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

*Benjamin Levin**

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I. INTRODUCTION

*Gone are the employer's goon squads and the billyclubs; 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

¹ AM. FED. LAB. & CONGRESS OF INDUS. ORG., PROCEEDINGS OF THE THIRTEENTH CONSTITUTIONAL CONVENTION OF THE AFL-CIO 118 (1979) (Resolution No. 272).

² GARY MINDA, *BOYCOTT IN AMERICA: HOW IMAGINATION AND IDEOLOGY SHAPE THE LEGAL MIND* 49–50 (1999). For a more detailed account of the Haymarket "Riot," see PAUL AVRICH, *THE HAYMARKET TRAGEDY* 197–214 (1984); JAMES GREEN, *DEATH IN THE HAYMARKET: A STORY OF CHICAGO, THE FIRST LABOR MOVEMENT AND THE BOMBING THAT DIVIDED GILDED AGE AMERICA* (2006).

³ See SAMUEL YELLEN, *AMERICAN LABOR STRUGGLES: 1877–1934*, at 42–43, 51 (1936).

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.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.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.⁹ Ultimately, a jury convicted eight of the defendants of murder, and seven were sentenced to death.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,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”).¹² For much of the previous decade the unions had been fighting a highly publicized battle to represent Cintas’s employees.¹³ As part of their “comprehensive” or “corporate” campaign,¹⁴ the unions had produced fliers and maintained websites dedicated to alerting Cintas employees of their rights and highlighting allegedly

⁷ See *id.* at 208; GREEN, *supra* note 2, at 191.

⁸ YELLEN, *supra* note 3, at 58–59.

⁹ *Id.* at 61–62.

¹⁰ See *id.* at 63.

¹¹ *Cintas Corp. v. UNITE HERE*, 601 F. Supp. 2d 571, 574 (S.D.N.Y. 2009); Press Release, Cintas, Cintas Alleges Extortion in New RICO Lawsuit Against Union Organizations (Mar. 5, 2008), http://www.cintas.com/company/news_media/press_releases/union_rico.aspx.

¹² *Cintas Corp.*, 601 F. Supp. 2d at 574; Racketeer Influenced and Corrupt Organizations Act, Pub. L. No. 91-452, § 901(a), 84 Stat. 941, 941–44 (1970) (codified as amended at 18 U.S.C. §§ 1961–1968 (2011)). For more discussion of the complaint and filing, see, for example, *Cintas Sues Unions on RICO Claims*, BUS. COURIER, (Mar. 5, 2008), <http://cincinnati.bizjournals.com/cincinnati/stories/2008/03/03/daily36.html>.

¹³ See *Cintas Corp.*, 601 F. Supp. 2d at 575–76; Press Release, Cintas, *supra* note 11.

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.¹⁵ Cintas claimed that the unions' campaign of concerted action was designed to extort the corporation into adopting a "card-check/neutrality agreement,"¹⁶ and also was a means of promoting and engaging in general unfair competition.¹⁷ Cintas's RICO claims were based on the allegation that the comprehensive campaign was extortive and therefore violated the Hobbs Act,¹⁸ 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."¹⁹

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 Procedure²⁰ that the complaint be a "short and plain statement."²¹ 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."²² 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.²³

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.

¹⁹ Hobbs Act, 18 U.S.C. § 1951 (2011).

²⁰ FED. R. CIV. P. 8(a)(1).

²¹ *Cintas*, 601 F. Supp. 2d at 574.

²² *Id.*

²³ For situations in which RICO complaints have been used in litigation by corporate employers against labor organizers, see, for example, *Wackenhut Corp. v. Serv. Emps. Int'l Union*, 593 F. Supp. 2d 1289 (S.D. Fla. 2009); *Smithfield Foods, Inc. v. United Food & Commercial Workers Int'l Union*, 593 F. Supp. 2d 840 (E.D. Va. 2008); *A. Terzi Prods., Inc. v. Theatrical Protective Union*, 2 F. Supp. 2d 485 (S.D.N.Y. 1998); *Petrochem Insulation, Inc. v. N. Cal. & N. Nev. Pipe Trades Counsel*, No. C-90-3628 EFL, 1991 WL 158701, at *1 (N.D. Cal. 1991), *aff'd sub nom. Petrochem Insulation, Inc. v. United Ass'n of Journeymen & Apprentices of the Plumbing & Pipe Fitting Indus. Of the U.S. & Canada*, Local Union No. 38,

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,²⁴ 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.²⁵

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 Chicago²⁶ or well-organized, politically powerful national labor organizations in twenty-first-century New York²⁷—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.²⁸ 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

No. 92-15511, 1993 WL 378807 (9th Cir. 1993); Complaint at para. 1, *Sodexo, Inc. v. Serv. Emps. Int'l Union*, No. 1:11-cv-00276-CMH-IDD (E.D. Va. Mar. 17, 2011); see also Brudney, *supra* note 14, at 754–56 nn.136–44 (providing an array of cases that discuss the civil liability of unions under RICO).

²⁴ See MINDA, *supra* note 2, at 50.

²⁵ See *Cintas*, 601 F. Supp. 2d at 577–78.

²⁶ See MINDA, *supra* note 2, at 49–50.

²⁷ See *Cintas*, 601 F. Supp. 2d at 574–77.

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,²⁹ their work has almost exclusively focused on analyzing these suits within the framework of post-National Labor Relations Act (“NLRA”),³⁰ labor law and NLRA preemption, or the doctrinal framework of civil RICO’s evolution.³¹ 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).³² They are also a potentially significant means of harkening 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

²⁹ To read a wider breadth of materials that discuss the growing role of RICO in labor disputes, see, for example, Victoria G.T. Bassetti, Note, *Weeding RICO Out of Garden Variety Labor Disputes*, 92 COLUM. L. REV. 103 (1992); Brudney, *supra* note 14; Raymond P. Green, *The Application of RICO to Labor-Management and Employment Disputes*, 7 ST. THOMAS L. REV. 309 (1995); Howard S. Simonoff & Theodore M. Lieberman, *The RICO-ization of Federal Labor Law: An Argument for Broad Preemption*, 8 LAB. LAW. 335 (1992).

³⁰ National Labor Relations (Wagner) Act, Pub. L. No. 74-198, 49 Stat. 449 (1935) (codified as amended at 29 U.S.C. §§ 151–69 (2011)). The National Labor Relations Act is “also known as the Wagner Act of 1935. It was amended by the Taft–Hartley Act of 1947 and the Landrum-Griffin Act of 1959. [It is] [a]lso termed *Wagner Act*.” BLACK’S LAW DICTIONARY 1052 (8th ed. 2004).

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.³³ 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*³⁴ 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

³³ See, e.g., *MINDA*, *supra* note 2, at 50.

³⁴ *Cintas Corp. v. UNITE HERE*, 601 F. Supp. 2d 571, 581 (S.D.N.Y. 2009).

era. It will trace the expansions in protection for organized labor that resulted from the recognition of unions as "legitimate"³⁵ 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 culture³⁶—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

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 'legitimizing 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 extortive 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?³⁷ 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.

³⁷ Cf. Robert W. Gordon, *Critical Legal Histories*, 36 STAN. L. REV. 57, 81–87, 98–101 (1984) (discussing the importance of “contingency” to critical legal historical projects).

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

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.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.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.⁴⁶

This embedding or imbricating—to use Gordon's formulation⁴⁷—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,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.⁴⁹ Specifically, in the

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.

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.

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).

⁴⁷ See, e.g., Gordon, *supra* note 37, at 68.

⁴⁸ See *id.* at 69.

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.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,"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 trends⁵² and also from the strands in legal scholarship that interrogate the cultural as a means of better understanding the ideological components of the law.⁵³

Novak, *The Myth of the "Weak" American State*, 113 AM. HIST. REV. 752 (2008); James Gray Pope, *How American Workers Lost the Right to Strike, and Other Tales*, 103 MICH. L. REV. 518 (2004); Katherine Van Wezel Stone, *The Post-War Paradigm in American Labor Law*, 90 YALE L.J. 1509 (1981); Richard Michael Fischl, *Pedagogy and Critique: Values and Assumptions in the Law School Classroom*, 58 BUFF. L. REV. DOCKET 1 (2010), http://www.buffalolawreview.org/docket/content/58/Fischl_Docket.pdf.

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.

⁵¹ See, e.g., FORBATH, *supra* note 45, at 5–6.

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).

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; JEANNIE 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 factors⁵⁴ or if we think that legal discourse comes to shape social and political discourse,⁵⁵ 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,⁵⁶ 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.⁵⁷

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,⁵⁸ a

HOME IN THE LAW: HOW THE DOMESTIC VIOLENCE REVOLUTION IS TRANSFORMING PRIVACY (2009); Kahan, *supra* note 49; Alan A. Stone, *Teaching Film at Harvard Law School*, 24 LEGAL STUD. F. 573 (2000); *see also infra* notes 196–97.

⁵⁴ *See supra* note 40 and accompanying text.

⁵⁵ *See, e.g., supra* notes 44–50 and accompanying text.

⁵⁶ *See* Richard Michael Fischl, *The Question That Killed Critical Legal Studies*, 17 LAW & SOC. INQUIRY 779, 794–800 (1992) (discussing the difficulties associated with pinpointing the causal relationship between law and society with any specificity); Gordon, *supra* note 37, at 124–25; Alan Hyde, *The Concept of Legitimation in the Sociology of Law*, 1983 WIS. L. REV. 379, 380–85 (1983) (“[T]he supposedly significant contribution of law and legal institutions to popular belief in legitimacy and hence to political action or nonaction . . . remains extremely obscure as an empirical or behavioral matter.”).

⁵⁷ *See* Gordon, *supra* note 37, at 124–25.

⁵⁸ For literature that focuses on the importance of social and cultural conditions of the workplace, *see, for example*, RICK FANTASIA, *CULTURES OF SOLIDARITY: CONSCIOUSNESS, ACTION, AND CONTEMPORARY AMERICAN WORKERS* 45–59 (1988); RICHARD B. FREEMAN & JAMES L. MEDOFF, *WHAT DO UNIONS DO?* 5–6, 13 tbl.1-1 (1984); RUTH MILKMAN, *L.A. STORY:*

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.⁵⁹ 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 workers⁶⁰ and union leaders as advancing their own interests over those of the workers.⁶¹ 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.⁶²

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

IMMIGRANT WORKERS AND THE FUTURE OF THE U.S. LABOR MOVEMENT (2006); Ruth Milkman, *Labor Organizing Among Mexican-Born Workers in the United States: Recent Trends and Future Prospects*, 32 LAB. STUD. J. 96 (2007).

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

⁶⁰ See, e.g., Richard Cohen, Op-Ed., *Government Pensions, an Obesity Epidemic*, WASH. POST, Feb. 21, 2011, <http://www.washingtonpost.com/wp-dyn/content/article/2011/02/21/AR2011022103775.html>; Jennifer Rubin, *A Decisive Moment: Public Employee Unions or the Common Good?*, RIGHT TURN BLOG, WASH. POST, Feb. 18, 2011, http://voices.washingtonpost.com/right-turn/2011/02/a_decisive_moment_public_empl.html.

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.⁶³ In the contemporary movement of union marginalization,⁶⁴ 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,⁶⁵ 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.⁶⁶ 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,⁶⁷ an understanding of the union as *malum in se*.⁶⁸

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

⁶³ For labor law cases that portray the union-as-conspiracy metaphor, painting collective bargaining as a dangerous and anti-American act, see, for example, *People v. Faulkner* (N.Y. Ct. Oyer & Terminer 1836), reprinted in 4 A DOCUMENTARY HISTORY OF AMERICAN INDUSTRIAL SOCIETY 315, 330–31 (John R. Commons et al. eds., 1910); *Kennedy v. Treillou* (Pa. Ct. Quarter Sess. 1829), reprinted in 4 A DOCUMENTARY HISTORY OF AMERICAN INDUSTRIAL SOCIETY, *supra*, at 265, 267–68; *Commonwealth v. Morrow* (Pa. Ct. Quarter Sessions 1815), reprinted in 4 A DOCUMENTARY HISTORY, *supra*, at 15, 85–86; *Commonwealth v. Grinder* (Pa. Rec's Ct. 1836), reprinted in 4 A DOCUMENTARY HISTORY OF AMERICAN INDUSTRIAL SOCIETY, *supra*, at 335, 335–36; see generally *infra* Part III (tracing the historical origins of the antithetical union attitude in the context of labor organization regulation by conspiracy law).

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.

⁶⁷ See, e.g., *People v. Faulkner* (N.Y. Ct. Oyer & Terminer 1836), in 4 A DOCUMENTARY HISTORY OF AMERICAN INDUSTRIAL SOCIETY, *supra* note 63, at 315, 330–31; *Commonwealth v. Morrow* (Pa. Ct. Quarterly Sessions 1815), in 4 A DOCUMENTARY HISTORY, *supra* note 63, at 15, 86; *Commonwealth v. Grinder* (Pa. Rec's Ct. 1836), reprinted in 4 A DOCUMENTARY HISTORY OF AMERICAN INDUSTRIAL SOCIETY, *supra* note 63, at 335, 335–36; MARJORIE S. TURNER, THE EARLY AMERICAN LABOR CONSPIRACY CASES: THEIR PLACE IN LABOR LAW: A REINTERPRETATION 2–3 tbl.1 (San Diego State Coll. Press, Soc. Sci. Monograph Ser. vol. 1 no. 3 1967) (listing early American labor conspiracy cases).

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

⁶⁹ *Cintas Corp. v. UNITE HERE*, 601 F. Supp. 2d 571 (S.D.N.Y. 2009).

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.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,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."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.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.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

⁷³ See, e.g., TOMLINS, *supra* note 49, at 107–79 (examining early English and American treatment of workers' attempts at collective bargaining).

⁷⁴ To read additional materials regarding the early application of the conspiracy doctrine in labor law cases see, for example, 1 JOHN R. COMMONS ET AL., *HISTORY OF LABOUR IN THE UNITED STATES* 138–52 (Augustus M. Kelley 1966) (1918); TOMLINS, *supra* note 49; CHRISTOPHER L. TOMLINS, *THE STATE AND THE UNIONS: LABOR RELATIONS, LAW, AND THE ORGANIZED LABOR MOVEMENT IN AMERICA, 1880–1960*, at 101–219 (1985); TURNER, *supra* note 67; Morris D. Forkosch, *The Doctrine of Criminal Conspiracy and Its Modern Application to Labor*, 40 TEX. L. REV. 303 (1962); Raymond L. Hogler, *Law, Ideology, and Industrial Discipline: The Conspiracy Doctrine and the Rise of the Factory System*, 91 DICK. L. REV. 697 (1987); Herbert Hovenkamp, *Labor Conspiracies in American Law, 1880–1930*, 66 TEX. L. REV. 919 (1988).

⁷⁵ Simonoff & Lieberman, *supra* note 29, at 335.

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).

⁷⁷ See TOMLINS, *supra* note 49, at 115–16, 130–31.

danger.⁷⁸ Perhaps any collective action posed an unacceptable risk to the authority of the state by invoking images of treasonous cadres or private militias,⁷⁹ 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.⁸⁰ Much as the Crown sought to maintain its “monopoly on violence” as a means of maintaining stability and retaining its authority,⁸¹ it also sought to maintain its primacy in the realm of the market by opposing organized labor as an interloper.⁸² As “outlaws” in the formal market, “journeymen’s groups” were representative of an alternative social and political grouping, making them anathema to

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 265, 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.⁸³ Their members acted in solidarity with each other and not necessarily in the best interests of the monarchy.⁸⁴

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.⁸⁵ 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.⁸⁶ 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."⁸⁷ Workers acting in concert were considered a harmful special interest group⁸⁸—a group whose concerns were not aligned with the public and whose actions endangered the public good.⁸⁹

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

⁸³ See TOMLINS, *supra* note 49, at 189 ("Journeyman'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. Grindler* (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.").

⁸⁷ *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.

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.⁹⁰

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);⁹¹ 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.⁹²

Historically, the focus on freedom and liberty that is so often prevalent in the rhetoric of American patriotism invoked market capitalism and “free enterprise.”⁹³ In the paradigm of classical legal

⁹⁰ 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 265, 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)).

⁹¹ 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).

⁹² See, e.g., Ruth Milkman & Kent Wong, *Organizing Immigrant Workers: Case Studies from Southern California*, in REKINDLING THE MOVEMENT: LABOR'S QUEST FOR RELEVANCE IN THE TWENTY-FIRST CENTURY 99, 120–21 (Lowell Turner et al. eds., 2001) (discussing organizing efforts among workers of diverse ethnic composition); George Raine, *Union Members Rally for Truckers; Independent Drivers Seek Job Protections*, S.F. CHRON., Apr. 28, 2006, at D1 (describing widespread worker support for independent contractors attempting to organize); Benjamin I. Sachs, *Employment Law as Labor Law*, 29 CARDOZO L. REV. 2685, 2698–715 (2008) (discussing the exclusion of undocumented immigrant workers from self-organization and unionization under federal labor law and the challenges this poses to labor activism).

⁹³ 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.⁹⁴ That is, the fundamental rights upon which freedom depended were the right to own private property and the right to contract freely.⁹⁵ Interestingly, in identifying the labor conspiracy as inherently unlawful, the *Faulkner* opinion repeatedly presents the union in opposition to American values.⁹⁶ Judge Edwards explains that he believes that the labor unions “are of foreign origin” and “mainly upheld by foreigners.”⁹⁷ 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.”⁹⁸ 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.

⁹⁴ *See* MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW: 1870–1960: THE CRISIS OF LEGAL ORTHODOXY* 33 (1992).

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)).

⁹⁶ *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, 330–31.

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.

⁹⁸ *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.

"[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).

¹⁰¹ 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.

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*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.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.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.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.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.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.¹¹⁰ This suggested that, notwithstanding judicial hostility, organized labor, at least in

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, 233, 235–36 (holding that the law condemns unionization).

¹⁰⁵ *Commonwealth v. Hunt*, 45 Mass. 111, 121–22 (1842).

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”).

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).

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).

¹⁰⁹ See *id.* at 38.

¹¹⁰ *The History of Labor Day*, U.S. DEP’T LAB., <http://www.dol.gov/opa/aboutdol/laborday.htm> (last visited Jan. 1, 2012).

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,¹¹¹ 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.¹¹²

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.¹¹³ 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.¹¹⁴ The traditional scholarly treatment of the "early conspiracy cases" often ends with *Commonwealth v. Hunt*,¹¹⁵ which effectively held that the labor combination was not an intrinsically criminal conspiracy in Massachusetts.¹¹⁶ 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.¹¹⁷ Criminal law continued to be used to attack unions for the remainder of the nineteenth century.¹¹⁸

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)).

¹¹⁶ See *Hunt*, 45 Mass. at 134–36.

¹¹⁷ *People v. Cooper* (N.Y. Ct. Gen. Sess. 1836), *reprinted in* 4 A DOCUMENTARY HISTORY OF AMERICAN INDUSTRIAL SOCIETY, *supra* note 63, at 279, 311; *Commonwealth v. Grinder* (Pa. Rec's Ct. 1836), *reprinted in* 4 A DOCUMENTARY HISTORY OF AMERICAN INDUSTRIAL SOCIETY, *supra* note 63, at 335, 340.

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.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 *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.”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.¹²¹

associations designed to coerce workmen to become members, or to interfere with, obstruct, vex, or annoy them in working, or in obtaining work, because they are not members, or in order to induce them to become members . . . are *pro tanto* illegal combinations or associations”; see generally FORBATH, *supra* note 45, at 59–166 (“Now we turn to the courts’ interventions on that plane of economic activity—from judicial impairment of reform by legislation to judicial constraints on reform through collective action.”).

In addressing the evolution of conspiracy doctrine in the nineteenth century, it is important to recognize that the “labor law” (to the extent criminal conspiracy law can be accurately described as such) that was at play in each of the cases cited in this section was state and not federal. This article will not deal with the state/federal distinction or the preemption issues at work in current debate over the use of RICO in the context of union organizing campaigns; this issue has received substantial treatment by scholars and commentators. See, e.g., Brudney, *supra* note 14, at 751 (discussing the Supreme Court’s tendency to interpret RICO provisions broadly in civil matters despite the typical concern over “federalizing” state law); Simonoff & Lieberman, *supra* note 29, at 335 (“The critical issue is whether RICO will usurp the National Labor Relations Act in governing labor-management disputes, or whether instead the courts will reaffirm the broad preemption standard that recognizes the special legal status of labor disputes.”). The distinction does merit mention, however, in conjunction with a discussion of shifting legal frameworks for the regulation of organized labor. Under a state law framework it is, of course, more difficult to speak in sweeping terms about the social or legal standing of unions, as they are clearly dependent on the forum state and its conspiracy regime. Indeed, one of the significant moves that the NLRA made was not only to standardize legal treatment in such a way that notice was provided and a “race to the bottom” was avoided, but also to set forth a nationwide set of protections guaranteeing that unions would enjoy legitimacy in the eyes of the law, even if they might not at first in a specific community. See Brudney, *supra* note 14, at 793.

¹¹⁹ See, e.g., *State v. Dyer*, 32 A. 814, 818 (Vt. 1895); *Crump v. Commonwealth*, 6 S.E. 620, 630 (1888) (“The acts alleged and proved in this case [relating to a boycott] are unlawful, and incompatible with the prosperity, peace, and civilization of the country; and, if they can be perpetrated with impunity by combinations of irresponsible cabals or cliques, there will be the end of government, and of society itself. Freedom, individual and associated, is the boon and the boasted policy and *peculium* of our country, but it is liberty regulated by law; and the motto of the law is, ‘*sic utere tuo ut alienum non laedas*.’”).

¹²⁰ TOMLINS, *supra* note 49, at 218.

¹²¹ See, e.g., *People ex rel. Gill v. Smith*, 10 N.Y. St. Rptr. 730, 731 (Ct. Oyer & Terminer 1887), (holding that a statutory protection did not cover strikers whose purpose was not clearly wage-related); *People v. Kostka*, 4 N.Y. Crim. 429, 434 (Ct. Oyer & Terminer 1886) (holding that a secondary boycott was a criminal conspiracy); FORBATH, *supra* note 45, app. at

Additionally, the labor conspiracy doctrine¹²² and ultimately even the Sherman Antitrust Act¹²³ served as powerful anti-union instruments, long after the courtroom victories for workers in the 1830s.¹²⁴ Further, using an ideological framework and set of background rules that focused on restraining interference with private property rights as critical to maintaining “freedom,”¹²⁵ 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.¹²⁶ Therefore, situated in a broader social and cultural framework that identified the union as a threatening and potentially dangerous force,¹²⁷ 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,¹²⁸ 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.”).

¹²³ Sherman Antitrust Act, ch. 647, 26 Stat. 209 (1890) (codified as amended at 15 U.S.C. §§ 1–7 (2011)).

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,¹²⁹ both as expressive markers and drivers of social and political will¹³⁰ and also as powerful impediments to normalcy, subsistence, and success.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.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

¹²⁹ See White, *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).

¹³⁰ See Gabel, *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 . . .”).

¹³¹ 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. . . .

[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 *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, *The Stakes of Law, or Hale and Foucault!*, 15 LEGAL STUD. F. 327, 346 (1991).

¹³² MINDA, *supra* note 2, at 84.

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.¹³³ 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 property¹³⁴—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.¹³⁵ 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,"¹³⁶ 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.¹³⁷ This

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.").

¹³⁴ See *Cintas Corp. v. UNITE HERE*, 601 F. Supp. 2d 571, 571, 577 (S.D.N.Y. 2009).

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.¹³⁸ 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.¹³⁹ Following decades during which the labor injunction had been used much like the criminal conspiracy charge, as a weapon against labor organizing,¹⁴⁰

interfere with the plaintiff's business by means of threats and intimidation, and by maintaining a patrol in front of his premises in order to prevent persons from entering his employment, or in order to prevent persons who are in his employment from continuing therein, is unlawful, even though such persons are not bound by contract to enter into or to continue in his employment; and the injunction should not be so limited as to relate only to persons who are bound by existing contracts."). Despite the fact that it is not a criminal case, the court in *Vegelahn* chooses to refer to a group of workers acting in concert as a "conspiracy." See *id.* at 1077–78. Though collateral to the holding, such a rhetorical move suggests the continued conceptualization of the union as somehow inherently related to the criminal or the clandestine. Indeed, there is almost something circular or perhaps even tautological about the court's use of "conspiracy" as a description for the collected workers. The Oxford English Dictionary defines "conspiracy" as a "combination of persons for an evil or unlawful purpose," and so the very designation implies not only hostility and a sense of the pejorative, but also—and more importantly—an understanding that the collective was united for illicit ends. 3 THE OXFORD ENGLISH DICTIONARY 782 (J. A. Simpson & E. S. C. Weiner eds., 2nd ed. 1989).

¹³⁸ As the source of federal labor regulation, the NLRA has received substantial scholarly, judicial, and legislative attention. See, e.g., *Loparex LLC v. NLRB*, 591 F.3d 540 (7th Cir. 2009); *Hyatt Corp. v. NLRB*, 939 F.2d 361 (6th Cir. 1991); KENNETH T. LOPATKA, *NLRA RIGHTS IN THE NONUNION WORKPLACE* (2010); 1 *DEVELOPING LABOR LAW*, *supra* note 138. My intention in this section is not to provide a comprehensive overview of the Act's policies or to offer a new reading. Rather, I intend to highlight the Act's marked departure from the doctrinal frameworks employed previously. That is, the goal is to produce a narrative that leads us out of the realm of criminal conspiracy into the modern administrative rubric.

¹³⁹ National Labor Relations (Wagner) Act, Pub. L. No. 74-198, 49 Stat. 449 (1935) (codified as amended at 29 U.S.C. §§ 151–69 (2011)); see Klare, *supra* note 49, at 265.

¹⁴⁰ See generally Karl E. Klare, *Critical Theory and Labor Relations Law*, in *THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE* 539, 542 (David Kairys ed., 3d ed. 1982) (explaining the

the Norris-LaGuardia Act,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,¹⁴² began to establish a protective barrier around the realm of workers’ collective action.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,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.”¹⁴⁵ In stark contrast to the characterization of the union as a pernicious force that would distort the market,¹⁴⁶ Congress effectively embraced the legal realists’ concern that without collective bargaining and regulation, the market would not allow workers to realize full freedom.¹⁴⁷ The extent to which the Act takes a normative stance on the social and economic utility of unionization is not necessarily a settled

benefits of an injunction as a “legal weapon of employers” because it provides immediate action that could end strikes and limited procedural safeguards for strikers).

¹⁴¹ Norris-LaGuardia Act, 29 U.S.C. §§ 101–15 (2011) (enacted 1932).

¹⁴² *Id.* § 101.

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).

¹⁴⁴ See *supra* notes 93–98 and accompanying text.

¹⁴⁵ 29 U.S.C. § 151 (2011).

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.”).

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

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).

¹⁴⁹ 29 U.S.C. § 151 (2011).

¹⁵⁰ *J. I. Case Co. v. NLRB*, 321 U.S. 332, 337 (1944).

¹⁵¹ *Order of R.R. Telegraphers v. Ry. Express Agency, Inc.*, 321 U.S. 342, 346 (1944).

¹⁵² *Walling v. Portland Terminal Co.*, 330 U.S. 148, 154 (1947) (Jackson, J., concurring).

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.¹⁵⁴ 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.¹⁵⁵ 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,¹⁵⁶ 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.¹⁵⁷

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).

¹⁵⁴ For a broader discussion of the relationship between state courts, judicial elections, and labor law, see generally FORBATH, *supra* note 45, at 33–34; MINDA *supra* note 2, at 34–54; TOMLINS, *supra* note 49, at 101–384; Sylvester Petro, *Injunctions and Labor-Disputes: 1880–1932*, 14 WAKE FOREST L. REV. 341 (1978).

¹⁵⁵ 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.

¹⁵⁶ 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.

¹⁵⁷ 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,”¹⁵⁸ and in fact the Act—at least as written¹⁵⁹—redefined the relationship between employers and their workers.¹⁶⁰ Indeed, the language of the Act, compared with the hyperbolic anti-union rhetoric of *Faulkner* and other nineteenth century opinions,¹⁶¹ suggests a clear paradigm shift in the legal treatment of the employment relationship:¹⁶² 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,”¹⁶³ 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,¹⁶⁴ but the language itself is evocative of a “culture of solidarity”¹⁶⁵—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.¹⁶⁶

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

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. 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.

¹⁶⁰ *Id.* at 266–67.

¹⁶¹ *See supra* notes 85–90 and accompanying text.

¹⁶² *See* Richard Posner, *Some Economics of Labor Law*, 51 U. CHI. L. REV. 988, 992 (1984) (“[T]he Wagner Act brought about a revolution in the American law of labor relations . . . [and a] tilt towards unions . . .”).

¹⁶³ National Labor Relations (Wagner) Act, 29 U.S.C. § 157 (2011).

¹⁶⁴ *See, e.g.,* *Eastex, Inc. v. NLRB*, 437 U.S. 556, 569–70 (1978); *NLRB v. Washington Aluminum Co.*, 370 U.S. 9, 12–13, 18 (1962); *Kaiser Eng’rs v. NLRB*, 538 F.2d 1379, 1385 (9th Cir. 1976).

¹⁶⁵ *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).

¹⁶⁶ *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.¹⁶⁷

That is, there is nothing intrinsically unwholesome or antithetical to rule of law,¹⁶⁸ American values,¹⁶⁹ or market capitalism¹⁷⁰ 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.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.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 doctrine¹⁷³ 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 *Hunt*, *Cooper*, or *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.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,¹⁷⁵ and section 10 actually provides remedies,¹⁷⁶ making the Act an effective, practical success,

¹⁶⁷ *Id.*

¹⁶⁸ *But see supra* note 105 and accompanying text.

¹⁶⁹ *But see supra* notes 96–97 and accompanying text.

¹⁷⁰ *But see supra* note 90 and accompanying text.

¹⁷¹ *See* Barenberg, *supra* note 147, at 1423–24.

¹⁷² *Cf. id.* (discussing "collective empowerment" as the goal of the Wagner Act).

¹⁷³ Klare, *supra* note 49, at 265.

¹⁷⁴ *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.").

¹⁷⁵ *See* National Labor Relations (Wagner) Act, 29 U.S.C. § 157 (2011).

¹⁷⁶ *See id.* § 160.

not just an expressive document gilded with egalitarian or pro-union rhetoric.¹⁷⁷ 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.¹⁷⁸ Klare has argued that the Act never achieved its radical potential,¹⁷⁹ and given the developments of the Labor Management Relations Act of 1947,¹⁸⁰ subsequent judicial opinions,¹⁸¹ and the contemporary distaste for and distrust of the Wagner Act as a driver of positive advances in labor law,¹⁸² 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,¹⁸³ however, the union-legitimizing power of the Wagner Act should not be underestimated.¹⁸⁴ Taking the prevalent nineteenth-century conception of the union as an inherently criminal conspiracy¹⁸⁵ 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.¹⁸⁶ 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).

¹⁷⁹ See Klare, *supra* note 49, at 336–39.

¹⁸⁰ Labor Management Relations (Taft-Hartley) Act, 1947, Pub. L. No. 80-101, 61 Stat. 136 (codified as amended in scattered sections of 29 U.S.C.); see also Posner, *supra* note 162, at 992 (“In the Taft-Hartley Act in 1947, Congress redressed the Wagner Act’s tilt toward unions somewhat.”).

¹⁸¹ See, e.g., *supra* note 159 and accompanying text.

¹⁸² See, e.g., James J. Brudney, *Reflections on Group Action and the Law of the Workplace*, 74 TEX. L. REV. 1563, 1563 (1996) (arguing that changes in “federal workplace law” have dismissed “group action” or “collective bargaining” as forms of workplace regulation); Cynthia L. Estlund, *The Ossification of American Labor Law*, 102 COLUM. L. REV. 1527, 1535–40 (2002) (emphasizing the ineffectiveness of the Wagner Act, especially in light of “social, economic, and legal change”); Sachs, *supra* note 92, at 2685–86; Paul Weiler, *Promises to Keep: Securing Workers’ Rights to Self-Organization Under the NLRA*, 96 HARV. L. REV. 1769, 1769–70 (1983).

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.¹⁸⁷ 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.”¹⁸⁸

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.”¹⁸⁹ 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.¹⁹⁰ Yet by evoking the image of the union as extorting or coercing property owners to cede what is rightly theirs,¹⁹¹ *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,¹⁹² but for the sake of this re-

¹⁸⁷ See *supra* notes 150–55 and accompanying text.

¹⁸⁸ ATLESON, *supra* note 49, at 2.

¹⁸⁹ Brudney, *supra* note 14, at 774. Brudney goes on to argue that the fundamental components of union activity in the bargaining process are inherently intended to extort some concession from employers. See *id.* “[R]allies, protests, staged media events, and also appeals to agencies, legislatures, or courts, are undertaken with the aim of instilling a fear of economic loss that will encourage management to reach an agreement with the union.” *Id.*

¹⁹⁰ See discussion *infra* Part IV.B (explaining labor law doctrinal shifts in the larger cultural context).

¹⁹¹ See *infra* notes 369–75 and accompanying text.

¹⁹² E.g., N. PETER LAREAU, 1 NATIONAL LABOR RELATIONS ACT: LAW AND PRACTICE (2d ed. 2011); 1 THE DEVELOPING LABOR LAW: THE BOARD, THE COURTS, AND THE NATIONAL LABOR RELATIONS ACT (John E. Higgins, Jr. et al. eds., 5th ed. 2006) [hereinafter DEVELOPING LABOR LAW].

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.¹⁹³ 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.”¹⁹⁴

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,¹⁹⁵ 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.¹⁹⁶ In

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 SIÈCLE 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.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 contracting¹⁹⁸ or the identification of positive workplace rights for employees.¹⁹⁹ Where the anti-labor decisions of the nineteenth century can be seen as reinforcing or perhaps even building a “dominant social consciousness”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.²⁰¹

When considered in conjunction with the post-NLRA decline in union power and prevalence²⁰² and the gradual legislative and

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.

¹⁹⁸ See *supra* notes 151–54 and accompanying text.

¹⁹⁹ See *supra* notes 178–79 and accompanying text.

²⁰⁰ Gabel, *supra* note 102, at 268.

²⁰¹ See discussion *supra* Part IV.B.

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.”).

judicial whittling away of protections granted by the Act,²⁰³ 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"²⁰⁴ of fellow employees or others in their socio-economic group.²⁰⁵ 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."²⁰⁶ 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"²⁰⁷ that should be read not only against the background rules of property and contract,²⁰⁸ but also against the background social conditions that the Act both reflected and helped to shape.²⁰⁹

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"²¹⁰ of American culture. Michael Denning, in his history of mass culture in this era argues that the national consciousness in the 1930s was

²⁰³ See *supra* notes 165, 182 and accompanying text.

²⁰⁴ 29 U.S.C. § 157 (2011).

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 'legitimizes,' 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;"²¹¹ that is, the language of work, industrial relations, and class struggle was incorporated into the cultural lexicon.²¹² 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 legitimate a potentially oppositional set of values and ideals.²¹³

Whether embodied in John Steinbeck's explicit call for labor organizing and class solidarity in *The Grapes of Wrath*,²¹⁴ or the descriptions of working people's struggles in the pages of now-forgotten proletarian novels and magazines,²¹⁵ or the less explicitly political or pro-union works of mainstream authors of this time period,²¹⁶ 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.²¹⁷

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 forces²¹⁸—but rather in the group, the collective, or the community.²¹⁹ The Act's language about "mutual aid or protection" mirrors Tom Joad's declaration of solidarity with the oppressed in *The Grapes of Wrath*²²⁰ and George Bailey's insistence that townspeople working together could promote decent lifestyles and stave off economic exploitation in *It's A Wonderful Life*.²²¹ 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.²²²

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 legitimization of the institution itself not just as a normatively desirable force but as an acceptable part of a broader *American* society.²²³ Indeed, in his veto of the explicitly anti-union Taft-Hartley Act, President Truman sweepingly declared that organized labor was essential to the

BLUE-COLLAR HOLLYWOOD: LIBERALISM, DEMOCRACY, AND WORKING PEOPLE IN AMERICAN FILM 106–10, 118–19 (2003) (referencing various films during the 1940s and 1950s which depict the idea of self-sacrifice, cooperation, and the furtherance of the community and nation).

²¹⁸ See generally DOUG ROSSINOW, VISIONS OF PROGRESS: THE LEFT-LIBERAL TRADITION IN AMERICA 15, 17–19 (2008) (describing the political and economic views of Americans was based on "self-sufficiency" and "economic individualism"); CAROL NACKENOFF, THE FICTIONAL REPUBLIC: HORATIO ALGER AND AMERICAN POLITICAL DISCOURSE x (1994) (describing the political ideology at the time as that of "self-help and individualism"); Joannie Fischer, *Self-Reliance: Those Rugged Individuals*, U.S. NEWS & WORLD REP., June 28–July 5 2004, at 42, 42–44 (explaining the American ideal of "individual freedom"); Kevin M. Ryan, *Reshaping the Welfare Debate: The Poor People's Labor Movement*, 10 AM. U. J. GENDER, SOC. POL'Y & L. 41, 43–44 (2002) (exploring the shift from collectivism to individualism).

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.²²⁴ “[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.²²⁵

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.²²⁶ Instead of the union as an entity dominated by the social outsider or the other—the immigrant, the malcontent, or the radical²²⁷—the union was an expression of American values by Americans.²²⁸

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 period²²⁹ and is central to what I mean when I suggest that this

²²⁴ HARRY S. TRUMAN, LABOR-MANAGEMENT RELATIONS ACT VETO MESSAGE, H.R. 3020, 80th Cong. (1947), *reprinted in* 1947 U.S. Code Cong. Serv. 1851, 1859.

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.

²²⁷ 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, 330–31; *The Folly of the Eight-Hour Strikers*, *supra* note 99, at 8.

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).

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).

²²⁹ 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 ideologies²³³—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

COHEN, *supra* note 210, at 2, 5–7 (examining how Chicago factory workers became effective unionists and political participants and adopted new ideological perspectives, mounting collective action).

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.*

²³³ See *The President and Political Leader*, SCHOLASTIC, <http://www.scholastic.com/browse/subarticle.jsp?id=1708> (last visited Jan. 1, 2012).

²³⁴ See, e.g., Hale, *supra* note 147, at 470, 481–82, 493; Cohen, *supra* note 147, at 8, 12.

rules,²³⁵ 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,²³⁶ then the employment contract necessarily is also embedded in these broader frameworks and by extension implicates the public interest.²³⁷

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,²³⁸ just as there are times when the unofficial voices of cultural realms clearly intrude on the formal spaces of the law.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.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 'legitimizes,' in the sense of exercising normative force on the citizenry."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.²⁴² As scholars bemoan the NLRA as an "ossified" document,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

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

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).

²⁴⁰ See *supra* text accompanying notes 171–79.

²⁴¹ Kennedy, *supra* note 131, at 347.

²⁴² Cf. Robert M. Cover, *Violence and the Word*, 95 YALE L.J. 1601, 1629 (1986) (examining the relationship between legal interpretation and violent action, and stating that legal violence cannot be divorced from legal interpretation).

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,²⁴⁴ the percentage of unionized workers has shrunk.²⁴⁵ 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.²⁴⁶ Further, entry into so-called "free trade agreements" and global markets that have

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.").

²⁴⁶ See *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 140 (2002) (holding that undocumented workers are not able to receive back pay for work performed while in the United States in violation of federal immigration law).

prioritized free movement of capital²⁴⁷ has complicated the potential for a closed regulatory system²⁴⁸ and has allowed for the sort of international race to the bottom that proponents of federal preemption had initially feared in a domestic context.²⁴⁹ Confronted by these impediments as well as by decades of constraining judicial opinions²⁵⁰ and legislative inaction,²⁵¹ the once radically cutting-edge Wagner Act is widely considered by scholars to have failed in its initial goals,²⁵² leading to a diverse array of proposals and attempts to reform and re-imagine governance of the unionization and collective bargaining processes.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

²⁴⁷ See, e.g., David Graeber, *The Globalization Movement: Some Points of Clarification*, in *THE ANTHROPOLOGY OF DEVELOPMENT AND GLOBALIZATION: FROM CLASSICAL POLITICAL ECONOMY TO CONTEMPORARY NEOLIBERALISM* 169, 169 (Marc Edelman & Angelique Haugerud eds., 2005); ROBERTO MANGABEIRA UNGER, *FREE TRADE REIMAGINED: THE WORLD DIVISION OF LABOR AND THE METHOD OF ECONOMICS* 194 (2007).

²⁴⁸ See generally RAPHAEL KAPLINSKY, *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).

²⁴⁹ See, e.g., Archibald Cox & Marshall J. Seidman, *Federalism and Labor Relations*, 64 HARV. L. REV. 211, 245 (1950); cf. Stephen F. Befort, *Labor and Employment Law at the Millennium: A Historical Review and Critical Assessment*, 43 B.C. L. REV. 351, 352, 424 (2002) (calling for meaningful reform in order to restore the equilibrium between management and labor in the context of the global economy).

²⁵⁰ See generally Klare, *supra* note 49, at 272–73 (outlining mid-twentieth-century progressivism).

²⁵¹ See *supra* notes 181–83 and accompanying text; see also Labor-Management Reporting and Disclosure Act, Pub. L. No. 86-257, 73 Stat. 519 (codified as amended at 29 U.S.C. §§ 401–531 (2011)). See generally Ahmed A. White, *The Crime of Staging an Effective Strike and the Enduring Role of Criminal Law in Modern Labor Relations*, WORKINGUSA: THE J. LAB. & SOC'Y, Mar. 2008, at 23–24, 31 (describing the overarching weakness of today's labor movement); Charles B. Craver, *The National Labor Relations Act at 75: In Need of a Heart Transplant*, 27 HOFSTRA LAB. & EMP. L.J. 311, 313 (2010) (describing the success of corporate leaders in inducing congress to curtail labor rights).

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

²⁵³ See, e.g., Jim Pope, *Next-Wave Organizing and the Shift to a New Paradigm of Labor Law*, 50 N.Y.L. SCH. L. REV. 515 (2005–2006); Kerry Rittich, *Between Workers' Rights and Flexibility: Labor Law in an Uncertain World*, 54 ST. LOUIS U. L.J. 565, 567 (2010); Rogers, *supra* note 16, at 51–54; Sachs, *supra* note 16, at 718–27 (outlining various proposals for labor reform); Katherine V.W. Stone, *A New Labor Law for a New World of Work: The Case For a Comparative-Transnational Approach*, 28 COMP. LAB. L. & POL'Y J. 565, 566–67 (2007); Richard Michael Fischl, *Rethinking the Tripartite Division of American Work Law*, 28 BERKELEY J. EMP. & LAB. L. 163, 163 (2007).

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.²⁵⁴ 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 complaints²⁵⁵ 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

²⁵⁴ See, e.g., Leah Rozen, *Hollywood's Vanishing Have-Nots*, N.Y. TIMES, Nov. 12, 2010, at L16, <http://www.nytimes.com/2010/11/14/movies/14dagenham.html> (discussing the absence of "blue-collar characters" and class conscious themes from contemporary mainstream films).

²⁵⁵ See, e.g., *Hemi Group, LLC v. City of New York*, 130 S. Ct. 983 (2010); *Boyle v. U.S.*, 556 U.S. 938 (2009); *Bridge v. Phoenix Bond & Indem. Co.*, 553 U.S. 639 (2008).

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 1935.²⁵⁶ 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.²⁵⁷ 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.²⁵⁸

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.²⁵⁹ 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

²⁵⁶ Beverly Takahashi, *A New Paradigm for the Labor Movement: New Federalism's Unintended Consequences*, 17 INT'L J. POL., CULTURE & SOC'Y 261, 261–64 (2003).

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.").

²⁵⁸ Eric Ames Tilles, Comment, *Union Receiverships Under RICO: A Union Democracy Perspective*, 137 U. PA. L. REV. 929, 930–31 (1989).

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-Hartley 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.²⁶⁰ 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.²⁶¹ Similarly, in his veto statement, President Truman concluded that the "bill would go far toward weakening our trade union movement."²⁶² Nevertheless, with bipartisan support, the Taft-Hartley Act was passed over the presidential veto,²⁶³ substantially altering the landscape of employer/employee relations and bargaining power.²⁶⁴

The 1947 amendments outlawed closed shops,²⁶⁵ protected the rights of workers *not* to join unions,²⁶⁶ and affirmatively permitted states to pass "right to work" laws.²⁶⁷ This latter provision allowing for anti-union state legislation, although not the heart of the bill,²⁶⁸ 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 1947,²⁶⁹ the Taft-Hartley Act stands as a counter-legitimation measure to the Wagner Act—legitimizing not union membership, but hostility to organizing.²⁷⁰ Through section 158(b)(4), the Act also established

²⁶⁰ See Paul A. Brinker, *The Taft-Hartley Act in Operation*, 16 S. ECON. J. 147, 147–52 (1949).

²⁶¹ *National Affairs: Barrel No. 2*, TIME, June 23, 1947, at 17.

²⁶² HARRY S. TRUMAN, LABOR-MANAGEMENT RELATIONS ACT VETO MESSAGE, H.R. 3020, 80th Cong. (1947), reprinted in 1947 U.S.C. Cong. Serv. 1851, 1859 (1947).

²⁶³ See Alexander Cockburn, *Presidential Elections: Not as Big a Deal as They Say*, in DIME'S WORTH OF DIFFERENCE: BEYOND THE LESSER OF TWO EVILS 10 (Alexander Cockburn & Jeffrey St. Clair eds., 2004).

²⁶⁴ See Brinker, *supra* note 260, at 148.

²⁶⁵ See Labor Management Relations (Taft-Hartley) Act, ch. 120, § 191, 61 Stat. 136, 140 (codified as amended at 29 U.S.C. § 158(a)(3) (2011)).

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-realist 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.

²⁷¹ See 29 U.S.C. § 158(b)(4).

²⁷² See *id.* § 158 (b)(7).

²⁷³ See, e.g., *W. Coast Hotel Co. v. Parrish*, 300 U.S. 379, 389 (1937) (upholding a Washington statute providing minimum wage protections for women).

²⁷⁴ See generally R. H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1, 2 (1960) (discussing the reciprocal nature of social cost).

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.²⁸⁰

The Wagner Act may have been designed to promote and allow workers to aggregate their strength,²⁸¹ but the attitude embodied by the language of the Taft-Hartley Act and its supporters was one of marked concern about *too much* aggregated strength.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.²⁸³ As the Supreme Court explained, a decade after the passage of the Taft-Hartley Act, in *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.²⁸⁴

²⁸⁰ See *supra* Part II.

²⁸¹ See *supra* Part III.

²⁸² See, e.g., Gerald Friedman, *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).

²⁸³ See generally *id.* (providing a historical discussion on the labor movement shift in the aftermath of World War II).

²⁸⁴ *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.

²⁸⁶ Labor-Management Reporting and Disclosure (Landrum-Griffin) Act of 1959, Pub. L. No. 86-257, 73 Stat. 519.

²⁸⁷ Following the LMRDA’s passage, the AFL-CIO described it as “the worst legislative blow suffered by the labor movement since enactment of the Taft-Hartley Act in 1947.” *Labor Legislation: Landrum-Griffin Act*, LABOR LOOKS AT THE 86TH CONGRESS (AFL-CIO, Washington, D.C.), Oct. 1960, at 5.

²⁸⁸ See Joseph A. Loftus, *President Hails New Labor Bill as ‘a Tremendous Improvement,’* N.Y. TIMES, July 30, 1959, at 12; Editorial, *Now Is the Time for All*, L.A. TIMES, Aug. 11, 1959, at B4.

²⁸⁹ See 29 U.S.C. §§ 411–415 (2011).

²⁹⁰ 29 U.S.C. §§ 481–483, 501–504 (2011).

²⁹¹ See, e.g., Joseph A. Loftus, *McClellan Backs New Labor Bill*, N.Y. TIMES, July 29, 1959, at 17; *The Labor Bill Free-for-All*, L.A. TIMES, Aug. 5, 1959, at B4.

²⁹² See Robert De Vore, *After Five Years, Howard Smith Scores Victory Over Labor*, WASH. POST, June 13, 1943, at B4. See generally Allison R. Hayward, *Revisiting the Fable of Reform*, 45 HARV. 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.²⁹⁴

The much-publicized legislative debate over the LMRDA²⁹⁵ 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."²⁹⁶ However, this minor caveat paled in comparison to a broader assessment of labor unions as mired in criminality.²⁹⁷ Interestingly, Eisenhower emphasized that the criminality of union leadership was a "not a partisan matter,"²⁹⁸ and was unrelated to the acceptable realm of union activity—the collective bargaining process.²⁹⁹ 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."³⁰⁰

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."³⁰¹

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

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.

²⁹⁶ *Eisenhower Insists on End of Blackmail Picket Lines*, CHI. DAILY TRIB., Aug. 7, 1959, at 5.

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.³⁰² The Employee Free Choice Act³⁰³ and the Labor Law Reform Act of 1977³⁰⁴ both languished in Congress, unable to generate sufficient political support and to overcome anti-union sentiment.³⁰⁵ 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).

³⁰³ Employee Free Choice Act of 2009, H.R. 1409, 111th Cong. (1st Sess. 2009).

³⁰⁴ See generally The Labor Reform Act of 1977, H.R. REP. NO. 95-637, at 93 (1977) (concluding that H.R. 8410 had credible objectives but failed to create remedies against violators); Richard N. Block, *Rethinking the National Labor Relations Act and Zero-Sum Labor Law: An Industrial Relations View*, 18 BERKELEY J. EMP. & LAB. L. 30, 34–37 (1997) (discussing reform proposals to amend the NLRA since 1977 and the “zero-sum” implications of the amendments).

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.³⁰⁶ 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,³⁰⁷ 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.³⁰⁸ 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.³⁰⁹ 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,³¹⁰ RICO was passed as title IX of the Organized Crime Control Act of 1970³¹¹ in order to aid “the elimination of the infiltration of organized crime and racketeering into legitimate organizations operating in interstate commerce.”³¹² More specifically, the Act was a byproduct of the 1967 President's Commission on Law Enforcement and Administration of Justice (the Katzenbach Commission),³¹³ which outlined the presence, structure, and activities of organized crime in America, described the threats posed by these syndicates, and made preliminary policy proposals.³¹⁴ As in the case of the LMRDA, public revelation of broad-ranging official findings of racketeers' influence became a powerful tool in legislative debates.³¹⁵ 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.³¹⁶

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).

³¹¹ Organized Crime Control Act of 1970, Pub. L. No. 91-452, § 901(a), 84 Stat. 922, 941.

³¹² S. REP. NO. 91-617, at 76 (1969).

³¹³ PRESIDENT'S COMM'N ON LAW ENFORCEMENT & ADMIN. OF JUSTICE, *THE CHALLENGE OF CRIME IN A FREE SOCIETY* 283–85 (1967) [hereinafter *PRESIDENT'S COMM'N*].

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).

³¹⁵ See Corrupt Organizations Act of 1969, S. 1861, 91st Cong. § 1.

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.³¹⁷ As centerpieces of the Nixon administration's war on organized crime,³¹⁸ which was geared at strengthening federal law enforcement and prosecutorial powers,³¹⁹ the statutes were expansive and almost unprecedented in scope.³²⁰ 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.³²¹

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.³²² 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).

³¹⁷ See JAMES B. JACOBS, *MOBSTERS, UNIONS, AND FEDS: THE MAFIA AND THE AMERICAN LABOR MOVEMENT* 121–22 (2006) (stating that RICO gave federal law enforcement agencies more powers in combating organized crime and also gave victims of the actions of organized crime groups a civil remedy at law).

³¹⁸ Douglas E. Abrams, *Crime Legislation and the Public Interest: Lessons from Civil RICO*, 50 SMU L. REV. 33, 50 (1996).

³¹⁹ *Id.* at 35.

³²⁰ See, e.g., *On Crime Bill*, ATLANTA DAILY WORLD, Feb. 8, 1970, at 10.

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

³²³ *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.

³²⁴ PRESIDENT’S COMM’N, *supra* note 313, at 187 (emphasis added).

³²⁵ *See id.* at 188.

³²⁶ *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).

³²⁷ *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.

³²⁸ *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.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

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. *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.

campaigns) has proved perhaps even more confounding for judges, legal practitioners, and scholars.³³⁰ 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”³³¹ 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.”³³² In turn, a “‘pattern of racketeering activity’ requires at least two ‘predicate acts’ in a ten-year period.”³³³ 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.”³³⁴ 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.”³³⁵

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.³³⁶ In arguing against a broad reading of the civil right of action in *Sedima, S.P.R.L. v. Imrex Co.*,³³⁷ 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. . . .

. . . .

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).

³³¹ 18 U.S.C. § 1964(c) (2011).

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

³³³ *Cintas Corp. v. UNITE HERE*, 601 F. Supp. 2d 571, 577 (S.D.N.Y. 2009) (citing 18 U.S.C. § 1961(5) (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.

³³⁵ L. Gordon Crovitz, *RICO: The Legalized Extortion and Shakedown Racket*, in THE RICO RACKET, *supra* note 310, at 15, 26.

³³⁶ See Brudney, *supra* note 14, at 747–48.

³³⁷ *Sedima, S.P.R.L. v. Imrex Co.*, 741 F.2d 482 (2d Cir. 1984), *rev’d*, 473 U.S. 479 (1985).

... 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).

³⁴⁰ *Scheidler v. Nat'l Org. for Women, Inc.*, 537 U.S. 393 (2003).

³⁴¹ *Wilkie v. Robbins*, 551 U.S. 537 (2007).

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).³⁴³ 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.³⁴⁴ 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.³⁴⁵

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 [d]efendants’ activities.”³⁴⁶

In *Cintas*, the activities that comprised the corporate campaign, which were alleged to have constituted the extortionate behavior,

³⁴³ See, e.g., *Cintas Corp. v. UNITE HERE*, 601 F. Supp. 2d 571, 577–78 (S.D.N.Y. 2009); *A. Terzi Prods., Inc. v. Theatrical Protective Union*, 2 F. Supp. 2d 485, 490, 496 (S.D.N.Y. 1998).

³⁴⁴ See *Hotel Emps. & Rest. Emps. Union, Local 57 v. Sage Hospitality Res., LLC*, 390 F.3d 206, 219 (3d Cir. 2004); *Hotel & Rest. Emps. Union Local 217 v. J.P. Morgan Hotel*, 996 F.2d 561, 566 (2d Cir. 1993); *Cintas*, 601 F. Supp. 2d at 577.

³⁴⁵ *Cintas*, 601 F. Supp. 2d at 577 (citing *Viacom Int’l, Inc. v. Icahn*, 747 F. Supp. 205, 213 (S.D.N.Y. 1990)); see also *Brokerage Concepts, Inc. v. U.S. Healthcare, Inc.*, 140 F.3d 494, 523–25 (3d Cir. 1998) (citations omitted) (adopting the First and Second Circuit definition of wrongful within the Hobbs Act).

³⁴⁶ *Cintas*, 601 F. Supp. 2d at 577–78; see also *Metro. Opera Ass’n v. Local 100, Hotel Emps. & Rest. Emps. Int’l Union*, 239 F.3d 172, 177–78 (2d Cir. 2001) (“[W]ithin the labor context, in seeking to exert social pressure . . . 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.”).

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.³⁴⁷ 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.”³⁴⁸ 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.³⁴⁹ Cintas's RICO complaints were dismissed.³⁵⁰ 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.³⁵¹

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.³⁵² 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.³⁵³

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.

employers’ involvement in judicial elections, see, for example, John D. Felice et al., *Judicial Reform in Ohio*, in JUDICIAL REFORM IN THE STATES 51, 59, 64 (Anthony Champagne & Judith Haydel eds., 1993); Anthony Champagne, *The Politics of Judicial Selection*, 31 POL’Y STUD. J. 413, 414–15 (2003) (offering an explanation for the continuance of partisan election of judges); Lawrence Baum, *Electing Judges*, in CONTEMPLATING COURTS 18, 29 (Lee Epstein ed., 1995) (discussing contributions to judicial campaigns in Ohio made by various interest groups); FORBATH, *supra* note 45, at 34 (discussing the inception of state judge selection by popular election).

³⁵⁴ Ronald Flowers, *Fighting Back Against Union Corporate Campaigns*, WORKFORCE MANAGEMENT, Mar. 11, 2010, <http://www.workforce.com/article/20100311/NEWS02/303119995>.

³⁵⁵ See Sodexo Inc.’s Brief in Opposition to Defendants’ Joint Motion to Dismiss Complaint, *Sodexo, Inc. v. Serv. Emps. Int’l Union*, No. 1:11-cv-276 (CMH/IDD) (E.D. Va. July 1, 2011), 2011 WL 2696374.

³⁵⁶ *Sodexo USA Files RICO Lawsuit Against SEIU*, PR NEWswire (Mar. 17, 2011), <http://www.prnewswire.com/news-releases/sodexo-usa-files-rico-lawsuit-against-seiu-118204534.html> (citing Senior Vice President and General Counsel of Sodexo USA).

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 extortionate.”).

*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.³⁵⁸ 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.³⁵⁹ 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.³⁶⁰ But as it stands,

³⁵⁸ See *supra* notes 103–06 and accompanying text.

³⁵⁹ See, e.g., *S.S.S. Co. v. NLRB*, 316 U.S. 31, 33 (1942); *Thornhill v. Alabama*, 310 U.S. 88, 104 (1940) (“The range of activities proscribed by [the statute], whether characterized as picketing or loitering or otherwise, embraces nearly every practicable, effective means whereby those interested—including the employees directly affected—may enlighten the public on the nature and causes of a labor dispute.”); *NLRB v. Fansteel Metallurgical Corp.*, 306 U.S. 240, 250–51 (1939); see also *ATLSON*, *supra* note 49, at 44–56 (“A good deal of the debate on the Wagner Act concerned its ‘one-sidedness,’ in that only employer actions were proscribed.”).

³⁶⁰ Potential legislative responses to the change in the face of labor relations have been a hot button issue in recent years. See generally Steven Greenhouse, *Unions Fear Rollback of Rights Under Republicans*, N.Y. TIMES, Nov. 1, 2010, at A19,

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.³⁶¹ 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.”³⁶² On the other hand, the Wagner Act³⁶³ 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.³⁶⁴ Additionally, unions have become recognized as significant political power wielders and are considered major players in local and national elections.³⁶⁵

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.³⁶⁶ 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/02labor.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).

³⁶¹ See News Release, Bureau of Labor Statistics, *supra* note 245 and accompanying text.

³⁶² FREEMAN & MEDOFF, *supra* note 58, at 4.

³⁶³ See National Labor Relations (Wagner) Act, Pub. L. No. 74-198, 49 Stat. 449 (1935) (codified as amended at 29 U.S.C. §§ 151–69 (2011)).

³⁶⁴ But see White, *supra* note 251 (discussing the continuing role of criminal law in labor relations and labor disputes).

³⁶⁵ See, e.g., Lawrence Baum & David Klein, *Voter Responses to High-Visibility Judicial Campaigns*, in *RUNNING FOR JUDGE: THE RISING POLITICAL, FINANCIAL, AND LEGAL STAKES OF JUDICIAL ELECTIONS* 140, 146 (Matthew J. Streb ed., 2007); PETER KEISLER, *SOLIDARITY AND DISSENT: UNION MEMBER ATTITUDES AND THE POLITICAL PROCESS* 23 (1984) (“Since 1974 . . . six of the ten biggest givers among political action committees have been unions . . .”); JONG OH RA, *LABOR AT THE POLLS: UNION VOTING IN PRESIDENTIAL ELECTIONS, 1952–1976* 5 (1978).

³⁶⁶ *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.³⁶⁷ 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,”³⁶⁸ provides a striking document of anti-union sentiment.³⁶⁹ The complaint portrays the unions as concerned with growing their own power and influence as opposed to protecting workers.³⁷⁰ 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.³⁷¹ The complaint alleges,

If Cintas gives in to [d]efendants’ demands, then [d]efendants’ ruthless corporate campaign will temporarily end—at least against Cintas, and only for so long as Cintas continues to give in to [d]efendants’ demands. If Cintas does not give in, then [d]efendants will continue with their corporate campaign and their *effort to destroy Cintas’s business*.³⁷²

In “remain[ing] strong and refus[ing] to give in to [d]efendants’ unlawful demands,”³⁷³ 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.³⁷⁴ 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.³⁷⁵ Jimmy Hoffa’s widely

³⁶⁷ See *Cintas*, 601 F. Supp. 2d at 581.

³⁶⁸ *Id.* at 574.

³⁶⁹ First Amended Complaint ¶¶ 1–12, *Cintas Corp. v. UNITE HERE*, 601 F. Supp. 2d 571 (S.D.N.Y. 2009) (No. 108CV02185).

³⁷⁰ *Id.* ¶¶ 4, 7–8, 10–11.

³⁷¹ *Id.* ¶ 97.

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.³⁷⁶ Since the Taft-Hartley Act and the beginning of the Wagner Act's deradicalization, films ranging from highly-revered classics like *On the Waterfront*,³⁷⁷ to mainstream Hollywood blockbusters like *Eraser*³⁷⁸ have uncritically elided organized crime with organized labor and bargaining power with extortion and violence.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,³⁸⁰ and indeed many of the unions targeted in the recent civil RICO suits have been active in trying to unionize immigrant communities.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.³⁸²

<http://www.nytimes.com/2010/10/15/nyregion/15waterfront.html>; 'Secrets of the Dead: Gangland Graveyard,' WASH. POST, Nov. 17, 2005, <http://www.washingtonpost.com/wp-dyn/content/discussion/2005/11/16/DI2005111601003.html> ("The mob is still involved in labor racketeering [I]n the New York and Chicago areas in particular, the mob still flexes its muscles in labor racketeering."); F.I.S.T. (United Artists 1978); Tom Robbins, *Cleaning Lessons for Dirty Bosses: Mob Tapes Yield a How-To Guide on Stiffing Workers*, VILLAGE VOICE, Sept. 24, 2002, <http://www.villagevoice.com/2002-09-24/news/cleaning-lessons-for-dirty-bosses/>. See generally WILLIAM J. PUETTE, THROUGH JAUNDICED EYES: HOW THE MEDIA VIEW ORGANIZED LABOR (1992) (examining the portrayal of unions through various mediums and the effect it has had on public opinion).

³⁷⁶ See generally CHARLES BRANDT, "I HEARD YOU PAINT HOUSES": FRANK "THE IRISHMAN" SHEERAN AND THE INSIDE STORY OF THE MAFIA, THE TEAMSTERS, AND THE LAST RIDE OF JIMMY HOFFA (2004) (detailing the life and crimes of Jimmy Hoffa); THADDEUS RUSSELL, OUT OF THE JUNGLE: JIMMY HOFFA AND THE REMAKING OF THE AMERICAN WORKING CLASS (2001) (providing an account of Jimmy Hoffa's life).

³⁷⁷ ON THE WATERFRONT (Columbia Pictures 1954).

³⁷⁸ ERASER (Warner Brothers Pictures 1996).

³⁷⁹ See *id.*; ON THE WATERFRONT, *supra* note 377.

³⁸⁰ See generally Sachs, *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).

³⁸¹ See, e.g., *About Us*, 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.").

³⁸² 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; 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.³⁸³ In recent years, labor disputes in the professional sports world have generated substantial media attention—much of it negative.³⁸⁴ 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.³⁸⁵ 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.³⁸⁶

Entertainment industry strikes and contract disputes, which have also enjoyed substantial media attention, have often raised complaints that employees are overpaid or greedy,³⁸⁷ and any positive vision of worker solidarity is usually lost amid the perception that those striking are not representative of the American working class.³⁸⁸ Similarly, during the recent crisis and

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 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.³⁸⁹ 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.³⁹⁰ 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.³⁹¹

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.³⁹² 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.³⁹³ 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 *particular view of the market*, a view of the market that was legislatively rejected in 1935.³⁹⁴ 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.³⁹⁵ 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.³⁹⁶ The extortion of

³⁹³ See *Cintas Corp. v. UNITE HERE*, 601 F. Supp. 2d 571, 574 (S.D.N.Y. 2009).

³⁹⁴ See National Labor Relations (Wagner) Act, 29 U.S.C. § 151 (2011).

³⁹⁵ See, e.g., *United States v. Green*, 350 U.S. 415, 420 (1956).

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,³⁹⁷ 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-legitimize 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.

BLUE EAGLE AT WORK: RECLAIMING DEMOCRATIC RIGHTS IN THE AMERICAN WORKPLACE 1 (2005); Sachs, *supra* note 92, at 2687; Benjamin I. Sachs, *Labor Law Renewal*, 1 HARV. L. & POL'Y REV. 375, 376 (2007); Rogers, *supra* note 16, at 39.

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

