We address a single argument against a constitutional right to strike: the argument that judges are unsuited for the fine line-drawing necessitated by any regulation of industrial action; that such decisions are better lodged with labour boards and other administrative entities; and that exclusion of a given labour right from the constitution may be justified as a way of reinforcing this optimal division of labour. It is possible that this particular argument against a constitutional right to strike may not be important in Canadian debates. Perhaps this Rubicon was already crossed once the Supreme Court of Canada recognized rights, guaranteed by the Charter of Rights and Freedoms, to collective bargaining or to picket. However, the argument, that labour rights are better guaranteed by administrative boards as part of a comprehensive scheme of labour regulation, has been influential in my country, particularly when courts have been faced with difficult tasks of line-drawing, and may yet become important in Canada.

This Article will evaluate the argument for deference to administrators. It has been tried in the United States; the results are in; they have been disastrous. An idealized labour board should never be the alibi for judicial shirking from duty.

We start, however, by accepting a major premiss of the critique. We consider the right to strike purely in its legal aspect, not as a question of political theory. That is, we do not ask whether the right to strike maximizes the greatest good for the greatest number, or would be selected by contracting parties ignorant of their social status, or maximizes human capability. Merely to ask questions of this type, none of which yields an obvious answer or even the beginnings of one, demonstrates the impossibility of grounding a right to strike in political theory. Constitutional theorists who prefer such political theory grounding for constitutional rights will have a hard time deciding anything about a constitutional right to strike one way or the other.

Posing a constitutional right to strike instead assumes a legal system, a constitution, its existing apparatus for enforcing constitutional rights, its legal practices, and, above all, its personnel: their training, biases, and values. Asking whether there should be a constitutional right to strike has pragmatic elements that are not reducible to ultimate values.

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* Distinguished Professor and Sidney Reitman Scholar, Rutgers University School of Law, Newark NJ, USA. Prepared for the Symposium, Is There a Constitutional Right to Strike?, University of Toronto Faculty of Law, December 5, 2009.
2 e.g. the right to secondary picketing under the Canadian Charter of Rights and Freedoms, Pepsi-Cola Canada Beverages (West) Ltd. v. Retail, Wholesale and Dept. Store Union, Local 558, 2002 SCC 8, 2002[1] SCR 156.
This is true of any constitutional right, of course, but there are—we also agree—particular problems with a constitutional right to strike. Unlike most constitutional rights, the strike exists for the sole purpose of causing economic harm to another. The strike is not the only member of this class. The consumer boycott is another, and, as we shall see, in the United States consumers, and in Canada consumers and labour unions, have a constitutional right to boycott. Still, strikes and boycotts do harm. It is inconceivable that they could be protected without any limitation. (For example, the consumer boycott might lose protection if it involved knowingly false allegations about the product being boycotted). Lines must be drawn. The question of a constitutional right at least implicates, if it is not fully reducible to, the question of who should draw those lines.3

Considerations of this kind have led American unions to put their efforts into the establishment of institutions of private ordering (such as labour arbitration) and administrative agencies, rather than constitutional rights. Indeed the presence of the private ordering, and expert agency, became an argument against the establishment of constitutional labour rights.

This strategy reflected political and judicial reality in the United States, rather than constitutional theory. In the United States in the first third of the twentieth century, there were a great many constitutional rights to particular labour conditions, and those rights belonged to the employer. These employer constitutional rights impeded the development of modern labour legislation for more than a generation, and trimming them—for these employer constitutional rights to discharge at will still exist—was a major constitutional prerequisite for the creation of such ordinary labour rights as regulation of wages and hours. The progressive project, for much of the twentieth century, was to exclude labour rights from the constitution—to get them away from judges—and lodge them instead in administrative agencies and private arbitration.

As a result, the constitutional dimensions of the right to strike remain somewhat undeveloped. As my colleague James Pope has shown, older cases recognize a weak constitutional right to strike, at least in the sense that a state or federal government could not constitutionally ban all collective cessation of work.4 However, these cases have not been heard from in a long time.

It is impossible to run the experiment in which the right to strike was more firmly planted in American constitutional discourse. However, the analogous problem of picketing and other labour speech permits exactly this experiment. Rights to picketing and other labour speech, like the right to strike, similarly are anchored mainly in

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3 Section 1 of the Canadian Charter of Rights and Freedoms commits courts to entertaining arguments on the limits of any right they recognize, for it “guarantees the rights and freedom set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.”

administrative labour law, only lightly in the Constitution. This has proved a bad bargain for labour. In the past half century, the United States Supreme Court has upheld severe limitations on the content or message of union speech, picketing, and boycotts, limitations that could not constitutionally be applied to the same conduct carried out by groups other than labour groups.

This Article will review the disfavored place of labour speech and action in U.S. constitutional law. While the basic outlines are familiar, there are no recent articles that point out how much wider the gulf has become in the past twenty years. For everyone but labour unions, constitutional protection of symbolic speech, speech accompanied by mass physical action like picketing, boycotts, and even potentially threatening speech, has expanded significantly in recent decades. The First Amendment protects flag burning, cross burning, picket lines that block abortion clinics, St. Patrick’s Day parades, and nude dancing. The anomalous treatment of the identical conduct by labour unions (apart from the nude dancing) is increasingly difficult to explain.

With hindsight, then, the American exclusion of labour speech and action from the basic constitutional framework, on the supposed grounds that it is and must be regulated through a comprehensive administrative scheme, has been bad for labour, bad for labour speech, and bad for the American constitution (for these unexplained disparate outcomes are used to delegitimize constitutional law). It is not for this American to advise Canadians on their constitutional questions. But I can report that near-total exclusion of labour rights from the constitution has been tried, and has failed to generate either good labour law, or good constitutional law.

Part I briefly reviews the continuing, never-abolished, American concept that employer liberty of contract and right to discharge at will are constitutional rights that constrain legislative power. Part II reviews the process by which comparatively progressive jurists walled labour rights off from the mainstream of constitutional rights, so that strikes, picketing, and speech by labour organizations receive little constitutional protection, assertedly because their protection comes from an integrated statutory scheme that protects labour organizations. Part III reviews developments over the last twenty years or so in the constitutional law of speech and picketing, showing how such speech by labour organizations is uniquely disfavored constitutionally. Meanwhile (Part IV), that comprehensive administrative scheme that was supposed to protect union rights to picket and speak has ossified; it protects exactly what it protected in 1947 and has become impervious to thought of any kind. Part V concludes by suggesting that, with hindsight, the US Constitution should have been read to protect labour organization activity at the same level as identical activity by non-labour groups.

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5 The standard citation is now Cynthia Estlund, The Ossification of American Labour Law, 102 Colum.L.Rev. 1527 (2002). However, the interaction of labour board, court, and Congress so as to ensure that none makes new labour law was evident half a century earlier and long a commonplace observation of the Yale legal process school of labour law in which Professor Estlund was trained. See, e.g., Clyde W. Summers, Politics, Policy Making, and the NLRB, 6 Syr.L.Rev. 93 (1954); C.W. Summers & H.H. Wellington, Cases and Materials on Labour Law (1st Ed. 1968).
I. Employers’ Constitutional Rights: still going strong

As everybody knows, the United States Supreme Court in the first third of the twentieth century took the position that the employer’s liberty of contract was a property right, of which the US Constitution prevented either federal or state government from depriving the employer. In practice, this liberty of contract consisted of the liberty to impose on the marginal employee whatever terms of an individual employment contract the employer could, including the employer’s ability to dismiss at will.

It is rarely appreciated, even in the U.S., that this structure remains robust as a constraint on government procedures. Since the 1930s, courts permit substantive federal and state legislative constraints on labour contracts. But the right to contract, including the employer’s right to discharge at will, remains a property right protected by the Constitution. This employer constitutional right restricts the scope of contemporary employment legislation in the U.S.

For example, at one time the US Department of Labour required employers immediately to reinstate, temporarily, drivers who complained of truck safety violations. The Supreme Court held as recently as 1987 that this was an unconstitutional deprivation of the employer’s property right to discharge at will. Constitutional due process required that any such compelled reinstatement be preceded by “notice [to the employer] of the driver’s allegations, notice of the substance of the relevant supporting evidence, an opportunity to meet with the investigator and present statements from rebuttal witnesses.”

Decisions of this type suggest caution before turning specific terms of employment, such as termination at will, into constitutional rights. The more obvious point is that constitutional rights, like diamonds, are forever. In the U.S., the employer’s right to discharge continues to be a Hohfeldian right (that is, implying a reciprocal duty in the government) and a constitutional right at that. This is so not merely in a theoretical sense. It shapes the design of modern employment legislation or indeed of truck safety legislation.

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6 Federal: U.S. Constitution, Fifth Amendment: “No person shall … be deprived of life, liberty, or property without due process of law.” This has always been interpreted, given the context of its adoption, as one of many restraints on the national or federal government, and not applicable in terms to state or local government.

State: U.S. Constitution, Fourteenth Amendment: “…nor shall any State deprive any person of life, liberty, or property, without due process of law….”


9 Id., 481 U.S at 264.
The more subtle point is that judges in constitutional courts may be unreliable guarantors of labour rights. Unlike administrators, or judges in labour courts, judges in constitutional courts have many agendas that may conflict. Such a constitutional judge is trained to understand a problem, like reinstatement of complaining truck drivers, through the lens of “due process” rather than one of “labour rights.”

This point emerges clearly when one examines the line-up of justices who decided Roadway Express. The passage quoted above comes from a plurality opinion of four justices who represented the centre of the Court on this question (Marshall J, author of the opinion, joined by Blackmun, Powell, and O’Connor JJ). It is the majority holding because of selective support from two wing groups. Brennan and Stevens JJ, the “liberals” on this issue, concurred in the result only because they would have required even more due process for the employer, a full hearing before the employer could be compelled to reinstate. A “conservative” group of White J, Rehnquist CJ, and Scalia J dissented from the requirement that the employer be told the identity of all the government’s complaining witnesses. This line-up shows the power of the “due process” issue to command votes, and the very weak force of understanding “labour rights.”

Obviously White, Rehnquist, and Scalia JJ did not favor secrecy of the witness list out of their regard for employees, though they should have; they took a more limited view of the obligations of due process of law. Identically, the opinion of Brennan and Stevens JJ is not shaped by their sense of employee rights or employer prerogative, but rather by an expansive sense of “due process.” I am not suggesting that any member of the Court was wrong to frame the issue as one of due process. Rather, such framing follows inevitably from their lengthy and constant exposure to problems of due process, as contrasted with their sporadic involvement with labour rights. I see no way of avoiding this problem. Constitutional judges may be unreliable guardians of labour rights. However, keeping them out of the business entirely is not, as we shall see, a good solution.

II. Walling Off Labour Rights from Constitutional Rights

At no point have American labour unions pursued a coherent strategy to secure the constitutional status of rights to labour action. General constitutional protection of speech and assembly was only secured against state (as opposed to federal) regulation in the mid-1920s. 10 Between 1935 (the National Labour Relations or Wagner Act) and 1947 (the Labour Management Relations or Taft-Hartley Act), federal law protected

10 “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.” The Fourteenth Amendment, protecting liberty against state deprivation, extended this restriction to state governments. Gitlow v. New York, 268 U.S. 652 (1925)(assumed arguendo), Fiske v Kansas, 274 U.S. 380 (1927)(reversing conviction).
labour union activity and did not restrict it. State courts frequently enjoined particular union pickets or speech, and the Supreme Court, in overturning these injunctions, would sometimes state that the union’s activity was speech protected by the First Amendment to the United States Constitution.\textsuperscript{11} As James Pope has shown,\textsuperscript{12} the Supreme Court advanced this position without help from labour union lawyers, who did not claim First Amendment protection and were critical of the invocation of constitutional grounds.\textsuperscript{13}

In the early 1940s, the Court began seeing a series of cases involving regulation of union strikes, picketing, or boycotts, in support of goals about which many American progressives were ambivalent or hostile. These included strikes or pickets to obtain recognition, even where the workforce had demonstrated no support for the union; or to administer a price-fixing cartel with some employers, cutting others from the market; or to require employers to hire redundant labour; or assign work to one union rather than another. Unwilling to draw these lines itself, the Court largely withdrew from applying to labour union conduct two bodies of federal law that had been a mainstay of federal judicial involvement in labour matters: the Sherman Antitrust Act, and the Constitution. In each case, the Court held that the presence, post-1935, of comprehensive administered labour law under the National Labour Relations (Wagner) Act, called for judicial retreat from application of either the antitrust laws, or the Constitution, to regulate union pickets and strikes. The reasoning process was so similar as to make it unlikely that there was any difference in judicial motivation. Plainly the Court anticipated future line-drawing in which some limitations would be drawn on union secondary and organizational activity. Plainly the Court did not want to be the one to draw those lines.

Antitrust provided the first confrontation. Thurman Arnold, as Assistant Attorney General for antitrust matters, announced a program to use government suits under the antitrust laws to curb such objectionable union practices as strikes to prevent technological improvement, hire unnecessary labour, obtain work from other unions, or fix prices with employers.\textsuperscript{14} When the first of these cases, a jurisdictional dispute between carpenters and machinists, reached the Supreme Court, its response was an unequivocal pass. Although there had been no amendment to the Sherman and Clayton antitrust laws, which had long been applied to union activity, those antitrust laws now had to be read in harmony with New Deal legislation protecting unions and labour disputes. Rebuking Arnold’s invitation: “So long as a union acts in its self-interest and does not combine with non-labour groups, the licit and illicit under Section 20 [Clayton Act] are not to be distinguished by any judgment regarding the wisdom or unwisdom, the rightness or wrongness, the selfishness or unselfishness of the end of which the particular union activities are the means.”\textsuperscript{15}

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\textsuperscript{11} Senn v. Tile Layers Protective Union, 301 U.S. 468, 478 (1937)(Brandeis, J.) (“Members of a union might, without authorization of the state, make known the facts of a labour dispute, for freedom of speech is guaranteed by the federal constitution”); Thornhill v. Alabama, 310 U.S. 88 (1940).


\textsuperscript{14} Thurman Arnold memorandum in Summers, Wellington and Hyde, Cases and Materials on Labour Law (2d Ed. 1982).

\textsuperscript{15} United States v Hutcheson, 312 U.S. 219, (1941).
At exactly the same time, and with the same arguments, the Court retreated from its earlier confident constitutional protection for labour pickets, and began upholding state court injunctions against union picketing that troubled liberals of the day, such as organizational picketing and secondary activity. In a series of cases, the Court weakened the constitutional protection for picketing and upheld some state injunctions.16 After 1947, federal labour law restricted these union activities, and some of those state injunctions now appeared preempted by federal law, but there was never to be a return to constitutional protection for union picket lines.

The constitutional issues were finally addressed, barely, in a case under federal labour law that outlawed, as illegal secondary activity, picketing directed at consumers of insurance agencies in support of a strike by employees of the insurance company whose products constituted over 90 percent of their business. The insurance agency owned between 12% and 53% of each agency. The Court, dividing 6-3, found this to be secondary activity, and thus had to reach the question of whether the Constitution nevertheless protected this appeal to consumers. A paragraph, joined by only four members of the Court, treated the absence of constitutional protection for union picket to be settled.17 In separate concurrences, Blackmun and Stevens JJ objected to the perfunctory treatment of the constitutional issue. Each offered an individual rationale for concurring with the finding of illegality. Blackmun J concurred “only because I am reluctant to hold unconstitutional Congress’s striking of the delicate balance between union freedom of expression and the ability of neutral employers, employees, and consumers to be free from coerced participation in industrial strife.”18 Stevens J observed that picketing was “a mixture of conduct and communication.” The Board’s order reached “only that aspect of the union's efforts to communicate its views that calls for an automatic response to a signal, rather than a reasoned response to an idea.”19

Thus, by 1980, the Court had firmly held that a picket line by a union is not free speech protected by the First Amendment to the US Constitution, but had not settled (and has not settled) on a single rationale. Included in its rationale are the following elements: union pickets have elements of threat and coercion; they constitute conduct calling for automatic responses, not reasoned responses to an idea; and they are comprehensively regulated as part of an integrated statutory scheme involving some restrictions on speech by both unions and employers. There, despite academic criticism, matters have rested for

17 National Labour Relations Board v. Retail Store Employees Union Local 1001, 447 U.S. 607, 616 (1980). The case is more commonly known as the Safeco decision, after the employer. The Court did not cite any cases involving appeals to consumers; its three examples all involved union pickets either as part of antitrust violations or top-down organizing.
19 447 U.S. at 619 (Stevens, J., concurring).
a generation. The Supreme Court has not returned to the question of the constitutional status of labour speech or picketing, let alone striking. This is all commonplace among American labour lawyers.

III. Recent Constitutional Protection for Threatening, Coercive, Symbolic Mixes of Speech and Conduct

The sole original contribution of this Article is to observe that, in the past thirty years, the Court has knocked out all but one of its arguments. If the speaker is anybody but a labour union, the Court will protect his or her right to organize consumer boycotts, even accompanied by violence or threats of violence; picket; engage in other symbolic speech; burn flags; burn crosses and otherwise threaten. If union speech can be regulated consistent with the First Amendment, the only argument that holds any constitutional water today is the notion, once individually expressed by a single justice, that speech may be taken away as part of an integrated statutory scheme. This is not a particularly appealing argument, but it is, we think, the only real one: American courts do not protect union speech and picketing, and, a fortiori, strikes, because they think that lines must be drawn and they want labour boards, not courts, to do so.

The lesson for audiences outside the United States is that exclusion is forever. At a crucial constitutional moment, labour activists and their friends may evaluate the costs and benefits of getting, say, labour rights away from courts and into the hands of labour boards or other administrators. The American experience suggests that this choice, once made, is not one that may be revisited. It is understandable why American labour unions, and progressive jurists, in the 1930s and 1940s, thought that labour rights would be better protected in that comprehensive administrative scheme than in the historically unreliable hands of federal judges. But, three-quarters of a century on, this choice appears to have been the wrong choice. In American law, today, everybody has more rights to boycott, symbolic speech, threatening speech, and mixed speech and conduct, than labour unions or their members.

A. Consumer Boycotts

As mentioned, the US Supreme Court’s 1980 Safeco decision found a union’s attempt to organize a consumer boycott of insurance policies sold exclusively at nominally independent insurance agencies to be an unfair labour practice because the picketing of the insurance agencies. Since this picketing effectively was calling for a

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20 It had been previously held that a union might picket a multi-product retailer, there a supermarket, seeking a consumer boycott of a specific product, there apples. NLRB v. Fruit and Vegetable Packers and Warehousemen, Local 760 (Tree Fruits), 377 U.S. 58 (1964). The picketing in Safeco was illegal because “following the product” of insurance policies to the retailer was tantamount to calling for a total boycott of the retail agency. The Court subsequently held that the boycott in Safeco—that is, an effective call for total consumer boycott of a retailer, because of a labour dispute at a particular input—may be conducted through print, broadcast media, or handbilling; only picketing becomes an unfair labour practice. Edward J.
totally consumer boycott of the independent agencies, it was coercion of an independent actor, hence both illegal, and outside constitutional protection.

The ink was scarcely dry on this decision before another consumer boycott came before the Court in National Association for the Advancement of Coloured People v. Claiborne Hardware Co., and was found protected by the First Amendment. In 1966 civil rights leaders in a corner of Mississippi organized a boycott of white-owned businesses. An effectively unanimous Court held that the First Amendment precluded any award of damages for resulting economic loss. The boycott was in support of a list of nineteen demands, including desegregation of public schools and facilities, hiring of black police officers, selection of black people for jury duty. These demands for political action made the boycotting, speeches, and picketing protected speech. The Court distinguished Safeco as permissible “economic regulation” as part of the Congressional “balance,” citing the individual opinion of Blackmun, J. While acts of violence against non-supporters of the boycott had undoubtedly occurred, tort remedies had to be restricted to the perpetrators of the violence, not to those who had engaged strictly in peaceful speech, picketing, and boycotting.

The incompatibility between this decision and regulation of labour boycotts was glaringly obvious. Peaceful union calls for a total boycott of “neutral” retailers who handle struck products “coerce” those retailers and may be punished for that reason. NAACP calls for total boycott of merchants who are white, accompanied by unsystematic violence, are protected by the First Amendment. “The contrast between [a labour boycott] and Claiborne illustrates the utter manipulability of the political-economic distinction and the Court’s hostility [to] the First Amendment rights of unions.” Every factual distinction between the consumer boycott in Safeco should grant it more protection than the boycott in Claiborne: Safeco’s was totally peaceful and targeted retailers for their deeds not their race. Only the earlier exclusion of labour pickets and boycotts from First Amendment analysis permits attaching liability to them; exclusion is forever.

B. Symbolic Speech

As recently as the Safeco decision of 1980, regulation of labour picketing was justified on the grounds that it combines “speech and conduct.” There is now nothing left

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22 Rehnquist J concurred only in the result, and Marshall J recused himself.
23 L.Tribe, Constitutional Choices 201 (1985). Professor Tribe referred to International Longshoremen’s Association v. Allied International, Inc., 456 U.S. 212 (1982), applying secondary boycott law to a purely political boycott of ships with cargo from the former Soviet Union, as a protest of the latter’s invasion of Afghanistan. The union’s political objective did not immunize its boycott, as the NAACP’s political objective had immunized its. See also Pope, supra n. 12[Texas]; Mark D. Schneider (student author), Peaceful Labour Picketing and the First Amendment, 82 Colum.L.Rev. 1469 (1982).
of this argument in the general run of First Amendment law; it exists solely for application to labour unions. Burning a flag is pure conduct, communicating only symbolically, in which the flag is a metonym for the nation; nevertheless burning a flag is protected by the First Amendment.24

C. Threatening Speech

So is cross-burning, in a decision that utterly repudiates the foundations of the regulation of labour speech.

Barry Black led a Ku Klux Klan rally in a field in Virginia. He was convicted under a Virginia statute that criminalized burning a cross on public property or the property of another “with the intent of intimidating any person or group of persons,” and further provided: “Any such burning of a cross shall be prima facie evidence of an intent to intimidate a person or group of persons.” The Court held, 8-1, that Black’s conviction had to be reversed. Because of the communicative aspects of cross-burning, states could criminalize it only under statutes requiring prosecutors to prove each defendant’s intent to intimidate.25 The “prima facie evidence” proviso, in purporting to relieve prosecutors of this burden, made the entire statute unconstitutional. The only “threats” that may be regulated, consistently with the First Amendment, are “true threats” “where a speaker directs a threat to a person or group of persons with the intent of placing the victim in fear of bodily harm or death.”26

Every federal statute making a labour picket into an unfair labour practice is unconstitutional under this standard, for none ever requires specific proof of intent to intimidate, or actual intimidation. Secondary pressure or organizational picketing are unfair, we are told, because of their tendency to intimidate, what Blackmun, J., referred to as “the ability of neutral employers, employees, and consumers to be free from coerced participation in industrial strife.”27 It is never necessary, in a labour case, to show that any individual was actually intimidated by the union conduct at issue, or that the union specifically intended such intimidation.28 And of course it is never necessary to show that a union ever intended to place a victim in fear of bodily harm or death; unions cross into illegality when their speech has a tendency that might, in some circumstance not necessarily present here, coerce a neutral consumer, employee, or employer into withdrawing patronage from another employer.

26 538 U.S. at 360.
27 NLRB v. Retail Store Employees, 447 U.S. at 617-18.
28 See, e.g., NLRB v. Local 825, International Union of Operating Engineers, 400 U.S. 297, 303-04 (1971) (general contractor who hired subcontractor without collective bargaining agreement with Engineers subject to “coercion in the form of threats or walkouts or both.”); while statute literally requires union demand that general “cease doing business” with subcontractor, it is equally illegal for union to pressure general contractor to change subcontractor’s practices).
If labour speech had not been conveniently excluded from the First Amendment, the US Supreme Court would now face the daunting task of explaining why a labour picket is conclusively presumed to be intrinsically intimidating in a way that burning a cross in Virginia is not.29

D. Conduct that Signals instead of Appealing to Reason

One long-lived rationale for excluding labour speech from constitutional protection is that it is a “signal” rather than an appeal to reason. This began as a description of union strike orders;30 then migrated to union appeals to consumers where it surely applies less clearly.31 In either context it is insulting to working people and their allies. But most importantly, it is constitutionally irrelevant; the First Amendment is not limited to appeals to reason. Not since it began protecting nude dancing.32 Or cross burning.

Another remarkable bit of “expressive” conduct protected by the First Amendment is a St. Patrick’s Day parade. I have been to St. Patrick’s Day parades, and they are not exactly appeals to reason. In fact, it is impossible to say what, if any, message, let alone appeal to reason, is communicated by a St. Patrick’s Day parade. Nevertheless, the parade’s organizers have rights under the First Amendment not to be associated with a gay and lesbian organization that wanted to march with them. This shabby bit of bigotry opened the spigots of judicial rhetoric in praise of the people marching out of doors. “Not many marches…are beyond the realm of expressive parades….Our tradition of free speech commands that a speaker who takes to the street

29 So far as I know, the potential implications for labour speech of Virginia v. Black have been noted only in a note that this author prepared for C.Summers, K. Dau-Schmidt & A.Hyde, Legal Rights and Interests in the Workplace 413-14 (2007), and subsequently in Kate L. Rakoczy (student author), On Mock Funerals, Banners, and Giant Rat Balloons: Why Current Interpretation of Section 8(b)(4)(ii)(B) of the National Labour Relations Act Unconstitutionally Burdens Union Speech, 56 Am.U.L.Rev. 1621, 1654 n.188 (2007).
30 “Section 8 (c) does not apply to a mere signal by a labour organization to its members, or to the members of its affiliates, to engage in an unfair labour practice such as a strike proscribed by Section 8 (b) (4) (A). That the placard was merely such a signal, tantamount to a direction to strike, was found by the Board: ‘...the issues in this case turn upon acts by labour organizations which are tantamount to directions and instructions to their members to engage in strike action. The protection afforded by Section 8 (c) of the Act to the expression of “any views, argument or opinion” does not pertain where, as here, the issues raised under Section 8 (b) (4) (A) turn on official directions or instructions to a union's own members.’” NLRB v. Denver Building and Constr. Trades Council, 341 U.S. 675, 690-91 (1951)(union commits secondary boycott by picketing construction site to protest hiring of a nonunion subcontractor), quoting 82 NLRB at 1213.

Section 8(c), referred to by the Court, is a statutory “free speech” provision that the Court later held “merely implements the First Amendment.” NLRB v. Gissel Packing Co., 395 U.S. 575, (1969).
31 NLRB v. Retail Store Employees, 447 U.S. at 619 (Stevens, J., concurring).
corner to express his views … should be free from interference by the state based on the
content of what he says.” 33 This sort of rhetoric, needless to say, has never appeared in a
case involving labour picketing, all of which involve a union “taking to the street corner”
and immediately getting walloped by “interference by the state based on the content of
what [the union] says,” justified because the union picket is a “signal”, while the St.
Patrick’s Day parade is “expressive.”

E. Picketing by Anybody But Labour

Finally, in the last two decades the Court has made clear that picket lines put up
by everybody except labour unions are protected by the First Amendment: the content of
their message lies beyond governmental regulation and they may only be lightly
regulated as to their timing and physical location. The Constitution protects picket lines
at embassies. 34 It protects picket lines designed to dissuade women from visiting clinics
that perform abortions. 35 The entire doctrine that pickets were “speech plus conduct” was
concocted only to support limitation of labour speech; it doesn’t apply to anyone else.

In short, the First Amendment to the US Constitution protects flag burning, cross
burning, pickets outside abortion clinics, the Ku Klux Klan, the NAACP, and St.
Patrick’s Day parades. It just doesn’t protect labour pickets. In earlier times, this
exclusion was justified by the asserted tendency of labour speech to signal rather than
reason, to coerce, to add an element of conduct to an element of expression, because it is
economic not political. None of these supposed exceptions to First Amendment
protection is applied to anyone but labour unions.

IV. Meanwhile Back at the Comprehensive Scheme of Labour Regulation

The sole surviving rationale for the disfavored position of labour speech is that
labour is supposed to get most of its rights (and surrender a few) as part of a
comprehensive administrative scheme that delicately balances those rights of expression
against the rights of employers, employees, and the public. If this was the deal, it has
proven a bad one for labour. The National Labour Relations Board has not made any
adjustments in union rights to picket in half a century. It certainly has made no efforts to
keep its regulation abreast of developments in First Amendment Law.

V. Conclusion

I make no pretense at advising Canadians on the desirability or dimensions of a
constitutional strike. I address only a single argument against such a constitutional right.

It may be said in Canadian debates that, inasmuch as the right to strike necessitates qualification and regulation, that task is better assigned to administrators than to courts.

No doubt Canadian labour administrators would do a far better job than their counterparts south of the border. No doubt a constitutional right to strike, like constitutional rights to picket and boycott, must be sensitively developed with attention to each’s potential for harm to the interests of others.

However, the complete exclusion of labour activity from the Constitution has been tried, and failed. It does not improve constitutional law to be walled off from problems raised by labour activity. And it certainly does not serve justice to develop a class within society that lacks the privilege to take to the streets with picket signs urging boycotts, when that privilege, over time, is increasingly extended to everyone else in society.