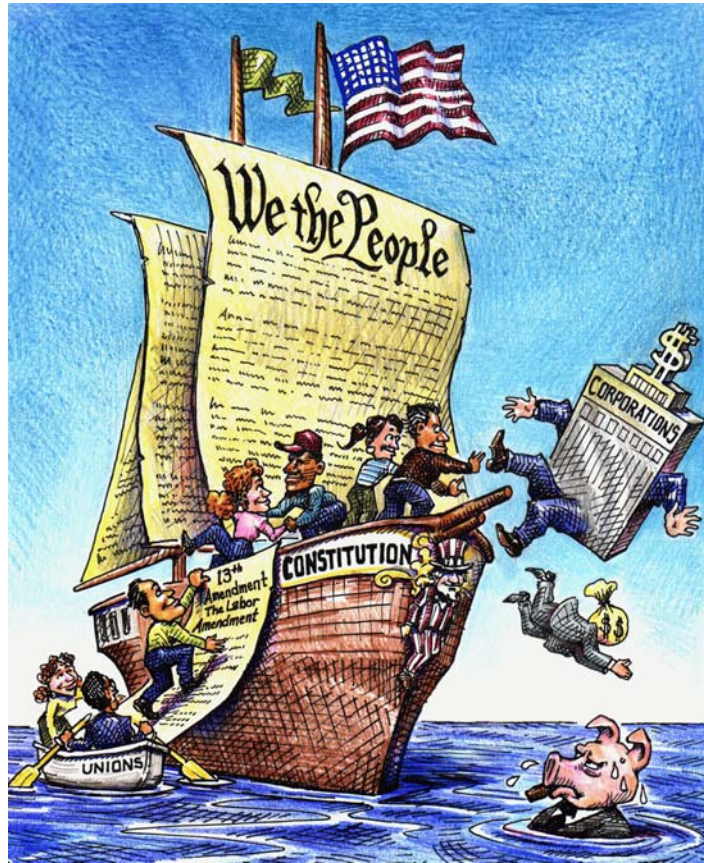


Toward a New Labor Law



Toward a New Labor Law is a proposal of the Interim National Council of the Labor Party pursuant to the Workplace Bill of Rights resolution adopted by the Labor Party First Constitutional Convention in November 1998.

The Labor Party circulated this proposal, initially drafted by Jim Pope, Peter Kellman, and Ed Bruno, to a large number of labor activists and union leaders and held discussions at a series of meetings across the country. In all, more than 200 labor activists and union leaders suggested changes. The present document reflects many of their ideas. It supersedes the version that was published in the Spring 2001 issue of *Working USA* under the title "Toward a New Labor Rights Movement."

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The Labor Party, founded in 1996, is a national organization comprised of international unions and thousands of local unions (representing over 2 million workers), worker-supportive organizations and individual members. The Labor Party represents the concerns of working people on issues such as trade, health care, and the rights to organize, bargain and strike.

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1. The Problem: Unfree Labor in the United States

Under today's labor law, most American workers are unfree. We can be fired by our employers for any reason or no reason at all, barring limited exceptions. Employers can change our hours, wages, and working conditions at will. They can play favorites, make us do work outside our job functions, reduce or eliminate our health-care coverage, and then fire us for complaining about it. In one case, a court ruled that it was perfectly legal for an employer to fire an employee for saying the words: "Black workers have rights too." Another court upheld a salesman's discharge for reporting to company officials that its product caused serious safety risks to users.¹

Employers even enjoy the royal prerogative to bar us from suing them in court.² As one law professor summed up, the law "endows the employer with the divine right to rule the working lives of its subject employees."³

Unless, of course, we organize a union. An active union can put an end to employer dictatorship and enable us to exercise a measure of democratic control over our working lives. Through collective bargaining, we build up standards of fairness and mutual respect. Nearly all union contracts prohibit discharge except "for just cause." The average union wage is about 20 percent higher than the average nonunion wage.⁴ Most union contracts establish the principle of seniority, thus limiting the ability of the employer to play favorites in promotions and lay-offs. Compared to corporations, unions operate on a democratic basis, giving their members an opportunity to elect officers and set organizational policy.

Unfortunately, less than 15 percent of all American workers are union members, and fewer than 10 percent in the private sector. This is not by choice. Given the option of joining a union or not, 44 percent of private-sector workers in this country would join – a higher percentage than have ever been organized.⁵ ***In other words, if workers were presented with a free, uncoerced choice,***

¹ See Clyde W. Summers, *Employment at Will in the United States: The Divine Right of Employers*, 3 U. Pa. J. Lab. & Emp. Law 65, 78 (2000); citing *Bigelow v. Bullard*, 901 P.2d 630, 632 (Nev. 1995); *Geary v. United States Steel Corp.*, 319 A.2d 174, 175 (Pa. 1974). The limited exceptions include anti-discrimination laws and minimum wage laws.

² See *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001) (holding that an employer may deprive an employee [employed in any industry other than transportation] of the right to sue by inserting language in an employment application specifying that all disputes relating to the employment will be resolved by a private arbitrator). In the *Circuit City* case, the employee lost his right to sue the employer for invidious discrimination prohibited by a state statute.

³ Summers (cited above, note 1) at 65.

⁴ United States Department of Labor, Bureau of Labor Statistics, *Union Membership in 1999* (Jan. 19, 2000).

⁵ See Richard B. Freeman and Joel Rogers, *What Workers Want* 89 (1999) (reporting survey results).

*private sector union membership would more than triple overnight.*⁶ Meanwhile, in the public sector, government workers choose to work union in overwhelming numbers when given the opportunity.⁷

But workers in the United States are not free to organize unions. Employers illegally fire or otherwise retaliate against one out of every 18 private-sector workers who have the nerve to support a union organizing campaign.⁸ With these odds, would you speak up for a union if you worked in a non-union workplace? In a national poll, 79 percent of American workers agreed with the statement that it was “very” or “somewhat” likely that “nonunion workers will get fired if they try to organize a union,” and about 40 percent feared that they personally would be fired if they participated in organizing.⁹ Employers feel free to violate workers’ rights because the legal remedies are woefully ineffective.¹⁰ Meanwhile, in the public sector, many employees are denied the legal right to bargain collectively – a right enjoyed by government employees in virtually every other industrialized country in the world.

The situation is so bad that Human Rights Watch – a group that we usually hear about in connection with countries like El Salvador, Afghanistan, or China – recently issued a scathing report on American labor law. “The frequency and growing incidence of workers’ rights violations should,” the report concluded, “cause grave concern among Americans who care

⁶ According to Freeman and Rogers, there would be union majorities in workplaces accounting for about the same percentage of the workforce as the percentage that would prefer a union. See *id.* at 68-69. We can project only a tripling of membership because 12% of the survey sample worked in unionized workplaces. *Id.* at 89.

⁷ The Research Department of the American Federation of State, County, and Municipal Employees estimates that, in jurisdictions that recognize the right to bargain collectively, nearly 60% of government employees are covered by union contracts.

⁸ See Charles J. Morris, *A Tale of Two Statutes: Discrimination for Union Activity Under the NLRA and the RLA*, 2 *Emp. Rts. & Pol’y J.* 327, 330 (1998) (study based on NLRB). The Dunlop Commission on the Future of Worker-Management Relations reported that 1 worker was offered reinstatement for every 48 union voters in a representation election. See U.S. Dept. of Labor & U.S. Dept. of Commerce, *Commission on the Future of Worker-Management Relations, Fact-Finding Report* (1994) (hereafter *Dunlop Commission Report*), at 82 (1994). The Commission’s estimate includes only discharged workers who filed charges with the NLRB and pursued them to a successful conclusion. As Professor Paul Weiler has pointed out, such estimates are likely to understate the actual number of retaliatory discharges because only a fraction are litigated to a conclusion. Paul Weiler, *Hard Times for Unions: Challenging Times for Scholars*, 58 *U. Chic. L. Rev.* 1015, 1023-24 (1991).

⁹ *Dunlop Commission Report* (cited above, note 8) at 72; David Brody, *Free Labor, Law and American Trade Unionism*, in Stanley L. Engerman ed., *The Terms of Labor: Slavery, Serfdom and Free Labor* 213, 238 (1999).

¹⁰ The law provides for the reinstatement with back pay of workers discharged for union activities. However, employers can delay reinstatement for years by pursuing appeals. See NLRB 1998 Annual Report at 187, Table 23 (reporting median time for NLRB ruling of two years, followed by up to three years for the resolution of court appeals). In the meantime, the fired worker is out of a job and her co-workers learn the lesson that the law cannot protect the right to organize.

about human rights and social justice.”¹¹ According to the report, employers not only fire unionists, they also spy on their employees, force them to attend anti-union meetings, have supervisors confront them one-on-one, threaten to close the business if they unionize, and threaten undocumented workers with deportation.¹²

Even if a group of workers somehow manage to organize a union, the law keeps them at a severe disadvantage. Unless workers can make a believable threat to strike, employers have no incentive to give up unilateral control over wages and working conditions. But government employees at the federal level and in four out of five states are prohibited from striking. In the private sector, most workers enjoy the right to strike – but only in theory. If they dare to exercise this right, the employer can punish them by hiring permanent replacements to fill their jobs.¹³ If their brothers and sisters at other companies try to help, they will discover that the labor law compels them to assist the employer instead. For example, if a tire manufacturer fires employees for trying to organize a union, the automobile workers union cannot ask its members to refuse to handle tires produced by the tire company. As a result of these rules, the strike no longer serves its purpose of giving the employer an incentive to bargain with the union. Instead, employers welcome strikes as opportunities to weaken or destroy the union.¹⁴ As one organizer summed up, “obeying the law reduces us to walking, in small circles, in front of facilities running on scab labor.”¹⁵

2. Electioneering and Lobbying Won’t Solve the Problem

If the situation is so bad, then why not elect better government officials to protect labor’s rights? Each election year, the labor movement spends millions of dollars on campaign contributions. Theoretically, these millions could improve the situation in two ways: (1) by obtaining better appointments to labor law agencies like the National Labor Relations Board and the Transportation Labor Board, and (2) by electing legislators who will enact labor law reform.

¹¹ Human Rights Watch, *Unfair Advantage: Workers’ Freedom of Association in the United States under International Human Rights Standards 8-9* (2000) (hereafter Human Rights Watch Report).

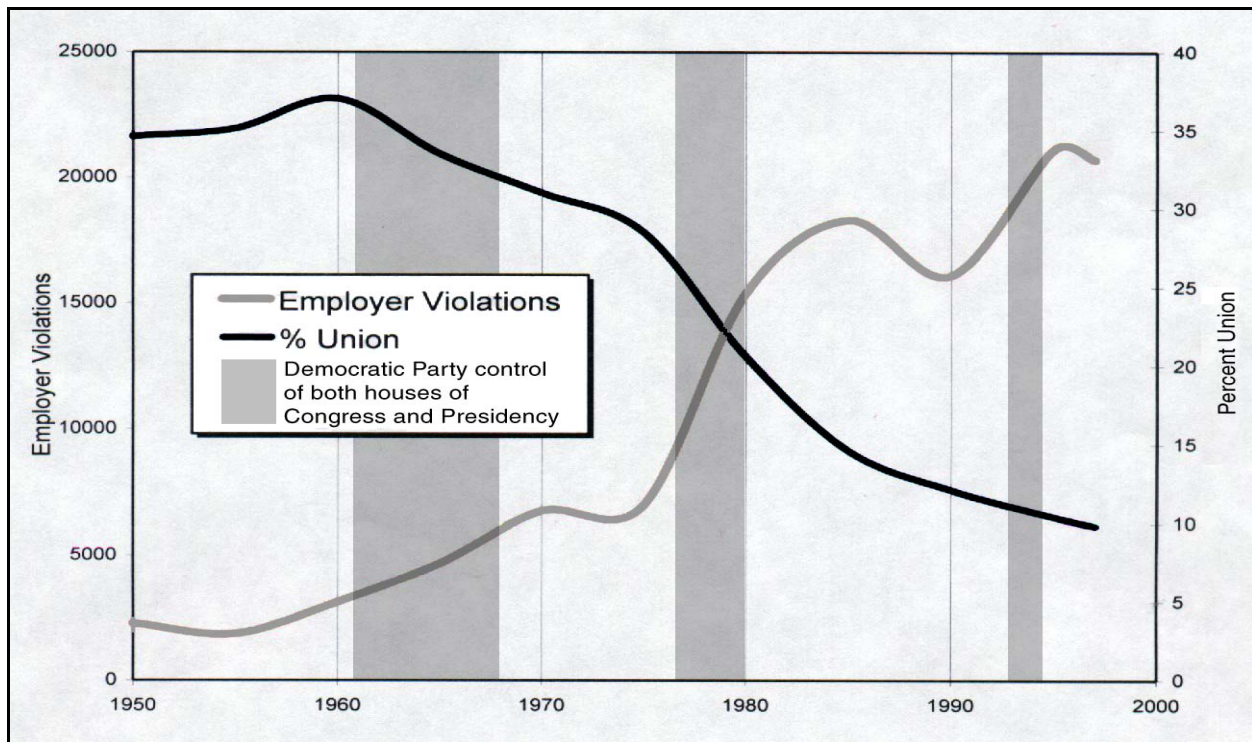
¹² Human Rights Watch Report (cited above, note 11) at 18-20, 72-73.

¹³ *NLRB v. Mackay Radio & Telegraph Co.*, 304 U.S. 333 (1938).

¹⁴ See Julius Getman, *The Betrayal of Local 14 225* (1998). According to a recent study of collective bargaining negotiations, employers are now more likely to threaten permanent replacement than unions are to threaten a strike. See Joel Cutcher-Gershenfeld, *The Social Contract at the Bargaining Table: Evidence from a National Survey of Labor and Management Negotiators*, Industrial Relations Research Association, Proceedings of the 51st Annual Meeting, Vol. 2 (1999).

¹⁵ Stephen Lerner, *Reviving Unions*, Boston Review, April/May 1996, at 3, 4.

In practice, however, neither of these theoretical possibilities has any perceptible effect on the problem. First, officials of the NLRB and other government agencies – however well-meaning they are – lack the power to deal with a problem as huge as the systematic violation of labor rights in American industry. As Human Rights Watch put it, government agencies can only “work incrementally at the margins of established rules but cannot take dramatic new initiatives absent legislation by Congress.”¹⁶ Over the past half-century, employer violations of worker rights have gone steadily up, while the proportion of the workforce organized has gone steadily down – all without regard to whether there was a Democrat or a Republican in the White House. (See graph below.) Even strong enforcers like William Gould and Fred Feinstein, respectively NLRB Chairman and NLRB General Counsel under President Clinton, have been unable to reduce the rate of employer violations.



X-Ing Out Unions¹⁷

¹⁶ Human Rights Watch Report (cited above, note 11) at 17.

¹⁷ Data for this graph drawn from Morris, A Tale of Two Statutes (cited above, note 8); Paul Weiler, Promises to Keep: Securing Workers’ Rights to Self-Organization Under the NLRA, 96 *Harv. L. Rev.* 1769, 1780 (1983) (Table II); Dunlop Commission (cited above, note 8) at 82.

So if the law is so bad, why not change it? For more than half a century, the labor movement has thrown energy and money into a series of unsuccessful campaigns for labor law reform. In 1949, labor's crusade to repeal the Taft-Hartley Act went down to defeat despite Democratic majorities in both houses of Congress and President Truman in the White House. In 1978, a modest reform bill fell to a filibuster, again with Democrats holding both houses of Congress and the Presidency. Most recently, labor failed to obtain even the limited objective of a striker replacement bill despite Democratic majorities in both houses of Congress and Bill Clinton and Al Gore in the White House.

This record of failure will not be reversed with more money, better lobbying, or stronger electioneering. The fact is that – absent very extraordinary circumstances – business interests hold a veto power over labor rights legislation in this country. For one thing, business outspends labor in political campaigns by a huge margin. Even if we consider only Political Action Committees, where labor is strongest, business prevails by a margin of three to one. In fact, business PACs contribute more to the Democratic Party than do labor PACs.¹⁸ But corporate wealth is not the only reason that business holds a veto. If corporations do not get what they want, they threaten to move their facilities out of state or overseas. Business has been very successful at making this kind of political blackmail look like nothing more than good business. “We can't remain competitive,” they say, unless they get what they want. Meanwhile, unions almost never threaten to strike for political reasons. The result is that politicians can usually afford to ignore unions, but they must do what it takes to obtain the cooperation of business.¹⁹

This does not mean that labor always loses; unions can win legislative change when business opposition is divided or less than fully committed — for example on bills pertaining to general labor issues like unemployment insurance and the minimum wage. But on bills concerning the rights to organize and strike, where business is united and committed, the success rate has been minimal.²⁰ ***In fact, Congress has never passed a major labor rights statute until after unions and workers have demonstrated the need for change by withholding cooperation through***

¹⁸ According to the Center for Responsive Politics, which bases its conclusions on data provided by the Federal Election Commission, business interests outspent labor by an overall margin of 15-1 during the campaign of 2000 as of October 1, 2000. See Center for Responsive Politics, Who Paid for this Election (2000) (available on-line at www.opensecrets.org/pubs/whopay00/). However, this margin is inflated due to the fact that individual contributions of over \$200 (the only ones for which data is available) are automatically attributed to business if the donor's employer is a business. The figures for PACs can, however, be accurately linked to business and labor interests. Business PACs contributed \$135,668,899, of which \$49,402,814 went to Democrats, while labor PACs contributed \$40,892,508, of which 37,338,295 went to Democrats.

¹⁹ See Charles Lindblom, *Politics and Markets* 175-76 (1977) (explaining that business occupies a “privileged position” in our political system because government officials understand that “to make the system work government leadership must often defer to business leadership”).

²⁰ See Richard Freeman & James Medoff, *What Do Unions Do?* 198-204 (New York: Basic Books, 1984) (study of 280 bills introduced in Congress between 1947 and 1980, showing a union success rate of 58% on “bills pertaining to general labor issues,” like unemployment insurance and minimum wage, as compared to a success rate of 20% on “bills relating to labor law” and “union-related legislation”).

strikes and boycotts. This generalization holds true from the Erdman Act of 1898 (the first railway labor law), which was a response to the Pullman Strike of 1894, to the Wagner Act of 1935 – the most recent major labor rights statute, which was a reaction to the massive strike waves of 1933 and 1934.²¹

3. A Solution?

In November 1998, the delegates to the first constitutional convention of the Labor Party declared that “we have wrongly come to accept that at work we are not entitled to the rights and privileges we normally enjoy as citizens.” The convention then proceeded to resolve that the “Labor Party rejects the status quo of today’s workplace where workers are forced to abandon their Constitutional Rights in order to earn their living, and are as a consequence subject to the tyranny of the corporation.”

Does the Constitution provide a solution to the problem of unfree labor in the United States? We believe that it does. We believe that the Constitution:

- < **guarantees the right to organize** free from interference by government or employers;
- < **guarantees the right to bargain collectively;**
- < **guarantees the right to strike** free from interference by government or employers, whether by discharge, by permanent replacement, or other means;
- < **guarantees the right to act in solidarity** with other workers, as explained below in chapter 8.

We further believe that under our Constitution, ***the unorganized workplace is presumptively unconstitutional***, because – as the Supreme Court pointed out many years ago – a single employee is “helpless in dealing with an employer” so that organization is “essential to give laborers an opportunity to deal on an equality with their employer.”²² This is the norm in most industrial countries, where – instead of the right to choose whether to have representation or

²¹ See James Gray Pope, *The First Amendment, the Thirteenth Amendment, and the Right to Organize in the Twenty-first Century*, 51 **Rutgers L. Rev.** 941, 944-45, 969 (1999).

²² *American Foundries v. Tri-City Council*, 257 U.S. 184, 209 (1921).

dictatorship at work – workers have a right to participate in decisions that affect their working lives.²³

At the outset, we admit that the Supreme Court does not currently agree with any of the above assertions about labor’s constitutional rights. The labor movement of today is in roughly the position of the civil rights movement a half-century ago, before the Supreme Court struck down segregation in *Brown v. Board of Education*. We can read the Constitution and see that our rights are being violated, but the courts have concocted various clever devices (like the old “separate-but-equal” doctrine that was overruled in *Brown*) to nullify our rights.

This means that the “solution” we are proposing is no quick fix. ***We cannot run to the courts and obtain a remedy.*** Nor can we turn the matter over to lawyers. Just as it took a civil rights movement to overcome official segregation, it will take a workers’ rights movement to end officially-sanctioned unfree labor in the United States.

Why, then, should we turn to the Constitution? If the struggle for constitutional rights is going to be so hard, why not try to squeeze the most we can out of the existing labor statutes instead? The answer is that the Constitution offers at least four crucial advantages over statutory law:

First, the Constitution applies to all persons, including the millions of public workers, farm workers, domestic workers, so-called “independent” contractors, and so-called “supervisors” who are excluded from coverage under the National Labor Relations Act and the Railway Labor Act. Also included are undocumented workers, some of whom are covered under the NLRA but whose rights are at the mercy of employers and the INS.

Second, our Constitution belongs to the people, not the legal profession. The reason why the American revolutionaries enacted a written Constitution (as opposed to the unwritten British Constitution) was so that the people could read it and enforce it on their own.

Third, the Constitution trumps all other sources of law, so that any statute or judicial ruling to the contrary (for example, the secondary boycott prohibition of the Taft-Hartley Act or a flat ban on public employee strikes) is null and void.

Fourth and finally, we have the benefit of the labor movement’s previous experience relying on the Constitution. In the days before the National Labor Relations Act, the movement claimed many of the same constitutional rights that are listed above. It was during this period that all of the major labor rights statutes were enacted. Before moving on to the details of the constitutional proposal, it will be useful to review this experience.

²³ See Roy J. Adams, *Choice or Voice? Rethinking American labor policy in light of the international human rights consensus* 4 (2000) (unpublished conference paper on file with the Labor Party). Typically, this right of participation is reflected in some kind of works council, organized independently of the employer. Unions exist alongside these councils and participate in them by running candidates for office.

4. Back to the Future

We have been laboring so long under the National Labor Relations Act that it is hard to envision a comprehensive alternative. One way to attack this problem is to turn the clock back to the period before the NLRA apparatus took over and try to imagine other possible outcomes. In the early 1930s, the main national labor statute was the Norris-LaGuardia Anti-Injunction Act. It barred the federal courts from issuing injunctions against peaceful strikes, boycotts (including secondary boycotts), and picketing (including peaceful mass picketing) in labor disputes. It also barred federal courts from enforcing yellow dog contracts by injunction or otherwise.²⁴ In Section 2, Congress set out the existing relationship between labor and owners of property in the United States:

Whereas, under prevailing economic conditions, developed with the aid of governmental authority for owners of property to organize in the corporate and other forms of ownership association, the individual unorganized worker is commonly helpless to exercise actual liberty of contract and to protect his freedom of labor, and thereby to obtain acceptable terms and conditions of employment . . .

Congress then went on to lay out the solution:

wherefore, though he should be free to decline to associate with his fellows, it is necessary that he have full freedom of association, self-organization, and designation of representatives of his own choosing, to negotiate the terms and conditions of his employment, and that he shall be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection

If this statement were effectively enforced in law today, we would be in a position to triple the size of the labor movement overnight. Of course, the Norris-LaGuardia Act by itself did not fully enforce the statement. Its operative provisions were designed to eliminate the main obstacles to labor freedom in 1932, namely labor injunctions and yellow dog contracts. But the Norris-LaGuardia Act put the development of labor law on a track toward the effective enforcement of the fundamental human rights of workers.

Suppose the labor law had remained on the fundamental rights track. What might it look like today? To answer this question, we need to know more about the fundamental rights track. It did not begin with the Norris-LaGuardia Act. To unionists at that time, the Act merely recognized and protected worker rights that were already guaranteed by the United States Constitution.

²⁴ Yellow dog contracts were agreements by workers not to join a union without their employer's permission. Workers were required to sign the contracts as a condition of employment.

5. The Labor Amendment to the U.S. Constitution

If you mention the labor amendment to the United States Constitution today, most people get a puzzled look on their faces. They know that the first amendment guarantees the right of free speech, and they may even know that the same amendment secures the right of assembly. But few have ever heard of the labor amendment. It takes awhile before they realize that you are talking about the thirteenth amendment, which provides: “Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.” At that point, they are likely to ask what in the world the thirteenth amendment could possibly have to do with labor rights today; after all, the amendment was intended to do away with slavery, a goal that was accomplished more than a century ago.

But according to the Supreme Court, *the purpose of the thirteenth amendment is not simply to eliminate slavery, but also “to make labor free by prohibiting that control by which the personal service of one man is disposed of or coerced for another’s benefit.”*²⁵ Before the NLRA, unionists understood from their own experience that in a modern industrial economy there was no way to prohibit “that control by which the personal service of one man is disposed of or coerced for another’s benefit” without the rights to organize, bargain collectively, strike, and act in solidarity with other workers.²⁶ “The truth is that in complex modern industry,” said Samuel Gompers, “the only really free labor is organized labor. The only workers not laboring under terms and conditions arbitrarily imposed upon them from a source wholly foreign to themselves, are the organized workers.”²⁷ Black unionists spoke with special authority on this subject. Testifying before a congressional committee on the suppression of a West Virginia coal strike, for example, George Echols of the United Mine Workers commented: “I was raised a slave . . . and I know the time when I was a slave, and I feel just like we feel now.”²⁸

Most courts rejected labor’s thirteenth amendment claims. They held that the amendment protected only the individual right to quit work. But labor leaders stood their ground. Gompers ridiculed the idea that a lone worker could avoid employer control by quitting: “just imagine what a wonderful influence such an individual would have, say for instance [on] the U.S. Steel

²⁵ *Bailey v. Alabama*, 219 U.S. 219, 241 (1911) (striking down Alabama’s debt peonage law).

²⁶ For detailed descriptions of this viewpoint, see William E. Forbath, *Law and the Shaping of the American Labor Movement* 135-41 (1991); James Gray Pope, *Labor’s Constitution of Freedom*, 106 *Yale L.J.* 941, 962-66, 978-81(1997).

²⁷ Samuel Gompers, *Union Labor and the Enlightened Employer*, *American Federationist* 28 (1921), 469, 472-73.

²⁸ Joe William Trotter, Jr., *Coal, Class, and Color* 114 (1990). Other black miners testified that working in a non-union field was equivalent to being enslaved. *See id.* at 114 (quoting black coal miner’s statement that working in a non-union field was “the same as being in slavery”); *Pittsburg Daily Headlight*, Oct. 3, 1921, at 1 (quoting G. W. Van Hook, a black union activist, explaining that he moved to the union coalfields of Kansas from the non-union fields of West Virginia “because he found that he was held in slavery there”).

Corporation.”²⁹ He acknowledged that the individual right to quit might protect a skilled worker who owned his own tools and “made a complete article in his own trade or calling,” but the rise of machinery and the division of labor had all but eliminated such workers.³⁰ Thus, the rights to organize, to strike, and to boycott were “nothing more than the application of the constitutional bill of rights to the conditions of our time.”³¹ His point was that labor rights, like other constitutional guarantees, must be applied to contemporary conditions if they are to retain their vitality.

The AFL did not wait for judicial approval to put its constitutional views into practice. Beginning in 1909, it was the official policy of the American Federation of Labor that a worker confronted with an unconstitutional injunction had an “imperative duty” to “refuse obedience and to take whatever consequences may ensue.”³² Under this policy, thousands of workers defied unconstitutional injunctions and went to jail. According to historians, their principled resistance exposed the injustice of the labor injunction and led to the passage of the Norris-LaGuardia Act in 1932.³³

When the Norris-LaGuardia Act was passed, labor’s leading constitutional thinkers maintained that it endorsed their view of the thirteenth amendment.³⁴ It doesn’t take any legal training to see why. If, as Congress declared, “the individual unorganized worker is commonly helpless to exercise actual liberty of contract and to protect his freedom of labor,” then ***the right to organize is obviously basic to human freedom, and its denial amounts to involuntary servitude***. Senator Norris defended this view, charging that anti-strike injunctions brought about “slavery”³⁵ and

²⁹ Debate Between Samuel Gompers and Henry J. Allen at Carnegie Hall, New York, May 28, 1920 15 (1920).

³⁰ *Testimony of Samuel Gompers, President, American Federation of Labor, before Joint Labor and Industries Committee of the New York State Legislature on the Duell-Miller industrial relations (anti-strike) bill, Assembly Chamber, Capitol, Albany, N.Y., March 1, 1922*, 29 **American Federationist** 253, 260 (1922) (hereafter “Gompers Testimony”).

³¹ Samuel Gompers, *Union Labor and the Enlightened Employer*, 28 **American Federationist** 469, 472 (1921).

³² American Federation of Labor, Report of the Proceedings of the Twenty-Ninth Annual Convention 313-14 (1909).

³³ *See* Forbath (cited above, note 26) at 158-63 (1991).

³⁴ *See* American Federation of Labor, Report of the Proceedings of the Fifty-First Annual Convention 460-63 (1931) (reporting statements by Andrew Furuseth and Victor Olander of the Seamen and Matthew Woll of the Photo-engravers as to the incorporation of thirteenth amendment principles into the Norris bill, which later became the Norris LaGuardia Act).

³⁵ *Limiting Scope of Injunctions in Labor Disputes: Hearings’ before the Subcommittee of the Senate Committee on the Judiciary*, 70th cong., 1st sess. (1928) at 672 (commenting, with regard to the right to persuade workers to strike: “We have got to leave that liberty to the citizen or we will have slavery, it seems to me, and we can not inquire into his motive, it seems to me, if he does it peacefully”).

involuntary servitude on the part of those who must toil in order that they and their families may live.”³⁶

6. From Labor Freedom to Freedom of “Commerce”

After the Norris-LaGuardia Act was passed, workers and unions for the first time enjoyed a degree of freedom from anti-strike, anti-picketing, and anti-boycott injunctions. But employers continued to interfere with the right to organize by firing thousands of unionists, establishing company-dominated unions, and refusing to bargain with genuine unions. The passage of the National Industrial Recovery Act in 1933 raised workers’ hopes because of its section 7(a), which appeared to prohibit employers from discriminating against unionists or forcing workers to join company unions. But the Roosevelt administration did not enforce the Act, leaving it up to workers to enforce their own rights.³⁷ In 1934, the country was shaken by four strikes that erupted into open class conflict. West coast Longshoremens, Minneapolis truckers, Toledo automobile workers, and southern textile workers staged strikes that escalated into pitched battles in which thousands of workers from many trades and industries joined the strikers in defending their picket lines against police, vigilantes, and soldiers. In early 1935, nationwide strikes of automobile and rubber workers were narrowly averted. Then, in the famous *Schechter Poultry* case, the Supreme Court struck down the National Industrial Recovery Act, leaving President Roosevelt facing a strike wave with no industrial policy in place. He turned to Senator Robert Wagner of New York, who had drafted the bill that would soon become the National Labor Relations Act.

The centerpiece of Wagner’s bill was section 7, which guaranteed the right of employees “to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection.” Section 8 of the bill went beyond the Norris LaGuardia Act in prohibiting employers from interfering with these rights by coercing workers, discriminating against unionists, or establishing company-dominated unions. In

³⁶ 75 Congressional Record 4502 (1932). During the Congressional hearings, Norris had defended labor’s view that injunctions prohibiting workers from combining to quit work violated the thirteenth amendment. *Limiting Scope of Injunctions* (cited above, note 35) at 672; see also 75 Congressional Record 4502 (1932) (quoting Senator Norris’ charge that labor injunctions brought about “involuntary servitude on the part of those who must toil in order that they and their families may live”).

³⁷ The Act authorized the President to approve “codes of fair competition” developed by boards composed of representatives from the affected industry. NIRA, U.S. Statutes at Large, Vol. 48, p. 195, section 3(a). Section 7(a) required that each code guarantee to employees “the right to organize and bargain collectively through representatives of their own choosing.” *Id.*, section 7(a). The Act empowered the Attorney General to enforce the codes in the federal courts (*id.*, section 3(c)) but Roosevelt did not authorize him to do so until February 1934, and even then he proceeded so cautiously that only one case reached a resolution before the Supreme Court declared the Act unconstitutional. See Irving Bernstein, *The New Deal Collective Bargaining Policy* 59 (1950); Peter Irons, *The New Deal Lawyers* 207-10 (1982).

addition, to make sure that the courts did not construe the Act against labor, section 13 directed that “Nothing in this Act shall be construed so as either to interfere with or impede or diminish in any way the right to strike.”

These provisions continued on the fundamental rights track of the Norris-LaGuardia Act. Like Senator Norris before him, Senator Wagner charged that the non-union workplace resembled slavery, and promised that his bill would bestow upon workers “emancipation from economic slavery and . . . an opportunity to walk the streets free men in fact as well as in name.”³⁸ Andrew Furuseth, President of the Seamen’s Union and the AFL’s deepest constitutional thinker, begged Wagner to implement these sentiments in law by grounding his bill on Congress’ power to enforce the thirteenth amendment.³⁹ But Wagner had been convinced by lawyers that the bill should be based on Congress’ power (granted in Article I, section 8 of the Constitution) to regulate interstate commerce. Wagner sincerely believed that his bill would end industrial slavery; but he also believed that it would bring about industrial peace, thus facilitating the free flow of interstate commerce. To Wagner, there was no contradiction between these goals; genuine labor-management cooperation could come about only on a foundation of worker freedom.

What the Senator did not realize was that his reliance on the commerce clause would tilt the interpretation of his statute against worker freedom. The first big question was whether the Act was constitutional. If it had been grounded on the thirteenth amendment, the issue would have focused on whether the rights to organize and engage in concerted activity were necessary for labor freedom. But instead, government lawyers defended the Act as an exercise of Congress’ power to “control” and “punish” strikes under the commerce clause.⁴⁰ Judging from the lawyers’ arguments, the Wagner Act might have been entitled the “Wagner Anti-Strike Law.” *Workers’*

³⁸ 1 National Labor Relations Board, Legislative History of the National Labor Relations Act 501-02, 1241 (1949); 2 Legislative History at 2284; *see also* 1 Legislative History at 47 (“it is simply absur[d] to say that an individual, one of 10,000 workers, is on an equality with his employer in bargaining for his wages. The worker, if he does not submit to the employers terms, faces ruin for his family. The so-called freedom of contract does not exist under such circumstances. The only way that the worker will be accorded the freedom of contract to which, under our theory of government, he is entitled, is by the intrusion of the Government to give him that right, by protecting collective bargaining”).

³⁹ Letter from Furuseth to Wagner, April 16, 1935, Robert F. Wagner Papers, Labor Series, Box 4, Folder 39, Georgetown University Special Collections; Letter from Furuseth to Wagner, May 28, 1935, Robert F. Wagner Papers, Labor Series, Box 4, Folder 39, Georgetown University Special Collections. The story of the labor movement’s efforts to ground national labor rights legislation on the thirteenth amendment is told in detail in James Gray Pope, *The Thirteenth Amendment versus the Commerce Clause: 1921-1950: Labor and the Shaping of American Constitutional Law, 1921-1957*, 102 *Colum. L. Rev.* 1 (2002).

⁴⁰ *See Arguments in the cases arising under The Railway Labor Act and The National Labor Relations Act before the Supreme Court of the United States, February 3-11, 1937*, U.S. Cong., Senate Document No. 52 (75th Cong., 1st sess.) at 124 (reporting Reed’s argument that Congress has “control power” over strikes); *id.* at 171 (reporting Madden’s argument “that the power of Congress clearly includes the power to prevent a strike--rather, to punish a strike--called with the intent of affecting commerce . . .”).

rights were to be protected not because they were important in themselves, but because protecting them would help to eliminate strikes. In order to drive home the point that strikes interfered with interstate commerce, government lawyers argued that strikes “disrupted” markets, “crippled” business, and caused “disorganization, obstruction, or even paralysis of interstate commerce.”⁴¹ They even praised federal military actions against strikers as “efforts to bring about industrial peace.”⁴²

As numerous historians have pointed out, it is unlikely that the lawyers’ commerce clause arguments had any effect in causing the Supreme Court to uphold the NLRA. Instead, the Court was responding to outside pressures.⁴³ Workers across the country forcefully demonstrated the need for a national labor law by staging a spectacular wave of sit-down strikes. President Roosevelt threatened to “pack” the Court with six new Justices. Congress refused to act on the sit-downs, instead awaiting the Supreme Court’s decision on the NLRA. Under this pressure, the Court would just as likely have upheld the law under the thirteenth amendment – which fit President Roosevelt’s own rhetoric of ending “economic slavery” and “economic royalism” – as under the commerce clause.⁴⁴ Instead, however, the workers’ movement for fundamental labor rights was sidetracked by lawyers and politicians into a massive expansion of the commerce power. For the first time in history, the Supreme Court held that the interstate commerce power could be used to regulate intrastate manufacturing operations.

Although the commerce clause strategy had little effect on the upholding of the NLRA, it had a huge impact on the interpretation of the new law. Having been introduced to the NLRA as an anti-strike measure, judges soon began to interpret its ambiguous provisions in line with their thinking on what would most effectively prevent strikes. Within a few years of its passage, the Supreme Court had ruled that employers could permanently replace workers who dared exercise their section 7 right to strike,⁴⁵ that an employer could fire its entire union workforce in retaliation against the union’s threat to strike even though the collective bargaining agreement expressly gave the union the right to strike over disagreements in interpretation,⁴⁶ and that an employer that flagrantly violated the workers’ right to organize, provoking them to stage a sit-down strike in protest, could then not only discharge the strikers and obtain their imprisonment for violating an injunction, but also pick and choose who would be punished, taking back those

⁴¹ Petitioner’s Brief, *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937), at 21-24.

⁴² *Id.* at 32-33 (citing, *inter alia*, the use of federal troops in the Pullman strike of 1894 and the steel strike of 1919 as examples of federal government “efforts to bring about industrial peace”).

⁴³ See Irons (cited above, note 37) at 272-73, 289; James A. Gross, *The Making of the National Labor Relations Board (1933-1937)* 227 (1974); Richard C. Cortner, *The Wagner Act Cases* 176-77 (1964).

⁴⁴ See Pope, *The Thirteenth Amendment versus the Commerce Clause* (cited above, note 39), at 72-76, 120-22.

⁴⁵ *NLRB v. Mackay Radio & Telegraph Co.*, 304 U.S. 333 (1938).

⁴⁶ *NLRB v. Sands Manufacturing Company*, 306 U.S. 332 (1939).

who renounced the union while firing and imprisoning those who remained loyal.⁴⁷ Since worker rights had no value in themselves, employers that violated them were guilty of no great offense. Despite statutory language empowering the Board to “prevent any person from engaging in any unfair labor practice” and to order violators not only to cease and desist, but also “to take such affirmative action . . . as will effectuate the policies of this Act,” the Court held that the Board could not penalize employers so as to prevent them from committing future violations.⁴⁸

The commerce clause strategy backfired even more spectacularly in 1947, when the Taft-Hartley Act was passed under the constitutional authority of the commerce clause. The Act brought back anti-strike and anti-picketing injunctions, banned secondary boycotts, limited the subjects over which unions could bargain, and gave employers new opportunities to obstruct union organizing. The labor movement held the Act unconstitutional as a “Slave Labor Law” and organized an impressive series of protests.⁴⁹ But the failure to ground the Wagner Act on the thirteenth amendment left the movement in an awkward position. With the Wagner Act resting on the commerce clause, Taft-Hartley looked like nothing more than a change in Congress’ method of protecting the flow of interstate commerce against strikes. Besides, now that unionists depended on the commerce clause to support the Wagner Act, they would be hard put to “cut off the limb they sit on.”⁵⁰ Given the numerous other difficulties facing unionists – including, most importantly, the chilling and divisive effects of the emerging Cold War — the enactment and constitutional validation of Taft-Hartley cannot be laid solely to the commerce clause strategy. However, there is no doubt that the labor movement suffered greatly from its failure to enshrine the rights to organize, bargain collectively, strike, and act in solidarity as fundamental constitutional rights during its moment of triumph in the 1930s.

7. Public Workers Pick Up the Torch

While private-sector unions declined under Taft-Hartley, a new wave of unionism arose in the public sector. In the early part of the twentieth century, few government employees were organized. The most dramatic organizing effort ended in disaster when 1,500 Boston policemen were fired for striking in protest of the police commissioner’s order to resign from their union.

⁴⁷ NLRB v. Fansteel Metallurgical Corp., 306 U.S. 240 (1939). These three cases and their consequences for labor law are analyzed in Karl E. Klare, *Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness, 1937-1941*, 62 *Minn. L. Rev.* 265 (1978).

⁴⁸ See *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 235-36 (1938).

⁴⁹ See Pope, *The Thirteenth Amendment versus the Commerce Clause* (cited above, note 39) at 98-101, 105-08.

⁵⁰ Arthur E. Sutherland, Jr., *Reasons in Retrospect: Reflections on the Labor Laws of 1947*, 33 *Cornell L.Q.* 1, 15 (1947).

The initial breakthroughs came in New York City. There, public-sector unionism received a jump-start when, in 1934, the city government purchased the privately owned subways, transforming the Transport Workers Union into a public-sector union. For a time, white-collar workers resisted the union appeal. But as blue-collar union wages rose above white collar nonunion salaries, they helped to lead a new wave of organization. By the late 1950s, hospital workers, teachers, and clerical workers were joining unions and conducting strikes.

As in private industry, government workers faced seemingly insurmountable legal barriers. In the great majority of states, strikes by government workers were banned altogether. But public-sector workers, like their private sector counterparts, exercised their constitutional right to strike despite official laws to the contrary. In the key decade of the 1960s, the frequency of public worker strikes rose from about 30 per year to more than 400. The American Federation of Teachers (AFT), the American Federation of State, County, and Municipal Employees (AFSCME), and Hospital Workers 1199 all made systematic use of “illegal” strikes to multiply their memberships and build union power.⁵¹

The newly invigorated public-sector labor movement fused with the civil rights movement, which had its own tradition of defying unconstitutional laws. A key turning point came in Memphis, Tennessee when 1,300 black sanitation workers struck against the city with the help of AFSCME. The Mayor promptly proclaimed the strike illegal. Speaking to a packed audience of strikers, AFSCME Field Director P.J. Ciampa replied:

I was advised that you are out of work in violation of the law. I don't know of any law in Tennessee that says you have to subject yourself to indentured servitude. And I don't think that I'm breaking the law one iota, because I think as a free American citizen I'm going to express myself. As a free American citizen you are expressing yourself by saying: “I am not working for those stinking wages and conditions.”

A court issued an injunction banning the union and civil rights leaders from marching or demonstrating. They persisted anyway, and a number were jailed for contempt of court. When

Martin Luther King came to Memphis to organize a march in support of the strikers, he had this to say about injunctions:

If I lived in China or even Russia, or any totalitarian country, maybe I could understand the denial of certain basic First Amendment privileges, because they hadn't committed themselves to that over there. But somewhere I read of the freedom of assembly. Somewhere I read of the freedom of speech. Somewhere I read of the freedom of the press. Somewhere I read that the greatness of America is the right to protest for right.

⁵¹ James R. Green, *The World of the Worker: Labor in Twentieth Century America* 233-35 (1980); Nelson Lichtenstein, *The State of the Union: A Century of American Labor* 181-85 (2002); Kim Moody, *An Injury to All: The Decline of American Unionism* 81-83, 196-97, 212 (1988); Theodore W. Kheel, *Introduction: Background and History*, in *Public Employee Unions: A Study of the Crisis in Public Sector Labor Relations* 1, 4-9 (1976).

And so just as I say, we aren't going to let any injunction turn us around. We are going on.

This was to be King's last speech. The next day, he was assassinated. The strike was settled soon after, and it provided the union with the momentum and credibility necessary to organize municipal workers across the South.

Today, public-sector union membership stands at about 4 million, constituting 40 per cent of the organized labor movement. Public workers in 26 states and Washington, D.C. enjoy the right to bargain collectively, as do most federal employees. Another 12 states grant bargaining rights to limited categories of workers. However, four out of five states and the federal government bar public employees from striking, and more than ten states continue to deny their employees the right to bargain collectively. Moreover, even where public workers do enjoy rights, they are constantly in jeopardy.

Public workers cannot go it alone. The 4 million membership figure is impressive, but it was reached in 1970. Since then, as private-sector unionism declined, governments have been increasingly tempted to subcontract union jobs out to nonunion private contractors. This gives politicians an opportunity to reward their wealthy contributors with public contracts – a strategy that Jim Davis of the American Federation of Government Employees has aptly called "corporate welfare." Without the support of strong private-sector unions, public-sector unions often lack the political muscle to fend off attacks on the rights to organize and to bargain collectively. The recent removal of legal protections from some 40,000 employees of the Homeland Security Agency is a case in point.

Which brings us back to our basic question. After more than half a century of treating labor rights as a means to the end of a free flow of commerce, what would happen if we were to get back on the main track of treating the rights to organize, bargain collectively, strike and act in solidarity as fundamental human rights that are valuable in and of themselves?

8. The Constitutional Rights to Organize, to Strike, to Bargain Collectively, and to Act in Solidarity With Other Workers

Section 1 of the thirteenth amendment provides: *“Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.”* What rights are necessary for workers to rise above a condition of “involuntary servitude”? The old labor movement won many victories under the banner of the thirteenth amendment because workers truly believed that the denial of the rights to organize and strike amounted to involuntary servitude. Does this position make any sense today?

Everybody agrees that the individual right to quit is necessary to overcome involuntary servitude. In explaining why, the Supreme Court set forth a principle that applies equally to the rights to organize and strike. When the worker cannot quit, the Court declared, “there is no power below to redress and no incentive above to relieve a harsh overlordship or unwholesome conditions of work.”⁵² **Notice that the constitutional payoff of the right to quit lies not in escaping servitude, but in transforming servitude into a relation of equality, where workers have the power to win improvements in conditions and to resist employer abuses.** Under the Supreme Court’s reasoning, the individual right to quit is not enough to satisfy the thirteenth amendment unless it actually provides the “power below to redress” and the “incentive above to relieve” employer autocracy and unwholesome working conditions.

But the individual right to quit cannot, by itself, raise workers out of servitude. Congress understood this more than half a century ago, when it declared – in the Norris-LaGuardia Act – that “the individual unorganized worker is commonly helpless to exercise actual liberty of contract and to protect his freedom of labor, and thereby to obtain acceptable terms and conditions of employment.” Congress reaffirmed this finding in the Wagner Act, which asserted that “the individual, unorganized worker [is] helpless to exercise actual liberty of contract, to secure a just reward for his services, and to preserve a decent standard of living.” Even the Supreme Court agreed with this proposition in words – though not in deeds – when it acknowledged that a “single employee was helpless in dealing with an employer,” and thus that “[u]nion was essential to give laborers an opportunity to deal on an equality with their

⁵² Pollock v. Williams, 322 U.S. 4, 17 (1944) (holding that a Florida debt peonage law conflicted with the thirteenth amendment and with federal anti-peonage legislation enacted under the authority of the thirteenth amendment).

employer.”⁵³ More recently, the status of the rights to organize and strike as basic human freedoms has been affirmed in international law.⁵⁴

Despite all this, some people insist that as long as you can quit your job, your servitude must be “voluntary.” How, they ask, can Jane Q. Employee be in a condition of involuntary servitude if she can tell her employer to “take this job and shove it!” But suppose you are Jane, and you just stomped out the door. You quickly discover that your only option is to find another job, and – unless you are lucky enough to find work in a unionized company – you will end up with another employer who has the power to control your working life. You can choose your master, and you can switch from one relation of servitude to another, but your employment relation is one of servitude, and you are in that condition not by choice but because you have no alternative.⁵⁵ Your only way out of involuntary servitude is to change the relation of servitude into one of equality. And your individual right to quit is not enough to force corporations to implement equality. That can be accomplished only through organization backed up by the right to strike.

Even if the thirteenth amendment did not by *itself* guarantee the rights to organize and strike, it would *when combined* with the first amendment freedom of association. As we have seen, no one disputes that the thirteenth amendment protects the individual right to quit. But in order to make the right to quit an *effective* right – that is, a right that individuals can actually use to counter employer domination – workers must have the freedom to associate in the exercise of the right. CIO General Counsel Lee Pressman summed up this contention over a half century ago: “The simple fact is that the right of individual workers to quit their jobs has meaning only when they may quit in concert, so that in their quitting or in their threat to quit they have a real bargaining strength. . . . It is thus hypocritical to suggest that a prohibition on the right to strike is not in practical effect a prohibition on the right to quit individually.”⁵⁶ This is the standard way of getting to the freedom of association in American constitutional law. First you establish that the individuals are doing something that they have a constitutional right to do; then you show that if they are prohibited from taking that action in combination, they are effectively prevented from doing it as individuals.⁵⁷

⁵³ *American Foundries v. Tri-City Council*, 257 U.S. 184, 209 (1921). The Court undercut the sincerity of this statement by holding that an injunction should issue limiting pickets to one per gate.

⁵⁴ See *Human Rights Watch Report* (cited above, note 11) at 13-14; Ruth Ben-Israel, *International Labor Standards: The Case of Freedom to Strike* (1988).

⁵⁵ As Samuel Gompers explained, an individual quitter can only “go to one corporation or another to find employment and offer his services to work and as an individual he must accept the treatment that the corporation sets down for him to accept or he can still continue to walk the streets in search of work.” *Gompers Testimony*, (cited above, note 30), at 260.

⁵⁶ Lee Pressman, CIO general counsel, *Memorandum on Ball-Taft-Smith Bill (S.55)*, in *Hearings before the Committee on Labor and Public Welfare, U.S. Senate, on S. 55 & S.J. Res. 22, 80 th cong., 1st sess.* (1947) at 1145, 1150.

⁵⁷ See Sheldon Leader, *Freedom of Association: A Study in Labor Law and Political Theory* 22-23 (1992).

The rights to organize and to strike are inextricably intertwined with a third right: the right to bargain collectively. This right does nothing more than charge the employer with a duty to respect the union as a party with a say in enterprise policy – a party that cannot be ignored, avoided, defrauded, undermined, or destroyed. It should be obvious that without this level of respect, unions cannot enable workers to, as the Supreme Court put it, “deal on an equality with their employer.”

A fourth right, the right to act in solidarity with other workers, is inherent in the rights to organize and strike. The very foundation of unionism is the principle of solidarity, that “an injury to one is an injury to all.” The conflict between union and non-union employment relations is – as the influential economist John R. Commons explained long ago – a clash between two competing principles: management’s principle of individual competition and labor’s principle of solidarity.⁵⁸ The right to stage a primary strike legalizes the principle of solidarity among the employees of a particular enterprise. But if workers are to transform servitude into a relation of equal respect, our principle of solidarity must extend far beyond the traditional strike against a single “enterprise.” When employees go out on strike against a local enterprise, they are likely to discover that their immediate employer is merely one part of a corporate empire with resources that dwarf their own. Where corporations control enterprises that are scattered across numerous industries and nations, then unions must be able to organize joint action by workers on a corresponding scope, across the boundaries of enterprises, industries, and nations. And where struck employers are free to ask other employers to continue doing business with them as if there were no labor dispute, unions must be free to ask the employees of those employers to cease handling products produced by the struck employer and to pressure their employer to cease doing business with the struck employer. This conclusion accords with the ruling of the International Labor Organization that flat bans on secondary boycotts and solidarity actions constitute “excessive limitations upon the exercise of the right to strike.”⁵⁹

We do not claim, of course, that the union-busting labor law of today is the equivalent of 19th century chattel slavery. Our point is that both forms of oppression spawn the same *kind* of evil: a condition of involuntary servitude that is inconsistent with citizenship in a republic. Today, this should not be a controversial assertion. In a world economy dominated by multinational corporations, nobody seriously believes that the individual right to quit by itself is enough to ensure labor freedom. Even the employer representatives who testified before the Dunlop Commission agreed with the basic principle that workers should enjoy “full freedom of association, self-organization, and designation of representatives of their own choosing.”⁶⁰ The rights to organize and strike are recognized in international law, and the NLRA still declares that it is the policy of the United States to protect the right to organize and encourage collective

⁵⁸ See John R. Commons, *Legal Foundations of Capitalism* 304 (Madison: U. Wisc. Press, 1968) (1923).

⁵⁹ *Quoted in Human Rights Watch Report* (cited above, note 11) at 212. The quoted ruling came in response to a challenge to Britain’s ban on secondary boycotts, which was modeled on U.S. law.

⁶⁰ Dunlop Commission Report (cited above, note 8) at 61 (quoting the NLRA).

bargaining.⁶¹ The problem is that employers have succeeded in nullifying labor's rights where it counts – namely, on the job.

9. Labor and the First Amendment Freedom of Speech

Under current law, private-sector workers surrender their first amendment freedom of speech when they enter the workplace. (The NLRA does give employees the theoretical right to talk union on nonworking time, but – as we have seen – the remedies are too weak to deter employer retaliation or alleviate employee fear.) It should be obvious that without freedom of speech, employees cannot hope to deal with their employers on a basis of equality. Under current law, an employee can be fired just for criticizing the employer or informing it that employees have rights. *We contend that, because freedom of speech is necessary for workers to rise above servitude and to deal with their employers on a basis of equality, the thirteenth amendment makes the first amendment binding on employers.*⁶² Of course, many jobs have a speech component; no-one would object to an employer firing a sales person for promoting a competing product. But where speech is not integral to job performance, restrictions on employee speech should be allowed only if the employer can prove that the restriction is narrowly tailored to serve a compelling business interest. Under this rule, no worker could be fired for expressing an opinion on unionism, politics, morality, or religion, and outrageous court decisions like the one upholding the discharge of a worker merely for saying “Black workers have rights too” could never happen.

⁶¹ See *Human Rights Watch Report* (cited above, note 11) at 15-16 (“International human rights law prohibits the use of state power to repress workers’ exercise of their right to freedom of association. Forming and joining unions, bargaining collectively, or exercising the right to strike may not be banned or rendered impotent by force of law”). Although the United States has not ratified the sources of these rights, International Labor Organization (ILO) Conventions 87 and 98, it has acknowledged that – as an ILO member – it is obligated to abide by them. *Id.* at 15. Section 1 of the NLRA declares it to be the “policy of the United States” to eliminate obstructions to commerce by “encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.”

⁶² Under current law, the first amendment is binding only on government and not on private employers. Courts justify this rule on the ground that the first amendment protects free speech only against the government. This argument finds support in the text of the amendment, which provides that “Congress shall make no law . . . abridging the freedom of speech.” The thirteenth amendment, on the other hand, protects against both governmental and private actors. See *The Civil Rights Cases*, 197 U.S. 207, 217 (1883). Our contention is that the thirteenth amendment incorporates the first amendment freedom of speech and makes it binding on employers as well as Congress. This “incorporation” approach has already been used by courts to make the first amendment binding on states as well as Congress. Just as courts have held that the freedom of speech is among those “fundamental principles of liberty and justice which lie at the base of all our civil and political institutions,” and therefore is incorporated into the fourteenth amendment’s guarantee of “liberty” (which binds the states), so is freedom of speech one of the fundamental rights that enable workers to rise above servitude to deal with their employers on a basis of equality, and so should be incorporated into the thirteenth amendment’s guarantee of labor freedom.

Just as Plantation owners controlled visits to the slave quarters, modern employers decide who can enter the workplace to talk to “their” employees. The Supreme Court has given employers the right to exclude union representatives on the ground that the employer’s property rights trump the workers’ right of self-organization. According to the Court, the NLRA permits the employer to exclude anyone it wants even if there is no substantial business reason for doing so.⁶³ Meanwhile, unions have the supposedly “reasonable” alternative of trying to track down individual workers by their license plate numbers, or of buying advertisements in general-circulation newspapers. But it is not enough that workers enjoy free speech outside the workplace. Realistically, the privately-owned work site is the only place where employees can communicate with union organizers as a group. If the right to organize is to be an effective right, then, it must include the right of union organizers to speak with workers at break time or lunchtime on company property.

10. What About the Supreme Court?

The Supreme Court has never squarely addressed labor’s thirteenth amendment claims. In two decisions, both in the late 1940s, the Court implicitly rejected labor’s arguments without providing any reasoning whatsoever.⁶⁴ In effect, the Court issued edicts more appropriate for the subjects of a monarchy, accustomed to unquestioning obedience, than for the citizens of a democracy, fully capable of reading their own Constitution. When we look into the history, it appears that the Justices avoided explanations not because their position was too obvious to require any, but because they were unable to come up with any principled reasons.⁶⁵ Much later, again without explanation, the Court asserted that the prohibition of involuntary servitude covers labor “enforced by the use or threatened use of physical or legal coercion” but not “compulsion of labor by other means, such as psychological coercion.”⁶⁶ The Court’s record with regard to the

⁶³ See *Lechmere, Inc. v. NLRB*, 502 U.S. 527 (1992).

⁶⁴ First, in *United States v. United Mine Workers* 330 U.S. 258 (1947), the Union challenged a strike injunction on 13th amendment and other grounds. The Court upheld the injunction without even mentioning the 13th amendment. Second, in the 1949 case of *UAW Local 232 v. Wisconsin Employment Relations Board*, the Court held that the thirteenth amendment did not prohibit a state from outlawing intermittent “quickie” strikes. The Court dismissed the thirteenth amendment claim without explanation, stressing that its ruling covered only “the particular course of conduct” involved in the case. 336 U.S. 245 (1949).

⁶⁵ See Pope, *The Thirteenth Amendment versus the Commerce Clause* (cited above, note 39) at 38-43 (contending that Felix Frankfurter, who eventually drafted some of the leading Supreme Court opinions, made up for his lack of principled arguments by maneuvering behind the scenes to defeat labor’s thirteenth amendment claims).

⁶⁶ *United States v. Kozminski*, 487 U.S. 931, 944 (1988).

first amendment is almost as bad. As documented by numerous legal scholars, the Court denies to workers and unions the benefit of free speech protections that are enjoyed by other groups.⁶⁷

What weight should workers, unions, and legislators give these decisions? According to Ronald Dworkin, a prominent legal philosopher, citizens in a democracy should not automatically accept Supreme Court rulings as conclusive just because they come from the Supreme Court. He points out that the Court often overrules itself, and that without challenges from the people, erroneous rulings might never be corrected.⁶⁸ The Supreme Court decisions rejecting labor's thirteenth amendment claims are old, based on out-of-date information, and totally unsupported by any reasoning whatsoever. Under the conditions that we face today, these decisions deprive workers of the basic human rights to organize and strike – the workers' only means of rising above servitude to deal with their employers on a basis of equality. Meanwhile, the Court's first amendment decisions deny to labor the basic protections that are enjoyed by other groups. ***We submit that these decisions do not merit compliance, and that all Americans who care about human freedom should reject and oppose them.***

As a model for *how* to change the Supreme Court's mind, we need look no further than the labor movement's own experience with the first amendment. You've probably seen those bumper stickers that say: "THE LABOR MOVEMENT: THE PEOPLE WHO BROUGHT YOU THE WEEKEND." Well, we could just as truthfully print up a sticker proclaiming: "THE LABOR MOVEMENT: THE PEOPLE WHO BROUGHT YOU THE FIRST AMENDMENT."⁶⁹ It is a little-known fact that the Supreme Court completely ignored the first amendment – much like it has ignored the thirteenth – until workers brought the amendment to life in the early twentieth century. At that time, there was no right to speak in public. But members of the Industrial Workers of the World and the Socialist Party got up on soap boxes and spoke out. When the

⁶⁷ See Cynthia Estlund, *Labor Picketing and Commercial Speech: Free Enterprise Values in the Doctrine of Free Speech*, 91 Yale L.J. 938 (1982); Julius Getman, *Labor Law and Free Speech: The Curious Policy of Limited Expression*, 43 Md. L. Rev. 4 (1984); Tom Kohler, *Commentary*, in *American Labor Policy: A Critical Appraisal of the National Labor Relations Act* 318, 324-26 (C. Morris ed. 1987); James G. Pope, *The Three-Systems Ladder of First Amendment Values: Two Rungs and a Black Hole*, 11 Hast. Const. L. Q. 189 (1984); Note, *Peaceful Labor Picketing and the First Amendment*, 82 Colum. L. Rev. 1469 (1982).

⁶⁸ See Ronald Dworkin, *Taking Rights Seriously* (1977), (as excerpted in Daniel R. Coquillette, *Lawyers and Fundamental Moral Responsibility* (1995), pp. 218-25).

⁶⁹ The story told in this paragraph was drawn from David Rabban, *Free Speech in Its Forgotten Years* 77-128 (1997) (describing the IWW's free speech fights); John Wertheimer, *Free Speech Fights: Free-Expression Litigation in the United States Prior to the First World War* (Unpublished PhD. Thesis, Princeton Univ. 1991) (recounting civil disobedience by Socialists seeking the freedom to speak in public places); Geoffrey D. Berman, Note, *A New Deal for Free Speech: Free Speech and the Labor Movement in the 1930s*, 80 Va. L. Rev. 291 (1994) (recounting role of the labor movement in the rise of free speech in the 1930s); David Kairys, *Freedom of Speech*, in *The Politics of Law* 140, 156-63 (David Kairys ed. 1982) (describing the central role of workers and unions in the transformation of free speech law culminating in the 1930s); Michael J. Klarman, *Rethinking the Civil Rights and Civil Liberties Revolutions*, 82 Va. L. Rev. 1, 39-42 (1996) (explaining how free speech gained acceptance partly because of its connection to the labor movement). For a comprehensive account of the labor movement's role in the rise of free speech, look for Karl Swidorski's forthcoming book on the subject.

police arrived to arrest them, they pulled copies of the Constitution from their pockets and proceeded to educate the officers on the text of the first amendment. On a number of occasions, IWW and SP members filled the jails of especially repressive towns, calling public attention to the blatant denial of free speech rights. The Supreme Court held out until the 1930s, when – in the landmark case of *Hague v. CIO* – it finally recognized the right to speak on public property free from government censorship. Along with the *Hague* decision, labor activists won a number of other breakthrough rulings that established the rights of free speech and free association that we take for granted today.⁷⁰ Thanks to the efforts of workers and unions, the first amendment had been rescued from the dustbin of history. We can do the same for the thirteenth amendment.

11. Reviving the Labor Movement

At one of the meetings called to discuss the first draft of this proposal, a local union president declared: “We need a movement before we can win back labor’s rights!” This truth underscores the difficulty of our position. We can’t win back our rights without a movement, but we can’t build a movement without exercising our rights. And after half a century of operating under the NLRA, workers and unions have lost the habit of exercising rights. We have become accustomed to thinking “inside the box” constructed by the labor law – a box that increasingly resembles a coffin. Since the mid-1970s, the U.S. strike rate has declined sharply and continuously. This is not because of economic conditions or because workers lack grievances; it is because workers are afraid to strike when employers can permanently replace them.⁷¹ Similarly, workers rarely engage in sympathy actions to support workers whose rights have been violated because the punishment for violating section 8(b)(4) is – in the words of the Human Rights Watch Report – “so swift and resolute.”⁷² When rights are not exercised, they atrophy. In response to the first draft of this paper, a number of people pointed out that most unionists have forgotten the tradition of solidarity that brought the labor movement its big gains around the turn of the century and in the 1930s.⁷³ Real solidarity has receded so far into the past that most union workers today think that it is perfectly natural to handle scab products or to supply unfair employers with supplies and services.

⁷⁰ See *Hague v. CIO*, 307 U.S. 496 (1939) (upholding injunction barring mayor from interfering with unionists speaking in a public park); *Thornhill v. Alabama*, 310 U.S. 88, 103 (1940) (overturning state statute prohibiting picketing, and establishing the principle that government may not restrict speak absent a “clear and present danger” to the public health or safety); *Thomas v. Collins*, 323 U.S. 516 (1945) (overturning state statute requiring union organizers to register with the government before soliciting members).

⁷¹ See Joshua B. Freeman, *The Strike Weapon: Can It Still Work?*, Dissent, Spring 1997, at 62-63.

⁷² See *Human Rights Watch Report* (cited above, note 11) at 210.

⁷³ Sanctions for violating section 8(b)(4) are so harsh that unions rarely test them. See *Human Rights Watch Report* (cited above, note 11) at 210.

How can we reverse these trends? We might learn something from the employers who engineered the decline of the right to strike. In the 1970s, they faced a strange situation. On paper, they enjoyed the right to hire permanent replacements. But workers had effectively nullified that right. During the great post-war strike wave of 1946-47, union workers had mass picketed facilities across the country. When police attempted to open the picket lines, the big CIO unions – including the steel workers, the auto workers, and the electrical workers – responded forcefully with solidarity demonstrations and renewed picketing. Workers staged city-wide general strikes to protest police attacks on mass picket lines in Rochester, New York; Lancaster, Pennsylvania; Stamford, Connecticut; and Oakland, California.⁷⁴ In the face of this strong labor response, the great majority of unionized employers gave up the idea of trying to bring in strikebreakers. In effect, the workers’ concept of the right to strike as the right to veto production prevailed.⁷⁵ Eventually, however, the managers who had learned the lessons of the 1940s began to retire, and a new generation of employer strategists questioned the old ways. They argued that employers could obtain adequate police protection for nonstriking workers, and that the gains would outweigh the costs.⁷⁶ As employers began to put the new ideas into practice, they were pleasantly surprised to discover that many workers too had forgotten their tradition of solidarity, as large numbers willingly crossed their brothers’ and sisters’ picket lines.⁷⁷

The employers’ successful assault on the right to strike suggests three lessons. First, the employers had to start thinking “outside the box” of the prevailing practice at a time when their opposition still appeared strong. They had to study the situation and envision the possibility of transforming their theoretical right to operate during strikes into a practical right to break unions. Second, they had to overcome their fears and begin exercising the claimed right. A few, initial successes showed the way for others to follow.⁷⁸ Finally, a single dramatic event – President Ronald Reagan’s highly publicized defeat of the air traffic controllers strike – signaled the shift to the new regime, emboldening employers and demoralizing workers.⁷⁹

⁷⁴ See George Lipsitz, *Class and Culture in Post-War America* 130-42 (1981).

⁷⁵ See, e.g., Jack Barbash, *The Practice of Unionism* 229 (New York: Harper & Bros., 1956): (explaining that “the prevailing situation” was that the employer accepted the permanence of unions and that, during strikes, the “net effect is that the employer, looking ahead to the time when the relationship will be resumed, makes no attempt to operate the plant during the strike and the picket line becomes only the symbolic expression of the strike”).

⁷⁶ See Charles R. Perry, Andrew M. Kramer and Thomas J. Schneider, *Operating During Strikes: Company Experience, NLRB Policies, and Governmental Regulations* (Phila: U Pa. Press, 1982).

⁷⁷ *Id.* at 39, 65.

⁷⁸ See *id.* (reporting on pioneering efforts by a small number of employers to operate during strikes, and drawing lessons from their experience); Freeman (cited above, note 71), at 63 (recounting the rise of strikebreaking).

⁷⁹ See Richard E. Walton et al., *Strategic Negotiations: A Theory of Change in Labor-Management Relations* 13 (1994).

Successful peoples' movements have always had to begin thinking and acting "outside the box" at the very times when the box appeared unbreakable. For example, the Civil Rights movement got started at a time when the Supreme Court maintained that segregation was entirely constitutional. Even after the Court declared segregation laws unconstitutional, it still held that states need only desegregate "with all deliberate speed," a standard that – in practice – permitted indefinite delay. In those days, many African-Americans were denied the right to vote through the device of "literacy tests," many of which included the text of the Constitution. But civil rights activists organized schools to teach literacy and discuss the Constitution. There, drawn by the desire for freedom and equality, people who had been denied rights by courts developed their own understanding of their constitutional rights. After a period of study, they returned to their communities where they became the teachers. This activity created organizations of people who read and talked about the meaning of the Constitution. They began to exercise their rights, defying the segregation laws. When Rosa Parks refused to go to the back of the bus, she wasn't acting on her own. She had studied at the Highlander Institute, one of the civil rights schools, and her courageous act of resistance had been planned with other, like-minded people.

The labor movement also has many experiences of its own to draw on. For example, the last great upsurge of union organization was achieved by industrial workers during the 1930s. This success resulted from a historical moment composed of a number of elements – some created by labor activists and some by the turmoil of the Great Depression. The first element, which is within our means to create today, was a core of experienced labor activists at the work site committed to a long-term struggle to emancipate working people from corporate tyranny. These activists firmly believed in the rights to organize and strike despite court decisions to the contrary. They experienced many defeats during the 1920s, but they were able to learn lessons, draw conclusions and – when the time was right – lead the sit-down strikes that eventually won recognition for the CIO unions.

The second element was a small number of national union leaders who were willing to give up the comforts of business-as-usual and back up the local activists. They created the CIO, marshaled resources to support the local activists, and publicly defended the sit-downs. In a way, we are in a better position today with regard to this element than were our forerunners going into the 1930s. Unlike the AFL of that time, the AFL-CIO of today is at least open to new ideas and strategies. Nevertheless, it is a long way from openness to actually going beyond business-like methods to reclaim labor's rights in the face of a repressive labor law. Other elements seem even more remote from our viewpoint today. For example, sharply defined class politics led to the 1936 re-election of Franklin Roosevelt and pro-labor, New Deal governors in key industrial states. A variety of labor and radical third party movements held Roosevelt to a class-oriented program by "constantly remind[ing] him that, if the Democratic party flagged in its pursuit of reform, it could be superseded as the party of protest by a coalescence of formidable forces."⁸⁰

With these lessons and experiences in mind,

⁸⁰ James L. Sundquist, *Dynamics of the Party System* 211-12 (1983).

12. The Labor Party Proposes . . .

Past experience shows that winning tactics are developed on the ground, in the midst of struggle. Even with the assistance of hundreds of labor activists across the country, the authors of this paper are in no position to predict the creative tactics that will emerge over the coming years. We do know, however, that those tactics will reflect workers' assessments of what is possible. After half a century of dependence on government, most labor leaders have come to accept the labor law as defining the limits of the possible. As explained in parts one and two above, that policy amounts to union suicide. We believe that by reviving the movement's tradition of independent rights consciousness, workers and unions can rise from the coffin erected by the labor law. As workers come to understand the fundamental illegitimacy of today's labor law, to regain their sense of entitlement to basic constitutional rights, and to recover their historic tradition of protecting democracy against corporate tyranny, the bounds of the possible will expand immeasurably. And as nonlabor publics see that workers can no longer be forced into quiet subjugation, official legal change will follow. Accordingly, the Labor Party proposes:

First, exercise our constitutional rights wherever and whenever possible despite unconstitutional laws to the contrary. History shows that constitutional rights become real only when people exercise them. The first amendment was a dead letter until socialists, IWWs, and other workers stood up on soap boxes and refused to stop talking. The equal protection clause did nothing to break down segregation until Rosa Parks and others crossed the color line and refused to budge. Today, many workers are already exercising their thirteenth amendment rights to organize, to strike, and to act in solidarity. Public school teachers and other public workers frequently exercise their right to strike despite state laws and court injunctions to the contrary. Pacific coast dock workers continue to nurture their long tradition of exercising the right to act in solidarity by refusing to handle the products of corporations and nations that violate human rights – despite section 8(b)(4) of the Taft-Hartley Act. Creative union organizers find ways to meet with workers on company property despite the rule allowing corporations to wall off their employees from union contact.

In 1919, the delegates to the annual convention of the American Federation of Labor resolved unanimously to “stand firmly and conscientiously on our rights as free men and treat all injunctive decrees that invade our personal liberties as . . . illegal as being in violation of our constitutional safeguards, and accept whatever consequences may follow.”⁸¹ Not only did this policy expose the injustice of the labor law for all to see, but it also pushed labor reform to the top of the legislative agenda. By exercising their rights to organize, strike, and picket despite official law to the contrary, working people demonstrated that an unjust labor law would not work. The denial of worker rights – which had been a problem only for labor – now became a matter of concern for other constituencies as well. As a result, pro-labor legislators were able to

⁸¹ American Fed'n of Labor, Report of the Proceedings of the Thirty-Ninth Annual Convention 361-62 (1919).

overcome business opposition and enact the Norris-LaGuardia and Wagner Acts.⁸² Similar sequences of worker protest and industrial crisis produced labor rights legislation in Canada and Western Europe in the second half of the twentieth century. The fact is that labor rights legislation has rarely, if ever, been enacted without the spur of workers exercising rights on their own.

Courageous actions alone, however, will not build a workers' rights movement, which brings us to the second proposal.

Second, publicize and defend our constitutional rights wherever and whenever possible, but especially at the moment we exercise them. In the early 20th century, when police officers told labor's soap-box speakers to shut up, they pulled copies of the first amendment out of their pockets and proclaimed their right of free speech. Decades later, when civil rights activists crossed the color line in defiance of segregation laws, they too invoked the Constitution, explaining that they were enforcing their fourteenth amendment right to equal protection of the laws. It was this combination of (1) exercising constitutional rights in the face of official opposition, and (2) publically claiming and explaining their rights that enabled these activists to build powerful rights movements. Gradually, large numbers of industrial workers and African-Americans came to believe that the Constitution actually meant what it said, and that they were morally and legally entitled to exercise their rights. As more and more people acted on these beliefs, the authorities were put on the defensive. When police resorted to violence – as in Bull Connor's use of fire hoses against black marchers – public opinion shifted in favor of the rights movement.

When the Bush administration slapped a Taft-Hartley injunction on the Pacific coast dock workers in the fall of 2002, the workers followed in the tradition of the free speech fighters and civil rights activists. They picketed with signs reading "TAFT LAW: PLAIN OLE SLAVERY." The Labor Party proposes that unions and workers seize on such opportunities to explain and publicize labor's constitutional claims. Such opportunities will rarely arise, however, unless these claims are widely known within the labor movement, which brings us to the third proposal.

Third, conduct educational campaigns and programs within unions to strengthen members' understanding of labor's constitutional rights. At the moment when a court issues an injunction, or when police arrive at a picket line, unionists have no difficulty understanding the fundamental injustice of the labor law. By that time, however, they need more than that. They need not only to understand injustice for themselves, but also to be capable of explaining it to co-workers, friends, neighbors, and the media. In the days when the labor movement functioned as a real rights movement, you could not go to a convention or read a labor publication without learning about labor's constitutional rights and their significance for the issues of the day. The

⁸² On the Wagner Act, see Frances Piven & Richard Cloward, *Poor People's Movements* 129-33 (1977); Michael Goldfield, *Worker Insurgency, Radical Organization, and New Deal Labor Legislation*, 83 *Am. Pol. Sci. Rev.* 1257, 1270-73 (1989); Pope, *The Thirteenth Amendment versus the Commerce Clause* (cited above, note 39) at 57-59. On the Norris-LaGuardia Act, see Forbath (cited above note 26) at 158-63.

Labor Party proposes that unions initiate educational campaigns culminating in the passage of resolutions affirming labor's constitutional rights and pledging support for those who exercise them.

Although many labor activists today are justifiably skeptical of resolutions that do not lead to immediate action, such resolutions can help to generate increased awareness both of labor's rights and of the movement's willingness to assert them despite official law to the contrary. In addition, we propose that ongoing education be conducted through regular educational channels such as conferences, union meetings, and publications.

In addition to the general content and history of labor's constitutional rights, educational efforts should include the constitutional justifications for tactics that are outside the box of the current labor law. Although the proposal of specific tactics is beyond the scope of this paper, we do think that it is important to point out a few of the tactics that can be justified, for example:

U ***Staging public-sector strikes***: Once it is accepted that workers enjoy a constitutional right to strike, flat bans on public employee strikes are clearly unconstitutional. The government cannot deny constitutional rights to a class of people without showing that the denial is necessary to serve a compelling governmental interest. The distinction between private and public employees cannot survive this test. In many cases, private and public employees perform precisely the same functions. As Judge Harry Edwards has explained, public employee strike bans are "clearly a vestige from another era, an era of unexpanded government."⁸³

U ***Withholding cooperation from employers that violate labor rights***: As it is now, lawbreaking employers can usually count on continued cooperation even from union members. For example, suppose that some apple-pickers try to organize a union and the orchard company fires the leading union supporters. No matter how flagrant the employer's violations, truckers, railroad workers, and sailors usually continue to pick up and deliver picked apples; cannery workers continue to process the apples; and retail workers continue to stock grocery shelves with apples. In other words, workers actively assist the lawbreaking employer to make a profit despite its attack on labor rights. This shameful state of affairs results mainly from the fact that section 8(b)(4) of the NLRA prohibits unions from asking employees of any company other than the lawbreaking employer itself to cease handling its products or providing it with services. We have argued that section 8(b)(4) is unconstitutional because it violates the right to act in solidarity. The case for this proposition is especially powerful with regard to lawbreaking employers. In effect, section 8(b)(4) compels workers to assist the lawbreaking employer – with their own personal labor – in getting away with its violations. It is one thing for

⁸³ Harry T. Edwards, *The Developing Labor Relations Law in the Public Sector*, 10 Duq. L.Rev. 357, 359-360 (1972); see also *County Sanitation Dist. No. 2 v. Los Angeles County Employees Ass'n*, 699 P.2d 835, 841-49 (Cal. 1985) (reviewing the justifications for the public employee strike ban and concluding that they are outmoded under current conditions).

the government to permit the lawbreaking primary employer to continue doing business as if no violation had occurred, but it is another altogether to compel workers to aid and abet the violations. The Supreme Court has struck down secondary boycott restrictions as applied to civil rights protesters partly because the protesters were seeking “to vindicate rights of equality and of freedom that lie at the heart of the fourteenth amendment.”⁸⁴ Workers and unions seeking to enforce the thirteenth amendment right to organize should receive the same treatment.

U *Organizing outside the bargaining unit - representation election model:* The current labor law carves workers up into thousands of bargaining unit boxes. In order to obtain certification, unions must win an election in a box. But the 44 percent of private-sector workers who wish to join unions rarely fit into the bargaining unit/election box, and consequently NLRB elections involve very few workers.⁸⁵ An entire industry of anti-union consultants has grown up to help employers find ways of using their position of power to rig representation elections.⁸⁶ Worse yet, the secondary boycott section of Taft-Hartley prohibits workers in one box from aiding workers in most of the other boxes. The whole idea of bargaining unit boxes (which was based on the model of an immovable factory employing a stable workforce) is out of place in most sectors of today’s economy, which are characterized by mobility of labor and capital across lines of trade, industry, and nation.

Consequently, some of labor’s most thoughtful strategists have been urging the movement to organize outside, across, in, around and through the box boundaries. There are proposals for organizing based on region, affinity, gender, and ethnicity. Naturally, these strategies will run up against the law. But we have the constitutional rights to organize and bargain and we should insist on them, without the requirement of bargaining-unit determinations or elections. When we think about freedom of association, this point seems obvious. After all, what is collective bargaining other than a group of workers getting together to bargain with the employer? Workers, not the government or the employer, must determine the scope of their own associations for purposes of collective action and bargaining.

U *Staging sit-down strikes and engaging in other forms of civil disobedience:* In recent years, some workers have begun to revive the sit-down tactic. For example, mine workers

⁸⁴ NAACP v. Claiborne Hardware Co., 458 U.S. 886, 914 (1982).

⁸⁵ As former NLRB Chairman Paul Herzog put it, “organization can proceed only piecemeal and to deny collective bargaining in those areas in which organization has been achieved is to deny it entirely.” See David Brody, *What Next for Labor Rights?*, Dissent, Spring 2001, at 18, 19 (reporting that only a few more than 200,000 workers per year participate in representation elections out of a workforce of 70,000,000 eligible but unrepresented workers, and explaining that this low rate reflects workers’ lack of freedom to choose representation).

⁸⁶ See Craig Becker, *Democracy in the Workplace: Union Representation Elections and Federal Labor Law*, 77 Minn. L. Rev. 495 (1993).

occupied the Pittston coal processing facility in 1990; Arizona nurses conducted a sit-down in 1997; members of the Canadian Auto Workers Union occupied a Volvo factory and a Molson brewery in 1998 and 1999; and St. Paul meat packers, mostly Mexican immigrants, staged a sit-down strike in 2000. We believe that these actions – all successful – were fully justified from a constitutional point of view. Using the threat of permanent replacements, employers have effectively eliminated the right to strike for most workers.⁸⁷ As the International Labor Organization has ruled, the right to strike “is not really guaranteed when a worker who exercises it legally runs the risk of seeing his or her job taken up permanently by another worker.”⁸⁸ Under these circumstances, we submit that workers are justified in occupying facilities and conducting sit-down strikes, and that public office-holders are justified in protecting and supporting such a strike. We say this even though the specific laws being violated – the trespass laws – are not in themselves unconstitutional. In a sit-down strike against a private employer, workers are not protesting against the law or against the government. They are protesting against the employer’s violation of workers’ rights. As the political philosopher Michael Walzer has said:

It is important . . . for state officials to realize that when they enforce the trespass laws against strikers, they are also doing something else. They are acting to restore not merely the “law and order” of the state, but that of the corporation as well. They are enforcing another set of rules in addition to their own. . . . Corporate authority is not the same as the authority of the property laws — it does not have their democratic legitimacy — and the differences between the two may require the police to use some discretion in moving against men [and women] who violate the laws of the state solely in order to challenge

the authority of the corporation. The corporate rebels may, for example, be defending rights they actually have as citizens.⁸⁹

Walzer concludes that workers are justified in staging sit-down strikes in a “good faith,” nonviolent effort to defend their democratic rights.⁹⁰ The same can be said of many other forms of nonviolent resistance.

Fourth and finally, make labor’s constitutional rights a central focus of all forms of labor advocacy including political campaigning, lobbying, and litigation. History shows that a rights movement will not be successful unless its constitutional claims are systematically and

⁸⁷ See above, note 14.

⁸⁸ Quoted in *Human Rights Watch Report* (cited above, note 11) at 31. The United States “is almost alone in the world in allowing permanent replacement of workers who exercise the right to strike.” *Id.* at 196.

⁸⁹ Michael Walzer, *Obligations: Essays on Disobedience, War, and Citizenship* 33 (Cambridge: Harvard U. Press, 1970).

⁹⁰ *Id.* at 29-30.

persistently pressed in every available forum. Whether we are selecting political candidates for endorsement, lobbying legislators and officials, drafting proposed legislation, engaging in litigation, or any of the other myriad forms of action that unions and workers routinely employ, we should put labor's constitutional rights at the forefront. We should not support any political candidate who is unwilling to sign on to the basic constitutional rights that are necessary for the movement's survival. When we seek legislation to enforce the rights to organize and strike, we should proceed under the banner of the thirteenth amendment, not the commerce clause. As one union organizer pointed out in response to the first draft of this paper, to protect labor rights under the commerce clause "would be as if the argument for the Bill of Rights was that the exercise of these rights was essential to the smooth operation of a capitalist system, not because there was any inherent value in the rights for their own sake." And, although we are unlikely to win major victories in the present Supreme Court, it is not too early to begin seeking out strong cases to raise our constitutional claims. Short-term victory in the Supreme Court is not the only purpose of litigation; as many unionists are fully aware, it can also help to sharpen issues and expose injustice.

13. Conclusion: No More Haired-Over Necks

The rights to organize, strike, bargain collectively, and act in solidarity are fundamental human rights. Yet, in the United States, courts and agencies treat them as if they were mere means to the end of facilitating commerce. Almost alone among the industrial countries, the United States permits employers to engage in systematic violations of worker rights. American labor law violates not only international standards, but also the United States Constitution. Accordingly, we maintain that American workers and unions are fully justified in thinking and acting "outside the box" of the current labor law.

A half-century ago, with the labor movement at a crossroads, John L. Lewis thundered his support for this policy. The big issue at the annual convention of the American Federation of Labor was whether to engage in constitutional resistance against what unionists were calling the Taft-Hartley "Slave Labor Act." After an initial outburst of saber-rattling, the AFL's top leadership had lost enthusiasm for the struggle. John L. Lewis turned his oratorical skills to reviving the spirit of resistance:

This Act was passed to oppress labor, to make difficult its current enterprises for collective bargaining, to make more difficult the securing of new members for this labor movement, without which our movement will become so possessed of inertia that there is no action and no growth, and in a labor movement where there is no growth there is no security for its existence, because deterioration sets in and unions, like men, retrograde I wonder what built up the labor movement in this country? Was it protecting laws and statutes that protected the organizers of our movement when they went out to the meetings? Oh, no! The founders of our Federation had no such protection. They had to fight for the right to be heard. They had to fight for the right to hold a meeting, and men had to sacrifice and sometimes die for the right to join a union . . . And what you are

doing today [by complying with Taft-Hartley] — you are repealing the 1919 injunction policy . . . and you are humbling yourselves in abasement before the return of government by injunction.⁹¹

AFL Secretary-Treasurer George Meany delivered the administration's response. It was a complete negation of the very idea that labor could develop and live by an independent interpretation of the Constitution. Despite his public position that Taft-Hartley was unconstitutional, Meany claimed that it was “the law of the land”:

Whether you like it or not, whether the National Association of Manufacturers and the representatives of the reactionary employers bought the Republican party or not, as someone seems to think, the fact remains that they counted the votes in Washington, and the Taft-Hartley Law is on the statute books. No one asked for a recount. Our representatives were there when the votes were cast, and no matter what the reason, whether it is the sinister reason attributed here today or not, the fact remains that they did pass this law. It is now the law of the land.”⁹²

With the Cold War in full swing, and the labor movement singled out as a hotbed of communism, constitutional resistance seemed un-American to Meany. “We know it is a bad law,” he continued, “but it was placed on the statute books by our representatives under the American democratic system, and the only way it is going to be changed is by our representatives under that system.”⁹³ Teamster President Daniel Tobin agreed that this “is a law that we will resent, but there is a certain legal procedure to change the law, and it isn't by revolution.”⁹⁴ Meany's speech was greeted with thunderous applause, and his position prevailed by a wide margin. For the next half century the movement dutifully lobbied and electioneered for labor law reform. The thirteenth amendment theory of labor liberty lay dormant as union lawyers paid it no more than lip service, the Supreme Court dodged the issue, and labor leaders gradually forgot about it as they became increasingly dependent on government protection.

Now, at the turn of the millennium, many labor activists and leaders have come to share Lewis' view that Taft-Hartley is indeed causing the movement to languish and decline. In the meantime, the chilling pressure of the Cold War has lifted. And, last but not least, the recent change in leadership at the AFL-CIO makes it possible to look back on the most famous lines of Lewis' 1947 speech with more optimism than would previously have been possible. The Mine Workers' President had threatened to resign from the Federation's Executive Council if it failed to defy Taft-Hartley. In regard to that threat, he declared:

⁹¹ American Federation of Labor, Proceedings of the Sixty-Seventh Annual Convention 487, 490, 492 (1947).

⁹² *Id.* at 495.

⁹³ *Id.*

⁹⁴ *Id.* at 493.

Perhaps . . . you will say “John L. Lewis is trying to hold a gun to the head of the convention.” That is not true. I don’t think anyone can hold a gun to the head of this convention. . . . As far as that is concerned, on this particular issue, I don’t think that the Federation has a head. I think its neck has just grown up and haired over.”⁹⁵

Where an employer has flagrantly violated labor rights, and where the law prohibits the victims from effectively protesting, we might do well to recall Samuel Gompers’ words: “History honors none above those who, in the past, have set themselves against unjust laws, even unto the point of rebellion. The Republic of the United States is founded upon defiance of unjust law. . . . The American Federation of Labor and its president have declared that manifestly unjust decisions of courts must be defied, and there is no disposition to recant.”⁹⁶

⁹⁵ *Id.* at 492.

⁹⁶ Samuel Gompers, *The Courts and Mr. Taft on Labor*, 28 *American Federationist* 220, 222 (1921).