

ARTICLES

COLLATERAL CONFLICT: EMPLOYER CLAIMS OF RICO EXTORTION AGAINST UNION COMPREHENSIVE CAMPAIGNS

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I. INTRODUCTION

Over the past twenty-five years, unions have turned increasingly to strategies outside the traditional framework of the National Labor Relations Act ("NLRA").¹ Frustrated by an ineffective NLRA legal regime² and the demise of the economic strike,³ organized labor has pursued coordinated approaches in order to generate extended economic pressure on private employers who seek to avoid recognizing unions or to resist bargaining collective agreements. Coordinated campaign tactics include publicity

1. National Labor Relations Act, 29 U.S.C. §§ 151–169 (2006). I use "NLRA" to refer to the 1935 statute as amended in 1947 and 1959.

2. See Cynthia L. Estlund, *The Ossification of American Labor Law*, 102 COLUM. L. REV. 1527, 1533–38 (2002) (noting that the NLRA has remained unchanged since 1959 in the face of major changes in labor force and the organization of the workplace); Paul Weiler, *Promises to Keep: Securing Workers' Rights to Self-Organization Under the NLRA*, 96 HARV. L. REV. 1769, 1774–1803 (1983) (discussing deficiencies of and remedies under the NLRA).

3. See U.S. GEN. ACCOUNTING OFFICE, LABOR-MANAGEMENT RELATIONS: STRIKES AND THE USE OF PERMANENT STRIKE REPLACEMENTS IN THE 1970S AND 1980S 1, 12–13, 15, 18 (1991) (discussing the increased use of permanent replacements in economic strikes since 1980 and the concomitant steep decline in the number of strikes); James J. Brudney, *To Strike or Not to Strike*, 1999 WIS. L. REV. 65, 69–72 (book review) (discussing reasons for the increased use of permanent replacements).

efforts aimed at attracting media attention and consumer interest; regulatory reviews initiated to focus on a company's possible health, safety, environmental, or zoning violations; and investigations of a company's financial status through use of pension funds or other shareholder resources.⁴ Unions relying on these comprehensive campaign or corporate campaign strategies⁵ have enjoyed some success which in turn has contributed to a modest rise in private sector union density, the first such increase for decades.⁶

Management responses to comprehensive campaigns often involve filing lawsuits against unions and workers. Employer civil actions may invoke state defamation law, federal labor law prohibiting secondary boycotts, or federal antitrust law.⁷ But the most high-profile and dramatic form of employer retaliation in court is lawsuits alleging a pattern of unlawfully extortionate activities under the Racketeer Influenced and Corrupt Organizations Act ("RICO").⁸

RICO actions pose an especially potent threat to the new form of union campaigns. There is the risk of treble damages and attorney's fees that accompanies a finding of liability. Given the Supreme Court's track record of construing RICO expansively in commercial disputes between

4. For a discussion of these tactics, see INDUS. UNION DEP'T, AFL-CIO, DEVELOPING NEW TACTICS: WINNING WITH COORDINATED CORPORATE CAMPAIGNS 4-10 (1985); CHARLES R. PERRY, UNION CORPORATE CAMPAIGNS (1987); Kate Bronfenbrenner & Tom Juravich, *It Takes More Than House Calls: Organizing to Win with a Comprehensive Union-Building Strategy*, in ORGANIZING TO WIN: NEW RESEARCH ON UNION STRATEGIES 19, 29-36 (Kate Bronfenbrenner et al. eds., 1998); David Moberg, *Labor's Capital Strategies*, in NOT YOUR FATHER'S UNION MOVEMENT: INSIDE THE AFL-CIO 201, 201-12 (Jo-Ann Mort ed., 1998); Herbert R. Northrup & Charles H. Steen, *Union "Corporate Campaigns" as Blackmail: The RICO Battle at Bayou Steel*, 22 HARV. J.L. & PUB. POL'Y 771, 784, 794-96 (1999).

5. Some scholars have suggested distinctions between corporate campaigns, focused primarily on investors and boards of directors, and comprehensive campaigns, which appeal to community groups and the public as well. See Kate Bronfenbrenner & Tom Juravich, *The Evolution of Strategic and Coordinated Bargaining Campaigns in the 1990s: The Steelworkers' Experience*, in REKINDLING THE MOVEMENT: LABOR'S QUEST FOR RELEVANCE IN THE TWENTY-FIRST CENTURY 211, 218 (Lowell Turner, Harry C. Katz & Richard W. Hurd eds., 2001); Estlund, *supra* note 2, at 1605. This Article uses the terms "comprehensive campaign" or "coordinated campaign," while recognizing that the target is generally a single corporation.

6. See *infra* text accompanying notes 51-54 (describing an increase in union membership during 2007 and 2008).

7. See Maurice Baskin & Herbert R. Northrup, *The Impact of BE&K Construction Co. v. NLRB on Employer Responses to Union Corporate Campaigns and Related Tactics*, 19 LAB. LAW. 215, 217-19 (2003) (discussing employer actions against unions under Section 303 of the Labor Management Relations Act ("LMRA") and under state defamation law); Paul More, *Protections Against Retaliatory Employer Lawsuits After BE&K Construction v. NLRB*, 25 BERKELEY J. EMP. & LAB. L. 205, 220-21 (2004) (discussing employer actions against unions under antitrust law).

8. Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961-1968 (2006).

business parties, this risk is not trivial.⁹ In addition, the very existence of a RICO claim can have an adverse impact on a union's reputation in light of RICO's established association with images of organized crime, corruption, and violence. Employers began using RICO against unions during labor-management disputes in the late 1980s, and litigation has continued as comprehensive campaigns have attracted greater attention.¹⁰ For union campaigns lacking any substantial element of violence, RICO lawsuits have a mixed record in strictly legal terms.¹¹ However, the RICO strategy has been effective in pressuring unions to reduce or abandon comprehensive campaign activities—due to the risks identified above, the substantial costs and delays accompanying complex civil litigation, and the shift in focus from employees' workplace concerns to court-centered legal disputes.¹²

Applicability of RICO to ordinary labor-management disputes raises interpretive questions regarding a major federal statute that has been heavily criticized but lightly amended. When RICO was drafted and enacted, Congress did not anticipate its widespread injection into routine business controversies or traditional labor-management relations.¹³ With respect to RICO litigation between businesses, however, the Supreme Court decided early on that the expansive language of the law, rather than the narrower intent of Congress, is what controls.¹⁴ The Court also has made clear that even if employers sue unions in retaliation for legitimate union activity, a retaliatory motive does not necessarily make such litigation unlawful under the NLRA.¹⁵

Starting in the mid-1980s, members of Congress complained vociferously about the sweeping application of RICO to private parties in ordinary commercial disputes far removed from organized crime.¹⁶ And Supreme Court Justices have invited—even urged—Congress to revise the statutory language.¹⁷ Although Congress did enact a limited amendment

9. See *infra* Part II.C (discussing expansive Supreme Court decisions in the 1980s).

10. See *infra* Part II.D (discussing lower court litigation from the late 1980s to the present).

11. See *infra* Part II.D (discussing outcomes in terms of surviving motions to dismiss).

12. See More, *supra* note 7, at 221–22; Adam Liptak, *A Corporate View of Mafia Tactics: Protesting, Lobbying and Citing Upton Sinclair*, N.Y. TIMES, Feb. 5, 2008, at A14.

13. See *infra* Part II.B (discussing RICO's legislative origins).

14. See *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 499–500 (1985); *Haroco Inc. v. Am. Nat'l Bank & Trust Co. of Chi.*, 747 F.2d 384, 398–99 (7th Cir. 1984), *aff'd per curiam*, 473 U.S. 606 (1985).

15. See *BE&K Constr. Co. v. NLRB*, 536 U.S. 516, 536–37 (2002).

16. See *infra* Part III.A (discussing the legislative history accompanying efforts at RICO reform from 1986 to 1998).

17. See *infra* Part III.A (discussing invitations in Supreme Court opinions and a speech by then-Chief Justice William Rehnquist).

addressing securities fraud as a small part of a securities reform package in 1995,¹⁸ the key RICO text remains essentially unchanged from 1970 and RICO reform is unlikely to occur in the near future. On the other hand, the Supreme Court in a series of more recent cases has adopted interpretations of civil RICO that are distinctly constraining when compared with the Court's first generation of decisions.

There is a lively current debate concerning possible revisions to the NLRA, but a "RICO fix" for labor-management disputes will not be part of any labor law reform package to emerge from Congress.¹⁹ Thus, if RICO's application to union comprehensive campaigns is to be clarified, appellate courts and ultimately the Supreme Court will have to undertake that task in the face of prolonged legislative inaction. This Article suggests how federal courts should engage in such a clarification, building from key "second generation" Supreme Court RICO decisions in which the Justices have narrowed the scope of private civil liability.

The Article focuses on employer complaints alleging that a series of nonviolent pressure tactics used in union comprehensive campaigns may constitute extortion, one of the core predicate offenses actionable under civil RICO. In determining the applicability of extortion as a predicate offense, civil RICO implicates questions of meaning and scope under a separate but incorporated criminal statute, the Hobbs Act. The relevant statutory definition of extortion, taken from the Hobbs Act, is "*the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.*"²⁰ Employers and their advocates contend that when unions bring multiple regulatory actions before agencies and courts, and communicate disparaging information about the company to customers, shareholders, and the public—all designed to injure an employer's business reputation and goodwill while making clear the union's willingness to negotiate on these matters in the context of the employer's agreement to certain labor relations requests—the pattern of harassing conduct qualifies as extortion under RICO.²¹

18. See *infra* Part III.A (discussing the text and legislative history of 1995 securities reform legislation).

19. See S. 560, 111th Cong. (2009) (proposing the Employee Free Choice Act, which does not address RICO in any form); H.R. 1409, 111th Cong. (2009) (same).

20. Hobbs Act, 18 U.S.C. § 1951 (2006) (emphases added). RICO defines "racketeering activity" to include any activities or conduct indictable under the Hobbs Act and authorizes private civil damages actions for persons injured by such racketeering activity. See 18 U.S.C. §§ 1961(1), 1962, 1964(c).

21. See, e.g., Memorandum in Opposition to Defendants' Motion to Dismiss at 5–15, *Smithfield Foods, Inc. v. United Food & Commercial Workers Union*, 593 F. Supp. 2d 840 (E.D. Va. 2008) (No.

The argument supporting extortion raises a number of distinct and contested legal questions. First, how, if at all, does a union “obtain property” from an employer when engaged in this type of comprehensive campaign? Second, assuming property is obtained from the employer, induced by a fear of economic loss, in what circumstances is that inducement “wrongful”? Third, apart from whether the union’s goals or objectives are wrongful, to what extent are certain means employed by the union presumptively protected from federal liability under the First Amendment? Finally, under what circumstances might the union’s overall campaign be deemed actionable as a form of “death by a thousand cuts,”²² even if the individual incidents or activities are generally lawful?

The Article proposes answers to each of these questions, relying principally on two recent Supreme Court decisions construing RICO, as well as an earlier decision interpreting the Hobbs Act and an extended line of Court cases reconciling federal regulation with expressive activity. The Article maintains that the key employer rights at stake in a union comprehensive campaign—the rights to control procedural and substantive approaches to union recognition or collective bargaining—may qualify as intangible property rights, but they are not “obtainable property” as that concept has been applied under RICO and the Hobbs Act. An employer’s exclusive control over the recognition or bargaining processes is not a commercially valuable business asset that can be transferred to a union to exercise or sell. The Article then contends that a union’s use of fear of economic loss as an inducement is not “wrongful” so long as the union is pursuing legitimate labor objectives. Whether a union’s economic objectives are legitimate is largely a function of federal labor law, and the union’s typical objectives in a comprehensive campaign setting—a collective bargaining agreement for a majority status union, a neutrality agreement, or an agreement for voluntary recognition based on card majority status—are entirely lawful under the NLRA.

Moving beyond these two definitional questions, the Article also argues that construing RICO to penalize the main techniques employed by unions in these campaigns—dissemination of negative information and petitioning courts or regulatory agencies—would raise serious concerns under the First Amendment. Neither the right to free speech nor the right to petition government is unqualified: union speech loses protection if it is knowingly or recklessly false while union lawsuits or regulatory complaints

3:07CV641); Northrup & Steen, *supra* note 4, at 803–11, 817–28.

22. Wilkie v. Robbins, 551 U.S. 537, 555 (2007).

lack protection if they amount to “sham litigation.”²³ Outside these narrowly drawn exceptions, union expressive activities ought to be immune from liability for extortion under RICO. Finally, the Article suggests that assuming a union’s comprehensive campaign includes a few instances of unlawful activity, those actions should not transform a campaign based predominantly on lawful conduct into actionable extortion. To hold otherwise would frustrate the federal policy commitment protecting employees’ “full freedom” to organize and engage in hard bargaining with employers under the NLRA.²⁴

Part II of the Article establishes relevant background. It describes the rise of union comprehensive campaigns, provides an overview of RICO’s legislative origins, and discusses how initial Supreme Court readings of RICO helped trigger extensive private litigation under the Act, including a steady stream of RICO civil actions by employers against unions. Part III situates RICO’s applicability to labor unions in the context of prolonged congressional inaction. It discusses failed efforts at RICO reform during the 1980s and 1990s, describes how a second generation of Supreme Court civil RICO decisions shifted from an expansive to a constraining approach, and suggests the Court has undertaken aspects of the reform effort that Congress was unable to accomplish. Part IV analyzes the four central legal questions implicated in the contention that union comprehensive campaigns constitute extortionate conduct under RICO. As part of that analysis, Part IV explains why union comprehensive campaigns qualify as lawful “hard bargaining” and why the federal courts should take the initiative to clarify the law and thereby reduce the chilling effect of RICO actions.

II. BACKGROUND ON COMPREHENSIVE CAMPAIGNS AND RICO

A. THE RISE OF UNION COMPREHENSIVE CAMPAIGNS

1. Objectives and Tactics

The term “corporate campaign” was first applied in the late 1970s when the textile workers’ union relied on a range of financial linkages and secondary pressures to help secure labor agreements with J.P. Stevens.²⁵

23. *Prof'l Real Estate Investors, Inc. v. Columbia Pictures Indus.*, 508 U.S. 49, 60 (1993) (internal quotation marks omitted).

24. *See* 29 U.S.C. § 151 (2006) (NLRA statement of purpose).

25. *See* PERRY, *supra* note 4, at 1–2; Paul Jarley & Cheryl L. Maranto, *Union Corporate Campaigns: An Assessment*, 43 *INDUS. & LAB. REL. REV.* 505, 506 (1990).

Subsequently, a number of unions have come to prefer the term “comprehensive campaign.”²⁶ These campaigns may be broadly defined as union attempts to influence company practices that affect key union goals—securing recognition and bargaining for improved working conditions—by generating various forms of extrinsic pressure on the company’s top policymakers.²⁷ Tactics regularly relied on by unions include engaging in public relations activities (such as literature distributions, media interviews, website postings, street demonstrations, or op-ed columns), advocating for government regulatory action (through legislative initiatives, appeals to regulatory agencies, or lawsuits), and targeting a firm’s financial standing (by pressuring lenders and creditors, threatening to withdraw pension fund assets, or bringing shareholder actions).²⁸

A 1990 empirical assessment by Paul Jarley and Cheryl Maranto examined twenty-eight labor relations disputes between 1976 and 1988 in which unions publicly announced they were conducting corporate campaigns.²⁹ Jarley and Maranto emphasized the central role played by conflict escalation in these campaigns: unions typically assert that the company is unfair to organized labor in general, that the company’s overall business conduct renders it a corporate outlaw, and that the company profits from human exploitation and misery when operating its business.³⁰ By enlarging the scope of a labor dispute to encompass issues of broader social importance and public interest, unions are better able to legitimize their own effort and to attract wider community support.³¹

Jarley and Maranto found that corporate campaigns complementing organizing drives were more likely to achieve successful results than bargaining-related campaigns.³² One important reason for the difference is that organizing disputes are more amenable to conflict escalation because they tend to involve low-wage employees operating under unsafe working

26. See Jarley & Maranto, *supra* note 25, at 507 n.2. See also Bronfenbrenner & Juravich, *supra* note 5, at 218, 229, 234 (discussing the evolution from 1980s corporate campaigns focused on pressuring boards of directors to more comprehensive coordinated approaches in the 1990s).

27. See THOMAS A. KOCHAN, HARRY C. KATZ & ROBERT B. MCKERSIE, *THE TRANSFORMATION OF AMERICAN INDUSTRIAL RELATIONS 195–97* (1994); Bronfenbrenner & Juravich, *supra* note 5, at 217–34.

28. See *INDUS. UNION DEP’T*, *supra* note 4, at 4–10.

29. Jarley & Maranto, *supra* note 25, at 505–06.

30. See *id.* at 515. See also PERRY, *supra* note 4, at 20–31 (elaborating on these three aspects of conflict escalation as part of a study of ten corporate campaigns during late 1970s and early 1980s).

31. See Jarley & Maranto, *supra* note 25, at 515.

32. See *id.* at 515–19. *But see* Bronfenbrenner & Juravich, *supra* note 5, at 217–30 (describing three bargaining-related campaigns in the 1990s that achieved some success).

conditions. By contrast, the possibility of invoking broader social justice concerns is often diminished in a mature bargaining context, where financially troubled employers seek adjustments from workers who in relative terms are viewed as highly paid.³³ A second reason for the greater success associated with organizing-related campaigns is the more limited nature of the union's objectives. In the organizing setting, union campaigns typically seek neutrality agreements or comparable procedural settlements that increase the likelihood of unionization but do not guarantee union success. Thus, the company receives a definite benefit (an end to being the target of consumer, stakeholder, regulatory, and public pressures) in exchange for largely contingent costs. Again by contrast, union campaigns aimed at securing initial or renewed collective bargaining agreements require companies to make concrete economic concessions in order to have the campaign terminate.³⁴

Since 1990, unions have expanded their use of comprehensive campaigns, especially in connection with efforts to organize new groups of workers. The increased emphasis reflects in part the labor movement's commitment of substantial additional resources to organizing activities starting in 1995.³⁵ It also reflects organized labor's recognition that a coordinated approach, relying on linkages to the political, regulatory, financial, and public relations arenas, is necessary to respond to the complex, interlocking corporate environment characteristic of the modern American workplace.³⁶

33. See Jarley & Maranto, *supra* note 25, at 515 (comparing conflict escalation in companies employing unorganized textile workers, farmers, and nursing home workers with less successful results at companies employing already-organized airline pilots and factory workers in the paper and meat processing industries).

34. See *id.* at 518–19.

35. See, e.g., Michelle Amber, *AFL-CIO Convenes Organizing Summit to Find New Ways to Expand Membership*, [2003] Daily Lab. Rep. (BNA), at C-1 (Jan. 14, 2003) (describing a substantial commitment of funds to organizing made by various individual unions); Elizabeth Walpole-Hofmeister, Michelle Amber & Susan McGolrick, *Unions Boost Funds, Develop Strategies for Organizing More Workers*, [1999] Daily Lab. Rep. (BNA), at C-1 (Aug. 18, 1999) (describing the American Federation of Labor and Congress of Industrial Organizations' ("AFL-CIO's") goal of having its affiliated unions expend 30 percent of their budgets on organizing, and reporting that some unions already exceed that goal); Michelle Amber, *AFL-CIO Leaders Warn Corporations That They Are Ready for a Fight*, [1995] Daily Lab. Rep. (BNA), at AA-2 (Oct. 27, 1995) (describing the new AFL-CIO president's proposal to create a separate organizing department that includes an office of strategic planning).

36. See Kate Bronfenbrenner, *The American Labour Movement and the Resurgence in Union Organizing*, in *TRADE UNIONS IN RENEWAL: A COMPARATIVE STUDY* 32, 42, 47 (Peter Fairbrother & Charlotte A. B. Yates eds., 2003); Bronfenbrenner & Juravich, *supra* note 4, at 32–34; Bronfenbrenner & Juravich, *supra* note 5, at 234–35; Harry C. Katz, Rosemary Batt & Jeffrey H. Keefe, *The Revitalization of the CWA: Integrating Collective Bargaining, Political Action, and Organizing*, 56 *INDUS. & LAB. REL. REV.* 573, 576–77 (2003).

A recent study by Adrienne Eaton and Jill Kriesky examined what motivates employers to negotiate organizing agreements containing neutrality or card check provisions.³⁷ The authors found that most employers they surveyed emphasized the avoidance of costs associated with not reaching an agreement.³⁸ Costs identified by these employers included the fear of economically damaging demonstrations at firms open to the public, as well as pressure from third parties (notably clients, municipalities, union pension funds, and religious or community groups) to withhold financial investment or customer business.³⁹ There is ample evidence beyond Eaton and Kriesky's database that employers are motivated to opt for neutrality agreements and also renewed collective bargaining arrangements through techniques that are part of a union comprehensive campaign. Tactics associated with union success include handbilling and picketing aimed at deterring customers,⁴⁰ demonstrations or interventions resulting from union partnerships with religious or community groups,⁴¹ investigating or publicizing a company's regulatory violations,⁴² and appeals to stockholders, board members, and institutional

37. See Adrienne E. Eaton & Jill Kriesky, *Dancing with the Smoke Monster: Employer Motivations for Negotiating Neutrality and Card Check Agreements*, in JUSTICE ON THE JOB: PERSPECTIVES ON THE EROSION OF COLLECTIVE BARGAINING IN THE UNITED STATES 139, 140 (Richard N. Block et al. eds., 2006).

38. See *id.* at 144.

39. See *id.* at 147.

40. See, e.g., Roger C. Hartley, *Non-Legislative Labor Law Reform and Pre-Recognition Neutrality Agreements: The Newest Civil Rights Movement*, 22 BERKELEY J. EMP. & LAB. L. 369, 390 n.111 (2001) (reporting that a union's threat to picket led a restaurant owner in Providence and a hotel owner in New Haven to reach neutrality agreements); Steven Greenhouse, *Local 226, "The Culinary," Makes Las Vegas the Land of the Living Wage*, N.Y. TIMES, June 3, 2004, at A22 (quoting J. Terrence Lanni, chairman of MGM Mirage, and reporting that employers' concern over "pickets and unhappy workers blocking [hotel] driveways" led numerous Las Vegas hotel owners to agree to neutrality and card check agreements).

41. See, e.g., Estlund, *supra* note 2, at 1606 (describing a coordinated nationwide protest at twenty-five Tiffany stores on behalf of mostly immigrant workers at a small jewelry company that supplied Tiffany and noting that workers had signed cards and requested union recognition); Michelle Amber, *SEIU Sees Record Growth; 64,000 New Members Organized in 1998*, 13 Lab. Rel. Week (BNA), 1419, 1421 (Dec. 23, 1999) (describing the Service Employees International Union ("SEIU") alliance with a Catholic cardinal to intervene in an organizing campaign at a Catholic hospital in California); Jon Newberry, *Two Labor Unions Will Charge Discrimination at Cintas*, CINCINNATI POST, Nov. 17, 2003, at 8B (reporting on a joint press conference involving the Union of Needletrades, Industrial, and Textile Employees ("UNITE"), Teamsters, and several national civil rights groups, held in the midst of unions' organizing campaigns, and aimed at highlighting employers' discriminatory practices against women and minorities).

42. See Bronfenbrenner & Juravich, *supra* note 5, at 219–25 (discussing Steelworkers' use of Occupational Safety and Health Administration ("OSHA") citations, National Labor Relations Board ("NLRB") charges, and Securities and Exchange Commission ("SEC") actions against an aluminum company and a steel company); Ruth Milkman & Kent Wong, *Organizing Immigrant Workers: Case Studies from Southern California*, in REKINDLING THE MOVEMENT, *supra* note 5, at 99, 109 (discussing

lenders.⁴³

The proliferation of comprehensive campaigns does not mean that these new strategic approaches enjoy anything like universal success. Unions have failed to achieve observable results in numerous campaigns involving organizing goals⁴⁴ and bargaining-related objectives.⁴⁵ Even when a union succeeds in securing recognition or negotiating a collective bargaining agreement, it is not always clear that the comprehensive campaign played an influential role in the result.⁴⁶

Nonetheless, comprehensive campaigns operating beyond the traditional labor law structure have become a central element in unions' strategic approach to both organizing and collective bargaining. The Service Employees International Union's ("SEIU's") Justice for Janitors campaign in large cities around the country,⁴⁷ the Communication Workers' efforts to organize a divested and deregulated telecommunications industry,⁴⁸ the Hotel and Restaurant Workers' successes in Las Vegas,⁴⁹ and the Steelworkers' campaign to restore union

SEIU's use of complaints filed with the NLRB and other government agencies protesting safety and health violations as part of a Justice for Janitors campaign).

43. See Moberg, *supra* note 4, at 203–04 (describing protests and demands by activist investors at shareholder meetings in 1998 involving Whole Foods, Crown Petroleum, ARCO, and Columbia/HCA hospitals); Rachel Sherman & Kim Voss, "Organize or Die": Labor's New Tactics and Immigrant Workers, in ORGANIZING IMMIGRANTS: THE CHALLENGE FOR UNIONS IN CONTEMPORARY CALIFORNIA 81, 85 (Ruth Milkman ed., 2000) (discussing the use of a "cockroach leaflet" culled from U.S. Department of Agriculture records and presented at a stockholders meeting of a food service company).

44. See, e.g., Jarley & Maranto, *supra* note 25, at 511 (discussing a lack of results involving New York Air, Seafirst, and Food Lion); Susan R. Hobbs, *Verizon Neutrality Pact with CWA, IBEW Expires After Four Years; No Units Organized*, [2004] Daily Lab. Rep. (BNA), at A-12 (Aug. 24, 2004) (reporting no new organizing at Verizon Wireless).

45. See, e.g., Jarley & Maranto, *supra* note 25, at 512 (discussing union failures involving lost recognition at Louisiana Pacific, Continental Airlines, Phelps Dodge, and International Paper, and an inferior contract settlement at Hormel); Bronfenbrenner & Juravich, *supra* note 5, at 223–26 (discussing mixed results in bargaining for a renewed contract at Bayou Steel).

46. See, e.g., BUREAU OF NAT'L AFFAIRS, UNIONS TODAY: NEW TACTICS TO TACKLE TOUGH TIMES 70 (1985) (describing the difficulty in determining the effectiveness of corporate campaigns); PERRY, *supra* note 4, at 6–7 (same); *OCAW Members Ratify Pact at BASF Ending Five-Year-Old Labor Dispute*, [1989] Daily Lab. Rep. (BNA), at A-7 (Dec. 20, 1989) (explaining that management viewed the comprehensive campaign as having played no role in the contract settlement).

47. See, e.g., Roger Waldinger et al., *Helots No More: A Case Study of the Justice for Janitors Campaign in Los Angeles*, in ORGANIZING TO WIN, *supra* note 4, at 102, 114–16; Susan R. Hobbs, *SEIU Members Ratify Pact with UNICCO Covering 400 University of Miami Janitors*, [2006] Daily Lab. Rep. (BNA), at A-11 (Aug. 24, 2006).

48. See Katz, Batt & Keefe, *supra* note 36, at 577–78.

49. See Courtney Alexander, *Rise to Power: The Recent History of the Culinary Union in Las Vegas*, in THE GRIT BENEATH THE GLITTER: TALES FROM THE REAL LAS VEGAS 145, 145–75 (Hal K. Rothman & Mike Davis eds., 2002).

jobs at Ravenswood Aluminum⁵⁰ are among the high-profile illustrations of how organized labor has sought to adapt its approach in light of changes in management behavior, corporate structures, and global economic circumstances.

Comprehensive campaigns have contributed to the first increases in union density among private sector employers in almost three decades. The proportion of private sector workers who belong to a union rose from 7.4 percent to 7.5 percent in 2007,⁵¹ and to 7.6 percent in 2008.⁵² In the economy as a whole, union membership grew by 311,000 in 2007⁵³ and by 428,000 in 2008.⁵⁴ Apart from reversing a long-term trend, the modest net increases are noteworthy because they occurred despite a substantial loss in traditionally unionized manufacturing jobs,⁵⁵ and also despite substantial withdrawal by unions from the traditional elections process supervised by the National Labor Relations Board (“NLRB”).⁵⁶ In sum, unions have turned to comprehensive campaigns as a primary organizing strategy in the twenty-first century.

2. An Archetypal Comprehensive Campaign

Unions’ traditional organizing approach features direct appeals to workers in the representation election setting, principally through leaflets, individual and group meetings away from the worksite, and home mailings. Their traditional approach to securing a collective bargaining agreement includes direct pressure on employers as needed during the negotiations

50. See TOM JURAVICH & KATE BRONFENBRENNER, *RAVENSWOOD: THE STEELWORKERS’ VICTORY AND THE REVIVAL OF AMERICAN LABOR* (1999).

51. Michelle Amber, *BLS Reports 12.1 Percent Unionization Rate in 2007; Unions Added 331,000 Members*, [2008] Daily Lab. Rep. (BNA), at AA-1 (Jan. 28, 2008).

52. Michael Rose, *Unions Added 428,000 Members in 2008 as Membership Rate Climbed to 12.4 Percent*, [2009] Daily Lab. Rep. (BNA), at AA-1 (Jan. 29, 2009). In 2009, however, private sector union density fell to 7.2 percent as the recession hit unionized jobs in the private sector especially hard. See Larry Swisher, *Unions Lost 771,000 Members in 2009, as Recession Eliminated Jobs*, *BLS Says*, [2010] Daily Lab. Rep. (BNA), at AA-1 (Jan. 25, 2010).

53. Amber, *supra* note 51.

54. Rose, *supra* note 52. Private sector growth was especially strong in health services, leisure and hospitality, and construction; the highest overall unionization in the private sector is in telecommunications, transportation and warehousing, and utilities. See *id.*; Amber, *supra* note 51.

55. See, e.g., *Number of Workers Idled by Mass Layoffs at Highest Level Since 2005*, *BLS Reports*, [2008] Daily Lab. Rep. (BNA), at D-1 (Mar. 24, 2008) (reporting that manufacturing firms accounted for approximately 67,000 jobs lost through mass layoffs in February 2008, over one-third of the national total); Amber McKinney, *Payrolls Declined by 4,000 Jobs in August, Led by Drops in Construction, Manufacturing*, [2007] Daily Lab. Rep. (BNA), at D-1 (Sept. 10, 2007) (reporting 46,000 jobs lost in manufacturing in August 2007).

56. See James J. Brudney, *Neutrality Agreements and Card Check Recognition: Prospects for Changing Paradigms*, 90 IOWA L. REV. 819, 827–30 (2005) (describing the decline in NLRB elections).

process, through employee strikes or primary picketing. By contrast, union comprehensive campaigns engage different secondary groups—shareholders, lenders, religious and social organizations, customers, politicians, regulators, mass media, and the public at large—who have varied and context-specific interactions with the employer that is the focus of union pressure. Although it is difficult to identify any particular comprehensive campaign as “typical,” this Article posits for purposes of subsequent analysis that the union coordinating the campaign takes a series of initiatives.

The union is assumed to form alliances or coalitions with religious groups and activist organizations interested in pursuing social justice or human rights objectives.⁵⁷ The union, either on its own or with its allies, seeks to exert regulatory pressure on the target company by advocating for or initiating agency action addressed to actual or reasonably believed company violations of federal occupational safety, environmental, or securities laws, and of state or local zoning laws.⁵⁸ The union also attempts to impose political pressure on the company by urging federal or state legislators to launch an investigation or hold hearings on a worker safety or public health problem that the union reasonably believes has been created or magnified by the company.⁵⁹

In addition, the union distributes information to various subgroups of the public—information it reasonably believes to be accurate—that is critical of the company’s business practices. The union disseminates this information by means of flyers and handbills to potential consumers, letters and faxes to local newspapers and radio and television stations, public demonstrations likely to attract media attention, and Web postings available to employees, shareholders, customers, and the general public.⁶⁰ Finally, the union attempts to exert financial pressure on the company through formal or informal appeals to corporate directors, submission of policy resolutions at shareholder meetings, and proposals to move union assets out of banks that lend money to the target company.⁶¹

For all of these activities, the union signals that the campaign need not

57. See PERRY, *supra* note 4, at 31–38; Lance Compa, *Free Trade, Fair Trade, and the Battle for Labor Rights*, in REKINDLING THE MOVEMENT, *supra* note 5, at 314, 325–26.

58. See JURAVICH & BRONFENBRENNER, *supra* note 50, at 87–90; PERRY, *supra* note 4, at 39–48; Charles Heckscher, *Living with Flexibility*, in REKINDLING THE MOVEMENT, *supra* note 5, at 59, 70–71.

59. See PERRY, *supra* note 4, at 49–53.

60. See *id.* at 79–89; Milkman & Wong, *supra* note 42, at 109–10.

61. See PERRY, *supra* note 4, at 55–65, 91–102; Moberg, *supra* note 4, at 203–04.

continue if the company acquiesces to the union's labor relations objectives—to enter a neutrality agreement setting ground rules for an organizing drive, to recognize the union once it has obtained a card majority, or to return to the table to bargain for an extension or modification of existing collective bargaining arrangements. The leverage for being able to reach such an agreement is the company's fear that it will suffer severe economic losses as a result of some combination of the union's campaign activities. In this respect, the union campaign creates pressure on the employer analogous to that of an economic strike.

The analogy to an economic strike also extends to the role played by violence. As with a strike, comprehensive campaigns, especially those involving large rallies or public demonstrations, may give rise to violent conduct by some participants. As with a strike, the acts of violence may themselves be independently actionable.⁶² But also as with a strike, relatively minor acts of violence incidental to the ongoing union campaign may not give rise to liability.⁶³

B. THE ORIGINS OF RICO AND ITS PROVISION FOR PRIVATE CIVIL LIABILITY

1. A Focus on Organized Crime and a More Far-Reaching Text

RICO was enacted as Title IX of the Organized Crime Control Act of 1970, culminating a three-year legislative process that began with the 1967 report of the President's Commission on Law Enforcement and Administration of Justice.⁶⁴ Throughout this process, Congress's primary concern was the problem of criminal infiltration of legitimate enterprises, especially commercial businesses but also labor unions.⁶⁵ Senators Roman Hruska and John McClellan, who jointly introduced the Senate bill that

Comment [EiC1]: Upon the first introduction of Senators/Congressmen in the text, our stylistic guidelines direct that we include first names and thereafter include only last names.

62. See, e.g., *NLRB v. Thayer Co.*, 213 F.2d 748, 756–57 (1st Cir. 1954) (finding certain strike-related activities to be independently actionable); *Clear Pine Mouldings, Inc.*, 268 N.L.R.B. 1044, 1046–47 (1984) (same), *enforced*, *Clear Pine Mouldings, Inc. v. NLRB.*, 765 F.2d 148 (9th Cir. 1985).

63. See, e.g., *Detroit Newspaper Agency*, 342 N.L.R.B. 223, 224 (2004) (finding no liability where conduct was not sufficiently egregious). See also *infra* Part IV.B.2 (discussing the impact of incidental or isolated unlawful acts on the legitimacy of the overall union comprehensive campaign).

64. For two thoughtful and comprehensive treatments of RICO legislative history, see Arthur F. Mathews, *Report of the Ad Hoc Civil RICO Task Force*, 1985 A.B.A. SEC. CORP., BANKING & BUS. LAW 70–126 [hereinafter *ABA Report*]; and Gerard E. Lynch, *RICO: The Crime of Being a Criminal, Parts I & II*, 87 COLUM. L. REV. 661, 666–94 (1987).

65. See Lynch, *supra* note 64, at 666–74 (discussing the role of the President's Commission in publicizing the issue of organized criminal infiltration into legitimate business and precursor bills introduced by Senator Roman Hruska in 1967 to address the issue); *ABA Report*, *supra* note 64, at 72–83 (same).

contained the framework and essential elements of RICO, made clear that the bill was “designed to attack the infiltration of legitimate business repeatedly outlined by investigations of various congressional committees” as well as by the President’s Commission.⁶⁶ Representative Richard Poff, a principal sponsor of RICO legislation in the House, was equally clear about the need to attack organized crime’s penetration of lawful commercial entities.⁶⁷ The Senate and House committee reports accompanying the bills that ultimately became the Organized Crime Control Act reiterated that RICO’s purpose was “the elimination of the infiltration of organized crime and racketeering into legitimate organizations operating in interstate commerce.”⁶⁸ And the statement of findings and purpose included as part of the enacted text confirms that Congress’s focus was on combating organized crime and its increasing use of “money and power . . . to infiltrate and corrupt legitimate business and labor unions.”⁶⁹

In terms of the text enacted into law, however, Congress did not limit applicability to organized crime. Whether due to conceptual challenges, constitutional concerns, or both, RICO’s provisions target a range of racketeering *activities* in which the Mafia or other organized criminal syndicates might engage, rather than attempting to define what *entities or individuals* qualify as “organized crime.”⁷⁰ The Act criminalizes three main forms of activity: acquiring an interest in a legitimate enterprise through income derived from a pattern of racketeering activity, acquiring an interest in or control of a legitimate enterprise directly by means of a pattern of racketeering activity, and conducting or participating in the operation of a

66. 115 CONG. REC. 9567 (1969) (statement of Sen. McClellan, accompanying the introduction of S. 1861, the Corrupt Organizations Act of 1969). *See also id.* at 6992–93 (statement of Sen. Hruska, accompanying the introduction of S. 1623, the Criminal Activities Profits Act of 1969) (expressing concern that racketeers would utilize not only traditional organized crime techniques of violence and intimidation, but also white collar business crime tactics such as embezzlement and consumer fraud to secure control of ordinary businesses and impose serious anticompetitive injury on the economy).

67. *See* 116 CONG. REC. 35,295 (1970) (statement of Rep. Poff, accompanying House consideration of the bill approved by the Senate).

68. S. REP. NO. 91-617, at 76 (1969). *See also* H.R. REP. NO. 91-1549, at 57 (1970) (describing prohibitions “aimed at stopping the infiltration of racketeers into legitimate organizations”).

69. Organized Crime Control Act of 1970, Pub. L. No. 91-452, 84 Stat. 922, 923 (1970) (identifying that the Act’s purpose is “to seek the eradication of organized crime in the United States by strengthening the legal tools in the evidence-gathering process, by establishing new penal prohibitions, and by providing enhanced sanctions and new remedies to deal with the unlawful activities of those engaged in organized crime”).

70. *See* Lynch, *supra* note 64, at 683 (discussing tensions between viewing organized crime narrowly as a “monolithic Italian-American conspiracy” and more broadly as a separable series of structural criminal organizations); 116 CONG. REC. at 35,343–46 (reporting on a proposed amendment to define the Mafia and La Cosa Nostra as “organized crime” groups, which was opposed on constitutional grounds and defeated).

legitimate enterprise through a pattern of racketeering activity.⁷¹ The last of these three prohibitions, 18 U.S.C. § 1962(c), goes beyond ordinary notions of infiltration and control: it authorizes criminal prosecution when the enterprise has been used to engage in racketeering, regardless of whether the racketeering entity has acquired or dominated the enterprise.⁷²

The Act's definitions section contributes further to the broad scope of coverage. The definition of an "enterprise" includes not only ordinary businesses but also labor organizations and other legal entities as well as any "group of individuals associated in fact."⁷³ The definition of "racketeering activity" identifies nine typical state offenses, such as murder, arson, robbery, and extortion, and more than seventy federal offenses separately indictable under various sections of the U.S. Code—including, importantly, sections addressed to mail fraud, Hobbs Act extortion, and money laundering.⁷⁴ A "pattern of racketeering activity" is defined as requiring at least two racketeering acts that occurred within ten years of one another.⁷⁵ The upshot of this textual approach is to encompass conduct wholly unconnected to organized crime. RICO's criminal prohibitions may be viewed as applying to anyone who commits a listed predicate offense on two or more occasions while participating in the operation of a legitimate business, union, or other associated group of individuals.⁷⁶

Persons convicted of engaging in this prohibited conduct are subject to traditional criminal sanctions such as enhanced fines and terms of imprisonment, and also to the then-novel remedy of criminal forfeiture.⁷⁷ The version approved by the Senate also authorized civil injunctive relief on behalf of the government, consciously modeled on the federal antitrust laws.⁷⁸ There was, however, no provision for private civil actions until late

71. See Organized Crime Control Act § 901(a), 84 Stat. at 942–43 (codified as amended at 18 U.S.C. § 1962(a)–(c) (2006)). A fourth prohibition, § 1962(d), criminalizes conspiracies to violate the first three prohibitions.

72. See 18 U.S.C. § 1962(c). See also Lynch, *supra* note 64, at 681–83. Put differently, the enterprise is a victim in the first two forms of racketeering activity (§ 1962(a) and (b)), while the enterprise is in effect the perpetrator under § 1962(c), as its affairs are conducted through a pattern of racketeering activity. I am grateful to my colleague, Alan Michaels, for this insight.

73. 18 U.S.C. § 1961(4).

74. *Id.* § 1961(1)(A) (listing nine state law offenses); *id.* § 1961(1)(B) (listing inter alia §§ 1341, 1951, 1956, relating to mail fraud, extortion, and money laundering, respectively).

75. *Id.* § 1961(5).

76. See Lynch, *supra* note 64, at 685–94.

77. 18 U.S.C. § 1963; S. REP. NO. 91-617, at 79 (1969) ("The use of criminal forfeiture . . . represents an innovative attempt to call on our common law heritage to meet an essentially modern problem."); *ABA Report, supra* note 64, at 95.

78. See *ABA Report, supra* note 64, at 96–97 (excerpting and discussing S. REP. NO. 91-617, at

in the legislative process, when the House took up the Senate-approved version of the bill.

2. Addition of a Private Civil Remedy

For a provision that has given rise to so much litigation and controversy, 18 U.S.C. § 1964(c) (authorizing private damages actions)⁷⁹ has a remarkably thin legislative history. The provision was first put forward at a House subcommittee hearing by Representative Sam Steiger and also by the American Bar Association (“ABA”).⁸⁰ Both Representative Steiger and the ABA patterned their request on the treble damages provision in Section 4 of the Clayton Antitrust Act.⁸¹ Steiger explained that “those who have been wronged by organized crime should at least be given access to a legal remedy” and that “the availability of such a remedy would enhance the effectiveness of [T]itle IX’s prohibitions.”⁸² The House Judiciary Committee incorporated the provision as one of some fifty amendments prior to reporting favorably on the bill as a whole.⁸³ When the amended bill was taken up in the House, the ranking minority member of the Judiciary Committee summarized important changes made from the Senate-passed version without mentioning the addition of the private cause of action.⁸⁴ The following day, a second prominent committee supporter briefly noted the addition as part of his statement on the floor, characterizing it as “another example of the antitrust remedy being adapted for use against organized criminality.”⁸⁵

Although the private damages provision seemed a minor change to the

80–83). The Senate report relied expressly on the ABA committee’s observation that “[t]he time tested machinery of the antitrust laws contains several useful and workable features which are appropriate for use against organized crime.” S. REP. NO. 91-617, at 81 (quoting 115 CONG. REC. 6995 (1969)).

79. 18 U.S.C. § 1964(c) (authorizing federal district court actions to recover treble damages and attorney’s fees for “[a]ny person injured in his business or property by reason of a violation of section 1962”).

80. See *Organized Crime Control: Hearings on S. 30, and Related Proposals, Before Subcomm. No. 5 of the H. Comm. on the Judiciary*, 91st Cong. 520, 547–48 (1970) (statements of Rep. Steiger and the ABA).

81. See *id.* at 520 (referencing antitrust laws); *id.* at 548 (citing Clayton Act, 15 U.S.C. § 15 (1968)).

82. *Id.* at 520. Similarly, Senator McClellan, commenting briefly on the ABA proposal months before it was added to the House bill, described it as potentially “a major new tool in extirpating the baneful influence of organized crime in our economic life.” 116 CONG. REC. 25,190 (1970).

83. See H.R. REP. NO. 91-1549, at 57–58 (1970), reprinted in 1970 U.S.C.C.A.N. 4007, 4034; 116 CONG. REC. at 35,197 (remarks of Rep. McCulloch) (referring to fifty changes in the House substitute).

84. See 116 CONG. REC. at 35,197–98 (remarks of Rep. McCulloch).

85. *Id.* at 35,295 (remarks of Rep. Poff).

bill's key supporters, it attracted the attention of several bill opponents. In their dissenting views to the House Judiciary Committee report, Representatives John Conyers, Abner Mikva, and William F. Ryan criticized the new provision for inviting "disgruntled and malicious competitors to harass innocent businessmen engaged in interstate commerce."⁸⁶ The dissenters went on to predict that "[w]hat a protracted, expensive trial may not succeed in doing, the adverse publicity may well accomplish—destruction of the rival's business."⁸⁷ Representative Mikva then offered an unsuccessful floor amendment seeking to authorize treble damages actions against anyone who brought a frivolous lawsuit under the new section.⁸⁸ The House passed its version of the Organized Crime Control Act by an overwhelming margin in the final days of the 91st Congress, and the Senate concurred in the House version with no comment or discussion on the RICO civil damages provision.⁸⁹

This sparse legislative history arguably points in two different directions. One could infer from the House committee report dissenting views, followed by the failed Mikva floor amendment, that House members were sufficiently apprised of the risks associated with authorizing private damages actions and that they voted to do so with eyes open. Fifteen years later, Mikva himself ruefully recognized the unintended impact of his "parade of horrors" approach, testifying to former colleagues that "[m]y hyperbole has been used by lawyers to prove that is what Congress had in mind" when it voted for the House version of the bill.⁹⁰

On the other hand, Mikva's negative comments on civil damages actions are contained in one paragraph of a fifteen-page dissent that itself is part of a two-hundred-page committee report filed less than a week before the massive Organized Crime Control Act was taken up by the full House.⁹¹ And Mikva's floor amendment was voted on by sixty-seven members meeting as the Committee of the Whole, less than one-sixth of the body.⁹² More generally, deriving the intent of the House from the dire

86. H.R. REP. NO. 91-1549, at 187 (dissenting views of Reps. Conyers, Mikva, and Ryan).

87. *Id.*

88. See 116 CONG. REC. at 35,342-43. The amendment was defeated in the Committee of the Whole by a vote of 45-22. See *id.* at 35,343.

89. See *id.* at 35,363 (reporting a House vote of 341-26 on final passage); *id.* at 36,296 (reporting unanimous acceptance by the Senate of the House-passed version).

90. *RICO Reform: Hearings on H.R. 2517, H.R. 2943, H.R. 4892, H.R. 5290, H.R. 5391, and H.R. 5445 Before the Subcomm. on Criminal Justice of the H. Comm. on the Judiciary*, 99th Cong. 527 (1985-86) [hereinafter *1985-86 House Hearings*] (statement of Mikva, J.).

91. See H.R. REP. NO. 91-1549, at 181-96 (dissenting views of Reps. Conyers, Mikva, and Ryan).

92. See 116 CONG. REC. at 35,342-43.

predictions offered by three opponents to a bill supported on final passage by over 90 percent of voting members seems highly questionable, quite apart from there having been no discussion at all of the provision by the Senate.

A more likely lesson to be drawn from this legislative history would invoke Sherlock Holmes's insight about the dog that did not bark.⁹³ If Congress had meant to create a substantial freestanding civil action for use in ordinary commercial disputes, key supporters would have expressed this intent rather than simply describing the new provision as an added tool in the fight against organized crime. The belated insertion of a private damages provision, combined with minimal explanation or commentary from supporters, suggests it was viewed at the time as of little consequence. Still, that Congress likely never anticipated the breadth of RICO's private damages provision does not mean the language itself is limited to organized crime settings. The Supreme Court in its initial wave of RICO decisions made clear that breadth of coverage is precisely what the RICO text provides.

C. AN EXPANSIVE FIRST GENERATION OF SUPREME COURT DECISIONS

Criminal prosecutions under RICO were infrequent during the Act's early years and civil lawsuits were almost nonexistent.⁹⁴ The Supreme Court did not hear its first RICO case until 1981⁹⁵ and did not issue a decision involving a civil RICO action until 1985.⁹⁶ Once it entered the field, however, the Court firmly established RICO's broad scope with respect to civil damages actions. A trio of decisions⁹⁷ made clear that civil RICO covers a range of activities wholly unrelated to the "infiltration of legitimate businesses" rationale that dominates the legislative history.⁹⁸

Following two cases that expanded the reach of criminal prosecutions under RICO,⁹⁹ the Court turned its attention to private civil actions in

93. See *Chisom v. Roemer*, 501 U.S. 380, 396 & n.23 (1991) (referring to ARTHUR CONAN DOYLE, *Silver Blaze*, in *THE COMPLETE SHERLOCK HOLMES* 335, 346-47 (Doubleday 1930)); *Harrison v. PPG Indus., Inc.*, 446 U.S. 578, 602 (1980) (Rehnquist, J., dissenting) (same).

94. See H.R. REP. NO. 101-975, at 6-7 (1990) (reporting data on criminal and civil RICO filings as part of a report accompanying the proposed RICO Amendments Act of 1990); Lynch, *supra* note 64, at 695 (discussing a three-year hiatus before the first reported court opinion dealing with RICO).

95. See *United States v. Turkette*, 452 U.S. 576 (1981).

96. See *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479 (1985).

97. *Nat'l Org. for Women, Inc. v. Scheidler (Scheidler I)*, 510 U.S. 249 (1994); *H.J. Inc. v. Nw. Bell Tel. Co.*, 492 U.S. 229 (1989); *Sedima*, 473 U.S. 479.

98. *Turkette*, 452 U.S. at 590.

99. See *id.* at 580-93 (broadly construing the term "enterprise" to encompass illegitimate as well

*Sedima, S.P.R.L. v. Imrex Co.*¹⁰⁰ The case involved a joint business venture in which one company—convinced it was being overbilled for expenses and thereby cheated out of profits by the other—asserted RICO claims under § 1964(c) for alleged violations of § 1962(c), based on predicate acts of mail and wire fraud.¹⁰¹ These RICO claims were dismissed by the district court and the Second Circuit affirmed on two separate grounds. The court of appeals reasoned that under § 1964(c), a plaintiff must allege a “racketeering injury,” meaning the type of organized crime injury that RICO was designed to deter rather than simply an injury occurring as a result of the predicate acts themselves.¹⁰² The appellate court also concluded that a valid RICO complaint must allege that respondents had been *convicted* of the RICO predicate acts, not simply that respondents had *committed* those acts.¹⁰³

The Supreme Court reversed in a 5-4 decision.¹⁰⁴ Writing for the majority, Justice White took note of the legislative history linking the treble damages provision to the goal of extirpating organized crime. But based on the Act’s definition of “racketeering activities”—encompassing conduct that is no more than “chargeable,” “punishable,” or “indictable” under a range of specified federal and state laws—the majority held that a prior conviction was not required.¹⁰⁵ The majority also rejected the appellate court’s second prerequisite for a private action under RICO, that the injury be “caused by an activity which RICO was designed to deter.”¹⁰⁶ Justice White observed that racketeering activities as defined involve nothing other than the commission of a predicate act, and that § 1962 prohibits “any person”—not just mobsters—from acquiring an interest in or participating in the conduct of an enterprise through such racketeering activities.¹⁰⁷

The majority conceded that it was interpreting the civil RICO

as legitimate enterprises, and holding that the Act’s criminal prohibitions apply to participation in an entity or association that performs only unlawful activities and has not infiltrated or attempted to infiltrate a legitimate enterprise); *Russello v. United States*, 464 U.S. 16, 20–29 (1983) (broadly construing the criminal penalty provision on forfeiture to hold that insurance proceeds received as a result of racketeering activities constitute an “interest” subject to forfeiture).

100. *Sedima*, 473 U.S. 479.

101. *Id.* at 483–84.

102. *Id.* at 484–85.

103. *See Sedima, S.P.R.L. v. Imrex Co.*, 741 F.2d 482, 496–503 (2d Cir. 1984), *rev’d*, 473 U.S. 479.

104. *See Sedima*, 473 U.S. 479. Justice White authored the majority opinion; Justices Marshall and Powell each wrote lengthy and impassioned dissents. *See id.* at 500–23, 523–30.

105. *See id.* at 488–89.

106. *Id.* at 493–94 (quoting *Sedima*, 741 F.2d at 494).

107. *Id.* at 495 (quoting 18 U.S.C. § 1964(c) (1984)).

provisions very broadly, but it emphasized that Congress meant for RICO to be construed broadly—as evidenced in its “self-consciously expansive language”¹⁰⁸ and also the express textual statement that RICO is to “be liberally construed to effectuate its remedial purposes.”¹⁰⁹ At the same time, the Court understood that private civil actions were being brought almost solely against legitimate businesses rather than against mobsters or organized criminals, and accordingly that “in its private civil version, RICO is evolving into something quite different from the original conception of its enactors.”¹¹⁰ The Court’s response, however, was that it was bound by the clear breadth of the text itself, and any corrections must come from Congress.¹¹¹

Sedima established the Supreme Court’s doctrinal and institutional approach for a first generation of decisions applying RICO’s private civil provisions. The Justices could have confined civil RICO to conduct adjudicated as criminal or directly linked to organized crime. The Court could have done so based on the Act’s legislative history and also on larger policy considerations the Court has often deemed important, such as the rule of lenity, the need to avoid federalizing large areas of state law, and the desirability of not supplanting other well-established federal regulatory schemes.¹¹² Instead, the Court relied on a contested “plain meaning” analysis of text to conclude that its hands were effectively tied.¹¹³ And while acknowledging the unanticipated breadth of its interpretation from Congress’s perspective, the Court in *Sedima* declined to signal any limits to this broad coverage; it simply invited Congress to address the situation.

The Court pursued its expansive text-based approach in two other

108. *Id.* at 498 (citing *United States v. Turkette*, 452 U.S. 576, 586–87 (1981)).

109. *Id.* (quoting Organized Crime Control Act of 1970, Pub. L. No. 91-452, § 904(a), 84 Stat. 922, 947 (1970)).

110. *Id.* at 500.

111. *See id.* at 499.

112. *See id.* at 501, 504–07 (Marshall, J., dissenting). *See also id.* at 526–29 (Powell, J., dissenting) (explaining that the statutory language and legislative history are consistent with a narrow reading of the statute). For indications that the Justices were attentive to these policy considerations, see, for example, *Cleveland v. United States*, 531 U.S. 12, 24–25 (2000); *Ratzlaf v. United States*, 510 U.S. 135, 148–49 (1994), *superseded by statute*, Riegle Community Development and Regulatory Improvement Act of 1994, Pub. L. No. 103-325, 108 Stat. 2160, 2253; and *McNally v. United States*, 483 U.S. 350, 359–60 (1987), *superseded by statute*, Anti-Drug Abuse Act of 1998, Pub. L. No. 100-690, 102 Stat. 4181, 7603.

113. Justice Marshall, writing for four Justices in dissent, invoked the plain meaning of § 1964(c), which grants a private cause of action only to persons injured “by reason of a violation of § 1962”; he argued that the majority had ignored this plain meaning by in effect authorizing recovery *whenever* there has been a violation of § 1962. *See Sedima*, 473 U.S. at 508–09 (Marshall, J., dissenting) (quoting 18 U.S.C. § 1964(c) (1984)).

early cases construing RICO's private damages provisions. In *H.J. Inc. v. Northwestern Bell Telephone Co.*, telephone company customers sought treble damages under RICO, alleging that the company had made cash and in-kind payments to public utility commissioners in a fraudulent scheme to secure rates in excess of a fair and reasonable amount.¹¹⁴ The Supreme Court reversed the lower court's dismissal of the complaint, and in doing so rejected the Eighth Circuit's test requiring that a pattern of racketeering activity involve multiple illegal schemes.¹¹⁵

Writing for five members, Justice Brennan began by noting that in the four years since *Sedima*, "Congress has done nothing . . . further to illuminate RICO's key requirement of a pattern of racketeering."¹¹⁶ The majority found no textual support for the Eighth Circuit's multiple-scheme rule or for the parallel arguments (advanced by numerous amici) that a defendant's racketeering activities form a pattern only if they are "characteristic either of organized crime . . . or of an organized-crime-type perpetrator."¹¹⁷ The Court instead held that Congress envisioned a "flexible concept of a pattern,"¹¹⁸ one that could be established by a single scheme of two or more racketeering predicates so long as the predicates are shown to be related and to pose a threat of continued criminal activity.¹¹⁹ The Court recognized the open-ended nature of this standard, but invoked its earlier reliance on "RICO's 'self-consciously expansive language and overall approach'" to resist any narrower construction.¹²⁰

Five years later, in *National Organization for Women, Inc. v. Scheidler (Scheidler I)*, the Court considered a RICO civil action alleging that a coalition of antiabortion groups were conspiring to shut down abortion clinics through extortion and related racketeering activities.¹²¹ The Supreme Court again reversed a lower court dismissal, this time rejecting the Seventh Circuit's test that racketeering predicate acts or a racketeering enterprise must be accompanied by an underlying economic motive.¹²²

Writing for a unanimous majority, Chief Justice Rehnquist observed that the Act sets forth broad definitions of both "racketeering activity" and "enterprise," but those definitions nowhere refer to the requirement or even

114. *H.J. Inc. v. Nw. Bell Tel. Co.*, 492 U.S. 229, 233–34 (1989).

115. *Id.* at 234–35.

116. *Id.* at 236.

117. *Id.* at 243.

118. *Id.* at 239.

119. *See id.* at 239–42.

120. *Id.* at 249 (quoting *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 498 (1985)).

121. *Nat'l Org. for Women, Inc. v. Scheidler (Scheidler I)*, 510 U.S. 249, 253 (1994).

122. *Id.* at 254, 256–60.

possibility of an economic motive.¹²³ Rehnquist viewed the RICO text that comes closest to suggesting the need for an economic motive as § 1962(c), prohibiting use of racketeering activities to participate in the conduct of “any enterprise engaged in, *or the activities of which affect*, interstate commerce.”¹²⁴ The majority relied on a dictionary definition of “affect” to construe this text, concluding that an enterprise “surely can have a detrimental influence on interstate or foreign commerce without having its own profit-seeking motives.”¹²⁵

The Court went on to reject the respondent’s reliance on RICO’s statement of findings which had emphasized that organized crime was draining billions of dollars from the American economy.¹²⁶ In doing so, the Court reiterated its now-familiar position that while RICO as enacted “had organized crime as its focus, [it] was not limited in application to organized crime.”¹²⁷ Finally, the Court declined to consult either legislative history or the rule of lenity because the text itself was unambiguous; the Court added the mantra from *Sedima* that RICO’s “appli[cation] in situations not expressly anticipated by Congress does not demonstrate ambiguity. It demonstrates breadth.”¹²⁸

Although no Justice voted against the result in *Northwestern Bell* or *Scheidler I*, there were serious concerns expressed in each case. In *Northwestern Bell*, Justice Scalia and three other Justices concurred only in the Court’s judgment.¹²⁹ Scalia found the Court’s definition of “pattern” vague and unhelpful, and he expressed a broader discomfort that the Court’s decision in *Sedima* was effectively allowing civil RICO actions to transform private litigation and to federalize whole areas of state common law.¹³⁰ And in *Scheidler I*, Justices Souter and Kennedy wrote separately to emphasize that despite the Court’s extension of RICO’s scope to

123. *Id.* at 256–57.

124. *Id.* at 257 (emphasis added) (quoting 18 U.S.C. § 1962(c) (1994)).

125. *Id.* at 258.

126. *See* Organized Crime Control Act, Pub. L. No. 91-452, 84 Stat. 922, 922–23 (1970).

127. *Scheidler I*, 510 U.S. at 260 (quoting *H.J. Inc. v. Nw. Bell Tel. Co.*, 492 U.S. 229, 248 (1989)).

128. *Id.* at 262 (quoting *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 499 (1985)). *See also* *Am. Nat’l Bank & Trust Co. of Chi. v. Haroco, Inc.*, 473 U.S. 606, 608–09 (1985) (per curiam) (relying on *Sedima* to reject summarily the argument that a civil RICO injury must flow from a defendant’s performance of predicate acts *as part of the conduct of an enterprise*, and holding that injury from the predicate offenses alone was sufficient).

129. *See Nw. Bell*, 492 U.S. at 251–56 (Scalia, J., concurring in the judgment, joined by Rehnquist, C.J., and O’Connor & Kennedy, JJ.).

130. *Id.* at 255 (citing with approval Justice Marshall’s dissenting opinion in *Sedima*, 473 U.S. at 501).

noneconomically based entities such as civil rights organizations, the First Amendment might preclude the statute's application in certain instances.¹³¹ Souter specifically referenced conduct alleged to constitute Hobbs Act extortion or one of the other comparably open-ended predicate acts that might "be fully protected First Amendment activity, entitling the defendant to dismissal on that basis."¹³²

Notwithstanding such concerns, the first generation of Court decisions, led by *Sedima*, contributed to a substantial increase in private RICO litigation. From enactment in 1970 through 1985, there were a total of 270 civil RICO cases reported.¹³³ Between 1985 and 1990, roughly 1000 civil cases were filed each year.¹³⁴ The number of RICO filings in federal district courts has declined somewhat since the early 1990s, but the average annual number from 2001 to 2008 remains above 700.¹³⁵ Included in this torrent of civil RICO cases are a considerable number of RICO claims from employers alleging extortionate conduct by unions in the midst of labor management disputes.

D. PRIVATE RICO ACTIONS AGAINST LABOR ORGANIZATIONS

Since the late 1980s, employer litigation against unions often has included claims under RICO. Over the past two-plus decades, dozens of district court decisions have addressed these issues,¹³⁶ and there are

131. See *Scheidler I*, 510 U.S. at 263–65 (Souter, J., concurring).

132. *Id.* at 264 (citing *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 917 (1982)).

133. H.R. REP. NO. 101-975, at 7 (1990) (citing Letter from L. Ralph Mechem, Dir., Admin. Office of U.S. Courts, to William J. Hughes, Chair, House Subcomm. on Crime (June 9, 1989) [hereinafter U.S. Courts Letter]).

134. See *id.* (citing U.S. Courts Letter) (reporting that an average of 1000 civil cases were filed each year from 1986 through 1989); ADMIN. OFFICE OF U.S. COURTS, FEDERAL JUDICIAL WORKLOAD STATISTICS: DECEMBER 31, 1990, at 33 (1990) (reporting that 957 private civil RICO actions were commenced during the twelve-month period ending December 31, 1990).

135. See ADMIN. OFFICE OF U.S. COURTS, FEDERAL JUDICIAL CASELOAD STATISTICS: MARCH 31, 2008, at 45 (2008) (637 private civil RICO actions); ADMIN. OFFICE OF U.S. COURTS, FEDERAL JUDICIAL CASELOAD STATISTICS: MARCH 31, 2007, at 45 (2007) (701 private civil RICO actions); ADMIN. OFFICE OF U.S. COURTS, FEDERAL JUDICIAL CASELOAD STATISTICS: MARCH 31, 2006, at 44 (2006) (676 private civil RICO actions); ADMIN. OFFICE OF U.S. COURTS, FEDERAL JUDICIAL CASELOAD STATISTICS: MARCH 31, 2005, at 44 (2005) (832 private civil RICO actions); ADMIN. OFFICE OF U.S. COURTS, FEDERAL JUDICIAL CASELOAD STATISTICS: MARCH 31, 2004, at 44 (2004) (691 private civil RICO actions); ADMIN. OFFICE OF U.S. COURTS, FEDERAL JUDICIAL CASELOAD STATISTICS: MARCH 31, 2003, at 44 (2003) (835 private civil RICO actions); ADMIN. OFFICE OF U.S. COURTS, FEDERAL JUDICIAL CASELOAD STATISTICS: MARCH 31, 2002, at 46 (2002) (700 private civil RICO actions); ADMIN. OFFICE OF U.S. COURTS, FEDERAL JUDICIAL CASELOAD STATISTICS: MARCH 31, 2001, at 46 (2001) (787 private civil RICO actions).

136. In addition to the district court cases cited *infra* at notes 138–39, 141–43, and 148, see cases cited or discussed in 2 THE DEVELOPING LABOR LAW 2500–2654 (John E. Higgins, Jr., et al. eds., 5th

doubtless many more filed actions that were settled or disposed of without a district court ruling on the employer's RICO claim. A handful of federal appellate court opinions also have examined issues of union civil liability under RICO.¹³⁷

In some of these actions, employers challenged as racketeering activity union conduct that was not part of a comprehensive campaign.¹³⁸ With respect to RICO claims that involve extended union campaigns, employers may allege that union conduct includes regular or pervasive acts of violence.¹³⁹ It is also the case that unions or employees bring RICO claims against employers with some frequency.¹⁴⁰

Nonetheless, there are a substantial number of RICO actions brought by employers, implicating union comprehensive campaigns in the organizing or bargaining context, where employers allege that various nonviolent campaign tactics and activities amount to extortionate conduct. Employers began bringing these cases in the late 1980s,¹⁴¹ they did so during the 1990s,¹⁴² and allegations that union campaign activities should

ed. 2006).

137. See, e.g., *Adcock v. Freightliner LLC*, 550 F.3d 369, 374–76 (4th Cir. 2008); *Hotel Employees Local 57 v. Sage Hospitality Res. LLC*, 390 F.3d 206, 218–19 (3d Cir. 2004); *Petrochem Insulation Inc. v. NLRB*, 240 F.3d 26, 28–33 (D.C. Cir. 2001); *Monterey Plaza Hotel Ltd. P'ship v. Local 483, Hotel Employees Union*, 215 F.3d 923, 925–28 (9th Cir. 2000).

138. See, e.g., *Asbestos & Lead Removal Corp. v. Severino*, No. CV-06-5949 (BMC) (MDG), 2007 U.S. Dist. LEXIS 24134, at *2–3 (E.D.N.Y. Mar. 23, 2007); *Levin-Richmond Terminal Corp. v. Int'l Longshoremen's Union, Local 10*, 751 F. Supp. 1373, 1374 (N.D. Cal. 1990); *MHC, Inc. v. Int'l Union, United Mine Workers*, 685 F. Supp. 1370, 1373–74 (E.D. Ky. 1988).

139. See, e.g., *AK Steel Corp. v. United Steel Workers*, No. C-1-00-374, 2002 U.S. Dist. LEXIS 19676, at *6–8 (S.D. Ohio Mar. 30, 2002); *Overnite Transp. Co. v. Int'l Bhd. of Teamsters*, 168 F. Supp. 2d 826, 833–35 (W.D. Tenn. 2001); *Teamsters Local 372 v. Detroit Newspapers*, 956 F. Supp. 753, 761–62 (E.D. Mich. 1997).

140. See, e.g., *Trollinger v. Tyson Foods, Inc.*, 370 F.3d 602 (6th Cir. 2004) (employees' suit against employers); *Butchers' Union, Local No. 498 v. SDC Inv.*, 631 F. Supp. 1001, 1006 (E.D. Cal. 1986) (union claim against employer); Susan J. McGolrick, *Attorney Says Latest Trend in RICO Suits Is Suing Employers That Hire Illegal Workers*, [2005] Daily Lab. Rep. (BNA), at C-1 (Aug. 12, 2005); *Court Dismisses Union Steward's RICO Lawsuit Against Employer*, [1995] Daily Lab. Rep. (BNA), at A-1 (Oct. 18, 1995); *Rubber Workers Settle RICO Suit over Closing of Uniroyal Plant*, [1992] Daily Lab. Rep. (BNA), at A-5 (July 14, 1992).

141. See, e.g., *Petrochem Insulation, Inc. v. N. Cal. & N. Nev. Pipe Trades Council*, No. C-90-3628 EFL, 1991 U.S. Dist. LEXIS 6659, at *2 (N.D. Cal. Apr. 30, 1991) (indicating the complaint alleged that the union extortion activities began in 1988), *aff'd*, 8 F.3d 29 (9th Cir. 1993) (unpublished opinion); *Tex. Air Corp. v. Air Line Pilots Ass'n Int'l*, No. 88-0804, 1989 U.S. Dist. LEXIS 11149 (S.D. Fla. July 14, 1989).

142. See, e.g., *Mariah Boat, Inc. v. Laborers Int'l Union*, 19 F. Supp. 2d 893 (S.D. Ill. 1998); *A. Terzi Prods. v. Theatrical Protective Union*, 2 F. Supp. 2d 485, 504 (S.D.N.Y. 1998); *Bayou Steel Corp. v. United Steel Workers*, No. Civ. A. 95-496-RRM, 1996 U.S. Dist. LEXIS 22938 (D. Del. Jan. 11, 1996).

be deemed extortionate continued to be raised in the 2000s.¹⁴³ The reported decisions in these cases tend to involve a union's motion to dismiss RICO claims on various grounds; such motions succeed or fail at roughly comparable levels.¹⁴⁴

Management attorneys have expressed reservations when discussing the efficacy of RICO and other civil actions solely as legal approaches to defeat comprehensive campaigns.¹⁴⁵ When assessing the value of RICO lawsuits in strategic terms, however, employer advocates are more bullish. As one attorney representing management recently explained to *The New York Times*, lawsuits that survive motions to dismiss usually trigger settlement discussions, and “[w]hen [unions] settle, . . . it normally breaks the campaign.”¹⁴⁶ There is ample evidence that RICO actions can have a chilling effect on unions and their individual supporters.¹⁴⁷ Of course, there is nothing wrong with employers relying on reasonable or even plausibly contestable legal arguments to survive motions to dismiss a RICO claim. But if a core legal argument is determined to be unreasonable or implausible as a matter of law, its settlement value would disappear and its adverse reputational impact would presumably decline as well.

143. See, e.g., *Cintas Corp. v. Unite Here*, 601 F. Supp. 2d 571 (S.D.N.Y.), *aff'd*, 355 F. App'x 508 (2d Cir. 2009); *Wackenhut Corp. v. SEIU*, 593 F. Supp. 2d 1289 (S.D. Fla. 2009); *Smithfield Foods, Inc. v. Commercial Workers Int'l*, 593 F. Supp. 2d 840 (E.D. Va. 2008); Transcript of Motion Hearing, *Food Lion, Inc. v. Commercial Workers Int'l* (D. S.C. 2003) (No. 2:96-CV-0687).

144. See *Cintas*, 601 F. Supp. 2d 571 (granting dismissal); *Wackenhut*, 593 F. Supp. 2d 1289 (granting dismissal); *Smithfield Foods*, 593 F. Supp. 2d 840 (denying dismissal); *Mariah Boat*, 19 F. Supp. 2d 893 (granting dismissal); *A. Terzi Prods.*, 2 F. Supp. 2d 485 (denying dismissal); *Bayou Steel*, 1996 U.S. Dist. LEXIS 22938 (denying dismissal); *Petrochem*, 1991 U.S. Dist. LEXIS 6659 (granting dismissal).

145. See *Baskin & Northrup*, *supra* note 7, at 217 (discussing inter alia RICO actions and opining that such actions “have had only limited success in the courts”); Stanley J. Brown & Alyse Bass, *Corporate Campaigns: Employer Responses to Labor's New Weapons*, 6 LAB. LAW. 975, 978 (1990) (reviewing employer legal strategies including RICO actions and observing that “[i]n short, employer efforts to utilize the Board and the courts for relief will often be frustrated, particularly if a union is well advised by counsel”).

146. Liptak, *supra* note 12 (quoting G. Robert Blakey, one of the lawyers in *Smithfield Foods*). Blakey, who helped draft RICO in 1970 as an aide to Senator McClellan, has appeared as counsel to employers in other RICO actions. See, e.g., *United States v. Palumbo Bros., Inc.*, 145 F.3d 850 (7th Cir. 1998); Plaintiffs' Memorandum in Opposition to Defendants' Joint Rule 12(b)(6) Motion to Dismiss, *Cintas*, 601 F. Supp. 2d 571 (No. 08-CV-2185).

147. See, e.g., JURAVICH & BRONFENBRENNER, *supra* note 50, at 87 (describing the chilling effect on a local union and its leaders during the campaign against Ravenswood Aluminum Corporation); *RICO Is a “Powerful Tool” in Labor Disputes*, CIVIL RICO REPORT (LRP Publications), Sept. 17, 2002 (quoting a union attorney at an ABA annual meeting, observing that management sees civil RICO as a means to weaken or destroy unions, adding that “[t]oday, RICO is the most powerful tool management has against organized labor”); Rick Boucher, Editorial, *Raising the Bogy of Big Business*, WASH. POST, May 13, 1989, at A17 (criticizing the chilling effect of a three-billion dollar RICO suit filed by Frank Lorenzo against Eastern Airlines pilots and mechanics unions).

When unions move to dismiss employers' RICO claims, they may do so on numerous grounds other than whether the challenged campaign amounts to extortion. Unions often argue that an employer's claim is preempted under federal labor law.¹⁴⁸ They also may contend that the union and its supporters do not qualify as a RICO enterprise,¹⁴⁹ that the union's conduct does not constitute a "pattern" of activity,¹⁵⁰ or that the union has not committed a predicate offense (other than extortion) alleged in the complaint.¹⁵¹

The central element in employers' RICO challenges to comprehensive campaigns is, however, the allegation of extortion. The whole point of these campaigns is to impose extended economic pressure on companies, to instill a sufficient fear of economic loss so as to squeeze the employer and extract procedural or substantive concessions in the areas of union recognition or collective bargaining. Whether this approach essentially qualifies as permissible concerted activity or as "the same thing as what John Gotti used to do"¹⁵² raises basic issues of statutory meaning, issues that turn on doctrine rather than on factual complexity.¹⁵³ Although the federal crime of extortion is defined under the Hobbs Act, the interpretation of that definition in private civil litigation against unions has become

148. See, e.g., *Merryman Excavation, Inc. v. Int'l Union of Operating Eng'rs, Local 150*, 552 F. Supp. 2d 745, 749–52 (N.D. Ill. 2008) (granting dismissal on grounds of LMRA Section 301 preemption); *Mariah Boat*, 19 F. Supp. 2d at 897–900 (denying dismissal on grounds of NLRA preemption); *Teamsters Local 372 v. Detroit Newspapers*, 956 F. Supp. 753, 761–62 (E.D. Mich. 1997) (same); *Buck Creek Coal Inc. v. United Mine Workers*, 917 F. Supp. 601, 610–11 (S.D. Ind. 1995) (granting dismissal on grounds of NLRA preemption); *Petrochem*, 1991 U.S. Dist. LEXIS 6659, at *15–20 (same).

149. See, e.g., *New Beckley Mining Corp. v. Int'l Union, United Mine Workers*, 18 F.3d 1161, 1163 (4th Cir. 1994) (granting dismissal because "persons" were not distinct from the "enterprise"); *Yellow Bus Lines, Inc. v. Drivers Local Union 639*, 883 F.2d 132, 139–41, 145 (D.C. Cir. 1989) (affirming the inadequacy of the original complaint naming the union as both person and enterprise), *aff'd in part, rev'd in part*, 913 F.2d 948 (D.C. Cir. 1990). See also *Northrup & Steen, supra* note 4, at 775–76 (discussing the issue of distinct identities involving a RICO person and enterprise).

150. See, e.g., *Cox v. Adm'r U.S. Steel & Carnegie*, 17 F.3d 1386, 1397–98 (11th Cir. 1994) (denying the union's motion for summary judgment), *amended by* 30 F.3d 1347 (11th Cir. 1994); *A. Terzi Prods. v. Theatrical Protective Union*, 2 F. Supp. 2d 485, 508–09 (S.D.N.Y. 1998) (denying the union's motion to dismiss).

151. See, e.g., *Monterey Plaza Hotel Ltd. P'ship v. Local 483, Hotel Employees Union*, 215 F.3d 923, 926–28 (9th Cir. 2000) (affirming dismissal because the complaint failed to state a claim for mail fraud or wire fraud); *Teamsters Local 372*, 956 F. Supp. at 764–65 (denying dismissal where the complaint adequately stated a claim alleging attempted robbery and arson).

152. See Liptak, *supra* note 12 (quoting G. Robert Blakey).

153. By contrast, the issue of federal labor law preemption often implicates difficult mixed matters of fact and law, such as whether the labor law questions in the case are merely "collateral" and whether a violation of the RICO predicate offense may be found only if the union's conduct violates the NLRA. See *Trollinger v. Tyson Foods, Inc.* 370 F.3d 602, 608–11 (6th Cir. 2004).

distinctly a matter of RICO's doctrinal application.

Before addressing this doctrinal matter, we first consider the record of RICO reform efforts by Congress, and the Supreme Court's later cases interpreting civil RICO. The Court's second generation of decisions, especially two cases decided in 2003 and 2007, suggest that the meaning of extortion ought not to cover the activities typically engaged in during union campaigns.

III. REFORMING RICO: CONGRESSIONAL INACTION AND SUPREME COURT INITIATIVES

A. FAILED EFFORTS AT LEGISLATIVE REFORM

Congress began exploring measures to limit the scope of private civil RICO in 1985 and 1986, as *Sedima* was being argued and decided by the Supreme Court. The criticisms raised to justify reform were strikingly similar to those voiced by Justices Marshall and Powell in their *Sedima* dissents.¹⁵⁴ Business representatives and some government regulators explained that § 1964(c) had become a weapon in ordinary commercial disputes wholly unrelated to organized crimes; that civil RICO was supplanting established federal regulatory schemes that did not provide for treble damages or attorney's fees in their private rights of action; and that the civil cause of action was burdening the federal court system by federalizing vast areas of state law.¹⁵⁵

Substantial support to reform civil RICO came initially from all three branches. The Department of Justice testified largely in favor of pending House and Senate bills in 1989.¹⁵⁶ The Court majority in *Sedima* had

154. See *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 470, 500–30 (1985) (Marshall and Powell, JJ., dissenting).

155. See 1985–86 House Hearings, *supra* note 90, at 487 (statement of Sam Scott Miller, Vice President and General Counsel, Paine Webber Group) (discussing RICO abuse in ordinary business disputes); *id.* at 779–80 (statement of Roger E. Middleton, on behalf of the U.S. Chamber of Commerce) (same); *id.* at 192 (statement of Irvin B. Nathan, on behalf of the Alliance of American Insurers) (discussing federalization of state common law remedies); *id.* at 792–94 (statement of John M. Finch, on behalf of the National Association of Manufacturers) (discussing vast growth of federal RICO litigation); *Oversight on Civil RICO Suits: Hearings Before the S. Comm. on the Judiciary*, 99th Cong. 632–33 (1985) (statement of Edward I. O'Brien, President, Securities Industry Association) (discussing supplanting of securities laws); *ABA Report*, *supra* note 64, app. F, at 3–5 (memorandum of SEC Commissioner Charles L. Marinaccio) (same). See also Bruce Haber, Note, *Congress Responds to Sedima: Is There a Contract Out on Civil RICO?*, 19 LOY. L.A. L. REV. 851, 867–82 (1986) (describing the abuse of RICO and examining counterarguments).

156. See S. REP. NO. 101-269, at 4 (1990); *Racketeer Influenced and Corrupt Organizations Reform Act: Hearing on S. 438 Before the S. Comm. on the Judiciary*, 101st Cong. 50–51 (1989)

implicitly invited Congress to override its decision,¹⁵⁷ and Chief Justice Rehnquist made that invitation unusually explicit. In a 1989 speech titled *Reforming RICO*, Rehnquist noted an eightfold increase in RICO civil filings between 1983 and 1988, emphasized that the provision “is now being used in ways that Congress never intended,”¹⁵⁸ and concluded “the time has arrived for Congress to enact amendments to civil RICO to limit its scope to the sort of wrongs that are connected to organized crime, or have some other reason for being in federal court.”¹⁵⁹ During this same period, then-U.S. Attorney Samuel Alito coedited a book titled *The RICO Racket*, in which he acknowledged the loud calls for amending civil RICO while expressing the hope that federal criminal enforcement would not be adversely affected.¹⁶⁰

Congress seriously pursued comprehensive civil RICO reform between 1985 and 1992 and considered an additional reform possibility in 1998.¹⁶¹ Bills favored by the judiciary committees in one or both chambers during this period featured numerous significant proposed changes, including: (1) barring private civil actions unless the defendant had been previously convicted of a RICO predicate offense; (2) barring treble damages and attorney’s fees except for instances in which a prior RICO offense conviction was present; (3) inserting a more precise and restrictive definition of “pattern of racketeering activity”; (4) imposing tougher federal pleading rules for all civil RICO cases; (5) creating an affirmative defense for persons who relied in good faith on state or federal regulatory action when performing the challenged activities; (6) prohibiting use of the term “racketeering activity” in civil suits not alleging a crime of violence; and (7) prohibiting RICO lawsuits that challenge nonviolent public speech expressed through protests, rallies, or demonstrations.¹⁶² One reform

[hereinafter *1989 Senate Hearing*] (statement of John C. Keeney, Deputy Assistant Att’y Gen., Criminal Division, U.S. Department of Justice); *RICO Reform Act of 1989: Hearings on H.R. 1046 Before the Subcomm. on Crime of the H. Comm. on the Judiciary*, 101st Cong. 91 (1989) [hereinafter *1989 House Hearings*] (same).

157. See *Sedima*, 473 U.S. at 499.

158. William H. Rehnquist, *Reforming RICO*, in *THE RICO RACKET* 63, 64 (Samuel A. Alito, Jr., et al. eds., 1989).

159. *Id.* at 67.

160. See Samuel A. Alito, Jr., *Racketeering Made Simple(r)*, in *THE RICO RACKET*, *supra* note 158, at 13–14.

161. See sources cited *infra* notes 162–65 (indicating major reform proposals between 1985 and 1992); Civil RICO Clarification Act of 1998, H.R. 4245, 105th Cong. § 3 (1998) (proposing to remove extortion as a separate predicate act for civil RICO actions).

162. See, e.g., RICO Amendments Act of 1991, H.R. 1717, 102d Cong. § 3 (1991) (adding stricter pleading requirements and a higher burden of proof and requiring that the defendant be a “major participant” in criminal conduct responsible for the plaintiff’s injury); RICO Reform Act of 1989, S.

measure was approved by the House but died on the Senate floor in October 1986.¹⁶³ Bills in subsequent Congresses received approval from the House or Senate Judiciary Committees, but did not garner support in either chamber as a whole.¹⁶⁴ By late 1991, momentum had receded for the reform of civil RICO.¹⁶⁵

Although organized labor was a marginal player in these legislative efforts, it regularly supported major civil RICO reform proposals during the 1985–1992 period.¹⁶⁶ Through testimony at congressional hearings and letters submitted to Congress, the American Federation of Labor and Congress of Industrial Organizations (“AFL-CIO”) and individual unions expressed their concerns about application of civil RICO to “run of the mine . . . labor disputes” bearing no relation to organized crime.¹⁶⁷ And the

438, 101st Cong. § 4 (1989) (prohibiting treble damages and attorney’s fees unless there has been a prior RICO conviction and prohibiting private actions against nonviolent public speech); H.R. 2943, 99th Cong. (1985) (permitting private actions only with a prior conviction for a RICO offense). *See also* H.R. 4245 (eliminating the RICO predicate offense of extortion).

163. 132 CONG. REC. 32,497–504 (1986) (reporting on the civil RICO amendment proposed by Senators Howard Metzenbaum and Dale Bumpers, identical to the bill that passed 371-28 in the House, which was tabled 47-44 following debate).

164. *See* H.R. REP. NO. 102-312, at 7–8 (1991) (discussing H.R. 1717, favorably reported on November 13, 1991); H.R. REP. NO. 101-975, at 5–9 (1990) (discussing H.R. 5111, favorably reported on October 27, 1990); S. REP. NO. 101-269, at 4 (1990) (discussing S. 1523, favorably reported by the Senate Judiciary Committee on May 24, 1988 although no floor action was taken); *id.* at 5–10 (discussing S. 438, favorably reported by the Senate Judiciary Committee on February 1, 1990).

165. Melanie Oberlin, reference librarian at the Moritz College of Law, conducted searches on December 2–3, 2009, on Thomas (<http://thomas.loc.gov>) and in the CCH Congressional Index for bills in the 102nd Congress (1991–1992) aimed at amending civil RICO. The search identified no bill in the Senate, and only H.R. 1717 in the House. A further search of congressional hearings, using the CIS Index on LexisNexis Congressional, indicates there were major hearings on civil RICO reform from early 1985 through April 1991, and then no more hearings until 1998.

166. Additionally, minor bills introduced during this period would have eliminated civil RICO actions for conduct “in connection with and during a labor dispute.” RICO Act of 1987, H.R. 3240, 100th Cong. § 4(b) (1987); Crime Control Act of 1988, H.R. 4920, 100th Cong. § 4 (1988). *See also* S. 300, 99th Cong. (1985) (creating an affirmative defense under the Hobbs Act for conduct “incidental to peaceful picketing in the course of a legitimate labor dispute”). None of these bills reached the committee report stage.

167. 1985–86 *House Hearings*, *supra* note 90, at 1451 (Letter from Laurence Gold, AFL-CIO General Counsel to House Judiciary Committee Chairman Conyers); *id.* at 1451–57. *See also id.* at 1459–60 (Letter from William B. Welch, the American Federation of State, County, and Municipal Employees Director of Legislation); *id.* at 1556–57 (Letter from William W. Winpisinger, International Association of Machinists and Aerospace Workers President); *id.* at 1619–22 (Letter from Arnold Mayer, United Food and Commercial Workers Director of Government Affairs); *RICO Amendments Act of 1991: Hearing on H.R. 1717 Before the Subcomm. on Intellectual Property and Judicial Administration of the H. Comm. on the Judiciary*, 102d Cong. 135 (1991) [hereinafter *1991 House Hearing*] (statement of Ernest Dubester, Legislative Rep., AFL-CIO); 1989 *House Hearings*, *supra* note 156, at 247 (same); 1989 *Senate Hearing*, *supra* note 156, at 169 (same); *Proposed RICO Reform Legislation: Hearings on S. 1523 Before the S. Comm. on the Judiciary*, 100th Cong. 292 (1987) [hereinafter *1987 Senate Hearings*] (same).

Senate Judiciary Committee specifically noted that the use of civil RICO against unions in labor disputes “is not what Congress had in mind when it was debating RICO” in 1970.¹⁶⁸

Several labor-specific factors add weight to the contention that Congress in 1970 never meant to cover ordinary labor-management controversies. One involves the jurisdiction of congressional committees. If the Senate or House had intended that RICO might be used against strikes, demonstrations, or similar economically motivated group action by unions, the bill would have been referred to Congress’s respective labor committees in addition to the judiciary committees. As G. Robert Blakey, chief aide to Senator McClellan, pointed out, it was no accident that such a referral never took place—Senator McClellan’s instructions were to be sure that RICO’s civil sanctions would not “be used at all in the context of demonstrations of any type.”¹⁶⁹ A second factor involves the predicate offenses contained in the definition of racketeering activity set forth in § 1961(1). Included in the list of over seventy separately indictable federal offenses are two crimes specified under federal labor law: embezzlement from union funds and improper payments or loans to labor organizations.¹⁷⁰ This attention to crimes implicating financial corruption in labor-management relations arguably indicates the nature of labor-related RICO coverage that Congress had in mind. Finally, and on a related note, repeated statements from key RICO sponsors focused on union abuses that were far removed from ordinary labor-management disputes. The union-related evils of particular concern to Senators McClellan and Hruska and Representative Poff included use of violence, extortion, and manipulation to “sell” labor peace to employers or contractors, to impose sweetheart labor contracts that depress employee wages and funnel extra monies to crime bosses, or to eject union members who try to resist mob control.¹⁷¹

168. S. REP. NO. 101-269, at 2.

169. *Application of the RICO Law to Nonviolent Advocacy Groups: Hearing Before the Subcomm. on Crime of the H. Comm. on the Judiciary*, 105th Cong. 24–25 (1998) [hereinafter *1998 House Hearing*] (statement of G. Robert Blakey). See also *1991 House Hearing*, *supra* note 167, at 135 (discussing Blakey’s comments characterizing the Daily News strike as a classic misuse of civil RICO). Blakey’s comments at the 1998 hearing and his paraphrased remarks from the 1991 hearing were made more than two decades after the original legislative record for RICO. Post-enactment history is generally viewed as unreliable, but Blakey’s role in drafting RICO is widely recognized and continues to be credited.

170. See 18 U.S.C. § 1961(1)(C) (2006) (specifically including acts indictable under 29 U.S.C. §§ 186 and 501(c) (2006)).

171. See 116 CONG. REC. 591 (1970) (remarks of Sen. McClellan); *id.* at 595–97 (remarks of Sen. McClellan, reprinting *The Conglomerate of Crime*, TIME, Aug. 22, 1969, at 31); *id.* at 601 (remarks of Sen. Hruska); *id.* at 35,201 (remarks of Rep. Poff). See also *id.* at 820 (remarks of Sen. Scott) (referencing misuses of union pension funds); *id.* at 35,319 (remarks of Rep. Roth) (same).

In the end, Congress failed to enact reforms narrowing the overall scope of civil RICO for a number of reasons. The Justice Department objected to some proposed versions on the grounds that they would weaken its ability to pursue misconduct under the Act.¹⁷² Key state government representatives such as the National Association of Attorneys General and the National Association of Insurance Commissioners expressed concern over limiting states' ability to pursue civil actions.¹⁷³ Consumer organizations, trial lawyers, and women's groups also resisted what they viewed as efforts to undermine civil enforcement.¹⁷⁴ In addition, the volume of federal court cases declined somewhat in the early 1990s.¹⁷⁵ The decline continued after 1995, when Congress enacted its only substantive narrowing of civil RICO by barring civil actions for securities fraud absent a prior criminal conviction.¹⁷⁶

Yet while Congress was unable to enact the major revisions proposed between 1985 and 1998, advocates for reform have achieved some success through the venue of the Supreme Court. Two sets of specific proposals warrant attention in this regard. First, reform advocates objected to the breadth of 18 U.S.C. § 1962(c), which makes it unlawful to "conduct or

172. See, e.g., *1991 House Hearing*, *supra* note 167, at 12–13, 25–33 (statement of John C. Keeney, Deputy Assistant Att'y Gen., Criminal Division, U.S. Department of Justice); H.R. REP. NO. 102–312, at 25–27 (1991) (dissenting views of Reps. Conyers, Edwards, Schroeder, Levine, Washington, and Reed, noting concerns of the Department of Justice).

173. See H.R. REP. NO. 102–312, at 25 (discussing opposition from the National Association of Attorneys General and the National Association of Insurance Commissioners); *1989 Senate Hearing*, *supra* note 156, at 90–104 (statement of Steven J. Twist, Chief Assistant Att'y Gen., National Association of Attorneys General); *id.* at, 660–73 (statement of James Long, Comm'r of Insurance, National Association of Insurance Commissioners).

174. See *RICO Reform: Hearings on H.R. 3240 and Related Bills Before the Subcomm. on Criminal Justice of the H. Comm. on the Judiciary*, 100th Cong. 164–71 (1987–88) (statement of Ralph Nader, Center for the Study of Responsive Law); *id.* at 662–66 (statement of Pamela Gilbert, U.S. Public Interest Research Group and Public Citizens' Congress Watch); *1998 House Hearing*, *supra* note 169, at 152–54 (statement of Susan Hill, President, National Women's Health Organization).

175. Compare ADMIN. OFFICE OF U.S. COURTS, FEDERAL JUDICIAL CASELOAD STATISTICS, DECEMBER 31, 1990, at 33 (1990) (reporting 957 private RICO cases closed), with ADMIN. OFFICE OF U.S. COURTS, FEDERAL JUDICIAL CASELOAD STATISTICS, MARCH 31, 1993, at 27 (1993) (reporting 851 private RICO actions closed), and ADMIN. OFFICE OF U.S. COURTS, FEDERAL JUDICIAL CASELOAD STATISTICS, MARCH 31, 1994, at 24 (1994) (reporting 841 private RICO cases closed). See also H.R. REP. NO. 102–312, at 27 (discussing Judge Rymer's statement describing the civil RICO caseload problem as "exaggerated").

176. See Private Securities Litigation Reform Act of 1995, Pub. L. No. 104–67, § 107, 109 Stat. 737, 758 (amending 18 U.S.C. § 1964(c)). Compare ADMIN. OFFICE OF U.S. COURTS, FEDERAL JUDICIAL CASELOAD STATISTICS, MARCH 31, 1995, at 38 (1995) (reporting 905 private RICO cases closed), with ADMIN. OFFICE OF U.S. COURTS, FEDERAL JUDICIAL CASELOAD STATISTICS, MARCH 31, 1998, at 39 (1998) (reporting 795 private RICO cases closed), and ADMIN. OFFICE OF U.S. COURTS, FEDERAL JUDICIAL CASELOAD STATISTICS, MARCH 31, 2000, at 39 (2000) (reporting 752 private RICO cases closed).

participate . . . in the conduct of [an] enterprise's affairs through a pattern of racketeering activities."¹⁷⁷ Some courts had construed this provision to cover persons whose participation in the enterprise lacked any supervisory or policymaking component.¹⁷⁸ Both the ABA and the AFL-CIO urged Congress to reject this position. They instead recommended modification of § 1962(c) to specify that culpable participants must exercise either managerial or supervisory responsibilities or else some form of policymaking direction over the enterprise.¹⁷⁹ The organized bar and organized labor repeatedly offered these proposals to revise § 1962(c) between 1985 and 1991.¹⁸⁰

Second, and of greater relevance for present purposes, a different set of reform proponents objected to the civil prosecution of advocacy groups for engaging in a series of heated protests and demonstrations. Proposals to limit the scope of extortion in the civil RICO setting were offered as early as 1990 and again in 1998¹⁸¹ in response to actions brought against groups and individuals who sought to block access to abortion clinics.¹⁸² Importantly, the proposals were to reform civil RICO rather than to amend the Hobbs Act. This legislative focus in turn reflects the unusual nature of

177. 18 U.S.C. § 1962(c) (2006).

178. See, e.g., *Bank of Am. v. Touche Ross & Co.*, 782 F.2d 966, 970 (11th Cir. 1986); *United States v. Elliott*, 571 F.2d 880, 903 (5th Cir. 1978).

179. See *1985–86 House Hearings*, *supra* note 90, at 1456 (citing a letter of October 11, 1985, from Laurence Gold, General Counsel of AFL-CIO, proposing that “conduct or participate . . . in the conduct,” 18 U.S.C. § 1962(c), be defined as “to manage in a supervisory capacity the enterprise’s basic functions so as to further the enterprise’s financial interests”); *1987 Senate Hearings*, *supra* note 167, at 330 (testimony of Robert Chiesa, Chairman, Special RICO Coordinating Committee, ABA) (recommending an amendment that would specify “that the conduct element requires some policy-making power over the affairs of the enterprise”).

180. Apart from sources cited *supra* note 179, the AFL-CIO proposal is in *1987 Senate Hearings*, *supra* note 167, at 304; and *1989 House Hearings*, *supra* note 156, at 253. The ABA proposal is in *1991 House Hearing*, *supra* note 167, at 144, 149. Additionally, the House Judiciary Committee twice reported out bills providing that RICO civil remedies were to be used only “against major participants” in criminal conduct. H.R. REP. NO. 102-312, at 7. See also H.R. REP. NO. 101-975, at 15 (1990).

181. See S. REP. NO. 101-269, at 7 (1990) (reporting a proposed amendment to § 1962 offered by Senator Humphrey and supported by the American Civil Liberties Union (“ACLU”) and Americans United for Life, which would have excluded from the definition of “racketeering activity” all nonviolent protests or demonstrations undertaken for reasons other than economic advantage); Civil RICO Clarification Act of 1998, H.R. 4245, 105th Cong. § 3 (1998) (eliminating extortion as a predicate offense for civil RICO purposes).

182. See, e.g., *Ne. Women’s Ctr., Inc. v. McMonagle*, 868 F.2d 1342, 1349–50 (3d Cir. 1989) (upholding a broad district court jury instruction on extortion); *United States v. Arena*, 180 F.3d 380, 394 (2d Cir. 1999) (affirming convictions for extortion where antiabortion protesters interfered with victims’ “right to conduct a business free from threats of violence and physical harm”); *Nat’l Org. for Women, Inc. v. Scheidler*, 267 F.3d 687, 695, 709 (7th Cir. 2001) (affirming a civil RICO award of \$257,000 and holding that the Hobbs Act covers protesters’ actions interfering with clinics’ rights to deliver medical services), *rev’d*, 537 U.S. 393 (2003).

the connection between the two federal statutes in that the proposed reforms would not have changed either law outside the context of their interaction.

Although the abortion-related circumstances of the proposed reforms led to partisan divisions among members of the judiciary committees,¹⁸³ the amendment to restrict civil RICO suits alleging extortion against nonviolent protesters received support from the American Civil Liberties Union (“ACLU”).¹⁸⁴ The proposed revision also was endorsed by Robert Blakey, who had helped draft RICO in 1970 as an aide to Senator McClellan. Blakey urged legislators to clarify the difference between two crimes: the RICO-included offense of extortion and the RICO-excluded offense of coercion.¹⁸⁵ Blakey elaborated on this distinction between extortion—which “classically was a seizing of property”¹⁸⁶—and coercion—which “is an interference with autonomy”¹⁸⁷—by invoking the New York common law concept of extortion as incorporated into the Hobbs Act.¹⁸⁸

Neither the proposals to limit the scope of “conduct or participate” nor the proposals to restrict the meaning of “extortion” were enacted by Congress. These reforms, however, were effectively adopted by the Supreme Court as part of its second generation of decisions interpreting civil RICO.

B. SUPREME COURT DECISIONS CONSTRAINING CIVIL RICO

As previously discussed, a trio of early Supreme Court decisions interpreted RICO provisions very broadly, indeed more broadly than the enacting Congress would have wanted.¹⁸⁹ By contrast, starting in 1993, the Court decided a second generation of cases confining the reach of civil RICO.¹⁹⁰ These later decisions were issued *after* unsuccessful efforts by

183. See, e.g., 1998 House Hearing, *supra* note 169, at 1–7 (reporting members’ explanations of their disagreements with respect to the antiabortion protests at issue).

184. See *id.* at 108–10 (statement of Louis Bogard, Senior Staff Attorney, ACLU); S. REP. NO. 101-269, at 7.

185. See 1998 House Hearing, *supra* note 169, at 23–29 (statement of G. Robert Blakey).

186. *Id.* at 26.

187. *Id.*

188. *Id.* at 36–38 (discussing New York common law and the Hobbs Act, submitted as part of written testimony).

189. See *supra* Part II.C (discussing *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479 (1985); *H.J. Inc. v. Nw. Bell Tel. Co.*, 492 U.S. 229 (1989); and *Nat’l Org. for Women, Inc. v. Scheidler (Scheidler I)*, 501 U.S. 249 (1994)).

190. I refer here principally to *Reves v. Ernst & Young*, 507 U.S. 170 (1993); *Scheidler v.*

Congress to override *Sedima* and otherwise to restrict the scope of civil RICO's operation. The majority opinions continued to rely on the same language-based approach used in the 1980s.¹⁹¹ Yet the Court's constraining interpretations echo post-*Sedima* proposals to modify this RICO language—proposals that had failed to secure approval in Congress.

In *Reves v. Ernst & Young*, the issue was whether an accounting firm's conduct during a series of audits was sufficient to expose it to RICO liability under § 1962(c).¹⁹² Resolving a split in the circuits,¹⁹³ the Court held that individuals or entities must participate in the operation or management of the enterprise itself in order to be subject to liability under § 1962(c).¹⁹⁴ Justice Blackmun for the majority rejected the Justice Department's position, relying on close linguistic analysis to conclude that the phrase "participate . . . in the conduct of [an] enterprise's affairs" requires some part in directing those affairs.¹⁹⁵ Blackmun dismissed efforts to invoke RICO's "liberal construction" clause, a clause the Court had embraced in its earlier expansive decisions;¹⁹⁶ he explained that the clause was "not an invitation to apply RICO to new purposes that Congress never intended."¹⁹⁷

The Court's narrowing construction of § 1962(c) closely parallels the ABA and AFL-CIO proposals to amend the section that had been offered without success between 1985 and 1991.¹⁹⁸ Although the majority resisted arguments to impose an even narrower interpretation,¹⁹⁹ its decision to

National Organization for Women, Inc. (Scheidler II), 537 U.S. 393 (2003); and *Wilkie v. Robbins*, 551 U.S. 537 (2007). Two other cases narrowing the civil RICO scope, *Anza v. Ideal Steel Supply Corp.*, 547 U.S. 451 (2006); and *Beck v. Prupis*, 529 U.S. 494 (2000), are discussed briefly in footnotes. Not every decision after 1993 restricts the scope of civil RICO. See, e.g., *Cedric Kushner Promotions v. King*, 533 U.S. 158 (2001); *Scheidler I*, 510 U.S. 249. But the thrust of the three key decisions is important for our purposes.

191. The majorities in *Beck*, *Scheidler II*, *Anza*, and *Wilkie* do not rely at all on RICO legislative history. The majority in *Reves* invokes legislative history in a supportive sense, to reinforce its basic textual analysis. See *Reves*, 507 U.S. at 179–83.

192. *Id.* at 173–77.

193. See *id.* at 177 (referencing a split in circuits).

194. *Id.* at 179, 184–85 (stating the "operation or management" test).

195. *Id.* at 177–79 (quoting 18 U.S.C. § 1962(c) (2000)); *id.* at 171 (referencing the Justice Department's position as amicus). The majority also invoked legislative history to reinforce its text-based analysis, a portion of the opinion not joined by Justices Scalia or Thomas. See *id.* at 172 n.1, 179–83.

196. See *Sedima, S.P.R.L. v. Imrex, Co.*, 473 U.S. 479, 497–98 (1985) (quoting Organized Crime Control Act of 1970, Pub. L. No. 91-452, § 904(a), 84 Stat. 922, 947 (1970)); *H.J. Inc. v. Nw. Bell Tel. Co.*, 492 U.S. 229, 248–49 (1989).

197. *Reves*, 507 U.S. at 183.

198. See *supra* notes 179–80 and accompanying text.

199. See *Reves*, 507 U.S. at 179 n.4 (disagreeing with the D.C. Circuit's suggestion that § 1962(c)

restrict the scope of the “conduct or participate” language was important and also controversial. In addition to the circuit split and the Justice Department’s opposition, dissenting Justices Souter and White objected that the words of § 1962(c) were far from clear and the Court therefore should have relied on the “liberal construction” clause as it had done in prior cases.²⁰⁰

Ten years after *Reves*, the Court issued a second major decision narrowing the scope of civil RICO, this time related to the concept of extortion.²⁰¹ In *Scheidler v. National Organization for Women, Inc.* (*Scheidler II*), the Court reviewed a RICO treble damages award against abortion protesters based on lower court findings that the protesters had violated federal and state extortion law.²⁰² The issue before the Justices following trial of the RICO claim was whether the protesters committed extortion within the meaning of the Hobbs Act, 18 U.S.C. § 1951, which forms the basis for extortion as a predicate offense under RICO.²⁰³ Writing for an eight-member majority, Chief Justice Rehnquist held that because the protesters did not “obtain property” from either the National Organization for Women (“NOW”) or the abortion clinics, there could be no extortion under the Hobbs Act as a matter of law and the finding of a RICO violation must be reversed.²⁰⁴

The majority emphasized that the Hobbs Act definition of extortion was closely modeled on the Penal Code of New York, and that under New York case law prior to the passage of the Hobbs Act, the “obtaining of property” requirement included two distinct components: depriving another of property and acquiring that property for oneself.²⁰⁵ The majority also

requires “significant control over or within an enterprise” (quoting *Yellow Bus Lines, Inc. v. Drivers Local Union 639*, 913 F.2d 948, 954 (D.C. Cir. 1990) (en banc) (emphasis added)).

200. See *id.* at 187–89 (Souter and White, JJ., dissenting).

201. In the interim, the Court decided *Beck v. Prupis*, holding that a person injured by an overt act undertaken in furtherance of a RICO conspiracy (in this instance terminating employees for refusing to participate in RICO activities) does not have a cause of action under § 1962(c) because the overt act was not otherwise wrongful under RICO. See *Beck v. Prupis*, 529 U.S. 494, 504–06 (2000).

202. *Nat’l Org. for Women, Inc. v. Scheidler*, 267 F.3d 687, 694–95 (7th Cir. 1994), *rev’d*, 537 U.S. 393 (2003). The Court had previously held that the clinics subjected to these protests had standing under RICO even though the protesters lacked any economic motive for their conduct. See *Nat’l Org. for Women, Inc. v. Scheidler (Scheidler I)*, 510 U.S. 249, 256–62 (1994).

203. See 18 U.S.C. § 1961(1)(B) (2006) (defining “racketeering activity” to include “any act which is indictable under . . . section 1951 (relating to interference with commerce, robbery, or extortion)”); *Scheidler II*, 537 U.S. at 397 (discussing the issue presented).

204. See *Scheidler II*, 537 U.S. at 402–11. The Hobbs Act defines “extortion” to mean “the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.” 18 U.S.C. § 1951(b)(2) (emphasis added).

205. *Scheidler II*, 537 U.S. at 403 (discussing 18 U.S.C. § 1951(b)(2)).

noted that the Court itself had embraced New York's two-pronged approach when it construed the Hobbs Act in a seminal decision.²⁰⁶ Chief Justice Rehnquist then determined that the "acquisition" prong of the "obtaining property" requirement had not been satisfied. The protesters may have deprived clinic operators of a property right of exclusive control over business assets, but they did not acquire such a right themselves: they "neither pursued nor received 'something of value from' respondents that they could exercise, transfer, or sell."²⁰⁷ The majority added that apart from vindicating the express language of the Hobbs Act, the requirement that property be "obtained" comported with the longstanding distinction between extortion and the separate crime of coercion under New York law. Coercion was a lesser offense, one that did not involve acquisition of property but rather the use of force or violence to compel or restrict the actions and decisions of another—such as the use of force to compel a business to enter into a labor agreement with a union.²⁰⁸

Because the clinic protesters did not engage in extortion within the meaning of the Hobbs Act, they did not commit a federal predicate offense under RICO. For similar reasons, the majority reversed the lower court's finding that the protesters had committed extortion under state law, a distinct RICO predicate offense. Here, the majority relied on its own precedents and the practice in most states to conclude that for RICO purposes, conduct charged as a matter of state law "must be capable of being generically classified as extortionate" consistent with Hobbs Act requirements.²⁰⁹ In a brief concurring opinion, Justices Ginsburg and Breyer lauded the Court's unwillingness "to extend RICO's domain further by endorsing the expansive definition of 'extortion' adopted by the Seventh Circuit."²¹⁰ They also noted that the contrary position taken by NOW, and also by the Justice Department, might well have made RICO extortion applicable to the civil rights sit-ins of the 1960s.²¹¹

The Court's approach in imposing constraints on the RICO predicate

206. See *id.* at 404 (discussing *United States v. Enmons*, 410 U.S. 396, 406 n.16 (1973)).

207. *Id.* at 405 (quoting *United States v. Nardello*, 393 U.S. 286, 290 (1969)).

208. See *id.* at 405–06 (relying specifically on *People v. Kaplan*, 269 N.Y.S. 161 (N.Y. App. Div. 1934)). Given the well-settled distinction between extortion and coercion, Congress's decision when drafting the Hobbs Act to include extortion but omit coercion was significant in construing the scope of the extortion provision. *Id.* at 406. Chief Justice Rehnquist recognized there was some overlap between the two crimes in that extortion requires using coercive conduct to obtain property, but he noted the basic distinction between these offenses persists to the present day. *Id.* at 407–08.

209. *Id.* at 409; *id.* at 409–10 (relying inter alia on *Nardello*, 393 U.S. 286, and *Taylor v. United States*, 495 U.S. 575 (1990)).

210. *Id.* at 412 (Ginsburg and Breyer, JJ., concurring).

211. See *id.* at 411 n.*.

offense of extortion bears a marked resemblance to the positions urged by groups and individuals who sought to amend RICO without success in the 1990s. Both Robert Blakey and the ACLU raised the civil rights analogy when testifying before Congress in support of proposals to restrict the scope of extortion.²¹² Blakey also testified specifically and at some length about the need for an amendment to separate extortion from coercion, invoking the Hobbs Act definition and its roots in New York law.²¹³ Moreover, the Court's restrictive interpretation in 2003 was by no means self-evident. As Justice Stevens noted in dissent, circuit courts had regularly held that using force or violence to attempt to compel a victim to abandon its business operations qualified as extortion under the Hobbs Act and RICO, and the executive branch fully supported this position.²¹⁴

Four years after *Scheidler II*, the Court reinforced its confining approach to extortion in *Wilkie v. Robbins*.²¹⁵ In *Wilkie*, the U.S. Bureau of Land Management ("BLM") had allegedly engaged in a campaign of administrative harassment and intimidation in an effort to force a Wyoming rancher (Robbins) to re-grant an easement that had been previously conferred by his predecessor.²¹⁶ Robbins brought suit against various BLM officials under RICO alleging extortion and also under the Fifth Amendment. The lower courts declined motions to dismiss both claims, but the Supreme Court reversed.²¹⁷

Writing for a unanimous Court on the RICO claims, Justice Souter held that the Hobbs Act has no application when the federal government is the intended beneficiary of allegedly extortionate conduct.²¹⁸ The Court recognized that at common law the crime of extortion was aimed at public officials. That offense, however, had addressed the harm of "public corruption, by the sale of public favors for private gain," not injuries resulting from "overzealous efforts to obtain property on behalf of the Government."²¹⁹ The Court then rejected the separate RICO claim brought

212. See 1998 House Hearing, *supra* note 169, at 26 (statement of G. Robert Blakey); *id.* at 108–10 (statement of Louis Bograd, Senior Staff Attorney, ACLU). See also sources cited *supra* note 181 (discussing a proposed 1990 amendment supported by the ACLU).

213. See 1998 House Hearing, *supra* note 169, at 36–40.

214. See *Scheidler II*, 537 U.S. at 415–16 (Stevens, J., dissenting); *id.* at 401 (majority opinion) (discussing the Solicitor General's amicus brief).

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

216. *Id.* at 541–48.

217. *Id.* at 548–49.

218. *Id.* at 563.

219. *Id.* at 564. Justice Souter added that while the Hobbs Act had expanded the common law offense to include private actors, Congress had "retain[ed] the core idea of extortion as a species of corruption, akin to bribery." *Id.* at 564 n.12. The majority noted an earlier decision applying the Hobbs

under a state blackmail statute, relying on *Scheidler II*'s holding that conduct not "capable of being generically classified as extortionate" cannot survive on a theory of being derived from state law.²²⁰

The Court also rejected Robbins's Fifth Amendment claim, which alleged that he had been vindictively retaliated against by BLM officials for refusing to grant an easement.²²¹ Writing for seven members, Justice Souter addressed the lawfulness of the federal government's regulatory harassment campaign, a course of conduct in important respects analogous to union comprehensive campaigns.

Justice Souter acknowledged that BLM officials' coordinated effort to pressure Robbins through a series of agency actions and lawsuits over a period of six years had the capacity to "deplete[] the spirit along with the purse."²²² Accordingly, the government's course of dealing warranted analysis and review as a whole rather than simply the sum of its parts. The majority concluded, however, that this campaign of regulatory harassment, undertaken to further the legitimate purpose of securing access to a neighbor's land, was a lawful form of hard bargaining aimed at improving the federal government's negotiating position.²²³

The Court recognized that a few instances of coercive government conduct alleged by Robbins could, if proven, constitute unlawful behavior going beyond hard bargaining. But the great majority of allegations involved activities that fell within the government's legitimate enforcement power.²²⁴ For the Court, the lawfulness of a hard bargaining campaign like this one did not depend on the government's having a spiteful or malicious motive. Rather, what transforms a campaign of hard bargaining into one of

Act to a union's use of violence and threats in order to secure jobs and pay for its members. There the Court had stated that extortion did not require the person obtaining property to receive direct benefits. *Id.* at 566 (discussing *United States v. Green*, 350 U.S. 415, 420 (1956)). It did not follow, however, that the Hobbs Act or RICO were meant to apply to public officials in the absence of such direct benefits. To hold otherwise could well allow the fear of civil claims for treble damages to "take the starch out of regulators who are supposed to bargain and press demands vigorously on behalf of the Government and the public." *Id.* at 567.

220. *Id.* at 567 (quoting *Scheidler v. Nat'l. Org. for Women, Inc. (Scheidler II)*, 537 U.S. 393, 409 (2003)).

221. *See id.* at 555–62.

222. *See id.* at 555.

223. *See id.* at 557–58. Justice Ginsburg, joined by Justice Stevens, dissented from this holding; on their view of the facts, viewed most favorably to Robbins on a motion to dismiss, the pattern of severe and pervasive government harassment went beyond hard bargaining to something like "the armed thug's demand: 'Your money or your life.'" *Id.* at 580 n.7 (Ginsburg and Stevens, JJ., dissenting).

224. *See id.* at 559–60 (majority opinion).

unlawful retaliation is that “the antagonistic acts by the officials extend beyond the scope of acceptable means for accomplishing the legitimate purpose They are ‘too much.’”²²⁵ In this instance, where at most a small handful of government actions over six years extended beyond acceptable means, there was no cognizable Fifth Amendment claim. To allow such a claim based on the undue zeal of government employees in exercising lawful enforcement powers would “invite an onslaught” of such lawsuits thereby undermining overall government enforcement.²²⁶

The Court’s decisions in *Reves*, *Scheidler II*, and *Wilkie*, limiting the applicability of civil RICO, contrast sharply with the earlier expansive majority opinions in *Sedima* and its progeny. These narrowing constructions are especially interesting given the intervening RICO developments in Congress. The failure to override *Sedima* or otherwise to limit the scope of civil RICO despite prolonged and serious efforts suggests Congress was prepared, however reluctantly, to tolerate RICO’s intrusion into a range of garden variety private business disputes. The failure to enact specific statutory amendments narrowing “conduct or participate” under § 1962 or limiting “extortion” under § 1961 reinforces this perception. The Court, however, was undeterred by these rejected congressional proposals. In *Reves* and *Scheidler II*, it construed the unamended RICO provisions in ways that effectively adopted restrictions comparable to what Congress had failed to enact. In each case, the Court did so without even mentioning Congress’s unsuccessful efforts. On what basis might the Court simply have ignored this rather high-profile legislative inaction?

C. DISREGARDING REJECTED CONGRESSIONAL PROPOSALS

There is an ongoing debate among judges and legal scholars about whether to attribute meaning to congressional silence.²²⁷ The strand of legislative inaction doctrine arguably relevant here is the Rejected Proposal Rule. When a conference committee, a chamber of Congress, or a standing

225. *Id.* at 558 n.10.

226. *Id.* at 562.

227. See, e.g., *Johnson v. Transp. Agency*, 480 U.S. 616, 629 n.7 (1987) (disagreeing with Justice Scalia’s dissent regarding the weight of Congress’s failure to act); *id.* at 671–72 (Scalia, J., dissenting) (criticizing the majority opinion’s reliance on congressional inaction as support for its conclusion); *Flood v. Kuhn*, 407 U.S. 258, 282–84 (1972) (finding “positive inaction” when Congress repeatedly rejected amendments to override earlier Supreme Court precedents). See generally William N. Eskridge, Jr., *Interpreting Legislative Inaction*, 87 MICH. L. REV. 67 (1988) (discussing three interpretive doctrines regarding the meaning of legislative inaction); John C. Grabow, *Congressional Silence and the Search for Legislative Intent: A Venture into “Speculative Unrealities,”* 64 B.U. L. REV. 737 (1984) (criticizing judicial reliance on congressional silence).

committee has failed to approve certain language proposed to amend a statute, the Court often refuses to construe the statute along the lines of the unenacted proposal.²²⁸

Often is by no means always, however. William Eskridge has identified numerous cases in which the Court refuses to attribute significance to the fact a proposal has been rejected,²²⁹ and he maintains that when doing so the Justices tend to emphasize how the rejected proposal differs materially from the issue litigated before the Court.²³⁰

This factor may help explain the approach in *Scheidler II*. The legislative proposals reported out of committee in 1990 and addressed during committee hearings in 1998 would have excluded from RICO's definition of "racketeering activities" all forms of nonviolent public speech undertaken for noneconomic reasons,²³¹ or would have excluded from civil RICO coverage any racketeering activity comprised of acts or threats involving extortion.²³² The question before the Court in *Scheidler II* involved the meaning of extortion as separately defined under the Hobbs Act—whether the right to pursue certain individual or business activities was "property" that had been "obtained" by clinic protesters under that statute.²³³ There also are differences between the issue litigated in *Reves* and the relevant unsuccessful congressional proposals, although the differences there seem less stark.²³⁴

228. See, e.g., *Monessen Sw. Ry. Co. v. Morgan*, 486 U.S. 330, 338–39 & n.8 (1988) (inferring significance from the failure of a proposal to receive committee approval); *Bob Jones Univ. v. United States*, 461 U.S. 574, 600 (1983) (same); *Burlington N. R.R. v. Bhd. of Maint. of Way Employees*, 481 U.S. 429, 439–40 (1987) (inferring significance from the failure of a proposal on the floor of one House); *Univ. Research Ass'n, Inc. v. Coutu*, 450 U.S. 754, 777–80 (1981) (same). See also Eskridge, *supra* note 227, app. 3 at 134–36 (listing twenty-seven Supreme Court decisions between 1962 and 1988 that inferred significance from inaction by a standing committee, and twenty-one Supreme Court decisions in the same period that inferred significance from inaction on the floor of one chamber).

229. Eskridge, *supra* note 227, app. 3, at 134–37 (listing fourteen Supreme Court decisions inferring no significance from inaction by a standing committee, and fourteen Supreme Court decisions inferring no significance from inaction on the floor of one chamber).

230. See *id.* at 87–88 (examining two illustrative Supreme Court decisions).

231. See S. REP. NO. 101-269, at 17 (1990) (describing the text of section 3 of the approved bill).

232. See Civil RICO Clarification Act of 1998, H.R. 4245, 105th Cong. § 3 (1998). This bill was discussed at the 1998 House hearing. See *1998 House Hearing*, *supra* note 169, at 5–10. An additional bill introduced in the 105th Congress focused on the "obtaining of property" issue later decided by the Court in *Scheidler II*, but no hearings were ever held related to this bill. See S. 2614, 105th Cong. § 2 (1998) (defining "extortion" for RICO purposes to require a taking of tangible or intangible property).

233. *Scheidler v. Nat'l Org. for Women, Inc. (Scheidler II)*, 537 U.S. 393, 400–01 (2003).

234. Compare *Reves v. Ernst & Young*, 507 U.S. 170, 176–77 (1993) (explaining a grant of certiorari to resolve a circuit court split over whether § 1962(c) requires proof that a RICO defendant has participated in the operation or management of the enterprise), with RICO Amendments Act of 1991, H.R. 1717, 102d Cong. § 3 (1991) (proposing to amend § 1964(c) to require that a RICO

Still it is somewhat puzzling that the Court in *Reves* and *Scheidler II* never even alluded to Congress's failed efforts to narrow the scope of the RICO text it is called on to interpret. Given the Justices' general level of interest in attempts to revise RICO,²³⁵ and the extended debates that took place in committees on these particular matters, Congress's record of inaction on RICO reform might have warranted some mention.

The Court's silence regarding rejected proposals in Congress may well reflect a combination of influences at work. First, the parties' briefs submitted to the Justices made virtually no mention of Congress's failed efforts with respect to the meaning of § 1962(c) in *Reves* or the "obtaining property" issue in *Scheidler II*.²³⁶ These failures involved proposals to modify or override lower court constructions of the 1970 RICO text rather than Supreme Court interpretations. The parties evidently decided that resolving tensions among various lower court rulings²³⁷ did not call for any weight to be assigned to what was merely committee commentary on those rulings.²³⁸ Additionally, some Justices are strongly opposed to relying on congressional inaction for any reason. Justice Scalia has expressed this

defendant be a "major participant" in the criminal conduct responsible for the plaintiff's injury), and sources cited *supra* notes 179–80 (proposing, on behalf of the AFL-CIO and ABA, that § 1962(c) be amended to require that a civil RICO defendant exercise some supervisory or policymaking powers over the affairs of the enterprise).

235. See, e.g., *H.J. Inc. v. Nw. Bell Tel. Co.*, 492 U.S. 229, 236 (1989) (noting Congress's inaction in four years since *Sedima*); *Sedima, S.P.R.L. v. Imrex, Co.*, 473 U.S. 479, 499 (1985) (inviting Congress to correct the Court's expansive interpretation); Rehnquist, *supra* note 158, at 67.

236. The parties in *Reves* did not advance any rejected proposal arguments in their main briefs. See Brief for Petitioners, *Reves*, 507 U.S. 170 (No. 91-886) (making no reference to legislative history); Brief for the Respondent at 23–24, *Reves*, 507 U.S. 170 (No. 91-886) (relying only on the 1969–1970 legislative history). But see Reply Brief for Petitioners at 9 & n.2, *Reves*, 507 U.S. 170 (No. 91-886) (relying briefly on Congress's failure to enact a specific "auditors' exemption" in 1985 and 1987 to support its argument against judicial creation of such an exemption). In *Scheidler II*, petitioner Operation Rescue invoked the 1998 House hearing testimony but only to illustrate its argument about the risk of RICO's being used against civil rights protesters. See Brief for Petitioner Operation Rescue at 27, *Scheidler II*, 537 U.S. 393 (Nos. 01-1118, 01-1119). The respondents would have been the logical party to invoke a congressional inaction argument based on the unsuccessful 1998 House proposal, but they did not do so. See Brief for Respondents, *Scheidler II*, 537 U.S. 393 (Nos. 01-1118, 01-1119). Indeed, when the petitioners made their own legislative inaction argument, relying on the House's failure to vote on a 1972 Senate amendment related to a separate issue in the case, the respondents dismissed the argument as based on "particularly unreliable uses of legislative history." *Id.* at 44.

237. See *Reves*, 507 U.S. at 176–77 (discussing the circuit court split). See also *supra* note 182 (listing several circuit court decisions that affirmed findings of extortion by antiabortion advocacy groups).

238. See James J. Brudney *Congressional Commentary on Judicial Interpretations of Statutes: Idle Chatter or Telling Response?*, 93 MICH. L. REV. 1, 66–68, 95–97 (1994) (discussing unreliability of committee report commentary disapproving of judicial interpretation with respect to a textual provision that is not being corrected or modified).

view in unequivocal terms,²³⁹ and Justice Kennedy seems similarly disinclined.²⁴⁰

In the end, though, the Court did more than simply ignore Congress's inaction. The decisions in *Reves* and *Scheidler II* are consistent with constraints unsuccessfully pursued by Congress, and these legislative efforts may well have encouraged the Justices to revisit their prior hands-off approach. By the 1990s, a number of Justices had expressed a visceral discomfort with civil RICO's profound effect on private litigation and its federalization of areas formerly reserved to state common law.²⁴¹ The Court could have curtailed the initial flood of RICO civil actions back in the 1980s, but a bare majority in *Sedima* concluded they were estopped from doing so by the text Congress had enacted.²⁴² Subsequently, however, the Justices apparently determined that their decisions should foreclose *additional* expansions of RICO's scope, just as their recent decision in *Wilkie* foreclosed an analogous constitutional cause of action to avoid opening new floodgates.²⁴³

Regardless of whether these second-generation decisions reflect primarily an abiding concern over the further expansion of civil RICO or a more conventional doctrinal analysis, the Court in effect decided that congressional gridlock was evidence of an inability to resolve widely perceived problems. Having discounted Congress's failure to enact RICO reform, the Court has signaled a willingness to exercise its own constraints when interpreting the language and concepts of civil RICO. That willingness helps to frame and guide an appropriate solution for the extortion cause of action at issue.

239. See *Rapanos v. United States*, 547 U.S. 715, 750–52 (2006); *Johnson v. Transp. Agency*, 480 U.S. 616, 671–72 (1987) (Scalia, J., dissenting).

240. See *Cent. Bank of Denver v. First Interstate Bank of Denver*, 511 U.S. 164, 187 (1994); *Patterson v. McLean Credit Union*, 491 U.S. 164, 175 n.1 (1989), *superseded by statute*, Civil Rights Act of 1991, Pub. L. No. 102-166, § 101, 105 Stat. 1072, *as recognized in Jones v. R.R. Donnelley & Sons Co.*, 541 U.S. 369, 372–73 (2004).

241. See, e.g., *H.J. Inc. v. Nw. Bell Tel. Co.*, 492 U.S. 229, 255 (1989) (Scalia, J., concurring, joined by Rehnquist, C.J., and O'Connor & Kennedy, JJ.). See also *supra* notes 158–59 and accompanying text (describing Rehnquist's speech urging RICO reform).

242. See *Sedima, S.P.R.L. v. Imrex, Co.*, 473 U.S. 479, 488–90 (1985).

243. See *infra* Part IV.B.2 (discussing *Wilkie v. Robbins*, 551 U.S. 537 (2007)).

IV. RICO, UNIONS, AND EXTORTIONATE CONDUCT

A. KEY DEFINITIONAL QUESTIONS REGARDING EXTORTION UNDER THE HOBBS ACT

Initially, it is important to recognize that federal labor law legitimates and indeed protects what might in ordinary meaning terms be thought of as extortionate activity. Section 7 of the NLRA establishes that employees working with unions have rights to organize and to bargain collectively with their employers. They also have the right, in broader terms, “*to engage in other concerted activities for the purpose of . . . mutual aid or protection.*”²⁴⁴ These lawful concerted activities can extend well beyond the immediate employer-employee relationship,²⁴⁵ and lawful conduct outside that relationship is often part of a tough bargaining strategy to impose economic pressure on a business.

Activities such as rallies, protests, staged media events, and also appeals to agencies, legislatures, or courts, are undertaken with the aim of instilling a fear of economic loss that will encourage management to reach an agreement with the union. As discussed in Part IV.B, constitutional protections may arguably attach to this range of activities when engaged in by any group, not just unions. In addition, however, the NLRA accords special statutory protection when it is workers and unions who undertake such activities to advance their cause. In attempting to reconcile federal labor law with RICO, the key issue is what distinguishes this type of hard bargaining by unions from extortion as defined under the Hobbs Act, which is the indictable offense specified in RICO.

1. Is the Employer’s Property Obtained?

As labor relations scholars have observed, union comprehensive campaigns typically feature either organizing-related or bargaining-related objectives.²⁴⁶ The union seeks a neutrality agreement or card check recognition in the organizing setting, and it is pursuing an initial or

244. 29 U.S.C. § 157 (2006) (emphasis added).

245. See *Eastex, Inc. v. NLRB*, 437 U.S. 556, 565 (1978) (holding that the “mutual aid or protection” clause protects employee efforts to “improve their lot as employees through channels outside the immediate employee-employer relationship”); *Compuware Corp. v. NLRB*, 134 F.3d 1285, 1290 (6th Cir. 1998) (protecting employees’ complaints to their employers’ clients about working conditions); *Hasbrouck v. Sheet Metal Workers Local 232*, 586 F.2d 691, 694 n.3 (9th Cir. 1978) (observing that the definition of a labor dispute under the NLRA is very broad and stating that “[r]arely have courts found concerted union activity to fall outside this broad definition”).

246. See *supra* notes 27–50 and accompanying text.

renewed collective bargaining agreement in the post-recognition context. These campaigns aim to compel the employer to enter into some kind of agreement with the union. The campaigns clearly are *coercive* in attempting to restrict the employer's freedom of action. But are they also *extortionate* as contemplated in *Scheidler II*? Do the union or employees receive something of value from the employer—property that the union can “exercise, transfer, or sell”?²⁴⁷

Applying the analysis under *Scheidler II*, one can see the argument that the union's campaign interferes with an employer's intangible property rights but the union does not *acquire* any such property. A comprehensive campaign is an attempt to deprive the employer of its rights to exercise exclusive control over its business assets. The employer is being pressured to restrict or abandon its right to control the nature of the union recognition process covering its own employees, or the right to refuse to engage in collective bargaining with the union.²⁴⁸ The employer also is denied its right to do business with its customers free from repeated verbal attacks on its goodwill and reputation. These rights may qualify as intangible property rights,²⁴⁹ and the campaign surely represents an effort to coerce the employer into diminished exercise of those property rights. As in *Scheidler II*, however, the perpetrators of this barrage of criticism are not attempting to *obtain* the property rights that are the object of their coercive campaign. Unions do not seek to exercise for themselves, or to sell or transfer, the employer's right to refuse to enter into a neutrality agreement, or to oppose card check recognition or collective bargaining.

Admittedly, there is a difference between the antiabortion protesters in *Scheidler II*, whose “ultimate goal [was] ‘shutting down’ a clinic that performed abortions,”²⁵⁰ and the union protesters in a comprehensive

247. *Scheidler v. Nat'l Org. for Women, Inc. (Scheidler II)*, 537 U.S. 393, 405 (2003).

248. See, e.g., *Wackenhut Corp. v. SEIU*, 593 F. Supp. 2d 1289, 1296 (S.D. Fla. 2009); *Roman Restoration, Inc. v. Operative Plasterers' & Cement Masons' Int'l Ass'n of the U.S. & Can. Local No. 8*, No. 07-2991 (RBK), 2008 U.S. Dist. LEXIS 49940, at *4–12 (D.N.J. June 30, 2008).

249. Congress has overridden one Supreme Court decision holding that deprivations of “property” under the mail fraud statute did not include deprivations of an intangible right to honest services. See Pub. L. No. 100-690, § 7603(a), 102 Stat. 4181, 4508 (1988) (codified as amended at 18 U.S.C. § 1346 (2006)). *But cf.* *Cleveland v. United States*, 531 U.S. 12, 19–20 (2000) (stating that Congress's override of the Court's previous decision in *McNally v. United States*, 483 U.S. 350 (1987), did not resolve questions about whether forms of public corruption other than the public's right to honest services may qualify as property rights under the mail fraud statute). The Court in *Scheidler II* was careful to avoid overturning the Second Circuit's conclusion that intangible rights may qualify as property under the Hobbs Act. See *Scheidler II*, 537 U.S. at 402 n.6 (declining to reach, much less reject, the holding in *United States v. Tropiano*, 418 F.2d 1069, 1076 (2d Cir. 1969)).

250. *Scheidler II*, 537 U.S. at 405.

campaign, whose ultimate goal typically involves not an employer's shutdown but rather its continued operation under economic terms and conditions more favorable to the employees.²⁵¹ The fact that union campaigns aim to secure economic adjustments for "their side" in the context of an ongoing business relationship makes the issue of whether property is being acquired seem more complex.

Even with respect to less tangible property rights, there may be room for debate. One lower court has distinguished *Scheidler II* in a labor setting, holding that individuals active in organized crime obtained certain intangible property rights when they exercised those rights for their own ends.²⁵² In *United States v. Gotti*, the Second Circuit affirmed the extortion conviction of union officials and others who had sought to exercise for themselves the statutory rights of union members to free speech and democratic participation in union affairs.²⁵³ The evidence was that the defendants had directed delegates to vote for particular leadership candidates and had controlled elected officials' performance of their jobs—all in a way that yielded personal financial gains for the defendants.²⁵⁴ The *Gotti* court concluded this satisfied the "exercise, transfer, or sell" test under *Scheidler II*, adding that analogously culpable conduct by antiabortion protesters might include forcing clinic staff to provide entirely new kinds of medical services or to turn all operations over to the protesters.²⁵⁵

Nonetheless, unions in comprehensive campaigns are not exercising or attempting to exercise that kind of control. The analogy between union goals and the clinic protesters' goals in *Scheidler II* is especially clear with respect to neutrality and card check agreements. These agreements do not seek to control employers' economic assets or employees' less tangible rights of participation; they simply establish a process or ground rules under which the union can then make its sales pitch to the employees.²⁵⁶

251. In exceptional cases, a union campaign may seek to drive a corporate target out of business in the hope that the union will have a better chance to reach agreement with the target's purchaser or successor. See S. REP. NO. 102-111, at 22 (1991) (describing how once an employer hires permanent replacements during a strike, the union may feel compelled to work toward displacement of current management or sale of the firm). A union campaign aimed at forcing the company out of business may be deemed to have an illegitimate or wrongful purpose. See *Tex. Air Corp. v. Air Line Pilots Ass'n Int'l*, No. 88-0804, 1989 U.S. Dist. LEXIS 11149, at *16-17 (S.D. Fla. July 14, 1989).

252. *United States v. Gotti*, 459 F.3d 296 (2d Cir. 2006).

253. *Id.* at 302-06, 350. See also *United States v. Gotti*, No. 02 CR 606 (ILG), 2002 U.S. Dist. LEXIS 25177, at *9-18 (E.D.N.Y. June 10, 2002) (identifying defendants and charges).

254. See *Gotti*, 459 F.3d at 325.

255. See *id.* at 324-25.

256. See *Adcock v. Freightliner LLC*, 550 F.3d 369, 374 (4th Cir. 2008).

Unlike in *Gotti*, the union does not acquire or effectively exercise the employees' right to choose or reject union representation; it is the employees themselves who must still decide whether to select the union as their bargaining representative.²⁵⁷

In contrast to neutrality and card check, traditional property assets are more directly at stake in a collective bargaining agreement. The union typically seeks to extract pay increases, health benefits, and other improvements in working conditions that have a tangible economic value. Yet even when the campaign's goal is an initial or renewed collective bargaining agreement, the union is not seeking to acquire something of value to be exercised for its benefit as contemplated under *Scheidler II* or *Gotti*.²⁵⁸ A collective bargaining relationship offers elements of value to both the employer and the employees.²⁵⁹ In this respect, it differs from a competitor's business asset that is subject to appropriation for the financial profit of the union or its leaders.²⁶⁰ Rather than being regarded in suspect terms, collective bargaining agreements are viewed under federal law as presumptively iconic. In addition to offering distinct benefits to firms and workers, these agreements promote the congressionally approved public policy objectives of labor relations stability and peace.²⁶¹

That so many employers choose to resist reaching either neutrality and card check agreements or collective bargaining agreements indicates resistance is highly prized by the business community. Still, it is not easy to envision how the union obtains this right to resist in the way such

257. See *supra* note 34 and accompanying text (discussing Jarley and Maranto's findings that organizing-related campaigns do not guarantee union success even if a neutrality or card check agreement is reached, and employers' understanding of that fact).

258. See *Roman Restoration Inc. v. Operative Plasterers' & Cement Masons' Int'l Ass'n of the U.S. & Can. Local No. 8*, No. 07-2991 (RBK), 2008 U.S. Dist. LEXIS 49940, at *7-11 (D.N.J. June 30, 2008).

259. See RICHARD B. FREEMAN & JAMES L. MEDOFF, *WHAT DO UNIONS DO?* 7-22 (1984) (reporting that unions raise wages and fringe benefits for workers and diminish wage inequality within the unionized workforce and that unions also reduce employee quit rates, improve workforce stability, and in many economic sectors improve productivity due to lower rates of turnover, enhanced managerial performance in response to the union challenge, and more cooperative labor-management relations at the plant or office level).

260. See *Dooley v. Crab Boat Owners Ass'n*, 271 F. Supp. 2d 1207, 1213-14 (N.D. Cal. 2003) (holding that allegations of extortion under RICO survived a motion to dismiss where crab boat owners competing with the plaintiff sought through various coercive activities to gain control of the plaintiff's right to harvest crab during crab season).

261. See 29 U.S.C. § 151 (2006) (purpose statement). This iconic perspective may relate more to whether a property transfer is wrongful than to whether a transfer of tangible property is taking place. See *infra* Part IV.A.2. But see *Interstate Flagging, Inc. v. Town of Darien*, 283 F. Supp. 2d 641, 646-47 (D. Conn. 2003) (relying on *Scheidler II* to hold that union efforts to insist on certain job preferences did not amount to obtaining property from another).

acquisition has been understood under the Hobbs Act. But assuming arguendo that unions in comprehensive campaigns are somehow seeking to obtain an employer's right to refuse to reach an agreement, the next question is what exactly is the basis for that employer right?

2. Is the Employer Wrongfully Induced by Fear of Economic Loss?

Just as *Scheidler II* provides the clearest insights into the meaning of "obtain property," the Court's earlier decision in *United States v. Enmons* establishes the framework for analyzing whether a union's use of "force, violence, or fear" is "wrongful" under the Hobbs Act.²⁶² *Enmons* involved the use of force and violence during a lawful strike that resulted in damage to company property. The Court held that while "wrongful" seems to modify an extortionist's three main identified *methods* of obtaining property (violence, force, or fear), the term must mean something else.²⁶³ A reference to "wrongful violence" or "wrongful force" would be redundant inasmuch as the use of violence or force to obtain another's property is inherently wrongful.²⁶⁴ Instead, the Court reasoned, "wrongful" covers only situations in which "the obtaining of the property would itself be 'wrongful' because the alleged extortionist has no lawful claim to that property."²⁶⁵

Applying this ends-oriented construction of "wrongful," the *Enmons* Court held that violence in support of a lawful strike cannot qualify as Hobbs Act extortion although it may well constitute a state criminal offense.²⁶⁶ The Court's understanding of legitimate labor ends included not only the effort in *Enmons* to secure a new collective bargaining agreement providing already-represented employees with higher wages, but also efforts to organize a group of employees in support of union representation.²⁶⁷ By contrast, threats of force or violence to promote an *unlawful* labor objective—such as personal payoffs to union officials or wage payments for superfluous or unwanted services—are actionable under the federal statute.²⁶⁸ The majority opinion invoked decades of circuit court precedent to support its conclusion that the Act does not prohibit the use of

262. *United States v. Enmons*, 410 U.S. 396 (1973) (quoting 18 U.S.C. § 1951(b)(2) (1973)).

263. *Id.* at 399.

264. *Id.* at 399–400.

265. *Id.* at 400 (emphasis added).

266. *See id.* at 411–12.

267. *See id.* at 398 (seeking a new collective bargaining agreement); *id.* at 406 n.16 (seeking to organize workers).

268. *See id.* at 400, 406 n.16.

force to achieve legitimate labor objectives.²⁶⁹

The *Enmons* holding applies a fortiori to property obtained through fear of economic injury, which, unlike force or violence, is not inherently suspect as a form of pressure.²⁷⁰ Since *Enmons*, the lower courts have developed an approach to distinguishing lawful from wrongful objectives that covers *all* Hobbs Act allegations involving fear of economic loss, not simply allegations growing out of a labor dispute. As the Third Circuit observed in a leading nonlabor case, “[T]he fear of economic loss is a driving force of our economy that plays an important role in many legitimate business transactions.”²⁷¹ Accordingly, when one side to a business transaction uses fear of financial loss as leverage to engage in hard bargaining, the Hobbs Act does not cover such exploitative efforts so long as the exploiting party has a legitimate claim to the property.²⁷² At the same time, the so-called “claim of right” defense is negated when the alleged extortion victim “has a pre-existing entitlement to pursue his business interests free of the fear he is quelling by receiving value in return for transferring property to the defendant.”²⁷³ Put differently, what distinguishes lawful hard bargaining from wrongful Hobbs Act extortion is whether one party is entitled by law to be free from the economic fear being generated by the other party’s nonviolent yet coercive pressure tactics.²⁷⁴

In the context of labor relations, an employer has a right to be free from the fear caused by union campaign activities if the union’s conduct would be prohibited under relevant labor statutes.²⁷⁵ Moreover, the scope

269. See *id.* at 408–10.

270. The *Enmons* Court concluded that “wrongful” was meant to and did modify all three terms—force, violence, and fear. *Id.* at 399 & n.2. The decision was controversial among some members of Congress insofar as it immunized from Hobbs Act prosecution violent conduct in furtherance of legitimate union objectives. See, e.g., 128 CONG. REC. 3832 (1982) (remarks of Sen. Thurmond accompanying the introduction of S. 2189, a bill to override *Enmons*); 127 CONG. REC. 3407 (1981) (remarks of Sen. Thurmond accompanying the introduction of S. 613, a bill to override *Enmons*). But the focus on wrongful purpose was widely accepted with respect to the presumptively lawful means of fear of economic loss. See, e.g., *United States v. Clemente*, 640 F.2d 1069, 1077–78 (2d Cir. 1981).

271. *Brokerage Concepts, Inc. v. U.S. Healthcare, Inc.*, 140 F.3d 494, 523 (3d Cir. 1998).

272. *Id.* at 523–24; *United States v. Sturm*, 870 F.2d 769, 773 (1st Cir. 1989); *Clemente*, 640 F.2d at 1076–78.

273. *Brokerage Concepts*, 140 F.3d at 525 (quoting *Viacom Int’l v. Icahn*, 747 F. Supp. 205, 213 (S.D.N.Y. 1990), *aff’d on other grounds*, 946 F.2d 998 (2d Cir. 1991)).

274. See *United States v. Vigil*, 523 F.3d 1258, 1265 (10th Cir. 2008); *George Lussier Enters., Inc. v. Subaru of New England, Inc.*, 393 F.3d 36, 50 (1st Cir. 2004); *United States v. Tobin*, 155 F.3d 636, 640–41 (3d Cir. 1998) (Alito, J.); *McLaughlin Equip. Co. v. Servaas*, No. IP98-0127-C-T/G, 2004 U.S. Dist. LEXIS 13939, at *99–105 (S.D. Ind. Feb. 18, 2004).

275. Although the NLRA is the labor statute under which these campaigns are most often assessed, union conduct or objectives could be evaluated under the Railway Labor Act, the Federal

of prohibited union conduct extends beyond what might be viewed as corrupt activity. Thus, it would be wrongful under the Hobbs Act to engage in labor picketing or other coercive tactics in an effort to secure a collective bargaining agreement for a union that is not authorized to represent a majority of employees.²⁷⁶ Similarly, it would be problematic under the Hobbs Act for a union to demand that supervisors be included in a collective bargaining unit of nonsupervisors given that the NLRA definition of “employee” excludes supervisory personnel.²⁷⁷ Union pressures undertaken with the announced aim of forcing the employer to shut down entirely or to sell its business also might be deemed suspect under the Act.²⁷⁸

On the other hand, if the union’s demands are in pursuit of a lawful labor relations objective under the NLRA, then an employer has no right to be free from the coercive economic pressure associated with those demands. Union objectives that are legitimate under the NLRA include the goal of negotiating a new or continuing collective bargaining agreement on behalf of employees who have authorized the union to represent them. The achievement of such an agreement setting terms and conditions of employment is in fact the ultimate objective Congress had in mind when enacting the NLRA.²⁷⁹

A union’s effort to secure a neutrality agreement in aid of organizing efforts also is plainly a lawful objective. The NLRA for more than sixty years has promoted contractual arrangements between management and unions as conducive to labor peace.²⁸⁰ Such arrangements, including employer agreements to refrain from objecting to a union or to recognize a union upon proof of majority support secured outside the NLRB elections context, have long been regarded as important contributors to stable labor

Labor Relations Act, and perhaps other labor-related laws as well.

276. See *A. Terzi Prods. v. Theatrical Protective Union*, 2 F. Supp. 2d 485, 506–07 (S.D.N.Y. 1998) (Sotomayor, J.); *C & W Constr. Co. v. Bhd. of Carpenters & Joiners*, 687 F. Supp. 1453, 1457 (D. Haw. 1988).

277. See 29 U.S.C. § 152(3) (2006); *Domestic Linen Supply & Laundry Co. v. Cent. States, Se. & Sw. Areas Pension Fund*, 722 F. Supp. 1472, 1475–76 (E.D. Mich. 1989).

278. See *Mariah Boat, Inc. v. Laborers Int’l Union*, 19 F. Supp. 2d 893, 901 (S.D. Ill. 1998) (holding that if the union’s “sole objective [were] running [the employer] out of business,” such conduct may be considered a predicate act); *Tex. Air Corp. v. Air Line Pilots Ass’n*, No. 88-0804, 1989 U.S. Dist. LEXIS 11149, at *16–17 (S.D. Fla. July 14, 1989) (holding that the forced sale of a business is not a “legitimate labor objective” (quoting *United States v. Enmons*, 410 U.S. 396, 404 (1973))).

279. See 29 U.S.C. § 151 (setting forth the Act’s basic findings and purposes); *id.* § 158(a)(5), (b)(3), (d) (describing both sides’ duty to bargain in good faith in an effort to reach agreement).

280. Section 301 of the Taft-Hartley Act makes contracts between unions and employers enforceable in federal court. See *Brudney*, *supra* note 56, at 847–48 (discussing the lawfulness of neutrality agreements in detail).

relations.²⁸¹ Neutrality agreements might raise issues of legitimacy if they were effectively a form of premature recognition stifling genuine employee choice.²⁸² But the employees themselves are in no way bound by neutrality agreements—they remain free to express opposition to the union, and in fact a sizeable number continue to do so.²⁸³

Finally, the union objective of securing a voluntary card check arrangement, with or without a neutrality agreement, is entirely lawful under the NLRA. Nonelectoral pathways to securing representative status have been approved under the NLRA since 1935.²⁸⁴ Although a “preferred” status is accorded to recognition via election, there are a number of circumstances in which a majority card showing is sufficient to *require* that employers bargain with their union.²⁸⁵ And employers are always *permitted* to enter voluntarily into a bargaining relationship with a union that possesses a card majority.²⁸⁶

To be sure, employers also have rights under the NLRA. In particular, they have a right in the organizing setting to share with employees their

281. See *Raley’s & Commercial Workers’ Union, Local 558*, 336 N.L.R.B. 374, 385–86 (2001); *Goldsmith-Louison Cadillac Corp.*, 299 N.L.R.B. 520, 522 (1990); *Alpha Beta Co.*, 294 N.L.R.B. 228, 229–30 (1989); *Cam Indus.*, 251 N.L.R.B. 11, 11 (1980), *enforced*, 666 F.2d 411, 412–14 (9th Cir. 1982); *S.B. Rest of Framingham, Inc.*, 221 N.L.R.B. 506, 507–08 (1975).

282. See *Int’l Ladies’ Garment Workers’ Union v. NLRB*, 366 U.S. 731, 736 (1961) (finding a violation of 29 U.S.C. § 158(a)(2) based on the concern that an employer’s granting exclusive representative status to a union supported by only a minority of employees provides “a deceptive cloak of authority with which [the union can] persuasively elicit additional employee support”).

283. See *Adrienne E. Eaton & Jill Kriesky, Union Organizing Under Neutrality and Card Check Agreements*, 55 INDUS. & LAB. REL. REV. 42, 53 (2001) (reporting that unions lost approximately one out of five organizing campaigns in which they relied on neutrality and card check, and one-half of all campaigns involving neutrality agreements alone). Employees’ opposition may on occasion trigger hostility from the union or its supporters, but instances of improper pressure or reprisal can be fully addressed through existing NLRB procedures. See *Brudney, supra* note 56, at 848 n.134 (citing NLRB and circuit court decisions).

284. From 1935 to 1947, the NLRB was authorized to certify a union as a majority representative based simply on the showing of a card majority. Congress in 1947 restricted NLRB certification to NLRB election victories, but specified that employers remained obligated to recognize and bargain with a union *designated* by an employee majority even outside an NLRB election. See *Brudney, supra* note 56, at 857.

285. *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 600 n.17 (1969). The preferred status from certification includes a one-year bar on elections, a bar that a successor employer must honor as well. *Id.* at 588–89 & n.14. Cards are sufficient, however, if unfair labor practices seriously disrupt the election process or if employers themselves collected “the evidence” through polls, interrogation, or third-party card check. See *Brudney, supra* note 56, at 857–58.

286. *Dana Corp.*, 351 N.L.R.B. 434, 436 (2007) (noting that voluntary recognition of a union with majority support is “undisputedly lawful”). The provision in § 159(a) indicating that members may be “*designated or selected*” by a majority of employees contemplates that employers and employees may agree to enter into a collective bargaining relationship without waiting for an NLRB-supervised election. 29 U.S.C. § 159(a) (2006) (emphasis added). See also *Gissel*, 395 U.S. at 595–600.

opposition to having a union and also the right to demand an election rather than accede to a card check majority.²⁸⁷ And in a postrecognition context, employers have a right to reject in good faith any collective bargaining proposals put forward by the union.²⁸⁸ That employers enjoy these rights to resist union efforts at organizing or collective bargaining does not mean, however, that they have a right to be free from fears associated with union efforts to achieve *their own* legitimate labor objectives. Indeed, the effort to create a legal framework for addressing the conflicting objectives of unions and employers is what gave rise to the fundamental national policy of the NLRA—deferring to labor-management bargains reached on the basis of each side’s ability to exert economic pressure on the other. Accordingly, it is not surprising that both the NLRB and the appellate courts have upheld the basic lawfulness of neutrality agreements with or without card check provisions.²⁸⁹

B. ADDITIONAL QUESTIONS INVOLVING UNION ACTIVITIES AS POTENTIALLY EXTORTIONATE

1. Are the Union’s Key Campaign Tactics Constitutionally Protected?

For the reasons just presented, Hobbs Act extortion would seem not to encompass union efforts to coerce employers into signing a neutrality, card check, or collective bargaining agreement. These union efforts do not amount to the obtaining of property, and the union’s objectives also are not wrongful—on the contrary they are a central part of the federal labor law enterprise. Beyond this, there remains the question whether unions’ prototypical comprehensive campaign *methods* may be regarded as actionable under the Hobbs Act and RICO. This question of wrongful means in turn implicates First Amendment considerations on which the Supreme Court has offered substantial guidance. With respect to two types of activities that form the core of union comprehensive campaigns—

287. See 29 U.S.C. § 158(c) (protecting employer speech that does not include promises or threats); *Livingston Shirt Corp.*, 107 N.L.R.B. 400, 406–09 (1953) (approving captive audience speeches); *Linden Lumber Div. v. NLRB*, 419 U.S. 301, 304–10 (1974) (approving an employer’s right to demand an election without evidence of a good faith doubt as to the reliability of the union’s card majority).

288. See 29 U.S.C. § 158(d) (indicating that the duty of good faith does not include an obligation to reach agreement); *H.K. Porter Co. v. NLRB*, 397 U.S. 99, 108 (1970) (determining that the penalty for bad faith does not include compelled agreement to terms or conditions).

289. See *Adcock v. Freightliner LLC*, 550 F.3d 369, 374–76 (4th Cir. 2008); *Hotel Employees Local 57 v. Sage Hospitality Res.*, 390 F.3d 206, 219 (3d Cir. 2004); *Dana Corp.*, 351 N.L.R.B. at 436–37.

sharing disparaging information with neutral third parties and petitioning government for redress—the Court’s decisions suggest that the First Amendment presents a formidable barrier to civil RICO claims for extortion.

a. Negative Publicity Efforts

Looking first at a union’s publicity activities, in its 1988 decision in *Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Construction Trades Council*, the Court held that a union may lawfully undertake an informational campaign criticizing an employer’s business practices and urging consumers and other neutral parties to stay away.²⁹⁰ *DeBartolo* involved the union’s effort to generate a consumer boycott at a shopping mall where one tenant allegedly paid substandard wages and benefits.²⁹¹ The NLRA prohibits unions from using picketers to threaten or coerce third parties into boycotting an employer’s business.²⁹² The Court, however, voiced serious doubts that this prohibition would be constitutional if applied to handbilling or other forms of disparaging expression unaccompanied by the inherently threatening presence of picketers.²⁹³ In order to avoid such First Amendment problems, the Court held that unions may appeal to customers or other third parties to boycott the company, using essentially any form of expressive communication besides physical picketing.²⁹⁴

DeBartolo’s constitutionally influenced construction of the NLRA provides unions with protection comparable to what civil rights organizations and other advocacy groups enjoy when using social pressure or the threat of social ostracism to alter business behavior.²⁹⁵ One court of appeals expressed similar constitutional motivations when considering a union’s campaign of public disparagement that involved organizing-related objectives.²⁹⁶ The union had engaged in a series of negative publicity activities aimed at pressuring a third-party business to help the union secure a neutrality and card check agreement with one of the business’s major

290. *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575–80 (1988).

291. *Id.* at 570.

292. *See id.* at 578 (discussing 29 U.S.C. § 158(b)(4)).

293. *See id.* at 580 (explaining that picketing, as “a mixture of conduct and communication,” is qualitatively different from other modes of communication (quoting *NLRB v. Retail Store Employees*, 447 U.S. 607, 619 (1980) (Stevens, J., concurring))).

294. *See id.* at 580–83.

295. *See id.* at 576; *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 902–15 (1982); *Org. for a Better Austin v. Keefe*, 402 U.S. 415, 419 (1971).

296. *See Metro. Opera Ass’n, Inc. v. Local 100, Hotel Employees*, 239 F.3d 172 (2d Cir. 2001).

contractors.²⁹⁷ This campaign of leaflets, rallies, and other public criticism—directed at the third party’s board of directors as well as its donors and patrons—clearly involved harassing forms of communication intended to coerce the third-party neutral into action.²⁹⁸ But the Second Circuit concluded that “unless we are to depart from settled First Amendment principles, [the activities] are constitutionally protected.”²⁹⁹

Such constitutionally influenced protection does not automatically extend to unions’ disparaging communications when they are expressed in a form other than picketing. The Supreme Court has held that the *content* of union speech may be actionable under state defamation or libel law if the negative publicity directed toward an employer is shown to be knowingly or recklessly false and to cause actual damage.³⁰⁰ At the same time, the Court has made clear that this state law cause of action based on knowing or reckless falsehoods is to be narrowly drawn, because federal labor policy protects freedom of speech quite apart from First Amendment considerations.³⁰¹ In this regard, the Court has observed that labor disputes are “ordinarily heated affairs” and that union campaigns regularly fall short of being actionable under state libel law even when the campaigns are “characterized by bitter and extreme charges, . . . unfounded rumors, vituperations[,] . . . misrepresentations[,] and distortions.”³⁰²

The Court’s cautious approach to state law civil actions restricting union speech based on content parallels its announced reluctance to outlaw any union speech under the NLRA unless the speech is joined to some form of physical intimidation. Accordingly, efforts to penalize a union’s negative publicity efforts under the Hobbs Act—even if those efforts are vituperative or distortive—would likely not survive constitutional scrutiny.³⁰³

297. *Id.* at 174–75.

298. *See id.* at 175 (describing activities such as chanting and distributing pamphlets at rallies in front of the main business entrance, sending letters to the business’s directors and donors, and asking donors to discontinue their contributions); *id.* at 177 (noting the lower court’s finding that the union acted with a coercive motive).

299. *Id.* at 178. *See also* *Beverly Hills Foodland, Inc. v. United Food & Commercial Workers Union, Local 655*, 39 F.3d 191, 195–97 (9th Cir. 1994) (upholding the dismissal of the employer’s state law challenge to a union negative publicity campaign).

300. *Linn v. United Plant Guard Workers, Local 114*, 383 U.S. 53, 64–65 (1966).

301. *See Nat’l Ass’n of Letter Carriers v. Austin*, 418 U.S. 264, 271–73 (1974).

302. *Linn*, 383 U.S. at 58 (quoted with approval in *Austin*, 418 U.S. at 272).

303. Justices Souter and Kennedy alluded to the possibility of dismissing RICO extortion claims on this First Amendment basis. *See supra* text accompanying notes 131–32 (discussing the concurring opinion in *National Organization for Women, Inc. v. Scheidler (Scheidler I)*, 510 U.S. 249, 263–65 (1994) (Souter, J., concurring)).

b. Efforts to Petition the Three Branches

Union comprehensive campaigns almost invariably include efforts to obtain some form of government action against the employer. A union may lobby for local, state, or federal legislation that would restrict or harm the employer's business interests; it may pressure agency officials to apply or enforce regulatory requirements against the employer; and it may initiate lawsuits against the employer on matters directly or indirectly related to employment conditions. The right to petition government is expressly protected in the First Amendment, and the Supreme Court has long been clear that it will not "lightly impute to Congress an intent to invade" this right.³⁰⁴

Through a series of antitrust decisions, the Court construed the Sherman Act to avoid impinging on one business entity's ability to invoke governmental processes against a competitor. In its decision in *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, the Court held that concerted efforts by an association of railroads to influence the passage and enforcement of laws harmful to the trucking industry did not give rise to a violation of the antitrust laws.³⁰⁵ Even if the sole purpose of such a lobbying campaign were to destroy a competitor's business, the right to petition government is not at all a function of the petitioners' anticompetitive motives.³⁰⁶ In construing the Act to avoid burdening the lobbying activities of economically self-interested parties, the Court explained that its position also furthered governmental objectives because those with a financial interest in a public policy issue are often valuable sources of information.³⁰⁷

Since *Noerr*, the Court has reiterated its commitment to interpreting federal statutes so as to shield private parties' attempts to influence public officials in different venues. In *United Mine Workers v. Pennington*, the Court held that efforts by the union and mine operators to pressure two federal agencies into regulatory actions that would raise employees' wage levels were not illegal under antitrust law, either on their own or as part of a broader anticompetitive scheme.³⁰⁸ Once again the Court specified that even though restraint of trade was an intended consequence of government intervention, the joint efforts to influence public officials were not

304. *E. R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 138 (1961).

305. *See id.* at 135–36.

306. *Id.* at 138–40.

307. *Id.* at 139.

308. *United Mine Workers v. Pennington*, 381 U.S. 657, 669–72 (1965).

themselves illegal.³⁰⁹ Then, in *California Motor Transport Co. v. Trucking Unlimited*, the Court extended the *Noerr-Pennington* doctrine of immunity from antitrust liability to the filing of lawsuits in state or federal court.³¹⁰ And in *BE&K Construction Co. v. NLRB*, the Court applied *Noerr-Pennington* principles in the federal labor law setting, holding that an employer is substantially protected from NLRA liability for its retaliatory and unsuccessful litigation against a union.³¹¹

The Court's use of the constitutional avoidance canon to shelter petitioning conduct from federal regulation does not mean that private parties are entirely immune from statutory liability when they petition government. The majority in *Noerr* identified the possibility of a "sham exception" had the railroads not been making a genuine effort to influence legislation and law enforcement practices.³¹² Subsequently, the Court has elaborated on the meaning of sham petitioning in the litigation context. It remains the case that a plaintiff's subjective intent to interfere with a defendant's competitive position (or with its exercise of statutory rights) through litigation is not sufficient to abrogate *Noerr-Pennington* immunity.³¹³ Rather, a sham lawsuit must be not only subjectively retaliatory but also "objectively baseless in the sense that no reasonable litigant could realistically expect success on the merits."³¹⁴ Circuit courts applying this sham litigation standard have been generally unwilling to find objective baselessness, invoking the First Amendment foundations of *Noerr-Pennington*.³¹⁵

Further, a number of circuits have accorded broad protection to petitioning conduct when construing other federal statutes.³¹⁶ Importantly,

309. *Id.* at 670.

310. *Cal. Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 510 (1972). *See also* Prof'l Real Estate Investors, Inc. v. Columbia Pictures Indus., 508 U.S. 49, 51 (1993).

311. *BE&K Constr. Co. v. NLRB*, 536 U.S. 516, 525-37 (2002). *See also* Bill Johnson's Rests., Inc. v. NLRB, 461 U.S. 731, 741-44 (1983).

312. *Noerr*, 365 U.S. at 144.

313. *See Columbia Pictures Indus.*, 508 U.S. at 60-61 (safeguarding petitioning conduct that attempts to interfere with a competitive position); *BE&K Constr.*, 536 U.S. at 530-31 (safeguarding petitioning conduct that attempts to interfere with statutory rights under the NLRA).

314. *Columbia Pictures Indus.*, 508 U.S. at 60.

315. *See, e.g.*, *Bayou Fleet, Inc. v. Alexander*, 234 F.3d 852, 861-62 (5th Cir. 2000); *White v. Lee*, 227 F.3d 1214, 1231-33 (9th Cir. 2000); *Cheminor Drugs, Ltd. v. Ethyl Corp.* 168 F.3d 119, 122-27 (3d Cir. 1999).

316. *See, e.g.*, *Herr v. Pequea Twp.*, 274 F.3d 109, 118-19 (3d Cir. 2001) (applying the immunity doctrine to 42 U.S.C. § 1983 (2000)), *overruled on other grounds by* *United Artists Theatre Circuit, Inc. v. Twp. of Warrington*, 316 F.3d 392, 400 (3d Cir. 2003); *White*, 227 F.3d at 1231-33 (applying the immunity doctrine to the Federal Fair Housing Act, 42 U.S.C. §§ 3601-3631); *Tarpley v. Keistler*, 188 F.3d 788, 794-95 (7th Cir. 1999) (applying the immunity doctrine to 42 U.S.C. § 1983).

the Ninth Circuit recently relied on *Noerr-Pennington* to guide its interpretive approach in a civil RICO action. *Sosa v. DIRECTV, Inc.* involved over 100,000 prelawsuit demand letters sent by DIRECTV.³¹⁷ The letters alleged that Sosa and other purchasers of certain programming equipment had illegally accessed DIRECTV's satellite television signal, and they threatened civil lawsuits unless the purchasers forfeited their equipment to DIRECTV and reached a monetary settlement.³¹⁸ Sosa and many others settled the claims and then sued DIRECTV alleging extortion under RICO.³¹⁹

The Ninth Circuit concluded that the RICO action burdened DIRECTV's ability to settle legal claims prior to filing a lawsuit, and that imposing such burdens on the transmission of prelitigation demand letters would violate the Petition Clause of the First Amendment.³²⁰ In reaching this conclusion, the appellate court relied on the notion of First Amendment "breathing space" derived from earlier Supreme Court free speech cases³²¹ and extended to the Petition Clause setting in the Court's *BE&K* decision.³²² The majority in *BE&K* had suggested that even baseless lawsuits, like false statements, may deserve some protection from NLRA challenges so as not to chill potential litigants from bringing more meritorious cases to court.³²³ The Court then stressed that unsuccessful yet reasonably based suits actually advance First Amendment interests such as allowing the "public airing of disputed facts"³²⁴ and promoting the law's evolution "by supporting the development of legal theories that may not gain acceptance the first time around."³²⁵ Relying on these Supreme Court precedents, the Ninth Circuit in *Sosa* determined there was also a close connection between presuit demand letters and access to the courts, and that the threat of a treble damages remedy with respect to such letters raised substantial Petition Clause concerns.³²⁶ The court went on to interpret RICO and the Hobbs Act as precluding the maintenance of an extortion action except in instances (unlike this one) in which the prelitigation

317. *Sosa v. DIRECTV, Inc.*, 437 F.3d 923, 925–26 (9th Cir. 2006).

318. *Id.*

319. *Id.* at 926–27.

320. *See id.* at 932–36.

321. *See id.* at 933 (citing *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 279–80 (1964); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340–42 (1974)).

322. *See BE&K Constr. Co. v. NLRB*, 536 U.S. 516, 531–32 (2002).

323. *Id.* at 531.

324. *Id.* at 532 (quoting *Bill Johnson's Rests., Inc. v. NLRB*, 461 U.S. 731, 743 (1983)).

325. *Id.*

326. *Sosa*, 437 F.3d at 936–37.

demand letters amounted to a sham.³²⁷

The upshot of the *Noerr-Pennington* line of cases is that the Supreme Court, when confronted with a claim against a civil defendant that involves retaliatory lobbying or litigation, will construe federal antitrust and labor laws to avoid burdening the defendant's right of access to courts, agencies, or legislatures. The Ninth Circuit's extension of this constitutional avoidance approach to the RICO extortion setting is entirely consistent with the Court's precedents. Indeed, given its provisions for treble damages and attorney's fees, RICO's potential to chill petitioning conduct is at least equivalent to that of antitrust law and much stronger than the potential of the NLRA.³²⁸ And again, the protection accorded here is not unlimited—it does not extend to lawsuits that are objectively baseless.³²⁹

2. Is the Union Campaign as a Whole Unlawful Even If Most of Its Parts Are Not?

Assuming that most of the union's complaints to courts and agencies are not objectively baseless, there remains the question whether a series of these legal actions, perhaps combined with a stream of negative publicity directed at the employer, may *cumulatively* be deemed unlawful as an extortionate abuse of governmental processes. The Supreme Court has hinted at such a possibility in its antitrust decisions discussing what constitutes sham petitioning.³³⁰ The Court at an early point suggested that a deluge of meritless claims effectively barring a competitor from its own

327. See *id.* at 942. See also *Kearney v. Foley & Lardner, LLP*, 582 F.3d 896, 902–07 (9th Cir. 2009) (applying the *Noerr-Pennington* doctrine to a civil RICO action but finding that, in contrast to *Sosa*, the sham exception applies); *Menjivar v. Trophy Props. IV DE, LLC*, No. C 06-03086 SI, 2006 U.S. Dist. LEXIS 76245, at *45–50 (N.D. Cal. Oct. 6, 2006) (following *Sosa* in applying the *Noerr-Pennington* doctrine to a RICO civil action). *But cf.* *Warnock v. State Farm Mut. Auto. Ins. Co.*, No. 5:08cv01-DCB-JMR, 2008 U.S. Dist. LEXIS 81507, at *24–25 (S.D. Miss. Oct. 14, 2008) (declining to follow *Sosa*'s lead in applying *Noerr-Pennington* to a civil RICO action until directed to do so by the Fifth Circuit).

328. The potential for a chilling effect is actually greater under RICO than antitrust law, as the stigma of being labeled a “racketeer” has no analog in the antitrust setting. See *supra* note 147 and accompanying text.

329. This “objectively baseless” standard helps explain why employers’ filings of RICO extortion lawsuits should not be similarly protected. The issue for employers’ RICO claims is not whether the lawsuits themselves violate a federal statute (as was charged with respect to harassing lawsuits being evidence of antitrust violations or unfair labor practices). Rather, the issue is whether these employer lawsuits should survive a motion to dismiss. The arguments set forth in Part IV are meant to demonstrate the employers’ claims are without foundation as a matter of law and therefore entirely dismissible.

330. See *Cal. Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 511, 513 (1972); *id.* at 518 (Stewart, J., concurring); *Prof'l Real Estate Investors, Inc. v. Columbia Pictures Indus.*, 508 U.S. 49, 70–73 (1993) (Stewart, J., concurring).

access to an agency or court, or as part of an effort to put the competitor out of business, might not be immunized under *Noerr-Pennington* even if one or two meritless claims would be.³³¹ The Court's later "sham litigation" cases do not seem entirely consistent with this distinction,³³² but the concept lingers that where an extended campaign of harassment is involved, the whole may exceed the sum of its parts.

The Supreme Court addressed the issue of regulatory harassment in the *Wilkie* decision.³³³ As summarized in Part III, the plaintiff in *Wilkie* alleged that a coordinated campaign by federal officials, aimed at extorting from him an easement across his land, was a violation of RICO and an unconstitutional denial of due process.³³⁴ The agency officials' campaign featured an extensive set of administrative actions and lawsuits—a form of regulatory harassment that closely parallels petitioning activities often pursued by unions in their campaigns. Justice Souter for the majority expressly recognized the need to examine the government's course of dealing as a whole, on the theory that "death by a thousand cuts" might be actionable even if incidents considered individually would not be.³³⁵

In that setting, the *Wilkie* majority emphasized two points that seem directly relevant to union campaigns. First, the Court's approach to assessing the campaign as a whole was essentially to determine whether the bulk of the antagonistic actions engaged in by the government should be deemed "legitimate tactics designed to improve the Government's negotiating position"³³⁶ or "illegal action plainly going beyond hard bargaining."³³⁷ The majority's application of this standard—concluding

331. *Cal. Motor Transp.*, 404 U.S. at 513. See also *Fed. Prescription Serv. Inc. v. Am. Pharm. Ass'n*, 663 F.2d 253, 261–68 (D.C. Cir. 1981) (analyzing an alleged multiyear conspiracy to lobby, boycott, and sue the plaintiff out of existence).

332. *Columbia Pictures Indus.*, 508 U.S. at 60 (internal quotation marks omitted). See also *id.* at 60–61 (discussing the objective baselessness test for sham litigation without referencing differences between single and multiple or repetitive claims); *BE&K Constr. Co. v. NLRB*, 536 U.S. 516, 529–32 (2002) (same). But see *USS-POSCO Indus. v. Contra Costa City Bldg. & Constr. Trades Council*, 31 F.3d 800, 810–11 (9th Cir. 1994) (suggesting that the *Columbia Pictures Industries* test for sham litigation applies only to single instances while the *California Motor Transport* approach applies if the defendant is accused of bringing a series of sham legal actions). The Ninth Circuit went on to hold that where fifteen of twenty-nine allegedly meritless legal actions proved successful, this success rate precludes a finding of a sham litigation campaign. *Id.* at 811. The court's focus on *successful* litigation is in some tension with the Supreme Court's subsequent discussion of how a *whole class of unsuccessful* lawsuits will not be a sham so long as a substantial proportion of them involved genuine grievances. See *BE&K*, 536 U.S. at 532.

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

334. *Id.* at 548–49. See also *supra* text accompanying notes 215–26.

335. *Wilkie*, 551 U.S. at 555.

336. *Id.* at 557.

337. *Id.* at 559–60.

that the campaign involved predominantly actions falling within the government's authorized enforcement powers—was hotly disputed by Justice Ginsburg in dissent.³³⁸ But regardless of how this approach plays out in particular cases, the Court's announced standard focusing on the predominant character of a regulatory offensive indicates that a small number of illegal actions cannot transform a prolonged campaign involving mostly lawful exercises of power into actionable government extortion.³³⁹ Similarly, a small handful of objectively baseless agency filings or several instances of violence during a protest should not be sufficient as a matter of law to taint an otherwise legitimate union campaign lasting months or years.³⁴⁰

Second, the *Wilkie* majority expressed deep concern about the negative consequences for government interests if federal regulators were exposed to causes of action for extortion arising out of their enforcement efforts.³⁴¹ In refusing to recognize either a constitutional cause of action or a civil RICO action, the Court elaborated on the chilling effect that would accompany allowing such claims to survive dismissal:

It is not just final judgments, but the fear of criminal charges or civil claims for treble damages that could well take the starch out of regulators who are supposed to bargain and press demands vigorously on behalf of the Government and the public. This is the reason we would want to see some text in the Hobbs Act before we could say that Congress meant to go beyond the common law preoccupation with official corruption, to embrace the expansive notion of extortion Robbins urges on us.³⁴²

Again by analogy, the fear of RICO treble damages is what can “take the starch out of” union efforts to press vigorously their lawful demands for neutrality, card check, or collective bargaining agreements.³⁴³

It might be argued that the Court's approach to reviewing civil liability exposure with respect to a government campaign of regulatory harassment is not instructive when assessing liability exposure for a

338. See *id.* at 578–80 & n.7 (Ginsburg, J., dissenting). See also Lawrence H. Tribe, *Death by a Thousand Cuts: Constitutional Wrongs Without Remedies After Wilkie v. Robbins*, 2006–2007 CATO SUP. CT. REV. 23, 29, 55 n.132.

339. *Wilkie*, 551 U.S. at 559–61.

340. This predominant character standard, although not well developed in the *Wilkie* majority opinion, bears some resemblance to the Court's statement in *BE&K* that if a “substantial proportion” of unsuccessful suits filed involve genuine (rather than baseless) grievances, the class of lawsuits itself deserves protection. See *BE&K Constr. Co. v. NLRB*, 536 U.S. 516, 532 (2002).

341. See *Wilkie*, 551 U.S. at 561.

342. *Id.* at 567.

343. See *id.*

comprehensive campaign orchestrated by a union. Deciding whether to expand the implied constitutional cause of action at stake in *Wilkie* raises distinct issues from those involved when construing an express statutory cause of action under RICO.³⁴⁴ More generally, executive branch officials' access to a range of constitutional and common law immunities implicates policy considerations that have no obvious parallel with respect to harassing conduct by private actors.³⁴⁵ On reflection, however, the *Wilkie* framework still carries considerable weight when transferred to the union campaign setting.³⁴⁶

The Court in *Wilkie* decided to protect from liability a “perpetrator” of regulatory harassment possessing resources and powers vastly disproportionate to the campaign’s target or “victim.” The federal government brings to the table virtually unlimited resources to support its campaign and also brings a unique capacity to perform as investigator, prosecutor, and adjudicator in regulatory proceedings. By contrast, a labor union as campaign perpetrator is a private entity typically taking on a major corporate actor. The union lacks the government’s direct powers of investigation or enforcement, and it is likely to possess no more than comparable resources and strength relative to the campaign’s corporate target. A standard immunizing the enormously powerful federal

344. See, e.g., *id.* at 568 (Thomas and Scalia, JJ., concurring) (expressing commitment to imposing strict limits on new causes of action for the violation of constitutional amendments under *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388 (1971)).

345. These considerations include the concern that harassment due to unfounded or costly litigation will deflect government officials from the energetic performance of their public duties or compromise their independent judgment in fulfilling those duties. See, e.g., *Harlow v. Fitzgerald*, 457 U.S. 800, 814 (1982) (discussing qualified immunity from actions alleging constitutional or statutory violations); *Barr v. Matteo*, 360 U.S. 564, 569–71 (1959) (discussing absolute immunity against common law tort actions). See also *Imbler v. Pachtman*, 424 U.S. 409, 422–23 (1976) (discussing common law immunity for judges, prosecutors, and grand jurors).

346. The *Wilkie* framework is not the only analogy available. One could borrow from Title VII case law establishing that hostile work environment sexual harassment requires “severe or pervasive” actions—something more than occasional boorish, sexist behavior. *Harris v. Forklift Sys. Inc.*, 510 U.S. 17, 21 (1993). See also *Baskerville v. Culligan Int’l Co.*, 50 F.3d 428, 430–31 (7th Cir. 1995). The analogy to hostile work environment claims under Title VII is less persuasive, however, because there the individual incidents themselves constitute discriminatory conduct; they simply do not rise to the level of “alter[ing] the conditions of [the victim’s] employment and [thereby] creat[ing] an abusive working environment.” *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 60 (1986) (second alteration in original) (quoting *Henson v. Dundee*, 682 F.2d 897, 904 (11th Cir. 1982)). See also Rebecca Hanner White, *De Minimis Discrimination*, 47 EMORY L.J. 1121, 1123, 1128–29, 1134–35, 1159 (1998) (discussing justifications for a de minimis threshold and describing extensive circuit court reliance on a de minimis standard in Title VII cases, including hostile work environment settings). By contrast, the campaign in *Wilkie*, like the typical union campaign, involved predominantly incidents that are entirely lawful and even protected, rather than objectionable but only in a de minimis way. *Wilkie*, 551 U.S. at 543–47, 555–57.

government for a regulatory crusade that includes only isolated or atypical instances of misconduct would seem to apply at least as persuasively to a campaign coordinated by a far less potent labor union that features similarly infrequent examples of illegal conduct—again, so long as the bulk of the union campaign rests on lawful tactics.

The Court in *Wilkie* also shielded from liability a federal government campaign whose ultimate goal was quite controversial in public policy terms. The government essentially was seeking a free easement; the individual landowner would have negotiated over compensation for such an easement, but the BLM wanted no bargaining at all.³⁴⁷ By contrast, the union's aim in a typical comprehensive campaign is more mainstream—to bargain for an agreement, not to demand what is tantamount to a takeover of property rights. Applying the *Wilkie* standard to union campaigns that pursue a negotiated solution would seem if anything less troubling than utilizing that standard for government campaigns that essentially demand a unilateral concession.

Finally, the union's hard bargaining strategy is part of a commitment to furthering legitimate government objectives, analogous in relevant respects to the law enforcement activities safeguarded under *Wilkie*. Admittedly, the Court in *Wilkie* expressed concerns on a very broad scale—it worried that allowing a *Bivens* cause of action would open the floodgates of litigation by “invit[ing] claims in every sphere of legitimate governmental action affecting property interests.”³⁴⁸ But as the dissent noted, the Court in prior cases had not considered “floodgates” to litigation a special factor that counseled against implying a *Bivens* action.³⁴⁹ In this context, that the Court unanimously expressed concern over the special chill accompanying RICO civil actions against government officials³⁵⁰ likely contributed to the majority's willingness to invoke the floodgates factor for the first time.

The special RICO chill is also relevant when it comes to the specter of employer claims alleging extortion against union comprehensive campaigns. As noted above, these campaigns typically impose intense

347. See *Wilkie*, 551 U.S. at 542–43 (describing the government's refusal to negotiate compensation); *id.* at 569 (Ginsburg, J., concurring in part and dissenting in part) (criticizing the government's vindictive effort “to extract property from [Robbins] without paying a fair price”).

348. *Id.* at 561 (majority opinion).

349. *Id.* at 577 (Ginsburg, J., concurring in part and dissenting in part). See Natalie Banta, Note, *Death by a Thousand Cuts or Hard Bargaining?: How the Court's Indecision in Wilkie v. Robbins Improperly Eviscerates the Bivens Action*, 23 BYU J. PUB. L. 119, 136 (2008–2009).

350. See *Wilkie*, 551 U.S. at 567. See also *supra* text accompanying note 343.

economic pressure on employers “through channels outside the immediate employee-employer relationship”³⁵¹ with the ultimate goal of obtaining agreements that will improve terms and conditions of employment. While they do not implicate “every sphere of legitimate . . . action”³⁵² as in *Wilkie*, the campaigns do seek to vindicate core objectives within one major sphere of governmental activity—federal regulation of labor-management relations. Congress in the NLRA declared as “the policy of the United States” that protecting workers’ “full freedom of association” and “encouraging the practice and procedure of collective bargaining” would enhance the free flow of commerce by, among other things, augmenting the wage rates and purchasing power of American workers.³⁵³ The threat of RICO extortion actions continues to chill these legitimate and protected union activities, just as the Court in *Wilkie* feared such a threat would chill government efforts at law enforcement.

Moreover, comprehensive campaigns have assumed special strategic importance in today’s complex American workplace as unions seek to vindicate the federal policy commitment to workers’ freedom of association and the practice of collective bargaining. Since the early 1980s, technological innovation, global competition, and the mobility of capital have helped produce a sharp decline in centralized firm decisionmaking and integrated firm structure.³⁵⁴ Subcontracted or compartmentalized production, outsourcing of work to offshore facilities, and automated information technology all contribute to a dynamic and decentralized labor market. Unions seeking to represent workers effectively in this market must engage multiple constituencies in diverse ways if they are to persuade or pressure employers to reach agreements. Until the federal courts make clear that such efforts at extended engagement do not as a matter of law constitute attempted extortion, unions will be deterred from acting to promote worker interests in the most effective ways allowed under current federal labor law.

351. *Eastex, Inc. v. NLRB*, 437 U.S. 556, 565 (1978) (discussed *supra* note 245).

352. *Wilkie*, 551 U.S. at 561.

353. 29 U.S.C. § 151 (2006).

354. See PAUL C. WEILER, GOVERNING THE WORKPLACE: THE FUTURE OF LABOR AND EMPLOYMENT LAW 4–6 (1990); Kenneth G. Dau-Schmidt & Timothy A. Haley, *Governance of the Workplace: The Contemporary Regime of Individual Contract*, 28 COMP. LAB. L. & POL’Y J. 313, 313–14 (2007). See also KOCHAN, KATZ & MCKERSIE, *supra* note 27, at 51–58 (describing the emergence of a large nonunion sector starting in 1960s, due to changes in economic environment, technological capacities, and managerial values).

V. CONCLUSION

Textualist judges and scholars typically warn against allowing reliance on legislative history to *expand* the actual or ordinary meaning of enacted text.³⁵⁵ The interpretive evolution of RICO reveals an intriguingly different story, as the Supreme Court initially ignored or rejected legislative record evidence that would have supported a substantial *narrowing* of civil RICO coverage.³⁵⁶ Subsequently, the Court has continued to ignore RICO's "narrowing" legislative history—both from its 1970 origins and from congressional reforms proposed during the 1980s and 1990s. Nonetheless, the Justices have developed a distinctly more constraining approach to civil RICO in their second generation of cases.

In light of these circumstances, especially the decisions in *Scheidler II* and *Wilkie*, this Article has attempted to explain why RICO extortion claims should be adjudicated as fundamentally inapposite with respect to union comprehensive campaigns. This is not an argument that RICO is irrelevant for ordinary union activity in general. Questions involving the scope of labor law preemption or the applicability of other predicate offense claims are for another day.³⁵⁷ Similarly, there has been no effort to address extortion allegations in which the union's conduct involves a predominant use of violence or other physically intimidating force.

RICO extortion claims against union campaigns that are built around regulatory offensives and negative publicity have been a central element of employer resistance for more than twenty years. While the Court has made clear that both labor organizations and companies have a right to use litigation as part of their efforts to secure an economic advantage, that right should not extend to causes of action that are deemed inadequate as a matter of law. Quite apart from the Court's recent forays into the nature of

355. See, e.g., *Bank One Chi. N.A. v. Midwest Bank & Trust Co.*, 516 U.S. 264, 281 (1996) (Scalia, J. concurring) (criticizing use of legislative history as "capable of injecting into a statute an 'intent' that its text alone does not express"); Frank H. Easterbrook, *Text, History and Structure in Statutory Interpretation*, 17 HARV. J.L. & PUB. POL'Y 61, 63 (1994) (criticizing legislative history's focus on imputed intent that "denies to the drafters the ability to choose rules, with their gains, their pains, and their limited scope"). See also Cheryl Boudreau et al., *What Statutes Mean: Interpretive Lessons from Positive Theories of Communication and Legislation*, 44 SAN DIEGO L. REV. 957, 980–81 (2007) (contending that liberal judges in the late 1970s and 1980s relied on legislative history to justify expansive readings of civil rights text enacted in 1964).

356. See *supra* notes 64–128 and accompanying text.

357. See *Monterey Plaza Hotel Ltd. P'ship v. Local 483, Hotel Employees Union*, 215 F.3d 923, 925–28 (9th Cir. 2000) (discussing allegations that union activities amounted to mail and wire fraud); Nathan Newman, *The Conflict of the Courts: RICO, Labor, and Legal Preemption in Union Comprehensive Campaigns*, 51 DRAKE L. REV. 307 (2003) (discussing labor law preemption issues).

federal pleading standards,³⁵⁸ the course of conduct that typically characterizes a union comprehensive campaign simply does not qualify as extortionate.

In the past several years, we have seen considerable debate, inside and outside of Congress, about the need for major labor law reform.³⁵⁹ Such a debate is overdue following six decades of congressional inaction and gridlock.³⁶⁰ Still, labor law reform, however broadly conceived, cannot address all the current controversies over statutory meaning that implicate protected activity under the NLRA. The chilling effect of RICO extortion claims on lawful hard bargaining by unions is one such controversy that the federal courts—and if necessary the Supreme Court—are in a position to resolve.

358. See *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949–51 (2009) (requiring that factual pleadings plausibly—not just conceivably—give rise to an entitlement to relief); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556 (2007) (requiring the complaint to state “enough fact[s] to raise a reasonable expectation that discovery will reveal evidence” of the alleged illegal activity); Adam N. Steinman, *The Pleading Problem*, 62 STAN. L. REV. 1293, 1300 (2010) (contending for a new pleading standard in order to “reconcile *Twombly* and *Iqbal* with binding pre-*Twombly* authority”).

359. See, e.g., S. 560, 111th Cong. (2009) (proposed amendment to the NLRA); H.R. 1409, 111th Cong. (2009) (same); Harry C. Alford, *EFCA Will Hurt Black-Owned Business Growth*, ROLL CALL, Apr. 20, 2009 (discussing the National Black Chamber of Commerce’s concern over the Employee Free Choice Act); Ray Marshall & Robert Reich, *In Need of Real Labor Reform*, CHIC. TRIB., June 14, 2009, at C25 (discussing debate surrounding the Employee Free Choice Act); Harold Meyerson, *Card Check and Gut Check*, WASH. POST, May 14, 2009, at A19 (same).

360. See James J. Brudney, *Isolated and Politicized: The NLRB’s Uncertain Future*, 26 COMP. LAB. L. & POL’Y J. 221, 228–31 (2005); Estlund, *supra* note 2, at 1532–40.

