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## RE-ASSEMBLING LABOR

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*Organized labor’s judicial, political, and public image is often associated with violence and anarchy. These descriptions are not spun out of whole cloth: violent uprisings that challenged the political and economic order were common in the early days of American labor unionism. But the assumptions underlying early judicial rhetoric and labor law doctrine have outlived their original context. Historical antecedents applied to modern protests like Fast Food Forward, OUR Walmart and the Occupy Movement yield troubling and inconsistent results. Courts struggle to characterize protest activities by workers acting collectively as either “pure speech” protected by the First Amendment or coercive conduct subject to significant regulation.*

*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 assembly-based protections for relational as well as individual expressive activity. 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 I and II by situating the historical relationship between labor and assembly. Part III develops three theoretical insights reinforced by the connections between assembly and labor. First, the experience of collective expression represents more than simply an aggregation of individual voices; expressive activities constitute the group’s very identity. Second, groups are not one-dimensional but have many functions, purposes and messages, which are developed and negotiated through collective expression.*

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*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 IV applies the theoretical insights discussed in Part III to labor law, demonstrating how the gains of assembly might facilitate a richer understanding of labor unionism and its connections to the rest of our First Amendment jurisprudence. We focus particularly upon doctrine relating to picketing, secondary boycotts, and other forms of concerted activity and collective expression.*

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## INTRODUCTION

Labor protests once confronted almost insurmountable caricatures: as one federal court put it, “There can be no such thing as peaceful picketing any more than there can be chaste vulgarity, or peaceful mobbing, or lawful lynching.”<sup>1</sup> Contemporary rhetoric has softened, but the images of the past still haunt today’s labor unionism.<sup>2</sup> Consider the following examples:

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<sup>1</sup> T.S.F. Ry. Co. v. Gee et al., 139 Fed. 582, 584 (1905).

<sup>2</sup> By “labor unionism,” we mean to include the broad range of forms that collective worker activism may assume, 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 CATHOLIC UNIV. L. REV. \_\_\_\_ (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*, 30 BERKELEY J. EMP. & LAB. L. 232 (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 (2006)(same).

- This past summer, thousands of workers gathered on public streets and sidewalks outside of fast-food restaurants around the country for one-day protests for higher wages in a movement they call “Fast Food Forward.”<sup>3</sup> Conservative politicians and the United States Chamber of Commerce pressured the Department of Labor to classify the protest organizers as “labor organizations” in an effort to subject them to financial reporting requirements and expressive limits.<sup>4</sup>
- In 2012, Walmart employees organized as a group called “OUR Walmart” launched a series of one-day pickets protesting low wages. Because the workers’ group was loosely affiliated with the United Food and Commercial Workers Union, the National Labor Relations Board indicated its intent to file blackmail picketing charges.<sup>5</sup>
- Since the 1980s, and with increasing frequency over the past two decades, employers have argued that union organizing

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<sup>3</sup> See Fast Food Forward, at [www.fastfoodforward.org](http://www.fastfoodforward.org). The protesters’ goals include 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 protest “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). Steven Greenhouse, *A Day’s Strike Seeks to Raise Fast-Food Pay*, N.Y. TIMES (July 31, 2013); see also 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 (describing one day walkouts in Milwaukee and Chicago, and noting that employees of 400 stores, including fast food and retail establishments such as Sears, Macy’s and Dollar Tree have conducted one-day strikes designed to press for higher pay and the right to unionize without retaliation).

<sup>4</sup> Susan J. McGolrick, *House Panel Looks at Future of Organizing and Legal Status of Worker Groups, Centers*, DAILY LAB. REP. No. 182, Sept. 19, 2013, at A-7, A-8; see Susan J. McGolrick, *U.S. Chamber Report Casts Worker Centers As Means for Unions to Circumvent NLRA*, DAILY LAB. REP. No. 38, Feb. 26, 2014, at A-12, A-13 (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).

<sup>5</sup> See Steven Greenhouse, *Labor Union to Ease Walmart Picketing*, N.Y. TIMES, Feb. 1, 2013. The NLRB sought to bring charges under section 8(b)(7) of the NLRA. The union 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.*

campaigns are racketeering activity.<sup>6</sup> Some employers have even sued unions under the Racketeer Influenced and Corrupt Organizations Act (RICO).<sup>7</sup> In one notable case, a federal district court rejected the workers’ First Amendment defense, noting that “the First Amendment simply does not protect extortion.”<sup>8</sup>

- In 2004, Secretary of Education Roderick Paige characterized the National Education Association as a “terrorist organization” and accused the union of “obstructionist scare tactics.”<sup>9</sup>

These examples illustrate how organized labor’s judicial, political, and public image remains linked to 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.<sup>10</sup> Worker solidarity and class-wide uprisings also threatened the capitalist economic order.

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<sup>6</sup> James J. Brudney, *Collateral Conflict: Employer Claims of RICO Extortion Against Union Comprehensive Campaigns*, 83 S. CAL. L. REV. 731, 754-56 (2010).

<sup>7</sup> 18 U.S.C. §§ 1961-1968 (2006).

<sup>8</sup> *Smithfield v. United Food & Commercial Workers International Union*, 585 F. Supp. 2d 789, 805 (2008). See Charlotte Garden, *Labor Values are First Amendment Values: Why Union Comprehensive Campaigns are Protected Speech*, 79 FORDHAM L. REV. 2617, 2619-20 (2011) (discussing the *Smithfield* lawsuit); 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) (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).

<sup>9</sup> Amy Goldstein, *Paige Calls NEA a “Terrorist” Group*, WASH. POST, Feb. 24, 2004, at A-19; Robert Tanner, *Education Secretary Attacks Teachers Union*, HERALD-SUN (Durham, N.C.), Feb. 24, 2004, at 3. 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.*

<sup>10</sup> See Paul Moreno, *Organized Labor and American Law: From Freedom of Association to Compulsory Unionism*, FREEDOM OF ASSOCIATION 22 (ELLEN FRANKEL *et. al* eds., 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 (1988–1989) (describing how judges came to equate union pickets and strikes with violence,

But the assumptions underlying early judicial rhetoric and labor law doctrine have outlived their original context. Historical antecedents applied to modern protests now yield troubling and inconsistent results. Courts struggle to characterize picketing and other protest activities by workers acting collectively as either “pure speech” protected by the First Amendment or coercive conduct subject to significant regulation. Particular cases often hinge on whether a labor union is involved in the protests. This posture, due in part to labor statutes but also reflecting labor unionism’s historical reputation, has direct consequences for the efficacy of worker protests and weakens doctrinal coherence in First Amendment jurisprudence.

These consequences have not gone unnoticed. A number of labor scholars have criticized the tension between free speech doctrine and labor law.<sup>11</sup> Meanwhile, free speech scholars have recognized but largely ignored the tensions raised in the Court’s treatment of labor expression.<sup>12</sup> But these *speech*-focused inquiries are only part of the story. The commentary to date has overlooked the important connection between the collective, group-based nature of labor activism and the First Amendment’s *assembly*-based protections for relational as well as individual expressive activity.

Recent work in both labor law and First Amendment scholarship has opened the door to the more robust inquiry we

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and critiquing 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*, 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).

<sup>11</sup> See, e.g., Marion Crain, *Between Feminism and Unionism: Working Class Women, Feminism and Labor Speech*, 82 GEO. L.J. 1903 (1994); Jack Getman, *Labor Law and Free Speech: The Curious Policy of Limited Expression*, 43 MD. L. REV. 4, 7 (1984); Cynthia Estlund, *Labor Picketing and Commercial Speech: Free Enterprise Values in the Doctrine of Free Speech*, 91 YALE L.J. 938 (1982); Charlotte Garden, *Citizens, United, and Citizens United: The Future of Labor Speech Rights?*, 53 WM. & MARY L. REV. 1, 17 (2011); 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).

<sup>12</sup> 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.”).

undertake here.<sup>13</sup> A vigorous body of First Amendment scholarship has drawn renewed attention to the right of assembly in our constitutional tradition.<sup>14</sup> And labor scholars have increasingly focused on renewal strategies for labor unionism, including

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<sup>13</sup> The focus of this article does not permit a lengthy discussion of reverse First Amendment rights—that is, the right not to speak or the right not to assemble. *See generally*, Joseph Blocher, *Rights To and Not To*, 99 CAL. L. REV. 761 (2012). 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) and *Knox v. Service Employees Int’l 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 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 I, the Court has focused in these cases on speech and association rights rather than on assembly rights. *See Citizens United, supra*, at 361-62; *Knox, supra*, 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 the two cases and criticizing the Court’s inconsistent treatment of a corporation and a labor union in the context of speech rights).

<sup>14</sup> *See* JOHN D. INAZU, LIBERTY’S REFUGE: THE FORGOTTEN FREEDOM OF ASSEMBLY (2012); Ashutosh Bhagwat, *Associational Speech*, 120 YALE L.J. 978 (2011); 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); John D. Inazu, *The Forgotten Freedom of Assembly*, 84 TUL. L. REV. 565 (2010); 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); John D. Inazu, *Virtual Assembly*, 98 CORNELL L. REV. 1093 (2013); Richard A. Epstein, *Forgotten No More*, ENGAGE 157 (March 2012); Michael McConnell, *Freedom by Association*, FIRST THINGS 39, 41 (August/September 2012); Timothy Zick, *Recovering the Assembly Clause*, 91 TEXAS L. REV. 375 (2012); Ashutosh A. Bhagwat, *Assembly Resurrected*, 91 TEXAS L. REV. 351 (2012); Gregory P. Magarian, *Entering Liberty’s Refuge (Some Assembly Required)*, 89 WASH. U. L. REV. 1375 (2012); Ashutosh Bhagwat, *Liberty’s Refuge, or the Refuge of Scoundrels?: The Limits of the Right of Assembly*, 89 WASH. U. L. REV. 1381 (2012); Robert K. Vischer, *How Necessary is the Right of Assembly?*, 89 WASH. U. L. REV. 1403 (2012); Susan Frelich Appleton, *Liberty’s Forgotten Refugees? Engendering Assembly*, 89 WASH. U. L. REV. 1423 (2012); John D. Inazu, *Factions for the Rest of Us*, 89 WASH. U. L. REV. 1435, 1436 (2012).

proposals focused on the judicially recognized right of association.<sup>15</sup> 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.<sup>16</sup>

We begin in Parts I and II by situating 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 one another.

Part III develops three theoretical insights reinforced by the connections between assembly and labor. First, the experience of collective expression represents more than simply an aggregation of individual voices; it builds and cements communal bonds which in turn make mobilization for transformative 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 these groups into outcome-determinative legal categories (like “expressive” or “nonexpressive”) 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 in the town square not only communicates to a different audience but also signals different meanings and expressions.

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<sup>15</sup> 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; Ruben J. Garcia, *Labor’s Fragile Freedom of Association Post 9/11*, 8 U. PA. L. J. LAB. & EMP. L. 283, 288-90 (2006); James Gray Pope, Peter Kellman & Ed Bruno, *The Employee Free Choice Act and A Long-Term Strategy for Winning Workers’ Rights*, 11 WORKINGUSA 125, 135 (March 2008); 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).

<sup>16</sup> Cf. Marion Crain & Ken Matheny, *Beyond Unions, Notwithstanding Labor Law*, 4 U.C.-IRVINE L. REV. \_\_\_\_ (forthcoming 2014) (mapping tentative connections and gesturing toward the possibilities of renewed assembly rights for labor law); 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).

These three insights—collective expression, multivalent meaning, and the importance of context—also shed light on the ramifications for collective and dissenting power that arise from an enfeebled commitment to legal protection for groups that push against prevailing norms. When law hobbles group expression and mobilization, it inevitably weakens the bonds between a group’s members, making it more difficult for the group to convey its message and to persuade others to join or to support the group’s goals, and weakening the efficacy of group action.

Part IV applies the theoretical critiques discussed in Part III to labor law, demonstrating how the gains of assembly might facilitate a richer understanding of labor unionism and its connections to the rest of our First Amendment jurisprudence. Our analysis shows how re-assembling labor impacts real-world activism as well as yielding theoretical gains, and suggests how law might be more attentive to the constitutional implications of labor’s collective voice.

## I. THE RIGHT OF ASSEMBLY

### A. *Early Understandings of Assembly*

The First Amendment protects the right of the people “peaceably to assemble.”<sup>17</sup> Contrary to the assumptions of generations of modern scholars, the stand-alone right is not wedded to the separate petition right.<sup>18</sup> In fact, assembly has long protected

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<sup>17</sup> U.S. CONST. AMEND.. I.

<sup>18</sup> See generally INAZU, *supra* note \_\_, at 21-25 (tracing textual history). 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, *supra*, 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 added); *McDonald v. Chicago*, 130 S. Ct. 3020, 3031 (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))); *cf.* *Chisom v. Roemer*, 501 U.S. 380, 409 (1991) (Scalia, J., dissenting) (the First Amendment “has not generally been thought to protect the right peaceably to



the private groups of civil society. 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.<sup>19</sup> 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.<sup>20</sup> 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.<sup>21</sup> Meanwhile, female abolitionists and suffragists in the North organized their efforts around a particular form of assembly, the convention.<sup>22</sup> 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.<sup>23</sup>

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.<sup>24</sup> 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.<sup>25</sup> 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).<sup>26</sup>

The manifestations of assembly throughout our nation’s history suggest that it encompasses not only group expression in

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assemble only when the purpose of the assembly is to petition the Government for a redress of grievances”).

<sup>19</sup> INAZU, *supra* note \_\_, at 24-25.

<sup>20</sup> *Id.* at 26-29.

<sup>21</sup> *Id.* at 29-44.

<sup>22</sup> *Id.* at 44-45.

<sup>23</sup> AKHIL R. AMAR, *THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION* 246 (1998).

<sup>24</sup> INAZU, *supra* note \_\_, at 55-57.

<sup>25</sup> *Id.* at 49-58.

<sup>26</sup> See John D. Inazu, *The Four Freedoms and the Future of Religious Liberty*, 92 N.C. L. REV. 101 (2014).

temporal gatherings but also the groups that precede that expression and make it possible. 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.<sup>27</sup> But the verb “assemble” presupposes a noun—an assembly. And while some assemblies occur spontaneously, most do not. As Michael McConnell has 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.<sup>28</sup>

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.<sup>29</sup> Indeed, the vision of assembly as extending to “pre-political” groups that inform rather than simply manifest expression

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<sup>27</sup>Epstein, *supra* note \_\_, at 157 (“[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.”).

<sup>28</sup>McConnell, *supra* note \_\_, at 41.

<sup>29</sup>*Cf.* INAZU, *supra* note \_\_, 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, *supra* note \_\_, 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.”).

underpins the social bonds that strengthened civil rights, women’s suffrage, and gay rights.<sup>30</sup>

In 1937, the Supreme Court chose a labor-related case to incorporate the right of assembly against the states. *De Jonge v. Oregon* involved 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.”<sup>31</sup> 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.”<sup>32</sup> In an opinion that made clear the assembly right’s significance to democratic government, 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, to the end that government may be responsive to the will of the people and that changes, if desired, may be obtained by peaceful means. Therein lies the security of the Republic, the very foundation of constitutional government.”<sup>33</sup>

### *B. The Public Forum*

Two years after *De Jonge*, the Court grounded one of the cornerstones of modern First Amendment jurisprudence—the public

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<sup>30</sup>See, e.g., JOHN HOPE FRANKLIN AND ALFRED A. MOSS JR., FROM SLAVERY TO FREEDOM: A HISTORY OF AFRICAN AMERICANS 377 (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 Lumsden, RAMPANT WOMEN: SUFFRAGISTS AND THE RIGHT OF ASSEMBLY 3 (1997) (describing 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*, 130 S. Ct. 2971 (2010) (No. 08-1371) (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.”).

<sup>31</sup>*DeJonge v. Oregon*, 299 U.S. 353, 359 (1937)

<sup>32</sup>*Id.* at 364.

<sup>33</sup>*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).

forum—in a case connecting labor and assembly.<sup>34</sup> The case arose in 1938, when the CIO brought a federal suit to enjoin Jersey City Mayor Frank Hague from interfering with its First Amendment rights of assembly and speech.<sup>35</sup> The district court granted the injunction on free speech grounds alone.<sup>36</sup> The opinion relied on “the history and philosophy of free speech.” The court explained that this was because of “the comparative paucity of material on free assembly.”<sup>37</sup> Based on that premise, the court concluded that “[i]nasmuch as free assembly is a special form of free speech, the philosophy of the latter applies.”<sup>38</sup>

The exclusively speech-based rationale was short lived. When the case was 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.<sup>39</sup> The core of the lengthy brief’s argument was the right of assembly.<sup>40</sup> It stressed that “the integrity of the right ‘peaceably to assemble’ is an essential element of the democratic system” and “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.”<sup>41</sup>

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<sup>34</sup> *Hague v. Committee for Industrial Organization*, 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).

<sup>35</sup> *Committee for Industrial Organization v. Hague*, 25 F.Supp. 127 (1938).

<sup>36</sup> *Id.* at 137.

<sup>37</sup> *Id.*

<sup>38</sup> *Id.* at 138.

<sup>39</sup> Brief for the Committee on the Bill of Rights, of the American Bar Association as Amicus Curiae, *Hague v. Committee for Industrial Organization*, 307 U.S. 496 (1939) (No. 651) (“ABA Brief”).

<sup>40</sup> The brief’s first argument was captioned “Freedom of assembly is an essential element of the American democratic system.” *Id.* at 7.

<sup>41</sup> *Id.* 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 (1939).

The Supreme Court’s *Hague* decision drew heavily from Chafee’s brief.<sup>42</sup> Justice Roberts’s plurality opinion referred to both rights of speech and assembly, but included more focused commentary on the right of assembly.<sup>43</sup> Roberts, penning a still notable phrase of First Amendment jurisprudence, wrote: “Wherever 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.”<sup>44</sup> The *New York Times* lauded the decision. It noted that “with the right of assembly reasserted, all ‘four freedoms’ of [the] Constitution are well established.”<sup>45</sup>

### C. Strengthening Assembly and Labor

The rhetorical high point of assembly and labor came in *Thomas v. Collins*.<sup>46</sup> 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. The law was Texas’s first attempt to regulate labor unions—it required that all union organizers register with the secretary of state and imposed

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<sup>42</sup> Compare *Hague*, 307 U.S. 496, 514-16 (1939) with ABA Brief at 37-40.

<sup>43</sup> *Hague*, 307 U.S. at 514-16.

<sup>44</sup> *Id.* at 515. See McConnell, *supra* note \_\_ [Freedom By Association] (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”).

<sup>45</sup> Dean Dinwoodey, *A Fundamental Liberty Upheld in Hague Case*, N.Y. TIMES, June 11, 1939, E7. 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. 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).

<sup>46</sup> 323 U.S. 516 (1943).

other substantive restrictions. 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.”<sup>47</sup>

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. In a 5-4 decision, the Supreme Court overturned the contempt conviction.<sup>48</sup> Justice Wiley 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 only “the gravest abuses, endangering paramount interests, give occasion for permissible limitation.”<sup>49</sup> However, Thomas had argued that the Manford Act contravened the National Labor Relations Act of 1935 (the NLRA).<sup>50</sup> Justice Rutledge 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.<sup>51</sup> 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.<sup>52</sup>

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

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<sup>47</sup> “Test for Texas Labor Law: Thomas of the Auto Union Will Argue His Case Before High State Court,” *New York Times*, October 10, 1943. 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.*

<sup>48</sup> *Thomas v. Collins*, 323 U.S. 516 (1945).

<sup>49</sup> *Id.* at 530.

<sup>50</sup> The National Labor Relations Act of 1935, 29 U.S.C. §§151-169 (“Wagner Act”).

<sup>51</sup> *Collins*, 323 U.S. at 531.

<sup>52</sup> *Id.*

with federal elections.<sup>53</sup> 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.<sup>54</sup> In *United States v. Committee for Industrial Organization*, the Court sided with the union without reaching the constitutional question.<sup>55</sup> Justice Rutledge, joined by three of his colleagues would have gone further.<sup>56</sup> 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.<sup>57</sup>

Rutledge lambasted the statutory restrictions for having the goal “to force unions as such entirely out of political life and activity,

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<sup>53</sup> *United States v. CIO*, 335 U.S. 106 (1948).

<sup>54</sup> *Id.* at 121.

<sup>55</sup> *Id.* at 121-22.

<sup>56</sup> *Id.* at 129 (Rutledge J., concurring) Justice Rutledge's concurrence is cited by the majority in *Citizens United*, 130 S. Ct. 876, 901 (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.’”).

<sup>57</sup> *Id.* 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.* Accord *INAZU*, *supra* note \_\_\_, 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.”).

including for presently pertinent purposes the expression of organized viewpoint concerning matters affecting their vital interests at the most crucial point where the expression would become effective.”<sup>58</sup>

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 political and expressive goals of labor organizers. A generation later, the eminent legal scholar Harry Kalven lamented that *Hague*’s framework was “not enshrined as the starting point for judicial analysis in cases of speech in public places.”<sup>59</sup> He hinted at “subtle but definite transformations” in subsequent decisions and worried about “[t]he Court’s neat dichotomy of ‘speech pure’ and ‘speech plus.’”<sup>60</sup> That distinction protected expression that was reducible to verbal or written speech but disfavored “parades, pickets, and protests” that were deemed to be “speech plus.”<sup>61</sup> It works within a speech-based framework. But the introduction of assembly necessarily collapses the distinction: every assembly is “speech plus.”<sup>62</sup>

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.”<sup>63</sup> His commentary on the public forum laid the groundwork for a renewed doctrinal focus by the Supreme Court.<sup>64</sup> Importantly, he clearly envisioned a minimalist approach to government regulation of the public forum, focusing on the need for “some commitment to order

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<sup>58</sup> *Id.* at 150.

<sup>59</sup> Harry Kalven, Jr., *The Concept of the Public Forum: Cox v. Louisiana*, 1965 SUP. CT. REV. 1, 14 (1965). Kalven also reaffirmed the assembly roots of *Hague* by highlighting the influence of Chafee’s brief on the Court’s decision. *Id.*

<sup>60</sup> *Id.* at 14.

<sup>61</sup> *Id.* at 22.

<sup>62</sup> The implications of the distinction between “speech” and “speech plus” are particularly salient in the labor context with respect to pickets. *See* Part II, *infra*.

<sup>63</sup> Kalven, *supra* note \_\_, at 11-12.

<sup>64</sup> *See* Robert Post, *Between Governance and Management: The History and Theory of the Public Forum*, 34 UCLA L. REV. 1713, 1714-15 (1987). (describing Kalven’s influence on the doctrinal framework surrounding the public forum).



and etiquette.”<sup>65</sup> As he concluded his article: “Among the many hallmarks of an open society, surely one must be that not every group of people on the streets is ‘a mob.’”<sup>66</sup> This kind of approach would have offered strong protections for expressive liberties in public spaces.

#### *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 free speech right. 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 movements toward free speech doctrine neglect the ways in which the nature, composition, and manifestation of a group are themselves important forms of expression and dissent.

##### 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. Patterson*.<sup>67</sup> The most significant reformulation of

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<sup>65</sup> Kalven, *supra* note \_\_, at 23.

<sup>66</sup> *Id.* at 32.

<sup>67</sup> 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

that right came in the Court’s 1984 decision in *Roberts v. U.S. Jaycees*.<sup>68</sup> Justice William Brennan’s majority opinion asserted that previous decisions had identified two separate constitutional sources for the right of association. One line of decisions provided protection to “intimate association,” a “fundamental element of personal liberty.”<sup>69</sup> Another set of decisions guarded “expressive association,” which in contrast, 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.”<sup>70</sup>

The expressive criterion implies that some groups are “nonexpressive.”<sup>71</sup> 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.<sup>72</sup> The expressive association doctrine ignores these realities, and eliminates constitutional protections for “pre-expressive” and “pre-political” groups in civil society.<sup>73</sup> 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

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of the judge’s order through a series of disingenuous procedural rulings, the NAACP appealed to the United States Supreme Court. *Id.* at 166.

<sup>68</sup> 468 U.S. 609 (1984).

<sup>69</sup> *Id.* at 617–18 (majority opinion).

<sup>70</sup> *Id.*

<sup>71</sup> Justice O’Connor made this distinction explicit in her concurrence. *Id.* at 638 (O’Connor, J., concurring) (“this Court’s case law recognizes radically different constitutional protections for expressive and nonexpressive associations).

<sup>72</sup> The “expressive” versus “non-expressive” distinction is also complicated because meaning is dynamic and subject to more than one interpretive gloss. See generally INAZU, *supra* note \_\_, 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, *supra* note \_\_, at \_\_.

<sup>73</sup> See Inazu, *supra* note \_\_, [Virtual Assembly] (discussing hypothetical St. Louis Beer Lovers Club). See also John D. Inazu, *More is More*, 99 MINN. L. REV. (forthcoming 2014) (discussing skating rinks, coffee shops, and fraternities).

widely shared societal norms.<sup>74</sup>

## 2. The (Speech-focused) Public Forum

The second doctrinal development that has weakened protections for assembly and labor has been the further drift of the public forum doctrine toward a speech-focused analysis.<sup>75</sup> One problem with the free speech framework is that it relies exclusively on a “content neutrality” inquiry that misses the expressive connection between speech and the time, place, and manner in which it occurs.<sup>76</sup> Content-neutral time restrictions sometimes sever the link between message and moment.<sup>77</sup> Content-neutral place restrictions that deny access to symbolic settings can be similarly distorting.<sup>78</sup> Content-neutral manner restrictions can drain an expressive message of its emotive content or even eliminate certain classes of people from the forum altogether.<sup>79</sup> A second problem with contemporary public forum doctrine is its failure to recognize

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<sup>74</sup> INAZU, *supra* note \_\_, at 4.

<sup>75</sup> This development unfolded in a line of cases culminating in *Perry Education Association v. Perry Local Educators’ Association*, 460 U.S. 37 (1983). For an elaboration of the history, *see* Inazu, *supra* note \_\_ [First Amendment’s Public Forum].

<sup>76</sup> *Perry*, 460 U.S. at 45 (describing content-neutrality inquiry).

<sup>77</sup> Consider, for example, the consequences for political dissent of a content-neutral time restriction that closed a public forum on symbolic days of the year like 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 closed 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. And yet all of these formally satisfy the content neutrality inquiry.

<sup>78</sup> *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.”).

<sup>79</sup> *Cf.* *City Council 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.” (quoting *Martin v. Struthers*, 319 U.S. 141, 146 (1943))).

that speech and assembly are two distinctive rights. One can speak individually, but one cannot assemble alone. An exclusive reliance on speech misses the relational underpinnings of assembly.

*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.”<sup>80</sup> Indeed, throughout our nation’s history, the right of assembly has developed alongside the law of “unlawful assembly.”<sup>81</sup> The right of assembly has not sheltered criminal conspiracies, violent uprisings, and even most forms of civil disobedience. Longstanding First Amendment doctrine allows the state to regulate speech and expression when it crosses the threshold of violence. The state, however, bears a high burden in drawing the constitutionally appropriate line. The Supreme Court has emphasized this burden. In its seminal decision in *Brandenburg v. Ohio*, the Court announced a standard applicable both to assembly and speech: “Statutes affecting the right of assembly, like those touching on freedom of speech, must observe the established distinctions between mere advocacy and incitement to imminent

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<sup>80</sup> U.S. CONST. AMEND. I (emphasis added).

<sup>81</sup>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, 878 (1960) (footnotes 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 engaging 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.

lawless action.”<sup>82</sup> The precise contours of this line are not apparent, but they are as workable in assembly as they are in speech.<sup>83</sup>

Unfortunately, the Court’s increased reliance on the right of expressive association and the speech-based contours of the public forum doctrine has far exceeded these minimalist constraints. These developments have been to the detriment of the values and principles underlying the right of assembly. And as the next section details, they have been to the detriment of labor.

## II. THE CHALLENGES OF LABOR

The boundaries of assembly brush against the elusive lines that separate protest from violence, connectedness from conspiracy, and democracy from anarchy. Nowhere is this more evident than in the relationship between assembly and labor unionism. The assembly right is important to workers in two distinct but related ways that are not sufficiently accounted for under the current speech-focused jurisprudence. First, assembly protects the right to form and join unions (a right that has been hindered by the speech-based focus of expressive association). Second, assembly facilitates group protests like picketing, boycotts, and strikes (activities that have been hindered by the speech-based focus of modern public forum doctrine). This section traces the consequences of these

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<sup>82</sup> *Brandenburg v. Ohio*, 395 U.S. 444, 449 n.4 (1969)); *cf. De Jonge*, 299 U.S. at 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.”).

<sup>83</sup> 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.’” Bhagwat, *supra* note \_\_ [Terrorism and Associations], at 624 (quoting *Scales v. United States*, 367 U.S. 203 (1961)). Although acknowledging that *Brandenburg* “suggested in a footnote that prosecution for assembly must satisfy the same requirements as prosecution for speech,” Bhagwat notes that the Court cited *Scales* approvingly in *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705, 2718 (2010), “without any hint that it was inconsistent with *Brandenburg*.” *Id.* at 624 n.266. *But see Inazu*, *supra* note \_\_ [Factions for the Rest of Us], at 1440 (“these differences [might not] doom a *Brandenburg*-like standard for assembly.”).

developments for labor as they emerged through the interactions between labor unions, common law courts and labor legislation.

*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.<sup>84</sup> 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.<sup>85</sup> During the nineteenth and early twentieth centuries, courts displayed open hostility toward labor unions and labor organizing. Courts linked them with foreign influence, socialism, and anarchy.<sup>86</sup> Influenced by centuries of English law, some American judges even characterized groups of workers as injurious to the public welfare.<sup>87</sup>

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<sup>84</sup> 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).

<sup>85</sup> *Id.* at 130. One of the most notorious examples was the 1886 Haymarket square rally in support of workers striking for an 8-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 JAMES GREEN, *DEATH IN THE HAYMARKET: A STORY OF CHICAGO, THE FIRST LABOR MOVEMENT AND THE BOMBING THAT DIVIDED GILDED AGE AMERICA* (2006); TIMOTHY MESSER-KRUSE, *THE TRIAL OF THE HAYMARKET ANARCHISTS: TERRORISM AND JUSTICE IN THE GILDED AGE* (2011).

<sup>86</sup> HATTAM, *supra* note \_\_, at 70; Morrison, *infra* note \_\_, at 17. See also JAMES B. ATLESON, *VALUES AND ASSUMPTIONS IN AMERICAN LABOR LAW* 7–8 (1983) (discussing law’s hostility and concern with the risk of “anarchy” stemming from collective action).

<sup>87</sup> See *Philadelphia Cordwainers’ Case* (Commonwealth v. Pullis, Philadelphia Mayors’ Court (1806)), reported at III Doc. Hist. of Am. Ind. Soc. 59, 127, 228 (2d ed. Commons 1910) (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); John T. Nockleby, *Two Theories of Competition in the Early 19<sup>th</sup> Century Labor Cases*, 38 AM. J. LEGAL. HIST. 452, 642-63 (1994) (exploring roots of the criminal conspiracy doctrine in Anglo-Saxon law); Morris D. Forkosch, *The Doctrine of Criminal Conspiracy and its Modern Application to Labor*, 40 TEX. L. REV. 303 (1962) (describing use of criminal conspiracy doctrine at English common law and in the earliest days of the American republic).

They viewed unions as illegal and violent organizations that threatened production and the market order.<sup>88</sup>

Common law courts originally used criminal conspiracy doctrine to block the formation and existence of unions: workers who sought to act collectively faced criminal conspiracy charges.<sup>89</sup> Some courts deemed groups of two or more workers to be coercive “whether the means employed are actual violence or a species of intimidation that works upon the mind.”<sup>90</sup> Judicial rhetoric of the era also reflected fears that unions would disrupt the market and lead to anarchy.<sup>91</sup> 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.”<sup>92</sup> The court concluded that boycotting and leafleting would lead to “anarchy, pure and simple.”<sup>93</sup>

Courts also used the injunction to control labor unionism.<sup>94</sup> Beginning in the mid-1800s, some judges backed away from outright outlawing of worker combinations, and began to focus instead on their actions; under the so-called “unlawful object/unlawful means” doctrine, courts examined the purpose and means deployed by groups of workers. As long as the group’s purpose was lawful, the law’s only interest was in the means

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<sup>88</sup> Avery, *supra* note \_\_\_, at 3–5; FORBATH, *supra* note \_\_\_, at 1115–16. Not all commentators agree with this characterization, however. *See, e.g.*, Moreno, *supra* note \_\_\_, at 24.

<sup>89</sup> *See, e.g.*, Philadelphia Cordwainers’ Case (*Pullis*, (1806)), reported at III Doc. Hist. of Am. Ind. Soc. 59 (2d ed. Commons 1910); *People v. Fisher*, 14 Wend. 9 (N.Y. Sup. Ct. Jud. 1835)); *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 nineteenth century); Steven R. Morrison, *The Conspiracy Origin of the First Amendment*, available at [http://works.bepress.com/steven\\_morrison/29](http://works.bepress.com/steven_morrison/29), 16-18 (2013) (exploring the historical context of the late nineteenth century American labor conspiracy cases).

<sup>90</sup> *State v. Stewart*, 59 Vt. 273, 9 A. 559 (“if two or more persons combine to coerce . . . choice . . ., it is a criminal conspiracy, whether the means employed are actual violence or a species of intimidation that works upon the mind.”).

<sup>91</sup> Morrison, *supra* note \_\_\_, at 18.

<sup>92</sup> *State v. Glidden*, 8 A. 890, 894-95 (Conn. 1887).

<sup>93</sup> *Id.* at 895.

<sup>94</sup> VICTORIA C. HATTAM, LABOR VISIONS AND STATE POWER: THE ORIGINS OF BUSINESS UNIONISM IN THE UNITED STATES 39 (1993).

employed by the union.<sup>95</sup> But judicial concerns also persisted over the threat that even peaceful labor union protests posed to the economic order.<sup>96</sup>

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. The labor injunction proved particularly effective because of its immediacy.<sup>97</sup> Labor pickets were often met with restraining orders with sweeping language, obtained *ex parte*.<sup>98</sup> Any action that managed to survive an initial restraining order then faced a costly litigation process that dragged out over a period of months or years.<sup>99</sup>

The judiciary's treatment of labor protests throughout this period reveals a marked tendency to equate labor union protests (including both picketing and boycotts) with violence.<sup>100</sup> In *Vegeahn v. Guntner*, for example, a state court enjoined a two-man picket in front of a factory, reasoning that the picket was inherently

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<sup>95</sup> Sidney Fine, *Frank Murphy, The Thornhill Decision, and Picketing as Free Speech*, 6 LAB. HIST. 99, 99-100 (1965). See, e.g., *Commonwealth v. Hunt*, 45 Mass. (4 Metc.) 111, 134 (Mass. 1842); Crain & Matheny (*Beyond Unions*), *supra* note \_\_\_\_.

<sup>96</sup> 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 \_\_, at 332. See also Ellen M. Kelman, *American Labor Law and Legal Formalism: How "Legal Logic" Shaped and Vitiating the Rights of American Workers*, 58 ST. JOHN'S L. REV. 1, 10-11 (1983) (discussing how courts prioritized property rights and redefined workers' rights as mere privileges); see also WILLIAM E. FORBATH, *LAW AND THE SHAPING OF THE AMERICAN LABOR MOVEMENT* 38, 177-87 (1991) (pointing out that from 1885-1900, five laws prohibiting discrimination against union members were struck down in addition to other laws aimed at curbing the abuses of labor in company housing and company towns in the coal fields); Crain & Matheny (*Beyond Unions*), *supra* note \_\_\_\_.

<sup>97</sup> From 1880 to 1930, judges issued over 4300 injunctions against strikes, boycotts, and other concerted actions by workers. FORBATH, *supra* note \_\_, at 193-98; Crain & Matheny (*Beyond Unions*), *supra* note \_\_\_\_.

<sup>98</sup> IRVING BERNSTEIN, *THE LEAN YEARS: A HISTORY OF THE AMERICAN WORKER, 1920-1933*, at 195-96 (2d ed. 2010).

<sup>99</sup> *Id.* at 196.

<sup>100</sup> Avery, *supra* note \_\_, at 11-13. See, e.g., = *Glidden*, 8 A. 890, 897 (Conn. 1887) (noting in the context of a labor boycott that "the thing we call a boycott originally signified violence, if not murder").



intimidating and posed a threat of violence.<sup>101</sup> 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 persuasion or argument, “although free from any threat of violence, either express[ed] or implied.”<sup>102</sup> Holmes questioned the majority’s assumption that picketing—which the court characterized as “patrolling”—“necessarily carries with it a threat of bodily harm.”<sup>103</sup>

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.<sup>104</sup> Socialist and anarchist sentiments were a growing concern; in 1901, an anarchist assassinated President McKinley.<sup>105</sup> 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.<sup>106</sup> And, most significantly, at least some of the actions of labor unions were cloaked in actual violence.

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”<sup>107</sup> was intimately connected to broader assumptions of political and economic theory. Courts framed unionism as harmful to the public welfare, depicting unions as greedy and self-interested and their economic activities as injurious to the broader society because they constrained economic growth and damaged existing institutions.<sup>108</sup> These views in turn stemmed from economic theory popular at the time, 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

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<sup>101</sup> 44 N.E. 1077, 1078 (Mass. 1896).

<sup>102</sup> *See id.* at 1079–82 (Holmes, J., dissenting).

<sup>103</sup> *Id.*

<sup>104</sup> Morrison, *supra* note \_\_\_\_, at 18-20.

<sup>105</sup> *Id.* at 21.

<sup>106</sup> *Id.* at 20.

<sup>107</sup> TURNER, *supra* note \_\_\_\_, at 21.

<sup>108</sup> Deborah A. Ballam, *The Law as a Constitutive Force for Change: The Impact of the Judiciary on Labor History*, 32 AM. BUS. L.J. 125, 137 (1994).

the rest.”<sup>109</sup> Some courts connected their fears of violence and anarchy with the threat that unions posed to the economic and political system. An 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.”<sup>110</sup>

The rise of the International Workers of the World (who were also known as the IWW or the Wobblies) exacerbated perceptions of the connection between labor unionism, anarchy, and violence. Founded in 1905, the IWW rejected the AFL’s more moderate commitment to advancing workers’ economic interests within existing market structures and called for the revolutionary overthrow of capitalism through direct action.<sup>111</sup> The IWW relied heavily on group action in the public sphere, including picketing, rallies, parades, and demonstrations.<sup>112</sup> Many of these actions were peaceful, and the IWW cautioned its members against violence. But the IWW also promoted actions with ties to violence and anarchy, including spontaneous strikes, sitdowns and slow downs at work, sabotage of production, and destruction of employer property.<sup>113</sup>

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<sup>109</sup> TURNER, *supra* note \_\_\_, 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.

<sup>110</sup> *Moores & Co. v. Bricklayers’ Union et al.*, 10 Ohio Dec. Rep. 665, \*9, 10 (Ohio Super. Ct. 1889).

<sup>111</sup> 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.

<sup>112</sup> *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.

<sup>113</sup> *See id.* at 79; 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*, 134-40, 160-64 (1965); DAVID MONTGOMERY, *THE FALL OF THE HOUSE OF LABOR: THE WORKPLACE, THE STATE, AND AMERICAN LABOR ACTIVISM, 1865-1925*, 310-27 (1987).

The Wobblies’ advocacy foregrounded debates over the distinction between speech and action. Some courts upheld convictions of prominent worker

Throughout this period, the IWW enlisted both speech and assembly rights in support of its actions.<sup>114</sup>

The criminal conspiracy doctrine, the labor injunction and the Supreme Court’s denunciation of picketing only represent a fraction of the judicial responses toward organized labor. The 1890 Sherman Act broadly declared contracts, combinations, and conspiracies to restrain trade illegal.<sup>115</sup> In the first seven years after the Act was passed, federal courts found that unions had violated its provisions in twelve separate cases.<sup>116</sup> As a result, courts issued injunctions and treble damage awards against the strikers and boycotters for conspiring to restrain interstate commerce.<sup>117</sup> The Sherman Act caused courts to once again treat unions as illegal combinations in restraint of trade.<sup>118</sup> In *Loewe v. Lawlor*, the Court cemented this impression; a union strike supported by the American Federation of Labor against a hat manufacturer was found to violate the Sherman Act.<sup>119</sup> The Court, stunned by the efficacy of the

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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 \_\_\_, at 118-21.

<sup>114</sup>RABBAN, *supra* note \_\_\_, at 83-87; INAZU, *supra* note \_\_\_, at 48. 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 \_\_\_, at 110.

<sup>115</sup>Sherman Antitrust Act of 1890 § 1, 15 U.S.C. § 1 (2012).

<sup>116</sup>BERNSTEIN, *supra* note \_\_\_, at 207.

<sup>117</sup>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 10 years after its passage, see William Letwin, *The First Decade of the Sherman Act: Judicial Interpretation*, 68 YALE L.J. 900 (1959).

<sup>118</sup>MELVYN DUBOFSKY & FOSTER RHEA DULLES, *LABOR IN AMERICA: A HISTORY* 164 (8th ed. 2010).

<sup>119</sup>*Loewe v. Lawlor*, 208 U.S. 274, 292 (1908).

protest and the high losses it caused to the employer,<sup>120</sup> read the Act as restraining not both combinations of capital, and “the threat posed to the social order by the ‘evils’ of massed labor.”<sup>121</sup> The Court’s decision outraged union supporters, who considered it “dangerously close to characterizing the routine functions of any labor union as illegal.”<sup>122</sup>

### *B. Early Labor Legislation*

The Progressive era saw some shifts in judicial and public attitudes toward labor. In 1914, two years after President Woodrow Wilson was elected, a Democratic Congress passed the Clayton Act.<sup>123</sup> 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.”<sup>124</sup> Section 20 of the Act disallowed most restraining orders and injunctions in cases which involved disputes between employers and employees.<sup>125</sup> Samuel Gompers, founder of the AFL, declared the Clayton Act to be “the Magna Carta upon which the working people will rear their structure of industrial freedom.”<sup>126</sup>

Gompers underestimated ongoing judicial resistance to these legislative reforms. In *Duplex Printing Press v. Deering*, the Court found that the Clayton Act did not apply to sympathetic strikes organized in aid of a secondary boycott.<sup>127</sup> The union had called a

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<sup>120</sup> The Loewe Company alleged economic losses of \$80,000, a staggering amount for the period. *Id.* at 302 n.† at ¶ 22 (quoting complaint).

<sup>121</sup> Avery, *supra* note \_\_, at 60.

<sup>122</sup> PHILIP DRAY, *THERE IS POWER IN A UNION: THE EPIC STORY OF LABOR IN AMERICA* 249 (2010). As a result of the Court’s ruling, the plaintiff was entitled to collect triple damages from union members as individuals, “to the point of attaching their individual bank accounts and threatening to foreclose on more than two hundred of the workers’ homes.” *Id.* at 249–50.

<sup>123</sup> Clayton Act, Pub. L. No. 63-212, 38 Stat. 730 (1914) (codified as amended at 15 U.S.C. §§ 12–27 and 29 U.S.C. §§ 52–53 (2012)).

<sup>124</sup> Clayton Act § 6.

<sup>125</sup> Clayton Act § 20.

<sup>126</sup> BERNSTEIN, *supra* note \_\_, at 208.

<sup>127</sup> 254 U.S. 443, 479 (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.

strike and organized a boycott to support its goal of unionization of the Duplex Printing Press factory in Michigan.<sup>128</sup> The union requested its members and members of affiliate unions, as a part of its boycott, not to work on any printing presses that Duplex delivered in New York.<sup>129</sup> 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.”<sup>130</sup> This kind of reasoning permitted lower courts to issue injunctions in peaceful labor disputes whose effects extended beyond the workplace site of the dispute. The economic pressure which could be accomplished through secondary boycotts was deemed to be inherently coercive.<sup>131</sup>

Although many labor protests did involve actual violence, court decisions in those cases often invoked sweeping condemnations of labor picketing itself. Emblematic of the judicial distaste for labor picketing was the Supreme Court’s decision in *American Steel Foundries v. Tri-City Central Trades Council*, which involved picketing by groups of four to twelve workers on the public street and near railroad tracks bordering the plant’s 25-acre enclosure, in support of a strike for union recognition.<sup>132</sup> The pickets were accompanied by threats of violence, name-calling, and physical assaults including brick-throwing; against that backdrop the Court issued a sweeping condemnation of the particular picket, finding that “[a]ll information tendered, all arguments advanced and all persuasion used under such circumstances were intimidation.”<sup>133</sup> 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

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<sup>128</sup> *Id.* at 462–63.

<sup>129</sup> *Id.* at 480.

<sup>130</sup> *Id.* at 472.

<sup>131</sup> *See id.* at 467–68.

<sup>132</sup> 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 \_\_\_, at 76–96.; Crain & Matheny (*Beyond Unions*), *supra* note \_\_\_.

<sup>133</sup> *Am. Steel Foundries*, 257 U.S. at 205.

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.<sup>134</sup>

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.<sup>135</sup>

Just two weeks later, the Court issued its decision in *Truax v. Corrigan*,<sup>136</sup> which extended the anti-labor implications of *American Steel Foundries* to condemn picketing in a case lacking any allegations of violence.<sup>137</sup> The Court focused instead on *economic* harm: the picketing inflicted harm on the employer, a restaurant, by damaging customer goodwill and cutting the restaurant’s receipts in half.<sup>138</sup>

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

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<sup>134</sup> *Id.*

<sup>135</sup> *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. 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.

<sup>136</sup> 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).

<sup>137</sup> *Id.* at 370 (Brandeis, J., dissenting).

<sup>138</sup> *Id.*

face.”<sup>139</sup> The court concluded that this activity amounted to “moral coercion,” tantamount to physical violence; it “compel[ed] every customer or would-be customer to run the gauntlet of most uncomfortable publicity, aggressive and annoying importunity.”<sup>140</sup> In short, 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.”<sup>141</sup>

The Court’s characterization of picketing as inherently intimidating reflected a concern for the economic interests of business owners, but it neglected entirely workers’ assembly rights. Indeed, the Court’s effort to limit lawful picketing to one or two individuals near a business occludes the fundamental purposes of assemblies of workers in conjunction with a labor dispute: to publicize the dispute, to demonstrate solidarity, and to encourage others to take sides. As labor scholar Diane 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

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<sup>139</sup> *Id.* at 325-27.

<sup>140</sup> *Id.* at 327-28.

<sup>141</sup> Avery, *supra* note \_\_, at 98 (quoting from Justice Taft’s biography, 2 HENRY F. PRINGLE, THE LIFE AND TIMES OF WILLIAM HOWARD TAFT 1035 (1939)).

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.<sup>142</sup>

*C. Law's Embrace of Unionism: The National Labor Relations Act*

The plight of workers during the Depression exerted a profound influence on both the popular mood and the political tides.<sup>143</sup> In 1932, Congress passed the Norris-LaGuardia Act, stripping federal courts of power to issue injunctions in most labor disputes.<sup>144</sup> Nineteen states enacted statutes designed to prohibit judicial interference with peaceful picketing.<sup>145</sup> Sixteen states guaranteed the right of “peaceful assembly” to strikers and their

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<sup>142</sup> Avery, *supra* note \_\_\_, 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. Irving Robert Feinberg, *Picketing, Free Speech, and “Labor Disputes,”* 17 N.Y.U. L. Q. Rev. 385 (1939-40); *Cumberland Glass Mfg. Co. v. Glass Bottle Blowers Ass’n*, 59 N.J. Eq. 49, 53 (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”).

<sup>143</sup> See BERNSTEIN, *supra* note --, at 506-07.

<sup>144</sup> 47 Stat. 70 (1932), 29 U.S.C. §§ 101-115. 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,

The agreement is 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* 11-38 (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.”

<sup>145</sup> Frank E. Cooper, *The Fiction of Peaceful Picketing*, 35 MICH. L. REV. 73, 73 & n.2 (1936).



sympathizers.<sup>146</sup> Nevertheless, the judiciary continued to issue injunctions in labor disputes, usually on the basis that the pickets were not, in fact, “peaceful”—even absent physical violence.<sup>147</sup> In short, most courts continued to view “peaceful picketing” as an oxymoron.<sup>148</sup>

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 passed the National Industrial Recovery Act (NIRA), the initial federal legislation protecting workers’ rights to organize unions, to engage in other concerted activities, and to bargain collectively.<sup>149</sup> The NIRA was followed by enactment of the National Labor Relations Act of 1935 (NLRA or the Wagner Act), which embraced as national labor policy the goals of encouraging the practice of collective bargaining and worker self-organization.<sup>150</sup>

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<sup>146</sup> *Id.* at 75.

<sup>147</sup> *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., *Bull v. International Alliance*, 119 Kan. 713, 718-19 (1926) (picketing enjoined where single picket approached patrons, greeted them, and stated “This theatre is unfair to organized labor;” as the picketing implied a threat); *State v. Perry*, 265 N.W. 302 (Minn. 1936) (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. Central Labor Council*, 104 Or. 236 (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); *Levy & Devaney, Inc. v. International Pocketbook Workers’ Union*, 114 Conn. 319 (1932) (picketing not peaceful where assembly of 6 to 20 picketers “gave threatening looks” to employees entering and exiting a factory where a strike had been called); *Lisse v. Local Union No. 31*, 2 Cal.2d 312, 317 (1935) (strikers were guilty of physical intimidation where they made “grimaces and insulting gestures” aimed at scabs).

<sup>148</sup> *Cooper, supra* note \_\_, at 82-86.

<sup>149</sup> 48 Stat. 198 (1933). The NIRA was struck down as unconstitutional in *Schechter v. U.S.*, 295 U.S. 495 (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. The NLRA was upheld against a constitutional challenge in *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937). See BERNSTEIN, *supra* note \_\_, at 508; IRVING BERNSTEIN, *THE TURBULENT YEARS: A HISTORY OF THE AMERICAN WORKER, 1933-1940* at 323.

<sup>150</sup> 29 U.S.C. §§ 151-169.

The NLRA's main architect was Senator Robert Wagner. Wagner 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.<sup>151</sup> Wagner wrote the following justification for the legislation:

[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.<sup>152</sup>

The protection afforded in the NLRA 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.<sup>153</sup> 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 to press for change at the bargaining table. But the Act's overriding purpose was promoting labor peace by channeling labor disputes into the therapeutic process of collective bargaining, as an alternative to unrestrained violence.<sup>154</sup>

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<sup>151</sup> James A. Gross, *A Long Overdue Beginning: The Promotion and Protection of Workers' rights as Human Rights*, in WORKERS' RIGHTS AS HUMAN RIGHTS, at 1 (James A. Gross ed. 2003).

<sup>152</sup> Robert F. Wagner, *The Ideal Industrial State—As Wagner Sees It*, N.Y. TIMES MAG., May 9, 1937, at 23. *Accord* INAZU, *supra* note \_\_, at 110-114.

<sup>153</sup> NLRA §13, 29 U.S.C. 158.

<sup>154</sup> Section 1 of the Act states:

Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours,

The Act’s statement of findings and policies also declared that it intended to promote “the exercise by workers of full freedom of association.”<sup>155</sup> The reference was more aspirational than constitutional—the Court would not recognize a right of association until decades later.<sup>156</sup> But other rhetoric surrounding the statutory framework drew more explicitly on First Amendment rights, including the right of assembly. In 1936, Congress had 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.”<sup>157</sup> National Labor Relations Board chairman J. Warren Madden testified that “the 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.<sup>158</sup> Committee chairman Hugo Black named Senator Robert La Follette Jr. of Wisconsin to lead a subcommittee to investigate these concerns. Five years later, La Follette reported back to Congress that “the most spectacular violations of civil liberty

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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.

29 U.S.C. § 151. *See also* Ross E. Davies, *Strike Season: Protecting Labor-Management Warfare in the Age of Terror*, 93 GEO. 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).

<sup>155</sup> NLRA § 1, 29 U.S.C. § 151.

<sup>156</sup> *See* NAACP v. Alabama ex rel. Patterson, 357 U.S. 449 (1958); John D. Inazu, *The Strange Origins of the Constitutional Right of Association*, 77 TENN. L. REV. 485 (2010).

<sup>157</sup> Jerold S. Auerbach, *The La Follette Committee: Labor and Civil Liberties in the New Deal*, 51 JOURNAL OF AMERICAN HISTORY 440, 440-42 (1964).

<sup>158</sup> *Id.*

. . . [have] their roots in economic conflicts of interest” and emphasized that “association and self-organization are simply the result of the exercise of the fundamental rights of free speech and assembly.”<sup>159</sup> As discussed in Part I, the Supreme Court initially reinforced these connections between labor and assembly.<sup>160</sup>

#### *D. Picketing as Pure 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.<sup>161</sup> But the importance of the right of assembly was never fully realized in at least one area of labor organizing: picketing. Following the lead of some state courts that had heeded the Court’s dicta in its 1937 decision in *Senn v. Tile Layers Protective Union*,<sup>162</sup> the Court formally recognized and embraced picketing as an exercise of free *speech* rights in *Thornhill v. Alabama*, which overturned the conviction of a union president for violating an anti-picketing statute by marching on a picket line involving 6-8 other men.<sup>163</sup> 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,”<sup>164</sup> and holding that the statute’s breadth lent itself to discriminatory enforcement against particular groups which would restrain that discussion.<sup>165</sup> The Court paid little heed to *Thornhill*’s claim that his assembly and petition rights had also been violated,<sup>166</sup> instead equating picketing with pure speech.<sup>167</sup>

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<sup>159</sup> *Id.*

<sup>160</sup> See generally Part I, *supra*.

<sup>161</sup> See generally Part I, *supra*.

<sup>162</sup> 301 U.S. 468, 478 (1937) (observing that “members 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 \_\_\_\_\_, at 103.

<sup>163</sup> 310 U.S. 88 (1940).

<sup>164</sup> *Id.* at 102.

<sup>165</sup> *Id.* at 97-98.

<sup>166</sup> *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. A companion case decided the same day, *Carlson v. California*, 310 U.S. 106 (1940), also involved assembly rights claims

Two years later, the Court made clear in *Bakery and Pastry Drivers v. Wohl* that even secondary picketing—as long as it was non-violent—was protected by *Thornhill*.<sup>168</sup> But a concurring opinion in *Wohl* penned by Justices Douglas, Murphy and Black suggested more ominously that “picketing by an organized group is more than free speech, since it involves patrol of a particular locality and since the very presence of the picket line may induce action of one kind or another, quite irrespective of the nature of the ideas which are being disseminated.”<sup>169</sup> 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.<sup>170</sup> These decisions culminated in *International Brotherhood of Teamsters v. Vogt*, in which Justice Douglas announced the “formal surrender” of the *Thornhill* doctrine.<sup>171</sup>

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

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by a labor union in a challenge to a similar ordinance; the Court struck down the ordinance on the same rationale articulated in *Thornhill*.

<sup>167</sup> Some note 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 Fine, *supra* note \_\_\_, 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, 372 (1995).

<sup>168</sup> 315 U.S. 769, 774 (1942).

<sup>169</sup> *Id.* at 776 (Douglas, J., concurring).

<sup>170</sup> *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490 (1949); *Hughes v. Superior Court of California*, 339 U.S. 460 (1950); *International Brotherhood of Teamsters v. Hanke*, 339 U.S. 470 (1950); *Building Service Employees v. Gazzam*, 339 U.S. 532 (1950).

<sup>171</sup> 354 U.S. 284, 297 (Black, J., dissenting).

claims in their briefs to the Supreme Court.<sup>172</sup> The Court simply ignored these claims, resolving the cases on other grounds.<sup>173</sup>

The Court was not the only branch of government neglecting the relational and group-based elements of labor. The Taft-Hartley Act of 1947 imposed significant restrictions on labor picketing and boycotts aimed at secondary employers who did business with the employer that was the union’s primary target.<sup>174</sup> Even peaceful picketing designed to shut off trade by a secondary employer with the struck (primary) employer is banned as “coercive” under section 8(b)(4) of the NLRA.<sup>175</sup> In 1959, Congress responded to allegations of racketeering, union abuse, and corruption with the Landrum-Griffin Act. The Act reined in union power and cabined labor picketing even against primary employers, where the picketing had an organizational or recognitional goal.<sup>176</sup> It also codified earlier

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<sup>172</sup> *Thornhill*, 310 U.S. 88, 93 (noting that the petitioner argued a violation of “the right of peaceful assemblage”); *Brief for Appellant*, *Carlson v. California*, 1940 WL 468886; *Brief for Petitioner*, *American Federation of Labor v. Swing*, 1940 WL 71247; *Brief for Petitioners*, *Youngdahl v. Rainfair, Inc.*, 1957 WL 87791. See also *Brief for Petitioner*, *Sanford v. Hill*, 1941 WL 53377 (No. 1187) (appeal dismissed for want of a substantial federal question in *Sanford v. Hill*, 316 U.S. 647 (1942) (*per curiam*)).

<sup>173</sup> *Thornhill*, 310 U.S. at 95 (relying on the freedom of speech and press); *American Federal 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”).

<sup>174</sup> Labor Management Relations (Taft-Hartley) Act of 1947, 29 U.S.C. §§ 141–197 (2012). Damages were made available against unions that violated the secondary boycott provisions, the only place in the NLRA where such a remedy exists. See *id.*; PAUL C. WEILER, GOVERNING THE WORKPLACE: THE FUTURE OF LABOR AND EMPLOYMENT LAW 269–73 (1990). Taft-Hartley also added a right to refrain from organization and concerted activities implemented through a prohibition on union restraint and coercion against those who exercised those rights, limited the categories of workers covered by the Act, and banned the closed shop, a union security device that served to entrench union power once workers elected a union. Taft-Hartley Act § 303.

<sup>175</sup> *NLRB v. Retail Clerks, Local 1001 (Safeco Title Insurance Co.)*, 447 U.S. 607 (1980) (finding picketing that is reasonably likely to threaten neutral party with ruin or substantial loss coercive where primary’s product constitutes 90% of the picketed employers’ gross incomes).

<sup>176</sup> 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

concerns about the “blackmail” effect of picketing that had animated the Court’s decisions in *American Steel Foundries* and *Truax v. Corrigan*, including concerns that picketing by labor unions was inherently intimidating and coercive.<sup>177</sup>

The legislative and judicial treatment of labor unionism in the second half of the twentieth-century reflected longstanding suspicions of labor activity like pickets and boycotts. But its inattention to the civil liberties dimensions of labor’s collective voice was heightened by the speech-based focused jurisprudence that neglected the significance of assembly and the values that assembly represents. We turn now to a consideration of those values and their implications for labor.

### III. THE INSIGHTS OF ASSEMBLY AND THE MEANING OF THE UNION

The preceding section traced the connections between assembly and labor that emerged in the Progressive Era and continued into the middle of the twentieth century. Where they existed, these connections reinforced the importance of labor unionism to democratic governance. 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. These latter consequences were exacerbated as initial connections between labor and assembly were 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 embrace of group action by private sector workers.

At least in part due to these changes, the contemporary First Amendment landscape neglects important connections between groups and the expression that flows out of them. One of the reasons for this neglect owes to an increased focus on individualism and autonomy in First Amendment theory and doctrine. These consequences are amplified in the labor context, whose individualistic focus has shifted away from past values and aspirations like solidarity. But the current status quo is neither

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on union picketing for organizational and recognition purposes, and expanded the secondary boycott prohibitions added by Taft-Hartley. *Id.*

<sup>177</sup> See, e.g., *Am. Steel Foundries v. Tri-City Cent. Trades Council*, 257 U.S. 184 (1921); *Truax v. Corrigan*, 257 U.S. 312 (1921).

longstanding nor impermeable. The historical and theoretical insights from assembly—including its connections to labor—shed light on possible changes. We focus on three insights: (1) the importance of group expression; (2) the many meanings of groups and group expression; and (3) expression and context.

### A. *The Importance of Group Expression*

Modern free speech jurisprudence is heavily grounded in autonomy-based theory centered on individual expression. 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.<sup>178</sup> This emphasis has also infused labor law, which particularly with the enactment of Taft-Hartley has largely shifted toward a normative focus on autonomy and individualism.<sup>179</sup> The individualistic focus of much contemporary labor law and First Amendment law ignores the ways in which group expression is different—both in its effects on its members and in the expressive message that emerges from the group itself. And missing these connections overlooks the power and significance of shared expression, collective activity—and solidarity.<sup>180</sup>

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<sup>178</sup> *Branzburg v. Hayes*, 408 U.S. 665, 704 (1972) (“lonely pamphleteer”); *Brown v. Entertainment Merchants Association*, 131 S.Ct. 2729, 2736 (2011) (video games).

<sup>179</sup> See Wilma Beth Liebman, *Labor Law Inside Out*, 11 WORKINGUSA: J. OF LAB. & SOC’Y 9 (2008) (arguing that 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, *Speech, Values and Assumptions of the Bush NLRB: Trumping Workers’ Rights*, 57 BUFF. L. REV. 648, 653 (2009) (explaining the role of values in driving NLRB jurisprudence toward a focus on individual choice); Pope, Kellman *et al.*, *supra* (describing labor movement’s single-minded support for the Employee Free Choice Act as inadvertently reinforcing a focus on individual choice in union election voting); James Gray Pope, *Class Conflicts of Law II: Solidarity, Entrepreneurship, and the Deep Agenda of the Obama NLRB*, 57 BUFF. L. REV. 652 (2009) (arguing for solidarity as a core anchoring theme in interpreting the NLRA). 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).

<sup>180</sup> See Brishen Rogers, *Passion and Reason in Labor Law*, 47 HARV. C.R.-C.L. L. REV. 313 (2012) (arguing that labor law’s focus on protecting



The preceding insights are reinforced by a basic doctrinal truism: 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 ignored repeated appeals by labor petitioners that the right of assembly encompassed picketing.<sup>181</sup> 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.”<sup>182</sup> This inattention to assembly is both stunning and

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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.

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 person is experienced as happening to others, to the group:

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

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

<sup>181</sup> See *supra* note \_\_\_ & accompanying text.

<sup>182</sup> *Thornhill*, 310 U.S. at 95 (relying on the freedom of speech and press); *American Federal 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”).

perplexing, and it has spread to other areas of labor law that neglect the collective and relational dimensions of labor unionism.

The right of assembly once offered a constitutional anchor for groups that challenged the dominant economic and social framework. It recognized the contribution that such groups make to our system of democratic self-governance.<sup>183</sup> Within the labor context, group gatherings and protests offer support and encouragement to workers, helping them to challenge state- and employer-endorsed norms and to resist the pressure toward consensus.

Labor unionism offers a paradigmatic illustration of how a robust right of assembly is connected to the contribution that groups can make as vehicles for expressing dissent and challenging entrenched power within the democratic polity. The Wagner Act’s premise was that robust unionism would enhance political participation by giving workers experience in the practice of everyday democracy, through their workplace participation.<sup>184</sup> While labor unionism has largely remained focused on “bread and butter” business unionism (wages and benefits for members),<sup>185</sup> unions have managed to play an important role as “schools for democracy,” working to advance civic virtue at work and in the larger community.<sup>186</sup>

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<sup>183</sup> See INAZU, *supra* note \_\_\_, at 22–25.

<sup>184</sup> See Lester, *infra* note \_\_\_, at 329 (observing that a core part of labor unions’ mission is furthering participation in the civic and political spheres). Some unions have pursued their political participation mission directly. In 2012, for example, the Service Employees’ International Union was the top outside spender on Democratic political campaigns, funding almost \$70 million worth of advertising and get-out-the-vote efforts for Democrats. Melanie Trottman & Brody Mullins, *Union is Top Spender for Democrats*, WALL ST. J., Nov. 2, 2012, at A6.

<sup>185</sup> Marion Crain & Ken Matheny, *Labor’s Identity Crisis*, 89 CALIF. L. REV. 1767, 1779–81 (2001); Marion Crain & Ken Matheny, *Unionism, Law, and the Collective Struggle for Economic Justice*, in WORKING AND LIVING IN THE SHADOW OF ECONOMIC FRAGILITY, *supra* note \_\_\_, ); Crain & Matheny (*Beyond Unions*), *supra* note \_\_\_.

<sup>186</sup> Thomas C. Kohler, *Civic Virtue at Work: Unions as Seedbeds of Civic Virtues*, 36 B.C. L. REV. 279, 297–302 (1995); see Peter Levine, *The Legitimacy of Labor Unions*, 18 HOFSTRA LAB. & EMP. L.J. 527, 565–67 (2001).

*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, and it is particularly elided in the labor context. 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,”<sup>187</sup> and that “the First Amendment does not protect speech and assembly only to the extent it can be characterized as political.”<sup>188</sup> 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 social movements under the First Amendment’s free speech doctrine.<sup>189</sup> Even when the Court has categorized union functions (in First Amendment cases that explore which union expenditures can be assessed against objecting non-members), its descriptions reveal judicial assumptions about the narrow economic realm of

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<sup>187</sup> *Bd. of R.R. Trainmen v. Virginia ex rel. Va. State Bar*, 377 U.S. 1, 8 (1964).

<sup>188</sup> *United Mine Workers of Am. v. Ill. State Bar Ass’n*, 389 U.S. 217, 223 (1967). *See also* *State Emp. Bargaining Agent Coalition 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.”).

<sup>189</sup> Garden, *supra*, at 17; *see also* James Gray Pope, *Labor-Community Coalitions and Boycotts*, 69 TEX. L. REV. 889 (1991); Marion Crain, *Between Feminism and Unionism: Working Class Women, Feminism and Labor Speech*, 82 GEO. L.J. 1903 (1994). These negative characterizations have serious implications which extend beyond the speech/assembly rights arena. *See, e.g.*, Benjamin Levin, *Blue-Collar Crime: Conspiracy, Organized Labor, and the Anti-Union Civil RICO Claim*, 75 ALB. L. REV. 559, 562-63 (2012) (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* James J. Brudney, *Collateral Conflict: Employer Claims of RICO Extortion Against Union Comprehensive Campaigns*, 83 S. CAL. L. REV. 731 (2010) (describing rise of RICO claims against unions in the context of union organizing and pressure strategies).

appropriate union activity, and its division of union activities into component parts misses the holistic sense of the group’s identity.<sup>190</sup>

And yet many unions have represented a kind of lived politics—through their gatherings, their ways of life, 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.<sup>191</sup> Unions have historically forged strong communal connections among African-Americans, women, immigrants, and other political minorities.<sup>192</sup> And unions have

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<sup>190</sup> See *Communications Workers of Am. v. Beck*, 487 U.S. 735 (1988) (describing obligation of nonmembers under NLRA to pay only for the support of union activities “germane to collective bargaining”); *UFCW, Locals 951, 7 & 1036 (Meijer, Inc.)*, 329 N.L.R.B. 730 (1999), *enforced*, 284 F.3d 1099 (9<sup>th</sup> Cir.) (*en banc*), *amended*, 307 F.3d 760 (9<sup>th</sup> Cir.), *cert. denied*, 537 U.S. 1024 (2002) (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); *Ellis v. Brotherhood of Railway, Airline & Steamship 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); *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 incident 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); *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).

<sup>191</sup> See, e.g., *Brotherhood of R. R. Trainmen v. Virginia ex rel. Va. State Bar*, 377 U.S. 1, 2-3 (1964) (“the 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, ARIANE LIAZOS, AND MARSHALL GANZ, *WHAT A MIGHTY POWER WE CAN BE: AFRICAN AMERICAN FRATERNAL GROUPS AND THE STRUGGLE FOR RACIAL EQUALITY* (2006).

<sup>192</sup> For examples of positive collaborations between unions and people of color, see Marion Crain, *Whitewashed Labor Law, Skinwalking Unions*, 23

formed alliances with many other groups to advance a wide array of social, political, and economic interests.<sup>193</sup>

Labor-oriented groups provide other benefits that reflect our democratic commitments. Some benefits occur at the individual level. Groups can provide individuals with emotional support, friendship, and stability, as well as advance the development of social identity.<sup>194</sup> They may also strengthen bonds by fostering habits of collaboration and cooperation, skills important to civic

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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 (2000); RUTH MILKMAN & KIM VOSS, REBUILDING LABOR: ORGANIZING AND ORGANIZERS IN THE NEW UNION MOVEMENT (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 2013. 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 WILLIAM E. FORBATH, LAW AND THE SHAPING OF THE AMERICAN LABOR MOVEMENT (1991); Marion Crain & Ken Matheny, *Labor's Identity Crisis*, 89 CAL. L. REV. 1767 (2001) (exploring how law cabined union agendas and directed them away from social justice concerns); 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); 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, *Colorblind Unionism*, 49 UCLA L. REV. 1313 (2002). See also RUTH MILKMAN, GENDER AT WORK (1987); ALICE KESSLER-HARRIS, OUT TO WORK (1982); WOMEN, WORK AND PROTEST (RUTH MILKMAN ED., 1985); PHILIP S. FONER, ORGANIZED LABOR AND THE BLACK WORKER 1619-1981 (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); DAVID E. BERNSTEIN, ONLY ONE PLACE OF REDRESS (2001).

<sup>193</sup> See, e.g., RUTH MILKMAN, JOSHUA BLOOM & VICTOR NARRO, WORKING FOR JUSTICE: THE LA MODEL OF ORGANIZING AND ADVOCACY (2010) (discussing coalitions between labor and immigrant groups); 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); Pope, *Labor-Community Coalitions*; Crain, *Between Feminism and Unionism*.

<sup>194</sup> Jason Mazzone, *Freedom's Associations*, 77 WASH. L. REV. 639, 695 (2002).

participation.<sup>195</sup> And they offer leverage to citizens who seek to amplify their voices at the political level, helping citizens to enhance their power and shape policy.<sup>196</sup> This is precisely the goal of group actions like those orchestrated by Fast Food Forward: among its goals is legislation to raise the minimum wage. Some groups, including labor unions and workers' centers, also function as training grounds for democratic governance; they offer members the opportunity to gain skills useful for political participation. These skills can include organizing and recruiting, public speaking, and persuasive writing.<sup>197</sup>

Unions have also wielded significant influence in the legislative arena. Unions have lobbied for different laws protecting workers' rights beyond the union sector. Union support has been critical to the enactment of antidiscrimination laws, unemployment insurance, wage and hour laws, protections for pensions and health benefits, workplace safety and health legislation, and even family leave legislation.<sup>198</sup> Unions have also been active players in

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<sup>195</sup> See *id.* at 696–97.

<sup>196</sup> *Id.*

<sup>197</sup> *Id.* at 697–98. For example, the AFL-CIO's Constitution contains the following commitment:

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

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

<sup>198</sup> MARION CRAIN ET AL., *WORK LAW: CASES AND MATERIALS* 31 (2d ed. 2010). Unions' interest in advocating for statutory protection for workers as a class is not entirely altruistic: new statutory rights raise the floor from which bargaining begins on behalf of union members, augmenting unions' power at the bargaining table. See Robert J. Rabin, *The Role of Unions in a Rights-Based Workplace*, 25 U.S.F. L. REV. 169, 173 (1991).

litigation, both as litigants, amicus curiae.<sup>199</sup> Their activity has affected affirmative action, federalism, campaign finance, voting rights, antidiscrimination law, wage and hour law, and constitutional rights for public sector employees.

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. Others are diffuse and less centralized.<sup>200</sup> And many new 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.”<sup>201</sup>

Perhaps one reason for the Court’s lack of charity toward labor groups has been an aversion to the kind of destabilizing dissent that such groups may produce. But the right of assembly embraces the possibility of this dissent. Originally, the assembly clause included a reference limiting it to “the common good.” However, during the debates over the text of the assembly clause, the drafters removed the reference.<sup>202</sup> We don’t know why this textual change occurred, but we do know its consequences. If the right of assembly had been limited to only the common good (as defined by the state),

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<sup>199</sup> See Garden, *supra* note \_\_ (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), available at <http://ssrn.com/abstract=1866844> (documenting labor movement involvement in impact litigation and examining implications for union identity).

<sup>200</sup> 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, March 26, 2013. 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 [www.NDLON.org](http://www.NDLON.org); [www.domesticworkers.org](http://www.domesticworkers.org); [www.nytw.org](http://www.nytw.org).

<sup>201</sup> Steven Greenhouse, *The Workers Defense Project, a Union in Spirit*, N.Y. TIMES, Aug. 10, 2013. Greenhouse notes that one dinner meeting served tacos, rice and beans and included a humorous skit mocking an employer. *Id.*

<sup>202</sup> See INAZU, *supra* note \_\_, at 22-23 (describing textual changes in various drafts).

the assembly as a means of dissent or protest would have been eviscerated.<sup>203</sup> Congress decided otherwise. When the Senate approved the final form of the amendment, it omitted any no reference to the common good. The final wording, with the qualification that any such assembly must be “peaceable,” suggests an important distinction between the constraints of peaceability and the constraints of the common good.<sup>204</sup> The former are *minimal* limits.<sup>205</sup> They tolerate a substantial amount of risk to the democratic project. We may rightly worry when speech or assembly begin to risk violence or threaten to undermine the democratic theory of free speech.<sup>206</sup> But our tolerance for potentially harmful or disruptive First Amendment activities must be exceedingly high.

### 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

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<sup>203</sup> 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.” Congressional Register, August 15, 1789, vol. 2, *quoted in* NEIL H. COGAN, *THE COMPLETE BILL OF RIGHTS: THE DRAFTS, DEBATES, SOURCES, AND ORIGINS* 145 (1997). *Cf.* Melvin Rische, *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.”).

<sup>204</sup> Stated differently, the peaceability limitation might reflect a very thin common good presumption, but one that excluded only assemblies that engage in violent activity.

<sup>205</sup> *Cf.* Post, *supra* note \_\_ [Between Governance], at 1730 (suggesting that the proper starting point is that “the 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.

<sup>206</sup> On the latter point, *see, e.g.*, Owen M. Fiss, *The Irony of Free Speech* 16 (1996) (expressing concern for private expression that would “make it impossible for . . . disadvantaged groups even to participate in the discussion.”).



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.<sup>207</sup> One problem with relying on speech is that it neglects the expressive connection between speakers and places.<sup>208</sup> As Timothy Zick has observed, a broad trend has emerged in which “speakers [are] denied the opportunity to reach intended audiences or permitted to speak only under the most restrictive conditions” which includes “the frequent physical displacement of speakers and speech.”<sup>209</sup>

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 is largely determined by the location and timing of the protest activity and the language on the picket signs or handbills.<sup>210</sup> The second asks what form the pressure takes, and the answer to this inquiry turns on whether the activity is coercive, and on whether it is categorized as picketing.<sup>211</sup> Each of these inquiries neglects the connection between expression and context.

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<sup>207</sup> *Perry Education Association v. Perry Local Educators’ Association*, 460 U.S. 37 (1983). *See generally* Inazu, *supra* note \_\_ [First Amendment’s Public Forum].

<sup>208</sup> *See* ZICK, *supra*, note \_\_ (“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.”).

<sup>209</sup> *Id.* at xii.

<sup>210</sup> *See, e.g.,* *Sailors’ Union of the Pacific & Moore Dry Dock Co.*, 92 N.L.R.B. 547 (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); *Int’l Union of Electrical, Radio & Machine Workers, Local 761 v. NLRB (General Electric Co.)*, 366 U.S. 667 (1961) (approving *Moore Dry Dock* test and applying it to situation where union picketed separate gates marked for subcontractors); *Houston Building & Constr. Trades Council (Claude Everett Constr. Co.)*, 136 N.L.R.B. 321 (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).

<sup>211</sup> *See, e.g.,* *NLRB v. Retail Clerks, Local 1001 (Safeco Title Insurance Co.)*, 447 U.S. 607 (1980) (finding picketing that is reasonably likely to threaten neutral party with ruin or substantial loss coercive where primary’s product constitutes 90% of the picketed employers’ gross incomes); *NLRB v. Fruit*

Consider first the time and place inquiries surrounding the target of a labor protest. In July 2013, Chicago-area funeral directors and funeral home drivers who were members of the Teamsters launched a strike against a national funeral home chain and undertook peaceful picketing aimed at consumers that pressed their need for pension and health care protections, only to be stymied by an injunction because their picket line activity disrupted the normal business of the funeral home and, according to the employer, offended public sensibilities.<sup>212</sup> The employer, a Chicago funeral home that had locked out union workers after contract negotiations broke down, argued that the union’s picket represented “gross insensitivity and harassment directed at grieving families.”<sup>213</sup> The court issued a preliminary injunction prohibiting picketers from (among other things) obstructing entrance to or exit from the funeral home within 30 minutes before or after funeral services.<sup>214</sup> In the struggle over the appropriate place and time for workers to publicize their dispute, the employer used labor doctrine against the union, obscuring the impact of its own actions on workers and their families, and simultaneously preventing the union from conveying its message of solidarity at the times when the largest number of members of the public would be on hand to witness it and when—as the publicity surrounding this protest demonstrates—the media would be most likely to cover it.<sup>215</sup>

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Packers (Tree Fruits), 377 U.S. 58 (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); *Service & Maint. Employees, Local 399 (William J. Burns Detective Agency)*, 136 N.L.R.B. 431 (1962) (where 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).

<sup>212</sup> Mike Nolan, *Teamsters to Strike Funeral Homes*, SOUTHTOWN STAR, July 1, 2013; Susan J. McGolrick, *Court Prohibits Funeral Home Workers From Making Threats in Post-Lockout Picket Lines*, DAILY LAB. REP. (BNA) No. 184, Sept. 23, 2013, at A-8.

<sup>213</sup> McGolrick, *supra* note \_\_\_, at A-8. Said 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.*

<sup>214</sup> *Id.*

<sup>215</sup> See ZICK, *supra* note \_\_\_, at 3.

The second inquiry in assessing the legality of a labor protest involves the manner of the protest. Because of its confrontational nature, picketing is deemed coercive for labor law purposes and is directly regulated by the NLRA.<sup>216</sup> And because the Court has classified handbilling as a form of pure speech protected by the First Amendment,<sup>217</sup> union agents can handbill in situations where picketing would be circumscribed, such as where the target is a secondary employer or where primary picketing would be time-limited.<sup>218</sup> But even handbilling may be found to be coercive depending upon the context.

The key to avoiding categorization of a labor protest as coercive is to minimize the potential for confrontation between the protestors and workers or consumers who seek to enter the business, often by reducing the number of protestors present. For this reason, unions often substitute inanimate objects 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.<sup>219</sup> The NLRB ruled that handbilling by the union was permissible, even though the handbill denominated the temporary staffing company a “rat employer” and highlighted its message with display of a 16-foot-tall giant inflatable rat.<sup>220</sup> Further, 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

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<sup>216</sup> See, e.g., NLRA §§ 8(b)(1)(A) (prohibiting picketing involving violence, intimidation, or threats that coerces employees to join or to refrain from joining a union); 8(b)(4) (prohibiting secondary boycotts); 8(b)(7)(limiting organizational or recognitional picketing).

<sup>217</sup> See *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council (DeBartolo II)*, 485 U.S. 568, 587-88 (1988).

<sup>218</sup> See NLRA §§ 8(b)(4); 8(b)(7); *supra* notes \_\_\_\_ & accompanying text.

<sup>219</sup> 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).

<sup>220</sup> *Sheet Metal Workers Local 15*, 356 N.L.R.B. No. 162 (2011); Mackson Landsberg, *supra*, note \_\_\_\_.

therefore is lawful as long as it does not block access to the facility.<sup>221</sup>

Unions are thus incentivized to ensure that their protests are treated as more akin to speech than to conduct. But the speech-based analysis of contemporary cases misses the connections that the protest may foster and the message that it sends of worker solidarity, persistence, and determination. It 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.

#### IV. IMPLICATIONS FOR LABOR’S IMAGE AND EFFICACY

We turn now to some of the real-world consequences for labor unionism of an impoverished understanding of the First Amendment that overlooks assembly rights. In particular, the eclipse of assembly rights by speech interests in cases addressing constitutional protection for collective activities by workers has contributed to an excessive emphasis on individualism and autonomy rather than on relational and communal interests. This emphasis has in turn watered down statutory protections, the most important of which is Section 7 of the NLRA, which protects “concerted activities.”<sup>222</sup> Ultimately, the sidelining of assembly rights has shaped the nature of labor unionism itself, reducing it in the public and judicial mind to a greedy self-interest group intent only on agitating for a larger share of the economic pie. Anti-labor forces have capitalized on the public’s distaste for labor unionism by working to expand the definition of the statutory term “labor organization” to further limit expressive activity by any group that advocates for workers’ rights.

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<sup>221</sup> *Carpenters & Joiners of Am. Local 1827*, 357 N.L.R.B. No. 44 (2011); *Southwest Reg’l Council of Carpenters (New Star Gen. Contractors Inc.)*, 356 N.L.R.B. No. 88 (2011).

<sup>222</sup> NLRA § 7.

*A. Protection for Concerted Activities*

The NLRA provides for the right of workers to organize and to engage in concerted activities “for mutual aid or protection,” and prevents employers from disciplining or discharging workers in retaliation for engaging in such activities.<sup>223</sup> The statute requires some nexus between the concerted activity and traditional economically-oriented union activity.<sup>224</sup> To claim the Act’s protection, the 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 (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.<sup>225</sup>

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 of interest to the group 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 employer-employee relationship.”<sup>226</sup> But these efforts

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<sup>223</sup> NLRA §§ 7, 8(a)(1), 8(a)(3).

<sup>224</sup> Richard Michael Fischl, *Self, Others, and Section 7: Mutualism and Protected Self-Interest 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).

<sup>225</sup> NLRB v. City Disposal Systems, 465 U.S. 822 (1984) (defining concerted activity); see NLRB v. Wash. Aluminum Co., 370 U.S. 9, 14–17 (1962) (protecting concerted activity in the nonunion setting); 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. Local Union No. 1229, IBEW, 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 original unlawful purpose/unlawful means test developed at common law for the evaluation of labor protests. See *Vegeahn v. Guntner*, 44 N.E. 1077, 1077 (Mass. 1896).

<sup>226</sup> *Eastex, Inc. v. NLRB*, 437 U.S. 556, 567–68 (1978).

must relate directly to employees' working conditions.<sup>227</sup> As a result, employee concerted action has been protected where it relates to the minimum wage, state right to work legislation, living wages and benefits, employee drug testing, and workplace safety laws. But these protections have not extended to concerted action deemed too attenuated from employees' workplace interests.<sup>228</sup> Moreover, to claim protection the activities must be self-interested rather than altruistic. Thus, 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.<sup>229</sup>

Further, worker conduct that is inconsistent with the business interests of the employer or which involves disrespectful or disloyal conduct loses protection under the Act.<sup>230</sup> For example, efforts by

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<sup>227</sup> *Id.*

<sup>228</sup> For example, protection might be denied to employees protesting environmental conditions created by the manufacturing processes of their employer which impact the surrounding community where they reside, while protests pertaining to workplace safety would be protected. See Pope, *Labor-Community Coalitions*, *supra* note \_\_.

<sup>229</sup> 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-LaGuardia Act of 1932, § 4. In this context the Court has interpreted the phrase "labor disputes" quite broadly, however, so that even some politically motivated protests by unions and other groups have been able to claim statutory protection. See, e.g., *Marine Cooks & Stewards v. Panama S.S. Co.*, 362 U.S. 36 (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); *Jacksonville Bulk Terminals, Inc. v. International Longshoremen's Ass'n*, 457 U.S. 702 (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); see also *New Negro Alliance v. Sanitary Grocery Co.*, 303 U.S. 552 (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).

<sup>230</sup> 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).

non-striking employees to generate a consumer boycott have been held to be unprotected where employees continue to draw pay while engaged in activities designed to “injure or destroy his employer’s business.”<sup>231</sup> Even where the employees are on strike (and thus no longer drawing pay), handbilling that disparages the employer’s product has been held unprotected.<sup>232</sup> In addition, workers who use profanity while exercising section 7 rights may forfeit protection under the Act.<sup>233</sup> Finally, concerted activity that is found to be particularly harmful to the employer’s business operations is deemed unprotected. 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” and “inappropriate” means of protest, disproportionate to the subject of their complaint.<sup>234</sup>

### *B. Defining the “Labor Organization”*

The NLRA also places three extraordinary limits on the public protests of “labor organizations.”<sup>235</sup> First, the act restricts primary picketing where labor unions undertake picketing with the goal of organizing workers or pressuring employers to recognize and bargain with the union.<sup>236</sup> Second, the Act bars unions from

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<sup>231</sup> Hoover Co. v. NLRB, 191 F.2d 380 (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 (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).

<sup>232</sup> *See* Patterson-Sargent Co., 115 N.L.R.B. 1627 (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).

<sup>233</sup> *See* Atlantic Steel Co., 245 N.L.R.B. 814 (1979); ALCOA, 338 N.L.R.B. 20 (2002).

<sup>234</sup> Bob Evans Farms, Inc. v. NLRB, 163 F.3d 1012, 1022-23 (7th Cir. 1998).

<sup>235</sup> *See* NLRA § 2(5)(defining “labor organization” for purposes of NLRA application).

<sup>236</sup> *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* International Hod Carriers Local 840 [Blinne Construction Co.], 135

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.<sup>237</sup> Finally, the Act bans any union activities potentially coercing or interfering with an individual’s decisions to join a union. This 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.<sup>238</sup>

Based on these restrictions, groups committed to advancing workers’ rights have sought to define themselves as anything but “labor organizations,” the statutory term of art that triggers these restrictions.<sup>239</sup> Modern unions have developed strategies with which to support worker protests, while staying sufficiently in the

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N.L.R.B. 1153, 1157 (1962). It prohibits unions that have lost an election from picketing, bars picketing by a rival union where another union already represents the workers, and limits the duration of nonviolent picketing by uncertified unions that fall into neither category to “a reasonable period not to exceed 30 days,” unless the picketing union files an election petition within that period. 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 30 percent of the workers in the potential bargaining unit. 29 C.F.R. § 101.18 (2013).

<sup>237</sup> 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*, 447 U.S. 607, 613–14 (1980); cf. PAUL WEILER, *GOVERNING THE WORKPLACE: THE FUTURE OF LABOR AND EMPLOYMENT LAW* 269–73 (1990) (discussing rationale behind Section 8(b)(4) and critiquing its application).

<sup>238</sup> NLRA § 8(b)(1); *Nestle Ice Cream Co. v. NLRB*, 46 F.3d 578 (6<sup>th</sup> Cir. 1995); *Freund Baking Co. v. NLRB*, 165 F.3d 928 (D.C. Cir. 1999). Catherine Fisk, *Unions and Employment Lawyers*, *supra* note \_\_\_\_.

<sup>239</sup> See § 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 (1959) (finding employee participation committees “labor organizations” if they “deal with” the employer concerning grievances); Rosenfeld, *supra* note \_\_\_\_, at 471 (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).



background so as to avoid liability under the NLRA and escape exposure to injunctions and damage awards.<sup>240</sup> This makes it difficult to institutionalize forms of worker representation over time that will outlast the particular advocacy effort. The result is more organic (but perhaps less effective) forms of organizing.<sup>241</sup>

Consider the recent example of protests by fast-food workers and other minimum wage earners described in the Introduction.<sup>242</sup> The protest quickly gathered momentum, spreading to retail establishments dependent on low-wage labor, and sparking additional protests and rallies in other major cities nationwide.<sup>243</sup> These rolling class-wide protests are not restricted by the labor laws because no “labor organization” is directly involved in orchestrating them and they do not exist to “deal with” a single employer.<sup>244</sup> But it is unclear whether their protests will have any concrete effect in actual workplaces. And the fact that labor unions have supported the protests has provoked a backlash from business and some politicians against the nonprofit groups that initiated the protests, arguing that they are mere fronts for union activism. These kinds of concerns also kept unions at a distance from the recent Occupy Movement,

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<sup>240</sup> See Kris Maher, *Worker Centers Offer a Backdoor Approach to Union Organizing*, WALL ST. J., July 24, 2013 (describing how workers’ centers, often backed by unions, avoid the NLRA’s restrictions because they lack ongoing bargaining relationships with employers).

<sup>241</sup> Alan Hyde, *Who Speaks for the Working Poor?: A Preliminary Look at the Emerging Tetralogy of Representation of Low-Wage Service Workers*, 13 CORNELL J.L. & PUB. POL’Y 599, 603–06 (2004) (describing the arrangements and questioning their efficacy). See also Matthew T. Bodie, *The Potential for State Labor Law: The New York Greengrocer Code of Conduct*, 21 HOFSTRA LAB. & EMP. L. J. 183, 194–200 (2003) (discussing New York City Greengrocer Code of Conduct establishing minimum terms and conditions for employment of predominantly Korean workforce; grocers who signed the Code were immune from prosecution for past state law violations but not for future violations, and the signatories agreed to future monitoring by an independent company).

<sup>242</sup> See *supra* notes \_\_\_ & accompanying text.

<sup>243</sup> Steven Greenhouse, “A Day’s Strike Seeks to Raise Fast-Food Pay,” *New York Times* (July 31, 2013); 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.

<sup>244</sup> See NLRA section 2(5); *NLRB v. Northeastern Univ.*, 601 F.2d 1208 n.9 (1st Cir. 1979) (finding National Association of Working Women 9To5 not a labor organization).

whose agenda included highlighting economic and workplace inequality.<sup>245</sup>

Each of the expressive protests described above challenges the economic status quo, sometimes at the level of the workplace and sometimes at a broader class-based level. Each is also a kind of political protest that implicates core First Amendment concerns. Yet under the current contours of the NLRA and judicial decisions interpreting its provisions, the political aspects of labor protest must be obscured or minimized if the workers are to retain their protections against retaliation within the confines of the employment relationship, which extend only to self-interested economic demands. Thus, the legislative and judicial restrictions on labor protest under the NLRA have powerfully affected the forms that protest assumes, its efficacy, the messages that are conveyed, and ultimately the character of the groups themselves.

What might labor unionism have looked like had it not been subject to the narrowing forces of the NLRA's jurisprudential stranglehold? 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. The first—"more, more, more"—captures the current public perception of unions as little more than special interest groups.<sup>246</sup> 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 comprehension of labor's aspirations and wants. . . . We want more schoolhouses and less jails; more books and less arsenals; more learning and less vice; more constant work and less crime; more leisure and less greed;

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<sup>245</sup> See Gillian Lester, chapter in *WORKING AND LIVING IN THE SHADOW OF ECONOMIC FRAGILITY* (Marion Crain & Michael Sherraden eds., forthcoming Oxford University Press 2014); Todd Gitlin, *OCCUPY NATION: THE ROOTS, THE SPIRIT, AND THE PROMISE OF OCCUPY WALL STREET* (2012).

<sup>246</sup> See RICHARD B. FREEMAN & JOEL ROGERS, *WHAT WORKERS WANT* 89 (1999) (documenting popular distaste for unionism).

more justice and less revenge; in fact, more of the opportunities that cultivate our better natures. . . .<sup>247</sup>

Gompers' words could themselves be dismissed as "too lofty, too ennobling." But to do so would miss the kind of politics that transcends a rigid compartmentalization of issues-driven interests. That politics insists that our lives are necessarily integrated with one another and throughout our different spheres. Books and leisure and public charity 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.

#### 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. 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, "Fear of serious injury cannot alone justify suppression of free speech and assembly. Men feared witches and burnt women."<sup>248</sup> Curtailing workers' assembly rights should be based on more than centuries-old notions of labor unionism as intrinsically violent. Both

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<sup>247</sup> See Samuel Gompers address, available at <http://www.history.umd.edu/Gompers/quotes.htm> (Vol. 3: Address, Aug. 28, 1893).

<sup>248</sup> *Whitney v. California*, 274 U.S. 357, 376(1927) (Brandeis, J., concurring).

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our constitution and our labor laws embrace assembly as fundamental to the health of our democratic polity.