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Is it Time for a New Free Speech Fight? Thoughts on Whether the First Amendment is a Friend or Foe of Labor

Catherine L. Fisk†

INTRODUCTION

Is the First Amendment's free speech clause the friend or foe of the labor movement?

The First Amendment, at least in the Supreme Court, hasn't been much of a friend to labor unions. Among the few First Amendment rights that the Supreme Court has expanded in the labor union context recently is the right of the union-represented employee to refuse to pay fees to the union that represents them.[1] Pushing an aggressive First Amendment agenda to protect labor protest, such as a constitutional challenge to the federal prohibition on secondary boycotts, might not really generate power for worker groups. Rather, one might reasonably fear, it will legitimate the efforts of business groups to use the First Amendment to attack union dues, collective

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† Barbara Nachtrieb Armstrong Professor of Law at the University of California, Berkeley, School of Law (Boalt Hall). This essay was delivered in a slightly different form as the David E. Feller Memorial Lecture on April 4, 2017. I was fortunate to study with Professor Feller; without his class I might never have become a labor lawyer. I thank David Rosenfeld for inviting me to deliver the Feller Lecture and for his dedicated and creative lawyering on behalf of working people and for sharing ideas with me over the years. Thanks to the staff of BJELL for organizing the lecture and helping to edit this essay. Finally, thinking about labor law in the Bay Area reminds me of my enormous debt to my father, Winston Mills Fisk, who worked his way through college, law school, and a PhD at Berkeley as a member of Harry Bridges' own local of the International Longshore and Warehouse Union and who inspired me to go to Berkeley Law because it was the best place to learn to be a lawyer for social justice.

1. *See* Harris v. Quinn, 573 U.S. 616 (2014).

bargaining,[2] and laws that restrict coercive or harassing workplace speech[3] or that require employers to notify employees of their rights.[4] The Supreme Court has already held that unions are free to distribute handbills to urge a secondary boycott,[5] and to picket to encourage a product boycott,[6] and the NLRB[7] and some courts of appeals[8] have held that other forms of nonpicketing labor protest are either not prohibited by statute or are constitutionally protected. One might therefore argue there is little to be gained by an attack on the federal restrictions on picketing or secondary boycotts and a lot to lose by increasing First Amendment protection, and therefore judicial scrutiny, of speech in the labor field.

Notwithstanding reasons to believe the contemporary First Amendment is more likely to be foe than friend of labor, history suggests the contrary. This essay explains why, making three arguments.

First, social movements exist only where and when there is a robust commitment to free speech, and workers have real power only when labor has the capacity to be a social movement.[9] One could look across the globe for evidence of this, but I will look to history. The constitutional rights of free speech and association owe their origins to labor organizing and labor protest.[10]

Second, labor gained power as a social movement by engaging in protest and it started down the path to losing power when, in a series of cases decided between 1941 and 1960, the Supreme Court largely eliminated constitutional rights to picket and boycott. In the early 1960s, just when the Court finished creating the labor protest exception to the free speech clause, it extended First

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2. *See, e.g.*, Janus v. Am. Fed'n of State, Cty., & Mun. Emps. Council 31, 138 S. Ct. 2448 (2018); Chamber of Commerce v. City of Seattle, 890 F. 3d 769 (9th Cir. 2018); Clark v. City of Seattle, 899 F.3d 802 (9th Cir. 2018).

3. *See, e.g.*, 29 U.S.C. § 158(a)(1) (2012); Michael M. Oswalt, *The Content of Coercion*, 52 U.C. Davis L. Rev. 1585 (2019) (describing the ways in which labor law restricts coercion).

4. *See* Chamber of Commerce v. NLRB, 721 F.3d 152 (4th Cir. 2015) (holding that NLRB rule requiring employers to post notice in workplace exceeds agency's statutory authority and not deciding First Amendment issue); Am. Meat Inst. v. U.S. Dep't of Ag., 760 F.3d 18 (D.C. Cir. 2014) (en banc) (holding that government interest in preventing deception justifies rule compelling provision of truthful information in commercial context), *overruling* Nat'l Ass'n of Mfrs. v. NLRB, 717 F.3d 947 (D.C. Cir. 2014) (holding that NLRB rule requiring employers to post notice in workplace violates section 8(c), which prohibits NLRB from treating noncoercive speech as an unfair labor practice).

5. *See* Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568 (1988).

6. *See* NLRB v. Fruit & Vegetable Packers, Local 760, 377 U.S. 58 (1964).

7. *See* United Bhd. of Carpenters, Local Union No. 1506, 355 NLRB No. 159 (2010).

8. *See, e.g.*, Overstreet v. United Bhd. of Carpenters., Local Union No. 1506, 409 F.3d 1199 (9th Cir. 2005).

9. *See* TOMIKO BROWN-NAGIN, COURAGE TO DISSENT: ATLANTA AND THE LONG HISTORY OF THE CIVIL RIGHTS MOVEMENT (2011); FRANCES FOX PIVEN & RICHARD CLOWARD, POOR PEOPLE'S MOVEMENTS: WHY THEY SUCCEED AND HOW THEY FAIL (1977).

10. LAURA WEINRIB, THE TAMING OF FREE SPEECH: AMERICA'S CIVIL LIBERTIES COMPROMISE (2016).

Amendment protection to civil rights and antiwar protest. Just as civil rights protesters drew on the sit down strike pioneered by labor in the 1930s, the Supreme Court found a First Amendment right to engage in civil rights protest by drawing on the cases that labor unions had won in 1939 and 1940.

Third, the literature on the role of lawyers for social movements between the 1930s and now suggests the importance of law to how lawyers advise their clients. The only hope for the future of the labor movement is in cultivating a spirit of protest. Without the right to engage in robust protest, labor lawyers are in a difficult place when they advise their clients, and can do little to create the legal space to enable workers and social justice activists to launch a new round of free speech fights of the sort that brought the labor movement into power in the 1930s.

Civil rights lawyers' aggressive commitment to protecting the right of protest was crucial to the development of civil rights law. Lawyers for conservative causes are being bold in their vision for what the First Amendment can do for their clients. Lawyers for labor should be bold too, especially if the boldness is encouraging speech and association – the only weapons that working people have ever had.

I.
LABOR AND FREE SPEECH BEFORE 1940: A BAY AREA STORY

An important chapter in the story of labor's relationship to the First Amendment began here in the East Bay with the Industrial Workers of the World (IWW), one of the first labor unions to successfully organize low-wage immigrant workers, people of color, and women, along with white men, all in One Big Union. The Wobblies, as the IWW was known, advocated robust labor protest and the general strike as a means to make all institutions more egalitarian. To that end, the Wobblies launched a series of protests that became known as "Free Speech Fights" to mobilize people and to raise consciousness. An IWW organizer would stand on a soapbox on a street corner talking about labor exploitation. When the police came to arrest them, the labor activist would say, "Have you ever read the Constitution?" It was a message to the police and to the audience: We have a right to demand a better life.[11]

Constitutionalizing protest has been an enduring strategy. During the Great Delano grape boycott in 1966, Robert Kennedy came to California as part of a Senate Subcommittee hearing on Farm Labor and suggested that the Kern County sheriff should "read the Constitution of the United States" and

11. *See, e.g.*, WEINRIB, *supra* note 10, at 26–36.

think again before arresting striking farm workers.[12] This is the same thing that protesters from the Black Lives Matter movement say.

In each of these cases, the First Amendment was asserted as a core part of an organizing campaign. Although the IWW lost their free speech fights in the short term, they won an important free speech war in the long run. One of those short term losses that became a major rhetorical win began in Oakland with the arrest of social reformer Anita Whitney, a middle-aged graduate of Wellesley College who had been posting bail for IWW activists arrested under California's new criminal syndicalism law.[13] In April 1919, California, by a vote of 59-9 in the Assembly and 33-0 in the Senate, enacted a statute that made it a felony to advocate, or to be involved with an organization that advocated "criminal syndicalism," which the statute defined as "any doctrine or precept advocating, teaching, or aiding and abetting the commission of crime, sabotage, (which word is hereby defined as meaning willful and malicious physical damage or injury to physical property), or unlawful acts of force and violence or unlawful methods of terrorism as a means of accomplishing a change in industrial ownership or control, or affecting any political change."[14] Seventeen other states enacted similar statutes.[15] In California, as elsewhere, the Chamber of Commerce lobbied intensely for the bill. And, within ten days after the California criminal syndicalism law was enacted, district attorneys in San Francisco and Alameda counties obtained warrants for the arrest of dozens of IWW members. As Oakland police Captain Walter J. Peterson told the press, he expected to have Oakland "cleaned of I.W.W.s" within a few hours.[16]

In November 1919, Whitney gave a speech at the Hotel Oakland in which she criticized the underfunding of segregated schools for black students and urged support for a federal anti-lynching bill. After a stirring conclusion urging that the blight of racism be eliminated "so that the flag that we love may truly wave o'er the land of the free and the home of the brave," Oakland police arrested her for violating California's newly enacted criminal syndicalism law.[17]

The crime was not her speech on race, but rather, having attended an organizational meeting of the California Communist Labor Party. When Anita Whitney's case finally reached the U.S. Supreme Court in 1927, the Court upheld the conviction. The Court found that Whitney's social justice

12. MARSHALL GANZ, WHY DAVID SOMETIMES WINS: LEADERSHIP, ORGANIZATION, AND STRATEGY IN THE CALIFORNIA FARM WORKER MOVEMENT 151 (2009).

13. PHILIPPA STRUM, SPEAKING FREELY: *WHITNEY V. CALIFORNIA* AND AMERICAN SPEECH LAW (2015).

14. *Id.* at 32.

15. *Id.* at 33.

16. *Id.*

17. *Id.* at 44.

activism posed a "clear and present danger" of inciting violence because the communist labor party criticized political participation as worthless and advocated worker organizing as the key weapon.[18] Although Ms. Whitney lost, Justice Brandeis wrote a concurring opinion that became a free speech icon, and his opinion emboldened many labor activists, supported by the ACLU, to fund Supreme Court litigation attempting to expand the rights of labor and those of leftist advocates.[19]

General strikes in San Francisco and Minneapolis in 1934, followed by the months-long sit-down strikes in the winter of 1936–37 not only forced companies to recognize unions, but also prompted the Supreme Court to uphold the National Labor Relations Act against constitutional challenge.[20] And then the ACLU and its labor clients began winning free speech cases. In 1937, in *De Jonge v. Oregon*, the Court overturned a conviction under an Oregon syndicalism statute, saying that "peaceable assembly for lawful discussion cannot be made a crime."[21] And in April 1940 labor finally achieved broad constitutional protection for picketing and protest when the Court handed down *Thornhill v. Alabama*[22] and *Carlson v. California*.[23] The Court in *Thornhill,* after citing the importance of speech in the American Revolution, explained that "[f]ree discussion concerning the conditions in industry and the causes of labor disputes appears to us indispensable to the effective and intelligent use of the processes of popular government to shape the destiny of modern industrial society."[24]

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18. Whitney v. California, 274 U.S. 357, 376 (1927).

19. WEINRIB, *supra* note 10, at 139–40. Four years after the Court upheld Anita Whitney's conviction, the Court in an opinion by Chief Justice Charles Evans Hughes—without citing *Whitney*—overturned the conviction of a 19-year-old woman who raised a red flag at a summer camp for communist youth. California had made it a crime to display a "red flag, banner or badge . . . as a sign, symbol or emblem of opposition to organized government or as an invitation or stimulus to anarchistic action or as an aid to propaganda that is of a seditious character." Stromberg v. California, 283 U.S. 359, 361 (1931).

20. NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937) (supporting the causal claim based on the close proximity in time between the massive sit-down strikes (from December 1936 through February 1937) and the Court's April decision upholding the NLRA in this case). *See also* James Gray Pope, *Worker Lawmaking, Sit-Down Strikes, and the Shaping of American Industrial Relations, 1935–1958*, 24 LAW & HIST. REV. 45 (2006). My thinking about the history of labor protest and the First Amendment owes a huge debt to Jim Pope's superb work in the field; indeed, readers may conclude that I haven't said much here that Jim hasn't already said. *See, e.g.*, James Gray Pope, *Labor's Constitution of Freedom,* 106 YALE L.J. 941 (1997); James Gray Pope, *Labor and the Constitution: From Abolition to Deindustrialization*, 65 TEX. L. REV. 1071 (1987).

21. 299 U.S. 353, 365 (1937).

22. 310 U.S. 88, 102 (1940).

23. 310 U.S. 106, 112–13 (1940) (explaining that the mode of expression was acceptable because "[t]he carrying of signs and banners, no less than the raising of a flag, is a natural and appropriate means of conveying information on matters of public concern").

24. 310 U.S. at 103.

II.
THE FALL OF LABOR'S FREE SPEECH AND THE RISE OF EVERYONE ELSE'S FROM 1940 TO 1980

Then started the long decline for labor speech and association rights. Less than a year after the Court granted protection for labor protest in *Thornhill* and *Carlson*, it began scaling it back. It gave a lot of reasons for doing so, all of which can be boiled down to six, which I highlight in bold face below. But, as we will see, it later repudiated each one of the six reasons for restricting protest when it turned its attention from labor to civil rights protest after 1960.

A. The Labor Protest Cases

First, the Court cited the spectre of **coercion and violence**. In *Milk Wagon Drivers v. Meadowmoor Dairies*, handed down in 1941 less than a year after *Thornhill* and *Carlson*, the Court rejected a First Amendment challenge to an injunction that prohibited the Chicago area dairy workers union, its 6,000 members, "and anyone who may now or hereafter agree or arrange with them," from picketing and encouraging a consumer boycott of stores that refused to employ unionized dairy drivers.[25] The reason was that there had been violence earlier in the campaign, although as Justices Black, Douglas, and Reed pointed out in dissenting opinions, the violence had occurred more than eight months before the union had picketed, more than four years before the trial court granted a narrow injunction against violence only, and more than five years before the Illinois Supreme Court granted a broader injunction against peaceful persuasion.[26]

A year later, in 1942, the Court found that even absent violence, some labor picketing can be enjoined because of the **harm and inconvenience** it causes.[27] After New York social security and unemployment compensation laws imposed payroll taxes on employees, some bakeries notified their drivers union that "they would no longer employ drivers but would permit the drivers to purchase trucks for nominal amounts . . . and thereupon to continue to distribute their baked goods as peddlers." In other words, they turned their employees into independent contractors to reduce labor costs. Sound familiar? As Justice Jackson explained,

> "The peddler system has serious disadvantages to the peddler himself. The court has found that he is not covered by workmen's compensation insurance, unemployment insurance, or by the social security system of the State and Nation. His truck is usually uninsured against public liability and property

25. 312 U.S. 287, 310 (1941).

26. *Id.* at 314–15 (Black, J., dissenting).

27. Bakery & Pastry Drivers & Helpers Local 802 of Int'l Bhd. of Teamsters v. Wohl, 315 U.S. 769, 770 (1942).

> damage . . . . If injured while working, he usually becomes a public charge, and his family must be supported by charity or public relief."[28]

And so the union tried to organize the low-wage peddlers and picketed bakeries to induce them to deal with unionized drivers. The New York courts enjoined the picketing, though it was peaceful and truthful, and the Court in *Bakery Drivers v. Wohl* found that the injunction violated the First Amendment.[29]

But in the very last sentence of the opinion, Justice Jackson observed in passing that the picketing had "slight, if any, repercussions upon the interests of strangers to the issue."[30] Justice Douglas was plainly alarmed, for he began his concurrence by saying: "If the opinion in this case means that a State can prohibit picketing when it is effective but may not prohibit it when it is ineffective, then I think we have made a basic departure from *Thornhill v. Alabama.*"[31]

And that is exactly what the Court did in another decision handed down the very same day. In *Carpenters and Joiners Union v. Ritter's Café*, a construction union picketed a café in Houston because the café owner had hired a nonunion contractor to work on a building he owned down the street.[32] The Court, in an opinion by Justice Frankfurter (who proved to be no friend of labor in his later years on the Court) upheld an injunction against the picketing under Texas unfair competition law invoking the power of states to protect "the common interest"[33] in being free from "**economic injury**."[34] The permissible "sphere of communication"[35] exists only "where there exists an interdependence of economic interest of all engaged in the same industry."[36] The Texas antitrust law, the Court added, was aimed at economic regulation rather than political protest.

Having characterized labor protest and boycotts as economic conduct that can be regulated to prevent inconvenience, the Court's next step in narrowing the free speech rights of labor was to characterize picketing and boycotts as **conduct not speech** that could be prohibited when the state has a valid interest in regulating the conduct. In 1949, in *Giboney v. Empire Storage and Ice*,[37] an association of retail ice peddlers in Kansas City tried to organize low wage peddlers by picketing suppliers and asking them not to sell to peddlers who refused to join the association. The picketing reduced

28. *Id.* at 771.
29. *Id.* at 775.
30. *Id.*
31. *Id.* at 775 (Douglas, J., concurring).
32. 315 U.S. 722, 722–23 (1942).
33. *Id.* at 725.
34. *Id.*
35. *Id.* at 727.
36. *Id.*
37. 336 U.S. 490 (1949).

the business of Empire, a supplier who continued to use nonunion peddlers, by 85 percent. A Missouri court enjoined the picketing under state antitrust law.

The Court viewed the case as a conspiracy among small businesses to restrain trade. It said the union's "activities – their powerful transportation combination, their patrolling, their formation of a picket line warning union men not to cross at peril of their union membership, their publicizing – constituted a single and integrated course of conduct."[38] Distinguishing *Thornhill*, Justice Black explained that conspiracies and many other crimes are accomplished through speech, and "it has never been deemed an abridgement of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed."[39]

In the government's and the Supreme Court's campaign to attack communism, which of course was also principally about attacking progressives in the labor movement, it was absolutely essential to characterize the criminal prosecution of communists as being about conduct, not about beliefs, or associations, or reading, or writing. Thus, in *Dennis v. United States*, in which the Court rejected a First Amendment challenge to a Smith Act conviction for some labor radicals who had organized a new branch of the communist party in New York, both Justice Vinson's majority opinion and Justice Jackson's concurring opinion insisted that the punishable activity was organizing the party (or in Jackson's view, a conspiracy), not the reading of Marxist-Leninist texts.[40]

The idea that picketing could be prohibited when it was *part of a course of conduct* was expanded in *Teamsters v. Vogt* in 1957 when the Court upheld an injunction against picketing that was the *only* conduct.[41] As Justice Douglas pointed out in dissent, the Court had come full circle. Labor protest had been the original constitutionally protected free speech. Now, it was not speech and it was not protected much at all, at least if it had any effect.

The Court convinced itself that federal labor law was a comprehensive regulatory regime that struck a delicate balance between the rights of labor, the rights of business, and the rights of consumers. To conclude that specific rules regulating speech violated the First Amendment, the Court said, would **upset the whole balance**. Thus, when the Court in 1950 upheld the noxious section 9(h) of the Taft-Hartley Act, which banned anyone from serving as a union officer who would not swear to an affidavit of noncommunist affiliation, it did so on the ground (among other things) that "[i]t is part of

38. *Id.* at 498.
39. *Id.* at 502.
40. 341 U.S. 494 (1951).
41. 354 U.S. 284 (1957).

some very complex machinery set up by the Federal Government for the purpose of encouraging the peaceful settlement of labor disputes."[42]

The Court took the sixth and final step in the dismantling of labor's First Amendment on June 4, 1951—a bad day for labor speech. To First Amendment lawyers, the best known case handed down that day was *Dennis v. United States*, upholding the constitutionality of the Smith Act which made it a federal crime to engage in the same conduct that Anita Whitney had engaged in—attending a political meeting to organize a radical left-wing party. *Dennis* articulated a new rule: government can prohibit speech whenever it is a reasonable way to prohibit some **unlawful objective**.

But to labor lawyers with mainstream, business-unionist clients, the big news of the day was a pair of cases, *NLRB v. Denver Building & Construction Trades Council*[43] and *International Brotherhood of Electrical Workers v. NLRB*,[44] which upheld the Taft-Hartley Act's broad ban on secondary protest under section 8(b)(4). In both cases, the Court upheld a prohibition on picketing used to persuade a general contractor to make a construction project an all-union job. In both cases, the union argued that the protest was not a secondary boycott: construction workers asked that they not be forced to work side by side on the same job with nonunion workers whose lower wages would ultimately undermine the cause of unions everywhere. As the Court explained in *Denver Building*, the unionists would have had a point if the general contractor was doing all the work on the jobsite itself, because then its own labor relations would have been in issue. But since it hired subcontractors, the unionists had no legitimate concern about the working conditions of any employer other than their own. The implications of that decision were huge in the construction industry then and now, just as they are huge in any industry that relies on a supply chain or outsourced labor today.

Having rejected a construction of the statute that would have allowed the labor protest by determining it not to be secondary, the Court compounded the problem in *IBEW*, decided on the same day, by a back of the hand treatment of the First Amendment challenge. The conduct alleged to be an unfair labor practice was peaceful "picketing followed by a telephone call emphasizing its purpose."[45] Not bothering to say why this was not speech, the Court simply said, in its entirety: "This provision has been sustained by several Courts of Appeals. The substantive evil condemned by Congress in § 8(b)(4) is the secondary boycott and we recently have recognized the constitutional right of states to proscribe picketing in

42. Am. Comms. Ass'n v. Douds, 339 U.S. 382, 401 (1950).

43. 341 U.S. 675 (1951).

44. 341 U.S. 694 (1951).

45. *Id.* at 705.

furtherance of comparably unlawful objectives. There is no reason why Congress may not do likewise."[46] And that was it.

Up to this point the Court had distinguished labor protest from the political speech protected by the first amendment for six reasons: **(1) coercion; (2) inconvenience to others; (3) economic regulation; (4) conduct not speech; (5) upset the balance in the regulatory framework; and (6) prevent unlawful objectives.**

If one stops to think about Uber drivers and the growth of the independent contractor classification, the need to launch a First Amendment challenge to section 8(b)(4) becomes apparent. Looking solely at the cases described above, one may conclude that such a challenge would be a sure loser. But that point of view would miss most of the modern free speech cases.

B. Civil Rights Protest and the Rise of Modern Free Speech Law

Long before a group of students started the direct action phase of the civil rights movement in 1960 by sitting in at a Woolworth's lunch counter in Greensboro, North Carolina,[47] there was a radical tradition in labor in which workers sat in at their factories. Sit-down strikes began in January 1936 when not-yet-unionized tire makers abruptly stopped work and refused to leave their Akron, Ohio Firestone plant for three days until the company reinstated a worker who had been suspended for one week without pay.[48] From there, the sit-down strike spread throughout the auto industry, and in the next several years hundreds of thousands of workers occupied their workplaces. Sit-down strikes spread to the South, as tobacco workers in the huge R.J. Reynolds factory in Winston-Salem, North Carolina won (for a short time) a union and a collective agreement in 1943 after a sit-down strike.[49] The next year Second Lieutenant Jack Roosevelt Robinson refused to move to the back of a Fort Hood army bus.[50] He was tried and acquitted by a court martial and went on to break the race barrier in Major League Baseball.

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46. *Id.* at 705 n.10 (citing Bldg. Serv. Emps. Int'l Union v. Gazzam, 339 U.S. 532 (1950); Int'l Bhd. of Teamsters v. Hanke, 339 U.S. 470 (1950); Hughes v. Superior Court, 339 U.S. 460 (1950); Giboney v. Empire Storage & Ice Co., 336 U.S. 490 (1949)).

47. Christopher W. Schmidt, *Divided by Law: The Sit-ins and the Role of the Courts in the Civil Rights Movement*, 33 LAW & HIST. REV. 93 (2015).

48. Pope, *Worker Lawmaking, supra* note 20, at 49–50.

49. ROBERT ROGERS KORSTAD, CIVIL RIGHTS UNIONISM: TOBACCO WORKERS AND THE STRUGGLE FOR DEMOCRACY IN THE MID-TWENTIETH CENTURY SOUTH 17 (2003); Robert Korstad & Nelson Lichtenstein, *Opportunities Found and Lost: Labor, Radicals, and the Early Civil Rights Movement*, 75 J. AM. HIST. 786, 788–93 (1988).

50. John Vernon, *Jim Crow, Meet Lieutenant Robinson: A 1944 Court-Martial,* 40 PROLOGUE MAG. 1 (Aug. 26, 2008).

When the Court first looked at civil rights protests, it regarded them with the same hostility it had toward labor. In *Hughes v. Superior Court,* decided in 1950, a group called Progressive Citizens of America picketed the Lucky supermarket in Richmond, California, asking Lucky to stop discriminating against blacks and hire black store clerks into vacant positions until the workforce at the store resembled the general population in the neighborhood, which was about half black.[51] The Contra Costa County Superior Court enjoined the picketing and the Supreme Court upheld a citation for contempt. Justice Frankfurter's theory was that the picketing would induce Lucky to discriminate in favor of blacks, and that California would treat such affirmative action as unlawful because "community tensions and conflicts would be exacerbated."[52] The only two cases Frankfurter cited for this were cases holding that unions could not discriminate *against* blacks.[53] It is doubtful that California would have treated voluntary affirmative action, at least as a remedy for Lucky's own immediate past discrimination, as unlawful at that time. But suppose it were unlawful. The picketing for an unlawful racial preference might be like picketing for anything else—the overthrow of capitalism, or refusal to report for the draft, for example—that was unlawful. Under the First Amendment law of the time, Justice Frankfurter was still obligated to explain why the picketing constituted unprotected incitement under *Fiske v. Kansas*[54] and *De Jonge v. Oregon*, both of which had overturned convictions for peaceful advocacy.[55] But he did not even try. There was no dissent, although Justices Black, Minton, and Reed concurred only in the judgment, stating simply that the case was controlled by *Giboney v. Empire Storage & Ice Co.*, which, as noted above, had upheld an injunction against a secondary boycott conducted by ice peddlers.[56]

It was a little more than a decade later—a few years after the lunch counter sit-ins—that the Court began to extend First Amendment protection to civil rights protest. In 1963 in *Edwards v. South Carolina*, the Court vacated the criminal convictions of 187 people who participated in a peaceful march around the South Carolina State House grounds with signs saying "I am proud to be a Negro" and "Down with Segregation."[57] The Court did not cite any labor protest case later than *Whitney*. Neither the holding nor the

51. 339 U.S. 460 (1950).

52. *Id.* at 464.

53. Williams v. Int'l Bhd. of Boilermakers, 27 Cal.2d 586 (1946) (holding discrimination unlawful); James v. Marinship Corp., 25 Cal.2d 721 (1944) (holding unlawful picketing to obtain or enforce a closed shop agreement where union refused to admit blacks to membership and closed shop would therefore exclude blacks from employment).

54. 274 U.S. 380 (1927) (overturning criminal syndicalism conviction for IWW organizing).

55. 299 U.S. 353 (1937) (overturning criminal syndicalism conviction for organizing meeting of Communist Party).

56. 339 U.S. at 469 (citing Giboney v. Empire Storage & Ice Co., 336 U.S. 490 (1949)).

57. 372 U.S. 229, 231 (1963).

language in *Edwards*—"The Fourteenth Amendment does not permit a State to make criminal the peaceful expression of unpopular views"[58]—can be reconciled with *Hughes*. Indeed, advocating integration in California was legal in 1950, in contrast to South Carolina, which still mandated segregation. It may have been unpopular (with some) to advocate integration in both places, but as the Court recognized in *Edwards*, by 1950 and certainly by 1963, the First Amendment did not allow states to enjoin peaceful picketing advocating unpopular ideas.

The Court's decisions on civil rights and anti-war protest in the 1960s also undermined the other tenets of its labor picketing cases, such as the ideas that labor picketing is unprotected by the First Amendment because it is not pure speech and is especially disruptive or necessarily coercive. In 1957, the Court in *Teamsters v. Vogt* said that peaceful labor picketing was not just speech and therefore could be prohibited.[59] The Teamsters engaged in peaceful organizational picketing that shut down a gravel plant in Oconomowoc, Wisconsin because no drivers would cross the picket line. The Court rejected a First Amendment challenge to an injunction against the picketing and noted that the picketing "involved more than just communication of ideas . . . since it involves patrol of a particular locality"[60] and "the picketing was to coerce the employer to put pressure on his employers [sic] to join the union, in violation of the declared policy of the State."[61]

Yet, the very next Term, the Court in *Youngdahl v. Rainfair* set aside part of an injunction against peaceful picketing by a group of women garment workers in Arkansas who were on strike in an effort to form a local of the Amalgamated Clothing Workers, CIO, at their small town factory.[62] And on the same day the Court decided *Teamsters v. Vogt,* it also handed down *Yates v. United States,* which overturned convictions under the Smith Act, the federal statute that made it a felony to "organize[] or help[] or attempt[] to organize any society, group, or assembly of persons who teach, advocate, or encourage the overthrow or destruction of any government in the United States by force or violence."[63] The Court in *Youngdahl* and *Yates* rejected the idea that speech or association in the form of picketing to support a strike or joining or holding office in the Communist Party included enough conduct separable from expression or association to justify prohibiting the conduct rather than the constitutionally protected advocacy of ideas.[64] And then, in

58. *Id.* at 237.
59. Int'l Bhd. of Teamsters, Local 695 v. Vogt Inc., 354 U.S. 284 (1957).
60. *Id.* at 289.
61. *Id.* at 294.
62. Youngdahl v. Rainfair, Inc., 355 U.S. 131 (1957).
63. 354 U.S. 298, 303 (1957) (quoting 18 U.S.C. § 2385 as it existed then).
64. *Youngdahl*, 355 U.S. at 139–40; *Yates*, 354 U.S. at 331.

Street v. New York, in 1969, the Court decisively rejected the idea that only speech and not expressive conduct is protected by the First Amendment; it overturned a conviction for flag desecration by a man who burned a flag in protest the day he heard that James Meredith had been shot by a sniper in Mississippi.[65]

Therefore, by the late 1960s, symbolic conduct was protected speech if done by civil rights groups, but proscribable conduct if by a labor picket. Harm and inconvenience to third parties caused by picketing were necessary consequences of robust democratic debate over civil rights, but they were grounds for an injunction if the cause was labor. And, most important, some ill-defined government objective was sufficient to prohibit labor protest but insufficient to prohibit civil rights protest.

C. Why It Doesn't Matter Whether Labor Protests Are Economic or Political

Since the 1970s, the Court has also expanded the scope of the First Amendment's free speech clause even when the government's objective is to regulate commercial activity. Recall that in *Ritter's Café* and other labor cases, the Court treated labor picketing as a matter of economic regulation well within the power of government. The Court in the 1940s and 50s was highly deferential to legislatures, especially in the realm of economic regulation. But in 1975, the Court extended First Amendment protection to advertising and commercial speech.[66] So, whatever the plausibility in the 1940s of the notion that government can prohibit labor protest as part of regulating the economy, the sharp First Amendment divide between political and economic speech has long since become very muddy.[67]

Most recently, in *Sorrell v. IMS Health, Inc.*, the Court struck down a Vermont law prohibiting data mining because, the Court said, it imposed "content- and speaker-based restrictions on the sale, disclosure, or use" of information regarding physicians' prescription practices.[68] Rejecting the argument that Vermont had an interest in protecting public health and controlling health care costs by restricting what it considered an abusive marketing practice, the Court said "fear that people would make bad decisions if given truthful information cannot justify content-based burdens on speech."[69] Of course, that is the whole point of laws restricting picketing and boycotts.

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65. 394 U.S. 576 (1969).

66. Bigelow v. Virginia, 421 U.S. 809 (1975).

67. *See* Jeremy K. Kessler, *The Early Years of First Amendment Lochnerism*, 116 COLUM. L. REV. 1915 (2016).

68. 564 U.S. 552, 563 (2011).

69. *Id.* at 577.

D. The Coercion Argument

In the 1990s and since, by extending First Amendment protection to anti-abortion protests, the Court has also chipped away at the idea that coercion or fear of the target or inconvenience to third parties is a basis for prohibiting speech.[70] Recall that the key to the Court's decision to reject First Amendment claims about allegedly coercive labor picketing is that people are not persuaded. Rather, they are afraid[71] or compelled to obey a signal.[72] Yet that argument has been rejected when the question is whether women entering a clinic to obtain an abortion should be immunized from protest.

The last time the Court was confronted with arguments about coercion in its labor picketing cases, it fumbled. And this is the last reason why I think it is time for a new free speech fight. In the 1960s, boycotts became a powerful symbol of resistance and a tremendous organizing tool. The sit-ins and bus boycotts were the first signals that Jim Crow could be challenged by direct action, not just litigation, and that the "patience, please," lawyer-centered, litigation strategy of the NAACP was not the Civil Rights Movement. In California, inspired by the courage, determination, successes, and publicity of the civil rights activists, farm workers rediscovered labor's direct action roots.

This had an impact in the Supreme Court. In 1964, the Court upheld the right of a labor union to urge a product boycott in *Tree Fruits*.[73] But when three cases involving labor's use of the boycott reached the Supreme Court in the early 1980s, the Burger Court backed away. In *NLRB v. Retail Store Employees Union (Safeco Title Insurance)*, the Court held that when a product boycott really hurt the seller, it was an unfair labor practice.[74] And, two years later, in *ILA v. Allied International*, the Court rejected without any reasoning the right of workers to express political opposition to the Soviet invasion of Afghanistan by refusing to handle Russian goods.[75] Yet, in the same year, in *NAACP v. Claiborne Hardware*, the Court held that a civil rights boycott—not a mere targeted-product boycott, but rather an entire boycott and picketing of every white-owned business that refused to hire blacks—was protected by the First Amendment.[76]

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70. *See, e.g.*, McCullen v. Coakley, 134 S. Ct. 2518 (2014); Hill v. Colorado, 530 U.S. 703 (2000).

71. *See, e.g.*, *Milk Wagon Drivers*, 312 U.S. at 310 (upholding injunction against picketing where, some months before, there had been violence in connection with the picketing).

72. *See, e.g.*, *Vogt*, 354 U.S. 284 (upholding injunction against picketing for recognition because picketing is a symbol calling for obedience).

73. NLRB v. Fruit & Vegetable Packers, Local 760, 377 U.S. 58 (1964).

74. 447 U.S. 607 (1980).

75. 456 U.S. 212 (1982).

76. 458 U.S. 886 (1982).

We have known for years that these cases cannot be reconciled.[77] Now is an especially good time to launch a legal attack on them. Most judges today probably will not see labor picketing or boycotts as coercive as a Teamsters picket line in 1957 or the longshoremen's boycott of Soviet goods in 1982.

III.
LAWYERS AND THE LABOR MOVEMENT

Now I now come to my third point. What role might lawyers play in facilitating a new Free Speech Fight? To do that, bear with me as I tell one last story.

During the Delano grape strike of 1965–66, the new organizing director of the AFL-CIO, William Kircher, went to California and wound up joining the farmworkers' March from Delano to Sacramento. Impressed by the organizing success of the fledgling farm workers union, Kircher thought it should affiliate with the AFL-CIO. Cesar Chavez was skeptical, explaining "I just knew that a big organization was not going to let a little organization get it into trouble. They had too many things at stake if we started raising hell with strikes and boycotts."[78]

Chavez had good reason to believe this. Early in the strike, in November of 1965, the farm workers had tried to stop the growers from shipping struck grapes, but the Teamsters would not help. So a few young Filipino strikers followed truckloads of grapes to Los Angeles and San Francisco, hoping to interfere with the unloading. Four of them picketed at Pier 50 in San Francisco as longshoremen were loading the grapes onto a ship bound for the far east. As one said:

> I'm standing out there with a little cardboard, with a picket sign, 'Don't eat grapes.' And then some of the longshoremen asked, 'Is this a labor dispute?' And I was nervous and didn't know whether we were legally allowed to use the term, so I said, 'No, no, no labor dispute.' So they would walk in. Jimmy Herman [president of the International Longshoremen's and Warehouse Union local] came over and asked me, 'What the hell you doing?' and I told him we were striking. He knew about the strike but wanted to know, what are you asking for? And I was telling him, and then he says, 'Come with me.' [. . .] He took me to his office and he got on his hands and knees, Jimmy Herman, and he made picket signs. And he told me, 'You go back there and don't tell nobody about who gave you this. But you just stand there. [You] don't [have to] say a goddamned thing.' The sign said 'Farm Workers on Strike.' And everybody walked out of that fucking place, man! That's the

77. *See, e.g.*, Cynthia Estlund, Note, *Labor Picketing and Commercial Speech: Free Enterprise Values in the Doctrine of Free Speech*, 91 YALE L.J. 938 (1982); Mark D. Schneider, Note, *Peaceful Labor Picketing and the First Amendment*, 82 COLUM. L. REV. 1469 (1982); *see also* Cynthia Estlund, *Are Unions a Constitutional Anomaly?*, 114 MICH. L. REV. 169 (2015).

78. GANZ, *supra* note 12, at 156.

> first time I felt like I was 10 feet tall, man! Everybody walked out. So then they asked what's happening and we were telling them, and Jesus Christ, man, I never seen anything like it. There were trucks all the way up to the bridge, man! So they stopped and Jimmy says, 'You're gonna get an injunction as soon as the people find out what's happening. In the meantime you got to stop them. You go ahead and do it. They ain't gonna do nothing to you. Can't do a thing to you, but they're gonna go after . . . Harry Bridges [who] will have no choice but to ask you to leave, because if they get an injunction, they'll get fined. So you do it until that happens.[79]

After the farm workers did the same thing with another ship in Oakland, a court enjoined further picketing at the docks. The growers sued the longshore and farm workers unions, winning judgments for $59,000 in one case and $38,000 in the other.[80]

I don't yet know what advice the UFW's, AFL-CIO's, or ILWU's lawyers gave them about whether to stop such picketing. I do know the farm workers union decided to focus on consumer boycotts instead.[81] To avoid the use of tools like this—the tools that had helped the labor movement in the 1930s but that were now illegal—the union had to adopt more labor-intensive strategies. It took huge numbers of volunteers to organize a consumer boycott and to make the unionization of farm workers a national movement. There was a silver lining, of course: the need to appeal to consumers rather than longshore workers and Teamster drivers did make the UFW a social movement. But what if a union could make common cause with longshore workers *and* truckers *and* consumers?

Labor scholars and labor lawyers have been complaining for decades that the law forces labor activism into a very narrow frame. One way to answer the question of whether the First Amendment is labor's friend or foe is to consider whether the advice given by labor lawyers prevents labor from becoming a movement once again.[82] By narrowing the First Amendment to push labor off the streets and to the bargaining table, by hounding out of unions the leftists who favored a more confrontational approach, the Court certainly had the effect—and probably the intention—of making labor less of a movement. The Court empowered elites within labor—lawyers, union officers—to embrace a strategy that focused on bureaucratic handling of disputes and organized labor's bargaining table or back channel political power to achieve higher wages, workplace safety, and job security. If the history of labor unions since the 1940s shows anything, it is that exclusive

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79. *Id.* at 140–41.

80. *Id.* at 141.

81. *Id.*

82. *See, e.g.*, Jennifer Gordon, *Law, Lawyers, and Labor: The United Farm Workers' Legal Strategy in the 1960s and 1970s and the Role of Law in Union Organizing Today*, 8 U. PA. J. LAB. & EMP. L. 1 (2005); Sameer Ashar, *Movement Lawyers in the Fight for Immigrant Rights*, 64 UCLA L. REV. 1464 (2017).

reliance on unions' institutional power, and reliance on the federal and state labor boards to protect that institutional power, has been a mistake. So, too, has been reliance on federal and state fair employment and housing agencies to ensure employment and housing equity.

As we know, political realignments, globalization, and the decline of organized industries wiped out the institutional power of unions. And now labor density is back to where it was in the early 1930s. The only way out of this is, I think, to do what labor once did so well—to mobilize. And to mobilize requires speech, lots of speech. It requires convincing workers that they can make a difference if they stand up and speak out against injustice. It is time for another round of Free Speech Fights.

CONCLUSION

The First Amendment's free speech clause represents the right of people to speak truth to power, even when courts rule that there is no such right. Rights consciousness is as important as the rights themselves.[83] Rights consciousness mattered to the Wobblies and to Anita Whitney. It mattered to the NAACP. And it mattered to Martin Luther King, Jr., who was assassinated a half century ago when he was in Memphis to support a sanitation workers strike as part of an effort to move the civil rights struggle from the focus on de jure discrimination to racialized economic inequality.

Labor advocates may have lost as many free speech fights as they have won, but as seasoned lawyers who work with organizers often say: losing in court can be a win in the streets or in the hearts and minds of workers. What lawyers can do is help build a legal consciousness about the right of workers to demand a better life.

On May Day this year,[84] there is going to be what organizers hope will be a massive Day Without an Immigrant march, rally, and one day strike. Under current law, such a protest is not protected by section 7 of the NLRA, so employees who observe the strike will be fired.[85] We also know that Uber and FedEx drivers face the exact situation of the peddlers in the *Bakery Drivers* and *Giboney* cases. Their protests or collective bargaining are

83. *See, e.g.*, FELICIA KORNBLUH, THE BATTLE FOR WELFARE RIGHTS: POLITICS AND POVERTY IN MODERN AMERICA (2007); Hendrik Hartog, *The Constitution of Aspiration and "The Rights That Belong to Us All"*, 74 J. AM. HIST. 1013 (1987).

84. Referring to the nationwide actions on May Day 2017.

85. Memorandum from Ronald Meisburg, Gen. Counsel, NLRB, to All Regional Directors, NLRB, regarding Guideline Memorandum Concerning Unfair Labor Practice Charges Involving Political Advocacy, 10 (July 22, 2008) (political strikes are not protected by section 7); *see* Michael C. Duff, *Days Without Immigrants: Analysis and Implications of the Treatment of Immigration Rallies Under the National Labor Relations Act*, 85 DENV. L. REV. 93 (2007) (arguing that in some circumstances participation in an immigration protest rally is protected by section 7).

unprotected by the First Amendment and may violate state unfair competition laws or federal antitrust law.[86]

It is time to think about how lawyers can do the conceptual work of the movement by arguing that these forms of protest are protected by the First Amendment. The tools are there. The job of lawyers is to pick them up and use them with the same creativity and courage as the labor activists who have come before.

86. Chamber of Commerce v. City of Seattle, 890 F.3d 769 (9th Cir. 2018); *see* Sanjukta M. Paul, *Uber as For-Profit Hiring Hall: A Price-Fixing Paradox and its Implications*, 38 BERKELEY J. EMP. & LAB. L. 233 (2017).