RE-ASSEMBLING LABOR

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Organized labor's judicial, political, and public image is often associated with violence and anarchy. This image has reinforced significant legal constraints on public protests, boycotts, and picketing orchestrated by labor organizations. Although violent uprisings that challenged the political and economic order were common in the early days of American labor unionism, the assumptions underlying past judicial rhetoric and labor law doctrine have largely outlived their original context. Historical antecedents applied to modern protests characterized by civil disobedience and nontraditional methods of group mobilization like Fast Food Forward, OUR Walmart, and the Occupy Movement yield troubling and inconsistent results.

Although these tensions have not gone unnoticed, scholarly commentary to date has overlooked the important connection between the collective, group-based nature of labor activism and the First Amendment's right of assembly, and how the history of assembly can inform contemporary protections for labor unionism. We seek to draw the lessons of assembly squarely into contemporary labor law—to re-assemble labor law around the theory and doctrine of assembly that formed its early core. We begin in Parts II and III by situating the historical relationship between labor and assembly. Part IV develops three theoretical insights reinforced by the connections between assembly and labor, and obscured by the contemporary focus on the rights of speech and expressive association. First, collective activity represents more than simply an aggregation of individual voices. Second, groups are not one-dimensional but have many func-

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tions, purposes, and messages, which are developed and negotiated through collective expression and existence. Third, expression depends on the context in which it unfolds, and current doctrine too easily obscures that context, with significant ramifications for both public perception and group efficacy. Part V applies these theoretical insights, suggesting how the gains of assembly might facilitate a richer understanding of labor unionism, labor law, and their connections to the rest of First Amendment jurisprudence.

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I. INTRODUCTION

Labor protests once confronted almost insurmountable caricatures. In the words of one federal judge, "[t]here . . . can be no such thing as peaceful picketing[] any more than there can be chaste vulgarity, or

peaceful mobbing, or lawful lynching."[1] Contemporary rhetoric has softened, but the images of the past still haunt modern forms of labor activism.[2] In 2004, for example, Secretary of Education Roderick Paige characterized the National Education Association as a "terrorist organization" and accused the union of "obstructionist scare tactics."[3]

Today, employers and management organizations not only block physical and virtual groups of workers that disrupt business, but also resist efforts that stir up and support such mobilization. This resistance is particularly fierce when employers sense union involvement. Consider the following examples:

> 1. Beginning in the fall of 2012 with a one-day strike in New York City and escalating into more than one hundred and fifty cities across the United States and internationally, thousands of workers have walked off their jobs and gathered on public streets and sidewalks outside fast-food restaurants to conduct protests for higher wages in a movement they call "Fast Food Forward."[4] Supported

1. Atchison, T. & S. F. Ry. Co. v. Gee, 139 Fed. 582, 584 (S.D. Iowa 1905).

2. By "modern forms of labor activism," we mean to include the broad range of worker collectives, whether or not the organization initiating action qualifies as a "labor organization" for coverage purposes under the National Labor Relations Act or the Labor Management Reporting and Disclosure Act. *Cf.* Michael C. Duff, *ALT-Labor, Secondary Boycotts, and Toward a Labor Organization Bargain*, 63 CATH. U. L. REV. 837, 843–50 (2014) (describing coalitions between union and non-union worker advocacy groups and potential for liability under secondary boycott law); Eli Naduris-Weissman, *The Worker Center Movement and Traditional Labor Law: A Contextual Analysis*, 30 BERKELEY J. EMP. & LAB. L. 232, 277–91 (2009) (describing potential violations of the labor laws if nonprofit worker advocacy groups are categorized as "labor organizations" at law); David Rosenfeld, *Worker Centers: Emerging Labor Organizations—Until They Confront the National Labor Relations Act*, 27 BERKELEY J. EMP. & LAB. L. 469, 493–503 (2006) (describing potential violations of labor laws if non-profit groups were categorized as "labor organizations").

3. Amy Goldstein, *Paige Calls NEA a "Terrorist" Group*, WASH. POST, Feb. 24, 2004, at A19; Robert Tanner, *Education Secretary Attacks Teachers Union; Union Leader, Top Dems Denounce 'Terrorist' Remark*, HERALD-SUN (Durham, N.C.), Feb. 24, 2004, at A3. Secretary Paige's comments came in response to the NEA's threat to sue the Bush Administration for failing to fund the requirements of the "No Child Left Behind" law. *Id.*

4. The movement originated under the moniker "Fast Food Forward," but now includes a number of other partners, such as "Fight for 15." *See* William Finnegan, *Dignity: Fast-food Workers and a New Form of Labor Activism*, NEW YORKER (Sept. 15, 2014), http://www.newyorker.com/magazine/2014/09/15/dignity-4. The protesters' original goals included raising the federal and state minimum wage and indexing it to the cost of living in the future and the right to organize a union; some also protested "wage theft" through the use of payroll debit cards in lieu of paychecks (the debit cards sometimes require workers to pay a fee in order to access their wages). *See* Steven Greenhouse, *A Day's Strike Seeks to Raise Fast-Food Pay*, N.Y. TIMES (July 31, 2013), http://www.nytimes.com/2013/08/01/business/strike-for-day-seeks-to-raise-fast-food-pay.html. Support from the Service Employees' International Union ("SEIU") and early success in Seattle (where the mayor raised the minimum wage to $15 per hour) focused the protests on a $15-per-hour wage and a right to unionize without employer retaliation. Finnegan, *supra* note 4. The protesters also seek to highlight the inequities of the economic structure in the fast food industry, where the differential between C.E.O. and worker pay vastly outstrips that which exists in all other domestic industry sectors. *Id.*; Ben Penn, *Pay Disparity in Fast Food Industry Drives Overall Income Inequality, Study Says*, DAILY LAB. REP. (BNA) No. 79, Apr. 24, 2014; *see also* SYLVIA ALLEGRETTO ET AL., FAST FOOD, POVERTY WAGES: THE PUBLIC COST OF LOW-WAGE JOBS IN THE FAST-FOOD INDUSTRY 1 (2013), *available at* http://laborcenter.

and guided by the Service Employees International Union ("SEIU"),[5] the fast food worker movement's tactics have included spontaneous walkouts and nonviolent mass civil disobedience such as closing freeways, blocking bridges, and obstructing entry to buildings.[6] They have also included group wage and hour litigation brought by lawyers affiliated with the campaign, and safety and health complaints filed with the Occupational Safety and Health Administration.[7] Conservative politicians and the U.S. Chamber of Commerce have responded to the protests by attacking the underlying process of group formation and mobilization, as well as seeking to constrain the protests themselves.[8] Among other strategies, they have pressured the Department of Labor to classify the fast food protest organizers as "labor organizations" in an effort to subject them to financial reporting requirements and limitations imposed on expressive activity by the labor laws.[9] Employers have also retaliated by firing striking workers for absenteeism.[10]

berkeley.edu/pdf/2013/fast_food_poverty_wages.pdf (documenting disproportionate reliance of fast food workers on public assistance).

5. The SEIU spent $2 million to organize New York City fast food workers before the first public protest, and reportedly has invested over $15 million nationwide. Finnegan, *supra* note 4; Steven Greenhouse, *Movement to Increase McDonald's Minimum Wage Broadens Its Tactics*, N.Y. TIMES, Mar. 30, 2015, http://www.nytimes.com/2015/03/31/business/movement-to-increase-mcdonalds-minimum-wage-broadens-its-tactics.html?_r=0. It has also sent staff out to train local community organizers and to organize the walk-outs. Ben Penn, *Fast Food, Retail Strikes Erupt in 60 Cities; Thousands Seek $15 an Hour, Union Rights*, DAILY LAB. REP. (BNA) No. 168, Aug. 29, 2013, at A-13.

6. Finnegan, *supra* note 4; *see also* Ben Penn, *Fast Food Workers Approve Resolution to Heighten Campaign via Strikes, Protests*, DAILY LAB. REP. (BNA) No. 144, July 28, 2014, at A-6 (describing fast food workers' decision to engage in non-violent direct action including civil disobedience).

7. Suits under the wage and hour laws challenge McDonald's franchise policies that require workers to work "off-the-clock." Ben Penn, *To Unions, McDonald's Joint Employer Status No Slam Dunk, as Fast Food Push Intensifies*, DAILY LAB. REP. (BNA) No. 177, Sept. 12, 2014, at C-1. Safety and health complaints describe exposure to hazards ranging from burns caused by cooking oil and grills, to slippery floors, to pressure to work more quickly than is safe due to understaffing, and a lack of safety training. Stephen Lee, *McDonald's Workers File OSHA Complaints, Citing Burns, Lack of Protective Equipment*, DAILY LAB. REP. (BNA) No. 50, Mar. 16, 2015, at A-8.

8. *See, e.g.*, Scott Flaherty, LAW360 (Dec. 3, 2014, 6:19 PM), http://www.law360.com/articles/600737/us-chamber-blasts-planned-fast-food-worker-protests; Sean Hackbarth, *Who's Behind the Fast Food Protests?*, U.S. CHAMBER COM. (Sept. 4, 2014, 4:30 PM), https://www.uschamber.com/blog/whos-behind-fast-food-protests.

9. Lawrence E. Dubé, *House Panel Looks at Future of Organizing and Legal Status of Worker Groups, Centers*, DAILY LAB. REP. (BNA) No. 182, Sept. 19, 2013, at A-7; *see* Ben Penn, *U.S. Chamber Report Casts Worker Centers as Means for Unions to Circumvent NLRA*, DAILY LAB. REP. (BNA) No. 38, Feb. 26, 2014, at A-12 (describing prominent role of the nonprofit New York Communities for Change in Fast Food Forward, and noting financial backing it received from the SEIU and the United Federation of Teachers).

10. The NLRB has filed charges in a number of these cases, where workers and the SEIU urge the Board to treat McDonald's corporate headquarters as a joint employer, jointly liable for legal violations at the restaurants run by its franchisees. Steven Greenhouse, *Fast-Food Workers Intensify Fight for $15 an Hour*, N.Y. TIMES (July 27, 2014), http://www.nytimes.com/2014/07/28/business/a-big-union-intensifies-fast-food-wage-fight.html.

2. In 2012, Wal-Mart employees organized as a group called "OUR Wal-Mart" (the Organization United for Respect at Wal-Mart) and launched a series of one-day pickets protesting low wages.[11] Because the workers' group was supported by the United Food and Commercial Workers Union, the National Labor Relations Board indicated its intent to file blackmail picketing charges under the labor laws.[12] Subsequent protests in 2013 by Wal-Mart workers, labor union supporters, faith-based groups, and community organizations in fifteen cities led to the arrests of one hundred workers who participated in demonstrations, rallies, marches, and civil disobedience.[13] Wal-Mart sought and obtained preliminary injunctions barring picketing or other demonstrations not only from blocking store entrances and disrupting operations, but also from annoying and harassing customers, and requiring organizations to post a $10,000 bond to cover payment of damages that might be caused if the injunction was violated.[14] It also disciplined and fired more than sixty employees in thirty-four stores who were involved in the ensuing demonstrations, strikes, and protests.[15]

3. Since the 1980s, and with increasing frequency over the past two decades, employers have argued that comprehensive union organizing campaigns are racketeering activity.[16] Employers have sued un-

11. Susan Berfield, *Walmart v. Union-Backed OUR Walmart*, BLOOMBERG BUS. (Dec. 13, 2012), http://www.bloomberg.com/bw/articles/2012-12-13/walmart-vs-dot-union-backed-our-walmart.

12. *See* Steven Greenhouse, *Labor Union to Ease Walmart Picketing*, N.Y. TIMES (Jan. 31, 2013), http://www.nytimes.com/2013/02/01/business/labor-union-agrees-to-stop-picketing-walmart.html. The NLRB sought to bring charges under Section 8(b)(7) of the NLRA. The union initially forestalled the charges by denying any intent to organize Wal-Mart and agreeing to forego picketing at Walmart for a period of 60 days. *Id.* Subsequently, however, the NLRB issued a complaint under NLRA Section 8(b)(1)(A) against the United Food and Commercial Workers ("UFCW") in one region in Michigan where the demonstrators' actions were allegedly "severe and egregious," involving coercive interrogations of Wal-Mart employees that interfered with their ability to perform work duties and impeded the entrance and exit to one department in the store. *See* United Food & Commercial Workers Int'l Union (Wal-Mart Stores, Inc.), NLRB Reg'l Dir., No. 16-CB-105773, complaint issued Mar. 31, 2014.

13. Rhonda Smith, *Wal-Mart Protests Lead to 100 Arrests; Organizers Announce 'Black Friday' Plans*, DAILY LAB. REP. (BNA) No. 173, Sept. 6, 2013, at A-11.

14. *See, e.g.*, Order for Preliminary Injunction at 1–4, Wal-Mart Stores, Inc. v. United Food & Commercial Workers Int'l Union, No. C-13-181974 (Md. Cir. Ct., Nov. 26, 2013); *see also, e.g.*, Stipulated Judgment at 1–2, Wal-Mart Stores, Inc. v. United Food & Commercial Workers Int'l Union, No. BC508587 (Cal. Aug. 28, 2014) (permanently enjoining the UCFW under the terms of the trial court's preliminary injunction issued on November 13, 2013).

15. Jad Mouawad, *Walmart is Facing Claims That It Fired Protesters*, N.Y. TIMES (Jan. 15, 2014), http://www.nytimes.com/2014/01/16/business/walmart-is-facing-claims-that-it-fired-protesters.html; *see also* Michele Amber, *NLRB Issues Complaint Against Wal-Mart Alleging Rights of Some 60 Workers Violated*, DAILY LAB. REP. (BNA) No. 10, Jan. 15, 2014, at A-10. The NLRB filed charges against Wal-Mart under NLRA Section 8(a)(1) for violating workers' Section 7 rights. Wal-Mart Stores, Inc. v. The Org. United for Respect at Walmart, NLRB GC, No. 16-CA-096240, complaint issued Jan. 14, 2014.

16. James J. Brudney, *Collateral Conflict: Employer Claims of RICO Extortion Against Union Comprehensive Campaigns*, 83 S. CAL. L. REV. 731, 754–56 (2010); Charlotte Garden, *Labor Values*

ions under the Racketeer Influenced and Corrupt Organizations Act ("RICO"),[17] arguing that unions manipulate workers and other social movement groups involved with the organizing campaigns.[18] In one notable case, a federal district court rejected the union's First Amendment defense, noting that "the First Amendment simply does not protect extortion."[19]

These examples also illustrate how labor's judicial, political, and public image remain linked to notions of violence and anarchy. These descriptions are not spun out of whole cloth; violent worker uprisings were common in the early days of American labor unionism.[20] Additionally, some worker solidarity and class-wide uprisings threaten the economic order in ways that unsettle some judges and politicians.[21]

But the assumptions underlying early judicial rhetoric and labor law doctrine have largely outlived their original context. Historical antecedents applied to modern forms of labor unionism yield troubling and inconsistent results. Monolithic understandings of "the union" obscure the diverse forms of contemporary worker collective action, which sometimes extend to broad coalitions of social justice and faith groups. Particular cases often hinge on whether a labor union is involved in the protests. This posture, due in part to coverage of "labor organizations" by

Are First Amendment Values: Why Union Comprehensive Campaigns Are Protected Speech, 79 FORDHAM L. REV. 2617, 2623–32 (2011) [hereinafter Garden, *Labor Values*].

17. 18 U.S.C. §§ 1961–1968 (2006).

18. *See* Josh Eidelson, *That's RICO*, AM. PROSPECT (Sept. 30, 2011), http://prospect.org/article/thats-rico.

19. Smithfield Foods, Inc. v. United Food & Commercial Workers Int'l Union, 585 F. Supp. 2d 789, 805 (2008); *see* Garden, *Labor Values*, *supra* note 16, at 2626–31 (discussing *Smithfield*); *see also* Benjamin Levin, *Blue-Collar Crime: Conspiracy, Organized Labor, and the Anti-Union Civil RICO Claim*, 75 ALB. L. REV. 559, 562–63 (2012) (comparing cases depicting unions as dangerous conspiracies using collective action to damage the public interest and modern cases permitting civil RICO claims against unions).

20. *See* Paul Moreno, *Organized Labor and American Law: From Freedom of Association to Compulsory Unionism*, 25 SOC. PHIL. & POL'Y 22, 24 (2008) (asserting that every labor protest of the era involved violence). Although the extent of actual violence is not well-documented, it is certainly true that worker protests evoked passionate responses. *See* Dianne Avery, *Images of Violence in Labor Jurisprudence: The Regulation of Picketing and Boycotts, 1894–1921*, 37 BUFF. L. REV. 1, 3–5 (1989) (describing how judges came to equate union pickets and strikes with violence, and critiquing the law's hostile response to collective action by workers); William E. Forbath, *The Shaping of the American Labor Movement*, 102 HARV. L. REV. 1109, 1115–16 (1989) (discussing the courts' harshly repressive approach to the "semioutlawry" of collective action by labor unions). *But cf.* Moreno, *supra* note 20, at 24 (arguing that "American law has never denied organized labor's freedom of association" and that law has served as an essential force in conferring power on unions).

21. *See* Goldstein *supra* note 3; *infra* notes 157–159 (discussing *Loewe v. Lawlor*); *infra* notes 165–68 (discussing *Duplex Printing Press*); *see also* James B. Atleson, *Threats to Health and Safety: Employee Self-Help Under the NLRA*, 59 MINN. L. REV. 647, 700–01 (1975) (noting the Court's emphasis on the chaos and anarchy that would result if employees could deploy self-help tactics (such as choosing when to work) in the face of unsafe working conditions in Gateway Coal Co. v. United Mine Workers, 414 U.S. 368 (1974)); Joel Rogers, *Divide and Conquer: Further Reflections on the Distinctive Character of American Labor Laws*, 1990 WIS. L. REV. 1 (exploring labor law's resistance to class-wide organizing and pressure strategies).

the National Labor Relations Act of 1935 ("NLRA") but also reflecting organized labor's historical reputation, constrains worker protests and weakens First Amendment doctrine.

These consequences have not gone entirely unnoticed. A number of labor scholars have criticized the tension between free speech doctrine and labor law.[22] Meanwhile, free speech scholars have recognized but largely ignored the tensions raised in the Court's treatment of labor expression.[23] But these *speech*-focused inquiries are only part of the story. Their focus on outward expression overlooks the critical importance of the group's formation and mobilization process and the role that this process plays in constructing the long-term identity of the movement.[24] In particular, scholarly commentary has until recently largely overlooked the important connection between the collective, group-based nature of labor activism and the First Amendment's *assembly*-based protections, which cover group formation as well as group expression.[25]

Recent work in both labor law and First Amendment scholarship has now opened the door to the more robust inquiry we undertake here regarding private sector unions.[26] A vigorous body of First Amendment

22. *See, e.g.*, Marion Crain, *Between Feminism and Unionism: Working Class Women, Sex Equality, and Labor Speech*, 82 GEO. L.J. 1903, 1903 (1994) [hereinafter Crain, *Between Feminism and Unionism*]; Charlotte Garden, *Citizens, United, and* Citizens United*: The Future of Labor Speech Rights?*, 53 WM. & MARY L. REV. 1, 17 (2011) [hereinafter: Garden, *Citizens, United*]; Julius G. Getman, *Labor Law and Free Speech: The Curious Policy of Limited Expression*, 43 MD. L. REV. 4, 7 (1984); Garden, *Labor Values*, *supra* note 16, at 2617; 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) [hereinafter Pope, *Three-Systems Ladder*]; Note, *Labor Picketing and Commercial Speech: Free Enterprise Values in the Doctrine of Free Speech*, 91 YALE L.J. 938, 938 (1982).

23. *See, e.g.*, Harry Kalven, Jr., *The Concept of the Public Forum:* Cox v. Louisiana, 1965 SUP. CT. REV. 1, 3 n.15 (1965) ("I am, perhaps somewhat cavalierly, putting the complex story of the labor picketing cases to one side."). More recently, Paul Horwitz's impressive study of First Amendment institutions neglects labor unions. *See generally* PAUL HORWITZ, FIRST AMENDMENT INSTITUTIONS (2013).

24. For a thoughtful analysis of how the new mobilization strategies that characterize Fast Food Forward and OUR Walmart may shape the labor movement by unlocking worker militancy, see Michael M. Oswalt, *Improvisational Unionism*, 104 CALIF. L. REV. (forthcoming 2016).

25. Jim Pope's work is the exception, though his foray into the relationship between labor and assembly has to date been limited. *See, e.g.*, James Gray Pope, *Republican Moments: The Role of Direct Popular Power in the American Constitutional Order*, 139 U. PA. L. REV. 287, 330–44 (1990) (discussing origins of the assembly clause in the labor context).

26. The focus of this Article does not permit a lengthy discussion of public sector union rights or reverse First Amendment rights—that is, the right not to speak, the right not to associate or the right not to assemble. *See generally* Joseph Blocher, *Rights To and Not To*, 100 CAL. L. REV. 761 (2012) (discussing conceptions of First Amendment rights and reverse First Amendment rights (*e.g.*, the right not to associate)). Over the past several years the Court has decided multiple cases addressing the rights of dissenters when an association speaks in the political arena, most notably *Citizens United v. Federal Election Commission*, 558 U.S. 310, 361–62 (2010) (rejecting the argument that a corporation's political expenditures could be limited to protect the First Amendment rights of dissenting shareholders), *Harris v. Quinn*, 134 S. Ct. 2618, 2639–40 (2014) (striking down Illinois' fair share law as applied to home care workers who were required to subsidize speech on matters of public concern with which they disagreed), and *Knox v. Service Employees International Union, Local 1000*, 132 S. Ct. 2277, 2293 (2012) (requiring unions to allow workers to opt-in rather than to opt-out of paying fees that were

scholarship has drawn renewed attention to the right of assembly in our constitutional tradition.[27] And labor scholars have increasingly focused on renewal strategies for labor unionism, including proposals focused on the judicially recognized right of association.[28] This Article is the first to build upon these recent efforts to draw the lessons of assembly squarely into contemporary labor law—to re-assemble labor law around the theory and doctrine of assembly that formed its early core.[29]

Parts II and III situate the historical relationship between labor and assembly. If the connections between the First Amendment's right of assembly and labor law's protection of collective activity seem almost intuitive, it is because their doctrinal underpinnings used to inform each other.

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used to fund political campaigns). *See also* Boy Scouts of America v. Dale, 530 U.S. 640 (2000) (upholding expressive association right of the Boy Scouts to exclude a gay scoutmaster from the organization). Consistent with our argument in Part II, the Court has focused in these cases on speech and association rights rather than on assembly rights. *See Citizens United*, 558 U.S. at 361–62; *see also Knox*, 132 S. Ct. at 2290. *See generally* Catherine L. Fisk & Erwin Chemerinsky, *Political Speech and Association Rights After* Knox v. SEIU, Local 1000, 98 CORNELL L. REV. 1023 (2013) (contrasting *Knox* and *SEIU* and criticizing the Court's inconsistent treatment of corporations and labor unions in the context of speech rights).

27. *See generally* JOHN D. INAZU, LIBERTY'S REFUGE: THE FORGOTTEN FREEDOM OF ASSEMBLY (2012) [hereinafter INAZU, LIBERTY'S REFUGE]; John D. Inazu, *Factions for the Rest of Us*, 89 WASH. U. L. REV. 1435, 1436 (2012) [hereinafter Inazu, *Factions*]; John D. Inazu, *The Forgotten Freedom of Assembly*, 84 TUL. L. REV. 565 (2010) [hereinafter Inazu, *Forgotten Freedom of Assembly*]; John D. Inazu, *Virtual Assembly*, 98 CORNELL L. REV. 1093 (2013) [hereinafter Inazu, *Virtual Assembly*]; Tabatha Abu El-Haj, *Changing the People: Legal Regulation and American Democracy*, 86 N.Y.U. L. REV. 1 (2011); Tabatha Abu El-Haj, *The Neglected Right of Assembly*, 56 UCLA L. REV. 543 (2009); Susan Frelich Appleton, *Liberty's Forgotten Refugees? Engendering Assembly*, 89 WASH. U. L. REV. 1423 (2012); Ashutosh A. Bhagwat, *Assembly Resurrected*, 91 TEX. L. REV. 351 (2012); Ashutosh Bhagwat, *Associational Speech*, 120 YALE L.J. 978 (2011) [hereinafter Bhagwat, *Associational Speech*]; Ashutosh Bhagwat, *Liberty's Refuge, or the Refuge of Scoundrels?: The Limits of the Right of Assembly*, 89 WASH. U. L. REV. 1381 (2012); Baylen J. Linnekin, *"Tavern Talk" and the Origins of the Assembly Clause: Tracing the First Amendment's Assembly Clause Back to Its Roots in Colonial Taverns*, 39 HASTINGS CONST. L.Q. 593 (2012); Gregory P. Magarian, *Entering Liberty's Refuge (Some Assembly Required)*, 89 WASH. U. L. REV. 1375 (2012); Robert K. Vischer, *How Necessary is the Right of Assembly?*, 89 WASH. U. L. REV. 1403 (2012); Timothy Zick, *Recovering the Assembly Clause*, 91 TEX. L. REV. 375 (2012). *See also* Richard A. Epstein, *Forgotten No More. A Review of Liberty's Refuge: The Forgotten Freedom of Assembly*, ENGAGE, March 2012, at 138, *available at* http://www.fed-soc.org/publications/detail/forgotten-no-more-a-review-of-libertys-refuge-the-forgotten-freedom-of-assembly; Michael McConnell, *Freedom by Association*, FIRST THINGS, August 2012, at 39, 41, *available at* http://www.firstthings.com/article/2012/08/freedom-by-association.

28. *See* Clyde W. Summers, *The Privatization of Personal Freedoms and Enrichment of Democracy: Some Lessons From Labor Law*, 1986 U. ILL. L. REV. 689, 697; *see also* Janice R. Bellace, *The Future of Employee Representation in America: Enabling Freedom of Association in the Workplace in Changing Times Through Statutory Reform*, 5 U. PA. J. LAB. & EMP. L. 1, 28–30 (2002); Ruben J. Garcia, *Labor's Fragile Freedom of Association Post-9/11*, 8 U. PA. J. LAB. & EMP. L. 283, 288–90 (2006); James Gray Pope et al., *The Employee Free Choice Act and A Long-Term Strategy for Winning Workers' Rights*, 11 WORKINGUSA: THE J. LAB & SOCIETY 125, 135 (2008) [hereinafter Pope et al., *Employee Free Choice Act*].

29. One of us has previously mapped tentative connections and gestured toward the possibilities that renewed assembly rights might hold for labor law, however. *See* Marion Crain & Ken Matheny, *Beyond Unions, Notwithstanding Labor Law*, 4 U.C. IRVINE L. REV. 561, 564–65 (2014) [hereinafter Crain & Matheny, *Beyond Unions*] (mapping tentative connections and gesturing toward the possibilities of renewed assembly rights for labor law).

Part IV develops three theoretical insights reinforced by the connections between assembly and labor and obscured by the contemporary focus on the rights of speech and association. First, collective activity represents more than simply an aggregation of individual voices; it builds and cements communal bonds, which in turn make mobilization for social change more likely. Second, groups are not one-dimensional but have many functions, purposes, and messages. Their gatherings represent a kind of lived politics, with varied and divergent manifestations. To force all groups into outcome-determinative legal categories (like the "expressive" and "intimate" categories that drive the current doctrine under the right of association) misses their diverse and textured nature. Third, expression depends on the context in which it unfolds, and current doctrine too easily obscures that context. A group protest that occurs in front of a particular business rather than blocks or miles away not only communicates to a different audience but also signals different meanings and expressions.

These three insights—collective activity, multivalent meaning, and the importance of context—also shed light more generally on the importance of protecting groups that push against prevailing norms. When law hobbles group activity, it inevitably weakens the bonds between a group's members. That not only weakens the efficacy of group action; it also hinders the ability of the group to shape and convey its message.

Part V suggests ways in which the theoretical insights of Part IV could enrich contemporary constitutional protections for labor law and improve upon the statutory bargain struck under the NLRA. We demonstrate how the gains of assembly might facilitate a richer understanding of labor unionism, labor law, and their connections to the rest of First Amendment jurisprudence.

II. THE RIGHT OF ASSEMBLY

A. Early Understandings of Assembly

The First Amendment protects the right of the people "peaceably to assemble."[30] Contrary to the assumptions of generations of modern scholars, the stand-alone right is not wedded to the separate petition right.[31] In fact, assembly has long protected the private groups of civil so-

30. U.S. CONST. amend I.

31. *See generally* INAZU, LIBERTY'S REFUGE, *supra* note 27, at 21–25 (tracing textual history and noting scholarly consensus). The Supreme Court has on one occasion suggested otherwise. *See* Presser v. Illinois, 116 U.S. 252, 267 (1886) (indicating that the First Amendment protects the right of assembly only if "the purpose of the assembly was to petition the government for a redress of grievances"); *see also* INAZU, LIBERTY'S REFUGE, *supra* note 27, at 39–40 (critiquing *Presser*'s interpretation and criticizing scholarly treatment). Scholars have repeated *Presser*'s erroneous interpretation for decades, but the Court has never reinforced it. *See* Thomas v. Collins, 323 U.S. 516, 530 (1945) (referring to "the *rights* of the people peaceably to assemble and to petition for redress of grievances" (emphasis add-

ciety. These broad contours of the assembly right were present from its constitutional inception: debates in the House of Representatives anchored its origins in the arrest and trial of William Penn for an act of religious worship that had nothing to do with petition.[32] Nor did the assembly right languish in obscurity in the early years of the Republic. At the end of the eighteenth century, the Democratic-Republican Societies emerging out of the increasingly partisan divide between Federalists and Republicans repeatedly invoked the right of assembly.[33] During the antebellum era, policymakers in southern states recognized the significance of free assembly to public opinion and routinely prohibited its exercise among slaves and free blacks.[34] Meanwhile, female abolitionists and suffragists in the North organized their efforts around a particular form of assembly: the convention.[35] As Akhil Amar has observed, the nineteenth-century movements of the disenfranchised brought "a different lived experience" to the words of the First Amendment's assembly clause.[36]

The right of assembly gained particular prominence in tributes to the Bill of Rights across the nation as America entered the Second World War. During the 1939 World's Fair, it anchored speeches and opinion pieces across the country.[37] Eminent twentieth-century Americans, including Dorothy Thompson, Zechariah Chafee, Louis Brandeis, John Dewey, Orson Welles, and Eleanor Roosevelt, all emphasized the significance of the assembly right.[38] At a time when civil liberties were at the forefront of public consciousness, assembly figured prominently as one of the original "Four Freedoms" (along with speech, press, and religion).[39]

The role of assembly throughout our nation's history suggests that it encompasses not only group expression in temporal gatherings but also the groups that precede that expression and make it possible. This is one of the key insights of the right of assembly that the contemporary focus on speech and association obscures: in order to protect the core expression that emerges from groups and effects political change, we must first

ed)); McDonald v. Chicago, 561 U.S. 742, 759 (2010) (referring to "the general 'right of the people peaceably to assemble for lawful purposes'" (quoting United States v. Cruikshank, 92 U.S. 542, 551 (1875))). *But see* Chisom v. Roemer, 501 U.S. 380, 409 (1991) (Scalia, J., dissenting) (noting that the First Amendment "has not generally been thought to protect the right peaceably to assemble only when the purpose of the assembly is to petition the Government for a redress of grievances").

32. INAZU, LIBERTY'S REFUGE, *supra* note 27, at 24–25.

33. *Id.* at 26–29.

34. *Id.* at 29–44.

35. *Id.* at 44–45.

36. AKHIL R. AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION 246 (1998).

37. INAZU, LIBERTY'S REFUGE, *supra* note 27, at 55–57.

38. *Id.* at 49–58.

39. *See* John D. Inazu, *The Four Freedoms and the Future of Religious Liberty*, 92 N.C. L. REV. 787, 788 (2014).

protect the background relationships and informal activities that provide the space and structure for that expression to form—in fits and starts, and over time.

At least one prominent scholar has expressed doubt that the textual formulation (the infinitive "to assemble") encompasses more than the momentary gathering of a physical assembly.[40] But the verb "assemble" presupposes a noun—an assembly. And while some assemblies occur spontaneously, most do not. As Michael McConnell recently asserted:

> [F]reedom of assembly was understood to protect not only the assembly itself but also the right to organize assemblies through more or less continual associations and for those associations to select their own members by their own criteria. The Sons of Liberty's public meetings were not purely spontaneous gatherings; they were planned, plotted, and led by men who shared a certain vision and met over a period of time, often secretly, to organize them. In this respect, the freedom of assembly is preparatory to the freedom of speech.[41]

Most assemblies flow out of groups of people who gather to eat and talk and share long before they make political speeches or enact agendas.[42] Indeed, the vision of assembly as extending to "pre-political" groups that inform rather than simply manifest expression underpins the social bonds that strengthened civil rights, women's suffrage, and gay rights.[43]

In 1937, the Supreme Court chose a labor-related case to incorporate the right of assembly against the states. *De Jonge v. Oregon* involved

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40. Epstein, *supra* note 27, at 138–39 ("[F]or a close textualist, Inazu's most significant maneuver is to transform the constitutional text, which refers to the right of the people to peaceably assemble, into the freedom of assembly, a phrase that, unlike freedom of speech, nowhere appears in the Constitution at all. I believe that this subtle transformation undercuts Inazu's determined effort to make the Assembly Clause the focal point of an expanded right of freedom of association. The two do not map well into each other.").

41. McConnell, *supra* note 27, at 41.

42. *Cf.* INAZU, LIBERTY'S REFUGE, *supra* note 27, at 5 ("[A]lmost every important social movement in our nation's history began not as an organized political party but as an informal group that formed as much around ordinary social activity as extraordinary political activity."); Bhagwat, *Associational Speech*, *supra* note 27, at 998 ("An association is a coming together of individuals for a common cause or based on common values or goals. Associations do not form spontaneously. Individuals seeking to form an association must be able to communicate their views and values to each other, to identify their commonality. They must also be able to recruit strangers to join with them, on the basis of common values.").

43. *See, e.g.*, JOHN HOPE FRANKLIN & ALFRED A. MOSS JR., FROM SLAVERY TO FREEDOM: A HISTORY OF AFRICAN AMERICANS 377 (7th ed. 1994) (describing "moments of informality" spread across clubs, literary parties, and other events that created "a cohesive force" among the leaders of the Harlem Renaissance); LINDA J. LUMSDEN, RAMPANT WOMEN: SUFFRAGISTS AND THE RIGHT OF ASSEMBLY 3 (1997) (detailing suffragist gatherings organized around banner meetings, balls, swimming races, potato sack races, baby shows, meals, pageants, and teatimes); Brief of Gays & Lesbians for Individual Liberty as Amicus Curiae in Support of Petitioner at 11, Christian Legal Soc'y v. Martinez, 561 U.S. 661 (2010) (No. 08-1371), 2010 WL 530513, at *11 (describing "gay social and activity clubs, retreats, vacations, and professional organizations" that fostered "exclusively gay environments in which to feel safe, to build relationships, and to develop political strategy.").

a meeting called by the Portland section of the Communist Party "to protest against illegal raids on workers' halls and homes and against the shooting of striking longshoremen by Portland police."[44] Writing for a unanimous Court, Chief Justice Hughes insisted that "the right of peaceable assembly is a right cognate to those of free speech and free press and is equally fundamental."[45] Hughes emphasized the need to: "preserve inviolate the constitutional rights of free speech, free press and free assembly in order to maintain the opportunity for free political discussion" so that "government may be responsive to the will of the people and that changes, if desired, may be obtained by peaceful means."[46] Indeed, "[t]herein lies the security of the Republic, the very foundation of constitutional government."[47]

B. The Public Forum

Two years after *De Jonge*, the Court grounded one of the cornerstones of modern First Amendment jurisprudence—the public forum—in a decision connecting labor and assembly.[48] The case arose in 1938, when the Congress of Industrial Organizations ("CIO") brought a federal suit to enjoin Jersey City Mayor Frank Hague from interfering with its First Amendment rights of assembly and speech.[49] The district court granted the injunction but relied solely on "the history and philosophy of free speech."[50] The court neglected an assembly analysis based on "the comparative paucity of material on free assembly," and concluded that "[i]nasmuch as free assembly is a special form of free speech, the philosophy of the latter applies."[51]

The exclusively speech-based rationale was short lived. When Hague appealed to the Third Circuit, the American Bar Association's Committee on the Bill of Rights submitted an amicus brief principally authored by Zechariah Chafee.[52] The core of the lengthy brief's argu-

44. 299 U.S. 353, 359 (1937).

45. *Id.* at 364.

46. *Id.* at 365. These words echoed Justice Brandeis's famous concurrence in *Whitney v. California*, 274 U.S. 357, 375–76 (1927) (Brandeis, J., concurring).

47. *Id.*

48. Hague v. Comm. for Indus. Org., 307 U.S 496 (1939). The ideas in this Section draw from John D. Inazu, *The First Amendment's Public Forum*, 55 WM. & MARY L. REV. (forthcoming 2015) [hereinafter Inazu, *First Amendment's Public Forum*].

49. Comm. for Indus. Org. v. Hague, 25 F. Supp. 127, 129 (1938).

50. *Id.* at 137–38.

51. *Id.* at 137–38. *See also* Kenneth M. Casebeer, *"Public . . . Since Time Immemorial": The Labor History of* Hague v. CIO, 66 RUTGERS L. REV. 147, 172 (2013) (suggesting that "[a]ssembly seems a right ancillary to speech" in the district court's opinion).

52. Brief of the Committee on the Bill of Rights, of the American Bar Association, as Friends of the Court, Hague v. Comm. for Indus. Org., 307 U.S. 496 (1939) (No. 651), 1939 WL 48753 [hereinafter ABA Brief].

ment was the right of assembly.[53] It stressed that "the integrity of the right 'peaceably to assemble' is an essential element of the democratic system" and emphasized that "public officials had the duty to make the right of free assembly prevail over the forces of disorder if by any reasonable effort or means they can possibly do so."[54]

The Supreme Court's *Hague* decision drew heavily from Chafee's brief.[55] Justice Roberts's plurality opinion referred to both speech and assembly, but included more focused commentary on the right of assembly.[56] Roberts, penning a still notable phrase of First Amendment jurisprudence, wrote: "[w]herever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions."[57] The *New York Times* lauded the decision, noting that "with the right of assembly reasserted, all 'four freedoms' of [the] Constitution are well established."[58]

C. Strengthening Assembly and Labor

The rhetorical high point of assembly and labor came four years later in *Thomas v. Collins*.[59] On September 21, 1943, R. J. Thomas, the president of the United Auto Workers, arrived in Houston to test the constitutionality of a new law known as the Manford Act.[60] The law was Texas's first attempt to regulate labor unions—it required that all union

53. The ABA brief's first argument was captioned "Freedom of assembly is an essential element of the American democratic system." *Id.* at *7.

54. *Id.* at *19. When Chafee published *Free Speech in the United States* two years later, his thirty-page discussion of the freedom of assembly largely reprised the brief. *See* ZECHARIAH CHAFEE, FREE SPEECH IN THE UNITED STATES 409–38 (1941). The American Bar Association later wrote that: "[h]ardly any action in the name of the . . . Association in many years, if ever, has attracted as wide and immediate attention and as general acclaim, as the preparation and filing of this brief." *Association's Committee Intervenes to Defend Right of Public Assembly*, 25 A.B.A. J. 7, 7 (1939).

55. *Compare Hague*, 307 U.S. at 514–16 (1939), *with* ABA Brief, *supra* note 52, at 37–40.

56. *Hague*, 307 U.S. at 514–16.

57. *Id.* at 515. *See* McConnell, *supra* note 27, at 41 (noting that the Court was wrong in its assertion: "In Britain, the people were not free to assemble in the streets and parks without official permission. Unauthorized groups of twelve or more could be charged and prosecuted . . . for unlawful assembly. Colonial governors tried to suppress the Sons of Liberty on similar legal bases. America's declaration of a freedom of assembly was a break from this history").

58. Dean Dinwoodey, *A Fundamental Liberty Upheld in Hague Case*, N.Y.TIMES, June 11, 1939, at E7 (capitalization of the quotation was edited for clarity); *see also* Lewis Wood, *Hague Ban on CIO Voided by the Supreme Court, 5-2, on Free Assemblage Right*, N.Y. TIMES, June 6, 1939, at 1. Within months of Hague, the Court underscored that "the streets are natural and proper places for the dissemination of information and opinion, and one is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place." Schneider v. State, 308 U.S. 147, 163 (1939). The Court has recognized the right of assembly as "fundamental." De Jonge v. Oregon, 299 U.S. 353, 364 (1937). "[I]t is, and always has been, one of the attributes of citizenship under a free government." United States v. Cruikshank, 92 U.S. 542, 551 (1876).

59. 323 U.S. 516 (1943).

60. *Id.* at 520–22; *see* TEX. REV. CIV. STAT. ANN. Art. 5154a.

organizers register with the secretary of state and imposed other substantive restrictions.[61] These provisions infuriated prominent newspaper columnist J. Frank Dobie, who argued:

> A man can stand up anywhere in Texas, or sit down either, and without interference invite people, either publicly or privately, to join the Republican party, the Holy Rollers, the Liars Club, the Association for Anointing Herbert Hoover as a Prophet, the Texas Folklore Society—almost any organization on earth but one—but it is against the law in Texas for a man unless he pays a license and signs papers to invite any person to join a labor union.[62]

After defying a Texas court's temporary restraining order forbidding him to solicit members without the proper license and registration, Thomas found himself jailed for contempt.[63] In a 5-4 decision, the Supreme Court overturned the contempt conviction.[64] Thomas had argued that the Manford Act contravened the NLRA.[65] Justice Wiley Rutledge instead grounded his opinion in the First Amendment's right of assembly, which guarded "not solely religious or political" causes but also "secular causes," great and small.[66] And he emphasized the expressive contours of the assembly right, noting that the rights of the speaker and the audience were "necessarily correlative" and closely linked to the effective functioning of the democratic process.[67]

In 1948, the Court addressed a union challenge to Section 313 of the Federal Corrupt Practices Act of 1925, which, as amended by the Labor Management Act of 1947, prohibited contributions or expenditures by corporations and labor organizations in connection with federal elections.[68] The union challenged the application of the statute to its endorsement of a congressional candidate in its weekly periodical, and alleged that the restriction violated its rights of speech and assembly.[69] In *United States v. Congress of Industrial Organizations*, the Court sided with the union without reaching the constitutional question.[70] Justice

61. *See Test for Texas Labor Law: Thomas of the Auto Union Will Argue His Case Before High State Court*, N.Y. TIMES, Oct. 10, 1943, at E6.

62. *Id.* The New York Times was more circumspect, editorializing that "the layman probably does not see the law as having any far-reaching effects on the rights of the laboring man or the rights of workers to join or to refrain from joining labor unions." *Id.*

63. *Collins*, 323 U.S. at 522–23.

64. *Id.* at 543. Justice Rutledge's opinion for the Court insisted that the "preferred place given in our scheme to the great, the indispensable democratic freedoms secured by the First Amendment" meant that "[o]nly the gravest abuses, endangering paramount interests, give occasion for permissible limitation." *Id.* at 530.

65. The National Labor Relations Act of 1935, 29 U.S.C. §§151–69 (1938) [hereinafter Wagner Act].

66. *Collins*, 323 U.S. at 531.

67. *Id.* at 534.

68. United States v. Cong. of Indus. Orgs., 335 U.S. 106, 107 (1948).

69. *Id.* at 108.

70. *Id.* at 121–22.

Rutledge, joined by three of his colleagues, would have gone further.[71] Rutledge wrote:

> The expression of bloc sentiment is and always has been an integral part of our democratic electoral and legislative processes. They could hardly go on without it. Moreover, to an extent not necessary now to attempt delimiting, that right is secured by the guaranty of freedom of assembly, a liberty essentially coordinate with the freedoms of speech, the press, and conscience. It is not by accident, it is by explicit design, as was said in *Thomas v. Collins*, that these freedoms are coupled together in the First Amendment's assurance. They involve the right to hear as well as to speak, and any restriction upon either attenuates both.[72]

Rutledge lambasted the statutory restrictions for trying "to force unions as such entirely out of political life and activity."[73]

Cases like *CIO*, *Hague*, *De Jonge*, and *Thomas* reveal significant connections between labor and assembly, and the role of group, message, and place in the formational and expressive goals of labor organizers. A generation later, Harry Kalven lamented that *Hague*'s framework was "not enshrined as the starting point for judicial analysis in cases of speech in public places."[74] Kalven hinted at "subtle but definite transformations" in subsequent decisions and worried about "[t]he Court's neat dichotomy of 'speech pure' and 'speech plus.'"[75]

The "dichotomy" that Kalven flagged protected expression that was reducible to verbal or written "speech pure" but disfavored "parades, pickets, and protests" that were deemed to be "speech plus."[76] It worked reasonably well when the Court confined its analysis to a free speech

71. *Id.* at 129 (Rutledge, J., concurring). Justice Rutledge's concurrence is cited by the majority in *Citizens United v. Federal Election Commission*, 558 U.S. 310, 344 (2010) (noting that Rutledge's concurrence "explained that any 'undue influence' generated by a speaker's 'large expenditures' was outweighed 'by the loss for democratic processes resulting from the restrictions upon free and full public discussion'").

72. *Cong. of Indus. Orgs.*, 335 U.S. at 143–44. Rutledge continued: "There is therefore an effect in restricting expenditures for the publicizing of political views not inherently present in restricting other types of expenditure, namely, that it necessarily deprives the electorate, the persons entitled to hear, as well as the author of the utterance, whether an individual or a group, of the advantage of free and full discussion and of the right of free assembly for that purpose." *Id.* at 144; *accord* INAZU, LIBERTY'S REFUGE, *supra* note 27, at 14 (construing the right of assembly as "a presumptive right of individuals to form and participate in peaceable, noncommercial groups"); *id.* at 2 ("[S]omething important is lost when we fail to grasp the connection between a group's formation, composition, and existence and its expression.").

73. *Cong. of Indus. Orgs.*, 335 U.S. at 150.

74. Kalven, *supra* note 23, at 14. Kalven also reaffirmed the assembly roots of Hague by highlighting the influence of Chafee's brief on the Court's decision. *Id.*

75. *Id.* at 14, 23.

76. *Id.* at 23.

framework. But the introduction of assembly necessarily collapses the distinction: every assembly is "speech plus."[77]

Kalven included in his article the memorable assertion that:

> [I]n an open democratic society the streets, the parks, and other public places are an important facility for public discussion and political process. They are in brief a public forum that the citizen can commandeer; the generosity and empathy with which such facilities are made available is an index of freedom.[78]

His commentary on the public forum laid the groundwork for a renewed doctrinal focus by the Supreme Court.[79] Importantly, Kalven clearly envisioned a minimalist approach to government regulation of the public forum, focusing on the need for "some commitment to order and etiquette."[80] As he concluded his article, "[a]mong the many hallmarks of an open society, surely one must be that not every group of people on the streets is 'a mob.'"[81] This kind of approach would have offered strong protections for assembly-based expression in the public forum.

D. Doctrinal Fracture

The broad protections envisioned by Kalven and highlighted in cases like *CIO*, *Hague*, *De Jonge*, and *Thomas* have been weakened by a conceptual shift away from assembly toward the rights of speech and association. The doctrinal implications of this shift have manifested in two distinct but related ways. First, the judicially recognized right of association, a late-breaking addition to our civil liberties, has neglected its assembly roots in favor of a speech-based "expressiveness." Second, the public forum doctrine has drifted toward a speech-based analysis that depends on "content-neutral" time, place, and manner restrictions without serious inquiry into the consequences of those restrictions. Both of these developments neglect the ways in which the nature, composition, and manifestation of a group are themselves important forms of expression, dissent, and democratic practice.

1. The Right of Association

The Supreme Court's first recognition of a constitutional right of association occurred just over fifty years ago in *NAACP v. Alabama ex rel.*

77. The implications of the distinction between "speech" and "speech plus" are particularly salient in the labor context with respect to pickets. *See infra* Part III.A.

78. Kalven, *supra* note 23, at 11–12.

79. *See* Robert C. Post, *Between Governance and Management: The History and Theory of the Public Forum*, 34 UCLA L. REV. 1713, 1718–19 (1987) (describing Kalven's influence on the doctrinal framework surrounding the public forum).

80. Kalven, *supra* note 23, at 23.

81. *Id.* at 32.

Patterson.[82] Justice Harlan's opinion for the Court drew upon a series of cases addressing both assembly and speech and acknowledged the "freedom to engage in association for the advancement of beliefs and ideas."[83] Contemporary commentary reflected confusion about the nature of the new right and its theoretical and constitutional anchor.[84]

The most significant reformulation of the right of association came in the Court's 1984 decision in *Roberts v. U.S. Jaycees*.[85] Justice William Brennan's majority opinion asserted that previous decisions had identified two separate constitutional sources for the right of association.[86] One line of decisions protected "intimate association," a "fundamental element of personal liberty."[87] Another set of decisions guarded "expressive association," which was "a right to associate for the purpose of engaging in those activities protected by the First Amendment—speech, assembly, petition for the redress of grievances, and the exercise of religion."[88]

The expressive criterion implies that some groups are "nonexpressive."[89] But it becomes very difficult, if not impossible, to police this line apart from expressive intent. Many groups that might seem to be "nonexpressive" could articulate an expressive intent.[90] The expressive association doctrine ignores these realities and eliminates constitutional pro-

82. 357 U.S. 449 (1958). The case arose after the State of Alabama sought to compel the NAACP to disclose its membership list. Alabama's Attorney General John Patterson initiated an action to enjoin the NAACP from operating within the state, arguing that the group was a "business" that had failed to register under applicable state law. *Id.* at 452. The state court trial judge issued the injunction ex parte, explaining that he intended "to deal the NAACP a mortal blow from which they shall never recover." LUCAS A. POWE, JR., THE WARREN COURT AND AMERICAN POLITICS 165 (2000) (internal quotation marks omitted). The judge also ordered the NAACP to produce its membership list, which Patterson had requested as part of a records review. When the NAACP refused to comply, the judge responded with a $10,000 contempt fine, which he increased to $100,000 five days later. After the Alabama Supreme Court rejected the NAACP's appeal of the judge's order through a series of disingenuous procedural rulings, the NAACP appealed to the United States Supreme Court. *Id.* at 165–66.

83. *Id.* at 460.

84. INAZU, LIBERTY'S REFUGE, *supra* note 27, at 80–85.

85. 468 U.S. 609 (1984).

86. *Id.* at 617–18.

87. *Id.*

88. *Id.*

89. Justice O'Connor made this distinction explicit in her concurrence. *Id.* at 638 (O'Connor, J., concurring) ("[T]his Court's case law recognizes radically different constitutional protections for expressive and nonexpressive associations.").

90. The "expressive" versus "non-expressive" distinction is also complicated because meaning is dynamic and subject to more than one interpretive gloss. *See* INAZU, LIBERTY'S REFUGE, *supra* note 27, at 160–62. The right of intimate association encounters similar line-drawing problems. All of the values, benefits, and attributes that courts assign to intimate associations are equally applicable to many, if not most, non-intimate associations. The *Roberts* opinion singled out intimate associations for heightened constitutional protection because they are capable of "cultivating and transmitting shared ideals and beliefs," they can "foster diversity and act as critical buffers between the individual and the power of the State," they provide "emotional enrichment from close ties with others," and they help "safeguard[] the ability independently to define one's identity that is central to any concept of liberty." *Roberts*, 468 U.S. at 618–19. Many non-intimate associations perform some or all of these functions. For a more extensive critique, see INAZU, LIBERTY'S REFUGE, *supra* note 27, at 117–49.

tections for "pre-expressive" and "pre-political" groups in civil society.[91] In doing so, it also reinforces a consensus-oriented ideal of democratic governance that is at odds with the protection of voices and groups that challenge widely shared societal norms.[92]

2. The (Speech-Focused) Public Forum

The second doctrinal development that has weakened protections for both assembly and labor has been the further drift of the public forum doctrine toward a speech-focused analysis.[93] One problem with this free speech framework is that it relies primarily on a "content neutrality" inquiry that misses the expressive connection between speech and the time, place, and manner in which it occurs.[94] Accordingly, restrictions that formally satisfy content neutrality may nevertheless significantly curtail the efficacy of speech and expression. Content-neutral time restrictions sometimes sever the link between message and moment.[95] Content-neutral place restrictions that deny access to symbolic settings can be similarly distorting.[96] Content-neutral manner restrictions can drain an expressive message of its emotive content or even eliminate certain classes of people from the forum altogether.[97]

A related problem with contemporary public forum doctrine is its failure to recognize that speech and assembly are two distinctive rights. One can speak individually, but one cannot assemble alone. An exclusive focus on speech misses the relational underpinnings of assembly.

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91. *See* Inazu, *Virtual Assembly*, *supra* note 27, at 1100–01 (discussing hypothetical St. Louis Beer Lovers Club). *See also* John D. Inazu, *More is More: Strengthening Free Exercise, Speech, and Association*, 99 MINN. L. REV. 485, 526–29 (2014) [hereinafter Inazu, *More is More*] (discussing skating rinks, coffee shops, and fraternities).

92. INAZU, LIBERTY'S REFUGE, *supra* note 27, at 4.

93. This development unfolded in a line of cases culminating in *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37 (1983). For an elaboration of the history, see Inazu, *First Amendment's Public Forum*, *supra* note 48, at 11–17.

94. *Perry*, 460 U.S. at 45 (describing the content-neutrality inquiry).

95. Consider, for example, the consequences of a content-neutral time restriction that would close a public forum on symbolic days of the year, such as September 11th, August 6th (the day the United States detonated an atomic bomb on the city of Hiroshima), or June 28th (the anniversary of the Stonewall Riots). Content-neutral time restrictions that would close the public sidewalks outside of prisons on days of executions, outside of legislative buildings on days of votes, or outside of courthouses on days that decisions are announced, would raise similar concerns. Yet, all of these formally satisfy the content neutrality inquiry.

96. *See* TIMOTHY ZICK, SPEECH OUT OF DOORS: PRESERVING FIRST AMENDMENT LIBERTIES IN PUBLIC PLACES 21 (2009) ("Speakers like abortion clinic sidewalk counselors, petition gatherers, solicitors, and beggars seek the critical expressive benefits of proximity and immediacy that inhere in such places.").

97. *Cf.* Members of the City Council of the City of L.A. v. Taxpayers for Vincent, 466 U.S. 789, 820 (1984) (Brennan, J., dissenting) ("The average cost of communicating by handbill is therefore likely to be far higher than the average cost of communicating by poster. For that reason, signs posted on public property are doubtless 'essential to the poorly financed causes of little people,' and their prohibition constitutes a total ban on an important medium of communication." (internal citation omitted) (quoting Martin v. City of Struthers, Ohio, 319 U.S. 141, 146 (1943))).

E. Sensible Limits

The physical manifestations of assembly have never been without limits. The assembly right is textually qualified in one important regard: the First Amendment protects "the right of the people *peaceably* to assemble."[98] An earlier draft of the assembly clause had limited the right to pursuit of "the common good."[99] During the debates over the text of the assembly clause, however, the drafters removed that reference.[100] We do not know why this textual change occurred, but we do know its consequences. If the right of assembly had been limited to the common good (as defined by the state), then assembly as a means of dissent or protest would have been eviscerated.[101]

The final wording of the assembly clause, with the qualification that any assembly must be "peaceable," suggests an important distinction between the constraints of peaceability and the constraints of the common good.[102] The former are *minimal* limits.[103] They tolerate a substantial amount of risk to the democratic project.

We also have some idea about what the limits of peaceable assembly might be. Throughout our nation's history, the right of assembly has developed alongside the law of "unlawful assembly."[104] The right of as-

98. U.S. CONST. amend. I (emphasis added).

99. Inazu, *Forgotten Freedom of Assembly*, *supra* note 27, at 571.

100. *See* INAZU, LIBERTY'S REFUGE, *supra* note 27, at 22–23 (describing textual changes in various drafts of the First Amendment).

101. The point was not lost during the House debates. When Thomas Hartley of Pennsylvania contended that, with respect to assembly, "every thing that was not incompatible with the general good ought to be granted," Elbridge Gerry of Massachusetts replied that if Hartley "supposed that the people had a right to consult for the common good" but "could not consult unless they met for that purpose," he was in fact "contend[ing] for nothing." NEIL H. COGAN, THE COMPLETE BILL OF RIGHTS: THE DRAFTS, DEBATES, SOURCES, AND ORIGINS 145 (1997) (internal quotation marks omitted) (quoting 2 CONG. REG. 197–217 (1789)); *cf.* Melvin Rishe, *Freedom of Assembly*, 15 DEPAUL L. REV. 317, 337 (1965) ("Were the courts truly bound to delve into whether or not an assembly served the common good, it is likely that many assemblies that have been held to be protected by the constitution would lose this protection.").

102. Stated differently, the peaceability limitation might reflect a very thin common good presumption, but one that excluded only assemblies that engage in violent activity.

103. *Cf.* Post, *supra* note 79, at 1730 (suggesting that the proper starting point is that "'[t]he right to use a public place for expressive activity may be restricted only for weighty reasons'" (quoting Grayned v. City of Rockford, 408 U.S. 104, 115 (1972))). Post suggests that the *Grayned* framework "invites courts to focus precisely on the relationship between speech and the reasons for its regulation." *Id.* at 1766. The "crucial question" is "'whether the manner of expression is basically incompatible with the normal activity of a particular place at a particular time.'" *Id.* at 1730 (quoting *Grayned*, 408 U.S. at 116).

104. The common law traditionally defined unlawful assembly—a criminal offense—as "(1) the assembling together of three or more persons, (2) with a common design or intent (3) to accomplish a lawful or unlawful purpose by means such as would give rational, firm, and courageous persons in the neighborhood of the assembly a well-grounded fear of a breach of the peace." J.P. Ludington, Annotation, *What Constitutes Offense of Unlawful Assembly*, 71 A.L.R. 2d 875, 876 (1960) (internal citations omitted). In *Cole v. Arkansas*, the Supreme Court upheld such a state criminal statute that outlawed "any person acting in concert with one or more other persons, to assemble at or near any place where a 'labor dispute' exists and by force or violence prevent or attempt to prevent any person from engag-

sembly has not sheltered criminal conspiracies, violent uprisings, and even some forms of civil disobedience.[105] First Amendment doctrine allows the state to regulate speech and expression when it crosses the threshold of violence.[106] The state, however, bears a high burden in drawing the constitutionally appropriate line.[107] The Supreme Court has emphasized this burden in its seminal decision in *Brandenburg v. Ohio*, announcing a standard applicable both to assembly and speech: "[s]tatutes affecting the right of assembly, like those touching on freedom of speech, must observe the established distinctions between mere advocacy and incitement to imminent lawless action."[108] The precise contours of this line are not apparent, but they are as workable in assembly as they are in speech.[109]

Indeed, we have some indication of the workability of the boundaries of peaceability in the labor context from the Court's decision in *NAACP v. Claiborne Hardware*.[110] The case involved a multi-year boycott of white-owned businesses by black individuals and organizations (including the NAACP) seeking racial equality and integration.[111] The white merchants sued to recover business losses from the boycott and to

ing in any lawful vocation" against a First Amendment challenge. 338 U.S. 345, 348 (1949) (internal quotation marks omitted). The Court first noted that the statute did not "penalize the promotion, encouragement, or furtherance of peaceful assembly" and then held that "it [was] no abridgment of free speech or assembly" for the state to ban "promoting, encouraging and aiding an assemblage the purpose of which is to wreak violence." *Id.* at 353–54.

105. *See* THE SOCIAL HISTORY OF CRIME AND PUNISHMENT IN AMERICA: AN ENCYCLOPEDIA 1552 (Wilbur R. Miller ed., 2012) ("As the Bill of Rights protects freedom of assembly and freedom of association, there has to be some violent or threatening quality in the collective behavior of the group, transforming its legal status to that of an 'unlawful assembly.'")

106. N.A.A.C.P. v. Claiborne Hardware Co., 458 U.S. 886, 916 (1982) ("The First Amendment does not protect violence.").

107. *See id.* ("When such conduct occurs in the context of constitutionally protected activity, however, 'precision of regulation' is demanded.").

108. Brandenburg v. Ohio, 395 U.S. 444, 449 n.4 (1969); *cf.* De Jonge v. Oregon, 299 U.S. 353, 364–65 ("These rights may be abused by using speech or press or assembly in order to incite to violence and crime. The people through their Legislatures may protect themselves against that abuse. But the legislative intervention can find constitutional justification only by dealing with the abuse. The rights themselves must not be curtailed.").

109. Ashutosh Bhagwat observes that the Supreme Court has held that "membership in an organization with violent goals may be punished, consistent with the First Amendment, so long as the prosecuted individual's membership is 'active and purposive membership, purposive that is as to the organization's criminal ends.'" Ashutosh Bhagwat, *Terrorism and Associations*, 63 EMORY L.J. 581, 624 (2014) [hereinafter Bhagwat, *Terrorism and Associations*] (quoting Scales v. United States, 367 U.S. 203, 229–30 (1961)). Although acknowledging that *Brandenburg* "suggested in a footnote that prosecution for assembly must satisfy the same requirements as prosecution of speech," Bhagwat notes that the Court cited *Scales* approvingly in *Holder v. Humanitarian Law Project*, 561 U.S. 1, 17–18 (2010), "without any hint that it was inconsistent with *Brandenburg*." Bhagwat, *Terrorism and Associations*, *supra* note 109, at 624 n.266. *But see* Inazu, *Factions*, *supra* note 27, at 1440 ("[T]hese differences [might not] doom a *Brandenburg*-like standard for assembly.").

110. 458 U.S. 886 (1982).

111. *Id.* at 888–90.

enjoin future boycott activity.[112] The Supreme Court denied relief for losses and harms related to nonviolent boycott activity.[113]

The Court's opinion recognized that some of the boycotters had been associated with individuals engaged in violence.[114] But it carefully distinguished the protected nonviolent activity from the illicit violent activity.[115] Commentators have noted, however, that this careful parsing may not have occurred had a labor union orchestrated the boycott rather than the NAACP.[116]

III. THE CHALLENGES OF LABOR

The boundaries of assembly brush against the elusive lines that separate protest from violence, connectedness from conspiracy, and dissent from anarchy. These precarious lines are particularly evident in the history of labor unionism. This Part traces that history through the interactions between labor unions, common law courts, and labor legislation. It begins with early judicial efforts to constrain union activity. It then traces the origins of labor legislation, which initially aided forms of worker organizing. This early labor legislation was followed by more robust protections under the Wagner Act of 1935.[117] But these protections were then curtailed by the courts and by the Taft-Hartley and Landrum-Griffin amendments, collectively known as the National Labor Relations Act.[118]

Throughout this ebb and flow, the development of labor was influenced, at varying times, by the presence and the absence of the protections of assembly. The assembly right has been important to workers in two distinct but related ways (neither of which is sufficiently accounted for under current speech and association doctrine). First, assembly protects the right to form and join unions (a right that has been neglected by the speech-based focus of expressive association). Second, assembly facil-

112. *Id.* at 889.

113. *Id.* at 915 ("We hold that the nonviolent elements of petitioners' activities are entitled to the protection of the First Amendment.").

114. *Id.* at 903–06.

115. *See id.* at 908 ("The right to associate does not lose all constitutional protection merely because some members of the group may have participated in conduct or advocated doctrine that itself is not protected."); *id.* at 910 ("Speech does not lose its protected character . . . simply because it may embarrass others or coerce them into action."); *id.* at 913 ("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.").

116. *See, e.g.*, Crain, *Between Feminism and Unionism*, *supra* note 22, at 1977–80; James G. Pope, *Labor-Community Coalitions and Boycotts: The Old Labor Law, the New Unionism, and the Living Constitution*, 69 TEX. L. REV. 889, 922 (1991) [hereinafter Pope, *Labor-Community Coalitions*]; Pope, *Three-Systems Ladder*, *supra* note 22, at 226–27.

117. 29 U.S.C. §§ 151–69 (2012).

118. Labor Management Relations (Taft-Hartley) Act, 29 U.S.C. §§ 141–97 (2012); Labor Management Reporting and Disclosure (Landrum-Griffin) Act, 29 U.S.C. §§ 401–531 (2012).

itates group protests like picketing, boycotts, and strikes (activities that have been hindered by the speech-based focus of modern public forum doctrine).

A. Criminal Conspiracy and the Labor Injunction

Labor unionism in the United States acquired national momentum in the latter half of the nineteenth century, developing from earlier local or regional efforts that had been limited to specific occupations and worksites.[119] With the rise of labor's power and its ability to coordinate collective action came an increasingly ambitious agenda that included strikes, boycotts, and rallies.[120] During the nineteenth and early twentieth centuries, courts displayed open hostility toward unions, linking them with foreign influence, socialism, and anarchy.[121] Influenced by centuries of English law, some American judges even characterized groups of workers as injurious to the public welfare.[122] They viewed unions as illegal and violent organizations that threatened production and the market order.[123]

Common law courts originally used criminal conspiracy law to block the formation and existence of unions.[124] Some courts deemed groups of

119. Deborah A. Ballam, *Commentary: The Law as a Constitutive Force for Change: The Impact of the Judiciary on Labor Law History*, 32 AM. BUS. L.J. 125, 129–30 (1994).

120. *Id.* at 130–31. One of the most notorious examples was the 1886 Haymarket Square rally in support of workers striking for an eight-hour workday. The rioting and bombing that erupted in response to police presence resulted in injuries and deaths, and eight anarchists were tried and convicted of conspiracy and sentenced to death. *See generally* JAMES GREEN, DEATH IN THE HAYMARKET: A STORY OF CHICAGO, THE FIRST LABOR MOVEMENT AND THE BOMBING THAT DIVIDED GILDED AGE AMERICA (1st ed. 2006); TIMOTHY MESSER-KRUSE, THE TRIAL OF THE HAYMARKET ANARCHISTS: TERRORISM AND JUSTICE IN THE GILDED AGE (2011).

121. VICTORIA C. HATTAM, LABOR VISIONS AND STATE POWER: THE ORIGINS OF BUSINESS UNIONISM IN THE UNITED STATES 70–71 (1993); Steven R. Morrison, The Conspiracy Origin of the First Amendment 17–18 (July 2013) (unpublished manuscript), *available at* http://works.bepress.com/cgi/viewcontent.cgi?article=1028&context=steven_morrison (2013); *see also* JAMES B. ATLESON, VALUES AND ASSUMPTIONS IN AMERICAN LABOR LAW 7–8 (1983) (discussing the law's hostility toward collective action due concerns of attendant "anarchy").

122. *See, e.g.*, Commonwealth v. Pullis (Phila. Cordwainers) 8 (Phila. Mayor's Ct. 1806), *in* 3 A DOCUMENTARY HISTORY OF AMERICAN INDUSTRIAL SOCIETY 68–69 (John R. Commons et al. eds., 1910) [hereinafter *Philadelphia Cordwainers' Case*] (finding that a combination of workers amounted to a criminal conspiracy, and reasoning that worker combinations were injurious to the public welfare because they interfered with the functioning of the free market by unfairly raising prices); *see also* Morris D. Forkosch, *The Doctrine of Criminal Conspiracy and its Modern Application to Labor*, 40 TEX. L. REV. 303, 307 (1962) (describing the use of the criminal conspiracy doctrine at English common law and during the earliest days of the American republic); John T. Nockleby, *Two Theories of Competition in the Early 19th Century Labor Cases*, 38 AM. J. LEGAL. HIST. 452, 642–63 (1994) (exploring roots of the criminal conspiracy doctrine in Anglo-Saxon law).

123. Avery, *supra* note 20, at 3–5; Forbath, *supra* note 20, at 1159–1182. Not all commentators agree with this characterization, however. *See, e.g.*, Moreno, *supra* note 20, at 24.

124. *See, e.g.*, People v. Fisher, 14 Wend. 9 (N.Y. 1835); *Philadelphia Cordwainers' Case*, *supra* note 122, at 69. *See generally* MARJORIE S. TURNER, THE EARLY AMERICAN LABOR CONSPIRACY CASES: THEIR PLACE IN LABOR LAW (1967) (analyzing the major labor conspiracy cases of the nine-

two or more workers to be coercive "whether the means employed are actual violence or a species of intimidation that works upon the mind."[125] Judicial rhetoric of the era also reflected fears that unions would disrupt the market and lead to anarchy.[126] For example, the Connecticut Supreme Court affirmed a conspiracy conviction of workers who had boycotted their employer and distributed flyers, worrying that "[t]he exercise of irresponsible power by men, like the taste of human blood by tigers, creates unappeasable appetite for more."[127] The court concluded that boycotting and leafleting would lead to "anarchy, pure and simple."[128]

Courts also relied on the injunction to control labor unionism.[129] Beginning in the mid-1800s, some judges backed away from outright outlawing of worker combinations, and began to focus instead on worker actions. These courts distinguished between purpose and means under the "unlawful object/unlawful means" doctrine.[130] As long as the group's purpose was lawful, the law's only interest was in the means used by the union.[131] But judicial concerns also persisted over the threat that even peaceful labor union protests posed to the economic order.[132]

Toward the close of the nineteenth century and well into the twentieth century, courts used both the criminal conspiracy doctrine and the labor injunction to ban physical assemblies and to criminalize unions.[133]

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teenth century); Morrison, *supra*, note 121, at 18–21 (exploring the historical context of the late nineteenth-century American labor conspiracy cases).

125. State v. Stewart, 9 A. 559 (Vt. 1887).

126. Morrison, *supra* note 121, at 18.

127. State v. Glidden, 8 A. 890, 894–95 (Conn. 1887).

128. *Id.* at 895.

129. HATTAM, *supra* note 121, at 39.

130. *See* Duplex Printing Press Co. v. Deering, 254 U.S. 443, 465–66 (1921) ("The accepted definition of a conspiracy is a combination of two or more persons by concerted action to accomplish a criminal or unlawful purpose, or to accomplish some purpose not in itself criminal or unlawful by criminal or unlawful means. If the purpose be unlawful, it may not be carried out, even by means that otherwise would be legal; and, although the purpose be lawful, it may not be carried out by criminal or unlawful means." (internal citation omitted)).

131. Sidney Fine, *Frank Murphy, The Thornhill Decision, and Picketing as Free Speech*, 6 LAB. HIST. 99, 99–100 (1965). *See, e.g.*, Com. v. Hunt, 45 Mass. (4 Metc.) 111, 134 (Mass. 1842); Crain & Matheny, *Beyond Unions*, *supra* note 29, at 567.

132. The unlawful object/unlawful means doctrine vested broad discretion in judges to determine which objectives were legitimate and which were not, which some judges accomplished by reference to their own social and economic philosophies. *See* Forkosch, *supra* note 122, at 331–32; *see also* WILLIAM E. FORBATH, LAW AND THE SHAPING OF THE AMERICAN LABOR MOVEMENT 38, 177–87 (1991) (demonstrating that from 1885–1930, five laws prohibiting discrimination against union members were struck down, in addition to other laws aimed at curbing the abuses of labor in company housing and company towns in the coal fields); Ellen M. Kelman, *American Labor Law and Legal Formalism: How "Legal Logic" Shaped and Vitiated the Rights of American Workers*, 58 ST. JOHN'S L. REV. 1, 10–11 (1983) (noting that courts prioritized property rights and redefined workers' rights as mere privileges); *see also* Crain & Matheny, *Beyond Unions*, *supra* note 29, at 601.

133. *See* Ahmed A. White, *The Crime of Economic Radicalism: Criminal Syndicalism Laws and the Industrial Workers of the World, 1917-1927*, 85 OR. L. REV. 649, 666–67 (2007) ("From the 1870s onward, courts exercised their powers of equity to issue thousands of labor injunctions. These injunc-

The injunction proved especially valuable because of its immediacy.[134] Restraining orders were obtained *ex parte* and were often issued with sweeping language, which effectively curtailed many labor pickets.[135] Any group that survived an initial restraining order still faced a costly litigation process that dragged out over a period of months or years.[136]

The judiciary sometimes equated labor protests (including both picketing and boycotts) with violence during this period.[137] In *Vegelahn v. Guntner*, for example, a state court enjoined a two-man picket in front of a factory, reasoning that the picket was inherently intimidating and posed a threat of violence.[138] In a famous dissent, Justice Holmes expressed dismay at the scope of the majority's opinion and the breadth of the injunction, which prohibited the defendants from engaging in peaceful activity, "although free from any threat of violence, either express[ed] or implied."[139] Holmes questioned the majority's assumption that picketing—which the court characterized as "patrolling"—"necessarily carries with it a threat of bodily harm."[140]

Some of the fears driving the judiciary in this era are understandable in historical context. The nation was struggling to integrate into the workforce a significant wave of immigrants whose presence inspired nativism and racism.[141] Socialist and anarchist sentiments were a growing concern—in 1901, an anarchist assassinated President McKinley.[142] The rise of industrialization and the evolution of the railway system offered unparalleled opportunities for labor unions to exert leverage by interrupting commerce, and labor quickly capitalized on them.[143] And, most significantly, some of the actions of labor unions were cloaked in actual violence.

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tions were issued on a variety of grounds: that strikes interfered unduly with the flow of commerce, that they portended violence (a near certainty in this period), or simply that they compromised property rights.").

134. From 1880 to 1930, judges issued over 4300 injunctions against strikes, boycotts, and other concerted actions by workers. FORBATH, *supra* note 132, at 193–98 ("I estimate that roughly 105 labor injunctions issued in the 1880s, 410 in the 1890s, 850 in the 1900s, 835 in the 1910s, and 2130 in the 1920s."); Crain & Matheny, *Beyond Unions*, *supra* note 29, at 568 n.35

135. IRVING BERNSTEIN, THE LEAN YEARS: A HISTORY OF THE AMERICAN WORKER, 1920-1933, at 195–96 (2d ed. 2010).

136. *Id.* at 196.

137. Avery, *supra* note 20, at 11–13. *See, e.g.*, State v. Glidden, 8 A. 890, 897 (Conn. 1887) (noting that, in the context of labor, "the thing we call a boycott originally signified violence, if not murder").

138. 44 N.E. 1077, 1078 (Mass. 1896).

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

140. *Id.* at 1080.

141. *See* Morrison, *supra* note 121, at 18–20 (noting that "new immigrants, primarily from eastern and southeastern Europe, were set apart from the native-born white population" and that "they also did not easily assimilate into communities of first wave immigrants, who were mostly from Britain, Germany, and Ireland").

142. *Id.* at 21.

143. *Id.* at 20.

But these concerns, while not insubstantial, are only part of the story. Judicial hostility to unions and the use of conspiracy doctrine to "do battle against unions"[144] were intimately connected to broader assumptions of political and economic theory. Courts framed unions as harmful to the public welfare, depicted them as greedy and self-interested, and described their economic activities as injurious to the broader society because they constrained economic growth and damaged existing institutions.[145] These views in turn stemmed from an economic theory which held that a fixed pie of wage income meant that the "selfish efforts of any individual group of workers to aggrandize its natural share robbed the rest."[146] Some courts connected the threat that unions posed to the economic and political system to fears of violence and anarchy. One Ohio court, for example, concluded that a labor boycott was tantamount to "terrorizing . . . a community" and found the conspiracy to boycott "injurious to the prosperity of the community, and subversive of the peace and good order of society."[147]

The rise of the International Workers of the World (also known as the "IWW" or the "Wobblies") exacerbated perceptions of the connection between unions, anarchy, and violence. Founded in 1905, the IWW rejected a more moderate commitment to advancing workers' economic interests within existing market structures and called for the revolutionary overthrow of capitalism.[148] The IWW relied heavily on group action, including picketing, rallies, parades, and demonstrations.[149] Many of these actions were peaceful, and the IWW cautioned its members against violence.[150] But the IWW also promoted actions linked to violence and anarchy, including spontaneous strikes, sitdowns and slowdowns at work, sabotage of production, and destruction of employer property.[151]

144. TURNER, *supra* note 119, at 21.

145. Ballam, *supra* note 118, at 139 ("Instead of language addressed at protecting the public welfare from economic injury, judges spoke of concern of individual economic injury to employers. The language in the decisions frequently described workers as dangerous and unsavory characters who presented a threat to society.").

146. TURNER, *supra* note 124, at 21. Unions were seen by some as officious intruders into the master-servant relation," interfering "with the natural operations of the free market." *Id.* at 20–21.

147. Moores & Co. v. Bricklayers' Union, 10 Ohio Dec. Reprint 665, 673–74 (Ohio Super. Ct. 1889).

148. DAVID M. RABBAN, FREE SPEECH: ITS FORGOTTEN YEARS 78–79 (1997). Wobblies also pointed to the link between capitalist property ownership and the ability of the property-owning class to maximize free speech rights, arguing that the constitution effectively subordinated the free speech rights of workers to those of the elite. *Id.* at 84, 86–87, 110–11.

149. *Id.* at 79. IWW members deliberately provoked arrest by speaking on soapboxes on street corners, and were arrested in significant numbers on various charges including obstructing the sidewalk, blocking traffic, unlawful assembly, and vagrancy; the charges were escalated in some communities to felonies, including conspiracy. *Id.* at 80–82.

150. *Id.* at 79 ("The IWW officially endorsed sabotage as a tactic of direct action even as it cautioned members against violence.").

151. *See id.*; *See also* MELVYN DUBOFSKY, WE SHALL BE ALL: A HISTORY OF THE INDUSTRIAL WORKERS OF THE WORLD 151–57 (1969); PHILIP S. FONER, HISTORY OF THE LABOR MOVEMENT IN THE UNITED STATES: THE INDUSTRIAL WORKERS OF THE WORLD, 1905-1917, at 134–40, 160–64

Throughout this period, the IWW enlisted both speech and assembly rights in support of its activities.[152]

Organized labor confronted another challenge in the 1890 Sherman Act, which broadly criminalized contracts, combinations, and conspiracies to restrain trade.[153] In the first seven years after the Act was passed, federal courts found that unions had violated its provisions in twelve separate cases.[154] Courts issued injunctions and treble damage awards against strikers and boycotters for conspiring to restrain interstate commerce.[155]

The remedies under the Sherman Act exacerbated judicial treatment of unions as illegal combinations in restraint of trade.[156] The Supreme Court cemented this impression in *Loewe v. Lawlor*, finding a Sherman Act violation in a union strike supported by the American Federation of Labor against a hat manufacturer.[157] The Court, influenced by the efficacy of the protest and the high losses it caused to the employer,[158] read the Act as restraining combinations of labor, and decried "the threat posed to the social order by the 'evils' of massed labor."[159] The decision outraged union supporters, who considered it "dangerously close to characterizing the routine functions of any labor union as illegal."[160]

(1965); DAVID MONTGOMERY, THE FALL OF THE HOUSE OF LABOR: THE WORKPLACE, THE STATE, AND AMERICAN LABOR ACTIVISM, 1865-1925, at 310–27 (1987).

The Wobblies' advocacy foregrounded debates over the distinction between speech and action. Some courts upheld convictions of prominent worker advocates for disorderly conduct or unlawful assembly against First Amendment challenges where public demonstrations, even though "peaceable" and "courteous," might result in a breach of the peace by those responding to the speech. *See, e.g.*, People v. Sinclair, 149 N.Y.S. 54, 60–61 (Ct. Gen. Sess. 1914) (upholding conviction of author and workers' rights advocate Upton Sinclair on a charge of disorderly conduct). Others required an intent to obstruct and interfere with others. *See, e.g.*, Haywood v. Ryan, 88 A. 820, 821 (N.J. 1913) (setting aside conviction of IWW leader Bill Haywood for disorderly conduct). Advocacy of illegal activity, however, was uniformly condemned. RABBAN, *supra* note 148, at 118–21.

152. *Id.* at 83–87; INAZU, LIBERTY'S REFUGE, *supra* note 27, at 48 (discussing how IWW members invoked rights of free speech and assembly during the Paterson silk strike of 1913). The IWW also recognized that freedom of expression was meaningful only if it included the right to speak in places where fellow workers would hear it—on public streets in the business district where workers labored. RABBAN, *supra* note 148, at 110.

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

154. *See* BERNSTEIN, *supra* note 135, at 207 ("[I]n those same seven years following passage in 1890 the federal courts held against unions in twelve cases.").

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

156. MELVYN DUBOFSKY & FOSTER RHEA DULLES, LABOR IN AMERICA: A HISTORY 164 (8th ed. 2010).

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

158. The Loewe Company alleged economic losses of $80,000, a staggering amount for the period. *Id.* at 296 n.1 (quoting complaint).

159. Avery, *supra* note 20, at 60.

160. PHILIP DRAY, THERE IS POWER IN A UNION: THE EPIC STORY OF LABOR IN AMERICA 249 (2010). As a result of the Court's ruling, the plaintiff was entitled to collect triple damages from union

B. Early Labor Legislation

The Progressive Era saw some shifts in judicial and public attitudes toward labor. In 1914, two years after the election of President Woodrow Wilson, a Democratic Congress passed the Clayton Act.[161] Section 6 of the Act stated that "[n]othing contained in the antitrust laws shall be construed to forbid the existence and operation of labor . . . organizations instituted for the purpose of mutual help."[162] Section 20 disallowed most restraining orders and injunctions in cases that involved disputes between employers and employees.[163] AFL founder Samuel Gompers called the Clayton Act "the Magna Carta upon which the working people will rear their structure of industrial freedom."[164]

Gompers underestimated ongoing judicial resistance to these legislative reforms. In *Duplex Printing Press Co. v. Deering*, the Supreme Court characterized the economic pressure from secondary boycotts as inherently coercive and beyond the protections of the Clayton Act.[165] The union had called a strike and organized a boycott to support its goal of unionizing the Duplex Printing Press factory in Michigan.[166] It had requested its members and members of affiliate unions, as a part of its boycott, to avoid working on any printing presses that Duplex delivered in New York.[167] Despite the absence of any violence, the Court worried that extending the Act's protections to workers not affected in a "proximate and substantial way" could lead to "a general class war."[168] This kind of reasoning permitted lower courts to issue injunctions in peaceful labor disputes whose effects extended beyond the workplace site of the dispute.[169]

Although some labor protests did involve actual violence, judicial decisions in those cases often invoked sweeping condemnations of labor picketing itself. The Supreme Court's decision in *American Steel Foundries v. Tri-City Central Trades Council* epitomized judicial distaste for la-

members as individuals, "to the point of attaching their individual bank accounts and threatening to foreclose on more than two hundred of the workers' homes." *Id.* at 249–50.

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

162. Clayton Act § 6, 38 Stat. at 731.

163. *Id.* § 20, 38 Stat. at 738.

164. BERNSTEIN, *supra* note 135, at 208.

165. 254 U.S. 443, 467–68 (1921). A secondary boycott refers to picketing, leafleting, and other forms of pressure directed against a business entity with whom the union does not have a dispute over wages, hours or working conditions (that entity is known as the "primary employer"), but whose business relationship with the primary employer ensures that the primary employer will feel the effects of the pressure—for example, a supplier or distributor of the primary's products.

166. *Id.* at 462–63.

167. *Id.* at 480.

168. *Id.* at 472.

169. Michael H. Leroy & John H. Johnson IV, *Death by Lethal Injunction: National Emergency Strikes Under the Taft-Hartley Act and the Moribund Right to Strike*, 43 ARIZ. L. REV. 63, 91–92 (2001).

bor picketing. The case involved picketing by groups of four to twelve workers on the public street and near railroad tracks bordering the plant's enclosure.[170] The pickets were accompanied by threats of violence, name calling, and physical assaults such as brick throwing.[171] Against that backdrop, the Court issued a sweeping condemnation of the picket, finding that "[a]ll information tendered, all arguments advanced and all persuasion used under such circumstances were intimidation."[172] The Court went further still, however, in its generalizations about labor picketing, suggesting that large numbers of picketers, the picketing methodology itself, and the place of the picket were inherently intimidating:

> It is idle to talk of peaceful communication in such a place and under such conditions. The numbers of the pickets in the groups constituted intimidation. The name "picket" indicated a militant purpose, inconsistent with peaceable persuasion. The crowds they drew made the passage of the employees to and from the place of work, one of running the gauntlet.[173]

The Court enjoined the picketers from approaching people in groups, permitting them only to approach target workers as individuals and use solitary "missionaries" at each of the plant's access points.[174]

Just two weeks later, the Court issued its decision in *Truax v. Corrigan*,[175] which extended the anti-labor implications of *American Steel Foundries* to a picketing case lacking any allegations of violence.[176] The Court focused instead on *economic* harm: the picketing inflicted harm on the employer restaurant by damaging customer goodwill and cutting the restaurant's receipts in half.[177]

The picketing was effective in part because of its timing and location: picketers set up in front of the restaurant during business hours.[178] The passionate and multi-faceted nature of the protest enhanced its efficacy. Picketers displayed a large banner proclaiming that the restaurant was unfair to cooks, waiters, and their union, made loud pleas to custom-

170. 257 U.S. 184, 196–97, 204–05 (1921). For an in-depth discussion of the case and its role in perpetuating imagery of labor violence, see Avery, *supra* note 20, at 76–96; Crain & Matheny, *Beyond Unions*, *supra* note 29, at 569.

171. *Am. Steel Foundries*, 257 U.S. at 197–98.

172. *Id.* at 205.

173. *Id.*

174. *Id.* at 206–07. The final injunction prohibited the defendants from "assembling, loitering, or congregating about or in proximity of" the plant with the purpose of interfering with access to it, and "from picketing or maintaining at or near the premises of the complainant, or on the streets leading to the premises of said complainant, any picket." *Id.* at 194 (emphasis omitted). Solitary "missionaries" were permitted, however: the injunction's purpose was "to prevent the inevitable intimidation of the presence of groups of pickets, but to allow missionaries." *Id.* at 207.

175. 257 U.S. 312, 328–33 (1921) (finding Arizona's interpretation of its "little Clayton Act" limiting state court jurisdiction to issue injunctions against peaceful labor picketing unconstitutional as a denial of due process and equal protection).

176. *Id.* at 370–71 (Brandeis, J., dissenting).

177. *Id.* at 321.

178. *Id.* at 325.

ers not to patronize the restaurant, distributed handbills that denounced the employer for hiring scab Mexican labor, disparaged the restaurant's pricing, products, and employment practices, and confronted would-be patrons directly, asking them how they could patronize the restaurant and "look the world in the face."[179] But the Court concluded that this activity amounted to "moral coercion," tantamount to physical violence, as it "compell[ed] every customer or would-be customer to run the gauntlet of most uncomfortable publicity, aggressive and annoying importunity."[180] The picketing failed to comport with the Court's conception of "civilized" labor picketers—"a patrol of one or two well-mannered, polite workers" who sought to "dissuade workers or win recruits only by speaking in low and cultivated voices."[181]

The Court's characterization of picketing as inherently intimidating may have reflected a concern for the economic interests of business owners, but it neglected entirely workers' assembly rights. Indeed, the Court's picketing limitations occluded the fundamental purposes of the labor assembly: to publicize the dispute, to demonstrate solidarity, and to encourage others to take sides. As labor scholar Dianne Avery has noted:

> Picket lines communicated the issues in a labor dispute to employees and other workers entering and leaving the employer's place of business. The act of joining a picket line was a public demonstration of loyalty to the union or sympathy with the union's goals. By the same token, crossing the picket line, whether by an employee strikebreaker or by another worker delivering goods or supplies, was a public admission of disloyalty to the union, or more, of contempt. Thus, the very existence of the pickets—the public identification of who was for the union and who was against it—was itself a form of moral persuasion. To the community at large, picket lines were a dramatic way of publicizing the labor dispute, as well as involving members of that community—family, friends, neighbors—in conducting the "patrol" itself. Finally, the number of people in the picket line and supporting it, its organization, its persistence day after day, was an indication to the employer and the strikebreakers of the strength and cohesiveness of the union. Picketers could accomplish all this without violence or threats of violence.[182]

179. *Id.* at 325–26.

180. *Id.* at 328. Notice how strikingly out-of-step this conclusion is with the balance of the Court's free speech jurisprudence. *See, e.g.*, Snyder v. Phelps, 131 S. Ct. 1207, 1220 (2011) ("As a Nation we have chosen a different course—to protect even hurtful speech on public issues to ensure that we do not stifle public debate.").

181. Avery, *supra* note 20, at 98 (quoting from Justice Taft's biography, 2 HENRY F. PRINGLE, THE LIFE AND TIMES OF WILLIAM HOWARD TAFT 1035 (1939)).

182. Avery, *supra* note 20, at 89. Another purpose of picketing was surveillance. As one scholar of the era explained, one of the original purposes of picketing was to determine the identity of non-striking employees in order to speak to them and persuade them not to cross the line and go to work.

C. Law's Embrace of Unionism

Not all developments during this time were detrimental to labor. The plight of workers during the Depression exerted a profound influence on both the popular mood and the political tides.[183] In 1932, Congress passed the Norris-LaGuardia Act, stripping federal courts of power to issue injunctions in most labor disputes.[184] Nineteen states enacted statutes designed to prohibit judicial interference with peaceful picketing.[185] Sixteen states guaranteed the right of "peaceful assembly" to strikers and their sympathizers.[186] Nevertheless, many courts continued to issue injunctions in labor disputes, usually on the basis that the pickets were not "peaceful"—even absent physical violence.[187]

In 1932, Franklin Delano Roosevelt won a landslide presidential election, and Democrats gained substantial majorities in both houses. The Roosevelt administration made protecting workers' rights to organize unions a legislative priority. The following year, Congress enacted the National Industrial Recovery Act ("NIRA"), the first federal legislation

Cumberland Glass Mfg. Co. v. Glass Bottle Blowers Ass'n, 59 N.J. Eq. 49, 54 (1899) ("It finds expression mainly upon the fact of 'picketing'; that is, by relays of guards in front of a factory or the place of business of the employer, for the purpose of watching who should enter or leave the same."); Irving Robert Feinberg, *Picketing, Free Speech, and "Labor Disputes,"* 17 N.Y.U. L. Q. REV. 385, 394 (1940).

183. *See* BERNSTEIN, *supra* note 135, at 506–07.

184. Norris–La Guardia Act, Pub. L. No. 72-65, 47 Stat. 70 (1932) (codified at 29 U.S.C. §§ 101–15 (2012)). The statute also outlawed the "yellow dog" contract, an agreement imposed by employers on workers as a condition of employment in which the worker agreed not to join a union. The term "yellow dog" appeared in early 1921 in the labor press. As the editor of the United Mine Workers' Journal explained it: "This agreement has been well-named. . . . It reduces to the level of a yellow dog any man that signs it, for he signs away every right he possesses under the Constitution and laws of the land and makes himself the truckling, helpless slave of the employer." JOEL I. SEIDMAN, THE YELLOW DOG CONTRACT 31 (1932). The yellow dog was a phrase used in political rhetoric that became popular during the 1928 elections, e.g., "yellow dog Democrat." It signified unthinking allegiance to the Democratic platform, as in "x would vote along Democratic lines even if a yellow dog was running for office."

185. Frank E. Cooper, *The Fiction of Peaceful Picketing*, 35 MICH. L. REV. 73, 73 & n.1 (1936).

186. *Id.* at 75.

187. *Id.* The display of banners, the use of loud tones or even a single epithet, or the making of grimaces could warrant an injunction. *Id.*; *see, e.g.*, Lisse v. Local Union No. 31, 41 P.2d 314, 315 (Cal. 1935) (strikers were guilty of physical intimidation where they made "grimaces and insulting gestures" aimed at scabs); Levy & Devaney, Inc. v. Int'l Pocketbook Workers' Union, 158 A. 795, 796 (Conn. 1932) (picketing not peaceful where assembly of six to twenty picketers gave "threatening looks" to employees entering and exiting a factory where a strike had been called); Bull v. Int'l Alliance of Theatrical Stage Emps., 241 P. 459, 460–62 (Kan. 1925) (picketing enjoined where single picket approached patrons, greeted them, and stated "the theatre was unfair to organized labor;" as the picketing implied a threat); State v. Perry, 265 N.W. 302, 302 (Minn. 1936) (holding that a single picket displaying a banner in front of the home of a non-striking employee that stated "[a] scab lives here" could be convicted of disorderly conduct; peaceful picketing statute did not apply); Greenfield v. Cent. Labor Council, 207 P. 168, 174 (Or. 1922) (injunction appropriate because picket not peaceful where more than one picket is involved or where the picket uses "loud tones" in its entreaties to customers not to patronize store). These courts continued to view "peaceful picketing" as an oxymoron. Cooper, *supra* note 185, at 82–86.

protecting workers' rights to organize unions, to engage in other concerted activities, and to bargain collectively.[188]

In 1935, the National Labor Relations Act embraced as national labor policy the goals of encouraging the practice of collective bargaining and worker self-organization.[189] Senator Robert Wagner, the NLRA's chief architect, believed that collective bargaining and union organizing were necessary to enable workers to develop agency and to instill the habit of participation in a democratic society.[190] As Wagner argued:

> [T]he struggle for a voice in industry, through the processes of collective bargaining is at the heart of the struggle for the preservation of political as well as economic democracy in America. Let men become the servile pawns of their masters in the factories of the land and there will be destroyed the bone and sinew of resistance to political dictatorship.[191]

The NLRA's protections for union organizing, activism, and concerted activity—including the right to strike—broke new ground in the law's embrace of group action by workers in the private sector.[192] These rights allowed workers to develop sufficient leverage to achieve contractual gains at the bargaining table. The protections for group action were instrumentally important to the efforts of workers to self-organize, which in turn allowed for the selection of a bargaining representative. But the Act's overriding purpose was promoting labor peace by channeling labor disputes into the collective bargaining process as an alternative to unrestrained violence.[193]

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188. National Industrial Recovery Act ("NIRA"), ch. 90, 48 Stat. 195 (1933). The NIRA was struck down as unconstitutional in *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 542 (1935). Determined to maintain momentum, however, the administration pressed the benefits of unionism forward and within two months of the NIRA's demise the National Labor Relations Act was enacted on July 5, 1935. Pub. L. No. 74-198, 49 Stat. 449 (1935) (codified at 29 U.S.C. §§ 151–69 (2012)). The NLRA was upheld against a constitutional challenge in *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 30 (1937). *See* BERNSTEIN, *supra* note 135, at 508; IRVING BERNSTEIN, THE TURBULENT YEARS: A HISTORY OF THE AMERICAN WORKER, 1933–1940 322–24 (1970).

189. 29 U.S.C. §§ 151–69.

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

191. Robert F. Wagner, *"The Ideal Industrial State"—As Wagner Sees It*, N.Y. TIMES, May 9, 1937, at SM8; *accord* INAZU, LIBERTY'S REFUGE, *supra* note 27, at 110–14.

192. NLRA § 158.

193. Section 1 of the NLRA states: "Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions, and by restoring equality of bargaining power between employers and employees. Experience has further demonstrated that certain practices by some labor organizations, their officers, and members have the intent or the necessary effect of burdening or obstructing commerce by preventing the free flow of goods in such commerce through strikes and other forms of industrial unrest or through concerted activities which impair the interest of the public in the free flow of such commerce. The elimination of such practices is a necessary condition to the assurance of the rights herein guaranteed." *Id.* § 151; *see also* Ross E. Davies, *Strike Season: Protecting Labor-Management Conflict in the Age of Terror*, 93 GEO.

The Act's statement of findings and policies also promoted "the exercise by workers of full freedom of association."[194] Significantly, the NLRA's conception of associational freedom extended protection to worker collective action against *private* employers. Section 7 of the Act protected the right of workers to organize and to engage in concerted activities "for . . . mutual aid or protection" and prevented employers from disciplining or discharging workers in retaliation for engaging in such activities.[195] In this way, the NLRA's statutory framework crossed the traditional state action line and recognized the importance of associational protections even against non-state actors.

The NLRA's reference to the freedom of association was more aspirational than constitutional—the Court would not recognize a right of association until decades later.[196] But other rhetoric surrounding the statutory framework drew more explicitly on First Amendment rights, including the right of assembly. In 1936, Congress authorized the Committee on Education and Labor to investigate "violations of the rights of free speech and assembly and undue interference with the right of labor to organize and bargain collectively."[197] National Labor Relations Board chairman J. Warren Madden testified that "[t]he right of workmen to organize themselves into unions has become an important civil liberty" and insisted that workers could not organize without exercising the rights of free speech and assembly.[198] Committee chairman Hugo Black named Senator Robert La Follette Jr. of Wisconsin to lead a subcommittee to investigate these concerns.[199] Five years later, La Follette reported back to Congress that "[t]he most spectacular violations of civil liberty . . . [have] their roots in economic conflicts of interest" and emphasized that "[a]ssociation and self-organization are simply the result of the exercise of the fundamental rights of free speech and assembly."[200] As discussed in Part II, the Supreme Court initially reinforced these connections between labor and assembly.[201]

L.J. 1783, 1795 (2005) (exploring how labor disputes at the time of the enactment of the Wagner Act posed a severe threat to commerce and to military readiness).

194. NRLA § 151.

195. *Id.* §§ 157–58.

196. *See* NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449, 466 (1958); John D. Inazu, *The Strange Origins of the Constitutional Right of Association*, 77 TENN. L. REV. 485, 486 (2010).

197. Jerold S. Auerbach, *The La Follette Committee: Labor and Civil Liberties in the New Deal*, 51 J. AM. HIST. 435, 440 (1964).

198. *Id.*

199. *Id.* at 441.

200. *Id.* at 442.

201. *See supra* Part II.

D. Picketing as Speech, Not Assembly

Progressive era cases like *De Jonge*, *Hague*, and *CIO* reveal the connections between labor and assembly rights, foregrounding the significance of group, message, and place in the political and expressive goals of labor organizers.[202] But the importance of the right of assembly was consistently neglected in at least one area of labor organizing: picketing. Following dicta from its 1937 decision in *Senn v. Tile Layers Protective Union Local No. 5*,[203] the Court formally recognized picketing as an exercise of free *speech* in *Thornhill v. Alabama*, which overturned the conviction of a union president for violating an anti-picketing statute by marching on a picket line comprised of six to eight other men.[204] The *Thornhill* Court emphasized the statute's role in suppressing speech, noting that "the dissemination of information concerning the facts of a labor dispute must be regarded as within that area of free discussion that is guaranteed by the Constitution."[205] The Court held that the statute's breadth lent itself to discriminatory enforcement against particular groups which would restrain that discussion.[206] The justices paid little heed to Thornhill's claim that his assembly and petition rights had also been violated,[207] instead equating picketing with speech.[208]

Two years later, the Court made clear in *Bakery and Pastry Drivers Local 802 v. Wohl* that even secondary picketing—as long as it was non-

202. *See supra* Part II.

203. 301 U.S. 468, 478 (1937) (observing that "[m]embers of a union might, without special statutory authorization by a State, make known the facts of a labor dispute, for freedom of speech is guaranteed by the Federal Constitution"); Fine, *supra* note 131, at 103.

204. 310 U.S. 88, 106 (1940).

205. *Id.* at 102. The Court highlighted the connections between the labor movement's pressure for livable hours, wages and working conditions and the public interest, commenting: "The health of the present generation and of those 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." *Id.* at 103.

206. *Id.* at 97–98.

207. Thornhill's challenge to the statute's constitutionality was based on "the right of peaceful assemblage, the right of freedom of speech, and the right to petition for redress." *Id.* at 92–93 (internal quotation marks omitted). A companion case decided the same day, *Carlson v. California*, 310 U.S. 106 (1940), also involved assembly rights claims by a labor union in a challenge to a similar ordinance; the Court struck down the ordinance on the same rationale articulated in *Thornhill*. *Id.* at 111–13.

208. Some scholars have noted that the facts in *Thornhill* more clearly supported a claim of interference with speech rights than with assembly or petition: the picketing at issue had been continuing for weeks without interference by the authorities. Thornhill was arrested when he approached a non-union worker entering the plant and told him that the men were on strike and that the men did not want anyone to cross the line to work. *See, e.g.*, Fine, *supra* note 131, at 104, 111. Others suggest that the Court's emphasis on speech rights in the labor context reflected "a nascent pluralist faith in 'an abstract concept of expressive freedom,' and endors[ed] free speech as the privileged vehicle for democratic participation." Alan Story, *Employer Speech, Union Representation Elections, and the First Amendment*, 16 BERKELEY J. EMP. & LAB. L. 356, 371–72 (1995).

violent[209]—was protected by *Thornhill*.[210] But a concurring opinion in *Wohl* penned by Justice Douglas (and joined by Justices Murphy and Black) suggested more ominously that "[p]icketing by an organized group is more than free speech, since it involves patrol of a particular locality and since the very presence of a picket line may induce action of one kind or another, quite irrespective of the nature of the ideas which are being disseminated."[211] Subsequently, the Court issued a string of anti-picketing decisions in the 1940s and 1950s that construed labor picketing as an application of economic power by workers that moved beyond protected free speech.[212] These decisions culminated in *International Brotherhood of Teamsters Local 695 v. Vogt*, in which Justice Douglas announced the "formal surrender" of the *Thornhill* doctrine.[213]

All of these developments unfolded without mention of the right of assembly. The omission is not intuitive—a picket seems no closer to a form of speech than to a form of assembly. Nor was the Court unaware of the connections between picketing and assembly. In the early 1940s, labor petitioners repeatedly raised assembly claims in their briefs to the Supreme Court.[214] The Court simply ignored these claims, resolving the cases on other grounds.[215]

209. The Court, however, continued to display special sensitivity to the risks of violence in connection with labor pickets. While labor pickets that were entirely peaceful could not be enjoined, see *Am. Fed'n of Labor v. Swing*, 312 U.S. 321, 326 (1941), an otherwise peaceful picket could be enjoined wholesale once non-trivial violence occurred on the line. Milk Wagon Drivers v. Meadowmoor Dairies, 312 U.S. 287, 294–95 (1941).

210. Bakery and Pastry Drivers Local 802 v. Wohl, 315 U.S. 769, 774 (1942).

211. *Id.* at 776 (Douglas, J., concurring).

212. *See generally* Building Serv. Emps. Int'l Union Local 262 v. Gazzam, 339 U.S. 532 (1950) (enjoining peaceful picketing where union's goal of obtaining a union shop agreement ran afoul of state law prohibiting employer coercion of employees' choice of bargaining agent); Hughes v. Superior Court, 339 U.S. 460 (1950) (enjoining peaceful picketing in support of a group's demand for racially proportional employment where the law did not forbid voluntary adoption of a quota system, but pressure to impose one contravened state public policy); Int'l Bhd. of Teamsters v. Hanke, 339 U.S. 470 (1950) (enjoining peaceful picketing by union of single-owner shop with no employees for purpose of maintaining union standards at union shops where such picketing contravened state public policy); Giboney v. Empire Storage & Ice Co., 336 U.S. 490 (1949) (enjoining peaceful picketing where its purpose was to compel the employer to violate antitrust laws).

213. 354 U.S. 284, 297 (1957) (Douglas, J., dissenting).

214. Thornhill v. Alabama, 310 U.S. 88, 92–93 (1940) (noting that the petitioner argued a violation of "the right of peaceful assemblage"); Brief for the Appellant at 19, Carlson v. California, 310 U.S. 106 (1940) (No. 667), 1940 WL 46886, at *12; Brief for Petitioners at 10, Am. Fed'n of Labor v. Swing, 310 U.S. 321 (1941) (No. 56), 1940 WL 71247, at *10; Brief for Petitioners at 69, Youngdahl v. Rainfair, Inc., 355 U.S. 131 (1957) (No. 11), 1957 WL 87791, at *69; *see also* Statement as to Jurisdiction at 8, Sanford v. Hill, 316 U.S. 647 (1942) (No. 1187), 1941 WL 53377, at *8 (appeal dismissed for want of a substantial federal question in *Sanford*, 316 U.S. 647 (1942) (per curiam)).

215. *Am. Fed'n of Labor*, 312 U.S. at 325–26 (relying on "the right to free discussion," "the guarantee of freedom of speech," and "[t]he right of free communication"); *Thornhill*, 310 U.S. at 95 (relying on the freedom of speech and press). One commentator has suggested that the Court's focus on speech rights to protect labor and constrain government was both logical and progressive; after all, when labor picketing, strikes, and boycotts had previously been conceptualized as conduct, they were criminalized. 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, 284

E. Legislative Retrenchment

The Court was not the only branch of government neglecting the constitutional protections afforded to group activity in the labor context: two legislative amendments to the NLRA severely circumscribed labor's assembly rights. The first was the Taft-Hartley Act of 1947, which imposed significant restrictions on labor picketing and secondary boycotts.[216] The goal of the secondary boycott provisions was to limit the spread of labor discord beyond the business directly involved in the labor dispute. The amendments banned peaceful picketing (and other forms of pressure) aimed at a secondary or "neutral" employer and designed to shut off trade by the secondary with the struck (primary) employer where the pressure is "coercive."[217]

The second legislative curtailment came in 1959, when Congress responded to allegations of racketeering, union abuse, and corruption with the Landrum-Griffin Act.[218] The Act curbed union power and restricted labor picketing even against primary employers where picketing had an organizational or recognitional goal and the union had not been certified through a Board supervised election.[219] The organizational and recogni-

(2006); *see also supra* notes 104–109 and accompanying text (discussing criminal conspiracy doctrine applied to labor unionism).

216. Labor Management Relations (Taft-Hartley) Act of 1947, 29 U.S.C. §§ 141–197 (2012). Damages were made available against unions that violated the secondary boycott provisions, the only place in the NLRA where such a remedy exists. *See id.*; PAUL C. WEILER, GOVERNING THE WORKPLACE: THE FUTURE OF LABOR AND EMPLOYMENT LAW 269–73 (1990). Taft-Hartley also added a right to refrain from organization and concerted activities implemented through a prohibition on union restraint and coercion against those who exercised those rights, limited the categories of workers covered by the Act, and banned the closed shop, a union security device that served to entrench union power once workers elected a union. 29 U.S.C. § 187.

217. *Id.* § 158(b)(4)(ii)(B). Publicity other than picketing for the purpose of truthfully advising the public of the union's primary labor dispute with a producer is exempt from the ban, as long as it does not interfere with product pick-ups, deliveries or transport, and does not induce workers employed by other employers (besides the primary) to refuse to perform services at the distributor's establishment. *Id.* § 158(b)(4) (setting forth the "publicity proviso"). In drawing the line between coercive picketing and non-coercive picketing, the Court has distinguished between picketing that has the potential to be sufficiently detrimental to the secondary employer's business such that the employer will feel compelled to yield to the union's demands in the primary labor dispute (prohibited) from picketing that poses a mere inconvenience and has a relatively minor impact upon the secondary employer's business. *Compare* NLRB v. Retail Store Emps. Union Local 1001 (*Safeco*), 447 U.S. 607, 614–15 (1980) (finding picketing coercive where it was reasonably likely to threaten insurance companies with ruin or substantial loss because the picketed product—Safeco insurance policies—constituted ninety percent of the picketed employers' gross incomes), *with* NLRB v. Fruit & Vegetable Packers Local 760, 377 U.S. 58, 72–73 (1964) (finding picketing at a supermarket non-coercive where it asked consumers not to purchase a particular type of apple produced by the apple growers with whom the union had a dispute).

218. Labor-Management Reporting and Disclosure (Landrum-Griffin) Act of 1959, 29 U.S.C. §§ 401–531 (2012). The Landrum-Griffin amendments established a bill of rights for individual union members to ensure democratic practices within the union structure, imposed financial reporting obligations on unions and labor relations consultants, imposed time limits and other restrictions on union picketing for organizational and recognition purposes, and expanded the secondary boycott prohibitions added by Taft-Hartley. *Id.*

219. 29 U.S.C. § 157.

tional picketing provisions reflected concerns about the impacts of "blackmail" picketing, particularly its use as a form of top-down organizing to pressure employers to accept the union as the representative of employees who had not selected the union through the Act's preferred mechanism of Board-supervised elections.

These new legislative limits on union pressure activities reflected the "speech-plus" understanding of picketing in the labor context: picketing was construed as a combination of conduct and expression that justified restrictions on what would otherwise have been protected First Amendment speech.[220] The legislative limits also resonated with worries that labor picketing is inherently intimidating and coercive, concerns that had animated the Court's earlier decisions in *American Steel Foundries* and *Truax v. Corrigan*.[221] As Justice Stevens explained in his concurring opinion in a 1980 decision, *NLRB v. Retail Store Employees Union Local 1001 (Safeco)*, regulation of labor pickets was "predicated squarely on [the picket sign's] content" where it communicated a signal to organized labor to respect union solidarity by refusing to cross the picket line. [222] Stevens reasoned that "[i]n the labor context, it is the conduct element . . . that often provides the most persuasive deterrent to third persons about to enter a business establishment."[223] By contrast, handbilling—even when directed at a neutral secondary employer and conducted by a labor union—was deemed non-coercive because, like pure speech, it depended for its success solely upon the persuasive power of its message.[224]

The modern Court's focus on the signaling and confrontational aspects of labor picketing echoes earlier judicial views of labor union protests as not only violent, but also disruptive to the economic order beyond the individual workplace.[225] These earlier opinions routinely

220. *Safeco*, 447 U.S. at 618–19 (Stevens, J., concurring); Theodore J. St. Antoine, *Free Speech or Economic Weapon? The Persisting Problem of Picketing*, 16 SUFFOLK U. L. REV. 883, 890–94 (1982) (considering picketing as "speech-plus"); *see also* Mark D. Schneider, Note, *Peaceful Labor Picketing and the First Amendment*, 82 COLUM. L. REV. 1469, 1487–88, 1496 (1982) (discussing courts' treatment of picketing as a mixture of conduct and communication, and noting cynically that "the labor picketing cases function to shape the meaning of the first amendment to the contours of the requirements of American business").

221. *See supra* notes 165–80 and accompanying text.

222. 447 U.S. at 618 (Stevens, J., concurring).

223. *Id.* at 618–19 (Stevens, J., concurring).

224. Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568, 578 (1988).

225. Justice Stevens's *Safeco* concurrence emphasized that the efficacy of labor pickets stems from the group-based nature of the protest (orchestrated by a labor union), their location (in front of the business), and the union's call for an automatic response to its "signal" to class-wide solidarity rather than to a reasoned idea. 447 U.S. at 619 (Stevens, J., concurring). In *Safeco*, the union's picket signs read simply: "Safeco NonUnion" and "Does Not Employ Members of or Have Contract with Retail Store Employees Local 1001." *Id.* at 610 n.2. Picket signs like these, Justice Stevens suggested, are designed as a signal to trigger unthinking obedience to the union's command by other workers, rather than as a reasoned appeal to the intellect designed to persuade. Such signaling effects were conceived as inherently coercive because they were backed by economic sanctions (which might be im-

invoked the history of violence associated with labor pickets and worried that the presence of large numbers of picketers walking a line in front of a business would induce fearful compliance with the union's wishes by customers, who would eschew the confrontation involved in running the gauntlet of the picket line.[226]

The legislative and judicial treatment of labor unionism in the second half of the twentieth century reflects longstanding suspicion of labor activity, particularly pickets and secondary boycotts. How might this history have been altered had the Court paid more heed to labor's assembly-based arguments? We turn next to a consideration of the values that undergird assembly rights. In the final Part, we address the implications of these values for contemporary labor unionism and labor law doctrine.

IV. THE INSIGHTS OF ASSEMBLY AND THE MEANING OF THE UNION

The preceding Part traced the connections between assembly and labor that emerged in the Progressive Era and continued into the middle of the twentieth century. Where these connections existed, they reinforced the importance of labor unionism in a democratic society. Where they were absent—as in the Supreme Court's labor picketing cases—the expressive and democratic significance of labor gave way to fear of political disorder and instability.[227] These latter consequences were exacerbated as initial connections between labor and assembly weakened even outside of the picketing context. Left without any constitutional or political counterweights, subsequent amendments to and interpretations of the NLRA lost sight of the Act's initial focus on group action by private sector workers.

In some ways reflecting these changes, the contemporary First Amendment landscape neglects important connections between groups and the expression that flows out of them. One reason for this neglect is an increased focus on individualism and autonomy in First Amendment theory and doctrine. These consequences are amplified in the labor context, where a recent individualistic focus has shifted away from past aspirations like solidarity. But the status quo is neither longstanding nor impermeable to challenge. The historical and theoretical insights from assembly—including its connections to labor—shed light on possible dimensions that might be reintroduced to contemporary labor law. We focus on three insights: (1) the importance of groups and group expression;

posed on nonconforming members by the union in the form of fines) and psychological and physical sanctions (imposed on members by their peers).

226. *See, e.g.*, Hughes v. Superior Court, 339 U.S. 460, 465 (1950) (referencing the loyalties and responses invoked by picketing).

227. *See id.* at 464.

(2) the many meanings of groups and group expression; and (3) the relationship between expression and context.

A. The Importance of Groups and Group Expression

Modern free speech jurisprudence is heavily grounded in autonomy-based theory centered on individual expression.[228] From the paradigmatic image of the "lonely pamphleteer" to the modern video gamer, we often get the sense from First Amendment case law that most expression occurs individually.[229] This emphasis has also infused labor law, which has shifted toward a normative focus on autonomy and individualism.[230]

The individualistic focus of much contemporary labor law and First Amendment law ignores the ways in which groups enrich the expressive and democratic landscape, both in their effects on their members and in the expressive messages that emerge from them. Missing these connections overlooks the power and significance of shared expression, collective activity, and solidarity.[231]

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228. *See generally* VINCENT BLASI, IDEAS OF THE FIRST AMENDMENT 875–1049 (2d ed. 2012) (chronicling "the contemporary turn toward individual-centered theories").

229. Brown v. Entm't Merchs. Ass'n, 131 S. Ct. 2729, 2738 (2011) (regarding video games); Branzburg v. Hayes, 408 U.S. 665, 704 (1972) (concerning the "lonely pamphleteer").

230. *See* Kenneth M. Casebeer, *Supreme Court Without a Clue:* 14 Penn Plaza LLC v. Pyett *and the System of Collective Action and Collective Bargaining Established by the National Labor Relations Act*, 65 U. MIAMI L. REV. 1063, 1066, 1068–69, 1078 (2011) (arguing that extending arbitration under collective agreements to individual statutory rights undermines the solidarity understanding of collective rights); Wilma Beth Liebman, *Labor Law Inside Out*, 11 WORKINGUSA: J. LAB. & SOC'Y 9, 10 (2008) (arguing that the focus of the NLRA has shifted to the individual right to choose not to organize, turning the original purpose of the law—fostering collective action with the goal of encouraging collective bargaining—"inside out"); Wilma B. Liebman, *Values and Assumptions of the Bush NLRB: Trumping Workers' Rights*, 57 BUFF. L. REV. 643, 648 (2009) (explaining the role of values in driving NLRB jurisprudence toward a focus on individual choice); James Gray Pope, *Class Conflicts of Law II: Solidarity, Entrepreneurship, and the Deep Agenda of the Obama NLRB*, 57 BUFF. L. REV. 653, 654–55 (2009) (arguing for solidarity as a core anchoring theme in interpreting the NLRA); Pope et al., *Employee Free Choice Act*, *supra* note 28, at 127–28 (describing the labor movement's single-minded support for the Employee Free Choice Act as inadvertently reinforcing a focus on individual choice in union election voting); Brishen Rogers, *Passion and Reason in Labor Law*, 47 HARV. C.R.-C.L. L. REV. 313, 319 (2012) (criticizing dominant NLRA model privileging autonomous employee choice and arguing that union organizing is a process of constructing collective identity and solidarity, not simply an aggregation of employee preferences). *See generally* Reuel E. Schiller, *From Group Rights to Individual Liberties: Post-War Labor Law, Liberalism, and the Waning of Union Strength*, 20 BERKELEY J. EMP. & LAB. L. 1 (1999).

231. *See* Rogers, *supra* note 230, at 316–17 (arguing that labor law's focus on protecting autonomous worker choice doesn't capture the significance and value of communal connections). As labor activist Staughton Lynd explains, the experience of group solidarity in the labor movement creates a new entity that moves beyond the individual, in which the well-being of the individual and that of the group are not experienced as antagonistic: "[T]he group of those who work together—the informal work group, the department, the local union, the class—is often experienced as a reality in itself. . . . I do not scratch your back only because one day I may need you to scratch mine. Labor solidarity is more than an updated version of the social contract through which each individual undertakes to assist others for the advancement of his or her own interest." Staughton Lynd, *Communal Rights*, 62 TEX. L. REV. 1417, 1427 (1984). Analogizing to the bonds that hold families together, Lynd wrote that communal bonds at work function to create an experience of "one flesh," so that what happens to one per-

The preceding insights are reinforced by a basic but often ignored doctrinal claim: the rights of speech and assembly are distinct from one another and facilitate different purposes. The assembly right is *inherently* relational and group focused. One can speak as an individual, but one cannot assemble alone. The two rights are linked, but they are not coextensive.

Labor picketing cases have ignored these differences. As we have noted earlier, in dozens of cases in the 1930s and 1940s, the Supreme Court neglected repeated appeals by labor petitioners that the right of assembly encompassed picketing.[232] Instead, the Court protected peaceful picketing under the First Amendment's rights of speech and press, or more nebulous concepts like the "right to free discussion."[233] This inattention to assembly is perplexing, and it has spread to other areas of labor law that neglect the collective and relational dimensions of labor unionism.

The Wagner Act was premised on the idea that groups can facilitate and encourage individual workers to come together to express dissent and challenge entrenched power. For example, the Wagner Act assumed that robust unionism would enhance political participation by giving workers experience in the practice of everyday democracy, through participation in workplace governance.[234] This initial focus, however, has been somewhat obscured. Since World War II, American labor unionism has largely pursued an ideology of business unionism, focusing on improving wages and benefits for union members and eschewing a direct social justice role.[235] Nevertheless, some unions have continued to play an

son is experienced as happening to others, to the group: "When you and I are working together, and the foreman suddenly discharges you, and I find myself putting down my tools or stopping my machine before I have had time to think—why do I do this? Is it not because, as I actually experience the event, your discharge does not happen only to you but also happens to *us*?" *Id.*

232. *See supra* note 214–15 and accompanying text.

233. Am. Fed'n of Labor v. Swing, 312 U.S. 321, 325, 326 (1941) (relying on "the right to free discussion," "the guarantee of freedom of speech," and "[t]he right of free communication"); Thornhill v. Alabama, 310 U.S. 88, 95 (1940) (relying on the freedom of speech and press).

234. *See* Gillian Lester, *"Keep Government Out of My Medicare": The Search for Popular Support of Taxes and Social Spending*, *in* WORKING AND LIVING IN THE SHADOW OF ECONOMIC FRAGILITY 176, 188 (Marion G. Crain & Michael Sherraden eds., 2014) (observing that a core part of labor unions' mission is furthering participation in the civic and political spheres). Some unions have pursued their political participation mission directly. In 2012, for example, the Service Employees' International Union was the top outside spender on Democratic political campaigns, funding almost $70 million worth of advertising and get-out-the-vote efforts for Democrats. Melanie Trottman & Brody Mullins, *Union is Top Spender for Democrats*, WALL ST. J. (Nov. 1, 2012, 8:07 PM), http://www.wsj.com/articles/SB10001424052970204707104578091030386721670.

235. The ideology of the American labor movement since World War II is often described as "business unionism," meaning that the labor movement has focused in a self-interested way on the immediate and practical "bread and butter" concerns of current union members rather than broader issues of class-wide injustice. In this model, unions are conceptualized as service organizations rather than social justice movements. During the last half of the twentieth century they partnered with business and government, defending the virtues of capitalism rather than challenging it, believing that shared prosperity would lift all boats. Marion G. Crain & Ken Matheny, *Unionism, Law, and the Col-*

important role as "schools for democracy," striving to advance civic virtue at work and in the larger community.[236] Others have offered assistance to workers in developing effective political and legal frames for their grievances, furthering dialogue between citizens and the government.[237] The SEIU's alliance with the Fast Food Forward movement is one example of this dynamic in action.[238]

In the modern context, examples of solidarity and empowerment through group action are also seen in worker activism that begins or develops online. Social media platforms like Facebook and Twitter have become popular sites for discussion of workplace grievances, complaints about supervisors, wages, and working conditions. Perhaps unsurprisingly, the NLRB has seen an uptick of these online cases in recent years. For example, in *Hispanics United of Buffalo, Inc.*,[239] the Board ordered an employer to reinstate employees who had been terminated for discussing workplace grievances on Facebook during off-duty time.[240] Such conversations in the virtual realm may be the precursor to union organizing or other more traditional forms of group action. The Board's message to employers in *Hispanics United* and a number of cases decided in its wake is clear: Facebook and other online dialogues about workplace concerns may qualify as protected concerted activity, regardless of union involvement.[241]

The potential protections for informal online organizing resonate with assembly-based protections for other online forms of collective ac-

lective Struggle for Economic Justice, *in* WORKING AND LIVING IN THE SHADOW OF ECONOMIC FRAGILITY, *supra* note 234, at 102, 110; Crain & Matheny, *Beyond Unions*, *supra* note 29, at 601; Crain & Matheny, *Labor's Identity Crisis*, 89 CALIF. L. REV. 1767, 1779–81 (2001).

236. Garden, *Labor Values*, *supra* note 16, at 2652–58; Thomas C. Kohler, *Civic Virtue at Work: Unions as Seedbeds of the Civic Virtues*, 36 B.C. L. REV. 279, 297–302 (1995); *see* Peter Levine, *The Legitimacy of Labor Unions*, 18 HOFSTRA LAB. & EMP. L.J. 529, 567–69 (2001).

237. Roy Godson, *Labor's Role in Building Democracy*, *in* PROMOTING DEMOCRACY 119, 122 (Ralph M. Goldman & William A. Douglas eds., 1988); Garden, *Labor Values*, *supra* note 16, at 2652–53.

238. *See* Jordan Wiessmann, *The Fast-Food Strikes Have Been a Stunning Success for Organized Labor*, SLATE (Sept. 7, 2014, 8:00 PM), http://www.slate.com/blogs/moneybox/2014/09/07/the_fast_food_strikes_a_stunning_success_for_organized_labor.html.

239. 359 N.L.R.B. No. 37 (2012).

240. The Board concluded that these discussions were classic protected concerted activity, despite the absence of a union, and held that retaliation against employees for the discussions violated their Section 7 rights.

241. *See, e.g.*, Three D, L.L.C., 361 N.L.R.B. No. 31 (2014) (finding Facebook discussion among restaurant employees protected where they discovered that they owed more in state income taxes than their employer had communicated to them, even where employees used profanity; employee who selected the "like" feature and was terminated for his support was entitled to reinstatement). *But see* Karl Knauz Motors, Inc., 358 N.L.R.B. No. 164 (2012) (upholding termination even where an employee's complaints on Facebook concerned working conditions and grew out of a group discussion in the workplace because the employee also posted photos of an accident occurring at a neighboring operation owned by the same employer, and made facetious comments; these comments did not grow out of group action, and the posting was evidently done "as a lark").

tivity.[242] Protecting virtual exchanges and conversations recognizes the importance of communication between group members across time and space, and the significance of guarding groups before they begin to gather, before they formally exist, and while their agendas are only beginning to coalesce.[243]

B. The Many Meanings of Groups and Group Expression

The multivalent nature of groups and group expression has been muddled across modern First Amendment jurisprudence, but it is particularly elided in the labor context. To be sure, the Supreme Court has asserted that "the Constitution protects the associational rights of the members of the union precisely as it does those of the NAACP,"[244] and noted that "the First Amendment does not protect speech and assembly only to the extent it can be characterized as political."[245] But the Court's actual treatment of labor groups has been far less charitable. Labor unions have repeatedly been cast as violent, self-interested, and "essentially economic" groups deserving of less protection than other kinds of groups under the First Amendment's free speech doctrine.[246] Even when the Court has focused on particular union functions (in First Amendment cases that explore which union expenditures can be assessed against objecting nonmembers), its descriptions reflect judicial assumptions about the limited economic realm of appropriate union activity.[247] Further, its

242. *Cf.* Inazu, *Virtual Assembly*, *supra* note 27, at 1102–15 (arguing that online groups should be protected against state incursions under the First Amendment's right of assembly because they advance similar values to physical assembly and because the boundaries between physical and virtual assembly are collapsing).

243. *Id.* at 1121–24.

244. Bhd. of R.R. Trainmen v. Va. *ex rel.* Va. State Bar, 377 U.S. 1, 8 (1964).

245. United Mine Workers v. Ill. State Bar Ass'n, 389 U.S. 217, 223 (1967); *see also* State Emp. Bargaining Agent Coal. v. Rowland, 718 F.3d 126, 133 (2d Cir. 2013) ("Not only do unions engage directly in partisan electoral politics, but labor unions have been predicated on ideas of worker solidarity that are as much political as economic. Opposition to labor unions, similarly, has at times been based not only on the perceived economic interests of employers, consumers, and workers, but on the perception that unions advocate radical political ideas.").

246. Garden, *Citizens, United*, *supra* note 22, at 17; *see also* Marion Crain, *Between Feminism and Unionism*, *supra* note 22, at 1974–76 (1994); Pope, *Labor-Community Coalitions*, *supra* note 116, at 896. These negative characterizations have serious implications which extend beyond the speech/assembly rights arena. *See, e.g.*, Levin, *supra* note 19, at 562–63 (discussing parallels between cases depicting unions as dangerous conspiracies involving collective action that was damaging to the public interest, and modern cases permitting civil RICO claims against unions). *See generally* Brudney, *supra* note 16 (describing rise of RICO claims against unions in the context of union organizing and pressure strategies).

247. *See* Locke v. Karass, 555 U.S. 207 (2009) (holding that dues money paid by objecting nonmembers could be used for non-unit litigation costs where the union imposes a reciprocal obligation on other locals to support litigation involving the unit of these employees if such litigation becomes necessary); Lehnert v. Ferris Faculty Ass'n, 500 U.S. 507 (1991) (finding that nonmembers could be charged for expenses of national union program expenditures, national publications, information services that benefited all teachers, participation by local union delegates in state and national union meetings at which bargaining strategies and representation policies were developed, and expenses in-

division of union activities into component parts misses the holistic sense of the group's identity.[248]

Contrary to these constrained and piecemeal characterizations, many unions have represented a kind of lived politics—through their gatherings, their practices, and their strivings for workplace change. The earliest unions in the United States emerged out of fraternal and mutual benefit societies that helped to provide insurance and financial assistance to workers in dangerous industries.[249] Unions have historically forged strong communal connections among African Americans, women, immigrants, and other political minorities.[250] Additionally, unions have formed

cident to strike preparation, but not for lobbying, electoral or other political activities, or for public relations efforts designed to enhance the reputation of the teaching profession generally, since there was no direct connection to the union's collective bargaining function); Commc'ns Workers v. Beck, 487 U.S. 735, 745 (1988) (describing obligation of nonmembers under NLRA to pay only for the support of union activities "germane to collective bargaining"); Ellis v. Bhd. of Ry., Airline & S.S. Clerks, 466 U.S. 435 (1984) (analyzing union activities for which nonmembers can be compelled to pay under the Railway Labor Act consistent with the First Amendment, including union conventions, social activities, and publications, but not litigation or organizing expenses); United Food & Commercial Workers Locals 951, 7 & 1036, 329 N.L.R.B. No. 69 (1999) (holding that NLRA unions may charge nonmembers for organizing expenses where the targets are employees at competitor firms, because of the direct relationship between wage levels of employees in the same competitive market and the union's interest in limiting undercutting), *enforcement den'd sub nom.*, 249 F.3d 1115 (9th Cir. 2001), *enforced*, 284 F.3d 1099 (9th Cir. 2002) (en banc), *amended*, 307 F.3d 760 (9th Cir. 2002).

248. See *infra* note 249 and accompanying text.

249. *See, e.g.*, Bhd. of R.R. Trainmen v. Va. *ex rel.* Va. State Bar, 377 U.S. 1, 2–3 (1964) ("[T]he Brotherhood was founded as a fraternal and mutual benefit society to promote the welfare of the trainmen and 'to protect their families by the exercise of benevolence, very needful in a calling so hazardous as ours . . . .'"). *See generally* THEDA SKOCPOL ET AL., WHAT A MIGHTY POWER WE CAN BE: AFRICAN AMERICAN FRATERNAL GROUPS AND THE STRUGGLE FOR RACIAL EQUALITY (2006).

250. For examples of positive collaborations between unions and people of color, see Marion Crain, *Whitewashed Labor Law, Skinwalking Unions*, 23 BERKELEY J. EMP. & LAB. L. 211 (2002). For examples of positive collaborations between unions and women, see Marion Crain, *Feminism, Labor and Power*, 65 S. CAL. L. REV. 1819 (1992). For examples of positive collaborations between unions and immigrants, see RUTH MILKMAN, ORGANIZING IMMIGRANTS: THE CHALLENGE FOR UNIONS IN CONTEMPORARY CALIFORNIA (Ruth Milkman ed., 2000); RUTH MILKMAN & KIM VOSS, REBUILDING LABOR: ORGANIZING AND ORGANIZERS IN THE NEW UNION MOVEMENT (Ruth Milkman & Kim Voss eds., 2004). In the modern era, labor has embraced immigrant rights as a part of union revitalization. *See* Jennifer Medina, *Immigrant Workers Give New Direction to Los Angeles Unions*, N.Y. TIMES (May 17, 2013), http://www.nytimes.com/2013/05/18/us/los-angeles-labor-leader-puts-focus-on-immigrants.html. Of course, labor's historical engagement with people of color, women and immigrants has been complex, and not always positive. Law has played a significant role in this history, although it has not been the sole driver. *See generally* FORBATH, *supra* note 132; Marion Crain, *Colorblind Unionism*, 49 UCLA L. REV. 1313 (2002); Marion Crain, *Feminizing Unions: Challenging the Gendered Structure of Wage Labor*, 89 MICH. L. REV. 1155 (1991) (exploring possibilities for altering labor's historic ineffectiveness in organizing women); Marion Crain & Ken Matheny, *"Labor's Divided Ranks": Privilege and the United Front Ideology*, 84 CORNELL L. REV. 1542 (1999) (analyzing unionism's mixed history with women workers in context of co-worker sexual harassment); Crain & Matheny, *Labor's Identity Crisis*, *supra* note 235 (exploring how law cabined union agendas and directed them away from social justice concerns). *See also, generally*, DAVID E. BERNSTEIN, ONLY ONE PLACE OF REDRESS: AFRICAN AMERICANS, LABOR REGULATIONS, AND THE COURTS FROM RECONSTRUCTION TO THE NEW DEAL (2001); PHILIP S. FONER, ORGANIZED LABOR AND THE BLACK WORKER 1619–1972 (1974) (describing union participation in continuing racially segregated jobs); WILLIAM B. GOULD, BLACK WORKERS IN WHITE UNIONS: JOB DISCRIMINATION IN THE UNITED STATES (1977) (describing union collaboration in maintaining racial caste system at work); ALICE

alliances with many other groups to advance a wide array of social, political, and economic interests.[251]

Labor-oriented groups provide other benefits that reflect our democratic commitments. Some of these benefits manifest on an individual level through emotional support, friendship, stability, and the development of social identity.[252] Labor groups can also strengthen bonds by fostering habits of collaboration and cooperation, skills important to civic participation.[253] Moreover, they offer leverage to citizens who seek to amplify their voices at the political level, helping citizens to enhance their positions and shape policy.[254] Some groups, including labor unions and workers' centers, also function as training grounds for democratic governance by offering members the opportunity to gain skills useful for political participation.[255] These skills can include organizing and recruiting, public speaking, and persuasive writing.[256]

Unions have wielded significant influence in the legislative arena. They have lobbied for different laws protecting workers' rights beyond

KESSLER-HARRIS, OUT TO WORK: A HISTORY OF WAGE-EARNING WOMEN IN THE UNITED STATES (1982); RUTH MILKMAN, GENDER AT WORK: THE DYNAMICS OF JOB SEGREGATION BY SEX DURING WORLD WAR II (1987); WOMEN, WORK AND PROTEST: A CENTURY OF U.S. WOMEN'S LABOR HISTORY (Ruth Milkman ed., 1985).

251. *See generally* JANICE FINE, WORKER CENTERS: ORGANIZING COMMUNITIES AT THE EDGE OF THE DREAM (2006) (discussing new advocacy groups that organize workers at the community level, sometimes in combination with labor unions); WORKING FOR JUSTICE: THE LA MODEL OF ORGANIZING AND ADVOCACY (Ruth Milkman et al. eds., 2010) (discussing coalitions between labor and immigrant groups); Pope, *Labor-Community Coalitions*, *supra* note 116; Crain, *Between Feminism and Unionism*, *supra* note 22; *Unions Join North Carolina 'Moral Monday' Protest*, INT'L ASS'N MACHINISTS & AEROSPACE WORKERS (June 17, 2014), http://www.goiam.org/index.php/imail/latest/12916-unions-join-north-carolina-moral-monday-protest (describing several labor unions joining grassroots "Moral Mondays" protest movement opposing recent legislation related to voting rights, unemployment, and education passed by GOP-led North Carolina legislature and Governor Pat McCrory).

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

253. *See id.* at 695–97.

254. *Id.* Consider, for example, group actions like those orchestrated by Fast Food Forward: among its goals is legislation to raise the minimum wage. *See* William Finnegan, *Dignity: Fast-food Workers and a New Form of Labor Activism*, NEW YORKER, Sept 15, 2014, *available at* http://www.newyorker.com/magazine/2014/09/15/dignity-4 (discussing fast food workers' support for legislation that would increase New York's $8.00/hour minimum wage).

255. *See* FINE, *supra* note 251, at 255–56.

256. Mazzone, *supra* note 252, at 697–98. For example, the AFL-CIO's Constitution contains the following commitment:

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

AFL-CIO Constitution Article II: Objects and Principles, http://www.aflcio.org/about/exec-council/afl-cio-constitution/ii.-objects-and-principles (last visited Mar. 4, 2015); *see also* Brief for Ohio AFL-CIO and District 1199 SEIU as Amici Curiae Supporting Respondent at 1, State *ex rel.* Colvin v. Brunner, No. 08-1813 (Ohio Sept. 24, 2008), 2008 WL 4525932, at *1. In its Amicus brief, the SEIU District 1199 noted that its Constitution commits it to "maintain, preserve, and extend the democratic process and institutions of our country." *Id.*

the union sector.[257] Unions have also been active players in litigation, both as litigants and as amicus curiae.[258] Their activity has affected policies including affirmative action, federalism, campaign finance, voting rights, antidiscrimination law, wage and hour law, and constitutional rights for public sector employees.[259]

Like all other groups and institutions—churches, schools, social clubs, businesses—unions are diverse and multifaceted. Some are large and powerful: the Service Employees International Union boasts over two million members and was the largest contributor to Barack Obama's 2008 presidential campaign.[260] Others are more diffuse and less centralized.[261] Indeed, many labor groups are small grassroots efforts with creative forms of engagement. For example, the Workers Defense Project organizes immigrant workers in the Texas construction industry with dinner meetings that are "part pep rally, part educational session, [and] part social hour."[262]

257. Harold Meyerson, *If Labor Dies, What's Next?*, AM. PROSPECT, http://prospect.org/article/if-labor-dies-whats-next (last visited Mar. 4, 2015).

258. *See* Garden, *Labor Values*, *supra* note 16, at 2629–32 (cataloguing Supreme Court cases outside the traditional labor law arena in which unions have played important advocacy roles); Jaime Eagan, Making an Impact: The Labor Movement's Use of Litigation to Achieve Social and Economic Justice (June 18, 2011) (unpublished manuscript), *available at* http://ssrn.com/abstract=1866844 (documenting labor movement involvement in impact litigation and examining implications for union identity).

259. MARION G. CRAIN ET AL., WORK LAW: CASES AND MATERIALS 31 (2d ed. 2010). Unions' interest in advocating for statutory protection for workers as a class is not entirely altruistic. New statutory rights raise the floor from which bargaining begins on behalf of union members, augmenting unions' power at the bargaining table. *See* Robert J. Rabin, *The Role of Unions in a Rights-Based Workplace*, 25 U.S.F. L. REV. 169, 173 (1991). Further, improved wages and workplace benefits in nonunion businesses reduce the competitive threat those businesses pose to unionized businesses in the same sector, making it easier for unions to sustain and expand gains made at the bargaining table in the unionized businesses. *See, e.g.*, Oswalt, *supra* note 24 (explaining that UFCW's support for OUR Walmart stems in part from its concern with the competitive threat Walmart poses to unionized grocery stores).

260. Press Release, Serv. Emps. Int'l Union, Andy Stern, President of Service Employees International Union (SEIU), Announces Retirement, (Apr. 14, 2010), *available at* http://www.seiu.org/2010/04/andy-stern-president-of-service-employees-international-union-seiu-announces-retirement.php.

261. The Freelancers' Union, for example, represents independent contractors and freelancers, offering access to affordable health insurance and advocating for legislative reforms protecting independent contractors. Steven Greenhouse, *Tackling Concerns of Independent Workers*, N.Y. TIMES (Mar. 26, 2013), http://www.nytimes.com/2013/03/24/business/freelancers-union-tackles-concerns-of-independent-workers.html. The National Day Laborer Organizing Network, the National Domestic Worker Alliance, and the New York Taxi Workers' Alliance all advance the concerns of workers not covered by the NLRA or left behind by traditional unions. *See About Us–Who We Are*, NAT'L DOMESTIC WORKERS ALLIANCE, http://www.domesticworkers.org/who-we-are (last visited Mar. 4, 2015); *About Us*, NAT'L DAY LABORER ORGANIZING NETWORK, http://www.ndlon.org/en/about-us (last visited Mar. 4, 2015); *About NY Taxi Workers Alliance*, N.Y. TAXI WORKERS ALLIANCE, https://www.facebook.com/nytwa/info?tab=page_info (last visited Mar. 4, 2015).

262. Steven Greenhouse, *The Workers Defense Project, a Union in Spirit*, N.Y. TIMES, Aug. 10, 2013, http://www.nytimes.com/2013/08/11/business/the-workers-defense-project-a-union-in-spirit.html. Greenhouse notes that one dinner meeting served tacos, rice and beans and included a humorous skit mocking an employer. *Id.*

C. Expression and Context

Contemporary First Amendment doctrine has grown increasingly insensitive to the communicative power that emerges from the connection between expression and the context in which it unfolds. Specifically, the well-known inquiry into time, place, and manner restrictions in First Amendment doctrine too easily severs these connections without considering the expressive consequences. Part of the reason for this change is an increasing reliance on the free speech right for public forum analysis.[263] One problem with relying solely on speech doctrine is that doing so neglects the expressive connection between speakers and places.[264] As Timothy Zick has observed, a broad trend has emerged wherein "speakers [are] denied the opportunity to reach intended audiences or permitted to speak only under the most restrictive conditions," which creates "the frequent physical displacement of speakers and speech."[265]

These speech-based time, place, and manner restrictions also dominate labor law. Current doctrine raises two fundamental inquiries in determining the legality of any labor protest. The first focuses on the target of the protest and the union's goal, and it is largely determined by the location and timing of the protest activity and the language on the picket signs or handbills.[266] The second inquiry asks what form the pressure takes.[267] The answer to this inquiry turns on whether the activity is coercive, and on whether it is categorized as picketing.[268] Each of these inquiries neglects the connection between expression and context.

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263. *See, e.g.*, Perry Edu. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983). *See generally* Inazu, *First Amendment's Public Forum*, *supra* note 48.

264. See ZICK, *supra* note 96, at 21 ("Speakers like abortion clinic sidewalk counselors, petition gatherers, solicitors, and beggars seek the critical expressive benefits of proximity and immediacy that inhere in such places.").

265. *Id.* at xii.

266. *See, e.g.*, Sailors' Union of the Pac., 92 N.L.R.B. No. 93 (1950) (establishing test for analysis of application of secondary boycott statute to labor pickets at common sites where two or more employers are present, and requiring consideration of location and time of picketing, presence of primary employer engaged in normal business, and message on picket signs); Local 761, Int'l Union of Elec., Radio & Mach. Workers v. NLRB, 366 U.S. 667, 680 (1961) (approving *Moore Dry Dock* test and applying it to situation where union picketed separate gates marked for subcontractors); Hous. Bldg. & Constr. Trades Council, 136 N.L.R.B. No. 28 (1962) (noting language on the union's signs during a picket as indicative of union's goal to maintain area wage standards in the area).

267. NLRB v. Retail Store Emps. Union Local 1001 (*Safeco*), 447 U.S. 607, 614 (1980).

268. *See, e.g.*, *id.* at 615 n.11 (finding picketing that is reasonably likely to threaten neutral party with ruin or substantial loss coercive where the primary employer's product constitutes ninety percent of the picketed employers' gross incomes); NLRB v. Fruit & Vegetable Packers Local 760, 377 U.S. 58, 63–64 (1964) (finding product picketing that follows the struck product to a neutral distributor's site non-coercive where the time, place and nature of the picket signs make clear that the union's dispute is only with the manufacturer of the struck product); Serv. & Maint. Emps. Union Local 399, 136 N.L.R.B. No. 34 (1962) (demonstrating that the Board split over whether a patrol by twenty to seventy workers in an elliptical path in front of the main entrance to a sports arena constituted picketing where the patrollers distributed handbills but did not carry placards).

Consider the time and place inquiries surrounding the target of a recent labor protest. In July 2013, Chicago-area funeral directors and funeral home drivers who were members of the Teamsters Local 727 launched a strike against a national funeral home chain.[269] They undertook peaceful picketing aimed at consumers that pressed workers' need for pension and healthcare protections.[270] A Chicago funeral home successfully sought an injunction because the picket line activity disrupted its normal business and, on its view, offended public sensibilities.[271] The employer argued that the union's picket line conduct represented "gross insensitivity and harassment directed at grieving families."[272] In the struggle over the appropriate place and time for workers to publicize their dispute, the employer leveraged labor doctrine to prevent the union from conveying its message at the times when the largest number of members of the public would be on hand to witness it and when the media would be most likely to cover it.[273]

The second inquiry in assessing the legality of a labor protest involves the manner of the protest. Because of its confrontational nature, most labor picketing is deemed potentially coercive and is directly regulated by the NLRA.[274] In contrast, because the Court has classified handbilling as a form of pure speech protected by the First Amendment,[275] union agents can handbill in situations where picketing would be

269. Anna Kwidzinski, *Court Prohibits Funeral Home Workers From Making Threats in Post-Lockout Picket Lines*, Daily Lab. Rep. (Bloomberg BNA) No. 184, Sept. 23, 2013, at A-8.

270. *Id.*

271. Mike Nolan, *Teamsters to Strike Funeral Homes*, SOUTHTOWN STAR, July 1, 2013; Kwidzinski, *supra* note 269.

272. In particular, the funeral home complained that the protesters laughed, smiled, and created a disturbance within the immediate vicinity of the entrance to the funeral home during a time frame when a funeral was being held; hurled epithets and taunts at funeral home workers while they were assisting grieving customers, brought large dogs to the picket line, and utilized bullhorns to publicize their message. Kwidzinski, *supra* note 269. According to the funeral home: "Despite the fact that these families were experiencing the most difficult times of their lives, picketers repeatedly chose to make the bereaved the target of their cowardly attacks." *Id.*; *see also* SCI Ill. Servs. Inc. v. Int'l Bhd. of Teamsters, Local 727, No. 1-13-2263 (Ill. App. Ct., July 24, 2013) (order granting preliminary injunction) (preliminary injunction prohibiting picketers from (among other things) obstructing entrance to or exit from the funeral home within thirty minutes before or after funeral services).

273. *See* ZICK, *supra* note 96, at 3. The NLRB subsequently found merit in the union's unfair labor practice charges against the funeral home for threats, coercion, and failure to bargain in good faith with the union, and the case settled. *See Funeral Industry Giant SCI Committed Unfair Labor Practices, Labor Board Says*, PR Newswire (Sept. 27, 2013), http://www.prnewswire.com/news-releases/funeral-industry-giant-sci-committed-unfair-labor-practices-labor-board-says-225550342.html; *Teamsters: SCI Admits to Labor Law Violations in Lockout of Funeral Workers*, PR NEWSWIRE (Dec. 13, 2013), http://www.prnewswire.com/news-releases/teamsters-sci-admits-to-labor-law-violations-in-lockout-of-funeral-workers-235752591.html.

274. *See, e.g.*, NLRA §§ 8(b)(1)(A), 29 U.S.C. § 158(b)(1)(A) (2012) (prohibiting picketing involving violence, intimidation, or threats that coerces employees to join or to refrain from joining a union); *id.* § 8(b)(4) (prohibiting secondary boycotts); *id.* § 8(b)(7) (limiting organizational or recognitional picketing); *see supra* note 225 and accompanying text.

275. *See* Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council (*DeBartolo II*), 485 U.S. 568, 587–88 (1988).

circumscribed, such as where the target is a secondary employer or where primary picketing would be time limited.[276] But even handbilling may be found to be coercive depending upon the context.[277]

In an effort to avoid categorization of a labor protest as coercive, creative unions have minimized the potential for confrontation between protesters and workers or consumers who seek to enter the business by reducing the number of protesters present or substituting inanimate objects or large banners for actual people. For example, in *Sheet Metal Workers Local 15*, a labor union accused a hospital of contracting with a company that hired temporary non-union workers to perform renovations, undermining wages and benefits in the area.[278] The NLRB ruled that handbilling by the union was permissible, even though the handbill described the temporary staffing company as a "rat employer" and the union highlighted its message by displaying a sixteen-foot-tall giant inflatable rat.[279]

In short, the law incentivizes unions to ensure that they structure their protests as more akin to speech than to conduct. But the speech-based analysis of contemporary cases misses the connections that a protest involving large numbers of people may foster and the message that it communicates about worker solidarity, persistence, and determination. Contemporary labor law thus reflects a circumscribed understanding of the First Amendment that flows from a narrow focus on speech values to the exclusion of assembly. And in labor settings, the omission of assembly-based considerations is particularly discordant because the connection between expression and the context in which it unfolds is central to effective organizing and communication. Workers who put their jobs at risk to support a union-organizing drive can be persuaded by the emotional and psychological momentum of group presence and action as much as they are by mere words.

276. *See* NLRA §§ 8(b)(4); 8(b)(7); *supra* note 274 and accompanying text.

277. *See Edward J. DeBartolo Corp.*, 485 U.S. at 579.

278. 356 N.L.R.B. No. 162 (2011). The rat (typically portrayed as sitting upright, smiling, and gripping a cigar in its mouth) is a traditional symbol of a labor dispute, referring either to a worker who refuses to join a strike or crosses a picket line to replace a striking worker, or to an employer who hires that worker. Tzvi Mackson-Landsberg, *Is a Giant Inflatable Rat an Unlawful Secondary Picket Under Section 8(b)(4)(ii)(B) of the National Labor Relations Act?*, 28 CARDOZO L. REV. 1519, 1519 n.3 (2006).

279. Sheet Metal Workers, Local 15, 356 N.L.R.B. No. 162 (2011); Mackson-Landsberg, *supra*, note 278, at 1519. In another context, the Board concluded that stationary bannering—even the display of large banners that proclaim "Shame" upon an employer for dealing with an employer with whom the union has a labor dispute—is not picketing, and therefore is lawful as long as it does not block access to the facility. Local Union No. 1827, United Bhd. of Carpenters, 357 N.L.R.B. No. 44 (2011); Sw. Reg'l Council of Carpenters, 356 N.L.R.B. No. 88 (2011).

V. IMPLICATIONS FOR LABOR'S IMAGE AND EFFICACY

We turn now to some of the real-world consequences for labor unionism of an understanding of the First Amendment that overlooks assembly rights. We first address the reduced statutory protections for labor organizations' organizing and collective bargaining activities under the NLRA. We then discuss the resulting question for scholars and labor organizers: whether the restrictions on collective labor activities have overwhelmed the benefits of forming traditional labor unions, and whether the constitutional possibilities of a reinvigorated assembly jurisprudence might better protect the interests of labor activism—particularly new forms of what Michael Oswalt has called "improvisational unionism."[280]

A. Protection for Concerted Activities

Section 7 of the NLRA protects the right of workers to organize and to engage (or not to engage) in concerted activities "for mutual aid or protection," and Sections 8(a)(1) and (3) prevent employers from disciplining or discharging workers in retaliation for engaging in such activities.[281] These protections enhance worker collective action by constraining a private employer's response to that action. In other words, they establish a kind of associational freedom enforceable against a private actor (as opposed to the more traditional conception of rights enforceable against the government).

But these limited protections come at a cost. To claim the Act's protection, workers' actions must meet three requirements: (1) they must be concerted (typically involving two or more employees); (2) they must deal with workplace issues that are potential bargaining topics of interest to the group (e.g., wages, hours, working conditions), rather than representing mere "personal griping" or addressing political concerns that transcend employment; and (3) they cannot be conducted in a manner that reflects undue disloyalty or be too inconsistent with the successful function of the business.[282]

280. Oswalt, *supra* note 24 (defining improvisational unionism as including "innovations like union organizing without the union, collective action for the sake of collective action, and strikes by courageous but tiny contingents").

281. NLRA §§ 7, 8(a)(1), 8(a)(3).

282. NLRB v. City Disposal Systems Inc., 465 U.S. 822, 822–23 (1984) (defining concerted activity); *see* Eastex, Inc. v. NLRB, 437 U.S. 556, 567–68 (1978) (addressing requirement that employees' concerns relate to employment conditions rather than to broader political issues); NLRB v. Wash. Aluminum Co., 370 U.S. 9, 14–17 (1962) (protecting concerted activity in the nonunion setting); NLRB v. Local Union No. 1229, Int'l Bhd. of Elec. Workers, 346 U.S. 464, 472 (1953) (finding handbilling by employees during off-duty time that disparaged the quality of the company's product without mentioning the existence of a labor dispute sufficiently disloyal to warrant discharge, and withdrawing protection for concerted activity). These cases cumulatively amount to a modern version of

The latter two restrictions, in particular, have proven to be severely limiting. The requirement that concerted activity address workplace issues that are potential bargaining topics has been understood to include worker activities "in support of employees of employers other than their own," or which "seek to improve . . . their lot as employees through channels outside the immediate employee-employer relationship."[283] However, these efforts must relate directly to employees' working conditions.[284] As a result, Section 7 has protected employee concerted action when it relates to issues like the minimum wage, state right to work legislation, living wages and benefits, employee drug testing, and workplace safety laws.[285] But protection has not extended to concerted action around issues deemed too attenuated from employees' workplace interests.[286] As some commentators have pointed out, this restriction places altruistic behavior by workers outside the contours of labor law's pro-tection.[287]

Section 7's loyalty constraint imposes the most crippling limitations. Worker conduct that is inconsistent with the business interests of the employer or involves disrespectful or disloyal conduct loses protection

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the original unlawful purpose/unlawful means test developed at common law for the evaluation of labor protests. *See* Vegelahn v. Guntner, 44 N.E. 1077, 1077 (Mass. 1896).

283. *Eastex, Inc.*, 437 U.S. at 564–65.

284. *Id.* at 567–68.

285. THEODORE J. ST. ANTOINE ET AL., LABOR LAW: CASES AND MATERIALS 139 (12th ed. 2011).

286. For example, bus drivers who complain about working conditions are protected, while those who complain about conditions related to student safety are not. Similarly, nurses who complain about staffing levels because they impact working conditions are protected, but those who complain about how staffing levels impact the quality of patient care are not. *Id.* Employees protesting manufacturing processes that threaten their workplace health and safety are protected, while those protesting environmental conditions created by the same manufacturing processes and impacting the surrounding community where they reside are not. *See* Pope, *Labor-Community Coalitions*, *supra* note 116, at 916–19.

287. *See, e.g.*, Richard Michael Fischl, *Self, Others, and Section 7: Mutualism and Protected Protest Activities Under the National Labor Relations Act*, 89 COLUM. L. REV. 789, 796 (1989); Charles J. Morris, *NLRB Protection in the Nonunion Workplace: A Glimpse at a General Theory of Section 7 Conduct*, 137 U. PA. L. REV. 1673, 1701 (1989). In a similar vein, the Norris-LaGuardia Act of 1932 limits the jurisdiction of federal courts to issue injunctions in cases involving or growing out of "labor disputes." Norris–La Guardia Act, Pub. L. No. 72-65, 47 Stat. 70, 70–71 (1932) (codified at 29 U.S.C. § 105 (2012)). In this context the Court has interpreted the phrase "labor disputes" broadly, however, so that even some politically motivated protests by unions and other groups have been able to claim statutory protection. *See, e.g.*, Jacksonville Bulk Terminals, Inc. v. Int'l Longshoremen's Ass'n, 457 U.S. 702, 723–24 (1982) (finding injunction unlawful where longshoremen refused to load vessels with cargo bound for the Soviet Union even though dispute was politically motivated, because the employer and the union had an intertwining dispute over the interpretation of the no-strike clause in their labor contract); Marine Cooks & Stewards v. Panama S.S. Co., 362 U.S. 365, 372 (1960) (finding that district court lacked jurisdiction to enjoin picketing of Liberian ship by an American union to protest substandard wages and benefits received by the ship's crew even where the union did not seek to represent the foreign workers); *see also* New Negro Alliance v. Sanitary Grocery Co., 303 U.S. 552, 563 (1938) (reversing injunction against an unincorporated association (not a labor union) that was boycotting and picketing a grocery store in support of demands that it hire African Americans).

under the Act.[288] For example, efforts by non-striking employees to generate a consumer boycott have been held to be unprotected where an employee continues to draw pay while engaged in activities designed to "injure or destroy his employer's business."[289] Even where the employees are on strike (and thus no longer drawing pay), handbilling that disparages the employer's product has been held unprotected.[290] In addition, workers who use profanity while exercising Section 7 rights may forfeit protection under the Act.[291] Further, concerted activity that is found to be particularly harmful to the employer's business operations may be deemed unprotected.[292] In 1998, when fifteen restaurant workers walked off the job during a peak business period after a popular supervisor was fired, the Seventh Circuit found the workers' action unprotected as an "unreasonable" means of protest.[293]

Finally, and significantly, courts have limited labor's economic weapons. One of the most effective means of concerted activity recognized and protected under the NLRA is the ability of workers to strike.[294] The strike is central to workers' leverage in collective bargaining, and the NLRA protects striking employees from employer interference under both Section 7 and Section 13.[295] But the Court ruled early on that although striking employees may not be fired, they may be permanently replaced, and the employer need not advance a legitimate business justification for doing so.[296]

The statutory bargain worsened for labor when the Taft-Hartley and Landrum-Griffin amendments to the NLRA added explicit restrictions on primary picketing, secondary boycotts, and union coercion.[297] As amended, the NLRA restricts primary picketing that has the

288. *See generally* Ken Matheny & Marion Crain, *Disloyal Workers and the "Un-American" Labor Law*, 82 N.C. L. REV. 1705, 1726–30 (2004) (describing cases where workers lost protection under the Act when their actions were characterized as disloyal).

289. Hoover Co. v. NLRB, 191 F.2d 380, 390 (6th Cir. 1951) ("An employer is not required, under the Act, to finance a boycott against himself."); *see also* George A. Hormel & Co. v. NLRB, 962 F.2d 1061, 1066 (D.C. Cir. 1992) (employee who participated in rally during off-duty time advocating consumer boycott of employer's products when no labor dispute existed could be discharged for unprotected disloyalty).

290. *See* Patterson-Sargent Co., 115 N.L.R.B. No. 255 (1956) (handbill warning consumers that paint was being manufactured by untrained, inexperienced workers during strike and thus might not possess its usual quality was unprotected; employees distributing it could be discharged).

291. *See In re* Aluminum Co., 338 N.L.R.B. No. 3 (2002); Atl. Steel Co., 245 N.L.R.B. No. 107 (1979).

292. *See supra* Part III.B.

293. Bob Evans Farms, Inc. v. NLRB, 163 F.3d 1012, 1022–24 (7th Cir. 1998).

294. James Gray Pope, *How American Workers Lost the Right to Strike, and Other Tales*, 103 MICH. L. REV. 518, 527–29 (2004) [hereinafter Pope, *How American Workers Lost the Right to Strike*].

295. NLRA §§ 7, 13, 29 U.S.C. §§ 157, 163 (2012).

296. NLRB v. Mackay Radio & Telegraph Co., 304 U.S. 333, 345–46 (1938). James Pope has observed that the employer's property and liberty rights were cloaked in Fifth Amendment constitutional garb, easily trumping the statutory rights of the workers predicated on associational freedom. Pope, *How American Workers Lost the Right to Strike*, *supra* note 294, at 530–31.

297. Labor Management Relations (Taft-Hartley) Act of 1947, 29 U.S.C. §§ 141–197 (2012).

goal of organizing workers or pressuring employers to recognize and bargain with a union.[298] It also bars unions from pressuring "secondary employers" (those who do business with the employer subject to the dispute (the "primary employer")), but with whom the union does not have any immediate dispute regarding wages or working conditions.[299] Finally, the Act bans any union activities potentially coercing or interfering with an individual's decision to join a union.[300] This restriction has been extended to include union-sponsored litigation that challenges an employer's violation of workers' rights in the time frame near to an election.[301]

These limitations create tension with assembly-based values. The narrowing of Section 7 protections for concerted activity cabins the subjects and sweep of labor activism, isolating the labor movement from other movements. It also frames the labor movement as a special interest group with an agenda limited to advancing its own members' economic well-being, even at the expense of others. The constraints on disloyalty and business disruption undercut dissenting efforts that might be the most effective means of garnering attention from employers or a sympathetic public. The strike protections strip workers of one of the most potent and timely forms of collective action. The restrictions on picketing block labor's ability to mobilize workers and the community against an employer at a critical point in time. The ban on secondary boycotts limits labor's ability to challenge business practices that involve networks or span an entire industry. In short, the significance of group action, the

298. *See* NLRA § 8(b)(7). Section 8(b)(7) was aimed at so-called "blackmail picketing" by uncertified labor unions (those which have not won a Board-supervised election and been certified as the bargaining representative of the employees) seeking to represent workers and/or to pressure employers to bargain. *See* Int'l Hod Carriers Local 840, 135 N.L.R.B. No. 121 (1962). It prohibits unions that have lost an election from picketing, bars picketing by a rival union where another union already represents the workers, and limits the duration of nonviolent picketing by uncertified unions that fall into neither category to "a reasonable period not to exceed 30 days," unless the picketing union files an election petition within that period. In order to file an election petition, the union must in turn be able to show sufficient employee interest, defined by Board rules as authorization cards or petitions signed by thirty percent of the workers in the potential bargaining unit. 29 C.F.R. § 101.18 (2014).

299. *See* NLRA § 8(b)(4). Section 8(b)(4) was motivated by the practice of top-down organizing, whereby powerful labor unions pressured employers to deal with the union in situations where the union was unable to organize workers by appealing directly to them. *See* NLRA § 8(b)(4)(i)(C). Section 8(b)(4) as enacted, however, focuses primarily on the impact of union pressure on so-called "neutrals"—the employers other than the primary who are impacted by the pressure. *See* NLRA § 8(b)(4)(i)(B). Consistent with the NLRA's industrial peace goal, 8(b)(4) seeks to cabin the dispute and to limit its ripple effects on the wider economy, including others with whom the primary does business. *See* NLRB v. Retail Store Emps. Union Local 1001 (*Safeco*), 447 U.S. 607, 613–15 (1980); *cf.* WEILER, *supra* note 216, at 269–73 (1990) (discussing rationale behind Section 8(b)(4) and critiquing its application).

300. NLRA § 8(a)(1).

301. NLRA § 8(b)(1); Freund Baking Co. v. NLRB, 165 F.3d 928, 930 (D.C. Cir. 1999); Nestle Ice Cream Co. v. NLRB, 46 F.3d 578, 579 (6th Cir. 1995); Catherine Fisk, *Unions and Employment Lawyers*, 23 BERKELEY J. EMP. & LAB. L. 57, 66 (2002).

many dimensions of a group's character and purposes, and the textured nature of message and place are all diminished within the conventions of the NLRA.

B. Worth the Bargain?

Given all of these constraints, is the NLRA worth the bargain for labor? Some labor leaders have suggested that the NLRA is more valuable to employers as a limit on labor activism than it is to workers and labor unions as a shelter for organizing and bargaining rights. For example, in 1969, Cesar Chavez, director of the Farm Workers Union Organizing Committee, testified before a Senate Subcommittee that the Farm Workers' Union would eschew coverage for agricultural workers under the NLRA absent amendments restoring labor's economic power through protection of the right to strike, boycott, and picket, lest coverage under the NLRA become "a glowing epitaph on our tombstone."[302]

It may be that the time has come to revisit the question of whether the benefits to labor are worth the burdens. The NLRA imposes restrictions on labor protests that would violate First Amendment doctrine in any other context. With the Taft-Hartley and Landrum-Griffin amendments, the already weak associational rights of workers against private employers now come with the added cost of sacrificing traditional speech and assembly rights against government actors who are empowered to constrain expressive (and otherwise legal) worker activity under the statutory framework.

The best evidence of the NLRA's disutility to the labor movement may be the fact that traditional labor unions are deliberately organizing outside the Act. Groups committed to advancing workers' rights are straining to avoid defining themselves as "labor organizations" in order to escape the NLRA's framework.[303] Further, labor unions isolate themselves from other movements, lest an alliance expose their partners to in-

302. Cesar E. Chavez, Director of Unified Farm Workers Organizing Committee, AFL-CIO, Testimony before the Subcommittee on Labor of the Senate Committee on Labor and Public Welfare, Apr. 16, 1969, *available at* https://libraries.ucsd.edu/farmworkermovement/essays/essays/Miller Archive/031%20Statement%20Of%20Cesar%20E.%20Chavez.pdf; *see also* Richard Trumka, *Why Labor Law Has Failed*, 89 W. VA. L. REV. 871, 881 (1987) (arguing that the NLRA should be abolished—not only the secondary boycott provisions that "hamstring labor at every turn," but the affirmative protections that Section 7 "promises but does not deliver"); Cathy Trost & Leonard M. Apcar, *AFL-CIO Chief Calls Labor Laws a "Dead Letter,"* WALL ST. J., Aug. 16, 1984, at 8 (contending that the NLRA is a "dead letter" and suggesting that workers would be "better off with the law of the jungle").

303. *See* NLRA § 2(5) (defining labor organization as one existing for the purpose of dealing with an employer); NLRB v. Cabot Carbon Co., 360 U.S. 203, 211 n.7 (1959) (finding employee participation committees "labor organizations" if they "deal with" the employer concerning grievances); Rosenfeld, *supra* note 2, at 471–72 (explaining risks that workers' centers or advocacy groups may be characterized as "labor organizations" and thus subject to the NLRA's restrictions on picketing and secondary pressure activities).

junctions and damages.[304] The consequences thus extend beyond questions of coverage for labor law to the scope of labor's broader participation in political discourse and action. Consider, by way of example, Jimmy Hoffa's conclusion that the NLRA's secondary boycott restrictions prohibited the Teamsters from accepting Martin Luther King, Jr.'s request that they join civil rights boycotts against the state of Alabama.[305]

Recent protests by fast-food workers and other minimum wage earners in the "Fight for 15" provide another example of how labor loses under the NLRA.[306] These protests have quickly gathered momentum, spreading to retail establishments beyond fast food that are also dependent on low-wage labor, and sparking additional protests, one-day strikes, and rallies in major cities nationwide.[307] These rolling, class-wide protests are not restricted by labor laws as long as the groups that engage in them are not defined as a "labor organization" that exists to "deal with" a single employer.[308] The SEIU disclaims the goal of organizing any single group, but has invested millions of dollars and substantial staff time in supporting the movement.[309] The SEIU's support for the protests has provoked a backlash from business and some politicians who argue that the Fast Food Forward movement is merely a front for union activism.[310] These kinds of concerns also kept unions at a distance from the recent Occupy Movement, whose agenda included highlighting economic and workplace inequality.[311]

The "Fight for 15" protests have the potential to achieve legislative change at the local, state, and even national level. And they have already affected wage and labor policies at McDonald's, Walmart, and other low wage workplaces. [312] But it is unclear whether the protests can sustain

304. *See* Kris Maher, *Worker Centers Offer a Backdoor Approach to Union Organizing*, WALL ST. J. (July 24, 2013, 6:53 PM), http://www.wsj.com/articles/SB10001424127887324144304578622050818960988 (describing how workers' centers, often backed by unions, avoid the NLRA's restrictions because they lack ongoing bargaining relationships with employers).

305. Letters from James R. Hoffa, Gen. President, Int'l Bhd. of Teamsters, to Martin Luther King, Jr., S. Christian Leadership Conference (Mar. 29, 1965) *available at* http://www.thekingcenter.org/archive/document/letter-james-r-hoffa-mlk#. Thanks to Charlotte Garden for pointing us to this letter.

306. *See, e.g.*, Steven Greenhouse, *A Day's Strike Seeks to Raise Fast-Food Pay*, N.Y. TIMES, (July 31, 2013), http://www.nytimes.com/2013/08/01/business/strike-for-day-seeks-to-raise-fast-food-pay.html?_r=0.

307. *Id.*; Ben Penn, *About 2,200 Fast Food, Retail Workers Strike for Raise in Pay in Seven Cities This Week*, Daily Lab. Rep. (BNA) No. 148, at A-13.

308. *See* NLRA § 2(5); NLRB v. Ne. Univ., 601 F.2d 1208, 1216 n.9 (1st Cir. 1979) (finding National Association of Working Women 9 to 5 not a labor organization).

309. *See supra* Part I.

310. *See id.*

311. *See generally* Lester, *supra* note 234; TODD GITLIN, OCCUPY NATION: THE ROOTS, THE SPIRIT, AND THE PROMISE OF OCCUPY WALL STREET (2012).

312. McDonald's, Walmart, and several other businesses that employ low-wage service workers recently agreed to raise workers' wages above the current minimum wage. Although these employers

themselves and resist rollbacks without some structural form of representation funded by dues.

Workaround strategies that avoid the statutory framework make it difficult to institutionalize forms of worker representation over time that will outlast the particular advocacy effort.[313] The result is more organic (but over the long haul, perhaps less effective) forms of organizing. Worse still, the NLRA's restrictions on labor protest have forced traditional unions to distance themselves from the most promising new organizing initiatives, leaving labor's tarnished image as self-interested and corrupt intact in much of the public mind. In turn, unions find it difficult to re-brand themselves as champions of the rapidly growing low-wage service sector. Ultimately, the law frustrates the evolution of the character of unions and other worker collectivities.

In light of the current statutory framework, workers might be better off with reinvigorated assembly rights that allow for the full range of peaceful picketing, secondary boycotts, and membership solicitation, even at the cost of losing section 7 protection against employer retaliation for that activity. In other words, our (admittedly provocative) suggestion is that the constitutional right to assembly (enforceable against government actors) might ultimately be better for labor unionism than the existing statutory associational protections (enforceable against private employers).[314] At the very least, a reinvigorated right of assembly could serve as the basis for a constitutional challenge to the NLRA's restrictions on picketing and secondary boycotts.

Importantly, though, contemporary First Amendment jurisprudence would need to change in order for these protections to manifest in meaningful ways. As we have noted here and others have shown elsewhere,

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explain the wage raise as necessary to attract and retain workers in a strengthening labor market, Fast Food Forward and OUR Walmart claim credit for obtaining the increase. *See* Lydia DePillis, *Following the Crowd, McDonald's Pledges to Raise Wages*, WASH. POST (Apr. 1, 2015), http://www.washingtonpost.com/blogs/wonkblog/wp/2015/04/01/following-the-crowd-mcdonalds-pledges-to-raise-wages/; OUR WALMART, www.forrespect.org (last visited Apr. 26, 2015) (OUR Walmart website proclaiming "We are Winning! 500,000 Associates Get a Raise"); Tom Zanki, *McDonald's to Raise Workers' Wages at Co.'s Restaurants*, EMP. L. 360 (Apr. 1, 2015, 10:07 PM), http://www.law360.com/articles/638521/mcdonald-s-to-raise-workers-wages-at-co-s-restaurants.

313. *See* Alan Hyde, *Who Speaks for the Working Poor?: A Preliminary Look at the Emerging Tetralogy of Representation of Low-Wage Service Workers*, 13 CORNELL J.L. & PUB. POL'Y 599, 603–06 (2004) (describing similar workarounds and questioning their efficacy); *see also* Matthew T. Bodie, *The Potential for State Labor Law: The New York Greengrocer Code of Conduct*, 21 HOFSTRA LAB. & EMP. L. J. 183, 194–200 (2003) (discussing New York City Greengrocer Code of Conduct establishing minimum terms and conditions for employment of predominantly Korean workforce; grocers who signed the Code were immune from prosecution for past state law violations but not for future violations, and the signatories agreed to future monitoring by an independent company).

314. Or, more bluntly, as one of us has argued, maybe it would be better to repeal the NLRA "and turn unions and workers loose in the streets and the courts." *See Scholar Floats Radical Plan: Repeal Most of National Labor Relations Act, Turn Unions, Workers Loose in Streets, Courts*, AM. FED'N SCH. ADMINS. (June 2, 2014, 3:54 PM), http://afsaadmin.org/scholar-floats-radical-plan-repeal-most-of-national-labor-relations-act-turn-unions-workers-loose-in-streets-courts/.

the modern focus on the rights of speech and expressive association has weakened the doctrinal framework of the right of assembly and obscured the values and history that animate that right. But there are good historical, theoretical, and constitutional reasons for returning to the right of assembly. We have highlighted two ways in which renewed attention to assembly could directly benefit labor. The first, which extends beyond the current doctrinal contours of the right of association, provides meaningful protection not only to organized unions and concerted activity, but also to informal forms of gathering and coalition building.[315] The second, which moves away from speech-based time, place, and manner restrictions, strengthens protections for protests and demonstrations, particularly in public forums.[316]

The broadly applicable protections of the assembly right, which cover all kinds of groups across the political and ideological spectrum, contrast with the labor-specific protections envisioned by the NLRA. Peculiar protections for labor unionism could be construed as a kind of "labor exceptionalism." In contrast, the broadly pluralistic impulses of assembly protections benefit labor unionism but extend to many other kinds of organizing and activity.[317]

What might labor unionism have looked like had it not been subject to the narrowing forces of the NLRA and instead developed alongside meaningful and robust assembly rights? We cannot know, of course, but consider the following: at an 1893 Labor Congress in Chicago, Samuel Gompers answered the oft-posed question—"What does labor want?"—with two responses.[318] The first—"more, more, more"—captures the current public perception of unions as little more than special interest groups.[319] But the second, less frequently quoted response, was this:

> What does labor want? It wants the earth and the fullness thereof. There is nothing too precious, there is nothing too beautiful, too lofty, too ennobling, unless it is within the scope and comprehen-

315. *See supra* Part IV.A.

316. *See supra* Part IV.B–C.

317. For a similar argument about the limited salience of claims of "religious exceptionalism" by religious groups, see Inazu, *More is More*, *supra* note 91, at 531. There are, in fact, interesting parallels between these two forms of collective action. Both have been singled out for special protection: in the case of labor, under the statutory framework of the NLRA; in the case of religion, under the free exercise clause of the First Amendment. Both also confront special disadvantages (the amendments to the NLRA that constrain labor and the establishment clause of the First Amendment that constraints religion). And in both labor and religion, courts have circumscribed what might otherwise have been broader protections. *See, e.g.*, Emp't Div. v. Smith, 494 U.S. 872, 887–88 (1990) (rejecting strict scrutiny review for free exercise challenge to neutral laws of general applicability); City of Boerne v. Flores, 521 U.S. 507, 516 (1997) (invalidating major provisions of the Religious Freedom Restoration Act of 1993 ("RFRA"), Pub. L. No. 103-141, 107 Stat. 1488 (1993)).

318. *See* Samuel Gompers, What Does Labor Want? (Sept. 1893), *available at* http://www.gompers.umd.edu/1893%20more%20speech.htm.

319. *See* RICHARD B. FREEMAN & JOEL ROGERS, WHAT WORKERS WANT 89 (1999) (documenting popular distaste for unionism).

> sion of labor's aspirations and wants. . . . We want more school houses and less jails; more books and less arsenals; more learning and less vice; more constant work and less crime; more leisure and less greed; more justice and less revenge; in fact, more of the opportunities to cultivate our better natures . . . .[320]

Gompers' words could themselves be dismissed as "too lofty, too ennobling."[321] But to do so would miss the kind of politics that transcends a rigid compartmentalization of issue-driven interests. That politics insists that our lives are necessarily integrated with one another and throughout our different spheres. Schoolhouses, books, and leisure have everything to do with the workplace when we recognize the ways in which we actually live our lives. Viewing the realm of labor as merely economic and its advocates as purely self-interested denies not only the realities of politics but also the reality of the human condition.

VI. CONCLUSION

Scholars have only begun to uncover the rich historical, theoretical, and doctrinal connections between labor and assembly. This Article has sought to advance that effort by highlighting the ways in which doctrines and cases from these two areas of law have informed one another: the labor protest and the public forum, the Court's distinction between "speech" and "speech plus," the efforts to characterize labor as monolithically violent, and the failure to appreciate the textured meanings of labor expression and labor unionism. Our analysis shows how reassembling labor could impact real-world activism as well as yield theoretical gains, and suggests how law might be more attentive to the constitutional implications of labor's collective voice.

We anticipate that there is a great deal more work to be done in the effort to re-assemble labor and, in that process, to point to the democratic aspirations of our polity, of the role of labor, and of the First Amendment. One thing seems clear, however: First Amendment jurisprudence and labor law doctrine have a great deal to learn from one another, and neither should be predicated on historically contingent fears. As Justice Brandeis famously wrote, "[f]ear of serious injury cannot alone justify suppression of free speech and assembly. Men feared witches and burnt women."[322] Curtailing workers' assembly rights should be based on more than centuries-old notions of labor unionism as intrinsically violent. Both our Constitution and our labor laws embrace assembly as fundamental to the health of our democratic polity.

320. *See supra* note 318.
321. *Id.*
322. Whitney v. California, 274 U.S. 357, 376 (1927) (Brandeis, J., concurring).