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IT'S NOW PERSUASION, NOT COERCION: WHY CURRENT LAW ON LABOR PROTEST VIOLATES TWENTY-FIRST CENTURY FIRST AMENDMENT LAW

*Michael J. Hayes**

I. INTRODUCTION

Multiple legal scholars have discussed how, in the ongoing “Roberts Court” era of the U.S. Supreme Court, the Court has expanded First Amendment protections in new ways and to previously unprotected persons.¹ This development has led many labor law scholars to revisit the federal statutory restrictions on protest by unions and other labor organizations,² with one important article, by Professor Catherine Fisk and former National Labor Relations Board attorney Jessica Rutter, even titled *Labor Protest Under the New First Amendment*.³ However, in the midst of such widespread reconsideration, the Roberts Court itself has

* Associate Professor, University of Baltimore School of Law. Due to the Author’s work for the federal government from 2013 to 2016, the Author states here unequivocally that the views expressed herein do not represent the views of any federal agency or the United States.

1. See, e.g., Charlotte Garden, *The Deregulatory First Amendment at Work*, 51 HARV. CR-CL L. REV. 323, 331-32 (2016); Joel M. Gora, *Free Speech Matters: The Roberts Court and the First Amendment*, 25 J.L. & POL’Y 63, 81-104 (2016); Leslie Kendrick, *First Amendment Expansionism*, 56 WM. & MARY L. REV. 1199, 1206-19 (2015). In a somewhat different description, Dean Erwin Chemerinsky has recently stated that the Roberts Court is “very protective of freedom of speech except when the institutional interest of the government as government are implicated. Then it’s not at all protective of speech.” Erwin Chemerinsky, *The First Amendment in the Era of President Trump*, 94 DENV. L. REV. 553, 554 (2017).

2. See, e.g., Charlotte Garden, *Citizens United and the First Amendment of Labor Law*, 43 STETSON L. REV. 571, 574-80 (2014); Julius G. Getman, *The NLRB: What Went Wrong and Should We Try to Fix It?*, 64 EMORY L.J. 1495, 1495, 1498-99 (2015); Ian Hayes, *The Unconstitutionality of Section 8(b)(4)(ii)(B) and the Supreme Court’s Unique Treatment of Union Speech*, 28 ABA J. LAB. & EMP. L. 129, 131-34, 136-38, 140-42 (2012); Joseph L. Guza, Comment, *A Cure for Laryngitis: A First Amendment Challenge to the NLRB’s Ban on Secondary Picketing*, 59 BUFF. L. REV. 1267, 1298-306 (2011); Zoran Tasić, Note, *The Speaker the Court Forgot: Re-Evaluating NLRB Section 8(b)(4)(B)’s Secondary Boycott Restrictions in Light of Citizens United and Sorrell*, 90 WASH. U. L. REV. 237, 245-63 (2012).

3. Catherine Fisk & Jessica Rutter, *Labor Protest Under the New First Amendment*, 36 BERKELEY J. EMP. & LAB. L. 277, 307-15 (2015).

not yet looked at whether the federal limits on labor protest are fully consistent with the First Amendment. The U.S. Supreme Court consistently found those restrictions constitutional during the last six decades of the twentieth century.⁴ However, other Supreme Court precedents, including not only those of the Roberts Court but others dating as early as the 1960s, make questionable whether the restrictions on labor protest are constitutionally permissible.⁵

The relevant precedents include not only Supreme Court decisions applying the First Amendment to labor protest and other rulings interpreting the First Amendment, but also Supreme Court decisions limiting the authority of unions to discipline their members and employees they represent. These latter precedents limiting union power and other rules regulating union policy were regularly referred to and researched by the Author when, from August 2013 through December 2016, he served as Director of the U.S. Labor Department's Office of Labor-Management Standards ("OLMS"), the federal agency that regulates internal union affairs.⁶ The Author has drawn on that work in this Article's explanation and analysis of how the legislative history of labor relations statutes and the development of agency and court doctrines under them reveals constitutional problems with the current rules restricting labor protest.

The fact that such problems exist has long been recognized. In 1984, Professor James G. Pope, in the course of considering the lesser First Amendment protection afforded to labor protest as compared to other forms of protest and expression, criticized the view that labor protest could be limited because "unions may have the power to discipline their members for refusing to support a work stoppage."⁷ Professor Pope pointed out that this rationale was questionable when "under current law, unions are prohibited from spending an individual member's dues for political purposes over the member's objection, much less from compelling a member to participate in a political boycott."⁸

4. See, e.g., *Int'l Longshoremen's Ass'n v. Allied Int'l, Inc.*, 456 U.S. 212, 222-27 (1982); *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 491, 504 (1949); *Fisk & Rutter*, *supra* note 3, at 296-97; *Guza*, *supra* note 2, at 1280-84; *Tasić*, *supra* note 2, at 245-48, 250-62.

5. See, e.g., *NLRB v. Fruit & Vegetable Packers, Local 760 (Tree Fruits)*, 377 U.S. 58, 62-64 (1964); *Hayes*, *supra* note 2, at 131-42.

6. It seems worth repeating here what the Author stated at the outset: the views expressed in this Article are the personal views of the Author and do not purport to represent the official views of the U.S. Government or any of its agents or employees.

7. James G. Pope, *The Three-Systems Ladder of First Amendment Values: Two Rungs and a Black Hole*, 11 HASTINGS CONST. L.Q. 189, 226 & n.229 (1984) (citing Note, *Labor Picketing and Commercial Speech: Free Enterprise Values in the Doctrine of Free Speech*, 91 YALE L.J. 938, 938 n.2 (1982)).

8. *Id.* This Article demonstrates, in Parts I and II, that the "union power to discipline"

Professor Pope expanded on this point seven years later when he observed in a 1991 article:

Except in the rare case of a boycott centered in a tightly knit community of union supporters, it is no longer possible to identify and punish consumer boycott violators—whether by formal union discipline or social ostracism. Even in the midst of a strike, members may now evade disciplinary sanctions simply by resigning their union membership before crossing a picket line.⁹

More recently, Professor Cynthia Estlund in her 2015 article, *Are Unions a Constitutional Anomaly?*, pointed out that the “union power to discipline” rationale for limiting union protest is now “illusory . . . because Taft-Hartley itself prohibited union-security agreements that made union membership a condition of employment,” and added that “a union’s decision to back up a picket line with the threat of union discipline against members who cross it should be a matter between unions and their members within their expressive and associational freedoms.”¹⁰

All the scholars referenced above and more have contrasted the relatively limited First Amendment protection granted to union protest with the broader rights of expression extended to other groups, such as anti-discrimination protesters¹¹ and corporations.¹² This Article,

rationale was in fact central to the leading Supreme Court precedents relied on ever since, that held that federal restrictions on union picketing were permissible under the First Amendment. *See infra* pp. 103, 105-11. Parts III and IV of this Article also extensively discuss the changed law on union discipline referenced by Professor Pope. *See infra* Parts III-IV. Part V explains why limits on union discipline render the current rules governing federal prohibitions on labor protest outdated. *See infra* Part V.

9. James Gray Pope, *Labor-Community Coalitions and Boycotts: The Old Labor Law, the New Unionism, and the Living Constitution*, 69 TEX. L. REV. 889, 933 & n.232 (1991) (footnote omitted) (first citing *Pattern Makers’ League v. NLRB*, 473 U.S. 95, 100 (1985); then citing *NLRB v. Textile Workers Union Local 1029*, 409 U.S. 213, 215 (1972)).

10. Cynthia Estlund, *Are Unions a Constitutional Anomaly?*, 114 MICH. L. REV. 169, 225-28 (2015). This Article contends (as Professor Pope also implied) that given the “freedoms” that union members now enjoy with regard to union discipline, based on Supreme Court decisions such as (but not limited to) *Pattern Makers’ League v. NLRB*, 473 U.S. 95 (1985), most unions currently have little or no practical ability to discipline a member for crossing a picket line, much less a union handbill requesting an employee not to perform work for a union employer. *See infra* Part IV. Professor Estlund, by contrast, maintained that “especially given the strong commitment to a right of [union member] exit in cases like *Pattern Makers’*, those who choose to remain union members, and who have the right to participate in its collective decisions, can fairly be bound by those decisions,” including the decision to discipline members for crossing picket lines. Estlund, *supra*, at 226 n.277.

11. *See NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 912, 914 (1982). For a discussion of *Claiborne Hardware*, see LAURENCE H. TRIBE, *CONSTITUTIONAL CHOICES* 200-02 (1985); Estlund, *supra* note 10, at 202 & n.175, 214 & n.226; Fisk & Rutter, *supra* note 3, at 304-05; Garden, *supra* note 2, at 578 & n.45; Julius Getman, *Labor Law and Free Speech: The Curious*

especially in Part V, also criticizes the differential treatment of union protest based on whether the targeted audience of such protest is or includes employees rather than only consumers.¹³ Moreover, this Article in Parts III and V, more than any scholarship in the past many decades, critiques the legal doctrine of “signal picketing” that has been used to extend the federal restrictions on union activity (which the U.S. Supreme Court has applied only to union picketing) to multiple other forms of labor protest.¹⁴

The Article will proceed in the following order: in Part II the Article explains how nearly all National Labor Relations Board (“NLRB” or “Board”) and court precedents upholding the constitutionality of restrictions on labor protest can be traced back to precedents that relied on unions’ ability to enforce member obedience to such protests through union discipline.¹⁵ Next, Part III focuses on a key development in establishing the line between lawful and unlawful union protest—the doctrine of “signal picketing”—and thoroughly explores and examines the origins and history of that slippery doctrine that can and sometimes has been used to greatly expand the scope of protest deemed unprotected by the First Amendment.¹⁶ That is followed by Part IV which, building upon the above-referenced insights about the connection between union discipline and the federal limits on labor protest, describes how current law for practical purposes prevents unions from imposing financial or other tangible penalties on employees who refuse to participate in labor protests.¹⁷ Finally, Part V starts by analyzing why the federal restrictions on labor protest, especially those based on the doctrine of “signal picketing,” are unconstitutional under the First Amendment except in a narrow range of circumstances.¹⁸ As mentioned earlier, Part V then explains why the existing federal restrictions on labor protest, by differentiating appeals to employees from appeals to consumers, are unreasonable and unfair in their treatment of workers.¹⁹ In the course of that analysis, this Article is the first to explain why the D.C. Circuit’s 1999 precedent in *Warshawsky & Co. v. NLRB*,²⁰ which found handbilling to be

Policy of Limited Expression, 43 MD. L. REV. 4, 15-18 (1984); Pope, *supra* note 7, at 224-28.

12. See, e.g., Garden, *supra* note 2 *passim*; Pope, *supra* note 7, at 201-02, 223, 235-36.

13. See *infra* Part V.B.

14. See *infra* Parts III, V.

15. See *infra* Part II.

16. See *infra* Part III.

17. See *infra* Part IV.

18. See *infra* Part V.A.

19. See *infra* Part V.B.

20. 182 F.3d 948 (D.C. Cir. 1999).

unprotected because it led some employees to refuse to perform work,²¹ should be found unconstitutional.

II. THE CURRENT (PURPORTEDLY) CONSTITUTIONAL LINE BETWEEN LAWFUL AND UNLAWFUL UNION PROTEST

The Supreme Court of the United States held in 1941 that union picketing is protected by the First Amendment.²² Nonetheless, federal law has restricted picketing and other forms of labor protest since 1947.²³ Congress added to and strengthened those restrictions in 1959²⁴ and 1976.²⁵ The U.S. Supreme Court has upheld the constitutionality of those federal restrictions since its 1951 decision in *International Brotherhood of Electrical Workers v. NLRB (IBEW Local 501)*.²⁶ In that ruling, the Court cited as support its prior decisions in which it upheld as constitutional state court injunctions against union picketing based on alleged violations of state law.²⁷

In the earliest of those prior cases, the 1949 *Giboney v. Empire Storage & Ice Co.* decision, the Court, in holding that the First Amendment did not bar enjoining union picketing, relied several times on the fact that union members could be tangibly disciplined if they crossed the picket line.²⁸ The Court's summary of facts in *Giboney* pointed out that, "[h]ad any one of [the union truck drivers] crossed the picket line he would have been subject to fine or suspension by the union of which he was a member."²⁹ In *Giboney's* final paragraph, the Court equated the State of Missouri's means of enforcing its law

21. *Id.* at 953-56.

22. *Thornhill v. Alabama*, 310 U.S. 88, 91-92, 95-96, 98-106 (1940) (holding that a state antipicketing statute violated the First and Fourteenth Amendments).

23. *See* Labor Management Relations (Taft-Hartley) Act, ch. 120, § 8(b)(4), 61 Stat. 136, 141-42 (1947).

24. *See* Labor-Management Reporting and Disclosure (Landrum-Griffin) Act of 1959, Pub. L. No. 86-257, 73 Stat. 519.

25. *See* Act of July 26, 1974, Pub. L. No. 93-360, 88 Stat. 395 (codified as amended at 29 U.S.C. § 158(g)).

26. *See* 341 U.S. 694, 705 (1951); *see also* Kate L. Rakoczy, Comment, *On Mock Funerals, Banners, and Giant Rat Balloons: Why Current Interpretation of Section 8(b)(4)(ii)(B) of the National Labor Relations Act Unconstitutionality Burdens Union Speech*, 56 AM. U. L. REV. 1621, 1632-35 (2007) (summarizing U.S. Supreme Court decisions upholding federal restrictions on picketing and other forms of labor protest).

27. *See IBEW Local 501*, 341 U.S. at 705 & n.10 (first citing *Bldg. Serv. Emps. Int'l Union, Local 262 v. Gazzam*, 339 U.S. 532, 538-39, 541 (1950); then citing *Int'l Bhd. of Teamsters, Local 309 v. Hanke*, 339 U.S. 470, 475-78, 480-81 (1950); then citing *Hughes v. Superior Court*, 339 U.S. 460, 465-66, 468-69 (1950); and then citing *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 501-04 (1949)).

28. *Giboney*, 336 U.S. at 493, 497-98, 504.

29. *Id.* at 493.

with the means the union had to enforce its picket line and that picketing's purpose:

Missouri has by statute regulated trade one way. The appellant union members have adopted a program to regulate it another way. The state has provided for enforcement of its statutory rule by imposing civil and criminal sanctions. The union has provided for enforcement of its rule by sanctions against union members who cross picket lines.³⁰

The importance of a union's disciplinary power over picket line crossers was reinforced by the Court the following year in *Gazzam*³¹ (another decision the Court relied on in *IBEW Local 501*³²). In *Gazzam*, the Court stated that "*Giboney* controls the disposition of this case," and after quoting *Giboney*'s reference to union picketing involving "economic power," the Court in *Gazzam* stated, "[h]ere, as in *Giboney*, the union was using its economic power . . . to compel respondent to abide by union policy rather than by the declared policy of the State."³³ The union economic power referenced in *Giboney* and *Gazzam* is inseparable from the power of unions, at that time, to fine and otherwise tangibly discipline picket line crossers.³⁴ A power that, as more fully discussed in Part IV of this Article, is in the twenty-first century much diminished from what it was in 1949 and 1950.³⁵

U.S. Supreme Court Justices shed additional light on the First Amendment issues raised by federal restrictions on picketing in the Court's first decision limiting the scope of those statutory restrictions—its 1964 decision, *NLRB v. Fruit & Vegetable Packers, Local 760 (Tree Fruits)*.³⁶ In that decision, the Court held that the NLRB had erred in finding that Section 8(b)(4)'s prohibitions on secondary activity covered a union's picketing of a secondary retail store employer when the picketing was limited to persuading customers of that store to refrain from buying a product of a primary employer with whom that union had a dispute.³⁷ The Court thus held that Section 8(b)(4) did not apply to such "struck product" picketing of a secondary employer.³⁸ The Court majority's opinion, by Justice Brennan, observed that "a broad ban

30. *Id.* at 504.

31. *Gazzam*, 339 U.S. at 536-39, 540-41.

32. *IBEW Local 501*, 341 U.S. at 705 & n.10.

33. *Gazzam*, 339 U.S. at 540 (citation omitted) (citing *Giboney*, 336 U.S. at 502-03).

34. The *Hughes* decision—also relied on in *IBEW Local 501*—did not involve picketing or labor protest by a union but rather picketing by a group named "Progressive Citizens of America." *Hughes v. Superior Court*, 339 U.S. 460, 461-62 (1950).

35. *See infra* Part IV.

36. 377 U.S. 58, 63-64, 71-73 (1964).

37. *Id.* at 61-64, 71-72.

38. *See id.* at 63.

against peaceful picketing might collide with the guarantees of the First Amendment.”³⁹ Relying on analysis of the legislative history of the Labor Management Relations Act (“LMRA”) prohibitions on secondary activity, the majority interpreted those provisions to be not so broad as to prohibit the “consumer picketing” at issue in the case.⁴⁰ Justice Black in his concurrence, and Justices Harlan and Stewart in their dissent, disagreed with the majority’s interpretation of the statute, which they found did prohibit the “struck product,” consumer picketing at issue in the case.⁴¹ Justice Black, however, found that the prohibition violated the First Amendment.⁴²

Justice Black relied on Justice Douglas’s concurrence in *Bakery & Pastry Drivers Local 802 v. Wohl*, a 1942 decision in which the Court struck down a New York State prohibition on picketing,⁴³ to describe most picketing as a combination of “patrolling” and of speech “made to persuade other people to take the picketers’ side of a controversy.”⁴⁴ Justice Black reasoned that “when conduct not constitutionally protected, like patrolling, is intertwined, as in picketing, with constitutionally protected free speech and press, regulation of the non-protected conduct may at the same time encroach on freedom of speech and press.”⁴⁵ Justice Black found such encroachment by Section 8(b)(4) because “it is difficult to see that [this section] intends to do anything but prevent dissemination of information about the facts of a labor dispute—a right protected by the First Amendment.”⁴⁶ Section 8(b)(4), Justice Black pointed out, does not regulate persons who “patrol” for any other purpose but to publicize labor disputes.⁴⁷ Therefore, Justice Black concluded, “we have a case in which picketing, otherwise lawful, is banned only when the picketers express particular views. The result is an abridgment of the freedom of these picketers to tell a part of the public their side of a labor controversy, a subject the free discussion of which is protected by the First Amendment.”⁴⁸

39. *Id.* at 59, 63.

40. *Id.* at 63-72.

41. *Id.* at 76, 78-79 (Black, J., concurring); *id.* at 82-84, 88, 92 (Harlan & Stewart, JJ., dissenting).

42. *Id.* at 78-80 (Black, J., concurring).

43. *See Bakery & Pastry Drivers Local 802 v. Wohl*, 315 U.S. 769, 773-75 (1942).

44. *Tree Fruits*, 377 U.S. at 77 (Black, J., concurring) (citing *Wohl*, 315 U.S. at 776 (Douglas, J., concurring)).

45. *Id.*

46. *Id.* at 78.

47. *Id.* at 79.

48. *Id.*

As noted above, the dissenting opinion by Justice Harlan joined by Justice Stewart disagreed with the majority's statutory interpretation, finding on the basis of statutory language and legislative history that "[n]othing in the statute lends support to the fine distinction which the Court draws between general and limited product picketing."⁴⁹ Of more relevance to this Article, Justice Harlan also responded to Justice Black's opinion that Section 8(b)(4) violated the First Amendment.⁵⁰ Justice Harlan invoked three Supreme Court precedents in which, he said, the Court "recognized that picketing is 'inseparably something more [than] and different' from simple communication."⁵¹ For this proposition, Justice Harlan cited a specific page from Justice Douglas's concurring opinion in *Wohl*, along with another Supreme Court decision—*Hughes v. Superior Court*—which also cited that same page.⁵² Justice Harlan's citations suggest he was referring to Justice Douglas's statement in his *Wohl* concurrence: "Picketing by an organized group is more than free speech, since it involves patrol of a particular locality and since *the very presence of a picket line may induce action* of one kind or another, quite irrespective of the nature of the ideas which are being disseminated."⁵³ That Justice Harlan was referring to the "non-communicative" aspects of picketing is further supported in his dissent, in which he maintained that Congress's "attempts" to "limit[] a form of communication likely to have effects *caused by something apart from the message communicated*" should be given "great deference."⁵⁴

The Supreme Court found it necessary to modify *Tree Fruits*'s rule that "struck product" picketing was outside the prohibition of Section 8(b)(4),⁵⁵ in its 1980 decision in *NLRB v. Retail Store Employees Union*,

49. *Id.* at 82, 84 (Harlan & Stewart, JJ., dissenting).

50. *See id.* at 93-94.

51. *Id.* at 93 (quoting *Hughes v. Superior Court*, 339 U.S. 460, 464 (1950)).

52. *See id.* (quoting *Hughes*, 339 U.S. at 464-65) (citing *Bakery & Pastry Drivers Local 802 v. Wohl*, 315 U.S. 769, 776 (1942) (Douglas, J., concurring)).

53. *See id.*; *Wohl*, 315 U.S. at 776 (Douglas, J., concurring) (emphasis added). The third precedent that Justice Harlan cited was *Building Service Employees International Union, Local 262 v. Gazzam*, which did cite *Wohl* in general, but did not cite any of the pages containing Justice Douglas's concurrence or refer to that opinion. *See Local 262 v. Gazzam*, 339 U.S. 532, 537 (1950). However, on the page that Justice Harlan referenced in *Gazzam*, the Court's majority, like Justice Douglas in *Wohl*, said it was not the message conveyed but the "induc[ement of] action" that made permissible legal restrictions on picketing: "[P]icketing is more than speech and establishes a *locus in quo* that has far more potential for inducing action or nonaction than the message the pickets convey." *Id.*; *Wohl*, 315 U.S. at 776 (Douglas, J., concurring).

54. *Tree Fruits*, 377 U.S. at 93, 94 (Harlan, J., dissenting) (emphasis added).

55. *Id.* at 70-72 (majority opinion); *NLRB v. Retail Store Emps. Union, Local 1001 (Safeco)*, 447 U.S. 607, 611-16 (1980).

Local 1001 (Safeco).⁵⁶ In that case, the “struck product” targeted in the union’s picketing of secondary employers was the only product sold by those secondary, neutral employers.⁵⁷ The Court found this distinguishable from *Tree Fruits*, in which the struck product was “one item among the many” sold by the secondary.⁵⁸ By contrast, in *Safeco*, the union’s picketing against the only product the secondaries sold meant that the picketing sought “to induce customers not to patronize the neutral parties at all,” which the Court found was forbidden by Section 8(b)(4).⁵⁹

Justice Stevens authored a concurring opinion in which he addressed the First Amendment issue, which he noted had been raised by Justice Black in *Tree Fruits*, that under Section 8(b)(4) “picketing, otherwise lawful, is banned only when the picketers express particular views.”⁶⁰ Justice Stevens concluded that Section 8(b)(4)’s content-based restriction on picketing was constitutional because it “affects only that aspect of the union’s efforts to communicate its views that calls for an automatic response to a signal, rather than a reasoned response to an idea.”⁶¹ Interestingly, given the Court’s *Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Construction Trades Council* decision on handbilling eight years later,⁶² and NLRB and court decisions discussed in this Article’s next Part that found handbilling to be prohibited by Section 8(b)(4),⁶³ Justice Stevens in his concurrence stated that union handbills, in contrast to picketing, “depend entirely on the persuasive force of the idea.”⁶⁴

The Supreme Court relied on its 1980 decision in *Safeco* two years later in *International Longshoremen’s Association v. Allied International, Inc.*⁶⁵ In that decision, the Court unanimously held that the International Longshoreman’s Association violated Section 8(b)(4) when its president ordered its members “to stop handling cargoes arriving from or destined for” what was then the Soviet Union, to protest that

56. *Safeco*, 447 U.S. at 616.

57. *Id.* at 613.

58. *Id.*

59. *Id.* at 613-14 (quoting Retail Store Emps. Union Local 1001, 226 N.L.R.B. 754, 757 (1976)).

60. *Id.* at 618 (Stevens, J., concurring) (quoting *Tree Fruits*, 377 U.S. at 79 (Black, J., concurring)).

61. *Id.* at 618-19.

62. *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 588 (1988).

63. See *infra* text accompanying notes 320-29, 400-02.

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

65. 456 U.S. 212, 226-27 (1982).

country's invasion of Afghanistan.⁶⁶ In the final substantive paragraph of Justice Powell's opinion, in one of the three places in that paragraph in which he cited the *Safeco* opinion, Justice Powell quoted part of Justice Stevens's concurrence in *Safeco* (also quoted in the immediately preceding paragraph of this Article) declaring that "[t]he statutory ban in this case affects only that aspect of the union's efforts to communicate its views that calls for *an automatic response to a signal*, rather than a reasoned response to an idea."⁶⁷ Justice Powell's third and final *Safeco* citation was to Justice Blackmun's concurrence in order to support his proposition that "[t]he labor laws reflect a careful balancing of interests."⁶⁸ The final sentence of Justice Powell's opinion identified the "interests" that were "balanced": namely, the union and its members' rights of expression (in this case to demonstrate "their opposition to Russian foreign policy") on the one hand, weighed against the form of expression "infringing upon the rights of others"⁶⁹ (those rights being secondary parties' rights to engage in commerce that was interrupted by the union⁷⁰) on the other hand.

Six years after *Allied International* and eight years after *Safeco*, the Supreme Court considered in *DeBartolo*⁷¹ whether a union's protest in the form of handbilling should be prohibited under Section 8(b)(4).⁷² The NLRB had found that the union (a building trades council) had violated Section 8(b)(4)(ii) when, to protest that a non-union contractor had built one store in a shopping center, that union distributed handbills urging the public not to shop at any store within the shopping center because that non-union contractor had paid "substandard" wages and fringe benefits.⁷³ In that decision, the Board "presume[d] the constitutionality" of Section 8(b)(4) and explained that for that reason it did not discuss the First Amendment issue.⁷⁴ The Eleventh Circuit, on First Amendment grounds, ruled in favor of the union and denied enforcement of the Board's order.⁷⁵

66. *Id.* at 214, 217-18, 226-27.

67. *Id.* at 226 & n.26 (emphasis added) (quoting *Safeco*, 447 U.S. at 619 (Stevens, J., concurring)).

68. *Id.* at 226-27 (citing *Safeco*, 447 U.S. at 617-18 (Blackmun, J., concurring)).

69. *Id.* at 227.

70. *See id.* at 218-19 (discussing how the union interfered with the commerce of the plaintiffs).

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

72. *See id.* at 570-74.

73. *Fla. Gulf Coast Bldg. Trades Council*, 273 N.L.R.B. 1431, 1431-32 (1985).

74. *Id.* at 1432.

75. *Fla. Gulf Coast Bldg. & Constr. Trades Council v. NLRB*, 796 F.2d 1328, 1332-36, 1346 (11th Cir. 1986).

The Supreme Court unanimously affirmed the Eleventh Circuit⁷⁶ and broadly ruled that peaceful appeals to consumers, such as through handbilling, that do not involve picketing are not prohibited by Section 8(b)(4) of the Act.⁷⁷ The Court's opinion, by Justice White, applied the rule of construction that "where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress."⁷⁸ Based on the Court's interpretation of Section 8(b)(4) in *Tree Fruits*, its construction of statutory language, and its examination of the legislative history of Section 8(b)(4), the Court found that there was no "clear intent" by Congress for "nonpicketing appeals to customers urging a secondary boycott" to be unlawful, even if they harmed secondary, neutral enterprises.⁷⁹ With regard to harm to neutrals, the Court distinguished *Safeco*, summarized above, on the ground that *Safeco* involved picketing, and "picketing is qualitatively 'different from other modes of communication.'"⁸⁰ To explain how picketing was "qualitatively different" from handbilling, the Court relied on Justice Stevens's concurrence in *Safeco*, also described above—specifically the language that "[h]andbills containing the same message [as picketing] . . . are 'much less effective than labor picketing' because they 'depend entirely on the persuasive force of the idea.'"⁸¹

The Court in *DeBartolo* expressly mentioned that "[t]he handbills made clear that the union was seeking only a consumer boycott against the other mall tenants, not a secondary strike by their employees,"⁸² and the Court throughout that decision referred to it as applying to "consumer publicity" and union appeals for "consumer boycotts."⁸³ *DeBartolo* thus left open whether handbilling and other non-picketing publicity intended to cause, and/or with the effect of causing, employees of secondary employers to refrain from working could be prohibited by Section 8(b)(4). That issue was addressed in 1999 by a split three-judge panel of the D.C. Circuit Court of Appeals in *Warshawsky & Co. v.*

76. *DeBartolo*, 485 U.S. at 588. Justice O'Connor and Justice Scalia concurred in the judgment, and Justice Kennedy took no part in the consideration or decision of the case.

77. *See id.* at 578, 582-84, 588.

78. *Id.* at 575.

79. *Id.* at 577-79, 581-89.

80. *Id.* at 579-80 (quoting *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 311 n.17 (1979) (quoting *Hughes v. Superior Court*, 339 U.S. 460, 465 (1950))).

81. *Id.* at 580 (quoting *NLRB v. Retail Store Emps. Union, Local 1001 (Safeco)*, 447 U.S. 607, 619 (1980) (Stevens, J., concurring)).

82. *Id.* at 571.

83. *Id. passim.*

NLRB.⁸⁴ The D.C. Circuit's position on this issue, as on all issues under the LMRA, is especially important because the D.C. Circuit is the only federal appellate court to which all decisions of the NLRB can be appealed, and thus the only such court to which any and all parties "aggrieved" by a Board decision can appeal.⁸⁵ In fact, in its *Warsawsky* decision, the D.C. Circuit denied enforcement of a Board decision⁸⁶ that had held that union handbilling did not violate Section 8(b)(4) even though some employees of secondary employers responded by not performing work.⁸⁷

The court's opinion by Judge Silberman, joined by Judge Henderson, reasoned that there was no First Amendment issue to avoid in this case because of the employees' cessation of work, which the majority found meant that the union's handbilling involved Section 8(b)(4)(i), which makes it unlawful for unions or their agents "to engage in, or to induce or encourage . . . a strike" for unlawful objectives.⁸⁸ In *DeBartolo*, by contrast, the Supreme Court interpreted Section 8(b)(4)(ii), which provides that unions and their agents cannot "threaten, coerce, or restrain any person" for an unlawful object.⁸⁹ While in *DeBartolo* the Supreme Court avoided a First Amendment issue by finding that Section 8(b)(4)(ii) did not cover union handbills appealing to consumers not to shop,⁹⁰ the *Warsawsky* majority, relying on the Supreme Court's 1951 decision in *IBEW Local 501*⁹¹ (discussed above and again below in Part V.A⁹²), held that no First Amendment issue was raised by Section 8(b)(4)(i) prohibiting union handbills intended to and with the effect of causing employees to refrain from working.⁹³ The *Warsawsky* majority concluded based on its review of the facts (and by dismissing language on the handbills that stated that the union was not seeking any person to "cease work" as being in "very small print"⁹⁴) that the Board's ruling that the union did not induce the employees to strike was not supported by "substantial evidence."⁹⁵

84. 182 F.3d 948, 952-56 (D.C. Cir. 1999).

85. See 29 U.S.C. § 160(f) (2012).

86. *Warsawsky*, 182 F.3d at 956.

87. *Iron Workers Local 386*, 325 N.L.R.B. 748, 752-53, 756-77 (1998).

88. See *Warsawsky*, 182 F.3d at 950-52 & n.2.

89. See *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 577-78, 583-86 (1988).

90. *Id.*

91. *IBEW Local 501*, 341 U.S. 694 (1951).

92. See *supra* text accompanying notes 23-27; *infra* text accompanying notes 486-91.

93. *Warsawsky*, 182 F.3d at 951-53.

94. See *id.* at 954.

95. *Id.* at 953-56.

Judge Wald dissented, finding that the majority's opinion "sets forth new constitutional law restricting the reach and protection of the First Amendment."⁹⁶ Judge Wald discussed the *DeBartolo* opinion's explanation of "the difference, constitutionally speaking, between pickets and handbills," including the point, which *DeBartolo* borrowed from Justice Stevens's concurrence in *Safeco*, that "[h]andbills . . . 'depend entirely on the persuasive force of the idea.'"⁹⁷ Judge Wald also noted that the Court in *DeBartolo* held that the "publicity proviso" to Section 8(b)(4) was a "clarification" of that Section, and she observed that this clarification included that "the public" to whom unions can communicate "includ[es] consumers and members of a labor organization."⁹⁸ In criticizing the majority's view of the scope of First Amendment protection, Judge Wald stated: "Surprisingly, the majority seems to be saying that the First Amendment is not implicated at all when a union communicates solely with neutral employees. There is no support for this belief."⁹⁹ Judge Wald found that "[t]he majority jump[ed] from the Supreme Court's holding that the prohibition under section 8(b)(4) of the inducement or encouragement of a secondary work stoppage does not constitute an unconstitutional abridgment of free speech to its conclusion that any kind of union speech directed to neutral employees carries no First Amendment protection."¹⁰⁰ Judge Wald pointed out that a union might have multiple reasons, other than to encourage cessation of work, to communicate by handbill with members of labor organizations (and other employees) who work for a secondary employer about a "primary employer" with whom the union has a dispute.¹⁰¹ Thus, Judge Wald concluded that the majority had erred in assuming that a union communicating with employees of neutral employers must have an illegal intent.¹⁰²

Four years after the D.C. Circuit's *Warshawsky* decision, in May 2003, President George W. Bush's first appointee as NLRB General Counsel, Arthur Rosenfeld, issued a "Report on Recent Case Developments."¹⁰³ In Part II of that report, under the heading

96. *Id.* at 958 (Wald, J., dissenting).

97. *Id.* at 959-60 (quoting *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 580 (1988) (quoting *NLRB v. Retail Store Empls. Union, Local 1001 (Safeco)*, 447 U.S. 607, 619 (1980) (Stevens, J., concurring))).

98. *Id.* at 960 (quoting National Labor Relations Act (NLRA) § 8(b)(4), 29 U.S.C. § 158(b)(4) (1994)).

99. *Id.* at 961.

100. *Id.* (citing *IBEW Local 501*, 341 U.S. 694, 705 (1951)).

101. *Id.* at 961-62.

102. *Id.* at 961-62, 964-65.

103. Press Release, Arthur F. Rosenfeld, Gen. Counsel, NLRB Office of the Gen. Counsel,

“Secondary Boycotts: Inflated Rat as ‘Signal Picketing,’” he summarized a case in which his Office had issued a complaint against a union for allegedly violating Section 8(b)(4)(i).¹⁰⁴ In that case, a union agent informed an employer, a construction general contractor, that the union “would ‘take [the Employer] down if it doesn’t go union.’”¹⁰⁵ Shortly afterward, a total of thirty individuals wearing union jackets brought large inflated rats to two separate construction sites overseen by that contractor.¹⁰⁶ While the inflated rats were at the sites, some supplier drivers refused to make deliveries.¹⁰⁷ According to a statement by one supplier to the general contractor, the supplier had said “that when his drivers see rats, they understand that there is a ‘job action’ and that they cannot cross the ‘picket line.’”¹⁰⁸ Also, some of the employees of subcontractors working on the sites left them or refused to enter them “because they would not cross the ‘picket line.’”¹⁰⁹ Relying on statements by employees given during the investigation, news reports regarding inflatable rats, and a reference to an inflated rat in the fictional TV show *The Sopranos*, the General Counsel’s Office concluded that the inflated rat “is a symbol of a labor dispute” and that the union’s displaying inflated rats near the entrances to the two construction sites was “the functional equivalent of picketing.”¹¹⁰

To further explain (and justify) this conclusion of “functional equivalence,” the General Counsel relied on the principle of “signal picketing.”¹¹¹ The summary explained that “[t]he Board has long used the doctrine of ‘signal picketing’ to describe union conduct that did not involve traditional picketing but could be characterized as ‘picketing’ because it evokes the same response as a traditional picket line.”¹¹² As examples of “signal picketing,” the summary mentioned a case in which union business agents were stationed near a workplace entrance, and a case where union placards were placed, with no persons near them, near

NLRB General Counsel Arthur Rosenfeld Issues Report on Recent Case Developments (May 2, 2003). All descriptions of this case come from the summary in this Report.

By what the Author assures all readers is a coincidence, former General Counsel Rosenfeld was appointed as the first Director since the author of the Labor Department’s Office of Labor-Management Standards.

104. *See id.* pt. II.

105. *Id.*

106. *Id.*

107. *Id.*

108. *Id.*

109. *Id.*

110. *Id.*

111. *See id.*

112. *Id.*

a workplace entrance.¹¹³ According to the General Counsel, “[t]he inflatable rat in this case served the same function,” as “[n]eutral employees would assume that a picket line existed.”¹¹⁴

Three years after this General Counsel report, in 2006, the NLRB held that a union violated Section 8(b)(4) when its agents walked back and forth at entrances to a secondary employer’s construction site while distributing handbills.¹¹⁵ The Board declared that the fact that the union’s agents were distributing handbills instead of carrying traditional picket signs or placards was “not controlling,” and stated: “Picketing may be found to occur where a small number of persons actively engage in patrolling—back and forth movement—establishing a form of barrier at the site in question.”¹¹⁶

The Board majority added in a footnote: “While the picketing in this case involved patrolling, the Board has held that ‘neither patrolling alone nor patrolling combined with the carrying of placards are essential elements to a finding of picketing; rather[,] the ‘important’ or essential feature of picketing is the posting of individuals at entrances to a place of work.’”¹¹⁷ This kind of equating of union agents’ presence at an entrance of a workplace with picketing is often referred to by the term “signal picketing,” a legal principle that is discussed more fully in the next Part of this Article.¹¹⁸ However, the Board in the *The Ranches at Mount Sinai* decision used the phrase “signal picketing” only when they were noting that they were not taking a position on the administrative law judge’s (“ALJ”) ruling that the union’s placing of an inflated rat near the worksite entrance was in itself “signal picketing.”¹¹⁹ In a footnote equating presence at workplace entrance with picketing, Member Liebman expressed a separate view, stating that “picketing is . . . some form of conduct that effectively creates a physical or symbolic barrier . . . [and] picketing is defined not by the mere presence of individuals, but by conduct that results in a coercive confrontation.”¹²⁰

113. *Id.* (first citing *United Mine Workers, Dist. 2*, 334 N.L.R.B. 677, 686 (2001); then citing *Sheet Metal Workers, Local Union No. 19 (Delcard Associates)*, 316 N.L.R.B. 426, 437-438 (1995), *petition for enforcement denied on other grounds*, 154 F.3d 137 (3d Cir. 1998)).

114. *Id.*

115. *Laborers’ E. Region Org. Fund (The Ranches at Mt. Sinai)*, 346 N.L.R.B. 1251, 1251-52 (2006).

116. *Id.* at 1253.

117. *Id.* at 1253 n.5 (quoting *Serv. Emps. Union, Local 87 (Trinity Maintenance)*, 312 N.L.R.B. 715, 743 (1993)).

118. *See infra* Part III.

119. *The Ranches at Mt. Sinai*, 346 N.L.R.B. at 1251, 1253.

120. *Id.* at 1253 n.5 (first citing *Sheet Metal Workers Int’l Ass’n, Local 15*, 346 N.L.R.B. 199, 200 (2006) (Liebman, Member, concurring); then citing *Chi. Typographical Union No. 16 (Alden Press)*, 151 N.L.R.B. 1666, 1669 (1965) (“The Board has held that not all patrolling constitutes

Member Liebman had first expressed this view of the meaning of “picketing” earlier in 2006 in a separate concurrence in the NLRB decision of *Sheet Metal Workers Local 15*.¹²¹ In that decision, Member Liebman, along with Chairman Battista and Member Schaumber, held that a union violated Section 8(b)(4) when its agents “patroll[ed]” on a public sidewalk in front of the secondary medical center during a “mock funeral procession,” during which some union agents engaged in handbilling while others were “carrying a faux casket and accompanied by a[n agent] dressed as the Grim Reaper.”¹²² Member Liebman in her concurrence relied on the 2005 Ninth Circuit decision in *Overstreet ex rel. NLRB v. United Brotherhood of Carpenters, Local Union No. 1506 (Carpenters Local 1506)*¹²³ to assert that “ambulatory picketing or patrolling classically involves more than the ‘mere persuasion’ of a banner, it also involves the intimidation of a physical or symbolic barrier to the entrance way.”¹²⁴ Applying this view to the case at hand, Member Liebman stated:

The gravamen of the violation is not that patrollers carried a faux casket and a costumed “grim reaper” figure carrying a large sickle, for these expressive displays offer “mere persuasion” and do not serve to erect a physical or symbolic barrier to the Medical Center’s entrance. Rather, it is the patrolling itself that erected a barrier to entering the hospital.¹²⁵

Chairman Battista and Member Schaumber stated that they agreed with Member Liebman as to “why this conduct was picketing,” but “to the extent that she implies that picketing requires a physical or symbolic barrier,” they “d[id] not necessarily agree.”¹²⁶ They explained that “[s]ince the funeral procession was such a barrier, we need not pass on whether such a barrier is a sine qua non of picketing.”¹²⁷ They added that “[i]t may be that other conduct, short of a barrier, can be ‘conduct’ that is picketing or at least ‘restraint or coercion’ within the meaning of Section 8(b)(4)(ii)(B).”¹²⁸

picketing in the statutory meaning of that term. . . . ‘One of the necessary conditions of “picketing” is a confrontation in some form’” (citation omitted)).

121. 346 N.L.R.B. at 200 (Liebman, Member, concurring).

122. *Id.* at 199-200 (majority opinion).

123. 409 F.3d 1199 (9th Cir. 2005).

124. *Sheet Metal Workers Local 15*, 346 N.L.R.B. at 200 (Liebman, Member, concurring) (quoting *Carpenters Local 1506*, 409 F.3d at 1211).

125. *Id.*

126. *Id.* (majority opinion).

127. *Id.*

128. *Id.*

As it turned out, the Court of Appeals for the D.C. Circuit did not agree with any of these positions. In its 2007 decision by a three-judge panel, the D.C. Circuit granted the union's appeal and denied enforcement of the Board's decision.¹²⁹ Relying on the Supreme Court's 1988 decision in *DeBartolo*,¹³⁰ and noting that the union agents' handbilling and "mock funeral" were directed at consumers,¹³¹ the D.C. Circuit held that these activities would not constitute or be equated with "picketing" unless they were "coercive."¹³² The court found that the handbilling and mock funeral "had none of the coercive character of picketing" because the union agents "did not physically or verbally interfere with or confront [the secondary employer] patrons coming and going" and, especially as the "mock funeral" was 100 feet away from the secondary employer's entrance, they did not "'patrol' the area in the sense of creating a symbolic barrier to those who would enter" and had not "in any other way interfered with or confronted patrons entering or leaving the [secondary employer]."¹³³ The D.C. Circuit then declared its finding that "the mock funeral lies somewhere between the lawful handbilling in *DeBartolo* and unlawful picketing or patrolling," and that the question whether it was unlawfully "coercive, threatening, restraining, or 'intimidating,'"¹³⁴ "must be answered consistent with developments in the Supreme Court's [F]irst [A]mendment jurisprudence."¹³⁵ As examples of such jurisprudence, the D.C. Circuit relied on 1994 and 2000 Supreme Court rulings on protests at abortion provider sites and found that "the Union's protest was consistent with the limitations upheld as constitutional—the buffer zones and the ban on confrontational conduct" and comparable in other ways to facts deemed relevant by the Supreme Court's guidance in abortion protest cases, with which the union had complied.¹³⁶

Both this D.C. Circuit decision in *Sheet Metal Workers Local 15* and Member Liebman's concurrence in the NLRB decision of that case relied on the Ninth Circuit Court of Appeals decision in *Carpenters*

129. *Sheet Metal Workers Int'l Ass'n, Local 15 v. NLRB*, 491 F.3d 429, 440 (D.C. Cir. 2007).

130. *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568 (1988). For a discussion of this decision, see *supra* text accompanying notes 71-83.

131. *Sheet Metal Workers Local 15*, 491 F.3d at 437.

132. *Id.* at 436-38.

133. *Id.* at 437-38.

134. *Id.* at 438 (citing *DeBartolo*, 485 U.S. at 580).

135. *Id.*

136. *Id.* at 436, 439 (comparing the facts of *Madsen v. Women's Health Center* and *Hill v. Colorado* (first citing *Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753, 758, 770, 773-74, 776 (1994); then citing *Hill v. Colorado*, 530 U.S. 703, 707, 712, 735 (2000))).

Local 1506.¹³⁷ In that case, the Ninth Circuit upheld a federal district court's denial of an NLRB Regional Director's request that a union's agents be enjoined from posting banners referencing a "labor dispute" at locations visible to customers of secondary retailer employers.¹³⁸ The Ninth Circuit found that the banners were entitled to the same First Amendment protection as the handbills at issue in *DeBartolo*, reasoning that though those handbills "contained a more complete argument favoring the union's position than do banners," the banners' "pithiness, however, does not remove [them] from the scope of First Amendment protections, as cases regarding well known short slogans demonstrate."¹³⁹ Again comparing the banners to the handbilling in *DeBartolo*, the court found, as Member Liebman later referenced in the NLRB decision of *Sheet Metal Workers Local 15*,¹⁴⁰ that the union's "bannering does not involve patrolling in front of an entrance way and therefore erects no symbolic barrier in front of the [secondary employers'] doorways."¹⁴¹ The court further pointed out that the banners were not placed so as to block entrances or the walkways approaching those entrances, and that the union's agents did not engage in any "behavior that could be regarded as threatening or coercive—no taunting, no massing of a large number of people, no following of the [secondary employers'] patrons."¹⁴²

The court added: "That the union members are physically present, holding up the banner, does not affect this conclusion. The handbillers in *DeBartolo* were also on the scene, able to communicate by their presence some greater degree of moral suasion, perhaps, than the words on their pamphlets standing alone."¹⁴³ Later, the court stated that "[t]he union members simply stood by their banners, acting as human signposts," so "[j]ust as members of the public can 'avert[their] eyes' from billboards or movie screens visible from a public street, they could ignore the [union members] and the union's banners."¹⁴⁴ The court also rejected the Regional Director's argument that the banners constituted

137. See *id.* at 438 (citing *Overstreet ex rel. NLRB v. United Bhd. of Carpenters, Local Union No. 1506 (Carpenters Local 1506)*, 409 F.3d 1199, 1213-16 (9th Cir. 2005)); *Sheet Metal Workers Int'l Ass'n, Local 15*, 346 N.L.R.B. 199, 200 (2006) (Liebman, Member, concurring) (citing *Carpenters Local 1506*, 409 F.3d at 1211).

138. *Carpenters Local 1506*, 409 F.3d at 1201.

139. *Id.* at 1211 (first citing *Cohen v. California*, 403 U.S. 15, 25-26 (1971); then citing *Cochran v. Veneman*, 359 F.3d 263, 266-68, 273-80 (3d Cir. 2004)).

140. See *Sheet Metal Workers Local 15*, 346 N.L.R.B. at 200 (Liebman, Member, concurring).

141. *Carpenters Local 1506*, 409 F.3d at 1211.

142. *Id.*

143. *Id.*

144. *Id.* at 1214 (quoting *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 211 (1975)).

“signal picketing,” which the court defined as “involving *more* than mere speech” because it would occur in a context in which “[t]he failure of a union member to comply could lead to formal union discipline or informal sanctions by other union members.”¹⁴⁵ The court declared that “‘signals,’ in this context, are ‘official directions or instructions to a union’s own members,’ implicitly backed up by sanctions.”¹⁴⁶ The court reasoned that “[t]o broaden the definition of ‘signal picketing’ to include ‘signals’ to any passerby would turn the specialized concept of ‘signal picketing’ into a category synonymous with any communication requesting support in a labor dispute[, and i]f ‘signal picketing’ were defined so broadly, then the handbilling in *DeBartolo* would have been deemed signal picketing.”¹⁴⁷ Since the court found that the union’s banners were directed at the public, not to union members or employees, it held that the doctrine of “signal picketing” was inapplicable.¹⁴⁸ For these reasons, the court concluded that it was unlikely that the Regional Director could prove that the union’s bannering was tantamount to “picketing” or “signal picketing,” and therefore denied the request for an injunction.¹⁴⁹

In the twenty years after the Supreme Court decided *DeBartolo* in 1988 (as the decisions from that period discussed above demonstrate), courts and the NLRB differed on how to apply the *DeBartolo* decision to handbilling, and how to apply it to what the D.C. Circuit in *Sheet Metal Workers Local 15* referred to as protest conduct “somewhere between . . . lawful handbilling . . . and unlawful picketing.”¹⁵⁰ Moreover, Board members disagreed with each other on where to draw the line between protest conduct protected by the First Amendment and conduct prohibited by Section 8(b)(4). Through much of the final eight years of that period, during the administration of President George W. Bush, the Office of the General Counsel (including Regional Directors) frequently argued for application of the doctrine of “signal picketing” to hold labor protest conduct unprotected by the First Amendment and unlawful under the LMRA.¹⁵¹ Although multiple NLRB ALJs did, at the General Counsel’s urging, use the signal picketing doctrine to find union

145. *Id.* at 1215 (citing S.F. Local Joint Exec. Bd. of Culinary Workers, 203 N.L.R.B. 719, 728 (1973) (describing signal picketing as “backed by group discipline”).

146. *Id.* at 1215 (emphasis omitted) (quoting *NLRB v. Denver Bldg. & Constr. Trades Council*, 341 U.S. 675, 691 (1951)).

147. *Id.* (emphases omitted).

148. *Id.* at 1215-16.

149. *Id.* at 1201, 1216.

150. *Sheet Metal Workers Int’l Ass’n, Local 15 v. NLRB*, 491 F.3d 429, 438 (D.C. Cir. 2007).

151. See, e.g., Press Release, *supra* note 103, at pt. II; *supra* notes 103-14 and accompanying text.

protest unlawful,¹⁵² the Board consistently declined to rule on the scope of that doctrine and based its decisions on other grounds.¹⁵³

The Board took a different approach to these issues after the appointees of President Barack Obama took office and became a majority of the Board. The Board's lead decision was their 2010 decision in *United Brotherhood of Carpenters, Local Union No. 1506 (Eliason & Knuth of Arizona)*.¹⁵⁴ The Board majority, consisting of Chairman Liebman, then-Member Pearce, and Member Becker (all appointed to their positions by President Barack Obama),¹⁵⁵ declaring the issue one of "first impression," held that the union's bannering did not violate Section 8(b)(4).¹⁵⁶ Members Schaumber and Hayes, who were appointed by President George W. Bush, dissented and found the union's bannering to be unlawful.¹⁵⁷

In the four-paragraph introduction to the majority's opinion, the majority—like the Supreme Court in *DeBartolo* (and based largely on *DeBartolo*)—invoked the doctrine of "constitutional avoidance" as justifying their conclusion that bannering did not violate Section 8(b)(4).¹⁵⁸ The majority reasoned: "Governmental regulation of nonviolent speech—such as the display of stationary banners—implicates the core protections of the First Amendment. The crucial question here, therefore, is whether the display of a stationary banner must be held to violate Section 8(b)(4)(ii)(B) . . ." ¹⁵⁹ The majority then decided: "Nothing in the language of the Act or its legislative history requires the Board to find a violation and thus present for judicial review the constitutionality of Section 8(b)(4)(ii)(B) as applied to the peaceful

152. See, e.g., Mid-Atl. Reg'l Council of Carpenters, JD(MD)–16–06, Case No. 5-CC-1289, at *5, *16-18 (N.L.R.B. Div. of Judges Mar. 2, 2006), *rev'd*, 356 N.L.R.B. 61 (2010); Laborers' E. Region Org. Fund, JD(NY)–22–05, Case No. 29-CC-1422, 2005 WL 1467350, at *14, *16-18 (N.L.R.B. Div. of Judges June 14, 2005); Local Union No. 1827, United Bhd. of Carpenters, JD(SF)–30–03, Case No. 28-CC-933, at *43, *54 (N.L.R.B. Div. of Judges May 9, 2003), *rev'd*, 357 N.L.R.B. 415 (2011). The Board decision in *Laborers' Eastern Region Organizing Fund* was discussed earlier in this Part. See *supra* notes 115-20 and accompanying text.

153. See, e.g., Dist. Council 711, Int'l Union of Painters, 351 N.L.R.B. 1139, 1139 n.2 (2007) (finding it unnecessary to rule on the union's argument that "merely holding banners" was unlawful); *The Ranches at Mt. Sinai*, 346 N.L.R.B. 1251, 1253 (2006) (declining to adopt the ALJ's finding that an inflated rat was "signal picketing"); Sheet Metal Workers Int'l Ass'n, Local 15, 346 N.L.R.B. 199, 199 (2006) (declining to decide whether inflated rat constituted "picketing").

154. 355 N.L.R.B. 797 (2010).

155. Chairman Wilma Liebman was in the midst of a five-year reappointment by President George W. Bush when, on January 20, 2009, she was designated Chairman of the Board by President Barack Obama. See *Wilma B. Liebman*, NLRB, <https://www.nlr.gov/who-we-are/board/wilma-b-liebman> (last visited Feb. 3, 2019).

156. *Eliason & Knuth of Ariz.*, 355 N.L.R.B. at 797.

157. *Id.* at 811-12, 815, 821.

158. *Id.* at 797.

159. *Id.* (emphasis omitted).

display of a stationary banner” because such bannering, like the handbilling in *DeBartolo*, is “noncoercive.”¹⁶⁰

The majority also addressed the General Counsel’s legal theories for finding the banners to be unlawful.¹⁶¹ According to the majority, the General Counsel’s main arguments/theories for why banners announcing a labor dispute with a secondary employer are unlawful include: (1) such banners constitute “picketing” for purposes of Section 8(b)(4) because “picketing exists where a union posts individuals at or near the entrance to a place of business for the purpose of influencing customers, suppliers, and employees to support the union’s position in a labor dispute,” and “the posting of individuals in this fashion is inherently confrontational”;¹⁶² and/or (2) “even if the banners did not constitute proscribed picketing, they constituted ‘signal picketing,’ that is, ‘activity short of a true picket line, which acts as a signal that sympathetic action’ should be taken by unionized employees of the secondary or its business partners.”¹⁶³

The majority’s response to the General Counsel’s first line of argument, that bannering met the legal definition of picketing, was that the General Counsel’s definition of “picketing” and also of “confrontation” were too broad because they did not require “the use of traditional picket signs or any form of patrolling.”¹⁶⁴ The majority reasoned that the General Counsel’s definition of proscribed union conduct—the posting of union agents near business location entrances to influence customers and others to support the union—was so broad as to cover the union handbilling the Supreme Court found to be constitutionally protected in *DeBartolo*.¹⁶⁵ With the definition of illegal conduct the General Counsel proposed, the majority asserted that “the General Counsel ignores the imperative, created by the words of the [LMRA] as well as the principle of constitutional avoidance, to

160. *Id.*

161. *See id.* at 799.

162. *Id.* at 803 (referencing arguments quoted in General Counsel’s brief).

163. *Id.* at 804-05 (quoting Int’l Bhd. of Elec. Workers, Local 98 (*The Telephone Man, Inc.*), 327 N.L.R.B. 593, 593 n.3 (1999)) (referencing arguments quoted in General Counsel’s brief). It should be noted that the dissenters asserted that the General Counsel did not argue that the banners were “signal picketing” directed at employees. *See id.* at 815 n.24 (Schaumber & Hayes, Members, dissenting). It is unclear why the dissent thought this was relevant, given how the majority pointed out that the U.S. Supreme Court had found that secondary handbilling does not violate Section 8(b)(4), and any “signal” to customers could be made more strongly by handbillers than by more distant banners. *Id.* at 799-805.

164. *Id.* at 803.

165. *Id.*

distinguish between actions the impact of which rests on persuasion and actions whose influence depend on coercion.”¹⁶⁶

Thus, the majority found that conduct must be “coercive” to be prohibited by Section 8(b)(4).¹⁶⁷ And the majority’s standard for finding coercion, at least with regard to “signs” used by union agents, was the following:

The core conduct that renders picketing coercive . . . is not simply the holding of signs (in contrast to the distribution of handbills), but the combination of carrying of picket signs and persistent patrolling of the picketers back and forth in front of an entrance to a work site, creating a physical or, at least, a symbolic confrontation between the picketers and those entering the worksite.¹⁶⁸

Perhaps unsurprisingly, this standard for defining “picketing” or “picket-like” conduct is similar to the definition that then-Member Liebman stated she was applying in 2006 in *Sheet Metal Workers Local 15* and *The Ranches at Mount Sinai*.¹⁶⁹ The majority acknowledged that some prior Board decisions had used broader language to define union conduct barred by Section 8(b)(4) and that the Board had found a violation of Section 8(b)(4) when union agents had been stationary and there was “no patrolling or other ambulation.”¹⁷⁰ The majority distinguished those cases on the grounds that they preceded the Supreme Court’s *DeBartolo* decision and/or stationary conduct was found illegal only after it followed “patrolling” conduct.¹⁷¹

The majority next turned to the General Counsel’s “signal picketing” argument.¹⁷² After observing that there was no evidence indicating the banners were intended to or did “signal” any employees,¹⁷³ the majority made the more general point that the General Counsel’s definition of “signal picketing” was overbroad.¹⁷⁴ The majority characterized the General Counsel’s interpretation of “signal picketing” as “includ[ing] all activity conveying a ‘do not patronize’ message directed at the public simply because the message might reach, and send a signal to, unionized employees.”¹⁷⁵ The majority found that

166. *Id.*

167. *See id.* at 797, 801.

168. *Id.* at 802.

169. *See supra* notes 115-25 and accompanying text.

170. *See Eliason & Knuth of Ariz.*, 355 N.L.R.B. at 803-04.

171. *Id.* at 804.

172. *See id.* at 804-05.

173. *Id.* at 805.

174. *Id.* at 803.

175. *Id.* at 805.

this interpretation was in conflict “with *DeBartolo*, *Tree Fruits*, and many other prior decisions.”¹⁷⁶ As was discussed earlier in this Part, in both *DeBartolo* and *Tree Fruits*, the Supreme Court found to be lawful union conduct that conveyed a “do not patronize” message (in whole or in part) that was also visible to employees.¹⁷⁷

The majority’s next criticism of the General Counsel’s broad definition of signal picketing relates to points made later in this Article in Part V. The majority denounced as unrealistic the General Counsel’s implicit assumption that banners operated “as a signal automatically obeyed by union members” rather than as “ordinary speech.”¹⁷⁸ The majority declared: “Our experience with labor relations in the early twenty-first century does not suggest such a categorical assumption is warranted.”¹⁷⁹ Part V will discuss why this assertion by the *Eliason & Knuth of Arizona* majority is well-justified.¹⁸⁰

As discussed earlier, the doctrine of constitutional avoidance was key to the majority’s conclusion that the union’s bannering was lawful.¹⁸¹ Consequently, a crucial part of the two dissenters’ opinion was their explanation why no First Amendment issue would be raised by concluding, as they did, that the bannering violated Section 8(b)(4).¹⁸² The dissent’s basis for distinguishing the handbilling in *DeBartolo* was that the bannering was more like traditional picketing that had been found unprotected by the First Amendment, at least in part because the “expressive element” of the “brief” message on a union banner “is less than the expressive element in picket signs . . . and it is certainly less than in handbills.”¹⁸³ The dissent also found that, like traditional picketing, the display of banners would evoke an “automatic response,” but from the public and consumers, not employees.¹⁸⁴ Having asserted that bannering was more comparable to traditional picketing than handbilling, the dissent relied on U.S. Supreme Court precedents that upheld, or referred to, Section 8(b)(4) restrictions to support their position that no constitutional issue was raised by prohibiting bannering.¹⁸⁵

176. *Id.*

177. *See supra* notes 36-48, 71-83 and accompanying text.

178. *See Eliason & Knuth of Ariz.*, 355 N.L.R.B. at 805.

179. *Id.*

180. *See infra* Part V.

181. *Eliason & Knuth of Ariz.*, 355 N.L.R.B. at 810-11.

182. *Id.* at 820-21 (Schaumber & Hayes, Members, dissenting).

183. *Id.* at 821.

184. *Id.* at 815 & n.24.

185. *Id.* at 815-16, 820-21.

In several subsequent decisions during President Obama's administration, the majority in NLRB decisions relied on *Eliason & Knuth of Arizona* to find that union bannerling was lawful, while one or more dissenting Board Members relied on the dissent of Members Schaumber and Hayes in the same decision as their reason for concluding such conduct was illegal.¹⁸⁶ Moreover, in *Sheet Metal Workers Local 15*,¹⁸⁷ nearly the same majority as in *Eliason & Knuth of Arizona* relied on their reasoning in that decision to find that a union's display of a large inflated rat near the entrance of a secondary employer was not unlawful under Section 8(b)(4), with Member Hayes dissenting for the same reasons as in his joint dissent with Member Schaumber in *Eliason & Knuth of Arizona*.¹⁸⁸ In *Laborers' International Union, Local 872 (Westgate Las Vegas Resort & Casino)*,¹⁸⁹ the Board relied on both *Eliason & Knuth of Arizona* and *Sheet Metal Workers Local 15* in holding that the union did not violate Section 8(b)(4) by displaying banners and various inflated animals (rat, cockroach, pig, and cat) near the secondary hotel and casino.¹⁹⁰

The most recent development is a pending petition by the NLRB General Counsel for an injunction against a union for posting an inflatable rat outside a construction site.¹⁹¹ The petitioner is Regional

186. See, e.g., Sw. Reg'l Council of Carpenters, Local 184 (*New Star*), 356 N.L.R.B. 613, 614-16, 618 (2011); *New Star*, 356 N.L.R.B. at 618-19 (Hayes, Member, dissenting); Mid-Atl. Reg'l Council of Carpenters (*Starkey Construction*), 356 N.L.R.B. 61, 61 (2010); *Starkey Construction*, 356 N.L.R.B. at 62 (Hayes, Member, dissenting); Sw. Reg'l Council of Carpenters, Local 1506 (*Held Properties II*), 356 N.L.R.B. 42, 42 (2010); *Held Properties II*, 356 N.L.R.B. at 42 (Hayes, Member, dissenting); Sw. Reg'l Council of Carpenters, Local Union No. 1506 (*Held Properties I*), 356 N.L.R.B. 21, 21-22 (2010); *Held Properties I*, 356 N.L.R.B. at 22 (Hayes, Member, dissenting); Sw. Reg'l Council of Carpenters (*Richie's Installations*), 355 N.L.R.B. 1445, 1445-46 (2010); *Richie's Installations*, 355 N.L.R.B. at 1446 (Hayes, Member, dissenting); Carpenters Local Union No. 1506 (*Marriott Warner Center Woodland Hills*), 355 N.L.R.B. 1330, 1330-31 (2010); *Marriott Warner Center Woodland Hills*, 355 N.L.R.B. at 1331 (Hayes, Member, dissenting); Sw. Reg'l Council of Carpenters, Local No. 209 (*Carignan Construction*), 355 N.L.R.B. 1301, 1301 (2010); *Carignan Construction*, 355 N.L.R.B. at 1301 (Hayes, Member, dissenting); United Bhd. of Carpenters, Local Union No. 1506 (*AGC*), 355 N.L.R.B. 1137, 1137, 1138-39 (2010) (noting this case is the "companion case" to *Eliason & Knuth of Arizona*); *AGC*, 355 N.L.R.B. at 1139 (Hayes, Member, dissenting); United Bhd. of Carpenters, Local 184 (*Grayhawk Development*), 355 N.L.R.B. 1117, 1117 (2010); *Grayhawk Development*, 355 N.L.R.B. at 1117 (Hayes, Member, dissenting).

187. *Sheet Metal Workers Int'l Ass'n, Local 15*, 356 N.L.R.B. 1290 (2011).

188. *Id.* at 1290, 1291-94; *id.* at 1295-97 (Hayes, Member, dissenting); see also *Eliason & Knuth of Ariz.*, 355 N.L.R.B. at 816 (Schaumber & Hayes, Members, dissenting).

189. 363 N.L.R.B. No. 168 (Apr. 19, 2016).

190. *Id.* at *1 & n.2.

191. Petition for Preliminary Injunction Under Section 10(l) of the National Labor Relations Act at 5-6, *Ohr v. Int'l Union of Operating Eng'rs, Local 150, AFL-CIO*, No. 1:18-cv-08414 (N.D. Ill. Dec. 21, 2018) [hereinafter *Petition for Preliminary Injunction*].

Director Peter Sung Ohr of the NLRB's Thirteenth Region,¹⁹² but the request for injunction was authorized by the NLRB's current General Counsel Peter Robb.¹⁹³ General Counsel Robb, in apparent disregard not only of past decisions by the NLRB with a majority appointed by President Obama,¹⁹⁴ but of a First Amendment decision by the Sixth Circuit,¹⁹⁵ is thus asking a court to find that a union's use of an inflatable rat in its protest likely violates Section 8 (b)(4)(i)(B), (ii)(b), and (7)(C) of the National Labor Relations Act ("NLRA").¹⁹⁶ In authorizing this action, General Counsel Robb is seeking a return to the legal view of his predecessor General Counsel Arthur Rosenfeld,¹⁹⁷ views that even a Republican-majority NLRB reserved on adopting in 2006.¹⁹⁸

The decisions on bannering and inflatables do not mean that unions have *carte blanche* in directing protests at secondary employers as long as they avoid traditional picketing. Neither the Board nor any court has ever taken issue with the D.C. Circuit's holding in *Warshawsky & Co. v. NLRB*,¹⁹⁹ discussed earlier in this Part, that union non-picketing protest conduct (in that case, handbilling) intended to cause, and/or with the effect of causing, employees of secondary employers to refrain from working was prohibited by Section 8(b)(4)(i).²⁰⁰ In fact, in the first of the bannering decisions of the "President Obama Board,"²⁰¹ *Southwest Regional Council of Carpenters, Local 184 (New Star)*, the Board majority found it necessary to distinguish *Warshawsky*, which the majority found to be heavily relied on by Member Hayes in his dissent.²⁰² The *New Star* majority pointed out that, unlike the timing of the union's handbilling in *Warshawsky*, the unions "did not time the display of the banners to coincide with secondary employees' reporting times" and, also unlike in *Warshawsky*, there was no evidence that "any secondary employees actually ceased work at any time or in any

192. *Id.* at 1.

193. Hassan A. Kanu, *Death to Scabby: Trump Labor Counsel Wants Protest Icon Deflated*, BLOOMBERG (Jan. 22, 2019, 5:54 AM), <https://news.bloomberglaw.com/daily-labor-report/death-to-scabby-trump-labor-counsel-wants-protest-icon-deflated>.

194. See generally *Westgate Las Vegas Resort & Casino*, 363 N.L.R.B. No. 168 (Apr. 19, 2016); *Sheet Metal Workers Int'l Ass'n, Local 15*, 356 N.L.R.B. 1290 (2011).

195. *Tucker v. City of Fairfield*, 398 F.3d 457, 462-64 (6th Cir. 2005) (holding that a union's use of an inflatable rat to protest was protected by the First Amendment); see also *infra* note 515.

196. See Petition for Preliminary Injunction, *supra* note 191, at 1.

197. See Press Release, *supra* note 103. These legal views of former General Counsel Rosenfeld were discussed earlier in this Article. See *supra* notes 103-10 and accompanying text.

198. *The Ranches at Mt. Sinai*, 346 N.L.R.B. 1251, 1251-52 (2006).

199. 182 F.3d 948 (D.C. Cir. 1999).

200. *Id.* at 953-56; see *supra* text accompanying notes 82-102.

201. The lead decision of the "President Obama Board" was discussed earlier. See *supra* note 155 and accompanying text.

202. *New Star*, 356 N.L.R.B. 613, 616-18 (2011).

manner.”²⁰³ Based on these and other differences in facts between *New Star* and *Warshawsky*, the *New Star* majority decided “we cannot find that the secondary employees would reasonably have understood that the Unions were asking them, through the display of the banners, to stop work for their employers.”²⁰⁴ The Board majority’s taking pains to distinguish *Warshawsky* in these ways implied that in a case in which a banner or other non-picketing protest conduct did cause one or more secondary employees to refrain from performing work, they might find that conduct to have violated Section 8(b)(4).

As mentioned earlier in the preceding paragraph regarding this *New Star* decision, Member Hayes in dissent relied on *Warshawsky* (and other court and Board decisions) to conclude that the union’s bannering was unlawful because he found that conduct was “coercive” and targeted employees of secondary employers, which was sufficient to find it illegal under Section 8(b)(4) even if the union did not succeed in causing any employees to stop working.²⁰⁵

III. HOW THE LINE CAME TO BE: DEVELOPMENT OF SIGNAL PICKETING

As discussed in Part II, the NLRB’s General Counsel, some NLRB ALJs, and some courts have used the doctrine of “signal picketing” in drawing the line between speech and expressive communication, which are protected by the First Amendment, and conduct, which is not.²⁰⁶ This speech/conduct distinction, however, was not the issue for which the NLRB and courts developed the doctrine of “signal picketing” in the 1950s. The NLRB and courts developed the concept of signal picketing, and its opposite “publicity” picketing, as a means of differentiating between union intentions for engaging in ambulatory picketing. Determining the intent of the union was necessary in interpreting Section 8(b)(4), the first federal statute to restrict union picketing and other persuasive activity, because that provision prohibited such conduct only where the union’s “object” was at least one of four goals.²⁰⁷

203. *Id.* at 617.

204. *Id.*

205. *See id.* at 618-21 (Hayes, Member, dissenting).

206. *See supra* Part II.

207. Until it was amended in 1959, Section 8(b)(4) read as follows:

(b) It shall be an unfair labor practice for a labor organization or its agents—

....

(4) to engage in, or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services, where an object thereof is:

The development of the “signal picketing” concept began in 1949, within two years after Section 8(b)(4) went into effect, with the NLRB’s decision in *Denver Building Trades*,²⁰⁸ a case that ultimately went to the U.S. Supreme Court.²⁰⁹ In *Denver Building Trades*, the Board adopted the Intermediate Report of Trial Examiner Earl S. Bellman, and specifically adopted the Trial Examiner’s findings and conclusions that the unions’ picketing of unionized contractor Doose & Lintner’s Bannock Street project violated Section 8(b)(4)(A) because that picketing had the unlawful objective of “forcing Doose & Lintner to cease doing business with [non-union subcontractor] Gould & Preisner.”²¹⁰

Trial Examiner Bellman began his analysis of the Bannock Street project picketing by quoting Articles I–B and XI–B of the Bylaws of the Denver Building and Construction Trades Council,²¹¹ one of the respondent labor organizations in the case. Trial Examiner Bellman then stated: “Manifestly the action with respect to picketing Doose & Lintner . . . was taken pursuant to the above provisions of the Council’s bylaws.”²¹² Trial Examiner Bellman found that the Council decided to

(A) forcing or requiring any employer or self-employed person to join any labor or employer organization or any employer or other 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;

(B) forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 9;

(C) forcing or requiring any employer to recognize or bargain with a particular labor organization as the representative of his employees if another labor organization has been certified as the representative of such employees under the provisions of section 9;

(D) forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class, unless such employer is failing to conform to an order or certification of the Board determining the bargaining representative for employees performing such work

Labor Management Relations (Taft-Hartley) Act, ch. 120, § 8(b)(4), 61 Stat. 136, 141-42 (1947).

208. *In re Denver Bldg. & Constr. Trades Council (Denver Building Trades)*, 82 N.L.R.B. 1195 app. at 1216 (1949).

209. *See* NLRB v. Denver Bldg. & Constr. Trades Council, 341 U.S. 675 (1951).

210. *See Denver Building Trades*, 82 N.L.R.B. at 1195-96.

211. *See id.* app. at 1214-15.

212. *Id.* app. at 1215.

engage in a “joint strike action” with its affiliated unions, pursuant to Bylaw Article XI–B, Section 1, which provided:

Strikes must be called by the Council or the Board of Agents in conformity with Article I–B, Sections 1–2. When strikes are called the Council shall have full jurisdiction over the same, and any contractor, who works on a struck job, or employs non-union men to work on a struck job, shall be declared unfair and all union men shall be called off from his work or shop.²¹³

Trial Examiner Bellman then tied the Council’s strike decision to the picketing by reasoning that the signs held by the picketers, which stated that “the Bannock Street project was unfair to the Council[,] constituted a clear *signal, in the nature of an order*, to the members of the respondent unions . . . to withhold their services for the duration of the picketing.”²¹⁴ Trial Examiner Bellman therefore concluded that the picketing was “an integral and inseparable part” of the “strike action.”²¹⁵ Trial Examiner Bellman reinforced his conclusion by pointing out that “as soon as the illegal objective of the Respondents’ strike action [i.e., the removal of the non-union subcontractor from the project] had been achieved, the picket, the *signal to union workmen that a strike was in progress*, was removed. Thereupon union workmen were again available to Doose & Lintner.”²¹⁶ Later in his decision, Trial Examiner Bellman repeated: “This picketing was the signal, far clearer than any wink or nod, whereby the Respondents *ordered* their members to refrain from work for the duration of such signal.”²¹⁷

Thus, the picketing in *Denver Building Trades* was found illegal because it was a “signal, in the nature of an order” by the unions to their members that they must strike.²¹⁸ Trial Examiner Bellman emphasized that if the picketing or other union expression had not constituted an

213. *Id.* Trial Examiner Bellman also quoted Article I–B, Sections 1 and 2, the provisions referenced in Article X–B, Section 1. Those provisions stated:

Section 1. It shall be the duty of this Council to stand for absolute *closed shop* conditions on all jobs in the City of Denver and jurisdictional surroundings. Notifications shall be given to all contractors to protect themselves in their contracts with the usual union labor clauses, so that they will be protected on materials in case of strike.

Section 2. The Board of Business Agents, by majority vote at any regular meeting, shall have the power to declare a job unfair and remove all men from the job. They shall also have the power to place the men back on the job when satisfactory arrangements have been made.

Id. app. at 1214-15.

214. *See id.* app. at 1216 (emphasis added).

215. *Id.*

216. *Id.* (emphasis added).

217. *Id.* (emphasis added).

218. *Id.* app. at 1216-17.

order to strike, he would not have found it illegal, stating near the end of his decision that

nothing in this report is intended to foreclose the Respondents from utilizing any type of publicity as to the nature of any labor dispute, so long as the form and method of such publication is distinguishable from, and does not incorporate within it, anything which, realistically interpreted, is tantamount to an order to their members to take strike action for any purpose repugnant to the Act.²¹⁹

When *Denver Building Trades* reached the U.S. Supreme Court,²²⁰ the Court agreed with the findings of the NLRB and Trial Examiner Bellman that the unions' picketing was tantamount to an order to strike.²²¹ Using language similar to Trial Examiner Bellman's, the Court stated that the Council's notice that it would picket the project as "unfair" was "a signal in the nature of an order to the members of the affiliated unions to leave the job and remain away until otherwise ordered."²²² Later in its decision, in rejecting the argument that Section 8(c) of the NLRA protected the unions' activity, the Court expressly relied on Trial Examiner Bellman's reasoning that the unions' picketing was an order to strike:

Section 8 (c) does not apply to a mere signal by a labor organization to its members, or to the members of its affiliates, to engage in an unfair labor practice such as a strike proscribed by § 8 (b) (4) (A). That the placard was merely such a signal, tantamount to a *direction* to strike, was found by the Board. "... [T]he issues in this case turn upon acts by labor organizations which are tantamount to directions and instructions to their members to engage in strike action. The protection afforded by Section 8 (c) of the Act to the expression of 'any views, argument or opinion' does not pertain where, as here, the issues raised under Section 8 (b) (4) (A) turn on official *directions or instructions* to a union's own members."²²³

It is also worth noting that throughout the *Denver Building Trades* decision, the Supreme Court referred to the unions' actions as a "strike."²²⁴

219. *Id.* app. at 1217.

220. *See* NLRB v. Denver Bldg. & Constr. Trades Council, 341 U.S. 675 (1951).

221. *Id.* at 687-92.

222. *See id.* at 678-79 (emphasis added). The Supreme Court also quoted the same provisions of the Council's Bylaws as Trial Examiner Bellman had in his report. *See id.* at 678-79 n.3.

223. *See id.* at 690-91 (emphases added) (quoting *Denver Building Trades*, 82 N.L.R.B. at 1213).

224. *See, e.g., id.* at 677 (announcing at the outset of the decision that the "principal question" in the case was whether the unions, "by engaging in a strike," had violated Section 8(b)(4)(A)); *id.*

The NLRB continued to develop the concept of signal picketing in its 1956 decision in *Local 50, Bakery and Confectionery Workers International Union (Arnold Bakers)*,²²⁵ where it again found that the union's picketing was a signal for a strike.²²⁶ Near the beginning of its *Arnold Bakers* decision, the Board announced there were

“two crucial questions” in determining whether the union's picketing violated Section 8(b)(4): “[1] Was ‘an object’ of Respondent Local 50 to force or require Arnold to recognize and bargain with Local 50 rather than the duly certified Arnold Bakers Employees Association? (2) Did Local 50's picketing activities at Arnold's plant . . . constitute inducement and encouragement of employees to engage in a strike . . . ?”²²⁷

Some factors complicating the Board's task in *Arnold Bakers* were that Local 50's picket signs never asked employees to stop working, and in the period for which the union's picketing was alleged to be illegal, the signs were directed at consumers and not employees.²²⁸

Regarding the first question, of the union's objective, the Board found that the language on the picket signs was “insufficient” evidence that the objectives of the union's picketing did not include forcing Arnold Bakers to recognize and bargain with Local 50.²²⁹ The Board reasoned that the union's objective could be gleaned from “the type of pressure brought to bear on the employer and the consequences to be anticipated therefrom.”²³⁰ In *Arnold Bakers*, of course, the “type of

at 685 (“Th[e] merits] require a study of the objectives of the strike and a determination whether the strike came within the definition of an unfair labor practice stated in § 8(b)(4)(A).”); *id.* at 687 (“We must first determine whether the strike in this case had a proscribed object.”); *id.* at 689 (“It is not necessary to find that the *sole* object of the strike was that of forcing the contractor to terminate the subcontractor's contract.”).

225. See 115 N.L.R.B. 1333, 1337-41 (1956).

226. *Id.* at 1341.

227. *Id.* at 1334.

228. See *id.* at 1334-35. The complaint against Local 50 alleged that it engaged in illegal picketing after another labor organization won an election to become the representative of Arnold Bakers' employees. See *id.* at 1334-38, app. at 1351. After the election, Local 50's agents at first picketed without any signs, and then picketed with signs bearing the following message:

PLEASE DO NOT BUY ARNOLD'S PRODUCTS ARNOLD'S EMPLOYEES HAVE REFUSED TO JOIN LOCAL 50 OF THE BAKERY AND CONFECTIONERY WORKERS INTERNATIONAL UNION AFFILIATED WITH THE AMERICAN FEDERATION OF LABOR THE WORKING CONDITIONS AT ARNOLD'S ARE BELOW LOCAL 50 STANDARDS IN OTHER BAKING COMPANIES PLEASE BUY BAKERY PRODUCTS MADE BY MEMBERS OF BAKERY & CONFECTIONERY WORKERS UNION, A. F. L.

Id. app. at 1354.

229. *Id.* at 1335.

230. *Id.* at 1337.

pressure” was picketing.²³¹ Of the picketing, the Board said: “If . . . the picket line *was* an inducement to employees to strike then certainly it may reasonably be anticipated that Arnold would be under substantial pressure to yield to Local 50’s demand for recognition and that [Local 50] would be aware of and have intended to apply such pressure.”²³²

The Board then turned to the second question, “whether Local 50’s picketing had the effect of inducing and encouraging employees” to strike.²³³ The Board also found it necessary, in deference to “several recent decisions” of the Second Circuit Court of Appeals, to decide whether the union *intended* to cause a work stoppage with its picketing.²³⁴ The Board noted that the Second Circuit had decided that “[a] finding of specific intent may not be necessary . . . if the inducement to cease work ‘was the inevitable result or even the “natural and probable consequence” of the picketing.’”²³⁵ Applying this principle, the Board reasoned that the “natural and foreseeable consequence” of union picketing was a work stoppage.²³⁶ Relying on *Denver Building Trades*, the Board again described picketing as a signal to strike: “the mere existence of a picket line is in most instances ‘a strike signal’ and induces employees to assist the picketing union by refusing to work regardless of the motive of the picketing union.”²³⁷

The Board announced very clearly in its decision that the reason that the union’s picketing violated Section 8(b)(4) was because its effect and probable purpose were to induce member employees to strike.²³⁸ In fact, the Board specifically refused to adopt “the Trial Examiner’s finding that picketing an employer’s place of business is in all circumstances inducement and encouragement of employees not to perform employment services.”²³⁹ The Board noted that it had not found the required illegal intent and effect of picketing in cases involving “consumer picketing of customer entrances to stores or plants,” and the Board added that “[c]onceivably, there may be other extraordinary circumstances in which a picket line cannot reasonably be found to

231. *See id.*

232. *Id.* (emphasis added).

233. *Id.*

234. *Id.*

235. *Id.* (quoting *NLRB v. Bus. Mach. & Office Appliance Mechs. Conference Bd.*, Local 459, 228 F.2d 553, 560 (2d Cir. 1955)).

236. *Id.* at 1338.

237. *Id.* (footnote omitted) (first citing *NLRB v. Denver Bldg. & Constr. Trades Council*, 341 U.S. 675, 690-91 (1951); then citing *IBEW Local 501*, 341 U.S. 694, 700-01 (1951)).

238. *Id.* at 1341.

239. *Id.* at 1340.

induce employees to strike.”²⁴⁰ But usually, according to the Board, picketing was a means to induce employees to strike:

[T]he Board has consistently held that the traditional union picket line before employee entrances has the effect of inducing employees to refuse to work for the picketed employer. This conclusion appeared to the Board to have been so well established in the field of labor relations that a specific finding of the union’s actual motive in picketing, while readily inferable in most cases, did not seem to be a requirement under Section 8 (b) (4).²⁴¹

The Board concluded that this principle that picketing is a signal to strike overcame the facts of the specific language on Local 50’s picket signs, holding: “Nor do we believe that the wording of the picket sign in and of itself was sufficient to dispel the normal reaction of employees, whether obeyed or not, to the existence of this picket line before Arnold’s plant.”²⁴² In the Board’s view, the “normal reaction” of employees to a picket line (though not the reaction of the employees in *Arnold Bakers* itself²⁴³) was to refuse to cross it and thus go on strike, and so picketing is—ordinarily—an inducement to strike.²⁴⁴

By 1958, the NLRB was declaring, in *Seafarers’ International Union (Superior Derrick)*, “[n]o lengthy list of citations is necessary to show that the mere appearance of a picket is frequently akin to a strike signal.”²⁴⁵ In *Superior Derrick*, as in the *Denver Building Trades* and *Arnold Bakers* decisions, the Board made its reference to picketing as a “strike signal” in the course of discussing the intent of the union’s picketing.²⁴⁶ Determining the union’s intent in *Superior Derrick* was complicated by a factor that the Board had also dealt with in *Arnold Bakers*: the language on the union’s picket sign did not indicate the union’s objective was one of those prohibited by Section 8(b)(4).²⁴⁷ The Seafarers Union’s picketing was alleged to be illegal because it had led to a work stoppage by employees of a “neutral” employer, Texla

240. *Id.* at 1339-40.

241. *Id.* (footnote omitted).

242. *Id.* at 1341.

243. The Board noted that “it does not appear that any employees refused to cross the picket line.” *Id.* The Board then explained, “as the Court of Appeals for the Second Circuit has held, the success or failure of a picket line does not determine its legality under Section 8 (b) (4).” *Id.* (citing *NLRB v. Associated Musicians, Local 802*, 226 F.2d 900, 904 (2d Cir. 1955)).

244. *Id.*

245. 122 N.L.R.B. 52, 55 (1958).

246. *See id.*; *NLRB v. Denver Bldg. & Constr. Trades Council*, 341 U.S. 675, 678-79 (1951); *Arnold Bakers*, 115 N.L.R.B. at 1338.

247. *Superior Derrick*, 122 N.L.R.B. at 54-56.

Stevedoring.²⁴⁸ However, the union's picket sign stated: "NO DISPUTE WITH ANY OTHER EMPLOYER EMPLOYEES OF SUPERIOR DERRICK CORP. ON STRIKE FOR BETTER WAGES HOURS & CONDITIONS SEAFARERS INT. UNION AFL-CIO."²⁴⁹ The Board members divided over whether, given this language on the picket sign, the intent of the union's picketing could be found illegal.²⁵⁰

Even though the Board majority used the strong language quoted in the preceding paragraph, that "the appearance" of a picket is a "strike signal," they did not, as the Board had in *Arnold Bakers*, find that the union's choice of picketing as a tactic was itself sufficient evidence of illegal intent to cause a strike.²⁵¹ Instead, the Board majority relied on other evidence of illegal intent.²⁵² The Board majority explained that a few months before the challenged picketing the Seafarers Union had engaged in picketing of Superior Derrick, with the same language on the signs as that quoted above, that caused employees of neutral employers to stop working.²⁵³ The Board majority found, given what had occurred during this earlier picketing, that during the challenged picketing involving Texla Stevedoring, the Seafarer Union's agents "could reasonably anticipate that [Texla's] longshoremen would not cross the picket line, regardless of the legend on the picket signs."²⁵⁴ The Board majority emphasized that Texla's longshoremen were members of the exact same unions (Locals 1418 and 1419 of the International Longshoremen's Association) as the longshoremen who stopped work during the earlier picketing.²⁵⁵ Thus, the Board majority found, the Seafarers Union

learned at Charbonnet [the site of the earlier picketing] that members of these locals would pay no attention to the legend on the picket signs, but rather would treat the appearance of pickets as a strike signal. Accordingly, when the members of the same union appeared at Dumaine [the location where Texla was operating], the [Seafarers Union] had every reason to expect that they' would again refuse to work.²⁵⁶

248. *Id.* at 54-55.

249. *Id.* at 54.

250. *See id.* at 58 (Fanning, Member, dissenting).

251. *See id.* at 55.

252. *See id.*

253. *Id.* at 53-54.

254. *Id.* at 55.

255. *See id.*

256. *Id.*

Even these facts indicating that it was foreseeable that picketing would result in a work stoppage by neutral employees were not the main bases for the Board majority's finding of illegal intent.²⁵⁷ The Board majority linked the past effects of the Seafarer Union's picketing to the fact that when Texla's longshoremen "asked Gould [the Seafarer Union's agent] what the picketing was all about[,] *Gould admittedly did not reply to their questions.*"²⁵⁸ The Board majority concluded that Mr. Gould's failure to reply was evidence of illegal intent, declaring that "when, as here, the picketing union has been specifically apprised by past experience that the appearance of a picket will result in secondary employees ceasing work, it may not remain silent when directly asked what is the purpose of the picketing."²⁵⁹ Although the Board majority in *Superior Derrick* found that the union's picketing was a "signal" for employees of a neutral employer to strike,²⁶⁰ the majority's reasoning could be interpreted as a step away from the *Arnold Bakers* view that the foreseeability of a work stoppage as a response to a picket can be sufficient evidence that the picketing was intended to cause a work stoppage.²⁶¹

The next step in the development of the doctrine of signal picketing was not taken by the NLRB or a court, but by the United States Congress. In 1959, for the first time, Congress added the words "picket," "picketed," and "picketing" to the NLRA, though Congress did not add a definition for any of these terms.²⁶² Congress used the term "picketing" in a new proviso added to Section 8(b)(4) that stated that under prescribed circumstances, union publicity other than picketing was not illegal even though it was directed at secondary employers.²⁶³ The

257. *See id.* at 55-56 (finding the picketing union's silence pertaining to the questions from the longshoremen troubling in light of the particular set of circumstances).

258. *Id.* at 55 (emphasis in original).

259. *Id.* at 55-56.

260. *See id.* at 55.

261. *See Arnold Bakers*, 115 N.L.R.B. 1333, 1338-41 (1956) (finding that in most circumstances "the mere existence of a picket line" serves as a disincentive for employees to work).

262. *See Labor-Management Reporting and Disclosure (Landrum-Griffin) Act of 1959*, Pub. L. No. 86-257, §§ 602, 704, 73 Stat. 519, 539, 544.

263. The new proviso stated:

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 in such distribution

history of that proviso is an interesting precursor to the current controversy over the scope of the prohibition on signal picketing. Most of the 1959 revisions to Section 8(b)(4) originated with the House version of the Bill, H.R. 8400,²⁶⁴ which was substituted on the floor of the House for the bill that passed the House Education and Labor Committee.²⁶⁵ Then-Senator John F. Kennedy, who presided over the House-Senate Conference Committee on the legislation, expressed concerns that the House bill's restrictions violated First Amendment rights:

The prohibition [of the House bill] reaches not only picketing but leaflets, radio broadcasts and newspaper advertisements, thereby interfering with freedom of speech. . . . [O]ne of the apparent purposes of the amendment is to prevent unions from appealing to the general public as consumers for assistance in a labor dispute. This is a basic infringement upon freedom of expression.²⁶⁶

To address that constitutional concern, the Conference Committee added the "publicity proviso" to Section 8(b)(4).²⁶⁷ Senator Kennedy explained the purpose of the proviso: it protected

[t]he right to appeal to consumers by methods other than picketing asking them to refrain from buying goods made by nonunion labor and to refrain from trading with a retailer who sells such goods. . . . We were not able to persuade the House conferees to permit picketing in front of that secondary shop, but were able to persuade them to agree that the union shall be free to conduct *informational activity short of picketing*. In other words, the union can hand out handbills at the shop . . . and *can carry on all publicity short of having ambulatory picketing*²⁶⁸

Congress was thus well aware that its restrictions on union protests raised constitutional issues, and that the threat of constitutional violations was heightened when the prohibitions extended to union expression other than traditional ambulatory picketing.

National Labor Relations Act (NLRA) § 8(b)(4), 29 U.S.C. § 158(b)(4) (2012).

264. See H.R. 8400, 86th Cong. § 705(a) (1959), in 1 NLRB, LEGISLATIVE HISTORY OF THE LABOR-MANAGEMENT REPORTING AND DISCLOSURE ACT OF 1959, at 680-83 (1959) (proposed amendments to Section 8(b)(4)).

265. See Chronological Statement of Legislative History of the Labor-Management Reporting and Disclosure Act of 1959, in 1 NLRB, LEGISLATIVE HISTORY OF THE LABOR-MANAGEMENT REPORTING AND DISCLOSURE ACT OF 1959, at XI (1959).

266. See 105 CONG. REC. 16,591 (1959).

267. See 29 U.S.C. § 158(b)(4); *id.* § 158 amends. (1959—Subsec. (b)(4)).

268. 105 CONG. REC. 17,898-99 (emphasis added).

In 1959, Congress also added a new provision, Section 8(b)(7), that restricted picketing for the purpose of organizing employees or attaining recognition from an employer.²⁶⁹ During Congress's discussions of this provision, the co-sponsor of the bill, Michigan Representative Robert Griffin, referred to picketing as a "signal" for employees to not perform work, stating: "The picket line *is a signal* for truckers not to pick up or deliver goods to employees of maintenance contractors."²⁷⁰ Representative Griffin did not say anything further about what he meant by signal, and no other member of Congress used the term during the discussion of the legislation.²⁷¹ However, a possible clue to Congress's intentions was revealed by Harvard Law Professor Archibald Cox, in a

269. See 29 U.S.C. § 158(b)(7); *id.* § 158 amends. (1959—Subsec. (b)(7)). Section 8(b)(7) provides:

(b) . . . It shall be an unfair labor practice for a labor organization or its agents—

. . . .

(7) to picket or cause to be picketed, or threaten to picket or cause to be picketed, any employer where an object thereof is forcing or requiring an employer to recognize or bargain with a labor organization as the representative of his employees, or forcing or requiring the employees of an employer to accept or select such labor organization as their collective bargaining representative, unless such labor organization is currently certified as the representative of such employees:

(A) where the employer has lawfully recognized in accordance with this subchapter any other labor organization and a question concerning representation may not appropriately be raised under section 159(c) of this title,

(B) where within the preceding twelve months a valid election under section 159(c) of this title has been conducted, or

(C) where such picketing has been conducted without a petition under section 159(c) of this title being filed within a reasonable period of time not to exceed thirty days from the commencement of such picketing: *Provided*, That when such a petition has been filed the Board shall forthwith, without regard to the provisions of section 159(c)(1) of this title or the absence of a showing of a substantial interest on the part of the labor organization, direct an election in such unit as the Board finds to be appropriate and shall certify the results thereof: *Provided further*, That nothing in this subparagraph (C) shall be construed to prohibit any picketing or other publicity for the purpose of truthfully advising the public (including consumers) that an employer does not employ members of, or have a contract with, a labor organization, unless an effect of such picketing is to induce any individual employed by any other person in the course of his employment, not to pick up, deliver or transport any goods or not to perform any services.

Nothing in this paragraph (7) shall be construed to permit any act which would otherwise be an unfair labor practice under this subsection.

Id. § 158(b)(7).

270. 105 CONG. REC. 14,344, 14,348 (1959) (statement of Rep. Griffin) (emphasis added) (arguing for the introduction of H.R. 8400, Labor-Management Reporting and Disclosure Act of 1959).

271. The Author makes this assertion based on a comprehensive search through the online legislative history of the Labor-Management Reporting and Disclosure Act (including the Congressional Record and committee reports and hearings) for use of the word "signal."

1959 speech and law review article he prepared shortly after serving as the adviser on the legislation to its co-sponsor in the Senate, then-Senator John F. Kennedy.²⁷²

Professor Cox expressly referred to some types of picketing as “signal picketing,” which he distinguished from “publicity picketing.”²⁷³ Professor Cox explained the distinction in the following way:

Picketing before a union election is divided by section 8 (b) (7) into two categories: (1) picketing which halts pick-ups or deliveries by independent trucking concerns or the rendition of services by the employees of other employers, and (2) picketing which appeals only to employees in the establishment and members of the public. The distinction is in terms of consequences rather than intent, because motives are too difficult to disentangle. The theory is that the *former class of picketing is essentially a signal to organized economic action backed by group discipline*. Such economic pressure, if continued, causes heavy loss and increases the likelihood of the employer’s coercing the employees to join the union. In the second type of picketing, the elements of communication predominate. If the employer loses patronage, it is chiefly because of the impact of the picket’s message upon members of the public acting as individuals.²⁷⁴

Professor Cox explained that signal picketing “backed by group discipline” should be subjected to much greater legal restriction than publicity picketing, even if the publicity picketing affected the work performance of some employees.²⁷⁵

Professor Cox’s analysis in this 1959 article echoed his reasoning in an article eight years earlier, in which he distinguished which types of picketing were and were not protected by the Constitution.²⁷⁶ In the 1951 article, Professor Cox declared that “a sharp distinction between various kinds of picketing may be drawn according to (1) the basis of its appeal

272. See Archibald Cox, *The Landrum-Griffin Amendments to the National Labor Relations Act*, 44 MINN. L. REV. 257, 257 & n.* (1959). In one of his author’s notes to the article, Professor Cox explained that “[t]he substance of this paper was delivered as a speech before the Labor Law Section of the Minnesota State Bar Association on November 6, 1959.” *Id.* at 257 n.*. That speech occurred less than two months after Congress passed the amendments. See Labor-Management Reporting and Disclosure (Landrum-Griffin) Act of 1959, Pub. L. No. 86-257, 73 Stat. 519, 519. Professor Cox added in that author’s note: “The author wishes to make it plain that although he has tried to achieve a measure of academic detachment, his participation in a tense legislative struggle, even if only as an adviser, probably left him with the shortcomings of a protagonist.” Cox, *supra*, at 257 n.*.

273. See Cox, *supra* note 272, at 267 & n.41.

274. *Id.* at 267 (emphasis added).

275. See *id.*

276. See Archibald Cox, *Strikes, Picketing and the Constitution*, 4 VAND. L. REV. 574, 591-602 (1951).

for support and (2) the character of the audience to which the appeal is addressed.”²⁷⁷ More concretely, Professor Cox contended that a speaker cannot claim constitutional protection “if the speaker goes beyond discussion and invokes sanctions to support his words.”²⁷⁸ Professor Cox then explained that some union picketing involved such invocation of sanctions: “The critical point . . . is . . . the fact that the union members respect the picket line because of a group discipline based partly on common loyalties, partly on the force of habit, partly on fear of social ostracism *but also on severe economic sanctions*.”²⁷⁹ Professor Cox, using actual examples, described how such sanctions operated and how forceful they were:

The truck driver who crosses a teamsters’ picket line is subject not only to union fines but also to expulsion, and in the trucking industry suspension or expulsion from the union may carry with it loss of employment. In the Hollywood jurisdictional strike carpenters who crossed a picket line established by their union were fined the equivalent of one year’s earnings. The constitutions and by-laws of other unions provide similar sanctions and while reliable statistics are not available, it seems plain that whenever the union is strong enough to exercise its power, the power will be invoked, if necessary.²⁸⁰

Professor Cox summarized: “The picket’s reliance . . . is on the sanctions inherent in the discipline and organized economic power of his union.”²⁸¹

Like the court and NLRB decisions discussed earlier in this Part,²⁸² Professor Cox used the term “signal picketing” to refer to the picketing that was based on threat of sanction.²⁸³ Professor Cox distinguished this signal picketing from “publicity picketing” and declared that “the constitutional decisions in picketing cases should depend, in part, on whether the ‘publicity’ or ‘signal’ aspect predominates.”²⁸⁴ Signal picketing, because it relied on sanctions, was not entitled to constitutional protection.²⁸⁵

Eight years later, in his *Minnesota Law Review* article, Professor Cox stressed that the distinction between “signal” and “publicity”

277. *Id.* at 593.

278. *Id.*

279. *Id.* at 594 (emphasis added).

280. *Id.*

281. *Id.*

282. *See supra* notes 206-61 and accompanying text.

283. Cox, *supra* note 276, at 594-95.

284. *Id.* at 595.

285. *See id.* at 593-95.

picketing should be observed in applying the new Section 8(b)(7) limits on picketing: “The NLRB, in administering section 8(b)(7), should recognize that the statute draws a line between two courses of conduct.”²⁸⁶ Professor Cox explained that the new statutory provisions treated the two types of picketing very differently: “Congress placed no limitation upon the period for which a union may engage in publicity picketing,”²⁸⁷ while signal picketing was prohibited from lasting “for more than a reasonable period, not to exceed 30 days” unless a petition for an election was filed.²⁸⁸

By no later than 1962, the Dictionary of Labor Law Terms published by Commerce Clearing House adopted the distinction between “publicity picketing” and “signal picketing” that Professor Cox had identified.²⁸⁹ As quoted in a 1962 NLRB decision, the Dictionary of Labor Law Terms’s definition of picketing distinguished between these two types of picketing: “*Publicity picketing* is intended to indicate to the public the existence of a labor dispute. It has been distinguished by the U.S. Supreme Court from *signal picketing*, the intent of which is to persuade other union members to leave their work or to refuse to enter the premises.”²⁹⁰

In 1960, a year after Professor Cox’s *Minnesota Law Review* article, a *Yale Law Journal* comment by Allen H. Duffy also examined Section 8(b)(7) and its new restrictions on picketing.²⁹¹ Like Professor Cox’s 1951 *Vanderbilt Law Review* article, the 1960 Yale comment focused on the constitutional issues surrounding picketing. The comment pointed out that a series of U.S. Supreme Court decisions had found that restriction of picketing was not unconstitutional because picketing was “something more than free speech.”²⁹² The comment stated that the reasoning behind this conclusion was first articulated by Justice Douglas in his concurrence in the 1942 *Wohl* decision, where he stated, “Picketing by an organized group is more than free speech, . . . since the very presence of a picket line may induce action of one kind or another, quite irrespective of the nature of the ideas which are being

286. Cox, *supra* note 272, at 267. Professor Cox further admonished that “[p]roof of a few widely separated instances of a trucker’s refusal to cross a publicity picket line should not convert it into signal picketing.” *Id.*

287. *Id.*

288. *Id.* at 268.

289. See COMMERCE CLEARING HOUSE, *DICTIONARY OF LABOR LAW TERMS* 94 (2d ed. 1953).

290. See Serv. & Maint. Emps. Union, Local 399 (*Burns Detective Agency*), 136 N.L.R.B. 431, 434 (1962) (quoting COMMERCE CLEARING HOUSE, *supra* note 289, at 94).

291. See Allen H. Duffy, Comment, *Picketing by an Uncertified Union: The New Section 8(b)(7)*, 69 *YALE L.J.* 1393, 1395 (1960).

292. See *id.* at 1396-97.

disseminated.”²⁹³ According to the comment, this statement by Justice Douglas recognized “the coercive and perhaps irrational appeal of the picket line—an appeal stemming not from an articulation of ideas but from ‘the very presence of a picket line.’”²⁹⁴ The comment then explained how union picketing achieved its objectives through means other than the “articulation of ideas”:

This appeal, by a process of elimination, must result from the face-to-face quality of a union picket line, the conspicuous and physical confrontation of nonpicket with picket. This confrontation invokes convictions or emotions sympathetic with the union activity, fear of retaliation if the picket is defied, the loyalty of nonpickets who are union members, simple embarrassment, or other similar reactions. Underlying all of these responses is an element of intimidation resulting from the physical presence of the pickets or the heritage of the union picket line tainted with bloodshed and violence. The fact that some picket lines may rely for their effectiveness upon voluntary observance by other unions does not necessarily diminish the importance of confrontation. The presence of pickets will make certain that the picket is brought to the attention of the individual member and will ensure that the agreement not to cross is honored.²⁹⁵

Mr. Duffy’s Yale comment thus reasoned that “confrontation” and even “intimidation” were key features of picketing that justified the Section 8(b)(4) and 8(b)(7) legal restrictions.²⁹⁶ Similarly, in his two articles, Professor Cox asserted that signal picketing was based on “sanction”²⁹⁷ and “group discipline.”²⁹⁸

A 1962 decision by the D.C. Circuit, authored by Judge David Bazelon, indicated agreement with these scholars on the rationales for restricting picketing.²⁹⁹ The court explained that “picketing combines

293. *Id.* at 1397 (quoting *Bakery & Pastry Drivers Local 802 v. Wohl*, 315 U.S. 769, 776-77 (1942) (Douglas, J., concurring)).

294. *Id.* (footnote omitted).

295. *Id.*

296. *Id.* at 1397-99. Interestingly, Mr. Duffy’s Yale comment stated that “picketing” should include such “substitutes as the distribution of circulars, the wearing of identifying apparel, or oral announcements,” as these activities would effectuate “the necessary confrontation and notification.” *Id.* at 1397-98. By contrast, as is discussed elsewhere in this Article (see *supra* notes 71-83 and accompanying text) the U.S. Supreme Court held in *DeBartolo* that activities such as distribution of circulars (called “handbills” in that case) were not regulated by the NLRA, unless they had the intent or effect of causing employees to desist from performing work. *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 578, 580, 583-84, 588 (1988).

297. See Cox, *supra* note 276, at 593-95.

298. See *supra* notes 272-85 and accompanying text.

299. *Fruit & Vegetable Packers, Local 760 v. NLRB*, 308 F.2d 311, 316 (D.C. Cir. 1962), *vacated*, 377 U.S. 58 (1964).

constitutionally protected speech for the purpose of communicating ideas with a 'signal' to act which must yield to the states' power 'to set the limits of permissible contest open to industrial combatants.'"³⁰⁰ Like the 1960 *Yale Law Journal* comment, the D.C. Circuit invoked the portion of Justice Douglas's concurrence in *Wohl* where Justice Douglas stated that picketing is "more than speech" because "the very presence of a picket line may induce action of one kind or another, quite irrespective of the nature of the ideas which are being disseminated."³⁰¹ The court noted that "[t]he response to which Mr. Justice Douglas referred is characteristic of unionized employees to whom pickets have traditionally addressed their appeal."³⁰² The court then invoked Professor Cox's 1951 *Vanderbilt Law Review* article to explain that the unionized employees at whom picketing was aimed "are subject to group discipline based on common interests and loyalties, habit, fear of social ostracism, or the application of severe economic sanctions."³⁰³ In reasoning reminiscent of Professor Cox's 1951 article, the D.C. Circuit stated that "[i]n that context" of threat of sanction, "picketing is more than 'pure' speech" and is not entitled to constitutional protection.³⁰⁴

A corollary of this reasoning would be that picketing not accompanied by threat of economic sanction is more akin to pure speech, and the D.C. Circuit applied that corollary to the facts of *Tree Fruits*.³⁰⁵ The court found that in this case, the union "successfully sought to *prevent* its picketing from having the customary 'signal' effect on employees" and instead aimed its picketing at potential customers and members of the public.³⁰⁶ According to the court, this picketing was not an order to a group, but an appeal to individuals: "Each prospective patron could read the Union's signs and literature and determine, in the light of his own interests and convictions, what course he would follow."³⁰⁷

The D.C. Circuit did not end its analysis here; the court also emphasized that there was no evidence in the record of economic injury to a neutral or "secondary" employer,³⁰⁸ and made that factor a key aspect of the legal test it applied to decide that the union's picketing was

300. *Id.* (quoting *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 499 (1949)).

301. *Id.* (quoting *Bakery & Pastry Drivers Local 802 v. Wohl*, 315 U.S. 769, 776-77 (1942) (Douglas, J., concurring)); *see also* Duffy, *supra* note 291, at 1397.

302. *Id.*

303. *Id.* (citing Cox, *supra* note 276, at 594).

304. *See id.*

305. *See id.*

306. *See id.*

307. *See id.*

308. *See id.* at 316-17.

not illegal.³⁰⁹ On appeal, the Supreme Court rejected the D.C. Circuit's test,³¹⁰ though the Court also concluded that the union's picketing was legal, on the ground that the picketing was only asking consumers to cease buying one product and was not asking consumers to stop dealing with a secondary employer altogether.³¹¹ From the outset of the Supreme Court's decision, the Court regarded the picketing as exclusively "consumer picketing,"³¹² so it did not discuss the concept of "signal picketing" aimed at employees.

Signal picketing and related concepts were applied by the NLRB and courts in the early 1960s as they had to interpret the meaning of the terms "picket" and "picketing" added to the NLRA in 1959 by the enactment of Section 8(b)(7) and of the new proviso to Section 8(b)(4).³¹³ In interpreting the latter provision in a 1962 decision, *Burns Detective Agency*,³¹⁴ the NLRB considered the factor of union discipline that had been identified as crucial by Professor Cox in his two articles and by the D.C. Circuit in *Tree Fruits*.³¹⁵ The issue before the Board in *Burns Detective Agency* was whether "patrolling" by twenty to seventy agents of the union at the main entrance to an arena, without "placards" or "armbands" but only the distribution of some handbills, was protected by the Section 8(b)(4) proviso.³¹⁶ The Board, reversing the Trial Examiner's findings, found that the union's patrolling did not violate Section 8(b)(4)(i)(B) because the union "effectively took steps to neutralize . . . implied inducement and encouragement of employees" to desist from working.³¹⁷ These steps included removal of the kind of threat of discipline discussed by Professor Cox and the D.C. Circuit:

These steps include the failure to seek *strike sanctions* from the Building Trades Council, notice to the Painters' representative that his

309. *See id.* at 317-18. The D.C. Circuit's test provided that "in the absence of a showing that a substantial economic impact on the secondary employer has occurred or is likely to occur," the NLRA does not prohibit "picketing as the form of making 'do not patronize' appeals, so long as the picketing is conducted in an entirely peaceful and non-coercive manner, is addressed solely to consumers, and has no side effects which might be a basis for distinguishing it from any other form of publicity." *Id.* at 317.

310. *See Tree Fruits*, 377 U.S. 58, 72-73 (1964).

311. *See id.* at 70-73.

312. *See id.* at 63-64.

313. *See* National Labor Relations Act (NLRA) § 8(b)(4), 8(b)(7), 29 U.S.C. § 158(b)(4), 158(b)(7) (2012); *id.* § 158 amends. (1959—Subsec. (b)(4)); *id.* § 158 amends. (1959—Subsec. (b)(7)).

314. *Serv. & Maint. Emps. Union, Local 399 (Burns Detective Agency)*, 136 N.L.R.B. 431 (1962).

315. *See id.* at 437; *supra* notes 272-88, 305-11 and accompanying text.

316. *See Burns Detective Agency*, 136 N.L.R.B. at 432, 433 & n.4.

317. *Id.* at 437.

men could work, and notice to the Olympia Building and Maintenance Company (which employed Respondent's members) that its employees were free to work the show. By this conduct Respondent not only negated any intent to cause a work stoppage but it made this known to its members and to other unions, and the record shows that all employees did carry out their assigned functions.³¹⁸

The Board did find that the patrolling violated Section 8(b)(4)(ii)(B) because it physically impeded access and imposed physical restraints upon "patrons" seeking to enter the arena, and thus was "coercive to a very substantial degree."³¹⁹

The union discipline issue was again important in the NLRB's 1965 decision in *Lumber & Sawmill Workers Local Union No. 2797 (Stoltze Land & Lumber)*,³²⁰ a case frequently cited over the next four decades as authority for the prohibition on signal picketing.³²¹ Interestingly, the NLRB in *Stoltze Land & Lumber* concluded that handbilling by the union amounted to signal picketing,³²² a holding that the NLRB later acknowledged was probably overridden by the U.S. Supreme Court's 1988 *DeBartolo* decision,³²³ though that has not stopped the NLRB and courts from relying on *Stoltze* for support when deciding that other forms of conduct constitute signal picketing.³²⁴ In *Stoltze*, the union claimed that its activity on and after April 6, 1965, when it discontinued using picket signs and instead engaged in handbilling, was not covered

318. *See id.* (emphasis added).

319. *See id.* at 436-37.

320. 156 N.L.R.B. 388 (1965).

321. In shepardizing the decision in July 2017, the Author found forty-eight subsequent decisions that cited to it, including one as recent as 2016.

322. *Stoltze Land & Lumber*, 156 N.L.R.B. at 388, 393-95.

323. *See Newark Morning Ledger Co.*, Case No. 22-CA-18197, 1993 N.L.R.B. LEXIS 892, at *16-17 (Oct. 6, 1993) (concluding that because the handbilling decisions relied on by the respondent, which include *Stoltze Land & Lumber* and *Burns Detective Agency*, "precede *DeBartolo*, and therefore did not consider the constitutional implications of proscribing handbilling[.] . . . much of the language of these decisions, cited by Respondent, which rely upon the purpose of the handbilling as significant in determining that the conduct therein was tantamount to picketing, is . . . superseded by *DeBartolo*").

324. *See, e.g., Kentov ex rel. NLRB v. Sheet Metal Workers' Int'l Ass'n Local 15*, 418 F.3d 1259, 1265-66 (11th Cir. 2005) (relying on *Stoltze Land & Lumber* to find that a mock funeral procession constituted signal picketing); *Serv. Emps. Union, Local 87 (Trinity Maintenance)*, 312 N.L.R.B. 715, 743, 754 (1993) (citing *Stoltze Land & Lumber* as support for finding that a demonstration constituted signal picketing); *Mid-Atl. Reg'l Council of Carpenters, JD(MD)-16-06*, Case No. 5-CC-1289, at *15-17 (N.L.R.B. Div. of Judges Mar. 2, 2006) (twice citing *Stoltze Land & Lumber* in support of the decision that bannerng constituted signal picketing), *rev'd*, 356 N.L.R.B. 61 (2010); U.S. Gov't Office of the Gen. Counsel, NLRB, Advice Memorandum on *Ornamental Iron Workers Local 63 Case 13-CC-2584*, at 4-5, 4 nn.5-6 (Feb. 2, 2006) (relying on *Stoltze Land & Lumber* in determining the display of a large inflatable rat to constitute signal picketing).

by Section 8(b)(7) because it was not “picketing.”³²⁵ The union’s argument was rejected by Trial Examiner James R. Hemingway, whose decision was adopted without comment by the Board.³²⁶ Trial Examiner Hemingway pointed out that the union had expelled and otherwise disciplined union members who returned to work for the employer being handbilled, which he found showed that the union regarded the handbilling as tantamount to a picket line.³²⁷ Trial Examiner Hemingway further found that the handbilling was picketing within the meaning of Section 8(b)(7) because it included what he determined was “[t]he important feature of picketing,” which was “the posting by a labor organization . . . of individuals at the approach to a place of business to accomplish a purpose which advances the cause of the union, such as keeping employees away from work or keeping customers away from the employer’s business.”³²⁸ Thus, because the union’s handbilling on April 6 and thereafter involved such posting, “what the Union was doing after April 6, 1965, was just as much picketing as what it was doing when it carried signs.”³²⁹

The concept of “signal picketing” also grew out of 1960s decisions in which there was little or no patrolling or movement by union agents. In an often cited³³⁰ 1962 decision, *Local 182, International Brotherhood of Teamsters (Woodward Motors, Inc.)*,³³¹ the union argued that its action of placing signs in a snowbank next to the employer’s premises “was something other than picketing.”³³² As its basis for agreeing with the Trial Examiner that the “signs in the snowbank” did constitute picketing, the NLRB stated: “These signs were watched by Respondent’s [union’s] agents from a car parked on the shoulder of an adjacent highway to make sure they were not removed or destroyed during the entire working day.”³³³ In enforcing the NLRB decision, the Second Circuit explained that patrolling was not a required element of picketing, but human observation of the picket “line” was required.³³⁴ In an opinion by Judge Henry J. Friendly,³³⁵ the court pointed out that the

325. *Stoltze Land & Lumber*, 156 N.L.R.B. at 392, 393-94.

326. *Id.* at 388, 394.

327. *See id.* at 393-94.

328. *Id.* at 394.

329. *Id.*

330. In shepardizing the decision in 2009, the Author found thirty-one subsequent decisions that cited to it, including one as recent as 2006.

331. 135 N.L.R.B. 851 (1962).

332. *Id.* app. at 857.

333. *Id.* at 851 n.1.

334. *See NLRB v. Local 182, Int’l Bhd. of Teamsters*, 314 F.2d 53, 56, 57-58 (2d Cir. 1963).

335. *Id.* at 56.

dictionary definition of the noun “picket” was “a person posted by a labor organization at an approach to the place of work,”³³⁶ so “[m]ovement is thus not requisite” for union conduct to be picketing.³³⁷ The court then described picketing as being composed of “material elements” and “human elements,” and found that in this case “the Union chose to bisect” the two by “placing the material elements in snowbanks but protecting the human elements from the rigors of an upstate New York winter by giving them the comfort of heated cars until a delivery truck approached.”³³⁸ The Second Circuit found that this conduct by the union “was still ‘more than speech and establishes a locus in quo that has far more potential for inducing action or nonaction than the message the pickets convey.’”³³⁹

The following year, in its 1964 *United Furniture Workers* decision, the Second Circuit had occasion to further explain the importance of the human elements in defining picketing.³⁴⁰ The NLRB in *United Furniture Workers* had adopted a Trial Examiner’s opinion that, relying on *Local 182, International Brotherhood of Teamsters*, held that union agents placing “On Strike” signs on trees and poles in front of the plant constituted picketing.³⁴¹ The Trial Examiner pointed out that after placing the signs, the union agents “return[ed] to the parking lot across the street from the plant where they sit in cars.”³⁴² Based on these facts, the Trial Examiner concluded that it was

a reasonable inference in this case that the union representatives in affixing the signs with chains and locks and sitting in cars were doing this so that the signs could be watched and protected. By their conduct the strikers were establishing a *locus in quo* which was more than mere speech within the meaning of the cases.³⁴³

The Second Circuit denied enforcement of the NLRB’s decision against the union.³⁴⁴ In an opinion by Judge Irving Kaufman (joined on the three-judge panel by Judges Henry Friendly and Thurgood Marshall),³⁴⁵ the Second Circuit acknowledged its decision the year

336. *Id.* at 57-58 (quoting WEBSTER’S NEW INTERNATIONAL DICTIONARY (2d ed.)).

337. *Id.* at 58.

338. *Id.*

339. *Id.* (quoting *Bldg. Serv. Emps. Int’l Union, Local 262 v. Gazzam*, 339 U.S. 532, 537 (1950)).

340. *See* *NLRB v. United Furniture Workers*, 337 F.2d 936, 940 (2d Cir. 1964).

341. *See* *United Furniture Workers (Jamestown Sterling Corp.)*, 146 N.L.R.B. 474, 475, 478 (1964).

342. *Id.* at 478.

343. *Id.*

344. *United Furniture Workers*, 337 F.2d at 939, 940.

345. *Id.* at 937.

before in *Local 182, International Brotherhood of Teamsters*, that patrolling or movement by union agents was not a required element of picketing.³⁴⁶ “But,” the court went on to say, “application of the term [picketing] to activity even further from traditional picketing requires more explanation than was here afforded.”³⁴⁷ The Second Circuit grounded its objections to the NLRB’s decision in the First Amendment, explaining that the Board’s findings “give no sufficient clue whether the Board considered those factors which have traditionally been invoked in distinguishing between prohibited picketing and protected free speech.”³⁴⁸

The key factor identified by the Second Circuit was confrontation: “one of the necessary conditions of ‘picketing’ is a confrontation in some form between union members and the employees, customers, or suppliers who are trying to enter the employer’s premises.”³⁴⁹ Confrontation was also the factor emphasized in Allen H. Duffy’s 1960 *Yale Law Journal* comment,³⁵⁰ and indeed the Second Circuit expressly quoted Duffy’s passage explaining that confrontation and intimidation were the reasons why picketing was more than the expression of an idea.³⁵¹ The court then stated, “We cannot be sure that the Board considered the extent of confrontation necessary to constitute picketing in reaching its conclusion.”³⁵² The court observed that there was no evidence on whether the union agents in parked cars were close enough that “they could be or were seen by employees, customers, or suppliers entering the plant,” or whether those men “were reasonably identifiable as union representatives.”³⁵³ Those facts, the court said, “would seem to be important in determining whether ‘confrontation’ was present.”³⁵⁴

The year after the Second Circuit’s *United Furniture Workers* decision, the NLRB relied on that decision in finding that the absence of “confrontation” meant that two unions’ conduct was not picketing within

346. See *id.* at 939.

347. *Id.*

348. *Id.* at 939-40.

349. *Id.* at 940.

350. See Duffy, *supra* note 291, at 1395-98.

351. Specifically, the portion of Mr. Duffy’s comment quoted by the Second Circuit was:

This confrontation invokes convictions or emotions sympathetic with the union activity, fear of retaliation if the picket is defied, the loyalty of nonpickets who are union members, simple embarrassment, or other similar reactions. Underlying all of these responses is an element of intimidation resulting from the physical presence of the pickets or the heritage of the union picket line tainted with bloodshed and violence.

United Furniture Workers, 337 F.2d at 940 (quoting Duffy, *supra* note 291, at 1397).

352. *Id.*

353. *Id.*

354. *Id.*

the meaning of the Act.³⁵⁵ In its 1965 decision in *Alden Press*, the Board overturned the Trial Examiner's decision that patrolling by unions at shopping centers and public buildings with signs advertising a labor dispute violated Section 8(b)(4) of the Act.³⁵⁶ At a crucial point in its analysis, the Board quoted the Second Circuit: "One of the necessary conditions of 'picketing' is a confrontation in some form between union members and employees, customers, or suppliers who are trying to enter the employer's premises."³⁵⁷ Finding that no such confrontation was present in this case,³⁵⁸ the Board concluded that the unions' patrolling and carrying of placards could reasonably be deemed "publicity other than picketing" for purposes of the "publicity proviso" to Section 8(b)(4).³⁵⁹

Thus, in the first several years after new federal restrictions on picketing were adopted, it was recognized in scholarship and in agency and court decisions that what made picketing more than expression was factors like actual physical confrontation or intimidation that created apprehension of violence, group discipline, or other tangible consequences. Unfortunately, this recognition seemed to fade in the subsequent decades. One early and salient example is the 1973 case *Richman v. Teamsters*,³⁶⁰ in which a federal district court judge granted the NLRB's request for an injunction against the Teamsters "picketing" of the Oil Products fuel oil company.³⁶¹ The Teamsters, invoking the Second Circuit's *United Furniture Workers* decision discussed above,³⁶² argued that the action of having union agents parked outside the Oil Products gate could not be deemed illegal picketing.³⁶³ The judge rejected the union's argument and found *United Furniture Workers* distinguishable on the ground that in this case, unlike *United Furniture*

355. See *Alden Press*, 151 N.L.R.B. 1666, 1669 (1965).

356. *Id.* at 1669.

357. *Id.* (quoting *United Furniture Workers*, 337 F.2d at 940).

358. *Id.* By way of explaining why no confrontation was present, the Board characterized the unions' activities as "a general parading through large public areas" that "was not designed to dissuade customers or others from patronizing the establishments in the area being paraded, nor was it intended to halt deliveries or to cause employees to refuse to perform services, and it did not in fact produce such results." *Id.* The Board further noted: "The General Counsel presented no evidence to show, and we have no reasonable basis to infer, particularly in the light of the language of the signs and the wording of the handbills distributed, that any of the persons in charge of the stores or other buildings, their employees, customers, or other persons entering the buildings, considered that these locations were in fact being picketed." *Id.*

359. See *id.* at 1668-69. For the full publicity proviso to Section 8(b)(4), see *supra* note 263 (quoting National Labor Relations Act (NLRA) § 8(b)(4), 29 U.S.C. § 158(b)(4) (2012)).

360. 82 L.R.R.M. 3138 (E.D.N.Y. 1973).

361. *Id.* at 3141.

362. See *supra* notes 340-54 and accompanying text.

363. See *Richman*, 82 L.R.R.M. at 3138.

Workers, “the presence of union representatives in cars outside the Oil Products gate was known to union drivers of other trucks and had an effect on them.”³⁶⁴ The judge thus disregarded *United Furniture Workers*’s extensive discussion of confrontation as a required element of picketing and diluted that element to require only that employees be aware of the presence of union agents and that such awareness has an apparent effect.³⁶⁵

A few years later, in the 1977 decision *District 1199, National Union of Hospital and Health Care Employees (United Hospitals of Newark)*,³⁶⁶ the NLRB itself offered only a truncated rationale for rejecting the union’s argument that its conduct was protected expression.³⁶⁷ The case involved a claim that the union violated Section 8(g) of the NLRA by picketing a health care institution without providing written notice ten days in advance of its intention to do so.³⁶⁸ The union contended that its conduct was “more akin to handbilling than to picketing,” but the NLRB rejected that argument because the union’s conduct involved “physical patrolling of an area,” and thus would be “treated by many as a signal which may induce them to take action, including ceasing work.”³⁶⁹ The NLRB then invoked Justice Douglas’s assertion, from his concurrence in the 1942 *Wohl* decision, that “picketing by an organized group is more than free speech, since it involves patrol of a particular locality and since the very presence of a picket line may induce action of one kind or another, quite irrespective of the nature of the ideas which are being disseminated.”³⁷⁰ The NLRB’s relatively superficial dismissal of the union’s argument provoked a dissent by twenty-year Board Member Howard Jenkins, Jr.,³⁷¹ who found that “the majority’s conclusion that Section 8(g) requires a *per se* ban on all forms of peaceful picketing at health care facilities results in a constitutionally impermissible restraint on free speech.”³⁷²

While *Richman* and *United Hospitals of Newark* were significant steps in redefining “signal picketing,” the most influential 1970s

364. *Id.*

365. *See id.* at 3138, 3141.

366. 232 N.L.R.B. 443 (1977).

367. *Id.* at 443.

368. *Id.* at 443 & n.1 (citing National Labor Relations Act (NLRA) § 8(g), 29 U.S.C. § 158(g) (2012)).

369. *Id.* at 443.

370. *Id.* at 443 & n.6 (quoting *Bakery & Pastry Drivers Local 802 v. Wohl*, 315 U.S. 769, 776 (1942) (Douglas, J., concurring)).

371. *See Board Members Since 1935*, NLRB, http://www.nlr.gov/about_us/overview/board/board_members_since_1935.aspx (last visited Feb. 3, 2019) (showing that Member Jenkins served on the NLRB from 1963 to 1983).

372. *See United Hospitals of Newark*, 232 N.L.R.B. at 447 (Jenkins, Member, dissenting).

decision in broadening that concept and its application was a 1979 decision by the Ninth Circuit, *International Association of Bridge, Structural and Ornamental Iron Workers, Local 433 v. NLRB*.³⁷³ The facts in the case arose in May 1977, when the union objected to the involvement of a particular subcontractor (R.F. Erection) in installing elevators at the Long Beach, California arena.³⁷⁴ A couple months later, NLRB ALJ Roger B. Holmes found that the union's picketing of the project on May 18 violated Section 8(b)(4) because the union picketed at multiple entrances to the construction site rather than just the entrance "reserved" for R.F. Erection, the only employer with whom the union had a dispute.³⁷⁵ On the following day, May 19, the union had restricted its picketing to the entrance reserved for R.F. Erection, but a union business agent and a union steward had been present at the "office gate" and "main gate," respectively, and employees of "neutral" employers did not report for work on the arena project that day.³⁷⁶ Based on those facts, ALJ Holmes found that "the General Counsel persuasively argues that both [business agent] Ward and [steward] Larken served as a 'signal' to employees of secondary or neutral employers," and therefore the May 19 conduct of these union agents also violated Section 8(b)(4).³⁷⁷ After the NLRB in November 1977 adopted ALJ Holmes's decision without discussion,³⁷⁸ the union appealed to the Ninth Circuit contending, among other things, that finding that its agents "engaged in signal picketing" on May 19 "would 'expand the doctrine' because there is no precedent for such a finding on facts such as those involved here."³⁷⁹

The Ninth Circuit did not disagree that there were no past cases in which "signal picketing" had been found based on similar facts, and in fact the court acknowledged that "other cases may demonstrate that generally it is more extreme conduct that earns the label of 'signal

373. 598 F.2d 1154 (9th Cir. 1979). In Shepardizing this decision in 2018, the Author found fifty-three subsequent decisions that cited to it, including four decisions in 2010 and three decisions in 2005.

374. *Id.* at 1155.

375. *See* Int'l Ass'n of Bridge, Structural & Ornamental Ironworkers, Local No. 433 (*Robert E. McKee, Inc.*), 233 N.L.R.B. 283 app. at 287, 288 (1977). ALJ Holmes's conclusion that the May 18 picketing violated Section 8(b)(4) was expressly based on rules for picketing first established in *NLRB v. Denver Building and Construction Trades Council* and *In re Sailors' Union of the Pacific (Moore Dry Dock Co.)*. *See id.* app. at 287 (first citing 341 U.S. 675, 689 (1951); then citing 92 N.L.R.B. 547, 553, 556 (1950)). Those rules remain in effect today, but are not the primary focus of this Article.

376. *See id.* app. at 287.

377. *See id.* app. at 287-88.

378. *See id.* at 283.

379. *See Iron Workers Local 433*, 598 F.2d at 1159.

picketing.”³⁸⁰ However, the Ninth Circuit declared that the assessment of whether unlawful signal picketing occurred “is one that must be made on a case-by-case basis,”³⁸¹ and so the “only question” in this case was “whether the Board’s finding that Ward and Larken did indeed engage in signal picketing is ‘supported by substantial evidence in the record as a whole.’”³⁸² The Ninth Circuit concluded that there was “substantial evidence” to support the NLRB’s finding that the union agents’ conduct on May 19 constituted signal picketing that violated Section 8(b)(4).³⁸³ The Ninth Circuit explained that the NLRB had discredited the reasons that unions agents Ward and Larken had offered for being present at the office and main gates on May 19³⁸⁴ and that the record showed that these two union agents “had spoken with various persons, including employees of neutral employers, none of whom reported for work that day.”³⁸⁵ The Ninth Circuit concluded that these facts were sufficient to support the inference that “Ward and Larken impermissibly induced or encouraged employees of neutral employers to stay off the job.”³⁸⁶

After *Iron Workers Local 433*, the doctrine of signal picketing was no longer limited to facts involving intimidation or confrontation, but to any situation where union protest or expression was regarded as intending to “encourage” employees not to work. In the 1982 *Construction & General Laborers Union, Local 304* decision,³⁸⁷ the NLRB adopted without discussion a decision (but not the recommended order) by the same ALJ who had decided *Iron Workers Local 433*, Roger B. Holmes, finding that the union’s placement of “signs on safety cones and barricades and on the jobsite fence” constituted picketing.³⁸⁸ ALJ Holmes did not cite any of the *Iron Workers Local 433* decisions, but instead relied for support on the NLRB’s 1960s decisions in *Teamsters Local 182* and *United Furniture Workers*,³⁸⁹ but did so

380. See *id.* As discussed earlier in this Part, the “more extreme conduct” that had been deemed “signal picketing” in cases prior to *Iron Workers Local 433* had usually involved intimidation or confrontation that involved threat of physical contact and/or group discipline. See *supra* notes 320-59 and accompanying text.

381. *Iron Workers Local 433*, 598 F.2d at 1159.

382. *Id.* (quoting *Carpenters Local 470, United Bhd. of Carpenters v. NLRB*, 564 F.2d 1360, 1362-63 (9th Cir. 1977)).

383. See *id.* at 1159-60.

384. See *id.* The union argued that Mr. Ward was at the office gate to speak to project superintendent Page and Mr. Larken was at the main gate to report for work, and both were also at the respective gates to keep picketers away from these neutral gates. *Id.* at 1160.

385. *Id.*

386. See *id.*

387. 260 N.L.R.B. 1311 (1982).

388. *Id.* at 1311; *id.* app. at 1319.

389. See *id.* app. at 1319.

without any mention of the element of union observation of the “picket line” that the NLRB and Second Circuit found so important in those cases and certainly without mention of the requirement of “confrontation” that led the Second Circuit to deny enforcement in *United Furniture Workers*.³⁹⁰ Three years after *Laborers Local 304*, ALJ Thomas E. Bracken relied on *Laborers Local 304* to conclude that a union’s “bannering” constituted signal picketing. In *Tamaha Local No. 1329, United Mine Workers*,³⁹¹ the NLRB adopted ALJ Bracken’s decision rejecting the union’s argument that its placement of banners on a fence post and a stake was “pure speech” and holding that while this bannering “was to some extent speech, it was much more[; i]t was, in fact, picketing.”³⁹² And in 1987, the NLRB adopted a decision by ALJ Gerald A. Wacknov in which the ALJ relied heavily on the Ninth Circuit’s decision in *Iron Workers Local 433* to conclude that “signal picketing” could be inferred from the fact that a number of union agents had “assembl[ed]” at an entrance used by employees of “neutral” employers.³⁹³

In the 1989 *Hoffman Construction* decision,³⁹⁴ the NLRB expressly (albeit briefly) stated what all these decisions had implied: that signal picketing was established whenever a union appealed to “neutral” employees for support.³⁹⁵ In *Hoffman Construction*, the NLRB cited the Ninth Circuit’s *Iron Workers Local 433* decision as authority when the

390. See *id.*; *supra* notes 331-54 and accompanying text (discussing the *Teamsters Local 182* and *United Furniture Workers* decisions). Similarly, in *Laborers International Union, Local No. 389*, ALJ Joan Wieder (whose decision was adopted by the Board) relied heavily on language adopted by the NLRB in its 1969 decision in *United Mine Workers, District 12* to find that the union’s placing signs at or near entrances to a work site constituted picketing. See *Laborers Int’l Union, Local No. 389*, 287 N.L.R.B. 570, 570, 573 (1987) (quoting *United Mine Workers, District 12*, 177 N.L.R.B. 213, 218 (1969)). ALJ Wieder emphasized the aspect of the *United Mine Workers, District 12* decision that explained that neither patrolling nor carrying of signs is a required element of picketing, but she made no mention that this discussion occurred in the context of a union and its agents that “emphatically and inescapably impressed upon” an employer and its employees “that they would not be permitted to work unless and until they joined [the union] and [the employer] signed a contract with that union,” and then backed up that message by bringing 200 union agents to the worksite to block the employer’s employees from working. See *id.* at 573 (quoting *United Mine Workers, District 12*, 177 N.L.R.B. at 218); see also *United Mine Workers, District 12*, 177 N.L.R.B. at 218.

391. 276 N.L.R.B. 415 (1985), *vacated on other grounds*, 812 F.2d 741 (D.C. Cir. 1987).

392. *Id.* at 415, 431 (first citing *Constr. & Gen. Laborers Union, Local 304*, 260 N.L.R.B. 1311, 1319 (1982); then citing *NLRB v. Local 182, Int’l Bhd. of Teamsters*, 314 F.2d 53, 58 (2d Cir. 1963)).

393. *Int’l Union of Operating Eng’rs, Local No. 12*, 284 N.L.R.B. 246, 246, app. at 248-49 (1987).

394. *Ironworkers Dist. Council of the Pac. Nw. (Hoffman Construction)*, 292 N.L.R.B. 562 (1989).

395. See *id.* app. at 581-82, 585.

Board stated it agreed with the ALJ that the activity of union agents gathered around a sign constituted illegal picketing because it “acts as a signal to neutrals that sympathetic action on their part is desired by the union.”³⁹⁶ By 1999, that had become the very definition of signal picketing; in the NLRB’s decision that year in *The Telephone Man, Inc.*,³⁹⁷ the Board declared: “‘Signal picketing’ is the term used to describe activity short of a true picket line that acts as a signal to neutrals that sympathetic action on their part is desired by the union.”³⁹⁸ This broad definition of signal picketing—diluting or erasing any requirement of confrontation, implicit threat, or intimidation—was often employed in the 2000s decade by the NLRB’s General Counsel and some ALJs in finding activities such as bannering or display of inflatables to be illegal picketing.³⁹⁹

Interestingly, given the seminal role of the Ninth Circuit’s 1979 *Iron Workers Local 433* decision in removing the requirement of “intimidation” from the definition of “signal picketing,” the Ninth Circuit in 2018 invoked the “intimidation” caused by picketing as a basis for holding that picketing, unlike handbilling, could be treated as unlawful without violating the First Amendment.⁴⁰⁰ Ironically, the charged party union defendant in this June 2018 decision was also *Iron Workers Local 433*.⁴⁰¹ In the Ninth Circuit’s 2018 *Iron Workers Local 433* decision, the court rejected the union’s argument that the

396. *Id.* at 562 & n.2.

397. *The Telephone Man, Inc.*, 327 N.L.R.B. 593 (1999).

398. *Id.* at 593 n.3 (citing Int’l Ass’n of Bridge, Structural & Ornamental Iron Workers, Local No. 433 v. NLRB, 598 F.2d 1154, 1158 n.6 (9th Cir. 1979)).

399. *See, e.g.*, Local Union No. 1827, United Bhd. of Carpenters, JD(SF)-30-03, Case No. 28-CC-933, at *46-47 (N.L.R.B. Div. of Judges May 9, 2003), *rev’d*, 357 N.L.R.B. 415 (2011) (“Activity short of a traditional picket line that signals neutrals that ‘sympathetic action on their part is desired by the union’ is regarded as ‘signal picketing.’” (first quoting *The Telephone Man, Inc.*, 327 N.L.R.B. at 593 n.3; then quoting Int’l Union of Operating Eng’rs, Local No. 12, 284 N.L.R.B. 246 app. at 248 n.3 (1987))); U.S. Gov’t Office of the Gen. Counsel, NLRB, Advice Memorandum on Graphic Communications Conference, International Brotherhood of Teamsters (Santa Barbara News-Press) Cases 31-CC-2169, 31-CC-2170, 31-CC-2171, 31-CB-12427, 31-CB-12429, at 7 & n.17 (Dec. 31, 2008); U.S. Gov’t Office of the Gen. Counsel, NLRB, Advice Memorandum on Electrical Workers IBEW Local 269 (Kay Construction, Inc.) Case 4-CC-2447, at 3 & nn.4-6 (May 3, 2006); U.S. Gov’t Office of the Gen. Counsel, NLRB, Advice Memorandum on Ornamental Iron Workers Local 63 Case 13-CC-2584, at 4-5 & nn.5-12 (Feb. 2, 2006); U.S. Gov’t Office of the Gen. Counsel, NLRB, Advice Memorandum on Carpenters Local 1144 (Cristalla, LLC) Pacific Northwest Regional Council of Carpenters (Cristalla, LLC) Cases 19-CC-2001, 19-CC-2002, at 4-8 (Jan. 25, 2005); U.S. Gov’t Office of the Gen. Counsel, NLRB, Advice Memorandum on Carpenters Union Local 405 (Green Valley Corporation d/b/a Barry Swenson Builder), Case No. 20-CC-3366-1; and Hayes Mansion Conference Center, Case No. 20-CA-30124-1, at *4 (Mar. 1, 2002).

400. *See* NLRB v. Int’l Ass’n of Bridge, Structural, Ornamental & Reinforcing Ironworkers Union, Local 433, 891 F.3d 1182, 1187 (9th Cir. 2018).

401. *Id.* at 1182.

Section 8(b)(4)(ii)(B) proscription against union picketing was content-based and therefore violative of the First Amendment under the U.S. Supreme Court's 2015 decision in *Reed v. Town of Gilbert*.⁴⁰² The Ninth Circuit briefly summarized *DeBartolo* to support its point that "not all forms of secondary protest are impermissible under [Section 8(b)(4)]."⁴⁰³ The court then found that in limiting picketing, Section 8(b)(4) "regulates conduct rather than content," and "specifically prohibits 'threatening, coercing, or restraining any person engaged in commerce,'" and reasoned that "[t]he First Amendment does not afford unbridled protection to these forms of harassing and intimidating conduct."⁴⁰⁴ One or more future Ninth Circuit decisions could reveal whether picketing and labor protest must be "harassing and intimidating" for that court to find that it can constitutionally be found unlawful.⁴⁰⁵

IV. A PREMISE FOR THE LINE VANISHES (NEARLY): THE INCREASING LIMITATIONS ON UNION POWER TO DISCIPLINE MEMBERS

As the late Professor Archibald Cox explained in his definitive 1950s summaries of the law on picketing, a key justification for the legal restrictions on picketing enacted in that decade and in the 1940s was that labor picketing was closely connected with "sanctions" and "discipline" that a union could impose on employee/members who crossed picket lines and performed work at a picketed establishment.⁴⁰⁶ In the past fifty years, however, the law has changed such that union members who disregard labor pickets can and do easily avoid any union discipline or economic consequence for doing so. The effective limits on union discipline stem from a series of U.S. Supreme Court decisions from the 1960s to the 1980s. As discussed earlier in Part I, Professors Pope and Estlund have noted how these rules on union discipline arguably make

402. *Id.* at 1186-87 (citing *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2227 (2015)).

403. *Id.* at 1187 (citing *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 578 (1988)).

404. *See id.*

405. Another possible limit on the extent to which labor protest can be constitutionally prohibited might be suggested by a September 2017 decision by the Eighth Circuit, *Wartman v. United Food and Commercial Workers Local 653*, 871 F.3d 638 (8th Cir. 2017). In that decision, the Eighth Circuit held that "the disruption of relationships with customers and suppliers" was not an objective covered by Section 8(b)(4) because it was no more than what "any picketed business would suffer." *Id.* at 644. However, the court's decision was also based on its finding that the union's objective in picketing was not to cause the picketed stores to "cease doing business with any other person" because the store referenced in the picket signs was closed, and the court found the union's objective was to get the owners of the picketed stores, who were sons of the owner of the closed store, to persuade their father to resolve a dispute with the union. *See id.* at 641-44.

406. *See supra* notes 272-90 and accompanying text (discussing Professor Cox's articles).

questionable the restrictions on picketing and other labor protest.⁴⁰⁷ As this Article has focused more than theirs on the centrality of union power over members as the justification for the constitutionality of restrictions on union protest, this Part will more fully cover the key precedents and rules on union disciplinary power.

In its 1969 decision in *Scofield v. NLRB*,⁴⁰⁸ the Supreme Court interpreted Sections 7 and 8(b)(1)(A) of the NLRA as permitting unions to enforce disciplinary rules against union members, but not only against “union members who are free to leave the union and escape the rule.”⁴⁰⁹ Five years after *Scofield*, in *NLRB v. Granite State Joint Board, Textile Workers Union, Local 1029*,⁴¹⁰ the Court reversed a ruling by the U.S. Court of Appeals that a union could lawfully fine two former union members for crossing a picket line and returning to work during a strike even though the employees submitted resignations from the union prior to crossing the line and working.⁴¹¹ The Supreme Court declared that “when a member lawfully resigns from the union, its power over him ends.”⁴¹² These Supreme Court rulings created what Professor David Abraham has called the “Achilles heel” of unions’ power to discipline: that the power was limited “to current union members.”⁴¹³ Consequently, a union member “can immunize himself from union fines [or other discipline] by resigning his union membership.”⁴¹⁴

Not only is union discipline unenforceable against a member who has resigned, the Court further held it is illegal for a union to attempt to enforce or even threaten to enforce such discipline against a former member.⁴¹⁵ The Court explained:

Where a member lawfully resigns from a union and thereafter engages in conduct which the union rule proscribes, the union commits an unfair labor practice when it seeks enforcement of fines for that conduct. That is to say, when there is a lawful dissolution of a union-member relation, *the union has no more control over the former member than it has over the man in the street.*⁴¹⁶

407. See *supra* notes 7-10 and accompanying text.

408. 394 U.S. 423 (1969).

409. *Id.* at 428-30 (emphasis added).

410. 409 U.S. 213 (1972).

411. *Id.* at 214-15, 217-18.

412. *Id.* at 215.

413. See David Abraham, *Individual Autonomy and Collective Empowerment in Labor Law: Union Membership Resignations and Strikebreaking in the New Economy*, 63 N.Y.U. L. REV. 1268, 1308 (1988).

414. Harry H. Wellington, *Union Fines and Workers’ Rights*, 85 YALE L.J. 1022, 1023 (1976).

415. See *Granite State Joint Board, Textile Workers Union, Local 1029*, 409 U.S. at 217-18.

416. *Id.* at 217 (emphasis added).

The Court did note that under the facts of this case that “[w]e have here no problem of construing a union’s constitution or bylaws defining or limiting the circumstances under which a member may resign from the union,”⁴¹⁷ thereby apparently reserving judgment on whether such provisions in union governing documents could restrict when and how union members resign.

The U.S. Supreme Court returned to and resolved that issue in 1985 in *Pattern Makers’ League v. NLRB*.⁴¹⁸ In that case, the union fined ten individuals who had violated a provision in the union’s constitution that prohibited resigning from union membership during a strike, when the members resigned from the union during a strike and then returned to work.⁴¹⁹ The Court considered a ruling by the NLRB, affirmed by the Seventh Circuit, that the union had violated Section 8(b)(1)(A) of the NLRA by resigning and returning to work during a strike, notwithstanding the union’s constitutional bar on resignations from membership while the union was striking.⁴²⁰ The Court’s opinion by Justice Powell was joined by the Chief Justice and three other Justices, with Justice White filing a separate concurring opinion.⁴²¹

In Justice Powell’s opinion, after noting that because of the NLRB’s “‘special competence’ in the field of labor relations” the agency’s construction of the NLRA “is accorded substantial deference,”⁴²² he held that “§ 8(b)(1)(A) properly may be construed” by the NLRB as forbidding unions from fining employees for resigning from membership even when the members resigned at a time when, or under circumstances which, resignations are impermissible under the union’s constitution.⁴²³ Of special interest in the current decade, when several states have enacted “right-to-work” statutes that bar union security agreements that make payment of union dues a condition of employment,⁴²⁴ a key part of the reasoning of Justice Powell’s opinion was that union limits on resignation violated the union security provisions of Section 8(a)(3) of the NLRA.⁴²⁵ Justice Powell, relying on

417. *Id.* at 216.

418. *See* 473 U.S. 95, 108-10 (1985).

419. *Id.* at 96.

420. *See id.* at 97-100.

421. *Id.* at 96.

422. *Id.* at 100 (quoting *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251, 266 (1975)).

423. *See id.*

424. Josh Eidelson, *Unions are Losing Their Decades-Long ‘Right-to-Work’ Fight*, BLOOMBERG BUSINESSWEEK (Feb. 16, 2017, 6:00 AM), <https://www.bloomberg.com/news/articles/2017-02-16/unions-are-losing-their-decades-long-right-to-work-fight>.

425. *See Pattern Makers’ League*, 473 U.S. at 104-07 & nn.14-17.

past Supreme Court decisions construing those provisions, held that they “require employees to pay dues, but an employee cannot be discharged for failing to abide by union rules or policies with which he disagrees.”⁴²⁶ Justice Powell added: “Moreover, no employee can be discharged if he initially joins a union, and subsequently resigns,” and “[b]y allowing employees to resign from a union at any time, § 8(a)(3) protects the employee whose views come to diverge from those of his union.”⁴²⁷ Based on these Section 8(a)(3) protections, Judge Powell’s opinion identified a “freedom to resign from full union membership” that was wrongly restricted by the union’s constitution’s limits on resignations during a strike.⁴²⁸

Based on the Supreme Court’s 1985 decision in *Pattern Makers’ League*,⁴²⁹ and on its own decision the year before in *International Association of Machinists and Aerospace Workers, Local Lodge 1414 (Neufeld Porsche-Audi, Inc.)*,⁴³⁰ in which the NLRB adopted the position approved in *Pattern Makers’ League*,⁴³¹ the Board has consistently held that because employees have the right to resign from the union at any time, it is illegal for unions to discipline employees for crossing a union picket line after so resigning.⁴³² In addition, in the current decade, NLRB ALJs have similarly held it to be unlawful for a union to bring internal disciplinary charges against union members who tried to resign prior to crossing a union picket line to work for a non-union contractor.⁴³³

Therefore, when faced with a picket line, a union member can avoid any penalty by resigning from membership before crossing. Moreover, union members know or should know about their right to resign, as unions are legally obligated to inform all members that they can resign from the union and become nonmembers.⁴³⁴ The Board

426. See *id.* at 106 & n.16 (first citing *Radio Officers Union v. NLRB*, 347 U.S. 17, 41 (1954) (noting that union security agreements cannot be used for “any purpose other than to compel payment of union dues and fees”); then citing *NLRB v. Gen. Motors Corp.*, 373 U.S. 734, 742 (1963) (“‘Membership’ as a condition of employment is whittled down to its financial core.”)).

427. *Id.* at 106.

428. *Id.* at 106-07.

429. 473 U.S. 95, *aff’g* 724 F.2d 57 (7th Cir. 1983).

430. 270 N.L.R.B. 1330 (1984).

431. *Id.* at 1134-35.

432. See, e.g., *Int’l Bhd. of Teamsters, Local Union No. 492 (United Parcel Service, Inc.)*, 346 N.L.R.B. 360, 363, 364 (2006); *Pattern & Model Makers Ass’n (Mich. Model Mfrs.)*, 310 N.L.R.B. 929, 941 (1993); *Bay Cities Metal Trades Council*, 306 N.L.R.B. 983, 986 (1992), *enforced*, 15 F.3d 1088 (9th Cir. 1993); *Int’l Ass’n of Machinists & Aerospace Workers, Local Lodge No. 1309 (O’Brien’s Brake Service)*, 289 N.L.R.B. 1286, 1287 (1988).

433. See, e.g., *Chi. Reg’l Council of Carpenters, JD(NY)-23-10, No. 13-CB-19310*, slip op. at 8-10 (N.L.R.B. Div. of Judges July 1, 2010).

434. *Teamsters Local 492*, 346 N.L.R.B. at 363.

requires “such notice, in order to be certain that [union members] have voluntarily chosen union membership.”⁴³⁵

If a union’s governing documents do not prescribe any requirement for resignation, then “resignation may be accomplished in any manner sufficient to show a voluntary decision to part with union membership”⁴³⁶ such that a member can resign “at will.” And the only requirements that unions are expressly allowed to prescribe for resignations are that they be in writing and submitted to the union.⁴³⁷ A written resignation will be effective as long as it clearly conveys the person’s intent to resign from union membership.⁴³⁸

Also, even when “submittal in writing” is required, that does not necessarily mean a significant delay in effectuating a resignation; since at least the 1970s, a written resignation is immediately effective upon receipt when delivered to any union officer at practically any location, including the employee’s workplace.⁴³⁹ Resignations submitted to the union by any kind of mail are also effective relatively soon—by “12:01 a.m. local time on the day following the deposit in the mail . . . [as] determined by postmark.”⁴⁴⁰ Currently and in the future, written

435. *Id.*

436. *Tile, Marble, Terrazo, Finishers, Shopworkers & Granite Int’l Union, Tile Finishers, Local 32 v. Tile, Marble, Terrazo, Helpers & Finishers Local 32*, 896 F.2d 1404, 1412-13 (3d Cir. 1990).

437. *See Mich. Model Mfrs.*, 310 N.L.R.B. at 930 (“[A] labor organization may require that, as a condition of resignation from membership, a member provide written notification of the member’s intention to resign from the labor organization.”). Since this 1993 decision, the Board has rejected any other conditions that unions have sought to require for resignation. *See, e.g., Local 58, Int’l Bhd. of Elec. Workers (Paramount Indus., Inc.)*, 365 N.L.R.B. No. 30, at *2-3 (Feb. 10, 2017) (holding unlawful a local union’s new policy requiring resignations to be submitted in writing with photo identification at the union’s hall).

438. *See, e.g., Shopmen’s Local Union No. 539 (Zurn Indus.)*, 278 N.L.R.B. 149, 152 (1986) (“There is no requirement that an employee use any magic words in order to effectively resign membership from the union.”); *Int’l Bhd. of Elec. Workers, Local Union 340 (Hulse Elec.)*, 273 N.L.R.B. 428, 432 (1984) (“[F]or an employee to effectively resign from membership, it is only necessary that he ‘clearly indicate that he no longer wishes to be bound by the union.’” (quoting *Int’l Bhd. of Elec. Workers, Local Union No. 66*, 262 N.L.R.B. 483 app. at 492 (1982))); *Int’l Bhd. of Elec. Workers, Local Union No. 66 (Hous. Lighting & Power Co.)*, 262 N.L.R.B. at 486 (“[Resignation] may be made in any feasible way and no particular form or method is required.”); *Local 340, Int’l Bhd. of Operative Potters (Macomb Pottery Co.)*, 175 N.L.R.B. 756, 760 n.14 (1969) (“[E]mployees may communicate their resignations from a union in any feasible way, and . . . no particular form or method is required, so long as they clearly indicate to it that they no longer wish to remain members of it.”).

439. *See, e.g., United Constr. Workers, Local 10, Christian Labor Ass’n (Erhardt Constr. Co.)*, 187 N.L.R.B. 762, 762-63 (1971); *see also Mich. Model Mfrs.*, 310 N.L.R.B. at 930 (“When the member personally serves an agent of the labor organization, including the business agent at the member’s work place, as well as at the union hall, with a notification of resignation, the resignation shall be effective upon receipt.”).

440. *Mich. Model Mfrs.*, 310 N.L.R.B. at 930.

resignations can be submitted even faster, as by e-mail and by texting from one device to another. Although there are not yet any published determinations on the effectiveness of such “e-resignations,” it seems likely that the NLRB will permit them and give them immediate effect, given how in the *Michigan Model Manufacturers* decision (in which the Board established the rules just discussed on when resignations will be effective), the Board declared that rules on membership resignations should “reflect the congressional policy of voluntary unionism noted by the Supreme Court in *Pattern Makers['] League*.”⁴⁴¹

All of this means that every union member has virtually complete freedom of choice when deciding whether to cross a picket line. Unlike when the limits on union protest were enacted in the 1940s and 1950s, unions cannot “direct” or “induce” a member to refrain from working for a targeted employer on pain of financial penalty if the member defies the union.⁴⁴² The member can resign from the union and work for that employer, and the union cannot penalize them financially or affect their employment, and the union may still be obligated by law to fully and fairly represent that former member. The statutory restrictions were imposed, and upheld, in a time when unions could economically force member-employees to refrain from working for an employer. That time is over.

V. THE LINE MUST BE MOVED FOR FEDERAL LIMITS ON LABOR PROTEST TO BE CONSTITUTIONAL

A. The Rationales for Upholding the Current Line are Unsustainable

1. The Key “Inducement” Not “Persuasion” Rationale No Longer Applies

Judges and other commentators on the constitutionality of the statutory restrictions on labor picketing have observed, especially in periods closer in time to the actual enactment of those restrictions, that they did not violate the First Amendment because they applied to union conduct with the intent (and often effect) of causing employees to act based on “inducement” and “sanction,” rather than on union persuasion and expression of ideas.⁴⁴³ For the reasons discussed in immediately

441. *See id.*

442. *See supra* notes 207-88 and accompanying text.

443. *See, e.g., supra* notes 43-48 and accompanying text (discussing *Wohl*, 315 U.S. 769 (1942) (Douglas, J., concurring)); *supra* notes 299-309 and accompanying text (discussing *Tree Fruits*, 308 F.2d 311 (D.C. Cir. 1962)); *supra* notes 340-54 and accompanying text (discussing *United Furniture Workers*, 337 F.2d 936 (2d Cir. 1964)); *supra* notes 355-65 and accompanying

preceding Part IV,⁴⁴⁴ the ability of unions to engage in such “inducement” or to impose such “sanction” is, in practice, wholly or nearly eliminated. After an employee resigns as a member of the union, the union cannot discipline that employee for crossing a picket line or otherwise working for an employer against the union’s wishes. And, as of the publication of this Article, the only conditions a union can require for a member’s resignation to be effective is that it be in writing and received by the union, conditions that with this century’s technology of instant messaging and just as “instant” (or nearly so) texting, e-mailing, etc., are conditions that virtually any union member-employee can satisfy as soon as they wish.

In *NLRB v. Granite State Joint Board, Textile Workers Union, Local 1029*,⁴⁴⁵ discussed in Part IV of the Article,⁴⁴⁶ the U.S. Supreme Court ruled that after an employee member resigns from their union, “the union has no more control over the former member than it has over the man in the street.”⁴⁴⁷ The distance is close between a man (or person) in the street and a customer leaving “the street” (or parking lot or sidewalk) to patronize a retail or other enterprise.⁴⁴⁸ With regard to such customers, the Supreme Court stated in *DeBartolo* that “[t]he loss of customers because they read a handbill urging them not to patronize a business, and not because they are intimidated by a line of picketers, is the result of mere persuasion, and the neutral who reacts is doing no more than what its customers honestly want it to do.”⁴⁴⁹ In practical terms, unions can no longer “intimidate” with any sanction any member employee who resigns from the union (or, perhaps, even informs the union they will do so if sanctioned for what they want to do). Currently such employees have the same or nearly the same freedom from coercion as customers in deciding whether to go ahead and engage with the union protesters’ target. This is true when the employees work directly for the targeted employer, and perhaps even more true when the employees work for a supplier, purchaser, or other enterprise seeking to transact with the targeted employer.

Consequently, when union agents are handbilling, bannering, or picketing or protesting in any way at a targeted employer, then—as long as persons seeking to engage with that employer are not physically

text (discussing *Alden Press*, 151 N.L.R.B. 1666 (1951)).

444. See *supra* Part IV.

445. 409 U.S. 213 (1972).

446. See *supra* notes 410-12 and accompanying text.

447. *Granite State Joint Board, Textile Workers Union, Local 1029*, 409 U.S. at 217.

448. Cf. *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 570-71, 574 (1988) (describing the handbilling process at issue).

449. *Id.* at 580.

blocked from or threatened against doing so—the union agents, like the handbillers in *DeBartolo*, are relying on nothing more than “mere persuasion” with regard to employees subject to their message, just as these union agents are seeking to persuade customers.

This equivalence has sometimes been recognized in court and Board decisions. In 1965 in *Stoltze Land & Lumber Co.*, discussed previously in Part III,⁴⁵⁰ the Board did equate appeals to consumers and appeals to employees:

The important feature of picketing appears to be the posting by a labor organization . . . of individuals at the approach to a place of business to accomplish a purpose which advances the cause of the union, such as keeping employees away from work or keeping customers away from the employer’s business.⁴⁵¹

The *Stoltze Land & Lumber* Board might well have been correct all along in treating union appeals to customers and appeals to employees the same, while mistaken in regarding both as unlawful.⁴⁵²

When unions could impose concrete monetary fines and other tangibly adverse consequences to discipline member employees who crossed picket lines, or who disregarded handbills, banners, or other messages seeking employees to refrain from performing work for an employer, those consequences could perhaps have justified the treatment of union appeals to member employees as “inducements” that involved more than “persuasion” or “communication.” However, now that unions are practically unable to inflict such consequences on member employees who want to work for a targeted employer, such justification is simply inapplicable.

Among the other rationales that have been offered to justify labor protest directed at employees as constitutionally permissible, there have been few instances of reliance on these in the federal courts since *DeBartolo*, and for good reason. In the *Carpenters Local 1506* case,⁴⁵³ in which former NLRB General Counsel Arthur Rosenfeld unsuccessfully

450. See *supra* notes 320-29 and accompanying text.

451. *Stoltze Land & Lumber*, 156 N.L.R.B. 388, 394 (1965).

452. The *Stoltze Land & Lumber* decision preceded not only the Supreme Court’s 1988 decision in *DeBartolo*, with which it was inconsistent in terms of union appeals to consumers, but also preceded the line of U.S. Supreme Court decisions limiting union discipline. In fact, it was decided during a period in which the Board’s position was that any union discipline of members, as long as it did not involve seeking employer discharge or other discipline of an employee, was permissible under federal labor law. See, e.g., *Millwrights Local 2232*, 166 N.L.R.B. 849, 850-51 (1967); *Local 283, United Auto., Aircraft & Agric. Implement Workers*, 145 N.L.R.B. 1097, 1101-04 (1964), *overruled by* *Scofield v. NLRB*, 394 U.S. 423 (1969).

453. 409 F.3d 1199 (9th Cir. 2005).

appealed⁴⁵⁴ the denial of an injunction against a banner display that the General Counsel claimed to be “signal picketing,” the Ninth Circuit did state that true signal picketing was “more than mere speech” and unprotected by the First Amendment because “[t]he failure of a union member to comply could lead to formal union discipline or informal sanctions by other union members.”⁴⁵⁵ The court added that “‘signals,’ in this context, are ‘official directions or instructions to a union’s own members,’ implicitly backed up by sanctions,”⁴⁵⁶ and that “[i]t is the mutual understanding among union employees of the meaning of these signals and bonds, based on either affinity or the potential for retribution, that makes these ‘signals’ sufficiently coercive to fall within the meaning of § 8(b)(4)(ii).”⁴⁵⁷ This language in *Carpenters Local 1506* was relied on by the Board majority in its 2010 *Eliason & Knuth of Arizona* decision,⁴⁵⁸ discussed at length in Part II of this Article,⁴⁵⁹ to define “signal picketing” that would be deemed unlawful, unlike the banner at issue in that case.⁴⁶⁰

2. (Non-Coerced) Loyalty Is an Insufficient Basis for Restricting Labor Protest

References to “informal sanctions” and “affinity” suggest restrictions on so-called “signal picketing” are justifiable, at least in part, by union members’ loyalty to each other. Relying on such supposed loyalty as a basis for limiting constitutional protection is problematic for practical and legal reasons. In finding the banners in *Eliason & Knuth of Arizona* to be lawful, the Board majority astutely observed that “the notion that the banners operated not as ordinary speech, but rather as a signal automatically obeyed by union members must be subject to a dose of reality,” and stated: “Our experience with labor relations in the early twenty-first century does not suggest such a categorical assumption is warranted.”⁴⁶¹ The Board majority further noted that the record did not show that “any union members worked for any of the secondary employers or otherwise regularly entered the premises in the course of their employment.”⁴⁶² This situation is likely to be common now in the

454. *Id.* at 1201 (including “Arthur F. Rosenfeld” on the list of attorneys for petitioner NLRB).

455. *Id.* at 1201, 1202-03, 1215 (emphasis omitted).

456. *Id.* at 1215 (emphasis omitted) (quoting *NLRB v. Denver Bldg. & Constr. Trades Council*, 341 U.S. 675, 691 (1951)).

457. *Id.*

458. 355 N.L.R.B. 797 (2010).

459. *See supra* notes 154-85 and accompanying text.

460. *Eliason & Knuth of Ariz.*, 355 N.L.R.B. at 802-03, 805.

461. *Id.* at 805.

462. *Id.*

“early 21st century” when the percentage of private sector employees (the only type of employees covered by the NLRA) represented by a union is currently 6.5%.⁴⁶³ Consequently, in labor protest situations covered by Section 8(b)(4), it will be far more common than not that employees of other businesses seeking to do business with the protested “neutral” enterprise (other businesses making deliveries of supplies to, or customer enterprises seeking to transact with, that enterprise) will not be represented by a union. And even when labor protesters at a neutral enterprise encounter unionized employees, it would usually require an unpredictable coincidence for those protesters to work regularly with employees seeking to interact with a neutral enterprise. Moreover, when protesters are engaging in recognition picketing under Section 8(b)(7), then virtually by definition the employees of the targeted employer will not be union members, and (given the low percentage of unionized employees in the private workforce) most employees who encounter the protesters will not be union members or represented by a union either. In sum, as a practical matter, unions will rarely be able to rely on any supposed “loyalty” of employees encountering their protests.

Ironically, the situations in which union protesters most likely can rely on loyalty of fellow union members, and perhaps other employees, have for more than sixty years been held to be outside the restrictions of the NLRA.⁴⁶⁴ Those would be protests against and at the working locations of so-called “primary” employers whose employees the union represents. Those represented employees are the ones who would usually most likely do what protesters ask (e.g., withhold labor) out of loyalty to the union and/or their fellow union members. Moreover, it’s at locations where a primary employer always or often works where employees of other employers would most likely interact regularly with a primary employer and perhaps feel some loyalty towards those employees. Yet since the U.S. Supreme Court’s 1951 decision in *NLRB v. International Rice Milling Co.*, labor protests appealing to employees of the primary employer to withhold labor (e.g., during a strike) and appeals to employees of “neutral” employers to not perform work at the primary’s work location have been held to be outside the prohibitions of Section 8(b)(4).⁴⁶⁵ Thus, in the twenty-first century, justifying current

463. News Release, U.S. Dep’t of Labor, Bureau of Labor Statistics, Union Members—2017 (Jan. 19, 2018, 10:00 AM).

464. See, e.g., National Labor Relations Act (NLRA) § 8(b), 29 U.S.C. § 158(b) (2012); *NLRB v. Int’l Rice Milling Co.*, 341 U.S. 665, 670-71 (1951); *Eliason & Knuth of Ariz.*, 355 N.L.R.B. at 805-06.

465. See *Int’l Rice Milling Co.*, 341 U.S. at 670-71. In 1959, a provision was added to Section 8(b)(4) of the NLRA that stated:

Provided, [t]hat nothing contained in this subsection shall be construed to make unlawful

legal rules prohibiting “signal picketing” on unionized employees’ expected “loyalty” to union protesters is unrealistic and at odds with the rules themselves.

It may be that when courts refer to “loyalty” and “affinity” in labor protest cases, they are referring to something broader—that when labor protesters ask employees not to perform work, those targeted workers will conform out of loyalty to their protesting fellow workers. That view is also problematic, as past scholars have rightly explained. For example, Professor Julius Getman concluded in a 1984 article⁴⁶⁶ that the Supreme Court’s labor law decisions, including its then-recent *Safeco* and *Allied International* decisions on labor picketing, “manifest a common, stereotyped, and paternalistic vision of workers as people whose decisions are not made on the basis of ideas and persuasion but on the basis of fear, coercion, and discipline.”⁴⁶⁷ Also in 1984, in the *University of Chicago Law Review*, a comment by Ms. Barbara J. Anderson reasonably observed:

While attention to the particular audience is crucial in determining whether appeals to join a boycott carry with them implicit threats, a per se rule prohibiting labor secondary boycotts that appeal not to the public but to other union members is likely to be overbroad. A secondary boycott that instigates a sympathy strike by the secondary target’s employees should not be presumed to be coercive. Nor should the fact that the boycott sparks a “reflexive” rather than reasoned response be determinative of coercion, since such a response may indicate natural empathy as easily as coerced support.⁴⁶⁸

In this passage, Ms. Anderson was also reasonable in suggesting that “empathy” by a protester’s target with the aims of a protester should not lead to that protest being deemed unworthy of First Amendment protection.⁴⁶⁹

Professor Laurence Tribe made related points in his 1985 book *Constitutional Choices*, published a year after Professor Getman’s article and Ms. Anderson’s comment.⁴⁷⁰ After quoting Justice Stevens’s

a refusal by any person to enter upon the premises of any employer (other than his own employer), if the employees of such employer are engaged in a strike ratified or approved by a representative of such employees whom such employer is required to recognize under this [Act].

29 U.S.C. § 158(b)(4).

466. See Getman, *supra* note 11.

467. *Id.* at 19-20.

468. Barbara J. Anderson, Comment, *Secondary Boycotts and the First Amendment*, 51 U. CHI. L. REV. 811, 830 (1984) (footnotes omitted).

469. See *id.* at 830.

470. See TRIBE, *supra* note 11.

concurrence in *Safeco* holding picketing to be unprotected because it “calls for an automatic response to a signal, rather than a reasoned response to an idea,”⁴⁷¹ Professor Tribe determined that this reference to “signal” did not imply “physical or economic coercion” and that “[t]he idea appears to be, rather, that by triggering deeply held sentiments, picketing bypasses viewers’ faculties of reason and, thus, in a sense brainwashes them into compliance with the boycott.”⁴⁷² Professor Tribe then pointed out that “this aspect of labor picketing”—appealing to “sentiments” rather than “reason”—is also central to other forms of expression that, under Supreme Court precedent, are protected by the First Amendment, such as “most effective political communication.”⁴⁷³ Consequently, Professor Tribe concluded that the Supreme Court’s reasons for finding labor picketing unprotected by the First Amendment, including that protest is a “signal” that “trigger[s] deeply held sentiments” of fellow employees, “add[] nothing to the underlying logic of the cases but does provide another superficially neutral facade to cover the Court’s consistent denial of protection to labor picketing.”⁴⁷⁴

More than twenty-five years after Professor Tribe’s *Constitutional Choices* book, Professor Brishen Rogers twice referenced its points about Justice Stevens’s *Safeco* concurrence to comment about the Supreme Court’s apparent approach to labor protesters appealing to other workers.⁴⁷⁵ In a 2010 article with a part III that, inter alia, defended union emotional appeals as a basis for promoting collective action,⁴⁷⁶ Professor Rogers relied on Professor Tribe’s characterization of Justice Stevens’s concurrence (which is quoted in the preceding paragraph of this Article) to support the view that “judges in labor law cases . . . often seem to fear unruly behavior by workers.”⁴⁷⁷ Two years later, Professor Rogers again relied on the *Constitutional Choices*’s comments on Justice Stevens’s concurrence,⁴⁷⁸ this time to support Professor Rogers’s assertion: “While outright bans on labor picketing are unconstitutional,

471. *Id.* at 200 (quoting *Safeco*, 447 U.S. 607, 619 (1980) (Stevens, J., concurring)). This *Safeco* decision (and Justice Stevens’s concurrence in it) are discussed earlier in this Article. See *supra* notes 55-64 and accompanying text.

472. TRIBE, *supra* note 11, at 200.

473. *Id.*

474. *Id.*

475. See Brishen Rogers, “Acting Like a Union”: Protecting Workers’ Free Choice by Promoting Workers’ Collective Action, HARV. L. REV. F., Jan. 2010, at 50 & nn.74-75.

476. See *id.* at 45-51.

477. *Id.* at 50 (quoting TRIBE, *supra* note 11, at 200 (“[B]y triggering deeply held sentiments, picketing bypasses viewers’ faculties of reason and, thus, in a sense brainwashes them into compliance with the boycott.”)).

478. See Brishen Rogers, *Passion and Reason in Labor Law*, 47 HARV. CR-CL L. REV. 313, 330 & n.83 (2012).

the Supreme Court has granted less First Amendment protection to labor picketing than to virtually identical picketing by civil rights and other organizations, seemingly on the grounds that workers are emotionally or psychologically incapable of crossing a picket line.⁴⁷⁹ Further on in the article, Professor Rogers explained how such grounds are likely misplaced, based on extensive scholarship showing that emotional reactions are not inconsistent with, and in many areas of law are not treated as inconsistent with, reasonable decision-making.⁴⁸⁰

Also, for Section 8(b)(4), when protest is directed at a secondary, neutral employer, employees of that employer—virtually by definition of “secondary”—are not co-workers of the protesters. If employees are loyal to employees, is it unfair to infer that employers are loyal to employers? And if that’s so, then there would be no such thing as employers who are “neutral” in a labor dispute between another employer and its employees, which is the purpose of Section 8(b)(4) restrictions in the first place.⁴⁸¹ For all these reasons it’s clear that union member or employee “loyalty” is at best a questionable and slippery justification.

3. A “Deference to Policy Balance” Rationale Is Vague and Outdated

Another rationale offered for upholding federal restrictions on labor protest is that, as Justice Blackmun phrased it in his concurrence in *Safeco*, finding otherwise would “hold unconstitutional Congress’ striking of the delicate balance between union freedom of expression and the ability of neutral employers, employees, and consumers to remain free from coerced participation in industrial strife.”⁴⁸² Two years after *Safeco*, in *Allied International*, the Court in a majority opinion by Justice Powell, expressly relied on Justice Blackmun’s “balance struck by Congress” rationale as the only ground, other than citing the Court’s past precedents on Section 8(b)(4), for holding that Section 8(b)(4) did not violate the First Amendment and thus could be constitutionally used to find unlawful the union’s political boycott activity of refusing to perform work for ships bound to or from the then-Soviet Union.⁴⁸³ The Court declared, “[t]he labor laws reflect a careful balancing of interests,” and

479. *Id.* at 328-29.

480. *Id.* at 359-61.

481. *See, e.g., Safeco*, 447 U.S. 607, 613-14 (1980) (“[A]n expansion of labor discord was one of the evils that Congress intended § 8(b)(4)(ii)(B) to prevent.”); *Am. Radio Ass’n v. Mobile S.S. Ass’n*, 419 U.S. 215, 236 (1974) (“[Section 8(b)(4)(ii)(B) is] designed to shield neutral third parties from the adverse impact of labor disputes.”).

482. *Safeco*, 447 U.S. at 617-18 (Blackmun, J., concurring).

483. *See Int’l Longshoremen’s Ass’n v. Allied Int’l, Inc.*, 456 U.S. 212, 226-27 (1982).

then cited to Justice Blackmun's *Safeco* concurrence.⁴⁸⁴ In the next sentence, the final one of the Court's decision, the Court added: "There are many ways in which a union and its individual members may express their opposition to Russian foreign policy without infringing upon the rights of others."⁴⁸⁵

Deference to legislative policy might also have been the basis for the *Allied International* Court's choice of past Supreme Court precedents to cite for its declaration: "We have consistently rejected the claim that secondary picketing by labor unions in violation of § 8(b)(4) is protected activity under the First Amendment."⁴⁸⁶ In support of that statement the Court cited, in addition to *Safeco*,⁴⁸⁷ the page of *Tree Fruits* in which that decision referenced legislative history and the type of conduct Congress sought to prohibit,⁴⁸⁸ and also cited *American Radio Association*⁴⁸⁹ and *IBEW Local 501*.⁴⁹⁰

In footnote 25, the *Allied International* Court quoted a statement from *IBEW Local 501* referring to state and Congressional policy: "[W]e recently have recognized the constitutional right of states to proscribe picketing in furtherance of comparably unlawful objectives. There is no reason why Congress may not do likewise."⁴⁹¹ The *American Radio Association* decision cited in *Allied International* was similarly one that relied on deference to other policymakers, in that case an Alabama tort law policy against wrongful interference with business.⁴⁹² The Court in *American Radio Association* stated that the free speech challenge to the injunction based on this policy was "foreclosed by our holding in *Vogt*."⁴⁹³ *American Radio Association* noted that the Court's 1957 ruling

484. *Id.* (citing *Safeco*, 447 U.S. at 617-18 (Blackmun, J., concurring)).

485. *Id.* at 227.

486. *Id.* at 226.

487. *Id.* (citing *Safeco*, 447 U.S. at 616).

488. *Id.* (citing *Tree Fruits*, 377 U.S. 58, 63 (1964)).

489. *Id.* (citing *Am. Radio Ass'n v. Mobile S.S. Ass'n*, 419 U.S. 215, 229-31 (1974)).

490. *Id.* at 226 n.25 (citing *IBEW Local 501*, 341 U.S. 694, 705 (1951)).

491. *Id.* (quoting *IBEW Local 501*, 341 U.S. at 705 (footnote omitted)). The *Allied International* Court "omitted" the precedents the Supreme Court relied on in *IBEW Local 501* to uphold the constitutionality of Section 8(b)(4), see *id.*, precedents that Part II of this Article explained demonstrate that then-existing union power to inflict tangible harms to discipline members and employees were key in finding limits on union protests to be constitutional. See *supra* notes 26-34 and accompanying text.

492. See *Am. Radio Ass'n*, 419 U.S. at 228-31; see also Brief for Petitioners at 8-9, *Am. Radio Ass'n*, 419 U.S. 215 (No. 73-748) ("The Association filed suit in an Alabama state court seeking to enjoin the picketing as tortious under Alabama law. The basis for the claim was that the unions['] conduct] constituted unlawful interference with the contractual relationship between Association members and the companies operating the picketed vessels, and the Association members' right to carry on their lawful business.").

493. See *Am. Radio Ass'n*, 419 U.S. at 229 (citing *Int'l Bhd. of Teamsters, Local 695 v. Vogt, Inc.*, 354 U.S. 284, 289-90, 293 (1957)).

in *International Brotherhood of Teamsters, Local 695 v. Vogt* marked the “culminati[on]” of its review of state law restrictions on picketing⁴⁹⁴ and that *Vogt* “endorsed the view that picketing involves more than an expression of ideas”⁴⁹⁵ and “referred to our ‘growing awareness that these cases involved not so much questions of free speech as review of the balance struck by a State between picketing that involved more than “publicity” and competing interests of state policy.’”⁴⁹⁶ The Court in its *American Radio Association* decision then found that in *Vogt* it previously had “concluded that our cases ‘established a broad field in which a State, in enforcing some public policy, whether of its criminal or its civil law, and whether announced by its legislature or its courts, could constitutionally enjoin peaceful picketing aimed at preventing effectuation of that policy.’”⁴⁹⁷ Based on *Vogt*, the *American Radio Association* decision found that Alabama could enjoin the peaceful picketing at issue in that case.⁴⁹⁸ In doing so, *American Radio Association* expressly relied on the aspects of *Vogt* that were based on the non-communicative aspects of picketing and on balancing the constitutional rights to engage in such “non-communicative” protest conduct against the public policy of the civil or criminal law.⁴⁹⁹

The federal and state policies considered by the U.S. Supreme Court in its decisions so far discussed in this Subpart involved policies aimed at secondary boycotts that interfered with the business of “neutrals” or “wrongfully interfered” with businesses. Any argument that those types of policies are somehow entitled to more deference than others would have to distinguish union protest from the protests at issue in *NAACP v. Claiborne Hardware Co.*,⁵⁰⁰ an October 1982 ruling made six months after *Allied International*.⁵⁰¹ In *Claiborne Hardware*, the Court ignored *Allied International*’s language about deference to other policymakers, and even *Allied International*’s specific reference to opposing a policy through means other than a boycott “infringing upon the rights of others,” when the Court struck down a challenge to a state

494. See *id.* at 230.

495. *Id.* at 229 (emphasis added) (citing *Vogt*, 354 U.S. at 289).

496. *Id.* (emphasis added) (quoting *Vogt*, 354 U.S. at 290).

497. *Id.* at 229-30 (quoting *Vogt*, 354 U.S. at 293).

498. See *id.* at 230.

499. See *id.* at 231-32 (pointing to non-communicative factors like “nature, location, and effect of picketing,” and noting the public policy “based on the state interest in preserving its economy against the stagnation” due to “disruption” by picketing).

500. 458 U.S. 886 (1982).

501. This Article’s Author acknowledges that other scholars have previously pointed out the difference between the U.S. Supreme Court’s treatment of the protests in *Claiborne Hardware* and the treatment of picketing by unions, including the union political protest at issue in *Allied International*. See *supra* notes 7-12 and accompanying text.

supreme court ruling against just such a boycott.⁵⁰² The Court in *Claiborne Hardware* justified that discrepancy based on the “balance struck by Congress” rationale first posited by Justice Blackmun in his concurrence in *Safeco*.⁵⁰³ The Court quoted that concurrence and cited the Court’s reliance on it in *Allied International*, declaring: “Secondary boycotts and picketing by labor unions may be prohibited, as part of ‘Congress’ striking of the delicate balance between union freedom of expression and the ability of neutral employers, employees, and consumers to remain free from coerced participation in industrial strife.”⁵⁰⁴ The Court in *Claiborne Hardware* did not offer any further guidance regarding what union protest could, and could not, be constitutionally prohibited.

There also was not any explanation of the Congressional balance and how to apply it when, in the *Eliason & Knuth of Arizona* decision that (at present) is one of the leading precedents on the scope of lawful union protest, dissenting Board Members Schaumber and Hayes relied on the “Congressional balance rationale” to contend that the large stationary banners the union used to protest in that case should have been found unlawful.⁵⁰⁵ Near the end of their dissent, these Board Members cited (and quoted) Justice Blackmun’s concurrence in *Safeco* and the Supreme Court’s decision in *Allied International*.⁵⁰⁶ In their footnote 40 following this statement, dissenting Members Schaumber and Hayes discussed the language in *NAACP v. Claiborne Hardware*,⁵⁰⁷ in which the Supreme Court distinguished the handbilling and other boycott activity at issue in that case from protest by labor organizations on the ground that the “delicate balance” of Congress justified existing prohibitions on the latter.⁵⁰⁸ This rationale for upholding the

502. *Allied Int’l*, 456 U.S. 212, 226-27 (1982); *Claiborne Hardware*, 458 U.S. at 888-89, 912, 934. In the opinion of this Article’s Author, that implicit ruling in *Claiborne Hardware* that it is irrelevant that means exist, other than a boycott, to protest policies makes it unnecessary to discuss that “other means” rationale as one that justifies as constitutional the NLRA’s restrictions on labor protest.

503. *See Claiborne Hardware*, 458 U.S. at 912 (quoting *Safeco*, 447 U.S. at 617-18 (Blackmun, J., concurring)).

504. *Id.* at 912 (quoting *Safeco*, 447 U.S. at 617-18 (Blackmun, J., concurring)) (citing *Allied Int’l*, 456 U.S. at 222-23 & n.20).

505. *See Eliason & Knuth of Ariz.*, 355 N.L.R.B. 797, 813-15, 821 (2010) (Schaumber & Hayes, Members, dissenting).

506. *Id.* (quoting *Safeco*, 447 U.S. at 617-18 (Blackmun, J., concurring)) (citing *Allied Int’l*, 456 U.S. at 222-23 & n.20).

507. *See supra* text accompanying note 504.

508. *See Eliason & Knuth of Ariz.*, 355 N.L.R.B. at 821 & n.40 (Schaumber & Hayes, Members, dissenting) (discussing the distinction, for First Amendment purposes, between labor protest and the NAACP’s similar means of protest in that instant case (citing *Claiborne Hardware*, 458 U.S. at 912 & n.47)).

constitutionality of prohibitions on labor protest, that such prohibitions are the result of a “delicate balance” fashioned by Congress,⁵⁰⁹ is problematic for multiple reasons. One is that, as previously noted, the Supreme Court has referred to this “balance” only in summary descriptions of “union freedom of expression” weighed against “coerced participation” in labor disputes.⁵¹⁰ Meanwhile, in other decisions that also at least arguably involved “coerced participation” of “neutrals” in labor disputes, such as the *Tree Fruits* decision permitting picketing of a neutral aimed at asking consumers not to purchase a specific product⁵¹¹ and the *DeBartolo* decision permitting handbilling urging consumers to not do any business with a neutral,⁵¹² the Court did not mention Congress’s “balance” and instead discussed only whether Congress had expressed clear intent to bar these forms of protest. The Court has certainly never offered guidance on how much weight should be given to each side of the balance and also has not explained why freedom of expression was outweighed by the policy of ensuring that third parties were not affected by such expression. And why expression is of lesser weight in, apparently, all situations, no matter how many third parties are affected or how many employees are having their interests advanced by the expression. With the Court failing to explain or define the “balance,” other courts and the NLRB have no way to apply it to determine whether forms of protest not yet considered by the Supreme Court are or are not prohibited by the NLRA consistent with the First Amendment. The result is that such decision-makers disagree about the permissibility of means of protest such as large stationary banners,⁵¹³ mock funerals,⁵¹⁴ and inflatables,⁵¹⁵ among others.

509. *See id.* at 821.

510. *See supra* notes 503-04, 506 and accompanying text.

511. *See supra* notes 36-42 and accompanying text.

512. *See supra* notes 71-83 and accompanying text.

513. *Compare Overstreet ex rel. NLRB v. United Bhd. of Carpenters, Local Union No. 1506, 409 F.3d 1199, 1210-19 (9th Cir. 2005), and Eliason & Knuth of Ariz., 355 N.L.R.B. at 799-811 (holding that union banners did not violate the NLRA), with Eliason & Knuth of Ariz., 355 N.L.R.B. at 813-821 (Schaumber & Hayes, Members, dissenting) (maintaining that union banners violated Section 8(b)(4)).*

514. *Compare Kentov v. Sheet Metal Workers' Int'l Ass'n Local 15, 418 F.3d 1259, 1265-66 (11th Cir. 2005), and Sheet Metal Workers Int'l Ass'n, Local 15, 346 N.L.R.B. 199, 199-200 (2006) (decision of the Board holding that mock funerals violated Section 8(b)(4)), with Sheet Metal Workers' Int'l Ass'n, Local 15 v. NLRB, 491 F.3d 429, 436-39 (D.C. Cir. 2007) (reversing the immediately-preceding cited Board decision and holding that the mock funeral could not be found to violate the NLRA based on that protest's similarity to protests found constitutionally protected by the Supreme Court in *Madsen v. Women's Health Center, Inc.* (citing 512 U.S. 753, 758, 773-74, 776 (1994))), and *Hill v. Colorado*, 530 U.S. 703, 707, 714-25 (2000). These Board and D.C. Circuit decisions in *Sheet Metal Workers Local 15* are discussed earlier in this Article. *See supra* notes 121-36 and accompanying text.*

Meanwhile, in the Roberts Court era, “delicate balance[s]” struck by Congress or other legislatures have received little deference when the Court found federal statutes inconsistent with the First Amendment.⁵¹⁶ As has been pointed out by other scholars, most notably Professor Catherine Fisk and Jessica Rutter and then-student, now Department of Justice attorney Zoran Tasić, the Roberts Court has ignored Congressional or other legislatures’ balances in complex regulatory statutes⁵¹⁷ in decisions such as *Citizens United v. Federal Election Commission*,⁵¹⁸ *McCutcheon v. Federal Election Commission*,⁵¹⁹ and *Sorrell v. IMS Health Inc.*⁵²⁰ This Article will now highlight how in *Citizens United* and *Sorrell* the Court in effect found legislative balance was irrelevant to or much outweighed by First Amendment considerations. In *Citizens United*, the Court invalidated as contrary to the First Amendment provisions of the comprehensive Bipartisan Campaign Reform Act of 2002 (“BCRA”) that prohibited corporate and union “expenditures” expressly advocating “election or defeat” of a candidate for defined federal offices.⁵²¹ More broadly, the Court majority held, and overruled its precedent in *Austin v. Michigan State Chamber of Commerce*⁵²² to do so, that “[g]overnment may not suppress political speech on the basis of the speaker’s corporate identity.”⁵²³ The Court majority made these First Amendment rulings even though, as Justice Stevens noted in his dissent joined by three other Justices, Congress had restricted corporate campaign spending since the 1907 Tillman Act.⁵²⁴ The dissenting Justices decried how “[t]he Court operate[d] with a sledge hammer” in “strik[ing] down one of Congress’ most significant efforts to regulate the role that corporations and unions play in electoral politics.”⁵²⁵ The dissenters further pointed out how “Congress crafted BCRA in response to a virtual mountain of research

515. Compare *Tucker v. City of Fairfield*, 398 F.3d 457, 462-64 (6th Cir. 2005) (holding that union’s use of inflatable rat to protest was protected by the First Amendment), with *Laborers’ E. Region Org. Fund, JD(NY)-22-05, Case No. 29-CC-1422*, 2005 WL 1467350, at *14-18 (N.L.R.B. Div. of Judges June 14, 2005) (finding union’s inflatable rat was not constitutionally protected and was illegal “signal picketing”).

516. See, e.g., *McCutcheon v. Fed. Election Comm’n*, 572 U.S. 185, 227 (2014); *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 557, 579-80 (2011); *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 318-19, 371-72 (2010).

517. See Fisk & Rutter, *supra* note 3, at 315-16; Tasić, *supra* note 2, at 264-71.

518. 558 U.S. 310 (2010).

519. 572 U.S. 185 (2014).

520. 564 U.S. 552 (2011).

521. *Citizens United*, 558 U.S. at 318-21, 372.

522. 494 U.S. 652 (1990).

523. *Citizens United*, 558 U.S. at 365.

524. *Id.* at 394-95 (Stevens, J., dissenting).

525. *Id.* at 399.

on the corruption that previous legislation had failed to avert.”⁵²⁶ Other language in the dissent referenced Congress’s “wisdom and experience in these matters,”⁵²⁷ along with its “reasoned judgment” and “years of bipartisan deliberation.”⁵²⁸ All such Congressional consideration and statutory crafting were, according to the *Citizens United* majority, outweighed by their First Amendment concerns over restriction on corporate expression.⁵²⁹

The same was true in the Court’s decision in *Sorrell*. In that case, the Court struck down as violative of the First Amendment a Vermont statute that prohibited the sale of data on patient prescriptions, with exceptions such as for “educational communications,” and that prohibited pharmaceutical manufacturers from using such data for marketing.⁵³⁰ According to the “legislative findings” that accompanied the lengthy and complex Vermont statute, its multiple purposes included reducing the likelihood that doctors’ medical decisions would be based on “biased” marketing information provided by pharmaceutical companies, over-prescription of relatively expensive drugs marketed by pharmaceutical firms rather than less costly generic drugs, and trying to prevent increases in health care costs caused by pharmaceutical marketing as aided by access to patients’ prescription information.⁵³¹ According to the Court majority, the statute’s furthering of these purposes was outweighed by their view that “[s]peech in aid of pharmaceutical marketing . . . is a form of expression protected by the Free Speech Clause of the First Amendment.”⁵³² Therefore, Justice Kennedy stated in his majority opinion, “Vermont’s statute must be subjected to heightened judicial scrutiny. The law cannot satisfy that standard.”⁵³³ Justice Kennedy found that “[t]he statute . . . disfavors marketing, that is, speech with a particular content[, and m]ore than that, the statute disfavors specific speakers, namely pharmaceutical manufacturers.”⁵³⁴ Consequently, because the Vermont statute was “directed at certain content and [was] aimed at particular speakers,” it was unconstitutional under the First Amendment.⁵³⁵

526. *Id.* at 400.

527. *Id.* at 461.

528. *Id.* at 462.

529. *See id.* at 371-72 (majority opinion).

530. *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 561-64, 580 (2011).

531. *Id.* at 560-61 (summarizing legislative findings).

532. *See id.* at 557.

533. *Id.*

534. *Id.* at 564.

535. *See id.* at 567-72.

As in *Citizens United*, it was left to the dissenting Justices, this time in an opinion by Justice Breyer joined by Justices Ginsburg and Kagan, to discuss that the First Amendment should not always override legislative balances.⁵³⁶ The dissent pointed out that past Supreme Court precedents “reflect[ed] the democratic importance of permitting an elected government to implement through effective programs policy choices for which the people’s elected representatives have voted.”⁵³⁷ Later, when focusing on the Vermont statute at issue, the dissent observed that “the statute’s requirements form part of a traditional, comprehensive regulatory regime”⁵³⁸ and that problems identified in the legislative record “required the legislature to make judgments about whether and how to ameliorate these problems[, because] it is the job of regulatory agencies and legislatures to make just these kinds of judgments.”⁵³⁹ The dissent even used the term “balance” to describe what Vermont legislators sought with this statute, stating that “Vermont’s attempts to ensure a ‘fair balance’ of information is no different from the [Food and Drug Administration’s] similar requirement.”⁵⁴⁰ But similar to *Citizens United*, the Court majority concluded that legislative judgments and even fair balances could not justify restrictions on rights pharmaceutical companies were found to possess under the First Amendment.⁵⁴¹ If the “deference to legislative balance” rationale is not obsolete as a ground for rejecting First Amendment challenges to statutes, the current U.S. Supreme Court will have to distinguish *Citizens United* and *Sorrell* in explaining why.

*B. The Warshawsky Interpretation of
the Law on Federal Restrictions is Unfair to Workers*

Respect for First Amendment rights and values, and the above-discussed lack of a convincing rationale for overriding them,⁵⁴² are reasons enough to recognize that the First Amendment protects labor protest even when, intentionally or unintentionally, that protest causes workers to withhold their labor. But another very important reason is that the current law on labor protest, as embodied by the D.C. Circuit’s

536. *See id.* at 580-81 (Breyer, J., dissenting).

537. *Id.* at 583.

538. *Id.* at 586.

539. *Id.* at 598.

540. *Id.* (citing 21 C.F.R. § 202.1(e)(1), (e)(5)(ii) (2018)).

541. *See id.* at 577-79 (majority opinion).

542. *See supra* Part V.A.

1999 *Warsawsky* decision,⁵⁴³ is unfair to workers, not only as protesters but as the *audience* to labor protest.

Consider the current rules governing restrictions on labor protest. The U.S. Supreme Court in its 1988 decision in *DeBartolo* established that union handbilling aimed at persuading consumers not to shop or otherwise transact business with a targeted entity could not be prohibited by federal law, because that might violate the First Amendment.⁵⁴⁴ The *DeBartolo* Court in pointing out that “[t]he handbills made clear that the union was seeking only a consumer boycott . . . [of] mall tenants, not a secondary strike by their employees”⁵⁴⁵ did leave open whether handbilling that did seek a work stoppage could be forbidden. The D.C. Circuit in *Warsawsky* at least arguably extended the scope of union protest that could be proscribed by holding that when union handbilling caused one or more employees to refrain from working that was sufficient to prove the union had an illegal intent to cause an employee not to work, and protest with that intent could be prohibited.⁵⁴⁶ In sum, any amount of union persuasion of consumers is permissible, even if (unlikely, but not impossible) all consumers cease doing business with an entity. But if a union persuades even one employee to refrain from performing any work for an employer, it’s likely the union’s persuasion would be found to violate federal law.

A similar stark contrast exists with regard to union persuasion of owners or managerial employees. Union appeals to enterprises, or their managers, to not engage with a specific enterprise have for decades been recognized as being outside the prohibitions of federal labor laws. The U.S. Supreme Court in 1959 in *Local 1776, United Brotherhood of Carpenters v. NLRB*⁵⁴⁷ held that “a union is free to approach an employer to persuade him to engage in a boycott [of another enterprise], so long as it refrains from the specifically prohibited means of coercion through inducement of employees” and that the NLRA is not violated if

543. See *Warsawsky & Co. v. NLRB*, 182 F.3d 948, 951-56 (D.C. Cir. 1999).

544. See *supra* notes 71-83 and accompanying text (discussing the Court’s *DeBartolo* decision).

545. *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 571 (1988).

546. See *supra* notes 84-95 and accompanying text (discussing majority’s opinion in *Warsawsky*).

547. 357 U.S. 93 (1958). One of those 1959 amendments, the enactment of NLRA Section 8(e), did abrogate this *Local 1776, United Brotherhood of Carpenters* decision’s rulings on so-called “hot cargo” clauses through which employers contractually agree to “cease doing business” with any other person. See National Labor Relations Act (NLRA) § 8(e), 29 U.S.C. § 158(e) (2012); *id.* § 158 amends. (1959—Subsec. (e)); see also *Woelke & Romero Framing, Inc. v. NLRB*, 456 U.S. 645, 654-60 (1982) (discussing the enactment and effect of Section 8(e)).

that employer acceded to the union's request.⁵⁴⁸ The Supreme Court reaffirmed these rules after the enactment of the 1959 amendments to the NLRA in its 1964 decision in *National Labor Relations Board v. Servette, Inc.*⁵⁴⁹ In *Servette*, the Court, reversing the Ninth Circuit, held that a union's requests to supermarket managers to not stock products distributed by another, secondary employer were not prohibited by Section 8(b) of the NLRA.⁵⁵⁰ The Court reasoned that the union was asking these managers to "make a managerial decision which the Board found was within their authority to make," and that requesting such a decision was not covered by the NLRA.⁵⁵¹ For the reasons discussed previously in Part IV of this Article, under current federal protections from discipline for union member employees, unions now usually have no more power or authority to "induce" or "coerce" those employees to decide not to work than the union in *Servette* had to compel the supermarket managers to decide not to stock products distributed by *Servette*.⁵⁵²

For reasons explained earlier in this Article, unions can no longer "induce" employees, through tangible discipline, to refrain from working,⁵⁵³ and unions in most situations cannot count on workers' "group loyalty" to respond automatically to a labor protest.⁵⁵⁴ Consequently, contrary to Justice Douglas's statement in *Wohl*, employees will no longer stop working simply because of the "presence" of union picketing "irrespective of the nature of the ideas which are being disseminated."⁵⁵⁵ And contrary to Justice Stevens's statement in *Safeco*, a twenty-first-century employee's reaction to union picketing will not be an "automatic response to a signal, rather than a reasoned response to an idea."⁵⁵⁶ In the twenty-first century, employees can and will work in disregard of pickets or other labor protest, and even unions members can and will resign from a union in order to work for an employer targeted by a union.⁵⁵⁷ Unions must rely on communication to

548. *Local 1976, United Bhd. of Carpenters*, 357 U.S. at 98-99.

549. *See* 377 U.S. 46, 50-54 (1964).

550. *Id.* at 49-51.

551. *Id.* at 51.

552. *See supra* Part IV.

553. *See supra* notes 408-42 and accompanying text (discussing legal limits on unions' power to discipline members and employees they represent).

554. *See supra* notes 464-81 and accompanying text.

555. *See Bakery & Pastry Drivers Local 802 v. Wohl*, 315 U.S. 769, 776 (1942) (Douglas, J., concurring).

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

557. *See, e.g., Int'l Bhd. of Teamsters, Local Union No. 492 (United Parcel Service, Inc.)*, 346 N.L.R.B. 360, 363 (2006); *Chi. Reg'l Council of Carpenters, JD(NY)-23-10, Case No. 13-CB-*

and persuasion of workers, as unions must with consumers and with owners and managers.

And workers have a right to listen, to read, and to respond to the message they witness. Indeed, other protesters can appeal to workers to refrain from working,⁵⁵⁸ and can even interfere with employees' work to some extent,⁵⁵⁹ and still be protected by the First Amendment.

Even labor organizations and their agents can seek to persuade customers not to buy, vendors not to sell, and other managers not to transact business. But when agents of labor organizations ask employees not to work, First Amendment protection vanishes, and the request is illegal. A decision not to work should not be treated any differently than a decision not to buy, not to sell, or not to transact business. But it is, whenever one or more agents of a labor organization appeal to one or more workers to make that decision not to work. No court or administrative agency has ever offered a justification for treating workers' decisions differently.

Like consumers and managers, employees are certainly capable of deciding how they will respond to the message they receive. As the NLRB and courts have recognized in other contexts, individual workers are fully capable of making individual judgments even when faced with a union, or even an employer and a union, encouraging worker(s) to do something. For example, multiple decisions have held that an employer can inform its employees that it would like to have a collective

19310, at *8-10 (N.L.R.B. Div. of Judges July 1, 2010); Gen. Truck Drivers Union Local No. 952, JD(SF)-30-06, Case No. 21-CB-13609, at *9-11 (N.L.R.B. Div. of Judges May 30, 2006); U.S. Gov't Office of the Gen. Counsel, NLRB, Advice Memorandum on Pennsylvania American Water Company Cases 6-CA-37197, -37198, -37199, -37202 Utility Workers Union of America, AFL-CIO Case 6-CB-11730, at 3-7 (May 27, 2011); U.S. Gov't Office of the Gen. Counsel, NLRB, Advice Memorandum on Writers Guild of America-West (ABC, Inc.) Case 31-CB-12839 Writers Guild of America-East (ABC, Inc.) Case 31-CB-12840, at 7-8 (Mar. 29, 2011).

558. For example, anti-abortion/pro-life activists have expressed to, or at least in the presence of, employees working for facilities that provide abortions their wishes that these employees will change their minds about participating in such work (see, for example, Dean Olsen, *First Day of Surgical Abortions in Springfield Attracts Handful of Protesters*, ST. J.-REG. (Aug. 4, 2016, 8:37 PM), <https://www.sj-r.com/news/20160804/first-day-of-surgical-abortions-in-springfield-attracts-handful-of-protesters>) and are involved with seeking and sometimes succeeding with getting employees who work in facilities who perform abortions to "transition" out of those jobs (see, for example, Maryann Gogniat Eidemiller, *Pro-Life Nonprofit Helps Ex-Abortion Workers*, OSV NEWSWEEKLY (Jan. 7, 2015), <https://www.osv.com/OSVNewsweekly/ByIssue/Article/TabId/735/ArtMID/13636/ArticleID/16720/Pro-life-nonprofit-helps-ex-abortion-workers.aspx>).

559. See, e.g., *Dakota Access, L.L.C. v. Iowa Citizens for Cmty. Improvement*, No. 4:16-cv-00482-RGE-CFB, 2016 WL 8902579, at *3-4 (S.D. Iowa Aug. 30, 2016) (denying company's request for temporary restraining order to halt non-violent protest of pipeline that was "disrupting" construction work); *Hous. Works, Inc. v. City of New York*, 72 F. Supp. 2d 402, 406, 421-22 (S.D.N.Y. 1999) (holding that conduct of activists who interfered with campaign employees' work was protected by First Amendment).

bargaining agreement with a union and that it will make one if a majority of those employees indicate support for that union.⁵⁶⁰ Every worker should similarly be permitted to exercise their judgment when a labor organization—through picketing, handbilling, bannering, or by any means—expresses to an employee they should refrain from working.

This Subpart's emphasis on union persuasion of employees suggests what will now be announced openly: where labor protest prevents or would reasonably be understood as threatening to prevent workers or consumers from acting as they wish, it is appropriate it not be protected by the First Amendment. This is consistent with statements in former NLRB Member Wilma Liebman's concurring opinions,⁵⁶¹ later repeated in Board holdings⁵⁶² and in Second,⁵⁶³ Ninth,⁵⁶⁴ and D.C. Circuit⁵⁶⁵ decisions, maintaining that the key to constitutionally holding labor protest to be unprotected and unlawful are elements of "confrontation" or "intimidation" of persons seeking to deal with an entity. Confrontation was also required to find that there was "signal picketing," at least when that doctrine was first established as part of the definition of picketing,⁵⁶⁶ and coercive confrontation should always be required when applying "signal picketing" to find that any type of labor protest should be proscribed.

To determine if such confrontation or intimidation is present, the same "reasonableness" standard should be used for these as is used in labor law for deciding if employer expression or conduct is coercive⁵⁶⁷

560. See, e.g., *Coamo Knitting Mills, Inc.*, 150 N.L.R.B. 579, 581 (1964); see also *Dana Corp.*, 356 N.L.R.B. 256, 259-60 & n.11 (2010) (relying on *Coamo Knitting* and *Tecumseh Corrugated Box* in upholding an agreement under which an employer expressed to its employees it would remain neutral during the union's organizing campaign and would bargain with the union if a majority of employees chose it to represent them), *enforced sub nom* *Montague v. NLRB*, 698 F.3d 307 (6th Cir. 2012); *Tecumseh Corrugated Box Co.*, 333 N.L.R.B. 1, 7-8 (2001) (holding it lawful for employer to tell employees at a meeting that employer "liked working with unions").

561. See, e.g., *The Ranches at Mt. Sinai*, 346 N.L.R.B. 1251, 1253 n.5 (2006); *Sheet Metal Workers Int'l Ass'n, Local 15*, 346 N.L.R.B. 199, 200 (2006) (Liebman, Member, concurring).

562. See, e.g., *Eliason & Knuth of Ariz.*, 355 N.L.R.B. 797, 803-05 (2010).

563. See, e.g., *NLRB v. United Furniture Workers*, 337 F.2d 936, 940 (2d Cir. 1964).

564. See, e.g., *Overstreet ex rel. NLRB v. United Bhd. of Carpenters, Local Union No. 1506*, 409 F.3d 1199, 1202-03, 1210-12 (9th Cir. 2005).

565. See, e.g., *Sheet Metal Workers Int'l Ass'n, Local 15 v. NLRB*, 491 F.3d 429, 437-38 (D.C. Cir. 2007).

566. See *supra* Part III.

567. See, e.g., *S. Bakeries, L.L.C.*, 364 N.L.R.B. No. 64, at *4 (Aug. 4, 2016) ("[E]mployees would reasonably understand the message [of employer's General Manager at captive audience meeting] as a threat of plant closure."), *enforced in relevant part*, 871 F.3d 811, 823, 828 (8th Cir. 2017); *Dorsey Trailers, Inc.*, 327 N.L.R.B. 835, 851 (1999) ("[T]he Board applies the objective standard of whether the remark would reasonably tend to interfere with the free exercise of employee rights . . ."), *enforced in relevant part*, 233 F.3d 831, 838-839, 845 (4th Cir. 2000); *United Charter Serv., Inc.*, 306 N.L.R.B. 150, 150 (1992) ("In determining whether a respondent has

or if employer policies might be unfair labor practices.⁵⁶⁸ And just as the “result” or “effect” of a union losing a representation election is not sufficient in itself to prove the fact that the employer committed unfair labor practices during an election campaign,⁵⁶⁹ so a result from labor protest that one or more employees refrain from performing work should not be sufficient to prove the protest was intimidating or coercive. Therefore, the NLRB and courts should not follow the D.C. Circuit’s ruling in *Warshawsky*⁵⁷⁰ that a secondary’s employees failing to work in response to a union handbilling is sufficient proof that the union had an illegal intent and the protest was illegal.

The current law on labor protest, especially if the *Warshawsky* decision is accepted and followed, allows for differential treatment of identical communication, based only on whether the targeted audience is workers, rather than consumers, owners or managers, or the public. To have constitutional protection depend on the recipients of a message not being workers should not be continued any longer in the twenty-first century. The First Amendment should fully protect workers to the same extent as it protects other inhabitants of the United States. It also should protect worker organizations as much as it protects other persons who group together to express, protest, and persuade. The statutory restrictions on worker organizations that violate these constitutional rights of communication and persuasion should and must be ended.

created an impression of surveillance, the Board applies the following test: whether employees would reasonably assume from the statement in question that their union activities have been placed under surveillance.”).

568. *Boeing Co.*, 365 N.L.R.B. No. 154, at *3 (Dec. 14, 2017) (determining that the first step for evaluating lawfulness of facially neutral employer policy or rule is whether the policy, “when reasonably interpreted, would potentially interfere with the exercise of NLRA rights”).

569. *See, e.g., Medieval Knights, L.L.C.*, 350 N.L.R.B. 194, 194-95 (2007); *TVI, Inc.*, 337 N.L.R.B. 1039, 1039 (2002); *id.* at 1039-40 (Liebman, Member, dissenting) (providing examples of decisions in which the Board expressly rejected claims of unfair labor practices that were alleged to have led the union to lose a representation election); *see also Edgar L. Landen t/a Speed Mail Serv.*, 251 N.L.R.B. 476 app. at 485 (1980) (referring to his conclusion that an employee was not a supervisor, ALJ Thomas A. Ricci criticized an argument the union made by stating, “[t]he Union lost the election; does that outcome prove, as the brief suggests, that the Respondent brought about such results by illegal conduct?”); U.S. Gov’t Office of the Gen. Counsel, NLRB, Advice Memorandum on *Savage Fueling Corporation Cases 13-CA-182757 and 13-CA-185688*, at 1, 5-6, 11-12 (May 4, 2017) (recommending dismissal of two unfair labor practice claims, even to reconsider the scope of a legal rule, in a case in which the union claimed to have lost an election based on alleged unfair labor practices).

570. *Warshawsky & Co. v. NLRB*, 182 F.3d 948 (D.C. Cir. 1999); *see also supra* notes 84-102 and accompanying text (discussing *Warshawsky*).

VI. CONCLUSION

In the Roberts Court 2018 First Amendment decision in *Janus v. AFSCME*, the Supreme Court majority asserted that “when a federal or state law violates the Constitution, the American doctrine of judicial review requires us to enforce the Constitution. . . . In holding that these laws violate the Constitution, we are simply enforcing the First Amendment as properly understood.”⁵⁷¹ Agencies and courts should now apply these same principles to the federal restrictions on labor protest—set forth in Section 8(b)(4) and 8(b)(7) of the federal Labor Management Relations Act⁵⁷²—as these are also laws that violate a “proper understanding” of the First Amendment, at least as they are currently interpreted.

The justifications in twentieth century Supreme Court decisions for holding otherwise are no longer viable, as explained at length in Part V of this Article,⁵⁷³ except in cases in which coercive physical confrontation and intimidation prevent workers (and others) from choosing to work or otherwise transact business with the target of the protest. In cases in which picketing or other labor protest is not physically confrontational or intimidating, but rather expresses a message seeking to persuade employees not to perform work, that expression should be recognized as protected by the First Amendment. Such expression might successfully persuade one or more employees to refrain from working; or, it might not. The response of workers would depend on many factors, perhaps including the persuasiveness of the union’s message and the appeal of its cause, and always including the attitudes and sympathies of the workers receiving the message. But how workers respond to a labor protest message should never depend on coercion imposed by federal law, as it unconstitutionally does now.

571. *Janus v. Am. Fed’n of State, Cty., & Mun. Emps., Council*, 138 S. Ct. 2448, 2486 n.28 (2018).

572. *See* National Labor Relations Act (NLRA) § 8(b)(4), 8(b)(7), 29 U.S.C. § 158(b)(4), 158(b)(7) (2012).

573. *See infra* Part V.