A PROGRESSIVE LABOR VISION OF THE FIRST AMENDMENT: PAST AS PROLOGUE

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Any progressive agenda for change will require robust exercise of speech and associational rights that law currently restricts for labor unions. Although the Supreme Court's conservative First Amendment judicial activism has raised doubts about whether constitutional protection for free speech can serve progressive ends, this Essay identifies a silver lining to the deregulatory use of the First Amendment. The Roberts Court's extension of heightened First Amendment scrutiny to regulation, like labor law, that was formerly deemed economic and subject to rational basis review provides an opportunity for progressive activists. Not only does labor protest today resemble the labor protest that the Court deemed protected free speech in the late 1930s, but the constitutional line between labor and civil rights protest that emerged between 1950 and 1965 has not survived the conditions that gave rise to it. Restoring the First Amendment protection that labor protest once enjoyed will not jeopardize antitrust or other regulation of expressive conduct in the workplace. The intellectual credibility of the First Amendment under any theory of free speech jurisprudence—whether in enabling democratic government, facilitating the discovery of truth, advancing autonomy, or promoting tolerance—depends on even-handed protection for peaceful expression in public forums on matters of public concern.

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INTRODUCTION

The First Amendment was once the banner under which labor and civil rights activists mobilized to create a more equitable political economy.[1] That activism paid off. By 1940, in the case of labor,[2] and 1963, in the case of civil rights,[3] activists had won both First Amendment protection and major legislative changes, including the National Labor Relations Act of 1935[4] (NLRA) and the Civil Rights Act of 1964.[5] Those political wins reduced Gilded Age inequality[6] and ended aspects of Jim Crow.[7]

Labor protest is rarer than it once was, but it remains powerful. In spring 2018, teachers in half a dozen states engaged in massive strikes and protest rallies that, in some states, spurred partial legislative reversals of education funding cuts, galvanized new political engagement by ordinary citizens, and forced reconsideration of the politics of tax and funding cuts.[8] To the extent that constitutional protection for picketing and rallies in public forums enables this kind of action, the Free Speech Clause remains "essential to the poorly financed causes"[9] of those seeking

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1. See Risa Goluboff, The Lost Promise of Civil Rights 30–32 (2013) (describing civil rights leaders' use of First Amendment freedom of speech and freedom of association guarantees to mobilize activists); Laura Weinrib, The Taming of Free Speech 1–2 (2017) (explaining how the American Civil Liberties Union advocated a "freedom to espouse" the labor movement's redistributive aims using the First Amendment).

2. See Thornhill v. Alabama, 310 U.S. 88, 101–05 (1940) (striking down an Alabama statute that criminalized various union-organizing activities as an unconstitutional restraint on freedom of speech).

3. See Edwards v. South Carolina, 372 U.S. 229, 235–38 (1963) (reversing on First Amendment grounds breach of the peace convictions of individuals who assembled on South Carolina state grounds to peacefully protest racially discriminatory state actions).

4. Ch. 372, 49 Stat. 449 (codified as amended at 29 U.S.C. §§ 151–169 (2012)).

5. Pub L. No. 88-352, 78 Stat. 241 (codified as amended at 42 U.S.C. §§ 2000a–2000h (2012)).

6. See, e.g., William E. Forbath, The Distributive Constitution and Workers' Rights, 72 Ohio St. L.J. 1115, 1129–30 (2011) (discussing how the NLRA "upended whole constellations of social power").

7. See, e.g., Julian Maxwell Hayter, To End Divisions: Reflections on the Civil Rights Act of 1964, 18 Rich. J.L. & Pub. Int. 499, 506–11 (2015) (surveying the positive effects of the Civil Rights Act of 1964 in addressing inequality in education, economic opportunity, and public accommodation).

8. See Melissa Daniels, Teachers Channel Momentum from Strikes into Midterm Races, U.S. News & World Report (May 17, 2018), http://www.usnews.com/news/us/articles/2018-05-17/teachers-who-led-strikes-now-turning-focus-to-elections (on file with the *Columbia Law Review*) (describing political actions galvanized by teacher strikes and rallies); Dana Goldstein & Alexander Burns, Teacher Walkouts Threaten Republican Grip on Conservative States, N.Y. Times (Apr. 12, 2018), http://www.nytimes.com/2018/04/12/us/teacher-walkouts-threaten-republican-grip-on-conservative-states.html (on file with the *Columbia Law Review*) (describing political consequences of teacher protests); Steven Greenhouse, Making Teachers' Strikes Illegal Won't Stop Them, N.Y. Times (May 9, 2018), http://www.nytimes.com/2018/05/09/opinion/teacher-strikes-illegal-arizona-carolina.html (on file with the *Columbia Law Review*) (assessing the political effects of teacher protests in six states).

9. Martin v. City of Struthers, 319 U.S. 141, 146 (1943).

to combat low wages, rising economic inequality, declining union density, criminalization of immigration, and outsourcing and subcontracting.[10]

The First Amendment now seems less friend than foe of egalitarian values. The well-heeled have used it to deregulate campaign finance,[11] invalidate protections for workers and consumers,[12] and attack civil rights laws[13] and reproductive freedom.[14] As one critic on the left said, what was once "a shield for . . . the dispossessed, has become a sword for authoritarians, racists and misogynists, Nazis and Klansmen, pornographers and corporations buying elections."[15]

Nevertheless, progressives would be mistaken to abandon the Free Speech Clause[16] because the new First Amendment offers promise along with peril for progressive causes.[17] Its promise is to legalize forms of labor

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10. See, e.g., Chris Zepeda-Millán, Latino Mass Mobilization: Immigration, Racialization, and Activism 25–40 (2017).

11. See Janus v. Am. Fed'n of State, Cty., & Mun. Emps., Council 31, 138 S. Ct. 2448, 2486 (2018) (declaring as unconstitutional statutes and public employer labor agreements requiring union-represented employees to pay their pro rata share of the union's costs incurred in bargaining and contract administration).

12. See Expressions Hair Design v. Schneiderman, 137 S. Ct. 1144, 1151 (2017) (holding that a law regulating how cash discounts and credit card surcharges are advertised requires First Amendment scrutiny); Sorrell v. IMS Health Inc., 564 U.S. 552, 579–80 (2011) (holding unconstitutional a law regulating the sale of physician prescription information); Nat'l Ass'n of Mfrs. v. SEC, 800 F.3d 518, 530 (D.C. Cir. 2015) (invalidating an agency rule that imposed on companies certain conflict mineral disclosure requirements); Am. Meat Inst. v. USDA, 760 F.3d 18, 27 (D.C. Cir. 2014) (en banc) (sustaining an agency rule requiring disclosure of the country of origin of commodities); cf. Chamber of Commerce v. NLRB, 721 F.3d 152, 154 (4th Cir. 2013) (invalidating an agency rule requiring employers to post notice of employee rights).

13. See Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n, 138 S. Ct. 1719, 1732 (2018) (declining to address whether a baker's discrimination against gay customers violated the Free Speech or Free Exercise Clauses).

14. See Nat'l Inst. of Family & Life Advocates v. Becerra, 138 S. Ct. 2361, 2368, 2375–78 (2018) (declaring unconstitutional a California law that required unlicensed crisis pregnancy centers to disclose that they are not licensed to provide medical services, and licensed centers to disclose to patients the availability of low-cost abortion services at other facilities within the state). See generally Charlotte Garden, The Deregulatory First Amendment at Work, 51 Harv. C.R.-C.L. L. Rev. 323 (2016) (highlighting the "potentially calamitous" effects of deregulatory First Amendment theories on workers); Amanda Shanor, The New *Lochner*, 2016 Wis. L. Rev. 133 (exploring the deregulatory application of the First Amendment in an administrative law context and analyzing its implications).

15. Adam Liptak, How Conservatives Weaponized the First Amendment, N.Y. Times (June 30, 2018), https://www.nytimes.com/2018/06/30/us/politics/first-amendment-conservatives-supreme-court.html (on file with the *Columbia Law Review*) (internal quotation marks omitted) (quoting Catharine A. MacKinnon, The First Amendment: An Equality Reading, *in* The Free Speech Century (Lee C. Bollinger & Geoffrey R. Stone eds.) (forthcoming Dec. 2018)).

16. Cf. Louis Michael Seidman, Can Free Speech Be Progressive?, 118 Colum. L. Rev. 2219, 2223 (2018) ("There is no doubt that the assertion of free speech rights can advance progressive goals in particular times and places.").

17. See Catherine Fisk & Jessica Rutter, Labor Protest Under the New First Amendment, 36 Berkeley J. Emp. & Lab. L. 277, 328 (2015) ("*Citizens United*, *McCutcheon*, and *Sorrell* clearly hold that the First Amendment protects speech by economic actors, that

protest that have been illegal for half a century since the Taft–Hartley Act of 1947 imposed viewpoint- and speaker-discriminatory restrictions on labor union speech.[18] The Supreme Court never held that the government has a *compelling* interest in preventing picketing aimed at organizing a union,[19] or in preventing calls for a boycott of a business due to unfair practices in its supply chain,[20] because the Court treated restrictions on labor protest as economic regulation that it sustained under the 1940s version of deferential rational basis review. The Court's recent embrace of strict scrutiny for economic regulation opens up an avenue of new constitutional attack.[21] If restrictions on data mining,[22] street directional signs,[23] sidewalk anti-abortion protests,[24] and homophobic funeral picketing are unconstitutional,[25] it defies logic to suggest that restrictions on peaceful union protest about working conditions are constitutional. If price advertising is speech protected by the First Amendment,[26] labor cost advocacy should be too.

Advocates should consider potential consequences before seeking to invalidate Taft–Hartley's restrictions on labor protests on First Amendment

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strict scrutiny applies to content and speaker discrimination, and that workers and unions enjoy at least the same speech rights as corporations."). But see NLRB v. Int'l Ass'n of Bridge, Structural, Ornamental & Reinforcing Ironworkers Union, Local 433, 891 F.3d 1182, 1187 (9th Cir. 2018) (holding that peaceful picketing at a government building is not protected by the First Amendment under Reed v. Town of Gilbert, 135 S. Ct. 2218 (2015), because the statute prohibits "these forms of harassing and intimidating conduct" and other "conventional avenues of government protest remain available for Ironworkers").

18. As will be explained below, the NLRA as amended by Taft–Hartley prohibits labor organizations and their agents (but no one else) from picketing or encouraging a strike or boycott when the advocacy is directed at organizing a union, demanding employer recognition of a union, or coordinating a secondary boycott. 29 U.S.C. § 158(b)(4), (7) (2012).

19. This is organizational and recognitional picketing prohibited by 29 U.S.C. § 158(b)(7).

20. This is secondary boycott activity prohibited by 29 U.S.C. § 158(b)(4).

21. It must be acknowledged, however, that federal courts have rejected recent constitutional challenges to restrictions on labor protest, pointing to the Supreme Court cases from the 1950s to 1980 upholding these statutes and insisting it is up to the high court, not the courts of appeals, to reconcile its recent First Amendment jurisprudence with the older decisions. See *Local 433*, 891 F.3d at 1186 (citing NLRB v. Retail Store Emps. Union, Local 1001, 447 U.S. 607 (1980), and holding that peaceful picketing at a government building that had been proscribed by section 8(b)(4) of the NLRA is not protected by the First Amendment and that *Reed* did not change the governing labor law); NLRB v. Teamsters Union Local No. 70, 668 F. App'x 283, 284 (9th Cir. 2016) (rejecting a similar challenge).

22. Sorrell v. IMS Health Inc., 564 U.S. 552, 580 (2011) (invalidating a law restricting the sale of prescriber-identifying information).

23. Reed v. Town of Gilbert, 135 S. Ct. 2218, 2231 (2015) (holding a street sign ordinance unconstitutional).

24. McCullen v. Coakley, 134 S. Ct. 2518, 2541 (2014) (holding a prohibition on sidewalk anti-abortion "counseling" unconstitutional).

25. Snyder v. Phelps, 562 U.S. 443, 458–59 (2011) (holding unconstitutional a tort judgment for emotional distress caused by homophobic funeral picketing).

26. Expressions Hair Design v. Schneiderman, 137 S. Ct. 1144, 1151 (2017) (treating a state law regulating price differentials for cash and credit card transactions as a speech regulation and remanding to the court of appeals to consider its constitutionality).

grounds. A successful challenge (or even an unsuccessful one) will further smudge the line between economic regulations that have been presumptively constitutional since 1937 and laws regulating political speech that are constitutionally suspect.[27] That line—though often breached in cases involving Communist Party membership or other allegedly dangerous speech—was essential to as much of a détente in free speech battles as the United States ever had.[28] Laws restricting labor speech were an important aspect of mid-twentieth-century economic regulation that aimed to manage the countervailing forces of labor and capital.[29] Economic regulation depends on adhering to a constitutional distinction between political activism and economic behavior, even though both involve speech.[30] Challenging laws that have long been on the economic side of the line risks inviting and legitimating challenges to other regulations of speech in or around the workplace. And, the argument continues, once the line between economic and political expression is breached, there is no reason to expect conservative federal courts to reject challenges to labor and employment discrimination laws restricting allegedly coercive employer speech. As Professors Laura Weinrib and Jeremy Kessler point out, the history of free speech in the courts gives reason to be skeptical of claims that the Supreme Court or other courts will use the First Amendment to aid the efforts of progressive challengers to economic

27. See Jeremy Kessler, The Early Years of First Amendment Lochnerism, 116 Colum. L. Rev. 1915, 1918 (2016) (outlining a history of "First Amendment Lochnerism" as the judicial conflation of economic and civil libertarianism).

28. The line between permissible regulation of economic activity, including speech, and impermissible regulation of political activity was never clear and courts did not always adhere to it. From 1942 through the 1970s, the period when the *Carolene Products* Footnote Four theory prescribed upholding economic regulation and striking down laws burdening fundamental rights and discrete and insular minorities, the courts rejected numerous constitutional challenges to denials of speech and association rights of labor, alleged Communists, and civil rights activists. See, e.g., Communist Party v. Subversive Activities Control Bd., 367 U.S. 1, 102–03 (1961) (rejecting a constitutional challenge to a law requiring that communist organizations register with the federal government); Dennis v. United States, 341 U.S. 494, 516–17 (1951) (rejecting a First Amendment challenge to indictments under the Smith Act, which made it a crime to teach the desirability of overthrowing by force or violence any government in the United States , or to print or disseminate literature so teaching, or to help organize a group to so teach). Nevertheless, accepting that the normative argument against seeking First Amendment protection for labor protest rests on respect for a discernable line between political and economic regulation, this Essay argues that labor protest is on the political side.

29. See Luke P. Norris, Labor and the Origins of Civil Procedure, 92 N.Y.U. L. Rev. 462, 544 (2017) ("The crafters of the [Norris–LaGuardia Act] were concerned with issues of corporate concentration and bargaining disparities between institutionalized firms and diffuse workers . . . .").

30. See, e.g., Robert Post & Amanda Shanor, Adam Smith's First Amendment, 128 Harv. L. Rev. Forum 165, 170 (2015), https://harvardlawreview.org/2015/03/adam-smiths-first-amendment [https://perma.cc/33DX-DPCD] ("Commercial speech doctrine was invented with the clear understanding that the state would be freer to regulate in the domain of commercial speech than it was 'in the realm of noncommercial expression.'" (quoting Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 456 (1978))).

inequality.[31] That may be true, as a matter of prediction. But what *will* happen in the law is different from what *should* happen. Belief in doctrinal consistency and in the importance of labor protest to progressive and democratic governance compels consideration of why challenging the restrictions on labor protest should be part of a progressive vision of the Free Speech Clause.

The Court's determination to erase the First Amendment line between political and economic speech in the labor law realm could hasten the demise of unions, but it could also aid their resurgence. The demise has been a Roberts Court project. In *Janus v. AFSCME*, the Court invalidated statutes and collective bargaining agreements in twenty-two states, the District of Columbia, and Puerto Rico that required union-represented government employees to pay fees for their fair share of the cost of negotiating and administering a collective bargaining agreement.[32] Explaining why collective bargaining should be regarded as a form of political speech for which financial support cannot be compelled, the five Republican-appointed Justices noted that labor costs have a substantial budget impact and bargaining implicates education, health care, anti-discrimination, and other policy.[33] The *Janus* majority denied the existence of a line between "political" and "economic" regulation in just the way that Justice Frankfurter did when the Court first began applying constitutional free speech principles to union security and union dues provisions.[34] But *Janus* drew precisely the opposite conclusion. For Frankfurter, the fact that unions pursued worker interests through "political" action as well as through the "economic" channels of collective bargaining meant that labor unions were economic actors; on that basis, he wrote numerous majority opinions upholding laws regulating their speech against First Amendment challenge.[35] For the *Janus* majority, that unions pursue worker

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31. See Weinrib, supra note 1, at 13 ("[Labor radicals] knew how often courts had blocked the way to democratic change. . . . We are still living with the legacy of the deal they struck."); Kessler, supra note 27, at 1918 ("[T]he worry that aggressive judicial enforcement of the First Amendment might enhance the economic power of some private actors at the expense of other private and public interests has a long history.").

32. Janus v. Am. Fed'n of State, Cty., & Mun. Emps., Council 31, 138 S. Ct. 2448, 2485–86 & n.27 (2018).

33. Id. at 2475. In reaching this decision, the Court relied on its earlier decision in Harris v. Quinn, 134 S. Ct. 2618, 2639, 2642 (2014), which invalidated fair share fees for home health aides paid with public funds under Medicare or Medicaid. See *Janus*, 138 S. Ct. at 2465. In *Harris v. Quinn*, the five conservative Justices likewise emphasized that the subjects of collective bargaining—"increased wages and benefits"—are a "matter of great public concern." 134 S. Ct. at 2642–43.

34. Int'l Ass'n of Machinists v. Street, 367 U.S. 740, 814 (1961) (Frankfurter, J., dissenting) ("The notion that economic and political concerns are separable is pre-Victorian. Presidents of the United States and Committees of Congress invite views of labor on matters not immediately concerned with wages, hours, and conditions of employment.").

35. Among Justice Frankfurter's numerous majority opinions for the Court in labor picketing cases, many upheld state and federal court injunctions against picketing. See, e.g., Int'l Bhd. of Teamsters, Local 695 v. Vogt, Inc., 354 U.S. 284, 295 (1957) (upholding a

interests through political actions as well as bargaining means that all union speech raises constitutional issues.[36] But if all union speech is political, that must mean that restrictions on union speech are unconstitutional. The Court cannot have it both ways: It cannot be that all speech by and about unions is political except when union supporters gather in a public forum to urge workers and consumers to boycott. If regulation of the funding that enables collective bargaining violates the First Amendment, regulation of labor protest should too.[37]

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state court injunction against picketing seeking to organize a workplace on the ground that the picketing would coerce the employer to coerce the employees to join the union); Int'l Bhd. of Teamsters, Local 309 v. Hanke, 339 U.S. 470, 479 (1950) (upholding a state court injunction against peaceful picketing seeking to organize sole proprietors on the ground that the state deemed the object of the picketing unlawful); Hughes v. Superior Court, 339 U.S. 460, 468 (1950) (upholding a state court injunction against civil rights picketing); Carpenters & Joiners Union, Local No. 213 v. Ritter's Cafe, 315 U.S. 722, 727–28 (1942) (upholding a state court injunction against secondary picketing on the ground that the state is justified in limiting picketing to "the area of the industry within which a labor dispute arises"); Hotel & Rest. Emps.' Int'l All., Local No. 122 v. Wis. Emp't Relations Bd., 315 U.S. 437, 439 n.1 (1942) (upholding a state court injunction against picketing that had been accompanied by use of force to block ingress and egress from a business); Milk Wagon Drivers Union, Local 753 v. Meadowmoor Dairies, Inc., 312 U.S. 287, 294 (1941) (rejecting a First Amendment challenge to a state court injunction against picketing of dairies).

In a few cases, however, Justice Frankfurter wrote majority opinions that struck down injunctions against peaceful labor picketing. See, e.g., Cafeteria Emps. Union, Local 302 v. Angelos, 320 U.S. 293, 295 (1943) ("[H]ere we have no attempt by the state through its courts to restrict conduct justifiably found to be an abusive exercise of the right to picket."); AFL v. Swing, 312 U.S. 321, 325 (1941) ("Such a ban of free communication is inconsistent with the guarantee of freedom of speech.").

36. The NLRA authorizes a union chosen by a majority to be the exclusive bargaining representative of all represented workers. 29 U.S.C. § 159(a) (2012). If deeming a union authorized to speak on behalf of another is compelled speech, the exclusive representation principle of the NLRA is constitutionally problematic. In *Janus*, the Court invited a constitutional challenge to the principle of majority rule in union representation. See *Janus*, 138 S. Ct. at 2460 (remarking that "[d]esignating a union as the employees' exclusive representative substantially restricts the rights of individual employees"); id. at 2478 (noting that the Court "simply draw[s] the line at allowing the government to go further still and require all employees to support the union irrespective of whether they share its views"). Numerous cases have been filed in lower courts arguing that exclusive representation is unconstitutional; all such cases failed before *Janus*. See, e.g., Hill v. Serv. Emps. Int'l Union, 850 F.3d 861, 864–66 (7th Cir. 2017); Jarvis v. Cuomo, 660 F. App'x 72, 74–75 (2d Cir. 2016); D'Agostino v. Baker, 812 F.3d 240, 241–42 (1st Cir. 2016); Bierman v. Dayton, 227 F. Supp. 3d 1022, 1031–32 (D. Minn. 2017), aff'd, 900 F.3d 570 (8th Cir. 2018); Mentele v. Inslee, No. C15-5134-RBL, 2016 WL 3017713, at *4 (W.D. Wash. filed Mar. 4, 2015).

37. The contention that the Taft–Hartley Act's restrictions on labor protest are unconstitutional is not novel. See, e.g., James G. Pope, The Three-Systems Ladder of First Amendment Values: Two Rungs and a Black Hole, 11 Hastings Const. L.Q. 189, 195 n.35 (1984) (summarizing cases in which Taft–Hartley Act restrictions on labor speech have been challenged); see also Cynthia Estlund, Are Unions a Constitutional Anomaly?, 114 Mich. L. Rev. 169, 225–28 (2015); Charlotte Garden, Citizens, United and *Citizens United*: The Future of Labor Speech Rights?, 53 Wm. & Mary L. Rev. 1, 18–19 (2011) (noting that First Amendment challenges to the NLRA's restrictions on labor picketing "have often

To use *Janus* and the Court's other First Amendment cases to rebuild labor action requires charting a doctrinal path that enables the invalidation of restrictions on labor protest without compelling invalidation of restrictions on employer anti-union speech or even the right of a union selected by the majority to represent (speak on behalf of) all workers in the workplace. The past offers a guide. The antipicketing decisions of the 1940s and 1950s were based on now-discredited rules that labor protest was conduct, not pure speech, and that government could prohibit peaceful picketing in "a broad field" to "enforc[e] some public policy, whether of its criminal or its civil law, and whether announced by its legislature or its courts."[38] The Court rejected those ideas in the 1960s and 1970s when it extended First Amendment protection to antiwar and civil rights advocacy.[39] The last Supreme Court labor protest cases, from the 1980s, distinguished the civil rights cases and rejected First Amendment challenges by saying that labor picketing and boycotts are, by their nature, coercive.[40] But it is no longer plausible to say that labor picketing or calls for secondary boycotts are coercive and civil rights protest is not. The Court, moreover, has long distinguished between speech on matters of public concern in traditional public forums and laws regulating coercive, harassing, or threatening speech inside the workplace.[41]

Part I shows that the cases granting broad protection for labor and civil rights activism in the late 1930s and early 1940s remain good law. Not only does labor protest today resemble the labor protest that the Court protected in that era and the civil rights protest of the 1960s, the

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failed based on the rationale that picketing is at least partly coercive conduct, which the First Amendment does not protect").

38. *Vogt*, 354 U.S. at 293.

39. See Cox v. Louisiana, 379 U.S. 536, 558 (1965) (overturning on First Amendment grounds convictions for disturbing the peace in which individuals engaged in peaceful parades and meetings to protest racial segregation); Edwards v. South Carolina, 372 U.S. 229, 235–38 (1963) (holding that a conviction based on evidence that speech merely "stirred people to anger" may not stand (internal quotation marks omitted) (quoting Terminiello v. City of Chicago, 337 U.S. 1, 5 (1949))).

40. See Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568, 584 (1988) (distinguishing persuasive and coercive picketing and handbilling); Int'l Longshoremen's Ass'n v. Allied Int'l, Inc., 456 U.S. 212, 226 (1982) (holding a partial work stoppage as part of a secondary boycott to be coercive and therefore not protected by the First Amendment); NLRB v. Retail Store Emps. Union, Local 1001, 447 U.S. 607, 616 (1980) (holding that asking consumers to engage in a secondary boycott is coercive, and therefore not constitutionally protected, when the target business is heavily dependent on the struck product).

41. See R.A.V. v. City of St. Paul, 505 U.S. 377, 389 (1992) (holding a hate speech law to be unconstitutional but saying in dictum that the government may prohibit sexually harassing speech as part of "Title VII's general prohibition against sexual discrimination in employment practices"). Compare Pleasant Grove City v. Summum, 555 U.S. 460, 469–70 (2009) (holding that government content regulation of speech in public streets and parks must satisfy strict scrutiny, though the government's own speech need not, and a monument in a park is government speech), with NLRB v. Gissel Packing Co., 395 U.S. 575, 617–20 (1969) (rejecting a First Amendment challenge to the NLRB's restriction of employer speech threatening retaliation against employees who vote to unionize).

constitutional dividing line between labor and civil rights protest that emerged between 1950 and 1965 has not survived the conditions that gave rise to it. Part II identifies in the Court's recent First Amendment cases a basis for distinguishing or overruling the labor picketing and secondary boycott cases from the late 1940s and 1950s. Part III explains why labor protest is political speech, not economic activity, why labor picketing and boycotts are not coercive, and why restoring the First Amendment protection that labor protest enjoyed in the 1940s will not jeopardize antitrust or other regulation of expressive conduct that lies close to the line between the economic and political.

I. LABOR PROTEST AND THE FIRST AMENDMENT IN THE TWENTIETH CENTURY

The modern First Amendment protections for contemporary civil liberties and civil rights are the product of mass worker activism of the 1920s and 1930s.[42] Until the late 1930s, courts had treated labor picketing as either a crime or a tort, or both, and presumed picketing wrongful unless justified in particular circumstances.[43] Under that vague nineteenth-century standard, government could criminalize or enjoin protest that advocated any objective the state considered unlawful or punish advocacy of a lawful objective through an improper means. The law began to change in 1937, when the Court upheld a Wisconsin law that stripped state courts of the power to issue injunctions in certain labor disputes.[44] And then, in 1939 and 1940, with ringing endorsements of constitutional protection for labor leafleting[45] and picketing,[46] the Court delivered canonical rulings requiring heightened judicial scrutiny of restrictions on political speech in public forums.

Nevertheless, many or most state courts persisted in enforcing common law rules that concerted labor activities could be directed only toward "lawful labor objectives" even after the Supreme Court held picketing to be protected by the First Amendment.[47] The persistence of such state court injunctions against labor protest,[48] along with NLRB enforcement of

42. See Goluboff, supra note 1, at 30–36; Weinrib, supra note 1, at 1–2.

43. See Ludwig Teller, Picketing and Free Speech, 56 Harv. L. Rev. 180, 180–82 (1942).

44. Senn v. Tile Layers Protective Union, 301 U.S. 468, 478, 481 (1937). The Wisconsin law was similar to the Norris–LaGuardia Act of 1932, 29 U.S.C. §§ 101–115 (2012).

45. Schneider v. New Jersey, 308 U.S. 147, 164–65 (1939); Hague v. Comm. for Indus. Org., 307 U.S. 496, 505 (1939).

46. Carlson v. California, 310 U.S. 106, 113 (1940); Thornhill v. Alabama, 310 U.S. 88, 105–06 (1940).

47. See Barbara Nachtrieb Armstrong, Where Are We Going with Picketing? Intra-Union Coercion Is Not Free Speech, 36 Calif. L. Rev. 1, 34–35 (1948).

48. See, e.g., Cameron v. Johnson, 390 U.S. 611, 622 (1968) (rejecting a void for vagueness challenge against the enforcement of a state law prohibiting civil rights picketing); Int'l Bhd. of Teamsters, Local 695 v. Vogt, Inc., 354 U.S. 284, 295 (1957) (upholding a state court injunction against picketing to organize workers); Local Union No. 10, United Ass'n

federal restrictions on picketing and boycotts enacted in 1947 and 1959,[49] prompted the Court to decide well over fifty cases involving the legality of sidewalk speech about working conditions.[50] Most involved picketing by workers affiliated with labor unions, but some involved civil rights. The Court granted robust protection for labor protest from 1939 to 1942,[51]

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of Journeymen Plumbers v. Graham, 345 U.S. 192, 201 (1953) (upholding a state court injunction against picketing at a construction site urging a general contractor to deal only with unionized subcontractors); Hughes v. Superior Court, 339 U.S. 460, 469 (1950) (upholding a state court injunction against picketing urging a grocery store to cease employment discrimination against African Americans and to hire more African Americans); Giboney v. Empire Storage & Ice Co., 336 U.S. 490, 504 (1949) (upholding a state court injunction against picketing wholesalers urging them to deal only with unionized delivery drivers); Bakery & Pastry Drivers Local 802 v. Wohl, 315 U.S. 769, 775 (1942) (reversing a state court injunction against picketing at a place where drivers picked up goods and where they delivered goods).

49. See infra note 99 and accompanying text (describing NLRB rules distinguishing protected from unprotected forms of labor speech).

50. See, e.g., *Thornhill*, 310 U.S. 88 (finding that the First Amendment protects labor protest in one of the Court's earliest First Amendment decisions on labor picketing). The most recent include FTC v. Superior Court Trial Lawyers Ass'n, 493 U.S. 411 (1990) (rejecting First Amendment protection for a boycott protesting low pay for indigent criminal defense lawyers); NAACP v. Claiborne Hardware Co., 458 U.S. 886 (1982) (holding that the First Amendment protects civil rights boycotting); Int'l Longshoremen's Ass'n v. Allied Int'l, Inc., 456 U.S. 212 (1982) (holding that the First Amendment does not protect labor boycotting). In a pair of cases handed down the same day, the Court held that the constitution protects civil rights picketing, Carey v. Brown, 447 U.S. 455 (1980), and does not protect labor picketing, NLRB v. Retail Store Emps. Union, Local 1001, 447 U.S. 607 (1980). The law review literature on the Court's picketing decisions is abundant and largely, but not uniformly, critical of the Court's handiwork. See, e.g., Armstrong, supra note 47; Pope, supra note 37.

51. See Cafeteria Emps. Union, Local 302 v. Angelos, 320 U.S. 293, 296 (1943) (holding that "the right to picket" cannot be revoked "merely because there may have been isolated incidents of abuse falling far short of violence occurring in the course of that picketing"); *Wohl*, 315 U.S. at 774 (holding that "one need not be in a 'labor dispute' as defined by state law to have a right under the Fourteenth Amendment to express a grievance in a labor matter by publication unattended by violence, coercion, or conduct otherwise unlawful or oppressive"); AFL v. Swing, 312 U.S. 321, 325 (1941) (holding that the guarantee of freedom of speech is infringed when state common law forbids "'peaceful picketing or peaceful persuasion' in relation to any dispute between an employer and a trade union unless the employer's own employees are in controversy with him"); *Carlson*, 310 U.S. at 112–13 (holding that a county ordinance which "proscribed the carrying of signs" in the "vicinity of a labor dispute to convey information about the dispute" unconstitutionally "abridges liberty of discussion"); *Thornhill*, 310 U.S. at 102–03 (holding 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"); Schneider v. State (Town of Irvington), 308 U.S. 147, 160 (1939) ("The freedom of speech and of the press secured by the First Amendment against abridgement by the United States is similarly secured to all persons by the Fourteenth against abridgement by a state."); Hague v. Comm. for Indus. Org., 307 U.S. 496, 515 (1939) (holding that an ordinance which allowed "arbitrary suppression of free expression of views on national affairs" in state parks to be "void upon its face" for abridging the privileges and immunities of citizens of the United States under the Fourteenth Amendment).

pared back protection between 1942 and 1950,[52] and then expanded protection for civil rights picketing beginning in 1963[53] without reconciling the civil rights and labor cases.[54]

In the expansive period from 1939 to 1942, the Court reversed injunctions against peaceful picketing because it found them to restrict speech on matters of public concern.[55] This was true even when the picketers were not employed by the targeted business,[56] or the picketers had organized for the benefit of independent-contractor peddlers rather than employees,[57] or the signs falsely accused the business of selling bad products and its customers of "aiding the cause of Fascism."[58] "Free discussion concerning the conditions in industry and the causes of labor disputes," the Court held, was "indispensable to the effective and intelligent use of the processes of popular government to shape the destiny of modern industrial society."[59] Moreover, "satisfactory hours and wages and working conditions" were crucial to the "health of the present generation and of those as yet unborn."[60] The Court treated peaceful picketing as persuasion, not coercion, even though the persuasion might inflict economic harm or

52. See, e.g., *Vogt*, 354 U.S. at 293–95 (holding that a state may constitutionally enjoin peaceful picketing aimed at coercing an employer to put pressure on his employees to join a union in violation of the declared state policy); *Giboney*, 336 U.S. at 498 (holding that a state may prohibit peaceful picketing when the sole purpose of the picketing is to restrain the freedom of trade in violation of a state penal statute); Carpenters & Joiners Union, Local No. 213 v. Ritter's Cafe, 315 U.S. 722, 726–38 (1942) (holding that the state's injunction against picketing against a restaurant "which industrially has no connection to the [labor] dispute" by union members did not violate the Fourteenth Amendment); Milk Wagon Drivers Union, Local 753 v. Meadowmoor Dairies, Inc., 312 U.S. 287, 296–98 (1941) (holding that a state can authorize its courts "to prohibit picketing when they should find that violence had given to the picketing a coercive effect whereby it would operate destructively as force and intimidation").

53. See Cox v. Louisiana, 379 U.S. 559, 571 (1965) (holding that police could not convict protesters from demonstrating near a courthouse when the police had previously sanctioned the location of the protest, as doing so would allow a type of entrapment violative of the Due Process Clause); Edwards v. South Carolina, 372 U.S. 229, 235–38 (1963) (holding that South Carolina infringed on the First Amendment rights of protesters who were arrested and ultimately convicted for the common law crime of breach of the peace for engaging in peaceful protest).

54. See, e.g., *Carey*, 447 U.S. at 459–61 (striking down a local ordinance that "impermissibly distinguished between labor picketing and all other peaceful picketing" without evidence proving nonlabor picketing as any less peaceful than labor picketing); Police Dep't of Chi. v. Mosley, 408 U.S. 92, 95–96 (1972) (same).

55. The major cases upholding a free speech right to picket and assemble were *Cafeteria Emps.*, 320 U.S. at 295; *Wohl*, 315 U.S. at 775; *Swing*, 312 U.S. at 325; *Carlson*, 310 U.S. at 113; *Thornhill*, 310 U.S. at 102–03; *Schneider*, 308 U.S. at 160; *Hague*, 307 U.S. at 515.

56. *Swing*, 312 U.S. at 326.

57. *Wohl*, 315 U.S. at 769–70, 772.

58. *Cafeteria Emps.*, 320 U.S. at 294.

59. *Thornhill*, 310 U.S. at 103.

60. Id.

offense to some listeners.[61] Finally, place matters: "[S]treets and parks . . . , time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions."[62]

The Court responded to the business case against picketing—that "loose language" may sometimes be offensive or harmful to a business—by insisting it was "part of the conventional give-and-take in our economic and political controversies" and, therefore, "a state cannot exclude working men in a particular industry from putting their case to the public in a peaceful way."[63] As to the argument that government may ban protest because of its effects on neutral businesses and consumers, the Court insisted that those interested in a labor dispute were not just the employer and the pickets. Rather, "the practices in a single factory may have economic repercussions upon a whole region."[64]

In the restrictive period from 1943 to 1957, the Court portrayed picketing as an economic tactic that states could restrict to avoid inconvenience to business or consumers. The shift from the political speech to the economic regulation perspective is illustrated by a pair of cases involving picketing by independent contractors ("peddlers") who delivered goods from manufacturers to retailers. In 1942, the Court found such picketing to be constitutionally protected free speech because the peddlers' "insulation from the public as middlemen made it practically impossible for [them] to make known their legitimate grievances to the public whose patronage was sustaining the peddler system" in any way other than through picketing on a sidewalk.[65] But in 1949, it upheld an injunction against such picketing because the peddlers' "placards were to effectuate the purposes of an unlawful combination" that had the "sole, unlawful immediate objective" of inducing a business not to deal with nonunion peddlers.[66] The Court later upheld restrictions on picketing targeting secondary employers,[67] advocating for affirmative action and an end to race discrimination in hiring,[68] and seeking to organize a nonunion business.[69]

The switch was brought about by a change in the composition of the Court, Justices Black and Frankfurter changing their views about the nature of labor protest and the desirability of constitutional protection for it, and, overall, the Court's determination to remove itself from judging the

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61. Id. at 104 ("[T]he group in power at any moment may not impose penal sanctions on peaceful and truthful discussion of matters of public interest merely on a showing that others may thereby be persuaded to take action inconsistent with its interests.").

62. Hague v. Comm. for Indus. Org., 307 U.S. 496, 515 (1939).

63. *Cafeteria Emps.*, 320 U.S. at 295–96.

64. *Thornhill*, 310 U.S. at 103.

65. Bakery & Pastry Drivers Local 802 v. Wohl, 315 U.S. 769, 775 (1942).

66. Giboney v. Empire Storage & Ice Co., 336 U.S. 490, 502 (1949).

67. NLRB v. Denver Bldg. & Constr. Trades Council, 341 U.S. 675, 688–89 (1951).

68. Hughes v. Superior Court, 339 U.S. 460, 464 (1950).

69. Int'l Bhd. of Teamsters, Local 695 v. Vogt, Inc., 354 U.S. 284, 294 (1957).

wisdom of economic regulation.[70] For example, in 1941, Justice Frankfurter, writing for the Court, held that the First Amendment protected picketers who were not employed at the target business even though their speech concerned "economic interests."[71] But the next year, Frankfurter wrote an opinion that rejected both points.[72] The Court upheld an injunction against picketing at a café whose owner had hired a nonunion contractor to build on another property.[73] The Court decided the union had no dispute with the café owner, only with the contractor, and it would be wrong to "compel the states to allow the disputants in a particular industrial episode to conscript neutrals having no relation to either the dispute or the industry in which it arose."[74] One might argue the union's effort was to make the protest less narrowly economic (about pay in a particular workplace) and more political (solidarity among workers and consumers across industries), and, therefore, the claim to constitutional protection might be stronger. But, perhaps because Congress had recently passed a law prohibiting secondary boycotts and picketing to organize an employer,[75] the Court retreated from its earlier approach.

The line between political and economic conduct was never going to be easy to draw.[76] But it got much harder as the Civil Rights Movement entered the direct-action phase of the bus boycotts, mass marches, and sit-ins. Labor and civil rights groups used picketing and boycotts to improve the working conditions of their members, but for a variety of reasons they did not do so together very often. This ultimately resulted in the Supreme Court treating civil rights picketing as political speech even while the Court insisted that restrictions on labor speech were permissible economic regulation. In the beginning, the Court treated restrictions on both kinds of protest as raising the same legal issues. In 1938, in its first civil rights picketing case, *New Negro Alliance v. Sanitary Grocery Co.*, the Court held that picketing as part of the NAACP's "don't shop where you can't work" campaign was protected by the Norris–LaGuardia Act,

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70. See United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938).

71. AFL v. Swing, 312 U.S. 321, 326 (1941).

72. See Carpenters & Joiners Union, Local No. 213 v. Ritter's Cafe, 315 U.S. 722, 728 (1942).

73. Id. at 724.

74. Id. at 728.

75. See Labor Management Relations (Taft–Hartley) Act, Pub. L. No. 80-101, ch. 120, sec. 101, § 8(b)(4), (7), 61 Stat. 136 (1947) (codified as amended at 29 U.S.C. § 158(b)(4), (7) (2012)).

76. Not surprisingly, the Court's effort to distinguish between political and economic regulation of labor speech was excoriated as arbitrary and unprincipled. See, e.g., Armstrong, supra note 47, at 39 (stating that the distinction, drawn by the Supreme Court in *Ritter's Cafe*, between permissible and impermissible labor picketing "drew a factual line that logically is so difficult to defend, as to invite state courts . . . to draw any line that they choose").

just as labor picketing was.[77] It seemed for a time that the constitutional protection for labor and civil rights picketing would therefore be the same. After the Court pared back constitutional protections for labor picketing, it likewise held in *Hughes v. Superior Court*, decided in 1950, that civil rights picketing urging a California grocery store to hire black employees was not constitutionally protected.[78] Handed down the same day as two opinions upholding injunctions against labor picketing seeking to persuade a business to recognize a union[79] and one upholding the provision of the Taft–Hartley Act that required unions to purge all Communist Party members from leadership positions,[80] *Hughes* signaled a retreat from First Amendment protection for *any* aspect of labor activity.[81]

Since the early 1940s, with the exception of the long series of decisions culminating in *Janus* that invalidated statutory or contractual obligations to join a union or pay union dues, the First Amendment has not been salient to labor law.[82] When it became apparent in the late 1950s that the NLRB and state courts disagreed about which labor goals and tactics were permissible, the Court reclaimed for the NLRB the territory it had ceded to the states by holding that federal labor law broadly preempts state law.[83] Therefore, although the Court withdrew labor from the First Amendment field, it trusted the NLRB and Congress to protect that which was worthy of protection.[84] The Court has not issued a decision squarely holding labor picketing to be protected by the First Amendment

77. 303 U.S. 552, 559–60 (1938).

78. 339 U.S. 460, 464 (1950). Efforts to challenge race discrimination in California, of which *Hughes* was a part, are chronicled in Mark Brilliant, The Color of America Has Changed: How Racial Diversity Shaped Civil Rights Reform in California, 1941–1978, at 119–22 (2010).

79. Bldg. Serv. Emps. Int'l Union, Local 262 v. Gazzam, 339 U.S. 532, 539 (1950); Int'l Bhd. of Teamsters, Local 309 v. Hanke, 339 U.S. 470, 479 (1950). Three years later, the Court extended the reasoning of *Hanke* and *Gazzam* to hold that a state could prohibit picketing to protest hiring of nonunion labor. Local Union No. 10, United Ass'n of Journeymen Plumbers v. Graham, 345 U.S. 192, 201 (1953).

80. Am. Commc'ns Ass'n v. Douds, 339 U.S. 382, 396 (1950).

81. See NAACP v. Claiborne Hardware Co., 458 U.S. 886, 912 (1982) ("This Court has recognized the strong governmental interest in certain forms of economic regulation, even though such regulation may have an incidental effect on rights of speech and association."); Cox v. Louisiana, 379 U.S. 536, 552, 558 (1965) (overturning a conviction for giving a speech condemning race discrimination and urging a sit-in).

82. For a few years, the Court held that the First Amendment required owners of private property used as a shopping mall to allow picketing in the public areas of the mall, but the Court eventually overruled that decision. See Amalgamated Food Emps. Union Local 590 v. Logan Valley Plaza, Inc., 391 U.S. 308, 325 (1968), overruled by Hudgens v. NLRB, 424 U.S. 507 (1976).

83. San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236, 244 (1959).

84. See id. ("[T]o allow the States to control conduct which is the subject of national regulation would create potential frustration of national purposes."); Youngdahl v. Rainfair, Inc., 355 U.S. 131, 139–40 (1957) (holding that an injunction prohibiting peaceful picketing was preempted and upholding the injunction only insofar as it prohibited violence).

since 1958,[85] and has not issued an opinion so holding since 1942.[86] As Professor Frederick Schauer put it, "most of labor law proceeds unimpeded by the First Amendment," just like antitrust, securities regulation, copyright, and a host of laws regulating economic activity.[87]

II. LABOR PROTEST AND THE FIRST AMENDMENT IN THE TWENTY-FIRST CENTURY

There has been only one growth area for freedom of speech in the labor field since the 1940s: the right of workers to refuse to join or pay fees to a union.[88] As union opponents have litigated dozens of cases in the Supreme Court seeking to expand a First Amendment right to refuse to join, pay fees to, or be represented by a union, they have dramatically increased the salience of the First Amendment in labor law.[89] Union opponents have relied on the First Amendment not only to restrict the content of collective bargaining agreements with respect to fees and dues but also to attack members-only voting on union leadership and contract ratification,[90]

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85. Even then, the Court granted certiorari in a case that enjoined peaceful primary picketing (along with a secondary boycott) and simply vacated and remanded without an opinion, giving only a single citation to *Thornhill*. See Chauffeurs Local Union 795 v. Newell, 356 U.S. 341, 341 (1958) (per curiam) (mem.).

86. Bakery & Pastry Drivers Local 802 v. Wohl, 315 U.S. 769, 775 (1942). The Court did, on constitutional avoidance grounds, protect consumer picketing calling for a product boycott in 1964, but it expressly did not hold the picketing to be protected by the First Amendment. NLRB v. Fruit & Vegetable Packers, Local 760, 377 U.S. 58, 62, 72 (1964).

87. Frederick Schauer, The Boundaries of the First Amendment: A Preliminary Exploration of Constitutional Salience, 117 Harv. L. Rev. 1765, 1782–83 (2004).

88. In *International Ass'n of Machinists v. Street*, the Court decided to avoid what it considered a difficult First Amendment question: whether the Railway Labor Act should be construed to prohibit an employer and a union from agreeing to require workers to pay dues to the union to the extent that the dues would fund ideological activities not germane to the union's role as bargaining agent. 367 U.S. 740, 749–50 (1961). Then, in *NLRB v. General Motors Corp.*, the Court held that the most a union and an employer could agree to require union-represented workers to do was to pay union dues and fees. 373 U.S. 734, 742 (1963) ("It is permissible to condition employment upon membership, but membership, insofar as it has significance to employment rights, may in turn be conditioned only upon payment of fees and dues. 'Membership' as a condition of employment is whittled down to its financial core."). Then, in *Abood v. Detroit Board of Education*, the Court reached the First Amendment question it had avoided in *Street* and held that the First Amendment prohibits a public-sector employer and a union from requiring payment of fees unrelated to the union's work as the employee's bargaining representative. 431 U.S. 209, 234 (1977). The Court applied the rule of *Street* and *Abood* to the NLRA in Communications Workers v. Beck, 487 U.S. 735, 745 (1988). The Court overruled *Abood* in *Janus*. Janus v. Am. Fed'n of State, Cty., & Mun. Emps., Council 31, 138 S. Ct. 2448, 2486 (2018) ("*Abood* was wrongly decided and is now overruled."). The history of the litigation is told in Sophia Z. Lee, The Workplace Constitution from the New Deal to the New Right 175–237 (2014).

89. See, e.g., *Janus*, 138 S. Ct. 2448; Harris v. Quinn, 134 S. Ct. 2618 (2014); Knox v. Serv. Emps. Int'l Union, Local 1000, 567 U.S. 298 (2012); D'Agostino v. Baker, 812 F.3d 240 (1st Cir. 2016), cert. denied, 136 S. Ct. 2473 (2016) (mem.).

90. See, e.g., Bain v. Cal. Teachers Ass'n, 156 F. Supp. 3d 1142, 1150 (C.D. Cal. 2015).

state statutes proscribing injunctions in certain labor disputes,[91] and employer notice-posting requirements.[92]

By making labor law one of the most significant battlegrounds over the boundaries of the First Amendment,[93] the Supreme Court has opened the door to First Amendment challenges to a complex legal regime that comprehensively regulates labor speech in a variety of viewpoint- and content-discriminatory ways. For example, employers and unions cannot threaten but they can try to persuade employees to join or not join the union,[94] though there has been little effort to distinguish threats from persuasion in the labor field, unlike in the law of incitement or other areas in which the First Amendment is salient.[95] Labor law restricts picketing only by labor organizations and their agents, not by anybody else.[96] The workplace is rife with legally mandated disclosures and notices applicable to employers or unions.[97] The laws restricting and compelling speech discriminate on the basis of content, speaker, and viewpoint, and not all of the discriminations track the First Amendment categories about protected or unprotected speech.[98] The NLRB rules distinguishing protected speech from that which is unprotected or prohibited are vague—prohibiting "disparaging," "rude," or "inflammatory" remarks—and frequently over- or underinclusive.[99] Unions can leaflet but not picket to

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91. Ralphs Grocery Co. v. UFCW Local 8, 290 P.3d 1116, 1126–27 (Cal. 2012).

92. Chamber of Commerce v. NLRB, 721 F.3d 152, 160–67 (4th Cir. 2013); see also Am. Meat Inst. v. U.S. Dep't of Agric., 760 F.3d 18, 23–28 (D.C. Cir. 2014) (en banc) (sustaining an agency rule requiring disclosure of the country of origin of commodities).

93. See supra note 89, in which all Supreme Court cases were divided 5-4 on ideological lines. A predecessor to those, Davenport v. Wash. Educ. Ass'n, 551 U.S. 177 (2007), was decided 6-3.

94. 29 U.S.C. § 158(c) (2012).

95. See, e.g., Holder v. Humanitarian Law Project, 561 U.S. 1, 43–45 (2010).

96. 29 U.S.C. § 158(b)(4), (7) (providing that "[i]t shall be an unfair labor practice for a labor organization or its agents . . . to induce or encourage any individual [to strike]" or "to picket or cause to be picketed [any employer]" to achieve specified prohibited objects).

97. Under the Fair Labor Standards Act, the Employee Retirement Income Security Act, and the Family and Medical Leave Act, for example, the employer is required to notify employees of their statutory rights. See id. §§ 218(b), 1166, 2619. Under *Chicago Teachers Union, Local No. 1 v. Hudson*, unions are required to notify employees they represent of their rights not to join or to pay full dues to the union. 475 U.S. 292, 306–07 (1986).

98. See Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 49 (1983) (distinguishing union access to a school's mail facilities based on the status of the unions rather than their views, explaining that those distinctions are "inescapable in the process of limiting a nonpublic forum to the activities compatible with the intended purpose of the property").

99. 29 U.S.C. § 157; see also NLRB v. Babcock & Wilcox Co., 351 U.S. 105, 113 (1956) (protecting the right of employees to hear from nonemployees regarding self-organization); NLRB v. Int'l Bhd. of Elec. Workers, 346 U.S. 464, 471 (1953) (finding "disparaging" speech to be unprotected); New York New York, LLC, 356 N.L.R.B. 907, 920 (2011) (finding appeals by employees of different employers working on the same premises to be protected), enf'd 676 F.3d 193 (D.C. Cir. 2012); Cellco P'ship, 349 N.L.R.B. 640, 646 (2007)

urge employees to join their organization, yet they can picket to urge employees not to join; they can picket to protest unfair labor practices but not to demand the employer to recognize the union.[100]

For decades, these and many other regulations of work-related speech were noncontroversial exercises of Congress's power to regulate commerce and the states' police powers to regulate for the general welfare. Since 1941, when the Court first rejected a First Amendment challenge to the NLRA's restriction on employer speech,[101] the Court has largely rejected invitations to apply the First Amendment to these various viewpoint and speaker regulations.[102] Content regulation of private speech in the workplace was considered an appropriate part of regulating employment relations and not to raise the issues that would be raised if the speech were to occur on a sidewalk or in the newspaper. The workplace is not a public forum, workers are generally a captive audience, and speech is integral to economic conduct. But even when the speech, like picketing, occurred in a public forum, the Court generally rejected First Amendment challenges.[103]

Yet even between 1940 and 1980, when the Court seemed most determined to refrain from injecting the Constitution into economic regulation, it created some exceptions. First, it outlawed certain aspects of race discrimination by unions[104] more than two decades before it held, following enactment of the Civil Rights Act of 1964, that the Reconstruction-era civil rights acts prohibited discrimination in the making and enforcement of employment contracts.[105] Second, it gave broad reach to the federal

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(holding that opprobrious or abusive speech or conduct is not protected); Universal Mfg. Co., 156 N.L.R.B. 1459, 1466–67 (1966) (setting aside a union election because of inappropriate pressure from community members); Sewell Mfg. Co., 138 N.L.R.B. 66, 71–72 (1962); Gen. Shoe Corp., 77 N.L.R.B. 124, 127 (1948) (prohibiting inflammatory and racially charged messaging in a Board election).

100. 29 U.S.C. § 158(b)(7); see also Fisk & Rutter, supra note 17, at 287–88.

101. NLRB v. Va. Elec. & Power Co., 314 U.S. 469, 477 (1941).

102. See, e.g., NLRB v. Gissel Packing Co., 395 U.S. 575, 616–19 (1969). On the controversy within the civil liberties community surrounding NLRB decisions restricting employer speech in the early years of the NLRA, see Weinrib, supra note 1, at 270–310.

103. See Int'l Bhd. of Teamsters, Local 695 v. Vogt, Inc., 354 U.S. 284, 284 (1957) (rejecting a First Amendment challenge to an injunction prohibiting picketing at the roadside entrance to a gravel pit); Hughes v. Superior Court, 339 U.S. 460, 461 (1950) (rejecting a First Amendment challenge to an injunction against picketing on a sidewalk in front of a grocery store); Carpenters & Joiners Union, Local No. 213 v. Ritter's Cafe, 315 U.S. 722, 723 (1942) (rejecting a First Amendment challenge to an injunction banning picketing on the sidewalk in front of a restaurant); Armstrong, supra note 47, at 11–34 (tracing the arc of the Supreme Court's picketing decisions).

104. See Steele v. Louisville & Nashville R.R. Co., 323 U.S. 192, 203–04 (1944) (holding that unions must represent and act for all members, regardless of race).

105. Patterson v. McLean Credit Union, 491 U.S. 164 (1989) (reaffirming prior cases holding that § 1981 prohibits discrimination in employment contracts between private entities); Runyon v. McCrary, 427 U.S. 160 (1976) (holding that § 1981, part of the Civil Rights Act of 1866, prohibits discrimination in contracts between private parties); Jones v.

statute allowing states to outlaw union security contracts, thus granting employees more rights than they might otherwise have had to resist union membership.[106] Third, it conferred a First Amendment right on government employees, a quasi-constitutional right on railroad and airline employees, and a statutory right on private sector employees to refuse to pay union fees for services not germane to the negotiation and enforcement of a labor contract.[107] Finally, a few labor speech rules reflect constitutional concerns about regulating workplace speech, even though the Court did not squarely hold that labor protest is constitutionally protected. To avoid what it termed "serious constitutional questions,"[108] the Court construed broad statutory prohibitions on picketing not to cover distributing leaflets[109] or picketing targeted only at a product,[110] except when the business is economically dependent on the product.[111]

In steadily expanding the role of the First Amendment in restricting public sector labor laws and contracts since 2012, the Court has eroded the line between political speech and economic conduct. The Court has created a doctrinal conundrum, because it has found a First Amendment problem with a compelled subsidy (fair share fees) when the First Amendment has never been held to protect the subsidized speech (collective bargaining). Under *Garcetti v. Ceballos*, which upheld discipline for a district attorney who wrote a memo protesting reliance on false police testimony in a criminal prosecution, it would appear that government employees have no federal constitutional right to protest working conditions individually or collectively.[112] Yet in *Janus*, the Court held that government employees have a right to refuse to subsidize collective bargaining because the cost of government employment is of concern to the taxpayers.[113] In other words, there is now a First Amendment right to refuse to engage in speech (paying union fees) when there is no First Amendment right to engage in the speech (about wages and benefits) that the person

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Alfred H. Mayer Co., 392 U.S. 409, 423–24 (1968) (holding that the Civil Rights Act of 1866 prohibits racial discrimination in the sale or rental of property).

106. Retail Clerks Int'l Ass'n, Local 1625 v. Schermerhorn, 373 U.S. 746, 756–57 (1963); see also Catherine L. Fisk & Benjamin I. Sachs, Restoring Equity in Right-to-Work Law, 4 U.C. Irvine L. Rev. 857, 860–64 (2014).

107. See Fisk & Sachs, supra note 106, at 867 (arguing that the interaction between state right-to-work laws and the federal regime of exclusive representation has enabled nonpaying employees in right-to-work states to receive free representation).

108. Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568, 588 (1988).

109. Id.; see also United Bhd. of Carpenters, Local Union No. 1506, 355 N.L.R.B. 797, 821 (2010) (finding that the display of a banner is more like distributing leaflets than like picketing).

110. NLRB v. Fruit & Vegetable Packers, Local 760, 377 U.S. 58, 71–73 (1964).

111. NLRB v. Retail Store Emps. Union, Local 1001, 447 U.S. 607, 614–16 (1980).

112. 547 U.S. 410, 426 (2006); see also Borough of Duryea v. Guarnieri, 564 U.S. 379, 398–99 (2011).

113. Janus v. Am. Fed'n of State, Cty., & Mun. Emps., Council 31, 138 S. Ct. 2448, 2475–76 (2018).

has a right not to subsidize. Moreover, in *National Institute of Family & Life Advocates v. Becerra* (*NIFLA*), decided the day before *Janus*, the Court struck down a disclosure requirement that is almost identical to the disclosure requirement that *Janus* rests on.[114] That is, *Janus* and the cases that came before it compel unions to notify all represented employees of their right not to join the union or to pay fees. But in *NIFLA* the Court held unconstitutional a requirement that crisis pregnancy centers disclose to customers that free or low-cost abortion services are offered elsewhere.[115] If pregnancy service providers have a right not "to inform women how they can obtain state-subsidized abortions—at the same time [they] try to dissuade women from choosing that option,"[116] why should unions have to notify their members of their right to quit the union "at the same time [unions] try to dissuade [workers] from choosing that option"?

The intellectual credibility of *Lochner*, such as it was, rested on the formal equality that it accorded the right to "both employers and employ[ee]s, to make contracts regarding labor upon such terms as they may think best, or which they may agree upon with the other parties to such contracts."[117] Freedom of contract protected (in theory) the right of both labor and management to contract without legislative imposition of minimum terms, and this remains the defense of *Lochner*.[118] *Lochner* redux in First Amendment law would have to offer the same formal equality if it were to have any intellectual credibility at all. If anti-union government employees have a First Amendment right to resist paying money to the union to negotiate over working conditions, formal equality would suggest that pro-union government employees have a First Amendment right to discuss their working conditions collectively. Having reintroduced the First Amendment into the labor field, there is no intellectually respectable way that the Court can insist that the only First Amendment right workers enjoy is the right *not* to join a union or to pay dues.

Of course, many labor advocates would find it distasteful to seek First Amendment protection for labor protest relying on *Janus*, *NIFLA*, *Harris*, and their predecessors, as well as the Court's other decisions applying strict scrutiny to regulation of speech in a commercial context, because all of these decisions are damaging to the labor movement. But ignoring them will not make them go away. Whether progressives cite *Janus* or not, others will. The question is whether they can provide the basis to expand the right to engage in the kind of protest and organizing that might challenge the economic inequality that enables the neoliberal legal regime that harms progressive values, without jeopardizing the laws

114. Nat'l Inst. of Family & Life Advocates v. Becerra, 138 S. Ct. 2361, 2377–78 (2018).

115. Id. at 2378.

116. Id. at 2371.

117. Lochner v. New York, 198 U.S. 45, 61 (1905).

118. See, e.g., Richard A. Epstein, In Defense of the Contract at Will, 51 U. Chi. L. Rev. 947, 951 (1984).

still on the books that protect progressive values. That is the issue addressed in Part III.

III. PROTECTING PROTEST AND REGULATING THE ECONOMY

The Court's venerable labor and civil rights protest cases offer a clear path forward. The Court never overruled and still cites seminal First Amendment decisions protecting advocacy of labor and civil rights through calls for boycotts, speeches, mass meetings, picketing, and the dissemination of literature in parks, on sidewalks, or door-to-door.[119] These cases provide three essential foundations of a progressive First Amendment right for worker agitation. First, labor protest is political speech on a matter of public concern in a public forum. Regulation of picketing is quite different from regulation of economic activity or speech inside the workplace. Second, labor picketing is persuasion, not coercion. A picket line may once have had coercive power when closed shops were legal and so workers who refused to honor one could be ejected from a union and thereby prevented from working. Those days are long gone; the Taft–Hartley Act outlawed closed shops in 1947,[120] and the Court subsequently extended the prohibition on requiring union membership at hiring to a broader prohibition on requiring employees to remain union members after starting work.[121] Third, moving labor protest into the category of protected political, noncoercive speech does not require rethinking all of commercial speech doctrine, all of antitrust law, or all of the law governing speech inside the workplace.

A. *Labor Protest Is Political Speech, Not Economic Activity*

Urging consumers not to patronize or workers not to go to work at a place because it sells products produced by another entity in deplorable conditions[122] or because the business owner has deprived workers of their

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119. See, e.g., Citizens United v. FEC, 558 U.S. 310, 336 (2010) ("The ongoing chill upon speech that is beyond all doubt protected makes it necessary in this case to invoke the earlier precedents that a statute which chills speech can and must be invalidated where its facial invalidity has been demonstrated." (citing Thornhill v. Alabama, 310 U.S. 88, 97–98 (1940))).

120. Labor Management Relations (Taft–Hartley) Act, Pub. L. No. 80-101, ch. 120, sec. 101, § 8(a)(3), 61 Stat. 136 (1947) (codified as amended at 29 U.S.C. § 158(a)(3) (2012)).

121. See Marquez v. Screen Actors Guild, Inc., 525 U.S. 33, 37–38 (1998) (explaining the rules about union shops); Pattern Makers' League v. NLRB, 473 U.S. 95, 115–16 (1985) (deferring to the NLRB's decision that a union that imposed fines on its former members who had resigned during a strike and returned to work had violated the NLRA).

122. See, e.g., NLRB v. Retail Store Emps. Union, Local No. 1001, 447 U.S. 607, 609–11 (1980) (upholding the NLRA's prohibition on secondary picketing that encourages consumers to boycott a product because the "neutral" secondary was heavily dependent on sales of the struck product).

rights at another business[123] is meant to persuade by providing information. As the Court recognized in allowing sidewalk advocacy against abortion, absent intimidation or coercion, the government should not be in the business of protecting people in a public forum against exposure to information or ideas that the government considers loathsome.[124]

When the *Janus* Court invalidated all state laws and contracts requiring government employees to pay their fair share of the costs of union representation, the majority emphasized that the pay and terms on which those public employees work are matters of great "public importance."[125] The Court discussed at some length "the mounting costs of public-employee wages, benefits, and pensions," which it said "undoubtedly played a substantial role" in the increase in public spending since 1970, and "[u]nsustainable collective-bargaining agreements," which it "blamed for multiple municipal bankruptcies."[126] Moreover, even noneconomic issues that might be subject to bargaining reflect important policy judgments; using the example of teachers, the Court rattled off several: "Should teacher pay be based on seniority, the better to retain experienced teachers? Or should schools adopt merit-pay systems to encourage teachers to get the best results out of their students?"[127]

It cannot be that wages are a matter of public concern only if the public cares about the costs to the employer. As the Court recognized in *Hague*,[128] *Carlson*,[129] and *Thornhill*,[130] wages and conditions of employment are of great public concern both to workers and to those who pay for work. The wave of teacher strikes in half a dozen states in the spring of 2018 illustrates the political importance of protest.[131] Teachers used

123. See, e.g., Carpenters & Joiners Union, Local No. 213 v. Ritter's Cafe, 315 U.S. 722, 727 (1942) (upholding an injunction against picketing a cafe whose owner had hired a nonunion contractor paying substandard wages to work on a nearby building it owned).

124. McCullen v. Coakley, 134 S. Ct. 2518, 2541 (2014).

125. Janus v. Am. Fed'n of State, Cty., & Mun. Emps., Council 31, 138 S. Ct. 2448, 2476 (2018); see also Harris v. Quinn, 134 S. Ct. 2618, 2643 (2014) (finding the "great public concern" in the cost of public sector employment to be the basis for invalidating fair share fees for home health aides).

126. *Janus*, 138 S. Ct. at 2483.

127. Id. at 2476.

128. Hague v. Comm. for Indus. Org., 307 U.S. 496, 504 (1939).

129. Carlson v. California, 310 U.S. 106, 113 (1940).

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

131. See, e.g., Dana Goldstein, Arizona Supreme Court Blocks a Ballot Measure, and Schools Miss Out on $690 Million, N.Y. Times (Aug. 30, 2018), https://www.nytimes.com/2018/08/30/us/arizona-teachers-tax-investined.html (on file with the *Columbia Law Review*) ("Teachers, unions and activists have shifted their focus to the ballot box in recent months, after educators in six states walked out of their schools this year."); Matt Pearce, Red-State Revolt Continues: Teachers Strike in Oklahoma and Protest in Kentucky, L.A. Times (Apr. 2, 2018), http://www.latimes.com/nation/la-na-teachers-spending-20180402-story.html (on file with the *Columbia Law Review*) ("Thousands of Oklahoma teachers went on strike Monday to demand higher pay and more education funding, digging in for a prolonged walkout as discontent spreads among public educators in conservative states."); Dale

massive rallies, marches, social media, and conventional media to get the public and elected officials to understand the high costs of low taxes.[132] In some of those states, teacher collective bargaining is not required or authorized by statute,[133] and public employee strikes are illegal in five of the six states.[134] In Texas, where teachers did not strike and failed to garner nearly the public attention to the plight of the schools that other states

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Russakoff, The Teachers' Movement: Arizona Lawmakers Cut Education Budgets. Then Teachers Got Angry, N.Y. Times Mag. (Sept. 5, 2018), https://www.nytimes.com/interactive/2018/09/05/magazine/arizona-teachers-facebook-group-doug-ducey.html (on file with the *Columbia Law Review*) ("[Arizona Educators United] held a vote to decide whether to walk out, and 78 percent of more than 50,000 participating teachers and support staff voted yes. . . . [T]he walkout would continue until lawmakers voted on the education budget.").

132. Dana Goldstein & Elizabeth Dias, Oklahoma Teachers End Walkout After Winning Raises and Additional Funding, N.Y. Times (Apr. 12, 2018), https://www.nytimes.com/2018/04/12/us/oklahoma-teachers-strike.html (on file with the *Columbia Law Review*) (explaining that in multiple states teachers pressured representatives to raise money for schools and salary increases, and "started the walkout movement by organizing on Facebook").

133. See N.C. Gen. Stat. § 95-98 (2018) (voiding all agreements between state or local government entities and representatives of employees of such entities); Okla. Stat. tit. 70, § 509.6 (2017) ("The board of education and the representatives of the organization must negotiate in good faith on wages, hours, fringe benefits, and other terms and conditions of employment."); City of Phoenix v. Phx. Emp't Relations Bd. ex rel. Am. Fed'n of State, Cty., & Mun. Emps. Ass'n, Local 2384, 699 P.2d 1323, 1326 (Ariz. Ct. App. 1985) ("It is anticipated that the negotiations [between city management and employee representatives] . . . will produce a memorandum of understanding . . . . Importantly, the final decision-making authority is expressly reserved to the Phoenix City Council because the memorandum of understanding is not to be effective until it is approved by the Council."); Littleton Educ. Ass'n v. Arapahoe Cty. Sch. Dist. No. 6, 553 P.2d 793, 797 (Colo. 1976) ("[A] school board, incidental to its statutory duties above enumerated, has the power and authority to collectively bargain with an agent selected by the employees, if the Board determines in its discretion that implementation of collective bargaining will more effectively and efficiently accomplish its objectives and purposes." (quoting La. Teachers' Ass'n v. New Orleans Par. Sch. Bd., 303 So. 2d 564, 567 (La. Ct. App. 1974))); Fayette Cty. Educ. Ass'n v. Hardy, 626 S.W.2d 217, 220 (Ky. Ct. App. 1980) ("[A] public agency may elect to negotiate with a representative of its employees, although it has no duty to do so."); Milla Sanes & John Schmitt, Ctr. for Econ. & Policy Research, Regulation of Public Sector Collective Bargaining in the States 5 (2014), http://cepr.net/documents/state-public-cb-2014-03.pdf [https://perma.cc/2J23-WTP6] (explaining that, for teachers in Arizona, "no set statutes or existing case law governs collective bargaining at the state level").

134. See N.C. Gen. Stat. § 95-98.1 ("Strikes by public employees are hereby declared illegal and against the public policy of this State."); Okla. Stat. tit. 70, § 509.8 ("It shall be illegal for the organization to strike or threaten as a means of resolving differences within the board of education."); Jefferson Cty. Teachers Ass'n v. Bd. of Educ., 463 S.W.2d 627, 629 (Ky. 1970) (holding that teachers are excluded from a statutory right to strike); Jefferson Cty. Bd. of Educ. v. Jefferson Cty. Educ. Ass'n, 393 S.E.2d 653, 659 (W. Va. 1990) ("Public employees have no right to strike in the absence of express legislation or, at the very least, appropriate statutory provisions for collective bargaining, mediation, and arbitration."); Op. Att'y Gen. No. I80-039 (Ariz. Mar. 18, 1980) (finding that "public school teachers do not have the right to strike"). Colorado is the one state that allows teacher strikes. Martin v. Montezuma-Cortez Sch. Dist. RE-1, 841 P.2d 237, 241 (Colo. 1992) ("We hold that, under the relevant statutes, employees in the public sector have a qualified right to strike subject to explicit executive and judicial controls.").

had, some speculated that teachers were intimidated not only by the statutory prohibition on strikes but also by the harsh remedies for striking.[135]

If wages and working conditions are a matter of public concern, then First Amendment protection turns on whether speech about them occurs in a public forum and in a reasonable time and manner. In a 2011 case involving picketing on public streets targeted at private individuals, the Court said that the permissibility of restrictions on picketing on public streets

> turns largely on whether that speech is of public or private concern, as determined by all the circumstances of the case. "[S]peech on 'matters of public concern' . . . is 'at the heart of the First Amendment's protection.'" The First Amendment reflects "a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." That is because "speech concerning public affairs is more than self-expression; it is the essence of self-government." Accordingly, "speech on public issues occupies the highest rung of the hierarchy of First Amendment values, and is entitled to special protection."[136]

And in an earlier case involving anti-abortion picketing, the Court explained, citing *Hague*: "'[T]ime out of mind' public streets and sidewalks have been used for public assembly and debate . . . ."[137] Because the prohibitions on labor protest are content-based, speaker- and viewpoint-discriminatory flat prohibitions on speech on a matter of public concern in a public forum, they are unconstitutional.

B. *Labor Picketing and Boycotts Are Not Coercion*

The Court went astray only when it made a variation on the move that some progressives have made today: to accept that expression of some ideas is so threatening that peaceful advocacy of them renders the sidewalk not a safe space for business. When the Court first recognized labor protest as speech protected by the First Amendment, it perceived it to be part of a lively and fundamentally political debate about the equitable distribution of wealth and decent working conditions.[138] Similarly,

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135. Texas public employees who strike stand to forfeit their job, their seniority, and even their pension. Tex. Gov't Code § 617.003 (2017); see also Tex. Classroom Teachers Ass'n, What Happens if Texas Teachers Strike?, Classroom Teacher, Spring 2018, at 12, 23.

136. Snyder v. Phelps, 562 U.S. 443, 451–52 (2011) (alterations in original) (citations omitted) (first quoting Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 758–59 (1985); then quoting N.Y. Times Co. v. Sullivan, 376 U.S. 254, 270 (1964); then quoting Garrison v. Louisiana, 379 U.S. 64, 74–75 (1964); then quoting Connick v. Myers, 461 U.S. 138, 145 (1983)).

137. Frisby v. Schultz, 487 U.S. 474, 480–81 (1988) (alteration in original) (quoting Hague v. Comm. for Indus. Org., 307 U.S. 496, 515 (1939)).

138. Thornhill v. Alabama, 310 U.S. 88, 103 (1940) ("Free discussion concerning the conditions in industry and the causes of labor disputes appears to us indispensable to the

when it struck down restrictions on civil rights boycotts, it emphasized the political character of public debate about fair working conditions.[139] In both situations, the Court rejected the argument that government can stop public protest because it harms business or might prompt public disorder.

When the Court upheld restrictions on picketing in the 1950s, it emphasized that picketing is a coercive signal, not speech, which could coerce reluctant employees to join a union. One aspect of that reasoning is that "picketing is more than speech and establishes a *locus in quo* that has far more potential for inducing action or nonaction than the message the pickets convey."[140] The First Amendment, the Court said, "does not apply to a mere signal by a labor organization to its members," and a picket is "merely such a signal, tantamount to a direction to strike."[141] But the Court later abandoned the idea that a "mere signal" or a "locus in quo" is not persuasion when it extended First Amendment protection to acts that convey a message even without speech, such as symbolic burning.[142]

The second aspect of the reasoning was that the picket line was "more than the mere publication of the fact[s]" about the job, but rather, "coupled with established union policies and traditions,"[143] picketing induces action "quite irrespective of the nature of the ideas which are being disseminated."[144] What are the "policies and traditions" that cause action "irrespective of the nature of the ideas"? It could be a high degree of solidarity. Some people honor picket lines the way others fast on Good Friday or Yom Kippur, or others sing their college fight song with gusto: It's just an article of faith, it's what you do, even if you don't really believe the reasons underlying the practice. That's not a good First Amendment argument. A better argument for treating pickets as coercive rather than persuasive was the closed shop, which was legal until 1947, or compulsory

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effective and intelligent use of the processes of popular government to shape the destiny of modern industrial society.").

139. See NAACP v. Claiborne Hardware Co., 458 U.S. 886, 913 (1982).

140. Bldg. Serv. Emps. Int'l Union, Local 262 v. Gazzam, 339 U.S. 532, 537 (1950).

141. NLRB v. Denver Bldg. & Constr. Trades Council, 341 U.S. 675, 690 (1951).

142. See Texas v. Johnson, 491 U.S. 397, 400 n.1, 416–17 (1989) (holding unconstitutional a law that prohibited any person to "deface, damage or otherwise physically mistreat" a flag in a way that the actor knows "will seriously offend one or more persons likely to observe or discover his action"); see also United States v. Eichman, 496 U.S. 310, 318–19 (1990) (declining to revisit the Court's holding in *Texas v. Johnson*); United States v. O'Brien, 391 U.S. 367, 376 (1968) (declaring, in upholding a law prohibiting draft card burning, that "when 'speech' and 'nonspeech' elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms").

143. Local Union No. 10, United Ass'n of Journeymen Plumbers v. Graham, 345 U.S. 192, 200 (1953).

144. Int'l Bhd. of Teamsters, Local 695 v. Vogt, Inc., 354 U.S. 284, 289 (1957).

union membership, which was legal until 1963.[145] Crossing a picket line could result in a worker losing union membership and, consequently, the ability to work in a densely unionized industry.[146] So, picketing in the 1950s did not seem, to the Court and to labor union critics, to be an expression of political belief as much as a tool wielded by union leaders in their battle against corporate leaders. Civil rights picketing and boycotts, the Court thought, were different, for they were advocacy for equality of opportunity in work and civil society, and "[s]peech does not lose its protected character . . . simply because it may embarrass others or coerce them into action."[147]

Much has changed. No worker can lawfully be prevented from working for crossing a picket line or refusing to serve picket duty.[148] Workers who picket today over labor issues frame their debate in civil rights terms about fairness, respect, and solidarity among all workers and between workers and those who rely on their work.[149] To the extent that the purpose of the First Amendment is to enable effective self-government by allowing people to express and to hear a range of ideas, picketing is core.

The Court and the NLRB have already recognized that most forms of labor advocacy other than picketing to encourage a full consumer and worker boycott are not coercive. Unions may picket to encourage consumers to boycott a product[150] (though not a store that sells the product,[151] and not even the product if a business is heavily dependent on the product[152]). Unions have the right to distribute leaflets and display banners to

145. See NLRB v. Gen. Motors Corp., 373 U.S. 734, 741 (1963) (explaining the evolution of the law regulating union security).

146. See Pattern Makers' League v. NLRB, 473 U.S. 95, 115–16 (1985) (deferring to the NLRB's determination that a union cannot fine union members who cross a picket line during a strike because the fine "restrains" employees in the exercise of their NLRA rights to resign from membership and thereafter defy a union rule requiring solidarity during a strike).

147. NAACP v. Claiborne Hardware Co., 458 U.S. 886, 910 (1982).

148. See *Pattern Makers' League*, 473 U.S. at 100 (upholding an NLRB ruling that invalidated a union rule prohibiting an employee from resigning membership during a strike so as to be able to cross the picket line without being subject to union discipline); cf. NLRB v. Allis-Chalmers Mfg. Co., 388 U.S. 175, 196 (1967) (holding that a union may impose fines on members who cross picket lines).

149. See, e.g., Susan Du, Allina Health, to Teachers Union: Stop Picketing Us. Teachers: No., City Pages (June 23, 2016), http://www.citypages.com/news/allina-health-to-teachers-union-stop-picketing-us-teachers-no-8380031 [https://perma.cc/XQY5-CYEL] (showing picketers with signs reading "Educators Support Nurses"); Day-by-Day Updates: 1245 Organizing Stewards Aid Teachers Strike in Oregon, IBEW 1245 (Feb. 21, 2014), http://ibew1245.com/2014/02/21/organizing-stewards-aid-teachers-strike-in-oregon/ [https://perma.cc/949Y-FQCK] (showing picketers with signs reading "Firefighters Support Teachers").

150. NLRB v. Fruit & Vegetable Packers, Local 760, 377 U.S. 58, 71 (1964).

151. Id. at 70.

152. NLRB v. Retail Store Emps. Union, Local 1001, 447 U.S. 607, 614–15 (1980).

publicize labor abuses, and to communicate via social media.[153] Civil rights activists, immigrant rights activists, and all groups other than labor unions have the rights to picket and to urge secondary boycotts. While a labor picket line may convey a more forceful message than a labor banner or a civil rights picket line, now that labor unions lack the power to prevent those who cross from getting or keeping a job, a picket line has lost the power to coerce.

Declaring picketing to be constitutionally protected would not jeopardize legal restrictions on workplace speech that is genuinely coercive. The prohibitions on union or employer threats in section 8(c) of the NLRA would remain constitutional, as threats are unprotected speech under the First Amendment.[154] The NLRB's administrative rule banning electioneering within twenty-four hours of a union election serves the purpose of fair play and is presumably constitutional for the same reasons and to the same extent that electioneering can be prohibited in polling places in political elections.[155] The requirement that unions notify bargaining unit

153. See United Bhd. of Carpenters, Local 1506, 355 N.L.R.B. 159 (2010) (explaining that the display of banners is not "coercion" prohibited by section 8(b)(4)). However, the NLRB's General Counsel has announced an intention to overturn many Obama Board precedents, see Memorandum GC 18-02, "Mandatory Submissions to Advice" (Dec. 1, 2017). The General Counsel is prosecuting some conduct protected under *United Brotherhood of Carpenters, Local 1506* as unfair labor practices, and the Board has recently held section 8(b)(4) prohibits peaceful picketing protesting working conditions at office buildings with many tenants. Preferred Bldg. Servs., Inc., 366 N.L.R.B. No. 159 (2018). This change of enforcement practices may invite challenge in federal courts of appeals that have held some such conduct protected by the First Amendment. See Overstreet v. United Bhd. of Carpenters, Local 1506, 409 F.3d 1199, 1218–19 (9th Cir. 2005). And then the issue would make its way to the Supreme Court, which has not ruled on this question since holding that leafletting is not coercive in Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Construction Trades Council, 485 U.S. 568, 582–83 (1988).

154. See NLRB v. Gissel Packing Co., 395 U.S. 575, 617 (1969) (noting that statutory protection of employer rights to anti-union expression must be balanced against the equal rights of employees to associate and the disparity in power between employees who are economically dependent on their employers); NLRB v. Va. Elec. & Power Co., 314 U.S. 469, 477 (1941) (holding that employer speech opposing a union is not an unfair labor practice under section 8(c) unless it is coercive). Drawing a dividing line between a threat and protected speech is not easy, but that is true throughout the constitutional law of true threats and incitement. See, e.g., Elonis v. United States, 135 S. Ct. 2001, 2005–06 (2015) (reversing the conviction of a man who made Facebook posts saying, among other things, that "it's illegal for me to say I want to kill my wife," and "[e]nough elementary schools in a ten mile radius to initiate the most heinous school shooting ever imagined"); Virginia v. Black, 538 U.S. 343, 358–60 (2003) (holding that a ban on cross burning carried out with the intent to intimidate does not violate the First Amendment); Watts v. United States, 394 U.S. 705, 706–08 (1969) (holding that a statement that "if they ever make me carry a rifle the first man I want in my sights is L.B.J." was not a threat against the life of the President of the United States). Labor picketing, like all other speech, cannot be flatly prohibited because of difficult line-drawing problems.

155. See Burson v. Freeman, 504 U.S. 191, 211 (1992) (upholding a prohibition on electioneering near a polling place); Peerless Plywood Co., 107 N.L.R.B. 427, 429–30 (1953). But cf. Minn. Voters All. v. Mansky, 138 S. Ct. 1876, 1891–92 (2018) (striking down a law prohibiting wearing political apparel in a polling place).

members of their rights to pay less than full union dues[156] is justified for the same reason as all compelled disclosure requirements—it is necessary to inform workers of their rights. Concededly, a few NLRB rules might be vulnerable to First Amendment challenge. For example, some applications of the *Sewell* rule, which prohibits appeals to invidious prejudice in a union election campaign,[157] may no longer be justified as necessary to prevent coercion or fearmongering because appeals to racial prejudice in many cases may be more offensive than threatening.

Of course, some large public protests are intimidating; the 2017 march in Charlottesville, Virginia,[158] and the Nazis' threatened march in Skokie, Illinois, in 1977[159] are examples. Even when the marchers themselves do not clearly threaten violence, the police presence that is necessary to prevent acts of violence by protesters or counterprotesters can be terrifying, especially to black men and anyone else who fears a police officer will shoot a spectator.[160] Protests, especially the ones that are large enough to have a real political impact, impose costs on local governments to ensure public safety and to manage public spaces, clean up litter, and so forth.[161] They disrupt business as usual, and not always in a good way. They cause genuine psychic stress for those who disagree.[162] And sometimes

156. Chi. Teachers Union, Local No. 1 v. Hudson, 475 U.S. 292, 306–07 (1986).

157. See Sewell Mfg. Co., 138 N.L.R.B. 66, 72 (1962).

158. See Frances Robles, Two Men Arrested in Connection with Charlottesville Violence, N.Y. Times (Aug. 26, 2017), https://www.nytimes.com/2017/08/26/us/charlottesville-arrests.html (on file with the *Columbia Law Review*) (describing incidents of violence and intimidation at a "Unite the Right" rally attended by "hundreds of white supremacists," where an African American man was badly beaten and a young woman "was struck and killed by a car in what the authorities have called a terrorist attack").

159. Geoffrey R. Stone, Remembering the Nazis in Skokie, Huffington Post (May 20, 2009), https://www.huffingtonpost.com/geoffrey-r-stone/remembering-the-nazis-in_b_188739.html [https://perma.cc/NGS7-U6YR] (last updated May 25, 2011) (explaining that Jewish residents sought a court order to block a planned Nazi march through their town on the grounds that it was a "deliberate and willful attempt to inflict severe emotional harm on the Jewish population in Skokie," especially on the 5,000 residents who were Holocaust survivors).

160. The U.C. Berkeley Free Speech Commission, on which I served in 2018, heard testimony from several Berkeley students and staff members about the stress and educational disruption associated with the right-wing campus protests in 2016 and 2017. One was a Berkeley staff administrator who described walking across campus and down the street after work on the day right-wing speakers came to campus and a massive police presence was out to prevent a riot. He said he was terrified to reach into his pocket even to show his staff ID to the police for fear an officer would think he was reaching for a gun and shoot him. This is one of the many costs of massive free speech events. See U.C. Berkeley Comm'n on Free Speech, Report of the Chancellor's Commission on Free Speech 9–10 (2018), https://chancellor.berkeley.edu/sites/default/files/report_of_the_commission_on_free_speech.pdf [https://perma.cc/ZVC8-DPAD].

161. See, e.g., Susan Berfield, The High Cost of Free Speech, from Charlottesville to the Women's March, Bloomberg Businessweek (Jan. 25, 2018), https://www.bloomberg.com/news/features/2018-01-25/the-high-cost-of-free-speech-from-charlottesville-to-the-women-s-march (on file with the *Columbia Law Review*).

162. See U.C. Berkeley Comm'n on Free Speech, supra note 160, at 9–10.

even a police presence will not prevent acts of violence, as happened in Charlottesville when a counterprotester at a white supremacist rally was hit and killed by a car driven by a white supremacist.[163]

All of this is a reason to be careful in applying time, place, and manner restrictions. It is not a reason to ban picketing and protest entirely. Labor law has long dealt with the problems caused by large protests by following a settled rule: Even when the subject matter of picketing is protected by statute, mass picketing is unprotected by federal labor law and can therefore be regulated by state law under the usual rules governing marches, rallies, and picketing. To take an analogous example, the civil rights movement that grew out of the student sit-in movement of 1960 and 1961 carefully managed mass picketing and marches by having marchers proceed two-by-two, only on the sidewalk, obeying all traffic lights, and allowing pedestrians to continue on their way.[164] The Supreme Court held that the First Amendment protected picketing and marches conducted in this fashion.[165]

The cases that should be overruled, however, are the ones holding that a single picket or a group of two or three can be enjoined simply because their message is so persuasive to consumers or other workers that it effectively shuts a business down.

C. *Protecting Labor Protest Will Not Jeopardize Economic Regulation*

Labor agreements to engage in conduct to raise wages by restricting output or by refusing to work are exempt from federal antitrust liability, even though business agreements to raise prices are not.[166] Because the Clayton Act removed labor conspiracies from the prohibitions of antitrust law, concerted action by workers seeking to improve wages and working conditions is not a conspiracy in restraint of trade.[167] But when Congress made secondary labor boycotts unlawful, it made conduct that could not be punished under antitrust law punishable under labor law.[168] And, thus, the issue arose once again as to whether labor unions should have a

163. See Hawes Spencer, A Far-Right Gathering Bursts into Brawls, N.Y. Times (Aug. 13, 2017), https://www.nytimes.com/2017/08/13/us/charlottesville-protests-unite-the-right.html (on file with the *Columbia Law Review*).

164. Cox v. Louisiana, 379 U.S. 536, 539–41 (1965).

165. See id. at 555–58; Edwards v. South Carolina, 372 U.S. 229, 235–37 (1963).

166. See Hebert Hovenkamp, Federal Antitrust Policy: The Law of Competition and Its Practice 966–67 (5th ed. 2016).

167. Antitrust (Clayton) Act, ch. 323, 38 Stat. 730, 738 (1914) (codified as amended in scattered sections of 15 and 29 U.S.C.); see also United States v. Hutcheson, 312 U.S. 219, 233 (1941).

168. Although an agreement among union supporters not to trade with or work for a nonunion company or not to work for less than what they consider a fair wage cannot be punished as a restraint of trade, it can be punished if it has one of the objects Congress prohibited in sections 8(b)(4) and 8(e) of the NLRA. This includes the object of getting a "neutral" employer to "cease doing business" with an employer whose labor practices the union supporters object to. 29 U.S.C. § 158(b)(4), 158(e) (2012).

First Amendment right to agree to withhold labor if that business does not have to agree to withhold production.

One aspect of the claim made here—that courts should extend to labor protest, including boycotts, the same constitutional protection enjoyed by political boycotts—presents a harder question than the claim that picketing is constitutionally protected because it is speech in a public forum on a matter of public concern. A boycott appears to involve more conduct, and more economic conduct, than standing on a sidewalk holding a sign on a stick. Yet strikes and boycotts are often simultaneously forms of political expression and economic conduct. Every political moment has its own examples; as of this writing, consider the desire of professional football players to kneel during the pregame national anthem to protest racism, the alleged blacklisting of Colin Kaepernick for instigating this protest, and the desire of the National Football League to prohibit such public protest.[169] Both players and owners are using their economic power to make a political statement, and their political statements have force because of the economic power of professional football. Whose conduct is political—either side, neither side, or both? Or, to take another example, is a boycott of a business because of wage theft, or because the business owner harassed or assaulted female employees, a political statement in the #metoo moment,[170] or is it the use of economic leverage?

There is a long history of distinguishing political boycotts from unlawful economic boycotts, though the difficulty of drawing the distinction has become greater as the goals and tactics of labor, political, civil rights, and business groups have become more similar. And the distinction between political and economic action and expression has been further complicated since the Court began to grant some First Amendment protection to advertising and other commercial speech.[171] The difficulty of drawing dividing lines between economic conduct (unprotected), commercial speech (protected, but subject only to intermediate scrutiny), and fully protected speech is illustrated by *Nike Inc. v. Kasky*, a case that invited the Court to eliminate the differential First Amendment protections for political and commercial speech when both Nike and its detractors

169. See, e.g., Benjamin Sachs & Noah Zatz, The Law Is on the N.F.L. Players' Side, N.Y. Times (Oct. 17, 2017), https://www.nytimes.com/2017/10/17/opinion/law-nfl-protests.html (on file with the *Columbia Law Review*).

170. Grace Dobush, How a #MeToo Scandal Led to Calls for a Boycott of Topshop, Fortune (Oct. 26, 2018), http://fortune.com/2018/10/26/metoo-scandal-philip-green-topshop/ (on file with the *Columbia Law Review*) ("After its billionaire owner was named in a sexual harassment scandal, clothing chain Topshop is facing boycotts.").

171. See Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 770 (1976); see also Robert Post, The Constitutional Status of Commercial Speech, 48 UCLA L. Rev. 1, 3 (2000).

made competing claims about sweatshop labor in its supply chain.[172] The Court dodged the issue and decided the case was not justiciable.[173]

Even if the Court were to conclude that labor speech is only commercial speech, not political speech, that would be a major advance for labor, as intermediate scrutiny provides more protection than the sort of rational basis review the Court has usually applied to restrictions on labor protest since the mid-1940s. Alternatively, even if labor speech is no more political than employer speech on the same topic, the Supreme Court suggested in *Matal v. Tam*[174] and *Sorrel v. IMS Health*[175] that viewpoint discrimination within the category of commercial speech violates the First Amendment.

The Court has not seriously considered whether labor protest should be analogized to commercial speech and instead has treated most labor boycotts as "economic" and unprotected under *Giboney v. Empire Storage & Ice Co.*,[176] *International Longshoremen's Ass'n v. Allied International*,[177] and *FTC v. Superior Court Trial Lawyers Ass'n* (*SCTLA*).[178] That has been true even when what was being protested was political, such as the Soviet invasion of Afghanistan in *Allied International*[179] and the deleterious effect on the Sixth Amendment right to counsel of low fees and heavy caseloads of court-appointed indigent criminal defense counsel in *SCTLA*.[180] The Court has never clearly articulated a rule for distinguishing prohibited "economic" boycotts from constitutionally protected "political" ones (and it appears that the latter category consists of the single example of the NAACP's boycott against Jim Crow in *Claiborne*). The distinction has to do both with the goals (what the Court saw as the narrow self-interest of the criminal defense lawyers or the union workers versus the community uplifting goals of the civil rights movement) and with the means (a work stoppage as opposed to a consumer boycott). The power of the boycotter may matter too—the NAACP and the hundreds of civil rights activists charged in *Claiborne* were, by the time of the Court's opinion, widely acclaimed as heroic, freedom-fighting underdogs; the longshoremen

172. 539 U.S. 654, 656 (2003) (Stevens, J., concurring) (per curiam).

173. Id. at 664–65. I have explored that line-drawing problem elsewhere. See Erwin Chemerinsky & Catherine Fisk, What Is Commercial Speech? The Issue Not Decided in *Nike v. Kasky*, 54 Case W. Res. L. Rev. 1143, 1145 (2004).

174. 137 S. Ct. 1744, 1751 (2017) ("Speech may not be banned on the ground that it expresses ideas that offend.").

175. 564 U.S. 552, 566 (2011) (applying heightened scrutiny when evaluating government regulations that limit speech when there is disagreement with the message conveyed).

176. 336 U.S. 490, 503 (1949).

177. 456 U.S. 212, 218–19 (1982).

178. 493 U.S. 411, 422–23 (1990).

179. *Allied Int'l*, 456 U.S. at 214; see also Jacksonville Bulk Terminals, Inc. v. Int'l Longshoremen's Ass'n, 457 U.S. 702, 716–17 (1982) (explaining that politically motivated refusal to load Soviet ships is a labor dispute that may not be enjoined under the Norris–LaGuardia Act).

180. See *SCTLA*, 493 U.S. at 423 n.9.

and the criminal defense lawyers seemed powerful in comparison. If these are the lines between the protected and prohibited, perhaps labor is more on the political underdog side now.[181]

A successful First Amendment attack on labor boycott restrictions requires threading a narrow path between cases rejecting such protection for professionals who endeavor to fix prices by adopting ethics rules that restrict competitive bidding,[182] or by agreeing to refuse to undertake new matters until fees are raised,[183] and the constitutional protection for civil rights boycotts. All line-drawing between the political and the economic is somewhat subjective and vague. If the *Carolene Products* Footnote Four enterprise requires drawing a line between political and economic, the choice is between accepting the necessity of putting things in one category or another and blowing up the categories entirely. This case is no different.

Moreover, advocacy of a boycott could be protected by the First Amendment even if the boycott itself is not. As the Court recognized when it protected civil rights protest, picketing may be protected even if it advocates conduct that would be illegal, so long as it does not incite imminent illegal conduct.[184] The Supreme Court found it "clear" in *SCTLA* that "efforts to publicize [a] boycott, to explain the merits of its cause" are "fully protected by the First Amendment"—even though the boycott (the concerted refusal to provide services at the Criminal Justice Act (CJA) rates) was not.[185] Under the reasoning of *SCTLA*, the NLRB and courts cannot prohibit picketing that advocates a secondary boycott, because that is expressive activity "fully protected by the First Amendment," unless perhaps it incites imminent unlawful boycott conduct.[186] Thus picketing that seeks to "*encourage* any individual employed . . . in an industry affecting commerce"[187] to engage in a boycott would seem to be protected unless the picketing meets the standard for incitement of an

181. Louis Uchitelle, How the Loss of Union Power Has Hurt American Manufacturing, N.Y. Times (Apr. 20, 2018), https://www.nytimes.com/2018/04/20/business/unions-american-manufacturing.html (on file with the *Columbia Law Review*) ("As union membership declines, labor has less leverage to intervene in the management of a corporation, or to galvanize the public into boycotting the products of manufacturers who put too many factories overseas while exporting less from the United States.").

182. Nat'l Soc'y of Prof'l Eng'rs v. United States, 435 U.S. 679, 697 (1978).

183. *SCTLA*, 493 U.S. at 416.

184. See Cox v. Louisiana, 379 U.S. 536, 554 (1965) (reversing a conviction for advocating an illegal civil rights sit-in).

185. *SCTLA*, 493 U.S. at 426.

186. Id. Justice Stone's concurring opinion in *United States v. Hutcheson* also recognized that speech advocating a secondary boycott on the grounds that the entity is unfair to labor and requesting the public not to patronize is also "an exercise of the right of free speech guaranteed by the First Amendment which cannot be made unlawful by act of Congress." 312 U.S. 219, 243 (1941) (Stone, J., concurring).

187. 29 U.S.C. § 158(b)(4)(i) (2012) (emphasis added).

illegal act, and incitement cannot be punished when it is just persuasion or advocacy.[188]

The Court has long struggled in incitement cases to draw the line between protected speech and unprotected incitement, but labor cases should be no different. As Justice Douglas complained about a 1942 opinion stating that picketing could not be enjoined when it had "slight, if any, repercussions upon the interests of strangers to the issue,"[189] the law cannot be that "a State can prohibit picketing when it is effective but may not prohibit it when it is ineffective."[190] Both civil rights and labor boycotts would be unprotected to the extent they actually constitute coercion,[191] or incite imminent violence,[192] or constitute a true threat of criminal action.[193] Similarly, engaging in peaceful boycotts must be protected equally. What must be unconstitutional is treating one category of labor-related speech as being outside the line-drawing enterprise entirely. One demanding an end to race subordination (protected political speech under *NAACP v. Claiborne Hardware Co.*[194]) and one calling for an end to labor subordination by employees protesting low wages at McDonald's or Walmart[195] are equally political. When students ask businesses to boycott

188. The test for incitement has not been entirely stable, but, in general, the more political the advocacy, the higher the tolerance for it seems to be, absent some connection to terrorism or violence. See Holder v. Humanitarian Law Project, 561 U.S. 1, 36–37 (2010) (holding that because the "particular speech plaintiffs propose to undertake" could constitute "part of a broader strategy to promote terrorism," Congress may ban that speech consistent with the First Amendment). Because a labor secondary boycott produces only economic harm—and even then only when workers and consumers are persuaded to inflict economic harm on themselves in the form of lost wages or lost purchases in order to advance the cause of justice as they see it—it would seem that contemporary labor boycotts are on the legal side of the incitement line.

189. Bakery & Pastry Drivers Local 802 v. Wohl, 315 U.S. 769, 775 (1942).

190. Id. (Douglas, J., concurring).

191. R.A.V. v. City of St. Paul, 505 U.S. 377, 386 (1992) (describing the exclusion of "fighting words," or threatening speech, from the scope of First Amendment protections).

192. See Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) (per curiam) ("[T]he constitutional guarantees of free speech . . . do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.").

193. See Virginia v. Black, 538 U.S. 343, 359 (2003) ("[T]he First Amendment also permits a State to ban a 'true threat' . . . [which] encompass[es] those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals.").

194. 458 U.S. 886, 907, 912–13 (1982) (holding that boycotts by black residents against white merchants in response to local civic and business leaders' failure to comply with demands for equality and racial justice constituted protected speech).

195. Bob Chiarito, Hundreds Protest Over Minimum Wage at McDonald's Stockholder Meeting, Reuters (May 24, 2017), https://www.reuters.com/article/idUSKBN18K2EB [https://perma.cc/26WZ-6GA9] ("Hundreds of fast-food workers demanded wage increases as they marched outside McDonald's Corp headquarters during the company's annual shareholder meeting . . . [as] part of a nationwide protest organized by 'Fight for 15,' a labor group that has regularly targeted McDonald's . . . ."); Claire Zillman, Walmart Workers Plan Black Friday Protests for the Fourth Year in a Row, Fortune (Nov. 25, 2015), http://fortune.com/

the National Rifle Association in the wake of a Florida high school shooting,[196] their speech is as political or as economic as the NAACP's call for a boycott of whites-only businesses or a labor organization's call to boycott a business that hires exploitative labor contractors.

The harder question is why the expressive component of a labor boycott—the symbolic conduct of collectively refusing to perform certain services or to patronize certain businesses, or picketing that incites such conduct—is protected.[197] Here the crucial line is the one the Court drew between the constitutionally protected protest about racial injustices that the boycott expressed in *Claiborne Hardware* and the unprotected pursuit of economic self-interest that the Court condemned in *SCTLA*, which involved a boycott conducted by appointed indigent criminal defense counsel protesting low fees paid under the Criminal Justice Act.[198] The Court distinguished the lawyers from the civil rights activists, explaining the latter "sought no special advantage for themselves."[199] The civil rights boycotters "sought only the equal respect and equal treatment to which they were constitutionally entitled" and "struggled 'to change a social order that had consistently treated them as second class citizens.'"[200] Of course, ending Jim Crow was all about improving the economic, as well as the political, situation of blacks. The phase of the assault on Jim Crow that began with boycotts in the 1930s urging black consumers not to shop at stores that refused to hire black workers leveraged the economic power of the black community to change the social order and, by so doing, to create job opportunities that white-owned businesses had long denied to black people.[201] Whether this kind of boycott is economic

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2015/11/25/walmart-black-friday-protest/ [https://perma.cc/Y2AR-5A83] ("A group that calls itself Our Walmart and advocates for workers at the retail giant is planning demonstrations at a dozen locations nationwide as it continues to push for a $15 per hour minimum wage and full-time status for workers.").

196. Marwa Eltagouri, Publix Halts Donations to Self-Described 'NRA Sell-Out' Amid Boycott, 'Die-In' Protests by David Hogg, Wash. Post (May 25, 2018), http://www.washingtonpost.com/news/business/wp/2018/05/25/publix-suspends-contributions-to-adam-putnam-amid-david-hoggs-anti-nra-protests (on file with the *Columbia Law Review*); Tiffany Hsu, Big and Small, N.R.A. Boycott Efforts Come Together in Gun Debate, N.Y. Times (Feb. 27, 2018), http://www.nytimes.com/2018/02/27/business/nra-boycotts.html (on file with the *Columbia Law Review*).

197. A full-length analysis of the First Amendment and antitrust issues in expressive boycotts is found in Hillary Greene, Antitrust Censorship of Economic Protest, 59 Duke L.J. 1037, 1056–64 (2010). See also Sanjukta M. Paul, Uber as For-Profit Hiring Hall: A Price-Fixing Paradox and Its Implications, 38 Berkeley J. Emp. & Lab. L. 233, 248–53 (2017) (exploring the connection between the nature of the employment relationship between Uber and its drivers and the antitrust implications of price coordination of ride services).

198. FTC v. Superior Court Trial Lawyers Ass'n, 493 U.S. 411, 414–18 (1990).

199. Id. at 427.

200. Id. at 426 (quoting NAACP v. Claiborne Hardware Co., 458 U.S. 886, 912 (1982)).

201. See Paul D. Moreno, From Direct Action to Affirmative Action: Fair Employment Law and Policy in America, 1933–1972, at 30–65 (1997) (discussing how "Don't Buy Where

conduct or political mobilization, whether it is coercion or persuasion, depends on who is judging and who is persuaded by the call of the boycott. The same may be said about labor boycotts today: Are they about a political challenge to the distribution of wealth in a society with record levels of inequality, or about calls to respect or protect immigrant workers or victims of sexual harassment, or about protests of wage theft? Each is both economic and political.

The line between the political and the economic inevitably reflects a value judgment about which kinds of challenges to economic arrangements are political, as the Court saw the Civil Rights Movement, and which are economic, as the Court saw the CJA lawyers' protest. But as the Court has found more politics in what used to be regarded as economic regulation, it has undermined the basis for treating restrictions on labor picketing and boycotts as political. As the Court said in *Janus*, the wages and working conditions of public employees are matters of "great public concern."[202]

The Supreme Court backed away this Term from deciding whether a baker can refuse to bake a cake to be served at a party to celebrate a same-sex wedding, instead admonishing the state civil rights commission to decide the scope of the right to refuse service to LGBT customers without hostility to religion.[203] The Court at the same time sent back for a lower court to reconsider another case in which there was no similar evidence of alleged hostility to religion.[204] It remains unclear whether some symbolic refusals to work are protected free speech. If the bakers and others who resist doing business with LGBT people gain a First Amendment right to refuse to do some aspects of their work, the question will then become whether there are other First Amendment conscience-based rights to refuse to work. Is refusing to bake a cake because of the use to which it will be put more or less symbolic than refusing to handle goods because of the use to which they will be put or the circumstances under which they were made? Is the concerted refusal of indigent criminal defense counsel to take cases in protest of low fees more or less political than the refusal of Hollywood writers to write because of the low residuals?[205] Is the refusal of engineers to bid against each other for jobs

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You Can't Work" campaigns began in Chicago before 1929 and "spread to almost every major black area in American cities").

202. Janus v. Am. Fed'n of State, Cty., & Mun. Emps., Council 31, 138 S. Ct. 2448, 2475 (2018).

203. See Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n, 138 S. Ct. 1719, 1729–30 (2018).

204. Arlene's Flowers, Inc. v. Washington, 138 S. Ct. 2671, 2671 (2018) (mem.).

205. See generally Catherine L. Fisk, Writing for Hire: Unions, Hollywood, and Madison Avenue (2016) (describing the history of film and television writers' efforts to negotiate for some form of profit sharing, their unions' efforts to prohibit writers from working for less than the collectively bargained minimum terms, and periodic strikes over residuals and other terms of employment).

because they consider it unprofessional[206] more or less political than the refusal of workers to cross a picket line because they consider it disloyal? The more First Amendment content the Court pours into paying money or baking a cake or engaging in other occupational tasks, the more troubling the lines it has drawn in a series of labor and antitrust cases become. But however hard the boycott lines may be, cases denying workers the right to march in the streets with signs or to ask for solidarity seem difficult to defend.

In the end, a huge amount of American constitutional law—in the area of the First Amendment as well as in equal protection—turns on the fuzzy line between economic regulation and political action. From 1938 to the mid-1940s, labor boycotts and picketing were on the political side of the line. Civil rights boycotts and picketing were on the economic side (as in *Hughes*) until the Court moved them to the political side after the sit-ins began in 1960. American judges now have a choice. They can move labor protest to the political side, a modest change in law that will leave most of the post-1937 constitutional order in place. Alternatively, they can continue to tolerate egregious content and viewpoint discrimination involving only labor groups. Or they can abandon the line altogether and engage in ad hoc and unprincipled rulings that grant First Amendment protections only to the forms of protest the judges find acceptable. In this area of law, a progressive vision of the First Amendment happens to be the only one that will avoid the Court's contemporary jurisprudence being susceptible to the same withering criticisms that brought the Court into disrepute in 1937.

CONCLUSION

Labor protest is a pressing contemporary issue. The Trump Administration's appointee as the National Labor Relations Board's General Counsel has taken steps to prosecute peaceful labor protest, including the use of the inflatable rat to publicize the use of nonunion labor.[207] Growing ranks of independent contractors who do not enjoy federal statutory labor protection will lose the ability to engage in ordinary strike or boycott activities if business groups succeed in their quest to have federal antitrust law and secondary boycott law invalidate state and local protections.[208] Union efforts to organize across the boundaries of a

206. Nat'l Soc'y of Prof'l Eng'rs v. United States, 435 U.S. 679, 679–80 (1978) (holding that professional society's canon of ethics prohibiting competitive bidding violated federal antitrust law).

207. Those unfamiliar with the rat and some of the constitutional debate about it may wish to consult Construction & General Laborers' Local Union No. 330 v. Town of Grand Chute, 834 F.3d 745 (7th Cir. 2016).

208. National Right to Work has attacked a Seattle ordinance authorizing collective bargaining by independent contractor for-hire drivers on the grounds that the ordinance allows contracts that violate federal labor prohibitions on secondary boycotts. See Clark v. City of Seattle, No. 17-35693, 2018 WL 3763527, at *3 (9th Cir. Aug. 9, 2018); see also

single employer are often punished as secondary boycotts.[209] Labor unions are among the few civil society organizations with national reach and deep policy and political expertise at the local, state, and national levels. They are among the few that have the ability to inform and mobilize voters and activists on economic inequality issues and to be bulwarks against erosion of constitutional democracy.[210] Unions have a funding mechanism necessary to engage in nationwide organizing and political action, and they have structures of democratic accountability to members. No modern constitutional democracy fails to protect civil society organizations of workers and their right to mobilize by publicizing grievances.

Any progressive agenda for change, including in constitutional norms and in labor rights necessary to create such a progressive constitution, will require robust exercise of speech and associational rights that law currently restricts for labor unions. As in spring 2018, when tens of thousands of teachers struck, picketed, rallied, and protested over years of education funding cuts and their devastating consequences for teacher pay, the quality of teachers, and the quality of education, sometimes it takes a massive protest to counter the effects of political malfunction.[211] For years, legislators had thought that cutting taxes was the best way to get elected. Only the massive protests made people aware of the consequences of education funding cuts and prompted legislators to consider alternative policy.[212]

The experience of teachers in 2018 has been replicated elsewhere. Farmworkers and their allies managed to gain improved wages for South Florida tomato pickers only by conducting protests and consumer and merchant boycotts to create the Fair Food Program.[213] There is no path

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Chamber of Commerce v. City of Seattle, 890 F.3d 769, 779–80 (9th Cir. 2018) (rejecting a state action immunity defense to an antitrust suit against the city that enacted an ordinance allowing collective bargaining by unions representing independent-contractor drivers).

209. See, e.g., Int'l Ass'n of Bridge, Structural, Ornamental, & Reinforcing Iron Workers, Local 229, 365 N.L.R.B. No. 126, at 6 (2017) (ordering a union representing workers in a craft employed on a construction job to cease encouraging other workers on the same construction job to respect a picket line).

210. See Aziz Huq & Tom Ginsburg, How to Lose a Constitutional Democracy, 65 UCLA L. Rev. 78, 89 (2018).

211. See supra notes 134–135.

212. See, e.g., Rivka Galchen, The Teachers' Strike and the Democratic Revival in Oklahoma, New Yorker (June 4, 2018), http://www.newyorker.com/magazine/2018/06/04/the-teachers-strike-and-the-democratic-revival-in-oklahoma (on file with the *Columbia Law Review*) (explaining that, although the strike failed to achieve all the education funding increases teachers sought, it "spawned a movement of politically engaged Okies"); Dana Goldstein, Teachers in Oklahoma and Kentucky Walk Out: 'It Really Is a Wildfire,' N.Y. Times (Apr. 2, 2018), https://www.nytimes.com/2018/04/02/us/teacher-strikes-oklahoma-kentucky.html (on file with the *Columbia Law Review*).

213. See Michael Braun, Protest at Fort Myers Wendy's Urges Company to Join Fair Food Program, Fort Myers News-Press (July 8, 2018), http://www.news-press.com/story/news/2018/07/08/protest-fort-myers-wendys-urges-company-join-fair-food-program/765274002

to greater protection for workers and to reduced inequality that does not require protest targeted at every place on the supply chain. The fissured workplace has made restrictions on secondary boycotts even more devastating than they were when the Court upheld them from the 1950s to 1980s. Legal doctrine can liberate labor unions and their lawyers from the strictures that have prevented unions from supporting progressive activism and can do so without legitimating the invalidation of economic regulation. The alternative is a free speech jurisprudence that grants constitutional protections only for speech that serves business and conservative interests.[214] The Supreme Court is facing charges from dissenting Justices, scholars, and the media that the five conservative Justices are ideologically driven activists, "black-robed rulers overriding citizens' choices," who are "weaponizing the First Amendment, in a way that unleashes judges . . . to intervene in economic and regulatory policy."[215] If the Court wishes to avoid replicating the abuses of the *Lochner* era, it will have to be even-handed in applying the First Amendment to speech it dislikes as well as speech it likes. Treating labor under the same rules as capital is a good place to start.

[https://perma.cc/G74G-2GXV]; Kari Lydersen, Farmworkers Call Out Wendy's for Failure to Act on Sexual Abuse and Harassment, Huffington Post (Mar. 21, 2018), http://www.huffingtonpost.com/entry/wendys-farmworkers-times-up_us_5aafd0eee4b0697dfe18da99 [https://perma.cc/R3AG-SD5K]; Fair Food Program, www.fairfoodprogram.org [https://perma.cc/D8T7-CQA5] (last visited Aug. 22, 2018).

214. The idea that the Court's First Amendment doctrine on labor speech reflects anything other than the Justices' preferences for speech they like has, as Professor Robert Gordon said in another context, "been criticized so often and so effectively that it always surprises me to see the idea still walking around, hale and hearty, as if nobody had ever laid a glove on it." Robert W. Gordon, A New Role for Lawyers?: The Corporate Counselor After Enron, 35 Conn. L. Rev. 1185, 1204 (2003) (referring to the false equivalence of the roles of corporate and criminal defense lawyers).

215. Janus v. Am. Fed'n of State, Cty., & Mun. Emps., Council 31, 138 S. Ct. 2448, 2501–02 (2018) (Kagan, J., dissenting).