Blue-Collar Crime: Conspiracy, Organized Labor, and the Anti-Union Civil RICO Claim

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BLUE-COLLAR CRIME: CONSPIRACY, ORGANIZED LABOR, AND THE ANTI-UNION CIVIL RICO CLAIM

Benjamin Levin*

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* J.D., Harvard Law School, 2011; B.A., Yale University, 2007. Thanks to Benjamin Sachs for his guidance over the course of this project. Also, thanks to Michael Denning, Christine Desan, Duncan Kennedy, Richard Parker, Brishen Rogers, Jed Shugerman, Jeannie Suk, and the members of the Harvard Legal History Workshop for their tremendously helpful advice and suggestions. An earlier draft of this article received the 2011 Irving Oberman Memorial Prize for the best paper on Law and Social Change from Harvard Law School.
Gone are the employer's goon squads and the billy clubs; today's union-busters wear business suits and carry attaché cases. Sharp lawyers and Madison Avenue propagandists have replaced the straight-forward coercion of brass knuckles with carefully calculated devices designed to destroy, without leaving any visible bruises, the desire of workers to organize.... There is no excuse for a continuation of the present situation. There are no complex legal mysteries to be solved.¹

On May 4, 1886, Chicago's Haymarket Square was host to a rally in support of a national strike by workers seeking a standardized, eight-hour workday.² Despite derision and hostility from the government and the press, the strike succeeded in hobbling many industries, particularly those that had previously benefited from a national building boom.³ The Chicago rally, like others across the country, was intended to be a peaceful show of solidarity and to provide a forum for explaining the importance of the eight-hour day.⁴ With Chicago police looking on, labor leaders and leftist political activists spoke to the crowd from a speakers' wagon throughout the day without incident; suddenly, for no apparent reason, the police marched on the square and ordered the workers to disperse.⁵

Exactly what happened next is unclear, but it is uncontested that someone hurled a pipe bomb that killed one of the police officers moments later.⁶ What had been by all accounts a peaceful rally...

⁴ See AVRICH, supra note 2, at 199–200.
⁵ Id. at 199, 206–07; YELLEN, supra note 3, at 54–55.
⁶ AVRICH, supra note 2, at 206; YELLEN, supra note 3, at 55.
deteriorated into a chaotic battle during which many were wounded and seven officers and four workers were killed.\textsuperscript{7} In the wake of the Haymarket Affair, the speakers and organizers of the rally, as well as members of the immigrant and anarchist communities, were investigated and prosecuted in connection with the pipe bomb death.\textsuperscript{8} During the trial, the prosecution failed to offer substantial evidence linking any of the defendants to the actual bombing; instead, the prosecution argued that the "general principles" of the organizers made them conspirators who were legally guilty of the murder.\textsuperscript{9} Ultimately, a jury convicted eight of the defendants of murder, and seven were sentenced to death.\textsuperscript{10}

On March 5, 2008, nearly a century and a quarter after the Haymarket Affair, Cintas Corporation, the largest manufacturer of business uniforms in the United States, filed suit in federal court in the Southern District of New York,\textsuperscript{11} claiming that worker-organizing campaigns by the International Brotherhood of Teamsters, UNITE HERE, Change to Win, and numerous other named and unnamed defendants had violated the Racketeer Influenced and Corrupt Organizations Act ("RICO").\textsuperscript{12} For much of the previous decade the unions had been fighting a highly publicized battle to represent Cintas's employees.\textsuperscript{13} As part of their "comprehensive" or "corporate" campaign,\textsuperscript{14} the unions had produced fliers and maintained websites dedicated to alerting Cintas employees of their rights and highlighting allegedly

\textsuperscript{7} See id. at 208; GREEN, supra note 2, at 191.
\textsuperscript{8} YELLEN, supra note 3, at 58–59.
\textsuperscript{9} Id. at 61–62.
\textsuperscript{10} See id. at 63.
\textsuperscript{13} See Cintas Corp., 601 F. Supp. 2d at 575–76; Press Release, Cintas, supra note 11.
\textsuperscript{14} The comprehensive campaign, as an organizing strategy based on assorted pressure tactics directed against a particular target, has gained stature over the past few decades. See James J. Brudney, Collateral Conflict: Employer Claims of RICO Extortion Against Union Comprehensive Campaigns, 83 S. CALIF. L. REV. 731, 737–39 (2010). In one of the only extensive scholarly treatments of these RICO suits, James Brudney defines the comprehensive campaign "as union attempts to influence company practices that affect key union goals—securing recognition and bargaining for improved working conditions—by generating various forms of extrinsic pressure on the company's top policymakers." Id. at 738.
objectionable business and employment practices. Cintas claimed that the unions' campaign of concerted action was designed to extort the corporation into adopting a "card-check/neutrality agreement," and also was a means of promoting and engaging in general unfair competition. Cintas's RICO claims were based on the allegation that the comprehensive campaign was extortive and therefore violated the Hobbs Act, which defines unlawful extortion as "the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right."

A year later, the court dismissed Cintas's RICO claim, concluding that it failed to satisfy the requirement of Rule 8 of the Federal Rules of Civil Procedure that the complaint be a "short and plain statement." Not only was the complaint insufficient as a matter of law but also according to the court, the complaint was merely "a manifesto by a Fortune 500 company that is more a public relations piece than a pleading." Although the Cintas claim was dismissed, similar civil RICO complaints against labor organizers have significantly multiplied since the late 1980s; in fact, their use has become almost a standard litigation tactic for corporate employers seeking to fight attempts to unionize their workers.

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15 See Cintas, 601 F. Supp. 2d at 575–76.
16 Id. at 55–77. Under a card check system, if a majority of employees of a particular employer sign authorization cards stating that they wish to be represented by a union, they can automatically organize without having to survive a National Labor Relations Board ("NLRB") certification and election. Id. at 575. Under a neutrality agreement, the employer agrees to remain neutral and refrain from delivering anti-union messages to employees during the organizing campaign. James J. Brudney, Neutrality Agreements and Card Check Recognition: Prospects for Changing Paradigms, 90 IOWA L. REV. 819, 825 (2005). For a broader discussion of card check legislation and policy significance, see id. at 826–31; Brishen Rogers, "Acting Like a Union": Protecting Workers' Free Choice by Promoting Workers' Collective Action, 123 HARV. L. REV. F. 38–39 (2010); Benjamin I. Sachs, Enabling Employee Choice: A Structural Approach to the Rules of Union Organizing, 123 HARV. L. REV. 656, 668–72 (2009).
17 See Cintas, 601 F. Supp. 2d at 575.
18 Id. at 577.
21 Cintas, 601 F. Supp. 2d at 574.
22 Id.
There is clearly a world of difference between the Cintas RICO suit and the Haymarket Affair. One was a civil resolution of a conflict, constrained by the rules of a courtroom and the strictures of legal procedure, where the other was a visceral, violent clash. One was a glaring loss for organized labor with the unions cast as a repository for bloodthirsty and lawless radicals committed to violence, while the other was a success for labor, with the judiciary upholding the rights of organizers and decrying the co-option of the legal system to smear organizing efforts.

Nonetheless, I begin this historical exploration of employer civil RICO claims against unions by juxtaposing these two moments in American labor history in order to emphasize the importance of the common tropes that unite both incidents and their legal foundations. Essential to the legal framework that underlies each of these labor conflicts is the potential for union activity to be characterized as conspiratory. The anti-union sentiment in both cases—whether it was being used to condemn socially-marginalized radicals in nineteenth-century Chicago or well-organized, politically powerful national labor organizations in twenty-first-century New York—finds root in the concept that the concerted action of workers is somehow a violation of social and legal norms, a betrayal of the accepted terms of the free market system and the manner of negotiating the employment relationship.

With its radical political affiliations, violence, and evocations of immigrant-led class warfare, the Haymarket Riot epitomizes the view of the union as hostile and threatening to the dominant economic and sociopolitical orders. Because the modern suits that this article is intended to address and historicize are civil and generally cast not as complaints against collections of workers but against the faceless, outside organizing entities conducting comprehensive campaigns, the title of this article, with its focus on class and criminality, may initially appear incongruous. By situating the characterization of union organizing and union

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24 See MINDA, supra note 2, at 50.
26 See MINDA, supra note 2, at 49–50.
28 This discussion owes much to Gary Minda’s discussion of the Haymarket Riot as a metaphor for the labor boycott in American legal history. See MINDA, supra note 2, at 48–54.
concerted action in the sphere of “blue-collar crimes,” however, I hope to ground the ostensibly impersonal, “civil” RICO claims in the ugliness and immediacy of the Haymarket Riot.

Despite the rise of employer RICO claims against comprehensive labor campaigns, there has been relatively limited scholarly engagement with the subject. While several authors have addressed the growing role of RICO in labor disputes, their work has almost exclusively focused on analyzing these suits within the framework of post-National Labor Relations Act (“NLRA”), labor law and NLRA preemption, or the doctrinal framework of civil RICO’s evolution. This article, however, seeks to take a step back from the merits of the latest batch of employer claims and to instead examine these claims in light of broader trends in U.S. labor relations.

This article will trace the historical, theoretical, and doctrinal relationship between conspiracy law and workers’ rights to organize, situating the current use of civil RICO claims by employers against unions in the context of past legal treatments and cultural understandings of labor unions. I will argue that the contemporary RICO claims based on unions’ comprehensive campaigns are not simply a novel litigation tactic that can be analyzed for legal merit, actively opposed by union counsel, and dismissed (as has often been the case). They are also a potentially significant means of harking back to an earlier moment in American political consciousness and cultural history when unions enjoyed a much lower social and legal standing than they do

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31 For examples of works that restrict their RICO analysis to a more limited framework than this article seeks to explore, see Brudney, supra note 14; Alexander M. Parker, Stretching RICO to the Limit and Beyond, 45 DUKE L.J. 819 (1996); Brian J. Murray, Note, Protesters, Extortion, and Coercion: Preventing RICO from Chilling First Amendment Freedoms, 75 NOTRE DAME L. REV. 691 (1999).

32 See Brudney, supra note 14, at 756 & n.144 (cataloguing outcomes of motions to dismiss in civil RICO cases brought by employers against unions staging comprehensive campaigns).
today. As a result, I will argue that these claims, when viewed in their historical context, become a striking marker of the duality of labor's standing in contemporary society. In other words, the dismissal of *Cintas* and similar cases may demonstrate a trend towards broader legal protections for the rights of workers to organize and an improvement in the union's legal standing, but the complaints themselves may reflect an inversely proportional devaluation of the union's social position and cultural acceptance. It may be that unions can confront corporations with greater impunity, but does the return to the legal framework of conspiracy evince a return to a cultural understanding of the union as a pernicious social force?

The article will proceed in four parts organized around three loosely defined historical moments—the height of the wave of anti-union criminal conspiracy charges in the mid-nineteenth century, the creation of modern labor protections in the 1930s, and the struggle for union legitimacy in the contemporary global economy. Before proceeding to a discussion of these three historical moments, Part II will briefly set up the methodological framework for the article by addressing the importance of cultural narratives to a legal history project and specifically outlining the importance of the narrative that characterizes the union as criminal conspiracy/extortionate actor to our understanding of labor law and the labor movement.

Part III will focus on the mid-nineteenth century and will briefly outline the attitudes toward unions that defined the American legal system prior to the Progressive Era. It will describe the ways in which common law conspiracy was used to strike down union activity, as well as the rhetorical framework that judges employed in applying conspiracy law to union activities. By rooting the treatment of organizing rights in the historical context of late nineteenth-century debates about immigration and the collectivization of a growing class of politically radical urban laborers, this section will attempt to underscore the correlative understanding of unions and revolutionary criminality.

Part IV will focus on the 1930s and will address the ways in which the NLRA and the labor preemption doctrine granted greater privileges to organizing workers and helped to silence the language of criminal law and conspiracy doctrine that had defined the earlier

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33 See, e.g., MINDA, supra note 2, at 50.
era. It will trace the expansions in protection for organized labor that resulted from the recognition of unions as "legitimate" and desirable sociopolitical entities and the development of a unique legal framework to accommodate them. It will also ground this expansion in a "laboring" of American culture—the New Deal Era acceptance of collective bargaining as a force for social good and the rhetorical re-imagination and incorporation of the union and solidarity into the mass cultural lexicon.

Part V will directly address the contemporary civil RICO suits. It will first trace the legislative aftermath of the NLRA and the weakening of the Act's endorsement of organized labor that preceded these suits. It will next examine the rise of RICO claims by employers in the context of federal racketeering doctrine and the expansion of civil RICO claims since the 1970s. Additionally, it will focus on Cintas, by addressing the language of the complaint and the legal arguments advanced, to suggest that Cintas-type suits represent a striking recycling of pre-NLRA conceptions and rhetoric. However, it will argue that the dismissal of these cases also may suggest a continued socio-legal commitment to organized labor and might even emphasize the need for legislative or judicial action to quell the proliferation of such suits and reinforce protections for unions.

Finally, Part V and the conclusion will explore the greater impact

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35 In exploring the concept of organized labor's legitimacy and its relationship with law as a potential force for both legitimation and delegitimation, I mean to use the definition of "legitimate" employed by Raymond Geuss:

To say that the members of the society take a basic social institution to be 'legitimate' is to say that they take it to 'follow' from a system of norms they all accept[,] . . . a set of general beliefs (normative beliefs and other kinds of beliefs) which are organized into a world-picture which they assume all members of the society hold. So a social institution is considered legitimate if it can be shown to stand in the right relation to the basic world-picture of the group.

RAYMOND GEUSS, THE IDEA OF A CRITICAL THEORY: HABERMAS AND THE FRANKFURT SCHOOL 59 (1981); see also David M. Trubek, Where the Action Is: Critical Legal Studies and Empiricism, 36 STAN. L. REV. 575, 589-90 (1984) ("American labor law . . . [is] the embodiment of a 'moral and political vision,' which contains a 'powerfully integrated set of beliefs, values, and political assumptions' (i.e., a world view) and which serves as a 'legitimating ideology' that reinforces the dominant institutions and hegemonic culture of our society." (citation omitted)).

36 See MICHAEL DENNING, THE CULTURAL FRONT: THE LABORING OF AMERICAN CULTURE IN THE TWENTIETH CENTURY xvi-xvii (1996). Denning, in his discussion of mass culture in Depression-era America, describes the cultural trends and transformations that accompanied the social and political workers' movements of the 1930s as a "laboring" of culture. Id. at xvi. As he explains, this usage "refers to the pervasive use of 'labor' and its synonyms in the rhetoric of the period," as well as to "the increased influence on and participation of working-class Americans in the world of culture and the arts." Id. at xvi-xvii.
of the recent spate of RICO complaints against unions, raising concerns about the chilling effects of these lawsuits on union activity and the impact of litigation costs on organizing campaigns. These parts will also address the expressive and cultural significances of grounding unionization in the paradigm of RICO. In other words, it may be that the dismissals of the civil RICO complaints signal a further protection of labor unions; however, what does the re-situation of union activity in the realms of extortion and "racketeering" tell us about the social significance and cultural understanding of the union? Perhaps the attempted return to the characterization of union activity as inherently conspiratory is indicative of a broader cultural hostility toward organized labor that has become an integral component of the new globalized economy. This article will ultimately argue that these cases and the plaintiffs' recycling of tropes of labor as criminal, conspiratory, or extortionate should serve as a catalyst for legislative reform and a recommitment to organized labor as a positive social force.

II. WHY TELL THIS KIND OF HISTORY AND WHY TELL THIS PARTICULAR HISTORY?

Before delving into the origins of the union-as-conspiracy motif, this part will briefly address two broad methodological questions (or sets of questions) that in some sense cut to the heart of this article. First, why focus on law as a component of cultural narratives at all? That is, what does it mean to suggest that the law and legal discourse do not exist in a realm separate and apart from the social or the cultural but are themselves part of and reciprocally constitutive of broader social/cultural consciousnesses?\footnote{Cf. Robert W. Gordon, \textit{Critical Legal Histories}, 36 \textit{Staun. L. Rev.} 57, 81–87, 98–101 (1984) (discussing the importance of "contingency" to critical legal historical projects).} What do we actually gain from reading a court document or legislator’s signing statement alongside a popular film or mass cultural text? Second, taken as a given that such a project is worthwhile, why focus on this particular narrative trope of organized labor as criminal or quasi-criminal extortionate conspiracy, and why focus on it now? The answers to these two sets of questions necessarily overlap to a certain extent and will, I hope, become clearer over the course of the article, but this part will briefly address them.
A. Critical Legal (Cultural) History

In his seminal work on *Critical Legal Histories*, Robert Gordon describes a set of critical departures from a traditional mode of historical legal scholarship that had focused on doctrinal evolution as existing in a sort of self-defined vacuum of legal thought and legal discourse.38 Where the traditional realm of legal history employed “evolutionary functionalism,” a theoretical framework rooted in determinist accounts of doctrinal progress that drew sharp distinctions between law and society,39 the critical legal projects that Gordon describes seek to endogenize external social and political forces, raising questions about the contingency of legal outcomes on their historical context.40 Gordon outlines a series of moves and “partial critiques” that “[c]ritical scholars” employ to re-examine legal history and enliven debates about widely-accepted explanations for legal doctrines and institutions41 before concluding that critical scholars should seek to produce “thickly described accounts of how law has been imbricated in and has helped to structure the most routine practices of social life.”42 That is, in Gordon’s framework, the critical historical project is one in which the “[l]aw/[s]ociety” distinction is blurred so that the legal is understood as a part of the ostensibly extralegal social or cultural to such an extent that the law may be seen as “constitutive of consciousness.”43

I begin with Gordon’s methodological roadmap to give a sense of the concerns and focal points that animate this project. At its most fundamental level, this article aims to provide a history of social/legal imbrication, an exploration of the way that the cultural

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38 See id. at 58–66 (“[W]hat I’m constructing is an ‘ideal type’: a list of the propositions that one could expect most legal writers within the dominant tradition to accept most of the time.”).
39 See id. at 59–67 (explaining that the “evolutionary functionalism” framework requires consideration of social development and how the law adapts to these changes to serve society’s needs).
40 See id. at 58, 71–116 (“Critical insights ... have developed—many of them within liberal scholarship itself—to corrode separate components of that dominant vision. ... Critical writers have tried to build these insights into a more thorough critique and ... this critique has affected the ways in which they go about their work.”).
41 See id. (listing several variations that share parts of the “dominant vision” but deviate from this vision in some aspects as well).
42 Id. at 125.
43 See id. at 102–13 (describing the difficulty in separating the law from society, in that it is “just about impossible” to discuss social processes without describing a simultaneous legal relationship, or, moreover, without witnessing how the law forms a rigid framework that dictates appropriate social actions and decisions).
treatment and conception of organized labor have interacted with legal treatments and conceptions of organized labor. This article's goal, from a methodological or historiographic perspective is to examine how cultural narratives and imagination have shaped and are shaped by legal discourse.\footnote{44} I argue that legal discourse and legal rhetoric not only provide a framework for courtroom argument and serve as a language for a set of elite actors; rather, legal discourse has an effect on political discourse and in turn on sociopolitical identification and broader socio-cultural interactions.\footnote{45} That is, the relationship between law and society is a two way street in large part because law is produced by social actors and in turn shapes social relationships.\footnote{46}

This embedding or imbricating—to use Gordon's formulation\footnote{47}—of the legal in the social and vice versa is not in and of itself a new project. Gordon's article was largely descriptive of trends in academia that were emerging in the early 1980s,\footnote{48} and, in the subsequent three decades, many of the partial critiques introduced by critical legal historians were absorbed by scholars of varying ideological and methodological commitments.\footnote{49} Specifically, in the

\footnote{44} For discussion of other scholars whose work on narrative and cultural consciousness is reflected in this project see, for example, infra notes 193–97 and accompanying text. For further exploration of the role of "imagination" or ideology in legal discourse and lawmaking, see Richard D. Parker, "Here, the People Rule": A Constitutional Populist Manifesto 53–115 (1994). In his treatment of the Constitutional argument, Parker presents a similar elision of law, society, and politics by emphasizing the importance of "assumptions, images, and attitudes." See id. at 55. The way that lawyers structure their arguments, judges craft their opinions, and voters determine their political preferences are all rooted in some sense in the irrational, the imagined relevant world, or the relevant social situation. See id. at 53–77.

\footnote{45} See, e.g., William E. Forbath, Law and the Shaping of the American Labor Movement 6–7 (1991); Minda, supra note 2, at 34, 50–54.

\footnote{46} See Forbath, supra note 45, at 6–7; Minda, supra note 2, at 34–54 (discussing how judges' reliance on metaphors that likened boycotts to acts of violence demonstrated preconceptions about the labor movement as dangerous); E. P. Thompson, Whigs and Hunters: The Origin of the Black Act 258–69 (1975) (explaining that by analyzing historiography, the law can be seen as a tool meant to reinforce or legitimate class relations and provide a medium through which class power can be executed); infra notes 196–97; see also supra note 35 (discussing the core set of beliefs that social actors hold in common and the standard they hold social institutions against in order to determine the legitimacy of those institutions).

\footnote{47} See, e.g., Gordon, supra note 37, at 68.

\footnote{48} See id. at 69.

\footnote{49} To further examine the incorporation of these partial critiques into legal scholarship, see, for example, James B. Atleson, Values and Assumptions in American Labor Law (1983); Christopher L. Tomlins, Law, Labor, and Ideology in the Early American Republic (1993); Christine Desan, Out of the Past: Time and Movement in Making the Present, 1 Unbound 39 (2005); Dan M. Kahan, The Secret Ambition of Deterrence, 113 Harv. L. Rev. 414 (1999); Karl E. Klare, Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness, 1937–1941, 62 Minn. L. Rev. 265 (1978); William J.
context of labor history, the focus on the importance of ideology or cultural consciousness to our understanding of the legal governance of the work relationship has served as a staple of much of the critical and social historical work over the past forty years.\textsuperscript{50}

By rooting the evolution of American labor law in social and historical contexts, this article intends to operate in a scholarly framework that seeks to explain doctrinal changes in the legal treatment of organizing and organized workers not simply via an internal narrative (social forces as exogenous to law) or an external one (law as exogenous to or as a restatement of social forces) but rather as part of an ongoing dialogue between disparate sociolegal actors, a merger of external and internal. In order to strengthen this account of law's relationship to society, this article aims to add a deeper engagement with cultural texts and cultural history to the legal history project. Central to the projects of the new labor historians and critical labor historians has been a focus on the social, in part as a means of telling history "from the bottom up,"\textsuperscript{51} but there is not often an engagement with the cultural, a treatment of history that is willing to view fictional works or rhetorical tropes as constitutive of the sorts of class consciousness(es) at issue. In examining the cultural and its place in the social/legal relationship and providing a bridge between the strands of intellectual and social history present in the projects mentioned above, this article borrows, then, from the work of cultural historians and critics who provide a paradigm for understanding the significance of mass culture to historical and political trends\textsuperscript{52} and also from the strands in legal scholarship that interrogate the cultural as a means of better understanding the ideological components of the law.\textsuperscript{53}


\textsuperscript{50} For works that focus on the importance of ideology or cultural consciousness in relation to the work relationship, see, for example, ATLESON, supra note 49; TOMLINS, supra note 49; Klare, supra note 49; Pope, supra note 49; Stone, supra note 49; Fischl, supra note 49; sources cited supra note 46.

\textsuperscript{51} See, e.g., FORBATH, supra note 45, at 5–6.

\textsuperscript{52} To read works from historians and critics who provide a model for understanding how mass culture relates to historical and political trends, see, for example, DENNING, supra note 36; FREDRIC JAMESON, THE CULTURAL TURN: SELECTED WRITINGS ON THE POSTMODERN, 1983–1998 (1998).

\textsuperscript{53} For legal scholarship that focuses on using the cultural as a tool to better understand the ideological components of law, see, for example, PARKER, supra note 44; JEANNE SUK, AT
While a discussion of film or of mass cultural texts in a history of labor conspiracies might initially appear incongruous or perhaps even extraneous, I consider such a cultural treatment to be a logical extension of the projects discussed earlier in this section. If we are focused on the ideological roots and significance of the law and we hope to gain greater insight into the way that the law is imbricated in society, why would we not be concerned with markers of ideology and cultural consciousness? From a causal perspective, if we view legal developments as contingent upon social factors or if we think that legal discourse comes to shape social and political discourse, then cultural discourse should be an ideal place to study the migration of rhetoric in the public lexicon, to map the ways in which the legal implicates and is implicated in the social. That is, while establishing a direct causal equation becomes difficult when discussing intangibles like consciousness, discourse, or legitimacy, I hope to echo Gordon's argument that a better-developed account of the similarities and disjunctures between legal and cultural narratives should provide us with a better understanding of the ideological roots of legal development and of the law's contingency.

For those concerned with legal reform and the adaptation of legal doctrine to meet the challenges of social problems, such an understanding of the complicated social, historical, and cultural context of lawmaking is essential not only to an appreciation of how we have gotten to the current legal moment, but also to an exploration of where we can go from here. Further, in the context of organized labor, where a substantial amount of sociological and theoretical literature focuses on the importance of social and cultural conditions of the workplace to worker empowerment, a...
greater engagement with social and cultural trends should be a particularly important component of the study of workers' legal environment.

B. Why RICO; Why Now?

Having set forth an argument for the importance of a socio-cultural history of the narratives concerning the union's place in society, this section next addresses the choice to focus on the particular narrative of the union as criminal or quasi-criminal extortionate conspiracy. This framing of the union is certainly not the only one present in U.S. cultural discourse and is certainly not the only one of significance or resonance. During the writing of this article, for instance, escalating legislative battles in Wisconsin and a number of other states have brought renewed public attention and critical emphasis to the alternative tropes of unions as monopolistic vehicles for greedy and overpaid workers and union leaders as advancing their own interests over those of the workers. My argument, therefore, is not that the conspiracy narrative is the only narrative that clearly unifies these different moments in labor history, but rather that it is one of the possible cultural discourses that has helped shape the public imagination and legal argument at each moment.

If the union-as-conspiracy narrative culminating in the rise of civil RICO is only one of many narratives or framings, one might ask, why focus on it here? The answer, I suggest, is because of the force and extremity of the narrative. It is not just a rhetorical trope

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59 See, e.g., infra notes 382-90 and accompanying text.


61 See, e.g., Doug Erickson & Ron Seely, Pro-Walker Bus Tour Ends in Madison as Protests at Capitol Continue, WIS. ST. J., Mar. 7, 2011, available at 2011 WLNR 4445299 (illustrating how some workers are forced into unions without choice); It's Time to Put an End to Forced Unionism, PROVIDENCE J. BULL. (R.I.), Mar. 6, 2011, available at 2011 WLNR 4393515 ("These states prohibit teachers from deciding for themselves whether they want to belong to a union or not. Such laws disrespect the choices of the adults who educate and care for public-school children.").

62 See Gordon, supra note 37, at 101-02, which discusses "competing stories that impress the same historical experience with radically divergent meanings."
or form of argument that suggests that organized labor is not desirable or may lead to economic harms. Rather, it is a trope that cuts to the fundamental legitimacy of worker collective action, casting unionization as antithetical not just to national economic success but also to the nation itself. In the contemporary movement of union marginalization, it may be that other narratives share space in the cultural consciousness, but the trope of the union-as-conspiracy, I will argue throughout this article, is one that has had substantial traction as a vehicle to delegitimize organized labor. If we take doctrinal evolution to be rooted in the ideological or the social, each of these narrative tropes is significant, but it is vital that we address the conspiracy motif that imports a definitive understanding of the union as inherently hostile to American values and society. Where images of unionized workers as lazy or greedy may resonate strongly and may be equally important in their own way, the image of unionization as a crime against the market is one that evokes an unambiguous cultural othering. With the concern for the socio-ideological legitimation and delegitimation of organized labor as a guide, the following sections will begin to examine this trope in legal and cultural discourse.

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64 See generally infra Part V (addressing the evolution of labor law following the enactment of the Wagner Act and the now growing trend of anti-union civil RICO suits).

65 See generally supra Part II.A (resolving that the evolution of labor law, specifically in conjunction with its legal governance, should be looked at in a social and historical context).

66 See, e.g., sources cited supra note 63.


68 Malum in se refers to "[a] crime or an act that is inherently immoral, such as murder, arson, or rape." BLACK'S LAW DICTIONARY 1045 (9th ed. 2009).
through the labor conspiracy cases of the nineteenth century.

III. COMMON LAW CONSPIRACY AND THE NINETEENTH-CENTURY UNION

In order to appreciate *Cintas Corp. v. Unite Here*69 and similar federal racketeering complaints by employers as more than attempts to expand the ever-growing civil scope of RICO or as failed attempts at creative lawyering by corporate attorneys as some commentators have suggested,70 it is important to recognize the significant legacy of the conspiracy claim against organizing workers. The Haymarket Riot is clearly a noteworthy historical marker of the turn-of-century social and political zeitgeist and stands as one of the bloodiest documented events in American labor history;71 in addition, however, it illustrates the legal views and treatments that defined labor relations prior to the Progressive Period.72 Even if the aggressive radicalism of the Haymarket workers and the intensely hostile reaction were unusual, the


70 For discussions of the continued attempts to stretch the scope of RICO, see, for example, Suzanne Wentzel, National Organization for Woman v. Scheidler: RICO a Valuable Tool for Controlling Violent Protest, 28 AKRON L. REV. 391, 396 (1995) ("[An] express provision [of the statute] states that RICO is to be read broadly to effectuate its purpose. . . . This clause appears to have accomplished its purpose, as it is often cited by the Supreme Court when the Court applies RICO to new areas."). For criticism of employer RICO claims as a misapplication of the statute that neither fits well within the racketeering framework, nor jibes well with the existing labor law framework, see, for example, Bassetti, *supra* note 29, at 105 ("[I]n a broadened context, the use of RICO against unions makes little sense, resulting either in a morass of conflict with existing labor law or in contorted efforts by the courts to avoid holding unions liable."); Green, *supra* note 29, at 309 ("[T]his article does seek to question whether private parties should initiate RICO suits in the context of labor relations disputes.").

71 See, e.g., PHILIP S. FONER, MAY DAY: A SHORT HISTORY OF THE INTERNATIONAL WORKERS' HOLIDAY 1886-1986, at 27-39 (1986) (discussing the relationship between the Haymarket Riot and the establishment of May Day as the International Workers' Holiday); see also sources cited *supra* note 2 (providing a detailed account of the events that led up to the Haymarket bombing, the bombing itself, and the legal consequences).

72 Countless pages could be (and have been) written about the contractual regimes, private legal schemas, and general laws of employment that served to create the groundwork for classical legal thought and its structural privileging of, or at least preference for, employer over employee, industry over worker. See, e.g., DUNCAN KENNEDY, THE RISE AND FALL OF CLASSICAL LEGAL THOUGHT (1998) (discussing the development and components of classical legal thought and its subsequent decline). However, such a discussion would be largely superfluous to my treatment of the historical legal “status” or understanding of the labor union. For the sake of this article, it is simply important that we recognize and take note of the background private law regime that spawned the workers' drive to organize and necessitated collective bargaining, a regime that prioritized ideals of property rights and “freedom of contract” over any concept of workplace regulation or employee rights. See TOMLINS, *supra* note 49, at 119 (discussing the private law regime).
ensuing use of conspiracy law and the general legal conclusion that the collective action of workers had an implicit air of criminality to it were in no way unique.\textsuperscript{73}

The application of conspiracy doctrine to workers' attempts to organize in England and the early republic have been examined and analyzed at length by legal and labor historians,\textsuperscript{74} so I do not intend to offer a comprehensive account of these nineteenth-century cases. Instead, in this section, I simply hope to give a general overview of the use of conspiracy law as a means of regulating labor organizations. My intention is to suggest that our interpretation of the employer RICO claims should be rooted not simply in our understanding of the modern iteration of post-Wagner Act labor law but in an awareness of "a darker, more sinister era of labor relations in the United States."\textsuperscript{75}

Dating back at least to the sixteenth century, English law made it a criminal offense for workers to "conspire, covenant, or promise together" to either refrain from working or to standardize wages or other conditions of employment.\textsuperscript{76} In his exhaustive history of early conspiracy cases against unions, Christopher Tomlins identifies the impetus for such explicit restrictions on non-state-sanctioned collective action as concerns about the safety of the monarchy and the state's authority.\textsuperscript{77} Without any additional requirements such as strikes, boycotts, or physical violence, the very act of organizing in an attempt to bargain collectively was treated as a societal

\textsuperscript{73} See, e.g., Tomlins, supra note 49, at 107–79 (examining early English and American treatment of workers' attempts at collective bargaining).


\textsuperscript{75} Simonoff & Lieverman, supra note 29, at 335.

\textsuperscript{76} Tomlins, Law, Labor, and Ideology, supra note 50, at 115 (quoting Anno 2 & 3 Edw. VI, ch. 15 (1548), An Act Touching Victuallers and Handicraftsmen (repealed 1549), in 3 The Statutes at Large of England and of Great Britain: From Magna Carta to the Union of the Kingdoms of Great Britain and Ireland 541 (John Raithby ed., 1811) (containing an amended version of the phrase "conspire, covenant, or promise together," using Middle English spelling of the words)). Generally, this section benefits greatly from Tomlins's detailed exploration of English and early American conspiracy cases against organizing groups of workers. See Tomlins, supra note 49, at 107–79 (describing English and American conspiracy cases against collective bargaining groups).

danger. Perhaps any collective action posed an unacceptable risk to the authority of the state by invoking images of treasonous cadres or private militias, but even so, the condemnation of workers acting in concert (and without violence) for shared economic benefits is jarring.

While a conspiracy of violent anti-statists or enemies of the Crown presented an obvious threat to the stability of the state, the conspiracy of workers may have been viewed as an insidious challenge to the "regulatory authority" of the King. Much as the Crown sought to maintain its "monopoly on violence" as a means of maintaining stability and retaining its authority, it also sought to maintain its primacy in the realm of the market by opposing organized labor as an interloper. As "outlaws" in the formal market, "journeymen's groups" were representative of an alternative social and political grouping, making them anathema to

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78 See id.
79 See, e.g., id.
80 Id. at 118. Tomlins goes on to explain that English "prosecutors and courts condemn[ed] the journeymen's associations as illegitimate encroachments of unlicensed power upon republican institutions." Id. at 125. This argument is clearly reflected in the American version of classical legal thought that finds its most vocal manifesto in Lochner v. New York, where the Supreme Court concluded that regulation of contracting terms and employment conditions was not only inefficient or out of keeping with the greater success of industry, but a violation of employers' right to due process. Lochner v. New York, 198 U.S. 45, 61-62, 64 (1905).
81 Benjamin Levin, Note, A Defensible Defense?: Reexamining Castle Doctrine Statutes, 47 HARV. J. ON LEGIS. 523, 527-29 (2010) (hypothesizing that the English law restricted a person's right to self-defense in part to prevent violence, but also so the state could retain exclusive control over the use of force); see, e.g., 4 WILLIAM BLACKSTONE, COMMENTARIES *184-85 (explaining the permissible situations in which homicide in self-defense is permitted under English law, typically favoring the avoidance of violence altogether); Suk, supra note 53, at 58 ("The distinction between the king and his subjects, and consequently between violence among nations and violence among individuals, entailed a general duty to retreat from another person's attack before killing, a duty that did not exist in warfare.").
82 For an instance in which the Crown thwarted a collective bargaining attempt see, for example, Carew v. Rutherford, 106 Mass. 1, 15 (1870), which addresses a civil suit arising out of a labor combination's activities, with the court emphasizing that "[f]reedom is the policy of this country . . . [b]ut . . . does not imply a right in one person, either alone or in combination with others, to disturb or annoy another . . . ." See also, for example, Kennedy v. Treillou (Pa. Ct. Quarter Sess. 1829), reprinted in 4 A DOCUMENTARY HISTORY OF AMERICAN INDUSTRIAL SOCIETY, supra note 63, at 259, 267-68, for a discussion on an unlawful labor combination that was, in fact, alleged to have threatened force, in which the court explicitly points to the state's monopoly on violence: "These individuals ought to know that their proper course is to seek redress for their injuries . . . in the courts of justice, which are as open to them as to their employers." See also People v. Cooper (N.Y. Ct. Gen. Sess. 1836), reprinted in 4 A DOCUMENTARY HISTORY OF AMERICAN INDUSTRIAL SOCIETY, supra note 63, at 279, 307 ("In our country the protection against such a partial operation of the laws, is to be found in our courts of justice and though the remedy may be delayed for a while, the good sense and true patriotism which pervade our whole community, render it ultimately certain.").
the essential, monolithic structure of English Empire and English enterprise. Their members acted in solidarity with each other and not necessarily in the best interests of the monarchy.

Like most components of the common law, the view of the labor or trade union as a potentially conspiratory criminal enterprise was imported into the United States' nascent legal framework. In many of the early nineteenth-century conspiracy trials, judicial hostility to informal or non-state actors is manifested by the identification of concerted action as a crime against the free market and hence against the public. In one of the most strongly-worded denunciations of workers' concerted action, Judge Ogden Edwards stated in People v. Faulkner that "[s]elf-created societies are unknown to the constitution and laws, and will not be permitted to rear their crest and extend their baneful influence over any portion of the community." Workers acting in concert were considered a harmful special interest group—a group whose concerns were not aligned with the public and whose actions endangered the public good.

While Part V of this article will more clearly examine the similarities between these nineteenth century opinions and the RICO complaints of the late twentieth and early twenty-first centuries, it is worth taking a moment here to point to an underlying theme of nationalism or xenophobia that creeps into the rhetoric of these conspiracy cases. When viewed through the lens of contemporary political discourse, these anti-union conspiracy

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83 See TOMLINS, supra note 49, at 189 ("Journeymen’s combinations were injurious interferences with private right, and they were public wrongs.").

84 See id. at 121.

85 For a list of nineteenth-century criminal conspiracy cases with the outcome of each case, see TURNER, supra note 67, at 2–3 tbl.1.

86 See, e.g., People v. Faulkner (N.Y. Ct. Oyer & Terminer 1836), reprinted in 4 A DOCUMENTARY HISTORY OF AMERICAN INDUSTRIAL SOCIETY, supra note 63, at 315, 330–31 (holding that the passing of the “trades of the country” to the private combinations rather than the state is harmful to not only the journeymen and their employers, but the community as a whole, as they are dependent on the prosperity of these trades); Commonwealth v. Morrow (Pa. Ct. Quarterly Sessions 1815), reprinted in 4 A DOCUMENTARY HISTORY OF AMERICAN INDUSTRIAL SOCIETY, supra note 63, at 15, 86 (“Combinations amongst master workmen, in any of the mechanical arts, tending to . . . restrain the entire freedom of trade, would be equally reprehensible . . . .”); Commonwealth v. Grinder (Pa. Rec’s Ct. 1836), reprinted in 4 A DOCUMENTARY HISTORY OF AMERICAN INDUSTRIAL SOCIETY, supra note 63, at 335, 336 (“[Conspiracies] against the public . . . violate public morals, insult public justice, destroy public peace, or affect public trade or business.”).


88 See id. at 330–31.

89 See id.
opinions often suggest the identification of a correlative relationship between the free market as an integral component of an amorphous, idealized concept of what it means to be American and the union as representative of a social or cultural other—a foreign threat to the values implicit in and definitive of American liberty.\(^9\)

I do not mean to suggest that this is necessarily an explicit attempt at framing by jurists and others addressing the union question (although at times throughout history such an element of intentionality is clearly present);\(^9\) rather, my hope in examining this rhetorical trope is to emphasize the significance and resonance of the modern evocation of the labor conspiracy when taken in conjunction with the changing ethnic composition of the work force and, more importantly for the sake of this article, the changing ethnic composition of the labor union.\(^9\)

Historically, the focus on freedom and liberty that is so often prevalent in the rhetoric of American patriotism invoked market capitalism and “free enterprise.”\(^9\) In the paradigm of classical legal

\(^9\) See, e.g., id. (explaining that combinations will only serve to diminish the prosperity of the community as they don’t afford Americans the same protection that the laws of the state already successfully provide); Kennedy v. Treillou (Pa. Ct. Quarter Sess. 1829), reprinted in 4 A DOCUMENTARY HISTORY OF AMERICAN INDUSTRIAL SOCIETY, supra note 63, at 285, 267–68 (“For all parties concerned ought to be convinced that combinations and conspiracies of this character are illegal, and we have seen in numerous instances the dangerous tendency of such conduct. In our country, but more especially abroad, combinations like these have led to consequences the most disastrous.” (emphasis added)).

\(^9\) See, e.g., People v. Faulkner (N.Y. Ct. Oyer & Terminer 1836), reprinted in 4 A DOCUMENTARY HISTORY OF AMERICAN INDUSTRIAL SOCIETY, supra note 63, at 315, 330–31 (emphasizing that the combinations are antagonistic to American prosperity, are most likely only utilized by foreigners and will only serve to injure the employers and workers as they cannot ensure the protections that American laws are able to provide); Revolution in U.S. Is Being Fostered by Reds in Moscow: American Communists Plotting Under Soviet Instructions, PHILA. INQUIRER, Dec. 3, 1922, at 1 (discussing the composition of the labor unions as groups of communists and their affiliates and describing the groups in question as being made up mostly of foreigners); The Labor Troubles: Troops Ordered Out in Cleveland—Strikers Still Under Arms, NEW HAVEN EVENING REG., July 18, 1885, at 2 (describing “foreigners” plotting violence in conjunction with a strike).


\(^9\) See, e.g., MICHAEL DENNING, CULTURE IN THE AGE OF THREE WORLDS 169–73 (2004) (discussing how cultural tropes of self-reliance, individual freedom, and American exceptionalism have stood in opposition to Marxist market critiques); Leon Samson,
thought (as an ideology, a jurisprudence, or perhaps simply a way of doing law), freedom and liberty generally were inextricably intertwined with conceptions of the free market. That is, the fundamental rights upon which freedom depended were the right to own private property and the right to contract freely. Interestingly, in identifying the labor conspiracy as inherently unlawful, the Faulkner opinion repeatedly presents the union in opposition to American values. Judge Edwards explains that he believes that the labor unions "are of foreign origin" and "mainly upheld by foreigners." He goes on to state that those hoping to organize workers "mistake the character of the American people, if they indulge a hope that they can accomplish their ends in that way." As a similar critique of unionization written in 1872 argues,

Americanism as Surrogate Socialism, in FAILURE OF A DREAM?: ESSAYS IN THE HISTORY OF AMERICAN SOCIALISM 426 (John H. M. Laslett & Seymour Martin Lipset eds., 1974). Samson, in his Marxian reading of American political and popular culture, argues that the public, idealized conception of America has served as a nearly insurmountable obstacle to more egalitarian or redistributive political movements in the United States. See id. In other words, because of the cultural coding and the rhetorical framings discussed, Americans tend to associate market critiques or criticisms of existing economic conditions with critiques of shared values and aspirational concepts of freedom and liberty. See supra Part II; see id. at 426–27. As Samson argues,

Americanism is to the American not a tradition or a territory, not what France is to a Frenchman or England to an Englishman, but a doctrine .... Americanism is looked upon not patriotically, as a personal attachment, but rather as a highly attenuated, conceptualized, platonic, impersonal attraction toward a system of ideas, a solemn assent to a handful of final notions—democracy, liberty, opportunity .... Id. at 426.

95 See id. (discussing the right to contract freely); see also Adkins v. Children's Hosp., 261 U.S. 525, 539, 545–46, 562 (1923) (citing Coppage v. Kansas, 236 U.S. 1, 14 (1915)).
97 Id. at 331. It is also worth noting that this link between foreignness, radicalism, and organized labor was prevalent in the treatment of the Haymarket incident. See supra text accompanying notes 1–25. There is a way in which the foreign composition of the union or the "un-American" identity of would-be organizers, see, e.g., infra text accompanying notes 98–99, provides a counter-narrative to that of the union as a creation of necessity and of worker interests. Such a view has found strength in post-Wagner Act opinions that specifically prevent nonemployee union organizers from interacting with employees on employers' property. See, e.g., Lechmere, Inc. v. NLRB, 502 U.S. 527, 534 (1992) (citing Central Hardware Co. v. NLRB, 407 U.S. 539, 545 (1972)). While the organizers in question in the nineteenth-century conspiracy cases were workers themselves, it is significant that those who sought to impose a collective unit on the otherwise individual-focused market were presented as outsiders who were somehow operating outside of the accepted terms of the marketplace and the bargaining process. See, e.g., People v. Faulkner (N.Y. Ct. Oyer & Terminer 1836), reprinted in 4 A DOCUMENTARY HISTORY OF AMERICAN INDUSTRIAL SOCIETY, supra note 63, at 315, 330–31.
"[e]very man who has labor to sell should claim for himself the right to sell it to whom and upon what terms he pleases; and all secret societies or trade-unions that by combination undertake to dictate to him in this matter should be spurned as trespassers upon his liberty."99

Rather than entertaining the possibility that the union was an organic institution, a means of achieving a common goal (a goal not incompatible with idealized American values of democracy and equality) and providing mutual aid, these cases present the union as an impediment to freedom—a foreign check on the free enterprise system that, if allowed to function, would severely impair the balance and independence of contracting parties. Much as English workers who joined to oppose unfair labor practices might be operating to serve an interest other than the monarchy,100 American workers who took advantage of concerted action were treated as somehow expressing hostility to the very structure and ideological underpinnings of the nation.101

All of this is not to say that Faulkner is somehow the definitive document of the nineteenth-century conspiracy cases. Indeed, in many ways it was an extreme case of anti-union animus finding its way into the official judicial narrative.102 Judge Edwards was an unpopular figure whose unbridled anti-union sentiments elicited wide-ranging public criticism.103 In fact, during the course of the nineteenth century, American jurisdictions wavered between

99 The Folly of the Eight-Hour Strikers, INDEPENDENT, July 11, 1872, at 8.
100 See supra notes 80–84 and accompanying text (discussing the criticisms of labor associations by courts in England).
102 See TOMLINS, supra note 49, at 165–66 ("The antagonism toward the existence of unions manifested in Edwards's opinion—his concern . . . evidences the depth of the social and political anxieties to which the previous three years of trades union growth and activity in New York had given rise."); cf. Peter Gabel, The Mass Psychology of the New Federalism: How the Burger Court's Political Imagery Legitimizes the Privatization of Everyday Life, 52 GEO. WASH. L. REV. 263, 269-70 (1984) (discussing the way that judicial opinions attempt to ascribe a broader ideology to the nation, effectively creating an artificial "we" and then purporting to speak for it); cf. also ATLESON, supra note 49, at 58–59 (discussing the scholarly discourse on slowdowns and other worker strategies that involved receiving pay while taking part in a concerted action against the employer's wishes, evoking "social condemnation"). Atleson responds to the notion of "social condemnation" by arguing that: "The extent of 'social condemnation' is also not clear, and such a perception seems based on the views of only part of the community. 'Deep-seated community sentiments' are sometimes cited to justify results that reflect the views of only portions of the community . . . ." Id. at 58; see infra text accompanying notes 115–21.
103 See TOMLINS, supra note 49, at 162–63.
outlawing unionization per se\textsuperscript{104} and simply holding (as in the case of non-labor-related conspiracies) that those involved in the collective action should be held criminally liable for any unlawful acts that arose from their involvement in the group, or for some sort of "unlawful means" of achieving their goals.\textsuperscript{105} These shifts and variances across state lines led to scholarly disagreement about the extent to which labor combination itself was unlawful, or whether general judicial and prosecutorial hostility towards organized labor caused a more expansive application of common law conspiracy principles.\textsuperscript{106}

Also, although opponents of organized labor viewed the trade unions as criminal or socially pernicious entities, this period was not without substantial growth in the stature of organized labor.\textsuperscript{107} Despite judicial hostility and its rhetoric of unionism as violent, anti-market, and hence anti-American, state legislatures throughout this period were much more receptive to the concerns of the working class.\textsuperscript{108} Indeed, much of the judicial action in the area of labor relations during the latter part of the nineteenth century actually involved striking down statutes that sought to protect organizing workers.\textsuperscript{109} From a cultural perspective, the Central Labor Union held the first Labor Day celebration in 1882 in New York City, and several states recognized the workers' day as an official holiday before the end of the century.\textsuperscript{110} This suggested that, notwithstanding judicial hostility, organized labor, at least in

\textsuperscript{104} See People v. Faulkner (N.Y. Ct. Oyer & Terminer 1836), reprinted in 4 A DOCUMENTARY HISTORY OF AMERICAN INDUSTRIAL SOCIETY, supra note 63, at 315, 331; see, e.g., Commonwealth v. Pullis (Pa. Mayor's Ct. 1806), reprinted in 3 A DOCUMENTARY HISTORY, supra note 63, at 59, 239, 235–36 (holding that the law condemns unionization).

\textsuperscript{105} Commonwealth v. Hunt, 45 Mass. 111, 121–22 (1842).

\textsuperscript{106} See JOHN R. COMMONS & JOHN B. ANDREWS, PRINCIPLES OF LABOR LEGISLATION 100–01 (1916) (discussing three theories that have been utilized in collective action cases); Francis B. Sayre, Criminal Conspiracy, 35 HARV. L. REV. 393, 427 (1922) (advocating for the abandonment of the theory that otherwise unlawful acts are made illegal by the mere formation of a combination); E. E. Witte, Results of Injunctions in Labor Disputes, 12 AM. LAB. LEGIS. REV. 197, 198 (1922) (discussing the perplexing use of the conspiracy theory in labor disputes); see, e.g., Hovenkamp, supra note 74, at 922–23 (evaluating the decision in Commonwealth v. Hunt, particularly the ramifications of the holding on the "common law conspiracy principles").

\textsuperscript{107} See FORBATH, supra note 45, at 42–51 (describing the maximum-hours laws that were enacted as a part of the Gilded Age labor movement in Illinois, Colorado, and sixteen other states).

\textsuperscript{108} See generally id. at 37–97 (discussing the successes and failures of pro-union legislation in the United States along with the judges who aided or stalled unions' progress towards gaining workers' rights).

\textsuperscript{109} See id. at 38.

some jurisdictions, enjoyed some political clout. Additionally, while there was certainly press coverage of union activity that focused on the criminal or undesirable elements of workers' concerted action, there was also significant treatment of unions that lacked any clearly negative spin and merely treated them as community or business organizations that sought to advance the concerns of working people.

That being said, for the sake of our understanding and analysis of the contemporary civil RICO claims, it is useful to recognize that in the nineteenth century, criminal conspiracy was the acceptable and uncontested legal paradigm by which to address worker-organizing efforts. Prior to the legitimizing force of the Wagner Act, and the ascension of administrative, regulatory, or other public, noncriminal legal institutional mechanisms through which worker's concerted action might be addressed, collective bargaining or attempts to bargain collectively were almost inextricable from the criminal framework. The traditional scholarly treatment of the "early conspiracy cases" often ends with Commonwealth v. Hunt, which effectively held that the labor combination was not an intrinsically criminal conspiracy in Massachusetts. But even after Hunt, in People v. Cooper and Commonwealth v. Grinder, jurors in New York and Pennsylvania, respectively, found labor combinations lawful absent proof of some overt act. Criminal law continued to be used to attack unions for the remainder of the nineteenth century.

111 See, e.g., The Folly of the Eight-Hour Strikers, supra note 99, at 8; see also Apprentices and Trades Unions, N.Y. TIMES, Aug. 30, 1868, at 4 (commending the conviction of five bricklayers for conspiracy, identifying unions as "injurious combinations"). The editorial argued that "[w]orkmen, if not bolstered up by their [u]nions, would soon find their proper spheres, and employers would not have unskilled workmen forced upon them." Id.

112 See, e.g., W.M. Oland Bourne, What Shall We Do?, N.Y. EVANGELIST, Feb. 21, 1856, at 32 (decrying the "selfishness" of trade laws and urging workers to join together); Labor Movements, N.Y. DAILY TRIB., May 21, 1850, at 4 (advertising local labor organizations and calling for more workers to join); The Central Labor Union: Its Formation and Growth, N.Y. DAILY TRIB., Oct. 26, 1890, at 22 (tracing the history of a New York union); Trades Unions' Protests Against the Conspiracy Law, N.Y. DAILY TRIB., Feb. 25, 1875, at 2 (chronicling organized labor's objections to anti-union uses of conspiracy law).

113 See TOMLINS, supra note 49, at 213–14, 216.

114 See id.

115 See, e.g., TURNER, supra note 67, at 2–3 tbl.1 (showing a chronological list of "early conspiracy cases", the last of which is Commonwealth v. Hunt, 45 Mass. 111 (1842)).


118 See, e.g., FORBATH, supra note 45, at 61; TOMLINS, supra note 49, at 216; see also Old Dominion S.S. Co. v. McKenna, 30 F. 48, 50 (C.C.S.D.N.Y. 1887) ("All combinations and
Indeed, even when requiring an overt criminal act, courts frequently appeared willing to accept a vague description of economic threat or interference with employer property rights as sufficient to support a criminal prosecution.\textsuperscript{119}

What is striking is ultimately how limited the impact of the pro-union doctrinal changes proved to be. Speaking broadly of the aftermath of the decision in \textit{Hunt}, Tomlins observes that "so far as working people's 'social right' to collective action was concerned, even the achievement of its legislative recognition after the Civil War in several states would make no practical difference."\textsuperscript{120} Indeed, some courts ignored or at least remained clearly skeptical of these legislative protections, continuing to apply the conspiracy framework even in the wake of pro-union statutory enactments.\textsuperscript{121}
Additionally, the labor conspiracy doctrine and ultimately even the Sherman Antitrust Act served as powerful anti-union instruments, long after the courtroom victories for workers in the 1830s. Further, using an ideological framework and set of background rules that focused on restraining interference with private property rights as critical to maintaining “freedom,” courts were by and large able to continue to apply the rationale of the pre-Hunt cases in order to find criminal predicate acts to support conspiracy convictions. Therefore, situated in a broader social and cultural framework that identified the union as a threatening and potentially dangerous force, the decisions in Hunt or Cooper simply redirected anti-union animus—the mode of assault might not have been the same, but the motivations and often the effects remained the same. By importing Tomlins’s argument and emphasizing the distinction between the law on the books and the law in action into this brief discussion of the nineteenth-century conspiracy cases, this section foreshadows the way I argue that we should read the contemporary RICO suits.

In drawing this link, therefore, I hope to suggest that addressing this recent spate of claims that have met with very limited success, and viewing them in light of past ideological treatments of labor, is not purely an academic exercise. That is, their dismissal is not the end of the story; the very existence of such claims may raise more

183-85 (collecting cases that ignored statutory reforms and continued to follow the “criminal conspiracy doctrine” in New York, Pennsylvania, and New Jersey).

122 See generally Hovenkamp, supra note 74, at 945-48 (discussing the application of the Sherman Act to the labor boycott, creating greater hostility towards workers who participated and the creation of criminal liability for the same); Tomlins, supra note 73, at 36-49 (selecting a set of twenty-two labor law cases decided from 1805 to 1842 involving the indictment of workers on conspiracy charges); Ahmed A. White, The Crime of Economic Radicalism: Criminal Syndicalism Laws and the Industrial Workers of the World, 1917-1927, 85 OR. L. REV. 649, 667 (2006) (“[T]he doctrine did not make criminal all strikes or other acts of labor protest, but what it surely did do was render just about any such activity on the part of labor potentially criminal.”).


124 See White, supra note 122, at 667 (“[The Sherman Antitrust Act] was not clearly intended to apply to most of the union activity it was used to deter and to punish; nevertheless in the first couple of decades of its enforcement, it was used against labor more frequently than business entities, its clearly intended targets.”).

125 See supra notes 94-95 and accompanying text.

126 See supra notes 118-119 and accompanying text.

127 See, e.g., MINDA, supra note 2, at 48-54 (discussing the Haymarket Riot and the resulting cultural fear of boycotts and collective action).

128 Cf. Karl N. Llewellyn, Some Realism About Realism—Responding to Dean Pound, 44 HARV. L. REV. 1222, 1254 (1931) (distinguishing between the “is” and the “ought” of the law—that is, the difference between the idea of the law and its effects).
complicated questions and much more serious concerns for the future of organized labor. Failed civil suits, much like unsuccessful prosecutions, can have substantial effects,\textsuperscript{129} both as expressive markers and drivers of social and political will\textsuperscript{130} and also as powerful impediments to normalcy, subsistence, and success.\textsuperscript{131} Gary Minda has argued that judicial opinions that “made peaceful labor boycotts criminal conspiracies” were implicitly, motivated by a historical and cultural context. Hence, the Haymarket Riot, the violence attributed to Irish-American mine workers known as the Mollies, the anarchist activities of the Industrial Workers of the World, and other highly sensationalized events involving labor, provided the metaphoric source for each judge’s conclusion of law in each case.\textsuperscript{132}

This article, then, as a means of historicizing modern claims that resemble those of an earlier time and focusing on such parallels, seeks to emphasize the important interplay between cultural context and legal rules and to raise a series of questions about contemporary labor law and policy.

Just as the rhetoric and cultural memory of labor violence

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\item \textit{See} White, \textit{supra} note 122, at 650, 752–53 (discussing the substantial and harmful impact that arrests and prosecutions had on the organizing potential of the Industrial Workers of the World).
\item \textit{See} Gabel, \textit{supra} note 102, at 268 (“[T]he fundamental purpose of these decisions is not to be found in their instrumental effects—that they ‘give more power’ to corporations—but rather [their power to] get people to believe in the legitimacy of the hierarchy-system . . .”).
\item Indeed, the relationship between the concrete effects of the law and its legitimating ones is challenging in part because of the unquantifiable or intangible elements of legitimacy as a concept. In many ways, therefore, it may be difficult to generalize arguments about the legitimating potential of a judicial decision or a piece of legislation without some sort of empirical groundwork or support. Duncan Kennedy, in discussing the way in which lack of enforcement shapes our understanding of law generally (and of the NLRA specifically), provides a useful summary:

To the extent the legal system just can’t get a deterrent handle on an aspect of social reality, its role in distributional issues is less than it appears to be. But it is easy by focusing on non-compliance to underestimate how much difference ineffectual enforcement makes by comparison with no enforcement at all, or legalization. The NLRB is ineffective at protecting workers from being discharged for exercising their right to organize, but if there were no protection at all, there would be a lot more discharge. . . .

\textit{[T]he argument for the pervasive causal significance of law in distribution is meant to be more than the tautology that because the legal system \textit{could imaginably} make anything happen, it is causally responsible for everything that does happen. Limits on the effectiveness of law, whether we attribute them to the “nature of bureaucracy” or to “human nature,” are limits on the claim that law is causally central.}

Duncan Kennedy, \textit{The Stakes of Law, or Hale and Foucault?}, 15 LEGAL STUD. F. 327, 346 (1991).
\item \textit{MINDA, supra} note 2, at 84.
\end{enumerate}
\end{footnotesize}
allowed, caused, or simply influenced judges’ and legislators’
decisions to treat worker concerted action as inherently criminal,
something—some set of background rules, recurrent cultural tropes,
sociopolitical shift, or perhaps some latent ideological strand that
never really went away—has reinvigorated, re-empowered, and
resuscitated the tropes of concerted action as violative of societal
norms in the form of the contemporary comprehensive campaign
RICO suit. The vagueness of the predicate acts alleged in Cintas
and similar recent cases—the vocalizing of worker unrest purported
to be extortive because it coerced employers to bargain and
therefore part with their property—mirrors a similar vagueness
in the later nineteenth century cases, which, although purporting
not to treat the union as per se unlawful, in effect did just that.
Before returning in Part V to this distinction between the ostensible
judicial acceptance of unions’ legitimacy and the prevalence of
claims challenging the union’s fundamental organizing project,
however, the next part will explore the ways in which the Wagner
Act and the symbiotic laboring of American culture in the first half
of the twentieth century undermined the nineteenth century anti-
labor ethos and created a new conception of the union.

IV. A MORE PERFECT UNION: THE NLRA, THE “CULTURAL
FRONT,” AND THE NEW ERA OF LABOR’S LEGITIMACY

Even when operating outside the explicitly condemnatory rubric
of criminal conspiracy law, courts in the late nineteenth and early
twentieth centuries generally treated the union as an impediment
to the fundamentally American right of freedom of contract.

133 See Meier v. Musburger, 588 F. Supp. 2d. 883, 899 (N.D. Ill. 2008) (“Congress passed
RICO in an effort to combat organized, long-term criminal activity.”).
135 See, e.g., Braceville Coal Co. v. People, 35 N.E. 62, 63 (Ill. 1893) (“[A]s an incident to the
right to acquire other property, the liberty to enter into contracts by which labor may be
employed in such a way as the laborer shall deem most beneficial, and of others to employ
such labor, is necessarily included in the constitutional guaranty.”); Commonwealth v. Perry,
28 N.E. 1126, 1126–27 (Mass. 1891) (striking down a statute that required employers to pay
their employees at the same rate they were guaranteed by contract when they were hired,
regardless of the quality of performance as a violation of the employers’ right to contract
freely); Low v. Rees Printing Co., 59 N.W. 362, 367 (Neb. 1894) (explaining that the right to
acquire property includes the right to acquire labor through contracts, which includes the
determination of rate, time, and mode of pay); People v. Gillson, 17 N.E. 343, 345–46 (N.Y.
1888) (holding that legislation violated the fundamental liberty of a salesman by restricting
his sales in a way that prevented fair competition).
136 See generally Denning, supra note 36 (terming “the cultural front”).
137 See, e.g., Vegelahn v. Guntner, 44 N.E. 1077, 1078 (Mass. 1896) (“A conspiracy to
part will examine the passage of the NLRA and Depression Era changes in the treatment and understanding of organized labor. It will first address the doctrinal framework of the Wagner Act as an embodiment of a shift away from the classical legal thought conception of the employment relationship to a realist one that accepts the potential importance of the collective bargaining unit. Then, it will move on to explore the cultural context of the Wagner Act and the ways in which the publicly constructed images of the union or the union organizer acted in concert with legal institutions to help shape a new regime for the treatment of labor in the United States.

A. Legislating a New Deal for Labor: The Wagner Act's Doctrinal Shift

Passed in 1935, in a moment of intense economic and social turmoil, the Wagner Act marked a staggering reconceptualization of the role of the union in American society. Following decades during which the labor injunction had been used much like the criminal conspiracy charge, as a weapon against labor organizing,
the Norris-LaGuardia Act,\textsuperscript{141} which prevented federal courts from issuing “any restraining order or temporary or permanent injunction in a case involving or growing out of a labor dispute, except in a strict conformity with the provisions of” the Act.\textsuperscript{142} began to establish a protective barrier around the realm of workers’ collective action.\textsuperscript{143} Under the much broader Wagner Act, however, worker organizing, identified less than a century earlier as inherently anti-American and inherently counter to the ideal of the free market,\textsuperscript{144} was dramatically recast as a driver of the economy and a necessary means of remedying “[t]he inequality of bargaining power between employees . . . and employers.”\textsuperscript{145} In stark contrast to the characterization of the union as a pernicious force that would distort the market,\textsuperscript{146} Congress effectively embraced the legal realists’ concern that without collective bargaining and regulation, the market would not allow workers to realize full freedom.\textsuperscript{147} The extent to which the Act takes a normative stance on the social and economic utility of unionization is not necessarily a settled


\textsuperscript{142} Id. § 101.

\textsuperscript{143} See, e.g., Crowe & Assoc., Inc. v. Bricklayers & Masons Union Local No. 2, 713 F.2d 211, 214 (6th Cir. 1983) (explaining that regardless of other non-labor statutes that declare a union’s activities to be unlawful, the Norris-LaGuardia Act still serves to prevent federal injunctions against union activity); Elec. Contractors Assoc. v. Local Union 103, IBEW, 327 F. Supp. 1177, 1180 (D. Mass. 1971) (holding that the Norris-LaGuardia Act, which prevents injunctions, has very few exceptions).

\textsuperscript{144} See supra notes 93–98 and accompanying text.


\textsuperscript{146} See People v. Faulkner (N.Y. Ct. Oyer & Terminer 1836), reprinted in 4 A DOCUMENTARY HISTORY OF AMERICAN INDUSTRIAL SOCIETY, supra note 63, at 315, 316 (“[T]he parent Society [of workers] adopted resolutions to carry out their purposes of coercion, and to compel the employers into a subserviency to their views.”).

\textsuperscript{147} See 29 U.S.C. § 157 (2011); see also Mark Barenberg, The Political Economy of the Wagner Act: Power, Symbol, and Workplace Cooperation, 106 HARV. L. REV. 1379, 1424 (1993) (“In applying that idea [of substantive or positive freedom] to labor relations, Wagner consistently deployed the moral vocabulary of two currents of progressivism represented among his closest advisers and associates: the institutionalists’ discourse of the workplace as a constitutional democracy, and the legal realists’ language of economic duress and substantive liberty of contract in the labor market.” (citation omitted)); cf. Robert L. Hale, Coercion and Distribution in a Supposedly Non-Coercive State, 38 POL. SCI. Q. 470, 474–75 (1923) (critiquing the libertarian conception of free markets as dependent on state recognition of property rights and arguing that the employment relationship was inherently unequal and that employment contracts could not be freely negotiated because of the existence of background property rules). But see Morris R. Cohen, Property and Sovereignty, 13 CORNELL L. Q. 8, 12 (1927) (arguing that “not only is there actually little freedom to bargain on the part of the steelworker or miner who needs a job, but in some cases the medieval subject had as much power to bargain when he accepted the sovereignty of his lord.”).
matter,148 but the Act clearly states that:

It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.149

In a substantial departure from the conspiracy cases, the right to bargain collectively was recognized as important to the nation.

Indeed, in the wake of the NLRA, collective bargaining can almost be seen to have enjoyed a privileged status over individual employment contracts. In J. I. Case Co. v. NLRB, for instance, the Supreme Court held that employers could not use contracts with individual workers to circumvent unionization or a collective bargaining process.150 Similarly, the Court in Order of R. Telegraphers v. Railway Express Agency, Inc., concludes that the NLRA grants “statutory approval to the philosophy of bargaining as worked out in the labor movement in the United States.”151 As Justice Jackson identified it, such a judicial strategy, endorsed on multiple occasions, was to “give decisiveness and integrity in borderline cases to collective bargaining.”152 Viewed in this light, the statute completely re-imagined not only who could take part in the bargaining process but also who the appropriate parties to an employment contract were.

Further, the Act established a federal framework for the regulation of the labor organizing and collective bargaining processes. Where labor disputes were previously subject to the prejudices and pressures of state or local economies and communities, the NLRA was able to establish a cohesive national regime.153 As a result, the law effectively guaranteed a shared set of

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148 See Klare, supra note 49, at 268, 282–83 n.56 (speculating that one of collateral effects of the Wagner Act was it put employers and employees on “equal footing” and that the resulting shift of economic power to the employees also resulted in changes in their social and political power).
153 See Brudney, supra note 14, at 793; Michael H. Gottesman & Michael R. Seidl, A Tale
assumptions about labor management relations for the nation's workers, a set of default rules that at least ostensibly did not depend on the local political clout of a union or of a state's judicial, electoral, or even judicial electoral politics. From a functional perspective, the national regulatory and adjudicatory structure provided a layer of insulation from more obviously political actors, put workers and management on better notice, and also guarded against a race to the bottom among employers nationwide. Expressively, or from an ideological perspective, the Act signified the incorporation of labor rights into the realm of federal policy concern. That is, the Act, in taking a set of employment practices off the table, effectively asserted that these elements of labor policy were sufficiently important to national policy and national well being to be outside of the reach of localized forces.

Based on these broad-reaching changes in policy and effect, Karl Klare has argued that the Wagner 'Act was perhaps the most radical piece of legislation ever enacted by the United States of Two Discourses: William Gould's Journey From the Academy to the World of Politics, 47 STAN. L. REV. 749, 783 (1995).


See Brudney, supra note 14, at 793; Gottesman & Seidl, supra note 153, at 783 (explaining that in lieu of the NLRA, employers and employees would not be protected from political efforts by states to enact more radical statutes); John C. Knapp, Note, The Boundaries of the ILO: A Labor Rights Argument For Institutional Cooperation, 29 BROOK. J. INT'L L. 369, 377 (2003) (stating that the NLRA helps improve labor standards by preventing employers from consistently lowering their labor standards, which prevented employees from suffering from worsening labor and social conditions); see supra note 118 and accompanying text.

The actual issue of the extent to which the NLRA preempted state laws relating to labor/management relations and collective bargaining has long been an issue of great contention, and to suggest that the very passage of the NLRA immediately guaranteed broad preemption would be a gross oversimplification at best. Archibald Cox, Federalism in the Law of Labor Relations, 67 HARV. L. REV. 1297 (1954); Simonoff & Lieberman, supra note 29.

Even though "[t]he NLRA contains no express preemption provision," state or local laws have been deemed preempted if they conflict with broader federal labor policy or "would frustrate the federal scheme." Bldg. & Constr. Trades Council v. Associated Builders & Contractors, Inc., 507 U.S. 218, 224 (1993) (quoting Metro. Life Ins. Co v. Mass. Travelers Ins. Co., 471 U.S. 724, 747 (1985)). As a result, federal labor preemption doctrine, despite a lack of a broad mandate of exclusive federal control, does recognize the importance of an overarching federal scheme and an overarching set of legal ideals associated with national policy. See Lodge 76, Int'l Ass'n of Machinists v. Wis. Emp't Relations Comm'n, 427 U.S. 132, 155 (1976) ("[T]he [boycott] is peaceful conduct constituting activity which must be free of regulation by the States if the congressional intent in exacting the comprehensive federal law of labor relations is not to be frustrated . . . ."); San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236, 244 (1959) ("[T]o allow the States to control conduct which is the subject of national regulation would create potential frustration of national purposes.").
Congress,” and in fact the Act—at least as written—redefined the relationship between employers and their workers. Indeed, the language of the Act, compared with the hyperbolic anti-union rhetoric of Faulkner and other nineteenth century opinions, suggests a clear paradigm shift in the legal treatment of the employment relationship: a rejection of the tenets of classical legal thought in favor of a realist agenda. By recognizing the right of the worker to participate in “self-organization” and to act in the interest of workers’ “mutual aid or protection,” the Act not only emphasizes the important individual rights of employees, it also appears to imply an understanding of worker solidarity as important to freedom and to the proper functioning of the American market system. Granted, the phrase “mutual aid or protection” has inspired numerous different readings, but the language itself is evocative of a “culture of solidarity” —a unified class of workers with shared concerns and shared interests.

In interpreting this phrase in NLRB v. Peter Cailler Kohler Swiss Chocolates Co., Judge Learned Hand went so far as to broadly read the Act as promoting a sort of culture of solidarity:

When all the other workmen in a shop make common cause with a fellow workman over his separate grievance, and go out on strike in his support, they engage in a “concerted activity” for “mutual aid or protection,” although the aggrieved workman is the only one of them who has any

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158 Klare, supra note 49, at 265.
159 The fundamental premise of Klare’s often-cited piece on the Wagner Act is that the law itself displayed a remarkable and unprecedented pro-labor bent, but such preferences were eroded through judicial implementation (and later legislative action). See id. at 266, 268–70.
160 In this article, I hope to invoke Klare’s thesis as an important lens through which to view the potential socio-legal impact of employer RICO claims. In other words, despite doctrinal support for workers’ rights and union organizing, the law, as implemented or as it functions, may often serve competing interests and serve to defang labor protections.
161 Id. at 266–67.
162 See supra notes 85–90 and accompanying text.
166 See generally FANTASIA, supra note 58, at 45–48 (explaining that incident to the Wagner Act, it was truly the solidarity and driving force of the workers that shifted the power to the employees).
167 See NLRB v. Peter Cailler Kohler Swiss Chocolates Co., 130 F.2d 503, 505–06 (2d Cir, 1942).
immediate stake in the outcome. The rest know that by their action each one of them assures himself, in case his turn ever comes, of the support of the one whom they are all then helping; and the solidarity so established is "mutual aid" in the most literal sense, as nobody doubts.\textsuperscript{167}

That is, there is nothing intrinsically unwholesome or antithetical to rule of law,\textsuperscript{168} American values,\textsuperscript{169} or market capitalism\textsuperscript{170} about workers seeking collective ends via non-state organizations. Rather, viewed through this lens, the union—or at least the collective bargaining unit—is the very embodiment, the concrete realization of worker democracy and substantive market freedom.\textsuperscript{171} Even if the classical legal thought objective of the contract as a freely reached meeting of the minds remains the goal of employment bargaining, "collective empowerment" of workers becomes a sort of precondition to the achievement of the free market labor transaction.\textsuperscript{172}

I do not mean to suggest that the Act embodied some sort of syndicalist ideal of the trade union as the quintessential social unit, but given the statute's plain language, Klare's description of the statute as a truly radical doctrine\textsuperscript{173} is compelling, not just because of its clearly realist bent, but because of its implicit nod to collectivist goals and methods of political, social, and economic action. Much like the ostensibly pro-union or pro-worker decisions in \textit{Hunt}, \textit{Cooper}, or \textit{Grinder}, however, the Wagner Act as a possibly radical, certainly labor-friendly, statute did not immediately herald a paradigm shift in the actual practicalities of industrial relations.\textsuperscript{174} Section 7 of the Act recognizes the basic forms of collective action that had comprised many of the earlier crimes against the market as positive rights,\textsuperscript{175} and section 10 actually provides remedies,\textsuperscript{176} making the Act an effective, practical success,

\textsuperscript{167} \textit{Id.}
\textsuperscript{168} \textit{But see supra} note 105 and accompanying text.
\textsuperscript{169} \textit{But see supra} notes 96–97 and accompanying text.
\textsuperscript{170} \textit{But see supra} note 90 and accompanying text.
\textsuperscript{171} \textit{See} Barenberg, \textit{supra} note 147, at 1423–24.
\textsuperscript{172} \textit{Cf. id.} (discussing "collective empowerment" as the goal of the Wagner Act).
\textsuperscript{173} Klare, \textit{supra} note 49, at 265.
\textsuperscript{174} \textit{See id.} at 266 ("It is of transcendent importance in understanding what follows . . . that the Wagner Act did not fully become 'the law' when Congress passed it in 1935, or even when the Supreme Court ruled it constitutional in 1937 . . . . The Act 'became law' only when employers were forced to obey its command by the imaginative, courageous, and concerted efforts of countless unheralded workers.").
\textsuperscript{176} \textit{See id.} § 160.
not just an expressive document gilded with egalitarian or pro-union rhetoric. Just because the Act embodied a realist conception of labor markets, however, did not mean that it was not similarly susceptible to the realist-recognized impediment of judicial implementation—if law is its effects, any statute does not truly become the law until it is effectively enforced and implemented by legal or regulatory actors. Klare has argued that the Act never achieved its radical potential, and given the developments of the Labor Management Relations Act of 1947, subsequent judicial opinions, and the contemporary distaste for and distrust of the Wagner Act as a driver of positive advances in labor law, it would be difficult to refute such a claim.

Even given its ultimate shortcomings as a means of protecting workers or incentivizing and facilitating unionization, however, the union-legitimating power of the Wagner Act should not be underestimated. Taking the prevalent nineteenth-century conception of the union as an inherently criminal conspiracy as one pole on a spectrum of social acceptance of unionization, the Wagner Act appears to push us forcefully in the opposite direction toward a fuller understanding and legal appreciation of the worker's collective as a positive, or at least potentially positive, social force. Whether it actually occupies the absolute opposite end of the spectrum from a Faulkner-era conception as Klare argues, or whether it was simply an incremental step away from a truly

177 See, e.g., Klare, supra note 49, at 288 (“[T]he statute went beyond merely legalizing union activity and providing for representation elections, but in addition created an affirmative duty on the part of employers . . . .”).
178 Cf. Llewellyn, supra note 128, at 1254 (distinguishing between the “is” and the “ought” of the law as the difference between the law and its effects).
181 See, e.g., supra note 159 and accompanying text.
183 See, e.g., Brudney, supra note 182.
184 See Klare, supra note 49, at 266.
185 MINDA, supra note 2, at 50–52.
186 See Klare, supra note 49, at 266.
laissez-faire will theory of employment contracts, the Act clearly recognizes the social and legal legitimacy of the collective bargaining process and hence (at least potentially) the union in the American market system. That is, one need not accept a radical reading of the Act as explicitly pro-union or reconstitutive of market interactions in order to recognize that the Act embodies a threshold recognition of union organizing as a legitimate activity directed at a legally recognized and perhaps even normatively desirable goal, a "notion that collective action should generally be protected despite the economic harm it might cause."

Put simply, then, what makes the recent RICO cases arising from comprehensive campaigns such a striking departure from the rationale of the Wagner Act is "that federal labor law legitimates and indeed protects what might in ordinary meaning terms be thought of as extortionate activity." The Wagner Act, when viewed in the context of the Progressive Movement and the rise of the administrative state, can be viewed as a clear renunciation of Lochner era or classical legal thought elevations of property rights and freedom of contract in the face of a concern for unequal bargaining power or workers' rights. Yet by evoking the image of the union as extorting or coercing property owners to cede what is rightly theirs, Cintas and similar claims operate to re-import the political economy of the nineteenth-century labor dispute into the twenty-first century.

B. Labor's Acculturation: Ideology, Representation, and Remaking an "American" Union

Tomes could be, and indeed have been, devoted to the doctrinal advances and intricacies of the NLRA, but for the sake of this re-
examination of employer RICO suits, such a detailed analysis of the section 7 or section 8 rights granted to, or perhaps withheld from, workers would be largely collateral. Rather, as a cultural historical project, this article is concerned more with the ways in which the NLRA interacted with extralegal narratives and societal trends to create a system of labor legitimation and to combat the ideologies that underlay the labor conspiracy framework. By looking beyond the case law at broader cultural treatments of organized labor, this section aims “to uncover the moral and political vision embedded in the doctrines, the values and images of justice and workplace rights that the cases evince.”

My hope in this section, then, is to argue that despite the ostensible extra cultural, elite, and privileged nature of the law and of legal discourse, we can read the doctrinal evolution of the law’s treatment of the union in this moment as being reflective of, reflected in, and perhaps quasi-symbiotic with mass cultural tropes of worker solidarity and collective, labor-based patriotism. In

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193 Accordingly, this project borrows methodologically from work on the “cultural study” of the law that suggests that there are important insights to be derived from an examination of judicial rhetoric and legal and political discourse as a means of tracking cultural politics and also as a means of understanding the ongoing legitimation of certain ideological strands. See, e.g., MINDA, supra note 2, at 52; Gabel, supra note 102, at 268; Gordon, supra note 37, at 93–100 (outlining various theories that emphasize ways in which the law forms the components of culture); Jeannie Suk, The Trajectory of Trauma: Bodies and Minds of Abortion Discourse, 110 COLUM. L. REV. 1193, 1197–98, 1200–01 (2010); Janet Halley, Recognition, Rights, Regulation, Normalisation: Rhetorics of Justification in the Same-Sex Marriage Debate, in LEGAL RECOGNITION OF SAME-SEX PARTNERSHIPS: A STUDY OF NATIONAL, EUROPEAN AND INTERNATIONAL LAW 97–111 (Robert Wintemute & Mads Andenaes eds., 2001). See generally DUNCAN KENNEDY, A CRITIQUE OF ADJUDICATION: FIN DE SIECLE 405 n.21 (1997) (“[C]ultural imagery may weigh more heavily than either deduction or policy in influencing judicial rule choice. This is an extension of the idea that appellate adjudication is a forum of ideology . . .”).

194 Klare, supra note 140, at 73.

195 See generally Austin Sarat et al., Where (or What) is the Place of Law? An Introduction, in THE PLACE OF LAW 1–20 (Austin Sarat et al. eds., 2006) (arguing that law is influenced by the place in which it exists and surrounding social forces); RICHARD K. SHERWIN, WHEN LAW GOES POP: THE VANISHING LINE BETWEEN LAW AND POPULAR CULTURE 3–13 (2000) (discussing the increasing convergence of popular culture and legal principles in contemporary discourse).

196 David Trubek describes the process of critically examining legal ideology as one in which:

[I]deas in some strong sense can be said to “constitute” society. That is, social order depends in a nontrivial way on a society’s shared “world views.” Those world views are basic notions about human and social relations that give meaning to the lives of the society’s members. Ideas about the law—what it is, what it does, and why it exists—are part of the world view of any complex society. These ideas form the legal consciousness of society. The critique of legal thought is the analysis of the world views embedded in modern legal consciousness.

Trubek, supra note 35, at 589.
order to accurately analyze, understand, and describe the evolution of labor law in this period, we also need to address the markers of the society's worldview—the cultural texts that serve as background conditions and the social signifiers against which the Act should be read and interpreted.\textsuperscript{197}

With this interplay between the legal, the ideological, and the social as a guide, this section suggests that the immediate effects of the NLRA went beyond the judicial acceptance of collective bargaining as a preferred form of contracting\textsuperscript{198} or the identification of positive workplace rights for employees.\textsuperscript{199} Where the anti-labor decisions of the nineteenth century can be seen as reinforcing or perhaps even building a "dominant social consciousness"\textsuperscript{200}—a rhetorical framework in which the union was the embodiment of anti-American, radical, and inherently undesirable social forces—the language of the Wagner Act can be seen as constitutive of an alternative consciousness, a state-sanctioned acquiescence to a new set of socio-economic conditions and social movements.\textsuperscript{201}

When considered in conjunction with the post-NLRA decline in union power and prevalence\textsuperscript{202} and the gradual legislative and

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\textsuperscript{197} This concept, of the cultural context as essential to the legal interpretive process, is one that will be explored elsewhere in another article. While the efficacy or desirability of such a theory of statutory interpretation is largely outside the scope of this article, I do think it is worth noting that this approach, which essentially situates the judge and attorney as cultural historians forced to unpack social meaning based on some sort of comparative contextualization, is not simply a convenient technique employed here as a way of integrating two disparate methodologies or as a means of importing non-legal sources and theoretical discourse into legal interpretation. Rather, based on the Supreme Court's opinions in District of Columbia v. Heller and McDonald v. Chicago, I would argue that there is good reason to believe that such an approach currently (at least in certain contexts) appears to enjoy a degree of judicial approval. District of Columbia v. Heller, 554 U.S. 570 (2008); McDonald v. City of Chicago, 130 S. Ct. 3020 (2010). In both majority and dissenting opinions in each case, (not to mention the numerous briefs presented) the primary legal claims rely heavily on non-legal primary sources used to support contentions about cultural meaning. See, e.g., Heller, 554 U.S. at 581; McDonald, 130 S. Ct. at 3037 n.16. Where courts have long looked at legislative history or even more "official" documents such as the Federalist Papers, it is striking to find the court focusing its interpretive energies on newspaper articles and other components of a less formal, potentially more democratized history. See, e.g., Heller, 554 U.S. at 594; McDonald, 130 S. Ct. at 3037 n.16.

\textsuperscript{198} See supra notes 151-54 and accompanying text.

\textsuperscript{199} See supra notes 178-79 and accompanying text.

\textsuperscript{200} Gabel, supra note 102, at 268.

\textsuperscript{201} See discussion supra Part IV.B.

\textsuperscript{202} See, e.g., CHARLES B. CRAVER, CAN UNIONS SURVIVE?: THE REJUVENATION OF THE AMERICAN LABOR MOVEMENT 42-51 (1993) (mapping the impact of global economic and industrial trends on the labor movement); MICHAEL D. YATES, WHY UNIONS MATTER 132-40 (1998) ("[T]he fraction of those employed who are in unions, began to fall in the mid-1950s, declining from 35 percent in 1955 to 23 percent in 1980.").
\end{flushright}
judicial whittling away of protections granted by the Act, the expressive or culturally legitimating effects of the law's passage may even be viewed as greater than the doctrinal ones. That is, the actual rhetorical construction of the section 7 rights appear to embrace an understanding of worker solidarity that recognizes that individuals are not simply self-interested actors and instead may be concerned (and in fact should be concerned) with “mutual aid or protection” of fellow employees or others in their socio-economic group. Thus, we can read the Act as another element—granted, one imbued with greater import and effective power due to its legal nature—in a broader discourse that sought to reshape the “dominant social consciousness.” Viewed through this lens, the process of union legitimation was an ongoing one that is best understood as rooted in a sense (illusory or otherwise) of shared experience, a merger of the political and the cultural, the legal and the social that allowed for the mobilization and empowerment of working class Americans. In a sense, the lawmaking here is a “praxis” that should be read not only against the background rules of property and contract, but also against the background social conditions that the Act both reflected and helped to shape.

Indeed, if we look to the mass cultural context of the Great Depression, it is hard not be left with a picture of a society where the role of the collective was being redefined generally; no longer antithetical to classical liberal or Enlightenment conceptions of individual freedoms, it was being recast as practically essential to some idealized form of Americanism. What I suggest, therefore, is that the shift in the official, legal narrative of the workplace embodied in the Wagner Act should be read in conjunction with a broader popularization or “proletarianization” of American culture. Michael Denning, in his history of mass culture in this era argues that the national consciousness in the 1930s was

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203 See supra notes 165, 182 and accompanying text.
205 See id.
206 Gabel, supra note 102, at 268.
207 See Karl Klare, Law-making as Praxis, 40 TELOS 123, 124 (1979); KENNEDY, supra note 72, at 359.
208 See Hale, supra note 147, at 471–75.
209 KENNEDY, supra note 72, at 347 (“T]he legal system creates as well as reflects consensus (this is true both of legislation and of adjudication). Its institutional mechanism ‘legitimates,’ in the sense of exercising normative force on the citizenry.”).
210 See DENNING, supra note 3636, at xvii. See generally LIZABETH COHEN, MAKING A NEW DEAL: INDUSTRIAL WORKERS IN CHICAGO, 1919–1939 323–33 (1990) (chronicling the impact of the labor movement on popular American culture in the 1920s through the 1940s).
"labored," that is, the language of work, industrial relations, and class struggle was incorporated into the cultural lexicon. If we read this relationship between the legal and the cultural into the shift from the union as conspiracy to the union as enabler of freedom, we are left with a picture of a nascent, alternative, and holistic movement to construct a new dominant social consciousness—an effort to reshape hegemonic institutions in order to legitimize a potentially oppositional set of values and ideals.

Whether embodied in John Steinbeck's explicit call for labor organizing and class solidarity in *The Grapes of Wrath*, or the descriptions of working people's struggles in the pages of now-forgotten proletarian novels and magazines, or the less explicitly political or pro-union works of mainstream authors of this time period, the relationship between collective action and the state during the Depression era was reframed. Time and again in the mass cultural works of the 1930s and 1940s, we see unambiguously positive representations of working class Americans acting in concert to help their communities or to achieve positive goals.

211 *See Denning, supra* note 36, at xvi–xvii.
212 *See id.*
213 *Cf. Atleson, supra* note 49, at 177 (arguing that one of the effects of the NLRA was to weaken "employer hegemony"); *Antonio Gramsci, Selections from the Prison Notebooks of Antonio Gramsci* 285–86 (Quintin Hoare & Geoffrey Nowell Smith eds. & trans., 1971) (discussing the managerial exercise of hegemony in the industrial context and the means of subduing worker dissatisfaction with the dominant sociopolitical order).
214 *John Steinbeck, The Grapes of Wrath* (Penguin Books 1992) (1939). In Steinbeck's work, the spiritual, consciousness-forming ideology of the church or of the formal political is supplanted by a collectivist understanding of humanity and a concern for the strength and well being of the group. *See generally* Jim Sanderson, *American Romanticism in John Ford's The Grapes of Wrath: Horizontalness, Darkness, Christ, and F.D.R.*, 17 LITERATURE/FILM Q. 231, 231 (1989). Both Jim Casy, the former preacher, and Tom Joad, the novel's protagonist take on the roles of labor organizers, proselytizers to the displaced, working class Americans. *See Steinbeck, supra* note 214. Tom's final monologue delivered to his mother, in which he promises to be present in every place of injustice or economic inequality suggests a totalizing view of the union as a necessary means of leveling the societal playing field. *See id.* at 570–73. As embodied in Tom, it is the very voice of the collective, the means of giving strength and substance to the promise of America. *See id.*
215 *See generally Denning, supra* note 36, at 211–29 (discussing the history of various proletarian novels and magazines during the early 1930s).
216 *See, e.g., Herbert Croly, Progressive Democracy 130* (1915) ("Whatever the purpose of the Union, the major consequence of its gradual triumph were beneficial to the interests of democracy in America.").
217 *See, e.g., Lifeboat* (Twentieth Century-Fox Film Corp. 1944) (telling the story of a group of shipwrecked Americans of assorted classes and backgrounds who unite to survive and kill an enemy soldier); *It's A Wonderful Life* (Liberty Films 1946). The nation's entry into the Second World War also provided a powerful incentive for positive portrayals of collective action and shared sacrifice. Indeed, a central theme of many of the films and advertisements that defined America's home front culture was average, working class Americans joining together for the shared benefit of the nation. *See generally John Bodnar,*
The ideals of freedom, justice, and equality are no longer embodied exclusively in the loner—the self-sufficient individual who must strive to succeed unaided in the face of hostile forces—but rather in the group, the collective, or the community. The Act’s language about “mutual aid or protection” mirrors Tom Joad’s declaration of solidarity with the oppressed in *The Grapes of Wrath* and George Bailey’s insistence that townspeople working together could promote decent lifestyles and stave off economic exploitation in *It’s A Wonderful Life*. And instead of the American Dream being portrayed as rooted in the independent accomplishments of individuals, the new American Dream seemed to be one of shared success.

It is not just that these cultural treatments of unions, collective action, and shared struggle evince a pro-labor bias; they also suggest a normalization of the union, a legitimation of the institution itself not just as a normatively desirable force but as an acceptable part of a broader American society. Indeed, in his veto of the explicitly anti-union Taft-Hartley Act, President Truman sweepingly declared that organized labor was essential to the

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219 See BODNAR, supra note 217, at 109–10.

220 See STEINBECK, supra note 214, at 572 (“Then I'll be all aroun' in the dark. I'll be ever'where—wherever you look. Wherever they's a fight so hungry people can eat, I'll be there. Wherever they's a cop beatin' up a guy, I'll be there. . . . I'll be in the way guys yell when they're mad an’—I'll be in the way kids laugh when they're hungry an’ they know supper's ready. An' when our folks eat the stuff they raise an’ live in the houses they build—why, I'll be there.”).

221 See IT’S A WONDERFUL LIFE, supra note 217.

222 See DOYLE GREENE, THE AMERICAN WORKER ON FILM: A CRITICAL HISTORY, 1909–1999 67 (2010); see, e.g., STEINBECK, supra note 214, at 572–73; THE CRADLE WILL ROCK (Federal Theatre Project 1937); IT’S A WONDERFUL LIFE, supra note 217 (focusing on the importance of friendship and community, rather than material possessions or wealth, as the accurate markers of success and happiness). See generally BODNAR, supra note 217, at 106–10, 118–19 (referencing various films during the 1940s and 1950s that depict the idea of self-sacrifice and cooperation for the benefit of the community and nation as a whole).

223 See supra Part IV.B; DENNING, supra note 36, at xvii.
American economic and political systems.  

"[C]onclud[ing] that the bill is a clear threat to the successful working of our democratic society," Truman stated that:

One of the major lessons of recent world history is that free and vital trade unions are a strong bulwark against the growth of totalitarian movements. We must, therefore, be everlastingly alert that in striking at union abuses we do not destroy the contribution which unions make to our democratic strength. 

While the introduction and ultimate success of the Taft-Hartley Act does demonstrate that just a decade after the Wagner Act's passage anti-union sentiment was once again on the rise, Truman's statement is striking in its characterization of the trade union as integral to the United States. Instead of the union as an entity dominated by the social outsider or the other—the immigrant, the malcontent, or the radical—the union was an expression of American values by Americans. 

The new perception of the union as American is in many ways at the heart of Denning's analysis of the "laboring" of culture in this period and is central to what I mean when I suggest that this

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225 Id.
226 See HARRY A. MILLIS & EMILY CLARK BROWN, FROM THE WAGNER ACT TO TAFT-HARTLEY: A STUDY OF NATIONAL LABOR POLICY AND LABOR RELATIONS 363 (1950); H.R. 3020.
228 Cf. Samson, supra note 93, at 437–39 (arguing that Americans unconsciously embrace socialism). Writing in 1935, Leon Samson argues against the Marxian critique that Americans are inherently hostile to class-consciousness and incapable of joining together and embracing collective solutions to economic problems. See id. Samson suggests that it is in part because they already accept socialistic or syndicalistic values that Americans are not more interested in Marxism. Id. at 438. He further claims that because of these cultural values, labor organizing and class-consciousness are really in keeping with Americanism. See id. at 439; see also DENNING, supra note 36, at 430 (exploring the "socialist revolution" that was occurring in the 1930s).
229 These sorts of views were similarly echoed by industrial pluralists schooled in Depression-era policy-making. See generally Reuel E. Schiller, From Group Rights to Individual Liberties: Post-War Labor Law, Liberalism, and the Waning of Union Strength, 20 BERKELEY J. EMP. & LAB. L. 1, 5–7 (1999) (examining pluralism and the labor relations of union workers, their rights, and the effect of judicial decision making in labor law). Viewed through this lens, trade unions were essential to democratizing the workplace and therefore essential to fulfilling individual freedom. See id. at 6. William Leiserson argued, "[t]hat labor unionism in the United States is an expression of the American democratic spirit working itself out in industry [and] is hardly to be doubted." WILLIAM M. LEISERSON, AMERICAN TRADE UNION DEMOCRACY 53 (1959).
230 See supra text accompanying notes 217–19; DENNING, supra note 36, at xvi–xvii, 462;
broader wave of discourse taken in conjunction with the NLRA and subsequent judicial decision-making served to legitimate the union.\(^{230}\) Raymond Geuss argues that "members of the society take a basic social institution to be 'legitimate' [when] they take it to 'follow' from a system of norms they all accept."\(^{231}\) It does not seem far-fetched, then, to look to Truman's statements about the role of unions in American society as a powerful statement of legitimation; not only was organized labor being invoked in the context of shared political and social values (and perhaps more importantly as standing in opposition to shared enemies or an inimical ethos—totalitarianism, fascism, communism),\(^{232}\) it was being invoked as such by the president. That the president of the United States—the official spokesman of the state's dominant political and social ideologies\(^{233}\)—would make such sweeping declarations about the desirability of organized labor given the nation's history of hostility toward trade unions demonstrates an extreme form of legitimation and suggests that a broad legitimating process had taken place over the course of the previous decade.

Merging the concept of American culture's laboring with this concept of the legitimate, therefore, we can view the legitimation of the union in the Great Depression/New Deal era as the result of a hybridized legal and cultural consciousness, a merger or at least a confluence of legal discourse and a broader sociopolitical understanding. The Wagner Act's reappraisal of the social relationship between the individual and the collective can be seen to jibe with the cotemporaneous legal realist assault on the public/private distinction.\(^{234}\) In a cultural climate where individuals were viewed as independent actors who formed preferences and made decisions without reliance on others or on other background

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\(^{230}\) See supra Part IV.A.

\(^{231}\) GEUSS, supra note 3537, at 59.

\(^{232}\) Truman actually specifically addresses the possibility that the Act and similar anti-union animus stemmed from a concern about undue communist influence in organized labor. See HARRY S. TRUMAN, LABOR-MANAGEMENT RELATIONS ACT VETO MESSAGE, H.R. 3020, 80th Cong. (1947), reprinted in 1947 U.S. Code Cong. Serv. 1851, 1853. While he expresses his shared hostility to communism and his approval of such a goal, Truman goes on to argue that the Act, by making it harder for unions to act legitimately under the supervision of the NLRB, would serve to cause disorder, pushing union activity into liminal spaces and increasing the possibility of communist intervention going unaddressed. See id.


\(^{234}\) See, e.g., Hale, supra note 147, at 470, 481–82, 493; Cohen, supra note 147, at 8, 12.
rules, it would be hard not to conceive of contracts between individuals and employers as private. If, however, the collective becomes the paradigmatic way of understanding social functioning, and if individual actions and decisions are seen as embedded in a web of interpersonal relationships and institutional preconditions, then the employment contract necessarily is also embedded in these broader frameworks and by extension implicates the public interest.

All this is not meant to suggest a causal, correlative link between mass cultural representations of the collective and the legal advancement of pro-union ideals—that somehow reading novels with collectivist themes led Senator Robert Wagner to introduce the NLRA or that exposure to judicial opinions led Frank Capra to craft paeans to the power of working class cooperation. Such causal links may be present at certain points in this narrative, but the aim of this project is not to highlight these or identify them; rather, my aim in highlighting the relationship between legal treatments of the union and cultural understandings of the union in the three broadly-drawn historical moments examined in this article is to emphasize the symbiotic, uncertain, and rhetorically powerful relationship between the law and non-legal culture in shaping

235 Cf. Hale, supra note 147, at 472 (comparing motivations for owning property with motivations for working for an owner, suggesting that both are induced by one’s wish to avoid the other).

236 Cf. KARL POLANYI, THE GREAT TRANSFORMATION 60 (Beacon Press 1964) (1957) (discussing the way in which social and economic relationships are mutually embedded); J. S. FURNIVALL, PROGRESS AND WELFARE IN SOUTHEAST ASIA: A COMPARISON OF COLONIAL POLICY AND PRACTICE 44–45 (1941) (examining the link between the economic and the social).

237 I have chosen to frame the elevation of collective rights and values over concerns for the individual in the context of explicitly left-leaning or radical redistributionist policies. That is, the narrative that I attempt to weave is one in which the idea of the collective and collective rights evoked is one of class solidarity for the purpose of class betterment in the face of economic struggle. In doing so, I hope to emphasize the radical potential of the Wagner Act and invoke the critiques made by Klare and others who have focused on the expansive potential of the Wagner Act. See, e.g., Klare, supra note 49, at 265–66; ATLESON, supra note 49, at 176–77; Stone, supra note 49, at 1515.

It is worth noting, however, that this is certainly not the only narrative in which to situate the Wagner Act and is certainly not the only way to historicize labor relations in the twentieth century. The Wagner Act and indeed support for legally governed, socially-acceptable unions can be seen as an inherently conservative move—a means of staving off communism, class struggle, or more direct or violent forms of sociopolitical action by American workers. See generally Schiller, supra note 228, at 11–13 (stating that American culture and politics became distinguished from European culture and politics via interest groups which acted to prevent totalitarian ideologies); HARRY S. TRUMAN, LABOR-MANAGEMENT RELATIONS ACT VETO MESSAGE, H.R. 3020, 80th Cong. (1947), reprinted in 1947 U.S.C. Cong. Serv. 1851, 1853 (1947) (advocating the importance of union security within the industrial sector of the U.S. workforce).
opinion and collective consciousness. There are occasions when legal discourse clearly escapes the courtroom and invades the cultural imagination.\textsuperscript{238} just as there are times when the unofficial voices of cultural realms clearly intrude on the formal spaces of the law.\textsuperscript{239} By de-emphasizing the causal component and de-stressing the importance of which tropes emerged first in which space, I mean to blur the distinction between the official labor law and the broader social context, between the legal and the sociopolitical, and between the sources that we take to establish legal meaning and those that we take to establish cultural meaning.\textsuperscript{240}

Before suggesting a complete lack of exceptionality in the law, however, it is important to recognize that the legal meaning of the NLRA is in some significant way unique and should not be equated completely with cultural meaning. As the vehicle of state authority, the law’s “institutional mechanism ‘legitimates,’ in the sense of exercising normative force on the citizenry.”\textsuperscript{241} The effects of legal decisions and background rules on a given organizing campaign or collective bargaining negotiation are therefore concrete and discernible in a way that the cultural impact of a novel, a film, or an editorial might not be.\textsuperscript{242} As scholars bemoan the NLRA as an “ossified” document,\textsuperscript{243} an increasingly dead letter, however, it becomes all the more important to examine the ways in which the union should or would be understood absent the Act and the ways in which the law interacts with the culture in shaping the societal understanding of the union, its role, and its desirability, to

\textsuperscript{238} See generally supra note 203 and accompanying text (describing the importance of cultural context within the legal interpretive process).

\textsuperscript{239} The citation to newspapers and other non-legal sources by attorneys in Supreme Court briefs and by the Court itself in its opinions is an example of the blurring of clear lines between formal and informal, official and unofficial. Judges' willingness to view as compelling documents such as newspaper articles that lack even the formal weight of legal journals suggests a recognition that the law and legal sources (e.g., statutes or legislative history) are not completely distinct from their cultural surroundings. Cf. United States v. Murphy, 406 F.3d 857, 859 n.1 (7th Cir. 2005) (“We think the court reporter, unfamiliar with rap music (perhaps thankfully so), misunderstood Hayden’s response. We have taken the liberty of changing ‘hoe’ to ‘ho,’ a staple of rap music vernacular as, for example, when Ludacris raps ‘You doin’ ho activities with ho tendencies.’”). See generally John J. Hasko, Persuasion in the Court: Nonlegal Materials in U.S. Supreme Court Opinions, 94 LAW LIBR. J. 427 (2002) (examining U.S. Supreme Court opinion over a ten-year period to illustrate the reliance by courts on non-legal resources to support their opinions).

\textsuperscript{240} See supra text accompanying notes 171–79.

\textsuperscript{241} Kennedy, supra note 131, at 347.


\textsuperscript{243} See Estlund, supra note 182, at 1609.
appreciate the ways in which the labor law as a formal vehicle of legitimation derives its strength from shared cultural values about work and workers, and in turn helps reinforce or discourage certain conceptions of the employment relationship.

With this challenging and at times tenuous relationship serving to provide a set of background questions about the way legitimacy and social meaning are mapped, the next part will address the conception of the union in our third, broader, historical moment. Having identified the nineteenth (and pre-nineteenth) century treatment of the union as inherently other, oppositional, and criminal, and the New Deal era treatment of the union as a unit integrated into the formal American economic system, the next part will extend this mapping of the contextualized union to the present. This part will turn to RICO and the tension between formal recognition of unions and labor rights and the more expansive political and cultural trends that have reshaped our understanding of the union as a social, legal, and economic entity.

V. DISORGANIZING LABOR: RICO'S RISE, THE CRISIS IN CONTEMPORARY LABOR LAW, AND THE STRUGGLE TO DEFINE THE SOCIOLEGAL STATUS OF THE MODERN UNION

Despite the dramatic improvements in the treatment of unions discussed in Part IV, now, well over half a century after the passage of the Wagner Act, the tenor of labor relations in the United States has changed dramatically. After periods of successful organizing and unionization efforts, the percentage of unionized workers has shrunk. Increases in the number of undocumented workers and those engaged in nontraditional employment relationships have led to a decrease in the number of workers who have access to the protections or the remedies of the Act. Further, entry into so-called “free trade agreements” and global markets that have

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244 See Posner, supra note 162, at 994.
245 See News Release, Bureau of Labor Statistics, U.S. Dep’t of Labor, Union Members—2009 (Jan. 22, 2010), www.bls.gov/news.release/archives/union2_01222010.pdf (“In 2009, the union membership rate—the percent of wage and salary workers who were members of a union—was 12.3 percent, essentially unchanged from 12.4 percent a year earlier . . . . The number of wage and salary workers belonging to unions declined by 771,000 . . . . In 1983, the first year for which comparable union data are available, the union membership rate was 20.1 percent, and there were 17.7 million union workers.”).
prioritized free movement of capital\textsuperscript{247} has complicated the potential for a closed regulatory system\textsuperscript{248} and has allowed for the sort of international race to the bottom that proponents of federal preemption had initially feared in a domestic context.\textsuperscript{249} Confronted by these impediments as well as by decades of constraining judicial opinions\textsuperscript{250} and legislative inaction,\textsuperscript{251} the once radically cutting-edge Wagner Act is widely considered by scholars to have failed in its initial goals,\textsuperscript{252} leading to a diverse array of proposals and attempts to reform and re-imagine governance of the unionization and collective bargaining processes.\textsuperscript{253}

This uncertain moment in labor law has been made even shakier by the peculiar, unsettled, and unsettling phenomenon of the anti-union civil RICO suit. This part will first look briefly to the doctrinal evolution (or perhaps devolution) of labor law in the decades following the Wagner Act's passage, paying particular attention to legislative activity. It will then address the RICO


\textsuperscript{248} See \textit{generally} Raphael Kaplinsky, \textit{Globalization, Poverty and Inequality} 163–232 (2005) (explaining that the global spread of production in conjunction with the increasing “concentration of global buying power” has led to a tension resulting in declining wages).


\textsuperscript{250} See supra Kaplinsky, supra note 49, at 272–73 (outlining mid-twentieth-century progressivism).


\textsuperscript{252} See \textit{generally} Sachs, supra note 92, at 2685–86 (outlining the reasons why scholars believe that the Wagner Act has failed).

claims themselves, situating them briefly in the broader framework of RICO litigation, before examining them and arguing that the deficiencies in the complaints mirror the nineteenth century treatment of worker's combinations as inherently criminal. Finally, as in the previous part, I will historicize the legal treatment and conception of the union these complaints suggest by looking to the broader cultural context of these claims and of the decline of unionization as a way to understand their broader social significance. I will explore what appears to be a de-laboring of American culture—a trend away from the cultural front's positive portrayals of worker organizing and towards a mass cultural understanding of the union as self-interested and hostile to a dominant system and group of economic and political actors who are perceived to embody American progress and American values. I will argue that a de-labored society need not be inevitable and that the contemporary moment is one ripe for re-examination and reappraisal of labor law, labor culture, and the way that society and legal institutions conceive of collective action.

A. Labor’s Legislative Losses: Setting the Doctrinal Framework for Modern Labor Law

In beginning this section, it is important to recognize that it would be a mistake to suggest that the recent spate of RICO complaints represents some unique or unprecedented assault on organized labor. Indeed, the very point of this article is to argue that we should view these suits as embedded in an ongoing history of labor strife, a history that cycles between moments of relative strength for workers and moments of relative strength for employers. By failing to recognize the repeated shifts in the balance of bargaining and political power over time we would risk embracing a totalizing or over-simplified reading of labor, legal, and cultural history that would teach little and would suggest a certain and definite historical arc, providing little room for normative adjustment or adaptation.

In moving to our third historical moment, then, there is not some specific point—one election, or piece of legislation, or judicial


decision—that we should identify as marking a distinct departure from the positive treatment of unions discussed in Part IV. Rather, the doctrinal landscape of labor law has shifted gradually (and not entirely coherently) since 1935. This section does not purport to provide a comprehensive history of the weakening of the Wagner Act or to chronicle in detail the way that the existing order in labor law came into being. Instead, it aims to give a general sense of the contours in the legal movement away from a potentially radical endorsement of workers' collective action. That is, even outside of the specific context of RICO law’s evolution and even without providing anything close to an exhaustive overview of the full doctrinal framework of the modern NLRA-based labor law, it is necessary to establish the treatment of unions and labor organizing during the middle part of the twentieth century as a means of situating and historicizing the RICO suits as a new phenomenon.

In the decades immediately following the Wagner Act's passage, legislative action pared down the radical scope of the law and took aggressive steps toward preventing the kind of expansive reading of "mutual aid or protection" that might have initially seemed natural in light of the solidaristic rhetoric of the 1930s. Passed in 1947, the Taft-Hartley Act operated as a clear check on the pro-unionization potential of the Wagner Act. Where the Wagner Act had been largely vague and expansive (e.g., failing to provide a concrete or easily applicable definition of "employee"; not giving a clear list of

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257 Such critical doctrinal histories of the Wagner Act’s failure and of the shift away from broad legal protections of unions abound. See, e.g., ATLESON, supra note 49, at 44–66 (describing the history of the narrowing of federal protection of workers’ rights); Klare, supra note 49, at 321; Weiler, supra note 182, at 1787–95 (reviewing current labor law deficiencies); Schiller, supra note 228, at 48 (“By the end of the 1940s, the same conception of pluralism that justified giving unions expanded rights and power . . . was invoked to regulate the use of those rights and powers.”).


259 See, e.g., Posner, supra note 162, at 992; Ann Fagan Ginger & David Christiano, Big Business and Government Unleash Taft-Hartley: The NAM Writes a Bill, in 1 THE COLD WAR AGAINST LABOR 243–45 (Ann Fagan Ginger & David Christiano eds., 1987) (discussing the fundamental changes to the Wagner Act that the Taft-Hartley Act would impose); HARRY S. TRUMAN, LABOR-MANAGEMENT RELATIONS ACT VETO MESSAGE, H.R. 3020, 80th Cong. (1947), reprinted in 1947 U.S.C. Cong. Serv. 1851, 1852 (1947) (“Much has been made of the claim that the bill is intended simply to equalize the positions of labor and management . . . . Many of the provisions of the bill standing alone seem innocent but, considered in relation to each other, reveal a consistent pattern of inequality.”); see also Schiller, supra note 228, at 42–43 (noting that the Taft-Hartely Act was passed to prevent unions from endorsing political candidates).
what sorts of collective activities would or would not be allowed under section 7), the Taft-Hartley Act cabined the NLRA's directives and provided definite limits and prohibitions. Union leadership recognized the significance of these changes to the Wagner Act framework, dubbing Taft-Hartley "the slave labor bill" and investing heavily in a lobbying effort to defeat its passage. Similarly, in his veto statement, President Truman concluded that the "bill would go far toward weakening our trade union movement." Nevertheless, with bipartisan support, the Taft-Hartley Act was passed over the presidential veto, substantially altering the landscape of employer/employee relations and bargaining power.

The 1947 amendments outlawed closed shops, protected the rights of workers not to join unions, and affirmatively permitted states to pass "right to work" laws. This latter provision allowing for anti-union state legislation, although not the heart of the bill, is especially noteworthy in view of the legislative framework established in the wake of the Wagner Act. Given that sixteen states passed such legislation during 1946 and 1947, the Taft-Hartley Act stands as a counter-legitimation measure to the Wagner Act—legitimating not union membership, but hostility to organizing. Through section 158(b)(4), the Act also established

264 See Brinker, supra note 260, at 148.
266 Id. § 157.
267 See id. § 164(b).
268 See id.
269 Schiller, supra note 228, at 59.
270 While a discussion of so-called "right-to-work" laws is largely outside of the scope of this article, it is worth taking a moment to note the rhetorical framing of such legislation when taken in conjunction with the broad trends in treatment of the employment relationship sketched out in Part II. By situating laws that elevate workers' rights to enter into individual employment contracts over the sorts of collective organizing rights created by the NLRA as reliant upon a right to work, such laws effectively invoke the Lochner era or classical legal thought conception of freedom of contract. See supra note 80 and accompanying text. In recognizing states' prerogatives to enact such laws (albeit without granting them protection from potential preemption claims), the Taft-Hartley Act serves as a powerful check on the official repudiation of classical legal thought and appears to strongly challenge the
that unions could commit unfair labor practices worthy of National Labor Relations Board ("NLRB") sanction and explicitly banned secondary boycotts,271 severely limiting the "mutual aid or protection" language of the Wagner Act to prevent situations in which workers in one union might use their political and economic strength to support workers in another union or another industry.272

In a certain sense, the amendments to regulate union behavior can understandably be seen as a positive check on the potential for union abuses. However, this move to expose unions to liability and to treat unions more analogously to employers also chipped away at the legal realist framework of the Wagner Act and similar New Deal era regulations273 of the employment relationship. That is, using the sort of realist or Coasian understanding of adjudication or rulemaking, the law must favor one party in any given dispute,274 and thus by harming unions, the legislation can be seen as a subsidy to employers.275 Granted, such a move to corral union activity might have provided benefits for some workers,276 but, without sufficient checks on employers or sufficient alterations to background legal rules,277 it also strengthened the standing of employers against unions.278 In other words, the NLRA was enacted to strengthen the power of workers via unions because of a systemic inequality of bargaining power between workers and employer;279 by resituating the conflict as one between workers and unions, the Taft-Hartley Act's framers and supporters were in many ways re-imagining a pre-realistic world in which employer coercion was not a concern. The Taft-Hartley Act, or at least the ideology

incorporation of legal realist ideals into doctrinal labor and employment law.

272 See id. § 158 (b)(7).
275 See id.
276 Cf. Int'l Ladies Garment Workers Union v. NLRB, 366 U.S. 731, 738 (1961) ("It was the intent of Congress to impose upon unions the same restrictions which the Wagner Act imposed on employers with respect to violations of employee rights.").
277 That is, if one of the prevailing reasons for collective bargaining, employment regulations, and checks on the at-will employment relationship was the realist concern with background conditions that prevented contracting from being free then reverting to an individual private rights framework without first addressing the background conditions fails to address the critique that the individual was not really free and that any rights were inherently at least quasi-public. See supra note 148 and accompanying text.
278 See supra Part II.
279 See supra note 146 and accompanying text.
that it pushed, forces the conceptualization of the labor/employment
relationship further towards a pre-Wagner Act moment where the
primary concern was ensuring that individual preferences were
being represented by unions rather than that employers might be
asserting too much control over their workers.\textsuperscript{280}

The Wagner Act may have been designed to promote and allow
workers to aggregate their strength,\textsuperscript{281} but the attitude embodied by
the language of the Taft-Hartley Act and its supporters was one of
marked concern about \textit{too much} aggregated strength.\textsuperscript{282} Indeed,
even as union power and the cultural legitimacy of organized labor
were on the rise during the Second World War, industry and other
forces opposed to unionization continued to emphasize the potential
for unions to exist as self-interested, anti-democratic entities.\textsuperscript{283} As
the Supreme Court explained, a decade after the passage of the
Taft-Hartley Act, in \textit{United States v. International Union United
Automobile} that unions possess the same democracy-distorting
potential as corporations:

The need for unprecedented economic mobilization
propelled by World War II enormously stimulated the power
of organized labor and soon aroused consciousness of its
power outside its ranks. Wartime strikes gave rise to fears
of the new concentration of power represented by the gains of
trade unionism. And so the belief grew that, just as the
great corporations had made huge political contributions to
influence governmental action or inaction, whether
consciously or unconsciously, the powerful unions were
pursuing a similar course, and with the same untoward
consequences for the democratic process. Thus, in 1943,
when Congress passed the Smith-Connally Act to secure
defense production against work stoppages, contained
therein was a provision extending to labor organizations, for
the duration of the war, [section] 313 of the Corrupt
Practices Act.\textsuperscript{284}

\textsuperscript{280} \textit{See supra} Part II.

\textsuperscript{281} \textit{See supra} Part III.

\textsuperscript{282} \textit{See, e.g.}, Gerald Friedman, \textit{Labor Unions in the United States}, ECONOMIC HISTORY
SERVICES (Feb. 1, 2010), http://eh.net/encyclopedia/article/friedman.unions.us (stating that
unions went into prolonged decline in the immediate aftermath of World War II. This period
was marked by a Republican-dominated Congress that passed legislation granting employers
and state officials significant new weapons against strikers and unions).

\textsuperscript{283} \textit{See generally id.} (providing a historical discussion on the labor movement shift in the
aftermath of World War II).

\textsuperscript{284} \textit{United States v. Int'l Union United Auto.}, 352 U.S. 567, 578 (1957).
Viewed through such a lens, the union increasingly becomes acceptable only in some basic form as a collective bargaining unit, not as the solidaristic vehicle for collective social, political, and economic concerns that had been embraced in the rhetoric and discourse of the cultural front.285

Like the Taft-Hartley Act, the Labor-Management Reporting and Disclosure Act of 1959 ("LMRDA"), also known as the Landrum-Griffin Act,286 served to amend the NLRA and to reformulate the basic terms of and values underlying the federal regulation of labor/management relations.287 The new labor reform legislation strengthened the ban on secondary boycotts, with supporters of the law decrying the use of expansive economic weapons as tantamount to "blackmail."288 Embodying this increasing return to the concern for individuals over collective rights, the Act created a "Bill of Rights" for union members.289 The Act also imposed restrictions on union spending, created fiduciary duties for union leadership, and established regulations on the manner in which unions and their leaders could be elected.290

This regulation of the internal functioning of the labor organization represented concern about overly powerful unions and the fear that union strength was often deeply enmeshed in a pattern of corrupt or unsavory dealings.291 Perhaps even more than the 1947 Act or the similarly union-impeding Smith-Connally Act,292 the LMRDA was explicitly geared towards remedying corrupt labor organizations and preventing abuses of union power.293 Indeed, as

285 DENNING, supra note 36, at xvi–xvii.
292 See Robert De Vore, After Five Years, Howard Smith Scores Victory Over Labor, WASH. POST, June 13, 1943, at 4. See generally Allison R. Hayward, Revisiting the Fable of Reform, 45 HARM. J. ON LEGIS. 421, 458 (2008) (summarizing republican argument that the Taft-Hartley Act was a measure to close existing loopholes, rather than an opportunity to restrict unions).
293 See, e.g., Joseph A. Loftus, Crux of Labor Bills: Pickets and Boycotts, N.Y. TIMES, Aug. 9, 1959, at E7 (describing the introduction of the Act as the culmination of a "legislative
much as Part III argued that the moment of union legitimization grew out of the Great Depression and moved into the 1940s, it is important to recognize how powerful the narrative of unions as corrupt and quasi-criminal was and how quickly it re-emerged even as organized labor was in many ways experiencing its greatest upswing in social and political capital.  

The much-publicized legislative debate over the LMRDA provides a clear window into the resiliency and resonance of the trope of union as (or at least as a breeding ground for) a criminal conspiracy. In a nationally televised statement in support of the bill, President Eisenhower reminded viewers “that only a relatively small minority of individuals among unions... [are] involved in corrupt activities.” However, this minor caveat paled in comparison to a broader assessment of labor unions as mired in criminality. Interestingly, Eisenhower emphasized that the criminality of union leadership was a “not a partisan matter,” and was unrelated to the acceptable realm of union activity—the collective bargaining process. He argued that,

“The legislation we need has nothing to do with wages—or strikes—or problems we normally face when employers and employes [sic] disagree. Nor am I talking of any... new labor-management philosophy. I am talking about a reform law—a law to protect the American people from the gangsters, racketeers, and other corrupt elements who have invaded the labor-management field.”

The image of the union that is presented to the public is once again not a collection of workers, an extension of the American working public, uniting for mutual benefit, but rather a collection of seedy, self-interested criminals, distinct from and with interests inconsistent with those of “[t]he American people.”

Even if the LMRDA and the rhetoric of its supporters did speak in

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struggle’ to eliminate unions from obtaining too much power); President Sees Abuses as ‘National Disgrace,’ BOSTON GLOBE, Aug. 7, 1959, at 1 (“He [Eisenhower] ticked off abuses uncovered by the Senate Rackets Committee and declared after mentioning each: ‘I want that sort of thing stopped. So does America.’”).

294 See supra Part III.
295 See, e.g., supra notes 109, 112, 114.

297 See id.
298 Id.
299 Id.
300 Id. (quoting President Eisenhower).
301 Id.
terms of bad actors instead of the labor movement as a whole, by targeting secondary boycotts or other more explicitly political behavior, the Act took a powerful normative stance against a certain kind of concerted activity or union—not necessarily one that was corrupt but rather one that was broadly adversarial or confrontational. Eisenhower's description and the rhetorical framing of the Act demonstrates a clear aversion to the political or oppositional model of concerted activity, suggesting that this model elevates the interests of the union (however we choose to define it) ahead of the interests of America (however we choose to define it). While I will return to this re-imagining of the union at greater length in the Section C of this part, it is important to recognize going forward that the conception of organized labor that informs the post-Wagner Act legislative labor law framework is one that has more in common with the nineteenth century view of the union as a hotbed of corruption, extortion, and criminality than with the Depression era perception of the union as a forum for a collective struggle.

Since the passage of the LMRDA, the history of labor law reform has been equally gloomy for organized labor. Despite repeated attempts to revitalize the NLRA, union leaders, activists, and lobbyists have largely failed to enact any sort of sweeping legislative changes to the general doctrinal frameworks of organizing, elections, and collective bargaining. The Employee Free Choice Act and the Labor Law Reform Act of 1977 both languished in Congress, unable to generate sufficient political support and to overcome anti-union sentiment. These legislative defeats for organized labor are only a few instances where the law reflected changes in the political and cultural landscape of labor management following the Wagner Act. They hardly begin to tell a complete

302 See generally William R. Corbett, Waiting for the Labor Law of the Twenty-First Century: Everything Old is New Again, 23 BERKELEY J. EMP. & LAB. L. 259, 272 n.68 (2002) (discussing the failure of the Labor Reform Act of 1977, which would have amended the NLRA to provide more effective remedies and the failure of the Teamwork for Employees and Managers Act, which would have amended the NLRA to give employers greater flexibility in establishing labor-management committees).


305 See H.R. 1409; H.R. REP. No. 95-637.
story of the law’s evolution over the course of the past seventy odd years. My intention is that they serve as signposts—markers of a powerful pushback to the Wagner Act conception of the union and a way to analogize contemporary treatment of unions to a pre-NLRA moment.

Other deradicalization narratives have often focused on judicial decisions more than these legislative developments, but I think for this project it is useful to emphasize the statutory framework as a means of more clearly appreciating the formal statements of union legitimation, union delegitimation, and the public discourse and the cultural narratives that surround these legislative developments. Moreover, in their interpretations of the Wagner Act and of federal labor policy generally, courts have frequently turned to these legislative battles to buttress their opinions. Even after the Taft-Hartley Act and the LMRDA, the NLRA remains a vague and broadly written statute, and as a result courts tend to rely on supplementary documents such as legislative history to interpret it, particularly focusing on the amendments’ shift in ideological focus as a way of supporting new judicial narrowing of rights. In other words, “judicial de-radicalization” in many ways is in turn reliant upon the rhetoric of legislative deradicalization. Therefore, in the following discussion of RICO’s place in this broader framework of labor/management relations, it is important to consider the legislative reformulations and reconceptualization of organized labor as background conditions or rhetorical frames through which to view and assess the significance of the anti-union RICO suit.

306 See discussion infra Part V.C (discussing how contemporary organized labor has evolved to be linked to organized crime, has included low-wage immigrant workers in organizing efforts, and has received negative media attention).

307 See, e.g., Klare, supra note 49, at 268–70 (“I will focus only on what was contributed to the deradicalization and incorporation of the working class . . . as revealed in the Supreme Court’s early Wagner Act decisions.”); Kennedy, supra note 131, at 348–51 (discussing the importance of the judicial role in interpreting broad statutes which govern employment and other important areas that ultimately leads to changes in the system).

308 See, e.g., Electromation, Inc., 309 N.L.R.B. 990, 1011–12 (1992) (Raudabaugh, Arb.) (stating that the Taft-Hartley Act shifted the legal conception of the union from an adversarial to a cooperationist model); Marriott In-Flite Servs. v. Local 504, 557 F.2d 295, 297–98 (2d Cir. 1977) (discussing the LMRDA’s impact on secondary boycotts).

309 See Marriott In-Flite Servs., 557 F.2d at 297–98 (holding that the legislative history of the LMRDA established that public sector unions were labor organizations subject to secondary boycott prohibitions).
B. The Anti-Union RICO Suits and Their Place in the Landscape of Modern Labor Law

1. RICO's Criminal Roots

Unlike the statutes discussed in the previous section, RICO was not exclusively or primarily focused on organized labor. Following decades of congressional attempts to confront organized crime, RICO was passed as title IX of the Organized Crime Control Act of 1970 in order to aid "the elimination of the infiltration of organized crime and racketeering into legitimate organizations operating in interstate commerce." More specifically, the Act was a byproduct of the 1967 President's Commission on Law Enforcement and Administration of Justice (the Katzenbach Commission), which outlined the presence, structure, and activities of organized crime in America, described the threats posed by these syndicates, and made preliminary policy proposals. As in the case of the LMRDA, public revelation of broad-ranging official findings of racketeers' influence became a powerful tool in legislative debates. Indeed, the pictures of an increasingly socially and economically dominant underworld helped spawn strong rhetoric about the imminent dangers posed to law-abiding citizens and the necessity of a sweeping and effective legislative response.

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310 See Samuel A. Alito Jr., Racketeering Made Simple(r), in THE RICO RACKET 1 (Gary L. McDowell ed., 1989) [hereinafter RICO RACKET] ("Enactment of RICO in 1970 culminated four decades of congressional efforts to combat organized crime."). This section's discussion of RICO's legislative history and purposes owes a great deal to Judge Gerard Lynch's seminal work on the subject. See Gerard E. Lynch, RICO: The Crime of Being a Criminal, Parts I & II, 87 COLUM. L. REV. 661 (1987) (suggesting that theoretical deficiencies of the original RICO caused repeated legislative expansion of RICO resulting in prosecutors using RICO to account for substantive and procedural gaps in the federal criminal code against any kind of criminal behavior which were identifiable by patterns).


314 See generally Lynch, supra note 310, at 666–73 (discussing the significance of the Katzenbach Commission recommendations in the history of the Organized Crime Control Act of 1970); see also Brudney, supra note 14, at 744–47 (noting that the committee reports accompanying the bills which ultimately became the Organized Crime Control Act contained the essential elements of RICO, and were explicit about including the President's Commission recommendations).


316 See, e.g., id. ("It is . . . the declared policy of the Congress to eradicate the baneful influence of organized crime in the United States."); cf. Barry M. Goldwater, Editorial, Liberals and Their Issues, L.A. TIMES, Sept. 27, 1970, at G–7 (arguing that crime was the
Where the LMRDA was at least ostensibly reactive to only a specific area of racketeering and was a means of combating only certain actors and activities, the Organized Crime Control Act of 1970 generally, and RICO more specifically, were broad reconceptualizations of the way society should deal with conspiracies or non-state sanctioned collective action. As centerpieces of the Nixon administration’s war on organized crime, which was geared at strengthening federal law enforcement and prosecutorial powers, the statutes were expansive and almost unprecedented in scope. To this end, RICO created three new crimes for engaging in racketeering activity or using racketeering in otherwise lawful ventures and created one new crime of conspiring to commit any of the other three offenses.

While this is not an article about criminal RICO prosecutions and while the cases that have given rise to this exploration are all civil, RICO’s criminal roots are nevertheless crucial to our understanding of the contemporary civil suits as related to, or at least analogous to, the nineteenth-century labor conspiracy cases. Indeed, whether criminal or civil in nature, both types of action share a common hostility toward concerted action as a potential space for market and social control by non-state actors. Where the court in Faulkner had stated that “[s]elf-created societies are unknown to the constitution and laws, and will not be permitted to rear their crest and extend their baneful influence over any portion of the most important social problem, yet the Democrats did not take enough action to address it).

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319 Id. at 35.


321 18 U.S.C. section 1962(a) makes it a crime to “use or invest” money derived from statutorily defined “racketeering” behavior to affect interstate commerce. 18 U.S.C. § 1962(a) (2011). Section 1962(b) criminalizes using such money in the maintenance of an interstate enterprise. Id. § 1962(b). Section 1962(c) makes it a crime “to conduct or participate, directly or indirectly, in the conduct of such enterprise’s affairs through a pattern of racketeering activity or collection of unlawful debt.” Id. § 1962(c). Finally, section 1962(d) criminalizes conspiracies to commit acts falling into the previous three categories. Id. § 1962(d).

Because criminal sanctions are not at issue in the anti-union RICO complaints arising out of comprehensive campaigns, this section will not go into detail as to the specifics of the crimes. For a more detailed overview of criminal RICO, however, see Lynch, supra note 310, at 680–85 (discussing the structure of the RICO statute).

322 PRESIDENT’S COMM’N, supra note 313, at 187.
community,"^{323} the Katzenbach Commission stated that "[o]rganized crime is a society that seeks to operate outside the control of the American people and their governments. It involves thousands of criminals, working within structures as complex as those of any large corporation, subject to laws more rigidly enforced than those of legitimate governments."^{324} There is clearly a fundamental concern that collective actors have the capacity to operate outside of the constraints of a democratic society and, in doing so, also have the capacity to subvert the constraints of democratic society.^{325}

It is important to this argument, however, to emphasize that this article is focused not on all civil RICO suits against unions or union leaders, but on a specific set of RICO suits of which Cintas is representative—suits based on a union’s behavior during an organizing campaign,^{326} rather than on allegations of misfeasance by union leaders against their members.^{327} Criminal RICO and civil RICO suits alleging breaches of fiduciary obligations against union officials—which have been frequent and predate the rise of civil complaints based on union organizing campaigns themselves—^{328} are somewhat less interesting and may say less about broader socio-legal attitudes towards organized labor. In other words, in more targeted suits against union officials where the allegation is that union leadership is no longer acting in the interests of its constituents and has instead become captured by alternative illegitimate or profit-seeking motives, we could view the charged concerted action not as a conspiracy against the free market (as in the classical legal thought conception) but rather as a conspiracy

\footnotesize{^323 \text{ People v. Faulkner (N.Y. Ct. Oyer & Terminer 1836), reprinted in 4 A DOCUMENTARY HISTORY OF AMERICAN INDUSTRIAL SOCIETY, supra note 63, at 315, 331.}}

\footnotesize{^324 \text{ PRESIDENT’S COMM’N, supra note 313, at 187 (emphasis added).}}

\footnotesize{^325 \text{ See id. at 188.}}

\footnotesize{^326 \text{ See Cintas Corp. v. UNITE HERE, 355 F. App’x 508, 510 (2d Cir. 2009) (outlining the allegations against the union seeking to organize Cintas’s workers, most of which are rooted in the online dissemination of statements about employer practices by the union).}}

\footnotesize{^327 \text{ See, e.g., United States v. ILA Local 1588, 77 F. App’x 542, 544 (2d Cir. 2003) (discussing federal government’s allegations that labor union violated the consent decree by associating with known organized crime group members); Caci v. Laborers Int’l Union of N. Am., No. 97-CV-0034A, 2000 WL 387599, at *3 (W.D.N.Y. 2000) (alleging defamation by defendant union); Agathos v. Muellenberg, 932 F. Supp. 636, 637–38 (D. N.J. 1996) (alleging that defendant union monitor acted without authority in holding disciplinary hearings). For a list of civil RICO lawsuits filed as of February 2005 see JACOBS, supra note 317, at 143–45.}}

\footnotesize{^328 \text{ See, e.g., ILA Local, 77 F. App’x at 544; Caci, 2000 WL 387599, at *1; Agathos, 932 F. Supp. at 637 (plaintiffs bringing suits alleging misconduct by union leaders); Donovan v. Fitzsimmons, 90 F.R.D. 583, 584 (N.D. Ill. 1981) (concerning misappropriation of funds by trustees of a union pension fund). See generally JACOBS, supra note 317, at 122–32 (outlining the rise of labor union racketeers).}
against the worker.\textsuperscript{329}

2. Civil RICO’s Rise

As uncertain in scope, contested, and much-maligned as criminal RICO has been, the evolution of civil RICO liability (the basis for the latest spate of employer actions against unions’ comprehensive

\textsuperscript{329} I identify this view of RICO as a potentially positive vehicle for vindicating workers’ rights not to endorse it, but rather to suggest that it can be distinguished usefully in the case of charges arising from comprehensive campaigns. James Jacobs, in his recent exhaustive treatment of organized crime’s relationship to the American labor movement has served as a major proponent of this positive view of RICO as compatible with a normative support for unionization. See JACOBS, supra note 317, at 259–62. Even if we were to adopt such a view—that corruption and organized crime’s influence among union leaders required the broad reaching force of RICO as a remedy, or perhaps, as Jacobs suggests, that organized crime is largely responsible for organized labor’s failure—such an argument should not support expansive applications of RICO in the context of comprehensive campaigns. Given the increasing prevalence of RICO as a tool in labor disputes, challenging Jacobs’s argument about RICO as a socially positive force to protect workers and fight socially undesirable actors merits much more space than this footnote and I hope to do so elsewhere. See Benjamin Levin, American Gangsters: RICO, Criminal Syndicates, and Conspiracy Law as Market Control 74–76 (unpublished manuscript) (on file with author) (arguing that replacing non-state-sanctioned actors within labor unions with state-sanctioned actors might lead to state-controlled unions).

While such a counter-argument about the fundamental nature of conspiracy law or about legal attempts to deradicalize unions or other collective actions is beyond the scope of this project, in the context of this article and considering the history of conspiracy law and hostility towards non-state collective action that have underpinned centuries of union-busting, it seems critical to view with at least a certain degree of skepticism a claim that this expansive federal legislation is a desirable vehicle to use in the interests of workers rights. That is, looking back at the legislative and political debates over the Taft-Hartley Act and the LMRDA (not to mention the classical legal thought objections to unionization generally expressed in Vegelahn v. Guntner, 44 N.E. 1077, 1078 (Mass. 1896)), this stated concern for the individual rights of the worker and concern that the union was conspiratorial against such rights was a primary justification for legal rules that—as a normative matter—made unionization substantially more difficult and in many ways eviscerated labor regulations.

Additionally, one of the purported successes of civil RICO in the union context has been the removal of officials with alleged organized crime ties with state-imposed trusteeships. See generally JACOBS, supra note 317, at 138–60 (discussing the process proving labor racketeering and replacing corrupt union officials with RICO trusteeships). Once again, it may be that worker interests in such unions prior to civil RICO suits were actually being disregarded and even harmed at the expense of enriching and empowering organized crime and that union leaders were being democratically elected in name only. However, if we embrace the view that I argue the Wagner Act represents—that unionization or at least independent worker organizing is a positive normative good—then a system that deposes union leadership and replaces it with a state-sanctioned alternative (usually a federal prosecutor) appears highly problematic. \textit{Id.} at 143. That is, such an alternative may prove an effective means of reducing organized crime, but when we consider the fact that more radical, pro-worker union leaders had been deposed decades earlier during the height of McCarthyism because of similar claims that they failed to represent worker interests, there seems to be good reason to think that such a regime might weed out politically disfavored or marginalized union leaders and unionization regimes as well as those that actually did not represent worker interests.
Anti-Union Civil RICO Claim

Section 1964(c) of the Act created a private right of action for "[a]ny person injured in his business or property by reason of a violation of section 1962 . . ." Section 1964(c) created a private right of action for "[a]ny person injured in his business or property by reason of a violation of section 1962 . . ." To succeed in a civil RICO action, a plaintiff must show the "(1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity." In turn, a "pattern of racketeering activity' requires at least two ‘predicate acts’ in a ten-year period." This provision for civil actions and civil damages expanded the statute’s power substantially. As one commentator noted, "[c]ivil RICO offers a unique opportunity to detect and punish illegal acts where it would be difficult or impossible to meet the burden of proof imposed in criminal cases." Another writes that "[a]s troubling as the criminal use of RICO has become, RICO as a rubber hose in the civil context affects more people, and poses an equally substantial threat to civil rights.

Despite its significance and the tremendous number of suits it has spawned, civil RICO lacks an extensive legislative history and is far from the criminal core of RICO discussed above. In arguing against a broad reading of the civil right of action in Sedima, S.P.R.L. v. Imrex Co., the Second Circuit observed that

The legislative history of the Organized Crime Control Act of 1970 gives little hint of the intended scope of private action under civil RICO . . .

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330 See, e.g., Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 481–82 (1985) (rejecting a holding from the Second Circuit that had expressed discomfort with a broad reading of the RICO statute that would provide for more expansive uses in civil litigation); United States v. Turkette, 452 U.S. 576, 590 (1981); Alito, supra note 310, at 3; Judah Best et al., The Racketeer Influenced and Corrupt Organizations Act: Hardly a Civil Statute, in RICO: EXPANDING USES IN CIVIL LITIGATION 3–59 (1984); G. Robert Blakey, The RICO Option: Federal, Criminal and Civil Remedies for the Unlawful Conduct of Enterprises, in RICO: EXPANDING USES IN CIVIL LITIGATION, supra, at 60–75; see Brudney, supra note 14, at 747–74 (discussing the legislative and judicial history of the RICO statute and examining efforts at reform).


332 Sedima, 473 U.S. at 496 (citation omitted); see 18 U.S.C. § 1962(c)–(d) (2011).


334 Best et al., supra note 330, at 59. For this reason, "RICO is potentially the most significant weapon available to . . . plaintiffs. Its scope and the power of its remedies (particularly if state remedies are taken into consideration) are awesome." Id. at 58–59.


... The decision to add a civil private damages provision was made by a House subcommittee at the behest of Representative Sam Steiger and the American Bar Association. The addition was not considered an important one, a remarkable fact which in itself indicates that Congress did not intend the section to have the extraordinary impact claimed for it.338

The intended scope of civil RICO, however, much like the question of whether RICO should be used against organizations other than the Mafia, is not one that this article will take up, as other scholars have addressed the doctrinal framework of civil RICO's evolution extensively.339 Significantly to this article, though, James Brudney has used a detailed reading of the statute’s legislative history and the Supreme Court’s decisions in Scheidler v. National Organization for Women, Inc. (Scheidler II)340 and Wilkie v. Robbins,341 which narrowed the reach of civil RICO, to argue compellingly that anti-union RICO suits arising from comprehensive campaigns are almost intrinsically without merit and are therefore an appropriate target for legislative action or at least strong judicial treatment.342

It would be unnecessary to restate Brudney’s argument and analysis of the claims as a matter of RICO and Hobbs Act doctrine here. And as stated at the outset, this article does not purport to offer a new analytical move for judges to use in dismissing these claims. In order to appreciate the parallel between these suits and the earlier labor conspiracy cases and to craft an argument about what this parallel tells us about contemporary labor law and its socio-cultural significance, this section will offer a brief explanation of the claims themselves. It is not just the nature of RICO and its historical context that make these claims so reminiscent of the pre-Wagner Act moment of anti-labor sentiment; rather, it is the factual

338 Id. at 488–90.
339 See, e.g., Sedima, 473 U.S. at 500–23 (Marshall, J., dissenting) (“[T]he civil RICO provision does far more than just increase the available damages. In fact, it virtually eliminates decades of legislative and judicial development of private civil remedies under the federal securities laws.”); Brudney, supra note 14, at 747–49 (discussing the statute's lack of legislative history); Crovitz, supra note 335, at 26–29 (discussing the broad scope of the civil RICO statute); Jack B. Weinstein, RICO and Federalism, in THE RICO RACKET, supra note 310, at 69, 69–70 (stating that the reach of RICO is much broader than initially anticipated by its enactors).
342 See Brudney, supra note 14, at 794–95.
and legal bases for these claims which represent an attempt to roll back the clock to an earlier understanding of property rights and an earlier moment of an ostensible cultural consensus about the value (or lack thereof) of concerted action in the employment relationship.

Using section 1964(c), the plaintiffs in Cintas, A Terzi Productions, Inc. v. Theatrical Protective Union, and other suits directed at comprehensive or corporate campaigns generally base their claims on an allegation of extortionate conduct (which frequently amounts to a Hobbs Act violation). Courts have held, however, that card check/neutrality agreements—the benefit that unions in these cases are allegedly trying to obtain via extortion—also provide certain benefits to employers. This means that employers face a somewhat higher bar to a successful claim of extortionate behavior because

Where a victim receives something of value in return for capitulating to fear of economic loss, the exchange of property may be the product of lawful “hard-bargaining” or unlawful extortion. The distinction between lawful and unlawful conduct in such a circumstance is drawn by examining whether the victim has a “preexisting right to pursue his business interests free of the fear he is quelling...” When a party does not have the right to pursue its business interests unchecked and receives a benefit, it cannot be the victim of extortion.

The legal arguments employed by the plaintiffs in these suits, then, are reliant on the concept that the employer “has a right to pursue its business free from defendants’ activities.”

In Cintas, the activities that comprised the corporate campaign, which were alleged to have constituted the extortionate behavior,
consisted of creating a website detailing Cintas's labor policies, contacting shareholders and customers, and generally disseminating negative statements about the corporation, and its business and employment practices. While it would strain credulity to argue that such behavior was not meant to extort concessions from the corporation, it is unclear how such behavior—to the extent it did not run afoul of defamation or other tort laws—was anything more than "hard-bargaining." Further, it is unclear what union activity would not amount to unlawful extortion according to this logic. To recognize as legitimate a cause of action based on the sort of extortionate predicate act described in Cintas, a court or a jury would have to accept the argument that an employer is free to engage in business without attempts by workers to use any sort of pressure or economic weapons, thus implicitly rejecting the fundamental basis of the Wagner Act. Cintas's RICO complaints were dismissed. The implicit argument that employers should be able to operate free from union organizing or use of economic weapons was roundly rejected as it had been in other cases.

That the complaint was dismissed and that the court refused to adopt a line of reasoning that is at odds with established labor law and First Amendment doctrine should most definitely be viewed as a victory for the defendant unions and, to a certain extent, for organized labor generally. However, as discussed in the context of failed prosecutions in Part III the disposition of the case does not always tell the whole story, and looking too closely at the result may at times cloud a better understanding of litigation's broader significance.

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347 See Cintas, 601 F. Supp. 2d at 575.
348 Id. at 577 (citing Viacom, 747 F. Supp. at 213).
349 Id. at 577–78.
350 Id. at 578.
351 Id. at 577–78; see Metro. Opera Ass'n, 239 F.3d at 177–78 ("[W]ithin the labor context, in seeking to exert social pressure on [plaintiff], the Union's methods may be harassing, upsetting, or coercive, but unless we are to depart from settled First Amendment principles, they are constitutionally protected."); see also Beverly Hills Foodland, Inc. v. United Food & Commercial Workers Union, Local 655, 39 F.3d 191, 197 (8th Cir. 1994) (reiterating constitutional protections for union boycotts and peaceful pamphleteering during an organizing campaign).
352 See Cintas, 601 F. Supp. 2d at 577–78.
353 Cintas's federal RICO complaint was accompanied by an equivalent state law claim, and even if federal judges uniformly dismissed these federal civil RICO claims, this pattern of litigation could continue in state courts, raising labor preemption advocates' concerns about industry's ability to influence state court decisions through judicial campaign spending. Id. at 581; see supra notes 119, 157 and accompanying text. For a discussion of unions' and
Even without empirical data on the finances of Federal civil RICO suits, it seems safe to assume that unions—and consequently their members—are forced to bear substantial financial costs. As a guide for employers facing comprehensive campaigns in the wake of *Cintas* suggests, "unsuccessful litigation can serve as an effective countermeasure against a union corporate campaign. Defending against complex defamation and extortion lawsuits can be costly, but it can provide publicity of the company’s position regarding the union’s untrue harassing attacks."\(^{354}\) A recent complaint by Sodexo Inc. against the Service Employees International Union ("SEIU"),\(^{355}\) for example, was accompanied by a press release that quoted the corporation’s general counsel claiming that the union’s “campaign jeopardizes our [c]ompany and our employees’ jobs, and ultimately would rob our employees of their right to vote.”\(^{356}\) Additionally, such suits may deter unions—particularly smaller ones with more limited resources—from attempting to organize workers at firms that prove willing to pursue similar claims. As a result, Brudney’s call for legislative or judicial action to curtail the proliferation of these suits should be echoed by those concerned about the further deradicalization of American labor policy.\(^{357}\) But beyond the economic issues, the proliferation of the civil RICO suit has sociopolitical significance and is a way of understanding the stature of the union and contextualizing and situating the future of the American labor movement.

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\(^{357}\) See Brudney, *supra* note 14, at 794–95 ("[T]he Court has made clear that both labor organizations and companies have a right to use litigation as part of their efforts to secure an economic advantage, [but] that right should not extend to causes of action that are deemed inadequate as a matter of law. . . . [T]he course of conduct that typically characterizes a union comprehensive campaign simply does not qualify as extortionation.").
C. Corruption, Cartels, and Coercion: The Ideological Significance of the New Assault on Organized Labor

1. The Union in the Contemporary Cultural Imagination

The standing of the union in the current moment with respect to labor relations and labor law is in many ways more challenging to assess and unpack than in the earlier times discussed in the previous sections. It is not that attitudes towards unions in the two historical moments discussed in Parts III and IV were monolithic. In the nineteenth century, there was clearly a strong and vocal group of workers' combinations and supporters serving as a driving force for organization to counteract the force of criminalization. Similarly, in the 1930s and 1940s there were clearly significant strands in the legal, political, and cultural realms that continued to view organized labor as threatening or undesirable. But in looking at the prevalent judicial, legislative, and cultural trends at each period, we can see these two moments as largely representative of the poles of a spectrum on which we would measure the sociolegal standing of the union. In other words, the laboring of America in the 1930s is in many ways the antithesis of the labor conspiracy cases of the 1830s—broadly speaking, a time of normalization and legitimation as opposed to a time of exceptionality, defensiveness, and open hostility.

The contemporary period in labor relations, however, rejects such an easy classification and exists instead as a moment replete with contradictions and inconsistencies in labor law doctrine and cultural and political treatments of unions. Perhaps it is simply the challenge of crafting a historical narrative for a moment that has yet to end, an era that in some sense has yet to reach a clear climax—a definitive reinterpretation or renunciation of the NLRA or a new, long-awaited piece of labor legislation. But as it stands,
the current conception of the union is rooted in contradiction. On the one hand, unionized workers today make up only a small percentage of the American workforce. Since the middle of the twentieth century, labor unions have also experienced declining approval and support as "many on both the right and left... doubt[ed] the social relevance and value of America's organized labor movement." On the other hand, the Wagner Act remains in effect, and the section 7 rights that helped define modern labor relations remain statutorily relevant and are at least nominally protected by the NLRB. That is, as imperfect as its institutional framework and enforcement mechanisms may be, there is at least a formal state recognition of the importance of collective bargaining. Criminal law also has largely ceased to be a major player in the treatment of unions and organizing workers in labor disputes. Additionally, unions have become recognized as significant political power wielders and are considered major players in local and national elections.

Cintas, then, can be seen as emblematic of this schizophrenic and uncertain moment. The complaint was dismissed and both the trial court and the Court of Appeals rejected the argument that the employer had the right to operate its business free from any sort of union interference. Both sides used economic weapons (the comprehensive campaign by the unions and the RICO suit by

http://www.nytimes.com/2010/11/02/us/politics/021abor.html ("[R]epublicans... are signaling that they plan to push bills and strategies to undermine labor's political clout and its ability to grow."). Union supporters have generally focused on legislation that would allow for card check organizing campaigns. See Employee Free Choice Act of 2009, H.R. 1409, 111th Cong. Opponents of the Employee Free Choice Act ("EFCA") have introduced the Secret Ballot Protection Act, which seeks to amend the NLRA to explicitly require secret ballot elections in order for unions to be certified. See Secret Ballot Protection Act, H.R. 1176, 111th Cong. (2009); Federal Agency Performance Review and Efficiency Act, H.R. 478, 111th Cong. (2009) (seeking to implement "annual reviews" of federal programs by the Inspector General).


But see White, supra note 251 (discussing the continuing role of criminal law in labor relations and labor disputes).


Cintas Corp. v. UNITE HERE, 601 F. Supp. 2d 571, 577–78 (S.D.N.Y. 2009), aff'd, 355 F. App'x 508 (2d Cir. 2009).
Cintas), and organized labor won the battle. But the question remains whether organized labor has lost the broader economic war. The complaint in Cintas, though dismissed by the trial court as “a manifesto by a Fortune 500 company that is more a public relations piece than a pleading,” provides a striking document of anti-union sentiment. The complaint portrays the unions as concerned with growing their own power and influence as opposed to protecting workers. Additionally, in a powerful redeployment of the language of the nineteenth century conspiracy cases, the complaint presents Cintas as representing a broad swath of other employers and economic actors (and by extension, one might argue, an entire economic system) threatened by cartelized labor. The complaint alleges,

If Cintas gives in to defendants’ demands, then defendants’ ruthless corporate campaign will temporarily end—at least against Cintas, and only for so long as Cintas continues to give in to defendants’ demands. If Cintas does not give in, then defendants will continue with their corporate campaign and their effort to destroy Cintas’s business.

In “remain[ing] strong and refus[ing] to give in to defendants’ unlawful demands,” Cintas is framed as standing as a sort of guard, a barrier between the rest of the business world and the threat of the hostile worker or the radical collective.

As in the nineteenth-century cases, the union is the threatening outsider. This perception is not just the result of examining legal documents crafted by attorneys representing a nonunionized firm. The latter half of the twentieth century saw an increase in mass cultural or media treatments of organized labor as almost inextricably linked to organized crime. Jimmy Hoffa’s widely

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368 Id. at 574.
370 Id. ¶¶ 4, 7–8, 10–11.
371 Id. ¶ 17.
372 Id. ¶ 11 (emphasis added).
373 Id. ¶ 12.
374 Cf. DENNING, supra note 36, at 227–29 (arguing that the “proletarian literary movement” of the 1930s reshaped U.S. culture by making the “union organizer . . . part of the mythology of the United States.”).
375 See infra notes 377–84; see, e.g., MAFIA: THE HISTORY OF THE MOB IN AMERICA, PART 3—UNIONS AND THE MOB (A&E television broadcast 1993); Richard Pérez-Peña, In Waterfront Hearings, Accounts of a Union’s Kickbacks and a Mafia Tie, N.Y. TIMES, Oct. 14, 2010, at A28,
publicized criminal convictions and ultimate disappearance helped draw a link in the cultural lexicon between the Teamsters and thuggish gangsters.\textsuperscript{376} Since the Taft-Hartley Act and the beginning of the Wagner Act's deradicalization, films ranging from highly-revered classics like \textit{On the Waterfront},\textsuperscript{377} to mainstream Hollywood blockbusters like \textit{Eraser}\textsuperscript{378} have uncritically elided organized crime with organized labor and bargaining power with extortion and violence.\textsuperscript{379}

Perhaps adding to this image of the worker and the organizing workers as other is the racial component discussed in Part III. As in nineteenth century and early twentieth-century cities, low-wage immigrant workers are a growing part of the modern American labor force,\textsuperscript{380} and indeed many of the unions targeted in the recent civil RICO suits have been active in trying to unionize immigrant communities.\textsuperscript{381} Such a racial dynamic may also serve as a background condition for the remobilization of the argument that the interests of the organizing or organized worker may be at odds with the interests of idealized America.\textsuperscript{382}


\textsuperscript{377} \textit{ON THE WATERFRONT} (Columbia Pictures 1954).

\textsuperscript{378} \textit{ERASER} (Warner Brothers Pictures 1996).

\textsuperscript{379} See \textit{id.}; \textit{ON THE WATERFRONT, supra note 377}.

\textsuperscript{380} See generally Sach, \textit{supra} note 92, at 2708 (noting that Bushwick, Brooklyn is home to hundreds of thousands of low-wage immigrant workers who earn below minimum wage, are not paid overtime, and lack union representation).

\textsuperscript{381} See, e.g., \textit{About Us}, \textit{UNITE HERE LOCAL 11}, http://unitehere11.org/index.php?option=com_content&view=article&id=66&Itemid=171 (last visited Jan. 1, 2012) ("UNITE HERE boasts a diverse membership, comprising workers from many immigrant communities as well as high percentages of African-American, Latino, and Asian-American workers. The majority of UNITE HERE members are women.").

\textsuperscript{382} See, e.g., \textit{People v. Faulkner} (N.Y. Ct. Oyer & Terminer 1836), \textit{reprinted in 4 A DOCUMENTARY HISTORY OF AMERICAN INDUSTRIAL SOCIETY, supra note 63, at 315, 330-31; see also Lechmere, Inc. v. NLRB, 502 U.S. 527 (1992) (holding that it was not an unfair labor practice to prohibit union protesters from distributing pamphlets on company property).
Additionally, considering how few sectors are unionized, it is striking that those areas in which unions have enjoyed at least a modicum of success have often been singled out as breeding grounds for laziness or greed. In recent years, labor disputes in the professional sports world have generated substantial media attention—much of it negative. Coming less than a decade after work stoppages in the National Hockey League and the National Basketball Association, *The Replacements*, a film loosely based on the 1987 National Football League players’ strike is told from the perspective of players brought in to replace the strikers. The *Replacement* players are from diverse backgrounds and often from socially and economically marginalized groups, whereas the unionized players are presented as greedy, arrogant, and completely oblivious to or unmoved by the concerns of fans or their replacements.

Entertainment industry strikes and contract disputes, which have also enjoyed substantial media attention, have often raised complaints that employees are overpaid or greedy, and any positive vision of worker solidarity is usually lost amid the perception that those striking are not representative of the American working class. Similarly, during the recent crisis and

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383 See infra notes 388–395 and accompanying text.
384 See, e.g., R.S. McDonald, NFL Work Stoppage Will Alienate Fans in Big Way, USA TODAY, Dec. 7, 2010, at 8A (criticizing “overpaid players” and their “public antics”); Pat Sangimino, Storm Gathers on NFL Horizon, THE HUTCHINSON NEWS, Sept. 12, 2010, at C3, http://www.hutchnews.com/Sports/nflcolumn (“In the end, nobody cares that the National Football League’s players are united in their resolve. Nobody cares about the index fingers they held up prior to Thursday night’s opener in New Orleans, which was meant to be a show of solidarity. If there is no professional football a year from now, that show of unity might as well have been a middle finger to football fans.”); Harold A. Gushue Jr., Strike Doesn’t Fly on This Diamond, WORCESTER TELEGRAM & GAZETTE, Mar. 26, 1995, at B1 (quoting a little league player describing major league baseball players as greedy).
385 See *The Replacements* (Warner Brothers 2000).
386 See id.
387 See, e.g., id.
388 Such hostility towards organized labor in the arts and in entertainment is particularly striking given Denning’s focus on the politicization of the production of cultural works as central to the laboring of American culture in the 1930s. DENNING, supra note 36, at 462. Denning emphasizes the merger of political and artistic projects, of industrial unions and collectivized artists and ultimately a “dialectic between work and art.” Id.; see, e.g., Mike Bianchi, Sports is the Only Workplace Where Labor Gets Blame, ORLANDO SENTINEL, Aug. 30, 2002, http://articles.orlandosentinel.com/2002-08-30/sports/0208300320_1_blame-the-players-baseball-players-professional-sports; A Picture of Pain Trickles Down in Hollywood: Threat of Movie Strike Tears at L.A.’s Economic Fabric, SEATTLE POST-INTELLIGENCER, Apr. 28, 2001, at F1 (focusing on the collateral effects to small business owners, other vulnerable groups, and local economies that would result from strikes by the Writers Guild of America and the Screen Actors Guild).
subsequent bailout of the American automotive industry, critical coverage and responses often focused not just on claims that General Motors and its competitors had greedy, overpaid, or incompetent executives, but also that the workers, represented by the United Auto Workers were overpaid and that it was their greed and cartelization that had led to a failed industry. Additionally, contemporary trends in education reform, perhaps reflected best in the film Waiting for Superman, have frequently targeted teachers unions as a key problem with the public school system and the laziness or incompetence of unionized workers as largely responsible for underperforming students. In other words, even when not painted as criminal, organized labor in these situations appears to be framed as largely incompatible with or at least an impediment to achieving socially desirable results.

2. The Place of the Civil RICO Suit in the Contemporary Cultural Climate

All of this is not to suggest that attitudes toward organized labor are monolithic or irreversible. The views expressed in complaints by large corporations today may be no more reflective of true public opinion than were the extreme views embraced by the court in Faulkner; additionally, there are certainly contrary examples of cultural works that may reflect a new “cultural front” rather than a de-laboring of American culture. However, given the relationship between the legal and the cultural discussed in Parts II and III, and

389 See, e.g., John D. Ambrose, Letter to the Editor, Let GM Die, AKRON BEACON J., June 22, 2009, at A7 (“[T]he United Auto Workers wants [sic] to pick the pockets of the taxpayers for their overpaid employees who have no skills for any other jobs.”); W. Lee Richardson, Death of a (Car) Salesman, DAYTONA NEWS-JOURNAL (Fla.), Dec. 31, 2008, at A6 (“Too bad that the nit wits at the UAW, and the overpaid (and out of touch) jackasses ensconced in the corporate towers screwed up such a good and valuable thing.”); Ricky Thomason, Op-Ed., In America, Why Does Money Defy the Law of Gravity?, The HUNTSVILLE TIMES, Dec. 21, 2008, at A22 (“For years, local UAW members have made twice what the average worker does with three times the benefits, and they don’t want to give anything up, even if it means sinking the ship.”).

390 See WAITING FOR SUPERMAN (Paramount Pictures 2010).

391 Whether or not these critiques of unionization, unions, or unionized workers in these cases are accurate is not a question that this article will address. The accuracy of such characterizations is largely collateral to the effect of these characterizations on public perception of, support for, or opposition to unions. For a critical look at arguments that unionization has substantial economic costs, see generally FREEMAN & MEDOFF, supra note 58, at 4 (“Because monopolistic wage increases are socially harmful—in that they can be expected to induce both inefficiency and inequality—most economic studies, implicitly or explicitly, have judged unions as being a negative force in society.”).

392 See, e.g., DENNING, supra note 36, at xvi.
given the prevalence of the anti-union tropes in contemporary culture, the civil RICO cases represent a significant area where the law can act as a force for legitimation of organized labor. By taking the sort of broader action suggested by Brudney to prevent the proliferation of claims against comprehensive campaigns, legislators and courts could act to re-affirm the promises of the Wagner Act.

On the arc of labor relations and labor law history generally traced by this article, the courts, the legislature, and the law have often lagged behind the general zeitgeist as expressed in mass cultural texts or social movements. In the nineteenth century, despite a rise in trade union activity, courts remained conservative, focused on preserving traditional social, political, and economic relationships. Over the course of the Progressive Period, the courts and legislators gradually began to accept that organized labor was a reality of modern life, ultimately recognizing the heightened power and prevalence of unions and strikes in the 1930s by passing the Wagner Act. The subsequent decades have without a doubt decreased the breadth of the Wagner Act, but as Cintas demonstrates, the courts have not (at least not yet) fully embraced the hostility towards unions pushed by many dominant social and cultural forces.\footnote{See Cintas Corp. v. UNITE HERE, 601 F. Supp. 2d 571, 574 (S.D.N.Y. 2009).}

Focusing on legitimation, then, this reading suggests that if there is to be a reinvigoration of cultural attitudes toward worker collective action, legislative action that serves an expressive as well as a substantive purpose is called for.

As an expression of a fundamental objection to worker collectivism as a sort of conspiracy against the market, these cases provide an opportunity to re-affirm fundamental support for worker collective action as a socially beneficial conspiracy against a \textit{particular view of the market}, a view of the market that was legislatively rejected in 1935.\footnote{See National Labor Relations (Wagner) Act, 29 U.S.C. § 151 (2011).} The anti-union RICO suits ultimately adopt a rationale that suggests that the interests of the worker are different from and oppositional to the interests of the employer and perhaps at times to the union.\footnote{See, e.g., United States v. Green, 350 U.S. 415, 420 (1956).} If we are concerned about workers being able to exercise self-determination, however, such arguments actually appear to weigh in favor of emphasizing the need for workers to exert collective power.\footnote{Such an argument has proved particularly compelling in recent labor law scholarship that emphasizes the importance of workers being able to join together to improve their conditions over the importance of traditional unionization. See, e.g., CHARLES J. MORRIS, THE...}

\textsuperscript{393} See Cintas Corp. v. UNITE HERE, 601 F. Supp. 2d 571, 574 (S.D.N.Y. 2009).
\textsuperscript{396} Such an argument has proved particularly compelling in recent labor law scholarship that emphasizes the importance of workers being able to join together to improve their conditions over the importance of traditional unionization. See, e.g., CHARLES J. MORRIS, THE...
employers by workers that is alleged in *Cintas* is not only central to the Wagner Act, it is central to the ability of workers to subsist and protect themselves in a global economy, where their interests and the interests of multinational or inherently stateless corporate employers are increasingly at odds.

VI. CONCLUSION

The rise over the past few decades of the civil RICO suit aimed at union comprehensive campaigns marks a re-emergence or at least a powerful new example of a particular trope or attitude in American labor history—the union as an extortive and dangerous conspiracy. This is a powerful trope both legally and culturally that has been used historically to mobilize popular opinion against organized labor and to de-legitimate the union. The increasingly adversarial treatment of the union signals the broader need for a new examination of and endorsement of the importance of worker collective action, particularly in the context of the ever more globalized economy. The RICO cases and the broader cultural narrative of which they are a part provide such an opportunity for reexamination. By painting worker collective action as a powerful vehicle for opposition to employers' actions and by emphasizing the potential lack of congruence between worker and employer interests, the rhetoric of these employer complaints ultimately inadvertently affirms the need for collective action to make sure that workers maintain a voice in the workplace and are able to maintain at least some degree of self-determination in their work lives.

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397 See Brudney, *supra* note 14, at 774 and accompanying text.