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## Labor Values Are First Amendment Values: Why Union Comprehensive Campaigns Are Protected Speech

Charlotte Garden

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## ARTICLES

### LABOR VALUES ARE FIRST AMENDMENT VALUES: WHY UNION COMPREHENSIVE CAMPAIGNS ARE PROTECTED SPEECH

Charlotte Garden\*

*Corporate targets of union “comprehensive campaigns” increasingly have responded by filing civil Racketeer Influenced and Corrupt Organizations Act (RICO) lawsuits alleging that unions’ speech and petitioning activities are extortionate. These lawsuits are the descendants of the Supreme Court’s unexplained treatment of much labor speech as less worthy of protection than other types of speech. Starting from the position that speech that promotes democratic discourse deserves top-tier First Amendment protection, I argue that labor speech—which plays a unique role in civil society—should be on an equal footing with civil rights speech. Thus, even if union advocacy qualifies as legal extortion, the First Amendment should trump civil RICO enforcement, with two limited exceptions: speech that is actually malicious, and speech that imminently threatens to force an employer to choose between breaking the law and suffering significant economic harm or shutting its doors altogether.*

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#### INTRODUCTION

Union density—the percentage of the eligible workforce that is represented by a union—is falling in the United States. Among private employers, it has been falling since the 1950s and is now well below ten percent, far lower than in previous decades.<sup>1</sup> Unless unions come up with new strategies to organize workers this is unlikely to change, particularly given employers’ impressive track records at defeating traditional organizing methods.<sup>2</sup> In response, unions are increasingly waging

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1. BUREAU OF LABOR STATISTICS, UNION MEMBERS SUMMARY (2011), available at <http://www.bls.gov/news.release/union2.nr0.htm>.

2. See generally Kate Bronfenbrenner, *Final Report: The Effects of Plant Closing or Threat of Plant Closing on the Right of Workers To Organize*, DIGITALCOMMONS@ILR INT’L PUBLICATIONS (Sept. 30, 1996), <http://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?article=1000&context=intl>.

“comprehensive campaigns” in pursuit of employer neutrality, recognition, first contracts, and the like. During comprehensive campaigns, unions deploy a range of tactics, including teaming up with community groups to criticize the company’s record on labor, environmental, and other issues of concern to the public and company stakeholders; lobbying city governments to pass resolutions condemning the company; opposing the company in the regulatory arena (such as by opposing permit applications); and organizing boycotts of the employer’s goods.<sup>3</sup>

Employers hate comprehensive campaigns. They can span decades, they can harm the employers’ reputations, and they can be costly to fight. (And, they sometimes result in unionization or a contract.) Increasingly, employers are responding by filing civil racketeering actions.<sup>4</sup> These suits allege that a comprehensive campaign is extortionate in that it leverages the employer’s fear of economic loss to obtain property, in the form of either a neutrality or card-check agreement or, more tangibly, union dues or increased wages and benefits.<sup>5</sup> Additionally, they may also allege that the comprehensive campaign’s goal was illegal.<sup>6</sup> For example, in *Smithfield v. United Food & Commercial Workers International Union* (UFCW),<sup>7</sup> the complaint alleged that the union sought to compel company recognition of the union as its employees’ exclusive representative, even though the union lacked majority support.<sup>8</sup> However, other suits simply focus on the fact that employers have no legal obligation to agree to certain union demands, such as remaining neutral during an organizing campaign.<sup>9</sup>

It is unclear what role the First Amendment plays in protecting unions from civil liability under the Racketeer Influenced and Corrupt

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3. Cynthia L. Estlund, *The Ossification of American Labor Law*, 102 COLUM. L. REV. 1527, 1605 & n.326 (2002).

4. There have been fewer than twenty such suits filed since 1980. James J. Brudney, *Collateral Conflict: Employer Claims of RICO Extortion Against Union Comprehensive Campaigns* 27 & nn.131–33 (Dec. 2009), available at [http://works.bepress.com/cgi/viewcontent.cgi?article=1001&context=james\\_brudney](http://works.bepress.com/cgi/viewcontent.cgi?article=1001&context=james_brudney).

However, the filing of three such suits within the space of a year might suggest that employers are beginning to view civil RICO as a more attractive way of fighting union organizing campaigns. See generally *Cintas Corp. v. UNITE HERE*, 601 F. Supp. 2d 571 (S.D.N.Y.) (complaint filed March 5, 2008, alleging civil RICO violation and trademark infringement), *aff’d*, 355 F. App’x 508 (2d Cir. 2009); *Wackenhut Corp. v. Serv. Emps. Int’l Union*, 593 F. Supp. 2d 1289 (S.D. Fla. 2009) (complaint filed Nov. 1, 2007 in the Southern District of New York, then transferred to the Southern District of Florida under Case no. 9:07-cv-81090, alleging civil RICO violation); *Smithfield Foods, Inc. v. United Food & Commercial Workers Int’l Union*, 585 F. Supp. 2d 789 (E.D. Va. 2008) (complaint filed Oct. 17, 2007, alleging violations of civil RICO and various North Carolina torts). Similarly, Sodexo recently filed a complaint against the Service Employees International Union and others, bringing civil RICO and tort claims. Complaint at 113–24, *Sodexo, Inc. v. Serv. Emps. Int’l Union*, No. 1:11-cv-276 (E.D. Va. Mar. 17, 2011).

5. See *supra* note 4.

6. For example, *Smithfield* alleged that the United Food & Commercial Workers’s (UFCW) comprehensive campaign had an illegal goal, whereas *Wackenhut* and *Cintas* did not.

7. 585 F. Supp. 2d 789.

8. See generally First Amended Complaint, *Smithfield*, 585 F. Supp. 2d 789 (No. 3:07CV641), 2008 WL 1825139.

9. See *infra* notes 77–80 and accompanying text.

Organizations Act (RICO) for their advocacy during comprehensive campaigns. For example, the *Smithfield* court rejected wholesale the union's First Amendment defense, concluding that "the First Amendment simply does not protect extortion."<sup>10</sup> However, it is clear that the same conduct carried out by civil rights protesters pursuing "political" goals would have a much stronger claim to First Amendment protection. In *NAACP v. Claiborne Hardware Co.*,<sup>11</sup> the Supreme Court held that the First Amendment protected coercive speech—speech that was significantly more coercive than that involved in most comprehensive campaigns—when it was part of a civil rights campaign.<sup>12</sup> Importantly, though, the *Claiborne Hardware* Court went on to state that tactically similar labor speech aimed at achieving traditional union goals fell somewhere lower down the ladder because labor's goals are "economic" rather than political.<sup>13</sup> Likewise, the Court has on other occasions stated that labor picketing and secondary boycotts are subject to regulation simply because they are coercive—even if they are motivated by purely political, and not economic, goals.<sup>14</sup>

In this Article, I argue that most labor speech employed in comprehensive campaigns should receive heightened First Amendment protection because of its important role in facilitating democratic discourse and deliberation.<sup>15</sup> Accounts of the First Amendment that focus on popular sovereignty and democratic discourse have failed to consider fully the role of associations in promoting such discourse. Yet associations perform tasks that are crucial to a well-functioning democracy: encouraging deliberation about shared interests and goals; acting as microcosms where members can develop civic skills and a heightened sense of their social roles; providing a check on government by promoting social solidarity independent from the state; and aggregating and amplifying their members' voices.<sup>16</sup>

Thus, my argument is, first, that associational speech belongs on the highest rung of the First Amendment hierarchy, and second, that union speech is an important component of associational speech. In that regard, unions, like other associations, perform deliberation-enhancing and state-checking functions. First, because unions are relatively formal democracies, they can serve as schools for democracy<sup>17</sup> in which members must engage in meaningful deliberation to keep the union running smoothly. Second, unions' relative diversity provides opportunities for members to forge new social bonds, facilitating group interdependence.

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10. *Smithfield*, 585 F. Supp. 2d at 805 (alterations omitted) (internal quotation marks omitted) (quoting *United States v. Boyd*, 231 F. App'x 314, 315–16 (5th Cir. 2007)).

11. 458 U.S. 886 (1982).

12. *Id.* at 928–29.

13. *Id.* at 912.

14. *E.g.*, *Int'l Longshoremen's Ass'n v. Allied Int'l, Inc.*, 456 U.S. 212, 225–26 (1982) (holding that secondary boycott launched to protest Soviet invasion of Afghanistan could be enjoined consistent with the First Amendment).

15. In this Article, I will use the words "discourse" and "deliberation" interchangeably.

16. See generally JEAN L. COHEN & ANDREW ARATO, *CIVIL SOCIETY AND POLITICAL THEORY* (1992).

17. See generally ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* (1835).

Third, unions can act directly in the political process as a partial counterweight to the interests of those with the easiest access to political power. Fourth, unions may encourage members' political participation, as there is at least some empirical evidence that union members are more likely than the rest of the public to participate in government, by engaging in activities such as volunteering for a political candidate or writing a letter to the editor.

So far, I have focused on only one side of First Amendment balancing. But of course, even top-tier First Amendment protection can be overcome by a compelling and narrowly-tailored state interest. Ultimately, I conclude that the interests advanced by civil RICO cannot surmount unions' First Amendment interests in nonviolent comprehensive campaign advocacy, except if the unions' speech (1) is actually malicious under *New York Times Co. v. Sullivan*<sup>18</sup> or (2) imminently threatens to force the employer to choose between taking an illegal action and suffering serious financial harm.

Part I of this Article describes comprehensive campaigns and the civil RICO lawsuits targeting them. Part II discusses the current state of the law governing First Amendment protection for union expressive activity. Part III argues that speech that enhances civil society, including union speech, deserves the highest level of First Amendment protection because of its role in promoting deliberative democracy. Finally, Part IV argues that the First Amendment should provide a defense to most civil RICO suits, though the National Labor Relations Board (NLRB) may be able to continue to regulate comprehensive campaigns without violating unions' First Amendment rights.

## I. BACKGROUND

### A. Union Comprehensive Campaigns

It is no surprise that union density is falling in the United States and has been for decades. In 2008, only 12.4% of workers—16.1 million workers—belonged to a union.<sup>19</sup> Just fifteen years earlier, 20% of workers belonged to a union,<sup>20</sup> and, in 1945, more than one-third of non-agricultural workers were union members.<sup>21</sup> This decline has continued even though “unionized workers tend to be paid more and are more likely to be covered

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18. 376 U.S. 254 (1964).

19. BUREAU OF LABOR STATISTICS, UNION MEMBERS SUMMARY (2009), available at [http://www.bls.gov/news.release/archives/union2\\_01282009.htm](http://www.bls.gov/news.release/archives/union2_01282009.htm). Unions represented another 1.7 million non-members. *Id.*

20. *Id.*

21. ERIC FONER, THE STORY OF AMERICAN FREEDOM 229 (1998); Daniel B. Cornfield & Bill Fletcher, *The U.S. Labor Movement: Toward a Sociology of Labor Revitalization*, in SOURCEBOOK OF LABOR MARKETS: EVOLVING STRUCTURES AND PROCESSES 61, 61 (Ivar Berg & Arne L. Kalleberg eds., 2001).

by a broader set of employer-provided fringe benefits than nonunion workers.”<sup>22</sup>

To reverse this trend, unions have begun waging “comprehensive campaigns.” These campaigns, also known as “corporate,” “coordinated,” or “strategic” campaigns,<sup>23</sup> are prolonged organizing efforts designed to pressure employers into agreeing to union demands. A union may seek employer neutrality during a union organizing drive or an alternative union election process, such as a card-check, instead of an NLRB-sponsored election. Comprehensive campaigns simultaneously target multiple employer pressure points—employees, customers, shareholders, directors, regulators, and the public at large—by “appeal[ing] directly to the public by way of rallies, pickets, speeches, and leafleting in public streets and parks, often with the active support of churches and other community organizations outside the labor movement itself.”<sup>24</sup>

Comprehensive campaigns differ from more traditional labor organizing tactics in a few respects. First, they move the locus of the dispute from the plant floor or the picket line out into the community and sometimes across state and national borders. Second, they involve both labor unions and other community, religious, and activist organizations and thus rally a broad base of support that goes beyond labor’s immediate constituency. Third, they move away from traditional labor rhetoric and include the concerns of the civil rights, environmental, and consumer protection movements, among others, which sometimes conveys the impression that those organizations—and not the labor union—are the driving force behind the various rallies, press releases, and other campaign events.

However, “comprehensive campaign” is not subject to precise definition. The U.S. Court of Appeals for the D.C. Circuit has observed that the equivalent term “corporate campaign”

encompasses a wide and indefinite range of legal and potentially illegal tactics used by unions to exert pressure on an employer. These tactics may include, but are not limited to, litigation, political appeals, requests that regulatory agencies investigate and pursue employer violations of state or federal law, and negative publicity campaigns aimed at reducing the employer’s goodwill with employees, investors, or the general public.<sup>25</sup>

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22. Cornfield & Fletcher, *supra* note 21, at 66 (“[O]ver time, union wages are consistently higher than nonunion wages for all demographic groups.”).

23. Much of the literature discussing these campaigns from employers’ perspectives uses the term “corporate campaign,” whereas unions have come to favor “comprehensive campaign.” Brudney, *supra* note 4, at 7 & nn.23–24. This Article uses the term “comprehensive campaign.”

24. Estlund, *supra* note 3, at 1605; *see also* Brudney, *supra* note 4, at 1 (“Coordinated campaign tactics include publicity efforts aimed at attracting media attention and consumer interest; regulatory reviews initiated to focus on a company’s possible health, safety, environmental, or zoning violations; and investigations of a company’s financial status through use of pension funds or other shareholder resources.”).

25. *Food Lion, Inc. v. United Food & Commercial Workers Int’l Union*, 103 F.3d 1007, 1014 n.9 (D.C. Cir. 1997).

It is unclear whether comprehensive campaigns actually affect employers' economic performance.<sup>26</sup> However, employers bringing civil RICO suits claim that they do,<sup>27</sup> and there is some evidence that comprehensive campaigns can convince an employer to agree to maintain a publically neutral stance toward union organizing or to hold an alternative union election, such as a card-check—both of which make it more likely that employees will vote to unionize.<sup>28</sup>

### B. Civil RICO as a Response to Union Comprehensive Campaigns

To state a claim under the civil RICO statute, an employer must plead a pattern or practice of racketeering activity, as evidenced by two or more commissions of “predicate crimes” from an enumerated list.<sup>29</sup> In civil RICO cases arising out of comprehensive campaigns, the predicate crime alleged is generally extortion. Though violations of state or federal extortion law can generally be a RICO predicate, the Supreme Court requires that the conduct also qualify as “‘generic’ extortion,” defined as “‘obtaining something of value from another with his consent induced by the wrongful use of force, fear, or threats.’”<sup>30</sup>

Civil RICO is only the most recent vehicle by which employers have filed lawsuits targeting core labor activity, such as organizing and striking. In the remainder of this section, I will trace the history of these lawsuits and then describe the most recent round of civil RICO suits, focusing on *Smithfield*.

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26. James Gray Pope, *Labor-Community Coalitions and Boycotts: The Old Labor Law, the New Unionism, and the Living Constitution*, 69 TEX. L. REV. 889, 906 (1991) (citing C. PERRY, *UNION CORPORATE CAMPAIGNS* 125 (1987)) (concluding that unions' attempts to put direct economic pressure on employers mostly had “nuisance value,” and that “the key to union success lies not in economic or direct pressure, but in union appeals to principle that influence public relations”); cf. Brudney, *supra* note 4, at 1–2 (stating that unions engaging in comprehensive campaigns “have enjoyed some success which in turn has contributed to a modest rise in private sector union density, the first such increase for decades.”).

27. For example, *Smithfield* claimed at least \$5,900,000 in damages in its complaint against the UFCW. First Amended Complaint, *supra* note 8, ¶ 1, at 91–92; *infra* Part IV.B. According to one press release issued by Hunton & Williams, the law firm that represented *Smithfield* in its civil RICO lawsuit against the UFCW, “the corporate campaign is a coordinated, negative publicity effort intended to place unbearable financial, legal and social pressure on a targeted employer in order to convince that employer to forego its NLRB rights and agree to the union’s organizing demands.” Press Release, Gregory B. Robertson & Kurt G. Larkin, Hunton & Williams LLP, RICO: A New Tool for Employers Facing Union Corporate Campaigns? (May 2009), available at [http://www.hunton.com/files/tbl\\_s47Details/FileUpload265\2664\RICO\\_A\\_New\\_Tool\\_5.09.pdf](http://www.hunton.com/files/tbl_s47Details/FileUpload265\2664\RICO_A_New_Tool_5.09.pdf).

28. Brudney, *supra* note 4, at 10 & n.38.

29. 18 U.S.C. § 1961(1) (2006) (defining racketeering activity).

30. *Scheidler v. Nat’l Org. for Women, Inc.*, 537 U.S. 393, 409 (2003) (quoting *United States v. Nardello*, 393 U.S. 286, 290 (1969)); see *James v. United States*, 550 U.S. 192, 222 n.2 (2007) (noting that the Court adopted that definition because the RICO statute leaves extortion undefined). This is the definition of extortion under the Hobbs Act. See 18 U.S.C. § 1951(b)(2); see also *United States v. Enmons*, 410 U.S. 396, 397 (1973).

### 1. Extortion Liability for Core Union Activity

The theory that core union activity, like strikes and boycotts, constitutes criminal conspiracy is not new; prosecutions of workers engaged in collective action date back to at least 1806.<sup>31</sup> Since then, employers' legal theories have evolved alongside Congress's and the courts' modification of the applicable law, but the underlying legal theory—that labor unions have no right to damage an employer's profitability or reputation through collective action, particularly through appeals to the general public—has remained remarkably similar.<sup>32</sup>

Early conspiracy lawsuits against unions often successfully invoked federal antitrust law, and these suits continued even after Congress attempted to exempt core union activity from the reach of antitrust law in the Clayton Act.<sup>33</sup> In *Duplex Printing Press Co. v. Deering*<sup>34</sup> and later cases, the *Lochner*-era Court reasoned that, through activities like picketing and secondary boycotts, unions sought to drag third parties “against [their] will into a concerted plan to inflict damage upon another employer who is in dispute with his employees.”<sup>35</sup> That reasoning was not limited to secondary boycotts: any labor protest could be tortious if its effect was to embarrass potential customers away from the business with which the union had a dispute. For example, in *Truax v. Corrigan*,<sup>36</sup> the Court overturned

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31. Jim Hawkins, *Papers, Petitions, and Parades: Free Expression's Pivotal Function in the Early Labor Movement*, 28 BERKELEY J. EMP. & LAB. L. 63, 68 (2007). Before the 1800s, criminal labor prosecutions were relatively rare and convictions even more unusual. See WILLIAM E. FORBATH, LAW AND THE SHAPING OF THE AMERICAN LABOR MOVEMENT 61 (1991) (“[T]here seem to have been relatively few criminal conspiracy trials of trade unionists until the 1870s . . . . In the 1870s and 1880s, however, sanctions grew harsher.”).

32. *E.g.*, *Duplex Printing Press Co. v. Deering*, 254 U.S. 443, 466 (1921); *Loewe v. Lawlor*, 208 U.S. 274, 301 (1908). In *Duplex Printing Press Co. v. Deering*, the Court concluded that the Clayton Act's labor exemption did not exempt from antitrust liability a union's threats of secondary boycotts and strikes—or the coerced participation of union members in those activities—aimed at pressuring employers to adopt union wage and hour scales. *Duplex Printing Press Co.*, 254 U.S. at 466. The Court stated that, by expanding the locus of the dispute beyond unionized employers, the union had “depart[ed] from its normal and legitimate objects,” *id.* at 469, and instead engaged in “a general class war,” *id.* at 472. Unsurprisingly, the Court theorized that “business . . . is a property right, entitled to protection against unlawful injury or interference” by labor unions. *Id.* at 465. However, in dissent, Justice Brandeis argued that the Clayton Act authorized “industrial combatants” to “push their struggle to the limits of the justification of self interest.” *Id.* at 484, 488 (Brandeis, J., dissenting); see also *Am. Steel Foundries v. Tri-City Cent. Trades Council*, 257 U.S. 184, 204 (1921) (concluding that the Clayton Act does not protect coercion or intimidation, from which “the person sought to be influenced has a right to be free and his employer has a right to have him free”); FORBATH, *supra* note 31, at 60 (stating that, “[b]y the early twentieth century, common law and antitrust doctrine condemned . . . virtually the entire spectrum of peaceful secondary actions”).

33. Seth Kupferberg, *Political Strikes, Labor Law, and Democratic Rights*, 71 VA. L. REV. 685, 713 (1985).

34. 254 U.S. 443.

35. *Duplex Printing Press Co.*, 254 U.S. at 474; see also *Am. Steel Foundries*, 257 U.S. at 212 (characterizing the *Duplex Printing Press Co.* boycott as an attempt by the union “to use the right of trade of persons having nothing to do with the controversy . . . to injure the Duplex Company in its interstate trade”).

36. 257 U.S. 312 (1921).

an Arizona statute protecting labor strikes and boycotts, holding that it violated the Fourteenth Amendment.<sup>37</sup> The Court explained that labor picketing that forced customers patronizing the struck restaurant to “run the gauntlet of most uncomfortable publicity, aggressive and annoying importunity, libelous attacks and fear of injurious consequences, illegally inflicted, to his reputation and standing in the community” was “moral coercion,” before adding that “[v]iolence could not have been more effective.”<sup>38</sup>

These cases were far from isolated. “Between 1880 and 1931, by one count, nearly two thousand injunctions were issued prohibiting strikes and labor boycotts.”<sup>39</sup> They declined only after Congress passed the Norris-LaGuardia Act, which “deprived federal courts of jurisdiction to issue injunctions in most cases arising from labor disputes.”<sup>40</sup> However, Norris-LaGuardia did not spell the end of lawsuits alleging that labor organizing activity was extortionate. In 1973, the Court addressed such a suit in the context of the Hobbs Act. In *United States v. Enmons*,<sup>41</sup> the federal government charged that a union’s acts of violence and property destruction constituted extortion under the Hobbs Act because they were aimed at compelling an employer to sign a collective bargaining agreement.<sup>42</sup> It was undisputed that the union’s objectives—higher wages—and the accompanying strike were both legal, but the government argued that the union’s use of violence amounted to extortion because it sought to obtain “property . . . by wrongful use of actual or threatened force, violence or fear.”<sup>43</sup> The Court rejected the government’s construction of the Hobbs Act because it would have elevated picket-line violence to a federal racketeering violation.<sup>44</sup> Instead, the Court held that a statutory violation exists only where force, violence, or fear is used to obtain property to which “the alleged extortionist has no lawful claim.”<sup>45</sup>

Thus, civil RICO is simply the latest legal theory under which labor unions have faced potential liability for organizing and related activity. As discussed in the next section, these RICO cases have met with mixed results, and it is unclear whether they will ultimately prove successful.

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37. *Id.* at 340–41.

38. *Id.* at 328.

39. FONER, *supra* note 21, at 123.

40. Kupferberg, *supra* note 33, at 713; *see also* *United States v. Hutcheson*, 312 U.S. 219, 231–33 (1941) (describing how newly-enacted Norris-LaGuardia Act accomplished what Congress first sought to accomplish through the Clayton Act and holding that its anti-injunction provisions precluded criminal liability for picketing and boycott activity).

41. 410 U.S. 396 (1973).

42. *Id.* at 397.

43. *Id.* (quoting 18 U.S.C. § 1951(b)(2) (2006)).

44. *Id.* at 411.

45. *Id.* at 400.

## 2. Recent RICO Lawsuits Targeting Unions

A growing number of employers have responded to union comprehensive campaigns by filing civil lawsuits based on RICO.<sup>46</sup> For example, in rapid succession between October 2007 and March 2008, Smithfield Foods, Wackenhut Corporation, and Cintas Corporation each filed a lengthy civil complaint alleging that a union (or, in the case of Cintas, two unions), along with other assorted labor organizations and individuals, had violated civil RICO and other causes of action by engaging in a comprehensive campaign.<sup>47</sup> None of those complaints alleged that union violence had taken place during campaign activities. Rather, each alleged that the defendants had committed extortion by threatening to continue the comprehensive campaign until the employer agreed to the union's demands.<sup>48</sup>

Smithfield Foods' recent lawsuit against the UFCW is illustrative because it both describes a comprehensive campaign that involved the tactics discussed above and resulted in a late-stage settlement, rather than a dismissal by a court. However, it also presents a somewhat more complicated case because unlike many other similar lawsuits, such as *Wackenhut Corp. v. Service Employees International Union*<sup>49</sup> and *Cintas Corp. v. UNITE Here*,<sup>50</sup> Smithfield alleged that the union goal was, at least in part, to compel Smithfield to behave illegally.<sup>51</sup> To provide context, I will discuss briefly the UFCW's comprehensive campaign and the resulting lawsuit.

### 3. The UFCW's Comprehensive Campaign To Organize Smithfield's Tar Heel Plant

The *Smithfield* civil RICO lawsuit had its genesis more than twelve years earlier, when the UFCW began trying to organize Smithfield's pork processing plant in Tar Heel, North Carolina. Tar Heel, population sixty-seven, is in southeastern North Carolina, the state with the lowest union density in the country.<sup>52</sup> The Smithfield plant is the largest pork processing plant in the world, employing about 5,000 workers who slaughter and process 32,000 hogs per day.<sup>53</sup>

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46. Pub. L. No. 91-452, Title IX, 84 Stat. 941 (1970) (codified at 18 U.S.C. §§ 1961-1968); see Brudney, *supra* note 4, at 27 nn.131-33 (listing cases).

47. See *supra* note 4.

48. See, e.g., First Amended Complaint, *supra* note 8, ¶ 43, at 12.

49. 593 F. Supp. 2d 1289 (S.D. Fla. 2009).

50. 601 F. Supp. 2d 571 (S.D.N.Y. 2009).

51. See *supra* note 6.

52. Tar Heel, North Carolina, CITY-DATA.COM, <http://www.city-data.com/city/Tar-Heel-North-Carolina.html> (last visited Apr. 20, 2011); BUREAU OF LABOR STATISTICS, *supra* note 19 (North Carolina's union membership rate is 3.5%).

53. First Amended Complaint, *supra* note 8, ¶ 9, at 3; *Smithfield Tar Heel Plant Votes for Union*, REUTERS (Dec. 12, 2008), <http://www.reuters.com/article/idUSN1139559220081212>;

The UFCW's early organizing attempts—which did not involve a comprehensive campaign—resulted in NLRB-monitored union elections in 1994 and 1997.<sup>54</sup> The UFCW lost both elections, but only after Smithfield engaged in what the NLRB later found to have been an array of unfair labor practices during the time leading up to each election, including threatening employees with plant closure, threatening pro-union employees with discipline, interrogating employees about their attitudes toward the union, maintaining surveillance of employees distributing pro-union handbills, suspending and firing pro-union employees, and assaulting and arresting at least one pro-union employee.<sup>55</sup> Following post-election unfair labor practice proceedings, the NLRB ordered Smithfield to reinstate with backpay those employees who had been wrongfully fired, issued a cease-and-desist order, required Smithfield to provide UFCW with a list of names and addresses of current employees, and ordered Smithfield to post notices.<sup>56</sup> However, the NLRB declined to issue a bargaining order, which would have compelled Smithfield to bargain with the UFCW without another election.<sup>57</sup> Moreover, Smithfield's appeal of the NLRB's decision was not completed until 2006—meaning that the Board-ordered remedies were not implemented until nearly a dozen years after the first election.<sup>58</sup>

Following the two unsuccessful NLRB elections, the UFCW changed tactics. While maintaining a presence in Tar Heel,<sup>59</sup> the UFCW launched a comprehensive campaign. Consistent with comprehensive campaigns more generally, the UFCW took its campaign to cities around the country and broadened its focus. It also partnered with groups dedicated to labor, civil rights, and environmental issues, as well as religious groups. Thus, Smithfield alleged that the UFCW “invest[ed] substantial resources towards events, actions and conduct that ha[s] little to no direct relation to the wages, hours, benefits and working conditions of the employees.”<sup>60</sup> More

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54. Smithfield Packing Co., Inc., 344 N.L.R.B. 1, 1 (2004).

55. *Id.* at 7.

56. *Id.* at 15–16.

57. *Id.* Courts may issue a “bargaining order” requiring an employer to recognize a union as the representative of the relevant bargaining unit when the “employer has committed independent unfair labor practices which have made the holding of a fair election unlikely or which have in fact undermined a union’s majority and caused an election to be set aside.” NLRB v. Gissel Packing Co., 395 U.S. 575, 610 (1969).

58. See generally United Food & Commercial Workers Union Local 204 v. NLRB, 447 F.3d 821 (D.C. Cir. 2006).

59. For example, the UFCW ran a “workers center” to help employees living and working in eastern North Carolina with workers’ compensation, immigration, and other problems, and to attempt to maintain a union presence and workers’ support in the area. Bob Geary, *A Fast-Moving Line and a Union Trying To Keep Up*, INDEP. WKLY. (Apr. 4, 2007), <http://www.indyweek.com/indyweek/a-fast-moving-line-and-a-union-trying-to-keep-up/Content?oid=1201323> (describing UFCW’s role in running workers center); see also Yonat Shimron & Barbara Barrett, *Bill’s Death Stings Illegal Immigrants*, NEWS & OBSERVER, June 9, 2007, at A12, available at <http://www.newsobserver.com/2007/06/09/35478/bills-death-stings-illegal-immigrants.html#storylink=misearch>.

60. First Amended Complaint, *supra* note 8, ¶ 39, at 11.

specifically, according to Smithfield, the campaign involved the following:<sup>61</sup>

1. Making unflattering (and according to Smithfield, untrue) statements, such as that Smithfield was a “racist, anti-immigrant company that feels they can terrorize workers at will,”<sup>62</sup> and distributing flyers and handbills criticizing the company, for example by stating that “There’s Blood on Smithfield Products” or that Smithfield mistreats workers in various ways;<sup>63</sup>

2. Publishing and distributing a report titled “Packaged With Abuse: Safety and Health Conditions and Smithfield Packing’s Tar Heel Plant,” which criticized the Tar Heel plant’s safety record;<sup>64</sup>

3. Holding protests at grocery stores selling Smithfield products, some of which stopped carrying Smithfield products;<sup>65</sup>

4. Attributing events to religious, civil rights, immigrant rights, and consumer advocacy groups to conceal the union’s orchestration of the comprehensive campaign;<sup>66</sup>

5. Leading a protest during which participants marched to the home of the president of a store that sold Smithfield products to deliver a large father’s day card, which was signed by the children of Smithfield workers and stated that Smithfield workers were abused and mistreated;<sup>67</sup>

6. Threatening a secondary boycott of stores carrying Smithfield products;<sup>68</sup>

7. Attempting to convince Smithfield spokesperson Paula Deen to end her relationship with Smithfield;<sup>69</sup>

8. Encouraging religious bodies and city councils to boycott Smithfield or to pass resolutions condemning the company;<sup>70</sup>

9. Sending letters criticizing the company to financial analysts;<sup>71</sup>

10. Protesting at Smithfield’s annual shareholders’ meetings;<sup>72</sup> and

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61. The UFCW’s comprehensive campaign against Smithfield was similar to other comprehensive campaigns that were the subject of contemporaneous lawsuits. *See, e.g.*, *Cintas Corp. v. UNITE HERE*, 601 F. Supp. 2d 571, 575 (S.D.N.Y.) (describing campaign, which included claims that the union falsely portrayed company as having engaged in racist, sexist and illegal acts, and targeted company’s customers to encourage them to stop doing business with the company), *aff’d*, 355 F. App’x 508 (2d Cir. 2009); *Wackenhut Corp. v. Serv. Emps. Int’l Union*, 593 F. Supp. 2d 1289, 1290 (S.D. Fla. 2009) (describing SEIU campaign against Wackenhut, including publishing “false and misleading reports disparaging Wackenhut and some of its national customers,” persuading Wackenhut customers to boycott the company, and other activities).

62. *E.g.*, First Amended Complaint, *supra* note 8, ¶ 74, at 23.

63. *Id.* ¶ 99, at 29–30.

64. *Id.* ¶¶ 88–95, at 25–28.

65. *Id.* ¶¶ 122–24, at 37–38.

66. *Id.* ¶ 100, at 30.

67. *Id.* ¶¶ 113–15, at 34–35.

68. *Id.* ¶¶ 125–27, at 38–40.

69. *Id.* ¶¶ 131–40, at 41–44.

70. *Id.* ¶¶ 141–54, at 45–50.

71. *Id.* ¶¶ 155–58, at 50–51.

72. *Id.* ¶¶ 159–67, at 51–54.

11. Filing regulatory complaints and opposing Smithfield's regulatory applications, such as Smithfield's application for a water permit, which would have allowed Smithfield to expand operations at the Tar Heel plant.<sup>73</sup>

#### 4. Smithfield's Extortion Allegation

According to Smithfield, the UFCW's goal was to force Smithfield to voluntarily recognize the union as the bargaining unit's representative, whether or not a majority of Smithfield employees wanted the representation.<sup>74</sup> An employer that recognizes a union as the exclusive representative of a bargaining unit violates the NLRA if the union does not enjoy majority support within the unit.<sup>75</sup> Thus, according to Smithfield, the extortionate threat was that UFCW would continue the comprehensive campaign until the company agreed to an illegal election process.<sup>76</sup> In other words, the gravamen of Smithfield's complaint was that the UFCW had attempted to extort Smithfield into illegally recognizing the union by saying untrue and embarrassing things about Smithfield that threatened to harm Smithfield's reputation and bottom line.

However, Smithfield apparently did not consider it *necessary* to show that the union sought to compel the company to commit an illegal act in order to establish the extortion predicate for civil RICO. Rather, Smithfield argued that the union's comprehensive campaign was extortionate even if its goal was only to secure Smithfield's neutrality regarding the prospect of unionization or to obtain a "card-check" election<sup>77</sup>—both agreements into which Smithfield could have entered perfectly legally.<sup>78</sup> Thus, Smithfield

73. *Id.* ¶¶ 168–72, 179–80, at 54–56, 58–59.

74. *Id.* ¶ 2, at 1 (“Defendants conspired to extort Smithfield’s ‘voluntary’ recognition of Defendants UFCW and Local 400 as the exclusive bargaining representatives of hourly employees at Tar Heel—regardless of the degree of actual employee support for such representation—by injuring Smithfield economically until Smithfield either agreed to Defendants’ demands or was run out of business.”).

75. *Int’l Ladies’ Garment Workers’ Union v. NLRB*, 366 U.S. 731, 738–39 (1961) (holding that it is an unfair labor practice to recognize a minority union as the exclusive representative, even if the employer has a good faith belief that the union actually enjoys majority support); *see also Kenrich Petrochemicals, Inc.*, 149 N.L.R.B. 910, 911 (1964) (holding that union and employer committed unfair labor practices when the company recognized the union as the majority representative of its employees despite both parties’ knowledge that the union did not represent a majority of employees in the appropriate unit).

76. First Amended Complaint, *supra* note 8, ¶ 238, at 80 (alleging that, some two years after the comprehensive campaign began, the UFCW demanded a “sham ‘election,’” among other possibilities).

77. *Id.* ¶ 240 (alleging that UFCW offered to stop its comprehensive campaign if Smithfield agreed to take legal actions such as “sit[ting] idly by while allowing Defendants to accost the Tar Heel employees to sign cards authorizing [UFCW] to represent them for purposes of collective bargaining”); Transcript of Hearing at 58, *Smithfield Food, Inc. v. United Food & Commercial Workers Int’l Union*, 585 F. Supp. 2d 789 (E.D. Va. 2008) (No. 3:07CV641) (Smithfield attorney stating that “extorting neutrality is just as unlawful as extorting a [sham] election. It’s a way they can guarantee they’ll win.”).

78. *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 597–98 (1969) (holding card-check election is lawful means of ascertaining whether union has support of majority of employees in bargaining unit); Roger C. Hartley, *Non-Legislative Labor Law Reform and Pre-*

also alleged that the UFCW conveyed extortionate threats when, for example, a UFCW contractor stated at a protest that “Smithfield is not listening, so we’re going to have to go after their pocketbook.”<sup>79</sup> Likewise, the plaintiffs in the *Wackenhut* and *Cintas* cases alleged extortion based on comprehensive campaigns that sought to pressure employers into agreeing to legal card-check or neutrality agreements.<sup>80</sup>

This theory may sound implausible because the notion that activities like peaceful protesting and lobbying can give rise to a charge of extortion is, to say the least, counterintuitive. In that regard, Professor Rick Bales mused that the *Smithfield* lawsuit seemed so implausible that the suit itself might give rise to *company* liability for an unfair labor practice.<sup>81</sup> In this vein, a few arguments that the union’s activity simply does not meet the statutory requirements are readily apparent. For example, in *Enmons*, the Supreme Court construed statutory language identical to that contained in the civil RICO statute, and held that union activity—even when accompanied by violence—could not give rise to extortion liability, provided the union’s objective was legitimate.<sup>82</sup>

Yet, none of these arguments prevailed in *Smithfield*. Instead, the court held at the motion to dismiss stage that *Enmons* did not control because it

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*Recognition Labor Neutrality Agreements: The Newest Civil Rights Movement*, 22 BERKELEY J. EMP. & LAB. L. 369, 374–77 (2001) (describing pervasive use of neutrality agreements).

79. First Amended Complaint, *supra* note 8, ¶ 106, at 32.

80. *Cintas Corp. v. UNITE HERE*, 601 F. Supp. 2d 571, 575 (S.D.N.Y.) (stating that unions sought “card-check/neutrality agreement”), *aff’d*, 355 F. App’x 508 (2d Cir. 2009); *Wackenhut Corp. v. Serv. Emps. Int’l Union*, 593 F. Supp. 2d 1289, 1296 (S.D. Fla. 2009) (stating that Wackenhut “asserts that SEIU is attempting to ‘bend its will’ and obtain from it various intangible property rights, including Wackenhut’s right to control the form and nature of the union recognition process that applies to its employees; Wackenhut’s right to refuse demands for recognition from a ‘mixed union’ such as SEIU; Wackenhut’s right to decline collective bargaining with SEIU; Wackenhut’s right to preserve its employees’ statutory right to ‘free choice,’ and Wackenhut’s right to conduct business with its customers free from interference, harassment and threats of economic doom from SEIU or its agents”).

81. Richard Bates, *NYT on Smithfield’s RICO Suit v. UFCW*, WORKPLACE PROF BLOG (Feb. 5, 2008), [http://lawprofessors.typepad.com/laborprof\\_blog/2008/02/nyt-on-smithfie.html](http://lawprofessors.typepad.com/laborprof_blog/2008/02/nyt-on-smithfie.html) (referencing *Smithfield* lawsuit and noting “the changes to the Board’s policies on when filing a frivolous suit might (or might not as the case may be) constitute a ULP”); *see also* Adam Liptak, *A Corporate View of Mafia Tactics: Protesting, Lobbying and Citing Upton Sinclair*, N.Y. TIMES, Feb. 5, 2008, at A14, available at <http://www.nytimes.com/2008/02/05/us/05bar.html> (opining that “what [Smithfield’s attorney] calls extortion sounds quite a bit like free speech”).

82. *United States v. Enmons*, 410 U.S. 396, 404 (1973). Further, it is not at all clear that employer-plaintiffs can satisfy “generic” extortion’s other requirements, including the mandates that any extortion result in obtaining property or that the use of force, fear, or threats be “wrongful.” *See Cintas Corp.*, 601 F. Supp. 2d at 577–78 (comprehensive campaign not extortionate because company does not have a right to operate free from criticism); Brudney, *supra* note 4, § III.A. There are other reasons that civil RICO suits might fail. For example, they may be preempted under *San Diego Building Trades Council, Local 2020 v. Garmon*, 359 U.S. 236 (1959) (holding that activity that is arguably encompassed within Sections 7 or 8 of the National Labor Relations Act (NLRA) can be regulated only by the NLRB, and that, even if the NLRB declines jurisdiction, the conduct is not redressable in state court unless it was a traditional tort or conduct marked by violence and imminent threats to public order).

construed only federal law, whereas civil RICO lawsuits can rely on state extortion law.<sup>83</sup> It then went on to reject each of the union's other arguments based on the civil RICO act's statutory language, labor preemption, and the First Amendment. (Other courts have rejected labor unions' *Enmons* arguments on other grounds, arguing that *Enmons* either is limited essentially to its facts and applies only to incidents of violence occurring during a strike,<sup>84</sup> or applies only when labor unions are seeking traditional collective bargaining goals such as increased wages.<sup>85</sup>) Ultimately, the Smithfield suit also survived a motion for summary judgment and ended in settlement on the eve of trial.<sup>86</sup>

In contrast, *Wackenhut* and *Cintas* were dismissed pursuant to Federal Rule 12(b)(6) under different legal theories.<sup>87</sup> The mixed track record of the *Smithfield*, *Wackenhut*, and *Cintas* suits is representative of civil RICO cases targeting comprehensive campaigns generally.<sup>88</sup> Thus, given the chance that an employer will survive a motion to dismiss, and the prospect of a favorable settlement, civil RICO suits are likely to continue. Further, the costs associated with defending a civil RICO suit and the prospect of losing such a suit and facing liability for treble damages and attorneys' fees (even if the prospect is small) is likely to deter unions from waging comprehensive campaigns. As the D.C. Circuit stated in the course of rejecting a civil RICO suit, they are "a potentially powerful weapon to wield against striking workers" that could "reset the labor-management balance."<sup>89</sup>

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83. *Smithfield Foods, Inc. v. United Food & Commercial Workers Int'l Union*, 585 F. Supp. 2d 789, 800–01 (E.D. Va. 2008); see also Herbert R. Northrup & Charles H. Steen, *Union "Corporate Campaigns" as Blackmail: The RICO Battle at Bayou Steel*, 22 HARV. J.L. & PUB. POL'Y 771, 813 (1998) (arguing that *Enmons* does not apply to state law).

84. See, e.g., *Tex. Air Corp. v. Air Line Pilots Ass'n Int'l*, No. 88-0804, 1989 WL 146414, at \*6 (S.D. Fla. July 14, 1989) (noting that "[n]umerous courts have effectively limited *Enmons* to its facts, creating an exception to the Hobbs Act only for what was at issue in that case—violence committed during the course of a lawful strike called for the purpose of inducing an employer's agreement to legitimate collective-bargaining demands" and citing cases).

85. See, e.g., *id.* (stating that "[i]n other contexts, the Supreme Court has made clear that to constitute 'legitimate labor objectives,' the goal defendants were seeking to accomplish must have been 'intimately related to wages, hours and working conditions.'" (quoting *Local Union No. 189, Amalgamated Meat Cutters v. Jewel Tea Co.*, 381 U.S. 676, 689–90 (1965))).

86. *Smithfield Foods, United Food and Commercial Workers Reach Settlement*, TRIANGLE BUS. J. (Oct. 27, 2008), <http://www.bizjournals.com/triangle/stories/2008/10/27/daily8.html>.

87. *Cintas Corp.*, 601 F. Supp. 2d at 577–78 (dismissing case after concluding that comprehensive campaign was "lawful 'hard-bargaining'" because *Cintas* would have received some benefit from a card-check/neutrality agreement); *Wackenhut Corp. v. Serv. Emps. Int'l Union*, 593 F. Supp. 2d 1289, 1296 (S.D. Fla. 2009) (dismissing case after concluding that union had not sought to "obtain" property as required to establish extortion as a RICO predicate).

88. Brudney, *supra* note 4, at 27 & n.134 (listing cases and stating that "motions [to dismiss] succeed or fail at roughly comparable levels").

89. *Yellow Bus Lines, Inc. v. Drivers Local Union 639*, 913 F.2d 948, 955 (D.C. Cir. 1990).

In sum, it is unclear under current law whether civil RICO liability can attach to comprehensive campaign activity. Moreover, even if civil RICO suits charging labor unions with extortion are ultimately determined to be legally untenable, they could be eclipsed by some other cause of action—for example, Smithfield pressed a variety of tort theories, which also survived a motion to dismiss and a motion for summary judgment. If there is a basis on which to find that labor unions' advocacy enjoys robust constitutional protection, however, then whether labor speech violates civil RICO or another statute will become largely irrelevant because "the point of modern First Amendment law is that speech is often protected even though it violates a law restricting it."<sup>90</sup> Thus, the remainder of this Article addresses whether comprehensive campaigns, even if otherwise subject to civil RICO liability, might nonetheless be protected by the First Amendment.

In the next section, I survey the evolution of the Supreme Court's jurisprudence on labor picketing, boycotting, and petitioning activity, focusing on the difficulty of reconciling the Court's labor speech cases with First Amendment cases involving other speakers.

## II. FIRST AMENDMENT PROTECTION FOR UNION COMPREHENSIVE CAMPAIGN SPEECH UNDER CURRENT LAW

Though the Supreme Court has tended to interpret the First Amendment in an increasingly speech-protective way since the 1920s, there have also been cycles of contracting free speech rights, as well as a fair amount of ambiguity in its First Amendment jurisprudence.<sup>91</sup> Even given that lack of clarity, labor speech occupies a relatively uncertain place in the hierarchy of First Amendment protection. At times, labor speech has driven an expansion of free speech rights; for example, it was in a labor case, *Thornhill v. Alabama*,<sup>92</sup> that the Court first found a First Amendment right to picket. But after a period of expansion in the late 1930s and early 1940s, labor speech rights contracted as the Court narrowed or eviscerated its earlier precedents. Now, while cases like *Thornhill* remain good law as applied to speech by other social movements, they are essentially inapplicable to labor speech. The net result is that labor speech is its own category under current First Amendment doctrine, entitled to less protection than that received by both other social movements and commercial entities.

Specifically, the Court has allowed greater restrictions on the types of labor expression commonly found in comprehensive campaigns—such as

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90. Eugene Volokh, *Speech as Conduct: Generally Applicable Laws, Illegal Courses of Conduct, "Situation-Altering Utterances" and the Uncharted Zones*, 90 CORNELL L. REV. 1277, 1315 (2005); see also *Nat'l Org. for Women v. Scheidler*, 510 U.S. 249, 264 (1994) (Souter, J., concurring) (noting that conduct that might otherwise be the basis for a civil RICO suit might "be fully protected First Amendment activity").

91. See generally Ken I. Kersch, *How Conduct Became Speech and Speech Became Conduct: A Political Development Case Study in Labor Law and the Freedom of Speech*, 8 U. PA. J. CONST. L. 255 (2006).

92. 310 U.S. 88 (1940).

boycotts, picketing, and petitioning activity<sup>93</sup>—than it has allowed in the civil rights context. At the same time, the Court’s description of, and justification for, its commercial speech doctrine does not neatly apply to labor speech. Moreover, the Court has not advanced a unified theory of its treatment of labor-related expression.<sup>94</sup> Collectively, the Court’s placement of union speech within the First Amendment hierarchy provides at least some support for the argument that a union’s expressive activity can be punished as extortionate without violating the First Amendment.

#### A. Picketing

As discussed above, until Congress intervened by passing the Norris-LaGuardia Act, courts routinely held that labor union picketing infringed employers’ property rights, regularly imposing injunctions or criminal penalties.<sup>95</sup> During that period, the Court viewed picketing as tantamount to violence, essentially unrelated to speech: “the name ‘picket’ indicate[s] a militant purpose, inconsistent with peaceable persuasion.”<sup>96</sup>

That began to change in the 1930s. First, the Court upheld a state statute that expressly allowed peaceful picketing against an employer’s Fourteenth Amendment challenge.<sup>97</sup> Then in *Thornhill*, the Court took a dramatic step toward broader protection for labor speech by overturning, on First Amendment grounds, the criminal conviction of a picketing striker. *Thornhill* held that labor speech deserved robust protection based on a truth-seeking theory of the First Amendment: “Those who won our independence had confidence in the power of free and fearless reasoning and communication of ideas to discover and spread political and economic truth.”<sup>98</sup> Significantly, the Court also directly linked “traditional” labor objectives to the political debates of the day:

It is recognized now that satisfactory hours and wages and working conditions in industry and a bargaining position which makes these possible have an importance which is not less than the interests of those in

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93. See, e.g., James Gray Pope, *Labor and the Constitution: From Abolition to Deindustrialization*, 65 TEX. L. REV. 1071, 1073 (1987) (arguing that rule established in *Fibreboard Paper Prods. Corp. v. NLRB*, 379 U.S. 203 (1964), would be an impermissible content-based prior restraint in any other context). See generally Alan Hyde, *Exclusion Is Forever: How Keeping Rights To Strike, Picket, and Other Labour Speech, Separate from Constitutional Rights, Has Proven a Bad Deal for American Labour Unions and Constitutional Law* 3 (Rutgers Sch. of Law Research Paper Series, Paper No. 057, 2009), available at <http://ssrn.com/abstract=1517844> (noting that the Supreme Court has “upheld severe limitations on the content or message of union speech, picketing, and boycotts, limitations that could not constitutionally be applied to the same conduct carried out by groups other than labour groups”). Cf. *Amalgamated Food Emps. Union Local 590 v. Logan Valley Plaza, Inc.*, 391 U.S. 308 (1968) (holding that peaceful labor picketing, absent an impermissible purpose or manner, is protected by the First Amendment).

94. Pope, *supra* note 93, at 1082 (noting that the courts have “declined to develop a unified doctrine of labor liberty” and instead rely on a hodgepodge of doctrines, including those pertaining to commercial rights and speech rights).

95. See *supra* Part I.B.1.

96. *Am. Steel Foundries v. Tri-City Cent. Trades Council*, 257 U.S. 184, 205 (1921).

97. *Senn v. Tile Layers Protective Union, Local No. 5*, 301 U.S. 468, 478–80 (1937).

98. *Thornhill v. Alabama*, 310 U.S. 88, 95 (1940).

the business or industry directly concerned. The health of the present generation and of those as yet unborn may depend on these matters, and the practices in a single factory may have economic repercussions upon a whole region and affect widespread systems of marketing. . . . Free discussion concerning the conditions in industry and the causes of labor disputes appears to us indispensable to the effective and intelligent use of the processes of popular government to shape the destiny of modern industrial society. The issues raised by regulations, such as are challenged here, infringing upon the right of employees effectively to inform the public of the facts of a labor dispute are part of this larger problem.<sup>99</sup>

Thus, in the Court's view, labor unions were more than just a collection of workers out to improve their own economic situations; to the contrary, they had broader social relevance.

But the Court soon began to chip away at *Thornhill*'s broad holding. The following year, the Court held in *Milk Wagon Drivers Union of Chicago, Local 753 v. Meadowmoor Dairies, Inc.*<sup>100</sup> that picketing could be enjoined wholesale once non-trivial violence had taken place on the picket line—and that the resulting injunction need not be narrowly targeted at stopping the violence.<sup>101</sup> One year after that, in *Bakery & Pastry Drivers Local 802 v. Wohl*,<sup>102</sup> the Court suggested in dictum that even nonviolent picketing might permissibly be enjoined if it was “coerci[ve]” or “excessive.”<sup>103</sup>

As foreshadowed in *Wohl*, the Court soon upheld an injunction against peaceful picketing because, in the Court's view, the purpose of the picketing was to compel an employer to violate the law.<sup>104</sup> *Giboney v. Empire Storage & Ice Co.* involved a labor dispute between a local affiliate of the Ice and Coal Drivers and Handlers union and some nonunion ice peddlers.<sup>105</sup> To pressure the peddlers to join the union, the union sought to convince ice wholesalers to stop supplying the peddlers—even though it would have been an antitrust violation for the wholesalers to do so.<sup>106</sup> Empire, one of the wholesalers, refused to participate in the union's plan, and the union responded by peacefully picketing with signs that truthfully stated that Empire sold ice to nonunion peddlers.<sup>107</sup> In response, eighty-five percent of the truck drivers who delivered to or from Empire honored the picket line and refused to do business with Empire, reducing Empire's

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99. *Id.* at 103.

100. 312 U.S. 287 (1941).

101. *Id.* at 294–95. *But cf.* *Am. Fed'n of Labor v. Swing*, 312 U.S. 321, 325–26 (1941) (overturning on First Amendment grounds injunction against picketing that had been entirely peaceful).

102. 315 U.S. 769 (1942).

103. *Id.* at 775 (striking down injunction of peaceful picket in part because there was no other avenue for the picketers to convey their message, but suggesting that states could limit peaceful picketing under other circumstances).

104. *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 504 (1949).

105. *Id.* at 492.

106. *Id.*

107. *Id.*

business by a corresponding amount.<sup>108</sup> The Court held that the effectiveness of the picket placed Empire in an untenable situation—absent court intervention, its only options were to commit illegal activity or go out of business.<sup>109</sup>

The *Giboney* Court easily rejected the union’s First Amendment defense, first stating the general principle that antitrust laws do not violate the First Amendment, even when antitrust conspiracies are formed through speech.<sup>110</sup> The Court added that the picketing—even if both peaceful and truthful—could not be separated from the union’s “single and integrated course of conduct,” which included “their powerful transportation combination, their patrolling, their formation of a picket line warning union men not to cross at peril of their union membership, [and] their publicizing,” which was aimed at “compel[ing] Empire” to stop selling to the nonunion peddlers.<sup>111</sup> Concluding that picketing “may include conduct other than speech,” the Court held that the union’s expressive conduct could be restrained because its “sole, unlawful immediate objective was to induce Empire to violate the Missouri law.”<sup>112</sup>

Following *Giboney*, the Court repeatedly upheld restrictions on labor picketing, reasoning that even though picketing has a speech component, it also involves conduct, to which the First Amendment does not apply.<sup>113</sup> Thus, the Court stated, “picketing, even though ‘peaceful,’ involved more than just the communication of ideas” because “the very presence of a picket line may induce action of one kind or another, quite irrespective of the nature of the ideas which are being disseminated.”<sup>114</sup>

Significantly, the Court expanded the application of that principle to cases in which the picketing involved neither unlawful means nor ends, but merely contravened state policy. For example, in *Hughes v. Superior Court*,<sup>115</sup> the Court upheld an injunction against picketing that supported a group’s demand for racially proportional employment—even though it

108. *Id.* at 493.

109. *Id.*

110. *Id.* at 495–96.

111. *Id.* at 498.

112. *Id.* at 501–02.

113. *E.g.*, *Int’l Bhd. of Elec. Workers, Local 501 v. NLRB*, 341 U.S. 694, 705 (1951) (permitting injunction against secondary picketing because picketing was tantamount to conduct aimed at accomplishing an unlawful end); *Bldg. Serv. Emps. Int’l Union, Local 262 v. Gazzam*, 339 U.S. 532, 536–37 (1950) (holding that, while picketing is in part an exercise of free speech, it is “more than speech and establishes a *locus in quo* that has far more potential for inducing action or nonaction than the message the pickets convey”); *Hughes v. Superior Court*, 339 U.S. 460, 464–65, 469 (1950) (stating that labor picketing is more than free speech and upholding injunction); *Int’l Bhd. of Teamsters Union, Local 309 v. Hanke*, 339 U.S. 470, 474, 480–81 (1950) (upholding injunction and reasoning that one ingredient of picketing is communication, but picketing does not receive full First Amendment protection).

114. *Int’l Bhd. of Teamsters, Local 695 v. Vogt*, 354 U.S. 284, 289 (1957) (quoting *Bakery & Pastry Drivers Local 802 v. Wohl*, 315 U.S. 769, 776 (1942)).

115. 339 U.S. 460.

would not have been illegal for the picketed employer to accede to the picketers' demand.<sup>116</sup>

Thus, by 1950, states could—without violating the First Amendment—enjoin peaceful and truthful picketing whenever it violated state policy because picketing was part conduct, and coercive conduct at that. Unsurprisingly then, the Court soon acknowledged that *Thornhill's* application had been sharply circumscribed.<sup>117</sup> Supplanting *Thornhill* was a focus on coercion. The potentially coercive effects of picketing were twofold. First, as to union sympathizers, even entirely peaceful pickets could function primarily as a “signal” calling for an “automatic response.”<sup>118</sup> Second, as to everybody else, the picket line would induce compliance out of fear or intimidation, rather than genuine persuasion.<sup>119</sup>

Thus, in First Amendment picketing cases, the Court has focused on whether the picketing had the potential to draw others into labor disputes for reasons unrelated to their independent belief in the union's cause. For example, in deciding when the NLRB could regulate secondary picketing, the Court distinguished cases in which the picketing was likely to be so detrimental to the secondary employer's business that the employer would feel compelled to cooperate with the union in the primary labor dispute (rather than withstand further picketing) from cases in which the picketing would be at most a mere inconvenience to the secondary employer.<sup>120</sup> Likewise, the Court has consistently held that handbilling is not coercive and therefore receives substantial First Amendment protection.<sup>121</sup>

Labor picketing has undoubtedly become less capable of coercion as union density has fallen over time. Thus, in earlier cases like *International*

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116. *Id.* at 468 (stating that even though “a State chooses to enjoin picketing to secure submission to a demand for employment proportional to the racial origin of the then customers of a business, it need not forbid the employer to adopt such a quota system of his own free will”).

117. *Vogt*, 354 U.S. at 291 (stating that *Giboney* was a “decisive reconsideration” of *Thornhill*).

118. *NLRB v. Retail Store Emps. Union, Local 1001*, 447 U.S. 607, 619 (1980) (Stevens, J., concurring in part and concurring in the result).

119. *E.g.*, *NLRB v. Fruit & Vegetable Packers, Local 760*, 377 U.S. 58, 82–83 (1964) (Harlan, J., dissenting) (“Because of the very nature of picketing there may be numbers of persons who will refuse to buy at all from a picketed store, either out of economic or social conviction or because they prefer to shop where they need not brave a picket line.”).

120. *Compare id.* at 72–73 (majority opinion) (holding that NLRB lacked statutory authority to regulate picketing at supermarket because the picketing only asked consumers not to purchase a particular type of apple, which was unlikely to cause the supermarket to suffer a decline in sales and, therefore unlikely to force the supermarket to join the union's fight against the apple growers), *with Retail Stores Emps. Union*, 447 U.S. at 614–16 (holding that NLRB could regulate secondary picketing consistent with the NLRA and the First Amendment because the secondary employer's primary source of income was derived from selling the picketed product).

121. *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 580 (1988) (holding as a matter of constitutional avoidance that NLRA does not prohibit secondary handbilling and stating that picketing is “qualitatively ‘different from other modes of communication,’” in part because picketing was more “effective” than handbilling and other modes of communication (quoting *Babbitt v. Farm Workers*, 442 U.S. 289, 311 n.17 (1979) (quoting *Hughes v. Superior Court*, 339 U.S. 460, 465 (1950)))).

*Brotherhood of Electrical Workers, Local 501 v. NLRB*,<sup>122</sup> in which the union caused unionized subcontractors to walk off a job site at which nonunion electrical contractors were working, the union was able to credibly threaten that the contractor would not be able to hire any skilled tradesmen to finish the work without first hiring union electricians.<sup>123</sup> However, given the extremely low rate of union density in most of the country, it seems doubtful that many unions could meaningfully make a similar threat today. Instead, most union picketing will need to rely primarily on its intellectual or emotional persuasiveness. Yet, the Court has not revisited the notion that labor picketing can be limited because of its coercive character.<sup>124</sup>

Further, labor picketing receives less protection than other picketing. The Court's conclusion that labor picketing is only part speech because of its coercive nature has not translated to other types of picketing. Thus, in cases involving picketing by other social movements, the Supreme Court has afforded top-tier First Amendment protection, upholding bans on picketing only where they were narrowly tailored to achieve compelling state interests.<sup>125</sup> The reason for this distinction is unclear, though the Court has suggested that it is not because other types of picketing are somehow less coercive, but instead because labor picketing is economic and not of "broader social concern."<sup>126</sup>

Finally, the Court has never offered a basis for reconciling cases like *Giboney* and *Hughes*, in which the Court held that picketing could be enjoined if it sought to compel an employer to act in contravention of state law or policy, with the Court's cases on incitement of illegal activity.<sup>127</sup> Specifically, in *Brandenburg v. Ohio*, the Court overturned a conviction under the Ohio Criminal Syndicalism Statute for advocating criminal

122. 341 U.S. 694 (1951).

123. *Id.* at 697.

124. Although it is counterintuitive, there is precedent for the notion that the amount of First Amendment protection to which particular speech is entitled depends on the likely responses of the listeners. *E.g.*, *Brandenburg v. Ohio*, 395 U.S. 444, 447–48 (1969); *cf.* *Bakery & Pastry Drivers Local 802 v. Wohl*, 315 U.S. 769, 775–76 (1942) (Douglas, J., concurring) ("If the opinion in this case means that a State can prohibit picketing when it is effective but may not prohibit it when it is ineffective, then I think we have made a basic departure from [*Thornhill*] . . .").

125. *E.g.*, *Frisby v. Schultz*, 487 U.S. 474, 487–88 (1988) (upholding ban on picketing in front of residences, which was challenged by abortion protestors, after holding that the ban was narrowly tailored to achieve a "substantial and justifiable" interest); *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 886, 909 (1982) (picketing deployed in support of civil rights boycott was protected by the First Amendment and received maximum First Amendment protection).

126. *Carey v. Brown*, 447 U.S. 455, 465–66 (1980) (rejecting an Illinois state statute that permitted labor picketing more broadly than other picketing, distinguishing labor picketing from "[p]ublic-issue picketing," which was "'an exercise of . . . basic constitutional rights in their most pristine and classic form'" and of "broader social concern" (alteration in original) (quoting *Edwards v. South Carolina*, 372 U.S. 229, 235 (1963))); *see, e.g., Claiborne Hardware Co.*, 458 U.S. at 913 ("While States have broad power to regulate economic activity, we do not find a comparable right to prohibit peaceful political activity . . .").

127. Volokh, *supra* note 90, at 1321–22 (arguing that *Giboney* is inconsistent with *Brandenburg*, unless *Giboney*'s holding is narrowed to apply only to labor picketing).

activity.<sup>128</sup> The Court held that “constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of . . . law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.”<sup>129</sup> The government may punish speech inciting others to violate the law only if three conditions are met: intent to incite lawless action, likelihood of success, and imminence.<sup>130</sup> *Claiborne Hardware* affirmed that standard in the civil context when it held that Charles Evers’s speeches, which threatened violence against boycott-violators, were nonetheless protected speech because appeals that “do not incite lawless action . . . must be regarded as protected speech.”<sup>131</sup>

### B. Boycotts

Like picketing, labor boycotts were once deemed violations of the law entitled to no First Amendment protection.<sup>132</sup> Now, many boycotts and strikes enjoy statutory protection under the NLRA, although the NLRA also prohibits secondary boycotts and strikes by unions.<sup>133</sup> The Court has upheld the prohibition of secondary boycotts based on the theory that they are coercive: they compel neutral employers to insert themselves into labor disputes to avoid becoming the targets of union-led boycotts.<sup>134</sup>

For example, in *International Longshoremen’s Ass’n v. Allied International*, the Court upheld an NLRB injunction ordering the International Longshoremen’s Association (ILA) to cease a secondary boycott involving ILA’s refusal to service ships carrying Russian cargo to express displeasure with the Soviet Union’s recent invasion of Afghanistan.<sup>135</sup> The Court rejected the ILA’s First Amendment defense, stating that “conduct designed not to communicate but to coerce merits still

128. *Brandenburg*, 395 U.S. at 444–45. *Brandenburg* was decided after both *Giboney* and *Hughes*, but courts have nonetheless continued to apply those cases in the labor context. E.g., *Smithfield Foods, Inc. v. United Food & Commercial Workers Int’l Union*, 585 F. Supp. 2d 789, 803 (E.D. Va. 2008).

129. *Brandenburg*, 395 U.S. at 447.

130. *Id.*; see also Steven G. Gey, *The Nuremberg Files and the First Amendment Value of Threats*, 78 TEX. L. REV. 541, 547 (2000) (“Under *Brandenburg*, political speech can be regulated only if the speech incites illegal action, is intended by the speaker to instigate that action, and is uttered in a context in which the illegal action is likely to occur immediately.”).

131. *Claiborne Hardware Co.*, 458 U.S. at 928; see also Gey, *supra* note 130, at 551–52.

132. E.g., *Gompers v. Bucks Stove & Range Co.*, 221 U.S. 418, 438 (1911) (holding that courts can enjoin boycotts when “property is irreparably damaged or commerce is illegally restrained”).

133. 29 U.S.C. § 158(b)(4)(ii)(B) (2006).

134. *Int’l Longshoremen’s Ass’n v. Allied Int’l, Inc.*, 456 U.S. 212 (1982); see also *Duplex Printing Press Co. v. Deering*, 254 U.S. 443, 466 (1921) (defining secondary boycott as a “combination not merely to refrain from dealing with complainant, or to advise or by peaceful means persuade complainant’s customers to refrain (‘primary boycott’), but to exercise coercive pressure upon such customers”).

135. *Int’l Longshoremen’s Ass’n*, 456 U.S. at 224 (stating that the boycott was aimed at “free[ing] ILA members from the morally repugnant duty of handling Russian goods” to protest the recent invasion).

less consideration under the First Amendment [than secondary picketing],”<sup>136</sup> and observing that other avenues of communication were available to the union and its members.<sup>137</sup> The Supreme Court did so despite its explicit recognition of the inherently political nature of the ILA’s protest and that the ILA’s members did not stand to gain financially from their boycott. If anything, the Court held that fact against the union, agreeing with the court of appeals’ assessment that it was “more rather than less objectionable that a national labor union” had engaged in a secondary boycott in support of a “random political objective far removed from what has traditionally been thought to be the realm of legitimate union activity.”<sup>138</sup> Further, the Court undertook no analysis of the likelihood that the secondary boycott would have any success in persuading the ship owners to attempt to influence Russian policy, stating only that the union had infringed their “rights.”<sup>139</sup>

Yet, less than a year later, in *Claiborne Hardware*, the Court took the opposite stance—holding that secondary boycotting and picketing activity were at the core of the First Amendment—in the context of a civil rights organization’s secondary boycott.<sup>140</sup> In *Claiborne Hardware*, the NAACP sought to pressure local government officials to improve racial equality and integration by, in part, boycotting white area merchants. In other words, the NAACP launched a secondary boycott designed to compel the merchants to pressure the government on the NAACP’s behalf.<sup>141</sup> In support of the boycott, the NAACP engaged in picketing and marches and also designated “store watchers” who were responsible for publicizing the names of individuals who violated the boycott so that those individuals could be socially ostracized.<sup>142</sup> Isolated incidents of violence also took place.<sup>143</sup>

The businesses sued, claiming the boycott violated a variety of tort and antitrust laws. The Court held that the First Amendment protected the NAACP’s secondary boycott and related activities, even though the conduct was coercive, and despite the incidents of violence.<sup>144</sup> The Court concluded:

While States have broad power to regulate economic activity, we do not find a comparable right to prohibit peaceful political activity such as that found in the boycott in this case. This Court has recognized that expression on public issues ‘has always rested on the highest rung of the hierarchy of First Amendment values.’<sup>145</sup>

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136. *Id.* at 226.

137. *Id.* at 227.

138. *Id.* at 225–26 (quoting *Allied Int’l, Inc. v. Int’l Longshoremen’s Ass’n*, 640 F.2d 1368, 1378 (1st Cir. 1981)).

139. *Id.* at 227.

140. *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 932–34 (1982).

141. *Id.* at 889.

142. *Id.* at 903–04.

143. *Id.* at 923.

144. *Id.* at 931–34.

145. *Id.* at 913 (quoting *Carey v. Brown*, 447 U.S. 455, 467 (1980)).

Thus, the Court rejected the principle that coercive expression, including secondary boycotts, merited less First Amendment protection than non-coercive speech.<sup>146</sup> Further, it did so by relying on *Thornhill*, which it had long since disavowed in the labor context.<sup>147</sup>

In fact, the Court specifically reaffirmed its earlier labor speech cases, including *Allied International*. It distinguished those cases—which upheld restrictions on labor picketing and boycotts based on their coercive nature—by stating that labor speech is primarily economic, rather than political, and may be regulated as “part of ‘Congress’ striking of the delicate balance between union freedom of expression and the ability of neutral employers, employees, and consumers to remain free from coerced participation in industrial strife.”<sup>148</sup> Specifically, *Claiborne Hardware* stated that the NAACP’s campaign

grew out of a racial dispute with the white merchants and city government of Port Gibson and all of the picketing, speeches, and other communication associated with the boycott were directed to the elimination of racial discrimination in the town. This differentiates this case from a boycott organized for economic ends, for speech to protest racial discrimination is essential political speech lying at the core of the First Amendment.<sup>149</sup>

Thus, *Claiborne Hardware* apparently revived only part of *Thornhill*, rejecting that Court’s statement regarding the necessity of “[f]ree discussion concerning the conditions in industry and the causes of labor disputes” to

146. The Court had previously overturned a prior restraint against coercive leafleting in a non-labor context, stating that:

The claim that the expressions were intended to exercise a coercive impact on respondent does not remove them from the reach of the First Amendment. Petitioners plainly intended to influence respondent’s conduct by their activities; this is not fundamentally different from the function of a newspaper. . . . But so long as the means are peaceful, the communication need not meet standards of acceptability.

Org. for a Better Austin v. Keefe, 402 U.S. 415, 419 (1971). However, *Organization for a Better Austin* did not address the extent of its application to labor speech.

147. *Claiborne Hardware Co.*, 458 U.S. at 909; see also *supra* Part II.A.

148. *Claiborne Hardware Co.*, 458 U.S. at 912 (quoting *NLRB v. Retail Store Emps. Union, Local 1001*, 447 U.S. 607, 617–18 (1980) (Blackmun, J., concurring in part and concurring in result)). Though *Claiborne Hardware Co.* distinguished between economic and political speech in the context of “coercive” speech, it was not the first case in which the Court expressed or implied that political speech was different from, and more important (in First Amendment terms) than, labor speech. *E.g.*, *Carey*, 447 U.S. at 467; *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 762–63 & n.17 (1976) (noting that “[t]he interests of the contestants in a labor dispute are primarily economic, but it has long been settled that both the employee and the employer are protected by the First Amendment when they express themselves on the merits of the dispute in order to influence its outcome,” and referring to labor speech as “speech of an entirely private and economic character”). Likewise, in *Milk Wagon Drivers Union of Chicago, Local 753 v. Meadowmoor Dairies, Inc.*, 312 U.S. 287 (1941), Justice Black stated in dissent that he would have overturned the labor injunction at issue because the speech involved public discussion of conflicting methods of milk distribution, implicitly rejecting—as did the rest of the Court, which upheld the injunction—the notion that discussion of working conditions deserved the same level of First Amendment protection. *Id.* at 302–03 (Black, J., dissenting).

149. *Claiborne Hardware Co.*, 458 U.S. at 915.

the “effective and intelligent use of the processes of popular government to shape the destiny of modern industrial society.”<sup>150</sup> Moreover, the Court did not confront its earlier statement in *Allied International* that the boycott in that case was purely political and had no economic motive.

One additional basis for distinguishing *Claiborne Hardware* from *Allied International*, though not one identified by the Supreme Court, is that *Claiborne Hardware* involved a consumer boycott, while *Allied International* involved a strike.<sup>151</sup> That distinction might be important if strikes were necessarily more coercive (by which I mean effective) than consumer boycotts. However, it is not readily apparent that that is the case, at least not in all situations. For example, a strike that lasts for only a short time or takes place at just one of a company’s several factories may well be less harmful to a company than a prolonged, nationwide (or international) consumer boycott. Further, the Supreme Court has upheld limits on coercive consumer boycotts sponsored by labor unions. For example, in *NLRB v. Retail Store Employees Union, Local 1001*,<sup>152</sup> the Court upheld an injunction against a union’s call for a consumer boycott based on the boycott’s potential to coerce the secondary employer.<sup>153</sup>

Since deciding *Claiborne Hardware*, the Court has continued to hold that boycotts arising from labor disputes do not fall under that case’s rule, reasoning that such speech is self-interested and economically-motivated. For example, in *Federal Trade Commission v. Superior Court Trial Lawyers Ass’n*,<sup>154</sup> the Federal Trade Commission brought an antitrust action against a group of lawyers seeking to influence the District of Columbia government to raise their compensation for representing indigent criminal defendants.<sup>155</sup> In support of their cause, they essentially went on strike—though without the protections of the Norris-LaGuardia Act—by refusing to accept any more appointments in criminal cases.<sup>156</sup> The lawyers argued that they were entitled to protection under *Claiborne Hardware*, and that, among other things, they would not have been able to generate support for their cause absent their public boycott.<sup>157</sup> The Court easily held that the

150. *Thornhill v. Alabama*, 310 U.S. 88, 103 (1940).

151. *See, e.g.*, Michael C. Harper, *The Consumer’s Emerging Right To Boycott: NAACP v. Claiborne Hardware and Its Implications for American Labor Law*, 93 *YALE L.J.* 409, 426–27 (1984).

152. 447 U.S. 607 (1980).

153. *Id.* at 616. In *Retail Store Employees Union*, a union picketed several sellers of Safeco insurance policies in order to protest Safeco’s actions. Though the union simply asked consumers to cancel their Safeco policies, and not to boycott the sellers entirely, the Court nonetheless held that the union had violated the NLRA because its actions were tantamount to asking consumers to boycott the sellers, who derived nearly all of their business from selling Safeco policies. *Id.* at 614–15. The Court further rejected the union’s First Amendment defense, holding that picketing that “predictably encourages consumers to boycott a secondary business . . . imposes no impermissible restrictions upon constitutionally protected speech.” *Id.*

154. 493 U.S. 411 (1990).

155. *Id.* at 414.

156. *Id.* at 416.

157. *Id.* at 420–21. There was also some evidence that the District of Columbia—the supposed victim of the antitrust conspiracy—welcomed the boycott, which generated enough

lawyers' conduct in publicizing their boycott and lobbying the District of Columbia government was protected by the First Amendment.<sup>158</sup> However, the Court rejected the argument that the First Amendment protected the actual boycott, distinguishing *Claiborne Hardware* because, whereas "[t]hose who joined the Claiborne Hardware boycott sought no special advantage for themselves," the trial lawyers sought "an economic advantage for those who agreed to participate."<sup>159</sup> It also rejected the argument that the boycott was protected speech because it was expressive activity on a matter of public concern, noting that "[e]very concerted refusal to do business with a potential customer or supplier has an expressive component," and "[p]ublicity may be generated by any other activity that is sufficiently newsworthy."<sup>160</sup>

### C. Petitioning

Labor petitioning activity, like picketing and boycotting, has received varying levels of First Amendment protection at different times in the Court's history. However, the Court has come nearly full-circle, recently holding as a matter of constitutional avoidance that petitioning activity, even in the labor context, cannot be regulated in most circumstances.<sup>161</sup>

One of the first cases to find broad First Amendment protection for petitioning activity, even if the goal of the activity was anticompetitive, arose in the union context. In *United Mine Workers of America v. Pennington*,<sup>162</sup> the Court held that, although it would ordinarily be an antitrust violation for a union and an employer to collaborate to impose a higher wage scale on a competitor, the First Amendment barred antitrust liability when such collusion related to petitioning activity.<sup>163</sup> Thus, the Court concluded that no antitrust liability attached when the United Mine Workers and a multi-employer association jointly approached the Secretary of Labor to set a minimum wage requirement for coal companies selling to the government, even if the purpose of that agreement was to drive small companies out of the market.<sup>164</sup>

Later, in *Bill Johnson's Restaurants, Inc. v. NLRB*,<sup>165</sup> the Court held that the NLRB could enjoin baseless lawsuits filed to retaliate against

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public support to make it politically feasible for the District government to raise the compensation rates. *Id.* at 442 (Brennan, J., concurring in part and dissenting in part).

158. *Id.* at 426–27 (majority opinion).

159. *Id.* at 426. The Court also rejected the argument that the lawyers' conduct was entitled to additional First Amendment protection because it facilitated the Sixth Amendment right to competent counsel. *Id.* at 427 n.11 ("*Claiborne Hardware* . . . does not protect every boycott having a constitutional dimension.>").

160. *Id.* at 431. Justice Brennan, concurring, suggested that the majority had been "insensitive to the venerable tradition of expressive boycotts." *Id.* at 437 (Brennan, J., concurring in part and dissenting in part).

161. *See, e.g.*, *BE & K Constr. Co. v. NLRB*, 536 U.S. 516, 536–37 (2002).

162. 381 U.S. 657 (1965).

163. *Id.* at 669–70.

164. *Id.*

165. 461 U.S. 731 (1983).

employees for exercising their rights under the NLRA.<sup>166</sup> This holding allowed greater regulation of lawsuits filed in the labor context than in the commercial setting, where only “sham” lawsuits could be limited.<sup>167</sup>

However, *Bill Johnson’s Restaurants* was short-lived. In 2002, in *BE & K Construction Co. v. NLRB*,<sup>168</sup> the Court addressed whether the NLRB could “impose liability on an employer for filing a losing retaliatory lawsuit,” even if the suit did not meet the sham exception.<sup>169</sup> The NLRB argued that its actions were less of an infringement on the First Amendment than the antitrust action in *Professional Real Estate Investors, Inc. v. Columbia Pictures Industries, Inc.*<sup>170</sup> because NLRB proceedings were initiated by a neutral third party, were less likely to impose high discovery costs on the defending party, and could not result in punitive remedies.<sup>171</sup> The Court rejected this argument, concluding that “[a]t most . . . these arguments demonstrate that the threat of an antitrust suit may pose a *greater* burden on petitioning than the threat of an NLRA adjudication. This does not mean the burdens posed by the NLRA raise no First Amendment concerns.”<sup>172</sup>

Reviewing the First Amendment interests served by unsuccessful lawsuits, the Court made three points: first, some unsuccessful lawsuits involve genuine grievances; second, unsuccessful lawsuits can advance First Amendment interests in “public[ly] airing [] disputed facts,” raising “matters of public concern,” “promot[ing] the evolution of the law,” and “add[ing] legitimacy to the court system as a designated alternative to force”; and third, “while baseless suits can be seen as analogous to false statements [which are not entitled to First Amendment protection], that analogy does not directly extend to suits that are unsuccessful but

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166. *Id.* at 748–49; *see also infra* Part IV.A.

167. *Cal. Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 515–16 (1972) (holding that courts could find antitrust violation because filing anti-competitive lawsuits with the alleged goal of limiting competitor’s access to administrative and judicial tribunals fell under the “sham” exception). “Sham” lawsuits are both “objectively baseless in the sense that no reasonable litigant could realistically expect success on the merits” and motivated by “an attempt to interfere *directly* with the business relationships of a competitor”; they are not entitled to First Amendment protection. *BE & K Constr. Co. v. NLRB*, 536 U.S. 516, 526 (2002) (quoting *Prof’l Real Estate Investors, Inc. v. Columbia Pictures Indus.*, 508 U.S. 49, 60–61 (1993)).

168. 536 U.S. 516.

169. *Id.* at 524.

170. 508 U.S. 49.

171. *BE & K Constr. Co.*, 536 U.S. at 528–29.

172. *Id.* at 529. Justice Breyer, concurring, rejected this conclusion, pointing out that antitrust law threatens “treble damages,” whereas the NLRB could at most force one side to pay the other’s attorneys’ fees. *Id.* at 541 (Breyer, J., concurring). Justice Breyer also pointed out that “the NLRA finds in the need to regulate an employer’s antiunion lawsuits much of its historical reason for being. Throughout the 19th century, courts had upheld prosecutions of unions as criminal conspiracies. . . . And in the process [the courts] had reinterpreted federal statutes that Congress had not intended for use against the organizing activities of labor unions.” *Id.* at 542 (citations omitted). Thus, Justice Breyer concluded that “an employer’s antiunion lawsuit occupies a position far closer to the heart of the labor law than does a defendant’s anticompetitive lawsuit in respect to antitrust law.” *Id.* at 543.

reasonably based.”<sup>173</sup> Next, the Court construed the text of the NLRA, finding no reason to read the Act “to reach all reasonably-based but unsuccessful suits filed with a retaliatory purpose.”<sup>174</sup> However, the Court did not decide whether the Board could “declare unlawful any unsuccessful but reasonably based suits that would not have been filed but for a motive to impose the costs of the litigation process, regardless of the outcome.”<sup>175</sup> Thus, although the Court did not apply the “sham” rule in the NLRA context, it intimated that it would do so in a future case.<sup>176</sup>

#### D. Labor Speech as Commercial Speech?

If, as the Court has suggested, labor speech is, at heart, economic rather than political, then perhaps it should be grouped with commercial speech for First Amendment purposes. In other words, just like a salesman selling cars, perhaps a union representative talking to as-yet-unorganized workers or the public is selling the benefits of unionism, or a bargaining agent trying to obtain higher wages is selling members’ work. Such a categorization may even have some advantages for labor speech. For one thing, it would place labor speech within a recognizable category of First Amendment protection. Moreover, inclusion in the commercial speech category would be a promotion for labor speech because at least some commercial speech currently is entitled to more protection than labor speech (though less than political speech).<sup>177</sup> But does the commercial speech doctrine fairly encompass labor speech in its various forms?

Courts have, at times, characterized labor unions as businesses, albeit with specialized missions. For example, in *Thomas v. Collins*,<sup>178</sup> a case

173. *Id.* at 532 (majority opinion) (quoting *Bill Johnson’s Rests., Inc. v. NLRB*, 461 U.S. 731, 743 (1983)).

174. *Id.* at 536.

175. *Id.* at 536–37.

176. Justice Scalia stated in his concurrence that the “implication” was that the Court would, in the future, construe the NLRA “in the same way we have already construed the Sherman Act: to prohibit only lawsuits that are *both* objectively baseless *and* subjectively intended to abuse process.” *Id.* at 537 (Scalia, J., concurring). Justice Scalia reasoned that the NLRA, if anything, demanded *higher* standards to infringe petitioning activity because the NLRA was enforced by an administrative body instead of an Article III court, and it was doubtful that an administrative agency could be given the authority to punish a reasonably-based suit filed in a court. *Id.* at 537–38.

177. Unlike labor speech, commercial speech can be regulated only when it concerns illegal activity, is misleading, or when it is tailored to directly advance a substantial government interest that could not be served by a more limited restriction. *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n*, 447 U.S. 557, 563–64 (1980); *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, 191 (1984) (“On the ladder of First Amendment values, political speech occupies the top rung, commercial speech rests on the rung below, and labor speech is relegated to a ‘black hole’ beneath the ladder.”); *cf.* Alan Story, *Employer Speech, Union Representation Elections, and the First Amendment*, 16 BERKELEY J. EMP. & LAB. L. 356, 392 n.189 (1995) (“Labor speech ‘has been routinely treated as commercial speech subject to virtually plenary regulation’ since *Thomas v. Collins*.” (quoting Craig Becker, *Democracy in the Workplace: Union Representation Elections and Federal Labor Law*, 77 MINN. L. REV. 495, 599 n.496 (1993))).

178. 323 U.S. 516 (1945).

decided during a period when the Court was expanding labor speech rights, the Supreme Court referred to unions' "economic function" as no barrier to First Amendment protection.<sup>179</sup> The *Thomas* dissent stated it more bluntly: "Labor unions are business associations; their object is generally business dealings and relationships as is manifest from the financial statements of some of the national unions. Men are persuaded to join them for business reasons, as employers are persuaded to join trade associations for like reasons."<sup>180</sup> Even if labor unions did have the same goals and functions as a for-profit corporation, however, that would not end the inquiry. Rather, whether speech falls into the commercial speech category is determined in part by looking at the function of the speech, not just the identity of the speaker.<sup>181</sup> Thus, the Supreme Court has characterized commercial speech as "expression related solely to the economic interests of the speaker and its audience"<sup>182</sup> and as "speech which does 'no more than propose a commercial transaction,' [and] is . . . removed from any 'exposition of ideas,' and from 'truth, science, morality, and arts in general, in its diffusion of liberal sentiments on the administration of Government.'"<sup>183</sup>

Under these definitions, speech that takes place at the bargaining table could arguably qualify as commercial speech, if one accepts that speech about the value of labor is analogous to speech about the value of goods. The union, as the representative of its members, makes and responds to proposals regarding wages and working conditions in much the same way that a salesman and a buyer might haggle over the price of a good or service. In contrast, comprehensive campaign speech that takes place away from the bargaining table does much more than propose a commercial transaction, and its intended audience extends well beyond potential union members. For example, during the Smithfield comprehensive campaign, the UFCW sought to tap into the general public's sense of moral outrage about the company's employment and environmental practices.<sup>184</sup> Further, even if it could fairly be said that the UFCW was proposing an economic transaction by asking members of the public not to buy Smithfield bacon, that request was tied to dignitary, not economic, interests, which places that

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179. *Id.* at 531.

180. *Id.* at 556 (Roberts, J., dissenting). Other courts have since taken a similar view. *E.g.*, Local Union No. 189, *Amalgamated Meat Cutters v. Jewel Tea Co.*, 381 U.S. 676, 723 (1965) (Goldberg, J., dissenting) (stating that "[t]he very purpose and effect of a labor union is to limit the power of an employer to use competition among workingmen to drive down wage rates and enforce substandard conditions of employment").

181. *See, e.g.*, *Citizens United v. Fed. Election Comm'n*, 130 S. Ct. 876, 898 (2010) (applying strict scrutiny to restrictions on political speech, even if speaker is a corporation).

182. *Cent. Hudson Gas & Elec.*, 447 U.S. at 561.

183. *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 762 (1976) (citations omitted) (quoting *Pittsburgh Press Co. v. Human Relations Comm'n*, 413 U.S. 376, 385 (1973); *Roth v. United States*, 354 U.S. 476, 484 (1957); *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942)).

184. *See supra* Part I.B.3.

speech outside the scope of the Supreme Court's commercial speech tests.<sup>185</sup>

It is unclear that organizing speech of any description should ever qualify as commercial speech.<sup>186</sup> To be sure, one could characterize the relationship between unions and members as an exchange of fees (union dues) for services (representation).<sup>187</sup> But unions do more than sell a negotiation service; they also offer a meaningful opportunity for members to exercise their associational rights<sup>188</sup> and to acquire a social identity.<sup>189</sup> Workers may also choose to join labor unions for a variety of reasons in addition to the expectation of improved wages and benefits, such as a desire to amplify their voices at work or in the political realm.

Finally, the reason for granting less First Amendment protection to commercial speech is the supposed durability of that speech—that is, it is

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185. In distinguishing commercial speech from other types of speech, the Court has focused on both the content of the speech and the motivation of the speaker. This was made most apparent in a pair of cases involving lawyers soliciting clients: *In re Primus*, 436 U.S. 412 (1978), and *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447 (1978). In the first, *Primus* approached a prospective client/plaintiff regarding a suit over the coerced sterilization of women who received Medicaid benefits. *Primus*, 436 U.S. at 415. Though *Primus* offered her legal services for free, there was some possibility that the American Civil Liberties Union, which sponsored the litigation, would be awarded counsel fees. *Id.* at 429–30. In the second, *Ohralik* sought to represent car crash victims for a fee. *Ohralik*, 436 U.S. at 450–51. Nonetheless, the Court held that *Ohralik*'s solicitation was commercial speech, which could be punished by the bar association in light of the state's interests in protecting consumers and maintaining attorney standards, *id.* at 437–39, while *Primus*'s solicitation was “political expression and association” that could be regulated only narrowly to prevent specific harms. *Primus*, 436 U.S. at 437–38. Acknowledging the unusual role that speaker motivation was playing, the Court stated that “[n]ormally the purpose or motive of the speaker is not central to First Amendment protection, but it does bear on the distinction between conduct that is ‘an associational aspect of ‘expression’,’ and other activity subject to plenary regulation by the government.” *Id.* at 438 n.32 (quoting Thomas I. Emerson, *Freedom of Association and Freedom of Expression*, 74 *YALE L.J.* 1, 26 (1964))). Thus, commercial speech was to be distinguished from political speech based on not only its content, but also its motivation.

186. In *DeBartolo*, the Court made clear that it did not mean to “suggest that communications by labor unions are never of the commercial speech variety and thereby entitled to a lesser degree of constitutional protection,” but that the leaflets at issue were not “typical commercial speech such as advertising the price of a product or arguing its merits.” *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 576 (1988). However, the decision did not give any examples of union speech that would be of the commercial variety, and further, the Court did not say what type of speech the leaflets were, if not commercial speech.

187. *See, e.g., Aitken v. Commc'ns Workers of Am.*, 496 F. Supp. 2d 653, 665 (E.D. Va. 2007) (“While union organizing certainly implicates First Amendment associational interests, it is also true that CWA performs economically valuable services for its members in exchange for a fee, namely union dues—an arrangement which has all the characteristics of a commercial transaction.”).

188. *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105, 113 (1956) (noting that “[t]he right of self-organization depends in some measure on the ability of employees to learn the advantages of self-organization from others”); *see also Thomas v. Collins*, 323 U.S. 516, 534 (1945) (noting that speech and associational rights were at issue in case concerning restriction on labor organizer's speech).

189. *See Marion Crain & Ken Matheny, Labor's Identity Crisis*, 89 *CALIF. L. REV.* 1767, 1785–86 (2001) (describing the AFL's recent attempt to cast the union movement in terms of not only class consciousness but also as a social justice movement).

less likely to be chilled by governmental restriction than political, artistic, or other non-commercial speech entitled to full First Amendment protection. In *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*,<sup>190</sup> the Court explained that durable commercial speech required less First Amendment protection than other speech in large part because of its profitability.<sup>191</sup> But this rationale does not translate to either comprehensive campaign speech or other “organizing” speech. Given that union dues average about \$400 per member per year,<sup>192</sup> comprehensive campaigns are unlikely to be profit-making ventures. Furthermore, defending civil RICO suits can be extremely expensive.<sup>193</sup> Thus, the possible chilling effect associated with making an incorrect statement about an employer will be much greater than in the typical commercial context.

In sum, even if the Court’s decisions are trending toward increased First Amendment protection for labor speech, the Court has yet to place union speech on the same footing as the speech of other social movements or to present a coherent theory of the First Amendment as it applies to labor speech. In the next section, I will argue that labor unions, like other civic associations, contribute significantly to deliberative democracy, and, for that reason, their speech should receive First Amendment protection equivalent to that of other social movements.

### III. CIVIL SOCIETY AND THE FIRST AMENDMENT

The Court’s apparent reluctance to set forth a coherent or consistent theory of labor speech and the First Amendment makes some sense in light of the limited consensus as to what speech the First Amendment should protect and, more importantly, why it should be protected.<sup>194</sup> To date, “[t]he Court has not set out anything like a clear theory to explain why and when speech qualifies for the top tier. At times the Court has indicated that speech belong[s] in the top tier if it is part of the exchange of ideas, or if it bears on the political process.”<sup>195</sup>

Though the Court has never directly endorsed a conception of the First Amendment that particularly values “civil society”<sup>196</sup> and its contributions

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190. 425 U.S. 748 (1976).

191. *Id.* at 762–63, 771 n.24.

192. Mark Brenner, *Give Your Union a Dues Checkup*, LABOR NOTES (May 27, 2007, 10:54 PM), <http://labornotes.org/node/908> (value for 2004; noting that union dues had fallen by 8.4% from 2000–2004).

193. *See infra* Part IV.B.

194. Steven Shiffrin, *The First Amendment and Economic Regulation: Away From a General Theory of the First Amendment*, 78 NW. U. L. REV. 1212, 1251–57 (1983) (observing that the Court has been generous about finding First Amendment values and employed an “eclectic” group of tests in various First Amendment contexts).

195. CASS R. SUNSTEIN, *DEMOCRACY AND THE PROBLEM OF FREE SPEECH* 11 (1995).

196. Ernest Gellner defines civil society as

‘that set of diverse non-governmental institutions which is strong enough to counterbalance the state and, while not preventing the state from fulfilling its role as keeper of the peace and arbitrator between major interests, can nevertheless

to democratic deliberation, there is a discernible strand running through some of the Court's free speech cases that seems to recognize that associations are critical to the sound exercise of popular sovereignty. For example, at least one scholar has suggested that Brandeis's vision of the First Amendment was based on civic virtue and that his classic dissent in *Whitney v. California*<sup>197</sup>—a case about speech at a meeting of the Communist Labor Party, where members debated and voted on a series of proposals related to the organization's purpose and function<sup>198</sup>—speaks not just to self-fulfillment or self-rule, but to “the duty to participate in politics, the importance of deliberation, and the notion that the end of the state is not neutrality but active assistance in providing conditions of freedom . . . .”<sup>199</sup> Similarly, Cass Sunstein argues persuasively that “[t]he placement of sovereignty in ‘We the People,’ rather than the government . . . . created an ambitious system of ‘government by discussion,’ in which outcomes would be reached through broad public deliberation.”<sup>200</sup>

Thus, Sunstein and others have proposed a reading of the First Amendment that focuses on deliberative democracy, including the need to draw citizens into public life to exercise their right to self-governance, and argues that speech that promotes deliberative democracy deserves robust First Amendment protection.<sup>201</sup> Further, a wealth of legal and social-scientific scholarship argues that civil society (or associational life) is critical to a well-functioning deliberative democracy.<sup>202</sup> In the next section, I will explore the intersection of these arguments and propose that certain labor speech should receive enhanced First Amendment protection. This proposal is based on two premises: first, that a healthy civil society

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prevent it from dominating and atomizing the rest of society[.] . . . Civil Society can check and oppose the state. It is not supine before it.”

Mark Tushnet, *The Constitution of Civil Society* 75 CHI.-KENT L. REV. 379, 380 (2000) (quoting ERNEST GELLNER, *CONDITIONS OF LIBERTY: CIVIL SOCIETY AND ITS RIVALS* 5, 193 (1994)).

197. 274 U.S. 357 (1927).

198. *Id.* at 365.

199. Pnina Lahav, *Holmes and Brandeis: Libertarian and Republican Justifications for Free Speech*, 4 J.L. & POL. 451, 460, 466 (1988) (“In Brandeis’ opinion, the potential goodness of individuals acting collectively was the source of legitimacy for democracy, and the reason he supported it.”).

200. SUNSTEIN, *supra* note 195, at xvi.

201. *E.g.*, SUNSTEIN, *supra* note 195, at 244–52; Martin H. Redish & Abby Marie Mollen, *Understanding Post’s and Meiklejohn’s Mistakes: The Central Role of Adversary Democracy in the Theory of Free Expression*, 103 NW. U. L. REV. 1303, 1303–04 (2009) (“[A]mong the most prominent and widely accepted theories of the First Amendment are those that explain the Free Speech Clause as either a catalyst for or a protection of democracy itself. Such ‘democratic’ theories of the First Amendment posit that speech receives constitutional protection because it is essential to a functioning and legitimate democracy.”); *see also* STEPHEN BREYER, *ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION* 37 (2005) (describing “active liberty” as “the need to make room for democratic decision-making”); Jason Mazzone, *Speech and Reciprocity: A Theory of the First Amendment*, 34 CONN. L. REV. 405, 415–16 (2002) (noting growing emphasis on Sunstein’s theory of deliberative democracy).

202. *E.g.*, COHEN & ARATO, *supra* note 16, at vii, viii (noting that “the concept of civil society . . . has become quite fashionable today” and arguing that civil society is “the primary locus for the potential expansion of democracy”).

contributes to deliberative democracy; and second, that labor unions are rightly considered a valuable part of civil society. I will also explore how associations, including labor unions, play a role in enhancing deliberation, both by helping members develop the skills required to deliberate and by providing literal and metaphorical space for deliberation.<sup>203</sup>

A. *The Role of Civil Society in Promoting Deliberative Democracy*

Associations foster democratic deliberation in two distinct ways. First, they participate directly in social debates by publishing position statements or lobbying elected officials. Second, they create conditions in which deliberation is likely to occur, or instill in their members values that make them more likely to deliberate. This section explores whether and how civil society either participates in democratic deliberation, or facilitates deliberation by promoting conditions, such as freedom, equality, diversity, and connectedness, under which it is more likely to occur.<sup>204</sup>

There are numerous accounts of the links between civil society and democratic self-governance or deliberative democracy.<sup>205</sup> Those links can be grouped into two general categories: first, benefits derived from what the associations themselves do, including what members do in their role as members; and second, benefits derived from what participation in the association might prompt individuals to do in their other social roles. Put more concretely, an association might lobby the government to pass legislation—an example of an association’s direct participation in democratic deliberation. Then, a member of that association might be inspired to try to convince her city council to add more bus lines—an example of an individual’s participation in democratic life that is a result of, but distinct from, her participation in an association.

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203. I do not mean to suggest that this is the only theory of the First Amendment under which labor speech should be afforded top-tier protection. However, other theories are beyond the scope of this Article.

204. Cynthia Estlund has called freedom, equality, diversity, and connectedness the “ideal conditions” for democratic deliberation. Cynthia L. Estlund, *Working Together: The Workplace, Civil Society, and the Law*, 89 GEO. L.J. 1, 58 (2000).

205. For example, Jane Mansbridge theorizes that civil society allows for “deliberative enclaves of resistance” or “counterpublics,” with a variety of goals:

‘understanding themselves better, forging bonds of solidarity, preserving the memories of past injustices, interpreting and reinterpreting the meanings of those injustices, working out alternative conceptions of self, of community, of justice, and of universality, trying to make sense of both the privileges they wield and the oppressions they face, understanding the strategic configurations for and against their desired ends, deciding what alliances to make both emotionally and strategically, deliberating on ends and means, and deciding how to act, individually and collectively.’

Linda C. McClain & James E. Fleming, *Some Questions for Civil Society-Revivalists*, 75 CHI.-KENT L. REV. 301, 318 (2000) (quoting Jane Mansbridge, *Using Power/Fighting Power: The Polity*, in DEMOCRACY AND DIFFERENCE: CONTESTING THE BOUNDARIES OF THE POLITICAL 46, 58 (Seyla Benhabib ed., 1996)).

Although the two categories will significantly overlap in many cases,<sup>206</sup> I will broadly group the democracy-enhancing benefits of civil society as follows: first, associations acting as associations are better able to “check and oppose” the state than individuals, foster interdependence and cooperation in pursuit of a common goal, and provide a venue and thus a reason for members to come together to deliberate. Second, associations can be “schools for democracy” that improve members’ competence and interest in participating in larger democratic life, even outside of the association.

I will discuss these in turn and then discuss labor unions’ potential contributions to civil society.

### 1. Associations and “Checking and Opposing” the State

In some undemocratic countries, civil society has literally opposed the state in the sense of undermining dictatorships.<sup>207</sup> In a democracy, though, the relationship is more symbiotic: although civil society influences governmental decision-making and moderates or counterbalances governmental excess, government also protects civil society.<sup>208</sup> At most then, as posited by Emile Durkheim, an early theorist of the value of intermediate associations, associations may help prevent the state from becoming corrupt.<sup>209</sup> Similarly, James Gray Pope has argued in the context of the labor movement that “[m]odern constitutional theory relies on organized groups to offset governmental power and prevent the rise of a ruling class. Group independence has replaced individual independence as the safeguard of democracy.”<sup>210</sup>

### 2. Associations and Interdependence

For Durkheim, Alexis de Tocqueville, and others, associations were crucially important for their ability to generate “social capital” and social trust.<sup>211</sup> Robert Putnam defined “social capital” as “connections among individuals—social networks and the norms of reciprocity and

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206. For example, when a member of an association goes knocking on doors to fundraise, he is probably acting both as a member and as a neighbor. The same is true when a member of an association drags a friend to a meeting.

207. GELLNER, *supra* note 196, at 193; Roy Godson, *Labor’s Role in Building Democracy*, in *PROMOTING DEMOCRACY: OPPORTUNITIES AND ISSUES* 119, 123 (Ralph M. Goldman & William A. Douglas eds., 1988) (describing labor’s role in undermining the stability of regimes in Eastern Europe and in decolonizing African countries).

208. COHEN & ARATO, *supra* note 16, at x (noting that “it would be a mistake to see civil society in opposition to the economy and state by definition”); Tushnet, *supra* note 196, at 399.

209. EMILE DURKHEIM, *PROFESSIONAL ETHICS AND CIVIC MORALS* 3–5 (Cornelia Brookfield trans., 1958).

210. Pope, *supra* note 93, at 1112.

211. Bob Edwards & Michael W. Foley, *Civil Society and Social Capital: A Primer*, in *BEYOND TOCQUEVILLE: CIVIL SOCIETY AND THE SOCIAL CAPITAL DEBATE IN COMPARATIVE PERSPECTIVE* 1, 1 (Bob Edwards, Michael W. Foley & Mario Diani eds., 2000).

trustworthiness that arise from them.”<sup>212</sup> Its purpose is to “help people to accomplish things together” by generating the trust necessary for individuals to put self-interest aside, at least temporarily, to act collectively for the common good.<sup>213</sup> In particular, associations have the potential to bring people together both within and across social groups, generating bonds of trust where there were none before and reinforcing those that already existed.<sup>214</sup>

A closely related concept is interdependence. When citizens depend on each other for survival and success, they are more likely to form a real community, where the needs of the group can sometimes be put above the needs of the individual, with an unstated expectation of future reciprocity.<sup>215</sup> Associations play a role in promoting interdependence in at least two ways. First, they are microcosms of society, in that members of an association depend on each other to make the organization successful. Second, associations themselves are social actors, capable of depending on others and being depended upon, as when they act in concert with other associations to accomplish shared goals.

### 3. Associations as Places and Reasons To Come Together

Associations can simply provide a physical place and a reason for individuals to come together to talk about great or small issues. Thus, in a literal as well as a metaphorical sense, “civil society can offer a multiplicity of spaces in which deliberative democracy, or public deliberation, can take place.”<sup>216</sup> To the extent the Court has endorsed a view of the First Amendment that cares about civil society and its relationship to deliberative democracy, this has been the value that it has identified.

Specifically, the Court has endorsed the idea that citizens must come together to deliberate about how to exercise their sovereignty. In *De Jonge v. Oregon*,<sup>217</sup> a case involving a meeting of the Communist party, the Court concluded that—at least when speech on “the public issues of the day” was tied to petitioning the government for redress of grievances—“[t]he very idea of a government, republican in form, implies a right on the part of its citizens to meet peaceably for consultation.”<sup>218</sup> Likewise, in *Thornhill*, the Court unanimously—if briefly—held that labor picketing was protected by the First Amendment because it was “essential to free government” that

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212. CYNTHIA ESTLUND, *WORKING TOGETHER: HOW WORKPLACE BONDS STRENGTHEN A DIVERSE DEMOCRACY* 114 (2003) (quoting ROBERT D. PUTNAM, *BOWLING ALONE: THE COLLAPSE AND REVIVAL OF AMERICAN COMMUNITY* 19 (2001)).

213. *Id.*; see also Edwards & Foley, *supra* note 211, at 1.

214. ESTLUND, *supra* note 212, at 107 (describing Putnam’s concepts of “bridging” associations, which bring people together from across different social groups, and “bonding” associations, which bring together people from the same social group).

215. See ROBERT N. BELLAH ET AL., *HABITS OF THE HEART: INDIVIDUALISM AND COMMITMENT IN AMERICAN LIFE* 246–47 (1987) (describing the role of interdependence in creating a real community rather than a “lifestyle enclave”).

216. McClain & Fleming, *supra* note 205, at 318.

217. 299 U.S. 353 (1937).

218. *Id.* at 364–65 (quoting *United States v. Cruikshank*, 92 U.S. 542, 552 (1875)).

“men may speak as they think on matters vital to them and that falsehoods may be exposed through the processes of education and discussion.”<sup>219</sup> Although it is not clear that the *Thornhill* Court thought “education and discussion” could best occur within associations,<sup>220</sup> it would have certainly been logical for the Court to have had associations in mind: the case arose in the context of associational advocacy, and associations are necessarily better at facilitating repeated and ongoing discussion between their members than, say, chance encounters on the street. Further, the Court cited the Continental Congress’s letter to the Inhabitants of Quebec, which articulated the value of a free press as, in part, “its ready communication of thoughts between subjects, and its consequential promotion of union among them, whereby oppressive officers are ashamed or intimidated, into more honourable and just modes of conducting affairs.”<sup>221</sup>

#### 4. Associations as “Schools for Democracy”

Associations can also inculcate the skills and desires necessary to become an active participant in deliberation on a larger scale. Accounts of civil society and democracy often use as a starting place Tocqueville’s observation that associations act as “schools for democracy”<sup>222</sup> by cultivating certain experiences, attitudes, and abilities. For example, associations may afford their members direct experience with democratic structures—such as electing a president to lead the association—on a scale that makes it easier to see the direct results of one’s contribution. Further, to the extent an association’s membership is composed of individuals with diverse backgrounds, experiences, and needs, individual members will benefit from developing mechanisms to bridge differences and compromise. Both types of experiences will, in turn, relate to politics on a larger scale.

##### B. Labor Unions and Civil Society

When it comes to inculcating the skills, not to mention the desire, to participate in a deliberative democracy, not all associations are created equal. It is implausible that the average cooking club is going to “check and oppose the state.” Nor is it likely that the cooking club will teach democratic values or help its members develop a sense of their own political efficacy. To use another example, “it is hardly self-evident how participation in bowling leagues nourishes the habits and skills of citizenship, much less civic virtue and democratic self-government.”<sup>223</sup>

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219. *Thornhill v. Alabama*, 310 U.S. 88, 95 (1940).

220. *Id.*

221. *Id.* at 102 (quoting 1 JOURNAL OF THE CONTINENTAL CONGRESS 104, 108 (1904)). To be sure, the *Thornhill* Court also articulated Holmes’s theory that freedom of speech was valuable because it facilitated testing ideas in the “market of public opinion.” *Id.* at 105; see also *Gitlow v. New York*, 268 U.S. 652, 673 (1925) (Holmes, J., dissenting).

222. Thomas C. Kohler, *The Overlooked Middle*, 69 CHI.-KENT L. REV. 229, 230 (1993).

223. McClain & Fleming, *supra* note 205, at 311–12. Professors Linda McClain and James Fleming suggest that, to believe that “the barest indication of connection with others

Labor unions, however, have some advantages over many other civil society institutions when it comes to both checking and opposing the state and acting as a school for democracy.

### 1. Unions “Checking and Opposing” the State

Unions can “channel[] grievances to the government and help[] to explain and assist in the administration and maintenance of the political system” by facilitating communication between citizens and the government.<sup>224</sup> In the United States, unions have done so largely by “seek[ing] change through political and legal channels” and “engag[ing] in battles to transform cultural understandings.”<sup>225</sup> Thus, unions helped create the public perception that work should be rewarded with “a ‘rate of pay commensurate with an American standard of living.’”<sup>226</sup> They were also instrumental in the fight against Lochnerism that paved the way for laws that improved working conditions.<sup>227</sup>

Further, unions helped secure the “economic independence and material security” that the Framers thought were necessary to meaningful participation in democratic life.<sup>228</sup> After the New Deal, unions “emerged as the only powerful, organized constituency for social and economic rights”<sup>229</sup> and helped secure passage of the wage and hour laws and workplace safety protections. Now, unions are key players in national debates over issues like national health care reform and free trade.<sup>230</sup>

### 2. Unions Promoting Interdependence

Unions can enhance interdependence in at least two ways. First, they make interdependence that already exists within workplaces more

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[would] seem to support or even to relate to citizenship,” one would have to view people as “atomistic individuals, unencumbered selves, or lone rights-bearers.” *Id.* at 353.

224. Godson, *supra* note 207, at 122.

225. Hawkins, *supra* note 31, at 76–77 (describing labor’s use of strikes to change social expectations about working conditions); McClain & Fleming, *supra* note 205, at 319.

226. FONER, *supra* note 21, at 199 (quoting 1937 collective bargaining agreement between the UAW and General Motors, and discussing unions’ role in creating belief that the Depression was caused by “underconsumption,” and that distributing wealth was important to economic stability).

227. *Id.* at 59 (stating that, in the 1840s, courts viewed “any decision to labor for another as a voluntary contractual agreement that allowed employers full authority over the workplace,” while viewing labor unions as conspiracies); *see also* FORBATH, *supra* note 31, at 1 (noting that American unions “never forged a class-based political movement to press for more generous and inclusive protections” for all workers).

228. William E. Forbath, *Social and Economic Rights in the American Grain: Reclaiming Constitutional Political Economy*, in *THE CONSTITUTION IN 2020*, at 55, 55 (Jack M. Balkin & Reva B. Siegel eds., 2009).

229. *Id.* at 60.

230. *See, e.g., MLKCLC Labor Day Party*, TEAMSTERS LOCAL UNION # 174 (Aug. 31, 2009), [http://www.teamsters174.org/news-archives/2009\\_july-august.htm](http://www.teamsters174.org/news-archives/2009_july-august.htm) (“The AFL-CIO Union Movement is fighting for a unique American plan for secure, high-quality health care for all that . . . [m]akes sure everyone gets high-quality health care as good as or better than they have now.”).

egalitarian. Second, they create new axes of interdependence among members and between union leadership and members.

Because American labor unions exist in connection with workplaces, they are influenced to a degree by the way workplaces are organized. In turn, one of the defining elements of industrialized society is the differentiation of labor, the primary characteristic of which is interdependence.<sup>231</sup> Thus, “work is the chief—and again for many the only—place outside the family where people are engaged in a common undertaking.”<sup>232</sup> However, workplaces are also “involuntar[y]”<sup>233</sup> (in the sense that employees generally have to work to live) and hierarchical. Both traits can impede meaningful connection and undermine workers’ autonomy.<sup>234</sup> By helping to equalize the balance of power between employers and employees, unions can improve workplace interdependence.

Once a workplace is unionized, the union and management must work together for the company to be productive (which in turn enhances workers’ job security and benefits).<sup>235</sup> Not only does a unionized workforce present the threat of a strike or other economic action, but, because a union contract often makes it harder for an employer to take unilateral action, unionization means that employers will have a greater incentive to maintain a cooperative workplace. Further, whereas employment relationships in the United States are generally severable “at will,” collective bargaining agreements typically include a provision that permits employees to be fired only “for cause.” They also limit the scope of what employees can be asked to do and other aspects of their working conditions. Thus, unlike in nonunion workplaces, where employees are heavily dependent on employers but the reverse is not necessarily true (particularly for unskilled employees), unionized employers must either work to win the “hearts and

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231. In *The Division of Labor in Society*, Emile Durkheim identified the differentiation of labor as an important source—perhaps the most important source—of social solidarity in modern society, which he termed “organic solidarity.” This was precisely because of work’s mandatory qualities: even individuals who did not have a family or participate in other associations would probably have to work and, therefore, to depend on others and be depended on. Thus, Durkheim saw joining a trade union as a moral good in itself. ERNEST WALLWORK, *DURKHEIM: MORALITY AND MILIEU* 87 (1972). To foster that interdependence, Durkheim advocated organizing society into “occupational groups,” which would function as a kind of super-union or trade group. See ESTLUND, *supra* note 212, at 111.

232. Kohler, *supra* note 222, at 233–34. Kohler further argues that, “[g]iven the importance of the work-life sphere in contemporary culture, the promotion of employee self-organization could serve as a buffer against the sort of fragmentation of the polity that Tocqueville understood would deform and pervert a democracy.” *Id.* at 243.

233. ESTLUND, *supra* note 212, at 4.

234. *Id.* at 131.

235. Although the courts and others have typically thought of this relationship as something like industrial warfare, *e.g.*, Kupferberg, *supra* note 33, at 701–02 & n.76 (describing Congress’s intent in enacting the NLRA as protection of workers’ democratic rights and reduction of “industrial warfare”), it can be more benignly characterized as interdependence.

minds” of their employees or risk becoming mired in endless disciplinary proceedings and union grievances.<sup>236</sup>

Unions also demonstrate internal interdependence, both between members and union leadership and among members. As to the former, although work may be involuntary, union membership is generally voluntary. In “right to work” states,<sup>237</sup> employees cannot be required to join labor unions at all (even though the unions are still required to represent the interests of non-member employees fairly), and in other states, employees in unionized workplaces can be required to pay, at most, the “agency fee,” which is the portion of union dues that goes to representational activities such as bargaining and defending employees in disciplinary proceedings.<sup>238</sup> Further, in exchange for the right to be the exclusive representative of a group of employees, unions are required by law to operate as relatively formal democracies. The law protects the rights of dissenters, and unions owe all members and agency-fee payers a “duty of fair representation.”<sup>239</sup> Thus, even though labor unions are, like most workplaces, hierarchical, they have less ability to squelch dissent and dampen debate and deliberation than workplaces.<sup>240</sup>

Moreover, when unions are functioning properly, they facilitate internal interdependence because members must rely on each other (and their elected leadership) to represent fairly the interests of the entire membership. For a union to be effective, its members must be able to speak across the negotiation table with a unified voice. For a union to maintain members, those members must remain confident the union will go to bat for them when they need its advocacy.

Finally, by virtue of their close relationship to workplaces, where workplaces are relatively diverse, it stands to reason that labor unions will also be diverse, particularly those unions that span multiple workplaces.<sup>241</sup> As Cynthia Estlund has noted, workplaces tend to be relatively more diverse than neighborhoods or voluntary associations, making the deliberation at work more likely to include unfamiliar points of view.<sup>242</sup> Correspondingly, a recent Center for Economic and Policy Research report

236. Further, with the rise of business unionism, unions and employers are probably more likely than ever to be able to maintain a functional working relationship. In either event, though, well-functioning unions increase employers’ dependence on their employees.

237. There are presently twenty-two right-to-work states, which are found mainly in the southeastern and midwestern United States. See *Right to Work States*, NAT’L RIGHT TO WORK LEGAL DEF. FOUND., INC., <http://www.nrtw.org/rtps.htm>, for a list of right-to-work laws.

238. See generally *Comm’n Workers of Am. v. Beck*, 487 U.S. 735 (1988).

239. Labor Management Reporting and Disclosure Act of 1959, Pub. L. No. 86-257, art. I, 73 Stat. 519 (codified as amended at 29 U.S.C. § 401 (2006)). See generally *Vaca v. Sipes*, 386 U.S. 171 (1967). Of course, unions are democratic to varying degrees. See Godson, *supra* note 207, at 119 (noting that “not all trade unions are democratic”).

240. ESTLUND, *supra* note 212, at 14 (arguing that the hierarchical nature of most workplaces suppresses their ability to create social capital).

241. Like workplaces, labor unions are subject to antidiscrimination laws, including Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2 (2006), and the Labor Management Reporting and Disclosure Act, 29 U.S.C. § 411(a).

242. ESTLUND, *supra* note 212, at 7.

indicates that the labor movement is becoming increasingly diverse along racial and gender lines.<sup>243</sup> Thus, labor unions, at least those where members participate meaningfully in union affairs, can fulfill some of the same “integrative” functions as workplaces—they too can “conven[e] strangers from diverse backgrounds and induc[e] them to work together toward shared objectives . . . .”<sup>244</sup> Therefore, to use Putnam’s terminology, unions are both “bridging” and “bonding” associations.<sup>245</sup> They are bonding associations because union members generally share a socioeconomic class and, in the case of local unions, a geographic area and often a profession. They are bridging associations because, like workplaces, unions are relatively diverse as compared to other types of associations.<sup>246</sup> Thus, the interdependence created at work and enhanced by a union is likely to be broader and more inclusive than that created by associations that are unconnected to the workplace.<sup>247</sup>

### 3. Unions as Places and Reasons To Come Together

Unions may be less effective than other types of associations at physically bringing people together in a single location. Generally, attendance at union meetings is non-mandatory, and—particularly if they feel that the union is functioning well and serving their interests—members may not be inclined to participate in union affairs.

This is not to say that deliberation never takes place among union members. When it does, members will undoubtedly influence each others’ views on the political issues of the day.<sup>248</sup> And when union members take collective action, such as striking or informational picketing, the level of

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243. JOHN SCHMITT & KRIS WARNER, CTR. FOR ECON. & POLICY RESEARCH, THE CHANGING FACE OF LABOR, 1983–2008 (2009), available at <http://www.cepr.net/documents/publications/changing-face-of-labor-2009-11.pdf>; see also BUREAU OF LABOR STATISTICS, *supra* note 19 (indicating that, whereas men used to belong to unions at much higher rates than women, the “gap between their rates has narrowed considerably since 1983”). Further, labor unions have become more diverse in terms of representing more unskilled and semi-skilled workers than in earlier decades, when unions tended to represent relatively well-off skilled workers. WILLIAM FORM, SEGMENTED LABOR, FRACTURED POLITICS: LABOR POLITICS IN AMERICAN LIFE 40–41 (1995).

244. ESTLUND, *supra* note 212, at 129. It may be that, in some unions, participation will be limited to a few committed members, so the potential integrative benefits of physically coming together at the union hall will be minimal. However, data showing that union members are more politically active than the general public suggests that union membership is still valuable to deliberative democracy. Presumably, which aspects of union membership—coming together to debate workplace condition and take collective action, being part of an organization that participates actively in politics, having to think about the welfare of other workers while negotiating contracts or processing grievances, or something else—influence democratic citizenship and participation will vary among unions and members.

245. *Id.* at 107 (citing PUTNAM, *supra* note 212, at 22).

246. See *supra* note 243 and accompanying text.

247. ESTLUND, *supra* note 212, at 130.

248. Tushnet, *supra* note 196, at 399.

deliberation is likely to be much higher. Public collective action also has the effect of reaffirming and reinforcing social identity.<sup>249</sup>

#### 4. Unions as “Schools for Democracy”

Unions are frequently characterized as schools for democracy,<sup>250</sup> and there is reason to believe that union membership contributes to political activism. Traditionally, it has been the case that “[b]lue-collar workers . . . are politically apathetic, or at least are less likely to vote . . . than their parents.”<sup>251</sup> Union members, however, are more likely than the general public to be registered voters, to vote, to try to influence others’ votes, to support a candidate by displaying a bumper sticker or making a campaign contribution, to care about election outcomes, and to follow public affairs.<sup>252</sup>

One reason for this level of participation may be that union members, who elect union leadership (usually at both the local and national or international level), are more accustomed to voting, running for office, or participating in campaigning activity.<sup>253</sup> Further, because unions often negotiate workplace protections, such as substantive and procedural limitations on discipline and firing,<sup>254</sup> workers may feel more comfortable participating in the political process if they know they cannot be fired for their political stances. Benefits such as higher wages<sup>255</sup> and more time off work also may contribute to workers’ ability to participate in the political process.

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249. Hawkins, *supra* note 31, at 74 (stating that “processions and festivals enlivened the unionists’ efforts, proclaiming to all their public identity and social ideals with banners like the New York GTU’s standard of Archimedes lifting a mountain with a lever”).

250. *E.g.*, Godson, *supra* note 207, at 125.

251. Christopher Grant, *Unions in a Fragmented Society*, 77 CHI.-KENT L. REV. 849, 850 (2002).

252. *The ANES Guide to Public Opinion and Electoral Behavior*, AM. NAT’L ELECTION STUD., <http://www.electionstudies.org/nesguide/gd-index.htm> (last visited Apr. 20, 2011). It is unclear whether there is a causal relationship between union membership and political activism, and if there is one, which way it runs. On one hand, it may be that, given the improved wages and benefits that come with unionization, employees have more resources and time to devote to politics. On the other, it may be that the most politically aware employees are also the most likely to perceive benefits of unionization, to be aware of the protected status of labor organizing in the workplace, or to have the energy and motivation to organize a union. Or, there may be a third factor that accounts for both phenomena. Carole Pateman points to the sense of “political efficacy” or “political competence” as strongly correlative to political participation, and those traits may also make unionization more likely. CAROLE PATEMAN, *PARTICIPATION AND DEMOCRATIC THEORY* 46 (1976).

253. Godson, *supra* note 207, at 125.

254. *Cf.* ESTLUND, *supra* note 212, at 130 (noting that “some employees are required to listen and submit to others who hire them and could fire them, and who control their advancement and conditions of employment” as a limit on workplace civil society); *id.* at 135 (noting that while collective bargaining “looks like a very pale version of democracy and nothing like a republic,” it nonetheless “represent[s] the rule of law, the institution of due process, and the opportunity for a real collective voice” in the workplace).

255. BUREAU OF LABOR STATISTICS, *supra* note 19 (showing that, among full-time workers, union members earned a median of \$886 per week, compared to \$691 for non-members).

The foregoing suggests that labor unions play a significant role in promoting a robust civil society that checks the state and acts as a democratic training ground. Thus, if one accepts that the First Amendment broadly protects speech that promotes deliberative democracy, then labor speech—in many of its forms—deserves top-tier First Amendment protection. This is especially so in the context of comprehensive campaigns and other organizing activity, where unions' speech has significant potential to enhance associational life.<sup>256</sup> In other words, where unions and workers are actively involved in forming new associations and creating foundational ties among one another, the speech that facilitates those associations is important from a First Amendment perspective. Further, the claim that union speech is “deliberative” has particular force in the context of comprehensive campaigns. Comprehensive campaigns generally involve appeals to the public or to government, and they often rely on their moral force to attempt to convince otherwise-uninvolved people to act in a particular way. Thus, the speech is likely to focus on dignitary concerns (such as a particular employer mistreating workers), the benefits of unionism to the community, or another matter of public concern.

Comprehensive campaigns have deliberative aspects even for employers—who are, after all, the targets of those campaigns. Because comprehensive campaigns are mainly aimed at the public, employers can attempt to disarm them by taking to the public to both talk and listen.<sup>257</sup> If employers are convincing, then presumably the public will ignore or discount the union voices; if unions are convincing, then the reverse will be true. Further, comprehensive campaigns are deliberative in that they are aimed at convincing employers that it is in their own best interest (or, possibly, the best interests of employees) to voluntarily agree to something like a card check. That unions seek to do so by making it less pleasant for employers to refuse does not necessarily make comprehensive campaigns undeliberative.<sup>258</sup>

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256. However, organizing speech is not the only labor speech that has the potential to enhance democratic deliberation. The need to bargain collectively will also bring union members together to deliberate: For example, during bargaining, union members are likely to discuss the merits and fairness of particular offers and counter-offers, and to vote on whether or not to approve a contract. Bargaining speech, including picketing and secondary activity, also has the potential to make workers feel empowered to, collectively, stand up to management. The results of successful bargaining—increased wages and job security—may leave workers with more time and money to participate in their unions, in other associations, in their communities more generally, and in the political process. Finally, bargaining speech may ultimately influence the outcomes of future organizing efforts, creating a virtuous cycle: if a union has a long track record of bargaining that improves wages and working conditions, it is more likely that the union will be able to attract new members within a workplace (in a right-to-work state) or organize new workplaces. Thus, it is not the case that *only* organizing speech, and not union speech more generally, promotes deliberative democracy.

257. For example, Smithfield ran a series of commercials in which workers touted their good working conditions and radio interviews with Smithfield spokesperson and “celebrity chef” Paula Deen.

258. See AMY GUTMANN & DENNIS THOMPSON, *DEMOCRACY AND DISAGREEMENT* 4 (1996) (stating that “[a] deliberative perspective sometimes justifies bargaining, negotiation, force, and even violence”). This is true particularly if comprehensive campaigns

IV. FIRST AMENDMENT VALUES AND THINKING SMALL: HOW CIVIL RICO  
POSES A GREATER FIRST AMENDMENT PROBLEM THAN NLRB  
REGULATION OF SPEECH

I have argued that because labor speech can enhance the First Amendment interest in deliberative democracy, it deserves the highest level of First Amendment protection—the same protection that the Court extended to the NAACP in *Claiborne Hardware*.<sup>259</sup> Because the NAACP's speech was significantly more coercive than the speech that has precipitated employers' civil RICO lawsuits, it seems clear that the speech involved in comprehensive campaigns—at least campaigns free of violence or threats to compel an employer to take illegal action—should be protected.

However, I do not argue that this conclusion necessarily requires the Court to reverse all of its decisions upholding the NLRB's authority to regulate union and employer speech during organizing campaigns and the bargaining process. First Amendment balancing analyses require courts to weigh the benefits of the speech at issue against the benefits of limiting that speech.<sup>260</sup> There may be good reason to differentiate regulatory restrictions on union speech imposed and policed by the NLRB from civil lawsuits filed by employers embroiled in labor disputes, given that regulation by the NLRB yields different benefits and imposes different burdens than civil RICO lawsuits.<sup>261</sup> As Harry Kalven has observed, “[t]o make a balancing approach meaningful, we must think in narrower terms, recognizing that the strengths of the competing interests may vary in new contexts.”<sup>262</sup>

Here, because the NLRB—although far from a model of administrative perfection—seeks to protect employees' rights to organize while ensuring union legitimacy, the NLRB's mission also furthers deliberative democracy interests. Therefore, even after labor speech is afforded top-tier First Amendment protection, the results of First Amendment balancing may favor NLRB regulation over unimpeded speech. Employers' civil RICO lawsuits targeting comprehensive campaigns, however, are another story. Though a civil RICO suit itself constitutes petitioning activity, it has a

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inconvenience, but do not realistically threaten, the companies at which they are aimed. *See supra* notes 24–28 and accompanying text.

259. *See supra* text accompanying notes 140, 144–45.

260. Norman T. Deutsch, *Professor Nimmer Meets Professor Schauer (and Others): An Analysis of “Definitional Balancing” as a Methodology for Determining the “Visible Boundaries of the First Amendment”*, 39 AKRON L. REV. 483, 485 (2006) (observing that the Court has conducted balancing in speech cases where First Amendment values were implicated on both sides of the equation).

261. Though the Court has not endorsed this distinction—and rejected it in *BE & K Construction Co. v. NLRB*—it seems to view restrictions on labor speech when criminal penalties or hefty fines are at issue with greater skepticism than when faced with an injunction. *Cf. BE & K Constr. Co. v. NLRB*, 536 U.S. 516, 541–42 (2002) (Breyer, J., concurring) (arguing that, because antitrust penalties and litigation costs are greater than those associated with NLRB enforcement proceedings, the First Amendment analysis need not be identical).

262. Shiffrin, *supra* note 194, at 1215 (quoting Kenneth Karst, *The First Amendment and Harry Kalven: An Appreciative Comment on the Advantages of Thinking Small*, 13 UCLA L. REV. 1, 18 (1965)).

chilling effect on union speech that has the potential to limit both union speech and unionization itself, even where employees generally agree that they would like to form a union. Thus, civil RICO lawsuits, if anything, stymie deliberative democracy.

A. *The NLRB's Potential To Enhance Democracy*

One could understand the NLRA, and the NLRB's efforts to enforce it, as an attempt to preserve the deliberative and state-checking benefits that legitimate unions can provide. In *In re General Shoe Corp.*,<sup>263</sup> the NLRB concluded that its role was to "provide a laboratory in which an experiment may be conducted, under conditions as nearly ideal as possible, to determine the uninhibited desires of the employees."<sup>264</sup> In performing this function, the NLRB "regulate[s] otherwise protected speech during representation election campaigns"<sup>265</sup> to protect employees' associational interests, particularly in light of their economic dependence on their employers.<sup>266</sup> These restrictions on unfair methods of either promoting or discouraging unionization can deter abuses (by either side) that would impair workers' exercise of their associational rights. Thus, though it involves restrictions on speech,<sup>267</sup> the "laboratory conditions" doctrine enhances civil society, as well as employees' First Amendment associational interests.<sup>268</sup>

Further, the threat of NLRB sanction is relatively unlikely to chill legitimate speech. The NLRB cannot impose punitive financial penalties—

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263. 77 N.L.R.B. 124 (1948).

264. *Id.* at 127; see also Shawn J. Larsen-Bright, Note, *Free Speech and the NLRB's Laboratory Conditions Doctrine*, 77 N.Y.U. L. REV. 204, 215 (2002).

265. Larsen-Bright, *supra* note 264, at 215; see also *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 612 (1969) (concluding that NLRB may order employer to bargain with union if employer has "succeeded in undermining a union's strength and destroying the laboratory conditions necessary for a fair election").

266. See *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 778 n.3 (1976) (Stewart, J., concurring) (noting that the Court permitted more speech restrictions in the context of labor elections than political elections to promote "antiseptic conditions," based on employees' competing First Amendment associational interests and dependence on their employers).

267. For example, during organizing campaigns, employers may not threaten to close the plant in retaliation if the employees vote the union in (though employers may state that the plant may close if the workers unionize, provided the statement is not motivated by anti-union animus), nor may they promise to improve working conditions or compensation if employees reject unionization. See Julius Getman, *Labor Law and Free Speech: The Curious Policy of Limited Expression*, 43 MD. L. REV. 4, 5-9 (1984).

268. Further, the NLRA is not universally speech-restrictive. In some contexts, the NLRA takes an expansive view of unions' and employers' speech rights. For example, the Court has repeatedly recognized that tempers run high during labor disputes, causing both sides to make extreme statements. *Linn v. United Plant Guard Workers of Am., Local 114*, 383 U.S. 53, 64 (1966). At times, the Court has even suggested that permitting such speech could prevent violence by providing a way for labor combatants to blow off steam. *Milk Wagon Drivers Union of Chi., Local 753 v. Meadowmoor Dairies, Inc.*, 312 U.S. 287, 296 (1941). Thus, the NLRA preempts defamation suits that do not meet the *New York Times Co. v. Sullivan* actual malice standard because of the risk that state-law defamation liability could "dampen the ardor of labor debate and truncate the free discussion envisioned by the Act [and] . . . might be used as weapons of economic coercion." *Linn*, 383 U.S. at 64.

at most, it can order backpay and attorneys' fees.<sup>269</sup> Thus, even though the NLRB can significantly burden speech by issuing an injunction that stops the speech altogether, the cost to a union or an employer of "going over the line" is relatively low, so even an active NLRB will not inadvertently chill *future* employer or union speech very much. Ironically, then, the aspects of the NLRB that render it ineffective at eradicating abusive labor practices make its interventions in labor disputes less problematic from a First Amendment perspective.

The NLRB's potential to improve union legitimacy and enhance workers' associational rights can be seen in some of the existing labor speech cases. For example, in *NLRB v. Virginia Electric & Power Co.*,<sup>270</sup> the Court upheld the NLRB's power to issue a cease-and-desist order against a company that interrogated its employees about their union sympathies and then facilitated the creation of an "inside union" that would accede to the company's wishes.<sup>271</sup> The Court rejected the company's argument that its speech was protected by the First Amendment, concluding that the NLRB's penalty was intended to protect workers' rights to form a "legitimate" union, not punish the employer's speech.<sup>272</sup> In terms of promoting deliberative democracy, the result is the correct one, even though it burdens the employer's speech. It is unlikely that the "inside union" would have performed any of the democracy-enhancing functions discussed in the previous section.<sup>273</sup> If anything, it would have been an object-lesson in corruption and the inability of workers to come together to change their situations through concerted action.<sup>274</sup>

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269. *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 152 n.6 (2002) (stating that the "[Labor] Board is precluded from imposing punitive remedies"); *Republic Steel Corp. v. NLRB*, 311 U.S. 7, 10 (1940) (describing purposes of NLRA as remedial, not punitive); see also Estlund, *supra* note 3, at 1537. The NLRB's position is that it has the authority to order attorneys' fees. Micah Berul, *To Bargain or Not To Bargain Should Not Be The Question: Deterring Section 8(A)(5) Violations in First-Time Bargaining Situations Through a Liberalized Standard for the Award of Litigation and Negotiation Costs*, 18 LAB. LAW. 27, 39–40 (2002). However, the U.S. Courts of Appeals for the Third and D.C. Circuits have called this position into doubt. *Quick v. NLRB*, 245 F.3d 231, 255 (3d Cir. 2001); *Unbelievable, Inc. v. NLRB*, 118 F.3d 795, 805–06 (D.C. Cir. 1997).

270. 314 U.S. 469 (1941).

271. See generally *id.*

272. *Id.* at 477.

273. See Kate E. Andrias, *A Robust Public Debate: Realizing Free Speech in Workplace Representation Elections*, 112 YALE L.J. 2415, 2459–60 (2003) (arguing that the NLRB should be required to regulate employer speech to facilitate employees' exercises of their associational rights).

274. Likewise, the result in *Building Service Employees International Union, Local 262 v. Gazzam*, 339 U.S. 532 (1950), was correct from the perspective of promoting legitimate civil society. In that case, the Court upheld an injunction against a union that sought to coerce an employer to coerce his employees to join the union. *Id.* at 540–41. A labor union that is formed through coercion not only infringes the employees' associational rights, but it is unlikely to encourage further participation in union affairs. Since the benefits to deliberative democracy come mainly from members' robust participation in an association's affairs, few are likely to accrue in this situation.

Likewise, from a deliberative democracy perspective, the Court's holding in *Bill Johnson's Restaurants*,<sup>275</sup> the predecessor case to *BE & K*,<sup>276</sup> was correct. In *Bill Johnson's Restaurants*, the employer filed a state-court lawsuit, seemingly to retaliate against employees who had filed unfair labor practice charges with the NLRB and engaged in picketing and leafletting.<sup>277</sup> The state-court suit claimed damages for mass picketing, harassment, blocking the entrance to the restaurant, creating a threat to public safety, and libel.<sup>278</sup> In response, the NLRB issued a new complaint against the employer, charging that the lawsuit was filed in retaliation for the employees' exercise of their rights under the NLRA.<sup>279</sup> Weighing the employees' labor rights against the employer's First Amendment right to petition, the Court held that the NLRB could enjoin ongoing lawsuits only when "the plaintiff's position is plainly foreclosed as a matter of law or is otherwise frivolous," but that "the Board should allow such issues to be decided by the state tribunals if there is any realistic chance that the plaintiff's legal theory might be adopted."<sup>280</sup> However, once the suit had concluded, if the employer loses or withdraws its state-court suit, then "the employer has had its day in court, the interest of the State in providing a forum for its citizens has been vindicated, and the Board may then proceed to adjudicate the . . . unfair labor practice case."<sup>281</sup>

The rule articulated in *Bill Johnson's Restaurants* served to promote deliberative democracy because retaliatory lawsuits have great potential to disempower workers. For an employee who has exercised her associational rights to change her working conditions—only to be forced to spend many months or years defending a lawsuit—the clear message will be that the exercise of her rights was not worth it. Further, even where lawsuits are not enjoined, the possibility of a subsequent NLRB proceeding—particularly one that has the potential to recoup attorneys' fees—can have restorative justice value.

If the NLRB's mission was to impose rules and procedures that would protect employees' capacity to form unions, which would in turn contribute to an effective civil society, one could sensibly object that it has largely failed.<sup>282</sup> The law governing union organizing and recognition is a

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275. See *supra* notes 165–67.

276. See *supra* notes 168–76 and accompanying text.

277. *Bill Johnson's Rests., Inc. v. NLRB*, 461 U.S. 731, 734 (1983).

278. *Id.*

279. *Id.* at 735–36.

280. *Id.* at 747.

281. *Id.* In *BE & K*, the Court stated that this language was dicta, and rejected it. *BE & K Constr. Co. v. NLRB*, 536 U.S. 516, 527–28 (2002).

282. Notably, one of the reasons that unions give for running comprehensive campaigns is that the NLRB process has failed to protect workers and create conditions under which workers can form a union free of intimidation and mistreatment. One study suggested that "almost one-in-five union organizers or activists can expect to be fired as a result of their activities in a union election campaign." JOHN SCHMITT & BEN ZIPPERER, CTR. FOR ECON. & POLICY RESEARCH, DROPPING THE AX: ILLEGAL FIRINGS DURING UNION ELECTION CAMPAIGNS 1 (2007), available at [http://www.cepr.net/documents/publications/unions\\_2007\\_01.pdf](http://www.cepr.net/documents/publications/unions_2007_01.pdf).

hodgepodge of unclear and shifting restrictions, and enforcement is hardly swift. In addition, the NLRB has proven to be subject to instability tied to its regular political “capture” by the executive branch, alternating between periods of being sympathetic to labor and periods of being sympathetic to employers.<sup>283</sup> These rules have hardly contributed to a robust union movement.

However, the courts are unlikely to do any better, particularly in light of the *Lochner*ism that still pervades labor law.<sup>284</sup> Further, because courts are limited to the controversy before them, they would be left to overturn one aspect of labor law here, and another there, resulting in a see-saw effect in the balance of power between unions and employers.<sup>285</sup> Mark Tushnet argues that “the idea that legal doctrine could stably distinguish among internal activities that reduce civil society’s effectiveness and those that promote it seem strained. . . . [C]ivil society’s institutions are likely to be more dependent on legislative grace than protected by constitutional law.”<sup>286</sup> Thus, where the legislative or executive branch attempts to create conditions that will promote civil society,<sup>287</sup> it makes sense for courts to defer to those judgments.

### B. Civil RICO and First Amendment Balancing

In contrast to NLRB proceedings, civil RICO lawsuits can result in judgments awarding treble damages and attorneys’ fees (and the attorneys’ fees are likely to be much higher than those in an NLRB enforcement proceeding, given the costs associated with formal discovery, summary

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283. See, e.g., James M. Owens et al., “Now You Have It, Now You Don’t”: *The NLRB’s Fickle Affair with the Weingarten Right and the Need for Congress To End the Controversy*, 11 J. INDIVIDUAL EMP. RTS. 155, 156 (2004) (noting the “flip-flopping of the NLRB’s decisions regarding the applicability of the *Weingarten* right to the nonunion workplace”); Steven Porzio, *NLRB Chairman Addresses Labor Law Reform at American Bar Association Meeting*, UNIONS AND LAB. L. REFORM BLOG (Nov. 11, 2009), <http://www.efcablog.com/2009/11/articles/craig-becker-nlr/nlr-chairman-addresses-labor-law-reform-at-american-bar-association-meeting/> (noting that NLRB “Chairman Liebman argued that Congressional inaction has fostered ‘deep divisions’ and ‘controversy’ in labor law and has ‘facilitated’ the NLRB’s ‘flip-flopping’ and ‘policy oscillation.’”).

284. Pope, *supra* note 93, at 1076 (arguing that the “black hole” of labor law “is traceable to the commodity theory of labor dominant during the *Lochner* era”).

285. See, e.g., *NLRB v. Retail Store Emps. Union, Local 1001*, 447 U.S. 607, 617–18 (1980) (Blackmun, J., concurring) (agreeing to uphold NLRB’s finding that a union engaged in an illegal secondary boycott “only because I am reluctant to hold unconstitutional Congress’ striking of the delicate balance between union freedom of expression and the ability of neutral employers, employees, and consumers to remain free from coerced participation in industrial strife”). Alternatively, if it is correct that “judges don’t like labor unions,” a steady erosion of labor rights could occur. See generally George Schatzki, *It’s Simple: Judges Don’t Like Labor Unions*, 30 CONN. L. REV. 1365 (1998).

286. Tushnet, *supra* note 196, at 397.

287. The NLRA itself discusses the importance of labor unions to achieving industrial peace and a just society. See 29 U.S.C. § 151 (2006) (“The inequality of bargaining power between employees who do not possess full freedom of association of actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce . . .”).

judgment briefing, and the like).<sup>288</sup> For example, the *Smithfield* plaintiffs sought \$5,900,000 in “compensatory and consequential” damages alone, and then asked that the amount be trebled and added to their (undoubtedly substantial) attorneys’ fees.<sup>289</sup> That is to say, even before attorneys’ fees, *Smithfield* was seeking over ten percent of UFCW’s 2008 net assets.<sup>290</sup> Of course, the UFCW also generated its own attorneys’ fees during the course of the lawsuit, which likely ran to many millions of dollars.<sup>291</sup> Therefore, even if civil RICO lawsuits based solely on expressive activity are usually unsuccessful, the threat of such a suit, by itself, has great potential to chill comprehensive campaign speech. If unions waging comprehensive campaigns are regularly targeted with “bet the union” lawsuits, few unions will choose to—or be able to afford to—engage in them.<sup>292</sup>

Further, civil RICO lawsuits are poor vehicles for advancing First Amendment interests of any color, except insofar as lawsuits themselves advance the First Amendment interests that the Court identified in *BE & K*: airing “genuine grievances” and related information, particularly where the subject of the lawsuit is a matter of public concern; “promot[ing] the evolution of the law”; and legitimating the court system as the acceptable way to resolve disputes in this country.<sup>293</sup> If civil RICO cases based solely or primarily on expressive activity are unlikely to be successful, employers will file fewer of them; however, that employers will be less likely to air their grievances through civil lawsuits cannot alone outweigh the First Amendment value of protecting the speech involved in comprehensive campaigns.

If I am correct that my First Amendment analysis does not necessarily affect the NLRB’s authority to restrict union and employer speech, then the

288. 18 U.S.C. § 1964(c) (2006) (civil remedies include treble damages and attorneys’ fees).

289. First Amended Complaint, *supra* note 8, ¶¶ 1–4, at 91–92.

290. FORM LM-2 LABOR ORGANIZATION ANNUAL REPORT: UNITED FOOD & COMMERCIAL WORKERS (Mar. 26, 2009), available at <http://erds.dol-esa.gov/query/getOrgQry.do> (search for file number 000-056; then follow “Food & Commercial Wkrs National Headquarters” hyperlink; then follow “2008 Report” hyperlink) (listing net assets of \$159,521,604).

291. According to the UFCW’s LM-2s, the union paid Bredhoff & Kaiser PLLC, the firm that represented UFCW and the individual defendants in *Smithfield*, \$5,579,684 in 2008, the year in which the *Smithfield* lawsuit was filed. *Id.* In the two previous years, UFCW paid Bredhoff only \$99,500 and \$23,722, respectively. See FORM LM-2 LABOR ORGANIZATION ANNUAL REPORT: UNITED FOOD & COMMERCIAL WORKERS (Mar. 28, 2008), available at <http://erds.dol-esa.gov/query/getOrgQry.do> (search for file number 000-056; then follow “Food & Commercial Wkrs National Headquarters” hyperlink; then follow “2007 Report” hyperlink); FORM LM-2 LABOR ORGANIZATION ANNUAL REPORT: UNITED FOOD & COMMERCIAL WORKERS (Mar. 22, 2007), available at <http://erds.dol-esa.gov/query/getOrgQry.do> (search for file number 000-056; then follow “Food & Commercial Wkrs National Headquarters” hyperlink; then follow “2006 Report” hyperlink). These numbers only include fees attributed to “representational activities.”

292. See, e.g., *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 277–78 (1964) (discussing the potential for a lawsuit to chill protected speech); Eugene Volokh, *Crime-Facilitating Speech*, 57 STAN. L. REV. 1095, 1192 (2005) (noting that “[s]peakers who are genuinely not intending to facilitate crime might nonetheless be deterred by the reasonable fear that a jury will find the contrary”).

293. *BE & K Constr. Co. v. NLRB*, 536 U.S. 516, 532 (2002).

potential for civil RICO suits to deter “illegitimate” union activity that might undermine deliberation—activity that, for example, coerces workers into signing a union authorization card against their will<sup>294</sup>—will be further diminished. First, the NLRB will be able to police the same activity, and, as a neutral third party, it will be less likely than an employer to attempt to suppress legitimate union speech. Second, the NLRB will be able to evaluate the entire context of the labor dispute, whereas a court adjudicating a civil RICO lawsuit will have, at best, a limited ability to take into account background like prior unfair labor practices committed by the employer.<sup>295</sup>

Nonetheless, it may yet be the case that some labor speech has so little value that it would not offend the First Amendment for the speech to form the basis for civil RICO liability (assuming, of course, that the speech met civil RICO’s statutory requirements). Speech could be low-value either because it is false or because it is intended to compel illegal employer behavior. I will discuss the First Amendment protection that should apply to speech falling into these categories in turn.

### 1. False Speech

I have argued that comprehensive campaign speech should receive the same First Amendment protection as civil rights speech.<sup>296</sup> That includes the “breathing space” created in *New York Times Co. v. Sullivan*,<sup>297</sup> which held that untrue statements should not form the basis for liability unless they are motivated by “actual malice.”<sup>298</sup> The *Sullivan* standard is necessary to prevent union speech from being chilled for two reasons. First, unions will rarely, if ever, be able to determine to a certainty that all the information they receive about a company’s employment practices is true. Second, speech about employers’ treatment of workers and the potential to unionize a workplace should be regarded as speech on a matter of public concern under *Sullivan*, for all the reasons described above.<sup>299</sup>

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294. By this, I do not mean union speech that educates workers about the value of unions, which will often contribute to workers’ abilities to exercise their associational rights by counterbalancing employers’ one-sided, anti-union statements. Rather, I refer to overtly coercive or threatening speech, such as “sign this card or else.”

295. See *San Diego Bldg. Trades Council, Local 2020 v. Garmon*, 359 U.S. 236, 244–45 (1959) (holding that NLRB has sole jurisdiction over activity that constitutes unfair labor practices, even if the NLRB declines jurisdiction over that activity).

296. See *supra* Part III.

297. 376 U.S. at 285–87 (holding that the *New York Times* was not liable for defamation when it published an NAACP-sponsored advertisement because it neither knew nor recklessly disregarded whether the published advertisement was false). Applying this standard to labor speech in non-NLRB proceedings will also have the advantage of extending the same standard to union speech in all contexts, as the *Sullivan* standard already applies under the NLRA, though as a matter of statutory interpretation rather than the First Amendment. See *Linn v. United Plant Guard Workers of Am., Local 114*, 383 U.S. 53, 65 (1966).

298. *Sullivan*, 376 U.S. at 279–80.

299. *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 761 (1985) (declining to apply *Sullivan* standard to speech on matters of private concern, holding that “[i]n light of the reduced constitutional value of speech involving no matters of public

Further, because labor unions (like other organizations) typically cannot maintain close control of unaffiliated protestors, liability should be limited to statements that were actually made, authorized, or ratified by the union.<sup>300</sup> This would leave, as potential bases for liability, “actually malicious” statements made by the union (such as statements made on “official” posters and flyers, and oral statements made by members of the union leadership) or endorsed by the union, including, for example, statements contained in reports or documents drafted by a union but given to another entity for distribution.

## 2. Comprehensive Campaign Speech in Pursuit of an Illegal Goal

If a comprehensive campaign aims to compel illegal behavior through false, actually malicious speech, the First Amendment provides no barrier to the application of civil RICO (assuming its other requirements are satisfied). When a comprehensive campaign employs speech that is either true or at least not recklessly false, however, the question is more complicated.

With some exceptions, the First Amendment usually does not inquire into the speaker’s motives to assess the appropriate level of protection to assign speech.<sup>301</sup> Truthful speech has First Amendment value, even when it is motivated by an illegal goal. For example, the speech still has potential to educate listeners about issues of public concern (and therefore at least some listeners have an independent First Amendment interest in hearing the speech), regardless of the speakers’ motives.<sup>302</sup> In any event, given that comprehensive campaigns often involve a coordinated effort by individuals and groups who may have different motivations (but who may receive information on which they base their speech from a labor union), it will be difficult, if not impossible, to attribute a single motive to all the expressive activity involved in a comprehensive campaign.<sup>303</sup>

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concern, we hold that the state interest adequately supports awards of presumed and punitive damages—even absent a showing of ‘actual malice’”).

300. This standard would be consistent with the Norris-LaGuardia Act, which provides that

[n]o officer or member of any association or organization, and no association or organization participating or interested in a labor dispute, shall be held responsible or liable in any court of the United States for the unlawful acts of individual officers, members, or agents, except upon clear proof of actual participation in, or actual authorization of, such acts, or of ratification of such acts after actual knowledge thereof.

29 U.S.C. § 106 (2006).

301. Volokh, *supra* note 292, at 1192 (listing instances in which the Court has rejected First Amendment tests that turn on the motives of the speaker).

302. Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 756–57 & n.15 (1976) (holding that speech about drug prices had First Amendment value, in part because of listeners’ First Amendment rights to receive the information).

303. This issue also arises in the context of assessing damages. If a court eventually finds a civil RICO violation, it would then have to separate damages attributable to the illegal speech from damages attributable to protected speech. If a court applied *Claiborne Hardware* to social movements other than labor unions, this inquiry could be extremely difficult.

On the other hand, *Giboney* suggests that the First Amendment does not protect expression aimed at compelling illegal activity, at least where labor picketing is concerned.<sup>304</sup> But *Giboney* is not the end of the story. Subsequent First Amendment cases, including *Brandenburg*, impose an “imminence” requirement before “inciting” speech loses First Amendment protection and call into question *Giboney*’s breadth.<sup>305</sup> Moreover, it is possible to read *Giboney* narrowly, in a way that is largely consistent with these later Supreme Court cases (including *Claiborne Hardware*). Finally, *Giboney* relied on a “signal picketing” analysis<sup>306</sup>—i.e., union members would see a picket line and unthinkingly obey it—that does not necessarily apply to comprehensive campaign speech.

In *Giboney*, the Court upheld a restraint on secondary picketing that sought to compel the target company to violate state antitrust law—and caused an immediate eighty-five percent drop in the target company’s sales—even though the picketing consisted of truthful speech.<sup>307</sup> Despite the Court’s later broad statements about *Giboney*’s holding,<sup>308</sup> the narrow factual situation presented in *Giboney* is consistent with *Brandenburg*’s imminence requirement:<sup>309</sup> *Giboney* stressed the “clear danger, imminent and immediate” that the union would succeed in its goal.<sup>310</sup> Thus, in light of *Brandenburg*’s “imminence” standard, *Giboney* should be read narrowly (and later, more expansive glosses on *Giboney* by the Supreme Court should be rejected), so that the only non-malicious speech that would lose its First Amendment protection is speech that both poses a serious, immediate threat to a company’s survival and seeks to compel the employer to act illegally.

Under this standard, comprehensive campaign speech is unlikely to lose First Amendment protection. Contrary to the picketing in *Giboney*, comprehensive campaigns have—at least so far—failed to inspire an instant response, at least among a large percentage of the target employers’ customers and suppliers. Therefore, in most cases, comprehensive campaigns will not put employers in the same untenable position as the target company in *Giboney*: they will not be forced to choose between

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304. *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 498 (1949); *see also* *Bldg. Serv. Emps. Int’l Union, Local 262 v. Gazzam*, 339 U.S. 532, 533, 541 (1950) (upholding injunction forbidding union from attempting to compel employer to coerce his employees).

305. *See supra* notes 127–30 and accompanying text.

306. *See supra* notes 110–12 and accompanying text.

307. *Giboney*, 336 U.S. at 492–95 (describing picketing that informed the public that Empire sold ice to nonunion peddlers).

308. *See Cox v. Louisiana*, 379 U.S. 559, 563–64 (1965) (stating that *Giboney* applied the general principle that “[a] man may be punished for encouraging the commission of a crime” in the context of a labor dispute).

309. Commentators have stressed the importance of the imminence requirement in protecting speech, given that intent and likelihood of success are somewhat subjective. *See Volokh, supra* note 292, at 1193 (stating that “the main barrier to liability under the *Brandenburg* test has generally been the imminence prong”).

310. *Giboney*, 336 U.S. at 503.

acquiescing in illegal behavior and imminent shutdown.<sup>311</sup> It is nonetheless conceivable that, after a comprehensive campaign has been underway for some time, its economic impact will begin to take a toll on an employer such that the employer's acquiescence in an illegal demand becomes imminent. Still, given the availability of NLRB procedures to enjoin illegal union activity at an earlier stage, this scenario seems unlikely.<sup>312</sup>

#### CONCLUSION

Civil RICO lawsuits that seek to impose liability for labor unions' comprehensive campaign activity expose numerous discrepancies between the Court's First Amendment treatment of labor unions and other seemingly similar speakers. It is doubtful that the Court's distinction between "economic" speech and "political" speech was ever workable, given the extent to which the two are intertwined in most people's daily lives. It certainly is not workable today, when labor unions and their members are intensely involved in political advocacy over issues that will have great impact on all workers and employers. Even if labor unions at one time could command large swaths of the public to respect picket lines and other union directives, those days are past. Thus, it is time for the Court to update its labor speech doctrine. The Court should take seriously labor unions' positive effects on deliberative democracy and afford them the same level of First Amendment protection that it has provided to the civil rights movement.

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311. One reason that comprehensive campaigns do not pose the same threat as the conduct in *Giboney* is that, in *Giboney*, the union could enforce its call for a secondary boycott by subjecting union truck drivers to "fine or suspension" for crossing the picket line to deliver the company's product. *Id.* at 493. By contrast, comprehensive campaigns appeal to the public at large, over which unions have little influence beyond their powers of persuasion.

312. A further desirable aspect of a labor law regime in which NLRB proceedings, but not civil lawsuits, are available to employers being targeted by union comprehensive campaigns is that, absent the additional incentive of forcing unions to incur significant attorneys' fees and the settlement value of a civil suit, employers will be less likely to attempt to interfere with union speech that poses little threat to the employers' interests.