

SLURRED SPEECH: HOW THE NLRB TOLERATES RACISM

By Michael H. LeRoy*

Racist speech in union representation elections is widespread and conflicts with the protections of Title VII for diverse employees across different industries. These messages contain slurs, promote white supremacy, and incite fears of legal favoritism for Blacks. Some besmirch Jews, Latinos, Japanese, and Mormons. The rise of white nationalism motivates my empirical study of racist speech in union representation elections. My database consists of fifty-one National Labor Relations Board cases and twenty-nine appellate court rulings on racially divisive campaign speech. In addition, the Article examines NLRB cases involving picketing employees who voice racial slurs to minority workers who cross their line. The fact findings show that the NLRB tolerates almost all slurs and incitements. The Board's permissive policy conflicts with Title VII's standard for racial harassment under Harris v. Forklift Systems, Inc. This Article suggests that in cases where racist speech is an issue, the NLRB should use Title VII's standard for a hostile work environment. Without making this policy change, the National Labor Relations Act opens the door for white nationalists to promote racial preference and re-segregation in the workplace.

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I. INTRODUCTION

A. Legal Importance the Research Question

Does the National Labor Relations Act¹ (NLRA) protect racist speech by employees?² This Article finds that the National Labor Relations Board (also called NLRB, or Board) often tolerates these messages.³ My data come from cases involving campaign speech in union representation elections.⁴ This Article also examines a smaller number of cases involving racist speech on picket lines during labor disputes.⁵ Here, too, the NLRB often rules that employees engage in protected concerted activity when they voice racial slurs.⁶ This Article concludes that the NLRB should afford

¹ The National Labor Relations Act, July 5, 1935, c. 372, § 1, 49 Stat. 449; June 23, 1947, c. 120, Title I, § 101, 61 Stat. 136 (also called NLRA).

² Throughout this Article, I use “racist” and “racially inflammatory” to describe different types of speech in my study. I employ both terms because speech varies in content and tone. One example of racist speech appears in *Detroit Newspaper Agency*, 342 N.L.R.B. 223, 268 (2004) (discussed *infra* note 222), where a striker who blocked a worker’s car shouted, “You fuckin’ bitch, nigger lovin’ whore.” That is racist, in my view. A less crude form of speech that I label as racially inflammatory appears in *N.L.R.B. v. Bush Hog, Inc.*, 405 F.2d 755, 757, n.2 (5th Cir. 1968) (employer made statement that union donated funds to further racial integration). For a comprehensive study that bundles these types of speech under the single heading “racist speech,” see Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim’s Story*, 87 MICH. L. REV. 2320, 2321 (1989) (proposing formal criminal and administrative sanctions as “appropriate response[s] to racist speech”).

³ See *infra* Part III.B.

⁴ See *infra* Part III.A.

⁵ See *infra* Part IV.D.

⁶ See *infra* Part IV.D. Section 7 of the NLRA provides employees the right to engage in “concerted activities for the purpose of collective bargaining or other mutual aid or protection.” 29 U.S.C. § 157 (2014).

less legal protection for racist speech by adopting Title VII's standard for hostile work environment.⁷

There are three justifications for my proposal. First, these NLRB rulings undermine Title VII's prohibition of racial harassment.⁸ This means that if employers discipline employees who use racist speech in these campaigns, employers face an unfair labor practice ruling or a re-run election under the NLRA.⁹ Second, racist speech is more pervasive.¹⁰ NLRB policies shelter the type of racist speech that occurred when workplaces were formally segregated.¹¹ This approach is outdated and conducive to exploitation by a

⁷ See *infra* Part V.

⁸ See *infra* Part IV.D.

⁹ Title VII of the Civil Rights Act of 1964, Pub. L. No. 88-352, § 703, 78 Stat. 255 (codified as amended at 42 U.S.C. §§ 2000e to 2000e-17) (2014) (also called Title VII).

¹⁰ Monica Stephens, *Geography of Hate: Geotagged Hateful Tweets in the United States*, Humboldt State University, http://users.humboldt.edu/mstephens/hate/hate_map.html# (last visited Dec. 18, 2017). The map was based on all geo-coded tweets in the United States from June 2012 to April 2013 that contained hate words such as “fag,” “nigger,” and other offensive terms. See also Pete Burnap & Matthew L. Williams, *Us and Them: Identifying Cyber Hate on Twitter across Multiple Protected Characteristics*, 5:11 EPJ DATA SCI. (2016) (adapting algorithms for spotting online religious hate to identify hate on the basis of race, disability, and sexual orientation).

Against this backdrop of the broad prevalence racist speech on Twitter, I note that black employees comprise a significant minority of employees represented by labor unions. Gerald Mayer, *Union Membership Trends in the United States*, CONG. RESEARCH SERVICE (Aug. 31, 2004), at CRS-14 (available online at https://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?article=1176&context=key_workplace).

¹¹ Part I.B, *infra*, elaborates on the history of labor unions with racial segregation and racist speech. For example, compare a 1950 case (Happ Bros. Co., Inc., 90 N.L.R.B. 1513 (1950), where employer representative told an employee, “Don’t you know if you all get the union up here you’ll be sitting up here by niggers?”) and a 2006 case (Airo Die Casting, 347 N.L.R.B. 810, 811 (2006), where an employee screamed at a black employee, “fuck you, nigger”).

new generation of white supremacists. Third, NLRB speech doctrines have unwittingly opened the door to form whites-only labor unions.¹² Some cases in this data set protect pro-union messages that promote white worker interests. No federal law—in this case, the NLRA—should offer a platform to re-segregate the American workplace.

The NLRB's permissive speech doctrine is rooted in its broad interpretation of protected concerted activity under the National Labor Relations Act. To fulfill the purposes of this labor law, Section 7 provides employees a right to engage in “concerted activities for the purpose of collective bargaining or other mutual aid or protection.”¹³ Today, the NLRB applies this law to contexts that lawmakers never imagined in 1935—for example, when employees post comments on social media.¹⁴ One problem, however, is that digital platforms are used for racist tweets, Facebook posts, and emails.¹⁵ The NLRB should narrow its speech doctrine for representation elections and concerted activity by denying protection to speech that expresses racial animus.

B. Motivation for the Research Question: Re-Emerging White Supremacy

¹² See *infra* Part II.A–Part II.B.

¹³ 29 U.S. Code § 157, NLRA, *supra* note 6.

¹⁴ See Christine Neylon O'Brien, *The Top Ten NLRB Cases on Facebook Firings and Employer Social Media Policies*, 92 OR. L. REV. 337, 346–48, 372, 375 (2014). See also *Three D LLC d/b/a Triple Play Sports Bar & Grille v. N.L.R.B.*, 629 F. App'x 33 (2d. Cir 2015) (employer rules prohibiting negative communication on social media about management violated right of employee to “like” Facebook message by a co-worker that unfavorably commented on the store owner's failing to withhold taxes properly).

¹⁵ *E.g.*, Michael H. LeRoy, *#AcademicFreedom: Twitter and First Amendment Rights for Professors*, 90 NOTRE DAME L. REV. ONLINE 158, 164 (2015); Lyrissa Barnett Lidsky, *Incendiary Speech and Social Media*, 44 TEX. TECH L. REV. 147 (2011); and Alexander Tsesis, *Inflammatory Speech: Offense Versus Incitement*, 97 MINN. L. REV. 1145, 1166–73 (2013).

White supremacy has returned to America's mainstream. As the Ku Klux Klan formed and grew in the aftermath of the Civil War, they organized mob actions¹⁶ and terror campaigns.¹⁷ Blacks were targets, but so were their white sympathizers.¹⁸ Congress held hearings to consider

¹⁶ See the account of Rep. Luke Poland—a proponent of the Ku Klux Klan Act of 1871—summarizing testimony of a white man from Ohio who taught in a Mississippi school for freed slaves:

While thus quietly pursuing his duties the house where he lived was one night surrounded by a large body of armed and disguised men; he was taken by them from his bed in his night-clothes, and in that condition to a swamp at some distance and terribly beaten. He succeeded in escaping with his life. I asked him what they said to him, and what reason, if any, they gave for the act. His answer was, 'All they said to me was that 'they would learn me not to come to Mississippi to make niggers as good as white folks.'

CONG. GLOBE, 42nd Cong., 2d Sess. 494 (May 30, 1872).

¹⁷ See CONG. GLOBE, 42nd Cong., 2d Sess. 493 (May 30, 1872):

It was perfectly clear upon all the evidence taken by the committee that the secret organization known popularly as the Ku Klux, but having really various other names, was set up for the purpose of keeping the negroes in a state of subjection to the old southern rebel element.... The strength of numbers in which the Klans generally rode, armed to the teeth, the bloody work they often made, were quite enough to excite the fears of braver and less defenseless people than the poor freedmen of the South, but probably their horrible and ghostly attire by midnight torchlight was as potent of influence as their lashes or their pistols.

¹⁸ See Gen. George Thomas's report, CONG. GLOBE, 42nd Cong., 1st Sess. 284 (Apr. 4, 1871):

Violence is openly talked of. The editorials of the public press are such as to create the most intense hatred in the breasts of ex-rebels and their sympathizers. The effect of this is to cause

legislation to combat Klan violence. Many witnesses described the extreme terror inflicted by white supremacists.¹⁹ By the 1870s, the Ku Klux Klan's effectiveness was thwarted by a combination of military and court actions.²⁰ The group re-emerged, however, in the early 1900s in response to Thomas Dixon's racist trilogy that romanticized the Klan.²¹

The Ku Klux Klan sought to segregate the work of black people, a group whom they viewed as suited only for menial agricultural labor.²² For the first half of the twentieth century, labor unions co-opted this ideology in

disturbance throughout the State [Tennessee], by inciting the ruffianly portion of this class of citizens to murder, rob, and maltreat white Unionists and colored people.

¹⁹ See the testimony of a white man, John Dunlap, describing how disguised Klansmen attacked him and a black man named James Franklin on July 4, 1868: "They then had Franklin undress himself, and then blindfolded him, and they then whipped him with what I supposed to be a leather thong, each one of their number striking him five strokes apiece, and then left him to return to his home." CONG. GLOBE, 42nd Cong., 1st Sess. 288 (Apr. 4, 1871). Dunlap was also whipped and ordered to leave town on the following Monday. *Id.* In Nashville, the Klan accosted Dunlap again, "when about sixty disguised men, armed and mounted, rode into the public square, hallooing they wanted Dunlap and fried nigger meat." *Id.*

²⁰ See Roland G. Fryer, Jr. & Steven D. Levitt, *Hatred and Profits: Getting under the Hood of the Ku Klux Klan*, National Bureau of Economic Research, NBER WORKING PAPER 13417 (Sept. 2007), at 1, available in file:///C:/Users/m-leroy/Downloads/SSRN-id1014794.pdf.

²¹ I refer to THOMAS DIXON, *THE LEOPARD'S SPOTS* (1902), THOMAS DIXON, *THE CLANSMAN* (1905), and THOMAS DIXON, *THE TRAITOR* (1907). A movie in 1915, *The Birth of a Nation*, further popularized the Klan. Evidence of the Klan's political prominence appears in a rally of 35,000 robed Klansmen in Washington, D.C. in 1925. See Philip Bump, *The Day the Ku Klux Klan Took over Pennsylvania Avenue*, WASH. POST (May 6, 2016) (embedding Washington Post coverage of the KKK's rally on August 8, 1925).

²² Rory McVeigh, *Structural Incentives for Conservative Mobilization: Power Devaluation and the Rise of the Ku Klux Klan, 1915–1925*, 77 SOC. FORCES 1461, 1476 (1999).

bylaws that mandated whites-only or segregated locals.²³ By the 1940s, however, labor's segregationist practices were challenged. The Supreme Court created a union's duty of

²³ W.E.B. DUBOIS, *THE NEGRO AMERICAN ARTISAN* 87–95, 100 (1912), citing many examples from a national survey of labor unions. A sample includes: Gardeners' Protective Union (no Negro members; and officer responded, "I have never heard of a good Negro gardener"); Machinists' Helpers and Laborers' Union of Washington, Indiana (contracts with employers had language not to hire "any Negroes or foreign men for twenty years"); Order of Railway Conductors of America (membership limited to "any white man"); Cutting, Die and Cutter Makers ("Nothing doing on the Negro"); Brotherhood of Locomotive Firemen and Enginemen (bylaws and constitution deny membership to Negroes); International Brotherhood of Boiler Makers, Iron Ship Builders and Helpers of America ("There is a future for the race but it must not be forced on the white race"); American Wire Weavers' Protective Association ("admits only white males"); The Paving Cutters' Union of the United States and Canada ("the white man will not, especially those in the South . . . tolerate the Negro to be on the same level as himself"); Waycross, Georgia, Trade and Labor Assembly (secretary believes that "Negro workers are 'treacherous and unreliable'"); Georgia Federation of Labor (some locals 'absolutely bar Negroes from membership'); Trade Assembly of Fort Worth, Texas (in skilled crafts, 'Negroes have not been admitted'); Federation Labor Union of Dallas, Texas (barring all Negroes due to 'ingrained prejudice towards anything that looks to the members like an approach towards social equality'); Marshall, Texas, Trades and Labor Council (Negroes 'cannot . . . stick as union men; will scab in spite of all that can be done'); Central Labor Union of Miami, Florida ("admitting Negroes has a 'tendency to lower wages and self-respect of white mechanics and casts a stigma of association'"); Labor Assembly of Lawton, Oklahoma (no Negro members and reporting, "we are not troubled with them to any extent"); Temple, Texas ("Nearly all men raised south of Mason and Dixon's line do not want to give the Negro any chance to become expert mechanics."); Teachers' Union of San Antonio, Texas (barring all Negroes, reporting that such membership is "unthinkable because it means social equality which saps the foundations of race purity"); Texas State Federation of Labor ("It is generally understood that the white trades unions of Texas do not admit colored people to membership," and furthermore, that the "Negro is marked with a color that distinguishes him from other poor working men"); and Emporia, Kansas, Trades and Labor Council (no Negro members; "Negroes should be treated white but kept separate.").

fair representation.²⁴ This legal duty was used on a case-by-case basis to abolish formal segregation in labor unions but did not address the Ku Klux Klan's societal influence.²⁵

The Klan's malignant ideology is back and appeals to many identity groups. White supremacy has its own racial music,²⁶ internet sites,²⁷ code language for bigotry,²⁸ warped

²⁴ *Graham v. Bhd. of Locomotive Firemen & Enginemen*, 338 U.S. 232, 239 (1949) (union of railroad firemen deprived blacks employment and seniority solely because of race); *Steele v. Louisville & Nashville R. Co.*, 323 U.S. 192, 202–03 (1944) (white union entered into agreement with railroads to promote only whites as engineers, set a cap on employment of blacks, and gave the union a right to further restrict employment of blacks); *Bhd. of R. R. Trainmen v. Howard*, 343 U.S. 768, 773 (1952) (white union threatened railroad with strike unless the company signed an agreement to discontinue all train porter positions).

²⁵ See discussion of *Brandenburg v. Ohio*, *infra* notes 135–137.

²⁶ See Robert Futrell, et al., *Understanding Music in Movements: The White Power Music Scene*, 47 *SOCIOLOGICAL Q.* 275 (2016), analyzing how Aryan music fosters a sense of purpose and belonging to people who practice racial exclusion. Popular groups are Aggravated Assault, Bully Boys, Max Resist, The Hooligans, and Skrewdriver. *Id.* at 282. Common types of music include “techno and Aryan folk genres” including “fundamental doctrines common to most movement groups: Aryan nationalism, whitepower, race war, anti-Semitism, anti-immigration, anti-race-mixing, and white victimization.” *Id.* at 281. See also BETTY A. DOBRATZ & STEPHANIE L. SHANKS-MEILE, *WHITE POWER, WHITE PRIDE!: THE WHITE SEPARATIST MOVEMENT IN THE UNITED STATES* (1997), reporting that WPM (White Power Music) draws participants from the KKK, Christian Identity sects, neo-Nazis, and Aryan skinheads.

²⁷ See Working Class Skin Heads, FACEBOOK (June 6, 2016), at https://www.facebook.com/WCSHSodaCity/?hc_ref=PAGES_TIMELINE&fref=nf [<https://perma.cc/87NS-DTCU>], stating: “This community is based on those who earn their living. Those of us who scrape by to take hone our slice of the dream. We are not slaves, we are not robots we are hard working people who know that something earned is something to be proud of.”

²⁸ See *Ku Klux Klan, Klan Glossary*, SOUTHERN POVERTY LAW CENTER, <https://www.splcenter.org/fighting-hate/extremist-files/ideology/ku-klux-klan> [<https://perma.cc/JZ7H-FNBB>]. The hidden nature of Klan-speak is demonstrated by terms such as SAN BOG (“A password meaning “Strangers Are Near, Be On Guard.”) and KIGY! (“A password meaning “Klansman, I greet you!”).

connection to Christianity,²⁹ and blood-and-soil justification for racial separation.³⁰ While part of the white supremacy movement is not visible to the public, other elements display racially-themed crosses at a state capitol³¹ and participate in state adopt-a-highway litter programs.³² This background provides context for my research question and findings.

II. THE NATIONAL LABOR RELATIONS ACT: CAMPAIGN SPEECH AND ELECTIONS

A. Overview

²⁹ Peterson v. Wilmur Commc'ns, Inc., 205 F. Supp. 2d 1014 (E.D. Wis. 2002).

³⁰ Wotan's Reich, *Why We Blood Oath* (Aug. 29, 2015), at <https://positivethoughtproject.blogspot.com/2015/08/why-we-blood-oath.html> [<https://perma.cc/RW92-28YN>], explaining:

Through our blood we carry the integrity of our ancestors. It is up to us to honor this integrity by our actions and deeds...and yes to an extent our words. When we swear an oath upon our blood we are affecting our hamingja, that "Guardian" and "Luck" that gets passed on through the generations of our Folk. What we swear an oath too is equally important, because you can swear to something that isn't worthy of you.

See also Southern Poverty Law Center, *Matthew Heimbach, "I Hate Freedom," Traditionalist Youth Network* (July 7, 2013), available in <https://www.splcenter.org/fighting-hate/extremist-files/individual/matthew-heimbach> [<https://perma.cc/PVE2-PP5B>], (stating "This is our home and our kith and kin.").

Racial separation is advocated in National Alliance, *What Is the National Alliance, White Living Space*, available at <https://natall.com/about/what-is-the-national-alliance/> [<https://perma.cc/WP6K-YBX9>] (stating, "We must have White schools, White residential neighborhoods and recreation areas, White workplaces, White farms and countryside. We must have no non-Whites in our living space, and we must have open space around us for expansion.").

³¹ *Advisory Bd. v. Pinette*, 515 U.S. 753 (1995) (Ku Klux Klan not barred by First Amendment's Establishment Clause from erecting its cross in holiday display at state capitol).

³² *See* discussion, *infra* note 149.

This study is set in the context of collective bargaining, a legal framework for union-management relations. The National Labor Relations Act (NLRA), enacted in 1935, provides employees a right to form a union, bargain over wages, hours, and terms and conditions of employment, and engage in concerted activity for their mutual aid and protection.³³ Concerted activity involves traditional union activities—for example, strikes.³⁴ But this right also applies to expressive conduct, such as verbal confrontations in labor disputes.³⁵

Concerted activity also includes employee messages in support of a union.³⁶ The NLRA prohibits employers from discriminating on this basis.³⁷ Specifically, pro-union communication is treated under the NLRA as an essential step to establish a formal bargaining relationship with an employer. Some unions may ask employers to voluntarily recognize them, leading to negotiations for a collective bargaining agreement that covers wages and other terms of employment.³⁸ Unions often are the party who petitions the

³³ 29 U.S.C. § 157, NLRA, *supra* note 6.

³⁴ N.L.R.B. v. *Erie Resistor*, 373 U.S. 221, 233 (1963) (“Section 7 guarantees . . . include the right to strike.”).

³⁵ See *Chi. Typographical Union No. 16*, 151 N.L.R.B. 1666, 1669 (1965) (“One of the necessary conditions of picketing is a confrontation in some form between union members and employees.”). Concerted activity is not protected, however, when picket line conduct “may reasonably tend to coerce or intimidate employees in the exercise of rights protected under the Act.” *NMC Finishing v. N.L.R.B.*, 101 F.3d 528, 531 (8th Cir. 1996) (citing *Clear Pine Mouldings, Inc.*, 268 N.L.R.B. 1044, 1046 (1984), *enfd.*, 765 F.2d 148 (9th Cir. 1985)).

³⁶ The Supreme Court gave substance to this right in *Republic Aviation Corp. v. N.L.R.B.*, 324 U.S. 793 (1945), finding that an employer’s rule prohibiting employees from wearing union buttons violated the Section 7 right to form a union.

³⁷ This prohibition is enforced under Section 8(a)(1) which prohibits interference, restraint, and coercion; and Section 8(a)(3), which prohibits discrimination in the form of discouraging union membership. See *Erie Resistor*, 373 U.S. at 233.

³⁸ See Jeffrey M. Hirsch, *Communication Breakdown: Reviving*

NLRB for a representation election; and in the past decade, the number of these elections have ranged between 1,330 and 1,614.³⁹ A union must obtain a majority of the votes to become the bargaining agent.⁴⁰

This background demonstrates the importance of campaign communication. Employee messages are broadly protected, including picketing.⁴¹ Employers also have a right to express their views about unions.⁴² Often, companies

the Role of Discourse in the Regulation of Employee Collective Action, 44 U.C. DAVIS L. REV. 1091, 1129 (2011) (unions seek voluntary recognition in over 80% of organizing drives but employers often reject this offer).

³⁹ NLRB, Representation Petitions—RC (Elections held by fiscal year: 2008 (1614); 2009 (1335); 2010 (1571); 2011 (1398); 2012 (1348); 2013 (1330); 2014 (1407); 2015 (1574); and 2016 (1396), available in <https://www.nlr.gov/news-outreach/graphs-data/petitions-and-elections/representation-petitions-rc> [<https://perma.cc/3T8T-AU34>].

A much smaller number of elections result from employer petitions—for example, when more than one union seeks representation. In the past ten years, the range of these elections has varied from 13 in 2013 to 60 in 2011. See NLRB, Employer-Filed Petitions—RM (Elections held by fiscal year: 2008 (25); 2009 (16); 2010 (13); 2011 (60); 2012 (14); 2013 (13); 2014 (15); 2015 (22); and 2016 (24)), available in <https://www.nlr.gov/news-outreach/graphs-data/petitions-and-elections/employer-filed-petitions-rm> [<https://perma.cc/5B4H-2PKS>].

⁴⁰ John W. Thomas Co., 111 N.L.R.B. 226, 229 (1955).

⁴¹ See *Thornhill v. Alabama*, 310 U.S. 88 (1940), striking down state law that prohibited all picketing at an employer's premises. However, courts have upheld some limits on picketing. *E.g.*, *Cox v. Louisiana*, 379 U.S. 536, 555 (1965), rejecting the idea that "patrolling, marching, and picketing on streets and highways" are on the same constitutional footing as "pure speech." The NLRA allows some types of picketing and boycotts. *E.g.*, *N.L.R.B. v. Retail Store Emp. Union, Local 1001*, 447 U.S. 607 (1980) (Section 8(b)(4)(ii)(B) of the NLRA does not prohibit all peaceful picketing—for instance, picketing grocery stores in order to persuade consumers not to buy Washington apples during a strike by orchard workers).

⁴² Section 8(c) of the NLRA provides:

The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the

describe negative effects that flow from voting for a union.⁴³ They talk about plant closures⁴⁴ and reducing benefits and wages.⁴⁵ They mention that unions force workers to strike,⁴⁶ and suggest that choosing a union is futile.⁴⁷

Employers may recognize a union voluntarily as a bargaining representative.⁴⁸ But often, they decline a

provisions of this subchapter [Act], if such expression contains no threat of reprisal or force or promise of benefit.

This provision is interpreted to mean that employers and unions are prohibited from making election speeches on company time to groups of employees within 24 hours of an election. *See* Peerless Plywood, 107 N.L.R.B. 427, 429 (1953).

⁴³ N.L.R.B. v. Gissel Packing Co., 395 U.S. 575, 618 (1969). In this landmark case, the Court tried to illustrate the line between lawful and prohibited employer communication, stating that “an employer is free to communicate to his employees any of his general views about unionism or any of his specific views about a particular union, so long as the communications do not contain a threat of reprisal or force or promise of benefit (quote omitted).” *Id.* This includes a “prediction as to the precise effects he believes unionization will have on his company.” *Id.* However, the “prediction must be carefully phrased on the basis of objective fact to convey an employer’s belief as to demonstrably probable consequences beyond his control or to convey a management decision already arrived at to close the plant in case of unionization.” *Id.*

⁴⁴ *E.g.*, N.L.R.B. v. Goya Foods of Florida, 525 F.3d 1117 (11th Cir. 2008)

⁴⁵ *E.g.*, Golden Eagle Spotting Co., 319 N.L.R.B. 64 (1995) (employer’s message that organizing would be futile and lead to regressive bargaining from the employer violated the NLRA).

⁴⁶ *E.g.*, Pyramid Mgmt. Grp., 318 N.L.R.B. 607 (1995).

⁴⁷ *E.g.*, Overnite Transp. Co., 296 N.L.R.B. 669, 671 (1989) (employer violated the NLRA by making threats that voting for a union would be futile).

⁴⁸ *E.g.*, Keller Plastics Eastern, Inc., 157 N.L.R.B. 583 (1966) (employer may voluntarily recognize a union if there is demonstrated support from a majority of employees). In the construction industry, see *John Deklewa & Sons*, 282 N.L.R.B. 1375, 1387, n.53 (1987), *enfd. sub nom*, explaining that where an employer voluntarily recognizes employees by checking union authorization cards signed by the employees, a union can become a bargaining representative through a subsequent NLRB election or clear showing of majority support. This is called a “valid card

union's evidence of majority support.⁴⁹ In some cases, they raise doubts about the validity of authorization cards.⁵⁰ When an employer declines to recognize a labor organization, this group may file a petition with the NLRB for a representation election.⁵¹

This is the background for my empirical study. The NLRB's overriding policy is to promote free choice when employees vote in representation elections.⁵² Its lodestar is whether speech interferes by threatening or coercing employees.⁵³

majority." *Id.*

⁴⁹ *E.g.*, Grismac Corp. 205 N.L.R.B. 1108, 1118 (1973) (in a proposed bargaining unit of 83 employees, where union presented 41 signed authorization cards, employer could lawfully decline to recognize union because two cards were signed by terminated individuals [union argued that two other people, determined no longer to be employees, should be counted in the proposed unit]).

⁵⁰ *E.g.*, Bookland, Inc., 221 N.L.R.B. 35 (1975) (employees were told that signing a card only meant they approved the union staying in touch with them). It is also a union unfair labor practice when a union offers to waive union initiation fees for employees who sign an authorization card. N.L.R.B. v. Savair Mfg. Co., 414 U.S. 270 (1973).

⁵¹ See Section 9(c)(1)(A) of the NLRA.

⁵² See N.L.R.B. v. Gissel Packing Co., 395 U.S. 575, 617 (1969) (scope of employer expression must be weighed against rights of the employees to associate without employer coercion).

⁵³ Speech is evaluated as to whether "the words themselves or the context in which they are used ... suggest an element of coercion or interference." *Midwest Stock Exchange, Inc. v. N.L.R.B.*, 635 F.2d 1255, 1267 (7th Cir. 1980). In regulating employer speech, it is common for the NLRB to consider if it created a fearful climate—for example, threats directed at employees or their employment. *E.g.*, *N.L.R.B. v. Browning-Ferris Indus. of Louisville, Inc.*, 803 F.2d 345, 347–49 (7th Cir. 1986) (factors include whether a threat is vague or specific, isolated or part of a pattern, and communicated by a person with authority).

The NLRB also regulates employee speech to ensure that it does not interfere with free choice. More latitude is given to speech by a co-worker than by a union agent. See *Beaird-Poulan Div., Emerson Elec. Co. v. N.L.R.B.*, 649 F.2d 589, 594 (8th Cir. 1981), and *N.L.R.B. v. Bush Hog, Inc.*, 405 F.2d 755, 1269 (5th Cir. 1968). Potentially coercive speech by union officials are subjected to greater review by the NLRB. A clear case of

B. The NLRB's Policies on Racist Speech

The NLRA does not specifically regulate speech for representation elections. Initially, the law did not even provide elections to determine majority support for a union. Following the Taft-Hartley Act, which amended the NLRA in 1947, employees or employers could petition for a representation election.⁵⁴ A year later, the NLRB announced in *General Shoe Corp.* a permissive speech policy: votes would not be put aside unless coercive speech interfered with the desires of employees to choose freely whether or not to have a union.⁵⁵ However, this approach did not address race appeals in elections, even though some campaigns were referendums on maintaining segregated workplaces.⁵⁶ As the civil rights movement gained momentum, the Board in *Sewell* (1962) announced a policy to limit racially inflammatory campaign messages.⁵⁷ About twenty years later, the NLRB issued several decisions showing its ambivalence, stating a policy of setting elections in 1978,⁵⁸ and returning to a more permissive policy in 1982.⁵⁹ During this flip-flop, *Sewell* remained in effect: it served as a racist speech filter on top of *General Shoe's* lax regulatory hand. But as this Article shows below in the research findings,⁶⁰

employee coercion appears in *N.L.R.B. v. Georgetown Dress Corp.*, 537 F.2d 1239,1241 (4th Cir. 1976), where the union's in-plant organizing threatened and harassed co-workers who would not support the union.

⁵⁴ Labor Management Relations Act, 1947, ch. 120, sec. 101, § 9(c)(1), 61 Stat. 143.

⁵⁵ *General Shoe Corp.*, 77 N.L.R.B. 124 (1948), *enfd* 192 F.2d 504 (6th Cir. 1951).

⁵⁶ *E.g.*, *Happ Bros. Co., Inc.*, 90 N.L.R.B. 1513 (1950); *American Thread Co.*, 84 N.L.R.B. 593 (1949).

⁵⁷ See discussion, *infra* note 102.

⁵⁸ *General Knit of California, Inc.*, 239 N.L.R.B. 619 (1978).

⁵⁹ *Midland Nat'l Life Ins. Co.*, 263 N.L.R.B. 127 (1982).

⁶⁰ *Infra*, Part III.B.

the NLRB's racist speech policy has existed more on paper than in its application.

1. No Policy (1935–1947)

Racism in the workplace was pervasive in the years and decades leading up to the following NLRB cases.⁶¹ Nonetheless, in the early years of the NLRA the Board turned aside complaints about racial segregation.⁶² The NLRB's earliest cases involving racial remarks during a union organizing campaign occurred during the end of World War II.⁶³ By this time, hopes were rising for integrated workplaces. President Franklin Roosevelt's Executive Order No. 8802 required all federal contractors to end racial segregation in their workplaces.⁶⁴ This directive started a slow process of integrating workplaces. Desegregation was expanded by executive orders in the 1950s and 1960s, requiring federal contractors to promote equal employment

⁶¹ *E.g.*, Robert J. Norrell, *Caste in Steel: Jim Crow Careers in Birmingham, Alabama*, 73 J. OF AM. HIST. 669 (1986), recounting the 1908 organizing attempt of Tennessee Iron and Coal Co. in Birmingham, Alabama by an all-white union. The company offered to “put all of the ‘niggers’ on one side of the mill, and on the white men on the other side” as a means to end a strike. Rejecting the offer, the union counter-proposed that the company “discharge all the niggers.” *Id.* at 671. *See also* Booker T. Washington, *The Negro and Labor Unions*, 111 THE ATL. MONTHLY 756 (June 1913) (blacks could be hired only to break strikes by white workers).

⁶² *Bethlehem-Alameda Shipyard, Inc., & Bethlehem Steel Co.*, 53 N.L.R.B. 999 (1943) (Board approved representation petition from union that had separate auxiliary local for blacks); *Atlanta Oak Flooring Co.*, 62 N.L.R.B. 973 (1945) (Board was “unable to agree that the segregation into separate locals is, per se, a form of racial discrimination in violation of . . . the Fifth Amendment”); and *Larus & Bros. Co.*, 62 N.L.R.B. 1075 (1945) (Board found that it lacked authority to pass upon racial eligibility requirements for membership in a labor organization).

⁶³ *Compare* *Edinburg Citrus Ass'n*, 57 N.L.R.B. 1145, 1156 (1944) (“If the CIO comes in the Mexicans will soon have your job.”) *with* *Bibb Mfg. Co.*, 82 N.L.R.B. 338, 358 (1949) (“You can join the union if you want to work with Negroes.”).

⁶⁴ Exec. Order No. 8802, 6 Fed. Reg. 3109 (1941), Point 2.

opportunity⁶⁵ and affirmative action.⁶⁶ These actions may have encouraged lawsuits against recalcitrant unions to end segregationist practices.⁶⁷

⁶⁵ President Eisenhower was the first president to issue an executive order that used the term “equal opportunity,” connoting a duty not only to refrain from prohibited discrimination, but “to promote full equality of employment opportunity.” Exec. Order No. 10,479, 18 Fed. Reg. 4899 (1953) (policy preamble).

⁶⁶ President Kennedy’s Executive Order 10,925 continued the progression of presidential regulation of employment discrimination. For the first time, a presidential order used the term “affirmative action.” Exec. Order No. 10,925, 26 Fed. Reg. 1977 (1961) (policy preamble).

⁶⁷ *Pettway v. Am. Cast Iron Pipe Co.*, 494 F.2d 211 (5th Cir. 1974) (prior to 1961, company had exclusively black jobs and exclusively white jobs); *Long v. Ga. Kraft Co.*, 455 F.2d 331 (5th Cir. 1972) (local union segregated 190 members in an all-white local, and 80 members in an all-black local); *Local 53 of Int’l Ass’n of Heat & Frost Insulators & Asbestos Workers v. Vogler*, 407 F.2d 1047 (5th Cir. 1969) (mechanics union refused to consider minorities for membership); *Local Union No. 12, United Rubber, Cork, Linoleum & Plastic Workers of Am., AFL-CIO v. N.L.R.B.*, 368 F.2d 19 (5th Cir. 1966) (union opposed racial desegregation of shower and toilet facilities); *Oliphant v. Bhd. of Locomotive Firemen & Enginemen*, 262 F.2d 359 (6th Cir. 1958) (union bylaws expressly included only white members); *Syres v. Oil Workers Int’l Union, Local No. 23*, 223 F.2d 739 (5th Cir. 1955) (after international union of combined its white and black locals unions, its bargaining committee negotiated racially segregated seniority lines); *United States v. Local 638 Enter. Ass’n of Steam, Hot Water, Hydraulic Sprinkler, Pneumatic Tube, Compressed Air, Ice Machine, Air Conditioning & Gen. Pipefitters*, 360 F. Supp. 979 (S.D.N.Y. 1973) (union engaged in a work-referral system that discriminated against nonwhites, including admitting 156 white members and no black members in 1972); *United States v. Wood, Wire & Metal Lathers Int’l Union, Local Union 46*, 328 F. Supp. 429 (S.D.N.Y. 1971) (union with 1,500 members in 1968 represented only four blacks); *Hicks v. Crown Zellerbach Corp.*, 310 F. Supp. 536 (E.D. La. 1970) (union unlawfully maintained separate locals for whites and blacks); *Dobbins v. Local 212, IBEW*, 292 F. Supp. 413 (S.D. Ohio 1968) (union with a history of excluding nonwhites perpetuated effects of racial exclusion); *United States by Clark v. Local 189, United Papermakers & Paperworkers, AFL-CIO, CLC*, 282 F. Supp. 39 (E.D. La. 1968) (white local union discriminated against black employees); *Haynes v. Louisiana Teachers Ass’n*, 381 So.2d 849, 850 (1980) (consolidation of predominantly black

The early cases in my sample (1935–1947) involved allegations that an employer committed an unfair labor practice under the NLRA.⁶⁸ In these cases, the NLRB mentioned but did not analyze racial comments because it had no policy on campaign speech. In other words, when the NLRB ruled against employers in cases involving racist speech, there was a broader pattern of managerial interference with the right of employees to join a union.

In these cases, employers appealed to white workers to reject a union to avoid working with blacks and other minorities. For example, the company president in *Reeves Rubber* told workers that if the plant had union representation the workplace “would be run by Negroes from Los Angeles and Mexicans from San Juan Capistrano.”⁶⁹ A shop foreman in *S.K. Wellman Co.* told two employees that “if the C. I. O. got in the plant, it would be fulla negroes.”⁷⁰ In *Planters Manufacturing Co.* a superintendent pressured an employee to quit a union by criticizing him for joining a group that admitted blacks as members.⁷¹ He admonished employees to avoid the union or they “would be replaced by negroes.”⁷²

teachers’ organization and white counterpart ended 70 years of racially separate teacher organizations); *Thorman v. Int’l All. of Theatrical Stage Emp. & Moving Pictures Mach. Operators of U.S. & Canada*, 320 P.2d 494 (Cal. 1958) (black union members, confined to auxiliary local, were required to pay a working fee to the white union while being denied employment security enjoyed by whites); *Williams v. Int’l Bhd. of Boilermakers, Iron Shipbuilders & Helpers of Am.*, 165 P.2d 903 (Cal. 1946) (international union admitted blacks if they consented to segregation in separate locals); and *James v. Marinship*, 155 P.2d 329 (Cal. 1944) (union required blacks to join an “auxiliary” that denied them full membership to the white local).

⁶⁸ These violations are set forth in §158, Sections 8(a)(1)-(5) (unfair labor practices by employer).

⁶⁹ 60 N.L.R.B. 366 (1945).

⁷⁰ *S.K. Wellman Co.*, 53 N.L.R.B. 214, 215 (1943).

⁷¹ *Planters Mfg. Co.*, 10 N.L.R.B. 735, 744 (1938).

⁷² *S.K. Wellman*, 53 N.L.R.B. at 225.

Employer race baiting took other forms. A superintendent in *Edinburg Citrus Ass'n* tried to convince employees that a vote for the union would benefit Mexican workers at their expense.⁷³ The company president in *Fred A. Snow Co.* punctuated his questioning of an employee about his union activities by stating, "You don't look like a German or a Jap but you act like one."⁷⁴ Sometimes, however, race appeals went the other way, intending to persuade black workers to reject unions. The general manager in *Arcade Sunshine Co.* told black workers that the union was of "no service to the black face" and therefore deserved to be rejected.⁷⁵

2. "Laboratory Conditions" in *General Shoe* (1948–1962)

In 1947 the Taft-Hartley Act, amending the NLRA, provided employers a right of free speech.⁷⁶ The new law also created a category of unfair labor practices committed by

⁷³ *Edinburg Citrus Ass'n*, 57 N.L.R.B. 1145, 1157 (1944). A superintendent reportedly told an employee:

You are going to get so many Mexican boys in this Union, Mexican laborers in this Union that you are going to have so many in there that they will have a majority . . . When they vote for something, what ever one of the Mexican boys votes for, the rest of them is going to vote for that, and the first thing you know they will be ruling the Union and will be trying to take your job.

⁷⁴ 41 N.L.R.B. 1288, 1292, n.2 (1942).

⁷⁵ 12 N.L.R.B. No. 38 (1938).

⁷⁶ Labor Management Relations (Taft-Hartley) Act, 1947, Pub. L. No. 101, § 8(b)(4)(A)–(C), 61 Stat. 136, 141–42 (hereinafter Taft-Hartley Act). Congress enacted Section 8(c) in response to NLRB rulings that severely restricted employer speech during representation elections. *See* S. REP. NO. 105 on S. 1126, 1 LEG. HIST. OF THE LABOR MANAGEMENT RELATIONS ACT 1947, 429–30 (1948) ("The committee believes these [Board] decisions to be too restrictive . . .").

unions.⁷⁷ These developments affected cases with racially inflammatory appeals.

The NLRB's first policy on campaign speech was set forth in *General Shoe*.⁷⁸ The employer disparaged the union during an organizing campaign, but there was no promise of benefit or threat of reprisal—nor any racial message.⁷⁹ Nonetheless, the company's heavy-handed tactics “went so far beyond the presently accepted custom of campaigns directed at employees' reasoning faculties that we are not justified in assuming that the election results represented the employees' own true wishes.”⁸⁰ The decision set forth a two-step review. The Board acknowledged the challenge of measuring coercive influence in campaign speech, and said the “question is one of degree.”⁸¹ To make its task easier, the Board also said it would only intervene where conduct is “so glaring that it is almost certain to have impaired employees' freedom of choice.”⁸²

Applying the first step, the NLRB considered whether campaign speech rose to the level of an unfair labor

⁷⁷ These violations are set forth in §158, codified in Sections 8(b)(1)–(7) (unfair labor practices by labor organization).

⁷⁸ *General Shoe Corp.*, 77 N.L.R.B. 124 (1948), *enfd* 192 F.2d 504 (6th Cir. 1951). A common example of coercive speech is an employer threat to close a plant if employees vote for a union. For an insightful explanation of the Board's two-step review, see Comment, *Labor Law Reform: The Regulation of Free Speech and Equal Access in NLRB Representation Elections*, 127 U. PA. L. REV. 755, 763–64 (1979).

⁷⁹ *General Shoe*, 77 N.L.R.B. at 125–27. The day before the representation election, the company president called employees into his office in groups of 20-25 people. He read a harsh anti-union address to them. The company also sent supervisors to employee homes to give a pro-company viewpoint. The NLRB concluded that the company “went so far beyond the presently accepted custom of campaigns directed at employees' reasoning faculties that we are not justified in assuming that the election results represented the employees' own true wishes.” *Id.* at 127.

⁸⁰ *Id.*

⁸¹ *Id.* at 126.

⁸² *Id.*

practice.⁸³ Next, it reviewed the disputed campaign speech to ensure that the election was conducted as “a laboratory in which an experiment may be conducted, under conditions as nearly ideal as possible, to determine the uninhibited desires of the employees.”⁸⁴

Thus, *General Shoe* put the NLRB in the posture of regulating campaign speech. From 1948 through 1962, roughly half of the NLRB rulings disallowed racial messages.⁸⁵ Following the pattern from 1935–1947, most cases involved bigoted speech against blacks. For instance, a supervisor in *Happ Bros. Co.* told an employee, “Don’t you know if you all get the union up here, you’ll be sitting up here by niggers?”⁸⁶ In *American Thread Co.*, a superintendent told a worker, “You will work side by side with Negroes sharing the same rest rooms.”⁸⁷ Company propaganda in *Bibb Manufacturing Co.* promoted the idea of preserving racial segregation. Its newspaper said that a labor group “would force white girls to use the same rest rooms and restaurants as Negro girls and penalize white girls who refuse to work under Negro overseers, and Negro

⁸³ *Id.* at 125.

⁸⁴ In this instance, the Board concluded that the employer “created an atmosphere calculated to prevent a free and untrammelled choice by the employees.” *Id.* at 126.

⁸⁵ In my research, I encountered a wide variety of fact patterns, often involving a mix of disputed conduct and speech (e.g., interrogation of employees regarding support of a union, as well as use by employers or workers of racist appeals in a representation campaign). Most of these cases raised the issue whether to certify elections results, though some involved the issue of whether certain conduct or speech rose to the level of an unfair labor practice. In reporting data from these diverse contexts, I have combined cases where either election results were not certified or an unfair labor practice was found, and use the term “disallow” to reflect adverse NLRB rulings.

⁸⁶ *Happ Bros. Co., Inc.*, 90 N.L.R.B. 1513 (1950).

⁸⁷ *American Thread Co.*, 84 N.L.R.B. 593, 601 (1949) (“You will work side by side with Negroes sharing the same rest rooms.”).

second hands.”⁸⁸ A foreman reinforced this prejudice to persuade an employee not to join a union.⁸⁹ There were times, however, when an employer engaged in race baiting but avoided an adverse Board ruling. *Sharnay Hosiery Mills, Inc.* did not overturn an election where the company mailed employees an account of the union’s efforts to promote racial integration.⁹⁰

Unions also stooped to racist appeals. In a contest between two unions to represent workers at a particular company, a devious union hired blacks and whites to hand out leaflets to employees. They hoped to dupe workers into believing that the rival union favored integration.⁹¹ The NLRB set aside the election, not on grounds of racial animus, but fraud.⁹²

The Board’s mixed record from 1948–1962 in treating racist speech was due to a refinement to its *General Shoe* policy. In *The Liberal Market*,⁹³ the NLRB loosened its speech monitoring approach, stating that elections “do not occur in a laboratory where controlled or artificial conditions

⁸⁸ *Bibb Mfg. Co.*, 82 N.L.R.B. 338, 358 (1949) (newspaper circulated by the company said that a labor group “would force white girls to use the same rest rooms and restaurants as Negro girls and penalize white girls who refuse to work under Negro overseers, and Negro second hands.”).

⁸⁹ 82 N.L.R.B. 338, 358 (1949). The foreman told the employee “he could join the Union if he wanted to work with Negroes.” *Id.* at 377. The NLRB found that this appeal “was another obvious attempt to raise the race prejudice among white employees in order to discourage membership in the Union by creating the economic threat that Negro employees would be allowed to hold positions then reserved for white employees.” *Id.*

⁹⁰ 120 N.L.R.B. 750 (1958). The letter correctly reported that the Union contributed \$75,000 to the NAACP and submitted legal briefs to the Supreme Court to promote racial integration. The NLRB refused to vacate the election because the Company’s communication contained no misrepresentation, fraud, or coercion.

⁹¹ *Kelsey-Hayes Co.*, 126 N.L.R.B. 151(1960).

⁹² *Id.* at 153 (where fraud and trickery occur, conditions for a proper election do not exist).

⁹³ 108 N.L.R.B. 1481 (1954).

may be established.”⁹⁴ The Board added that the actual facts must be assessed “in the light of realistic standards of human conduct.”⁹⁵ This more permissive approach guided the Board in *Paula Shoe Co.*⁹⁶ The NLRB upheld a union election even though the labor organization’s handbill said, “If you want to avoid that the Jew Sandler continue to mistreat you, vote for UTM (sic).”⁹⁷ The NLRB minimized the significance of this message, reasoning that “mere mention of a racial or religious issue is not grounds for setting aside an election.”⁹⁸ The Board added that union elections are marked by emotional appeals and hyperbole.⁹⁹

3. Sewell (1962) and Midland Life Insurance Co. (1982)

Until 1962, the NLRB did not have an explicit policy for racist speech.¹⁰⁰ When racial issues arose over campaign

⁹⁴ *Id.* at 1482.

⁹⁵ *Id.*

⁹⁶ 121 N.L.R.B. 673 (1958).

⁹⁷ *Id.* at 676.

⁹⁸ *Id.* N.L.R.B. v. Silverman’s Men’s Wear, Inc., 656 F.2d 53 (3d Cir. 1981), *overruled by* Paula Shoe Co., 121 N.L.R.B. 673 (1958).

⁹⁹ *Schneider Mills, Inc. v. N.L.R.B.*, 390 F.2d 375, 379 (4th Cir. 1968) (en banc), *denying enft to* Schneider Mills, Inc., 159 N.L.R.B. 982 (1966). The NLRB certified the election results for the Union, even though the Union’s campaign message compared the Company president to Hitler. The court, disagreeing with the NLRB, said that this comparison “interjected into the election one of the most sordid episodes of modern history, with all of its overtones of religious persecution.” *Id.* at 379. The court continued, “such propaganda was of a highly inflammatory nature and was manifestly not germane to the issues at stake in the election.” *Id.* at 380.

¹⁰⁰ Leading up to *Sewell Manufacturing Co.*, 138 N.L.R.B. 66 (1962), the NLRB also set aside some elections due to racial coercion but lacked a structured framework for making these judgments. *E.g.*, *Associated Grocers of Port Arthur, Inc.*, 134 N.L.R.B. 468, 474 (1961) (overturning election results that favored the employer in part to “intimidating the existing Negro complement” of employees with the prospect of white replacements for them if the union won). *See also*

messages, the Board used broad criteria for unfair labor practices from 1935-1947 and the “laboratory conditions” doctrine after *General Shoe*. This changed, however, in *Sewell Manufacturing Co.*, a case where the Board set aside an election because the employer repeatedly used racial integration as a divisive message.¹⁰¹ The *Sewell* Board said that “appeals to racial prejudice on matters unrelated to the election issues or to the union’s activities are not mere ‘prattle’ or puffing. They have no place in Board electoral campaigns.”¹⁰²

Sewell has remained in effect since 1962. In a series of conflicting rulings, however, the Board has alternated between regulating election speech that is based on misrepresentations and maintaining a hands-off approach. Decided the same year as *Sewell*, *Hollywood Ceramics Co.*, said that elections would be set aside if campaign information contained significant misrepresentations.¹⁰³ This approach did not specifically address racially themed messages, though prejudicial speech is often a misrepresentation. The Board reversed course in *Shopping Kart Food Market, Inc.*, holding that it would no longer set

Granwood Furniture Co., 129 N.L.R.B. 1465 (1961).

¹⁰¹ *Sewell Mfg. Co.*, 138 N.L.R.B. 66 (1962). The employer extensively communicated racially charged messages to employees. One example involved newspaper pictures “purportedly showing white labor leaders dancing with Negro women and an unidentified Negro man dancing with a white woman, above a caption reading ‘The CIO strongly pushes and endorses the FEPC.’” *Id.* at 66–67. The NLRB found “the challenged propaganda has lowered the standards of campaigning to the point where it may be said that the uninhibited desires of the employees cannot be determined in an election.” *Id.* at 71. In *Sewell*-type cases, the Board may order a new election. *See Zartic, Inc.*, 315 N.L.R.B. 495, 496 (1994).

¹⁰² *Sewell Mfg.*, 138 N.L.R.B. at 71. The *Sewell* court added that racially inflammatory appeals “inject an element which is destructive of the very purpose of an election. They create conditions which make impossible a sober, informed exercise of the franchise.” *Id.*

¹⁰³ 140 N.L.R.B. 221, 224 (1962).

aside elections based on misrepresentations,¹⁰⁴ but then reverted to the *Hollywood Ceramics* standard in *General Knit of California, Inc.*¹⁰⁵ These alternating policies dealt with campaign messages in general, not racist speech. Eventually, the Board in *Midland National Life Insurance Co.* (1982) settled on a hands-off policy allowing voters to separate truth and fiction, reality and distortion, puffery and honesty.¹⁰⁶

To summarize, since the Taft-Hartley Act the Board has conducted representation elections. Campaign speech by employers and unions is filled with hyperbole, much like American political elections. For the past thirty-five years, the NLRB has taken a *laissez-faire* approach to speech in these elections. Paradoxically, however, its policy in *Sewell* set a standard for prohibiting appeals to racial prejudice.

¹⁰⁴ 228 N.L.R.B. 1311, 1313 (1977).

¹⁰⁵ 239 N.L.R.B. 619, 620 (1978).

¹⁰⁶ In *Midland National Life Insurance Co.*, 263 N.L.R.B. 127, 133 (1982), the NLRB returned to the Shopping Kart standard, stating “we will no longer probe into the truth or falsity of the parties’ campaign statements, and . . . will not set elections aside on the basis of misleading campaign statements.” This policy removes “impediments to free speech by permitting parties to speak without fear that inadvertent errors will provide the basis for endless delay or overturned elections.” *Id.* at 132.

More generally, the burden to overturn an election has remained high, even where racial animosities are involved, because an “election by its nature is a heated affair.” *N.L.R.B. v. Halperin Distrib. Corp.*, 826 F.2d 287, 290 (4th Cir. 1987). The Board will overturn an election only if “an atmosphere of fear and coercion rendered free choice impossible.” *Id.* Even when that burden is met, the party who communicated a racial message is allowed to prove that its message was truthful and germane. *Family Serv. Agency S.F. v. N.L.R.B.*, 163 F.3d 1369, 1378–79 (D.C. Cir. 1999) (union’s use of Spanish as a wedge-issue to win over Hispanic vote while alienating black employees was relevant to its campaign, even if inflammatory). A judge in another case noted, “Only the successful propagandist need concern us” in deciding whether a racially provocative statement is part of an election. *N.L.R.B. v. Bancroft Mfg. Co., Inc.*, 520 F.2d 1406, 1407 (5th Cir. 1975) (per curiam) (Gee, J., concurring). See generally Comment, Charlotte LeMoyné, *The Unresolved Problem of Race Hate Speech in Labor Union Elections*, 4 GEO. MASON U. C.R.L.J. 77 (1993).

Thus the question to explore is whether—and to what extent—the Board has taken action in campaigns where this speech occurs.

III. RESEARCH METHODS AND FINDINGS: RACIST MESSAGES IN NLRB ELECTIONS

My research parallels methods used in similar studies on discrimination within labor law.¹⁰⁷ The closest comparison is Paul Frymer's research.¹⁰⁸ In 2005, Frymer explored evidence of racism in labor union elections by examining NLRB and federal appeals court cases.¹⁰⁹ His study was based on 150 cases from 1935–2000.¹¹⁰ Mine is limited to seventy-seven cases from 1938–2015. However, Frymer did not report how he selected cases, nor did he list these cases; and he presented statistical findings in text without data tables.

I explain my study's methodology,¹¹¹ include an appendix of cases,¹¹² present data tables,¹¹³ and report

¹⁰⁷ Michael Jordan, *The NLRB Racial Discrimination Decisions 1935-64: The Empiric Process of Administration and the Inner Eye of Racism*, 24 CONN. L. REV. 55 (1991); Karl E. Klare, *The Quest for Industrial Democracy and the Struggle Against Racism: Perspectives from Labor Law and Civil Rights Law*, 61 OR. L. REV. 157 (1982); Lawrence F. Doppelt, *Employer Racial Discrimination: Reviewing the Role of the NLRB*, 8 J. L. REFORM 453 (1974); James M. Hughes, *Allocating Jurisdiction Over Racial Issues Between the EEOC and NLRB: A Proposal*, 54 CORNELL. L. REV. 43 (1968); and Douglas L. Leslie, *Government Action and Standing: NLRB Certification of Discriminatory Unions*, 1974 ARIZ. ST. L. J. 35 (1974).

¹⁰⁸ Paul Frymer, *Racism Revised: Courts, Labor Law, and the Institutional Construction of Racial Animus*, 99 AM. POL. SCI. REV. 373 (2005).

¹⁰⁹ *Id.* at 374.

¹¹⁰ *Id.*

¹¹¹ *Infra* Part III.A.

¹¹² *Infra* Part VI.

¹¹³ *Infra* Part III.B.

specific fact findings.¹¹⁴ Frymer and this Article reach similar conclusions about the NLRB's permissive treatment of racist speech in union elections.¹¹⁵ But our inquiries differ in key respects. Since 2005, white nationalism has become a major force in American culture and politics. My study captures the raw, internet-mediated expressions of white nationalism in a way that was not possible even a decade ago.¹¹⁶ These social media platforms are a potent outlet for racist communication that could be part of union representation elections.

The most immediate distinction is my comparison of NLRB racist speech cases to comparators under Title VII,¹¹⁷ and to unjust dismissal laws that employees use to challenge employers who fire them for racist speech.¹¹⁸ My conclusion—that the NLRB's toleration of racist speech undercuts hostile work environment standards in Title VII—supports earlier studies that flagged this concern as long as 40 years ago.¹¹⁹

¹¹⁴ *Infra* Part III.B.

¹¹⁵ Frymer, *supra* note 108, at 384–85.

¹¹⁶ *Id.* at 373–74, assumed that the study of racism through a psychological lens was incomplete and also assumed that racist speech and actions were strategic behaviors. While he examined NLRB and court rulings to examine these assumptions, he did not explore specific illustrations of white supremacist organizations, likely because they were less visible without social media in the early 2000s. By comparison, I present my findings within the broader milieu of white supremacist culture and organizations today. See Futrell, *supra* note 26; Working Class Skins Heads, *supra* note 27, Southern Poverty Law Center, *supra* note 28; Peterson, *supra* note 29; and Wotan's Reich, *supra* note 30.

¹¹⁷ *Infra* Part IV.

¹¹⁸ *Infra* Part IV.

¹¹⁹ Doppelt, *supra* note 107, at 459 (“[T]he NLRB is wrong, as a matter of law, in requiring that racial discrimination be ‘inherently destructive’ of employee rights under the Act in order to be unlawful”); Hughes, *supra* note 107, at 950 (“[A] method of apportionment must be developed under which the Board can continue to prohibit union racial practices that substantially undermine the efficacy of the LMRA, and at the same time defer to EEOC jurisdiction in matters that are peripheral to

A. Sample and Research Methods

I created a database of NLRB and federal court rulings involving racist messages during a union representation election. Using Westlaw's internet database for NLRB cases, I searched for cases with the key words "racial" (and its extensions, such as "racially" and "racist"), "campaign," and "representation." These words were an initial guide. My search led to cases containing campaign slurs of Jews,¹²⁰ Japanese,¹²¹ Hispanics,¹²² and Mormons.¹²³

I found cases with racist speech in union elections. These cases were recorded in a roster. I also explored precedents cited by these decisions. In addition, I keycited the cases for additions to the database. Finally, I examined the case history for each NLRB decision to see if a federal appeals court also made a ruling related to speech.

The initial research focused on campaign messages from company and union representatives. Some NLRB cases also revealed third-party speakers who communicated racist messages during an organizing campaign: co-workers,¹²⁴ allies to unions and employers,¹²⁵ and outsiders.¹²⁶ I added

organizational and collective bargaining processes"); and Leslie, *supra* note 107, at 61 ("[W]hen the NLRA accords exclusive representation rights to a union that discriminates in membership, it arguably satisfies a condition precedent to the union's existence . . . [but] the Act neither passes upon nor enforces the union's acts of discrimination in membership").

¹²⁰ N.L.R.B. v. Katz, 701 F.2d 703 (7th Cir. 1983).

¹²¹ KI (USA) Corp., 309 N.L.R.B. 1063 (1992).

¹²² Family Serv. Agency S.F. v. N.L.R.B., 163 F.3d 1369, 1378-79 (D.C. Cir. 1999).

¹²³ Honeyville Grain, Inc. v. N.L.R.B., 444 F.3d 1269 (10th Cir. 2006)

¹²⁴ *E.g.*, Beaird-Poulan Div., Emerson Elec. Co. v. N.L.R.B., 649 F.2d 589 (8th Cir.1981) and N.L.R.B. v. Georgetown Dress Corp., 537 F.2d 1239 (4th Cir. 1976)

¹²⁵ *E.g.*, N.L.R.B. v. Katz, 701 F.2d 703 (7th Cir. 1983).

these cases to the database.

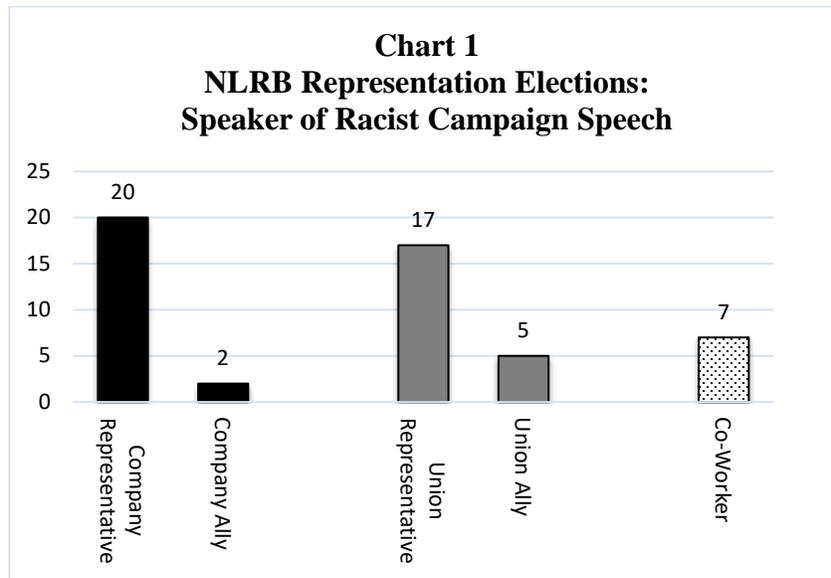
Fact Findings 1–6 are presented in Part III.B, all of which pertain to NLRB rulings. Part III.C presents Fact Finding 7, relating to appellate court rulings on these NLRB cases. Part III.D provides a textual analysis of these appellate cases.

B. Data and Fact-Findings

My sample contained fifty-one NLRB cases decided from 1938 to 2015. Federal appeals courts ruled in twenty-eight of these cases. Thus, the database has seventy-nine legal rulings. My data presentation is organized in five charts. Following these statistics, this Article reports key fact findings. Chart 1 classifies speakers who communicated racist messages. Chart 2 displays how often the NLRB permitted racist speech; counts how often a union or employer won the ruling; and shows certification outcomes for union elections. Charts 3A and 3B break down NLRB rulings by time frames that relate to different NLRB speech policies. In Chart 4, I show whether (1) the ruling affirmed an NLRB determination to certify a union or deny certification of the election, and (2) the employer's speech was an unfair labor practice before the NLRA had a certification process.

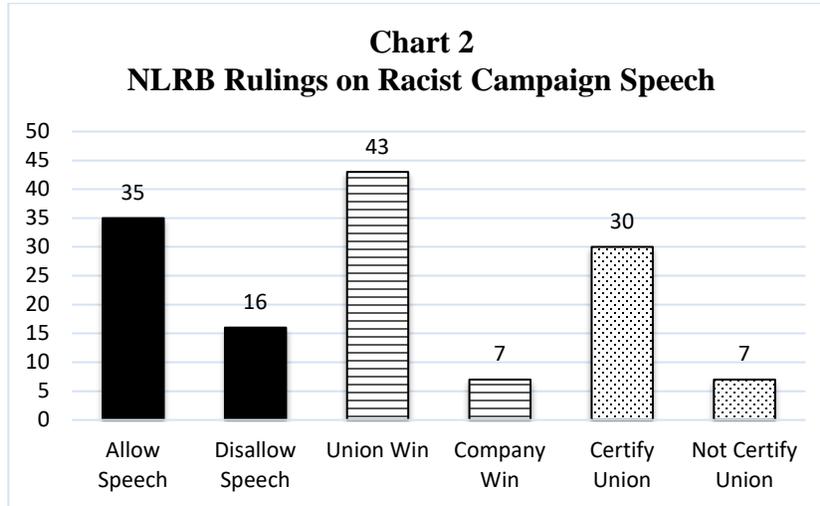
¹²⁶ *E.g.*, *Ashland Facility Operations, LLC*, 701 F.3d 983 (4th Cir. 2012). In *Ashland*, an employer contended that an outside group made racially inflammatory remarks that undermined an election that resulted in a union victory and certification. The appeals court, applying an agency analysis, affirmed the NLRB's ruling that the comments by a leader of the NAACP was not an agent of the union. *Id.* at 990–91. The court also concluded that the NAACP officer's comments to employees were not racially inflammatory. *Id.* at 992.

1. Statistical Findings for NLRB Rulings



Fact Finding 1: In NLRB representation elections, an equal number of company and union speakers communicated racist messages: Company representatives used this type of speech in twenty cases, plus two of their allies (total of twenty-two cases). Similarly, union representatives used racist speech in seventeen cases, and five of their allies (total of twenty-two cases). Since co-workers are viewed by the NLRB and courts as third parties, seven cases involving their speech is not analyzed as a form of company or union speech.¹²⁷

¹²⁷ See discussion, *infra* note 220.



Fact Finding 2: In two-thirds of representation campaigns involving racist messages, the NLRB allowed this communication (see bars at left, with solid shading).¹²⁸ The NLRB allowed racist speech in thirty-five cases (68.6%) compared to sixteen contrary rulings (31.4%).

Fact Finding 3: Unions won more than three-fourths of the cases involving representation campaigns with racist messages (see middle bars with horizontal lines).¹²⁹ Unions won forty-three cases (84.3%) involving racist speech, compared to seven cases (13.7%) where the Board disallowed this communication. One case produced a mixed outcome (2.0%, not shown).

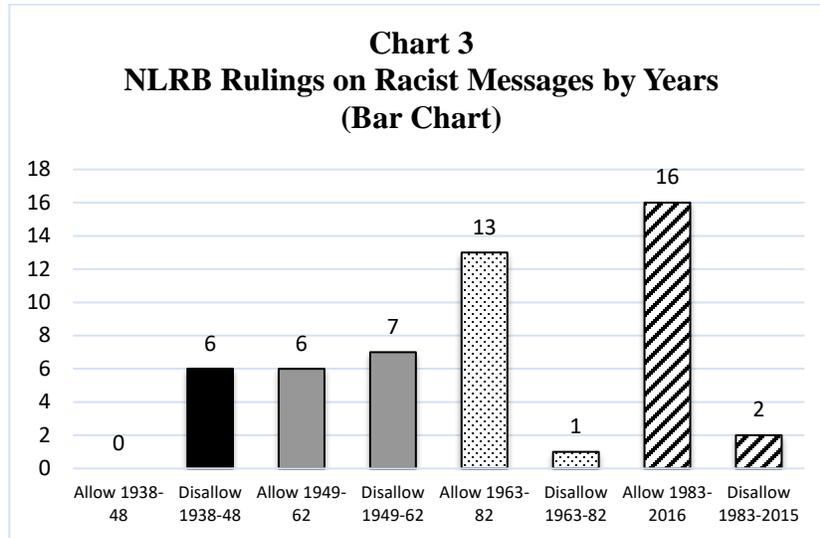
Fact Finding 4: Unions were certified as bargaining representatives in four of five cases with racist messages (see dotted bars at right).¹³⁰ Unions won thirty cases (58.8%) involving racist speech, compared to

¹²⁸ Refer to black bars, left.

¹²⁹ Refer to bars with horizontal shading, center.

¹³⁰ Refer to dotted bar, right.

seven cases with contrary rulings (13.7%). Fourteen other rulings (27.5%) involved an unfair labor practice finding or an order of a new election, but they were not a ruling on whether to certify a union.

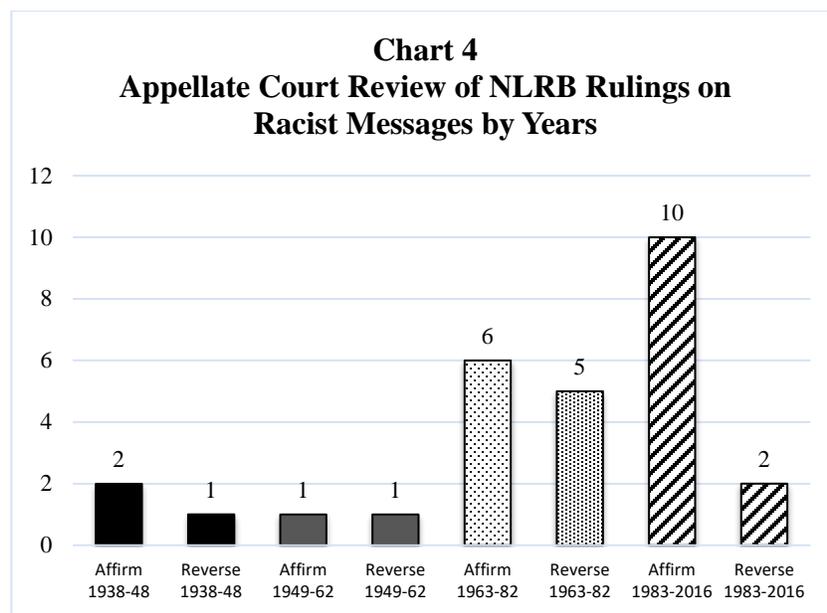


Fact Finding 5: Since 1938, NLRB rulings have dramatically changed from disallowing all racist messages to allowing most of these communications, especially since 1963. From 1938–1948 (pre-*General Shoe*), the NLRB disallowed racially themed speech in all six cases (see black bar near far-left). But this pattern changed during 1949–1962 (*General Shoe* period), when the NLRB only disallowed racist speech in about half of its cases (see bars at middle-left in light gray). Paradoxically, after *Sewell* in 1962 and through 1982—a period when the NLRB announced a more rigorous test for racially themed campaign messages—the NLRB rarely disallowed these messages (see bars at middle right with dotted pattern, indicating one cases that disallowed speech and thirteen contrary rulings). After the NLRB returned to a more hands-off policy for evaluating

all forms of campaign speech in 1982 (see bars at far right with horizontal pattern), there was no change in outcomes: In sixteen cases from 1983–2015, the NLRB allowed racist messages and disallowed this speech only twice.

2. Statistical Findings for Federal Appellate Court Rulings

My sample includes twenty-seven federal appeals court rulings on the NLRB cases.



Fact Finding 7: Federal appeals courts denied enforcement in 9 out of 27 NLRB cases involving racist speech, signaling a difference in how courts and the Board treat these campaign messages. The period of greatest disagreement followed *Sewell* (1963–1982), when federal appeals courts reversed five out of eleven NLRB

rulings (45.5%) on racist campaign messages.¹³¹ For NLRB rulings from 1938 through 1982,¹³² federal appeals courts reversed seven out of sixteen (43.75%) NLRB rulings that allowed racially themed campaign messages. These statistics are inconsistent with the deference that courts usually apply to NLRB rulings and orders.¹³³ In the most recent period (1983–2016), however, courts affirmed ten out of twelve (83.3%) NLRB orders involving racist speech.¹³⁴ One ruling, which partially affirmed an NLRB ruling, was not included in Table 4.

IV. RESURGENT WHITE SUPREMACY: EMPLOYER LIABILITY UNDER TITLE VII

In Part IV, this Article demonstrates how the NLRB's permissive treatment of racist campaign messages undermines Title VII's standards for racial harassment. Part IV.A shows how white supremacists are enlarging their communications, including in workplaces. This background is relevant to my study because it indicates that racist speech is more prevalent than my small sample indicates. Part IV.B explores cases where employers failed to address racist speech. Under Title VII and related anti-discrimination laws, employers pay costly judgments or settlements. The main implication of Part IV.B is that racist speech harms businesses that ignore or tolerate it. Part IV.C examines cases in which employers disciplined employees who communicated racist messages at work—in effect, the

¹³¹ Refer to dotted bars (right-center).

¹³² Refer to black bars (left), and gray bars (left-center).

¹³³ See James J. Brudney, *A Famous Victory: Collective Bargaining Protections and the Statutory Aging Process*, 74 N.C. L. REV. 939, 965–66 (1996) (analyzing 1,224 National Labor Relations Board decisions that were appealed to federal courts). Appellate courts reversed only 14.7% of the NLRB cases where a union violated the NLRA. *Id.* at 976, tbl.3.

¹³⁴ Refer to diagonal bars (right).

flip-side of cases in Part IV.B. In these cases, employees sued their employers for taking adverse actions on the basis of their workplace speech. Important to note, employers usually defended these lawsuits successfully. Part IV.D integrates these sub-parts to explain how the NLRA and Title VII subject employers to conflicting speech policies—the former promoting free speech even if racist, and the latter resulting in monetary damages for permitting racist speech when it adversely affects conditions of employment.

A. Resurgence of White Supremacy

White supremacy has crawled out from the shadows into America’s mainstream. This resurgence is anchored in time by a landmark case, *Brandenburg v. Ohio*.¹³⁵ A Klu Klux Klan leader was convicted under a state criminal syndicalism statute for a rally that hinted at violence against the federal government.¹³⁶ That rally, held on a farm,¹³⁷ was repeated on a larger scale in 2017 when armed white supremacist groups violently marched through the streets of Charlottesville, Virginia.¹³⁸ After that disturbance, a national poll shows that four percent of Americans “mostly agree” with white nationalist beliefs.¹³⁹

¹³⁵ 395 U.S. 444 (1969) (striking down Ohio’s criminal syndicalism statute because the law criminalized mere advocacy of violence).

¹³⁶ *Id.* at 445. The rally featured a message that the federal government was suppressing the white race, and “revengeance” (sic) might be an appropriate response. *Id.* at 446.

¹³⁷ *Id.* at 445.

¹³⁸ Hawes Spencer, *A Far-Right Gathering Bursts Into Brawls*, N.Y. TIMES (Aug. 13, 2017), at <https://www.nytimes.com/2017/08/13/us/charlottesville-protests-unite-the-right.html>, and Hunton & Williams, FINAL REPORT: INDEPENDENT REVIEW OF THE 2017 PROTEST EVENTS IN CHARLOTTESVILLE, VIRGINIA (Nov. 24, 2017), at <http://www.charlottesville.org/home/showdocument?id=59691> [<https://perma.cc/S3WL-ATUL>].

¹³⁹ A national poll showed that four percent of Americans mostly

On a cultural scale, white supremacists embrace racist music.¹⁴⁰ They mingle on the internet¹⁴¹ and some mask their bigotry in a new style of cultural discourse.¹⁴² Others link their ideology to Christianity.¹⁴³ A few promote racial separation in terms of ancestral blood,¹⁴⁴ and kith and kin.¹⁴⁵ Others advocate “living space”¹⁴⁶ and white culture.¹⁴⁷

agree with the beliefs of white nationalists. *NPR/PBS News Hour/Marist Poll of 1,125 National Adults* (Aug. 17, 2017), at 13, available in http://maristpoll.marist.edu/wp-content/misc/usapolls/us170814_PBS/NPR_PBS%20NewsHour_Marist%20Poll_National%20Nature%20of%20the%20Sample%20and%20Tables_August%202017,%202017.pdf [<https://perma.cc/UR2B-K47D>].

¹⁴⁰ See Futrell, *supra* note 26 (analyzing how the Aryan music scene fosters purpose and belonging to people who practice racial exclusion).

¹⁴¹ See Working Class Skin Heads, post from June 6, 2016 (last viewed on Jan. 12, 2018), https://www.facebook.com/WCSHSodaCity/?hc_ref=PAGES_TIMELINE&fref=nf [<https://perma.cc/87NS-DTCU>] (“This community is based on those who earn their living. Those of us who scrape by to take hone our slice of the dream. We are not slaves, we are not robots we are hard-working people who know that something earned is something to be proud of.”).

¹⁴² See Mitch Berbier, “*Half the Battle*”: *Cultural Resonance, Framing Processes, and Ethnic Affectations in Contemporary White Separatist Rhetoric Transforming the Stigma of White Supremacy: The Ethnic Affectations of Love, Pride, and Heritage-Preservation*, 45 *SOCIAL PROBLEMS* 431, 443–40 (1998) (discussing the new rhetoric of white separatists). Courts have been presented with expert testimony on coded communication used by white supremacists. *E.g.*, *State v. Tankovich*, 307 P.3d 1247 (Idaho 2012) (expert testimony established that the defendant’s three-leaf clover tattoo was a common symbol worn by Aryan white supremacists).

¹⁴³ *Peterson v. Wilmur Commc’ns, Inc.*, 205 F. Supp. 2d 1014 (E.D. Wis. 2002).

¹⁴⁴ Wotan’s Reich, *supra* note 30.

¹⁴⁵ Southern Poverty Law Center, *Matthew Heimbach*, *supra* note 30.

¹⁴⁶ National Alliance, *What Is the National Alliance, White Living Space*, *supra* note 31.

¹⁴⁷ *E.g.*, white nationalist leader Jared Taylor’s 2016 election “robocall” asking voters to support Donald Trump because he would

While a portion of the white supremacy movement is not visible to the public, other elements seek legitimacy through civic activities. They assert rights to display their racially-themed crosses at a state capitol,¹⁴⁸ and participate in state adopt-a-highway litter programs.¹⁴⁹

B. Employer Liability for Racial Harassment: High Risk

In this section, this Article explores white supremacy in the workplace. This Article presents a lengthy catalogue of cases to prove that racist speech is not isolated or infrequent. This detailed and extensive documentation dispels any notion that the small number of NLRB cases in my database reflects the real frequency of racist speech in the workplace.

By way of background, Title VII prohibits several forms of employment discrimination. Most pertinent to this study, the law applies to race discrimination.¹⁵⁰ Title VII

promote immigration of “smart, well-educated white people” who can assimilate to white America. Peter Holley, *Hear a White Nationalist’s Robocall Urging Iowa Voters to Back Trump*, WASH. POST (Jan. 12, 2016).

¹⁴⁸ *Advisory Bd. v. Pinette*, 515 U.S. 753 (1995) (First Amendment Establishment Clause does not bar Ku Klux Klan from erecting its cross in holiday display at state capitol, where the KKK’s application for a permit said its cross is a religious symbol). *Cf.*, *Sons of Confederate Veterans, Va. Div. v. City of Lexington, Va.*, 722 F.3d 224 (4th Cir. 2013) (city regulation limiting display on public light poles to U.S., state and city flags is not unconstitutional).

¹⁴⁹ *Robb v. Hungerbeeler*, 370 F.3d 735 (8th Cir. 2004) (Missouri’s denial of Klan group’s petition to participate in Adopt-a-Highway Program violates First Amendment); *Knights of Ku Klux Klan v. Ark. State Highway & Transp. Dep’t*, 807 F. Supp. 1427 (W.D. Ark. 1992) (Klan group had constitutional right to participate in state’s Adopt-A-Highway Program); and *State v. Int’l Keystone Knights of the Ku Klux Klan, Inc.*, 788 S.E.2d 455 (Ga. 2016) (state highway department improperly denied Klan group’s permit to participate in Adopt-a-Highway program).

¹⁵⁰ The legal doctrine of racial harassment in the employment context originates in *Rogers v. EEOC*, 316 F. Supp. 422 (E.D. Tex. 1970),

applies to harassment when it is so pervasive or severe that an employee's conditions of employment are adversely affected.¹⁵¹ Administering the law, the Equal Employment Opportunity Commission (EEOC) advises employers to provide a workplace that is free of racial harassment.¹⁵² Many state discrimination laws supplement Title VII.¹⁵³

Isolated harassment, when it becomes extreme, is sufficient to expose employers to liability.¹⁵⁴ Some

rev'd, 454 F.2d 234 (5th Cir. 1971).

¹⁵¹ Courts use a totality-of-circumstances test to judge whether racial harassment is sufficiently severe and pervasive to constitute discrimination. *E.g.*, *Henry v. CorpCar Servs. Houston, Ltd.*, 625 F. App'x 607, 611–12 (5th Cir. 2015) (applying *Harris v. Forklift Sys., Inc.*, (discussed *infra* note 228), to a racial harassment complaint (Title VII is not a “general civility code,” but applies when extreme conduct is “sufficiently severe or pervasive”)).

¹⁵² EEOC Compliance Manual, “Race and Color Discrimination” (Apr. 19, 2006), at 35, available at <https://www.eeoc.gov/policy/docs/race-color.pdf> [<https://perma.cc/CUQ5-65ZE>]. Discrimination includes employer toleration of “offensive jokes, slurs, epithets or name calling, physical assaults or threats, intimidation, ridicule or mockery, insults or put-downs, offensive objects or pictures, and interference with work performance.”

¹⁵³ *Cowher v. Carson & Roberts*, 40 A.3d 1171, 1175 (N.J. 2012) (“Jew Bag,” “Fuck [] you Hebrew,” “Jew Bastard,” “Where are [you] going, Jew,” “I have friends in high places, not in fucking temple,” “Jew Shuffle,” “If you were a German, we would burn you in the oven,” “We have Jews and Niggers that work here” are actionable discrimination); and *Nazir v. United Airlines, Inc.*, 100 Cal. Rptr. 3d 296 (Cal. 2009) (terminated employee of Kuwaiti and Pakistani descent may proceed to trial under state discrimination law after being called “sand nigger,” “sand flea,” “rag head,” and “camel jockey”).

¹⁵⁴ *Ayissi-Etoh v. Fannie Mae*, 712 F.3d 572, 580 (D.C. Cir. 2013) (“being called the n-word by a supervisor ... suffices by itself to establish a racially hostile work environment”); *Rivera v. Rochester Genesee Reg'l Transp. Auth.*, 743 F.3d 11, 24 (2d Cir. 2012) (“no single act can more quickly alter the conditions of employment and create an abusive working environment than the use of an unambiguously racial epithet such as ‘nigger’ by a supervisor in the presence of his subordinates”); *McGinest v. GTE Serv. Corp.*, 360 F.3d 1103, 1116 (9th Cir. 2004) (“It is beyond question that the use of the word ‘nigger’ is highly offensive and

illustrations make this concept clearer. Graffiti, written below the name of an African-American employee and

demeaning, evoking a history of racial violence, brutality, and subordination”); *Swinton v. Potomac Corp.*, 270 F.3d 794, 817 (9th Cir. 2001) (the word “nigger” is “perhaps the most offensive and inflammatory racial slur in English, ... a word expressive of racial hatred and bigotry”); *Spriggs v. Diamond Auto Glass*, 242 F.3d 179, 185 (4th Cir. 2001) (far more than a “mere offensive utterance,” the word ‘nigger’ is pure anathema to African-Americans”); *Rodgers v. Western-Southern Life Ins. Co.*, 312 F.3d 668, 675 (7th Cir. 1993) (“Perhaps no single act can more quickly alter the conditions of employment and create an abusive working environment than the use of an unambiguously racial epithet such as ‘nigger’ by a supervisor in the presence of his subordinates”); *Daso v. The Grafton School, Inc.*, 181 F. Supp. 2d 485, 493 (D. Md. 2002) (“The word ‘nigger’ is more than [a] ‘mere offensive utterance’ . . . No word in the English language is as odious or loaded with as terrible a history.”); *Bailey v. Binyon*, 583 F. Supp. 923, 927 (N.D. Ill. 1984) (“The use of the word ‘nigger’ automatically separates the person addressed from every non-black person; this is discrimination per se.”); and *City of Minneapolis v. Richardson*, 239 N.W.2d 197, 203 (Minn. 1976) (“We cannot regard use of the term ‘nigger’ . . . as anything but discrimination . . . based on . . . race When a racial epithet is used to refer to a [black] person . . . an adverse distinction is implied between that person and other persons not of his race. The use of the term ‘nigger’ has no place in the civil treatment of a citizen . . .”).

Other cases require, or suggest, that slurs be repetitious to support actionable claims of discrimination. See *Amirmokri v. Balt. Gas & Elec. Co.*, 60 F.3d 1126, 1131 (4th Cir. 1995) (finding a prima facie case of national origin harassment because of repeated ethnic slurs uttered toward an Arab-American employee); *Bolden v. PRC Inc.*, 43 F.3d 545, 551 (10th Cir. 1994) (two racial slurs insufficiently severe because there was no barrage of opprobrious racial comments); *Boutros v. Canton Reg'l Transit Auth.*, 997 F.2d 198, 204 (6th Cir. 1993) (same); *Davis v. Monsanto Chem. Co.*, 858 F.2d 345, 349 (6th Cir. 1988) (repeated slurs are necessary to establish a racial harassment claim); *Erebia v. Chrysler Plastic Prod. Corp.*, 772 F.2d 1250, 1256 (6th Cir. 1985) (repeated racial slurs created a hostile work environment); *McCray v. DPC Indus., Inc.*, 942 F. Supp. 288, 293 (E.D. Tex. 1996) (sporadic racial slurs by co-workers fails to establish a hostile work environment); *Bivins v. Jeffers Vet Supply*, 873 F. Supp. 1500, 1508 (M.D. Ala. 1994) (one-time calling a co-worker a “nigger” fails to establish hostile work environment); *Bennett v. N.Y.C. Dep't of Corr.*, 705 F. Supp. 979, 983 (S.D.N.Y. 1989) (remark, “hey black bitch, open the . . . gate,” does not establish a hostile work environment).

stating “kill all niggers,” was sufficiently severe to survive an employer’s motion to dismiss a lawsuit.¹⁵⁵ In a different case, a trial court ruled similarly, reasoning that “the noose is among the most repugnant of all racist symbols, because it is itself an instrument of violence.”¹⁵⁶ Another employer lost its motion to dismiss when a black employee’s name was written in a workplace shower by an arrow connecting him to a burning cross and a KKK sign.¹⁵⁷ These cases signify that some courts categorically view nooses, references to the KKK, and incitements to kill blacks as speech that alters conditions of employment.

While a single incident can create actionable harassment, most cases require a pattern of speech or expressive conduct. These types of Title VII cases involve displays of nooses,¹⁵⁸ graffiti,¹⁵⁹ clothing,¹⁶⁰ tattoos,¹⁶¹ and

¹⁵⁵ See *Reedy v. Quebecor Printing Eagle, Inc.*, 333 F.3d 906, 909 (8th Cir. 2003) (racially hateful bathroom graffiti that amounted to a death threat satisfied the severity element for proof).

¹⁵⁶ *Williams v. N.Y.C. Hous. Auth.*, 154 F. Supp. 2d 820, 824–25 (S.D.N.Y. 2001).

¹⁵⁷ *Jackson v. Flint Ink N. Am. Corp.*, 382 F. 3d 869 (8th Cir. 2004).

¹⁵⁸ *Turley v. ISG Lackawanna, Inc.*, 774 F.3d 140 (2d Cir. 2014) (upholding compensatory damages of \$1.32 million for racially abusive environment that included noose and derogatory racial terms); *Vance v. S. Bell Tel. & Tel. Co.*, 863 F.2d 1503 (11th Cir. 1989) (noose displayed near the work station of a black employee); *Smith v. Town of Hempstead Dep’t of Sanitation Sanitary Dist. No. 2*, 798 F. Supp. 2d 443 (E.D.N.Y. 2011) (employees alleged display of a noose); *Wilson v. N.Y.C. Dep’t of Transp.*, No. 01-civ-7398(RJH), 2005 WL 2385866 (S.D.N.Y. 2005) (workplace permeated with offensive nicknames and noose); and *Williams v. N.Y.C. Hous. Auth.*, 154 F. Supp. 2d 820 (S.D.N.Y. 2001).

¹⁵⁹ *Tademy v. Union Pac. Corp.*, 520 F.3d 1149 (10th Cir. 2008) (black employee’s workplace had a noose, racist graffiti, and racial intimidation); *Hunter v. Allis-Chalmers Corp.*, 797 F.2d 1417 (7th Cir. 1986); and *EEOC v. Rock-Tenn Servs. Co.*, 901 F. Supp. 2d 810 (N.D. Tex. 2012) (racist graffiti and noose on employer’s premises).

¹⁶⁰ *E.g.*, *Swartzentruber v. Gunit Corp.*, 99 F. Supp. 2d 976 (N.D. Ind. 2000) (denying religious discrimination complaint of a member of the Church of American Knights of the Ku Klux Klan who was ordered to

flags;¹⁶² racist materials;¹⁶³ recruitment to white supremacy groups;¹⁶⁴ racist slurs, epithets, and jokes;¹⁶⁵ intimidation of

cover his forearm tattoo of a hooded figure standing in front of a burning cross).

¹⁶¹ *Lawrenz v. James*, 852 F. Supp. 986 (M.D. Fla. 1994) (corrections officer terminated for wearing a T-shirt with a swastika and the words “White Power”).

¹⁶² *Dixon v. Coburg Dairy, Inc.*, 369 F.3d 811 (4th Cir. 2004) (employer did not violate speech rights of employee who refused to remove a Confederate flag from his toolbox after complaint from a black employee); *Webber v. First Student, Inc.*, 928 F. Supp. 2d 1244 (D. Ore. 2013) (no violation of bus driver’s First Amendment rights who was terminated for refusing to a Confederate flag from his pickup truck which was parked on the school district’s property); *Carpenter v. City of Tampa*, No. 8:03-CV-451- T-17-EAJ, 2005 WL 1463206 (M.D. Fla. 2005) (public employee displayed Confederate flag on his car); *Vanderhoff v. John Deere Consumer Prods., Inc.*, 21 IER Cases 862, 2003 WL 23691107 (D.S.C. 2003) (no wrongful discharge of employee who displayed a Confederate flag decal on his toolbox because it is not a political opinion under state law); *in re N.Y.S. Law Enft Officers Union, Council 82, AFSCME, AFL-CIO (State)*, 694 N.Y.S.2d 170 (N.Y. App. 3d 1999) (corrections officer who flew Nazi flag at his home violated work rule).

¹⁶³ *Pappas v. Giuliani*, 290 F.3d 143 (2d Cir. 2002) (police officer circulated anti-black and anti-Semitic materials); *Savina v. Gebhart*, 497 F. Supp. 65 (D. Md. 1980) (school security monitor distributed Ku Klux Klan information, and broadcasted racially derogatory remarks over a school’s public address system); and *Essex Cty. Sheriff’s Dep’t. v. Essex Cty. Corr. Officers Ass’n*, 27 Mass. L. Rptr. 487 (Mass. Sup. Ct. 2010) (corrections employees condoned and encouraged racially harassing posts to union’s website).

¹⁶⁴ *See Lake v. AK Steel Corp.*, No. 2:03-cv-517, 2006 WL 1158610 (W.D. Penn. 2006) (workplace was pervaded with racial slurs, epithets and graffiti, including swastikas, Ku Klux Klan video, and display of a noose).

¹⁶⁵ Appellate cases include *Green v. Franklin Nat’l Bank of Minneapolis*, 459 F.3d 903, 911 (8th Cir. 2006) (black employees called “baboon[s],” “porch monkeys,” “spear-chuckers,” “ghetto assholes,” “nigger,” “super nigger”); *Webb v. Worldwide Flight Serv.*, 407 F.3d 1192, 1193 (11th Cir. 2005) (black employee called “nigger” constantly by manager); *White v. BFI Waste Servs. LLC*, 375 F.3d 288, 298 (4th Cir. 2004) (employee subjected to racially-oriented degradation); *Hrobowski v. Worthington Steel Co.*, 358 F.3d 473, 477, n.2 (7th Cir. 2004) (“the word ‘nigger’ was used frequently”); *Spriggs v. Diamond Auto Glass*, 242 F.3d 179, 182 (4th Cir. 2001) (plaintiff was called “dumb monkey”); *Hollins v.*

Delta Airlines, 238 F.3d 1255 (10th Cir. 2001) (several hangman's nooses coupled with racist jokes); Walker v. Thompson, 214 F.3d 615, 626 (5th Cir. 2000) (supervisors compared African American employees to "monkeys," "slaves," and "nigger"); Jackson v. Quanex Corp., 191 F.3d 647, 661 (6th Cir. 1999) (workplace filled with racial epithets and racially offensive graffiti); Allen v. Mich. Dep't of Corr., 165 F.3d 405 (6th Cir. 1999) (workplace included racial epithets, slurs, and intimidating symbols, including nooses); Jeffries v. Metro-Mark, Inc., 45 F.3d 258, 260 (8th Cir. 1995) (plaintiff was called a "monkey"); Rodgers v. Western-Southern Life Ins. Co., 12 F.3d 668, 673-75 (7th Cir. 1993) (female employee called a "nigger"); Brown v. Miss. Elec. Power Ass'n, 989 F.2d 858, 861 (5th Cir. 1993) ("unlike certain age-related comments which we have found too vague to constitute evidence of discrimination, the term 'nigger' is a universally recognized opprobrium, stigmatizing African-Americans because of their race"); Daniels v. Pipefitters' Ass'n Local Union No. 597, 945 F.2d 906, 910 (7th Cir. 1991) (plaintiffs were called "porch monkeys" and "baboons"); Brewer v. Muscle Shoals Bd. of Educ., 790 F.2d 1515 (11th Cir. 1986) (school superintendent's comment that he did not want to appoint plaintiff to an administrative position because he did not want to see the school system "nigger-rigged" is direct evidence of discriminatory animus, even though the comment was made after the alleged violation); Taylor v. Jones, 653 F.2d 1193 (8th Cir. 1981) (black employee constructively discharged where he was subjected to terms such as "niggers" and "spooks").

Cases in federal district court include Dapkus v. Chipotle Mexican Grill, Inc., 2017 Fair Empl. Prac. Cas. (BNA) 1009, 2017 WL 36448 (N.D. Ill. 2017) (words such as "nigger," "nigga," and "gorilla" frequently used); McCaslin v. Comcast Cable Commc'ns Mgmt., LLC, 127 Fair Empl. Prac. Cas. (BNA) 242, 2015 WL 2365955 (W.D. Mich. 2015); Vital v. Nat'l Oilwell Varco, Civ. A. No. H-12-1357, 2014 WL 4983485 (S.D. Tex. 2014) (employees called words "nigger," "gorilla," and "coonass" on daily basis); Burton v. Heckmann Water Res., Civ. No. 4:13-cv-880, 2015 WL 1427971 (M.D. Pa. 2015) (employee repeatedly exposed to terms such as "nigger," "niggahjew," and other racially derogatory terms); Davis v. Lakeside Motor Co., Inc., 117 Fair Empl. Prac. Cas. (BNA) 1539, 2013 WL 149594 (N.D. Ind. 2013) (employee repeatedly called a "nigger"); Market v. Ill. Bell Tel. Co., No. 01 C 3841, 2003 WL 22697284 (N.D. Ill. 2013); Fulmore v. M&M Transp. Servs., Inc., No. 1:11-cv-0389-TWP-TAB, 2012 WL 5331229 (S.D. Ind. 2012) (employee called "nigger," "black motherfucker," and subjected racially offensive jokes and comments); Wallace v. Platt's Heating & Air Conditioning Co., Inc., C/A No. 2:08-3679-MBS, 2010 WL 427738 (D.S.C. 2010); Walker v. SBC Servs., Inc., 375 F. Supp. 2d 524 (N.D. Tex. 2005) (warehouse workers were called "monkeys"); Colbert v. Infiniti Broad.

co-workers on the basis of race;¹⁶⁶ and employer condonation of bigotry.¹⁶⁷ Apart from Title VII, employees also sue under state discrimination statutes¹⁶⁸ or torts, such as intentional

Corp., 423 F. Supp. 2d 575 (N.D. Tex. 2005) (manager called used term “monkey” in derogatory manner); Sykes v. Franciscan Skemp Healthcare, No. 99-c-734-c, 2000 WL 34235984 (W.D. Wis. 2000) (black employee had writings such as “nigger” and “nigger go home” in work area); Tillmon v. Garnett Corp., 80 Fair Empl. Prac. Cas. (BNA) 1470, 1999 WL 592119 (N.D. Ill. 1999) (black employee subjected to recurring racist name-calling, noose from co-workers, and swastika etched on his tool box); Briggs v. Hannag’s Rest., Inc., No. 95 C 4315, 1997 WL 269597 (N.D. Ill. 1997) (numerous references to “niggers” as pimps, drug pushers, and prostitutes); LaFleur v. Wallace State Cmty. Coll., 955 F. Supp. 1406, 1416 (M.D. Ala. 1996) (employee warned to leave down because “in Cullman after dark because there used to be a sign at the city limits that read, ‘nigger, don’t let the sun set on your ass’”).

State cases include Cutler v. Dorn, 955 A.2d 917 (N.J. App. 2008) (Jewish police officer was subjected to supervisor comments about “dirty Jews” and other anti-Semitic communications); and Alcorn v. Anbro Eng’g, Inc., 468 P.2d 216, 219, n.4 (Cal. 1970) (“‘nigger’ may once have been in common usage” but now is “particularly abusive and insulting”).

¹⁶⁶ Williams v. ConAgra Poultry, Inc., 378 F.3d 790 (8th Cir. 2004) (\$1.2 million awarded to employee whose workplace had nooses, a black doll hung by a noose, and invitations for black employees to attend Ku Klux Klan hunting parties where they would be the prey).

¹⁶⁷ *Essex Cty. Sheriff’s Dep’t*, 27 Mass. L. Rptr. 487; Goldsmith v. Bagby Elevator Co., Inc., 513 F.3d 1261 (11th Cir. 2008) (employer toleration of recurring racial hostility results in \$500,000 punitive damages award); and Lake v. AK Steel Corp., No. 2:03-cv-517, 2006 WL 1158610 (W.D. Penn. 2006). Condonation can be proved by if co-workers use racial slurs, an employee complains, and the employer ignores the situation. *E.g.*, Snell v. Suffolk Cty., 782 F.2d 1094, 1103–04 (2d Cir. 1986); Erebia v. Chrysler Plastic Prods. Corp., 772 F.2d 1250, 1258 (6th Cir. 1985); and Walker v. Ford Motor Co., 684 F.2d 1355, 1358 (11th Cir. 1982).

¹⁶⁸ Philip v. Gtech Corp., 2016 Fair Empl. Prac. Cas. (BNA) 233,007, 2016 WL 3959729 (S.D.N.Y. 2016) (employee subjected to racial slurs may proceed to trial under state discrimination law, where theories of liability are broader than in Title VII); and Marigny v. Mercury Air Ctr., Inc., 2002 WL 34235964 (Cal. Super. 2002) (Trial Order), *aff’d in part, rev’d in part*, 2003 WL 21978622 (Cal. App. 2d Dist. 2003) (co-workers and managers used the word “nigger” regularly).

infliction of emotional distress.¹⁶⁹

Employers who fail to address racial harassment face costly judgments and settlements. There is no central repository for this information. To address this informational gap, I researched five separate sources to find evidence of the high costs of racist speech. Two sources were federal¹⁷⁰ and state¹⁷¹ court decisions that published

¹⁶⁹ *Adams v. Vertex, Inc.*, Civ. A. No. 04-01026 (HHK), 2007 WL 1020788 (D.D.C. 2007) (racial slurs can constitute emotional distress); *Williams v. Asplundh Tree Expert Co.*, No. 3:05-cv-479-J-33MCR, 2006 WL 2131299 (M.D. Fla. 2006) (jury entitled to decide emotional distress claim where employee was subjected to repeated racial slurs and threatened with a rope); *Taylor v. Metzger*, 706 A.2d 685, 691 (N.J. 1998) (“jungle bunny” is patently a racist slur, and is ugly, stark and raw in its opprobrious connotation”); *Robinson v. Hewlett-Packard Corp.*, 183 Cal. App. 3d 1108, 1129–30 (Cal. Ct. App. 1986) (supervisor insulting an employee with racial slurs is outrageous is a triable jury issue); *Chauffeurs, Teamsters & Helpers, Local Union No. 238 v. Iowa Civil Rights Comm’n*, 394 N.W.2d 375 (Iowa 1986) (award of damages for use of racially derogatory terms); *Contreras v. Crown Zellerbach Corp.*, 565 P.2d 1173, 1177 (Wash. 1977) (en banc) (rejecting motion to dismiss because racial insults at the workplace could constitute outrageous conduct). *But see* *Briggs v. N. Shore Sanitary Dist.*, 914 F. Supp. 245, 252 (N.D. Ill. 1996) (racial slurs and doll insufficient for recovery of emotional distress claim); *McCray v. DPC Indus., Inc.*, 875 F. Supp. 384, 391 (E.D. Tex. 1995) (racial slurs and jokes by co-employees are not outrageous conduct); *Herlihy v. Metro. Museum of Art*, 633 N.Y.S.2d 106, 114 (App. Div. 1995) (ethnic slurs are not sufficiently outrageous or extreme to support emotional distress claim).

¹⁷⁰ *Turley v. ISG Lackawanna, Inc.*, 774 F.3d 140 (2d Cir. 2014) (upholding compensatory damages of \$1.32 million for racially abusive environment that included noose and derogatory racial terms); *Goldsmith v. Bagby Elevator Co., Inc.*, 513 F.3d 1261 (11th Cir. 2008) (employer toleration of recurring racial hostility results in \$500,000 punitive damages award); and *Williams v. ConAgra Poultry, Inc.*, 378 F.3d 790 (8th Cir. 2004) (\$1.2 million awarded to employee whose workplace had nooses, a black doll hung by a noose, and invitations for black employees to attend Ku Klux Klan hunting parties where they would be the prey); *MacMillan v. Millennium Broadway Hotel*, 873 F. Supp. 2d 546 (S.D.N.Y. 2012) (reducing \$1.25 million award to \$130,000 for voodoo doll and repeated references to “nigger”); and *Carter v. Chi. Transit Auth.*, No. 99 C 7738, 2001 WL 1035712 (N.D. Ill. 2001) (award of \$300,000 for Title VII

damages figures. Two additional sources were media reports of large jury awards,¹⁷² and monetary settlements in discrimination lawsuits.¹⁷³ EEOC press releases added a fifth source to document the cost of racist speech to employers. The agency pursues claims under Title VII for

violations involving repeated use of racial slurs reduced to no more than \$100,000).

¹⁷¹ *Lin v. Dane Const. Co.*, 126 Fair Empl. Prac. Cas. (BNA) 974, 2014 WL 8131876 (N.J. App. Ct. 2015) (affirming award of \$25,000 in pain and humiliation damages to employee who was subjected to repeated racial slurs); *Smith v. Superior Prod. LLC*, 13 N.E.3d 664 (Ohio App. 2014) (involving jury award of \$549,307.77 for employee who was subjected to recurring racial slurs); and *Boone v. City of Lavergne*, 111 Fair Empl. Prac. Cas. (BNA) 1072, 2011 WL 553757 (Tenn. Ct. App. 2011) (affirming jury awards of \$350,000 and \$300,000 to two employees who were subjected to racial harassment).

¹⁷² Large verdicts that are reported in news outlets include *\$16.6 Million Verdict Against Corona Company in Racial Discrimination Lawsuit*, THE PRESS-ENTERPRISE (June 29, 2017) (employee was called the “N” word and other racially offensive names); Kirk Mitchell, *Denver Jury Awards Nearly \$15 Million in Racial Discrimination Case*, THE DENVER POST (Feb. 11, 2015) (white employees and supervisors of Matheson Trucking and Matheson Flight Extenders Inc. often used the N-word when referring to black workers); Greg Kocher, *8 Men Awarded \$5.3 Million from UPS; Effigy Hung from Ceiling*, LEXINGTON HERALD-LEADER (Apr. 14, 2016); *Pennsylvania State Trooper Wins Nearly \$2M in Racial Discrimination Lawsuit*, NBC10 (Nov. 12, 2014); Bethany Barnes, *Portland Public Schools, After Expressing ‘Respect’ for \$1 Million Verdict, Appeals It*, THE OREGONIAN (Aug. 22, 2017) (two employees were relentlessly subjected to the N-word and noose in the workplace).

¹⁷³ Laura Bult, *Sara Lee Agrees to Pay \$4M to Black Employees Who Say They Were Called Racial Slurs*, DAILY NEWS (Dec. 22, 2015); Chris DiMarco, *Top 10 Most Expensive Discrimination Settlements of 2013*, INSIDECOUNSEL MAGAZINE (July 8, 2014) (*Bradley v. City of Richmond* settled for \$1 million in a case brought by eight African-American pipefitters who alleged that they were subjected to racial epithets and other forms of bias); George Rede, *6 Takeaways from Daimler’s Settlement of Discrimination, Harassment Claims in Oregon*, THE OREGONIAN (Feb. 5, 2015); and Tim Gould, *Noose, ‘N-word’ Lead to \$3.6M Race Discrimination Settlement*, HR MORNING (Aug. 3, 2016) (New Jersey Transit settled discrimination lawsuit with seven employees who were subjected to the N-word; and a noose was hung over one employee’s neck).

workplace speech that constitutes racial harassment. Table 7 is the product of EEOC press releases for racial harassment cases from 2009–2017. The table begins with the most costly cases for employers.

Chart 5 EEOC Settlements & Court Judgments, 2009-2017 (Ranked by Expense to Employers)
\$14,500,000 Settlement (Patterson-UTI Drilling, 4/20/2015): Minority Employees Subjected to Racial & Ethnic Slurs & Jokes, & Fired for Complaining
\$11,000,000 Decree (YRC/Yellow Transportation, 6/29/2012): Black Employees Subjected to Nooses, Racist Graffiti and Epithets, Harsher Discipline, & Tougher Work Assignments
\$8,900,000 Settlement (Albertsons, 12/15/2009): Employees Subjected to Swastikas, Lynching Drawings, Epithets, White Supremacist, and Anti-Immigrant Comments
\$4,000,000 Settlement (Hillshire Bros. Co., 12/22/2015) Blacks Subjected to Racist Comments/Graffiti
\$2,750,000 Settlement (WRS Compass, 8/27/2012) Black Workers Harassed with Nooses & Slurs, Plus Harassment of White Workers Who Associated with Blacks
\$2,000,000 Consent Decree (Blockbuster Inc., 12/14/2011) Hostile Environment for Female and Hispanic Workers, Including Racial Remarks
\$1,200,000 Settlement (Well Servicing Companies, 12/2/2004): Minorities Verbally Abused and Punished
\$1,073,261 Damages (Whirlpool, 4/1/2011) Verbal/Physical Attack Due to Race and Gender
\$1,000,000 Settlement (Elmer W. Davis, Inc., 8/10/2010) Black Employees Called “n----r,” “lazy n-----rs,” “sambo,” “slave,” “monkey”; Exposed to Nooses & Swastikas
\$650,000 Settlement (Race, LLC/Studsvik, 12/31/2009) Targeting Black Workers for Higher Radiation Exposure, and Subjecting Them to Racial Slurs

\$630,000 Settlement (Scully Distribution, 8/27/2012)
Drivers Subjected to Racial Slurs

\$600,000 Settlement (Mercury Air Centers, 8/9/2010)
Filipino and Hispanics Barraged with Slurs

\$500,000 Settlement (RockTenn Services, 12/3/2012)
Employees Subjected to Racist Graffiti, Noose, and
Employer Ignoring of Complaints

\$400,000 Settlement (Big Lots, 2/16/2010) Black Employees
Subjected to Racial Jokes

\$250,000 Settlement (Swissport Fueling, 12/2/2014)
Employees Repeatedly Called “Monkeys”

\$243,000 Judgment (A.C. Widenhouse, 3/8/2013) Blacks
Face Racial Slurs and Nooses, Retaliation

\$228,000 Settlement (Titan Waste Services, 3/14/2014)
Black Employee Subjected to “N-word,” Discharged

\$180,000 Settlement (Emmert Int’l, 1/7/2013) Employee
Subjected to Regular Use of “N-Word,” Racial Jokes and
Retaliation for Complaining

\$150,000 Settlement (Torqued-Up Energy, 5/28/2013)
Employee Fired for Reporting Racial Slurs

\$122,500 Settlement (Pace Services, L.P., 4/22/2010)
Muslim, Black and Hispanic Employees Repeatedly called
“Terrorist,” “Taliban,” “Osama,” “Al-Qaeda,” “n-----s,” & “f---
-g Mexicans”

\$120,000 Settlement (Downhole Technology, 4/26/2017)
Black Employee Fired for Complaining that Co-Worker
Wore KKK Hood

\$118,000 Settlement (Professional Building Systems of
N.C., 4/8/2010) Black Employees Subjected to “n-word,”
Nooses, and Racially Offensive Pictures

\$150,000 Settlement (Affordable Care, Inc., 6/2/2010)
Harasser Said He Had KKK Relative

\$100,000 Settlement (McGriff Industries, Inc., 7/1/2010)
Black and White Employees Routinely Subjected to
Racially Derogatory Comments, Slurs, and Insults Directed
at or About African-Americans

\$87,205 Settlement (Mike Enyart & Sons, 10/6/2010) Black

Employee Fired After Complaining About Racial Epithets and Swastika

\$80,000 Settlement (Mel-K Mgt. Co., 8/28/2015) Blacks Subjected to “n----r”, “ho” & “black b----h”

\$50,000 Settlement (OnSite Solutions, LLC, 11/2/2016) Manager Used Code Language (“Sprinkle a Little Salt”) to Fire Blacks and Replace with Whites

When these sources are viewed in totality they provide a gauge to estimate the cost of racist speech at work. Repeated displays of nooses, combined with racial slurs, can cost employers millions of dollars. In addition, plaintiff lawyers can choose between different venues and legal theories to redress this form of discrimination. These five sources probably understate employer expenses related to racial harassment because many settlements are never published in court records, news accounts, or EEOC press releases. Even the published information in Part IV.B fails to disclose employer litigation costs in defending these actions, including the possibility of paying plaintiffs’ costs and attorneys’ fees.

C. Employer Liability for Disciplining Employees for Racial Harassment: Low Risk

When the EEOC and courts first fashioned a doctrine for racial harassment, they agreed that Title VII is violated when a working environment is “dominated by racial slurs.”¹⁷⁴ More recently, the EEOC has expanded these

¹⁷⁴ The origin of the racial harassment doctrine is set forth in *EEOC v. Murphy Motor Freight Lines, Inc.*, 488 F. Supp. 381 (D. Minn. 1980), stating that racial harassment had been recognized for some time (citing EEOC Dec. 72-0779, 4 FEP Cases 317 (1971); EEOC Dec. 72-1561, 4 FEP Cases 852 (1972)). In its earliest formulation, the racial harassment doctrine made an employer responsible for maintaining a “working environment free of racial intimidation,” and required “positive action

grounds for racial harassment.¹⁷⁵ This policy change likely explains why employers have addressed racial harassment more aggressively by disciplining offenders.¹⁷⁶

Some terminated employees have offered the

where positive action is necessary to redress or eliminate employee intimidation.” *Id.* at 384 (citations omitted). Numerous courts consider whether there is a “steady barrage of opprobrious racial” comment or comments to determine if there is race discrimination. *E.g.*, *Schwapp v. Town of Avon*, 118 F.3d 106, 110 (2d Cir. 1997); *Bolden v. PRC Inc.*, 43 F.3d 545, 551 (10th Cir. 1994); *Ways v. City of Lincoln*, 871 F.2d 750, 754 (8th Cir. 1989); *Hicks v. Gates Rubber Co.*, 833 F.2d 1406 (10th Cir. 1987); and *Johnson v. Bunny Bread Co.*, 646 F.2d 1250, 1257 (8th Cir. 1981). At the state level, see *Valcarcel v. First Quality Maint.*, 2013 WL 5832545, at *9 (N.Y. Sup. Ct. 2013).

¹⁷⁵ See EEOC Compliance Manual, stating:

Racial harassment is unwelcome conduct that unreasonably interferes with an individual's work performance or creates an intimidating, hostile, or offensive work environment. Examples of harassing conduct include: offensive jokes, slurs, epithets or name calling, physical assaults or threats, intimidation, ridicule or mockery, insults or put-downs, offensive objects or pictures, and interference with work performance. An employer may be held liable for the harassing conduct of supervisors, coworkers, or non-employees (such as customers or business associates) over whom the employer has control.

And see Equal Employment Opportunity Commission, EEOC Compliance Manual (Apr. 19, 2006), available at <https://www.eeoc.gov/policy/docs/race-color.pdf>. The EEOC also expands on this statement of policy by giving examples in a question-and-answer format. See Equal Employment Opportunity Commission, *Questions and Answers About Race and Color Discrimination in Employment*, available at https://www.eeoc.gov/policy/docs/qanda_race_color.html [<https://perma.cc/4A7Q-M492>] under the heading “Harassment.”

¹⁷⁶ *Harberson v. Monsanto Textiles Co.*, 17 Fair Empl. Prac. Cas. (BNA) 99, 1976 WL 720 (D.S.C. 1976) (termination due to membership in the KKK, and expressing racist statements at work, do not violate Title VII). *Cf.*, *Contreras*, 565 P.2d 1173 (employer took no corrective action when Mexican-American employee was subjected to racial jokes, slurs, and comments).

anachronistic defense that “southernness,”¹⁷⁷ “confederate southern-american,”¹⁷⁸ and “Confederate American”¹⁷⁹ are forms of national origin, protected from discrimination under Title VII. Others have contended, usually without success, that white supremacy is a religion.¹⁸⁰ Public employees have also asserted constitutional speech or assembly rights, mostly without success.¹⁸¹

¹⁷⁷ *Williams v. Frank*, 757 F. Supp. 112, 120 (D. Mass. 1991) (“Southernness” not a protected characteristic).

¹⁷⁸ *Storey v. Burns Int’l Sec. Servs.*, 390 F.3d 760 (3d Cir. 2004) (denying claims of national origin and religious discrimination after employee was fired for refusing to obey directive not to display Confederate flag at work).

¹⁷⁹ *Terrill v. Chao*, 31 F. App’x 99, 100 (4th Cir. 2002) (holding that “Confederate American” is not a protected class, and therefore no discrimination in denying request to display materials at a diversity day event).

¹⁸⁰ *See Storey*, 390 F.3d 760 (denying complaint of employee who claimed religious discrimination after he was terminated for failing to remove Confederate flag stickers on his lunch box); *Chaplin v. Du Pont Advance Fiber Sys.*, 293 F. Supp. 2d 622 (E.D. Va. 2003) (no adverse action in the form of religious discrimination when company barred Confederate imagery in workplace); *Swartzentruber v. Gunite Corp.*, 99 F. Supp. 2d 976 (N.D. Ind. 2000); *Slater v. King Soopers, Inc.*, 809 F. Supp. 809 (D. Colo. 1992); *Bellamy v. Mason’s Stores, Inc.*, 368 F. Supp. 1025 (E.D. Va. 1973); and *Augustine v. Anti-Defamation League of B’nai-B’rith*, 249 N.W.2d 547 (Wis. 1977). *See also* EEOC Dec. No. 79-6, 1978 WL 5828, at *3 (Oct. 6, 1978), concluding: “Viewing the Klan’s history, its goals and purposes, it is apparent that the Klan’s beliefs are more political, social or economic than theistic and they do not involve a relation to a superior being involving duties superior to those arising from any human relation.”

Cf., *Peterson v. Wilmur Commc’ns, Inc.*, 205 F. Supp. 2d 1014 (E.D. Wis. 2002). The court ruled that Peterson’s demotion violated Title VII’s prohibition against religious discrimination, noting that Peterson never acted in a racially motivated manner while he was employed as a supervisor.

¹⁸¹ *Pappas v. Giuliani*, 290 F.3d 143 (2d Cir. 2002); *Allen v. Mich. Dep’t of Corr.*, 165 F.3d 405 (6th Cir. 1999); *Weicherding v. Riegel*, 160 F.3d 1139 (7th Cir. 1998) (prison sergeant terminated for engaging in white supremacist activities and involvement with the Ku Klux Klan); *McMullen v. Carson*, 754 F.2d 936 (11th Cir. 1985) (sheriff department employee also served as organizer for a Ku Klux Klan event); *Smith v.*

Private sector cases are less common because these jobs lack the same constitutional protections. Nonetheless, courts have generally upheld an employer's right to discharge an employee for racist speech.¹⁸² Paradoxically, some white supremacists have alleged a violation of civil rights laws. In lawsuits to challenge these firings, courts have ruled against Klan members.¹⁸³

Town of Hempstead Dep't of Sanitation Sanitary Dist. No. 2, 798 F. Supp. 2d 443 (E.D.N.Y. 2011) (sanitation department employees alleged that noose was displayed); *Wilson v. N.Y.C. Dep't of Transp.*, No. 01-civ-7398(RJH), 2005 WL 2385866 (S.D.N.Y. 2005); *Carpenter v. City of Tampa*, No. 8:03-CV-451-T-17-EAJ, 2005 WL 1463206 (M.D. Fla. 2005); *Williams v. N.Y.C. Housing Auth.*, 154 F. Supp. 2d 820, 824–25 (S.D.N.Y. 2001); *Lawrenz v. James*, 852 F. Supp. 986 (M.D. Fla. 1994); *Savina v. Gebhart*, 497 F. Supp. 65 (D. Md. 1980); *Murray v. Jamison*, 333 F. Supp. 1379 (W.D.N.C. 1971) (city wrongfully discharged its employee in violation of the First and Fourteenth Amendments for being Grand Dragon of the Ku Klux Klan); *Essex Cty. Sheriff's Dep't v. Essex Cty. Corr. Officers Ass'n*, 27 Mass. L. Rptr. 487 (Mass. Sup. Ct. 2010) (corrections employees condoned and encouraged racially harassing posts to union's website); *State v. Henderson*, 762 N.W.2d 1 (Neb. 2009) (state trooper joined the Knights Party, a Ku Klux Klan affiliate); *Cutler v. Dorn*, 955 A.2d 917 (N.J. App. 2008); *in re N.Y.S. Law Enf't Officers Union*, 694 N.Y.S.2d 170; *Karins v. City of Atlantic City*, 706 A.2d 706 (N.J. 1998) (racial epithet by off-duty fire fighter uttered at police officer was not protected by the First Amendment); and *Hawkins v. Dep't of Public Safety & Corr. Servs.*, 602 A.2d 712 (Md. Ct. App. 1992) (corrections officer discharged for off-duty anti-Semitic outburst at bank).

¹⁸² *Dixon v. Coburg Dairy, Inc.*, 369 F.3d 811 (4th Cir. 2004); *Webber v. First Student, Inc.*, 928 F. Supp. 2d 1244 (D. Ore. 2013); *Vanderhoff v. John Deere Consumer Prods., Inc.*, 21 IER Cases 862, 2003 WL 23691107 (D.S.C. 2003); and *Powell v. Media Gen. Ops., Inc.*, Civ. A No. 7:10-3170-HFF-KFM, 2011 WL 4501836 (D.S.C. 2001) (discharged employee's speech, equating Muslims with terrorism, not protected in private workplace).

¹⁸³ In *Bellamy v. Mason's Stores, Inc.*, 368 F. Supp. 1025 (E.D. Va. 1973), the plaintiff contended that his termination from employment due to his affiliation with the United Klans of America, and therefore violated his First Amendment rights. Rejecting this view, the court concluded that Section 1985(3) does not recognize a right of freedom of association against a private actor. See also *Savina v. Gebhart*, 497 F. Supp. 65 (D. Md. 1980) (Section 1985 does not protect speech of a Klan member).

D. Conflicting Treatment of Racist Speech: Employer Dilemma

Federal appellate court rulings offer the most direct evidence of the growing conflict between the NLRA and Title VII in treating racist speech in the workplace. Four trends are discernible in the relationship between courts and the NLRB since the Board decided *Sewell*. The following analysis provides a qualitative complement to the statistical charts in Part III.

The first trend is surprising: After *Sewell*, the NLRB almost always tolerated this type of communication.¹⁸⁴ The Board did not overturn an election even though the employer said that the union tried to force integration “down the throats of the people living in the South.”¹⁸⁵ Similarly, the Board found no problem in “temperate statements with racial overtones,” reasoning that employees were free to discuss race relations.¹⁸⁶ Where a union capitalized on

¹⁸⁴ *Kresge-Newark, Inc.*, 112 N.L.R.B. 869 (1955) (workers were able to sift through the employer’s claim that a union official said that the company would layoff minority workers unless they had union protection).

¹⁸⁵ *Allen-Morrison Sign Co.*, 138 N.L.R.B. 73 (1962), where the Board reasoned that the employer’s comments were germane and a matter of genuine interest to the white southern workers whom the union was attempting to organize. *See also* *N.L.R.B. v. Bush Hog, Inc.*, 405 F.2d 755, 757, n.2 (5th Cir. 1968 (employer’s statement that union donated funds to further racial integration did not warrant reversal of union election as a bargaining representative).

¹⁸⁶ *N.L.R.B. v. Balt. Luggage Co.*, 387 F.2d 744, 746 (4th Cir. 1967). Campaign messages that related to minority employee concerns about unfair treatment did not violate the NLRA because this communication “was no gospel of hate.” *Id.* at 747. Where African-American employees perceived selective enforcement of rules by their employer, the appeals court concluded: “Rather than appealing to deep-seated emotional fears, the letter and speeches temperately addressed themselves to the economic and social self-interest of the workers, over ninety percent of whom were Negro. Such an exhortation must be a legitimate tactic in any pre-election campaign.” *Id.*

tensions in a workplace between blacks and Hispanics, the Board did not overturn an election.¹⁸⁷ The NLRB tolerated racial remarks if they were used casually.¹⁸⁸ In a similar vein, racial epithets did not result in setting aside an election where they were “common usage” and without any proof of racial animosity.¹⁸⁹ Inflammatory race appeals in speeches and leaflets did not invalidate an election;¹⁹⁰ nor did expression of religious prejudice.¹⁹¹ The Board declined to set aside an election in which a supervisor said that a potential union representative “did not like blacks.”¹⁹² Innuendo suggesting that managers are racists did not overturn election results.¹⁹³ Nor did a union’s mention that

¹⁸⁷ *Family Serv. Agency S.F. v. N.L.R.B.*, 163 F.3d 1369 (D.C. Cir. 1999).

¹⁸⁸ *Englewood Hosp.*, 318 N.L.R.B. 806, 807 (1995).

¹⁸⁹ *N.L.R.B. v. Foundry Div. of Alcon Indus., Inc.*, 260 F.3d 631, 635 (6th Cir. 2001). Apart from campaign messages, a workplace climate where racial slurs are common will not result in the NLRB overturning an election in the absence of persuasion “to vote for or against a union on the basis of invidious prejudices.” *Id.* at 637.

¹⁹⁰ *See N.L.R.B. v. HeartShare Human Servs. of N.Y., Inc.*, 108 F.3d 467 (2d Cir. 1997) (finding that a union’s references to a “racists empire (sic),” “slaves in the cotton fields,” and “apartheid” did not undermine the fairness of the election). *Cf. Newark Portfolio JV, LLC v. N.L.R.B.*, 658 F. App’x 649 (3d Cir. 2016) (denying enforcement to NLRB order certifying a union, where an unknown person during the representation election may have shouted, in reference to the company’s owners, “These Jews don’t care about you, they only care about the money.”).

¹⁹¹ *N.L.R.B. v. Carl Weissman & Sons, Inc.*, 849 F.2d 449, 450 (9th Cir. 1988) (union official told employees that “the Weissmans were pretty stingy with their wages and they had the right kind of background for being stingy”).

¹⁹² *Coca-Cola Bottling Co.*, 232 N.L.R.B. 717, 718 (1977) (comment by supervisor was “temperately presented and . . . fairly capable of evaluation by eligible voters”).

¹⁹³ *See, e.g., N.L.R.B. v. Utell Int’l, Inc.*, 750 F.2d 177 (2d Cir. 1984) (holding that the representation election was not tainted by employee misrepresentations of racial prejudice). The issue of racially-charged communication was not discussed in the NLRB’s decision, *Utell*

the employer is racist.¹⁹⁴ The fact that union organizers played up the “pro-black protection sentiments” of the workforce was not inflammatory.¹⁹⁵ In a mostly black workforce, the union’s intentional exclusion of whites from the campaign did not overturn an election.¹⁹⁶ A union’s comparison of management to Hitler was not sufficiently inflammatory under *Sewell* to void election results.¹⁹⁷

Taking the totality of these rulings—all of which occurred after *Sewell*’s policy for regulating racially inflammatory speech—the Board showed no ability to distinguish between epithets and stray remarks, on the one hand, and slurs that aimed to bait and divide workers along racial and ethnic lines, on the other. In short, the first observable trend is that the NLRB’s *Sewell* policy is rarely enforced. The policy is virtually meaningless.

In a second trend, federal appeals courts

Int’l, Inc., 270 N.L.R.B. No. 76 (1984); but the appellate court took up the issue. See also *Zartic, Inc.*, 315 N.L.R.B. 495, 496 (1994) (union falsely accused employer of giving money to the Ku Klux Klan).

¹⁹⁴ *Beatrice Grocery Prods.*, 287 N.L.R.B. No. 31 (1989) (NLRB found that Union’s one-time remarks criticizing the company’s racism was not a central part of the campaign). The order was enforced in *Martha White Foods, Inc. v. N.L.R.B.*, 872 F.2d 1026 (6th Cir. 1989).

¹⁹⁵ *N.L.R.B. v. Bancroft Mfg. Co., Inc.*, 516 F.2d 436, 442 (5th Cir. 1975).

¹⁹⁶ *N.L.R.B. v. Hood Furniture Mfg. Co.*, 941 F.2d 325, 330–31 (5th Cir. 1991).

¹⁹⁷ *Arlington Hotel Co., Inc. v. N.L.R.B.*, 712 F.2d 333, 338 (8th Cir. 1983). The court explained:

The Hitler and slave ship references at issue were found by the Regional Director to fall outside the *Sewell* standard. *Sewell* does not require that all racial references be excluded from a campaign, but is concerned with appeals to animosity and prejudice. The slave ship reference, although having racial overtones, was directed at economic, not racial, oppression. The Hotel replied to the slave ship reference with statements about increased employees’ benefits and improved conditions.

demonstrated more concern for prejudicial comments than the NLRB.¹⁹⁸ In these cases, the Board certified a union's election or ordered a company to bargain with a union without mentioning any controversy about race. But as the following discussion shows, appellate courts delved into the record and cited racial slurs during campaigns as reasons to deny enforcement to these orders.

• **Third Circuit Court of Appeals:** The NLRB in *Silverman's Men's Wear, Inc.* ordered an employer to bargain with a union, without mentioning a slur during the union's organizing campaign.¹⁹⁹ On appeal, the Third Circuit denied enforcement to the Board's order, noting that a union representative told employees that a company officer is a "stingy Jew."²⁰⁰

• **Fourth Circuit Court of Appeals:** In *Schapiro &*

¹⁹⁸ The Ninth Circuit Court of Appeals provided an exception to the trend in appellate rejection of the NLRB's permissive application of Sewell. The Board ordered the company to bargain with the union in *Did Building Services*, 291 N.L.R.B. No. 37 (1988). The NLRB case made no mention of employer objections to racially-themed campaigning in behalf of the union. The Ninth Circuit enforced the Board's order, explaining that an employee's slurs against "gringos and Jews" were "vile and seething with prejudice" but did not warrant invalidation of the election. *Did Bldg. Servs., Inc. v. N.L.R.B.*, 915 F.2d 490, 499 (9th Cir. 1990). The court concluded that isolated appeals to prejudice must be left to voters' "good sense and judgment." *Id.* See also *Case Farms of N.C., Inc. v. N.L.R.B.*, 128 F.3d 841, 845 (4th Cir.1997), where the Fourth Circuit affirmed the NLRB's decision not to overturn an election where appeals to racial prejudice were part of an effort to air workplace grievances or other work-related issues. The company objected to the union's misleading and false statement that the company fired Amish workers from its Ohio plant. *Id.* at 844. The court rejected the Company's argument that Sewell disallowed appeals to "ethnocentric fears." *Id.* at 845. The court said, in response, "If . . . racial or sexual remarks . . . do not form the core or theme of the campaign . . . and if the remarks are not inflammatory, they should be reviewed [only] under the standards applied to other types of misrepresentation (quotation and citation omitted)."

¹⁹⁹ 250 N.L.R.B. No. 181 (1980).

²⁰⁰ *N.L.R.B. v. Silverman's Men's Wear, Inc.*, 656 F.2d 53, 55 (3d Cir.1981).

Whitehouse, Inc., the Board ordered the employer to bargain with a union, dismissing the employer's concern that the union circulated leaflets that appealed to racial prejudice.²⁰¹ Denying enforcement to the order, the Fourth Circuit applied *Sewell* to reject the Union's incitements to a mostly black workforce.²⁰²

• **Sixth Circuit Court of Appeals:** The NLRB in *Carrington South Health Care Center* found that a union was properly certified as a bargaining representative after an election.²⁰³ The Sixth Circuit denied enforcement, citing evidence that union cartoons used "obvious images of bondage or violence visited upon racial minorities by a white majority."²⁰⁴ The NLRB in *Eurodrive, Inc.* ordered the employer to bargain with a union following a representation election, notwithstanding the employer's contention that the union instigated racial harassment.²⁰⁵ In denying enforcement,²⁰⁶ the court cited information that the Board omitted from its decision—the union organizer told white employees that they "needed the Union to protect their jobs because white employees were not protected by the equal opportunity laws."²⁰⁷ The Board in *KI (USA) Corp.* ordered

²⁰¹ 148 N.L.R.B. 958 (1964).

²⁰² N.L.R.B. v. Schapiro & Whitehouse, Inc., 356 F.2d 675, 679 (4th Cir. 1966) (stating that "[f]or the union to call upon racial pride or prejudice in the contest could 'have no purpose except to inflame the racial feelings of voters in the election.' Besides their utter irrelevance, the leaflets appear to this court as highly inflammatory . . . The reliance upon race inhibited a 'sober, informed exercise of the franchise' and was altogether out of place.").

²⁰³ 314 N.L.R.B. No. 9 (1994).

²⁰⁴ Carrington S. Health Care Ctr., Inc. v. N.L.R.B., 76 F.3d 802, 807 (6th Cir. 1996) (union cartoons also showed a group of workers labor as "beasts of burden, pulling their superiors in a wagon while being whipped; a black worker is to be summarily executed by a white overlord").

²⁰⁵ N.L.R.B. v. Eurodrive, Inc., 60 N.L.R.B. 1466 (1982).

²⁰⁶ 724 F.2d 556, 559 (6th Cir. 1984).

²⁰⁷ *Id.* at 557 (the court found that this communication was an appeal to racial prejudice).

the Company to bargain with the Union following an election.²⁰⁸ The NLRB certified the union's election, reasoning that the letter was not "intended to generate a general racially-based hostility against Japanese nationals."²⁰⁹ However, the Sixth Circuit refused to enforce the Board's order, citing the Union's circulation of a letter at a Japanese-owned company that communicated a Japanese businessman's view that American workers are lazy.²¹⁰

• **Seventh Circuit Court of Appeals:** In *Triplex Manufacturing Co.*, the NLRB ordered business owners to bargain with a union.²¹¹ On appeal, the Seventh Circuit in *NLRB v. Katz*²¹² denied enforcement, citing a union rally where a priest said the owners "are Jewish and they're getting rich while we're getting poor,"²¹³ and "why should we make them rich because Jewish people are rich and we are poor and killing ourselves for them."²¹⁴

• **Eleventh Circuit Court of Appeals:** The Board in *M & M Supermarkets, Inc.*, never mentioned racist communications in the election process.²¹⁵ On appeal,

²⁰⁸ KI (USA) Corp., 309 N.L.R.B. 1063 (1992).

²⁰⁹ *Id.* at 1066.

²¹⁰ KI (USA) Corp. v. N.L.R.B., 35 F.3d 256 (6th Cir. 1994). In an unusual development, the court explicitly stated that the *Midland* standard is the "wrong one to apply" where racially inflammatory speech is used. *Id.* at 260. The court held that "the truthfulness of racially-related remarks is the type of 'other campaign conduct' to which the lenient *Midland* standard of truthfulness, by its own terms, does not apply." *Id.* The court adopted the dissenting view in the NLRB decision that the union's "negative stereotyping" of the Japanese has no place in an NLRB election. *Id.* Compare N.L.R.B. v. DPM of Kansas, Inc., 744 F.2d 83, 86 (10th Cir. 1984) ("elections will not be set aside because of misleading campaign statements, absent the use of forged documents or the alteration of an official Board document in a manner suggesting that the Board favors one of the parties").

²¹¹ 251 N.L.R.B. No. 111 (1980).

²¹² 701 F.2d 703 (7th Cir. 1983).

²¹³ *Id.* at 705.

²¹⁴ *Id.*

²¹⁵ 280 N.L.R.B. No. 40 (1986).

however, the Eleventh Circuit denied enforcement to the NLRB's order, noting that an employee said, "Blacks were out in the cotton field while they, the damned Jews, took their money from the poor hardworking people."²¹⁶

The third trend shows that appellate courts are divided in applying *Sewell's* framework where the speaker is a third party (not formally with a union or an employer). Third parties include employees who support or oppose a union, or an outside organization.²¹⁷ In one view, the Seventh Circuit applied the *Sewell* framework, regardless of third party status, provided that prejudicial communications impair the employees' freedom of choice in an NLRB election.²¹⁸ The fact that the speaker is not the union or the employer is immaterial: the determinant is whether an inflammatory "remark prejudiced the outcome of the election."²¹⁹

The Ninth, Eleventh, and Fourth Circuits have differed by requiring more proof that the communication tainted the election with intolerable prejudice.²²⁰ The

²¹⁶ *M & M Supermarkets, Inc. v. N.L.R.B.*, 818 F.2d 1567, 1569 (11th Cir.1987).

²¹⁷ *N.L.R.B. v. Katz*, 701 F.2d 703, 705 (7th Cir. 1983) (Catholic priest who made anti-Semitic comments about the company's owners during an organizing meeting was a third party).

²¹⁸ *Id.* at 706-07.

²¹⁹ Thus, the Seventh Circuit concluded that a priest's anti-Semitic characterization of the company's owners, expressed at a union meeting attended by a mostly Catholic workforce, was evidence that the election was swayed by these slurs. *Id.* at 708.

²²⁰ This is because unions and employers are unable to control the communications of individual employees (speaking as co-workers) or outsiders, such as community leaders. See *Did Bldg. Servs. v. N.L.R.B.*, 915 F.2d 490, 498 (9th Cir. 1990), involving religious and ethnic slurs by an employee who was also union organizer ("the Jewish gringos were exploiting us"). The court said that an election should be invalidated only if a third-party's "appeal to prejudice ... so taint[ed] the election atmosphere as to render free choice of representation impossible." *Id.* at 498. In another case, a union supporter—speaking as an employee and not an officer of the union—referred to the company's owners as "the damn

finding for these circuits is significant in view of the increasing activism of white supremacy groups in protests and political campaigns. These courts effectively open the door for racist grievances in union representation elections insofar as effective racist appeals can be subtle, cleverly symbolic, or communicated on private and disguised social media platforms. Subtlety and privacy can protect racism

Jews who run this company.” *M & M Supermarkets*, 818 F.2d at 1572. Denying enforcement to the NLRB’s bargaining order, the Eleventh Circuit said that third-party appeals to prejudice will invalidate an election if they “destroyed the atmosphere necessary to the exercise of a free choice in the representation election.”

More recently, in *Ashland Facility Operations, LLC v. N.L.R.B.*, the Fourth Circuit joined these appellate courts, reasoning that “were we to apply the *Sewell* burden-shifting approach, it would create the absurd result that a party would bear the burden of defending the veracity and relevance of comments made by an entity not party to the case and for which it was not responsible.” 701 F.3d 983, 993 (4th Cir. 2012).

But see the dissenting opinion in *N.L.R.B. v. Flambeau Airmold Corp.*, 178 F.3d 705 (4th Cir. 1999), upholding a vote for a union notwithstanding a damaging and false rumor. There, Judge Niemeyer noted:

The misconduct in this case—a false accusation, circulated on the eve of the representation election, that a manager referred to the employees as “a bunch of niggers”—was most clearly an accusation of racial bigotry. It was directed at management; it was an attempt to win the election by creating animosity along racial lines; and it was an attempt “to divert the employer from legitimate issues by insinuating an irrelevant appeal to race.”

A better approach, according to Judge Niemeyer, “would require a new representation election based on third-party race-based inflammatory conduct when (1) the conduct was of the type that would pollute the atmosphere necessary for the exercise of free choice, and (2) the overall circumstances suggest that, more likely than not, the conduct altered the outcome of the election.” *Id.* at 715.

See also *Rheem Mfg. Co. v. N.L.R.B.*, 28 F.3d 1210 (4th Cir. 1994) (union supporter started false rumor that company promoted a white employee as a supervisor, a matter that was discussed by more senior black employees).

when courts use a high proof standard of intolerable prejudice.

The fourth trend is found in federal court rulings on racist speech that occurs on picket lines, not representation elections or organizing campaigns. Recent courts have observed the conflict between Title VII's dictates for a workplace free of racial harassment, and the NLRB's emphasis on protecting slurs during heated labor disputes.²²¹

This problem is illustrated in *Detroit Newspaper Agency*, where the Board ordered reinstatement for a striker whose racist slurs and personal threats were directed at an employee who crossed a picket line.²²² The NLRB also ordered reinstatement of a striker in *Airo Die Casting, Inc.* who approached a replacement worker with both middle fingers extended while screaming "fuck you, nigger."²²³ In *Cooper Tire & Rubber Co. v. NLRB*, where picketing strikers shouted racial taunts Black replacement workers, the NLRB ordered the company to rehire an offending employee who was fired under its EEO policy.²²⁴

²²¹ *Polynesian Hospitality Tours*, 297 N.L.R.B. 228, 252 (1989) (employees engaged in protected concerted activity with "use of epithets, vulgar words, profanity, vulgar gestures, and the like"); and *Cont'l Can Co., Inc.*, 291 N.L.R.B. 290 (1988) (discharge due to racially insulting comments was actually motivated by employee's pro-union comments, and employer had previously tolerated racial slurs).

²²² 342 N.L.R.B. 223 (2004). A woman who was working during the strike had her car blocked by two picketers at which point one striker said, "You fuckin' bitch, nigger lovin' whore. It's your fault that white America lost their jobs. Your family is going to die. I hope you tell your children before they die that its (sic) your fault and its (sic) because you gave our jobs away." *Id.* at 268.

²²³ 347 N.L.R.B. 810, 811 (2006). The Board reasoned that striker's "use of obscene language and gestures and a racial slur, standing alone without any threats or violence, did not rise to the level where he forfeited the protection of the Act." *Id.*

²²⁴ 866 F.3d 885, 889 (8th Cir. 2017) (striker called out, "Did you bring enough KFC for everybody?" and "Hey, anybody smell that? I smell fried chicken and watermelon." After that comment, an unidentified picketer shouted, "go back to Africa, you bunch of f***ing losers.").

But two courts have taken note of the conflict between Title VII's proscription of racial harassment and the NLRB's anachronistic acquiescence to it. A jury in *Dowd v. United Steelworkers of America* found that a striking union created a hostile work environment under Title VII for employees who were subjected to a continuing stream of racial slurs and physical threats.²²⁵ And a recent federal appeals court decision, *Consolidated Communications, Inc. v. NLRB*,²²⁶ reached a similar conclusion. Judge Millett's concurring opinion offers a fitting summation of the growing conflict between NLRA and Title VII cases:

I write separately, though, to convey my substantial concern with the too-often cavalier and enabling approach that the Board's decisions have taken toward the sexually and racially demeaning misconduct of some employees during strikes. Those decisions have repeatedly given refuge to conduct that is not only intolerable by any standard of decency, but also illegal in every other corner of the workplace. The sexually and racially disparaging conduct that Board decisions have winked away encapsulates the very types of demeaning and degrading messages that for too much of our history have trapped women and minorities in a second-class workplace status.²²⁷

²²⁵ 253 F.3d 1093, 1102 (8th Cir. 2001).

²²⁶ 837 F.3d 1, 25 (D.C. Cir. 2016) (admonishing the NLRB not to assume that "the use of abusive language, vulgar expletives, and racial epithets" between employees "is part and parcel of the vigorous exchange that often accompanies labor relations.").

²²⁷ *Id.* at 20–21. Against the backdrop of Judge Millett's concurrence, several NLRB rulings have taken the stance she advocates. Notably, however, many of these are older cases. *E.g.*, *Old Town Shoe Co.*, 91 N.L.R.B. 240, 273–74 (1950) (NLRB denied reinstatement to striker

V. CONCLUSION

The NLRB should revise its speech doctrine for representation elections to remove legal protection for racist speech that meets the standard for hostile work environment under Title VII. In particular, the NLRB should apply *Harris v. Forklift Systems, Inc.* by considering the “frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee’s work performance.”²²⁸ Labor and employment law should not be judicially segregated so that racist speech is protected under the NLRA while triggering liability under Title VII for employers.

But there is more to this research. When the NLRB tolerates racist speech in representation elections, this normalizes an atmosphere of union organizing or employer resistance to unionizing that was typical when white workers fought racial integration.²²⁹ Turning to strikes where replacements are hired, employers take advantage of economic inequality.²³⁰ This often means that Blacks,

who told a co-worker, while picketing, that “it is too bad Hitler couldn’t have lasted a couple of more years. He’d have gotten rid of all the goddam Jews”); *Nassau Ins. Co.*, 280 N.L.R.B. 878, 894 (1986) (“[T]he use of racial and religious epithets [by striking employees is] unlikely to be forgotten or forgiven after the strike is over, thus leading to potentially disruptive conditions in the workplace if the [offending employee] were [reinstated]”); and *Avondale Indus.*, 333 N.L.R.B. 622, 637–38 (2001) (employer lawfully discharged union activist who had unfounded concern that her foreman was a Klansman, where employer concerned about the disruption her remark would cause in the workplace).

²²⁸ *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 23 (1993).

²²⁹ DuBois, *supra* note 23.

²³⁰ A detailed case study is published in Timothy J. Minchin, *Torn Apart: Permanent Replacements and the Crossett Strike of 1985*, 59 ARK. HIST. Q. 30, 43 (2000) (“replacement workers claimed that they were motivated primarily by the high wages and good benefits” that were once

Hispanics, and immigrants are hired to break strikes by white employees.²³¹ In this explosive environment, the NLRB takes an antiquated view that picketers should be legally protected when they resort to racist taunts and ridicule. Given that many strikes end with employers retaining replacement workers,²³² the Board's current policy adds fuel to divisive employer strategy by affording legal protection to strikers who transmute an economic dispute into a racial confrontation.²³³

My policy proposal is supported by empirical evidence showing that the NLRB ignores its own policy against racist speech in *Sewell*; and these findings align with a growing body of rulings from federal appeals courts. Critics of my proposal may complain that having a unity of speech policy between the NLRA and Title VII would create a civility code

paid to strikers).

²³¹ Mark Noon, "It Ain't Your Color, It's Your Scabbing"; *Literary Depictions of African American Strikebreakers*, 38 AFRICAN AM. REV. 429 (2004) (reporting contemporaneous written accounts of strikes by whites with black replacement workers). Another example of racial cleavage appears in *United Brotherhood of Carpenters & Joiners of America, Local 610, AFL-CIO v. Scott*, 463 U.S. 825 (1983), where white union members attacked black workers, hired from outside the community, to work at a construction site.

²³² The striker replacement doctrine, fashioned by the Supreme Court in *N.L.R.B. v. Mackay Radio & Tel. Co.*, 304 U.S. 333, 345–46 (1938), allows employers to hire permanent striker replacements without violating the NLRA.

²³³ An example of this tactic appears in *TWA, Inc. v. Independent Fed'n of Flight Attendants*, 489 U.S. 426 (1989). During a flight attendants strike, the airline lures strikers to abandon the picket line by promising these crossovers a seniority advantage over strikers, thereby improving job and domicile assignments. Criticizing the majority's reason that this tactic did not undermine the right to strike, Justice Brennan reasoned: "More fundamental, I fear, is the legal mistake inherent in the Court's objection to 'penalizing those who decided not to strike in order to benefit those who did.' The Court, of course, does precisely the opposite: it allows TWA to single out for penalty precisely those employees who were faithful to the strike until the end, in order to benefit those who abandoned it." *Id.* at 447.

in representation elections. Elections, they may argue, should be free-wheeling, uncensored forums for all viewpoints. This would miss the point, however, that a workplace election is not the same as an election for public office. While a racist can be elected as president, a union or employer cannot run on a platform of white separatism or racial preference without creating liability under Title VII. A free speech approach would also overlook the fact that mere epithets and stray remarks do not constitute verbal harassment under Title VII. Instead, speech must be sufficiently severe or pervasive as to alter conditions of employment.

Other critics may point out that employers already have a psychological advantage over union organizers because they can hold captive audience speeches that sow fear and anxiety over losing jobs if employees elect a union as a bargaining agent. Why shouldn't a union organizer, or union-busting management consultant, be able to tap into employee anxieties over immigration and race? My study answers this question by proposing Title VII's harassment standard, which has been accepted without significant controversy for over twenty years. If a union organizer or management consultant cannot hang nooses or use racial epithets in their own employment relationship without facing legal consequences, why should their campaign speeches that use or lead to these incitements be protected under the NLRA? My proposal not only limits the worst type of union election speech, but would focus campaigns on economics and the benefits and drawbacks of having union representation. Without making this policy change, the NLRA will shield racist grievances by employees and race-baiting by employers, opening the door to re-segregating the American workplace.

VI. TABLE OF CASES

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