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Beyond Unions, Notwithstanding Labor Law

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INTRODUCTION

What is the relationship between group rights and a healthy democracy? What role should law play in supporting, regulating, or suppressing groups that challenge the economic and political status quo, and in amplifying or suppressing their communication with the polity? These are large questions, and they are vital to developing a new frame for labor rights. Labor unionism and the labor law regime created by the National Labor Relations Act of 1935 (NLRA)[1]—once core elements of the nation's answers to these questions—now inspire contempt and vitriol rather than confidence. Courts, employers, and the public no longer embrace the Act's collectivist premise that law must protect workers' rights to join

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1. National Labor Relations Act of 1935 (NLRA), 29 U.S.C. §§ 151–169 (2012).

together to advocate for better wages and working conditions.[2] This lack of support for the fundamental values underlying the law has contributed to a labor law jurisprudence that is fundamentally hostile to group rights.[3] The National Labor Relations Board (NLRB or Board) has been sidelined by attacks—on its composition, enforcement strategies, and rulemaking abilities.[4] The labor law itself has been transformed into a weapon limiting group power rather than supporting it.[5] Employment law increasingly confers protection only on individuals, stifling efforts to characterize violations of legal rights as group harms.[6]

A strong labor movement is critical to achieving a more egalitarian distribution of wealth. As the NLRA's statement of Findings and Policies proclaimed, the employment relationship is characterized by an "inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association."[7] By protecting the right of individual workers to combine with one another, the law established American labor unions as a countervailing source of economic power, helping to channel a

2. *See* William R. Corbett, *"The More Things Change, . . .": Reflections on the Stasis of Labor Law in the United States*, 56 VILL. L. REV. 227, 243 (2011); Ellen Dannin, *NLRA Values, Labor Values, American Values*, 26 BERKELEY J. EMP. & LAB. L. 223, 246 (2005); Cynthia L. Estlund, *The Ossification of American Labor Law*, 102 COLUM. L. REV. 1527, 1530 (2002); Wilma B. Liebman, *Decline and Disenchantment: Reflections on the Aging of the National Labor Relations Board*, 28 BERKELEY J. EMP. & LAB. L. 569, 572 (2007).

3. *See* James J. Brudney, *Reflections on Group Action and the Law of the Workplace*, 74 TEX. L. REV. 1563, 1572–80 (1996).

4. *See* NLRB v. Enter. Leasing Co. Se., 722 F.3d 609, 660 (4th Cir. 2013) (finding President Obama's recess appointments of three NLRB members invalid); NLRB v. New Vista Nursing & Rehab., 719 F.3d 203, 221 (3d Cir. 2013) (finding President Obama's recess appointment of NLRB member Craig Becker invalid); Noel Canning v. NLRB, 705 F.3d 490, 499 (D.C. Cir. 2013) (holding that President Obama's recess appointments of three NLRB members on January 4, 2012, were invalid), *cert. granted*, 133 S. Ct. 2861 (June 24, 2013) (No. 12-1281). These decisions call into question the validity of decisions made by the NLRB in all cases decided since January of 2012. In addition, a recent case involving a challenge to Acting General Counsel Lafe Solomon's appointment raises questions about the validity of cases in which Solomon has delegated his authority to Regional Directors to initiate suits for injunctive relief against employers in federal court. *See* Hooks v. Kitsap Tenant Support Servs., Inc., No. C-13-5470, slip op. at 3–4 (W.D. Wash. Aug. 13, 2013) (finding Solomon's appointment pursuant to the Federal Vacancies Reform Act invalid). Finally, even the Board's efforts to engage in rulemaking regarding notice posting have been struck down by the circuit courts that have addressed the question to date. *See* Chamber of Commerce of U.S. v. NLRB, 721 F.3d 152, 154, 161 (4th Cir. 2013) (finding that the NLRA limits the NLRB to a reactive role); Nat'l Ass'n of Mfrs. v. NLRB, 717 F.3d 947, 958–59 (D.C. Cir. 2013) (finding that Board's notice-posting rule contravened employers' First Amendment speech rights). *See generally* James J. Brudney, *Isolated and Politicized: The NLRB's Uncertain Future*, 26 COMP. LAB. L. & POL'Y J. 221 (2005) (explaining how the politicization of the appointment process for new NLRB members and congressional gridlock on labor law reform have hobbled the NLRB's capacity to respond to modern workplace trends).

5. *See* JAMES B. ATLESON, VALUES AND ASSUMPTIONS IN AMERICAN LABOR LAW 171–80 (1983); Karl E. Klare, *Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness, 1937–1941*, 62 MINN. L. REV. 265, 267 (1978).

6. *See* Marion Crain & Pauline T. Kim, *A Holistic Approach to Teaching Work Law*, 58 ST. LOUIS U. L.J. 7, 8–9 (2013).

7. NLRA § 1, 29 U.S.C. § 151 (2012).

larger share of corporate profits to workers.[8] Unions served as a vehicle for worker voice and political influence, facilitating democratic self-governance at the local, state, and national levels. They lobbied for worker-friendly legislation and campaigned for political candidates whose platforms promised law and policy reforms that would benefit workers. They were largely responsible for lifting significant segments of the working poor into the middle classes.[9] The downstream effects of a declining labor law and an enfeebled labor movement are now visible everywhere. Rising income inequality[10] and a muted voice for workers in the political sphere undermine our democratic system of government.[11]

Nevertheless, efforts by progressive unions and worker advocacy groups to reframe workplace organizing around issues with political salience and to develop new legal strategies seem promising.[12] Some of these mobilization efforts mirror pre-NLRA worker organizing, crossing workplace, industry, and geographical boundaries, and connecting economic issues with political and social justice. Consider Fast Food Forward, a protest organized during the spring and summer of 2013 to challenge low wages in the fast-food industry.[13] The protest has rippled

8. Marion G. Crain & Ken Matheny, *Unionism, Law, and the Collective Struggle for Economic Justice*, *in* WORKING AND LIVING IN THE SHADOW OF ECONOMIC FRAGILITY 101 (Marion Crain & Michael Sherraden eds., 2014); *see also* JOHN KENNETH GALBRAITH, AMERICAN CAPITALISM: THE CONCEPT OF COUNTERVAILING POWER (1952) (describing concept of countervailing power); Tali Kristal, *The Capitalist Machine: Computerization, Workers' Power, and the Decline in Labor's Share Within U.S. Industries*, 78 AM. SOC. REV. 361, 377 (2011) (finding that waning unionization is partially responsible for the drop in workers' share of corporate profits).

9. Crain & Matheny, *supra* note 8.

10. In a widely cited study, Bruce Western and Jake Rosenfeld found that hourly wage inequality increased by over 40% between 1973 and 2007—at the same time that union density and influence was precipitously declining. Bruce Western & Jake Rosenfeld, *Unions, Norms, and the Rise in U.S. Wage Inequality*, 76 AM. SOC. REV. 513, 513 (2011). During this period, private sector union membership dropped from 34% to 8% for men and from 16% to 6% for women, which Western and Rosenfeld concluded accounted for between one-third and one-fifth of the growth in wage inequality. *Id.* at 514. Research by others confirmed these findings. *See* Rudy Fichtenbaum, *Do Unions Affect Labor's Share of Income: Evidence Using Panel Data*, 70 AM. J. ECON. & SOC. 784, 784 (2011) (finding that the decline in labor union density explains approximately 29% of the decline in the share of income to workers); Lawrence Mishel, *Unions, Inequality, and Faltering Middle-Class Wages*, 342 ECON. POL'Y INST. 1, 2 (2012), *available at* http://www.epi.org/publication/ib342-unions-inequality-faltering-middle-class (reporting that union decline between 1978 and 2011 explained about 75% of the increased wage gap between white- and blue-collar men, and more than 20% of the increased wage gap between high school- and college-educated men).

11. *See* Catherine L. Fisk, *Law and the Evolving Shape of Labor: Narratives of Expansion and Retrenchment*, 8 LAW, CULTURE & HUMAN. 1, 11 (2012), *available at* http://ssrn.com/abstract=2102676 (examining ripple effects of labor law and unionism's decline, including encroachments on the base of democratic political power, a regressive immigration policy, and an employment law regime that is susceptible to manipulation by management lawyers to exploit workers).

12. *See, e.g.*, Janice Fine, *Worker Centers: Organizing Communities at the Edge of the Dream*, 50 N.Y.L. SCH. L. REV. 417, 418–19 (2005–2006); Alan Hyde, *New Institutions for Worker Representation in the United States: Theoretical Issues*, 50 N.Y.L. SCH. L. REV. 385, 401–02 (2005–2006); Jim Pope, *Next Wave Organizing and the Shift to a New Paradigm of Labor Law*, 50 N.Y.L. SCH. L. REV. 515, 515–17 (2005–2006).

13. *See* Steven Greenhouse, *Fighting Back Against Wretched Wages*, N.Y. TIMES, July 28, 2013, at

across the country and now extends to workers in retail sectors; its demands include both political and workplace reforms.[14] But the legal frames within which these groups operate inevitably cabin their efforts, limiting their ability to accomplish enduring results. And if they are too effective in achieving concrete reforms, they risk a Catch-22: they are categorized as labor unions and disciplined by the labor law regime.[15]

In this Article, we ask what vehicles for worker advocacy and representation at a collective level are most likely to support a healthy democracy, and (notwithstanding the NLRA) what legal architecture will nurture them. Our answer to the first question is "many mechanisms." The best hope for a revived labor movement appears to lie with new actors such as workers' centers, community and occupational groups, and identity caucuses that can work in partnerships with established unions; class action plaintiffs' firms dedicated to enforcing workplace rights; and government agencies and attorneys general. The experience of these groups with law thus far is instructive because it signals hostility to group rights beyond labor law. Accordingly, reforming labor law will not be sufficient. A bolder approach is necessary. We argue that more robust constitutional protection for group action in its many forms is essential to create breathing space for worker mobilization. That protection can and should be founded upon the First Amendment freedom of assembly. Relying on a vigorous body of First Amendment scholarship that emphasizes the role that assembly rights have played in our constitutional tradition,[16] we offer a preliminary sketch

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SR7. The protesters' goals include raising the federal and state minimum wage and indexing it to the cost of living in the future, recognizing and enforcing the right to join a union without suffering retaliation for doing so, and ending "wage theft" through the use of payroll debit cards in lieu of paychecks (debit cards sometimes require workers to pay a fee in order to access their wages). *See* Steven Greenhouse, *A Day's Strike Seeks to Raise Fast-Food Pay*, N.Y. TIMES. Aug. 1, 2013, at A1.

14. Ben Penn, *Fast Food, Retail Strikes Erupt in 60 Cities: Thousands Seek $15 an Hour, Union Rights*, Daily Lab. Rep. (BNA) No. 168, at A-13 (Aug. 29, 2013) (describing demands made by workers on picket lines and rallies outside McDonald's, Burger King, Wendy's, Macy's, and Sears, and citing resistance from the National Retail Federation and the National Restaurant Association).

15. *See, e.g.*, Steven Greenhouse, *Labor Union to Ease Walmart Picketing*, N.Y. TIMES, Feb. 1, 2013, at B1 (describing picketing at Walmart by OUR Walmart group on Black Friday in November 2012 as raising potential issues under NLRA section 8(b)(7), which regulates "blackmail picketing" for organizational or recognitional purposes by "labor organizations"); Stephen Lee, *Worker Centers Push Back Against Allegations of Being Union 'Front Groups,'* Daily Lab. Rep. (BNA) No. 156, at A-13 (Aug. 13, 2013) (describing efforts of Congress and the Center for Union Facts to categorize informal advocacy groups, workers' centers, and other workers' rights groups as "labor organizations" subject to the reporting and disclosure obligations imposed by the NLRA).

16. *See, e.g.*, JOHN D. INAZU, LIBERTY'S REFUGE: THE FORGOTTEN FREEDOM OF ASSEMBLY 1–7 (2012); Tabatha Abu El-Haj, *Changing the People: Legal Regulation and American Democracy*, 86 N.Y.U. L. REV. 1, 42, 68 (2011) [hereinafter Abu El-Haj, *Changing the People*]; Tabatha Abu El-Haj, *The Neglected Right of Assembly*, 56 UCLA L. REV. 543, 543–47 (2009) [hereinafter Abu El-Haj, *The Neglected Right of Assembly*]; Susan Frelich Appleton, *Liberty's Forgotten Refugees? Engendering Assembly*, 89 WASH. U. L. REV. 1423, 1428–29 (2012); Ashutosh A. Bhagwat, *Assembly Resurrected*, 91 TEX. L. REV. 351, 351–52 (2012) [hereinafter Bhagwat, *Assembly Resurrected*] (reviewing INAZU, *supra*); Ashutosh A. Bhagwat, *Associational Speech*, 120 YALE L.J. 978, 980–82 (2011) [hereinafter Bhagwat, *Associational Speech*]; Ashutosh A. Bhagwat, *Liberty's Refuge, or the Refuge of Scoundrels?: The Limits of the Right of*

of how reframing labor rights as assembly rights might expand legal protections for labor unions and other worker advocacy efforts, and shore up democracy in the process.[17]

The argument proceeds in four parts. Part I treads ground familiar to labor scholars, describing the role that judicial hostility to group action has played in cabining group rights in the labor law context. Part II describes the new vehicles for collective worker activism that have developed to fill the gaps left by the decline of conventional unions, and assesses the law's response to their strategies. We explain how law has been hostile to collective action by workers even where unions and labor law are not involved. This hostility is manifested most starkly in a recent series of decisions from the Supreme Court narrowing the availability of class claims by workers in workplace-based litigation and arbitration. Because class claims may play a critical role in the formation of group identity, these developments stifle nascent forms of worker activism. Part III argues that a new legal frame is essential to support group rights, and looks to constitutional law theory for inspiration. We find a promising avenue in a revitalized First Amendment right of assembly. Part III also discusses the implications of this reframing, explaining why the new frame is vital to a healthy democracy. Part IV briefly outlines how such a frame might alter the existing labor law regime.

I. LABOR UNIONISM AND THE LABOR LAW FRAME

During the nineteenth and early twentieth centuries, courts displayed open hostility toward labor unions and labor organizing. Unions were characterized as semi-outlaw organizations that threatened production and the market order, and later became associated in the judicial mind with violence and anarchy.[18] Common

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Assembly, 89 WASH. U. L. REV. 1381, 1381–82 (2012) [hereinafter Bhagwat, *Liberty's Refuge, or the Refuge of Scoundrels?*]; Richard A. Epstein, *Forgotten No More*, ENGAGE, Mar. 2012, at 138, 138–41 (reviewing INAZU, *supra*); John D. Inazu, *Factions for the Rest of Us*, 89 WASH. U. L. REV. 1435, 1436 (2012) [hereinafter Inazu, *Factions for the Rest of Us*]; John D. Inazu, *The Forgotten Freedom of Assembly*, 84 TUL. L. REV. 565, 566–67 (2010) [hereinafter Inazu, *The Forgotten Freedom of Assembly*]; John D. Inazu, *Virtual Assembly*, 98 CORNELL L. REV. 1093, 1115–17 (2013) [hereinafter Inazu, *Virtual Assembly*]; Baylen J. Linnekin, *"Tavern Talk" and the Origins of the Assembly Clause: Tracing the First Amendment's Assembly Clause Back to Its Roots in Colonial Taverns*, 39 HASTINGS CONST. L.Q. 593, 593–95 (2012); Gregory P. Magarian, *Entering* Liberty's Refuge *(Some Assembly Required)*, 89 WASH. U. L. REV. 1375, 1375–76 (2012); Michael W. McConnell, *Freedom by Association*, FIRST THINGS, Aug.–Sept. 2012, at 39, 41; Robert K. Vischer, *How Necessary Is the Right of Assembly?*, 89 WASH. U. L. REV. 1403, 1409 (2012); Timothy Zick, *Recovering the Assembly Clause*, 91 TEX. L. REV. 375, 375–77 (2012) (reviewing INAZU, *supra*). Labor unions and labor protests have been important sites for the development of assembly rights. *See* James Gray Pope, *Republican Moments: The Role of Direct Popular Power in the American Constitutional Order*, 139 U. PA. L. REV. 287, 330–44 (discussing the origins of the assembly clause in the labor context).

17. One of us has elsewhere undertaken a more in-depth analysis of the potential impact of a fully implemented freedom of assembly on labor picketing, boycotts, and public actions. *See* Marion Crain & John Inazu, *Re-Assembling Labor*, 2015 U. ILL. L. REV. (forthcoming).

18. *See* ATLESON, *supra* note 5, at 7–8 (discussing law's hostility and concern with the risk of "anarchy" stemming from collective action); Dianne Avery, *Images of Violence in Labor Jurisprudence: The Regulation of Picketing and Boycotts, 1894–1921*, 37 BUFF. L. REV. 1, 3–5 (1988–1989) (describing how

law courts initially used criminal conspiracy doctrine to block the formation and existence of unions, and later turned to the labor injunction and antitrust law to ban physical assemblies and recriminalize unions. Although labor's fortunes shifted with the rise of the New Deal and the enactment of legislation embracing unionism as an economic re-empowerment strategy, the rise of union power soon triggered a revolt by elites. New legislation and judicial lawmaking followed that significantly limited labor's ability to leverage labor power and appeal to the public for support. In the modern era, distrust for unions continues to shape judicial decision making in new contexts, branding unions as self-interested, manipulative, potentially violent interest groups that operate to undermine the public good.

A. A History of Union Suppression

Most labor historians describe the interaction between law and labor unionism during the nineteenth and early twentieth centuries as one of repression.[19] Although it is probably more historically accurate to visualize the dynamic between unionism and law as a continuous wavelike pattern of action and reaction,[20] the history of judicial hostility to class-based collective action in America is firmly established, dating back to the earliest years of the Republic.[21] Deeply influenced by centuries of English law, American judges characterized as per se illegal the existence of combinations by workers who sought to raise wages and reduce hours, finding the organization itself "proof of an unlawful and indictable conspiracy."[22] Workers were tried and convicted for forming combinations injurious to the public welfare.[23]

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judges came to equate union pickets and strikes with violence); William E. Forbath, *The Shaping of the American Labor Movement*, 102 HARV. L. REV. 1109, 1115–16 (1989) (discussing the courts' harshly repressive approach to the "semioutlawry" of collective action by labor unions).

19. *See, e.g.*, Leon Fink, *Labor, Liberty, and the Law: Trade Unionism and the Problem of the American Constitutional Order*, 74 J. AM. HIST. 904, 905–06 (1987); William E. Forbath, *Down by Law?: History and Prophecy About Organizing in Hard Times and a Hostile Legal Order*, *in* AUDACIOUS DEMOCRACY: LABOR, INTELLECTUALS, AND THE SOCIAL RECONSTRUCTION OF AMERICA 132, 132–36 (Steven Fraser & Joshua B. Freeman eds., 1997). *But see* Paul Moreno, *Organized Labor and American Labor Law: From Freedom of Association to Compulsory Unionism*, 28 SOC. PHIL. & POL'Y 22, 24, 51 (2008) (critiquing American labor historians' accounts of the relation between law and unionism as heavily influenced by anticapitalist bias, and arguing that unions have enjoyed favoritism in American law and depend upon government privileges for their success).

20. *See* Crain & Kim, *supra* note 6.

21. *See* Morris D. Forkosch, *The Doctrine of Criminal Conspiracy and Its Modern Application to Labor*, 40 TEX. L. REV. 303, 318–20 (1962) (discussing how the English common law viewed combinations of workers to raise wages and reduce hours of work as an unlawful conspiracy, and how this view was generally accepted in the earliest days of the American republic); *see also* 3 A DOCUMENTARY HISTORY OF AMERICAN INDUSTRIAL SOCIETY 135–41 (John R. Commons et al. eds., 1910) [hereinafter A DOCUMENTARY HISTORY] (exploring roots in English common law of conspiracy as a criminal offense); VICTORIA C. HATTAM, LABOR VISIONS AND STATE POWER: THE ORIGINS OF BUSINESS UNIONISM IN THE UNITED STATES 35 (1993) (discussing the application of criminal conspiracy law to labor societies in England).

22. Forkosch, *supra* note 21, at 319.

23. *See, e.g.*, Commonwealth v. Pullis (Philadelphia Cordwainers' Case) (Phila. Mayor's Court

By the mid-nineteenth century, however, courts began to back away from outlawing worker combinations per se, focusing instead on the workers' actions. In *Commonwealth v. Hunt*, the court developed a doctrine that distinguished an organization's objects and the means used to accomplish them.[24] So long as the object of the association was lawful, the law's only interest was in the means employed by the union.[25] Where the means were lawful, indictments would not issue; where they were unlawful or involved falsehood or force, criminal conspiracy doctrine would apply.[26]

Nevertheless, the unlawful object/means doctrine continued to vest broad discretion in judges to determine which objectives were legitimate and which were not, something judges accomplished by reference to their own social and economic philosophies.[27] In the nineteenth and early twentieth centuries, most American judges came from privileged backgrounds that made them naturally suspicious of class-based activism.[28] As a result, court decisions of this period quite consistently privileged the rights of the propertied class to the detriment of unions and workers.[29]

The rights of the propertied class eventually found constitutional purchase. For example, the Court struck down a statute prohibiting discrimination against railroad workers based on union membership, finding the law an unconstitutional invasion of liberty of contract and property rights.[30] On similar reasoning, the Court invalidated a Kansas statute prohibiting employers from requiring as a condition of employment that employees agree not to join a union (a so-called yellow-dog contract).[31] Soon thereafter, the Court blessed the yellow-dog

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1806), *reprinted in* 3 A DOCUMENTARY HISTORY, *supra* note 21, at 59. For a more detailed discussion of the case, see Walter Nelles, *The First American Labor Case*, 41 YALE L.J. 165, 192 (1931). *See also* People v. Fisher, 14 Wend. 9 (N.Y. 1835) (finding that both the existence of a combination of workers formed for the purpose of raising wages and a strike in furtherance of that goal violated a state statute prohibiting "any act" "injurious to trade or commerce"). *Fisher* is discussed in more detail in Forkosch, *supra* note 21, at 327–28.

24. Commonwealth v. Hunt, 45 Mass. (4 Met.) 111, 111 (1842).

25. *Id.* at 134.

26. *Id.*

27. *See* Forkosch, *supra* note 21, at 332.

28. Forbath, *supra* note 18, at 1129–30 (describing how the judicial elite of this period intervened in labor matters more aggressively than the judiciary of other industrialized countries in the same period).

29. *See* Ellen M. Kelman, *American Labor Law and Legal Formalism: How "Legal Logic" Shaped and Vitiated the Rights of American Workers*, 58 ST. JOHN'S L. REV. 1, 10–11 (1983) (discussing how courts prioritized property rights and redefined workers' rights as mere privileges); *see also* WILLIAM E. FORBATH, LAW AND THE SHAPING OF THE AMERICAN LABOR MOVEMENT 38, 177–87 (Harvard Univ. Press 1991) (1989) (pointing out that from 1885 to 1900, five laws prohibiting discrimination against union members were struck down in addition to other laws aimed at curbing the abuses of labor in company housing and company towns in the coal fields).

30. Adair v. United States, 208 U.S. 161, 180 (1908), *overruled in part by* Phelps Dodge Corp. v. NLRB, 313 U.S. 177 (1941).

31. Coppage v. Kansas, 236 U.S. 1, 26 (1915), *overruled in part by* Phelps Dodge Corp. v. NLRB, 313 U.S. 177 (1941).

contract,[32] equipping employers with a powerful weapon to break unions.[33] By the end of the 1920s, an estimated 1,250,000 workers had signed yellow-dog contracts.[34]

Early courts also routinely issued injunctions against labor activity, a remedy that because of its timeliness was even more effective than criminal prosecution in suppressing labor unionism.[35] Labor pickets were met with restraining orders obtained ex parte and characterized by sweeping language, including prohibitions on striking or holding union meetings.[36] Any action that survived the initial restraining order typically died at the next steps of a process that dragged out over a period of months or years.[37]

The power of the injunction to halt labor protest was dramatically demonstrated in an 1894 strike by railroad workers against the Pullman Palace Car Company. Injunctive relief by a federal district court prohibiting anyone from interfering in any way with the operation of the railroads accomplished what the intervention of the U.S. Army (acting pursuant to a presidential order) could not: a special jury found the strike leaders guilty of conspiracy and sentenced Eugene Debs (leader of the American Railway Union), three of his aides, and hundreds of strikers to jail.[38]

The judiciary equated labor union protests (particularly picketing) with violence,[39] which further contributed to the liberal use of the injunction. In *Vegelahn v. Guntner*, two workers picketed the employer's factory with the object of persuading other workers to stop work so as to halt the business.[40] The court issued an injunction to halt the picket, reasoning that the two-man "patrol" entailed a conspiracy and posed a threat of violence and intimidation.[41] The court characterized the picket as inherently intimidating and ruled it an unlawful interference with the rights of employers and employees who were not part of the dispute.[42] In a famous dissent, Justice Holmes expressed alarm at the sweeping scope of the majority's opinion and the injunction.[43] The order not only reached

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32. *See* Hitchman Coal & Coke Co. v. Mitchell, 245 U.S. 229, 261–62 (1917).

33. *See* Int'l Org., United Mine Workers of Am. v. Red Jacket Consol. Coal & Coke Co., 18 F.2d 839 (4th Cir. 1927). There, the court approved an injunction essentially barring the United Mine Workers from attempting to organize any miners in the West Virginia coal industry. *Id.* at 849–50.

34. IRVING BERNSTEIN, THE LEAN YEARS: A HISTORY OF THE AMERICAN WORKER, 1920–1933, at 200 (Haymarket Books 2010) (1969).

35. From 1880 to 1930, judges issued over 4300 injunctions against strikes, boycotts, and other concerted actions by workers. FORBATH, *supra* note 29, at 193–98.

36. BERNSTEIN, *supra* note 34, at 195–96.

37. *Id.* at 196.

38. MELVYN DUBOFSKY & FOSTER RHEA DULLES, LABOR IN AMERICA: A HISTORY 161–64 (8th ed. 2010). The Supreme Court later upheld Debs' conviction. *In re* Debs, 158 U.S. 564, 599–600 (1895).

39. Avery, *supra* note 18, at 11–13.

40. Vegelahn v. Guntner, 44 N.E. 1077, 1077 (Mass. 1896).

41. *Id.* at 1078.

42. *Id.* at 1077.

43. *See id.* at 1079–82 (Holmes, J., dissenting).

actual threats of violence, but also enjoined the defendants from trying to achieve their purpose by peaceful persuasion or argument, "although free from any threat of violence, either express[ed] or implied."[44] Justice Holmes also objected to the majority's assumption that picketing (patrolling) "necessarily carries with it a threat of bodily harm."[45]

The Court's distaste for labor picketing reached its zenith in *American Steel Foundries v. Tri-City Central Trades Council*, which involved picketing by groups of four to twelve workers in support of a strike for union recognition.[46] The pickets were accompanied by violence, and against that backdrop, the Court issued a sweeping condemnation of labor picketing, finding that "[a]ll information tendered, all arguments advanced and all persuasion used under such circumstances were intimidation."[47] Further, the Court intoned,

> It is idle to talk of peaceful communication in such a place and under such conditions. The numbers of the pickets in the groups constituted intimidation. The name "picket" indicated a militant purpose, inconsistent with peaceable persuasion. The crowds they drew made the passage of the employees to and from the place of work, one of running the gauntlet.[48]

The Court enjoined the union from posting more than one person at each entrance to the plant, and enjoined the picketers from approaching persons in groups—they were permitted to approach targets only singly.[49] Just two weeks later, the Court issued its decision in *Truax v. Corrigan*,[50] where it extended the antilabor implications of *American Steel Foundries* to condemn picketing that did not comport with its conception of "civilized" labor picketers—"a patrol of one or two well-mannered, polite workers" who sought to "dissuade workers or win recruits only by speaking in low and cultivated voices."[51]

The criminal conspiracy doctrine, the labor injunction, the yellow-dog contract, and the Supreme Court's denunciation of picketing were not the only legal developments evidencing judicial hostility toward organized labor. The 1890 Sherman Act broadly declared contracts, combinations, and conspiracies to

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44. *Id.* at 1080.

45. *Id.* Justice Holmes proceeded to express his grave doubts that two men "walking together up and down a sidewalk, and speaking to those who enter a certain shop, do necessarily and always thereby convey a threat of force." *Id.*

46. Am. Steel Foundries v. Tri-City Cent. Trades Council, 257 U.S. 184, 204–05 (1921). For an in-depth discussion of this case and how judicial imagery of workers and their public protests was inevitably violent, see Avery, *supra* note 18, at 76–96.

47. *Am. Steel Foundries*, 257 U.S. at 205.

48. *Id.*

49. *Id.* at 206–07.

50. Truax v. Corrigan, 257 U.S. 312, 328–33 (1921) (finding Arizona's interpretation of its "little Clayton Act" limiting state court jurisdiction to issue injunctions against peaceful labor picketing unconstitutional as a denial of due process and equal protection).

51. Avery, *supra* note 18, at 98 (quoting 2 HENRY F. PRINGLE, THE LIFE AND TIMES OF WILLIAM HOWARD TAFT 1035 (1939)).

restrain trade illegal.[52] In the first seven years of the Sherman Act's existence, the federal courts found that labor unions had violated the Sherman Act in twelve cases,[53] issuing injunctions and treble damage awards against strikers and boycotters who conspired to restrain interstate commerce.[54] In effect, the Sherman Act cases revived the old criminal conspiracy doctrine that treated unions as illegal combinations in restraint of trade.[55] In *Loewe v. Lawlor*, the Court cemented this impression, finding that a union's American Federation of Labor (AFL)-supported strike against a hat manufacturer, and its peaceful appeal to retailers not to handle and to customers not to patronize, violated the Sherman Act.[56] Alarmed by the efficacy of the protest and the extent of the losses sustained by the employer,[57] the Court read the Sherman Act as restraining not only combinations of capital, but also "the threat posed to the social order by the 'evils' of massed labor."[58] The Court's decision outraged union supporters, coming "dangerously close to characterizing the routine functions of any labor union as illegal."[59]

In 1914, two years after the election of President Woodrow Wilson, a Democratic Congress passed the Clayton Act.[60] Section 6 of the Act stated, among other things, that "[n]othing contained in the antitrust laws shall be construed to forbid the existence and operation of labor . . . organizations instituted for the purpose of mutual help."[61] Section 20 of the Act forbade most restraining orders and injunctions in cases involving disputes between employers and employees.[62] Samuel Gompers, founder of the AFL, declared the Clayton Act to be "the Magna Carta upon which the working people will rear their structure of industrial freedom."[63] But Gompers underestimated judicial hostility to class-based collective action and to labor unions in particular. In *Duplex Printing Press v. Deering*, the Court ruled that the Act did not apply to sympathetic strikes in aid of a

52. Sherman Antitrust Act of 1890 § 1, 15 U.S.C. § 1 (2012).

53. BERNSTEIN, *supra* note 34, at 207.

54. James Gray Pope, *The Thirteenth Amendment Versus the Commerce Clause: Labor and the Shaping of American Constitutional Law, 1921–1957*, 102 COLUM. L. REV. 1, 19–20 (2002). For a thorough discussion of the courts' interpretation of the Sherman Act in the first ten years after its passage, see William Letwin, *The First Decade of the Sherman Act: Judicial Interpretation*, 68 YALE L.J. 900 (1959).

55. DUBOFSKY & DULLES, *supra* note 38, at 164.

56. Loewe v. Lawlor, 208 U.S. 274, 292 (1908).

57. The Loewe Company alleged economic losses of $80,000, a staggering amount for the period. *Id.* at 302 n.†, at ¶ 22 (quoting complaint).

58. Avery, *supra* note 18, at 60.

59. PHILIP DRAY, THERE IS POWER IN A UNION: THE EPIC STORY OF LABOR IN AMERICA 249 (2010). As a result of the Court's ruling, the plaintiff was entitled to collect triple damages from union members as individuals, "to the point of attaching their individual bank accounts and threatening to foreclose on more than two hundred of the workers' homes." *Id.* at 249–50.

60. Clayton Act, Pub. L. No. 63-212, 38 Stat. 730 (1914) (codified as amended at 15 U.S.C. §§ 12–27 and 29 U.S.C. §§ 52–53 (2012)).

61. *Id.* § 6.

62. *Id.* § 20.

63. BERNSTEIN, *supra* note 34, at 208.

secondary boycott.[64] The union had called a strike and organized a boycott in support of its goal of unionizing the Duplex Printing Press factory in Michigan.[65] As part of the boycott, the union requested its members and members of affiliate unions not work on the printing presses that Duplex delivered in New York.[66] Despite the lack of any overt violence, the Court worried that extending the Clayton Act to protect protest by workers who were not affected in a "proximate and substantial way" by the dispute, but "merely [in] a sentimental or sympathetic[] sense," would further "a general class war."[67] Accordingly, the federal courts reclaimed the power to issue injunctions in peaceful labor disputes with effects that extended beyond the workplace that was the site of the dispute; economic pressure accomplished through the secondary boycott was inherently coercive.[68] Labor's "Magna Carta" was quashed.

Suppressing labor pickets and especially the secondary boycott had predictable effects on union power. During the 1920s, the labor movement came close to disappearing.[69] The results were equally predictable—appalling working conditions and a rapid rise in economic inequality.[70] Although most sectors of the economy experienced wage stagnation, long hours, and unsafe working conditions, perhaps the worst conditions existed in the coal fields of Kentucky, West Virginia, Ohio, and Pennsylvania. Destitution, child labor, wages below the subsistence level, and even starvation afflicted miners and their families.[71]

B. Shifting Sympathies and the Rise of the New Deal

Labor's fortunes began to shift with the enactment of the Norris-LaGuardia Act in 1932.[72] Privileged elites whose sense of justice was offended by the widespread suffering were the driving force behind the Act. As early as 1923,

64. Duplex Printing Press Co. v. Deering, 254 U.S. 443, 479 (1921), *superseded by statute*, Norris-LaGuardia Act, Pub. L. No. 72-65, 47 Stat. 70 (1932), *as recognized in* Burlington N. R.R. Co. v. Bhd. of Maint. of Way Emps., 481 U.S. 429 (1987).

65. *Id.* at 462–63.

66. *Id.* at 480.

67. *Id.* at 472.

68. *See id.* at 467–68.

69. In 1920, 19.4% of the nonagricultural workforce was unionized; by 1930, only 10.2% was unionized. BERNSTEIN, *supra* note 34, at 84. Some unions, such as the once-powerful United Mine Workers, had almost totally disappeared by the end of the decade. *Id.* at 85. By 1929, strikes were extremely rare. *Id.* at 90 (noting that by 1929, "the strike as an instrument of collective bargaining . . . had fallen into almost total disuse," and further noting that the few attempts by workers to strike usually ended in defeat).

70. For a vivid description of one example of the brutal working conditions that employees faced in the 1920s, see *id.* at 1–43, discussing the working conditions of millworkers in the South during the 1920s. Regarding inequality, see *id.* at 63–70, detailing the rise in inequality during the 1920s even as productivity greatly increased. *See also* NELSON LICHTENSTEIN, STATE OF THE UNION: A CENTURY OF AMERICAN LABOR 23 (2002) (noting the marked increase in economic inequality in the 1920s, despite a soaring increase in productivity).

71. BERNSTEIN, *supra* note 34, at 358–90 (discussing the "catastrophe" in the coal fields).

72. Norris-LaGuardia Act, 29 U.S.C. §§ 101–115 (2012).

Roscoe Pound, Dean of the Harvard Law School, proposed legislation to abolish the yellow-dog contract.[73] Distinguished lawyers warned judges that their abusive use of injunctions against workers was causing public disrespect for the courts and the law.[74] In 1930, Felix Frankfurter and Nathan Greene published an influential book detailing the courts' abuse of the labor injunction.[75] In the late 1920s, Republican Senator George Norris toured the coal mining regions of America and was dismayed at what he saw—virtual dictatorships in company towns, destitute and disabled miners who had been physically broken by brutal working conditions in the mines, exploitation practiced by the "company stores," and implacable hostility to unions.[76]

Senator Norris assembled a committee of expert advisers, including Felix Frankfurter, to draft a bill to strip federal courts of the jurisdiction to enforce yellow-dog contracts and issue injunctions in most labor disputes.[77] Because the Supreme Court on many occasions had upheld the power of Congress to define the jurisdiction of federal courts, the Act was on strong legal ground.[78] President Hoover signed the Norris-LaGuardia Act into law on March 23, 1932.[79] Section 3 of the Act stripped federal courts of the power to enforce yellow-dog contracts.[80] Section 4 prohibited federal courts from issuing injunctions involving most labor disputes.[81]

On March 4, 1933, Franklin Delano Roosevelt won a landslide election and was sworn in as the thirty-second President of the United States.[82] The country lay in ruins: fifteen million people were unemployed, twenty-five percent of the workforce; millions more were involuntarily working reduced hours; millions of men abandoned their families and trudged from one state to another in a hopeless search for work; families disintegrated; and crime, prostitution, and alcoholism rose at an alarming rate.[83] Angry workers were in a state of revolt.[84]

Roosevelt needed a labor policy. With a substantial Democratic majority in both houses,[85] the time was ripe for labor legislation. Following an initial false step with the short-lived National Industrial Recovery Act,[86] Congress passed the

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73. *Id.*
74. BERNSTEIN, *supra* note 34, at 394.
75. FELIX FRANKFURTER & NATHAN GREENE, THE LABOR INJUNCTION (1930).
76. BERNSTEIN, *supra* note 34, at 392–93.
77. *Id.* at 397–98.
78. *Id.* at 397.
79. *Id.* at 414.
80. Norris-LaGuardia Act § 3, 29 U.S.C. § 103 (2012).
81. Norris-LaGuardia Act § 4, 29 U.S.C. § 104.
82. BERNSTEIN, *supra* note 34, at 508.
83. *Id.* at 506–07 (discussing some of the devastation caused by the Great Depression).
84. *Id.* at 172–73 (discussing the resurgence of labor militancy that began in 1933).
85. *See* IRVING BERNSTEIN, THE TURBULENT YEARS: A HISTORY OF THE AMERICAN WORKER, 1933–1941, at 323 (1969) (reporting that the 1934 election gave the Democrats a majority of 45 in the Senate and 219 in the House).
86. *See* A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 551 (1935) (holding

Wagner Act in 1935.[87] Senator Robert Wagner, the NLRA's main architect and proponent, believed that affording workers freedom of association through union organizing and collective bargaining was essential to enable workers to develop agency and to inculcate the habit of participation in a democratic society.[88] Wagner penned the following justification for the legislation that bore his name:

> Under modern conditions government by the people is not so simple. Politics in the narrower sense is becoming impersonalized. People cannot all join in as they joined in the old New England town meeting. The country is too large, its problems too complex, the pace of life too rapid. For the masses of men and women the expression of the democratic impulse must be within the industries they serve—it must fall within the ambit of their daily work.
>
> That is why the struggle for a voice in industry through the processes of collective bargaining is at the heart of the struggle for the preservation of political as well as economic democracy in America. Let men become the servile pawns of their masters in the factories of the land and there will be destroyed the bone and sinew of resistance to political dictatorship.
>
> Fascism begins in industry, not in government. . . . But let men know the dignity of freedom and self-expression in their daily lives, and they will never bow to tyranny in any quarter of their national life.[89]

Wagner hoped to instill democratic values by affording workers the day-to-day experience of voice, influence, and democratic governance within the workplace, where decisions that impacted their daily lives most directly were made.[90] Critical to that experience was protection against employer retaliation for the exercise of associational rights.[91] Section 1 of the Act's statement of Findings and Policies declares an intention to promote "the exercise by workers of full freedom of association."[92] The core of the Act's protection, section 7, conferred "the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection."[93]

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that Title I of the National Recovery Act was unconstitutional in that Congress had exceeded the powers granted to it by the commerce clause of the Constitution).

87. BERNSTEIN, *supra* note 85, at 348.

88. James A. Gross, *A Long Overdue Beginning: The Promotion and Protection of Workers' Rights as Human Rights*, *in* WORKERS' RIGHTS AS HUMAN RIGHTS 1 (James A. Gross ed., 2003).

89. Robert F. Wagner, *The Ideal Industrial State—as Wagner Sees It*, N.Y. TIMES MAG., May 9, 1937, at 23.

90. *Id.*

91. Ruben J. Garcia, *Labor's Fragile Freedom of Association Post-9/11*, 8 U. PA. J. LAB. & EMP. L. 283, 288–90 (2006); Clyde W. Summers, *The Privatization of Personal Freedoms and Enrichment of Democracy: Some Lessons from Labor Law*, 1986 U. ILL. L. REV. 689, 697.

92. NLRA § 1, 29 U.S.C. § 151 (2012).

93. NLRA § 7, 29 U.S.C. § 157.

The protection afforded by the Wagner Act for concerted activity broke new ground in the embrace of group action by workers in the private sector. The Act's potential for redistributing power was never realized, however, in large part because of the Court's enduring distrust of worker activism and labor unions and its fears of the risks they posed to the propertied class.[94] Further, the Act itself as a product of political compromise was ambiguous. Importantly, its protections for association were expressly circumscribed by the economic purposes for which the Act's protections were designed: forming a labor organization, selecting a bargaining representative, negotiating a collective bargaining agreement, or engaging in "other mutual aid or protection."[95] These protections were in turn derived from the Act's two explicit objectives: to promote industrial peace by channeling widespread labor unrest (which, at the time of its enactment, posed a severe threat to commerce as well as to military readiness)[96] into the therapeutic process of collective bargaining,[97] and to equalize power between individual employees and the employer organized in the corporate form.[98] Ultimately, judicial "preoccupation with the economic function of labor law"—that is, with the goals of balancing power and promoting collective bargaining as a market mechanism—

94. *See* Klare, *supra* note 5, at 292–93 (arguing that the judiciary undermined the radical potential of the Wagner Act by importing its sense of liberal individualism and its deep suspicion of class-based collective action).

95. NLRA § 1 ("It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, *for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection*." (emphasis added)).

96. *Id.* (alluding in the Act's statement of Findings and Policies to the "industrial strife or unrest" which then "impair[ed] the interest of the public in the free flow of . . . commerce"); *see also* Ross E. Davies, *Strike Season: Protecting Labor-Management Conflict in the Age of Terror*, 93 GEO. L.J. 1783, 1795 (2005) (describing how labor unrest in this era posed a threat to military readiness).

97. MARION CRAIN ET AL., WORK LAW: CASES AND MATERIALS 21 (2d ed. 2010); *see also* H.K. Porter Co. v. NLRB, 397 U.S. 99, 103 (1970) ("The basic theme of the Act was that through collective bargaining the passions, arguments, and struggles of prior years would be channeled into constructive, open discussions leading, it was hoped, to mutual agreement.").

98. Section 1 of the Act states:

> Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions, and by restoring equality of bargaining power between employers and employees.
>
> Experience has further demonstrated that certain practices by some labor organizations, their officers, and members have the intent or the necessary effect of burdening or obstructing commerce by preventing the free flow of goods in such commerce through strikes and other forms of industrial unrest or through concerted activities which impair the interest of the public in the free flow of such commerce. The elimination of such practices is a necessary condition to the assurance of the rights herein guaranteed.

NLRA § 1.

led to the sidelining of constitutional values, both freedom of association and freedom of speech.[99]

In a series of decisions over the next several decades, the Court severely curtailed the rights of workers to deploy group action to leverage their labor power. Other scholars have analyzed these cases in detail, so there is no need to repeat that critique here.[100] Of particular note, however, were two cases that directly limited workers' economic power to act as a group, and simultaneously bowed to the rights of the propertied class. In *NLRB v. Fansteel Metallurgical Corp.*, the Court ruled that a sit-down strike by workers in response to the employer's unfair labor practices was unprotected because it infringed the employer's property rights.[101] In *NLRB v. MacKay Radio & Telegraph Co.*, the Court laid the groundwork for a severely hobbled right to strike when it stated in dicta that employers seeking to continue operations in the face of a strike motivated by economic matters had the right to hire permanent replacements for the strikers.[102] Although permanent replacement is not tantamount to discharge because strikers retain reinstatement rights for open positions once the strike ends, the practical effect is that striking workers risk losing their jobs. The *MacKay* doctrine has had an undeniably devastating impact on the power of the strike weapon.[103]

Legislative retrenchment followed. The Taft-Hartley Act of 1947 recalled the early fears of the *Duplex Printing Press* Court regarding the spread of industrial disputes and the risk of class warfare; the statute imposed significant restrictions on labor picketing and boycotts aimed at so-called secondary employers who did business with the employer that was the union's primary target.[104] In 1959, Congress responded to allegations of union abuse, racketeering, and corruption with the Landrum-Griffin Act, reining in union power and severely cabining rights to picket even against primary employers.[105] The Act, in statutory form, reified

99. Summers, *supra* note 91, at 697–98, 701.

100. *See, e.g.*, ATLESON, *supra* note 5; Klare, *supra* note 5.

101. NLRB v. Fansteel Metallurgical Corp., 306 U.S. 240, 253 (1939). In so doing, the Court ignored the workers' argument that their property rights to the job as a basic human right were also at stake. *See* Jim Pope, *Worker Lawmaking, Sit-Down Strikes, and the Shaping of American Industrial Relations, 1935–1958*, 24 LAW & HIST. REV. 45, 72 (2006).

102. NLRB v. Mackay Radio & Tel. Co., 304 U.S. 333, 345–46 (1938).

103. The doctrine has been the subject of frequent scholarly critique. *See, e.g.*, ATLESON, *supra* note 5, at 20; Julius G. Getman & F. Ray Marshall, *The Continuing Assault on the Right to Strike*, 79 TEX. L. REV. 703, 728–29 (2001); Klare, *supra* note 5, at 265; James Gray Pope, *How American Workers Lost the Right to Strike and Other Tales*, 103 MICH. L. REV. 518, 527–28 (2004).

104. Labor Management Relations (Taft-Hartley) Act of 1947, 29 U.S.C. §§ 141–197 (2012). Damages were made available against unions that violated the secondary boycott provisions, the only place in the NLRA where such a remedy exists. *See id.*; PAUL C. WEILER, GOVERNING THE WORKPLACE: THE FUTURE OF LABOR AND EMPLOYMENT LAW 269–73 (1990). Taft-Hartley also added a right to refrain from organization and concerted activities implemented through a prohibition on union restraint and coercion against those who exercised those rights, limited the categories of workers covered by the Act, and banned the closed shop, a union security device that served to entrench union power once workers elected a union. Taft-Hartley Act § 303.

105. Labor-Management Reporting and Disclosure (Landrum-Griffin) Act of 1959, 29 U.S.C.

concerns about the "blackmail" effect of picketing and its inherently coercive and intimidating nature when deployed by labor unions that had animated the Court's decisions in *American Steel Foundries* and *Truax v. Corrigan*, among other early cases.[106]

Subsequent cases further limited the scope of rights protected by section 7. Although the Act protects speech or action beyond that aimed directly at achieving union organization or recognition, there must be some nexus between the concerted activity and traditional economically oriented union activity. Employees must act concertedly, their speech or action must be self-interested and relate to traditional subjects of bargaining—wages, hours, or terms and conditions of employment—and their actions must not be so disloyal to the employer's business interests that they are not deserving of protection.[107]

C. Modern Retrenchment

In the early to mid-twentieth century, democracy was conceived as the product of the compromise of the positions of clashing interest groups; thus, group rights were protected even at the expense of individual rights and liberties.[108] By the late 1950s, however, the idea of representative government as the outcome of a group pluralist process gave way to an individual rights orientation.[109] The 1960s and 1970s brought a wave of new influences to the scene: civil rights protesters, feminists, environmental activists, and antiwar protesters, among others, became major players in the shaping of the Court's jurisprudence addressing group rights. Political theory regarding the shaping of public policy shifted in response, with important consequences for labor unions. Interest groups were seen as functioning to submerge individual voices through consensus mechanisms operating inside the groups and completely disenfranchising individuals who lacked access to interest groups.[110] Courts and

§§ 401–531 (2012). The Landrum-Griffin amendments established a bill of rights for individual union members to ensure democratic practices within the union structure, imposed financial reporting obligations on unions and labor relations consultants, imposed time limits and other restrictions on union picketing for organizational and recognition purposes, and expanded the secondary boycott prohibitions added by Taft-Hartley. *Id.*

106. *See, e.g.*, Am. Steel Foundries v. Tri-City Cent. Trades Council, 257 U.S. 184 (1921); Truax v. Corrigan, 257 U.S. 312 (1921).

107. Richard Michael Fischl, *Self, Others, and Section 7: Mutualism and Protected Protest Activities Under the National Labor Relations Act*, 89 COLUM. L. REV. 789, 796 (1989); Charles J. Morris, *NLRB Protection in the Nonunion Workplace: A Glimpse at a General Theory of Section 7 Conduct*, 137 U. PA. L. REV. 1673, 1701 (1989). For doctrinal elaboration on these limits, see generally Eastex, Inc. v. NLRB, 437 U.S. 556, 567–68 (1978) (requiring that activity be connected to workplace concerns); NLRB v. Wash. Aluminum Co., 370 U.S. 9, 14–17 (1962) (concerted activity); NLRB v. Local Union No. 1229, Int'l Bhd. of Elec. Workers, 346 U.S. 464, 472 (1953) (disloyalty limitation).

108. Reuel E. Schiller, *From Group Rights to Individual Liberties: Post-War Labor Law, Liberalism, and the Waning of Union Strength*, 20 BERKELEY J. EMP. & LAB. L. 1, 4, 11 (1999).

109. *Id.* at 4.

110. *See* Joe Soss & Lawrence R. Jacobs, *Guardianship and the New Gilded Age: Insular Politics and the Perils of Elite Rule*, *in* WORKING AND LIVING IN THE SHADOW OF ECONOMIC FRAGILITY, *supra*

Congress took on the role of protectors of individual rights against interest group politics.. Labor unions became part of the problem, illustrating all the flaws of interest groups.[111]

The conflict between group rights and individual rights was well-illustrated by a series of cases from the Board and the circuit courts in which unions sought to market themselves to workers as watchdogs for the individual statutory rights that unions' lobbying power and litigation efforts had helped to create and maintain. While endeavoring to organize a workforce, union organizers frequently discovered violations of employment law statutes, particularly the wage and hour laws.[112] When unions sought to support workers in filing group claims under workplace legislation by deploying union lawyers or financing the lawsuit, they were charged with violating section 8(b)(1) of the NLRA, which prohibits a labor organization from restraining or coercing employees in the exercise of section 7 rights, including the right to choose—or, after Taft-Hartley, not to choose—a union.[113] Union-financed group litigation was conceptualized as vote buying, likely to pressure employees who might fear forgoing individual rights if they did not vote for the union in an upcoming election.[114] In the contest between group rights and individual rights—both the rights conferred by employment law statutes and those conferred by Taft-Hartley's protection of the individual right not to engage in concerted activity—individual rights prevailed.

The early courts' conceptualization of unions as conspiracies enjoyed another revival during the 1980s and beyond, as federal courts demonstrated their willingness to apply the Racketeer-Influenced and Corrupt Organizations (RICO) Act[115] to union activities that pose a threat to enterprises involved in interstate commerce.[116] RICO's powerful criminal and civil remedial provisions render it a significant weapon in employers' antiunion arsenal. It has been deployed to penalize unions that authorize strikes or other concerted actions that are characterized by violence, even when strikes have involved relatively minor misconduct.[117] RICO has also been utilized to block union organizing drives and

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note 8, at 157 (explaining how democracy has functioned in America to insulate governing elites from popular pressure, removing issues to less visible and accountable arenas, suppressing ad hoc protest, and facilitating the management of nonelites).

111. Schiller, *supra* note 108, at 58.

112. *See, e.g.*, Freund Baking Co. v. NLRB, 165 F.3d 928, 930 (D.C. Cir. 1999) (overtime pay violations).

113. NLRA § 8(b)(1), 29 U.S.C. § 158(b)(1) (2012).

114. *See Freund Baking Co.*, 165 F.3d at 930; Nestle Ice Cream Co. v. NLRB, 46 F.3d 578, 580 (6th Cir. 1995). *See generally* Catherine L. Fisk, *Union Lawyers and Employment Law*, 23 BERKELEY J. EMP. & LAB. L. 57, 80–89 (2002) (discussing how labor law constrains union efforts to advance workers' rights through employment law litigation).

115. Racketeer-Influenced and Corrupt Organizations (RICO) Act, 18 U.S.C. §§ 1961–1968 (2012).

116. Scott D. Miller, *RICO's Application to Labor's Illegal Strike Conduct: Reconciling RICO with the NLRA*, 11 HAMLINE J. PUB. L. & POL'Y 233, 241 (1990).

117. Getman & Marshall, *supra* note 103, at 728–29; Benjamin Levin, *Blue-Collar Crime: Conspiracy, Organized Labor, and the Anti-Union Civil RICO Claim*, 75 ALB. L. REV. 559, 562 (2011–2012).

union-run peaceful corporate campaigns, raising significant First Amendment free speech concerns.[118] And even when unions ultimately prevail in civil RICO litigation, employers nonetheless benefit from publicity portraying unions as "an extortive and dangerous conspiracy," harkening back to the early nineteenth century cases that depicted unions as dangerous conspiracies and characterized collective action "as a crime against the free market and hence against the public."[119] The judiciary's skepticism regarding collective action by labor unions was not limited to the RICO context or to the Supreme Court. Jim Brudney studied over 1200 appellate court decisions issuing between 1986 and 1993, and concluded that they displayed a profound "distaste" for the concept of collective action.[120]

Ultimately, such negative portrayals of unions have shaped public opinion, delegitimating unions in the public mind.[121] Union density has declined dramatically to its present level of just above eleven percent.[122] While the hostile judicial and legislative treatment of labor is not the only force behind the decline, it is a significant one, particularly because it shapes public perception so directly. Broad public support for labor law and unionism with its ideology of collectivism has declined since the New Deal era,[123] and labor law is seen as "out of sync" with a legal architecture premised on individual rights.[124] NLRA values have been described even by scholars sympathetic to unionism as "un-American."[125] Union

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For a sample of such cases, see *id.* at n.23 (citing representative cases brought in the 1990s and as recently as 2011).

118. *See* James J. Brudney, *Collateral Conflict: Employer Claims of RICO Extortion Against Union Comprehensive Campaigns*, 83 S. CAL. L. REV. 731, 736, 782–83 (2010); Charlotte Garden, *Labor Values Are First Amendment Values: Why Union Comprehensive Campaigns Are Protected Speech*, 79 FORDHAM L. REV. 2617, 2617 (2011); Levin, *supra* note 117, at 562.

119. Levin, *supra* note 117, at 577. Levin draws parallels between the reaction to the Haymarket Square pipe bombing incident and a 2008 RICO claim brought by Cintas against the Teamsters Union, arguing that both scenarios frame unionization as a criminal conspiracy and cast unionized workers as "a harmful special interest group" whose concerns are antithetical to capitalism and "whose actions endangered the public good." *Id.* at 563, 573.

120. Brudney, *supra* note 3, at 1591.

121. Levin, *supra* note 117, at 631.

122. *Union Members Summary*, BUREAU LAB. STAT., www.bls.gov/news.release/union2.nr0.htm (last modified Jan. 24, 2014).

123. Stephen F. Befort, *Labor and Employment Law at the Millennium: A Historical Review and Critical Assessment*, 43 B.C. L. REV. 351, 375–77 (2002) (indicating that unionism is a poor fit with rugged individualism of American folklore); Thomas C. Kohler, *Civic Virtue at Work: Unions as Seedbeds of Civic Virtues*, 36 B.C. L. REV. 279, 297–302 (1995); Gillian Lester, *Beyond Collective Bargaining: Modern Unions as Agents of Social Solidarity*, *in* THE IDEA OF LABOUR LAW 329, 335 (Brian Langille & Guy Davidov eds., 2011); Levin, *supra* note 117, at 628–30 (discussing public perception of unions and belief that unionized workers are lazy).

124. *See* Corbett, *supra* note 2, at 243; Estlund, *supra* note 2, at 1530.

125. Dannin, *supra* note 2; Reinhold Fahlbeck, *The Demise of Collective Bargaining in the USA: Reflections on the Un-American Character of American Labor Law*, 15 BERKELEY J. EMP. & LAB. L. 307, 320–21 (1994); Ken Matheny & Marion Crain, *Disloyal Workers and the "Un-American" Labor Law*, 82 N.C. L. REV. 1705, 1705 (2004).

This hostility to the right to organize is uniquely American. The right to organize has been

organizing is seen as disloyal to the employer's business interests, a threat to the state, and incompatible with the American dream of individual advancement.[126]

II. ALTERNATIVE FORMS OF COLLECTIVE ACTION

As traditional unionism and the collective bargaining regime have spiraled into decline, worker activism has found new outlets. Individual workers have continued to come together to protest workplace conditions, new groups have taken up the challenge of representing them, and progressive unions have developed new strategies for exerting leverage. These new forms of representation include community organizations and social justice groups, often supported by or working in tandem with progressive unions, as well as groups that are fundamentally different from unions in their organization and philosophy, such as workers' centers, mutual aid associations, government organizations, and public interest law firms devoted to advancing workers' rights through class litigation. While these new forms of representation may escape the negative reputation that labor unionism has acquired, they face significant obstacles. The union bureaucratic machine may inspire animus, but it is also well positioned to achieve structural reform.[127]

Alternative forms of worker advocacy face the twin challenges of sustaining themselves over time without a stable membership base and a source of revenue, and risking that if they act too much like unions and are too effective in

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endorsed internationally as a basic human right. *See, e.g.*, Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III), arts. 20(1) & 23(4) (Dec. 10, 1948), *available at* http://www.un.org/en/documents/udhr/index.shtml#a20 (strongly affirming the freedom of association to all persons, including the right of workers to associate to form organizations to protect and promote their rights at work); *see also* Int'l Labour Org. Convention 87, arts. 2 and 12 (Jul. 9, 1948), *available at* http://www.ilo.org/dyn/normlex/en/f?p=normlexpub:12100:0::no::P12100_instrument_id:312232. For arguments by American labor scholars that the right to organize should be conceptualized as a fundamental human right, see Janice R. Bellace, *The Future of Employee Representation in America: Enabling Freedom of Association in the Workplace in Changing Times Through Statutory Reform*, 5 U. PA. J. LAB. & EMP. L. 1, 28–30 (2002) (arguing that all employees should be covered by a statute that gives all employees freedom of association to gain representation at the workplace); Lance Compa, *Workers' Freedom of Association in the United States: The Gap Between Ideals and Practice*, *in* WORKERS' RIGHTS AS HUMAN RIGHTS, *supra* note 88, at 23, 52 (arguing that human rights, such as freedom of association, "cannot flourish where workers' rights are not enforced"); David L. Gregory, *The Right to Unionize as a Fundamental Human and Civil Right*, 9 MISS. C. L. REV. 135, 137 (1988) (arguing that "[t]he right to unionize, when understood as an aspect of the right to associate, is certainly a fundamental human right"); Gross, *supra* note 88, at 1; James A. Gross, *Workers Rights as Human Rights: Wagner Act Values and Moral Choices*, 4 U. PA. J. LAB. & EMP. L. 479, 492 (2002).

126. Matheny & Crain, *supra* note 125, at 1720–26. Notably, the Bush Administration's Education Secretary characterized the National Education Association as a "terrorist organization," making clear the Administration's distrust and fear of unionism. *Id.* at 1725.

127. *See* Katherine Van Wezel Stone, *The Legacy of Industrial Pluralism: The Tension Between Individual Employment Rights and the New Deal Collective Bargaining System*, 59 U. CHI. L. REV. 575, 593, 624, 637–38 (1992) (explaining unique role played by unions and collective bargaining in workplace governance and arguing that the collective bargaining system is superior to individual employment protections because it enhances voice, improves productivity, allows for flexibility and fosters efficiency, enhances enforcement, and offers more stability).

institutionalizing themselves, they will be categorized as labor organizations and subjected to the restrictions imposed by the labor laws.[128] In this Part, we discuss how law's hostility to group formation and activism by workers appears not to be limited to labor unionism or to the labor law regime. Instead, such hostility is inspired by groups, strategies, or activism that challenge the existing economic order, raising the specter of class warfare and disruption.

A. Worker Representation and Advocacy Beyond Unions

Union decline has not spelled the end of group action by workers. First, workers have continued to come together informally to discuss and critique workplace-related issues, sometimes without thought of organizing a union at all. The expanding popularity of social media platforms, including Facebook, MySpace, LinkedIn, and Twitter, has created new avenues for consciousness-raising around workplace issues, raising familiar questions in a high-tech context about the scope of concerted activity undertaken "for mutual aid or protection" that is protected under the NLRA.[129] Conversations between workers on Facebook have prompted some employers to take prophylactic steps designed to suppress the dialogue before it begins, including enactment of company policies that limit worker speech perceived as damaging to the company's reputation or harmful to worker morale, and retaliatory action intended to quell any group activity that may result.[130] The NLRB has now evolved a jurisprudence under the NLRA protecting concerted activity by workers that occurs through virtual dialogue,[131] and policing the contours of employer policies that would tend to chill the exercise of protected section 7 rights.[132] This doctrine is in question, however, with the attacks on the Board's composition.[133]

Second, new forms of unionism are emerging to fill the spaces left by the retreat of established unions and those attributable to coverage gaps in the NLRA. The Freelancers' Union, for example, functions as a kind of mutual aid association representing independent contractors and freelancers by advocating for legislative reform on their behalf and offering affordable health insurance.[134] The National

128. *See* David Rosenfeld, *Worker Centers: Emerging Labor Organizations—Until They Confront the National Labor Relations Act*, 27 BERKELEY J. EMP. & LAB. L. 469, 471 (2006) (explaining risks that workers' centers or advocacy groups may be characterized as "labor organizations" and thus subject to the NLRA's restrictions on picketing and secondary pressure activities).

129. NLRA § 7, 29 U.S.C. § 157 (2012).

130. *See infra* notes 133 & 134.

131. *See, e.g.*, Design Tech. Grp., LLC, 359 N.L.R.B. No. 96, at 1–2 (Apr. 19, 2013); Hispanics United of Buffalo, Inc., 359 N.L.R.B. No. 37, at 1–4 (Dec. 14, 2012); Karl Knauz Motors, Inc., 358 N.L.R.B. No. 164, at 3–9 (Sept. 28, 2012).

132. *See, e.g.*, Dish Network Corp., 359 N.L.R.B. No. 108, at 5 (Apr. 30, 2013) (finding that employer's Social Media Policy unlawfully restricted employees' section 7 rights where it prohibited employees from making "disparaging or defamatory comments" about the employer or making negative comments online during "Company time").

133. *See supra* text accompanying note 4.

134. Steven Greenhouse, *Going It Alone, Together*, N.Y. TIMES, Mar. 24, 2013, at BU1.

Day Laborer Organizing Network,[135] the National Domestic Worker Alliance,[136] and the New York Taxi Workers' Alliance[137] developed to advance the concerns of workers who are either not covered by the NLRA or who have been left behind by traditional unions. Traditional union leaders express openness to these new forms of representation and willingness to work with them.[138]

Third, a host of new organizations have taken up the task of representing workers. Community-based membership organizations known as workers' centers have sprung up at a grassroots level to organize and educate workers about their rights.[139] Workers' centers are nonprofit organizations dedicated to training workers to be leaders and activists, transforming them from victims of workplace exploitation while simultaneously improving their wages and working conditions.[140] Workers' centers have been particularly effective in immigrant communities, where workers tend to live in close proximity and work in similar service sector jobs that exploit their undocumented status and unfamiliarity with U.S. law and the English language.[141] Some workers' centers receive support from established unions, including structural support (affiliation) and financial support.[142] Identity caucuses have also played important roles in improving the situation of workers, both within the workplace and outside of it. Identity caucuses are organized around common interests that arise out of social identities that transcend the workplace, but have important impacts inside it, particularly on wages, discriminatory treatment, and harassment.[143] Identity caucuses advance the

135. *See* NAT'L DAY LABORER ORGANIZING NETWORK, http://www.ndlon.org/en/about-us (last visited Jan. 10, 2014).

136. *See About Us*, NAT'L DOMESTIC WORKERS ALLIANCE, http://www.domesticworkers.org/who-we-are (last visited Jan. 10, 2014). The Domestic Workers Alliance has approximately 10,000 members. *Id.*

137. *See Mission & History*, N.Y. TAXI WORKERS ALLIANCE, http://www.nytwa.org/about/mission-history (last visited Jan. 10, 2014). The Taxi Workers Alliance has approximately 17,000 members. *Id.*

138. *See, e.g.*, Michael Bologna, *Trumka Calls on Labor Movement to Adapt to New Models of Representation*, Daily Lab. Rep. (BNA) No. 45, at A-12 (Mar. 7, 2013).

139. As some commentators have put it, worker centers increasingly constitute a "back door" approach to union organizing. *See* Kris Maher, *Worker Centers Offer a Backdoor Approach to Union Organizing*, WALL ST. J. (July 24, 2013, 6:53 PM), http://online.wsj.com/news/articles/SB10001424127887324144304578622050818960988 (describing how workers' centers, often backed by unions, avoid the NLRA's restrictions because they lack ongoing bargaining relationships with employers).

140. *See* Jennifer Gordon, *We Make the Road by Walking: Immigrant Workers, the Workplace Project, and the Struggle for Social Change*, 30 HARV. C.R.-C.L. L. REV. 407, 409 (1995).

141. *See generally* JANICE FINE, WORKER CENTERS: ORGANIZING COMMUNITIES AT THE EDGE OF THE DREAM (2006); JENNIFER GORDON, SUBURBAN SWEATSHOPS: THE FIGHT FOR IMMIGRANT RIGHTS (2005).

142. Maher, *supra* note 139. The United Food and Commercial Workers International Union (UFCW), for example, has publicly vowed to support worker activism through OUR Walmart. Rhonda Smith, *UFCW Leaders Vow to Continue Supporting Wal-Mart Workers in Their Push for Change*, Daily Lab. Rep. (BNA) No. 157, at C-1 (Aug. 14, 2013).

143. *See generally* Matthew W. Finkin, *The Road Not Taken: Some Thoughts on Nonmajority Employee Representation*, 69 CHI.-KENT L. REV. 195, 207–11 (1993).

interests of their constituencies by exerting pressure directly against the employer[144] as well as against unions.[145]

Perhaps most promising are less formal group actions that have bound workers together across workplaces, cities, and even industries. Unions have often played a supporting role in these mobilization efforts, but the goals of the groups do not necessarily include worksite-by-worksite collective bargaining. In May 2006, for example, workers joined students and immigrant rights organizations in a one-day strike and public rallies designed to communicate the vital role that immigrant workers play in our economy, and to influence the legislative debate over immigration policy.[146] In November 2012, an organization of Walmart workers calling themselves OUR Walmart (the Organization United for Respect at Walmart) mounted a national public protest in the form of a picket line on Black Friday (the day after Thanksgiving, widely known to be the heaviest shopping day of the year), protesting working conditions and wages at Walmart operations throughout the nation.[147] And during the spring and summer of 2013, fast-food workers in New York City, Detroit, Seattle, Chicago, and elsewhere mounted a series of one-day strikes and rallies on public streets and sidewalks outside of fast-food restaurants advocating for increased wages, dubbed "Fast Food Forward."[148] The protest soon gathered momentum, spreading to other cities and expanding to retail establishments dependent on low-wage labor.[149]

B. Challenges for Nonunion Groups

While all these groups may serve as important vehicles for worker voice, they face the vexing challenge of how to leverage worker power to accomplish lasting change. Some organizations have effectively assumed the role once played by labor unions in sectors where unions are weak or absent, using legal strategies and securing leverage by appealing to government agencies for enforcement; they then "negotiate" agreements with employers who are frequent violators of the labor and employment laws, using waivers of prosecution for previous violations to secure assent.[150] Examples of such organizations include Restaurant Opportunities

144. Michael J. Yelnosky, *Title VII, Mediation, and Collective Action*, 1999 U. ILL. L. REV. 583, 615–17 (1999).

145. Ruben J. Garcia, *New Voices at Work: Race and Gender Identity Caucuses in the U.S. Labor Movement*, 54 HASTINGS L.J. 79, 102 (2002).

146. Randal C. Archibold, *Immigrants Take to U.S. Streets in Show of Strength*, N.Y. TIMES, May 2, 2006, at A1; Anita Hamilton, *A Day Without Immigrants: Making a Statement*, TIME (May 1, 2006), http://content.time.com/time/nation/article/0,8599,1189899,00.html.

147. Steven Greenhouse & Stephanie Clifford, *Protests Backed by Union Get Wal-Mart's Attention*, N.Y. TIMES, Nov. 19, 2012, at B1.

148. *See* supra note 13.

149. Steven Greenhouse, *In New Wave of Walkouts, Fast-Food Strikers Gain Momentum*, N.Y. TIMES, Aug. 30, 2013, at B3; *see also* Ben Penn, *About 2,200 Fast Food, Retail Workers Strike for Raise in Pay in Seven Cities This Week*, Daily Lab. Rep. Online (BNA) No. 148, at A-13 (Aug. 1, 2013) (noting that workers at retail establishments such as Sears, Macy's and Dollar Tree had joined the protests).

150. Cynthia Estlund, *Rebuilding the Law of the Workplace in an Era of Self-Regulation*, 105 COLUM.

Center United (ROC United) and OUR Walmart, which focus on public advocacy, rallies, and negotiated settlements.[151] Community benefits agreements negotiated by labor and community groups are another mechanism by which workers' advocates seek to leverage group power to institutionalize gains, including living wages and benefits agreements; they are often combined with card check provisions and neutrality pledges to smooth the way for union organizing in the future.[152] Even these arrangements, however, do not institutionalize a system of worker representation that will survive the particular advocacy campaign or issue that produced the settlement.[153]

Moreover, these new groups also must confront pressure to cabin their activities by defining them as "labor organizations"[154] and so bring them within the sweep of the labor laws, including the reporting and disclosure obligations created by the Labor Management Reporting and Disclosure Act, and the NLRA's restrictions on economic pressure.[155] The latter restrictions are threefold. First, labor unions that undertake picketing activities with the goal of organizing workers or pressuring employers to recognize and bargain with the union are subject to the Act's restrictions on primary picketing.[156] Second, the Act bars

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L. REV. 319, 373 (2005) (suggesting that independent monitors at least "multiply regulatory eyes within the workplace," afford workers "not a collective voice, [but] at least a chance of exercising their individual voices," and assist with "formalizing and protecting employee whistleblowing"); Alan Hyde, *Who Speaks for the Working Poor?: A Preliminary Look at the Emerging Tetralogy of Representation of Low-Wage Service Workers*, 13 CORNELL J.L. & PUB. POL'Y 599, 603–06 (2004) (describing the arrangements and questioning their efficacy); *see also* Matthew T. Bodie, *The Potential for State Labor Law: The New York Greengrocer Code of Conduct*, 21 HOFSTRA LAB. & EMP. L. J. 183, 194–200 (2003) (discussing New York City Greengrocer Code of Conduct establishing minimum terms and conditions for employment of predominantly Korean workforce; grocers who signed the Code were immune from prosecution for past state law violations, but not for future violations, and the signatories agreed to future monitoring by an independent company).

151. *See* Ben Penn, *AFL-CIO, SEIU Leaders Call for Innovation to Transform and Restore Labor Movement*, Daily Lab. Rep. (BNA) No. 119, at A-8 (June 20, 2013).

152. Katherine Stone & Scott Cummings, *Labor Activism in Local Politics: From CBAs to 'CBAs,' in* THE IDEA OF LABOUR LAW, *supra* note 123, at 273, 289.

153. Hyde, *supra* note 150, at 613; *see also* Alan Hyde, *New Institutions for Worker Representation in the United States: Theoretical Issues*, 50 N.Y.L. SCH. L. REV. 385, 401–02 (2005–2006) (expanding on this concern). It is also possible that the existence of such organizations and the settlements they obtain may actually block nascent union organizing activity. Hyde, *supra* note 150, at 605.

154. *See* NLRA § 2(5), 29 U.S.C. § 152(5) (2012) (defining "labor organization" for purposes of NLRA application).

155. In 2013, House Republicans and the Center for Union Facts, an antiunion business group, began pressing claims that worker centers are "fronts" for labor unions and thus should be governed by the labor laws. *See* Lee, *supra* note 15. In July, two House Republicans asked the Labor Department to investigate these questions. *Id.* The Center for Union Facts identifies on its website a list of what it dubs union "front groups," including OUR Walmart, ROC, Working America, and Fast Food Forward—some of the most effective nonunion worker advocacy groups. *Id.*; *see Text "FRONTGROUP" to . . .*, LABORPAINS, http://laborpains.org/2013/08/13/text-frontgroup-to (last visited Jan. 10, 2014).

156. *See* NLRA § 8(b)(7), 29 U.S.C. § 158(b)(7). Section 8(b)(7) was aimed at so-called "blackmail picketing" by uncertified labor unions (those which have not won a Board-supervised election and been certified as the bargaining representative of the employees) seeking to represent

union pressure on so-called "secondary" employers—those with whom the union does not have an immediate dispute as to wages or working conditions, but who do business with the employer with whom the union does have a dispute (the "primary" employer).[157] Third, the Act bans union activities that potentially coerce or interfere with individuals' decisions to join a union, including union-sponsored litigation challenging the employer's violation of workers' rights in the time frame adjacent to an election.[158]

As a result of these restrictions, groups committed to advancing workers' rights have been careful to identify themselves as anything other than "labor organizations," the statutory term of art that triggers application of the law.[159] If they are successful in institutionalizing themselves and begin to look and act too much like unions, conservative forces will succeed in categorizing advocacy groups and workers' centers as "labor organizations," and they will be subject to the straitjacket imposed by labor law.[160] And in a classic Catch-22, workers who participate in these protests risk termination or discipline unless they are able to claim protection for concerted activity under NLRA section 7.[161] To be sheltered by section 7, the protesters must ensure that their demands are workplace related and self-interested, effectively cabining any larger political agendas.[162] The result is

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workers and/or to pressure employers to bargain. *See* Int'l Hod Carriers Bldg. & Common Laborers Union of Am., Local 840, 135 N.L.R.B. 1153, 1157 (1962). It prohibits unions that have lost an election from picketing, bars picketing by a rival union where another union already represents the workers, and limits the duration of nonviolent picketing by uncertified unions that fall into neither category to "a reasonable period not to exceed 30 days," unless the picketing union files an election petition within that period. *See* NLRA § 8(b)(7)(C). In order to file an election petition, the union must in turn be able to show sufficient employee interest, defined by Board rules as authorization cards or petitions signed by thirty percent of the workers in the potential bargaining unit. 29 C.F.R. § 101.18 (2014).

157. *See* NLRA § 8(b)(4). Section 8(b)(4) was motivated by the practice of top-down organizing, whereby powerful labor unions pressured employers to deal with the union in situations where the union was unable to organize workers by appealing directly to them. *See id.* § 8(b)(4)(i)(C). Section 8(b)(4) as enacted, however, focuses primarily on the impact of union pressure on so-called "neutrals"—the employers other than the primary employers who are impacted by the pressure. *See id.* § 8(b)(4)(i)(B). Consistent with the NLRA's industrial peace goal, section 8(b)(4) seeks to cabin the dispute and to limit its ripple effects on the wider economy, including others with whom the primary does business. *See* NLRB v. Retail Store Emps. Union, Local 1001, 447 U.S. 607, 613–14 (1980). *Cf.* WEILER, *supra* note 104, at 269–73 (discussing rationale behind section 8(b)(4) and critiquing its application).

158. NLRA § 8(b)(7). *See generally* Freund Baking Co. v. NLRB, 165 F.3d 928, 935 (D.C. Cir. 1999); Nestle Ice Cream Co. v. NLRB, 46 F.3d 578, 584 (6th Cir. 1995); Fisk, *supra* note 114.

159. *See* NLRA § 2(5) (defining labor organization as one existing for the purpose of dealing with an employer); NLRB v. Cabot Carbon Co., 360 U.S. 203, 213 (1959) (finding employee participation committees "labor organizations" if they "deal with" the employer concerning grievances); Rosenfeld, *supra* note 128, at 471.

160. *See, e.g.*, Maher, *supra* note 139 (describing how workers' centers, often backed by unions, avoid the NLRA's restrictions because they lack ongoing bargaining relationships with employers).

161. *See* NLRA § 7, 29 U.S.C. § 157.

162. *See id.*

more organic (but perhaps less effective) forms of organizing that struggle to institutionalize themselves beyond the time period of the current advocacy effort.

Progressive unions have tried to help by supporting worker advocacy while remaining sufficiently in the background to avoid liability under the NLRA and exposure to injunctions and damage awards. Unions have not always been successful in their efforts to remain in the background, however. For example, the Black Friday protest by OUR Walmart provoked a potential blackmail picketing charge under section 8(b)(7) of the NLRA because the group was loosely affiliated with the United Food and Commercial Workers Union.[163] Last summer's Fast Food Forward protests—potentially the most radical because they appear to be both nationwide and class-wide—should be seen as conceptually distinct from union activities because the coalition of workers is not a traditional "labor organization," nor does it exist to "deal with" a single employer.[164] Ironically, even though it is difficult to predict how the protests might concretely alter the wages or working conditions in the workplaces where the protesters labor, the group and its activities are nevertheless vulnerable to suppression under the labor law regime because the Service Employees International Union has provided funding and organizational support.[165]

C. Class Claims As Collective Action

Class litigation has proved to be a critical tool for both progressive unions and new worker advocacy groups. Particularly in the post-union era, class action employment law claims offer an opportunity to engage in consciousness raising, build a collective identity, leverage power, and institutionalize concrete reforms. Progressive unions have capitalized on employment law violations discovered during organizing campaigns, aiming to (as Ben Sachs eloquently put it) "galvanize nascent forms of collective organization, insulate workers' collective efforts from employer interference, and set in motion dynamics that can generate successive forms of collective activity that go beyond demands for statutory rights."[166] He explains:

> By diagnosing an employer's payment of low wages, or her differential treatment of employees based on race, as an injustice practiced on

163. *See* Greenhouse, *supra* note 15 (explaining that the NLRB indicated its intent to file charges, which the group was able to forestall only by denying any intent to organize Walmart and agreeing to forego picketing at Walmart for a period of sixty days).

164. *See* NLRA § 2(5); NLRB v. Ne. Univ., 601 F.2d 1208, 1216 n.9 (1st Cir. 1979) (finding National Association of Working Women 9to5 not a labor organization). 9to5 later affiliated with the Service Employees International Union as Local 925. *See* KIM MOODY, AN INJURY TO ALL: THE DECLINE OF AMERICAN UNIONISM 278–79 (1988) (describing establishment of Boston chapter of 9to5 as an SEIU local in 1975, and subsequent creation of District 925 by the SEIU with staff drawn from 9to5).

165. *See* Penn, *supra* note 149.

166. Benjamin I. Sachs, *Employment Law as Labor Law*, 29 CARDOZO L. REV. 2685, 2728 (2008).

> workers collectively . . . employment laws can be instrumental to constructing for workers a shared experience of unjust treatment. As such, successful use of employment law to frame oppressive working conditions as collective injustices can increase the salience of a collective identity based around possession of employment rights.[167]

Workers' centers have also profitably combined litigation with instruction on workers' rights, language skills, community education, and the provision of legal services to build strong coalitions, sometimes paving the way for the formation of traditional unions.[168] Even unsuccessful litigation efforts may raise public consciousness and inspire group cohesion and, ultimately, political action; it is the process of struggle—in which litigation is emblematic—that mobilizes constituencies.[169] Litigation itself is an "act of resistance" that stimulates debate, educates the public, generates media coverage, and challenges existing norms and values.[170] Finally, some class litigation presents concrete opportunities to forge coalitions with other movements, coalitions from which more permanent alliances may emerge.[171]

These efforts to deploy litigation in service of worker mobilization, however, have been plagued by difficulties. First, hostility toward unions and labor organizing continues to erect hurdles. Although group litigation is a classic example of protected concerted activity,[172] it may raise concerns under NLRA section 8(b)(1) as a form of restraint or coercion if a labor organization provides funding for the litigation or uses it as an entering wedge in an organizing campaign.[173] Consider, for example, class litigation claims under federal or state wage and hour laws. The opt-in character of wage and hour collective action

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167. *Id.*

168. *See* Scott L. Cummings & Ingrid V. Eagly, *A Critical Reflection on Law and Organizing*, 48 UCLA L. REV. 443, 470 (2001); Scott Cummings & Ingrid Eagly, *Lawyers, Unite*, LEGAL AFF., Mar.–Apr. 2005, at 63, 65 (reviewing GORDON, *supra* note 141) (describing how the Long Island-based Workplace Project utilized litigation and picketing to advance workers' rights).

169. *See* Jules Lobel, *Losers, Fools & Prophets: Justice as Struggle*, 80 CORNELL L. REV. 1331, 1332–33 (1995) (describing how unsuccessful test cases can inspire political action); Douglas NeJaime, *Winning Through Losing*, 96 IOWA L. REV. 941, 954 (2011) (explaining that litigation can spur beneficial indirect effects, including enhancing fundraising, legitimating a cause, and influencing other relevant actors).

170. *See* STAUGHTON LYND, THE FIGHT AGAINST SHUTDOWNS: YOUNGSTOWN'S STEEL MILL CLOSINGS 187–89 (1982) (describing the power of unsuccessful challenges to the steel mill closings in Youngstown, Ohio, in the larger quest for community social justice); Winnie Chau, Note, *Something Old, Something New, Something Borrowed, Something Blue and a Silver Sixpence for Her Shoe:* Dukes v. Wal-Mart *& Sex Discrimination Class Actions*, 12 CARDOZO J.L. & GENDER 969, 994 (2006) (suggesting that the widespread publicity associated with the Walmart case is more likely to spur broad-based change than a financial recovery because of its public consciousness-raising and mobilization effect).

171. *See* Charlotte Garden, *Union Made: Labor's Litigation for Social Change*, 88 TUL. L. REV. 193, 194–95 (2013).

172. *See* NLRB v. Moss Planing Mill Co., 206 F.2d 557, 560 (4th Cir. 1953); M.F.A. Milling Co., 26 N.L.R.B. 614, 626 (1940).

173. *See* NLRA § 8(b)(1), 29 U.S.C. § 158(b)(1) (2012); *see supra* notes 114–116 & accompanying text.

litigation under the federal law poses significant challenges for plaintiffs' lawyers. Building a substantial class would be easier if lawyers could work in tandem with union organizers, and lawyers might be more motivated to take the cases if unions were able to provide financial assistance. This kind of collaboration would also further the consciousness-raising goals of the union, and would make it easier to persuade workers to support the union by demonstrating its efficacy. Unfortunately, partnerships between plaintiffs' lawyers and union organizers will be viewed by the courts and the Board as an unlawful pre-election benefit if conferred during the critical period prior to a union election, and could result in a decision to set aside an election win for the union.[174] Courts worry that employees will perceive the significant benefit of union-funded legal assistance as conditioned upon a positive vote for the union in the NLRB election, and characterize such a benefit as coercive because it is likely to interfere with reasoned employee free choice.[175] Further, at least one court reduced fees sought by a class action plaintiffs' firm where union involvement was present, and imposed sanctions on the firm for protracting the litigation.[176]

Where unions and organizing are not directly involved, different but equally serious concerns arise. Suppose that a union refers workers to a plaintiffs' firm, but otherwise does not involve itself in the litigation. One significant concern is whether, in the absence of active mobilizing efforts that extend beyond the litigation sphere, class actions engage workers as active agents in resisting their own exploitation, or on the other hand, function to co-opt leaders and reinforce a victim-orientation.[177] A second worry is whether litigation can produce the kind of enduring and forward-looking changes that unionization and collective bargaining

174. *See, e.g.*, Freund Baking Co. v. NLRB, 165 F.3d 928, 935 (D.C. Cir. 1999); Nestle Ice Cream Co. v. NLRB, 46 F.3d 578, 584 (6th Cir. 1995); *see generally* Fisk, *supra* note 114, at 93 (discussing legal barriers to union role in enforcing employment statutes in nonunion workplaces); Michael Carlin, Note, *Are Union-Financed Legal Services Provided Prior to a Representation Election an Impermissible Grant of Benefit?: An Analysis of* Nestle*,* Novotel*, and* Freund, 79 N.C. L. REV. 551, 552 (2001) (discussing cases and proposing middle ground).

175. *See* Carlin, *supra* note 174, at 553.

176. Orozco v. Borenstein, No. CV-11-02305-PHX-FJM (D. Ariz. Aug. 28, 2013). As part of its organizing efforts at Bada Bing Bakery, the United Food and Commercial Workers Union had spearheaded a class action alleging state and federal wage and hour claim. In the successful wage and hour litigation, the district court judge reduced the plaintiffs' attorneys' fee award by over $100,000, and imposed sanctions on the law firm, commenting that "there is clear evidence in this case that plaintiff's counsel, working with the UFCW, used this case to unionize rather than to defend employees' [Fair Labor Standards Act] rights, and in the process unreasonably and vexatiously protracted this litigation." *Id.*

177. Jennifer Gordon raised this concern in her early article reflecting on the experience of the Workplace Project, an early worker center serving low-wage immigrants in Long Island. *See* Gordon, *supra* note 140, at 437–40 (observing that the Project's decision to provide legal services for individual workers inadvertently undermined larger organizing goals by conditioning reliance on lawyers and co-opting potential leaders); *see also* Ann C. Hodges, *Avoiding Legal Seduction: Reinvigorating the Labor Movement to Balance Corporate Power*, 94 MARQ. L. REV. 889, 903–05 (2011) (expressing concern about the influence that lawyers and law have wielded over the labor movement, particularly in litigation contexts where litigation is part of a larger advocacy campaign).

offer once the litigation is concluded; some have argued persuasively that class actions' primary function is to serve as vehicles for financial recoveries for lawyers.[178]

Finally, a recent series of decisions from the Supreme Court heralds an era of increasing hostility toward collective litigation by workers (and others) that extends beyond the union-organizing context. That hostility has taken new form in the context of class or collective action litigation under work law statutes.[179] In *Wal-Mart Stores v. Dukes*, the Court dismissed a claim by a nationwide class of women workers at Walmart who alleged that a corporate policy resulted in discriminatory pay and promotion decisions.[180] The Court found that the proposed class did not satisfy the commonality requirement of Rule 23(a) of the Federal Rules of Civil Procedure.[181] Some courts have begun to apply the *Dukes* rationale in other workplace contexts, including wage and hour claims under the Fair Labor Standards Act (FLSA),[182] notwithstanding its different standard for collective claims.[183]

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178. *See* Michael Selmi, *The Price of Discrimination: The Nature of Class Action Employment Discrimination and Its Effects*, 81 TEX. L. REV. 1249, 1297 (2003) (arguing that class litigation is focused on remedying past discrimination rather than altering the workplace structure to prevent future discrimination, and observing that incentive structures for attorneys and diversity task forces are poorly aligned with the goal of furthering forward-looking change).

179. Nantiya Ruan, *Facilitating Wage Theft: How Courts Use Procedural Rules to Undermine Substantive Rights of Low-Wage Workers*, 63 VAND. L. REV. 727, 759–60 (2010). Judicial hostility toward group action in the litigation context is not limited to labor and employment law cases. *See* Arthur R. Miller, *Simplified Pleading, Meaningful Days in Court, and Trials on the Merits: Reflections on the Deformation of Federal Civil Procedure*, 88 N.Y.U. L. REV. 286, 318 (2013) (examining recent Supreme Court jurisprudence on federal civil procedure and concluding that it makes aggregation of individual claims in public fora very difficult, reducing the plaintiffs' choice to one "between collective access to the judicial system or no access at all"); Judith Resnik, *Fairness in Numbers: A Comment on* AT&T v. Concepcion*,* Wal-Mart v. Dukes*, and* Turner v. Rogers, 125 HARV. L. REV. 78, 145–46 (2011) (explaining how resistance to class action opportunities has spanned the economic spectrum, from litigation efforts by Legal Services on behalf of the poor to securities litigation).

180. Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2545–46 (2011).

181. *Id.* at 2550–57.

182. *See, e.g.*, Wang v. Chinese Daily News, Inc., 737 F.3d 538, 541 (9th Cir. 2013) (vacating original opinion certifying California state law wage and hour claims as a class action and FLSA claims as a collective action following remand by Supreme Court and instruction to reconsider the decision in light of *Dukes*); Ealy v. Pinkerton Gov't Servs., Inc., 514 F. App'x. 299, 311 (4th Cir. 2013) (applying *Dukes* to an FLSA claim); MacGregor v. Farmers Ins. Exch., No. 2:10-CV-03088, 2011 WL 2981466, at *4 (D.S.C. July 22, 2011) (finding *Dukes* treatment of Rule 23's commonality requirement "illuminating" at the conditional certification stage in an FLSA collective action suit); *see also* Forrand v. Fed. Express Corp., No. CV 08-1360 DSF (PJWx), 2013 WL 1793951, at *1 (N.D. Cal. Apr. 25, 2013) (refusing to certify class under California wage and hour law, citing *Dukes*). Not all courts have accepted this reasoning, however. *See, e.g.*, Creely v. HCR ManorCare, Inc., 920 F. Supp. 2d 846, 852 (N.D. Ohio 2013) (denying final certification, but the court did not cite *Dukes*); Essame v. SSC Laurel Operating Co., 847 F. Supp. 2d 821, 828 (D. Md. 2012) (stating that Rule 23 standards are "generally inapplicable" to FLSA collective actions and certifying plaintiff class in overtime pay case); Creely v. HCR ManorCare, Inc., Nos. 3:09 CV 2879, 3:10 CV 417, 3:10 CV 2200, 2011 WL 3794142, at *1 (N.D. Ohio July 1, 2011) (refusing to apply *Dukes* to FLSA collective action for overtime pay, and granting conditional certification at the earliest phase of the action).

183. Unlike class actions under Title VII, collective actions under the FLSA are opt-in claims

The Court erected two other hurdles to class litigation in its 2012 Term, both of which have been applied to wage and hour claims. In *Genesis Healthcare Corp. v. Symczyk*, the Court ruled that employers may "pick off" the lead plaintiff in an FLSA collective action by offering her all the relief she has requested so that her personal interest in the litigation is eliminated; if no other employees have joined the action at that point, the lead plaintiff cannot seek relief for similarly situated workers, and the case must be dismissed.[184] And in *Comcast Corp. v. Behrend*, a consumer-initiated class action antitrust claim by current and former Comcast subscribers in the Philadelphia area, the Court required that plaintiffs establish at the class certification stage that individual injury will be capable of proof at trial through evidence common to the class, and that damages are measurable on a class-wide basis.[185] The *Comcast* analysis was soon applied to wage and hour claims.[186]

Additional barriers to class claims in the workplace context exist in the form of what Katherine Stone dubbed modern day "yellow dog" contracts: predispute arbitration agreements, required by employers as a condition of obtaining employment, in which workers waive the right to proceed on statutory or common law claims arising out of employment in court or administrative fora, in exchange for a private dispute resolution process.[187] The Court has ruled that these waivers are enforceable.[188] The question later arose whether a waiver of the right to bring class claims in both public fora and in arbitration would be enforceable. In *AT&T Mobility v. Concepcion*, the Supreme Court ruled in a

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requiring only that plaintiffs be "similarly situated," a standard that has historically been easier to satisfy than Rule 23's commonality requirement. *See* David Borgen & Laura L. Ho, *The Fair Labor Standards Act: Litigation of Wage and Hour Collective Actions Under the Fair Labor Standards Act*, 7 EMP. RTS. & EMP. POL'Y J. 129, 130–31 (2003) (describing differences between Rule 23 class actions and collective actions under the Fair Labor Standards Act).

184. Genesis Healthcare Corp. v. Symczyk, 133 S. Ct. 1523, 1530 (2013).

185. Comcast Corp. v. Behrend, 133 S. Ct. 1426, 1434 (2013).

186. *See* Roach v. T.L. Cannon Corp., 889 F. Supp. 2d 364 (N.D.N.Y. 2012), *petition to appeal filed*, *available at* http://www.citizen.org/documents/roach-v-cannon-corp-petition-appeal-class-certification.pdf (2d Cir. Apr. 12, 2013) (applying *Comcast* to deny certification to class of Applebee's employees suing under state law for unpaid wages because monetary relief would have to be calculated individually for each member of the class). *But see* Leyva v. Medline Indus., Inc., 716 F.3d 510, 514 (9th Cir. 2013) (finding that district court abused its discretion in denying class certification in wage and hour claim under California law and distinguishing *Comcast* because data for calculating damages could be readily culled from the company's electronic payroll and timekeeping database). A recent high-profile case involving a class of former interns at Hearst Corporation who argued that they had been misclassified as interns rather than employees and thus were owed back wages suffered a defeat at the class certification stage; the district court judge cited both *Dukes* and *Comcast* in support of his decision. Wang v. Hearst Corp., No. 12 CV 793(HB), 2012 WL 3642410, at *1 (S.D.N.Y. Aug. 24, 2012).

187. *See* Katherine Van Wezel Stone, *Mandatory Arbitration of Individual Employment Rights: The Yellow Dog Contract of the 1990s*, 73 DENV. U. L. REV. 1017, 1037 (1996). For a full treatment of the cases discussed in the remainder of this section in historical context, see Katherine V. W. Stone, *Procedure, Substance, and Power: Collective Litigation and Arbitration of Employment Rights*, 61 UCLA L. REV. DISCOURSE 164, 168–70 (2013).

188. Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 25 (1991).

consumer context that it was, relying on the proarbitration policy of the Federal Arbitration Act.[189] The Court went further still in its 2012 Term, ruling in *American Express Co. v. Italian Colors Restaurant* that a class action waiver is enforceable even where the cost of proving an individual claim exceeds the potential recovery, preventing (as the plaintiffs argued) the effective vindication of federal statutory rights.[190]

A decade ago, Ann Hodges argued forcefully that class claims to enforce workplace rights legislation were protected concerted activity under the NLRA regardless of union involvement, and that predispute arbitration agreements that purported to waive workers' rights to file such claims thus violated section 7.[191] In *D.R. Horton, Inc.*, the NLRB took a step in this direction, ruling that a predispute employment arbitration agreement that precluded the filing of both class claims in court and class claims in arbitration interfered with employees' section 7 rights to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection.[192] The Fifth Circuit refused to enforce the Board's ruling,[193] following the lead of three circuit courts that had previously rejected the Board's reasoning as inconsistent with the Court's ruling in *Concepcion* and the Federal Arbitration Act.[194] Pursuant to its policy of nonacquiescence, however, the Board may continue to apply its *D.R. Horton* rationale to press for its preferred statutory interpretation.[195]

It seems apparent, then, that class claims are not a panacea, and plaintiffs' lawyers cannot be relied upon to take the place of unions as vehicles for worker

189. AT&T Mobility L.L.C. v. Concepcion, 131 S. Ct. 1740, 1748 (2011).

190. Am. Express Co. v. Italian Colors Rest., 133 S. Ct. 2304, 2309 (2013).

191. *See* Ann C. Hodges, *Can Compulsory Arbitration Be Reconciled with Section 7 Rights?*, 38 WAKE FOREST L. REV. 173, 176–77, 217–18 (2003); *see also* Michael D. Schwartz, *A Substantive Right to Class Proceedings: The False Conflict Between the FAA and NLRA*, 81 FORDHAM L. REV. 2945, 2985 (2013) (arguing that the right to invoke class proceedings is a substantive right protected by the NLRA).

192. D.R. Horton, Inc., 357 N.L.R.B. No. 184, at 12 (Jan. 3, 2012), *enforced in part and denied in part*, 737 F.3d 344 (5th Cir. 2013).

193. D.R. Horton, Inc. v. NLRB, 737 F.3d 344 (5th Cir. 2013) (enforcement denied).

194. *See* Richards v. Ernst & Young L.L.P., 734 F.3d 871 (9th Cir.) (reversing lower court's denial of motion to compel arbitration of collective action wage and hour claims, and noting that *D.R. Horton* conflicts with the court's stated policy of deference to arbitration agreements under the FAA), *amended and superceded*, 744 F.3d 1072 (9th Cir. 2013) (reversing lower court's denial of motion to compel arbitration, but declining to consider *D.R. Horton*); Sutherland v. Ernst & Young L.L.P., 726 F.3d 290, 297 (2d Cir. 2013) (refusing to follow *D.R. Horton* and citing the Court's opinions in *Gilmer*, *Concepcion*, and *Italian Colors* in support of the federal policy of deferring to arbitration agreements under the FAA); Owen v. Bristol Care, Inc., 702 F.3d 1050, 1055 (8th Cir. 2013) (holding that the court is not required to defer to the NLRB's interpretation of Supreme Court precedent, and "that arbitration agreements containing class waivers are enforceable in claims brought under the FLSA").

195. *See* Leslie's Poolmart, Inc., Case 21-CA-102332, 2014 WL 204208, (N.L.R.B. Jan. 17, 2014) (applying *D.R. Horton* and ruling that an arbitration agreement that did not expressly bar workers from bringing class or collective claims nevertheless violated the NLRA where the employer raised the agreement to compel arbitration of and seek dismissal of an employee's class and collective action claims for overtime pay); Ross E. Davies, *Remedial Nonacquiescence*, 89 IOWA L. REV. 65 (2003).

representation. Nor can advocates rely upon class litigation to perform its traditional function of public consciousness raising. It is not surprising, then, that the closing of the courthouse doors to group action would prompt worker advocacy groups to pursue their agendas elsewhere—by taking to the streets to press for reform. It is vital, then, that any new legal frame protect groups regardless of the form they assume (traditional union or alternative form of advocacy group) or the locus of their activity (in the courts or on the streets).

III. A NEW LEGAL FRAME—ASSEMBLY RIGHTS[196]

If courts resist assertions of group rights by workers because they are fundamentally hostile toward collectivist values that ground the legal protection of group rights, reforms rooted in labor law are unlikely to make much difference. Fortunately, a legal frame with the power to reinforce collectivist values already exists, though it has been underemployed in Supreme Court jurisprudence. That frame is the First Amendment freedom "of the people peaceably to assemble."[197] The right of assembly has played an important role historically in protecting collective protest, including labor struggles.[198] Over time, however, the Court's

196. Several scholars have argued for a reformed labor law regime more firmly based on the First Amendment freedom of association. *See, e.g.*, Garcia, *supra* note 91; Summers, *supra* note 91. Jim Pope is perhaps the preeminent advocate of reconstitutionalizing the NLRA. He suggests that a labor law founded on freedom of association would offer stronger guarantees for organizing and striking, more effective prohibitions against employer discrimination or coercion of workers attempting to exercise the right of association, would leave more economic tools open to unions, including the secondary boycott, and would not exclude large categories of workers from coverage, as does the current statute. James Gray Pope et al., *The Employee Free Choice Act and a Long-Term Strategy for Winning Workers' Rights*, 11 WORKINGUSA 125, 135 (2008); *see also* James G. Pope, *The Three-Systems Ladder of First Amendment Values: Two Rungs and a Black Hole*, 11 HASTINGS CONST. L.Q. 189, 197–98 (1984) [hereinafter Pope, *Three-Systems Ladder*] (arguing that First Amendment free speech jurisprudential principles concerning viewpoint and speaker neutrality are strangely reversed when the subject is labor speech, and critiquing the implicit depoliticization of labor speech in this jurisprudence). Alternatively, Pope argues for anchoring the right to organize in the Thirteenth Amendment. *See* James Gray Pope, *Labor's Constitution of Freedom*, 106 YALE L.J. 941, 942 (1997). He contends that "labor's constitution of freedom" historically rested on the Thirteenth Amendment as well as the First Amendment; in the Thirteenth Amendment, workers found protection for the strike in response to oppressive hours, pay, or working conditions, while the First Amendment protected labor picketing in support of the strike. *See id.* Looking to the boycott and sit-in cases from the civil rights context, Pope suggests that the courts are likely to be most receptive to a constitutional grounding protecting worker activism where there exists a convergence of First Amendment and Fourteenth Amendment values, as in cases involving civil rights boycotts and sit-ins. *Id.* at 943–44; *see also* Marion Crain, *Between Feminism and Unionism: Working Class Women, Sex Equality, and Labor Speech*, 82 GEO. L.J. 1903, 1987–2000 (1994) (arguing the same point in the context of activism at the confluence of labor rights and sex equality). Because that convergence is frequently lacking in the labor context, where the emphasis is on combatting class-based inequality (or conversely, advancing rights to economic equality), which lies outside the realm of Fourteenth Amendment protection, Pope eschews the First Amendment freedom of assembly as a constitutional foundation for collective action by workers. James Gray Pope, *The First Amendment, the Thirteenth Amendment, and the Right to Organize in the Twenty-First Century*, 51 RUTGERS L. REV. 941, 947 (1999) [hereinafter Pope, *The First Amendment*].

197. U.S. CONST. amend. I.

198. Pope, *The First Amendment*, *supra* note 196, at 957; Pope, *supra* note 16, at 330–44.

jurisprudence has subordinated assembly rights to the First Amendment protection for freedom of speech and an implied freedom of expressive association necessary to further protected speech.[199]

In this Part, we explore the potential of the First Amendment's freedom of assembly to reenergize worker activism, both within labor unions and beyond their boundaries. Our analysis draws heavily on recent work by constitutional law theorists who have explored the historical role that the rights of assembly[200] and associational speech in service of assembly[201] have played in the American democratic system. Their work offers exciting possibilities for a new jurisprudence of collective action that could expand the breathing space for labor unions and other groups seeking to advance workers' rights.

A. "The Forgotten Freedom of Assembly"

In his groundbreaking book, *Liberty's Refuge: The Forgotten Freedom of Assembly*, John Inazu carefully traces the evolution of the freedom of assembly, documenting the origins of the right as independent of the rights to speech or to petition.[202] He describes how assembly rights were deployed in protests by slaves and free blacks against slavery during the antebellum period, by the Wobblies, by the abolitionist and women's rights movements, and by the civil rights movement.[203] The right of assembly also shaped political rhetoric and was instrumental in gaining popular support for labor organizing that culminated in enactment of the Wagner Act in 1935.[204]

The Court's First Amendment jurisprudence still conferred robust protection for the freedom of assembly as late as 1945, when it relied upon the right of assembly to strike down a Texas statute requiring that union organizers register with the secretary of state and obtain a license prior to engaging in union organizing activities.[205] Subsequently, however, the Court's free speech jurisprudence swallowed the assembly right, erecting in its stead an implied right

199. INAZU, *supra* note 16, at 22–25.

200. *See generally* INAZU, *supra* note 16; Abu El-Haj, *Changing the People*, *supra* note 16; Abu El-Haj, *The Neglected Right of Assembly*, *supra* note 16; Appleton, *supra* note 16; Bhagwat, *Assembly Resurrected*, *supra* note 16; Bhagwat, *Liberty's Refuge, or the Refuge of Scoundrels?*, *supra* note 16; Epstein, *supra* note 16; Inazu, *Factions for the Rest of Us*, *supra* note 16; Inazu, *The Forgotten Freedom of Assembly*, *supra* note 16; Inazu, *Virtual Assembly*, *supra* note 16; Linnekin, *supra* note 16; Magarian, *supra* note 16; McConnell, *supra* note 16; Vischer, *supra* note 16; Zick, *supra* note 16.

201. Bhagwat, *Associational Speech*, *supra* note 16, at 981 (explaining how speech, assembly, and associational rights are connected in First Amendment jurisprudence, and arguing that associational speech—"speech that is meant to induce others to associate with the speaker, to strengthen existing associational bonds among individuals including the speaker, or to communicate an association's views to outsiders"—lies at the core of the First Amendment).

202. INAZU, *supra* note 16, at 22–25.

203. *Id.* at 29–48.

204. *Id.* at 51–52.

205. Thomas v. Collins, 323 U.S. 516, 539–40 (1945).

of association.[206] In *NAACP v. Alabama ex rel. Patterson*,[207] the Court recognized a First Amendment right to association tied to free speech and subordinate to it.[208] In this conceptualization, associational rights were valuable only instrumentally, by supporting and advancing the freedom of speech. Striking down an Alabama statute requiring the NAACP to disclose its membership lists, the Court explained, "Effective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association."[209]

The shift from assembly to association came to full flower in the 1960s with the rise of the civil rights movement and the adoption of antidiscrimination norms in law. Some private groups—including labor unions—invoked associational rights to *resist* integration. The result was a clash between equality norms and liberty interests, typically framed as a contest between individual rights (to equality) and group rights (to association).[210] The law's emerging preference for individual liberties over group autonomy in this contest ultimately further diluted associational rights. By the end of the 1960s, the legal significance of the assembly right had dwindled and it was applied only to protests and demonstrations. By the 1980s, the assembly right had been completely forgotten, submerged within the Court's expressive association and speech doctrines.[211]

The associational rights that emerged function as handmaidens to free speech rights. Where once the Court deployed free speech rights to strengthen associational rights, it now limits associational rights to those groups that are predominantly expressive.[212] In *Roberts v. United States Jaycees*, for example, the Court ruled that the Jaycees, whose mission was to "promot[e] the interests of young men," could not exclude women; the Jaycees' right to associate was limited to association for expressive purposes, which the Court concluded would not be

206. The right to petition the government for redress of grievances met a similar fate. *See* NAACP v. Button, 371 U.S. 415, 428–29 (1963) (striking down a Virginia statute that prohibited groups from providing lawyers to represent civil rights plaintiffs when the organization itself was not a party to the litigation; the Court described the NAACP's right to support the litigation as the right "to associate for the purpose of assisting persons who seek legal redress for infringements of their constitutionally guaranteed and other rights," and the litigation as "a form of political expression"); Bhagwat, *Associational Speech*, *supra* note 16, at 986. *See generally* RONALD J. KROTOSZYNSKI, JR., RECLAIMING THE PETITION CLAUSE: SEDITIOUS LIBEL, "OFFENSIVE" PROTEST, AND THE RIGHT TO PETITION THE GOVERNMENT FOR REDRESS OF GRIEVANCES (2012) (discussing the failure of current First Amendment jurisprudence to protect the right of petition).

207. NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449 (1958).

208. *Id.* at 460; *see also* Bhagwat, *Associational Speech*, *supra* note 16, at 985–86.

209. *Patterson*, 357 U.S. at 460.

210. Clearly, however, individuals and groups claim rights on both sides of the divide. For example, the freedom of assembly facilitates individual acts of protest and expression. Zick, *supra* note 16, at 394. And protections for individuals who join group activities strengthen the group and fortify the power of its actions. *See* Sheldon Leader, *Can You Derive a Right to Strike from the Right to Freedom of Association?*, 15 CANADIAN LAB. & EMP. L.J. 271, 293–94 (2009–2010).

211. INAZU, *supra* note 16, at 61–62. The claim has not made an appearance in Supreme Court jurisprudence in thirty years. *Id.*

212. Bhagwat, *Associational Speech*, *supra* note 16, at 988.

impeded by admission of women.[213] The right to expressive association—distinct from the right to intimate association—includes "a right to associate for the purpose of engaging in those activities protected by the First Amendment—speech, assembly, petition for the redress of grievances, and the exercise of religion."[214]

Given the history of resistance to collectivist premises discussed *supra* in Parts I and II, perhaps it should not surprise us that the Court chose to view assembly through the lens of speech, which in turn was seen primarily as a vehicle for individual self-fulfillment and expression. The Court's hyper-emphasis on free speech rights was also grounded in the view that "the primary *constitutional* significance of free speech is its contribution to political debate and thus its enablement of democratic self-governance."[215] The right to speak contributes directly to political debate as the speaker seeks to persuade voters to support a particular viewpoint. Thus, it was logical, if not inevitable, that free speech would become the penultimate goal of the First Amendment.

Still, the disappearance of the assembly clause in the Court's First Amendment jurisprudence is striking. After all, the freedom of assembly enjoys explicit textual protection,[216] while the freedom of expressive association that emerged in its place is merely an implicit right. Had the Court been more willing to embrace collectivist premises, it might just as easily have concluded that protecting speech was necessary to facilitate assembly and petition, rather than the other way around.[217]

B. Assembly, Dissent, and Democracy

The weakened associational right that emerged from the Court's reinterpretation of the First Amendment freedom of assembly was both shaped by and ultimately reinforced a consensus-oriented ideal of democratic governance.[218] Constitutional protection was afforded to groups that reinforced democratic

213. Roberts v. U.S. Jaycees, 468 U.S. 609, 627 (1984).

214. *Id.* at 617–18.

215. Bhagwat, *Associational Speech, supra* note 16, at 994. Bhagwat traces this view in Supreme Court jurisprudence to *Whitney v. California*, 274 U.S. 357, 375–79 (1927) (Brandeis, J., concurring) (describing self-governance rationale for protecting speech), *overruled in part by Brandenburg v. Ohio*, 395 U.S. 444 (1969), and *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957) (showing that the Court observed that "[o]ur form of government is built on the premise that every citizen shall have the right to engage in political expression and association," and that the Court stated that the exercise of "basic freedoms in America has traditionally been through the media of political associations"). For more detailed explanations of the relationship between speech and democratic self-governance penned by an influential legal philosopher, see ALEXANDER MEIKLEJOHN, FREE SPEECH: AND ITS RELATION TO SELF-GOVERNMENT 6 (1948); Alexander Meiklejohn, *The First Amendment Is an Absolute*, 1961 SUP. CT. REV. 245, 252.

216. *See* U.S. CONST. amend. I.

217. *Cf.* Bhagwat, *Associational Speech*, *supra* note 16, at 981 ("[O]ne of the most important functions of free speech in our society, and in constitutional law, is to advance and protect the right of association, rather than purely the converse as the Supreme Court has suggested in recent years.").

218. *See* INAZU, *supra* note 16, at 4, 96–97.

premises, while those outside that consensus were suppressed.[219] Existing, more stable groups were thus pressed toward conformity and congruence; dissenting ad hoc protesters that did not limit themselves to "reasoned and appropriately constrained disagreement" were less likely to be seen as contributing to democracy, and were therefore seen as less deserving of protection.[220]

Assembly rights once offered a strong constitutional foil for groups that challenged the dominant economic and social framework. Assembly rights recognized the contribution that such groups make to our system of democratic self-governance.[221] By foregrounding dissent and provoking dialogue, dissenting groups offer support and backbone to individuals, allowing those individuals the psychological distance to challenge state-endorsed norms and resist the pressure toward consensus. Ultimately, dissenting groups highlight and focus the social conflict that is the essential destabilizing force in a robust democracy.[222] Assembly rights were instrumental in fostering citizen agitation for social change.[223]

Groups provide other benefits as well, many of which support our democracy. Some accrue at the individual level: groups offer individuals emotional support, friendship, and stability, and facilitate the development of social identity.[224] They also provide the social glue that binds citizens together, helping to inculcate habits of cooperation and collaboration and skills important to civic participation.[225] And they offer leverage to citizens who seek to amplify their voices at the political level to shape policy, enhancing their power.[226] Some groups, such as labor unions and workers' centers, serve as training grounds for democratic governance, offering members the opportunity to acquire skills useful for political participation, including organizing and recruiting skills, public speaking opportunities, and skills in persuasive writing.[227]

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219. *See id.* at 105–06.

220. *Id.*

221. *See id.* at 22–25.

222. *See* SHELDON S. WOLIN, POLITICS AND VISION: CONTINUITY AND INNOVATION IN WESTERN POLITICAL THOUGHT 156 (expanded ed. 2004).

223. *See* Zick, *supra* note 16, at 394.

224. Jason Mazzone, *Freedom's Associations*, 77 WASH. L. REV. 639, 695 (2002).

225. *See id.* at 696–97.

226. *Id.*

227. *Id.* at 697–98. For example, the AFL-CIO's Constitution contains the following commitment:

> To protect and strengthen our democratic institutions, to secure full recognition and enjoyment of the rights and liberties to which we are justly entitled, and to preserve and perpetuate the cherished traditions of our democracy. . . . [and] to encourage workers to register and vote, to exercise their full rights and responsibilities of citizenship, and to perform their rightful part in the political life of the local, state and national communities.

AFL-CIO Const. Art. II, AFL-CIO, OBJECTS & PRINCIPLES, http://www.aflcio.org/about/exec-council/afl-cio-constitution/ii.-objects-and-principles (last visited Jan. 10, 2014); *see also* Brief for Ohio AFL-CIO and District 1199 SEIU as Amici Curiae Supporting Respondent at 1, State *ex rel.* Colvin v. Brunner, No. 08-1813, 2008 WL 4525932, at *1 (Ohio Sept. 24, 2008). In its Amicus brief, the SEIU District 1199 noted that its Constitution commits it to "maintain, preserve, and extend the democratic process and institutions of our country." *Id.*

Labor unionism offers a classic illustration of the connections between a robust right of assembly and the contribution that groups make as a vehicle for expressing dissent and challenging entrenched power, and democracy. The premise of the Wagner Act—firmly rooted in the right of assembly and an independent right of free association—was that robust unionism would enhance political participation by schooling workers in the practice of everyday democracy in the workplace.[228] Notwithstanding labor unionism's focus on so-called bread and butter business unionism (wages and benefits for members),[229] unions have played an important role as "schools for democracy," striving to advance civic virtue at work and in the larger society.[230]

Unions have also wielded significant influence in the legislative arena, lobbying for laws protecting workers' rights that apply beyond the union sector. Union support was critical to the enactment of antidiscrimination laws, wage and hour laws, unemployment insurance, workplace safety and health legislation, protections for pensions and health benefits, and family leave legislation.[231] In addition, unions have been active in the courts, litigating and filing amicus briefs in important cases involving issues that transcend labor law, including affirmative action, constitutional rights for public sector workers, federalism, campaign finance, voting rights, wage and hour law, and antidiscrimination law.[232] In so doing, they have served as a powerful voice on behalf of the working class, challenging the rights of the propertied class.

The silencing of labor's dissenting voice in American politics has many implications, and they are visible throughout our economic, political, and legal regimes. As union density and power have declined, income inequality has grown.[233] Political influence by the working class has been diluted, and

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228. *See* Lester, *supra* note 123, at 329 (observing that a core part of labor unions' mission is furthering participation in the civic and political spheres). Some unions have pursued their political participation mission directly. In 2012, for example, the Service Employees' International Union was the top outside spender on Democratic political campaigns, funding almost $70 million worth of advertising and get-out-the-vote efforts for Democrats. Melanie Trottman & Brody Mullins, *Union Is Top Spender for Democrats*, WALL ST. J., Nov. 2, 2012, at A6.

229. Marion Crain & Ken Matheny, *Labor's Identity Crisis*, 89 CALIF. L. REV. 1767, 1779–81 (2001); Crain & Matheny, *supra* note 8.

230. Thomas C. Kohler, *Civic Virtue at Work: Unions as Seedbeds of Civic Virtues*, 36 B.C. L. REV. 279, 297–302 (1995); *see* Peter Levine, *The Legitimacy of Labor Unions*, 18 HOFSTRA LAB. & EMP. L.J. 527, 565–67 (2001).

231. MARION CRAIN ET AL., WORK LAW: CASES AND MATERIALS 31 (2d ed. 2010). Unions' interest in advocating for statutory protection for workers as a class is not entirely altruistic: new statutory rights raise the floor from which bargaining begins on behalf of union members, augmenting unions' power at the bargaining table. *See* Robert J. Rabin, *The Role of Unions in a Rights-Based Workplace*, 25 U.S.F. L. REV. 169, 173 (1991).

232. *See* Garden, *supra* note 171 (cataloguing Supreme Court cases outside the traditional labor law arena in which unions have played important advocacy roles); Jaime Eagan, Making an Impact: The Labor Movement's Use of Litigation to Achieve Social and Economic Justice (June 18, 2011) (unpublished working paper), *available at* http://ssrn.com/abstract=1866844 (documenting labor movement involvement in impact litigation and examining implications for union identity).

233. *See* Levine, *supra* note 230, at 555.

enforcement of workplace rights has withered.[234] The New Deal safety net is rapidly unraveling.[235] If labor's mission was to "protect and strengthen our democratic institutions,"[236] it has failed.

Law played a key role in that failure. In our view, the correlation between the decline of labor and the disappearance of the right of assembly is more than coincidental. We join Inazu in arguing for reinvigoration of the right of assembly to strengthen constitutional protection for groups that challenge existing economic and social norms—including labor unions and worker advocacy groups. Inazu urges protection for the "formation, composition, expression and gathering" of all groups.[237] In this respect, Inazu joins other scholars who have argued for protection for groups that possess primary goals relevant to the democratic process, including political organization, value formation, and skill building.[238] But Inazu adds an important caveat: he would afford the strongest protection to "those groups that dissent from majoritarian standards."[239] Assembly rights are critical for the protection of dissenting voices and potentially destabilizing influences that are incompatible with existing social and economic norms. Thus, if our goal is to support the most robust democratic system, protection should attach not only to groups like labor unions and worker centers that exist to promote democratic function, but to less structured groups that explicitly challenge existing power arrangements and straddle conventional axes of power, such as Fast Food Forward, Occupy, and similar uprisings.

C. Assembly Rights Versus Speech Rights

What difference would it make in the level of protection afforded to groups if assembly rights could be revived and harnessed in lieu of speech rights? First, if the right of assembly is to have any substantive content, it must protect the process of forming and maintaining groups; otherwise, state and private power might intervene to eliminate the group altogether.[240] Thus, the right of assembly would guard against restrictions on group formation imposed *prior to* the actual act of assembly. In the labor context, assembly rights would protect the mere existence of worker advocacy against constraints imposed by the state.

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234. Sharon M. Dietrich, *When Working Isn't Enough: Low-Wage Workers Struggle to Survive*, 6 U. PA. J. LAB. & EMP. L. 613, 623–24 (2004) (describing challenges to enforcing workplace protections); Soss & Jacobs, *supra* note 110 ("Americans outside the upper echelons of business and government are relegated to the sidelines, their potential for influence now reduced to one of the 'problems' that elites endeavor to manage in governing.").

235. Fisk, *supra* note 11, at 13.

236. *See AFL-CIO Const. Art. II*, *supra* note 227.

237. INAZU, *supra* note 16, at 153.

238. *See* Bhagwat, *Associational Speech*, *supra* note 16, at 1000; s*ee also* Mazzone, *supra* note 224, at 647–48 (arguing that associations should be entitled to constitutional protection if they engage in political activities or equip their members with politically relevant skills).

239. INAZU, *supra* note 16, at 153.

240. Bhagwat, *Associational Speech*, *supra* note 16, at 998; Inazu, *Virtual Assembly, supra* note 16, at 1097–1102.

Second, a robust right of assembly would offer the greatest protection to groups that challenge prevailing consensus norms because it is in that respect that assembly makes its greatest contribution to a robust democracy. Thus, the more fundamental the group's challenge to the economic order, the more protection the group would enjoy.

Third, in contrast to free speech rights, assembly rights embrace the ways in which meaningful self-government extends beyond voting, beyond the right to speak freely. Meaningful democracy requires a system in which there is a right to be heard, to educate listeners, and an opportunity to persuade others to make common cause. Recognizing a distinct right of assembly would acknowledge the ways in which free speech and expressive association facilitate assembly, rather than just the other way around.[241] Thus, a fully realized assembly right would extend to all forms of peaceable group action, including nonphysical gatherings[242] and assemblies for the purpose of litigation.[243]

Fourth, the focus in cases involving group protests would be on the assembly itself—its location, its existence—rather than on the message that the group conveys when it gathers (the words on the picket sign or handbill, the language used by protesters, or the words on the protesters' T-shirts, which are the focus of free speech analyses)[244] or the form that the message assumes (handbills versus picket signs, the size of the banner, and the use of an inflatable rat).[245]

This holistic focus on assembly would more accurately reflect what groups are actually doing when they gather in protest. As the Court has intimated in its analyses of picketing, workers who gather to protest workplace policies are doing more than speaking.[246] There is, in fact, a conduct-like aspect to their behavior:

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241. *See* Bhagwat, *Associational Speech*, *supra* note 16, at 998.

242. Inazu, *Virtual Assembly*, *supra* note 16, at 1123–24.

243. *See* NAACP v. Button, 371 U.S. 415, 429–30 (1963); *see also* Carol Rice Andrews, *A Right of Access to Court Under the Petition Clause of the First Amendment: Defining the Right*, 60 OHIO ST. L.J. 557, 596–626 (1999).

244. INAZU, *supra* note 16, at 2.

245. *See, e.g.*, Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568, 576 (1988) (finding that union leafleting urging a secondary boycott was protected where it "pressed the benefits of unionism to the community and the dangers of inadequate wages to the economy and the standard of living of the populace," and distinguishing leafleting from picketing); Local Union No. 1827, 357 N.L.R.B. No. 44, at 6 (Aug. 11, 2011) (finding no violation of section 8(b)(4)(ii)(B) where union displayed a large banner proclaiming "shame" on a neutral employer during a labor dispute with another employer); Sheet Metal Workers Int'l Ass'n, 356 N.L.R.B. No. 162, at 2 (May 26, 2011) (finding that union's display of sixteen-foot inflated rat balloon at work site of a secondary employer did not violate section 8(b)(4)(ii)(B) because it was not picketing).

246. *See* NLRB v. Retail Store Emps. Union, Local 1001, 447 U.S. 607, 619 (1980) (noting that "picketing is a mixture of conduct and communication," and "[i]n the labor context, it is the conduct element rather than the particular idea being expressed that often provides the most persuasive deterrent to third persons about to enter a business establishment"); Babbitt v. United Farm Workers Nat'l Union, 442 U.S. 289, 311 n.17 (1979) (stating that "picketing is qualitatively 'different from other modes of communication'" (quoting Hughes v. Superior Court, 339 U.S. 460, 465 (1950)));

they are communicating their solidarity. To gain protection under First Amendment free speech doctrine, however, unions and worker advocacy groups are constrained by the Court's labor jurisprudence to argue that they are engaging in "pure" speech—that is, that bannering or picketing on public property adjacent to a business with which the group has a dispute is akin to handbilling or an advertisement.[247] But important insights are lost when we overlook the links between how groups form, how they express themselves, and how they sustain themselves: as Inazu observes, "Many group expressions are only intelligible against the lived practices that give them meaning."[248] Thus, bannering and picketing are more than speech; they are expressions of solidarity, physical demonstrations of workers' willingness to stand up against oppressive employment practices even when doing so places their jobs at risk. They display the courage and strength that arises from the bonds between people.[249] They function as a public demonstration of loyalty to the cause; their persistence over weeks or months signals the degree of strength, cohesion, and passion of the participants.[250] And even as a form of publicity, they are far different from a passive advertisement: they actively engage the community. Community members confronting the protesters must decide whether to join the protest, run the gauntlet to enter the business, or turn away.[251] These choices have real consequences for personal friendships, relationships, and reputation.

In short, the mere existence and presence of a group in a particular location at a particular time often *is* the message.[252] In labor parlance, the assembly communicates in poignant terms the meaning of labor solidarity: "an injury to one

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Bakery & Pastry Drivers & Helpers Local 802 of Int'l Bhd. of Teamsters v. Wohl, 315 U.S. 769, 776–77 (1942) (Douglas, J., concurring) ("Picketing by an organized group is more than free speech, since it involves patrol of a particular locality and since the very presence of a picket line may induce action of one kind or another, quite irrespective of the nature of the ideas which are being disseminated.").

247. *See Edward J. DeBartolo Corp.*, 485 U.S. at 584 (finding that secondary boycott prohibitions do not reach handbilling at the site of neutral employers and explaining that Congress did not intend to bar nonpicketing appeals such as handbilling, newspaper, radio, and television appeals); United Bhd. of Carpenters & Joiners of Am., Local Union No. 1506, 355 N.L.R.B. No. 159, at 11 (Aug. 27, 2010) (finding that display of large banner proclaiming "Shame" in front of neutral employer's premises did not violate secondary boycott provisions, and analogizing labor bannering to signs, billboards, newspapers, and web-based advertising).

248. INAZU, *supra* note 16, at 2.

249. As Timothy Zick so eloquently describes this benefit of assembly:

> The ability to freely assemble or join with others fortifies individuals. It emboldens them to come forward, and to participate in social and political activities. In addition to creating space for group activities and group autonomy, the freedom of assembly facilitates a variety of *individual* acts of defiance, contention, and expression.

Zick, *supra* note 16, at 394.

250. *See* Avery, *supra* note 18, at 89 (describing these signals in the context of labor picketing).

251. Zick, *supra* note 16, at 394.

252. Bhagwat, *Associational Speech*, *supra* note 16, at 1016 (explaining that speech is almost peripheral in many modern protests; the fact of a large assembly itself sends a message).

is an injury to all."[253] Labor activist Staughton Lynd has described eloquently the experience of solidarity in the labor movement.[254] The realization of communal bonds creates a new entity—the group—that moves beyond the individual, in which the well-being of the individual and that of the group are experienced as neither antagonistic nor reciprocal:

> [T]he group of those who work together—the informal work group, the department, the local union, the class—is often experienced as a reality in itself. . . . I do not scratch your back only because one day I may need you to scratch mine. Labor solidarity is more than an updated version of the social contract through which each individual undertakes to assist others for the advancement of his or her own interest.[255]

Analogizing to the bonds that hold families together, Lynd wrote that solidarity functions to create an experience of "one flesh," so that what happens to one person is experienced as happening to others, to the group:

> When you and I are working together, and the foreman suddenly discharges you, and I find myself putting down my tools or stopping my machine before I have had time to think—why do I do this? Is it not because, as I actually experience the event, your discharge does not happen only to you but also happens to *us*?[256]

Finally, the process of staking a public identity claim shapes the character of the organization that ultimately emerges.[257] Escalating public tactics help to reinforce commitment among union adherents, persuade as-yet undecided workers to support the union, and build a sense of collective identity. These activities may include litigation, the picket, the boycott, rallies, web-based assemblies, and other formal and informal ways of coming together in public spaces. What Brishen Rogers calls "acting like a union"—which means acting together, standing together, listening together, and reacting together[258]—is what creates the group. And increasingly, the forms that protest and assembly assume are critical to group identity because they may facilitate or block coalitions with other social justice movements, including the civil rights movement, the women's movement, and the immigrant rights movement.[259]

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253. *See* Eric Tucker, *Who's Running the Road? Street Railway Strikes and the Problem of Constructing a Liberal Capitalist Order in Canada, 1886–1914*, 35 L. & SOC. INQUIRY 451, 455 & n.3 (2010) (noting historical origins of this mantra in the Knights of Labor, a powerful nineteenth-century union).

254. Staughton Lynd, *Communal Rights*, 62 TEX. L. REV. 1417, 1423–30 (1984).

255. *Id.* at 1427.

256. *Id.*

257. RICK FANTASIA, CULTURES OF SOLIDARITY CONSCIOUSNESS, ACTION, AND CONTEMPORARY AMERICAN WORKERS 131 (1988) (generalizing from ethnographic studies of worker mobilization).

258. Brishen Rogers, *Passion and Reason in Labor Law*, 47 HARV. C.R.-C.L. L. REV. 314, 318 (2012).

259. *See id.* at 353.

IV. IMPLICATIONS OF A REVIVED RIGHT OF ASSEMBLY FOR LABOR LAW

The labor law regime significantly cabins class-wide organizing. It imposes an obligation to collectively bargain only where a majority union exists, prefers single-employer worksites, and limits the bargaining obligation to bargaining units within the workgroup that share a community of interests around traditional bargaining issues, including wages, hours, and working conditions.[260] A robust assembly right would promote a more expansive view of solidarity that would further labor organizing and would require collective bargaining on a horizontal basis, across employers and even across industries.[261] Some commentators argue that these limitations derive from a fundamental fear of broad-based worker solidarity as threatening to the existing economic order.[262] The same fear justifies the labor law's prohibition on secondary boycotts, which mobilize workers across the walls of their worksites and thus tend to generalize class struggles.[263] And it explains the limited protection afforded to the right to strike[264] and other concerted activities: only actions that are self-interested are protected, which limits union ability to promote citizen solidarity in service of broader social justice goals.[265] If given full force, a revived freedom of assembly would significantly alter this labor law landscape. Precisely because broad-based worker groups and their activities challenge prevailing economic norms, they deserve the broadest degree of protection under the assembly clause.

Of course, assembly rights are not without limits. Most obviously, the Constitution itself qualifies protected assemblies as "peaceable"[266]—thus, criminal conspiracies, violent assemblies, and other uprisings that challenge the state's interest in maintaining the public order would not be protected, and some judicial line drawing would be required. There would be a risk, of course, that meaningful protection for groups might be eviscerated by this line drawing. But in the First Amendment speech context, similar line-drawing exercises have resulted in doctrine that protects speech as long as it does not advocate imminent lawless action;[267] we ought to be able to develop similar boundaries in the assembly context.[268]

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260. Joel Rogers, *Divide and Conquer: Further "Reflections on the Distinctive Character of American Labor Laws,"* 1990 WIS. L. REV. 1, 56–57, 76–79, 121–25, 133–36.

261. *See* George Feldman, *Unions, Solidarity, and Class: The Limits of Liberal Labor Law*, 15 BERKELEY J. EMP. & LAB. L. 187, 199–201 (1994).

262. *See, e.g.*, *id.* at 205.

263. *Id.* at 247–48.

264. Pope, *supra* note 103, at 524.

265. Lester, *supra* note 123, at 332.

266. U.S. CONST. amend. I.

267. *See* INAZU, *supra* note 16, at 166–67 (discussing these concerns).

268. *See id.* (reaching this conclusion). Inazu suggests a contextual analysis that would "allow[] courts to examine how power operates on the ground" and to "evaluate challenges to the exercise of the right of assembly in the specific contexts in which those assemblies exist." *Id.* at 172. Some particularly powerful assemblies may overreach, and those should give way to the state's interests; others will not, and in those cases courts should defer to the right of assembly. *Id.*

We sketch below the contours of the existing law that seem immediately vulnerable to challenge. It may be, however, that given the intricate ways in which NLRA provisions link to one another, a reinvigorated right of assembly would raise constitutional questions about so many aspects of the NLRA that, ultimately, repeal or significant legislative reform would be the only way to make the statute internally coherent.[269] For now, we leave aside those larger questions and focus on constitutional challenges that could be made to existing NLRA law.

Restrictions on Picketing and Boycotts—Most obviously, restrictions on primary picketing (section 8(b)(7))[270] and secondary boycotts (section 8(b)(4))[271] would be vulnerable to challenge, since both sections purport to circumscribe the right to peaceably assemble on public property by limiting either the period during which such activities may occur or the entities or persons who may be targeted. It is true that the secondary boycott provisions have withstood First Amendment challenge on free speech grounds[272] despite the fact that the statute applies only to labor organizations communicating a particular message.[273] To accomplish its goal of preserving the statute against the free speech-based challenge, the Court distinguished labor leafleting from picketing, finding the former was a purer form of expressive activity that "depend[s] entirely on the persuasive force of the idea," while the latter was "a mixture of conduct and communication" that appeals to preexisting class-based loyalties and thus invokes "an automatic response to a signal, rather than a reasoned response to an idea."[274] Despite compelling scholarly critique,[275] this reasoning has thus far remained intact. Unions have responded with increasingly creative strategies designed to frame their protests as

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269. Others who have argued for a reinvigorated freedom of association have made that assumption and have outlined the contours of a new charter of labor rights that would bring American law into line with international human rights standards. *See* Pope et al., *supra* note 196, at 135–36 (arguing for a new labor law regime based on the freedom of association that would include revived rights to organize and to strike, a prohibition on employer discrimination, and a bargaining obligation; would omit restrictions on secondary pressure, expand coverage of the Act to include more categories of workers; and would continue the ban on company unions).

270. *See* NLRA § 8(b)(7), 29 U.S.C. § 158(b)(7) (2012).

271. *See* NLRA § 8(b)(4).

272. *See* NLRB v. Retail Store Emps. Union, Local 1001, 447 U.S. 607, 616 (1980) (upholding prohibition of secondary consumer picketing); Int'l Bhd. of Elec. Workers, Local 501 v. NLRB, 341 U.S. 694, 705 (1951) (upholding prohibition of secondary boycott aimed at labor).

273. Section 158(b)(4) makes it an unfair labor practice for a "labor organization or its agents" to "engage in, or to induce or encourage" workers, or "to threaten, coerce or restrain" consumers where the union possesses one of the listed objects in parts A–D of the statute. Though a proviso to the statute excepts "publicity, other than picketing, for the purpose of truthfully advising the public, including consumers and members of a labor organization, that a product or products are produced by an employer with whom the labor organization has a primary dispute and are distributed by another employer," it applies only where the publicity does not interfere with the performance of services or pick-up, delivery or transport of goods. NLRA § 8(b)(4).

274. *Retail Store Emps. Union*, 447 U.S. at 619 (Stevens, J., concurring).

275. *See, e.g.*, Charlotte Garden, *Citizens, United and* Citizens United*: The Future of Labor Speech Rights?*, 53 WM. & MARY L. REV. 1 (2011); Julius Getman, *Labor Law and Free Speech: The Curious Policy of Limited Expression*, 43 MD. L. REV. 4 (1984); Pope, *Three-Systems Ladder*, *supra* note 196.

handbilling rather than as picketing, including coalitions with nonlabor groups, street theatre, bannering, and the use of inflatable rats.[276]

Reframed as a constitutionally protected form of assembly, however, peaceful picketing would warrant protection at least equal to leafleting. Unions and other groups would no longer be required to argue that their assemblies are nothing more than speech; instead, they could rely on the right to assemble itself, and offer descriptions of what standing together means in labor activism and how it supports democracy. This would make a difference, both in terms of the message communicated to the public and the efficacy of the assembly, which is linked, certainly, to its form. Avoiding the narrower speech frame would also make a significant difference in situations where protests are disorganized, spontaneous, or convey multiple messages. For example, Occupy activists were frequently criticized for conveying an incoherent message and arguably received lowered First Amendment free speech protection as a result.[277] But if the act of assembling were itself the "relevant constitutional event," no further inquiry into the nature of the speech, the verbal message communicated, the signage, or the consistency of the message would be required. Indeed,

> [i]f individuals want to assemble for the purpose of snapping their fingers, chanting in tongues, or simply showing solidarity or strength through numbers, then [in a world of robust assembly rights] they have a First Amendment right to do so (subject, of course, to any permitting and other requirements).[278]

Similarly, the purpose or object of picketing activity, so important to analysis under labor law, would be irrelevant if the activity were seen as an assembly protected at law. Absent an illegal goal or violent activity, the picket would be lawful. Its target, its location, and the time of day would all be irrelevant except as to state police power-based permitting or time, place, and manner restrictions.

The Right to Strike—The right to strike might gain added resonance. As Sheldon Leader has argued, a right to strike may be derived from a robust conceptualization of the freedom of association, either directly (if the strike is seen as a species of association) or indirectly (if the strike furthers the function of an organization, i.e., the union).[279] A revived freedom of assembly would offer even more support for the right to strike if the strike were viewed as linked to the group action that produces it—including the strike vote, the picket line, and other

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276. *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, 1519–22 (2006); *see, e.g.*, Local Union No. 1827, 357 N.L.R.B. No. 44, at 1–2 (Aug. 11, 2011) (finding no violation of section 8(b)(4)(ii)(B) where union displayed a large banner proclaiming "shame" on a neutral employer during a labor dispute with another employer); Sheet Metal Int'l Ass'n, 356 N.L.R.B. No. 162, at 2 (May 26, 2011) (finding that union's display of a sixteen-foot inflated rat balloon at work site of a secondary employer did not violate section 8(b)(4)(ii)(B) because it was not picketing).

277. Zick, *supra* note 16, at 398–99.

278. *Id.* at 398.

279. Leader, *supra* note 210, at 272–74.

activities maintained by the union in support of the strike—and thus essential to the survival and strength of the group that calls the strike.

Union-Funded Employment Litigation—As Part II explains, NLRA section 8(b)(1) has been interpreted as prohibiting unions from funding litigation advancing workers' rights as a group under individual rights statutes during the period proximate to a union election.[280] This interpretation seems flatly inconsistent with full recognition of the right to assembly.[281] Litigation can function as a key component of group organizing, helping to forge and shape group identity. And as Ben Sachs has shown, group litigation can help to shape an oppositional consciousness, empowering workers by providing a legal frame for their actions and in turn triggering further group action.[282]

Access Rights—The right of assembly might also profitably be deployed to challenge the Court's jurisprudence upholding employer rights to require attendance by employees at captive audience speeches while simultaneously denying unions equal access.[283] Here, assembly rights would directly confront private property rights. Although assembly rights would inevitably yield to some degree, that question of degree might leave more room for equal access claims than is currently available.

Majority Rule/Exclusivity and the NLRB Election Architecture—Although not all union adherents would embrace these implications, a robust freedom of assembly doctrine could be deployed to challenge the majority rule and exclusivity doctrines (section 9(a)).[284] Current doctrine requires employers to bargain collectively only with a union that represents a majority of employees in an appropriate bargaining unit.[285] Once a union gains majority status, it has exclusive rights to bargain; smaller groups or factions within the workforce cannot go around the majority union to negotiate directly with the employer, but instead must work within the system.[286] Though many view the majority rule and exclusivity doctrines as critical to protect labor's united front at the bargaining table in order to leverage class-based worker power against the employer,[287] others (including ourselves) have criticized these doctrines because they tend to homogenize unions and to constrain activism by smaller nested groups, particularly where those groups

280. *See supra* note 174 and accompanying text.

281. *See, e.g.*, NAACP v. Button, 371 U.S. 415, 428–29 (1963) (upholding NAACP's right to fund civil rights litigation to which it was not a party).

282. Sachs, *supra* note 166, at 2728.

283. *See* NLRB v. United Steelworkers of Am., 357 U.S. 357, 363–64 (1958) (finding that labor organizations are not entitled to use every possible means of reaching workers, nor are they entitled to use the same medium of communication as the employer).

284. *See* NLRA § 9(a), 29 U.S.C. § 159(a) (2012).

285. *See id.*

286. Emporium Capwell Co. v. W. Addition Cmty. Org., 420 U.S. 50, 62–64 (1975).

287. *See, e.g.*, Molly S. McUsic & Michael Selmi, *Postmodern Unions: Identity Politics in the Workplace*, 82 IOWA L. REV. 1339, 1362–65 (1997).

diverge from the majority along race, gender, or ethnicity lines.[288] We question whether the majority rule and exclusivity doctrines could survive serious analysis under the assembly clause because it tends to privilege some groups over others.[289] Thus, the presence of a majority union in a workplace should no longer prevent smaller groups of workers from organizing and challenging employer policies that disproportionately impact them. Further, union organizing would no longer be an all-or-nothing proposition: unions might gain a foothold in some workplaces where they are unable to mobilize a majority of the workers. On similar reasoning, a revitalized freedom of assembly would certainly protect members-only bargaining.[290] Taken to the full extreme, it seems possible that assembly rights might be used to challenge the NLRA's election architecture, particularly the restrictions on appropriate bargaining units (section 9).[291]

The Ban on Company Unions—The ban on company unions embodied in section 8(a)(2) seems fundamentally inconsistent with a robust freedom of assembly.[292] If the freedom of assembly is taken seriously, law should no more be able to dictate the form of the assembly when the employer controls it (absent, of course, complete domination or compelled membership) than when the employees choose it. Though most labor advocates regard this ban as vital to protection of workplace rights,[293] many workers indicate that they would prefer some form of voice to no form at all.[294] It is also possible that employer-supported caucuses and work groups may furnish a base from which such groups may subsequently morph into independent unions.[295]

Section 7 Rights—On the flip side, it seems obvious that a revitalized assembly right would be completely consistent with a robust interpretation of section 7 and its central goal of furthering concerted activity, particularly for "mutual aid or protection."[296] No group would ever form without protection for the processes by which concerted activity begins. Absent protection against the use of private power to eliminate the group altogether, group action by workers would not

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288. *See, e.g.*, Marion Crain & Ken Matheny, *"Labor's Divided Ranks": Privilege and the United Front Ideology*, 84 CORNELL L. REV. 1542, 1619 (1999).

289. For a more extended analysis of the majority rule and exclusivity doctrines and the racial and gender privilege they entrench, see generally *id.*

290. *See* CHARLES J. MORRIS, THE BLUE EAGLE AT WORK: RECLAIMING DEMOCRATIC RIGHTS IN THE AMERICAN WORKPLACE (2004); Pope et al., *supra* note 196, at 135.

291. *See* Pope et al., *supra* note 196, at 135.

292. *See* NLRA § 8(a)(2), 29 U.S.C. § 158(a)(2) (2012).

293. *See, e.g.*, Pope et al., *supra* note 196, at 135.

294. *See* Bruce E. Kaufman, *The Employee Participation/Representation Gap: An Assessment and Proposed Solution*, 3 U. PA. J. LAB. & EMP. L. 491, 540 (2001) (noting that Canadian labor law permits company unions and that the net effect has been neutral or even positive when combined with strong protections to organize).

295. *See* Carol Brooke, *Nonmajority Unions, Employee Participation Programs, and Worker Organizing: Irreconcilable Differences?*, 76 CHI.-KENT L. REV. 1237, 1263–64 (2001).

296. *See* NLRA § 7, 29 U.S.C. § 157.

exist.[297] Thus, the Board would find new support for its efforts to expand protected concerted activity beyond traditional contexts.

We do not mean to suggest that assembly rights are a panacea. Large questions exist concerning whether the assembly right can be revived, and if so, whether it can be deployed to support worker advocacy groups against the inevitable push-back from the propertied elite. Assembly's textual basis and its history as a source of protection for labor organizing distinguishes it, however, from the implied freedom of association, a creature of Supreme Court judicial construction that lacks a link to labor rights. The swell of scholarly efforts in service of resurrecting assembly also offers hope. And no legislative action is necessary to begin the process; all unions and other advocacy groups need do is to begin using the rhetoric of assembly rights on the streets, in their public communications and proworker or prounion campaigns, and in litigation before the courts and the Board challenging the application of labor law where it restricts assembly.

CONCLUSION

The unrelenting decline in union density and influence in the United States is attributable, at least in part, to a work law regime that is fundamentally hostile to group action. The law effectively hamstrings efforts by progressive unions to adapt to new employment regimes, new ways of structuring work, and the shifting demographics of the labor force. In this Article, we have urged a direct challenge to that hostility through resurrection of the constitutional right, explicitly protected in the First Amendment, "peaceably to assemble."[298] The assembly right played a critical role in labor rhetoric that built momentum toward the enactment of the Wagner Act, and it provided legal shelter for organizers during the heyday of union organizing that followed.

We argue that reframing labor rights as assembly rights would offer modern unions and other worker advocacy groups a new rhetorical tool in the struggle to win hearts and minds. Constitutional rights are accessible to the public and to workers in a way that statutory mandates are not.[299] Thus, they are more likely to be effective in the crusade to rebrand labor unionism.[300] Unions, worker centers, and other advocacy groups should consider appealing to the public to support the constitutional right to assembly in the context of rallies, pickets, boycotts, demonstrations, and social media appeals designed to advance workers' rights. They might reform their marketing strategies, including websites, publicity, handbills, and other mediums to foreground assembly rights. Further, the constitutional stature of the assembly right could ground serious challenges in

297. *See* Bhagwat, *Associational Speech*, *supra* note 16, at 998; Inazu, *Virtual Assembly*, *supra* note 16, at 1097–1102.

298. U.S. CONST. amend. I.

299. Pope, *The First Amendment*, *supra* note 196, at 947.

300. *Id.*

court to portions of the labor law that hamstring both unions and new forms of worker advocacy groups, particularly restrictions on picketing, secondary boycotts, the strike weapon, and group litigation conducted as part of an organizing drive.