THE CONFLICT OF THE COURTS: RICO, LABOR, AND LEGAL PREEMPTION IN UNION COMPREHENSIVE CAMPAIGNS

*Nathan Newman**

TABLE OF CONTENTS

* Nathan Newman is Associate Counsel at the Brennan Center for Social Justice at New York University School of Law. Previously he was an associate at the labor law firm of Eisner & Hubbard. He received his law degree from Yale Law School and a Ph.D. from the Sociology Department at the University of California-Berkeley.

I. INTRODUCTION

Why do we regulate labor conflict in one set of courts, largely through National Labor Relations Board proceedings overseen by circuit courts of appeals, while internal corporate governance is regulated largely by state corporate law statutes, overwhelmingly overseen by the Delaware Court of Chancery? Despite the fact that labor conflict is largely a struggle with shareholders over labor's share of corporate surplus (the so-called wage-profits split),[1] the oddity is not just that the U.S. so completely separates the law governing shareholder versus labor interests over that same surplus, but that such completely different courts are involved in their respective disputes with firm management.

---

1. As economist and legal scholar Kenneth G. Dau-Schmidt notes, this split is not always the simplistic zero-sum conflict portrayed:

> [T]he primary sources of union benefits are employer rents, quasi-rents, and productivity increases associated with unionism. These rents and productivity increases constitute the cooperative surplus that the parties divide through collective bargaining. Individual bargaining will not secure for employees a share of this surplus. The workers must organize and bargain collectively to raise themselves to a position of rough equality relative to the employer and gain a share of the surplus.

Kenneth G. Dau-Schmidt, *A Bargaining Analysis of American Labor Law and the Search for Bargaining Equity and Industrial Peace*, 91 MICH. L. REV. 419, 424 (1992). Strategic bargaining can increase wages or profits without necessarily coming at the expense of the other party, but the very dependent interrelationship of wage and profit demands in some ways makes the split court jurisdiction more problematic.

While such a split approach had a semblance of coherence in the immediate post-New Deal era of integrated oligopolistic firms,[2] in an era of increased subcontracting, merger and spin off activities, and intensive consumer and environmental regulation, this tradition of split court jurisdiction over corporate governance has become less viable.[3] As this Article will explore, nothing highlights this dysfunction more than the recent turn by corporations to use the Racketeer Influenced and Corrupt Organization Act (RICO)[4] against unions seeking to enlist consumer and some shareholder allies in conflicts with firms. Such lawsuits suddenly add federal criminal and civil courts to the cacophony of players over corporate governance and the economic weapons that are viable for each side in battling for shares of the corporate surplus.[5]

This breakdown in simple court jurisdiction reflects a broader legal and theoretical breakdown in simple models of the firm that once worried little about the relationship of firm internal governance to the markets in which they operated. What more recent corporate governance analysts make clear is that firm structure decisions have both efficiency maximization aspects as well distributional effects by changing the relative bargaining power of different actors, both within and outside the firm.[6] So decisions on "internal" corporate governance, whether decided in the Delaware Courts of Chancery or in federal courts determining through RICO hearings that union tactics are illegitimate interference in such governance, inevitably have effects on traditional bargaining under the aegis of the National Labor Relations Act (NLRA). Given this reality, this Article will highlight why the recent breakdown in court jurisdictional divisions was inevitable in the modern era, especially as unions have increasingly begun to use broad "corporate campaigns" to target corporate opponents beyond their traditional strike weapon.

II. CORPORATE CAMPAIGNS AND THE CONFLICT OF THE COURTS

In recent years, labor unions have begun regularly resorting to new strategies that target corporations beyond traditional workplace-based pressure. Labeled corporate or comprehensive campaigns, these tactics leverage union pension funds and alliances with a whole variety of other economic actors in order to challenge their employer-opponents directly at the level of corporate

---

2. *See* discussion *infra* Parts II.B, II.D.
3. *See* discussion *infra* Part III.A-B.
4. *See infra* note 13 and accompanying text.
5. *See* discussion *infra* Parts II.C, IV.
6. *See* discussion *infra* Parts II.D, IV.B.

deal making.[7] Examples include simple zoning challenges, initiating regulatory actions, using pension assets, and attempts to directly replace the opposition corporate board of directors.[8]

With labor reverses in recent decades, comprehensive campaigns have grown significantly, with new departments at many unions devoted specifically to the national coordination needed for such campaigns.[9] The contemporary birth of comprehensive campaign strategies is usually traced to the success of the J.P. Stevens textile campaign by the Textile Workers Union in forcing a militantly antiunion employer to agree to unionization.[10] Since then, a whole range of unions have begun emulating the successes of that campaign and adding new tactics.[11]

The kicker to such campaigns is that they take unions outside the traditional legal venues of the NLRA and into entirely different areas of economic and legal conflict where unions have no clear legal status.[12] This has led many employers to try to block such campaigns by suing the unions under RICO[13] with charges of engaging in blackmail, extortion, and tortious interference in business relations.[14] Employers are jockeying to either have

---

7. *See* David Moberg, *Labor's Capital Strategies*, *in* NOT YOUR FATHER'S UNION MOVEMENT 201, 206-07 (Jo-Ann Mort ed., 1998) (discussing corporate campaigns in the new labor movement).

8. *See id.* at 206-10 (providing examples of corporate campaigns by unions and the resulting actions by management).

9. *See, e.g.*, *id.* at 202 (discussing the creation of a new department in the AFL-CIO).

10. *See* SARA U. DOUGLAS, LABOR'S NEW VOICE: UNIONS AND THE MASS MEDIA 8-9 (1986) (discussing the comprehensive campaign strategies used by the Textile Workers Union in the campaign against J.P. Stevens as "a classic example of a union going beyond established and conventional union techniques").

11. *See generally* Moberg, *supra* note 7, at 206-07 (discussing corporate campaign strategies and providing examples of current union actions).

12. *See* San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236 (1959) (holding that federal labor law preempts most state government attempts to regulate labor relations). But as this Article will detail, as unions have conducted campaigns with tools outside the traditional arsenal of collective bargaining pressure in the workplace, the question becomes whether that preemption is still valid in such cases.

13. 18 U.S.C. § 1962 (2000) (enacted as Title IX of the Organized Crime Control Act of 1970, Pub. L. No. 91-452, 84 Stat. 922 (1970)). While originally enacted to combat organized crime, it has been extended to a range of economic areas with the Supreme Court affirming that Congress has mandated a "liberal construction" of the statute to extend it to economic activity. *See, e.g.*, United States v. Turkette, 452 U.S. 576, 587 (1981) (holding that enactment of an intentionally broad RICO statute cannot be restricted by courts); Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 495-97 (1985) (holding that RICO is not limited to organized crime, but may be applied to legitimate businesses).

14. *See* Overnite Transp. Co. v. Int'l Bhd. of Teamsters, 168 F. Supp. 2d 826, 826 (W.D. Tenn. 2001) (noting that plaintiff alleged violations of RICO, tortious interference with the plaintiff's business, tortious interference with the plaintiff's employment relations, and malicious

judges support their legal position or pass legislation that would clearly make any union action illegal outside the straightjacket of traditional labor actions.[15]

A. *Preemption and the NLRB-Delaware Divide*

These legal challenges to comprehensive campaigns play out in an almost ping-pong movement of preemption and conflict of courts. To take one example, Bayou Steel a few years ago reacted to a comprehensive campaign by the United Steelworkers over a strike at a Louisiana factory by filing a RICO action in the federal district court of Delaware, basing venue on the union's filing of a shareholder suit in the Delaware Court of Chancery.[16] They argued that the Louisiana state law of extortion and blackmail should govern the case based on applying the federal RICO act's definition of "predicate acts."[17] The Steelworkers in turn argued that federal labor law preempted the state law and RICO claims, and the case should be moved to the National Labor Relations Board (NLRB), and asserted that their shareholder actions were completely legal under Delaware chancery court rules.[18]

---

destruction of property against the defendant union); MHC, Inc. v. United Mineworkers of Am., 685 F. Supp. 1370, 1374 (E.D. Ky. 1988) (stating that plaintiff sued the union for RICO violations and tortious interference with business relations).

15. Peter Hoekstra of Michigan has been one of the most prominent advocates of changing the law to ban union comprehensive campaigns. As soon as Republicans took control of Congress in 1995, he began calling for hearings to investigate and ban the corporate campaign tactic by unions. In 1998, he cited a janitors' organizing campaign against Hewlett-Packard as fresh evidence of the need for legislation. *See* David Bacon, *Silicon Valley Cleanup*, S.F. BAY GUARDIAN, Feb. 25, 1998, at 14. Bacon has an extended version of his analysis on this campaign and its strategic role in the company's fights against unions on his website. David Bacon, *The New Face of Unionbusting* (1999), *at* http://www.igc.org/dbacon/Unions/02ubust1.htm. By 2002, Workforce Protections Subcommittee Chairman Charlie Norwood of Georgia had taken up leadership on the issue, holding hearings on corporate campaigns and whether new legislation was needed to ban them. *See* John Boehner, *Subcommittee Hears Testimony on Union Dues and 'Corporate Campaigns'*, *available at* http://edworkforce.house.gov/press/press107/corcams72302.htm (July 23, 2002).

16. Herbert R. Northrup & Charles H. Steen, *Union "Corporate Campaign" as Blackmail: The RICO Battle at Bayou Steel*, 22 HARV. J.L. & PUB. POL'Y 771, 798 (1999). Bayou still alleged the defendants engaged in a corporate campaign of harassment with the intent to take over or destroy it, as a result of failed labor negotiations. Bayou Steel Corp. v. United Steelworkers of Am., No. CIV.A.95-496-RRM, 1996 WL 76344, at *1 (D. Del. Jan. 11, 1996). The court held Bayou alleged sufficient facts to support its RICO claims and that those claims were not barred legally. *Id.* at *2. Moreover, Bayou's RICO claims established a basis for federal jurisdiction and therefore Bayou could proceed on its pendent state law claims. *Id.*

17. Northrup & Steen, *supra* note 16, at 773-74.

18. *See id.* at 795-96; Brief in Support of Defendants United Steelworkers of America's and Industrial Union Department's Motion for Summary Judgment at 53-54, 64-65, Bayou Steel Corp. v. United Steelworkers of Am., 1996 WL 76344 (D. Del. Jan. 11, 1996) (No. CIV.A.95-496-RRM).

This whole set of preemption and venue arguments might be seen as just one more amusing by-product of U.S. federalism in the courts, but this conflict of courts is more than that. What these union comprehensive campaigns are pushing against is not just conflicts in the courts, but the very way class conflict is contained within separate legal spheres in our system. What it reveals, contrary to conventional wisdom, is how starkly class-conscious American economic law is in its heart, even as it desperately uses procedural rulings to mask substantive decisions over conflicts between employee and shareholder interests.

On one hand, you have a set of arduously obtained labor laws that create a narrow but deep right of workers to fight employers collectively for as great a share of profits as they can. Both the Right and Left at the NLRA's inception had contempt for any argument for shared interests between investors and workers.[19] From the ban on company unions[20] to the refusal to let supervisors collectively organize,[21] the question of "which side are you on" was the basic question of the law—labor on one side, management on the other. There was no social democratic mediating codetermination for the U.S., just flat-out conflict. With more and more conservative labor laws piled on,[22] this may have degenerated into a more functional division between labor and management within the corporate enterprise, but its core is class conscious with the NLRB designated as a mediator of the rules of war, not an arbiter of results. To describe labor battles as blackmail and extortion is to be almost tautological—power and threats in the interests of union employees, not substantive economic regulations, are the core of the wage-rate and work condition setting in American labor law.[23]

---

19. *See* discussion *infra* Part III.B.

20. Mark Barenberg argues that the ban on company unions was based on the perceived incompatible interests of labor and management, but that the law's proponent, Senator Robert Wagner, pursued his overall regulatory scheme with more collaborationist goals in mind than generally credited. Mark Barenberg, *The Political Economy of the Wagner Act: Power, Symbol, and Workplace Cooperation*, 106 HARV. L. REV. 1379, 1442-51 (1993) [hereinafter Barenberg, *The Political Economy*].

21. *See* National Labor Relations Act, 29 U.S.C. § 2(11) (2000). Section 14(a) frees employers from obligations to deal with supervisors as employees for the purposes of collective bargaining. *Id.* § 14(a). This was passed as part of the 1947 Taft-Hartley Act, which saw the divided loyalties of supervisors as unacceptable in the workplace. Int'l Org. of Masters, Mates and Pilots, Marine Div., Int'l Longshoremen's Ass'n v. NLRB, 539 F.2d 554, 559-60 (5th Cir. 1976).

22. Taft-Hartley, also known as the Labor Management Relations Act, 29 U.S.C. § 141 (2000) [hereinafter LMRA], would significantly restrict a union's ability to organize, while the Landrum-Griffin Act, also known as the Labor Management Reporting and Disclosure Act of 1959, 29 U.S.C. § 401 (2000) [hereinafter LMRDA], significantly increased the criminal liability of union leaders for their actions.

23. *See* discussion *infra* Part III.D.

Less obviously, but as significantly, this class conflict is mirrored in corporate law as well. Shareholder interests are treated as paramount within corporate governance with an almost frenetic agitation among free market theorists and most judicial decisions against any mediation of those interests with "stakeholder" interests within corporate governance.[24] Maximizing returns to shareholders is considered so singularly the goal of corporate governance that, in principle, the shareholders collectively cannot renounce that goal for other concerns. The cornerstone of this principle was highlighted in the *Dodge v. Ford Motor Co.*[25] decision of 1919, where Henry Ford, as majority owner, was barred by the courts from renouncing expanded dividends in the name of running the company on behalf of employees and society.[26] The court famously stated: "A business corporation is organized and carried on primarily for the profit of the stockholders," and while discretion could be used by the directors in the means to attain that goal, that discretion "does not extend to a change in the end itself, to the reduction of profits."[27] This principle was extended in *Pillsbury v. Honeywell*,[28] which barred even the discussion of a shareholder resolution that would renounce a profit-making enterprise without a business justification.[29]

In the context of corporation law that theoretically bars any firm from offering a wage that does not maximize profits, the implication is that any union demanding a wage above that amount must, by definition, engage in some form of threat or blackmail in order for a firm to have a legal justification to offer a higher wage. So between U.S. labor law and U.S. corporate law, we have embedded the starkest separation of class interests and conflict possible.

What normally keeps the class politics of this opposition out of our legal system is that it usually plays out in completely separate courts, with decisions regulating labor conduct occurring at the National Labor Relations Board, and most corporate law decisions governing shareholder interests coming down in the Delaware Court of Chancery. United States law therefore generally eliminates substantive discussion of conflicts between shareholder and employee interests

---

24. This idea is embodied in the "shareholder primacy norm" and "shareholder wealth maximization norm" terms used regularly within the corporate governance literature. *See, e.g.*, Stephen M. Bainbridge, *In Defense of the Shareholder Wealth Maximization Norm: A Reply to Professor Green*, 50 WASH. & LEE L. REV. 1423, 1423 (1993); William W. Bratton & Joseph A. McCahery, *Regulatory Competition, Regulatory Capture, and Corporate Self-Regulation*, 73 N.C. L. REV. 1861, 1875 n.41 (1995); Lyman Johnson, *The Delaware Judiciary and the Meaning of Corporate Life and Corporate Law*, 68 TEX. L. REV. 865, 880 (1990).

25. Dodge v. Ford Motor Co., 170 N.W. 668 (Mich. 1919).

26. *See id.* at 685 (holding that the corporation must issue expanded dividends).

27. *Id.* at 684.

28. Pillsbury v. Honeywell, 191 N.W.2d 406 (Minn. 1971).

29. *Id.* at 411.

by reducing them to procedural rules that shunt decisions to one court or the other.

B. *Origins of the Conflict of the Courts*

This approach to addressing class issues is a complicated product of both the nature of historic economic conflict between employers and employees in the U.S. and the way the dynamics of U.S. legal history shaped how this conflict was funneled into legal principles and procedures.

Corporate governance grew from strong direct control by state governments under early American incorporation acts, to broad general purpose incorporation laws that, with the federal rules allowing incorporation in any state, allowed corporations to "shop" for the most favorable pro-shareholder venue they could find.[30] Ultimately, corporate incorporation overwhelmingly settled in Delaware.[31] Combined with sharp limits on state or federal regulation of corporations imposed by the Lochner Court in the early part of this century,[32] this left state and federal governments with little political role to represent nonshareholder interests in corporate operations.

Labor unions, on the other hand, have throughout U.S. history been subjected to criminal conspiracy statutes, antitrust injunctions, and other court-ordered restrictions.[33] This led to a rather bitter, anti-judicial orientation among U.S. unionists that sought a corrective to corporate power, not so much through legal restrictions on business, but rather through freeing workers to fight without judicial restraint.[34] This manifested itself in 1914 with the Clayton Act

---

30. Curtis Alva, *Delaware and the Market for Corporate Charters: History and Agency*, 15 DEL. J. CORP. L. 885, 885-88 (1990).

31. On the rise of Delaware as the premiere venue for corporate incorporation, see *id.* and William L. Cary, *Federalism and Corporate Law: Reflections Upon Delaware*, 83 YALE L.J. 663, 663-70 (1974).

32. *See, e.g.*, Coppage v. Kansas, 236 U.S. 1 (1915) (striking down state prohibition against "yellow dog contracts"—agreements obligating workers to refrain from joining unions); Adair v. United States, 208 U.S. 161 (1908) (invalidating federal prohibition against "yellow dog contracts"); Lochner v. New York, 198 U.S. 45 (1905) (invalidating state maximum hours law).

33. Between 1880 and 1930, state and federal courts issued roughly 4300 antistrike decrees. THE OXFORD COMPANION TO THE SUPREME COURT OF THE UNITED STATES 490 (Kermit L. Hall ed., 1992).

34. Mark Barenberg notes that as late as 1933, the American Federation of Labor (AFL) resisted any suggestion of creating administrative boards governing labor disputes. Barenberg, *The Political Economy*, *supra* note 20, at 1394; *see also* FELIX FRANKFURTER & NATHAN GREENE, THE LABOR INJUNCTION 82-182 (1930) (surveying early judicial restraints on union activities by the use of vague terminology in judicial injunctions and also discussing legislative attempts to support union activities through statutes which were ultimately interpreted narrowly by the courts). James Grey Pope notes that against business's laissez-faire ideology, labor union leaders developed a

exceptions to antitrust laws,[35] and more clearly in the 1932 Norris-LaGuardia Act, which was designed to completely take federal courts out of the business of regulation by injunction.[36] The 1935 Wagner Act reflected that anti-judicial libertarian streak in its preemption of state and federal courts in favor of decisions by a new National Labor Relations Board, whose function was merely to usher the parties to the bargaining table and leave employers and employees to fight over the substantive results.[37]

The success of unions in the 1930s was, of course, a response to the economic crisis of the Great Depression, which undermined the legitimacy of the corporate-dominated laissez-faire system of the 1920s. Numerous theorists have argued that this marked a global shift to a new form of managing the economy, and a new system of political management of class conflict.[38] Legal and political theorist Jurgen Habermas has described the transition as one of the state absorbing the economic crisis of the private economy into political mediation by the state, which requires the state to manage and contain the ensuing

---

"labor constitution" of rights based heavily on expanding the meaning of the Thirteenth Amendment's prohibition on "involuntary servitude," a promotion of absolutist right to strike that many progressive union allies found as hard to accept as laissez-faire absolutist defense of the right to contract. James Gray Pope, *Labor's Constitution of Freedom*, 106 YALE L.J. 941, 963-66 (1997) (citing KAREN ORREN, BELATED FEUDALISM: LABOR, THE LAW, AND LIBERAL DEVELOPMENT IN THE UNITED STATES 16, 163 (1991)). Pope argues that it was precisely strike action by unions in defiance of court orders that undermined the Lochner-era "state of courts" in favor of progressive constitutionalism in the 1930s. *Id.* at 949.

35. Clayton Act of 1914 §§ 6, 20, 15 U.S.C. § 17, 20 U.S.C. § 52 (2000) (original version found at ch. 323, §§ 6, 20, 38 Stat. 730 (1914)); *see also* WILLIAM E. FORBATH, LAW AND THE SHAPING OF THE AMERICAN LABOR MOVEMENT 156-58 (1991) (discussing the exceptions found in sections 6 and 20 of the Clayton Act). The Clayton Act exceptions would essentially be nullified by a narrow interpretation by the Supreme Court. *See* Duplex Printing Press Co. v. Deering, 254 U.S. 443, 468-75 (1921) (holding that sections 6 and 20 merely codified preexisting common law).

36. Norris-LaGuardia Act, 29 U.S.C. §§ 101-115 (2000) (original version at 47 Stat. 70 (1932)); *see also* FORBATH, *supra* note 35, at 159-63 (discussing the Norris-LaGuardia Act as a collective libertarian impulse).

37. *See* Wagner Act, Pub. L. No. 74-198, § 3, 49 Stat. 449 (1935) (codified as amended at 29 U.S.C. § 153). The Chairman of the Senate Committee that drafted the National Labor Relations Act declared:

> When the employees have chosen their organization, when they have selected their representatives, all the bill proposes to do is to escort them to the door of their employer and say, "Here they are, the legal representatives of your employees." What happens behind those doors is not inquired into, and the bill does not seek to inquire into it.

79 CONG. REC. 7660 (1935) (statement of Senator Walsh).

38. *See, e.g.*, MICHEL AGLIETTA, A THEORY OF CAPITALIST REGULATION: THE US EXPERIENCE (David Fembach trans., 1979); JÜRGEN HABERMAS, LEGITIMATION CRISIS (Thomas McCarthy trans., 1975); DAVID HARVEY, THE CONDITION OF POSTMODERNITY: AN ENQUIRY INTO THE ORIGINS OF CULTURAL CHANGE (1989).

"legitimation crisis" that state-centered politics entails.[39] While the U.S.'s New Deal encompassed some aspects of that transition, it avoided the corporatist and social democratic mediations of employer-employee conflicts and corporate governance common in Europe, in favor of the more unique procedural separation of courts noted above.[40]

This sharply different political course was not foreordained, since the U.S. had sampled a version of social democratic mediation in the War Labor Board policy of World War I,[41] and enacted the extremely corporatist National Industrial Recovery Act (NIRA) in 1933,[42] which would have created radical state mediation of most economic conflicts. But with the declaration of the NIRA's unconstitutionality[43] and the turn to competition-oriented securities regulation and antitrust enforcement, the shareholder interests model of the

---

39. HABERMAS, *supra* note 38, at 50-60.

40. The U.S. system can be contrasted with systems of codetermination, where workers serve on supervisory boards of directors directly by statute. These systems exist in Austria, Germany, Luxembourg, and the Netherlands, with partial versions used in France, Ireland, and Portugal. Uwe Blarock, *Steps Toward a Uniform Corporate Law in the European Union*, 31 CORNELL INT'L L.J. 377, 389 (1998). While Great Britain, Italy, Spain, and Sweden have no codetermination regulations, "many voluntary codetermination models exist in practice." *Id.* at 390; *see also* Wolfgang Streeck, *Works Councils in Western Europe: From Consultation to Participation*, *in* WORKS COUNCILS: CONSULTATION, REPRESENTATION, AND COOPERATION IN INDUSTRIAL RELATIONS 313 (Joel Rogers & Wolfgang Streeck eds., 1995). For a general discussion on Japan's complicated system of interlocking firms and structured internal labor markets which tie management directly into the labor force, see KAZUO SUGENO, JAPANESE LABOR LAW 34 (Leo Kanowitz trans., 1992), and Ronald J. Gilson & Mark J. Roe, *Lifetime Employment: Labor Peace and the Evolution of Japanese Corporate Governance*, 99 COLUM. L. REV. 508 (1999).

41. See JOSEPH A. MCCARTIN, LABOR'S GREAT WAR: THE STRUGGLE FOR INDUSTRIAL DEMOCRACY AND THE ORIGINS OF MODERN AMERICAN LABOR RELATIONS, 1912-1921 (1997), for an in-depth analysis of this first experiment in government-enforced labor-management mediation. Although this model was somewhat revived for World War II, it was revived in the context of a NLRA that had moved beyond the industrial democracy model to the antagonistic collective bargaining model developed in the 1930s, even as the war bureaucratized and routinized the model. *See* JAMES B. ATLESON, LABOR AND THE WARTIME STATE: LABOR RELATIONS AND LAW DURING WORLD WAR II 55-102 (1998).

42. National Industrial Recovery Act, ch. 90, 48 Stat. 195 (1933) (repealed in 1935 after being held unconstitutional in *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 537-38 (1935)).

43. *See* A.L.A. Schecter Poultry Corp. v. United States, 295 U.S. at 542 (holding section 3 of the NIRA an unconstitutional delegation of legislative power). With the overturning of the corporatist model of the NIRA, labor pushed for passage of the NLRA as a freestanding labor rights law without the corporate-dominated collusive model promoted by the NIRA. In a sense, instead of the NIRA, the dominant model for federal policy on corporations became focused on the 1933 and 1934 Securities Exchange Act, which reinforced shareholder interests in conjunction with state corporate law, while the NLRA enacted the separate sphere of labor governance detailed in this Article.

Delaware corporate law framework was maintained[44] with the 1935 Wagner Act becoming the labor-based legal system to uphold worker interests in the new New Deal procedural compromise.

The result was the maintenance of more bitter class conflict within the operations of the workplace and economy in the U.S. than in Europe,[45] even as it downplayed class conflict in the political and judicial system. The assumption was that employee interests in corporate governance would be adequately addressed at the bargaining table.[46]

For reasons this Article will further explore, this corporate and labor law system would slowly unravel in the postwar period and fail to give workers a real position to enforce their interests within corporate governance. This unraveling was due to changes in the law that undermined labor interests,[47] transformation in the economy that undermined its operation,[48] and an aggressive campaign by corporate interests against unions that undermined their power.[49] The result was that unions and other worker activists increasingly turned to alternative political remedies to address worker concerns, from a new regime of individual

---

44. Mark J. Roe argues that it was a combination of populist ideology and the political dynamics of federalism in the U.S. that encouraged the "fragmentation" of financial power in favor of diffuse shareholder interests. *See* Mark J. Roe, *A Political Theory of American Corporate Finance*, 91 COLUM. L. REV. 10, 31-53 (1991). Major banking, insurance, and other financial interests that might have favored consolidated ownership and regulation of corporate property were concentrated in states like New York and were overmatched by the local banking and economic interests of other states. *Id.* at 48-53.

45. The decline of unions in the late 1970s and 1980s obscures the memory of the massive number of strikes in the postwar period, from the 1946 strike wave to the 1950s when, even during the Korean War, workers struck repeatedly across different industries. *Work 'n' Progress: Stories of Southern Labor*, Southern Labor Archives, Ga. State Univ., Part VI.A, *at* http://www.library.gsu.edu/spcoll/labor/work_n_progress/index.htm (last visited Oct. 31, 2002). In 1952, the number of strikes rose above 5000 for the first time ever. *Id.* "The U.S. Steel Company strike of 1959 lasted for 116 days," one of the longest strikes of the era. *Id.* "Though the number of strikes dropped early in the 1960s, it jumped once again to the 5000-level later that decade." *Id.* This can be contrasted with countries like France with extensive political mediation of worker conflict through nationalization and an extensive welfare state, coinciding with an extremely weak labor movement within the workplace itself. *See* Laura B. Aldir, Comment, *The American Model Unrealized: A Reevaluation of Plant Bargaining in France*, 10 COMP. LAB. L. 196, 213 (1998) (arguing for a more robust labor union presence in the French economy). Even Germany, with some of the strongest unions in Europe due partly to the consensual codetermination model, has had remarkably short strikes in the postwar period, usually confined to a limited number of workers. *See* Martin Behrens, *IG Metall Calls Strike in Metalworking*, EUROPEAN INDUS. REL. OBSERVATORY ON-LINE (July 5, 2002), *available at* http://www.eiro.eurofound.ie/2002/05/feature/DE0205205F.html.

46. *See* discussion *infra* Part III.D.

47. *See* discussion *infra* Part IV.A.

48. *See* discussion *infra* Part IV.A.

49. *See* discussion *infra* Part IV.B.

employment laws to a host of new environmental,[50] consumer, and workplace safety regulations.[51] Some academics, legislatures, and judges also began arguing for a stronger direct role for stakeholders like labor within corporate law itself.[52] Furthermore, unions began utilizing both these new laws and growing pension funds to seek influence over corporate governance outside the traditional workplace strike system.[53]

C. *RICO and the Unraveling of Labor Preemption*

Enter RICO. RICO was passed in 1970 primarily as a tool to fight organized crime.[54] Clearly, there was no intention by the legislative authors to modify the traditional labor law system with its passage.[55] While fears of corruption in unions had been a staple of antiunion rhetoric, most agree that the goal of this legislation in regards to its union provisions was to help workers by

---

50. Federal Water Pollution Control Act, 33 U.S.C. §§ 1251-1387 (2000) [hereinafter Clean Water Act]; National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321-4370 (2000) [hereinafter NEPA]; Air Pollution Prevention and Control, 42 U.S.C. §§ 7401-7671 (2000) [hereinafter Clean Air Act]; *see also* discussion *infra* Part IV.C.

51. Occupational Safety and Health Act of 1970, 29 U.S.C. § 651 (2000).

52. *See, e.g.*, Timothy L. Fort, *Corporate Constituency Statutes: A Dialectical Interpretation*, 15 J.L. & COM. 257 (1995); Morey W. McDaniel, *Symposium: Corporate Malaise—Stakeholder Statutes: Cause or Cure?*, 21 STETSON L. REV. 3 (1991). In the wake of controversies over corporate takeovers, some state governments have adopted legislation that requires corporations to address the interests of stakeholders other than shareholders, a move denounced by conservative analysts like the *Wall Street Journal* as undermining the U.S. tradition of mandating the maximization of shareholder value. *See* Mark G. Robilotti, *Codetermination, Stakeholder Rights, and Hostile Takeovers: A Reevaluation of the Evidence from Abroad*, 38 HARV. INT'L L.J. 536, 537 (1997).

53. *See* Stewart J. Schwab & Randall S. Thomas, *Realigning Corporate Governance: Shareholder Activism by Labor Unions*, 96 MICH. L. REV. 1018, 1020 (1998) ("Unions, union pension funds, individual union members, and labor-oriented investment funds are using the corporate voting process to push for a wide variety of changes in corporate governance."); Katherine Van Wezel Stone, *Labor and the Corporate Structure: Changing Conceptions and Emerging Possibilities*, 55 U. CHI. L. REV. 73, 73 (1988) ("Unions and their lawyers are developing ways to exert pressure on corporate decisions outside the conventional labor law framework."); Steven Heim, *Workers and Their Capital: Labor Unions as Shareholder Activists* (Spring 2002), *at* http://www.waldenassetmgmt.com/social/topics/02041i.html (noting that labor unions "have sponsored many shareholder resolutions dealing with corporate governance"); Marleen O'Connor, *Union Pension Power and the Shareholder Revolution*, *at* http://www.heartlandnetwork.org/conference4_99/downloads/OConnor.pdf (last visited Jan. 24, 2003) ("For the past several years, organized labor has been one of the most active players in the shareholder revolution, that seeks to focus managers' attention upon creating shareholder value.").

54. *See supra* note 13 and accompanying text.

55. As Victoria Bassetti writes, use of RICO as a weapon through private lawsuits "are a far cry from RICO's initial purpose." Victoria G.T. Bassetti, *Weeding RICO Out of Garden Variety Labor Disputes*, 92 COLUM. L. REV. 103, 125 (1992).

eradicating mob influence from the scattered corrupt union locals that often betrayed worker interests.[56]

RICO in its structure is a limited, but real, corporate governance statute, whatever its stated purposes. Any new federal corporate governance statute that could reach the actions of any union, business, or other economic entity (or even noneconomic entity in recent abortion clinic cases) could inevitably impact and even preempt the traditional divide between NLRB-based labor law and largely Delaware-based corporate law.[57]

While not obvious on its face, RICO's character as a corporate and business governance law flows naturally from the kind of crime it was trying to target. Rather than just seeking to punish individual criminal acts, RICO's goal is to prevent one group (envisioned originally as the mafia) from using a series of what could be small crimes—labeled "predicate acts" in the law—to control the operations of an economic enterprise, whether union or business.[58] Now, while most traditional state corporate law assiduously concentrates on internal rules of corporate governance, RICO is in many ways government recognition that a business's operations can be indirectly controlled through a range of means, including controlling capital sources, key suppliers, transport facilities, or employment contracts.[59] What RICO attempts to define are the illegal methods for conducting such indirect corporate governance.[60]

In the case of violent crimes like murder, physical assault, and arson, the illegitimacy of the means is relatively well understood (although even in the

---

56. *See, e.g.*, Randy M. Mastro et al., *Private Plaintiffs' Use of Equitable Remedies Under the RICO Statute: A Means to Reform Corrupted Labor Unions*, 24 U. MICH. J.L. REFORM 571, 574 (1991).

57. Steven T. Ieronimo, *Is It a Panacea or a Bitter Pill for Labor Unions, Union Democracy and Collective Bargaining?*, 11 HOFSTRA LAB. & EMP. L.J. 499, 502-03 (1994) (footnotes omitted).

58. Steven Ieronimo summarized the goals of RICO in regards to labor racketeering:

> Labor racketeering traditionally consisted of individuals using union power to promote a variety of illicit activities including misuse of funds, "sweetheart" deals, and "strike insurance." Prior to RICO it had been difficult to prove these types of charges because of the very nature of the illegal activity. For instance, in the context of syndicated crime, labor racketeering was not perceived as a single action or event. Additionally, labor racketeering was usually conducted by members of organized crime who would find, take control, and make use of the union for their own personal profit. What RICO allows that prior legislation had not, is an attack on entire organizations for their patterns and practices of corruption, rather than chasing these racketeering criminals one-by-one through the labyrinth of criminal law.

Id. at 504.

59. *Id.* at 499.

60. *Id.* at 500-02.

labor union context there are issues of how incidental physical violence relates to the legitimacy of the more general aims of collective bargaining).[61] But in the case of more specific economic acts, where their illegitimacy is based on their assumed damage to the economy or economic rights, you end up in slippery policy areas without an overarching political and economic determination of what is really bad for corporate governance.[62]

The inherent flexibility of interpretation in such a context is reflected elsewhere in the varying interpretations over the years of antitrust laws—a companion piece of federal corporate governance law whose reach was largely restricted in recent years by the courts as the economic views of judges changed,[63] even in a time when RICO enforcements have expanded. Complicating the problem is that many of the state or federal crimes defined as RICO "predicate acts" were never legislated with a view toward their role in corporate governance. As a result, judges are left to carve out new interpretations for which crimes cross the line into RICO and which crimes do not. Incorporating many white collar crimes into RICO has taxed the interpretative skills of judges for this very reason, and incorporating most state labor law violations into RICO faces even deeper problems.

One more complication is that a RICO violation is not just a criminal act, but also has a civil lawsuit punitive component where alleged victims of RICO acts can sue for triple damages, making RICO itself a weapon of economic

---

61. *See* discussion *infra* Part IV.D.

62. This issue was most prominent in RICO lawsuits over technical violations of securities laws that some argued disrupted the already existing regulations governing contests for corporate control in takeover bids. Andrew P. Bridges, *Private RICO Litigation Based Upon "Fraud in the Sale of Securities,"* 18 GA. L. REV. 43, 55 (1983) ("RICO allegations alone may disrupt competition for corporate control by making the fight unfair and disturbing the elaborate and balanced scheme of regulation worked out in the Williams Act."). By the mid-1980s, it was estimated that thirty-five percent of published civil RICO decisions relied solely or primarily on allegations of securities fraud; approximately ninety percent relied upon one of the three "commercial fraud" predicate offenses—mail fraud, wire fraud, or securities fraud. Gary G. Lynch & Thomas P. Ogden, *The Private Securities Litigation Reform Act of 1995: Civil RICO Reform*, *in* 1 SWEEPING REFORM: LITIGATING AND BESPEAKING CAUTION UNDER THE NEW SECURITIES LAW 623, 628 (PLI Corp. Law & Practice Handbook Series No. B-923, 1996). Congress then sought to diminish this perceived problem in the Private Securities Litigation Reform Act of 1995 by removing securities fraud as a predicate act for RICO claims. Todd A. Noteboom & Michael A.G. Korengold, *Nunc Pro Tunc: The Application of the Private Securities Litigation Reform Act of 1995 to Pending Civil RICO Claims Based on Securities Fraud*, 23 WM. MITCHELL L. REV. 565, 577 (1997) ("Congress enacted the [1995 Act] to cure certain evils that had surfaced in some securities lawsuits.").

63. *See* Joseph P. Bauer, *The Stealth Assault on Antitrust Enforcement: Raising the Barriers for Antitrust Injury and Standing*, 62 U. PITT. L. REV. 437, 438-39 nn.7-9 (2001) (noting the large decline in civil antitrust filings).

conflict and control.[64] This leaves judges to evaluate whether enforcing RICO suits will in turn chill and distort the original economic system it was supposed to protect.

The end result is that our odd federal system has created three nearly autonomous areas of corporate governance law: (1) the internal shareholder governance rules of corporate law (usually Delaware law); (2) federal labor law governing firm-employee conflict over governance; and (3) RICO law (in combination with state law over commercial activity in states where the firm does business) governing the power of non-firm actors to indirectly exert governance control. In such a divided legal situation, procedural preemption decisions by judges are usually more important in deciding the outcome of the case than any substantive interpretation of the particular area of law. And in the case of union comprehensive campaigns where the union actors in question can arguably fit within any of the legal categories, the decision becomes essentially a political decision based on unlegislated assumptions of the economic worth of union goals and the union's role in our society.

D. *Theories of the Firm and RICO*

The politics in judicial interpretation of this divided body of corporate governance law is reflected in recent scholarly divisions in understanding the very idea of a firm and its governance in our economy. Surprisingly, up until recent years, the division between "the firm" and other economic actors was taken by most economists as a given.[65] The firm acted essentially as a black box

---

64. Raymond Green argues that there is little that is problematic with government initiated prosecutions under RICO in regards to unions, but that it is the civil lawsuit aspect of RICO with its threats of treble damages that distorts the labor-management relationship. *See* Raymond P. Green, *The Application of RICO to Labor-Management and Employment Disputes*, 7 ST. THOMAS L. REV. 309 (1995). Two commentators have noted:

> The use of RICO lawsuits against unions by employers during labor disputes threatens a return to a darker, more sinister era of labor relations in the United States. Once denounced as criminal syndicates, then antitrust conspiracies, then communist fronts, American labor unions now increasingly face being labeled as racketeering conspiracies for which they may be liable for treble damages and sizeable attorneys' fees. Although use of the RICO statute is commonly believed to be for rooting out corruption and organized crime, private RICO litigation has no such interest or limitation. To the contrary, it usually is aimed directly at conduct arising out of bona fide labor disputes, where there is no hint of "racketeering" on the part of the unions.

Howard S. Simonoff & Theodore M. Lieverman, *The RICO-ization of Federal Labor Law: An Argument for Broad Preemption*, 8 LAB. LAW. 335, 335-36 (1992).

65. *See* William J. Carney, *The Legacy of "The Market for Corporate Control" and Origins of the Theory of the Firm*, 50 CASE W. RES. L. REV. 215, 216 (1999) ("Only lawyers cared about corporate law, and they did so without benefit of economic analysis.").

unit in competition with other firm units, with the main question being how the firm deals with other firms and maximized competition and efficiency in the overall economy—the classic worry of antitrust analysts.[66] However, more recent analysis has opened up the black box of the firm and questioned the determination of where one firm starts and another ends, especially in a period that has seen an explosion of both mergers and contracting out of functions previously internal to a firm. On one hand, some analysts have downgraded the very idea of a firm by arguing that what we see as a unitary entity is really just a "nexus of contracts"—little difference from the range of contracts negotiated in the marketplace.[67] The only difference is the density of different actors (employees, shareholders, and creditors) involved in what we identify as "firms."

"Transaction cost" theorists have emphasized how the need to prevent opportunism in contracts over relation-specific investments often leads firms to internalize certain operations rather than contract in the marketplace.[68] It is precisely because outside actors can "hold up" firms through control of crucial supplies, transport, capital, or employment contracts (note the parallel to RICO worries) that firms will attempt to structure themselves to avoid the danger.[69] This latter transaction cost analysis has been teamed with analysis of property rights over physical assets to argue that it is strategic control over critical assets that define the limits of the firm and its decisions to subcontract to other firms.[70] This general point has led analysts like John Coffee, Jr. to abandon any "equilibrium" analysis of efficiency maximization within firms in favor of seeing

---

66. *See id.* ("The firm was a black box of little interest to most economists."); Sidney G. Winter, *On Coase, Competence, and the Corporation*, 4 J.L. ECON. & ORG. 163, 164-65 (1988) (describing basic elements of "textbook orthodoxy" on firms).

67. *See* FRANK H. EASTERBROOK & DANIEL R. FISCHEL, THE ECONOMIC STRUCTURE OF CORPORATE LAW 36-39 (1991) (representing modern literature to the nexus of contracts concept in the literature); Armen A. Alchian & Harold Demsetz, *Production, Information Costs, and Economic Organization*, 62 AM. ECON. REV. 777, 781-83 (1972) (identifying the essence of a classical firm as a contractual structure); Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, 3 J. FIN. ECON. 305, 310-11 (1976) (theorizing that a firm is a "legal fiction which serves as a nexus for contracting relationships").

68. The origin of this theory is usually attributed to Ronald Coase. *See* R.H. Coase, *The Nature of the Firm, in* READINGS IN PRICE THEORY 331, 336-38 (Kenneth E. Boulding & George J. Stigler eds., 1952) (emphasizing the nature of the firm as a center of contracts to reduce the transaction costs of business). Oliver Williamson is one of the primary modern economists who has theorized the reasons why firm hierarchies are substituted for the market in such situations. *See* OLIVER E. WILLIAMSON, MARKETS AND HIERARCHIES: ANALYSIS AND ANTITRUST IMPLICATIONS (1975); OLIVER E. WILLIAMSON, THE ECONOMIC INSTITUTIONS OF CAPITALISM: FIRMS, MARKETS, RELATIONAL CONTRACTING (1985).

69. *See supra* note 68 and accompanying text.

70. *See* Oliver Hart, *An Economist's Perspective on the Theory of the Firm*, 89 COLUM. L. REV. 1757 (1989).

firms as a system of "unstable coalitions" involving various shareholder, creditor, managerial, and employee actors negotiating both alliances for power and economic distribution within the firm.[71]

The first upshot of this new analysis is that it becomes harder to define the "natural" line between what should be considered an insider and what should be considered an outsider for corporate governance, because in similar situations an actor could be part of the firm, or alternatively, a contractor in the marketplace. More importantly, analysts like Oliver Hart emphasize that such decisions on firm structure have both efficiency maximization aspects and relation-specific distributional effects by changing the relative bargaining power of different actors, both within and outside of the firm.[72]

Given all this analysis on the complicated internal and external politics of firm structure, legal restrictions on how inside and outside actors can cooperate have significant distributional results. In the case of labor unions, the invocation of RICO against union comprehensive campaigns is a weapon used by corporate management seeking to prevent unions from teaming up strategically with alternative actors in corporate governance—dissident shareholders unhappy with management for their own reasons, creditors at odds with shareholders, and regulatory agencies representing other social interests.

What this means is that decisions on whether federal labor law preempts RICO is ultimately less about interpreting substantive law (especially given RICO's notorious ambiguity), and much more about whether judges will make a political decision to use a new procedural tool to restrict union power within corporate governance. In this sense, RICO is merely one more legal tool in a succession throughout American history, from "criminal conspiracy" to antitrust at the turn of the century, which has been used to limit union power within corporate governance and thereby redistribute resources form workers to shareholders.[73] What is different, however, is that RICO is one element

---

71. John Coffee, Jr., *Unstable Coalitions: Corporate Governance as a Multiple-Player Game*, 78 GEO. L.J. 1495, 1545-49 (1990).

72. *See* Hart, *supra* note 70, at 1766. Hart notes:

> In a world of transaction costs and incomplete contracts, ex post residual rights of control will be important because, through their influence on asset usage, they will affect ex post bargaining power and the division of ex post surplus in a relationship . . . . Hence, when contracts are incomplete, the boundaries of firms matter in that these boundaries determine who owns and controls which assets.

Id.

73. Raymond T. Mak, *City Disposal Systems and the Interboro Doctrine: The Evolution of the Requirement of "Concerted Activity" Under the National Labor Relations Act*, 2 HOFSTRA LAB. & EMP. L.J. 265, 271 (1985). Mak noted:

> In the 1800's, one of the employer's most effective weapons against union organization was the common law proscription against conspiracy. Such concerted

undermining the political ingenuity that decades ago depoliticized class conflict in the U.S. through the procedural separation of corporate governance spheres.

E. *Understanding the Conflict of the Courts*

Due to the fact that other legal scholars have strongly laid out the case why such uses of RICO betray the intentions and goals of our labor law system, the rest of this Article is not designed to argue for the maintenance of that separation.[74] Nor will the Article lay out an alternative legal synthesis that will eliminate the legal and economic contradictions of the present system. Rather, the Article will place the legal confrontation of union comprehensive campaigns with RICO in the broader historical and economic context of the class conflict over control of corporate power and wealth, thereby illustrating the inherent conflicts that have made and still make such a legal synthesis impossible, and why class conflict over legal structures inherently rears its head as the economic and political landscape itself is transformed.

In that sense, the confrontation over RICO, like the rise of union comprehensive campaign tactics themselves, is just a reflection of a broader failure of the old New Deal labor and corporate law regime to contain that conflict, with the subsequent result being a repoliticization of class issues in the courts. The last few decades have seen increased corporate assaults on labor unions, along with an increased political assault (including use of RICO) to undermine the collective bargaining system. Conversely, as labor law itself was narrowed and unions have increasingly seen the whole system as too limiting in a

---

> activities as strikes and picketing, were deemed to comprise criminal conspiracies. The antitrust laws, which subjected unions to treble damage suits, posed a second barrier which restricted the growth of the labor movement.

Id.

74. *See, e.g.*, Green, *supra* note 64, at 309 (stating that private parties should not be allowed to bring RICO suits in labor-management disputes because this upsets the balance of power in labor-management violations); Ieronimo, *supra* note 57, at 500 (distinguishing government and private use of civil RICO, reviewing court decisions which demonstrate that civil RICO in private hands is being used in the labor arena in uncontemplated, disruptive ways, and concluding that this disruptive force should be proscribed); Scott D. Miller, *RICO's Application to Labor's Illegal Strike Conduct: Reconciling RICO with the NLRA*, 11 HAMLINE J. PUB. L. & POL'Y 233 (1990) (arguing that federal courts' overextension of RICO to reach illegal strike conduct creates an unnecessary conflict between RICO and the NLRA, that RICO and the NLRA can be reconciled by employing traditional rules of statutory construction, and that, therefore, the NLRA, not RICO, should be applied to labor's illegal strike conduct when their ends are legitimate and their means are already punishable under state law); Simonoff & Lieverman, *supra* note 64, at 337 (focusing on the use of civil RICO by employers against unions in labor disputes and arguing that "bona fide labor disputes should enjoy an exemption from private RICO actions similar to the policy that limits the applicability of antitrust laws to trade unions").

globalizing economy, unions have increasingly pushed the envelope of the law to assert a greater degree of control over corporate governance.

III. ORIGINS OF CLASS CONFLICT

A. *The Escape of Corporations from Public Purpose Requirements*

As a yardstick for this rising legal and economic battle, the first section of this part of the Article will place that struggle in the context of the history that led to the present system. The procedural compromise of the New Deal was in many ways a reflection of the procedural struggle that had preceded it, where federal courts had assumed ever greater discretion limiting state power over corporations while encouraging state and federal court suppression of labor unions.

In the early years of the Republic, all corporate charters were seen as based on promoting "public or near public" purposes, with only 355 entities granted corporate status by 1800.[75] These charters were regulated by "quo warranto" state statutes, which "granted the power to state Attorney Generals to revoke a corporation's charter for the 'abuse,' 'misuse,' or 'non-use' of charter-granted rights and duties."[76]

However, in 1819, the Supreme Court in *Trustees of Dartmouth College v. Woodward*,[77] restricted state power to modify corporate charters once granted by a state,[78] the first step towards the Lochner-era upholding "rights of contract" over public concerns. Chief Justice John Marshall argued that the "constitution of our country has placed [corporate charters] beyond legislative control"[79] and

---

75. Thomas Linzey, *Killing Goliath: Defending Our Sovereignty and Environmental Sustainability Through Corporate Charter Revocation in Pennsylvania and Delaware*, 6 DICK. J. ENVTL. L. & POL'Y 31, 36 (1997) [hereinafter Linzey, *Killing Goliath*]. Linzey argues that charter revocation is still a viable tool for activists seeking to restrain the power of corporations seen as abusing their public responsibilities. *Id.* at 35. The Program on Corporations, Law and Democracy, a non profit organization, has been most prominent in promoting this strategy. *Id.* at 62.

76. *Id.* at 37. These powers would continue into the 1960s. *See id.* at 37 n.30 (citing People v. Equity Gaslight Co., 36 N.E. 194 (N.Y. 1894); People v. Westchester Transaction Co., 108 N.Y.S. 59 (N.Y. App. Div. 1908); People v. Abbott Maint. Corp., 200 N.Y.S.2d 210, 217 (N.Y. Sup. Ct. 1960)).

77. Trus. of Dartmouth Coll. v. Woodward, 17 U.S. (4 Wheat.) 517 (1819). The 1855 case of *Dodge v. Woolsey*, 59 U.S. (18 How.) 331 (1855), would extend this principal and create a private right of action by shareholders to enforce it, even when the officers of a corporation had no desire to challenge a state abridgement of a charter, in this case a tax assessment that contradicted the rate established in the corporate charter.

78. Trus. of Dartmouth Coll. v. Woodward, 17 U.S. (4 Wheat.) at 710.

79. *Id.* at 625.

that such charters should be considered inviolate charters in order to keep the legislature from "violating the right to property."[80]

Shareholders gained even more independence from state power, however, with the rise of general incorporation statutes, propelled by Jacksonian denunciation of monopolies holding state-chartered "privileges," statutes that freed companies from many restrictions on their ability to change businesses.[81] With the judicial extension of "personhood" to corporations under the Fourteenth Amendment, corporate governance would become even more independent from state governments seeking to represent nonshareholder interests.

But the most dramatic limits on political control of corporate governance came from procedural rules declaring the law of the state of incorporation supreme, allowing corporations to escape most obligations to nonshareholders by merely filing incorporation paperwork in a more hospitable state.[82] The late nineteenth century saw the rise of many business trusts and monopolies that state governments sought to regulate and, in some cases, abolish by challenging their corporate charters.[83] But the possibility of reestablishing incorporation in a more hospitable state defeated these attempts to rein in the new corporate power. The Ohio Supreme Court in 1892 declared Standard Oil's corporate charter void as "organized for a purpose contrary to the policy of our laws,"[84] but John D. Rockefeller's company was able to elude sanction by reconstituting its charter in the more favorable climate of New Jersey.[85] Anxious to collect the incorporation fees from these new mobile corporate gypsies, a number of states engaged in a

---

80. *Id.* at 628.

81. Thomas Linzey notes that today agencies designated by statute to approve the charter, merely review the submitted articles of incorporation and determines whether "'all the necessary information has been provided, [and whether] all the papers have been properly executed.'" Thomas Linzey, *Awakening a Sleeping Giant: Creating a Quasi-private Cause of Action for Revoking Corporate Charters in Response to Environmental Violations*, 13 PACE ENVTL. L. REV. 219, 222 (1995) [hereinafter Linzey, *Awaking a Sleeping Giant*] (quoting ALFRED F. CONARD, CORPORATIONS IN PERSPECTIVE 11-16 (1976)). States also review the submitted articles to discover whether there is anything "'in the articles of incorporation that violates state law or policy.'" *Id.* (footnote omitted).

82. *See, e.g.*, IOWA CODE § 490.1505 (2001) ("This chapter does not authorize this state to regulate the organization or internal affairs of a foreign corporation authorized to transact business in this state.").

83. Herbert Hovenkamp, *The Classical Corporation in America Legal Thought*, 76 GEO. L.J. 1593, 1669-70 (1988).

84. State *ex rel.* Att'y Gen. v. Standard Oil Co., 30 N.E. 279, 290 (Ohio 1892).

85. *See* Hovenkamp, *supra* note 83, at 1669-70 ("The great combinations then petitioned and obtained from states such as New Jersey new incorporation acts . . . ."); *see also* Linzey, *Killing Goliath*, *supra* note 75, at 37 (citing People v. Equity Gas Light Co., 36 N.E. 194 (N.Y. 1894); People v. Westchester Traction Co., 108 N.Y.S. 59 (N.Y. Sup. Ct. 1908); People v. Abbott Maint. Corp., 200 N.Y.S.2d 210 (N.Y. App. Div. 1960)).

competition to weaken state control mechanisms and thereby attract incorporation in those states.[86]

B. *Early Labor Law as an Alternative Curb on Corporate Power*

As attempts at political limits on the supremacy of shareholder interests increasingly disappeared into the preemptive power of the Delaware Court of Chancery, the struggle to have labor unions make a similar escape from control by the courts as a counterbalance became an increasing focus of progressive intellectuals and working class unionists.[87] The Norris-LaGuardia and Wagner Acts embodied this goal of preemption of state courts on behalf of labor interests to counterbalance the Delaware Chancery preemption in favor of shareholders.[88]

Leaving their mark on American discourse over labor's role in corporate governance, the common law courts of the pre-New Deal era that allowed union actions would make distinctions between permission for narrow firm-based actions versus prohibited actions allied with outside interests. In the early history of the Republic, common law courts had often declared any union action a per se criminal conspiracy, although criminal prosecution was largely abandoned by the middle part of the nineteenth century.[89] Still, common law courts would continue to issue injunctions against many strikes, especially those deemed based on

---

86. Hovenkamp, *supra* note 83, at 1669-70; *see also* State *ex rel.* Att'y Gen. v. Standard Oil Co., 30 N.E. at 290.

87. This attack on court power was highlighted most famously in Felix Frankfurter and Nathan Greene's *The Labor Injunction* (1930), which attacked the labor injunction as a prime evil keeping worker freedom down.

88. *See* Norris-LaGuardia Act, 29 U.S.C. §§ 101-115 (2000) (prohibiting U.S. courts from issuing restraining orders or injunctions in labor disputes except in conformance with the provisions of this chapter, and with the public policy of the U.S., and stating that a worker must "have full freedom of association, self-organization, and designation of representatives of his own choosing, to negotiate the terms and conditions of his employment, and that he shall be free from the interference, restraint, or coercion of employers of labor, or their agents," while engaging in such activities "for the purpose of collective bargaining or other mutual aid or protection"); Wagner Act, Pub. L. No. 74-198, 49 Stat. 449 (1935) (providing that employees shall have "the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representative of their own choosing, and to engage in" other activities for the purpose of collective bargaining). For a classic statement of federal preemption of state law in regard to labor issues, see *San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959).

89. In 1842, Judge Shaw decided *Commonwealth v. Hunt*, 4 Met. 111, 129 (1842), which threw out a criminal indictment against a union, stating that union organizing per se no longer counted as a criminal conspiracy. Juries would often refuse to convict strikers who were still indicted. *See* Clay S. Conrad, *Scapegoating the Jury*, CORNELL J.L. & PUB. POL'Y 7 (1997). States increasingly inserted exceptions to criminal conspiracy for union actions. *See* William E. Forbath, *The Shaping of the American Labor Movement*, 102 HARV. L. REV. 1109 (1989) (providing examples of reform legislation).

noneconomic issues, such as seeking to strengthen union power generally.[90] While judges increasingly approved strikes restricted solely to a single worksite, they were far more likely to issue injunctions against a strike covering greater regional areas or seeking to enlist the help of workers at other firms or appealing to the general consuming public.[91] Armed with the Sherman Antitrust Act, courts would deploy that new tool against unions, much more than corporations in the law's early years.[92] In the 1908 *Loewe v. Lawlor*[93] case, the so-called Danbury Hatters case, the Supreme Court upheld an injunction against a hatters union for launching a consumer boycott because it imposed the conflict on "third parties and strangers involuntarily."[94] Similarly, in *Coronado Coal Co. v. United Mine Workers of America*,[95] the Supreme Court held that an otherwise legitimate local strike could be enjoined because its purpose was not merely to win higher wages locally, but to prevent non-union production from undermining union wages at other companies.[96] Despite the passage of the 1914 Clayton Act, which was supposed to end the application of the Sherman Act to labor actions, the Supreme Court essentially gutted the intent of the law in *Duplex Printing Press Co. v. Deering*[97] by holding that the passed exemption applied only to actions taken by an employer's direct employees.[98] Any sympathy action or boycott by fellow union members could be enjoined.[99]

However, the dissent in *Duplex* argued that older common law ideas about unions had to give way to "new facts" since the "centralization in the control of business brought its corresponding centralization in the organization of workingmen."[100] The dissent argued that the clear legislative intent of the Clayton Act was to "declare the right of industrial combatants to push their struggle to the limits of the justification of self-interest" without judicial interference.[101] The dissent's understanding of the intent of the Clayton Act would be embodied in the 1932 Norris-LaGuardia Act; notably, the first response

---

90. *See, e.g.*, Carew v. Rutherford, 106 Mass. 1 (1870) (upholding an injunction against a union striking to enforce its internal union rules). *But see* Plant v. Woods, 176 Mass. 492 (1900) (refusing an injunction for a similar strike to strengthen a union shop agreement).

91. *See* Forbath, *supra* note 89, at 1151-54 (discussing the move toward injunctions as used by judges in labor cases).

92. *See* Sherman Antitrust Act, 15 U.S.C. §§ 1-7 (2000) (making some labor union activities a violation of the antitrust laws because they restrain trade).

93. Loewe v. Lawlor, 208 U.S. 274 (1908).

94. *Id.* at 294.

95. Coronado Coal Co. v. United Mine Workers of Am., 268 U.S. 295 (1925).

96. *Id.* at 310.

97. Duplex Printing Press Co. v. Deering, 254 U.S. 443 (1921).

98. *Id.* at 472.

99. *Id.* at 479.

100. *Id.* at 482 (Brandeis, J., dissenting).

101. *Id.* at 488.

to the Depression was not to call for more state intervention, but to demand, via judicial injunction, that the state withdraw its support from the side of capitalist concentration seen as ungovernable by local and national legislation.[102] With changes in the New Deal Court, subsequent rulings would declare union activities essentially exempt from the Sherman Act injunction or criminal indictment.[103] Essentially, unrestrained and unmediated industrial conflict had been legitimized with economic self-interest on each side of the class divide marking the proper realm of action.

C. *Triumph of Shareholder Interests in Twentieth Century Corporate Law*

This shift in attitude was also reflected in the state corporate laws. The pendulum had swung so far away from public interest controls on corporate behavior that even the assertion by a company of an intent to operate in the public interest was deemed an illegal betrayal of responsibility to a company's shareholders.[104] When Henry Ford announced plans to stop issuing dividends to shareholders and instead devote the increased capital to higher wages and the expansion of production to lower the cost of cars for the public, minority shareholders successfully sued the corporation to force dividends instead of such public-interested purposes.[105] As the Michigan Supreme Court declared:

> A business corporation is organized and carried on primarily for the profit of the stockholders. The powers of the directors are to be employed for that end. The discretion of directors is to be exercised in the choice of means to attain that end, and does not extend to a change in the end itself, to the reduction of profits, or to the nondistribution of profits among stockholders in order to devote them to other purposes.[106]

At the dawn of the New Deal, the law had established a basic legal framework of industrial combat that not only legitimized full-out pursuit of class interests, but in fact *required it* of corporate directors. Economic threat by labor was sanctified as the main weapon of restraining corporate power. This basic class-conscious divide would ultimately be further endorsed by New Deal

---

102. *Id.* at 483-84.

103. *See* Apex Hosiery Co. v. Leader, 310 U.S. 469 (1940) (holding that a strike at plaintiff's factory alleged to be a conspiracy was not a violation of the Sherman Anti-Trust Act); United States v. Hutcheson, 312 U.S. 219 (1941) (holding that picketing of Anheuser-Busch premises and recommending that union members and their friends not buy or use Anheuser-Busch products was neither criminal nor a violation of the Sherman Anti-Trust Act).

104. *See* Dodge v. Ford Motor Co., 170 N.W. 668 (Mich. 1919) (holding that a corporation is carried on primarily for the profit of its stockholders).

105. *See id.*

106. *Id.* at 684.

changes, but would be modified procedurally and, with post-New Deal amendments, would weaken labor's hand without restoring any social democratic mediation within corporate governance.

It is worth noting that the U.S. was not immune to the corporatist and social democratic currents that were sweeping European capitalism. The passage of the National Industrial Recovery Act (NIRA) in 1933 envisioned industry-wide codes that would restrain economic competition,[107] and its section 7(a) required companies to allow the collective organization of workers without interference.[108] While both employer and union provisions were largely unenforced in the face of corporate resistance[109] and the law was ultimately struck down as unconstitutional by the Supreme Court,[110] its passage shows that a more corporatist alternative structure of corporate governance was not as alien to the American character as some might argue.[111] In many ways, it had its roots in the rhetoric of "industrial democracy" that shaped the War Labor Board of World War I and its public controls of much industry,[112] and would be reflected again in war-time industrial controls in World War II.[113]

But in the wake of the Supreme Court's actions against the NIRA, federal regulation in the U.S. retreated from corporatist forms in favor of a greater insistence on the sovereignty of shareholder interests and a stronger focus on individual firm competition rather than cooperation. The 1933 and 1934 Securities Acts became the basis of a federal supplement to state incorporation laws, focusing the attention of corporate management on serving shareholders' interests above all else.[114] With Thurman Arnold's new trustbusting focus at the

---

107. *See* DONALD R. BRAND, CORPORATISM AND THE RULE OF LAW: A STUDY OF THE NATIONAL RECOVERY ADMINISTRATION 11-13 (1988).

108. *Id.* at 22.

109. *Id.* at 102-05.

110. *See* A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 541-42 (1935) (invalidating the minimum wage and maximum hour provisions of the NIRA on both Commerce Clause and nondelegation doctrine grounds); Pan. Ref. Co. v. Ryan, 293 U.S. 388, 436-39 (1935) (invalidating "hot oil" as an unconstitutional delegation of lawmaking power).

111. *See* BRAND, *supra* note 107, at 143-50 (discussing the popular misconception that American business was universally opposed to the NIRA).

112. *See generally* MCCARTIN, *supra* note 41, at 1-10. The alliance between the Wilson administration and the American Federation of Labor (AFL), a probe conducted by the U.S. Commission on Industrial Relations, President Wilson's reelection campaign, and left wing progressives are examples of groups that injected the issue of industrial democracy into American politics prior to World War I.

113. *See generally* ATLESON, *supra* note 41, at 2-7 (detailing the tripartitute labor-corporate-government agreements that structured workplace life and bargaining during World War II).

114. Securities Act of 1933, 15 U.S.C. § 77 (2000); Securities Exchange Act of 1934, 15 U.S.C. § 78 (2000).

Justice Department in the late 1930s, and a new tough Supreme Court antitrust regime, the period from the 1930s to the 1970s focused federal policy on deterring corporate combination, not encouraging corporatist cooperation.[115]

D. *Creation of the Conflict of the Courts*

The 1935 passage of the Wagner Act, essentially codifying the collective bargaining remains of the NIRA without the corporatist framework, resulted in two major changes. First, it extended a few new protections to workers voicing support for unionization in their workplaces.[116] Second, and what proved to be its most important function, it created the National Labor Relations Board (NLRB) as the main institution to judge the legitimacy of union actions.[117] This meant that state common law courts were largely preempted from ruling against union actions, essentially creating a preemption of state court action similar to the Norris-LaGuardia Act's preemption of federal courts.[118]

Procedurally, if control of corporations was being spirited off to the Delaware Court of Chancery where shareholder interests would dominate, labor disputes were being sectioned off from state common law into the NLRB system and federal court review. While labor unions immediately benefited from escaping inconsistent and often antiunion state courts, this separation also isolated them away from the rest of the legal terrain. The New Deal era *Erie Railroad Co. v. Tompkins*[119] decision had definitively declared that "[t]here is no federal general common law,"[120] yet the *Textile Workers Union v. Lincoln Mills*[121] decision essentially repudiated *Erie* in the area of labor law, calling for a federal common law to supersede any state procedural rules governing labor conflicts,[122] an anomaly marking the oddness of labor law in the procedural universe of U.S. law.

The New Deal would make more labor weapons legal, but the continued firm-specific focus of the law was embodied in the majority certification rules for

---

115. William H. Page, *Legal Realism and the Shaping of Modern Antitrust*, 44 EMORY L.J. 1, 15-19 (1995).

116. *See* Wagner Act, Pub. L. No. 74-198, 49 Stat. 449 (1935); *see also* Workplace Fairness Act, H.R. Rep. No. 102-57 (III), at 40 (1991) (discussing the purposes of the Wagner Act).

117. *See* 49 Stat. at 449; *see also* Workplace Fairness Act, at 40 (discussing the purposes of the Wagner Act).

118. *See* 49 Stat. at 449 (placing the analysis and interpretation of the federal regulations in the hands of the NLRB).

119. Erie R.R. v. Tompkins, 304 U.S. 64 (1938).

120. *Id.* at 78.

121. Textile Workers Union v. Lincoln Mills, 353 U.S. 448 (1957).

122. *See id.* at 456-57.

recognition at firms.[123] Later antilabor amendments would ban secondary strikes[124] and restrict unions seeking pressure on employers through alliances with other workers in the corporation's nexus of suppliers and customers.[125] While not as narrow a restriction as the older common law framework, by concentrating labor on this firm-specific venue, legal conflicts over labor could more easily be separated from the vast tangle of legal concerns that would be involved if multiple industries and actors were involved. This allowed labor law to be procedurally isolated and depoliticized.[126]

Some analysts, both radical and conservative, have dismissed this procedural compromise as a very American response reflecting the conservatism of the American society.[127] Given the bloody battles that line the history of early U.S. labor conflict, from the Homestead strike, to the Pullman railroad strike, to the bloody Idaho and Colorado mining battles, it is too glib to explain this history from the passivity of the workers' viewpoint. More fruitfully, many analysts have argued that such a compromise was the result not of worker conservatism in the U.S., but rather the strength of the corporate class that opposed them.[128] This is supported by the previously noted corporate power to uphold its interests within its own sphere of corporate law, but that is still insufficient given the militancy of union struggle in the 1930s and the embrace by unionists of the emancipation from state law, which was celebrated by labor leaders.[129] The

---

123. Barenberg contrasts the NLRA's upholding of exclusive representation chosen by a majority of workers as reflecting a view of workers in a firm as "organic groups unified by solidarity interests and norms." Barenberg, *The Political Economy*, *supra* note 20, at 1452-53. This is contrasted to the "associational" conception of unionism endorsed by those who accepted company unions or proportional representation by multiple unions in the same workforce. *Id.* at 1453.

124. *See* H.R. CONF. REP. NO. 80-510, at 25-26 (1947) (embodying in the Labor-Management Relations Act of 1947 that secondary strikes are unlawful).

125. This was embodied in the ban on "hot cargo" agreements passed as part of the 1959 Labor-Management Reporting and Disclosure Act amendments and embodied now in 29 U.S.C. § 158(e) (2000).

126. *See* Karl E. Klare, *Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness, 1937-1941*, 62 MINN. L. REV. 265, 280 (1978).

127. For a general view of "Amercian exceptionalism," see DANIEL BELL, THE END OF IDEOLOGY: ON THE EXHAUSTION OF POLITICAL IDEAS IN THE FIFTIES (2000); LOUIS HARTZ, THE LIBERAL TRADITION IN AMERICA: AN INTERPRETATION OF AMERICAN POLITICAL THOUGHT SINCE THE REVOLUTION (1955); ARTHUR M. SCHLESINGER, JR., THE VITAL CENTER: THE POLITICS OF FREEDOM (1949).

128. *See* KIM VOSS, THE MAKING OF AMERICAN EXCEPTIONALISM: THE KNIGHTS OF LABOR AND CLASS FORMATION IN THE NINETEENTH CENTURY 132-35 (1993) (discussing the inability of union workers to effectively combat the corporate and political class).

129. *See, e.g.*, James Gray Pope, *The Thirteenth Amendment Versus the Commerce Clause: Labor and the Shaping of American Constitutional Law, 1921-1957*, 102 COLUM. L. REV. 1, 112-13 (2002) (indicating that unionists embraced the Wagner Act "as labor's latest 'Magna Charta'").

social democratic "codetermination" of labor and management in Europe and Japan was denounced not only by anticommunist unionists, but also by the many left-leaning union radicals who to this day denounce any joint "team" between union leadership and management as an incipient sell-out of the working class.[130] United States unions would act on the power given to them under U.S. labor law to lead some of the longest and most militant strike waves around the world, from continual wildcat strikes in the coal fields (precipitating President Truman's takeover),[131] to the 1946 strike wave, to the bitter 1958 Steel strike.[132] There was a confidence in U.S. labor that what could not be wrested from capital through worker power to strike, was probably not worth begging for at the knees of politicians in Washington. As unions were pushed on the defensive, this perspective would change, but for decades there remained among unionists a strong laissez-faire view that open conflict in the street was better than compromise in the political sphere.[133]

E. *Failure of Postwar Unions to Exercise Pension Fund Power on Firms*

Along with the legal bar to unions teaming up with supplier networks to challenge corporate governance, both union ideology and the law restrict unions from making control of corporate investments an important tool in their immediate postwar fights with corporate America.[134] The financial collapse of 1929 destroyed most of the tentative steps made by unions in the 1920s toward

---

130. The strongest opposition to "teams" today is centered around *Labor Notes* magazine and associated union democracy movements. *See generally* MIKE PARKER & JANE SLAUGHTER, CHOOSING SIDES: UNIONS AND THE TEAM CONCEPT (1988).

131. *See* United States v. United Mine Workers of Am., 330 U.S. 258, 262-63 n.1 (1947) (providing a brief history of President Truman's takeover of bituminous coal mines).

132. *See* Forbath, *supra* note 89, at 1231-32 (noting the problems unions had implementing strikes prior to obtaining favorable labor legislation).

133. Before enactment of the Wagner Act, many in the old American Federation of Labor resisted any federal intrusion in the workplace—and later viewing even the Wagner Act itself suspiciously. *See* Barenberg, *The Political Economy*, *supra* note 20, at 1394. Stanley Aronowitz has criticized this avoidance of broader society-wide social mobilization as narrowing labor's actions to protecting its own members, often at the expense of the working class as a whole in the postwar period. *See* STANLEY ARONOWITZ, FROM THE ASHES OF THE OLD! AMERICAN LABOR AND AMERICA'S FUTURE 31 (1998). Aronowitz quoted Harry Bridges, a left wing leader of the west coast Longshoremens Union (ILWU), as in retirement ruefully describing his role as, "I sold out the working class to save our members." *See id.*

134. The Taft-Hartley Act required that all union pension funds be jointly managed with employer trustees and the Employee Retirement Income Security Act (ERISA). Taft-Hartley Act, 29 U.S.C. § 186(c)(5) (2000); Thomas Griffin, *Investing Labor Union Pension Funds in Workers: How ERISA and the Common Law Trust May Benefit Labor by Economically Targeting Investment*, 32 SUFFOLK U. L. REV. 11, 19 (1998); *see also supra* notes 19-20 and accompanying text.

worker-owned banks and businesses.[135] Combined with left-wing union hostility towards sharing capitalist management of firms, this created broad disdain towards workers, compromising the class struggle by confusing the wage-earner interest with shareholder interests—a parallel with the corporate law allergy to mixing nonshareholder interests in with a primary shareholder focus. Despite growing pension funds, unions were largely indifferent or even hostile to establishing even limited control over union pension funds allowed after the 1947 Taft-Hartley restrictions. Labor lawyer Thomas Geoghegan has called this attitude by labor "the longest-running mistake in the history of labor, the unwitting, almost Gandhi-like renunciation of power."[136] He notes that if unions had fought for control of their pensions from day one instead of leaving most of them under direct employer control, the term "'pension-fund socialism'" would not be a "business school joke" and the President of the AFL-CIO "would be king of the junk bonds."[137]

The result of these three legal and social traditions—the procedural division of corporate and labor law, the bar to unions applying pressure through supplier or customer networks, and the ideological and legal bar to unions using their pension funds aggressively—would all combine to create the strict oppositional worker-management class conflict characteristic of the postwar system in the U.S. Court preemption by the NLRB and the Delaware Court of Chancery would keep labor issues and corporate governance separated into different legal spheres, not only from each other, but from the general legal debates of the postwar period, largely depoliticizing class issues even in the midst of the most raucous strikes of the era.

IV. BREAKDOWN OF THE SYSTEM

Why did this system break down? What are the reasons for the turn of the unions to comprehensive campaigns and their more broad-based alliances with consumers, regulatory agencies, and capital markets in their conflict with employers for control of corporate governance? This next section will explore that question and how this repoliticization of class issues would collide with

---

135. In 1921, Congress gave tax-favored status to profit-sharing plans, but the initial hopes for worker participation in management was dimmed as worker-owned assets often became worthless in the 1929 collapse. *See* CAREY CTR. FOR DEMOCRATIC CAPITALISM, DEMOCRATIC CAPITALISM, THE WAY TO A WORLD OF PEACE AND PLENTY ch. 5 (2002), *at* http://www.democratic-capitalism.com/chptrs/chptr5.htm#_ftn12 (citing JOSEPH R. BLASI, EMPLOYEE OWNERSHIP: REVOLUTION OR RIP-OFF 8 (1988)).

136. THOMAS GEOGHEGAN, WHICH SIDE ARE YOU ON? TRYING TO BE FOR LABOR WHEN IT'S FLAT ON ITS BACK 246 (1991).

137. *Id.*

RICO and reveal the complexities of dealing with corporate governance in the modern era.

The breakdown of labor law as an alternative avenue for the workers' role in corporate governance had two parts related to its inherent weaknesses: changes in labor law and the economic changes that reshaped firm structures to the detriment of labor given that legal context.

A. *Legal Undermining of the New Deal Procedural Compromise*

The failure of labor law on its own terms to give labor a role in corporate governance was clear in the initial strike wave that followed World War II.[138] The United Auto Workers' Walter Reuther launched the 1946 auto strikes with the goal of linking worker pay to company productivity and demanding a union role in company governance, including the ability to monitor the company books to prevent opportunistic behavior by management.[139] That campaign was rebuffed in the name of "management rights"; while economic demands would be addressed, management of the auto industry, as in other industries, made it clear that labor would have as limited a role in governance as possible.[140]

This 1946 strike defeat would be legislated into a more permanent defeat in the 1947 Taft-Hartley Act[141] and 1959 amendments[142] along with NLRB interpretations that weakened labor's ability to bargain over many "management"

---

138. *See* HARVEY, *supra* note 38, at 133 (arguing that "the defeat of the resurgent radical working-class movements of the immediate postwar period, for example, prepared the political ground for the kinds of labor control and compromise that made Fordism possible").

139. In 1946, UAW leader Walter Reuther highlighted the "fight against inflation" and argued that wage increases should be "paid out of the higher profits of industry made possible by the economies of full production and improved technology." *See* MARTIN HALPERNH, UAW POLITICS IN THE COLD WAR ERA 186 (1988). Greater labor-management cooperation and the union ability to look over the books would also allow the union to "expose the lies of industry." *Id.* at 197.

140. While unions like the UAW would make significant economic gains in the postwar period, the ability of management to control production in the name of management rights ended up being the price. *See id.* at 259.

141. Labor Management Relations Act, Pub. L. No. 80-101, 61 Stat. 136 (1947) (codified as amended at 29 U.S.C. §§ 141-197 (2000)).

142. Labor-Management Reporting and Disclosure Act, Pub. L. No. 86-257, 73 Stat. 543 (1959) (codified as amended at 29 U.S.C. § 158(e)). In 1959, section 8(e)—the "hot cargo" amendment—was added to the NLRA to further tighten prohibitions on unions negotiating with firms for agreements by the firm "to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer." 29 U.S.C. § 158(e); *see also* Theodore J. St. Antoine, *Secondary Boycotts and Hot Cargo: A Study in the Balance of Power*, 40 U. DET. L.J. 189, 205-11 (1962) (analyzing the history of § 158(e)).

areas while barring labor law protection for supervisors[143] and management personnel.[144] Unions lost not only the ability to contract against the company dealing with nonunion subcontractors and suppliers,[145] but the law barred unions from contracting to prevent a firm itself from opening nonunion subsidiaries[146] or requiring that workers be retrained for new jobs where automation eliminates their old ones.[147] Making labor control even more precarious, in the case of acquisition of assets from a firm by another company, the new owner can generally abrogate all terms of the collective bargaining agreement, and need not retain either the employees or the union itself.[148]

Regarding both bargaining and the role of specific employees, the law has hardened the "which side are you on" line of opposition between management

---

143. In exclusions to NLRA coverage, subsection (3) added, "The term 'employee' shall . . . not include . . . any individual employed as a supervisor," with supervisor defined in subsection (11): "The term 'supervisor' means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action . . . ." 29 U.S.C. § 152(3), (11).

144. While the NLRA has no specific management exclusion clause, the Board developed its own doctrine that management employees were not entitled to the protections of the Act. *See In re* Denver Dry Goods, 74 N.L.R.B. 1167, 1175 (1947).

145. *See, e.g.*, NLRB v. Milk Wagon Drivers Union, Local 753, 335 F.2d 326, 328-29 (7th Cir. 1964) (holding that a union-only subcontracting clause violates section 8(e) of the Labor Management Relations Act); Unis v. Int'l Bhd. of Teamsters, 541 F. Supp. 706 (W.D. Pa. 1982) (holding that union only subcontracting clauses violate section 8(e) of the Labor Management Relations Act).

146. In *D'Amico ex rel. NLRB v. Painters & Allied Trades District Council No. 51*, 120 L.R.R.M. 3473, (BNA) 3477 (D. Md. 1985), the NLRB barred contracts by unions to prevent the creation of such "double-breasting" nonunion subsidiaries doing bargaining unit work. In this case, a court issued an injunction against a strike to attain such a clause, declaring it an illegal "hot cargo" strike in violation of section 8(e). *Id.* at 3485-86.

147. While courts and the NLRB protect union contracts that protect traditional bargaining unit work, they bar union efforts to negotiate to include new work within the bargaining unit, even in most cases where the new jobs functionally substitute for the older jobs being lost to automation. *See* Ted Cassman, *Deconsolidating the Work Preservation Doctrine: Dolphin-Associated Transport*, 4 INDUS. REL. L.J. 604 (1981); Howard Lesnick, *Job Security and Secondary Boycotts: The Reach of N.L.R.A. §§ 8(b)(4) and 8(e)*, 113 U. PA. L. REV. 1000, 1004-05 (1965); Alicia G. Rosenberg, Note, *Automation and the Work Preservation Doctrine: Accommodating Productivity and Job Security Interests*, 32 UCLA L. REV. 135, 148-49 n.69 (1984). However, while this general NLRB policy was upheld, some flexibility was introduced in *NLRB v. International Longshoremen's Association*, 447 U.S. 490 (1980), and *NLRB v. International Longshoremen's Association*, 473 U.S. 61 (1985), where some work replacement rules were upheld where "the objective of the agreement was work preservation rather than the satisfaction of union goals elsewhere." NLRB v. Int'l Longshoremen's Ass'n, 447 U.S. at 510.

148. A new company need not bargain with its predecessor's union if it does not retain a majority of the former company's employees or if there is not substantial continuity between the operations. *See* Howard Johnson Co. v. Detroit Local Joint Executive Bd., 417 U.S. 249 (1974); NLRB v. Burns Int'l Sec. Servs., Inc., 406 U.S. 272, 280-81 (1972).

and labor. To accentuate this divide, the Supreme Court, in its 1980 *NLRB v. Yeshiva University*[149] decision, declared that where workers attain significant collective control over firm decision-making, they are collectively declared managerial employees, are unprotected under labor law, and lose the right to be certified as a union.[150] This decision was essentially the nail in the coffin of attempts by workers to exercise power over corporate governance solely through collective bargaining, because any eventual success is legally self-defeating.

This limit on union power at the negotiations level has been paralleled by corporate law that restricts representation on boards of directors to directors chosen by shareholders, a sharp contrast to German codetermination[151] or Japanese systems[152] of corporate governance, where such governance bodies play a mediating role between shareholders and workers. Unions can achieve limited representation on boards by negotiating with management to nominate a union representative on the management slate,[153] usually tantamount to election at most companies, but such representation is inherently limited by the power of shareholders to replace them.[154] The major exception to this limited representation is where union members have been granted significant ownership stakes in the company in exchange for wage concessions, as at Chrysler in the 1970s and more recently in airline contracts.[155] Since this takes the discussion outside bare workplace-based bargaining, we will return to it later in the section.

---

149. NLRB v. Yeshiva Univ., 444 U.S. 672 (1980).

150. *Id.* at 687. Two years after *Yeshiva*, in *College of Osteopathic Medicine & Surgery*, 265 N.L.R.B. 295 (1982), the NLRB held that where faculty members achieved some degree of decision-making power through the process of unionizing and collective bargaining, they had to be decertified as a bargaining unit. *Id.* at 295. In response to the union's objection that it should not be able to "bargain itself out of the protections of the Act," the NLRB said it had to decide questions of employee status on the basis of the extent of managerial authority, not "the manner in which such authority was obtained." *Id.* at 297-98.

151. *See* Katharina Pistor, *Co-Determination in Germany: A Socio-Political Model with Governance Externalities*, *in* EMPLOYERS AND CORPORATE GOVERNANCE 387 (Margaret Blair & Mark Roe eds., 1999).

152. *See generally* MASAHIKO AOKI, INFORMATION, INCENTIVES, AND BARGAINING IN THE JAPANESE ECONOMY (1990); Zenichi Shishido, *Japanese Corporate Governance: The Hidden Problems of Corporate Law and Their Solutions*, 25 DEL. J. CORP. L. 189 (2000).

153. In 1976, the United Auto Workers secured board representation through this method. *See* Douglas Fraser, *Worker Participation in Corporate Government: The U.A.W.-Chrysler Experience*, 58 CHI.-KENT L. REV. 949 (1982); Michael C. Harper, *Reconciling Collective Bargaining with Employee Supervision of Management*, 137 U. PA. L. REV. 1, 11-13 (1988).

154. An excellent example is section 141(k) of the Delaware General Corporate Law, which gives shareholders full power to remove any director by vote of those holding a majority of the shares.

155. *See* Jeffrey N. Gordon, *Employee Stock Ownership in Economic Transitions: The Case of United Airlines*, *in* EMPLOYEES AND CORPORATE GOVERNANCE 317 (Margaret M. Blair & Mark J. Roe eds., 1999); Harper, *supra* note 153, at 13 n.45.

B. *Corporate Restructuring Used to Exploit These Legal Restrictions on Unions*

Restrictions on secondary strike activity in support of subcontractor employees,[156] along with increasing legal weakening of unions' right to block subcontracting,[157] has led many firms to strategically reorganize firm structures to minimize labor power.[158] Since workers isolated in subcontractors would largely be barred from solidarity support from workers in the main firm or other subcontractors, this dynamic, along with other economic transformations, has encouraged widespread subcontracting throughout industry.[159] Combined with economic globalization, firm-based collective bargaining had control over an ever decreasing share of total employment contributing to a firm's core output. The rise of new technology has decreased the coordination costs for employers managing geographically dispersed economic units, further encouraging this strategic decentralization.[160] A general assumption of the New Deal labor system was that employers and employees both had large sunk costs in specific locations, so neither necessarily had great opportunistic bargaining power in the threat to abandon a location.[161] But, with the increased flexibility of new

---

156. This is based on section 8(b)(4) of the NLRA which declares it an unfair labor practice for a union to strike to induce any employer other than their primary employer to recognize a union. *See* Howard Lesnick, *The Gravamen of the Secondary Boycott*, 62 COLUM. L. REV. 1363 (1962).

157. In *First National Maintenance Corp. v. NLRB*, 452 U.S. 666, 686 (1981), the Supreme Court held that an employer has no duty to bargain with existing unions over its decision to close part of its operation even though that decision was based on the employer's desire to lower labor costs. *See* Van Wezel Stone, *supra* note 53, at 86-102 (discussing the limits of bargaining over subcontracting and corporate reorganization).

158. The mere threat of plant shutdowns has been used by companies to gain concessions from unions who felt they had little legal leverage to prevent "runaway shops," sometimes pitting union workers at different locations against each other in competition for the jobs involved. *See* Fran Ansley, *Standing Rusty and Rolling Empty: Law, Poverty and America's Eroding Industrial Base*, 81 GEO. L.J. 1757, 1774-76 (1993).

159. BENNETT HARRISON, LEAN AND MEAN: THE CHANGING LANDSCAPE OF CORPORATE POWER IN THE AGE OF FLEXIBILITY 18 (1994) ("It is the strategic downsizing of the big firms that is responsible for driving down the average size of business organizations in the current era, *not* some spectacular growth of the small firms sector, per se.").

160. MANUEL CASTELLS, THE RISE OF THE NETWORK SOCIETY 245-46 (1996) (exploring the complex interdependence of corporate governance goals and the technology that facilitated the subcontracting and expanding global division of labor in all industries). Castells follows up on Harley Shaiken's *Work Transformed: Automation and Labor in the Computer Age* (1985), which emphasized that the early applications of technology had more to do with enforcing control on labor than as an instrument of organizational change.

161. It was not until 1965 that the Supreme Court addressed when a plant shutdown was being used opportunistically to undermine union rights. *See* Textile Workers Union of Am. v. Darlington Mfg. Co., 380 U.S. 263, 268 (1965). For an extensive discussion on how the NLRB and courts have dealt with the emerging issue of "runaway shops" undermining traditional assumptions

technology, employers now have a strong ability to use employee sunk investments in community and home values to leverage opportunistic concessions.[162]

The rise of union comprehensive campaigns is a response to this undermining of any real role for labor in corporate governance through strike-based negotiations. Not only were unions increasingly weakened under the law, but employers specifically began using corporate governance decisions, such as subcontracting, to further undermine labor bargaining power,[163] thereby making a search for a renewed labor role in corporate governance doubly vital. In the New Deal procedural separation of corporate and labor law, labor-management conflicts were supposed to occur in a deep but isolated river of law, yet the ban on secondary activity by labor and corporate subcontracting acted like a dam on that river that, though delayed by years, has led to union comprehensive campaigns overflowing the banks spilling like rivulets all over the legal terrain.

C. *How Regulatory Changes Opened Up New Opportunities for Union Campaigns*

If legal and economic changes pushed labor towards alternatives of the strike-based labor law system, expanded state and federal regulation of corporations, and particular restrictions on union use of pension funds encouraged the specific shape of union comprehensive campaigns. The rise of new environmental,[164] consumer,[165] and workplace safety[166] regulations in the last few decades has constituted a strong reassertion of the government's role in corporate governance, especially by state governments, which had lost such a role through both Lochner-era constitutional restrictions and the rise of Delaware corporate law autonomy. Where antitrust and fair trade statutes had made small inroads into regulation of interfirm interactions between suppliers and contractors, these new laws assert much greater direct regulation on day-to-day operations in the name of the social interest. Some states, like California, even

---

of collective bargaining, see Peter Munger et al., *Plant Closures and Relocations Under the National Labor Relations Act*, 5 GA. ST. U. L. REV. 77 (1988).

162. *See* Ansley, *supra* note 158, at 1772-82 (emphasizing the changed dynamics that have encouraged a "race to the bottom" both by workers and local governments seeking to keep footloose companies in place).

163. A key legal setback for labor was *First National Maintenance Corp. v. NLRB*, 452 U.S. 666 (1981), which gave employers the right to contract out operations without bargaining with workers covered by a union contract. *See* Munger et al., *supra* note 161, at 87.

164. Clean Water Act, 33 U.S.C. §§ 1251-1387 (2000); NEPA, 42 U.S.C. §§ 4321-4370 (2000); Clean Air Act, 42 U.S.C. §§ 7401-7671 (2000).

165. Consumer Product Safety Act, 15 U.S.C. § 2050 (2000).

166. Occupational Safety and Health Act, 29 U.S.C. § 651 (2000).

tried (largely unsuccessfully) to reassert governing authority over core shareholder-firm relationships in companies that had large operations within their states, but who were not incorporated in their states.[167]

These new state and federal laws not only strengthened the public voice in corporate governance, but dramatically strengthened state and federal courts as venues for corporate governance battles along with the more traditional Delaware Court of Chancery and NLRB labor forums. Crucially, the state's involvement could be initiated by nongovernment actors. As Thomas Linzey argues, "The citizen suits authorized by many of the major legislative acts . . . provided what has turned out to be one of the most productive mechanisms for the enforcement of the procedural and substantive provisions contained within the legislation."[168]

The addition of RICO law in 1970 added to this expansion of venue as a whole range of securities fraud and other legal violations of state laws governing attempts to influence corporate conduct brought more corporate governance cases into venues outside the traditional corporate law courts. The depoliticization of corporate governance under U.S. law was badly under assault as the New Deal separation of courts for labor and capital was being undermined.

D. *The Rise of Union Comprehensive Campaigns*

Into this newly politicized legal environment entered the union comprehensive campaign beginning largely in the late 1970s with the J.P. Stevens textile workers campaign.[169] Tools used in these campaigns included the simple application of union resources to push regulatory agencies to fully apply the new laws in ways that hurt corporate opponents, thereby encouraging companies to settle labor contracts in order to induce unions to pull back their resources.[170] A second, more complicated step by union comprehensive campaigns was to highlight the legal misdeeds not just of their core corporate opponents, but of the web of suppliers and contractors that worked with that

---

167. *See, e.g.*, DOUGLAS M. BRANSON, CORPORATE GOVERNANCE § 1.12, at 34-37 (1993) (discussing the California statute that attempted to mandate cumulative voting for directors and other regulations which cause California corporations to "run away" to other incorporating jurisdictions such as Delaware or Nevada).

168. Linzey, *Killing Goliath*, *supra* note 75, at 39 (citing Endangered Species Act, 16 U.S.C. § 1540(g) (1994); Clean Water Act, 33 U.S.C. § 1365 (1988); Solid Waste Disposal Act, 42 U.S.C. § 6972 (1988); Clean Air Act, 42 U.S.C. § 7604 (1988 & Supp. V 1993); Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. § 9659 (1988)).

169. *See* DOUGLAS, *supra* note 10, at 199 (stating that the Amalgamated Clothing and Textile Workers Union (ACTWU), merged with the Textile Workers Union of America (TWUA), forming the ACTWU, "declared a large-scale campaign against the J.P. Stevens Company, Inc.").

170. *See id.* at 199-259.

firm.[171] Aiding unions in this endeavor was one of the few pro-union Supreme Court decisions of recent decades, the *Edward J. DeBartolo Corp. v. Florida Gulf Coast Building and Construction Trades Council* decision,[172] which upheld the First Amendment right of unions to distribute factual information about such secondary companies so long as the unions did not engage in physical picketing.[173] As a result of this decision, unions began using comprehensive campaigns to promote consumer boycotts and regulatory pressure on the supply networks of their core firm opponents, encouraging them to in turn, apply pressure on the core firm to settle labor disputes.[174] Through the strange twisting of U.S. legal history, union workers were barred from using their core strike and picketing weapon against any firm other than their primary employer, but seemed to have the ability to make alliances with consumers, stockholders, and regulatory agencies to put pressure on the goods and capital supplier networks they could not directly pressure themselves.[175]

The third major part of comprehensive campaigns was the mobilization of pension funds and other allied capital sources to put pressure on firms directly at the corporate board level.[176] Again, legal history forced unions to use an indirect rather than a direct approach to this pressure. The 1947 Taft-Hartley Act had completely barred union workers from owning their own pension funds directly, and union pension funds were required to include company officials as joint trustees.[177] While in practice this meant that union officials had significant control, the legal rules for a trusteed fund significantly restricted the use of those funds for any noninvestment-based use on behalf of workers. The 1973 ERISA law only compounded that situation with even tougher rules requiring that unions run their pension funds in the interest of their members as investors, not as workers.[178] Again, U.S. law created a rather stark conflict between shareholder and worker interests, admitting no situation where a worker-investor might have dual interests that needed mediation rather than rigidly defined fiduciary rules that assumed only investor interests. In order to mobilize its pension fund resources, unions found themselves approaching corporate venues as investors

171. *Id.*

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

173. *Id.* at 575.

174. *See* Jim McKay, *Union Starts State Boycott of Mellon: State AFL-CIO Asks Bank to Help Settle Strike at Wheeling-P. Steel*, PITT. POST-GAZETTE, July 1, 1997, at C7.

175. For an analysis of these odd contradictory Supreme Court rulings, see George Feldman, *Unions, Solidarity, and Class: The Limits of Liberal Labor Law*, 15 BERKELEY J. EMP. & LAB. L. 187, 266-67 (1994).

176. *See* Schwab & Thomas, *supra* note 53, at 1018.

177. 29 U.S.C. § 186(c)(5) (2000) (derived from section 302(c)(5) of the 1947 Taft-Hartley Act).

178. *See* Schwab & Thomas, *supra* note 53, at 1080-81.

qua investors, mobilizing allies to pressure corporate opponents under traditional investor-based interests, even as their indirect motives were promoting worker interests.[179]

The end result was a legal regime where unions could not directly launch strike solidarity between workers in the same corporate network or mobilize capital directly in their own interests. Barred from extending solidarity among workers, unions increasingly looked to alliances with customers, regulatory agencies, creditors, and disenchanted shareholder forces to seek new coalitions in shaping corporate governance both at the core firm and suppliers in the corporate network who could be pressured themselves to exert pressure on core union opponents.[180]

V. RICO VERSUS COMPREHENSIVE CAMPAIGNS

The third part of this Article will outline the corporate attack on union comprehensive campaigns using RICO as a key tool. While there is, given the above-noted odd procedural and ideological development of U.S. law, a seemingly attractive line of attack here, what is ignored is its economic incoherence given the much broader law and economics analysis that conservatives have promoted in justifying corporate law.[181] Given the more flexible view of firm differentiation embodied in everything from attacks on antitrust enforcement to support of mergers in corporate law, the odd sanctity of the independent firm embodied in the attack on union comprehensive campaigns is in jarring contradiction. Of course, as detailed procedural rules for preemption have been the classic mode of managing such contradictions in U.S. law, the very use of RICO creates a cross-jurisdictional politicization of the law that does more to expose such contradictions than to manage them effectively.

A. *Herbert Northrup and RICO at Bayou Steel*

This section of the Article will briefly examine the *Bayou Steel Corp. v. United Steelworkers of America*[182] case, primarily because Herbert R. Northrup, a former Chairman of the Wharton School's Council of Labor Relations and Department of Industry, was a consultant on the case and has co-written an extensive law review article outlining the case for RICO prosecution of union

---

179. *Id.* at 1074-75.
180. *See* Moberg, *supra* note 7, at 201.
181. *See id.*; Hart, *supra* note 70, at 1764.
182. Bayou Steel Corp. v. United Steelworkers of Am., No. CIV.A.95-496-RPM, 1996 WL 76344, at *1 (D. Del. Jan. 11, 1996).

comprehensive campaigns.[183] This Article follows up on other general articles Northrup has written against such campaigns.[184] Northrup's views are worth considering because of his history as an ideological advisor to a range of business groups in perfecting union-busting strategies in the last few decades; most notably in his leadership in promoting the use of permanent replacement workers in the early 1980s.[185] First widely used upon his advice in the 1983 Arizona Phelps Dodge mining strike, this was considered a critical turning point in the radical decline of union density in the last two decades.[186] Given Northrup's background, his views on using RICO as a weapon against unions are worth careful examination.

Northrup's argument for RICO prosecution preempting the traditional labor law courts is based largely on the politicized power given to judges in our procedural separation of courts.[187] With labor law covering a range of areas, courts can either treat every union act as covered by NLRB courts unless another law specifically designates otherwise, or, as Northrup essentially argues, they can preempt the NLRB unless labor law specifically covers the union action.[188] It is the political choice between "all that is not prohibited is permitted" versus "all that is not permitted is prohibited" that makes procedural decisions so powerful.

Just as courts in the early part of the century made innovative consumer boycotts and other nonstrike activities illegal as being outside the direct interests of the workers involved, Northrup and other union opponents essentially want to revive that general prohibition on innovation in union tactics through RICOization of any nontraditional approach.[189] The core of Northrup's argument is that while union threats to strike an employer may be a protected "privilege" under U.S. law, any attempt to link a threat to disclosure of nasty information about the employer to a third party constitutes legal blackmail.[190] This bias against including "third parties" in supposed two-party labor-management disputes is a pervasive theme in labor history, with the invocation of RICO

---

183. Northrup & Steen, *supra* note 16, at 773.

184. *See, e.g.*, Herbert R. Northrup & Augustus T. White, *Construction Union Use of Environmental Regulation to Win Jobs: Cases, Impact, and Legal Challenges*, 19 HARV. J.L. & PUB. POL'Y 55 (1995).

185. *See* JONATHAN D. ROSENBLUM, COPPER CRUCIBLE: HOW THE ARIZONA MINERS' STRIKE OF 1983 RECAST LABOR-MANAGEMENT RELATIONS IN AMERICA 61-63 (1999).

186. *See id.* at 61-63 (discussing Northrup's involvement in the Phelps Dodge mining strike).

187. Northrup & Steen, *supra* note 16, at 797-98.

188. *Id.* at 799.

189. Northrup & White, *supra* note 184, at 98 n.185.

190. Northrup & Steen, *supra* note 16, at 844-45.

merely being a new procedural method to bypass the NLRB in favor of state common law courts.[191]

Ignoring tough preemption decisions (including *San Diego Building Trades Council v. Garmon*[192] and *United States v. Enmons*[193]) that the Supreme Court has traditionally used to avoid dragging unions into state courts on criminal charges (preemption arguments to which I will return later), Northrup's theoretical argument is, on its face, reasonable. If an individual threatens to reveal information about another person unless payment is made, even when the information is true, but in some way dangerous if known publicly, the individual commits common law blackmail and extortion.[194] Northrup compares this to the threat made in a union comprehensive campaign where unions threaten to call attention to environmental or other regulatory violations unless a contract is signed.[195]

Northrup recognizes that not all union demands for a contract will constitute blackmail, and admits that "it is not obvious how courts distinguish lawful threats from unlawful ones."[196] What defines blackmail, according to Northrup, is the entangling of threats with third-party interests:

> The key to distinguishing blackmail from lawful hard bargaining lies in noting blackmail's distinctive triangular structure. Characteristically, and invariably, blackmail involves not only a blackmailer and a victim, but third-party interests as well . . . . In each instance, however, the blackmailer threatens to bring third parties into a dispute with the victim, unless the blackmailer's silence is purchased. Thus, the hallmark of blackmail is a disjunction between the blackmailer's genuine interests and the genuine interests of the third parties whose leverage is used for the blackmailer's personal gain. Stated concisely, in blackmail the blackmailer threatens to exploit third-party interests to exert pressure—usually economic pressure—

---

191. *See* discussion *supra* Part II.B (discussing the early disdain in the law for entangling "third parties" in labor conflict).

192. San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236, 246 (1959) (holding that even though the NLRB had not determined the type of behavior the State of California sought to compensate, the behavior in question was arguably covered under the Federal Act, therefore the State did not have jurisdiction).

193. United States v. Enmons, 410 U.S. 396, 411 (1973) (stating "Congress has traditionally been reluctant to define as a federal crime conduct readily denounced as criminal by the states," which indicates that, unless Congress clearly states a purpose to break from this tradition, the Court will presume that Congress did not intend to change this relationship).

194. Northrup & Steen, *supra* note 16, at 805-06 (footnotes omitted).

195. *Id.* at 783-84.

196. *Id.* at 807.

> on the victim; that is, the blackmailer plays with someone else's 'chip,' and absent such third-party interests there is no blackmail.[197]

Here we see a nice intersection of the complicated legal debate over the definition of blackmail,[198] combined with the historical suspicion of labor disputes enveloping third parties. The unfairness and apparent illegality is that unions are using the pressure of those other third parties to win economic concessions where the union's own power might be insufficient on its own. Yet every union strike by picketing reveals information to a third-party public that may be motivated to put pressure on a company based on revelations of employer unfairness. Every contract strike encourages other workers not to cross a picket line or consumers not to purchase the company's goods. Essentially, a union's contract is the price of "buying the silence" of the union, a transaction which effectually bans a union from badmouthing the company to such third parties.

B. *RICO and Corporate Governance Coalitions*

Stepping aside from the theoretical critiques of general common law blackmail in the labor context, it is unclear that it even has a place in more general corporate governance situations in which threats of exit and disclosure of negative information is critical to the functioning of the system. Analysts have argued that large creditors are often in a position to know critical information about a firm's finances, and that their threats of exit play a critical role in forcing firms to both keep faith with those creditors and, in the case of creditor exit, signaling other "stakeholders" such as shareholders or regulatory agencies that something is seriously amiss with the company, thereby giving those other actors the chance to act to mitigate the harm.[199] Of course, there is the concern against encouraging creditors or others (such as unions) to become collaborators with a firm's management in deceit against others in exchange for payoffs, but Northrup's argument is focused purely on restraining the union's power, not on protecting the public through assuring fuller disclosure.[200]

---

197. *Id.* at 807-08.

198. James Boyle has noted the continuing theoretical problems in explaining why blackmail is illegal, calling the challenge a "muddy and treacherous test track" for new generations of scholars to prove themselves. *See* JAMES BOYLE, SHAMANS, SOFTWARE & SPLEENS: LAW AND THE CONSTRUCTION OF THE INFORMATION SOCIETY 61 (1996).

199. George Triantis & Ronald Daniels, *The Role of Debt in Interactive Corporate Governance*, 83 CAL. L. REV. 1073, 1108 (1995).

200. *See* Northrup & Steen, *supra* note 16, at 844-45 (concluding that the responsibility lies with the union to restrict its activity, but failing to mention alternative remedies such as full public disclosure).

The point of most union comprehensive campaigns is to inform other stakeholders whether customers, creditors, shareholders, or regulatory agencies of information that they, for their own interests, need to know; exactly the kind of information that is seen as crucial for restraining general management abuse against other stakeholders.[201] If the Steelworkers at Bayou Steel had information of illegal management activities to which only they were privy as insider employees, and demanded a contract as the price for keeping the information private, the traditional paradigm of blackmail may have been met.[202] However, as Northrup details, what the Steelworkers did was publicize little known but public information about Bayou's environmental compliance record, which helped lead to an investigation by the state environmental agency.[203] The state environmental agency used that publicity of Bayou's poor environmental record to delay tax benefits Bayou was seeking from another state agency, and argued before the Securities Exchange Commission (SEC) that the company had failed to detail these state environmental investigations and associated problems in prospectuses filed with the securities agency and sent to investors.[204] During the SEC registration process, the Steelworkers actively worked to dissuade potential investors from buying Bayou Steel's mortgage notes, even publishing critical "tombstone" ads in the *Wall Street Journal*.[205]

To use blackmail charges to stop unions from informing such third parties of useful facts would not only constrain the power of unions, but would hurt the third parties uninformed of that information. While such third parties may not receive such information if a company "buys off" the union with a contract, the company does have an incentive to correct any legal or management problems in order to avoid giving unions the leverage of a publicity advantage during contract negotiations. If unions were deprived of the ability to do such comprehensive campaign publicity, the company would, in turn, be deprived of a major incentive to correct the problems impacting those third parties. So, whether the information is in fact revealed or not during a contract campaign, the union's ability to reveal information publicly helps the third parties.

---

201. *See id.* (stating that "a corporate campaign aimed at obtaining a contract is designed to win more from an employer than a union can achieve utilizing labor processes alone").

202. *See, e.g.*, MODEL PENAL CODE § 223.4, 10 U.L.A. 559 (2001) (stating the requirements for blackmail).

203. *See* Northrup & Steen, *supra* note 16, at 783, 786-91.

204. *See id.* at 789-92.

205. *See id.* at 788-92.

C. *Avoiding Criminalizing Basic Economic Activities Under RICO*

The fact that we can only consider the charge of blackmail based on the use of the federal RICO statute further complicates the picture, because the whole point of RICO is not merely to federalize various state common law crimes, but to prevent systematic illegitimate control of corporate governance.[206] While the case law on RICO is conflicting, the general thrust of the law has been specifically to avoid using public policy concerns to criminalize the economic (as opposed to criminal) acts of regular participants in corporate governance such as unions, creditors, and shareholders.

To prosecute a RICO suit, a plaintiff must prove that the defendant engaged in racketeering, which includes "any act or threat involving murder, kidnapping, gambling, arson, robbery, bribery, extortion, dealing in obscene matter, or dealing in a controlled substance or listed chemical . . . which is chargeable under State law and punishable by imprisonment for more than one year" or activities covered by federal mail or wire fraud.[207] While the latter provisions have created broad litigation using RICO as an antifraud statute, circuit courts have been reluctant to allow RICO to federalize other state law crimes not listed as a so-called "predicate act," because fraud distorts such corporate governance. As the Third Circuit noted in *Annulli v. Panikkar*:[208]

> [I]f garden-variety state law crimes, torts, and contract breaches were to constitute predicate acts of racketeering (along with mail and wire fraud), civil RICO law, which is already a behemoth, would swallow state civil and criminal law whole. Virtually every litigant would have the incentive to file their breach of contract and tort claims under the federal civil RICO Act, as treble damages and attorney's fees would be in sight. We will not read language into § 1961 to federalize every state tort, contract, and criminal law action.[209]

D. *Labor Preemption Law and RICO*

Recognizing this restriction, the Bayou Steel Corporation argued that the blackmail it alleged was a form of extortion covered by Louisiana law and thus,

---

206. *See* Mastro et al., *supra* note 56, at 575 ("The RICO statute represents an economic approach to rooting out organized crime in businesses and labor unions, not simply a reorganization of previously established methods of fighting corruption.").

207. Annulli v. Panikkar, 200 F.3d 189, 199 (3d Cir. 1999).

208. Annulli v. Panikkar, 200 F.3d 189 (3d Cir. 1999).

209. *Id.* at 200.

encompassed by the RICO statute listing of extortion as a predicate act.[210] As opposing counsel argued in the case, even in nonlabor contexts, courts have generally rejected such a broad definition of extortion when what is being "extorted" is a legitimate objective of the person or entity making the threat (i.e., bargaining made in a business negotiation).[211] In the case of labor negotiations, the Supreme Court has laid out very tough preemption arguments that seem to forestall almost any extortion claim made against a labor union.[212] The basic preemption of state law applying to the labor context came in *San Diego Building Trades Council v. Garmon*,[213] but the Supreme Court has ruled more specifically since that decision that even physical violence does not constitute extortion under the federal Hobbs Act when a union is pursuing a legitimate collective bargaining agreement.[214] In *United States v. Enmons*, the Court held that union violence could be "wrongful" extortion only "where the obtaining of the property would itself be 'wrongful' because the alleged extortionist has no lawful claim to that property."[215] However, the Court declared that desired wages were not the property of the employer:

> [T]he literal language of the statute will not bear the Government's semantic argument that the Hobbs Act reaches the use of violence to achieve legitimate union objectives, such as higher wages in return for genuine services which the employer seeks. In that type of case, there has been no "wrongful" taking of the employer's property; he has paid for the services he bargained for, and the workers receive the wages to which they are entitled in compensation for their services.[216]

This decision starkly restates the basic agnostic class conflict underlying U.S. labor law—there is no "natural" wage rate beyond whatever level each side

---

210. Bayou Steel Corp. v. United Steelworkers of Am., No. CIV.A.95-496-RPM, 1996 WL 76344, at *2 (D. Del. Jan. 11, 1996).

211. *See, e.g., id.* at *1; Viacom Int'l Inc. v. Icahn, 747 F. Supp. 205 (S.D.N.Y. 1990) (involving the threat of hostile corporate takeover), *aff'd*, 946 F.2d 998 (2d Cir. 1991); Brief in Support of Defendants United Steelworkers of America's and Industrial Union Department's Motion for Summary Judgment at 48-49, Bayou Steel Corp. v. United Steelworkers of Am., 1996 WL 76344 (D. Del. Jan. 11, 1996) (No. CIV.A.95-496-RRM). *See generally* United States v. Capo, 791 F.2d 1054, 1062-63 (2d Cir. 1986) (stating that where defendant seeks to obtain property he has a right to seek, the Hobbs Act does not prohibit "hard bargaining," including the use of "fear of economic loss . . . as leverage in bargaining"), *rev'd on other grounds en banc*, 817 F.2d 947 (2d Cir. 1987).

212. *See* United States v. Enmons, 410 U.S. 396, 411 (1973); San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236, 246 (1959).

213. *See* San Diego Bldg. Trades Council v. Garmon, 359 U.S. at 245.

214. United States v. Enmons, 410 U.S. at 412.

215. *Id.* at 400.

216. *Id.*

of the conflict can win in industrial battle. Until that battle has been concluded in a bargaining agreement, there is no property to be stolen as far as compensation is concerned, and therefore nothing to extort until the bargaining is concluded. In that sense, extortion is impossible in the normal union context.

Taken in the context of *Garmon*, the Court in *Enmons* said that state courts were free to prosecute individuals engaging in illegal violence, although the union struggle for higher wages or benefits itself could not be considered criminal even if illegal means might have been used.[217] Instead, any evaluation of union wrongdoing would be done in the context of NLRB hearings. This decision provides another clear illustration of the way class conflict is contained and depoliticized by separating issues into different court contexts: individual wrongdoing decided in state criminal courts with "class" wrongdoing.[218]

E. *Trying to Find Exceptions to Preemption Under RICO*

A number of lower courts found exceptions to the *Enmons* preemption rules in the early years of RICO litigation.[219] Due to the fact that RICO does not have the same requirements of wrongful motive for illegal acts, an early RICO decision by the Ninth Circuit found no *Enmons* exemptions for large-scale violence during a union conflict, which the court distinguished from the lower-level and isolated acts involved in *Enmons*.[220] Other lower courts have held that where a union demanded concessions that it could not legally demand under labor law, such as including supervisors in the bargaining unit, the union thereby loses its preemption from RICO.[221]

Along these lines of thought, Northrup argues that because secondary publicity is not governed by the NLRB, unions have been held liable in state courts for defamation.[222] Northrup argues, "Thus, federal labor law arguably neither protects labor unions' speech, nor arguably proscribes their speech.

---

217. *See id.* at 396 (affirming the district court's holding that legitimate union objectives were beyond the scope of the Hobbs Act).

218. For example, union wrongdoing, to be decided in a separate NLRB venue based on the violence being considered an unfair labor practice. *Id.*

219. *See, e.g.*, United States v. Thordarson, 646 F.2d 1323, 1328 (9th Cir. 1980); Domestic Linen Supply & Laundry Co. v. Cent. States, S.E. & S.W. Areas Pension Fund, 722 F. Supp. 1472, 1477 (E.D. Mich. 1989).

220. *See* United States v. Thordarson, 646 F.2d at 1328 (comparing minor picket line violence with blowing up and burning vehicles used for interstate commerce).

221. *See, e.g.*, Domestic Linen Supply & Laundry Co. v. Cent. States, S.E. & S.W. Areas Pension Fund, 722 F. Supp. at 1477 (noting that including supervisors within a bargaining unit is an illegitimate collective bargaining objective).

222. *See* Linn v. United Plant Guard Workers of Am., Local 114, 383 U.S. 53, 63 (1966); Northrup & Steen, *supra* note 16, at 811-12.

Indeed, the fact that an employer cannot assert an unfair labor practice charge for injurious speech by a union assures that federal labor law does not preempt state blackmail law."[223] This is actually a clever legal argument. Under the NLRA, certain kinds of secondary acts such as sympathy strikes are barred.[224] But it is clear that the Steelworkers acts in *Bayou Steel* would not be barred under the labor courts—the whole reason the RICO case was brought. Yet the argument against NLRA preemption is essentially that the secondary acts barred under labor law are not specific weapons denied to labor unions out of a large potential arsenal, but rather show the general antipathy of the law toward any nontraditional form of labor solidarity beyond single-firm, single-union strike action.[225] By this argument, any specific union act of solidarity not specifically permitted or barred under labor law is appropriately governed by other venues, an ideological move that essentially borrows the specific antiunion rules of labor law to negate the core pro-labor nature of the original Wagner Act—that is, the specific preemption of state common law in governing labor union struggle against the employer.

However, despite this creative playing with preemption arguments, the almost insurmountable barrier to applying RICO to labor struggles became clearer as the Supreme Court focused more clearly on RICO's role as a corporate governance law and the limits on what players in the corporate enterprise can be targeted.[226] RICO is not written as a general conspiracy statute for any set of linked crimes, but rather focuses on restricting the ability of outside players (the prototype being the mafia) manipulating specific economic actors for their own ends.[227] Section 1962(c) prohibits a "person . . . associated with any enterprise . . . [from] conduct[ing] . . . such enterprise's affairs through a pattern of racketeering activity . . . ."[228]

This phrase has two key effects. First, courts have held that a sued RICO "person" cannot be the same as the "enterprise" that is targeted as the criminal enterprise.[229] This is known as the so-called "nonidentity rule."[230] Secondly, a "person" must be "associated" with an enterprise in some way, meaning that the courts do not allow too distant an economic relationship between them.[231]

---

223. *See* Northrup & Steen, *supra* note 16, at 812.
224. *See id.*
225. *See id.*
226. *See, e.g.*, Reves v. Ernst & Young, 507 U.S. 170 (1993).
227. *See* Racketeer Influenced Corrupt Organizations Act, 18 U.S.C. § 1962(c) (2000).
228. *Id.*
229. *See, e.g.*, B.F. Hisch v. Enright Refining Co., 751 F.2d 628, 633 (3d Cir. 1984).
230. *Id.*
231. *Id.*

The nonidentity rule—upheld in every circuit other than the Eleventh[232]—holds that a corporation, union, or any other entity cannot be sued under RICO for the activities of that entity itself.[233] This goes to the purpose of RICO in targeting "outside" racketeers manipulating a legitimate enterprise for its own self-interest. Generally, it prevents a union from being treated as both a RICO defendant and the illegal RICO enterprise.[234]

To escape the nonidentity rule, Bayou Steel claimed that the RICO enterprise was not just the union, but an "association-in-fact," involving the Steelworkers, the AFL-CIO Industrial Department, consultants, and outside experts writing reports for the campaign.[235] This argument would provide that the "enterprise" involved more than the RICO defendant Steelworkers.[236] The problem with this argument, however, is that courts have declared that there is no "association" between an entity and its own subdivisions, employees, and agents.[237] For example, a corporation cannot be sued as an "outside" actor controlling a subsidiary under RICO law, but instead, actors outside the official corporate governance structure must be involved seeking gain for their own ends.[238] For this reason, courts have generally refused to treat a union itself as a possible RICO actor, but have instead required association by the union with others to create an illegal RICO enterprise that can be prosecuted.[239] The Tenth Circuit clearly rejected an attempt to allege an association-in-fact between a

---

232. *See* United States v. Hartley, 678 F.2d 961, 988-89 (11th Cir. 1982) (stating that under RICO, "a corporation may be simultaneously both a defendant and the enterprise").

233. *See, e.g.*, Bd. of City Comm'n of San Juan v. Liberty Group, 965 F.2d 879, 885 n.4 (10th Cir. 1992) (citations omitted); B.F. Hirsch v. Enright Refining Co., 751 F.2d at 633 (citation omitted).

234. *See* Landry v. Airline Pilots Ass'n, 901 F.2d 404, 425 (5th Cir. 1990) (holding it would be incongruous to find that the Air Line Pilots Association cannot be a RICO person but could be vicariously liable for the tortious acts of its employee); Yellow Bus Lines, Inc. v. Drivers, Chauffeurs & Helpers Local Union 639, 883 F.2d 132, 141 (D.C. Cir. 1989) (holding that, although unsuccessful, if Yellow Bus Lines had been able to amend its complaint to name the Local as the "enterprise," the amended complaint would fail to state a proper RICO claim).

235. Brief in Support of Defendants United Steelworkers of America's and Industrial Union Department's Motion for Summary Judgment at 7, Bayou Steel Corp. v. United Steelworkers of Am., 1996 WL 76344 (D. Del. Jan. 11, 1996) (No. CIV.A.95-496-RRM).

236. Northrup & Steen, *supra* note 16, at 817-18.

237. Gasoline Sales, Inc. v. Aero Oil Co., 39 F.3d 70, 73 (3d Cir. 1994); Lorenz v. CSX Corp., 1 F.3d 1406, 1411 (3d Cir. 1993); Brittingham v. Mobil Corp., 943 F.2d 297, 302-03 (3d Cir. 1991).

238. *See, e.g.*, Gasoline Sales, Inc. v. Aero Oil Co., 39 F.3d at 73 (noting the limited susceptibility of parent corporations to RICO actions regarding control over their subsidiaries); Lorenz v. CSX Corp., 1 F.3d at 1406 (holding a parent corporation that merely directs a subsidiary's fraudulent acts would not satisfy distinctiveness requirement under RICO for parent corporation to be a defendant and its subsidiary to be the enterprise).

239. *See, e.g.*, Jaguar Cars, Inc. v. Royal Oaks Motor Car Co., 46 F.3d 258, 263 (3d Cir. 1995); Gasoline Sales, Inc. v. Aero Oil Co., 39 F.3d at 70.

union and its business agent,[240] and the Fifth Circuit refused to impose vicarious liability under RICO for the actions of its union negotiator based on the nonidentity rule.[241]

Bayou and Northrup tried to evade these precedents by making the interesting argument that international unions and their locals and other affiliated union groups are organized in a way that they are not completely agents of one another.[242] In a sense, Northrup argues that the multiple levels of democracy in unions make them more vulnerable to RICO lawsuit than the clear lines of subordination within corporate enterprises.[243] Aside from the perverseness of the argument where internal democracy creates greater legal liability and would thereby create very bad incentives for unions to decrease internal democracy, it did not fit the facts of a pretty tight comprehensive campaign run by the Steelworkers.

However, in other campaigns where a looser coalition might be formed in support of a union fight, such an argument creates the danger of opening a divide between free-to-act individual unions and legally suspect conspiracies under RICO, when acting in association with other unions or nonunion actors. This application of RICO would essentially replicate the old *Danbury Hatters* attack on unions enlisting nonlabor support for its goals.[244] Assuming all the other labor preemption defenses failed, this opens up the dangerous realm of restraint on democratic activity that many fear is at stake in the ongoing RICO litigation against antiabortion protesters.[245] But, even for such broad associations, the courts usually require that they exist for more than the particular alleged illegal activity, that is, that they maintain an ongoing decision-making structure and continuity beyond the specific alleged RICO acts themselves,[246] something

---

240. *See* Yellow Bus Lines, Inc. v. Drivers, Chauffeurs & Helpers Local Union 639, 883 F.2d 132, 141 (D.C. Cir. 1989).

241. *See* Landry v. Airlines Pilots Ass'n, 901 F.2d 404, 425 (5th Cir. 1990).

242. Brief for Defendants United Steelworkers of America's and Industrial Union Department's Motion for Summary Judgment at 21-22, Bayou Steel Corp. v. United Steelworkers of Am., 1996 WL 76344 (D. Del. Jan. 11, 1996) (No. CIV-A95-496-RRM); Northrup & Steen, *supra* note 16, at 819-20.

243. *See* Northrup & Steen, *supra* note 16, at 819-20 (contrasting union organization with typical parent/subsidiary corporate organization).

244. *See* Loewe v. Lawlor, 208 U.S. 274, 294 (1908).

245. *See, e.g.*, NOW, Inc. v. Scheidler, 267 F.3d 687 (7th Cir. 2001), *cert. granted*, 122 S. Ct. 1604 (2002).

246. *See* United States v. Turkette, 452 U.S. 576, 583 (1981). At least two circuit courts require proof of such ongoing decision-making structure across the association-in-fact. *See* Chang v. Chen, 80 F.3d 1293, 1298-99 (9th Cir. 1996) (holding that an enterprise under RICO must have ascertainable structure separate from that inherent in the pattern of racketeering activity); Libertad v. Welch, 53 F.3d 428, 442 (1st Cir. 1995) (holding that the appellants RICO claim failed because

neither the Bayou nor almost any other particular union comprehensive campaign does, even when involving allied groups. And there are clear First Amendment arguments that any union or associated activists could invoke against RICO claims based on lobbying or publicity in a comprehensive campaign.[247]

One other argument asserted by employers in some RICO cases, although not in the Bayou Steel litigation, has been that unions are illegally involved in seeking to manage the enterprise of the company itself.[248] This line of argument was essentially foreclosed by the *Yellow Bus Lines, Inc. v. Drivers, Chauffeurs & Helpers Local Union 639*,[249] decision of the D.C. Circuit in 1989, which held:

---

they did not show that the purpose of their alleged conspiracy was to prevent or hinder law enforcement officers from giving or securing to women their right to seek abortions).

247. In *Now, Inc. v. Scheidler*, 510 U.S. 249, 264 (1994) (Souter, J., concurring), the Court's first *Scheidler* opinion, Justice Souter, joined by Justice Kennedy, specifically noted that while a non profit association was a possible "enterprise" under the RICO statute, their decision was a narrow procedural ruling that in no way meant that a later assertion of First Amendment rights would not protect activities normally targeted under RICO. Justice Souter wrote:

> Conduct alleged to amount to Hobbs Act extortion, for example, or one of the other, somewhat elastic RICO predicate acts may turn out to be fully protected First Amendment activity, entitling the defendant to dismissal on that basis. See NAACP v. Claiborne Hardware Co., 458 U.S. 886, 917, 102 S.Ct. 3409, 3427, 73 L.Ed.2d 1215 (1982) (holding that a state common-law prohibition on malicious interference with business could not, under the circumstances, be constitutionally applied to a civil-rights boycott of white merchants). And even in a case where a RICO violation has been validly established, the First Amendment may limit the relief that can be granted against an organization otherwise engaging in protected expression. See NAACP v. Alabama ex rel. Patterson, 357 U.S. 449, 78 S.Ct. 1163, 2 L.Ed.2d 1488 (1958) (invalidating under the First Amendment a court order compelling production of the NAACP's membership lists, issued to enforce Alabama's requirements for out-of-state corporations doing business in the State). See also NAACP v. Claiborne Hardware Co., supra, 458 U.S., at 930- 932, 102 S.Ct., at 3434-35 (discussing First Amendment limits on the assessment of derivative liability against ideological organizations); Oregon Natural Resources Council v. Mohla, 944 F.2d 531 (9th Cir. 1991) (applying a heightened pleading standard to a complaint based on presumptively protected First Amendment conduct).
>
> This is not the place to catalog the speech issues that could arise in a RICO action against a protest group, and I express no view on the possibility of a First Amendment claim by the respondents in this case (since, as the Court observes, such claims are outside the question presented . . .). But I think it prudent to notice that RICO actions could deter protected advocacy and to caution courts applying RICO to bear in mind the First Amendment interests that could be at stake.

Id. at 264-65.

248. *See, e.g.*, Yellow Bus Lines, Inc. v. Drivers, Chauffeurs & Helpers Local Union 639, 913 F.2d 948, 956 (D.C. Cir. 1990) (holding that the Union acted with interests adverse to those of Yellow Bus and conducted its affairs as an enterprise).

249. Yellow Bus Lines, Inc. v. Drivers, Chauffeurs & Helpers Local Union 639, 913 F.2d 948 (D.C. Cir. 1990).

> We see no logical reason why a union attempting to gain recognition from a company is any more participating in the conduct of the company's affairs than is any other external entity attempting to contract with the putative enterprise . . . . [T]he Union, acting as a party with interests adverse to those of Yellow Bus, conducted only its own affairs as an enterprise.[250]

Like the Third Circuit's *Annulli v. Panikkar* decision mentioned earlier, which blocked application of RICO to "garden variety" torts by business contractors,[251] any other approach would threaten to have RICO swallow business law whole as every corporate player negotiating for advantage would face the tripwire of RICO treble damages at the hint of any legal violations. A few years after *Yellow Bus*, the Supreme Court in *Reves v. Ernst & Young*[252] created a tight, bright-line rule that contractors whose role was to provide specific services to a firm could not be considered as "participating" in the affairs of a company.[253] As such, those contractors could not be charged as RICO persons in regards to the company as an enterprise.[254] As the *Enmons* case makes clear, the Court treats collective bargaining as an arms-length conflict over the price of contracting for labor services,[255] not as an internal matter of corporate governance, so unions would pretty clearly be covered by the *Reves* rule—no doubt one of the reasons Bayou Steel pushed the "association-in-fact" argument in their pleading.[256]

V. CONCLUSION

A. *How RICO Highlights Complications in Theories of the Firm*

While RICO, under present case law, has largely not restricted union comprehensive campaigns, there remains the chilling threat that a shift in Supreme Court precedent, such as abolishing the *Enmons* exemption for union activities (where Justice Rehnquist was in the original dissent[257]), or new legislation could bring the historic separation of class issues into separate courts

---

250. *Id.* at 955-56.
251. Annull v. Panikkar, 200 F.3d 189, 200 (2000).
252. Reves v. Ernst & Young, 507 U.S. 170 (1993).
253. *Id.* at 185.
254. *Id.*
255. *See* United States v. Emmons, 410 U.S. 396, 409-10 (1973).
256. Plaintiff's Second Amended Complaint, Bayou Steel v. United Steelworkers of Am., 1996 WL 76344 (D. Del. Jan. 11, 1996) (No. CIV.A.95-496-RRM).
257. United States v. Enmons, 410 U.S. at 413 (Douglas, J., dissenting) (stating that the legislative history of the Hobbs Act clearly precludes any conclusion that Congress did not intend to include the employee-employer relationship).

in the end.[258] As the NLRB ruled in numerous cases, including the Bayou Steel conflict, just the threat of litigation chills union speech and organizing rights.[259] However, Justice Scalia, in his concurrence to the Court's recent *BE & K Construction Co. v. NLRB*[260] decision, indicated that NLRB sanctions against employer lawsuits are inappropriate unless an employer lawsuit is completely baseless, even if done with a retaliatory motive.[261] Given the procedural complications involved in union corporate campaigns and RICO, it may be hard for unions to prove that RICO litigation is completely baseless even where it may fail on specific merits, given the contradictions of U.S. labor, common law, and corporate law approaches to workplace conflict and corporate governance.

At one level, the one-sided nature of any targeting of union acts using state common law is highlighted by the fact that the Bayou lawsuit was filed not in Louisiana, but in Delaware federal court due to Bayou Steel's incorporation there.[262] Bayou Steel had specifically incorporated in a state different from its main operations so that the corporation could escape most economic regulation

---

258. *See supra* note 16 and accompanying text.

259. *See* Northrup & Steen, *supra* note 16, at 801-02 (discussing Bayou steel's RICO suit and the complaint issued against that claim by the NLRB).

260. BE & K Const. Co. v. NLRB, 122 S. Ct. 2390 (2002).

261. *See id.* at 2402 (Scalia, J., concurring). Justice Scalia stated:

> I agree with JUSTICE BREYER that the implication of our decision today is that, in a future appropriate case, we will construe the National Labor Relations Act (NLRA) in the same way we have already construed the Sherman Act: to prohibit only lawsuits that are both objectively baseless and subjectively intended to abuse process.

Id. The implication of the decision was not lost on management-side lawyers. Almost immediately, the law firm issued a press release on the case entitled *Supreme Court Strengthens Right of Employers to Fight Back Against Union Corporate Campaigns*, noting that the decision "reduces the legal risk employers assume when they decide to fight corporate campaigns and other union conduct by filing lawsuits of their own." MICHAEL BEST & FRIEDRICH LLP, SUPREME COURT STRENGTHENS RIGHT OF EMPLOYERS TO FIGHT BACK AGAINST UNION CORP. CAMPAIGNS, *at* http://www.mbf-law.com/pubs/articles/661.cfm (last visited Oct. 31, 2002). Unclear in the wake of the decision is whether prounion rulings by circuit courts upholding NLRB sanctions against some RICO lawsuits will now be in danger. *See* Petrochem Insulation, Inc. v. NLRB, 240 F.3d 26 (D.C. Cir. 2001) (affirming the NLRB's ruling that a construction company committed an unfair labor practice by bringing a RICO suit against unions that opposed construction and zoning permits sought by nonunion contractors, and granting the NLRB's petition for enforcement, ordering the company to pay legal fees incurred by the unions in defending the suit).

262. Since the unions had to bring their shareholder lawsuit in Delaware, Bayou was able to bring its RICO lawsuit based on assertion of venue there. *See generally* Plaintiffs' Second Amended Complaint, Request for Injunctive Relief and Request for a Jury Trial, Bayou Steel Corp. v. United Steel Workers of Am., 1996 WL 76344 (D. Del. Jan. 11, 1996) (No. CIV.A.95-496-RRM).

of the actions of its shareholders under Louisiana state law.[263] If RICOization of union comprehensive campaigns expands, the situation will arise where corporations can, by carefully choosing separate places of incorporation and operations, choose the corporate law least restrictive on shareholder power to threaten workers or other stakeholders, and pick the state common law most restrictive on worker power to influence corporations through regulatory or other comprehensive campaign tactics. This selective preemption of state law to benefit shareholders and undercut NLRB preemption is at the heart of the RICO assault on unions.

However, the most interesting result of this RICO strategy by corporations is that by highlighting the complicated web of relationships that affect corporate governance, they are inviting a more far-ranging analysis of the relationship of all stakeholders both within firms and as actors in the broader marketplace. In the postwar period, an expanded antitrust enforcement challenged a range of corporate deals with suppliers and others in the production and distribution chain as unfairly restricting competition.[264] While such analysis focused almost exclusively on harm to other firms or consumers without disaggregating harms to particular stakeholders in the firms, it still challenged certain aspects of Lochner-era laissez-faire corporate decision-making.

B. *Corporate Coalitions and Union Comprehensive Campaigns*

In the past, an ever-widening law and economics analysis challenged the simple black-box treatment of firms in that postwar antitrust tradition in favor of arguing that mergers or corporate deal-making should be analyzed more in terms of transaction cost analysis for various contracting agents.[265] The "firm" was increasingly disaggregated into its component parts such that only inefficient contracting arrangements, rather than reification of "unfair" contracting between specific "firms," should be targeted by antitrust law.[266] The immediate thrust of this analysis was largely a conservative pulling back of government supervision of corporations under antitrust law.[267]

---

263. *See, e.g.*, RESTATEMENT (SECOND) CONFLICTS OF LAWS §§ 303, 304 (1971) (stating that the law of the state of incorporation will typically govern issues concerning shareholders rights).

264. *See supra* notes 63-64 and accompanying text.

265. ROBERT H. BORK, THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF (1978); RICHARD A. POSNER, ANTITRUST LAW: AN ECONOMIC PERSPECTIVE (1976).

266. Posner would describe this change as the triumph of understanding antitrust using the tools of "economic theory rather than those of traditional industrial organization." Richard A. Posner, *The Chicago School of Antitrust Analysis*, 127 U. PA. L. REV. 925, 934 (1979).

267. *See* Peter M. Gerhart, *The Supreme Court and Antitrust Analysis: The (Near) Triumph of the Chicago School*, 1982 SUP. CT. REV. 319; William E. Kovacic, *The Antitrust*

But what law and economics takes with one hand, it may theoretically give with the other. This skepticism of the reification of the firm in the antitrust field opens up the firm as a whole to broader analysis. While most law and economics types still found that such analysis left shareholders as the best owners of residual claims on revenues, this was only because other stakeholder actors were seen as exercising control over their interests in corporate governance through other methods.[268] What this implies is that political or judicial restrictions on such "other methods" of action of stakeholders like unions cannot be abstracted from how this upsets the "coalitions" that govern corporations, in John Coffee's phrase.[269]

Which returns us to the phenomenon of corporations pushing to use RICO as a quasi-corporate governance law regulating such "other methods" somewhat like an unguided missile. While the enforcement of RICO initially threatens a range of worker interests, it also potentially repoliticizes the whole arena of corporate governance to lay out class conflicts that were sublimated in the postwar era of separated courts for shareholder and labor interests. It encourages a much deeper analysis of the interdependence of labor rights with shareholder rights constituting power within the modern corporate firm.

This extends not just to analyzing the corporate coalitions of stakeholders in the firms and how different rules on exit and disclosure affect their ability to assert their interests, but also forces a reevaluation of what constitutes an "insider" versus an "outsider" within that corporate web of interests. At one level, it is almost nonsensical under law and economics analysis that a business-oriented conservative would make the argument that a union hiring independent consultants for a comprehensive campaign should be treated differently under RICO than a union that internalized those functions.

C. *Why RICOization of Union Campaigns Interferes with Internal Firm Governance*

More broadly, the whole firm-specific focus on union action is open to new critical light. As Oliver Hart argues, relationships between firms in a corporate web not only change which managers and shareholders get the benefits of surpluses, but also change the power of workers.[270] An employee-subcontractor has less ability to contract for part of the surplus important to the

---

Paradox Revisited: Robert Bork and the Transformation of Modern Antitrust Policy, 36 WAYNE L. REV. 1413, 1416 (1990).

268. EASTERBROOK & FISCHEL, *supra* note 67, at 10-11, 67.

269. *See* Coffee, *supra* note 71.

270. *See* Hart, *supra* note 70, at 1769 (stating that when workers capture a lower share of the surplus, their incentive to make improvements in the first place will fall).

main contractor because he or she cannot bargain directly with the main controller of that surplus.[271] Because this analysis shows that the choice to merge or subcontract in such a situation has both distributional as well as efficiency results, denying workers the ability to cooperate across the artificial divide of such firm divisions is merely a decision to allow corporate shareholders to set the framework for bargaining, not a legally neutral implication of firm governance. Given statutory prohibitions on secondary strikes, such economic analysis does not repeal such prohibitions, but it should encourage an evaluation of RICO to understand that disabling non strike cooperation across the shareholder-chosen firm divisions is not legally neutral, but a firmly political pro-worker or pro-shareholder decision on power.

If the preemption of NLRB law by state court common law through RICO is then to be analyzed for its economic and political implications for power within corporate governance, it is equally true that the second major component of union comprehensive campaigns—its mobilization of worker capital assets—needs a reevaluation in this new politicized terrain. The odd fact of union shareholder actions is that they are never able to represent their members' interests as workers, but only as shareholders, as if those interests are so clearly separable.[272] That attempts to use such union pension assets directly in support of worker campaigns (that in many cases are fought to expand those same pensions) is targeted as criminal under RICO or ERISA laws, merely emphasizes the way corporate law has been used to disable workers' ability to express their interests within corporate governance.

D. *Why the Global Economy Undermines Codetermination Alternatives*

Some liberals propose to address the politicization of corporate governance, having been highlighted by union comprehensive campaigns, by seeking to emulate the social democratic and codetermination models of Europe.[273] The idea is to create a legal structure that mediates, rather than completely separates, the interests of different stakeholders as the New Deal labor laws and U.S. corporate law system have traditionally done. Whether through forms of pension fund socialism or embedding such shared codetermination in labor-management bargaining,[274] the problem is that there is

---

271. *See id.* (emphasizing that worker power to bargain for a portion of production surplus is greater when directly employed by the main producer rather than a subcontractor).

272. *See* Schwab & Thomas, *supra* note 53, at 1020 (opining that a viewpoint equating union and worker interests is naive).

273. *See, e.g.*, William H. Simon, *The Prospects of Pension Fund Socialism*, 14 BERKLEY J. EMP. & LAB. L. 251 (1993); Van Wezel Stone, *supra* note 53, at 73.

274. Van Wezel Stone, *supra* note 53, at 166-67 (stating that some approaches take into account social interest or codetermination in labor-management bargaining).

no neutral legal point where workers and shareholders would not face zero-sum distributional choices.

Some reduce the debate to the pure efficiency gains from shareholder control argued for by conservative law and economics advocates versus the social interests (including concern for social externalities) represented by the codetermination style approaches. Many advocates of such codetermination or labor-management cooperation models promote them as achieving greater social efficiency across the economic board, often dubbing such an approach a "high road" to economic growth versus the "low road" of lower wages and a lower skill economy.[275]

However, the problem with such codetermination style approaches is that they replicate and entrench the firm-specific focus of law that was the base, not only of the New Deal system, but the codetermination approach of Germany or the labor-management cooperation system of Japan.[276] And all those systems are suffering erosion in a globalizing economy of increasing subcontracting and networking of firms.[277]

In a sense, the problems of all these firm-specific systems of corporate governance are not new, but were muted in the Depression and immediate postwar periods when large corporations operating overwhelmingly within national economies were the norm. Yet numerous labor scholars have noted that the gains for workers in these systems were partial, and usually left a harsh divide in the economy between core workers protected by these systems and those left out, usually women and racial minority groups in what analysts dubbed the "peripheral" economy.[278] As subcontracting, "flexible" employment, and globalization have preceded apace, the "periphery" of the labor force has become the main event.[279] Echoes of this divide are heard currently in the global debate on labor standards as peripheral Third World workers who fear "labor standards"

---

275. Joel Rogers is one of the most prominent advocates for a "high wage" alternative to the "low road." *See, e.g.*, Mark Barenberg, *Democracy and Domination in the Law of Workplace Cooperation: From Bureaucratic to Flexible Production*, 94 COLUM. L. REV. 753 (1994) [hereinafter Barenberg, *Democracy and Domination*]; Joel Rogers, *Reforming U.S. Labor Relations*, 69 CHI.-KENT. L. REV. 97 (1993).

276. *See* AOKI, *supra* note 152; Pistor, *supra* note 151, at 170-71.

277. *See* Pistor, *supra* note 151, at 170-71.

278. *See, e.g.*, DAVID GORDON ET AL., SEGMENTED WORK, DIVIDED WORKERS 190-92 (1982); VENUS GREEN, RACE ON THE LINE 195-205, 220-28 (2001); HARRISON, *supra* note 159, at 189-216.

279. *See* WILLIAM GREIDER, ONE WORLD, READY OR NOT: THE MANIC LOGIC OF GLOBAL CAPITALISM (1998) (outlining how runaway shops have gone global to undermine labor rights); SASKI SASSEN, THE GLOBAL CITY 22-34 (1991) (same).

may be a code word for shutting them out of the systems protecting core workers in developed nations.[280]

While RICO prosecutions threaten to further restrict workers rights, it also politicizes the broader problem of corporate governance that transcends firm-specific stakeholder debates. For progressive advocates, it requires both an activist and intellectual focus on new regimes of worker organization that allow workers the same flexibility of organization beyond the confines of the firm that shareholders have attained in the age of mergers, subcontracting, and globalization.

At their heart, union comprehensive campaigns are radical because they inherently transcend the firm-specific focus of traditional labor regimes in the U.S. Accordingly, by transcending the separation of courts that depoliticized labor-capital conflict in the postwar period, they are forcing that conflict into whole new areas of legal decision-making. If backed by the always-necessary political organizing power, they may help force the social changes needed to reflect the true organizational needs of workers in the global economy.

---

280. *See* Alice Amsden, *Hype or Help?*, BOSTON REV. Dec.-Jan. 1995-96, at 6 (stating that tighter labor standards in the South will likely harm the South and be "weak tea" in the North); Lance Compa, . . . *And the Twain Shall Meet? A North-South Controversy Over Labor Rights and Trade*, 23 LAB. RES. REV. 50, 52 (1995) (noting that "social activists in developing countries" oppose labor standards as "a protectionist tool to preserve job[s]" in developed countries); R. Michael Gadbaw & Micahel T. Medwig, *Multinational Enterprises and International Labor Standards: Which Way for Development and Jobs?*, *in* HUMAN RIGHTS, LABOR RIGHTS AND INTERNATIONAL TRADE 141, 155-56 (Lance A. Compa & Stephen F. Diamond eds., 1996) (noting that developing countries opposed a labor standards clause in GATT because it was viewed as protecting jobs in developed countries).