

**ON MOCK FUNERALS, BANNERS, AND  
GIANT RAT BALLOONS: WHY CURRENT  
INTERPRETATION OF SECTION  
8(b)(4)(ii)(B) OF THE NATIONAL LABOR  
RELATIONS ACT UNCONSTITUTIONALLY  
BURDENS UNION SPEECH**

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TABLE OF CONTENTS

Introduction.....1622

    I. The Picketing Test: An Attempt to Clarify Section 8(b)(4)(ii)(B) and Exempt All Constitutionally Protected Speech.....1627

    II. The Picketing Test Fails to Clarify the Provision or Solve Its Constitutional Problems .....1635

        A. What’s in a Picket? .....1636

        B. A Protest by Any Other Name Would Be Constitutionally Protected .....1637

            1. Union secondary protests as communicative conduct.....1638

            2. The picketing test’s failure to limit the secondary boycott ban to truly coercive union protests .....1641

    III. The Coercion Test.....1646

    IV. The Coercion Test Better Clarifies the Meaning of Section 8(b)(4)(ii)(B) and Protects Unions’ Free Speech Rights.....1649

Conclusion .....1654

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## INTRODUCTION

On March 15, 2004, seven individuals affiliated with Local 15 of the Sheet Metal Workers' International Association ("Sheet Metal Workers") staged a mock funeral procession outside of a hospital in Brandon, Florida.<sup>1</sup> Four of the individuals served as pallbearers, carrying a sheet metal coffin.<sup>2</sup> They were followed by another individual, dressed as the Grim Reaper, complete with an eight-foot-tall black costume and plastic scythe.<sup>3</sup> As the "mourners" walked a loop of several hundred feet in front of the hospital, a radio blasted classical funeral marches.<sup>4</sup> The remaining two union officials handed out leaflets warning, "Going to Brandon Regional Hospital should not be a Grave Decision," and summarizing lawsuits brought against the hospital for wrongful deaths and improper treatment.<sup>5</sup>

Through this "street theater," the union was not protesting the quality of the hospital's medical care or even the hospital's treatment of its own workers.<sup>6</sup> Rather, the union disapproved of the labor practices of two subcontractors whom the hospital had hired to perform construction and staffing work.<sup>7</sup> The union hoped that by putting pressure on the hospital it could force the hospital to stop doing business with the subcontractors.<sup>8</sup> This type of protest is commonly referred to as a "secondary boycott" or "secondary protest."<sup>9</sup> It is "secondary" because it is not directed at the real target

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1. Sheet Metal Workers Int'l Ass'n Local 15 (*Sheet Metal Workers ALJ*), 2004 NLRB LEXIS 688, at \*17-21 (Dec. 7, 2004), *aff'd*, 346 N.L.R.B. No. 22, 2006 NLRB LEXIS 3, at \*5-8 (Jan. 9, 2006).

2. *Id.* at \*18.

3. *Id.*

4. *Id.* at \*18-19.

5. *Id.* at \*20.

6. *Kentov ex rel. NLRB v. Sheet Metal Workers Int'l Ass'n Local 15*, 418 F.3d 1259, 1263, 1266 (11th Cir. 2005).

7. *See id.* at 1261 (establishing that the union's true grievance was with the use of non-union labor by a sheet metal fabrication and installation contractor and a temporary staffing agency).

8. *Id.* at 1263.

9. *See* David Westfall & Gregor Thüsing, *Strikes and Lockouts in Germany and Under Federal Legislation in the United States: A Comparative Analysis*, 22 B.C. INT'L & COMP. L. REV. 29, 50-51 (1999) (defining a "secondary boycott" as when a union "strikes or pickets Employer F to put pressure on it to stop doing business with Employer E"); *see also* Matthew W. Finkin, *Employer Neutrality as Hot Cargo: Thoughts on the Making of Labor Policy*, 20 NOTRE DAME J.L. ETHICS & PUB. POL'Y 541, 547-48 & n.20 (2006) (noting that the statutory prohibition of secondary boycotts does not preclude a secondary employer from voluntarily boycotting another employer). The NLRA's secondary boycott ban does not forbid secondary employers from boycotting the businesses of primary employers, but rather forbids unions from trying to force secondary employers to engage in such boycotts. Finkin, *supra*, at 547-48 & n.20. As a matter of terminology, this Comment will distinguish between "secondary boycotts" and "secondary consumer boycotts," which refer to consumer boycotts of secondary employers' businesses.

## 2007] ON MOCK FUNERALS, BANNERS, AND GIANT RAT BALLOONS 1623

of the union's criticism, but at employers who do business with the real target.<sup>10</sup>

This Comment discusses whether the government may prohibit unions from engaging in types of secondary protest like mock funerals.<sup>11</sup> Since 1959, § 8(b)(4)(ii)(B)<sup>12</sup> of the National Labor Relations Act ("NLRA" or "the Act")<sup>13</sup> has made it illegal for unions to "threaten, coerce, or restrain" secondary employers into severing their business ties with primary employers.<sup>14</sup> Precisely what forms of protest this provision outlaws, however, is unclear.<sup>15</sup> On one end of the spectrum, courts almost always find that picketing<sup>16</sup> secondary employers constitutes illegal coercion, for courts see pickets as having a unique power to induce automatic action.<sup>17</sup> On the other end, the Supreme Court has declared that handing out fliers, a tactic commonly referred to as "handbilling," is not coercive and is,

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10. Finkin, *supra* note 9, at 547-48. *See generally* 8 THEODORE KHEEL, LABOR LAW § 36.01[1] (LexisNexis 2002) (1964) (explaining that the fundamental difference between a primary protest and a secondary protest is the target of the protest); Archibald Cox, *The Landrum-Griffin Amendments to the National Labor Relations Act*, 44 MINN. L. REV. 257, 271 (1959) (defining "secondary activity" as a refusal to deal with an entity that transacts with the offending employer).

11. *See infra* Part II.B.1 (arguing that unions have both a legal and a constitutional right to protest secondary employers with mock funerals, rat balloons, and giant banners that declare "Shame!" on the secondary employer).

12. National Labor Relations Act, 29 U.S.C. § 158(b)(4)(ii)(B) (2000).

13. *Id.* §§ 151-160.

14. *Id.* § 158(b)(4)(ii)(B).

15. *See* NLRB v. Drivers, Chauffeurs, Helpers, Local Union No. 639, 362 U.S. 274, 290 (1960) (observing that the words of the provision are "nonspecific, indeed vague"); *see also* Benjamin Aaron, *The Labor-Management Reporting and Disclosure Act of 1959* (pt. 2), 73 HARV. L. REV. 1086, 1113 (1960) (describing § 8(b)(4)(ii)(B) as "surely one of the most labyrinthine provisions ever included in a federal labor statute"). *See generally* Richard A. Bock, *Secondary Boycotts: Understanding NLRB Interpretation of Section 8(b)(4)(b) of the National Labor Relations Act*, 7 U. PA. J. LAB. & EMP. L. 905, 931-62 (2005) (providing a thorough overview of the many different meanings that have been given to § 8(b)(4)(ii)(B)); Howard Lesnick, *The Gravamen of the Secondary Boycott*, 62 COLUM. L. REV. 1363, 1366-1430 (1962) (discussing the different standards for discerning between a protest directed at a secondary employer and one directed at a primary employer).

16. The precise definition of picketing is the subject of some debate. *See infra* notes 86-90 and accompanying text. Generally speaking, however, the term "picketing" refers to the posting of individuals by a labor union "at the approach to a place of business to accomplish a purpose which advances the causes of the union." Bock, *supra* note 15, at 921.

17. *See, e.g.*, NLRB v. Retail Store Employees Union, Local 1001 (*Safeco*), 447 U.S. 607, 616 (1980) (finding that a picket that called for a total consumer boycott of a secondary employer's store was illegal); *Hughes v. Superior Court*, 339 U.S. 460, 461, 469 (1950) (upholding the state of California's right to prohibit picketing intended to force a grocery store to hire only black employees until the proportion of black employees in the store reflected the proportion of black members of the local community).

therefore, legal.<sup>18</sup> There is no easy way to judge the legality of secondary protest activity that falls between these two extremes, because courts and the National Labor Relations Board (“NLRB”)<sup>19</sup> have consistently failed to articulate the key elements of coercion. Instead, they judge the legality of union secondary protests on a case-by-case basis, typically by seeing if the protest activity can be analogized to picketing.<sup>20</sup>

This approach, which this Comment refers to as the “picketing test,” fails to give unions a clear idea of what types of secondary protest will be analogized to picketing and thus prohibited.<sup>21</sup> Moreover, this approach allows for the prohibition of some constitutionally protected speech, because picketing and other forms of protest resembling picketing are not inherently devoid of First Amendment guarantees.<sup>22</sup> The consequences are illustrated by the government’s recent efforts<sup>23</sup> to punish unions for protesting secondary employers with mock funerals,<sup>24</sup> giant rat balloons,<sup>25</sup> and

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18. See Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bld. & Constr. Trades Council (*DeBartolo II*), 485 U.S. 568, 588 (1988) (holding that the distribution of leaflets by a union against a secondary employer does not constitute an “unfair practice” under § 8(b)(4)(ii)(B)).

19. The NLRB is the executive agency responsible for enforcing the NLRA.

20. See *infra* Part I (describing how, rather than defining “coercion,” courts usually list examples of coercive behavior and analyze the legality of any challenged union secondary protest by seeing if it can be matched up with any of those examples).

21. See *infra* Part II.A (explaining that there is no consensus over what constitutes picketing, and that some judges feel the mere presence of a group of workers in front of a place of business constitutes picketing, while other judges require additional elements such as the holding of signs, marching back and forth (“patrolling”), or a confrontational character).

22. See *infra* Part II.B (arguing that picketing is expression, and therefore the government may only burden picketing with restrictions that are narrowly tailored to serve an important government interest).

23. The General Counsel of the NLRB is responsible for investigating allegations of illegal union or employer activity. NLRB, About the NLRB, How Are Unfair Labor Practice Cases Processed?, [http://www.nlr.gov/about\\_us/overview/fact\\_sheet.aspx](http://www.nlr.gov/about_us/overview/fact_sheet.aspx) (last visited June 1, 2007). After a party has lodged a complaint with one of the NLRB’s local field offices, that office investigates the claim. *Id.* If the Regional Director of the office deems the claim sufficient, the director will first try to get the parties to settle their dispute. *Id.* If the settlement fails, the Regional Director will issue a formal complaint, which will place the action before an NLRB Administrative Law Judge. *Id.* If that decision is appealed, it will be considered by the five-member NLRB in Washington, D.C. *Id.* The NLRB’s decisions are subject to appeal in any of the United States Courts of Appeals. *Id.* See generally Timothy F. Ryan & Kathryn M. Davis, *Banners, Rats, and Other Inflatable Toys: Do They Constitute Picket Activity? Do They Violate Section 8(b)(4)?*, 20 LAB. LAW. 137, 144-47 (2004) (reviewing the history of the General Counsel’s stance on the legality of secondary boycotts using rat balloons and banners and noting that the General Counsel has, in the last decade, begun to aggressively investigate unions’ secondary use of rat balloons and banners).

24. See *supra* notes 1-5 and accompanying text (describing the mock funeral staged by the Sheet Metal Workers outside the hospital in Brandon, Florida).

## 2007] ON MOCK FUNERALS, BANNERS, AND GIANT RAT BALLOONS 1625

large banners that declare “SHAME ON [NAME OF SECONDARY EMPLOYER]!” and “LABOR DISPUTE!”<sup>26</sup> Though these efforts have not had great success, at least one administrative law judge has found each of these three forms of union secondary protest illegal,<sup>27</sup> despite the fact that all three are likely constitutionally protected.<sup>28</sup>

25. See *Sheet Metal Workers ALJ*, 2004 NLRB LEXIS 688, at \*13 (Dec. 7, 2004) (observing how, in addition to the mock funeral, the Sheet Metal Workers at other times inflated a twelve-foot-wide, sixteen-foot-tall balloon in the shape of a rat one hundred feet from the hospital entrance), *aff'd*, *Sheet Metal Workers Int'l Ass'n Local 15 (Sheet Metal Workers NLRB)*, 346 N.L.R.B. No. 22, 2006 NLRB LEXIS 3, at \*7 n.3 (Jan. 9, 2006) (avoiding a ruling on the legality of the rat balloon because the Board had already found that the union committed an unfair labor practice through its staging of the mock funeral); *Laborers' E. Region Organizing Fund*, 346 N.L.R.B. No. 105, 2006 NLRB LEXIS 167, at \*4-8 (Apr. 28, 2006) (explaining that the union inflated a thirty-foot rat wearing a sign with the name of the primary employer with whom the union had a dispute at the entrance to a secondary employer's construction site).

26. *E.g.*, Mid-Atl. Reg'l Council of Carpenters, No. 5-CC-1289, 2006 NLRB LEXIS 80, at \*3-5 (Mar. 2, 2006); Sw. Reg'l Council of Carpenters (*Richie's Installations*), No. 21-CC-3337, 2005 WL 2071662 (NLRB Aug. 22, 2005); Sw. Reg'l Council of Carpenters (*Held Profs. II*), No. 31-CC-2126, 2005 WL 831458 (NLRB Apr. 5, 2005); United Bhd. of Carpenters Locals 184 & 1498 (*Grayhawk Dev.*), No. 28-CC-973, 2005 WL 195115 (NLRB Jan. 13, 2005); United Bhd. of Carpenters Local 1506 (*Sunstone Hotel Investors*), No. 31-CC-2121, 2005 WL 77044 (NLRB Jan. 6, 2005); Sw. Reg'l Council of Carpenters (*New Star Gen. Contractors*), No. 27-CC-877, 2004 WL 2671638 (NLRB Nov. 12, 2004); Sw. Reg'l Council of Carpenters (*Held Profs. I*), No. 31-CC-2115, 2004 WL 762435 (NLRB Apr. 2, 2004); Sw. Reg'l Council of Carpenters (*Carignan Constr. Co.*), No. 31-CC-2113, 2004 WL 359075 (NLRB Feb. 18, 2004); United Bhd. of Carpenters Local 1827 (*United Parcel Serv., Inc.*), No. 28-CC-933, 2003 WL 21206515 (NLRB May 9, 2003). This Comment will refer to this practice as “bannering.”

27. The NLRB already has declared that the Sheet Metal Workers' mock funeral violated the secondary boycott ban because it involved members “patrolling” back and forth in front of the hospital and, therefore, constituted picketing. *Sheet Metal Workers NLRB*, 346 N.L.R.B. 22 (2006) NLRB LEXIS 3, at \*5-8. However, the United States Court of Appeals for the District of Columbia Circuit recently reversed this decision, holding that a union's secondary mock funeral is constitutionally protected speech. *Sheet Metal Workers' Int'l Ass'n Local 15 v. NLRB (Sheet Metal Workers D.C. Circuit)*, No. 06-1028, slip op. at 19 (D.C. Cir. June 19, 2007).

The NLRB has yet to decide whether, on its own, the display of a rat balloon or a giant banner violates § 8(b)(4)(ii)(B), having twice dodged the issue. See *Sheet Metal Workers NLRB*, 2006 NLRB LEXIS 3, at \*7 n.3 (finding it unnecessary to rule on the legality of the rat balloon because it found an unfair labor practice on the grounds of the Sheet Metal Workers' mock funeral); *Laborers' E. Region Organizing Fund*, 346 N.L.R.B. No. 105, 2006 NLRB LEXIS 167, at \*13-14 (opting not to review the administrative law judge's decision that the rat balloon, on its own, was sufficient to constitute illegal secondary picketing after concluding that the union engaged in illegal picketing because union members patrolled in front of and blocked the entrance to the secondary employer's premises).

Nine bannering cases are all pending before the NLRB. Telephone Interview with Richard Hardick, NLRB Division of Operations Management, NLRB (Sept. 27, 2006). So far, six of the nine administrative law judge decisions resisted declaring bannering illegal, based on their concerns that such a finding would violate the First Amendment. *Richie's Installations*, 2005 WL 2071662; *Held Profs. II*, 2005 WL 831458; *Grayhawk Dev.*, 2005 WL 195115; *Sunstone Hotel Investors*, 2005 WL 77044; *New Star Gen. Contractors*, 2004 WL 2671638; *Carignan Constr. Co.*, 2004 WL 359075. Similarly, four district court judges and one federal circuit court judge found that bannering is

A new framework for interpreting § 8(b)(4)(ii)(B) is therefore necessary to clarify the provision's meaning and to bring its ban on secondary boycotts back within the bounds of the First Amendment.<sup>29</sup> This Comment proposes that § 8(b)(4)(ii)(B) be interpreted as banning union secondary protests only when (1) they inflict or

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a legal and constitutionally protected activity. *Overstreet ex rel. NLRB v. United Bhd. of Carpenters & Joiners of Am. Local 1506*, 409 F.3d 1199, 1218-19 (9th Cir. 2005), *aff'g*, No. 03-0773 J (JFS), 2003 U.S. Dist. LEXIS 19854, at \*16-17 (S.D. Cal. May 7, 2003); *Gold ex rel. NLRB v. Mid-Atl. Reg'l Council of Carpenters*, 407 F. Supp. 2d 719, 729 (D. Md. 2005); *Benson ex rel. NLRB v. United Bhd. of Carpenters & Joiners of Am. Locals 184 & 1498*, 337 F. Supp. 2d 1275, 1281 (D. Utah 2004); *Kohn ex rel. NLRB v. Sw. Reg'l Council of Carpenters*, 289 F. Supp. 2d 1155, 1175 (C.D. Cal. 2003). The reason these district court judges faced this issue was that, in four of the banner cases described in note 26, the General Counsel petitioned the local federal district court for an injunction prohibiting the union from engaging in the secondary banner pending the administrative law judge's decision. *See, e.g., Kohn*, 289 F. Supp. 2d at 1161 (invoking authority to seek injunctive relief under 29 U.S.C. § 160(1) (2000)).

Despite the NLRB's initial avoidance of the rat balloon question and most judges' reluctance to declare banner illegal, the NLRB seems poised to forbid both secondary protest tactics. *See Sheet Metal Workers NLRB*, 2006 NLRB LEXIS 3, at \*6 (being careful to note that, although the Sheet Metal Workers' mock funeral constituted picketing because union members patrolled in front of the hospital and thus formed a barrier to entrance, such a barrier is not an essential element of picketing). *But see Ryan & Davis*, *supra* note 23, at 147-54 (forecasting that the NLRB and courts will likely reject the government's efforts to prohibit unions' secondary use of rat balloons and banners on First Amendment grounds).

28. *See infra* Part II.B (asserting that, under certain circumstances, mock funerals, rat balloons, and banners all constitute communicative conduct that is protected by the First Amendment).

29. *See Tzvi Mackson-Landsberg*, Note, *Is a Giant Inflatable Rat an Unlawful Secondary Picket Under Section 8(b)(4)(ii)(B) of the National Labor Relations Act?*, 28 CARDOZO L. REV. 1519, 1560-61 (2006) (arguing that the current interpretation of § 8(b)(4)(ii)(B) abridges unions' free speech rights and suggesting a new interpretation that the provision bans only those union protests that block access to a secondary employer's business through physical force or intimidation); Manuela Albuquerque Scott, *The Invisible Hand and the Clenched Fist: Is There a Safe Way to Picket Under the First Amendment?*, 26 HASTINGS L.J. 167, 179-80 (1975) (proposing that courts distinguish between union secondary protests directed at workers, which would be presumed coercive and thus illegal, and union secondary employers directed at the public, which would be presumed non-coercive and legal).

The D.C. Circuit's recent decision in the Sheet Metal Workers' mock funeral case also supports the need for a new test. *Sheet Metal Works D.C. Circuit*, No. 06-1028, slip op. at 19 (D.C. Cir. June 19, 2007). In that decision, the court found that a mock funeral does not constitute picketing and is therefore protected by the First Amendment. *Id.* at 15-16, 17. As such, it could only be banned if it were truly coercive. *Id.* The court noted the lack of a clear standard for gauging the coerciveness of a union secondary protest. *Id.* at 17. But rather than articulate a definition of coercion, the D.C. Circuit merely compared the mock funeral to the conduct in the Supreme Court abortion protest cases. *See id.* at 17-19 (noting that in those cases the Court also had to grapple with whether the protestors' conduct was coercive). Such an approach solves the constitutional problems of the picketing test, but it still fails to give unions a clear test they can use to decide whether a secondary protest tactic will be deemed illegal. Rather, it requires unions to continue to guess whether a judge will analogize their behavior to a different kind of protest conduct. To solve this shortcoming, this Comment proposes an actual definition of coercion to be used by the courts and the NLRB in secondary protest cases. *See infra* Part III.

## 2007] ON MOCK FUNERALS, BANNERS, AND GIANT RAT BALLOONS 1627

threaten to inflict an injury on secondary employers, their customers, or their employees that those individuals have a right to avoid, and (2) the injury threatened or inflicted is so substantial that no reasonable person would feel free to ignore the union's demands.<sup>30</sup> Part I describes in more detail how the current "picketing test" arose from efforts by Congress, courts, and the NLRB to clarify § 8(b)(4)(ii)(B)'s ambiguous text and to avoid an unconstitutional meaning. Part II demonstrates that the picketing test has failed to solve either of these problems, for the test is neither clear nor constitutional. Part III articulates a new test for when union secondary protests are coercive. Building off of definitions of coercion used in other areas of the law, Part III asserts that a "coercive" union protest is one that would overcome the will of any reasonable person by threatening that person with substantial harm that he or she has a legal right to avoid.<sup>31</sup> Part IV applies this proposed test to the mock funeral, rat balloon, and banner cases. The Comment concludes that courts should adopt this new test, for it does a better job of clarifying the meaning of § 8(b)(4)(ii)(B) and ensuring that the provision exempts all constitutionally protected speech.

I. THE PICKETING TEST: AN ATTEMPT TO CLARIFY SECTION  
8(b)(4)(ii)(B) AND EXEMPT ALL CONSTITUTIONALLY PROTECTED  
SPEECH

The "picketing test" approach to interpreting the NLRA's secondary boycott ban arose from efforts by Congress, courts, and the NLRB to give clear and constitutional meaning to the provision's terms.<sup>32</sup> The secondary boycott ban was added to the NLRA by the

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30. See *infra* Part III (deriving the test from legal definitions of coercion found in other sections of the NLRA and other areas of law).

31. *Infra* Part III. Please note that this proposed test only determines whether secondary protest speech rises to the level that it may be prohibited under the NLRA. This test does not consider the time, place, and manner restrictions that the government may impose on such speech. Compare *Madsen v. Women's Health Ctr.*, 512 U.S. 753, 773-74 (1994) (holding that a state court violated the First Amendment rights of abortion protestors by declaring that they could not physically approach any person within 300 feet of an abortion clinic unless that person expressed a desire to communicate), with *Hill v. Colorado*, 530 U.S. 703, 730 (2000) (approving a restriction that stated that, when within one hundred feet of an abortion clinic, protestors could only come within eight feet of their intended target, for such a buffer zone still allowed the protestors to communicate their point of view).

32. See *infra* notes 45-47 and accompanying text (explaining how, in trying to define "threaten, coerce, or restrain," courts tend to give examples of coercive union behavior rather than define the term and compare subsequently challenged protests to those previously-cited examples of coercive conduct); *infra* notes 48-82 and accompanying text (observing that both congressional and judicial efforts to prove

Taft-Hartley Act of 1947.<sup>33</sup> The goal of the provision was to prevent unions from forcing neutral third parties to get involved in labor controversies not of their own making.<sup>34</sup> The legislation was a response to unions' tremendous success at the beginning of the twentieth century in crippling the businesses of many neutral employers through secondary-employee strikes.<sup>35</sup> As a result, in its original form, the ban prohibited unions from inducing strikes among secondary employers' workers.<sup>36</sup>

After a decade, Congress decided that the language of the statute contained so many loopholes that unions were still successfully forcing secondary employers to get involved in primary labor disputes.<sup>37</sup> For example, the ban technically allowed a union to induce a strike among a secondary's employees if it appealed to workers one at a time, and it failed to prohibit coercive activity targeted directly at the management and supervisory personnel of secondary employers.<sup>38</sup> Therefore, the 1959 Landrum-Griffin Amendments<sup>39</sup> expanded the scope of § 8(b)(4)(ii)(B) to prohibit

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that § 8(b)(4)(ii)(B) does not violate the First Amendment have stressed the lack of constitutional value of picketing).

33. Labor Management Relations Act, 1947, Pub. L. No. 101, 61 Stat. 136 (1947) (codified as amended at 29 U.S.C. §§ 141-188 (2000)).

34. See 93 CONG. REC. 4310, 4323 (1947) (statement of Sen. Taft), *reprinted in* II NLRB, LEGISLATIVE HISTORY OF THE LABOR-MANAGEMENT RELATIONS ACT, 1947, at 1106 (1985) (declaring that the statute prohibited behavior that would hurt the businesses of third parties "wholly unconcerned in the disagreement between an employer and his employees"); *Local 1976, United Bhd. of Carpenters & Joiners of Am. v. NLRB*, 357 U.S. 93, 100 (1958) (finding that the purpose of the provision is to "restrict the area of industrial conflict"); *NLRB v. Denver Bldg. & Constr. Trades Council*, 341 U.S. 675, 692 (1951) (observing that § 8(b)(4)(ii)(B) was adopted to serve "the dual congressional objectives of preserving the right of labor organizations to bring pressure to bear on offending employers in primary labor disputes and of shielding unoffending employers and others from pressure in controversies not their own").

35. See, e.g., Mackson-Landsberg, *supra* note 29, at 1531-32 (describing how one union cost a secondary employer eighty-five percent of its business by inducing a strike among its employees); see also Kheel, *supra* note 10, § 36.01[2][a] (observing that, prior to the passage of the Taft-Hartley Act, secondary boycotts were "an effective weapon in labor's arsenal").

36. See Labor Management Relations Act § 8(b)(4)(A), 1947, Pub. L. No. 101, 61 Stat. 136 (1947) (codified as amended at 29 U.S.C. §§ 141-188 (2000) (making it an unfair labor practice for unions "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 perform any services, where an object thereof is . . . forcing or requiring [the secondary employer] to . . . cease doing business with any other person").

37. Bock, *supra* note 15, at 913-14.

38. *Id.*

39. Labor-Management Reporting and Disclosure Act of 1959, Pub. L. No. 86-257, §§ 701-707, 73 Stat. 519 (1959) (codified as amended at 29 U.S.C. §§ 151-160 (2000)), *reprinted in* I NLRB, LEGISLATIVE HISTORY OF THE LABOR-MANAGEMENT REPORTING AND DISCLOSURE ACT OF 1959, at 23-28 (1985).

## 2007] ON MOCK FUNERALS, BANNERS, AND GIANT RAT BALLOONS 1629

any secondary union protest that would “threaten, coerce, or restrain” any person, with the object of forcing a secondary employer to stop doing business with a primary employer.<sup>40</sup> This remains the language of the statute today.<sup>41</sup>

Unfortunately, as courts have noted, this language is “nonspecific” and “vague.”<sup>42</sup> It is not readily apparent when a union protest will “threaten, coerce, or restrain” a secondary employer or its customers or employees.<sup>43</sup> Instead of explicitly defining these terms, however, courts and the NLRB have preferred to examine the unique facts surrounding each protest to decide whether it violated the secondary boycott ban.<sup>44</sup> Because this approach leaves judges without clear standards for determining whether a union secondary protest is coercive, judges tend to look at which protest tactics courts have declared illegal in earlier cases and compare those tactics to the protest in the case before them.<sup>45</sup> Because Congress enacted the secondary boycott ban largely with secondary picketing and strikes in

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40. *Id.* § 704(a).

41. 29 U.S.C. § 158(b)(4) (2000). The section now reads, in its entirety:

It shall be an unfair labor practice for a labor organization or its agents . . .

(i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is . . .

(B) forcing or requiring any person . . . to cease doing business with any other person . . . .

*Id.*

42. NLRB v. Drivers, Chauffeurs, Helpers, Local Union No. 639, 362 U.S. 274, 290 (1960).

43. *See id.* (holding that the NLRB’s interpretation of § 8(b)(1)(A) was broader than Congress intended). There is also much confusion about how one determines whether the union *intended* to force the secondary employer to stop doing business with the primary employer. Lesnick, *supra* note 15, at 1366-1430. This Comment does not address the proper standard of intent in secondary boycott cases; rather, its main focus is what type of *conduct* the government may constitutionally prohibit.

44. *See* Bock, *supra* note 15, at 934 (observing that courts and the NLRB have been “circumspect” in giving definite meaning to § 8(b)(4)(ii)(B)); *see also* Bricklayers Local 1 (*Yates Restoration Group*), Case No. 2-CC-2594-1 (NLRB Advice Memorandum Jan. 12, 2004), [http://www.nlr.gov/research/memos/advice\\_memos/index.aspx](http://www.nlr.gov/research/memos/advice_memos/index.aspx) (select “2004” and click “Go” button; click “HTML” hyperlink under “Bricklayers Local 1”) (asserting that the Board looks at the “totality of the circumstances” surrounding a union secondary protest to decide if it is illegal).

45. *See, e.g.,* Kentov *ex rel.* NLRB v. Sheet Metal Workers Int’l Ass’n Local 15, 418 F.3d 1259, 1264 n.6 (11th Cir. 2005) (listing, as examples of coercion, “strike[s], picketing, or other economic retaliation and pressure in the background of a labor dispute” (citing Carpenters Ky. State Dist. Council, 308 N.L.R.B. 1129, 1130 n.2 (1992))).

mind,<sup>46</sup> judges see picketing as the archetypal example of a coercive secondary protest and often justify a finding that a secondary protest is illegal by analogizing the challenged protest to picketing.<sup>47</sup> In other words, one reason judges began using the picketing test was to clarify the ambiguous language of the secondary boycott ban.

The picketing test also arose out of efforts by Congress, courts, and the NLRB to avoid any meaning of § 8(b)(4)(ii)(B) that would infringe upon unions' constitutional rights.<sup>48</sup> Many judges and commentators have noted that the provision may be unconstitutional on its face.<sup>49</sup> The First Amendment declares that "Congress shall make no law . . . abridging the freedom of speech."<sup>50</sup> The Supreme Court has interpreted this amendment to mean that when speech occurs on sidewalks and in other "traditional public fora," the government may only burden it with reasonable time, place, and manner restrictions,<sup>51</sup> and the government may not entirely prohibit speech because of its content or viewpoint.<sup>52</sup> Since § 8(b)(4)(ii)(B) singles out and bans only labor speech, speech that often occurs on public sidewalks and streets, courts could find that the provision constitutes viewpoint discrimination in violation of the First Amendment.<sup>53</sup>

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46. See *supra* notes 34-35 and accompanying text (explaining that secondary strikes were the impetus for the NLRA's secondary boycott ban).

47. See, e.g., Sw. Reg'l Council of Carpenters (*Held Props. II*), No. 31-CC-2126, 2005 WL 831458 (NLRB Apr. 5, 2005) (declaring that a union's act of holding up a banner was coercive because this act resembled picketing, which also involves standing outside an employer's premises and holding up a sign).

48. See Thomas C. Kohler, *Setting the Conditions for Self-Rule: Unions, Associations, and Our First Amendment Discourse and the Problem of DeBartolo*, 1990 WIS. L. REV. 149, 166-70 (1990) (noting that, because labor legislation is a particularly sensitive area of congressional activity, there is a general reluctance to invalidate federal labor laws on constitutional grounds).

49. See NLRB v. Retail Store Employees Union, Local 1001 (*Safeco*), 447 U.S. 607, 616-18 (1980) (Blackmun, J., concurring) (worrying that the NLRA places an unconstitutional "content-based ban on peaceful picketing of secondary employers"); NLRB v. Fruit & Vegetable Packers Local 760 (*Tree Fruits*), 377 U.S. 58, 76, 79 (1964) (Black, J., concurring) (asserting that § 8(b)(4)(ii)(B) violates the First Amendment because, under the provision, "picketing, otherwise lawful, is banned only when the picketers express particular views"); Mark D. Schneider, Note, *Peaceful Labor Picketing and the First Amendment*, 82 COLUM. L. REV. 1469, 1471, 1483-84 (1982) (illustrating the content discrimination of § 8(b)(4)(ii)(B) by noting that the provision would punish union picketing where members held signs condemning a secondary employer, but would ignore union picketing where members held signs condemning a primary employer).

50. U.S. CONST. amend. I.

51. *Cox v. New Hampshire*, 312 U.S. 569, 576 (1941).

52. *Hague v. CIO*, 307 U.S. 496, 515-16 (1939).

53. Cf. *R.A.V. v. City of St. Paul*, 505 U.S. 377, 391 (1992) (declaring that a law banning threatening hate speech constituted unconstitutional viewpoint discrimination); *Police Dep't of Chi. v. Mosley*, 408 U.S. 92, 99-102 (1972) (striking

## 2007] ON MOCK FUNERALS, BANNERS, AND GIANT RAT BALLOONS 1631

To avoid this constitutional problem, one must read the secondary boycott ban as prohibiting only types of protest that are not protected by the First Amendment.<sup>54</sup> Congress attempted to follow this path in 1959, when it passed the Landrum-Griffin Amendments to the NLRA.<sup>55</sup> In addition to amending the language of § 8(b)(4), Congress added what is now commonly known as the “publicity proviso.”<sup>56</sup> The proviso declares that § 8(b)(4)(ii)(B) was not meant to prevent unions from engaging in “publicity, other than picketing, for the purpose of truthfully advising the public . . . that a product or products are produced by an employer with whom the labor organization has a primary dispute and are distributed by another employer . . . .”<sup>57</sup> Because the proviso irrefutably states that picketing is *not* publicity, it reflects Congress’s judgment that picketing may be prohibited without raising any concerns about unduly burdening union speech.<sup>58</sup> This proviso has given judges another reason to

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down an ordinance which forbids picketing near school buildings unless related to labor-management disputes).

54. See *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942) (observing that there are several types of speech that are “of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality”).

55. See *supra* notes 39-40 and accompanying text (explaining how Congress amended the NLRA to try to solve some of the problems presented by its original wording).

56. Mackson-Landsberg, *supra* note 29; see also H.R. REP. NO. 86-1147 (1959) (Conf. Rep.), reprinted in I LEGISLATIVE HISTORY OF THE LABOR-MANAGEMENT REPORTING AND DISCLOSURE ACT OF 1959, at 942 (1985) (listing, as one of the compromises made between the two houses of Congress regarding their differences over the Landrum-Griffin Bill, the addition of the publicity proviso to clarify that § 8(b)(4)(ii)(B) did not prohibit unions from publicizing their labor disputes to the employees, managers, and customers of secondary employers).

57. 29 U.S.C. § 158(b)(4) (2000). The legislative history of the Landrum-Griffin Amendments does not clarify exactly what Congress meant when it exempted all forms of “publicity” from the secondary boycott ban; most of the comments made during the discussion and debate of the provision echoed the following statement given by then-Senator John F. Kennedy:

We were not able to persuade the House conferees to permit picketing in front of that secondary shop, but we were able to persuade them to agree that the union shall be free to conduct informational activities short of picketing. In other words, the union can hand out handbills at the shop, can place advertisements in the newspapers, can make announcements over the radio, and can carry on all publicity short of having ambulatory picketing in front of a secondary site.

105 CONG. REC. 17, 898-99 (1959), reprinted in II LEGISLATIVE HISTORY OF THE LABOR-MANAGEMENT REPORTING AND DISCLOSURE ACT OF 1959, at 1432 (1985).

58. 29 U.S.C. § 158(b)(4) (2000); accord Lee Modjeska, *The Tree Fruits Consumer Picketing Case—A Retrospective Analysis*, 53 U. CIN. L. REV. 1005, 1032 (1984) (providing a thorough overview of the legislative history of the Landrum-Griffin Amendments and concluding that the comments universally agree that secondary picketing is not exempt from § 8(b)(4)(ii)(B) by the publicity proviso).

enforce the secondary boycott ban by analogizing challenged protests to picketing.<sup>59</sup>

The final circumstance that has led to the use of the picketing test in interpreting § 8(b)(4)(ii)(B) has been courts' own efforts to deal with the provision's constitutional problems. The publicity proviso does not exempt all constitutionally protected speech from § 8(b)(4)(ii)(B)'s scope. The case of *Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Construction Trades Council*<sup>60</sup> highlights this point. In *DeBartolo*, a union distributed leaflets urging the public to boycott a shopping mall because one of the mall's tenants hired a construction company who, in the union's opinion, gave its workers substandard wages and fringe benefits.<sup>61</sup> Such handbilling, the Supreme Court held, is protected by the First Amendment.<sup>62</sup> But since the publicity proviso only explicitly exempts publicity meant to alert others to the fact that a secondary employer is distributing *goods* that were *produced* by a primary employer, and not publicity aimed at advising the public that a secondary employer is utilizing *services* that were *supplied* by a primary employer, the handbilling at issue in *DeBartolo* was not exempt from the secondary boycott ban.<sup>63</sup>

As a result, those constraints have forced the courts and the NLRB to either strike down the thirty-year-old provision as unconstitutional or read § 8(b)(4)(ii)(B) in such a way as to allow constitutionally protected speech like handbilling.<sup>64</sup> Because courts do not like to strike down statutes on constitutional grounds,<sup>65</sup> they generally reach

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59. Bock, *supra* note 15, at 922-24; *see, e.g.*, Mid-Atl. Reg'l Council of Carpenters, No. 5-CC-1289, 2006 NLRB LEXIS 80, at \*50-51 (Mar. 2, 2006) (ruling that the publicity proviso does not protect union bannerings of secondary employers because bannerings is a form of picketing).

60. *DeBartolo II*, 485 U.S. 568 (1988).

61. *Id.* at 570-71.

62. *See id.* at 575-76, 578 (noting that the leaflets were distributed in a peaceful fashion, without any picketing-like activity, and presented the public with truthful information about the wage and benefit practices of the shopping mall's business partners).

63. *See* *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bld. & Constr. Trades Council (DeBartolo I)*, 463 U.S. 147, 155-58 (1983) (holding that the proviso did not exempt a union protest aimed at publicizing the fact that a shopping mall employed the labor of a non-union subcontractor, for the subcontractor was not a *producer* of *goods*, as explicitly required to be exempt under the proviso). *But see* *NLRB v. Servette, Inc.*, 377 U.S. 46, 54-56 (1964) (finding that the proviso exempted a union protest of a grocery store that distributed the goods of a wholesale distributor with whom the union had a primary dispute; even though the distributor had not actually *manufactured* goods sold by the grocery store, the Court felt it could be considered a "producer" within the meaning of the publicity proviso).

64. *DeBartolo II*, 485 U.S. at 575-76, 577.

65. *See id.* at 575 (citing *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490 (1979); *Murray v. The Schooner Charming Betsy*, 6 U.S. 64, 118 (1804)) (explaining that, when a statute seems like it may be unconstitutional, courts should see if there

## 2007] ON MOCK FUNERALS, BANNERS, AND GIANT RAT BALLOONS 1633

one of two conclusions in secondary boycott cases: (1) that the challenged form of union secondary protest is constitutionally protected, but, conveniently, § 8(b)(4)(ii)(B) does not prohibit it;<sup>66</sup> or (2) that the challenged form of protest is banned by § 8(b)(4)(ii)(B), but such a ban poses no constitutional problem because the protest falls outside the protection of the Constitution.<sup>67</sup>

In the *DeBartolo* case, the Supreme Court followed the first strategy to keep the NLRA within the bounds of the First Amendment.<sup>68</sup> As explained above, *DeBartolo* presented the Court with a type of union secondary handbilling that was constitutionally protected but was not exempt from the secondary boycott ban by the publicity proviso.<sup>69</sup> The Supreme Court successfully avoided any constitutional problems by concluding that handbilling is not coercive because it lacks the characteristics of picketing that have led courts to traditionally find picketing coercive.<sup>70</sup> The Court also looked at the legislative history behind § 8(b)(4)(ii)(B) and found no evidence that Congress meant to proscribe peaceful handbilling.<sup>71</sup> Therefore, the Court avoided any First Amendment problems by finding that the secondary boycott ban does not prohibit handbilling.<sup>72</sup>

In other cases, the Court followed the tactic of finding that the form of union protest is prohibited by § 8(b)(4)(ii)(B) but that it is

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are other ways to legitimately read the statute that would not raise such serious constitutional problems).

66. See *DeBartolo II*, 485 U.S. at 578 (finding that handbilling was constitutionally protected but was not “coercive” and thus did not violate § 8(B)(4)(ii)(B)).

67. See, e.g., *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942) (finding that the government may ban “fighting words,” or words likely to incite a violent reaction from a reasonable listener, without raising any First Amendment concerns). But see *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382-84 (1992) (asserting that even types of speech like obscenity, defamation, and fighting words are covered by the First Amendment and, thus, the government may not discriminate on the basis of content or viewpoint in regulating them).

68. See *DeBartolo II*, 485 U.S. at 570-71 (describing how the union distributed leaflets urging the public to boycott a shopping mall because one of the mall’s tenants hired a construction company who, in the union’s opinion, gave its workers substandard wages and fringe benefits).

69. See *supra* notes 60-67 and accompanying text (explaining that the handbills the union distributed were truthful and peacefully distributed, and thus a form of First Amendment speech, but were not covered by the publicity proviso because they did not publicize information about a secondary employer selling a primary employer’s goods).

70. See *DeBartolo II*, 485 U.S. at 580 (pointing out that picketing is “a mixture of conduct and communication and the conduct element often provides the most persuasive deterrent to third persons about to enter a business establishment,” whereas handbills “depend entirely on the persuasive force of the idea” (internal quotations omitted)).

71. *Id.* at 580.

72. *Id.*

not constitutionally protected speech.<sup>73</sup> Initially, courts invoked the First Amendment doctrine that expression aimed at illegal ends is not constitutionally protected.<sup>74</sup> Because the goal of a union secondary boycott is, by definition, to induce one party to stop doing business with another party, courts felt that the protests were aimed at the “illegal end” of restraint of trade and thus lay outside the First Amendment.<sup>75</sup>

Over time, however, this position became untenable. First, courts decided that antitrust laws did not apply to the activities of labor unions.<sup>76</sup> Second, in the civil rights context, the Supreme Court began to recognize the tremendous importance of consumer boycotts as a protest tool, and declared that activities aimed at inducing consumer boycotts were entitled to First Amendment protection.<sup>77</sup>

The courts then turned to a different First Amendment doctrine, the so-called “speech-conduct distinction” (also known as the “expression-action dichotomy”), to justify the constitutionality of their decisions declaring union secondary protests illegal.<sup>78</sup> The speech-conduct distinction asserts that the First Amendment protects only speech, not conduct.<sup>79</sup> Under this theory, union secondary

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73. *Schneider*, *supra* note 49, at 1469.

74. *Id.* at 1481-88; *see, e.g., Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 498 (1949) (“It rarely has been suggested that the constitutional freedom for speech and press extends its immunity to speech or writing used as an integral part of conduct in violation of a valid criminal statute.”).

75. *See, e.g., Giboney*, 336 U.S. at 497-98 (1949) (finding that, where a union attempted to put pressure on primary by obtaining agreements from suppliers not to sell to the primary, the union protests could constitutionally be prohibited because they were part of an illegal conspiracy to engage in restraint of trade); *Carpenters & Joiners Union Local 213 v. Ritter’s Cafe*, 315 U.S. 722, 724, 728 (1942) (ruling that union picketing of a neutral employer lacked First Amendment protections because such picketing violated the state’s antitrust laws); *Gompers v. Buck’s Stove & Range Co.*, 221 U.S. 418, 439 (1911) (holding that a union’s dissemination of messages urging customers not to patronize non-union businesses constituted illegal restraint of trade).

76. *See United States v. Hutcheson*, 312 U.S. 219, 233-36 (1941) (holding the Sherman Antitrust Act inapplicable to unions).

77. *See, e.g., NAACP v. Claiborne Hardware*, 458 U.S. 886, 909-12 (1982) (upholding right of civil rights activists to organize a consumer boycott against white merchants). *See generally* Michael C. Harper, *The Consumer’s Emerging Right To Boycott: NAACP v. Claiborne Hardware and its Implications for American Labor Law*, 93 YALE L.J. 409 (1984) (arguing that, although there was no foundation in First Amendment precedent for the right to boycott as articulated in *Claiborne Hardware*, this right is consistent with American social and constitutional values and should be extended to protests outside of the civil rights context).

78. *See Schneider*, *supra* note 49, at 1488-95 (summarizing the reasons why the Supreme Court has found picketing to constitute something more than speech: its potential for violence, its threat of economic or physical harm to those who cross the picket line, its powerful emotional impact, and its persuasive force).

79. STEVEN H. SHIFFRIN & JESSE H. CHOPER, *THE FIRST AMENDMENT* 209 (2d ed. 1996). *Compare Cohen v. California*, 403 U.S. 15, 16-17, 26 (1971) (reversing an appellant’s conviction for entering a courthouse wearing a jacket emblazoned with

## 2007] ON MOCK FUNERALS, BANNERS, AND GIANT RAT BALLOONS 1635

protests lose their First Amendment protection when they persuade through the force of their conduct rather than the strength of their ideas.<sup>80</sup> The Court has held that picketing constitutes such unprotected conduct for two reasons: (1) picketing typically involves the act of “patrolling” (i.e. walking back and forth in front of a particular locality) and thereby physically blocks or impedes access to places of business; and (2) picketing has tremendous symbolic power in this country and triggers automatic sympathetic responses on the part of observers.<sup>81</sup> This position that picketing is conduct, not speech, and is devoid of constitutional protection is the final reason why judges are often tempted to decide the legality of challenged union secondary protests by analogizing them to picketing.<sup>82</sup>

Therefore, the picketing test is the result of efforts by judges to clarify the ambiguous meaning of the NLRA’s secondary boycott ban and to bring this meaning within the mandate of the First Amendment. The following section discusses why the picketing test has not succeeded in achieving either of those goals.

## II. THE PICKETING TEST FAILS TO CLARIFY THE PROVISION OR SOLVE ITS CONSTITUTIONAL PROBLEMS

A test that determines the legality of a union secondary protest by analogizing the protest to picketing fails to clarify the meaning of § 8(b)(4)(ii)(B)<sup>83</sup> and to exempt all constitutionally protected

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the words “Fuck the Draft”), *with* United States v. O’Brien, 391 U.S. 367, 381-82 (1968) (upholding an appellant’s prosecution for publicly burning his selective service certificate).

80. *See, e.g.*, United Bhd. of Carpenters & Soc’y Hill Towers Owners’ Ass’n, 335 N.L.R.B. 814, 826 (2001) (finding that it infringes no constitutional rights to forbid a union from broadcasting protest messages at excessive volumes); *Serv. & Maint. Employees Union Local 399*, 136 N.L.R.B. 431, 436-38 (1962) (finding a union protest illegal because union members physically blocked access to the entrance to a building).

81. *NLRB v. Retail Store Employees Union, Local 1001 (Safeco)*, 447 U.S. 607, 619 (1980) (Stevens, J., concurring); *accord Hughes v. Superior Court*, 339 U.S. 460, 464-65 (1950) (concluding that picketing is not pure speech for the purposes of the First Amendment because it involves patrolling and because of its greater power to trigger certain automatic responses on the part of observers).

82. *See infra* Part II.B (describing how some judges have declared the staging of mock funerals, the inflation of giant rat balloons, and the holding of large banners to violate the secondary boycott ban, and have justified the constitutionality of such decisions by drawing an analogy between each of these protest activities and picketing).

83. *See* Lee Goldman, *The First Amendment and Nonpicketing Labor Publicity under Section 8(b)(4)(ii)(B) of the National Labor Relations Act*, 36 VAND. L. REV. 1469, 1471 (1983) (warning that the current approach to interpreting the NLRA’s secondary boycott ban “leaves the state of the law in doubt and provides little guidance to unions that increasingly contemplate employing this most effective economic weapon”).

expression from its scope.<sup>84</sup> Part II.A explains why it is not clear what types of activities are prohibited by a ban on union secondary picketing. Part II.B argues that, in both theory and practice, the picketing test can be used to unconstitutionally burden unions' free speech rights.

A. *What's in a Picket?*

The picketing test for interpreting § 8(b)(4)(ii)(B) fails to give unions a precise idea of what forms of secondary protest are prohibited.<sup>85</sup> It is very difficult to predict whether a judge will analogize a given union protest tactic to picketing.<sup>86</sup> In addition, there is little agreement over what constitutes picketing.<sup>87</sup> For example, some judges argue that picketing requires patrolling, while others hold that it does not.<sup>88</sup> Similarly, some courts will not find that union behavior amounts to picketing unless it was confrontational; others completely ignore this factor.<sup>89</sup> Finally, even if a judge does find that the challenged form of protest constitutes picketing, it is not clear whether the judge will automatically find the union protest

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84. See *Thornhill v. Alabama*, 310 U.S. 88, 105 (1940) (acknowledging that a ban on picketing is constitutional where picketing poses a "clear and present danger of destruction of life or property, or invasion of the right of privacy, or breach of the peace," but noting that such dangers are not "inherent in the activities of every person who approaches the premises of an employer and publicizes the facts of a labor dispute involving the latter").

85. See *infra* notes 91-95 and accompanying text (asserting that picketing may be protected by the First Amendment because picket lines can be forms of expression).

86. See, e.g., James Gray Pope, *Labor-Community Coalitions and Boycotts: The Old Labor Law, the New Unionism, and the Living Constitution*, 69 TEX. L. REV. 889, 937-43 (1991) (presenting a series of hypothetical situations that demonstrate how difficult it is to tell the difference between constitutionally protected handbilling and unprotected picketing).

87. Bock, *supra* note 15, at 921.

88. Compare Sw. Reg'l Council of Carpenters (*New Star Gen. Contractors*), 2004 WL 2671638 (NLRB Nov. 12, 2004) (noting that "[w]hat particularly distinguishes picketing from other types of expression is [that] . . . [t]ypically, pickets patrol a facility or location"), with *Serv. Employees Union Local 87*, 312 N.L.R.B. 715, 743 (1993) (arguing "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" (citations omitted)).

89. Compare *NLRB v. United Furniture Workers*, 337 F.2d 936, 940 (2d Cir. 1964) ("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."), with *United Bhd. of Carpenters Local 1827 (United Parcel Serv., Inc.)*, 2003 WL 21206515 (N.L.R.B. May 9, 2003) ("[C]onfrontation in the sense of assertive or aggressive behavior is not a necessary element of picketing.").

## 2007] ON MOCK FUNERALS, BANNERS, AND GIANT RAT BALLOONS 1637

illegal or simply consider that fact as evidence of illegal secondary activity.<sup>90</sup>

*B. A Protest by Any Other Name Would Be Constitutionally Protected*

In addition to creating confusion about what types of behavior are forbidden, the picketing test fails to exempt all constitutionally protected expression from the NLRA's secondary boycott ban.<sup>91</sup> Just because a form of protest looks like, or actually is picketing, that does not mean that the First Amendment does not protect it.<sup>92</sup> On the contrary, unions usually form picket lines to convey a message and thereby engage in a form of expression.<sup>93</sup> As a result, the government may only burden such protests with reasonable restrictions.<sup>94</sup> Because the picketing test encourages courts to prohibit unions from engaging in secondary protests that resemble picketing, even when

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90. Compare *Service Employees Union Local 87*, 312 N.L.R.B. 715, 743 (1993) (asserting that "it is, of course, clear that picketing . . . restrains or coerces employers within the meaning of Section 8(b)(4)(ii)"), with *Carpenters Health & Welfare Fund & Metro. Reg'l Council*, 334 N.L.R.B. 507, 508 (2001) (rejecting the concept that "all picketing at a secondary site, no matter what the circumstances, is inherently coercive" under § 8(b)(4)(B)).

91. *Mackson-Landsberg*, *supra* note 29, at 1543.

92. See *Thornhill v. Alabama*, 310 U.S. 88, 102 (1940) (stating that a union's publicizing of its labor disputes is "within that area of free discussion that is guaranteed by the Constitution"); see also *Carlson v. California*, 310 U.S. 106, 112-13 (1940) ("The carrying of signs and banners, no less than the raising of a flag, is a natural and appropriate means of conveying information on matters of public concern."). Though the Supreme Court has never overruled *Thornhill*, it has since adopted a position that contradicts the sentiment expressed in that case. See *NLRB v. Retail Store Employees Union, Local 1001 (Safeco)*, 447 U.S. 607, 619 (1980) (Stevens, J., concurring) (reasoning that picketing forfeits its constitutional guarantees because "the conduct element rather than the particular idea being expressed . . . provides the most persuasive" argument in favor of the union's position). Nonetheless, for as long as the Supreme Court has attempted to characterize picketing as unprotected conduct, commentators have exposed the logical inconsistencies in this position and offered theories for why the Court really refuses to extend picketing the rights enjoyed by nearly identical forms of political, religious, and cultural protests. See generally Note, *Labor Picketing and Commercial Speech: Free Enterprise Values in the Doctrine of Free Speech*, 91 YALE L.J. 938 (1982) (arguing that the Supreme Court's extension of greater First Amendment protection to peaceful non-labor picketing and to commercial speech requires a reexamination of the way the Court treats peaceful labor picketing).

93. See *infra* Part II.B.1 (contending that union picketing and similar forms of protest constitute communicative conduct because they are intended to convey a message of protest against particular employers, a message that is likely to be understood by most American audiences).

94. See *infra* Part II.B.2 (explaining that the Supreme Court has ruled that the government may only burden communicative conduct with reasonable restrictions that are necessary to serve an important government interest).

the government has no legitimate reason to prohibit them, it violates the First Amendment.<sup>95</sup>

*1. Union secondary protests as communicative conduct*

Most union protests contain an expressive element and are thus entitled to First Amendment protection. In picketing, for example, union members hold signs and march back and forth in order to express an idea: their disapproval of the secondary employer doing business with the primary employer.<sup>96</sup> This is similar to marching in a parade to express pride in one's group,<sup>97</sup> burning a flag to protest the government,<sup>98</sup> or taping a peace sign to a flag to express distress over the killing of protestors.<sup>99</sup> The Supreme Court has identified such types of protest as "communicative conduct," or conduct that is entitled to First Amendment protection because, even though it is not pure speech, it is undertaken in order to communicate a message.<sup>100</sup>

It is true that nearly all conduct potentially communicates an underlying message, and so it would be absurd to view all conduct as constitutionally protected.<sup>101</sup> Therefore, the test for determining whether conduct is truly communicative is whether the actor possessed "[a]n intent to convey a particularized message" through

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95. See *id.* (arguing that staging mock funerals, inflating rat balloons, and displaying giant banners are all communicative conduct entitled to constitutional protection).

96. See Mackson-Landsberg, *supra* note 29, at 1528 (referring to picketing as "the workingman's means of communication" (citing *Milk Wagon Drivers Union v. Meadowmoor Dairies, Inc.*, 312 U.S. 287, 293 (1941))).

97. Cf. *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston, Inc.*, 515 U.S. 557, 561, 568 (1995) (finding an expression of pride in the Irish heritage of the gay, lesbian, and bisexual members of the group and defining a parade as "marchers who are making some sort of collective point, not just to each other but to bystanders along the way").

98. Cf. *Texas v. Johnson*, 491 U.S. 397, 399 (1989) (describing how, during a protest of the 1984 Republican National Convention, an individual burned an American flag while protestors chanted, "America, the red, white, and blue, we spit on you").

99. Cf. *Spence v. Washington*, 418 U.S. 405, 407-08 (1974) (noting that the protestor taped his peace sign to the flag to let people know that he thought "America stood for peace" and was deeply discouraged by the killing of the student protestors at Kent State University).

100. See *Hurley*, 515 U.S. at 568 (holding that parades are a form of expression in addition to being a form of motion); *Johnson*, 491 U.S. at 416-17 (holding that the state cannot limit the expressive messages that conduct such as flag burning might represent); *Spence*, 418 U.S. at 409, 414-15 (finding that the act of taping a peace sign to a flag was "sufficiently imbued with elements of communication to fall within the scope of the First . . . Amendment[']").

101. See *United States v. O'Brien*, 391 U.S. 367, 376 (1968) (rejecting the argument "that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea").

## 2007] ON MOCK FUNERALS, BANNERS, AND GIANT RAT BALLOONS 1639

the conduct and whether, given the surrounding circumstances, “the likelihood was great that the message would be understood by those who viewed it.”<sup>102</sup> By this definition, most union protests, including pickets, are a constitutionally protected form of speech because they are undertaken for the purpose of conveying a message of dissatisfaction with an employer, and most Americans will perceive such a message when they view a union protest.<sup>103</sup>

Some have argued that even though picketing fits the Supreme Court’s definition of communicative conduct, it is by its nature something more powerful than speech and thus undeserving of First Amendment protection.<sup>104</sup> Justice Stevens embraced this so-called “speech-plus” argument when he opined that picketing “calls for an automatic response to a signal, rather than a reasoned response to an idea.”<sup>105</sup> Similarly, Justice Frankfurter considered picket lines to possess a mythical power that evokes “loyalties and responses . . . unlike those flowing from appeals by printed word.”<sup>106</sup> Both Justices Stevens and Frankfurter were therefore confident that bans on union picketing did not violate the First Amendment.<sup>107</sup>

But the speech-plus theory is based on the assumption that labor picketing is more than speech because Americans tend to respond sympathetically to union protests.<sup>108</sup> Such a theory punishes union

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102. *Spence*, 418 U.S. at 410-11.

103. *See supra* note 96 and accompanying text (discussing how unions use picket lines to publicize their labor disputes).

104. *See, e.g.*, Jeff Vlasek, Note, *Hold Up the Sign and Lie Like a Rug: How Secondary Boycotts Received Another Lease on Life*, 32 J. CORP. L. 179, 193-94 (2006) (warning that banners declaring “Shame!” on secondary employers might lead consumers to automatically boycott those businesses because they would assume such signs meant that the secondary employer was engaged in a labor dispute with a union and would immediately decide to stop patronizing that store).

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

106. *Hughes v. Superior Court*, 339 U.S. 460, 465 (1950) (citation omitted).

107. *Safeco*, 447 U.S. at 619 (Stevens, J., concurring); *Hughes*, 339 U.S. at 465-66 (citation omitted). *See generally* Goldman, *supra* note 83, at 1482-86 (discussing the evolution of, and justifications for, the speech-plus theory of picketing).

108. *See* Scott, *supra* note 29, at 178 (contending that picketing directed at the general public is not very powerful because almost no unions have enough control over members of the public to force them to take sympathetic action). *But see* *Bakery & Pastry Drivers & Helpers Local 802 v. Wohl*, 315 U.S. 769, 776 (1942) (Douglas, J., concurring) (“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 disseminated.”). In the past, the speech-plus theory was also justified by a belief that picketing was almost always accompanied by violence. *See Milk Wagon Drivers Union v. Meadowmoor Dairies, Inc.*, 312 U.S. 287, 294 (1941) (holding that a state may constitutionally enjoin peaceful picketing if picketing in the region was historically violent and, thus, even peaceful picketing would cause fear); Edgar A. Jones, Jr., *Picketing and Coercion: A Jurisprudence of Epithets*, 39 VA. L. REV. 1023, 1024 (1953) (explaining that courts during the early twentieth century believed that the possibility of “peaceful

speech for its effectiveness, a result contrary to the spirit of the First Amendment.<sup>109</sup> Indeed, Americans have historically shown great respect for religious values and the sanctity of human life, yet this is not grounds to view abortion protests by religious groups as inherently more powerful (and thus subject to less First Amendment protection) than other forms of protest.<sup>110</sup> Nor should it be grounds to strip labor unions of their constitutional rights.

The only other reason to view picketing and similar labor protests as constitutionally-unprotected conduct is if the aims of union speech can negate the constitutional protection to which it would otherwise be entitled. The Supreme Court advanced such an argument in dicta in the civil rights case of *NAACP v. Claiborne Hardware Co.*<sup>111</sup> In *Claiborne*, the Court found that civil rights protesters had a First Amendment right to use picketing to publicize a consumer boycott of white merchants who refused to embrace racial integration.<sup>112</sup> The Court was quick to limit its holding, however, to pickets aimed at inducing consumer boycotts in *non-labor* contexts.<sup>113</sup> In the labor context, the Court explained, such picketing could promote “industrial strife;” thus, the government must have the power to regulate and even prohibit union picketing.<sup>114</sup> In other words, speech aimed at effecting economic change is subject to less protection than speech aimed at effecting political change because of the government’s important interest in regulating the economy.<sup>115</sup>

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picketing” was as unlikely as “chaste vulgarity” (quoting Atchison, Topeka & Santa Fe Ry. Co. v. Gee, 139 F. 582, 584 (S.D. Iowa 1905)).

109. See *Bakery & Pastry Drivers*, 315 U.S. at 775-77 (Douglas, J., concurring) (acknowledging the special power of picketing but finding that, so long as it is peaceful, picketing may not be banned solely because it is effective).

110. See *Madsen v. Women’s Health Center, Inc.*, 512 U.S. 753, 773 (1994) (upholding First Amendment right of protestors to stand outside abortion clinics carrying posters that were potentially offensive to those seeking the clinic’s services); *Cannon v. City of Denver*, 998 F.2d 867, 873-74 (10th Cir. 1993) (holding that the First Amendment protected abortion protestors marching on the sidewalk outside of a clinic with signs that read “The Killing Place”).

111. 458 U.S. 886 (1982).

112. *Id.* at 909-12.

113. See *id.* at 912 (noting the disruptive effect that even peaceful boycotting can have on local economies).

114. *Id.* (quoting *NLRB v. Retail Store Employees Union, Local 1001 (Safeco)*, 447 U.S. 607, 618 (1980) (Blackmun, J., concurring)).

115. See George Carruthers Covington, Note, *Constitutional Law—The First Amendment and Protest Boycotts: NAACP v. Claiborne Hardware Co.*, 62 N.C. L. REV. 399 (1984) (reading *Claiborne Hardware* as stating that the government’s interest in economic regulation can sometimes outweigh the free speech rights guaranteed by the First Amendment). See generally Julius Getman, *Labor Law and Free Speech: The Curious Policy of Limited Expression*, 43 MD. L. REV. 4, 4 (1984) (characterizing labor law as “the one area of law in which the policies of the [F]irst [A]mendment have been consistently ignored, reduced, and held to be outweighed by other interests”); James Gray Pope, *Labor and the Constitution: From Abolition to Deindustrialization*, 65 TEX. L.

## 2007] ON MOCK FUNERALS, BANNERS, AND GIANT RAT BALLOONS 1641

This view of picketing is unsettling for two main reasons. First, it is difficult to distinguish those pickets aimed solely at political change versus those with purely economic goals;<sup>116</sup> in fact, some protests might combine the two.<sup>117</sup> Even if such a distinction were possible to draw, the Supreme Court has never fully justified why union speech pushing for better economic conditions for workers is less worthy of protection than pure political speech.<sup>118</sup> Perhaps for these reasons, the Supreme Court has retreated from the economic-versus-political speech distinction, declaring in *DeBartolo* that a union does not forfeit its First Amendment right to hand out leaflets just because the content of the leaflets urges a consumer boycott.<sup>119</sup>

In conclusion, nothing about the inherent form or ends of union secondary picketing makes it devoid of constitutional protection. As long as the union initiates the picketing with the purpose of conveying a message, and that message is likely to be understood, picketing and similar forms of union secondary protest constitute communicative conduct. As such, these forms of protest are guaranteed by the First Amendment.

2. *The picketing test's failure to limit the secondary boycott ban to truly coercive union protests*

The picketing test violates unions' First Amendment rights because the test sweeps under its rule not only coercive union protests, but

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REV. 1071, 1073, 1074-78 (1987) (arguing that there is a "black hole" in the Constitution as far as labor speech is concerned, and tracing the origins of this black hole to the *Lochner*-era idea that "labor is a commodity and labor liberty consists solely of an individual's right to sell her labor commodity"); *Schneider*, *supra* note 49, at 1497 (suggesting that the unspoken reason for the Supreme Court's restrictive view of labor picketing is that it is unwilling to extend constitutional protection to speech that damages the economic interests of businesses).

116. See Covington, *supra* note 115, at 404 (noting that protest boycotts can be viewed as both political and economic in nature).

117. See, e.g., *Int'l Longshoremen's Ass'n v. Allied Int'l, Inc.*, 456 U.S. 212, 214-15 (1982) (involving a labor union that protested the Soviet Union's invasion of Afghanistan by refusing to handle cargo shipped from or to the Soviet Union).

118. See Seth Kupferberg, *Political Strikes, Labor Law, and Democratic Rights*, 71 VA. L. REV. 685, 697 (1985) (comparing worker strikes for political goals with worker strikes for economic goals to demonstrate that both are deserving of equal constitutional protection).

119. See, e.g., *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council (DeBartolo II)*, 485 U.S. 568, 580 (1988) (upholding a union's right to distribute leaflets while observing that when consumers boycott a store after reading a leaflet, the loss of customers suffered by the secondary employer "is the result of mere persuasion, and the [secondary employer] who reacts is doing no more than what its customers honestly want it to do"); see also Kohler, *supra* note 48, at 172 (observing that the legality of a union's appeal to consumers to boycott a secondary employer depends on the "manner in which the union makes that appeal," not in its result).

also protests that merely seek to *persuade* secondary employers to stop doing business with primary employers. Assuming that union secondary protests generally constitute communicative conduct,<sup>120</sup> the government may only burden such protests with restrictions that are narrowly tailored to serve a legitimate government interest.<sup>121</sup> The government interest furthered by § 8(b)(4)(ii)(B) is the protection of secondary employers from being coerced into other parties' labor disputes.<sup>122</sup> So, to stay within the bounds of the Constitution, courts must interpret § 8(b)(4)(ii)(B) as prohibiting only those protests that truly coerce secondary employers into ceasing their business with primary employers.<sup>123</sup>

Because picketing and similar forms of labor protest do not always force a secondary employer's hand, a rule banning *all* secondary picketing is not narrowly tailored.<sup>124</sup> Application of the picketing test to the mock funeral, rat balloon, and banner cases illustrates this point. Staging mock funerals, inflating giant rat balloons, and holding up large banners are all forms of communicative conduct.<sup>125</sup> As explained above, communicative conduct is conduct that is undertaken with the intent to convey a particularized message amidst circumstances that indicate that the message will likely be understood

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120. See *supra* Part II.B.1 (making the case for why most forms of union secondary protests fit the Supreme Court's definition of communicative conduct).

121. Cf. *United States v. O'Brien*, 391 U.S. 367, 376 (1968) (finding that a protest combining elements of speech and non-speech can be limited when a "sufficiently important governmental interest in regulating the non-speech element" exists).

122. See *supra* note 34 and accompanying text (explaining that the goal of § 8(b)(4)(ii)(B) is to limit union-employer disputes to those parties alone and not involve neutral businesses).

123. Cf. *O'Brien*, 391 U.S. at 381-82 (observing that burning a draft card could constitutionally be prohibited because such a prohibition was necessary to serve the substantial government interests of coordinating and maintaining the draft, and there was no less burdensome way to promote this objective).

124. As one commentator queried:

Cannot the handbiller confront the approaching customer with the same pair of beady eyes as the picketer? Or is it the sign on the stick that bothered Justice Stevens [when he noted in a concurring opinion that picketing is different from other forms of protest, *NLRB v. Retail Store Employees Union, Local 1001 (Safeco)*, 447 U.S. 607, 619 (1980) (Stevens, J., concurring)]? Unless we expect the stick to be wielded as a weapon, it would surely seem improper to forbid the picket sign but not the handbill merely because the placard may be more visible and thus more likely to catch a busy shopper's eye.

Theodore J. St. Antoine, *Labor and Employment Law in Two Transitional Decades*, 42 *BRANDEIS L.J.* 495, 501 (2004).

125. See Mackson-Landsberg, *supra* note 29, at 1560-61 (reasoning that inflatable rats and large banners fall under the free speech exemptions of § 8(b)(4)(ii)(B)); see also *Tucker v. City of Fairfield*, 398 F.3d 457, 462 (6th Cir. 2005) (finding that a union could not constitutionally be enjoined from erecting a giant rat balloon on a public right of way, for inflating a rat balloon in a traditional public forum is constitutionally protected speech), *cert. denied*, 126 S. Ct. 399 (2005) (mem.).

## 2007] ON MOCK FUNERALS, BANNERS, AND GIANT RAT BALLOONS 1643

by those who view it.<sup>126</sup> Rat balloons and banners both constitute such communicative conduct because unions use them to convey a specific message (displeasure with labor conditions at the protested venue), and viewers are likely to understand that message because of the plain meaning of the words on the banners<sup>127</sup> and because of the ubiquity of the rat balloon as a symbol of union-management disputes.<sup>128</sup>

The Sheet Metal Workers' mock funeral also fits the Supreme Court's definition of communicative conduct. The union staged the performance to make the point that the use of non-union labor hurts not only workers, but also the people who rely on the services provided by those workers.<sup>129</sup> It attempted to convey this message by suggesting that patients died at the hospital, possibly due to the negligence of the hospital's workers.<sup>130</sup> Even though the funeral addressed solely the hospital's treatment of patients rather than its treatment of workers, the First Amendment does not limit its protection to speech that is directly within the scope of an individual or organization's business.<sup>131</sup> Thus, because the Sheet Metal Workers' street theater was intended to convey a message and the message seemed to be understood by passersby, the mock funeral constituted communicative conduct that was entitled to constitutional protection.<sup>132</sup>

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126. See *supra* notes 101-103 and accompanying text (setting forth the Supreme Court's definition of communicative conduct).

127. See, e.g., Sw. Reg'l Council of Carpenters (*Carignan Constr. Co.*), 2004 NLRB LEXIS 74, at \*10-11 (Feb. 18, 2004), available at [http://www.nlr.gov/shared\\_files/A\\_LJ%20Decisions/JD\(SF\)-14-04.pdf](http://www.nlr.gov/shared_files/A_LJ%20Decisions/JD(SF)-14-04.pdf) (describing how the union members held up a banner clearly declaring, "Shame on [name of employer]! Labor Dispute").

128. See Laborers' E. Region Org. Fund & The Ranches at Mt. Sinai, 346 N.L.R.B. No. 105, 2006 NLRB LEXIS 167, at \*76 (Apr. 28, 2006), available at [http://www.nlr.gov/shared\\_files/Board%20Decisions/346/346-105.pdf](http://www.nlr.gov/shared_files/Board%20Decisions/346/346-105.pdf) (noting that it is common knowledge that a "rat" is an employer who employs non-union labor).

129. See Sheet Metal Workers Int'l Ass'n, Local 15 (*Sheet Metal Workers ALJ*), 2004 NLRB LEXIS 688, at \*20-21 (Dec. 7, 2004) (explaining that the union felt the underlying greed of the targeting hospital was negatively affecting both workers and patients), *aff'd*, Sheet Metal Workers Int'l Ass'n, Local 15 (*Sheet Metal Workers NLRB*), 346 N.L.R.B. No. 22, 2006 NLRB LEXIS 3 (Jan. 9, 2006), available at [http://www.nlr.gov/shared\\_files/Board%20Decisions/346/346-22.pdf](http://www.nlr.gov/shared_files/Board%20Decisions/346/346-22.pdf).

130. See *id.* at \*17-21 (describing how some union members acted like members of a funeral procession, while other union members handed out fliers that described deaths and injuries sustained by patients at the hands of the hospital's doctors).

131. See *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 784-85 (1978) (invalidating a Massachusetts policy that prohibited corporations from funding political advertising on issues that were not likely to "materially affect[]" their business or property).

132. Cf. *supra* notes 127-128 and accompanying text (describing how, to protest the labor practices of a secondary employer, unions use words and symbols that are universally understood to express labor-management disputes); accord *Sheet Metal*

Just because mock funerals, rat balloons, and banners are forms of communicative conduct protected by the First Amendment, however, does not mean that the government may not regulate or even ban such protests; on the contrary, the government may restrict communicative conduct if such restrictions are narrowly tailored to serve § 8(b)(4)(ii)(B)'s identified goal of preventing unions from dragging secondary employers into other parties' labor disputes.<sup>133</sup> There is, however, no evidence that mock funerals, rat balloons, or banners are so inherently frightening or disruptive that they force customers and workers to avoid a secondary employer's premises or otherwise impede a secondary employer's business so that the employer has to give in to the union's demands.<sup>134</sup> In fact, unions only use stunts like inflating rat balloons and staging mock funerals because they are absurd and will grab the attention of members of the public who would otherwise be too busy to notice the union's protest.<sup>135</sup> Because mock funerals, rat balloons, and banners present no actual or threatened harm that the government would have a legitimate interest in preventing, the Constitution forbids the government from completely prohibiting their use.<sup>136</sup>

Nevertheless, some judges have analogized the use of mock funerals, rat balloons, and banners to picketing and have thus concluded that neither the law nor the Constitution protects these

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Workers D.C. Circuit, No. 06-1028, slip op. at 17-19 (D.C. Cir. June 19, 2007) (comparing the mock funeral to the conduct in the Supreme Court's abortion protest cases and concluding that the mock funeral was not coercive and thus could not constitutionally be banned).

133. See *supra* notes 120-123 and accompanying text (explaining that the government may only restrict communicative conduct in ways that are reasonably necessary to achieve some legitimate government purpose, and noting that the government interest behind the secondary boycott ban is preventing unions from forcing neutral employers to get involved in primary labor disputes).

134. See *supra* notes 1-5, 24-26 and accompanying text (describing the non-threatening use of these protest techniques).

135. See *Unions' Inflatable Rat an Endangered Species: Unions say the prop is protected under the Constitution*, WORKFORCE MANAGEMENT, Sept. 9, 2005, available at <http://www.workforce.com/section/00/article/24/15/94.html> (quoting a union organizer as saying that giant rat balloons are necessary to get the attention of passersby). *But cf.* Sheet Metal Workers Int'l Ass'n, Local 15 (*Sheet Metal Workers ALJ*), 2004 NLRB LEXIS 688, at \*32 (Dec. 7, 2004) (observing that the union admitted that patients of the hospital and their families might find a mock funeral outside a hospital offensive, and thus such a protest risks alienating potential supporters), *aff'd*, Sheet Metal Workers Int'l Ass'n, Local 15 (*Sheet Metal Workers NLRB*), 346 N.L.R.B. No. 22, 2006 NLRB LEXIS 3 (Jan. 9, 2006), available at [http://www.nlr.gov/shared\\_files/Board%20Decisions/346/346-22.pdf](http://www.nlr.gov/shared_files/Board%20Decisions/346/346-22.pdf).

136. See *supra* note 123 and accompanying text (deducing that, if a union secondary protest tactic constitutes communicative conduct, the government may only burden such protected speech with limitations designed to prevent it from forcing observers to acquiesce to the union's demands).

## 2007] ON MOCK FUNERALS, BANNERS, AND GIANT RAT BALLOONS 1645

forms of union secondary protest.<sup>137</sup> The NLRB found that the mock funeral constituted illegal picketing because the “funeral” participants marched in a loop in front of the hospital.<sup>138</sup> An administrative law judge found that the inflation of a rat balloon constitutes picketing if the rat has a sign on its chest, for then the rat is acting as a “surrogate” picketer.<sup>139</sup> Similarly, three of the nine administrative law judges who have considered the legality of bannering have concluded that bannering is picketing because, like picketing, bannering involves several union members standing outside the premises of an employer and holding up a sign.<sup>140</sup> Those administrative law judges and NLRB members who declared the mock funeral, rat balloons, and banners illegal saw no constitutional problem in doing so because, by analogizing these protest tactics to picketing, they were able to conclude that the tactics amounted to unprotected conduct.<sup>141</sup>

The NLRB’s and administrative law judges’ treatment of unions’ use of mock funerals, rat balloons, and banners in secondary protests demonstrates how the picketing test sometimes leads to the

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137. See *supra* note 27 (explaining that two administrative law judges have found rat balloons analogous to picketing, three administrative law judges have reached the same conclusion about bannering, and the NLRB may be poised to adopt these positions).

138. See *Sheet Metal Workers NLRB*, 2006 NLRB LEXIS 3, at \*5-6 (describing how the protesting union members patrolled, and therefore picketed, the public area near the hospital).

139. See *Sheet Metal Workers ALJ*, 2004 NLRB LEXIS 688, at \*25; see *Laborers’ E. Region Org. Fund & The Ranches at Mt. Sinai*, 346 N.L.R.B. No. 105, 2006 NLRB LEXIS 167, at \*4-8, \*13-14 (Apr. 28, 2006), available at [http://www.nlr.gov/shared\\_files/Board %20Decisions/346/346-105.pdf](http://www.nlr.gov/shared_files/Board%20Decisions/346/346-105.pdf) (observing that the administrative judge in the initial case below held rat balloons to be synonymous with picket lines because of their power as a symbol of labor strife, but dodging the question of whether rat balloons, on their own, constitute picketing because the rat balloon in this case was joined by patrolling union members and thus violated § 8(b)(4)(ii)(B)).

140. See *Mid-Atl. Reg’l Council of Carpenters*, 2006 NLRB LEXIS 80, at \*40-42 (Mar. 2, 2006), available at [http://www.nlr.gov/shared\\_files/ALJ%20Decisions/JD-16-06.pdf](http://www.nlr.gov/shared_files/ALJ%20Decisions/JD-16-06.pdf) (emphasizing the many NLRB decisions that have held that union protest need not involve patrolling to constitute picketing); *Sw. Reg’l Council of Carpenters (Held Props. I)*, 2004 NLRB LEXIS 159, at \*30-31 (Apr. 2, 2004), available at [http://www.nlr.gov/shared\\_files/ALJ%20Decisions/JD\(SF\)-24-04.pdf](http://www.nlr.gov/shared_files/ALJ%20Decisions/JD(SF)-24-04.pdf) (finding bannering to be picketing because it involved placing union members at the approach to a business’ entrance, to accomplish the goal of keeping customers away from the business); *Local Union No. 1827, United Bhd. of Carpenters (United Parcel Serv., Inc.)*, 2003 NLRB LEXIS 256, at \*91 (May 9, 2003), available at [http://www.nlr.gov/shared\\_files/ALJ%20Decisions/JD\(SF\)-30-03.pdf](http://www.nlr.gov/shared_files/ALJ%20Decisions/JD(SF)-30-03.pdf) (observing that bannering has “significant features akin to picketing: a visual message comprehensible at a glance and notice of a labor dispute”).

141. See, e.g., *United Parcel Serv., Inc.*, 2003 NLRB LEXIS 256, at \*97-101 (justifying a ban on secondary bannering by citing precedent holding that secondary picketing could be banned without interfering with unions’ constitutional rights).

suppression of union protests that are not coercive.<sup>142</sup> Thus, the picketing test does not satisfy the Supreme Court's requirement that restrictions on communicative conduct be narrowly tailored to the government interest they were meant to serve.<sup>143</sup> The First Amendment therefore requires that courts and the NLRB abandon the picketing test in favor of a new test that bans only those forms of union secondary protest that are truly coercive.<sup>144</sup> Part III proposes such a test.

### III. THE COERCION TEST

Courts and the NLRB should adopt a new rule that outlaws secondary union protests only when they inflict or threaten to inflict upon the secondary employer (or its employees or customers) a harm that (1) they have the right to avoid, and (2) is so substantial that no reasonable person would feel free to ignore the union's demands. This proposed test is derived from the definition ascribed to "coercion" in other areas of the law and in other sections of the NLRA.<sup>145</sup> As the Supreme Court has made clear, "[w]here Congress borrows terms of art in which are accumulated the legal tradition and meaning of centuries of practice, it presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken."<sup>146</sup>

Most legal definitions of coercion contain two elements: a force element and a violation of legal rights element.<sup>147</sup> First, in order to

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142. See *supra* notes 124-136 and accompanying text (discussing the nature of mock funerals, rat balloons, and banners, and arguing that such forms of protest do not *force* anyone to give in to the unions' demands).

143. Cf. *supra* notes 124-125 and accompanying text (explaining that the government violates the First Amendment when it seeks to prohibit communicative conduct, that is, conduct by which a party communicates a message in such a way that it is likely to be understood).

144. See *supra* note 29 (describing alternate tests proposed in other scholarly articles).

145. See *infra* notes 147-159 and accompanying text (reviewing the way coercion is defined in other legal contexts).

146. *Morrisette v. United States*, 342 U.S. 246, 263 (1952).

147. See ALAN WERTHEIMER, COERCION 19-169 (1987) (analyzing use of the term "coercion" in the following areas of the law: contracts; torts; marriages, adoptions, and wills; criminal coercion and blackmail statutes; confessions and searches; plea bargaining; and criminal defense). Synthesizing the definitions of coercion from these multiple areas of law, Wertheimer concluded that there is a "two-pronged" theory of legal coercion. *Id.* at 172-73. See generally Robert Nozick, *Coercion*, in RIGHTS AND THEIR FOUNDATIONS 242-74 (Jules L. Coleman ed., Garland Publishing 1994) (defining the essential elements of coercion as (1) P threatens to commit some act if Q does A (and P and Q both understand these words to be a threat); (2) the threat makes Q substantially less able to do A than she was before; (3) P and Q both believe that if Q does A and P carries out her threat, Q will be worse off than if Q didn't do A and P therefore didn't carry out the threat; and (4) Q does not do A, and the reason

## 2007] ON MOCK FUNERALS, BANNERS, AND GIANT RAT BALLOONS 1647

commit coercion, Person A must force Person B to take some action, or to refrain from taking some action, by acting or threatening to act in such a way that would overcome the will of any reasonable person.<sup>148</sup> Second, Person B must have a legal right to avoid that harmful action or threat.<sup>149</sup>

The second element is often overlooked in colloquial use of the word “coercion,”<sup>150</sup> but it is crucial to the legal definition of the term. The law invokes the concept of coercion when it needs to decide who bears responsibility for an individual’s actions.<sup>151</sup> Because a finding of coercion absolves the doer of a deed of legal responsibility for the deed, the deed must have been necessary for the doer to avoid some

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is P’s threat); MICHAEL R. RHODES, COERCION: A NONEVALUATIVE APPROACH 118-23 (Robert Ginsberg et al. eds., Rodopi 2000) (identifying the elements of a coercion claim as (1) an assertion that Q was actually threatened or reasonably believed she was threatened with harm, loss, or injury, and (2) Q acted in such a way as to avoid this threat, and Q’s avoidance behavior was reasonable, given the actual or perceived threat).

148. See WERTHEIMER, *supra* note 147, at 172 (stating that the first prong of the test for legal coercion is whether A makes a proposal that “creates a choice situation for B such that B has no reasonable alternative but to do X”); see also MODEL PENAL CODE § 212.5 (2006) (defining coercion as threats made with the purpose of unlawfully restricting “another’s freedom of action to his detriment”); MODEL PENAL CODE § 2.09 (2006) (creating the affirmative defense of duress where a defendant was coerced into criminal action “by the use of, or a threat to use, unlawful force against his person or the person of another, which a person of reasonable firmness in his situation would have been unable to resist”).

149. Edwin C. Baker, *Scope of the First Amendment Freedom of Speech*, 25 UCLA L. REV. 964, 999 (1978); see WERTHEIMER, *supra* note 147, at 172 (explaining that the second prong of the coercion test is that it must be wrong for A to inflict or threaten to inflict the harm on B: “It is ordinarily not coercion if A proposes to do what he has an independent legal right to do, so long as the right is not abused or used for purposes that the law considered illegitimate”). Similarly, fifteen states have criminal coercion statutes (Alabama, Alaska, Arkansas, Colorado, Connecticut, Delaware, Montana, Nevada, New Jersey, New York, North Dakota, Ohio, Oregon, Pennsylvania, Washington). WAYNE R. LAFAVE ET AL., SUBSTANTIVE CRIMINAL LAW § 18.3(e), at 50 n.173 (2d ed. 2003). All of these statutes list the specific types of conduct or threats that courts should consider “coercive;” if a criminal defendant forced another person to do something by acting or threatening to act in a way not listed in the statute, then the defendant did not commit legal coercion. *Id.* at 51; see, e.g., MODEL PENAL CODE § 212.5 (stating that a defendant only committed criminal coercion if, in an effort to restrict another person’s freedom, the defendant threatened to “(a) commit any criminal offense; or (b) accuse anyone of a criminal offense; or (c) expose any secret tending to subject any person to hatred, contempt or ridicule, or to impair his credit or business repute; or (d) take or withhold action as an official, or cause an official to take or withhold action”). Most of the fifteen state criminal coercion statutes echo the Model Penal Code, although some expand the list of coercive conduct and threats to include: inflicting injury to another’s person, health, property, business, credit, or reputation; staging or bringing about a strike or boycott; or testifying against another person in a legal matter. WAYNE R. LAFAVE ET AL., *supra*, at § 18.3(e) n.179.

150. WERTHEIMER, *supra* note 147, at 172.

151. See *id.* at 172-75 (explaining that the legal theory of coercion is a moral theory in that it seeks to assign responsibility and not to simply determine the objective truth of whether A forced B to act against B’s will).

harm that he or she had a legal right to avoid.<sup>152</sup> For instance, suppose two women rob a bank, one because her husband threatened to kill her if she did not, and the other because her husband threatened to leave her if she did not.<sup>153</sup> In this hypothetical, both women were forced to rob the bank, but only the former was legally coerced, because only she was threatened with a harm that she had a legal right to avoid.<sup>154</sup>

This definition of coercion is also consistent with the way the word “coercion” has been interpreted when used in other parts of the NLRA.<sup>155</sup> For example, § 8(a)(1) prohibits employers from coercing employees into refraining from organizing.<sup>156</sup> This provision is interpreted as banning only that activity which presents workers with a “threat of reprisal or force or promise of benefit.”<sup>157</sup> In other words,

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152. This is why, when the drafters of the Model Penal Code separated the crime of coercion from the crime of extortion, they limited the definition of coercion to instances where defendants overcome the will of another by threatening to commit certain types of criminal or tortious behavior. LAFAYE ET AL., *supra* note 149, § 18.3(e) n.175 and accompanying text (quoting MODEL PENAL CODE § 212.5, Comment at 266 (1980)) (observing that while any method of obtaining property that is not rightfully yours counts as extortion, because obtaining property that is not rightfully yours is always wrong, the way an alleged coercer prompts another person to act against his or her will is central to determining whether coercion occurred, given that not all ways of getting people to act against their will are morally culpable).

In addition to being fairer, the First Amendment may require that coercers are only assigned legal penalties when their coercive actions are also unlawful. See *State v. Robertson*, 649 P.2d 569, 589-90 (1982) (striking down Oregon’s coercion law as overly broad because it allowed individuals to be convicted of coercion for causing others to fear the disclosure of discreditable assertions about them, and thus allowed individuals to be criminally convicted for constitutionally protected expression). For an overview of the constitutional (expression) implications of the criminal coercion laws, see Kent Greenawalt, *Criminal Coercion and Freedom of Speech*, 78 NW. U. L. REV. 1081 (1984).

153. See Comment, *Coercion, Blackmail, and the Limits of Protected Speech*, 131 U. PA. L. REV. 1469, 1473-74 (1983) (providing a similar example involving threats made to a tavern owner and reaching similar conclusions).

154. See, e.g., MODEL PENAL CODE § 2.09 (2006) (declaring that the defense of duress will not be available to defendants who recklessly place themselves in a coercive situation or to female defendants who act on the commands of their husbands).

155. See generally 3 THEODORE KHEEL, LABOR LAW § 10.05(5)(a)-(b) (LexisNexis 2002) (1964) (stressing that employers can be found to have “coerced” employees by acting in any way that, given the totality of the circumstances, “economically dependent” workers would feel that they had no choice but to do what their employer was asking them to do).

156. 29 U.S.C. § 158(a)(1) (2000).

157. NLRB v. *Gissel Packing Co.*, 395 U.S. 575, 618 (1969). See generally Alan Story, *Employer Speech, Union Representation Elections, and the First Amendment*, 16 BERKELEY J. EMP. & LAB. L. 356 (1995) (providing a critical analysis of the interpretive framework that courts and the NLRB use to interpret 29 U.S.C. § 158(c)); Shawn J. Larsen-Bright, Note, *Free Speech and the NLRB’s Laboratory Conditions Doctrine*, 77 N.Y.U. L. REV. 204 (2002) (reviewing the doctrine used by the NLRB for interpreting

## 2007] ON MOCK FUNERALS, BANNERS, AND GIANT RAT BALLOONS 1649

employers only act coercively if they act in such a way that indicates that, if employees do not comply with the employers' demands, the employees will either suffer some injury or forfeit some benefit to their employment status or working conditions.<sup>158</sup> A central premise of § 8 of the NLRA is that workers have a right to be free from having to make such choices.<sup>159</sup> Therefore, the § 8(a)(1) definition of coercion focuses on preventing workers from being threatened with a harm that they have a legal right to avoid.

In sum, the key elements of legal coercion are: (1) the making of a demand that (2) forces another person to choose between (a) agreeing to that demand or (b) sustaining some injury or loss that the person has a legitimate right to avoid, such that (3) the person has no reasonable choice but to give in to the demand.<sup>160</sup> Thus, a union secondary protest is only coercive when, (1) with the intent of forcing a secondary employer to stop doing business with a primary employer, a union (2) causes or threatens to cause some person harm that (3) the individual has a legal right to avoid, and (4) is so substantial that no reasonable person would be able to ignore the union's demands. The next section will discuss the advantages of this test.

#### IV. THE COERCION TEST BETTER CLARIFIES THE MEANING OF SECTION 8(b)(4)(ii)(B) AND PROTECTS UNIONS' FREE SPEECH RIGHTS

The two prongs of the coercion test will give unions a better idea than the picketing test of what types of protests are prohibited and will also do a better job limiting the ban to truly coercive protest tactics. The coercion test would find that a union violates § 8(b)(4)(ii)(B) only when the union inflicts or threatens to inflict a harm that (1) is so substantial that no reasonable person would be able to resist the union's demands, and (2) the allegedly coerced individual has a right to avoid.

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§ 8(a)(1) and arguing that this doctrine places unconstitutional restrictions on employer speech during labor organizing campaigns).

158. KHEEL, *supra* note 155, § 10.05(5)(b). Section 8(b)(1)(A), which forbids unions from coercing employees into exercising their organizing rights, 29 U.S.C. § 158(b)(1), is considered to be the analogue to § 8(a)(1) is interpreted similarly. *Id.* § 12.07[2].

159. *See* 29 U.S.C. § 151 (2000) (noting that one reason Congress enacted the NLRA was because it recognized the inequality of bargaining power between employees and employers and felt that workers needed legal protection of their right to organize).

160. *See supra* notes 147-154 and accompanying text (explaining the use of the term "coercion" in law, the essential elements of the term, and its purpose and effect).

The coercion test more clearly articulates what makes a union secondary protest illegal. The first prong of the coercion test shifts the inquiry of whether a union protest is coercive to the perspective of a reasonable person. Thus, to determine whether a given protest tactic is illegal under the coercion test, unions simply need to ask whether a reasonable person would find it so harmful or intimidating that they would have no choice but to give in to the union's demands.<sup>161</sup> Though reasonable minds sometimes differ, this is a much easier inquiry than the question of whether a judge will find that a particular protest tactic constitutes picketing.<sup>162</sup> The second prong also provides greater clarity by tying the definition of coercion to the question of whether the alleged victim had a right to avoid the harm with which the individual was threatened. The second prong provides that unions can only be found to have staged an illegal secondary protest if they acted illegally or in such a way that would give the secondary employer a legal right of action.<sup>163</sup> In other words, unions can consult the well-defined bodies of criminal and tort law in their jurisdiction to get a good idea of the legality of their proposed secondary protest tactics.

Both prongs of the coercion test also ensure that § 8(b)(4)(ii)(B) prohibits only constitutionally-unprotected conduct.<sup>164</sup> As explained in Part I, the Supreme Court's justification for the constitutionality of the secondary boycott ban is that it bans only those forms of protest where "the conduct element rather than the particular idea being expressed . . . provides the most persuasive deterrent to third persons about to enter a [secondary] business establishment."<sup>165</sup> But the picketing test fails to limit the secondary boycott ban to such forms of protest.<sup>166</sup> Rather, as demonstrated in Part II, the picketing test allows unions to be punished in some situations where the idea being

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161. See *supra* Part III (describing the legal definition of coercion, the coercion test, and the application of the coercion test to employers and unions).

162. Cf. *supra* Part II.A (describing the lack of consensus about the precise elements that constitute picketing and what effect should be given to a finding that a given union secondary protest amounts to picketing).

163. See *supra* Part III (discussing how most criminal coercion laws find coercion only if the alleged coercer has acted or threatened to act in an independently unlawful manner).

164. See *infra* notes 165-175 and accompanying text (criticizing how the picketing test bans constitutionally protected expression and stating how the coercion test focuses on truly illegal conduct).

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

166. See *supra* Part II.B (describing how union secondary boycotts are communicative conduct undertaken to convey a particular message that is likely to be understood and should thus be given constitutional protection, and how the picketing test is overbroad and not narrowly tailored).

## 2007] ON MOCK FUNERALS, BANNERS, AND GIANT RAT BALLOONS 1651

expressed is the most persuasive element of the protest.<sup>167</sup> For example, because some judges believe that the mere congregation of union members in front of a place of business constitutes picketing, the picketing test would find a § 8(b)(4)(ii)(B) violation where a handful of union members silently held up a sign that said, “Labor Dispute—Shame on [Name of Secondary Employer]!”<sup>168</sup> Few reasonable people would feel too intimidated to enter a place of business just because four or five people were standing outside holding a banner, absent evidence that the union members were acting or speaking in an intimidating manner. Thus, if bannering is a persuasive protest tactic, it must be because of the expression on the banner, and not the conduct of the people holding it.<sup>169</sup> In other words, the picketing test sanctions the prohibition of some constitutionally protected communicative conduct.<sup>170</sup>

In contrast, because the first prong of the coercion test focuses on overcoming the will of the protest’s target, it would prohibit only those forms of protest where the conduct element is truly more persuasive than the communicative element.<sup>171</sup> Application of the coercion test to the mock funeral, rat balloon, and bannering cases will demonstrate this point. On their own, it is doubtful that the presence of a handful of union members holding up a sign, a handful of workers marching around in a faux funeral procession, or a giant rat balloon with a cigar in its mouth would force a reasonable person to refrain from entering a secondary employer’s place of business, for none of these forms of protest pose any harm or threat of harm to potential customers.<sup>172</sup> Nor do they cause or threaten to cause the

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167. *See id.* (critiquing the logic behind the picketing test and demonstrating how the picketing test fails to exempt mock funerals, rat balloons, and banners from the secondary boycott ban, despite the fact that these forms of protest are not inherently devoid of First Amendment protections).

168. *See supra* note 140 and accompanying text (describing the reasoning employed in the three administrative law judge decisions that found bannering to violate the secondary boycott ban).

169. *Cf. supra* note 165 and accompanying text (justifying the constitutionality of the secondary boycott ban by alleging that it only bans non-communicative conduct, that is, conduct that seeks to induce action through intimidation rather than reasoned persuasion).

170. *See supra* notes 143-144 and accompanying text (concluding that the forms of protest banned by the picketing test that should receive First Amendment protection).

171. *See supra* Part III (crafting the coercion test to forbid secondary protests one where the union’s behavior poses such a substantial harm or threat of harm that no reasonable person would feel free to ignore it).

172. *See supra* notes 1-5, 24-26 and accompanying text (explaining that the union members participating in and accompanying the mock funeral, rat balloons, and bannering did not engage in any violent or confrontational conduct, and that the protest tactics themselves were also peaceful and non-intimidating).

secondary employer harm, for they do not directly interfere with the secondary employer's business.<sup>173</sup> One could imagine a situation where the union employers holding the banner, marching in the funeral, or standing around the rat balloon physically blocked the secondary employer's entrance, or shouted in such an intimidating tone of voice or with such threatening words that reasonable potential customers would turn back in fear.<sup>174</sup> But absent those circumstances, the coercion test would find that mock funerals, rat balloons, and banners do not constitute illegal secondary boycotts because they fail the first prong of the test—they would not overcome the will of the reasonable observer.<sup>175</sup>

The second prong of the coercion test—the requirement that the allegedly coerced individual has a legitimate right to avoid the harm threatened by the union—also makes the coercion test better equipped than the picketing test to solve the constitutional concerns raised by § 8(b)(4)(ii)(B). One of the most difficult questions posed by the secondary boycott ban is whether the act of inducing a secondary consumer boycott is sufficient, on its own, to violate the provision.<sup>176</sup> Under the picketing test, the answer to this question is: only if the consumer boycott was brought about by picketing.<sup>177</sup> That answer is unsatisfying for both unions and secondary employers. On the one hand, it is possible to imagine unions inducing a consumer boycott through the peaceful dissemination of truthful information but being punished because the information was contained on a picket sign. On the other hand, one could imagine incredibly intimidating protests that might not constitute picketing but would scare away customers and cause serious damage to the secondary

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173. *Id.*

174. *Cf., e.g.,* Serv. & Maint. Employees Union Local 399 and William J. Burns Int'l Detective Agency, 136 N.L.R.B. 431, 432-33 (1962) (describing how union members physically blocked access to the entrance to a secondary employer's place of business).

175. *Accord Sheet Metal Workers D.C. Circuit*, No. 06-1028, slip op. at 18 (D.C. Cir. June 19, 2007) (holding that although the NLRB "would have us believe . . . the mock funeral 'forced' patrons to 'cross a death march' in order to get to the Hospital, as if the horrors of Bataan in 1942 were being reenacted in front of the Hospital," the protest tactic was not the type of protest "by which a person of ordinary fortitude would be intimidated"); *cf.* Part III (declaring that the coercion test bans only those protest activities that would overcome the will of a reasonable person by subjecting that person to a substantial harm or injury that the person has a right to avoid).

176. *See supra* notes 73-77 and accompanying text (describing how secondary union protests used to be automatically illegal when they induced a consumer boycott and explaining why this policy proved unworkable).

177. *See supra* notes 75-82 and accompanying text (explaining that courts were concerned that picketing was persuasive because of its actions, not its communication).

## 2007] ON MOCK FUNERALS, BANNERS, AND GIANT RAT BALLOONS 1653

employer's business. In other words, the picketing test has the potential to be overinclusive and underinclusive. The coercion test provides a better solution to this problem; it would find that the inducement of a secondary consumer boycott violates § 8(b)(4)(ii)(B) only where the employer has a legitimate right to be free from that type of consumer boycott.<sup>178</sup> Thus, where a consumer boycott is induced by coercion or the dissemination of false information, the protest is illegal because secondary employers have a right to be free from such harm.<sup>179</sup> But, where unions induce a boycott through the peaceful distribution of truthful information, no illegitimate harm has been inflicted and no illegal action has been taken.<sup>180</sup> This is a more just result for both unions and secondary employers because it outlaws only secondary boycotts that the employer has a right to avoid and the unions have no right to initiate.<sup>181</sup> It is also more consistent with First Amendment, since the Supreme Court has clearly stated that speech aimed at inducing consumer boycotts may be constitutionally protected.<sup>182</sup>

Some may criticize the coercion test for undercutting the purpose of the secondary boycott ban: protecting neutral employers from being dragged into other parties' labor disputes.<sup>183</sup> After all, an employer who has a giant rat balloon standing vigil outside its place of business for months on end certainly will not feel like it is being treated as a "neutral." But such is the price of living in a democratic society.<sup>184</sup> While Congress has the right to protect neutral employers from being *coerced* into other parties' labor disputes, it does not have

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178. See *supra* note 149 (defining the second prong of the coercion test).

179. See *supra* note 154 and accompanying text (arguing that individuals only have a legitimate right to be free from harms caused by criminal, tortious, or otherwise illegal conduct).

180. *Id.*

181. Cf. *supra* Part III (arguing that it is only fair to find coercion when Person A overcomes the will of Person B by threatening a harm that Person B has a right to avoid).

182. See *supra* notes 111-115 and accompanying text (summarizing the holding in *NAACP v. Claiborne Hardware*, 458 U.S. 886 (1982)).

183. See *supra* note 34 and accompanying text (explaining that Congress enacted § 8(b)(4)(ii)(B) to prevent the spread of industrial strife outside of the union-primary employer context).

184. Cf., e.g., *Boos v. Barry*, 485 U.S. 312, 322 (1988) ("As a general matter, we have indicated that in public debate our own citizens must tolerate insulting, and even outrageous, speech in order to provide adequate breathing space to the freedoms protected by the First Amendment." (internal quotation marks omitted)). *But see Hill v. Colorado*, 530 U.S. 703, 717-19 (2000) (balancing abortion protestors' First Amendment rights against the interest of observers in being left alone, but limiting this holding to situations where local governments do not *prohibit* protests but merely restrict how close protestors can get to their targeted audience).

the right to take away unions' freedom of speech in the process.<sup>185</sup> Because the coercion test interpretation of § 8(b)(4)(ii)(B) is necessary to bring the scope of that provision within the mandates of the First Amendment,<sup>186</sup> neutral employers will have to live with any incidental inconveniences that it sanctions.

#### CONCLUSION

Staging a mock funeral outside a hospital may be distasteful. Sticking an employer's name on a giant rat balloon may be childish. But, the First Amendment allows Americans to be distasteful and childish in expressing their views.<sup>187</sup> They just cannot use force or other intimidating conduct and still claim First Amendment protection.<sup>188</sup> Courts and the NLRB should thus interpret § 8(b)(4)(ii)(B) of the NLRA as banning solely those union secondary protests that inflict or threaten to inflict a harm that (a) the secondary employer has a legal right to avoid, and (b) is so substantial that no reasonable person would be able to ignore the union's demands. Such a rule will serve the government's interest in protecting neutral employers from being forced into labor disputes not of their own making, while at the same time protecting unions' First Amendment rights and providing them with a clear test for when their protest actions will lose constitutional protection.

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185. *Cf.* *Texas v. Johnson*, 491 U.S. 397, 407 (1989) (stating that there must be an important governmental interest that is unrelated to the suppression of free speech to justify limitations on First Amendment freedoms).

186. *See supra* Parts II.B, IV (highlighting the ways in which the picketing test fails to exempt all constitutionally protected speech from the scope of § 8(b)(4)(ii)(B) and demonstrating why the coercion test would solve these problems).

187. *See, e.g.*, *Cohen v. California*, 403 U.S. 15, 25 (1971) (pointing out that "one man's vulgarity is another's lyric").

188. *See* *Virginia v. Black*, 538 U.S. 343, 359-60 (2002) (noting that the First Amendment does not protect "true threats").