

ITS OWN DUBIOUS BATTLE: THE IMPOSSIBLE DEFENSE OF AN EFFECTIVE RIGHT TO STRIKE

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One of the most important statutes ever enacted, the National Labor Relations Act envisaged the right to strike as the centerpiece of a system of labor law whose central aims included dramatically diminishing the pervasive exploitation and steep inequality that are endemic to modern capitalism. These goals have never been more relevant. But they have proved difficult to realize via the labor law, in large part because an effective right to strike has long been elusive, undermined by courts, Congress, the NLRB, and powerful elements of the business community. Recognizing this, labor scholars have made the restoration of the right to strike a cornerstone of labor law scholarship. Authorities in the field have developed an impressive literature that stresses the importance of strikes and strongly criticizes the arguments that judges, legislators, and others have used to justify their degradation of the right to strike. But this literature has developed without its authors ever answering a fundamental question, which is whether an effective right to strike is a viable aspiration in the first place. This Article takes up this question. It documents the crucial role that strikes have played in building the labor movement, legitimating the labor law itself, and indeed validating the New Deal and, with this, the modern administrative state; and it confirms the integral role that strikes play in contesting the corrosive power capitalism accords employers over the workplace and the spoils of production. But this Article also shows how the strikes that were effective in these crucial ways were not conventional strikes, limited to the simple withholding of labor and the advertisement of workers' grievances. Instead, they inevitably embraced disorderly, coercive tactics like mass picketing and sit-down strikes to a degree that suggests that tactics such as these are indeed essential if strikes are to be effective. Yet strikes that have featured these tactics have never enjoyed any legitimacy beyond the ranks of labor, radical activists, and academic sympathizers. Their inherent affronts to property and public order place them well beyond the purview of what could ever constitute a viable legal right in liberal society; and they have been treated accordingly by courts, Congress, and other elite authorities. From this vantage, it becomes clear that an effective right to strike is not only an impossible distraction but a dangerous fantasy that prevents labor's champions from confronting the broader, sobering truths that this country's legal and political system are, at root, anathema to a truly viable system of labor rights and that labor's salvation must be sought elsewhere.

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INTRODUCTION

“They say ‘you got a right to strike but you can’t picket,’ an’ they know a strike won’t work without picket-in’.”¹ This is the angry lament of Mac McLeod, a central character in John Steinbeck’s 1936 novel, *In Dubious Battle*, delivered just after Mac and fellow unionists were enjoined by a carload of heavily-armed police “to keep order.”² “You can march as long as you don’t block traffic,” said the head cop, “but you are not going to interfere with anybody. Get that?”³

Recently adapted to film in a movie that is notably long on stars but short on distribution,⁴ the novel is considered one of Steinbeck’s finest.⁵ It is also perhaps the most powerful depiction of a labor strike in American literature. A bitter reflection on the intense interpersonal conflicts, moral dilemmas, and political impasses that are central to labor struggles, and based on the author’s acquaintances with workers and organizers in the region, the book tells the tragic story of a fruit-pickers strike led by radicals in Depression-era California.⁶ *In Dubious Battle* broaches a set of crucial issues, which are seldom discussed

1. JOHN STEINBECK, *IN DUBIOUS BATTLE* 165 (Penguin 1992) (1936).

2. *Id.* at 164–65.

3. *Id.*

4. *IN DUBIOUS BATTLE* (AMBI Pictures 2017). Among the cast: James Franco, Robert Duvall, Ed Harris, and Selena Gomez. *In Dubious Battle*, IMDB, <https://www.imdb.com/title/tt4411618/> [https://perma.cc/Y3S6-X2WA].

5. See Alfred Kazin, *The Unhappy Man from Happy Valley*, N.Y. TIMES, May 4, 1958, at BR1; Fred T. March, *In Dubious Battle and Other Recent Works of Fiction*, N.Y. TIMES, Feb. 2, 1936, at BR7.

6. Jackson J. Benson & Anne Loftis, *John Steinbeck and Farm Labor Unionization: The Background of In Dubious Battle*, 52 AM. LIT. 194 (1980).

anymore, concerning the nature of strikes and the acceptable limits of class struggle and workers' protests in liberal society.⁷

For much of this country's post-Civil War history, "hitting the bricks" was a way for workers to try to push back against capitalist employers. Sometimes the strikers succeeded, gaining union recognition and better working conditions. But often enough, their impertinence was repaid with arrests, beatings, and blacklisting; and the strikes ended in failure, sometimes with blood pooled on the streets and soaked into the dirt, as in Steinbeck's story. Hundreds, possibly thousands lost their lives⁸—one can only roughly estimate the numbers, so commonplace and prosaic were these practices in the late nineteenth and early twentieth centuries. Nevertheless, excluding the years 1906 through 1913, for which there are no records, between 1881 and 1935, the year Congress enacted the National Labor Relations Act (or Wagner Act, in its early form), there were in the neighborhood of 80,000 strikes in America, involving about 30 million workers.⁹ Despite all the dangers and the likelihood that their efforts would prove futile, workers in these millions downed the tools and picketed, convinced that doing so was not only necessary to their immediate interests but a mandate of their position in class society.

The Wagner Act purported, for the first time in American history, to extend a definite, readily enforceable right to strike to most American workers. Not coincidentally, the years surrounding its enactment featured the most intense wave of labor conflict in the country's history. When the statute became effective in 1937 (having been widely ignored by employers and blocked by hostile courts), the violence of strikes began to diminish, though not so much their frequency. For much of the period after the Second World War, strikes remained common even as they also became less ambitious in their aims and less militant in their conduct. Beginning about forty years ago, things changed again. Strikes suddenly became rare as well, to the point that workers today basically do not strike at all. From 1947 through 1976, the government documented an average of just over 300 "major work stoppages" (strikes and lockouts involving at least 1000 workers) every year; over the last decade, the annual average was only

7. On the way Steinbeck's dislike of Communists and, apparently, Mexican-American workers shaped his narratives, see KATHRYN S. OLMSTED, *RIGHT OUT OF CALIFORNIA: THE 1930S AND THE BIG BUSINESS ROOTS OF MODERN CONSERVATISM* (2015).

8. See Paul F. Lipold, "Striking Deaths" at *Their Roots: Assaying the Social Determinants of Extreme Labor-Management Violence in US Labor History—1877–1947*, 38 *SOC. SCI. HIST.* 541, 542 (2014).

9. Florence Peterson, *Review of Strikes in the United States*, 46 *MONTHLY LAB. REV.* 1047, 1066 (1938). The total of number of workers involved also excludes the years 1914 and 1915. *Id.*

14.¹⁰ Even the much-ballyhooed mini-strike wave of 2018 appears to be largely an illusion built on a combination of wishful thinking and a convenient misconstruction of a string of well-reported, and sometimes impressive, strikes, as a trend.¹¹ In any event, militancy of the sort that was commonplace when Steinbeck wrote his book, along with the open strife and bloodshed that made the novel a work of undeniable realism, are nearly unheard of today.

The waning of bloody battles may be a good thing. But there is not much to celebrate about the overall demise of strikes—not if you are a worker or care about the working class. For strikes are the most important mode of working class protest, the best way, it seems, for workers to directly challenge capitalist hegemony by their own hand, to alter the terms of exploitation if not to build a new world. As they have declined, so has the strength of the labor movement and, with this, the ability of workers to contest the power that employers wield over their work lives and economic fortunes. And so it is that with the demise of strikes, union representation has plummeted, wages have stagnated, economic inequality skyrocketed, and the everyday caprices and tyrannies of capitalist management have been entwined in the web of demeaning indignities, patronizing indulgences, and suffocating bureaucratic rules that define the contemporary workplace.

Nevertheless, in most quarters the decline in strikes has been taken in stride, if noticed at all. For most people, strikes are hardly more than historical relics or quaint curiosities that seldom affect their daily lives or command much of their attention. Ironically, this is probably one reason the very modest labor conflict of the last year has been so over-characterized. Once a preoccupation of newspaper editorialists, lawyers, and other commentators, a concern of government, and the subject of numerous hearings and reports, abundant litigation, and seemingly endless attempts at legislation, strikes are now rarely of any interest in any of these quarters. Where judges, politicians, and editorialists once worried greatly over how to deal with strikes of the kind that Steinbeck fictionalized, how to protect the economy (not to mention the interests of individual capitalists) from the disruptive effects of labor unrest, and sometimes how to preserve the ability of workers to strike in meaningful ways, their successors stand mute in the context of the near extinction of this form of protest. It has been two

10. Press Release, Bureau of Labor Statistics, Major Work Stoppages in 2016 (Feb. 9, 2017), https://www.bls.gov/news.release/archives/wkstp_02092017.pdf [https://perma.cc/R9W5-FP8G].

11. On the actual frequency of both strikes and of idle days because of them over this period, see Doug Henwood, *Sadly, There Is No Strike Wave*, MONTHLY REV. ONLINE (Sept. 12, 2018), <https://mronline.org/2018/09/12/sadly-there-is-no-strike-wave/> [https://perma.cc/F7FS-P47J].

decades since Congress, which once grappled with these issues on a regular basis, has seriously confronted the question of strikes.¹² Its last engagement with the right to strike attempts, in the early 1990s, to enact modest changes in the law relative to employers' use of replacement workers during strikes. And even this effort, which collapsed in the mid 1990s, hardly seemed possessed of the kind of urgency that characterized earlier forays on these issues.¹³

Among the few Americans who well remember what strikes are and why they are important are labor scholars. For them, at least, strikes remain a preoccupation. Prominent students of labor like James Atleson, Julius Getman, Karl Klare, and James Pope—to name the most notable of this group—have expended much effort over the past few decades identifying and critiquing legal doctrines which have undermined the right to strike. Important to them in this regard are doctrines that give employers the prerogative to easily replace striking workers; that allow employers to enjoin and even fire strikers on the ground that they have engaged in coercive “misconduct,” or because they have protested the wrong issue or in the wrong way; that prohibit sympathy strikes and general strikes, and spontaneous “wildcat” strikes; and that funnel labor disputes off of picket lines and into legal proceedings and arbitrations.¹⁴

12. The diminishing interest in the right to strike is evident in the results a search of Proquest's Congressional and Executive Publications database, which shows that in the 50 years between 1948 and 1999, the term “right to strike” appeared in nearly 5000 documents, including over 500 bills and nearly 1500 entries in the Congressional Record (Bound Edition); and that in the twenty years since then, the phrase has appeared only 703 times, in 41 bills and 31 times in the Congressional Record (Bound Edition).

13. See, e.g., *Hearings on H.R. 5, The Striker Replacement Bill: Hearings Before the Subcomm. on Labor-Mgmt. Relations of the H. Comm. on Educ. & Labor*, 102d Cong. (1991); *Collective Bargaining and the Hiring of Permanent Strike Replacements: Hearing Before the Emp't & Hous. Subcomm. of the H. Comm. on Gov't Operations*, 102d Cong. (1992); *Preventing Replacement of Economic Strikers: Hearing on S. 2112 Before the Subcomm. on Labor of the S. Comm. on Labor & Human Res.*, 101st Cong. (1990); 137 CONG. REC. 2073 (1991) (statement of Rep. Owens); 137 CONG. REC. 5455 (1991).

14. See generally JAMES B. ATLESON, *VALUES AND ASSUMPTIONS IN AMERICAN LABOR LAW* (1983); JULIUS G. GETMAN, *THE SUPREME COURT ON UNIONS 52–68* (2016); James Gray Pope, *How American Workers Lost the Right to Strike, and Other Tales*, 103 MICH. L. REV. 518 (2004); Karl Klare, *Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness, 1937-1941*, 62 MINN. L. REV. 265 (1978); see also Julius G. Getman & F. Ray Marshall, *The Continuing Assault on the Right to Strike*, 79 TEX. L. REV. 703, 718 (2001). I have also contributed to this literature. See, e.g., Ahmed A. White, *The Depression Era Sit-Down Strikes and the Limits of Liberal Labor Law*, 40 SETON HALL L. REV. 1, 26–60 (2010); Ahmed A. White, *Mutiny, Shipboard Strikes, and the Supreme Court's Subversion of New Deal Labor Law*, 25 BERKELEY J. EMP. & LAB. L. 275 (2004). Interest in this topic has continued in recent times as well. There was, for instance, a wide-ranging colloquy in

These doctrines have eviscerated a once-vital right to strike, these scholars tell us, subverting a prerogative that earlier in the century was central to improving conditions for workers and lending legitimacy to the very idea that workers have rights to claim in the first place. Indeed, in the 1930s and 1940s, especially, a massive and sustained campaign of strikes proved crucial to the formation of the modern labor movement, the political and legal validation of the Wagner Act, and ultimately the survival of the New Deal itself. This was true even as the Wagner Act itself seemed to play a crucial role in conveying to workers, for the first time, an effective right to strike. But the problem as far as the right to strike goes, we are told, is that the statute was later weakened and corrupted by the connivances of judges and Congress, urged on by a business community relentless in its contempt for organized labor, and abetted at times by inept or corrupt union leaders and a weak and politically diffident National Labor Relations Board (NLRB, the entity with primary authority for enforcing the labor law). And so the Wagner Act is said to have had a great potential, only to have been tragically “deradicalized,” as Klare puts it; and workers are said to have “lost” the right to strike, in Pope’s words, with devastating consequences for workers today and ominous portents for generations ahead.¹⁵ Critically, these authors argue, an effective right to strike must be restored at the expense of these unjustified impositions.¹⁶ Only then will the labor law regain its relevance and the labor movement its ability to improve the lives of workers.

Early on, this attempt to defend an effective right to strike was the object of mean-spirited criticism by more conventional scholars who, in the guise of unmasking its interpretative shortcomings, rejected its radicalism and recoiled at its underlying supposition that law is not only malleable and untethered to its formal, elite iterations, but within the province of workers to reshape around their own interests and visions.¹⁷ Despite these efforts, which focused on the work of Klare and Katherine Stone, whose critique of post-war “industrial pluralism”

the *Boston Review* on this question last year. See James Gray Pope, Ed Bruno & Peter Kellman, *The Right to Strike*, BOS. REV. (May 22, 2017), <http://bostonreview.net/forum/james-gray-pope-ed-bruno-peter-kellman-right-strike> [https://perma.cc/2TTF-FCG4]; see also Garret Keizer, *Labor’s Last Stand*, HARPER’S, Sept. 2018, at 24. And the issue was also the subject of an important panel at the Annual Meeting on Law and Society 2018 in Toronto. See 2018 Annual Meeting Schedule, L. & SOC. ASS’N, http://www.lawandsociety.org/Toronto2018/docs/2018_Guts_May_1_,_2018_FINAL_Single_page.pdf [https://perma.cc/9GQP-43XP].

15. Klare, *supra* note 14, at 265–68; Pope, *supra* note 14, 527–34.

16. See *infra* Part III.

17. Matthew W. Finkin, *Revisionism in Labor Law*, 43 MD. L. REV. 23 (1984); Louis B. Schwartz, *With Gun and Camera Through Darkest CLS Land*, 36 STAN. L. REV. 413 (1984).

shared a similar reasoning—or maybe, to some extent, anyway, because of them—support for this campaign to restore the right to strike seems like a mandate among scholars and commentators who purport to take seriously the interests of workers.¹⁸ And yet for all its appeal, this project nevertheless suffers from a remarkably negligent oversight, one that has nothing to do with morality of its pretense that the law is malleable and that workers can remake it—a proposition that is broadly true and eminently defensible. Instead, it has to do with its practical feasibility. In fact, as this Article argues, a critical reflection on this question suggests that the effort to realize an effective right to strike is actually quite impossible and that attempts to do so, however earnest and thoughtful they may be, represent as dubious a battle as the hopeless walkout dramatized in Steinbeck's book.

This doleful conclusion rests on a frank understanding of the legal and political realities in which strikes necessarily play out. There are many kinds of strikes, but those that are apt to be successful in challenging employers' power and interests entail a level of militancy that sets them against well-entrenched notion of property and public order. This was true in the 1930s and 1940s when these values contradicted, at once, strike militancy and whatever radical potential the Wagner Act may have had. Ironically, it is perhaps even truer today, now that workers do in fact enjoy the right to strike, albeit only in more conventional ways. Seen in this light, those doctrines that have undermined the right to strike are not aberrations or jurisprudential failings—not mistakes in any sense, in fact, nor a retreat from some earlier, truer iteration of the labor law. Rather, they represent a settling of the labor law on bedrock precepts of the American life. However illegitimate those precepts may be from a vantage that questions capitalism's essential legitimacy and takes the rights of workers seriously, they reign supreme, foreclosing an effective right to strike.

All of this, as I argue in this Article, is made plainly evident by a critical review of the history of strikes and striking. To anticipate a bit more of the argument that follows, the strikes most crucial to the building of the labor movement in the 1930s and 1940s were not built only around peaceful picketing and a withholding of labor. Rather, they were sit-down strikes and strikes built on mass picketing, as well as, to some extent, secondary boycotts. And strikes of this kind were never considered lawful or politically appropriate. Ironically, it was these strikes that legitimated the Wagner Act itself and the New Deal. But they could not legitimate themselves.

Those who call for resurrecting the right to strike contend that the flourishing of strike militancy reflected, if not the inherent politics of

18. Finkin, *supra* note 17, at 23, 54–55.

the original Wagner Act before it was “de-radicalized,” then at least its potential. To be sure, it is clear that the Wagner Act was a remarkable document which did more to advance workers’ rights than any statute in American history; and it was at least ambiguous on the question of the legal status of strike militancy. But what seemed like its support for worker militancy was not a product of any particular potential. Rather, it was a reflection of the difficulty that judges, legislators, and other authorities, who dedicated themselves to restraining these strikes even as they flourished, encountered in prosecuting these values amid the unique economic and political conditions of the 1930s and 1940s. These obstructive conditions were quite temporary, though, and the authorities’ efforts culminated soon enough in the near-categorical prohibition of the tactics that had made strikes so effective. It is in this way that the history of strikes shows less in the way of de-radicalization than an encounter with the unyielding outer boundaries of what labor protest and labor rights can be in liberal society.

As this all played out, it left in its wake a right to strike, but one whose power consists almost entirely of the ability of workers to pressure employers by withholding labor, while also maybe publicizing the workers’ issues and bolstering their morale. But while publicity and morale are not irrelevant, in the end they are not effective weapons in their own right. Nor are they generally advanced when strikes are broken. Moreover, the withholding of labor, unless it could be managed on a very large scale—something the law also tends to prohibit by its restrictions on secondary boycotts, by barring sympathy strikes and general strikes—is inherently ineffective in all but a small number of cases where workers remain irreplaceable. Of course, striking in such a conventional way accords with liberal notions of property and social order; but precisely because of this it is simply not coercive enough to be effective. And it is bound to remain ineffective, particularly in a context where workers far outnumber decent jobs, where mechanization and automation have steadily eaten away at the centrality of skill, where the perils that employers face in the course of labor disputes are as impersonal as the risks to workers are not, where employers wield overwhelming advantages in wealth and power over workers, where the state’s machinery for enforcing property rights and social order have never been more potent—where, in fact, capital is capital and workers are workers.

From this perspective, the quest for an effective right to strike emerges as a fantasy—an appealing fantasy for many, but a fantasy no less, steeped in a misplaced and exaggerated faith in the law and a misreading of the class politics of modern liberalism. The campaign to resurrect such a right appears, too, not only as a dead-end and a distraction, but an undertaking that risks blinding those who support viable unionism and the interests of the working class to the more

important and fundamental fact that liberalism and the legal system are, in the end, antithetical to a meaningful system of labor rights. It is for this reason that the call for an effective right to strike should be set aside in favor of more direct endorsement of militancy and a turn away from the law and instead towards a political program that might advance the interests of the working class regardless of what the law might hold.

The argument that follows further elaborates these main contentions about the history of striking and the nature of strikes in liberal society, augmented by a discussion of the legal terrain on which all of this has played out. It unfolds in three main parts. Part I describes how the concept of a right to strike developed in concert with the history of striking itself, how both were influenced by the evolving condition of labor, and how this history created the circumstances under which it became possible to conceive of an effective right to strike without making this possible in fact. Part II consists of a critical review of the fate of coercive and disorderly strikes, especially those featuring sit-down tactics and mass picketing. It considers how the courts, the NLRB, and Congress confronted these strikes, and how they moved with increasing vigor to proscribe them as soon as these strikes emerged as effective forms of labor protest. Part III looks more carefully at the underpinnings of this repudiation of strike militancy, finding in court rulings and other pronouncements against the strikes an opposition to coercion and disorder that, even if sometimes invoked disingenuously, is nonetheless firmly anchored in modern liberalism and its conception of the appropriate boundaries of class protest and labor conflict. On this rests the argument that an effective right to strike is impossible and the pursuit of it, problematic. The final part is a brief conclusion that sums up some of the implications of this argument.

I. THE HISTORY OF THE RIGHT TO STRIKE

To understand anything about the right to strike it is crucial to appreciate the hostility running through much of American history to workers' ability to strike at all—a stance that stood at the center of a comprehensive program of labor repression in the latter parts of the nineteenth and early twentieth centuries so complete that it made the formation of functional unions nearly impossible. Time and again, police, militiamen, and company agents, sometimes armed with the law, sometimes without any legal pretext at all, denied workers the right to strike. Often this took the form of limiting workers' ability to picket or to persuade others to join them; sometimes it involved

denying workers the right simply to quit work in a concerted fashion.¹⁹ Effectuating what labor historian Selig Perlman famously called an “effective will to power” that, he said, is the capitalists’ fundamental prerogative, theirs was the authority of the loaded gun.²⁰ It was in this context that modern views about the right to strike were first shaped.

A. The Right to Strike in the “Open Shop” Era

The period of the late nineteenth and early twentieth centuries was the era of the “open shop,” a term popularized by employers who sought to present their opposition to unions as some sort of libertarian indifference to union membership marked, too, by their scrupulous deference to their workers’ wishes on the subject. In fact, the open shop was largely an artifact of propaganda, one that fraudulently misrepresented what was in fact implacable hostility to unionism. As Clarence Darrow put it, the open shop was less about “some principle of liberty and justice,” and more about employers’ “selfish ends,” which were better served by fending off unionism by almost any means necessary.²¹

In grim confirmation of both Darrow’s judgment and Perlman’s observation, open shop employers were responsible for killing hundreds of unionists and seriously injuring thousands of others.²² The law did not directly justify many of these killings and assaults, but it gave them implicit sanction as almost no one was ever prosecuted for any of this. And it gave express sanction to the far more common practice of firing or blacklisting workers because they went out on strike or supported a union.²³ Such was the implication of the doctrine of employment at will. Nor was this the extent of the perils that unionists had to contend with. Workers who struck also faced arrest, injunction, and prosecution, at the hands of an increasingly large and potent criminal justice system.

Often enough, the pretext behind this was that the strikers had engaged in, or were about to engage in, some kind of violence; but often, too, enough violence was found to inhere in the very fact of

19. A remarkable example of this can be found in the “Great Steel Strike” of 1919–20, the largest strike to that point in American history, during which workers who deigned to stay at home were accosted in their houses by police and forced back to work. WILLIAM Z. FOSTER, *THE GREAT STEEL STRIKE AND ITS LESSONS* 135 (Arno 1969) (1920). On the right to strike in this period, see also H.R. REP. NO. 57-183, at lxx-lxxiii (1901).

20. SELIG PERLMAN, *A THEORY OF THE LABOR MOVEMENT* 4–5 (Porcupine 1979) (1928).

21. CLARENCE DARROW, *THE OPEN SHOP* 13 (1904).

22. Elbridge H. Neal, *The “Open” Shop*, 195 N. AM. REV. 618, 619 (1912).

23. See, e.g., *Adair v. United States*, 208 U.S. 161, 179 (1908).

striking, or at least picketing. For in this period prior to the U.S. Supreme Court's 1940 decision in *Thornhill v. Alabama*²⁴ and the recognition of a right to picket under the First Amendment, it was not at all uncommon for courts to embrace in a positive way the bitter judgment of the organizer in Steinbeck's story: that picketing by strikers was coercive provocation in and of itself, and therefore subject to repression by means both legal and extralegal.²⁵ In a 1921 case called *Truax v. Corrigan*,²⁶ the Supreme Court intimated just that.²⁷

Sometimes in the course of labor disputes workers augmented the effect of merely quitting their jobs and advertising their grievance to the public, and did so by engaging in boycotts or coercing "scabs" or other replacement workers not to cross their lines, by organizing general strikes, or by undertaking to defend themselves from violence visited on them by employers and their allies.²⁸ But doing these things guaranteed they would face the full force of labor repression, again both legal and extralegal. These circumstances, which defined the course of innumerable smaller strikes, led to countless arrests, beatings, and prosecutions. They are also what made names like Haymarket, Pullman, Paint and Cabin Creek, and Ludlow such apt symbols of the nature of class conflict in American history.²⁹

Governments at every level generally supported the suppression of strikes. Police and prosecutors enforced the criminal laws in biased ways to repress strikes and undermine unionism. They also enforced in relatively unbiased ways laws, like "criminal syndicalism" statutes, that were conceived by legislatures as ways of criminalizing unionism, particularly in its radical incarnations, and also deterring strikes.³⁰ And courts, both federal and state, went beyond upholding these actions by police, prosecutors, and legislators and beyond generically condemning the right to strike. They issued thousands of injunctions which

24. 310 U.S. 88 (1940).

25. *Id.* at 101-02.

26. 257 U.S. 312 (1921).

27. *Id.* at 327-28; see also *Pre' Catelan, Inc. v. Int'l Fed. of Workers*, 188 N.Y.S. 29, 33 (N.Y. Special Term 1921); *Atchison Co. v. Gee*, 139 F. 582, 584 (C.C.S.D. Iowa 1905).

28. Herbert J. Hovenkamp, *Labor Conspiracies in American Law, 1880 - 1930*, 66 TEX. L. REV. 919, 947 (1988).

29. Philip Taft & Philip Ross, *American Labor Violence: Its Causes, Character, and Outcome*, in *VIOLENCE IN AMERICA* 270 (Hugh D. Graham & Ted R. Gurr eds., 1969). For a review of the dynamics of labor repression in early twentieth century America, see U.S. COMM'N ON INDUS. REL., FINAL REPORT (1915).

30. Taft & Ross, *supra* note 29, at 287; Ahmed A. White, *A Different Kind of Labor Law: Vagrancy Law and the Regulation of Harvest Labor, 1913-1924*, 75 U. COLO. L. REV. 667, 739-40 (2004); Ahmed A. White, *The Crime of Economic Radicalism: Criminal Syndicalism Laws and the Repression of the Industrial Workers of the World, 1917-1927*, 85 OR. L. REV. 649, 700-01 (2006).

prohibited strikes and boycotts, usually on the grounds that these acts of labor protest impinged on public order, individual property and contract rights, or the free flow of commerce.³¹ The federal courts in particular also invalidated nearly every attempt by workers and their supporters to advance labor rights by legislation.³²

Faced with this implacable hostility, otherwise vastly different elements of the labor movement adopted a deep skepticism about the role of the state and the value of the law as a means of advancing workers' interests. The American Federation of Labor (AFL), the umbrella under which most unions were organized by the turn of the century, hewed to a "voluntarist" approach which conceived labor's most important right as the right to be left alone by the state to fight its own battles—battles which, the federation often sought vainly to assure, would not involve excessively militant tactics or radical aspirations anyway.³³ A smaller organization which nonetheless wielded an outsized influence, the Industrial Workers of the World (IWW) epitomized a different turn on the same theme. Founded in 1905 around a stridently anti-capitalist agenda, and convinced that the state and its legal system were inviolate servants of the ruling-class, the IWW also embraced "direct action," meaning of range of strike tactics, as a better field of activism than political organizing or legal practice.³⁴ Unlike the AFL, the IWW conceived of this as a means of toppling capitalism itself.³⁵ But the IWW shared with the AFL a dominant view within the labor movement that realizing a right to strike was less a matter of embracing the protections of the law and the power of the state behind this than confronting the laws' impositions and evading or undermining its authority.³⁶

Not surprisingly, most legal scholars and commentators at this time categorically rejected the IWW's radicalism.³⁷ But many endorsed the authorities' nearly categorical rejection of the right to strike as well,

31. On this history, see, for example, William E. Forbath, *The Shaping of the American Labor Movement*, 102 HARV. L. REV. 1109 (1989); Hovenkamp, *supra* note 28.

32. For effective reviews of these practices, see RICHARD WHITE, *THE REPUBLIC FOR WHICH IT STANDS: THE UNITED STATES DURING RECONSTRUCTION AND THE GILDED AGE* 810–22 (2017); Laura Weinrib, *The Right to Work and the Right to Strike*, 2017 U. CHI. LEGAL F. 513, 520–24 (2017).

33. This link between voluntarism and repression is particularly well developed by William Forbath in his story of labor injunctions. Forbath, *supra* note 31.

34. Michael R. Johnson, *The I.W.W. and Wilsonian Democracy*, 28 SCI. & SOC'Y 257, 257–58 (1964).

35. On the IWW's attitude toward the state and its legal system, see MELVYN DUBOFSKY, *WE SHALL BE ALL: A HISTORY OF THE INDUSTRIAL WORKERS OF THE WORLD* 138–41 (1969).

36. *Id.* at 140.

37. *Id.* at ix.

even in the conventional ways that AFL unionists conceived of the tactic.³⁸ Those who did deign to endorse some kind of a right to strike typically started from the assumption that strikes might be lawful, but if and only if they featured neither overt violence nor undue coercion.³⁹ A typical expression of this view appeared in a 1922 issue of the *Yale Law Journal*, at the hand of liberal Democrat and civil rights lawyer Moorfield Storey, a Harvard Law graduate who was a friend and secretary to the great abolitionist Charles Sumner.⁴⁰ “The right to strike is only the right to quit work without being liable to punishment for so doing,” wrote Storey,

and that right may be taken away at any time by the legislature which, finding it grossly abused and the public suffering thereby, may restore the criminal law and make it again a criminal offense to combine in any attempt to interfere with the public service, or by striking to inflict any injury upon the public.⁴¹

Despite his pretenses, in fact, what Storey really did was essentially to deny any right to strike that went much beyond the right to quit work.⁴² This reading of the right to strike typified the narrow and formal construction that many commentators imposed on the concept of “free labor,” that much-contested legacy of four years of civil war, in the decades following that conflict. It was consistent, for instance, with the conclusions of Joseph Feely, a prominent Boston lawyer who, in a 1910 article in the *North American*, framed his very limited view of the reach of the right to strike around the premise that “the act of the many is not the same” as the “individual act.”⁴³ “A man may walk down the street as he chooses, but a body of men may not walk down the same street in procession without a permit from the public authorities.”⁴⁴

38. See, e.g., Joseph J. Feely, *The Right to Strike: Its Limitations*, 191 N. AM. REV. 644, 645–48 (1910).

39. See, e.g., Alpheus T. Mason, *The Right to Strike*, 77 U. PA. L. REV. 52, 53–54 (1929).

40. Geoffrey D. Austrian, *Moorfield Storey: Brief Life of a Patrician Reformer: 1845-1929*, HARV. MAG. (July–Aug. 2018), <https://www.harvardmagazine.com/2018/07/moorfield-storey> [https://perma.cc/KPY5-WFDZ].

41. Moorfield Storey, *The Right to Strike*, 32 YALE L.J. 99, 108 (1922).

42. *Id.* at 100.

43. Feely, *supra* note 38, at 646.

44. *Id.* at 644, 646; see also Paul Bourget, *The Abuse of the Right to Strike*, 19 LIVING AGE 68 (1920).

This perspective was consistent, too, with that of other commentators in this period who also pretended to endorse the right to strike while insisting that it entailed little more than the right to quit work. Such a position was a staple of editorials in major newspapers like the *New York Times* and *Chicago Tribune*, which repeatedly asserted—usually in the guise of condemning broader readings of the right—that the right to strike was properly subject to very drastic restrictions and could not be conceived otherwise. This was particularly true in the late 1910s and early 1920s, when, amid an unprecedented wave of strikes across the country and increased efforts by Congress and the states to restrain the right to strike, there was a huge increase in editorials on the subject—many hundreds each year, in fact.⁴⁵ In 1919 the *Tribune* gave expression to a common theme among these pieces when it insisted that “[n]o right known to man is without limitation” and that the right to strike, which it quite wrongly suggested was “without limitation,” had to be brought under control.⁴⁶ Eight months later, the paper brought this logic to bear in condemning a coal strike that enveloped its region, venturing that while “men as individuals cannot be forced to work, . . . men as union members” could be.⁴⁷ That same year, the *Los Angeles Times* went further, declaring the use of strikes to create “public distress” with which to compel “employers to capitulate” a “crime against humanity.”⁴⁸ Nor were such views the province only of antiunion papers, which the *Tribune* and the *Los Angeles Times* (like most of the big papers) both were; for that year even the *Saint Louis Post-Dispatch*, a considerably more liberal publication, insisted that the right to strike was not “absolute.”⁴⁹

Nevertheless, inasmuch as this framework, which so well vindicated drastic limits on the right to strike, also tended to problematize the right because it was so often exercised in an “abusive” way, it could also be reworked as a way of justifying and describing the appropriate boundaries of a rather more meaningful view of the right to strike. These “abuses,” in other words, could be interrogated, challenged, and exposed as exaggerated, unjustified, and perverse in

45. This observation is consistent with a search of Proquest Historical Newspapers, which reveals that from 1906 through 1915, 119 editorials featuring the phrase “right to strike” appeared in all publications in that database, while from 1916 through 1925, 326 editorials used that phrase. The same trend is evident among major papers, including the *Chicago Tribune*, the *Los Angeles Times*, the *Saint Louis Post-Dispatch*, the *New York Times*, and the *Washington Post*, where, together, the increase in such editorials between these two periods was from 28 to 98.

46. *The Right to Strike*, CHI. DAILY TRIB., Nov. 3, 1919, at 8; see also *The Right to Strike*, COURIER-J. (LOUISVILLE), Nov. 1, 1919, at 4.

47. *Sacrificing the Right to Strike*, CHI. DAILY TRIB., Jul. 27, 1920, at 6.

48. *The Right to Strike*, L.A. TIMES, Nov. 10, 1920, at I14.

49. *The Right to Strike*, ST. LOUIS POST-DISPATCH, Jan. 2, 1920, at 28.

their implications, which is what many champions of the right to strike did. They subverted the logic that Storey and Feely and so many others relied on to present the right to strike as something that was indeed a natural extension of an individual's right to leave work (albeit temporarily), a corollary of the right of businesses to combine in pursuit of their own interests, and a practice that could actually be better realized precisely by limiting the reach of labor injunctions and reining in police and guardsmen, which made a mess of something that might otherwise unfold in an orderly and generally peaceable fashion.⁵⁰ For many unionists and their allies, the right to strike thereby took on a negative, "voluntarist," meaning as well, as something whose existence depended not on what the government did to protect those who would strike but rather on its willingness to stay out of labor conflicts. It was in exactly this spirit that Samuel Gompers, longtime president of the AFL, opposed an attempt in 1920 by the Maryland Public Service Commission to institute compulsory arbitration of labor disputes by observing that "[l]egislation on labor questions has always had the tendency to circumscribe the rights of working people."⁵¹ In fact Gompers and his lieutenants in the AFL repeated this argument time and again, insisting that restrictions on the right to strike were not only contrary to workers' fundamental entitlements in a free society but also the very cause of much of the unrest and disorder that people like Storey and Feely blamed on the right to strike itself.⁵²

The attempt to intellectualize this position involved an interesting campaign to present the right to strike as a mandate of the Thirteenth Amendment, albeit one that, under the conservative influence of lawyers, was reduced to a justification of the right to quit one's job.⁵³

50. See, e.g., DUANE MCCrackEN, *STRIKE INJUNCTIONS IN THE NEW SOUTH* (1931); Note, *Picketing by Labor Unions in the Absence of a Strike*, 40 HARV. L. REV. 896 (1927); Comment, *The Right to Enjoin Strikes on the Ground of Interference with Interstate Commerce*, 12 YALE L.J. 448 (1903).

51. *Gompers for the Right to Strike*, BALT. SUN, Feb. 8, 1917, at 3.

52. See also Samuel Gompers, *Labor Must Always Have the Right to Strike*, BOS. DAILY GLOBE, Sept. 3, 1916, at 42; Samuel Gompers, *The Right to Strike: Its Importance*, 30 AM. FEDERATIONIST 404 (1923); W.M. Reedy, *The Right to Strike*, 19 AM. FEDERATIONIST 58 (1912); *Supreme Court Ruling Criticized by Gompers: Head of Labor Union Interprets Coronado Decision as Negation of Right to Strike*, ST. LOUIS POST-DISPATCH, Jun. 10, 1922, at 9; *Gompers is Critic of Supreme Court*, WASH. POST, Mar. 22, 1917, at 5; cf. Richard Boeckel, *Labor Loses the Right to Strike*, 105 INDEP. 283 (1921).

53. James Gray Pope, *The Thirteenth Amendment Versus the Commerce Clause: Labor and the Shaping of American Constitutional Law, 1921-1957*, 102 COLUM. L. REV. 1, 12-38 (2002); Archibald Cox, *Strikes, Picketing and the Constitution*, 5 VAND. L. REV. 574, 575-79 (1951). For an example of how conservative commentators brought this argument to the same conclusion, see S.H. Kaufman, *Limiting the Right to Strike*, 84 CENT. L.J. 121 (1917).

Less interesting but more successful was a pragmatic argument that the widespread use of injunctions against strikers was incompatible with fundamental precepts of American jurisprudence—including, for instance, notice and due process—and was bad social policy to boot.⁵⁴ This perspective was perhaps most fully expressed in the landmark critique of labor injunctions by Felix Frankfurter and Nathan Greene, published in 1930, which presumed that restricting and rationalizing the use of injunctions would, perforce, not only enhance the right to strike but allow workers “to achieve the possibility of free competition with concentrated capital.”⁵⁵

This view that restricting injunctions would at once restore the right to strike and reinvigorate the labor movement had already found footing in Congress when Frankfurter and Greene published their book. An effort to limit the use of injunctions in labor disputes, both procedurally and substantively, was codified in the Clayton Act of 1914. But that statute was very soon judicially emasculated, after being rather prematurely hailed by Gompers as labor’s “Magna Carta.”⁵⁶ Another effort of this kind came with the passage of the Norris-LaGuardia Act of 1932,⁵⁷ for which the Frankfurter and Greene book was essentially a brief. A more effective statute, Norris-LaGuardia did indeed successfully limit the power of federal courts to issue injunctions in labor disputes.⁵⁸ It also provided some states with a model for enacting their own anti-injunction statutes.⁵⁹ These followed earlier attempts at both the state and federal level to impose limits on the use of strikebreaking services, including, as a typical statute put it, the “importation of armed forces” for use in breaking a strike.⁶⁰ But the few statutes of this kind that were enacted were limited in scope, short on remedies, and ultimately ineffective.⁶¹

54. FELIX FRANKFURTER & NATHAN GREENE, *THE LABOR INJUNCTION* 202–04 (1930).

55. *Id.* at 204.

56. Samuel Gompers, *The Charter of Industrial Freedom*, 21 AM. FEDERATIONIST 971, 971 (1914). The Clayton Act was essentially invalidated by the Supreme Court only a few years after Gompers said this in *Duplex Printing Co. v. Deering*, 254 U.S. 443 (1921).

57. Norris-LaGuardia Act of 1932, Pub. L. No. 72-65, 47 Stat. 70 (codified as amended at 29 U.S.C. § 101 (2006)).

58. *Id.*

59. *Id.*; Clayton Antitrust Act, Pub. L. No. 63-212, 38 Stat. 730 (1914) (codified at 15 U.S.C. §§ 12–27 (2012), 29 U.S.C. §§ 52–53 (2012)); *see also A Bill to Amend the Judicial Code and to Define and Limit the Jurisdiction of Courts Sitting in Equity, and for Other Purposes: Hearings on S. 1482 Before the Subcomm. of the S. Comm. on the Judiciary*, 70th Cong. (1928); *Trust Legislation, Hearing on H.R. 18711 Before the H. Comm. on the Judiciary*, 63d Cong. (1914).

60. *See, e.g.*, S.D. CODIFIED LAWS § 1-1-11 (West 2004) (repealed 2006).

61. S. REP. NO. 76-6, at 13–16 (1939).

Despite all these efforts, in fact, the capacity of workers to strike free of government interference and employer reprisals remained limited. Through the 1920s and well into the 1930s, workers who did go out on strike continued to face arrest, imprisonment, civil liability, discharge, blacklisting, assaults, and even death, while the annual number of strikes, which had reached well over 3000 a year in the 1910s, plummeted, ranging from about 600 to 1000 a year in the second part of the 1920s and the early years of the 1930s.⁶² In line with this reality, the labor movement itself seemed poised on the verge of collapse. Partly this state of affairs reflected the limited reach and enforceability of the anti-strikebreaking and anti-injunction laws. But it also reflected the fact that that insofar as these statutes, which did not speak directly of the right to strike at all, did advance such a right, they advanced it in a fashion that was, of its nature, bound to do little more than codify the right of workers to quit their jobs. And that did not amount to much.

B. The Right to Strike in the New Deal Era

The New Deal and the changes in labor politics that accompanied its attempt to erect a new political economy which might redress the economic crisis which had so staggered American capitalism did not make strikes any less contentious or risky for workers, at least not immediately. But these developments did alter the status of strikes in practice and in concept. Section 7(a) of the 1933 National Industrial Recovery Act (NIRA), the leading legislation of the “First” New Deal, and various provisions of the Wagner Act (especially §§ 7 and 13), enacted in 1935 and in many ways the leading statute of the “Second” New Deal, for the first time codified a right to strike, alongside the other basic labor rights of self-organization and collective bargaining.⁶³ Never really effective anyway, as it lacked adequate enforcement mechanisms, § 7(a) was declared unconstitutional by the Supreme Court in 1935, which ruled that Title I of the NIRA exceeded Congress’ legislative authority; and the Wagner Act was ineffective until 1937, its functionality hamstrung by employers’ near universal

62. Peterson, *supra* note 9, at 1066.

63. National Industrial Recovery Act, Pub. L. No. 73-67, 48 Stat. 195 (1933) (formerly codified at 15 U.S.C. §§ 703–710), *invalidated by A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935); National Labor Relations Act, Pub. L. No. 74-198, 49 Stat. 449 (1935) (codified as amended at 29 U.S.C. §§ 151–169). A year after enacting the Wagner Act, Congress also enacted the Strikebreaker Act, or Byrnes Act, which criminalized the transportation in interstate commerce of “any person” employed for the purpose of using threats or force to interfering with the rights of workers to picket, or engage in collective bargaining or self-organization. Note, *Industrial Strikebreaking: The Byrnes Act*, 4 U. CHI. L. REV. 657–66 (1937).

contempt for its mandates and the courts' similarly widespread view that it could not possibly survive constitutional review either.⁶⁴

Nevertheless, these statutes were immediately important. Enacted as part of a program to rationalize and stabilize the industrial economy—and in the case of the Wagner Act, especially, in the face of vehement opposition from the business community and the press—these statutes reflected by far the most important attempts to establish a legally enforceable right to strike in America.⁶⁵ In fact, § 7(a) and § 7 employed the same language for this purpose, codifying a right of workers to “self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection.”⁶⁶ They also prioritized this right, in the case of § 7(a) incorporating it within a broader attempt at corporatist economic management; and in the case of the Wagner Act, situating it at the center of an elaborate system of labor rights and making the realization of these rights dependent on the ability of workers to strike.⁶⁷ In their different ways, both statutes intended, in other words, that workers would realize the right to organize and engage in collective bargaining, and by these means transform the country's political economy, via their ability to mount effective strikes.⁶⁸ Unlike the NIRA, though, the Wagner Act established a fairly robust administrative machinery to enforce these rights, one that empowered the National Labor Relations Board, via its enforcement and remedy of various “unfair labor practice[s],” to “take

64. *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935); IRVING BERNSTEIN, *THE TURBULENT YEARS: A HISTORY OF THE AMERICAN WORKER, 1933-1941*, 633-46 (2010).

65. On the political economy of the New Deal and the place of labor in its program, see ELLIS W. HAWLEY, *THE NEW DEAL AND THE PROBLEM OF MONOPOLY: A STUDY IN ECONOMIC AMBIVALENCE* (Fordham 1995) (1966); on opposition to the Act, see BERTSTEIN, *supra* note 64, at 336-39; Leon Keyserling, *The Wagner Act: Its Origin and Current Significance*, 29 GEO. WASH. L. REV. 199, 201-02 (1960).

66. See National Industrial Recovery Act § 7(a), Pub. L. No. 73-67, 48 Stat. 195 (1933) (formerly codified at 15 U.S.C. §§ 703-710), *invalidated by A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935); National Labor Relations Act § 7, 29 U.S.C. § 157 (2012).

67. Inherent in the structure of the Wagner Act, which eschews any notion of government intrusion in the substance of collective bargaining and defers to the “economic weapons” of the parties to decide this and (to some extent) the question of union representation, the notion that the right to strike is fundamental to the functionality of the statute's entire scheme, was endorsed by none other than Senator Robert Taft himself, in the debates on the law that bears his name. 93 CONG. REC. 3834-36 (1947) (statement of Sen. Taft); see also *NLRB v. Ins. Agents Int'l Union*, 361 U.S. 477, 489-95 (1960); *NLRB v. Lion Oil Co.*, 352 U.S. 282, 291 (1957).

68. Ken Casebeer, *Drafting Wagner's Act: Leon Keyserling and the Precommittee Drafts of the Labor Disputes Act and the National Labor Relations Act*, 11 BERKELEY J. EMP. & LAB. L. 73, 83, 86 (1989).

such affirmative action including the reinstatement of employees with or without back pay, as will effectuate” these rights.⁶⁹

In this fashion, both statutes underwrote a broader change in labor discourse and politics, at the base of which was the idea that labor rights were not only legitimate but government-sponsored and central to the commonwealth. This notion was in turn central to the attempt by ambitious labor leaders to lay hold of the massive upsurge in rank-and-file activism that characterized labor relations in the mid-1930s. The most important manifestation of this was the emergence in 1935 of the Committee for Industrial Organization, (later, the Congress of Industrial Organizations, or CIO).⁷⁰ One of the great social movements in America history, the new labor federation built its campaign to organize the industrial workforce in large part on a mutual embrace of the New Deal state and its legal system. However, threatened for a time with losing its position of dominance in the labor movement to the upstart federation which had emerged so impertinently from its own ranks, the AFL shed some of its voluntarism and tentatively followed suit. It began, too, to seek out support among New Deal politicians and, eventually, from the workings of the NLRB.⁷¹

In this context, labor leaders and organizers presented the right to strike as a prerogative definitely endorsed by the state, and which the state was bound to defend against impositions by employers. The culmination of this view was the extraordinary—and during the mid-1930s, extraordinarily common—practice of using union literature, picket signs, and other organizing activities to present union campaigns and the strikes that backed them as mandates of the New Deal.⁷² As remarkable as it might seem, this new turn by unionists away from the voluntarism that prevailed earlier in the century actually aligned with the views of many New Deal scholars, commentators, and government officials, who also viewed the right to strike as a perquisite defined by and protected through the offices of the state. Many of these figures in turn viewed the defense of the right to strike as a means of defending the New Deal.

Among the most prominent representatives of this tendency were the authors of Wagner Act itself, including Senator Robert Wagner, as well as his key assistant on the bill, economist and lawyer Leon Keyserling. On the one hand, in line with the overall structure of the Act, Wagner and Keyserling presented the legislation as a means of regulating and even diminishing strikes; on the other hand, and more

69. National Labor Relations Act, 29 U.S.C. § 160(c) (2012).

70. BERNSTEIN, *supra* note 64, at 400–01.

71. On the rise of the CIO out of the AFL and the subsequent conflicts between these two organizations, see *id.*; ROBERT ZIEGER, *THE CIO: 1935-1955* (1997).

72. ZIEGER, *supra* note 71, at 39–41.

importantly, they conceived of strikes, and therefore the right to strike, as fundamental to a statute that would not only, paradoxically, reduce strikes, but also advance the more critical aims of increasing workers' bargaining power, improving workers' material conditions, sustaining consumer demand, and reforming the workplace.⁷³ As Keyserling emphasized—revealingly for our purposes—among the important vectors of opposition to the law was the claim by those “on the left . . . who argued that it would lead inevitably to the destruction of free trade unionism through the intervention of government.”⁷⁴

Equally reflective of this view of the right to strike as central to a government-sponsored reordering of the political and economic order was the work of the so-called La Follette Committee. A subcommittee of the U.S. Senate Committee on Education and Labor under the leadership of Senator Robert La Follette Jr., who had been a strong supporter of the Wagner Act in Congress, the La Follette Committee undertook a series of investigations of labor repression and employer contempt for the Wagner Act.⁷⁵ Conducted between 1936 and 1941, these investigations documented systematic “violations of the rights of free speech and . . . the right[s] of labor” which, in large part by undermining the right to strike, also undermined the validity and functionality of the labor law.⁷⁶ And then, too, there was the NLRB itself. Under the leadership of a group of leftist lawyers between 1935 and 1939, the NLRB aggressively defended the right to strike.⁷⁷ With an obvious sense that an effective right to strike was crucial to the entire regime of labor law, the agency's staff went to considerable lengths to protect strikers from reprisals by employers and government officials.⁷⁸

To be sure, the Wagner Act defined the right to strike in terms that were not only ambiguous but surprisingly negative in their own ways. Beyond § 7's declaration that workers had the right “to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection” there was § 13, which provided that nothing in the Act should be construed to “impede or diminish in any way the right to strike.”⁷⁹ Nevertheless, it is important to stress, the statute did conceive of the prerogative to strike as a right and not merely as

73. Keyserling, *supra* note 65, at 215–18.

74. *Id.* at 202.

75. JEROLD S. AUERBACH, LABOR AND LIBERTY: THE LA FOLLETTE COMMITTEE AND THE NEW DEAL 1, 4–6 (1966).

76. *Id.* at 1, 6–8, 195–96.

77. JAMES A. GROSS, THE RESHAPING OF THE NATIONAL LABOR RELATIONS BOARD 2–3, 6–12, 17–19 (1981).

78. *Id.* at 7–8; AHMED WHITE, THE LAST GREAT STRIKE: LITTLE STEEL, THE CIO, AND THE STRUGGLE FOR LABOR RIGHTS IN NEW DEAL AMERICA 251–68 (2016).

79. National Labor Relations Act § 13, 29 U.S.C. § 157 (2012).

something that might thrive if the other impediments that weighed on it were diminished.⁸⁰ And of course it also established an agency, the NLRB, to enforce this right and the labor law more broadly. So it was that under the Wagner Act, the right to strike became, in the fashion of other government protections of the interest of workers and the poor during this period of ascendance of social democracy and the welfare state, a right to be defended by defending the power of the state to regulate labor relations, by protecting the legitimacy of the Wagner Act, and by defending the authority of the NLRB to administer the Act.⁸¹ In a prosaic but very meaningful way, this is what made the Supreme Court's decision in *NLRB v. Jones & Laughlin Steel Corp.*,⁸² which at once upheld the Wagner Act and legitimated the New Deal itself, seem so crucial, even as it made the right to strike seem evermore dependent on the active sponsorship of the state.⁸³ In all these ways, the right to strike assumed the rough parameters of its contemporary meaning.

These important changes in the legal, political, and scholarly conceptions of the right to strike occurred alongside a dramatic increase in the incidence of strikes beginning in the mid-1930s. There had been massive strike waves in the late nineteenth century and again in the late 1910s.⁸⁴ But the incidence of strikes fell dramatically in the 1920s as repression did its work and many in the union movement seemed resigned to defeat.⁸⁵ This retrenchment continued through the first, grim years of the Depression. There were fewer than 900 strikes a year from 1930 through 1932; and the great majority of these were desperate affairs in protest of rampant wage cuts and deteriorated working conditions.⁸⁶ But things changed quickly. In 1933, there were 1700 strikes, and then an average of about 3000 a year over the following ten years—notwithstanding the wartime no-strike pledge subscribed by most unions during the latter part of this period.⁸⁷ And a large number (in some years a majority) were organizing strikes. During 1937, which

80. Another provision of the Wagner Act relevant to the right to strike is § 2(3), which included in its definition of “employees” entitled to the protections of the Act workers who were out on strike.

81. In this way, the defense of the right to strike also entailed a defense of the Wagner Act against increasingly active attempts to repeal or amend it. *See, e.g.*, Lee Pressman, *The Right to Strike and Compulsory Arbitration*, 1 *LAW. GUILD REV.* 40, 40–45 (1941).

82. 301 U.S. 1 (1936).

83. *Id.* at 30, 33–34.

84. BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, *HISTORICAL STATISTICS OF THE UNITED STATES: COLONIAL TIMES TO 1970*, at 179 (1975).

85. *Id.*

86. *Id.*

87. *Id.*

is probably the single most critical year in American labor history, the government counted 4740 strikes involving over seven percent of the working population.⁸⁸

Both § 7(a) and the Wagner Act were shaped by this increase in labor activism at least as much as they influenced and inspired such activism. Section 7(a) was most certainly enacted in response to pressures from the labor movement and its political allies.⁸⁹ The same is true of the Wagner Act. As activist and scholar Staughton Lynd has noted, the impetus to enact the Wagner Act in particular “waxed and waned in direct correlation with the waxing and waning of the strike wave of 1934–35.”⁹⁰

In fact, both § 7(a) and the Wagner Act were explicitly aimed at rationalizing and ultimately reducing labor conflict. This agenda, which was most clearly reflected in the first section of the Wagner Act, coexisted uneasily alongside the statute’s purpose in rationalizing industrial production as well as its aim to diminish economic inequality and advance workers’ rights for their own sake.⁹¹ In its conception, it encompassed the ironic but very plausible idea—which was actually consistent with the vision of voluntarism articulated by Gompers and the AFL a generation earlier—that protecting the right to strike would serve as a way of diminishing the intensity and even the frequency of strikes. Nevertheless, the Wagner Act would end up being asserted as a limit on the right to strike. In *Jones & Laughlin* itself, the Court’s majority took the opportunity to valorize labor peace, to invoke it as the essential, legitimate purpose behind the Congress’ enactment of the statute. “Experience has abundantly demonstrated,” wrote Chief Justice Charles Evans Hughes, “that the recognition of the right of employees to self-organization and to have representatives of their own choosing for the purpose of collective bargaining is often an essential condition of industrial peace.”⁹² A functional labor law, Hughes made clear, was above all a way of avoiding strikes.⁹³ In the process the Court did exactly the thing that Senator Wagner, who thought peaceful industrial relations were one purpose of the Act, had feared, which was to elevate

88. *Id.*; FLORENCE PETERSON, BUREAU OF LABOR STATISTICS, U.S. DEP’T OF LABOR, STRIKES IN THE UNITED STATES: BULLETIN NO. 651, at 61, tbl.28 (1937).

89. Michael Goldfield, *Worker Insurgency, Radical Organization, and New Deal Labor Legislation*, 83 AM. POL. SCI. REV. 1257, 1262 (1989); PETER H. IRONS, *THE NEW DEAL LAWYERS* 203, 227 (1993).

90. Staughton Lynd, *Government Without Rights: The Labor Law Vision of Archibald Cox*, 4 INDUS. REL. L.J. 483, 484 n.10 (1981). On this point, see also IRVING BERNSTEIN, *THE NEW DEAL COLLECTIVE BARGAINING POLICY 71–77* (1950).

91. Keyserling, *supra* note 65, at 215.

92. *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 42 (1936).

93. *Id.*

this aim over the statute's more fundamental purpose "to make the worker a free man."⁹⁴

It is not difficult to comprehend the mechanisms at work in these developments. These Depression-era strikes were the lifeblood of a labor movement that, by the end of 1936 and the beginning of 1937, was not only reborn but was rapidly surging to unprecedented strength. Aimed so often at organizing large numbers of industrial workers who had never been successfully organized, and so often successful, the strikes led to rapid growth in the labor movement, with total membership increasing from 2.9 million in 1933, to 8.9 million in 1940, to 14.8 million in 1945.⁹⁵ In this way, the strikes were central to the rise of powerful industrial unions like the United Automobile Workers (UAW) and the United Steelworkers of America (USWA). In a related but more attenuated fashion, the strikes also contributed to a dramatic shift in American politics. For not only did unions like the UAW and USWA later play a central role in mainstream liberal politics in the twentieth century, but as these CIO unions emerged, CIO funding and voter mobilization contributed directly to the landslide victories that Roosevelt and New Dealers across the country realized in the 1936 election and, by this means, inaugurated the bond between the labor movement and the Democratic party that would define and structure the union movement's political relevance in the decades ahead.⁹⁶

The CIO led the biggest, most iconic strikes of this period. And its emergence and subsequent growth initially accounted for most of the increase in union membership in the mid and late 1930s. But by 1937, too, the AFL, so long moribund, was also gaining membership, in part on the strength of a new-found faith in strikes.⁹⁷ By then it was even using right-to-strike rhetoric to prosecute its rivalry with the CIO, criticizing what it regarded as the NLRB's pro-CIO bias as a denial of the right to strike.⁹⁸ These AFL strikes were generally less militant, though. And in employing them, the AFL seemed to benefit from a sense among employers and many in the government that at least it was

94. On Wagner's views, see Keyserling, *supra* note 65, at 215–19; *see also Jones & Laughlin Steel*, 301 U.S. at 42; Jim Pope, *Worker Lawmaking, Sit-Down Strikes, and the Shaping of American Industrial Relations, 1935–1958*, 24 L. & HIST. REV. 45, 98–107 (2006). On the role of labor activism in shaping the Court's ruling, *see also* FRANCES FOX PIVEN & RICHARD A. CLOWARD, *POOR PEOPLE'S MOVEMENTS* 96–175 (1988).

95. BUREAU OF THE CENSUS, *supra* note 84, at 159, 178.

96. BERNSTEIN, *supra* note 64, at 449–50.

97. BUREAU OF THE CENSUS, *supra* note 84, at 157–58, 176.

98. *See AFL Hits NLRB's CIO 'Bias' as Denial of Right to Strike*, WALL ST. J., Aug. 20, 1937, at 1.

not the CIO, whose greater militancy and overtly social democratic politics cast the AFL in a more politically acceptable light.

Nonetheless, it was these CIO strikes that demonstrated not only to Congress but to the courts and other reactionary elements of the state the considerable risks of continued opposition to labor reform. As both Pope and Drew Hansen have argued persuasively, the Supreme Court's decision in the *Jones & Laughlin* case cannot be understood apart from the Justices' apprehensions about where this remarkable upsurge of labor militancy might lead if the Wagner Act were not upheld, which looms as important in this regard as the President's court-packing scheme and the magnitude of his and other New Deal candidates' landslide victories in the 1936 election.⁹⁹ *Jones & Laughlin* was in turn critical in giving constitutional legitimacy to the New Deal. In fact, it seems certain that the militancy of this era was as important to the survival of the New Deal as was the New Deal important to the rise of the modern labor movement. And yet even then militancy was understood as a threat that best be muted and contained by the validation of a functional system of labor law. Not only did the effective use of the right to strike not legitimate itself; as the *Jones & Laughlin* decision made so clear, it created the conditions for its own invalidation in the name of an effective system of labor rights.

The surge in labor conflict that shaped all these events did not end in April 1937, which is when the Court's *Jones & Laughlin* decision came down, or even with the coming of the Second World War, despite a pledge subscribed by both the major labor federations, the AFL and the CIO, to suspend strikes during the conflict. After falling off somewhat during and just after the devastating "Roosevelt Recession" of 1937–38, the escalation in strikes continued well into the 1940s.¹⁰⁰ In fact, the end of the war brought on the greatest number of strikes in American history—over five million workers went out on strike between the middle of 1945 and the end of 1946.¹⁰¹ Over the course of this sustained surge in labor militancy, basic labor rights expressed in the Wagner Act became increasingly secure, as we shall see, even as the right to strike was increasingly circumscribed by statute and by judicial and administrative rulings.

99. Pope, *supra* note 94, at 95–97; Drew D. Hansen, *The Sit-Down Strikes and the Switch in Time*, 46 WAYNE ST. L. REV. 49, 114–17 (2000).

100. Hansen, *supra* note 99, at 88 n.201.

101. *Postwar Work Stoppages Caused by Labor-Management Disputes*, 63 MONTHLY LAB. REV. 872, 871 (1946).

C. The Right to Strike in Times of Détente and Decline

Even though strikes remained surprisingly frequent in the decade that followed the New Deal and the war, they diminished dramatically in militancy and resulted in no great clashes, let alone any spectacular upsurges, on par with those of the New Deal period.¹⁰² Already by the late 1940s, in fact, a change had arrived, one whose significance can be witnessed in the steel industry, where a history of bitter conflict, book-ended by the infamous Homestead dispute in 1882 and the dramatic and tragic “Little Steel” Strike in 1937, had claimed scores of lives and resulted in countless injuries and thousands of arrests.¹⁰³ Largely unionized by the CIO in the late 1930s and early 1940s, the industry continued in the postwar period to feature some of the biggest strikes in American history. But by then the industry’s strikes had become by contrast very tame, almost ritualistic affairs concerned mainly with contract negotiations. During the industry-wide 1949 walkout a somewhat incredulous Mary Heaton Vorse, a popular, leftist labor journalist of the day who had witnessed the carnage of earlier strikes first-hand, now found picket stations constructed from lumber donated by management, appointed with radios and heaters provided by the companies, and provisioned at company expense with doughnuts and coffee.¹⁰⁴

During this new era in labor relations, which ran roughly from 1950 to the early 1970s, working conditions also improved substantially across industries; and union membership, which increased quickly in the late 1930s and 1940s, continued to rise, albeit more on the strength of job growth in previously unionized workplaces than because of continued success in organizing open shop industries.¹⁰⁵ By the mid-1950s, roughly one-third of eligible workers, and nearly one-fifth of all adults, were unionized; and from that point through 1960s, total union membership hovered just below 20 million.¹⁰⁶ This accompanied the resolution of the AFL versus CIO schism that had raged since the latter federation formed. And it featured the consolidation of the labor movement as the key institutional pillar of the Democratic Party and the standard-bearer of postwar liberal politics.¹⁰⁷

102. BUREAU OF THE CENSUS, *supra* note 84, at 159–60, 179.

103. WHITE, *supra* note 78, at 4.

104. Mary Heaton Vorse, *An Altogether Different Strike*, HARPER’S MAGAZINE, Feb. 1950, at 50, 52.

105. On union membership during this period, see BUREAU OF THE CENSUS, *supra* note 84, at 175–77.

106. *Id.* at 122, 176–77.

107. On the labor movement’s increased political influences, and its limits and eventual decline, see JEFFERSON COWIE, *STAYIN’ ALIVE: THE 1970S AND THE LAST DAYS OF THE WORKING CLASS* 28, 288–89 (2012); JUDITH STEIN, *RUNNING STEEL*,

As labor historian Nelson Lichtenstein has recently reminded readers, it is important not to mistake the relative stability and quiet of this period, let alone the increased influence of the labor movement, for a suspension of class conflict, which still expressed itself in considerable, low-level discord.¹⁰⁸ Nevertheless, things had changed and a period of relative détente was at hand. Not surprisingly, under these conditions the concept's essential integrity was taken for granted. Embracing a newly dominant ideology steeped in visions of "industrial pluralism" and the permanent management of labor discord, most labor scholars did not bother with the subject at all, except in a rather technical way that, in contrast to earlier ruminations on the subject, decoupled the right to strike from pressing concerns about the fate of the labor movement or the survival of the New Deal. They foreswore all interest in the relationship between strikes and existential concerns of the sort that Steinbeck, among others, had posed.¹⁰⁹

From this novel vantage, the right to strike was, in the suitably dry language of one of the apostles of this new perspective, Harvard law professor Archibald Cox, nothing more than "the concerted cessation of work by agreement among employees for the purpose of inflicting upon their employer losses sufficient to induce him [sic] to grant the terms that they demand."¹¹⁰ In Cox's view, there had been a perhaps unwarranted shift in the 1940s to the view that "the law has a useful role to play in the conflicts of interest between employers and employees," but this reflected in part "the conviction that unions sometimes pursued objectives quite inconsistent with accepted notions of fairness and sound policy, and sometimes used weapons that ought to be banned."¹¹¹ Among these offensive weapons: "mass picketing and extreme forms of secondary boycott."¹¹²

The article by Cox from which the preceding quotations are taken delves into the constitutional status of the right to strike and picket; and it cites with evident approval Justice Louis Brandeis's dictum from the

RUNNING AMERICA: RACE, ECONOMIC POLICY, AND THE DECLINE OF LIBERALISM 15–18, 271 (1998).

108. NELSON LICHTENSTEIN, *STATE OF THE UNION: A CENTURY OF AMERICAN LABOR* 98–140 (2013).

109. This approach is strongly associated with Daniel Bell, Archibald Cox, and John Dunlop, among others. For a description of its main features, see, for example, Lynd, *supra* note 90, at 487–88; David Feller, *A General Theory of the Collective Bargaining Agreement*, 61 CALIF. L. REV. 663, 720–24 (1973). On the rise of pluralism in labor discourse and practice more generally, see Katherine Van Wezel Stone, *The Post-War Paradigm in American Labor Law*, 90 YALE L.J. 1509 (1981).

110. Cox, *supra* note 53, at 575.

111. *Id.* at 574–75.

112. *Id.* at 575.

1926 case *Dorchy v. Kansas*¹¹³ that there is no absolute right to strike. The full quotation of Brandeis—“Neither the common law, nor the Fourteenth Amendment, confers the absolute right to strike,” he wrote—appears in dozens of articles and commentaries on the right to strike from the 1950s and 1960s.¹¹⁴ And not because it is a catchy phrase—it really is not—but because it so provided an appealing way to frame what many people had come to think about the right to strike in the postwar period.

Cox was as famous a labor scholar as one could find, at a time when labor scholars enjoyed considerable prominence in academia.¹¹⁵ He was also, along with fellow Harvard professor John Dunlop, famously antipathetic to the right to strike, which the two men argued was legitimately qualified by law in various ways and could be freely waived by unions in collective bargaining.¹¹⁶ A less conspicuous but equally revealing example of this standpoint can be found in a 1950 article in the *American Bar Association Journal* by former NLRB lawyer George Rose, who inveighed that while the right to strike might be the “prerogative of all free peoples,” the right was not absolute.¹¹⁷ Rather, taking the empirically dubious but not-uncommon view that unions and employers were now roughly on par in economic power—a view that ironically rested on the idea that unions wielded massive power by their ability to strike—Rose claimed that the right to strike was burdened with layers of responsibility to the public.¹¹⁸ It was a prerogative that put unions and employers “on trial to demonstrate and confess the sincerity of their belief in the democratic process.”¹¹⁹ This was in many ways an injunction to both sides to allow disputes to result in strikes, if at all, with the understanding that these events would unfold like the steel strike that left Mary Heaton Vorse so surprised.¹²⁰ A few years later in the same journal, Rose attacked the “myth” that the notorious Taft-Hartley (Labor Management Relations) Act of 1947, which had radically amended the Wagner Act, was a “union busting” statute.¹²¹ He did this in part by insisting that despite Taft-Hartley’s

113. 272 U.S. 306 (1926).

114. *Id.* at 311.

115. Lynd, *supra* note 90, at 487.

116. See, e.g., Archibald Cox & John Dunlop, *Regulation of Collective Bargaining by the National Labor Relations Board*, 63 HARV. L. REV. 389 (1950). For a critical review of Cox and Dunlop on this score, see Lynd, *supra* note 90.

117. George Rose, *The Right to Strike: Is it an Inalienable Right of Free Men?*, 36 ABA J. 439, 521 (1950).

118. *Id.*

119. *Id.*

120. Vorse, *supra* note 104.

121. George Rose, *The Taft-Hartley Act: The Myth of the “Union-Busting,”* 40 ABA J. 398, 399 (1954).

dramatic impositions on the right to strike—matters we will turn to shortly—the statute somehow left that right in perfectly good standing.¹²²

Other scholars and commentators joined Cox, Dunlop, and Rose in suggesting that while the right to strike was a legitimate notion, it was subject to a number of equally legitimate constraints which, in pursuit of a functional system of labor rights, the courts, the Board, and the public should all take seriously.¹²³ In so doing, they also followed the courts and the NLRB, whose rulings hewed to a similar approach which confirmed the right to strike but, as we shall see more of shortly, qualified it by a slew of mandates to ensure that it was exercised responsibly, which is to say in line with newly reaffirmed notions of property and order.

There were some expressions of concern about the viability of the right to strike in this period, albeit enclosed less in worries about workers' immediate interests, which generally seemed to be advancing, and more in concerns about how those interests were being advanced and whether this could be sustained. For instance, George Rose's rather casual dismissal of Taft-Hartley's effects on labor rights was refuted in the same journal a year later by the prescient anticipations of a labor lawyer named Robert Gilbert, who predicted that the aggressive use of the statute's provisions would decimate union membership.¹²⁴ Likewise, in a 1960 speech at Yale Law School, New York labor lawyer Henry Mayer warned that the right to strike was being simultaneously "diluted" and threatened with displacement by a semi-corporatist system of government-managed labor disputes inconsistent with "democracy" and a "free society."¹²⁵ In fact, Mayer was one of a number of commentators who worried that the right to strike, and with it the independence of the labor movement, was being consumed by the era's turn to what others have called "soft corporatism" in the management of labor conflict.¹²⁶

Come the mid-1970s, though, there would be little further talk of the dangers of corporatism or industrial pluralism. For by then, the

122. *Id.*

123. See, e.g., Frank H. Stewart & Robert J. Townsend, *Strike Violence: The Need for Federal Injunctions*, 114 U. PA. L. REV. 459 (1966); William E. Pate, *The Effect of Strike Misconduct on Reinstatement Rights of Employees*, 15 J. PUB. L. 150 (1966); Note, *Strike Misconduct: An Illusory Bar to Reinstatement*, 72 YALE L.J. 182 (1962).

124. Robert W. Gilbert, *Taft-Hartley: A Method for "Union Busting,"* 41 ABA J. 25 (1955).

125. Henry Mayer, *Strategy of the Strike*, 11 LAB. L.J. 753, 754 (1960).

126. *Id.* at 754. On the concept of soft corporatism, see DAVIS STEBENNE, ARTHUR J. GOLDBERG: NEW DEAL LIBERAL 186 (1996). On concerns about this shift, see also William S. Hopkins, *Labor Relations Trends*, 4 LAB. L.J. 196 (1953).

labor movement found itself again locked in bitter conflicts not only over the terms of exploitation—wages and hours and the like—but increasingly over more fundamental issues, including the movement’s very right to exist in a meaningful way. Things had changed again and they had changed quickly. Driven by a transformed political economy that countenanced fewer concessions to workers, and that was backed by a new orthodoxy in economic thought, new approaches in management and management-side labor law practice, and new and powerful business lobbying institutions like the Business Roundtable (founded in 1972), employers resumed aggressively contesting union representation.¹²⁷

In prosecuting this approach, employers relied on both lawful tactics like hard bargaining, refusals to recognize unions without an NLRB-sponsored election, and aggressive antiunion propaganda, as well unlawful means, like firings of union organizers and the willful refusal to bargain in good faith. Workers responded with a wave of strikes which almost rivaled in numbers the big strike waves of the 1930s and 1940s.¹²⁸ But employers had ample means of countering these tactics. Invoking a prerogative that the Supreme Court (and the NLRB) had endorsed back in 1938—but which relatively few employers had used in the interim—they resorted with increasing frequency to the use of permanent replacement workers, thus presenting workers with the very real prospect of losing their jobs if they went out on strike.¹²⁹ Employers also invoked other rights under the labor law, as it now existed; they aggressively accused strikers of prohibited forms of misconduct, fired them, filed unfair labor practice charges against them with the NLRB, and enjoined them with court orders.¹³⁰

This change in circumstances set up a one-sided contest in which strikes were soon being defeated with such regularity that many employers embraced work stoppages as a weapon of their own. They began to provoke strikes (or resort to lockouts) as a method for destroying union representation and deterring workers from challenging them in any way. As this increasingly unequal struggle extended into the 1980s and 1990s, union membership plummeted, along with the influence of individual unions and the overall strength of the labor

127. LICHTENSTEIN, *supra* note 108, at 229–30; COWIE, *supra* note 107, at 230–32.

128. Press Release, Bureau of Labor Statistics, Work Stoppages Involving 1,000 or More Workers, 1947-2017 (Feb. 9, 2018), <https://www.bls.gov/news.release/wkstp.t01.htm> [https://perma.cc/67R7-22NK] [hereinafter Work Stoppages, 1947-2017].

129. *NLRB v. Mackay Radio & Telegraph Co.*, 304 U.S. 333, 345 (1938).

130. Ahmed A. White, *Workers Disarmed: The Campaign Against Mass Picketing and the Dilemma of Liberal Labor Rights*, 49 HARV. C.R.-C.L. L. REV. 59, 117–18 (2014).

movement.¹³¹ So did the number of strikes. It was at this point that strikes receded to levels which have not been seen since the birth of modern labor relations in post-bellum Industrial America, on their way to nearly disappearing entirely. Not coincidentally, the political and economic conditions of the working class, which had improved steadily in the postwar period, began to deteriorate—for some workers, very drastically.¹³²

As these developments unfolded, labor scholars began, yet again, to concern themselves in a different way with the right to strike. Viewing the decline in strikes as a major factor in the decline in the fortunes of the working class and the weakening of the labor movement, they bewailed this development; and they attributed it to a host of legal changes that seemed to have narrowed the circumstances under which workers could strike.¹³³ Of these there many ready objects of blame. There was the replacement worker doctrine, the so-called *Mackay Radio* rule, as well as the prerogative under the labor law to punish workers for supposed strike-related misconduct.¹³⁴ There was the enforcement of state and local criminal laws and civil liability, as well as the issuance of injunctions against strikers.¹³⁵ There was the multi-faceted prohibition on secondary boycotts. And there was, too, the doctrine—which evolved out of a trilogy of 1960 Supreme Court decisions involving the USWA and reached its apogee with a 1970 case, *Boys Market, Inc. v. Retail Clerks Union, Local 770*¹³⁶—which made it unlawful for workers to strike over any issue covered by an arbitration clause in a collective bargaining agreement, even if the contracts made no express waiver of this kind.¹³⁷ This all formed, together, a comprehensive legal assault on the right to strike, one that

131. On union membership in this period, see Megan Dunn & James Walker, *Union Membership in the United States*, U.S. BUREAU OF LAB. STATS. (Sept. 2016), <https://www.bls.gov/spotlight/2016/union-membership-in-the-united-states/pdf/union-membership-in-the-united-states.pdf> [<https://perma.cc/4V87-374L>].

132. There have been only about fifteen major “work stoppages”—strikes or lockouts involving more than 1000 workers—a year of the last ten years, compared to almost 290 a year in the 1970s, and over 280 a year in the 1960s. Work Stoppages, 1947-2017, *supra* note 128.

133. See, e.g., Getman & Marshall, *supra* note 14, at 703–05.

134. *Mackay Radio*, 304 U.S. 333.

135. Pope, *supra* note 94, at 98–99.

136. 398 U.S. 235 (1970).

137. *Id.* at 237–38. For a critical reflection on the case and doctrine surrounding it, see James B. Atleson, *The Circle of Boys Market*, 7 BERKELEY J. LAB. & EMP. L. 88 (1985).

lay at the root of the labor movement's travails in the latter decades of the twentieth century.¹³⁸

Significantly, in defending an effective right to strike against these impositions, the scholars who advanced this argument not only venerated the labor militancy of the New Deal period and (in some cases, at least) the years that immediately followed it; they also hewed to a framework that had predominated since the New Deal, one that saw the ability of workers to strike in an effective way as dependent on this prerogative's integrity *as a right*. In so doing, these scholars declined to indict liberalism and its legal system themselves for their reign over labor relations, even though, ironically, this critique has always been implicit in all the most important representatives of this work. Instead, theirs was necessarily an appeal to liberalism itself, one that asked as we shall see shortly, that it somehow renounce its own fundamental values in this realm in favor of the interests of workers, and use its legal system to implement this agenda. This attempt to defend labor's interests in liberal, legalistic terms might well have made sense if, as it presupposes, there had once been an effective right to strike which validated all these possibilities. But as it turns out, this supposition is highly problematic. For the kinds of strikes that built the labor movement in the 1930s and 1940s, and that these critics (for the most part) rightly anticipate seem necessary to save the movement today, were never really construable as rights anyway. At least not in any practical, enduring way, as a closer look at the reality of strikes from this period shows.

II. THE TRIUMPH OF EFFECTIVE STRIKES AND THE STILLBIRTH OF AN EFFECTIVE RIGHT TO STRIKE

The period from the mid-1930s until the enactment of the Taft-Hartley Act in 1947 represented the first time that American workers were able to strike effectively. In this period, as we have seen, strikes not only revived the labor movement, overthrew the open shop, and led to improved labor conditions for millions of workers, but also played a crucial role in effectuating the Wagner Act and validating the New Deal. However, this would be the only time that American workers could strike effectively. For even as effective strikes changed the world in all these ways, they could not validate themselves in law. Far from it, in fact. The very tactics that made these strikes effective—sit-down strikes and mass picketing, as well as, to some extent, other tactics like secondary boycotts—made them too disorderly and too

138. See, e.g., ATLESON, *supra* note 14; GETMAN, *supra* note 14; Pope, *supra* note 14; Klare, *supra* note 14; Getman & Marshall, *supra* note 14; White, *supra* note 14.

destructive to be certified or even tolerated in this fashion. The courts and the Congress, especially, saw to this. As a close review of this paradoxical and important turn in history makes clear, the triumph of effective strikes was in fact marked by the stillbirth of an effective right to strike.

A. Effective Strikes and the Law—from the Wagner Act to Taft-Hartley

Nowhere was this paradoxical turn clearer than in regard to the sit-down strikes. Although there had been sit-down strikes earlier in the century and a few earlier in the Depression era (including a prominent one in Austin, Minnesota in 1933 and a number of brief, “quickie” sit-downs in Cleveland and Toledo in 1934), the practice began to come into its own in 1936, when there were significant sit-downs in rubber factories and automobile parts and assembly plants in Ohio and Indiana.¹³⁹ The signature event of this sort was the great General Motors sit-down strike, which began on the second-to-last day of the year, 1936, in Flint, Michigan, and which forced that company—a leader in labor repression, an anchor of the open shop, and the largest corporation in the world—to recognize the UAW.¹⁴⁰

An electrifying episode that ranks among the most important events in American history, it was this strike that played the key role in influencing the Supreme Court to follow through in upholding the constitutionality of Wagner Act (and thus the entire New Deal) later that spring, in the landmark *Jones & Laughlin Steel* decision.¹⁴¹ The strike also sent to countless open shop employers a clear message that maybe the time had come to acknowledge the inevitability of unionism. Indeed, from many vantages, the militancy of the GM strike, combined with the fact that it was led by unabashed leftists, portended a general uprising against the rule of capital that was best preempted by sensible compromise.¹⁴²

One reason for this is that the GM strike was not the only affair of this kind at this crucial period in labor history. There were hundreds of sit-down strikes in the Second New Deal period, concentrated in the first half of 1937 and no doubt inspired in part by the GM strike. According to the U.S. Labor Department, approximately one in ten strikes—477 out of 4740—that year were sit-down strikes; in March

139. Louis Ademic, *Sit-Down: II*, 143 *NATION* 702, 702–04 (1936).

140. *Sit-Down Strike Begins in Flint*, *HISTORY* (Jan. 27, 2010), <https://history.com/this-day-in-history/sit-down-strike-begins-in-flint> [<https://perma.cc/SN5X-YL9X>].

141. *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937).

142. *Id.*; Pope, *supra* note 94, at 95–97; Hansen, *supra* note 99, at 49.

alone there were 170.¹⁴³ And they were decisive in defeating the open shop across a vast range of industries, including the manufacture of farm equipment, steel, and rubber; lumber and mining; ocean shipping; as well as a host of service industries.¹⁴⁴ A remarkable eighty percent were at least partially successful, despite their concentration at open shop firms that had most vigorously resisted labor rights, defied the Wagner Act, and had been the forefront of a concerted campaign to overturn the entire New Deal.¹⁴⁵ This reflected the enormous tactical advantages that these strikes conveyed in comparison to conventional strikes: they preempted the running of struck businesses, thus negating the demoralizing and resource-exhausting use of replacement workers; at a time when conventional picketers were often overwhelmed with armed force, they placed the strikers in defensible positions; they made hostages of the building and equipment of the struck business; and in a context where many workers were afraid to support unionism even if they agreed with it, the strikes could be executed by relatively small numbers of union stalwarts.¹⁴⁶

The sit-down strikes were never widely accepted as legitimate though, despite earnest and creative attempts by some unionists and their champions to justify them in legal terms.¹⁴⁷ Early on, many authorities elected not to challenge the strikers or else did so in clumsy or half-hearted ways.¹⁴⁸ The GM strike succeeded in part because neither the Roosevelt Administration nor state forces under the control of Michigan Governor Frank Murphy intervened forcefully to oust the strikers.¹⁴⁹ But later in 1937 strikes like these were increasingly suppressed by local and state police, who were armed not only with truncheons and gas, but with judicial injunctions and criminal laws that affirmed the struck employers' rights to exclude the workers.¹⁵⁰ In fact, such repression became more frequent and aggressive after the strikes compelled GM, Chrysler, and U.S. Steel (which abandoned the open shop in March 1937, in part out of fear of sit-down strikes) to abide their workers' labor rights, and after the *Jones & Laughlin* decision positioned the NLRB as a proper and functional venue for resolving

143. BUREAU OF LABOR STATISTICS, HANDBOOK OF LABOR STATISTICS: 1941 EDITION: BULLETIN NO. 694, at 338 (1942).

144. SIDNEY FINE, SIT-DOWN: THE GENERAL MOTORS STRIKE OF 1936-1937, at 327-31 (1969).

145. *Id.* at 332; PETER IRONS, NEW DEAL LAWYERS 243-47 (1993); BERNSTEIN, *supra* note 64, at 514-17.

146. FINE, *supra* note 144, at 121-22.

147. Pope, *supra* note 94, at 62-82.

148. *Id.* at 74-75, 88-91.

149. FINE, *supra* note 144, at 233-36.

150. Pope, *supra* note 94, at 88-90, 98-99.

labor conflicts.¹⁵¹ It seems clear that as the labor law gained validity and as the labor movement gained power, employers and their allies moved quickly to present themselves, not as lawless and immoral adversaries of hard-pressed workers, but as the victims of a legal regime and labor movement that imposed far too much on their rights and on the interests of the commonwealth. It is significant in this light that opponents of the strikes did not usually condemn or seek to break the sit-down strikes in the name of capitalist hegemony or in categorical defiance of the labor law. The strikes had to be suppressed, they said, deploying the rhetoric of open shop opponents of the right to strike, because they were unlawful violations of public order and the rights of property, and also because they transgressed the limits of legitimate labor rights.¹⁵²

Neither the text of the Wagner Act nor its legislative history addressed the question of sit-down strikes, or even the broader issue of the limits of strike militancy. Instead, there are a couple of relevant passages in the legislative history that deal with the question of coercion and criminality in general.¹⁵³ Among these is a statement by the act's main sponsor, Senator Wagner himself, in which Wagner denied that the statute should have been seen as establishing a separate police function.¹⁵⁴ "To saddle upon the National Labor Relations Board the duty to prevent 'coercion' by labor unions or employees would create a superfluous remedy for wrongs simply dealt with today by police courts and by injunctive relief in Federal and State courts," he said.¹⁵⁵ Moreover, such a move would threaten to overwhelm the NLRB and give "new congressional sanction to those many old decisions which have banned peaceful picketing, the mere threat to strike, and even the circularization of banners, on the ground that they were 'coercive.'"¹⁵⁶ And, he said, referring to the Norris-LaGuardia Act, it would force the worker back into the "bondage that existed before that humane piece of legislation was enacted."¹⁵⁷ But by the same token, Wagner and other sponsors of the legislation also insisted that the Wagner Act would do nothing to displace the authority of police and courts to deal with violence and unrest. Both House and Senate reports on the legislation subscribed to the view that "[t]he remedies against such acts in the State

151. *Id.* at 98–102.

152. *White, supra* note 14 at 26–60.

153. 79 CONG. REC. 9733 (1935), *reprinted in* 2 NLRB, LEGISLATIVE HISTORY OF THE NATIONAL LABOR RELATIONS ACT, 1935, at 3234 (1949).

154. *Id.* at 9734–35, *reprinted in* 2 NLRB, *supra* note 153, at 3233–34.

155. *Id.* at 9725, *reprinted in* 2 NLRB, *supra* note 153, at 3234.

156. *Id.*

157. *Id.*; *see also* 78 CONG. REC. 12,021 (1934), *reprinted in* 1 NLRB, LEGISLATIVE HISTORY OF THE NATIONAL LABOR RELATIONS ACT, 1935, at 1191 (1949); 79 CONG. REC. 7674 (1935), *reprinted in* 2 NLRB, *supra* note 153, at 2396.

and Federal courts and by the invocation of local police authorities are now adequate, as arrests and labor injunctions in industrial disputes throughout the country will attest.”¹⁵⁸

It requires but little critical judgment to see in this active deferral to the authority of police and courts a deference as well to the sanctity of property and order, at least in every practical sense. For the defense of these institutions has always been at the very center of what police and courts evolved to do. Such functions had defined what police and courts had done in the fields of labor conflict in the half-century preceding the New Deal. And despite limits imposed on courts by the Norris-LaGuardia Act,¹⁵⁹ this continued to be the case in the years immediately surrounding the enactment of the Wagner Act. Senator Wagner and his liberal colleagues no doubt knew this, just as they had to know that, if not the Wagner Act or the NLRB, nothing else was positioned to divert the police and the courts from these functions.

The full implications of these notions would soon be made evident. For several years in the late 1930s, the NLRB walked a thin line. It refused to categorically condemn the strikes as unlawful or to give them broad sanction.¹⁶⁰ Instead, deferring to the notion that it was not the agency’s business to censure the misconduct inherent in such strikes, it typically ordered fired sit-down strikers reinstated, provided their actions had been sufficiently provoked or were otherwise not excessively violent.¹⁶¹ The key example of this was a relatively extended and disorderly, though not especially bloody and altogether innocuous, sit-down strike at a small specialty steel manufacturer called Fansteel Metallurgical in suburban Chicago, in the winter of 1937.¹⁶² As was so often the case, the strikers seized the company’s property in a desperate bid to compel the company to abide their rights under the Wagner Act.¹⁶³ Armed with an injunction and a small army of police to enforce it, the employer eventually ousted them, fired many of them, and cooperated with the court in having dozens found in criminal contempt and thrown in jail.¹⁶⁴

What the strikers had done was wrong, the agency notably conceded; but a balancing of the equities and the need to effectuate the

158. H.R. REP. NO. 74-969, at 14–15 (1935), *reprinted in* 2 NLRB, *supra* note 153, at 2924; *see also* 79 CONG. REC. 9683 (1935), *reprinted in* 2 NLRB, *supra* note 153, at 3112.

159. Norris-LaGuardia Act of 1932, 29 U.S.C. § 101 (2012).

160. White, *supra* note 14, at 37–38, 50–51.

161. *See, e.g., McNeely & Price Co.*, 6 N.L.R.B. 800 (1938); *Kuehne Mfg. Co.*, 7 N.L.R.B. 304 (1938); *Elec. Boat Co.*, 7 N.L.R.B. 572 (1938).

162. White, *supra* note 14, at 26–28.

163. *Id.* at 27.

164. *Fansteel Metallurgical Corp.*, 5 N.L.R.B. 930, 942–43 (1938); White, *supra* note 14, at 27–38.

purposes of the Wagner Act and abide its prohibition on firing workers for going out on strike, mandated that it order the strikers' reinstatement. In line with its usual approach, the agency disclaimed giving any general sanction to sit-down strikes.¹⁶⁵ It admitted refusing to reinstate strikers in other cases involving criminal behavior, including some sit-down strike cases, but insisted those were more serious cases than the one at hand. That thirty-seven strikers (and two union organizers) in this instance were jailed and fined for criminal contempt of a judge's order to quit the plant was, in the agency's view, not really its business—even though this concession made it someone else's business to moot everything the NLRB might do for these workers.¹⁶⁶

The case made its way to the Supreme Court.¹⁶⁷ In an opinion by Chief Justice Charles Evans Hughes, the Court rejected the NLRB's attempt to justify the strikers' reinstatement.¹⁶⁸ Hughes' decision was a comprehensive defeat for the strikers and the NLRB.¹⁶⁹ They were not entitled to reinstatement and their firing deprived the union of any claim to represent a majority of workers at the plant, putting to rest any claim that the employer was bound to recognize and bargain with the union—the very things that led to the strike in the first place.¹⁷⁰ Hughes' reasoning rested firmly on the inviolate nature of the employer's property rights and the importance of order, which he used to brush aside the NLRB's reasoning that its decision to order the reinstatement of the strikers rested on its expertise and its careful balancing of the equities in a case involving two sides that had done wrong.¹⁷¹ In Hughes' view,

the ousting of the owner from lawful possession is not essentially different from an assault upon the officers of an employing company, or the seizure and conversion of its goods, or the despoiling of its property, or other unlawful acts in order to force compliance with demands. To justify such conduct because of the existence of a labor dispute or of an unfair labor practice would be to put a premium on resort to

165. *Fansteel*, 5 N.L.R.B. at 949.

166. *Id.* at 949-50. On the tally of punishments imposed on the strikers and organizers, see *Fansteel Metallurgical Corp. v. Lodge 66*, 14 N.E.2d 991, 992 (Ill. App. Ct. 1938).

167. *NLRB v. Fansteel Metallurgical Corp.*, 306 U.S. 240 (1939).

168. *Id.*

169. *See id.*

170. *Id.* at 258, 262.

171. *Id.* at 252-53.

force, instead of legal remedies, and to subvert the principles of law and order which lie at the foundations of society.¹⁷²

“Nor is it questioned that the seizure and retention of respondent’s property were unlawful,” he wrote.¹⁷³ “It was a high-handed proceeding without shadow of legal right.”¹⁷⁴

NLRB v. Fansteel was not unanimous.¹⁷⁵ But Justice Stanley Reed’s dissent, which attempted to uphold the NLRB’s reinstatement of the strikers, actually represented a different way of deferring to similar values.¹⁷⁶ For Reed, the issue in *Fansteel* was not whether the strikers had acted legally, for they had not, but rather whether the Court should second-guess the NLRB’s authority to sort out the equities in cases, like this one, where both parties had “erred grievously.”¹⁷⁷ As Reed appreciated, there could be no justifying what the strikers had done—not in law, at least, and not before courts that deferred, above all, to the sanctity of property and order.¹⁷⁸ Although the question of how far state and local authorities could go in regulating strikes without being preempted by the federal labor law was also not quite settled in these early years, there was little doubt that they enjoyed considerable authority to suppress the sit-down strikes by police action. By the 1950s, it would be completely clear that states faced almost no impediments at all in this regard—not when dealing with threats to property and order.¹⁷⁹

Above all, *Fansteel* established the illegality and unprotected character of sit-down strikes. In its wake, employers fired hundreds of strikers and police and other authorities accelerated their suppression of the strike.¹⁸⁰ But *Fansteel* also had a broader relevance. It made clear that strikes in violation of state law, particularly those in violation of state criminal laws, were illegitimate and that those who participated in them were at least presumptively unprotected from discharge. Likewise, beyond extending the ruling in *Fansteel* to seamen, the Court’s decision in *Southern Steamship Co. v. NLRB*¹⁸¹ three years later had the broader effect of establishing that strikes in violation of federal laws or “policies”—in this instance, an archaic mutiny statute, enacted

172. *Id.* at 253.

173. *Id.* at 252.

174. *Id.* at 252.

175. *See id.* at 263 (Stone, J., concurring in part); *see also id.* at 265 (Reed, J., dissenting in part).

176. *See id.* at 267–68 (Reed, J., dissenting in part).

177. *Id.* at 267 (Reed, J., dissenting in part).

178. *Id.* (Reed, J., dissenting in part).

179. White, *supra* note 130, at 107–08.

180. Pope, *supra* note 94, at 107.

181. 316 U.S. 31 (1942).

a century before the Wagner Act and invoked (the strikers never faced any charges of this kind) in the case of peaceful, dockside strikers who, in protesting their employer's flagrant violation of their labor rights, simply refused to make the ship ready to sail—were also illegal and unprotected.¹⁸²

In that case, too, the dissenters among the Supreme Court justices, in line with the NLRB itself, did not deign to suggest that the strikers had a right to seize the ship, let alone do so in a disorderly way; rather, they hinged their argument on the assertion that the strike was not a seizure, not disorderly, and of course not a sit-down strike within in the meaning of *Fansteel*.¹⁸³ And yet even this argument failed in the face of a political and juridical reality, embraced by the Court's majority in that case, too, that labor rights are subordinate to property rights and the right of employers to own and control their workplaces.¹⁸⁴

Indeed, the federal courts were hardly alone in taking such a stance. State courts, too, condemned sit-down strikes in exactly the fashion of Justice Hughes. In 1939, for instance, in a case involving an injunction against a "one man sit-down strike" on an oil rig, the Oklahoma Supreme Court cited *Fansteel*, noting that the strike in that case did not involve

the exercise of "the right to strike" to which the [Wagner] Act referred. It was not a mere quitting of work and statement of grievances in the exercise of pressure recognized as lawful. It was an illegal seizure of the buildings in order to prevent their use by the employer in a lawful manner and thus by acts of force and violence to compel the employer to submit.¹⁸⁵

Because the strike in *Fansteel* was unprotected, so was this one-man strike.¹⁸⁶

Mass picketing was also an integral, though often overlooked, factor in the remarkable expansion of labor rights and union representation in the Depression era and in the years that followed it. Though somewhat less dramatic this practice was also far more common and persisted for much longer than the sit-down strikes. On countless occasions in the 1930s and 1940s, strikers gathered in large numbers, sometimes even in the hundreds or thousands, at struck businesses.¹⁸⁷ By their teeming and often threatening presence,

182. *Id.* at 43, 48; White, *supra* note 14, at 331–36.

183. *S. S.S. Co.*, 316 U.S. at 50 (Reed, J., dissenting).

184. White, *supra* note 14, at 334; *see also* White, *supra* note 14, at 61–77.

185. *Holland v. Minnehoma Oil & Gas Co.*, 89 P.2d 764, 766 (Okla. 1939).

186. *Id.*

187. White, *supra* note 130, at 69–71.

picketers were consistently able to deter the use of scabs and shutter struck businesses, thereby impressing fence-sitting workers with the strength of their movement and forcing employers to respect their rights under the labor law and meet their terms in collective bargaining.¹⁸⁸ Like sitting down on the job, mass picketing was a strike-winning tactic.¹⁸⁹

No better example can be found than in the conflict that followed at Jones & Laughlin Steel Company itself, after the Supreme Court rejected the company's challenge to the constitutionality of the Wagner Act.¹⁹⁰ The Court's decision, handed down April 12, 1937, came in the middle of a drive by CIO unionists to organize the company's two big steel plants in Pennsylvania.¹⁹¹ Marked by relentless, sometimes violent resistance on the part of the company, this push for unionization was hardly settled by that decision, the main import of which was simply that the Wagner Act was constitutional. Instead, in keeping with the logic of the Wagner Act, the Court's decision left the matter to be decided by the relative economic strength of the parties. And so it was, as the conflict devolved into a massive strike focused at the company's plant in Aliquippa and occurring about a month after the Court's decision.¹⁹² Thousands of unionists turned out.¹⁹³ Armed with clubs and sticks, they blocked all entrances and forced the massive complex to close down.¹⁹⁴ Unable to break the siege despite the formidable means of labor repression at their disposal, and fearful the company would be driven out of business if they did not end the strike and reopen soon, company leaders capitulated.¹⁹⁵ They agreed to sign a favorable collective bargaining agreement contingent on the outcome of an NLRB-sponsored election, held several weeks later, which the union won decisively.¹⁹⁶

Mass picketing on a comparable scale was used to press big industrial employers in other cases in the late 1930s and early 1940s. A strike at General Motors in Cleveland in the summer of 1938 saw 8000 picketers turn out; and a series of walkouts at Bethlehem Steel in Lackawanna, New York, and Bethlehem, Pennsylvania, in early 1941, involved several thousand workers who cordoned those plants and

188. *Id.*

189. *Id.* at 73–86.

190. *Id.* at 76–77.

191. *Id.* at 76.

192. *Id.* at 77.

193. *Id.*

194. *Id.*

195. *Id.*

196. BERNSTEIN, *supra* note 64, at 672–75.

battled police and employees loyal to the company.¹⁹⁷ It was in the spring of 1941, too, that UAW organizers succeeded in cordoning Ford Motor's massive River Rouge plant in Dearborn, Michigan (then the largest factory in the world) with several thousand strikers, and forcing that company, which had stubbornly and violently adhered to the open shop for several years longer than most other big mass production employers, to finally agree to union representation.¹⁹⁸

Alongside these really big episodes of mass picketing were hundreds, probably thousands, of smaller occurrences. Indeed, mass picketing was a hallmark of Depression-era labor conflict, when the practice extended throughout the country and stretched across a broad range of industries, from oil refining and ship-building, to retail and newspapers, to industrialized agriculture, to government services. And unlike the sit-down strikes, which became far less frequent after the *Fansteel* decision, mass picketing remained common in the 1940s, when it played a key role in the tremendous upsurge in strikes that attended the end of the Second World War.¹⁹⁹ During this period there were notable episodes in electrical equipment manufacturing, motion pictures production, aircraft and farm equipment manufacturing, public transit, and retail. In fact, every industry that featured a significant degree of labor conflict in the late 1930s and early 1940s—and most did—was the scene of considerable mass picketing along with a fair number of secondary boycotts and more than a few episodes of picket-line violence.²⁰⁰ One would be hard pressed to find any important labor disputes in the 1930s and 1940s, besides some of the sit-down strikes, in which mass picketing did not feature prominently.

Like the sit-down strikes, mass picketing was also reviled by business interests and elites and regularly interdicted by local and state authorities, who repeatedly used injunctions and arrests to break up the protests. As with the sit-down strikes, they were able to intervene in this way because the NLRB never really claimed to have preempted their authority to do so. In some instances, picketers were read the riot act before being routed by police.²⁰¹ Serious violence was relatively uncommon, particularly come the 1940s. But it was not unheard of. One of the deadliest events in American labor history, the 1937 “Memorial Day Massacre,” which occurred in the first days of the Little Steel Strike, resulted from an attempt by the Chicago police to enforce their ban on mass picketing at a struck plant owned by Republic Steel Corporation. Ten unionists were killed and about 100 injured

197. White, *supra* note 130, at 80–81.

198. *Id.* at 80–82.

199. *Id.* at 78–79.

200. *Id.* at 82–86.

201. *Id.* at 85–86.

when, without any real provocation, the police opened fire on a crowd of strikers and sympathizers.²⁰² There would be no mass picketing at that plant. Moreover, the strike itself, which extended across seven states and involved over 70,000 workers was defeated in large part because within weeks of the Memorial Day Massacre, authorities had succeeded in proscribing mass picketing nearly everywhere.²⁰³ After some initial success, the strikers were ultimately unable to use the tactic to close or keep closed the plants operated by Republic and the three other struck companies. Continued repression by heavily armed company police, judicial injunctions, and the intervention of public authorities saw to this. And so they lost, although not before six more unionists were killed. The result was a crucial turning point in labor history, as it marked the last time that the labor movement relied on a militant, industry-wide strike as an organizing tool.²⁰⁴

On the question of the legality of mass picketing, too, the NLRB prevaricated. With its punitive and injunctive authority limited at the time to sanctioning employers and not unions or their agents, the agency did occasionally decline to protect mass picketers from reprisals by employers, although usually because they not only picketed in large numbers but engaged in overt violence. In a few notable cases, the NLRB rejected the view that merely having participated in mass picketing or other unruly protests necessarily disqualified workers from the benefits of the labor law.²⁰⁵ An oft-cited example of this sentiment can be found, for instance, in the Third Circuit's published opinion in its review of the main NLRB case against Republic Steel, in which the court rejected the company's view that thousands of strikers fired at the end of the Little Steel strike were disentitled to reinstatement because of their alleged involvement in strike violence related to mass picketing and other instances of picket-line militancy.²⁰⁶

We think it must be conceded, however, that some disorder is unfortunately quite usual in an extensive or long drawn out strike. A strike is essentially a battle waged with economic weapons. Engaged in it are human beings whose feelings are stirred to the depths. Rising passions call forth hot words. Hot words lead to blows on the picket line. The transformation from economic to physical combat by those engaged in the

202. Carol Quirke, *Reframing Chicago's Memorial Day Massacre*, 60 *AM. Q.* 129, 134 (2008).

203. White, *supra* note 130, at 61.

204. WHITE, *supra* note 78, at 130-46.

205. *Republic Steel*, 9 N.L.R.B. 219 (1938); *Republic Steel v. NLRB*, 311 U.S. 7 (1940).

206. *NLRB v. Republic Steel*, 107 F.2d 472, 479 (3d Cir. 1939).

contest is difficult to prevent even when cool heads direct the fight. Violence of this nature, however much it is to be regretted, must have been in the contemplation of the Congress when it provided in Sec. 13 of the [Wagner] Act, 29 U.S.C.A. § 163, that nothing therein should be construed so as to interfere with or impede or diminish in any way the right to strike. If this were not so the rights afforded to employees by the Act would be indeed illusory.²⁰⁷

This remarkable expression of judicial realism represents a high-water mark of judicial tolerance of disorder and violence in the context of the right to strike—on par with Governor Frank Murphy’s equally remarkable refusal to use the National Guard to oust the General Motors sit-down strikers in the winter of 1937, which was so vital to the union’s victory in that strike.²⁰⁸

But in saying this, of course, the Third Circuit was not saying that violent protests were, perforce, legitimate. Instead, it was merely agreeing with the NLRB, which, as in *Fansteel*, was keen to justify reinstating these strikers without justifying the kind of strike they engaged in.²⁰⁹ In fact, in those mass picketing cases where it did order strikers reinstated, the NLRB not only balanced the disorder and violence of their protest against the employer’s culpability in causing the strike. Consistent with this view, it also condemned the strikes themselves as unfortunate episodes that would not arise under a well-functioning system of labor rights—albeit, it should be noted, without giving much thought to how the labor law would function if it turned out that workers needed to resort to mass picketing to strike effectively. As with sit-down strikes, too, even when the NLRB ordered strikers reinstated, it was content to let the police and criminal courts assert their authority as well.²¹⁰

These moves left the NLRB a long way from justifying or legitimating mass picketing, particularly where it was violent or disorderly. But they did not please the courts, which soon rejected the implication of *Thornhill*, that strike-related protests were broadly protected by the First Amendment, in favor a much more restrictive view that not only accepted the authority of police and prosecutors to

207. *Id.*

208. Sidney Fine, *The General Motors Sit-Down Strike: A Re-examination*, 70 AM. HIST. REV. 691, 702 (1965).

209. *Republic Steel*, 9 N.L.R.B. 219.

210. See, e.g., *Precision Casting*, 48 N.L.R.B. 970 (1943); *Sun Shipbuilding & Dry-Dock Co.*, 38 N.L.R.B. 234 (1942); *Wilson & Co.*, 26 N.L.R.B. 1353 (1940); cf. *Indus. Rayon Corp.*, 7 N.L.R.B. 878 (1940).

restrain disorderly or coercive strikes, but resurrected the courts' own authority to enjoin strikes that were transgressive in these ways.²¹¹

A similar dynamic unfolded in regard to secondary boycotts. A technical term for labor protests, especially strikes, that implicate so-called neutral parties in a labor dispute, secondary boycotts had been a common basis or pretext of labor injunctions in the late nineteenth and early twentieth centuries.²¹² But while they continued to occur with fair frequency in the 1930s and 1940s, they were not as common as mass picketing nor as sensational as sit-down strikes. The tactic was important, though. A practical way to concentrate workers' influence, secondary boycotts were reviled by employers as an expression of solidarity that threatened to evolve into the apocalyptic sum of employers' fears, the general strike. And so they needed to be restrained.

Like sit-down strikes and mass picketing, too, secondary boycotts were not directly regulated by the Wagner Act. Rather, the policing of them was left to others besides the NLRB, particularly judges, both state and federal. Between 1935 and 1947, the tactic was only mentioned four times in published NLRB cases; but over that same period, it was the subject of well over 100 reported judicial opinions, most of them concerning injunctions. Here, though, earlier changes in the law had somewhat confused matters. For in trying to rein in the tactic, courts and employers navigated a landscape that had been left rather more muddled by the Norris-LaGuardia Act and dozens of state laws on injunctions, than had the terrain surrounding overtly disorderly or trespassory kinds of labor protest.²¹³ But suffice it to say that neither these laws nor the Wagner Act prohibited courts from intervening.

In the decade after the Wagner Act was passed, the courts repeatedly expressed their hostility to all these abuses of the right to strike. They invoked the same reasoning as many pre-New Deal courts, framing their opposition as a stance against violence, whether it was manifest or not. For instance, in 1947 the Wisconsin Supreme Court, in the course of upholding contempt proceedings against militant strikers in an ongoing conflict at equipment manufacturer Allis-Chalmers, inveighed that

[t]he right to strike is a valuable right which not only the Congress and Legislatures of the various states but the courts, Federal and State, have sought to guard and protect, but the

211. White, *supra* note 130, at 104–11.

212. Forbath, *supra* note 31, at 1150.

213. On the state of the law of secondary boycotts in this period, see for example, Robert C. Barnard & Robert W. Graham, *Labor and the Secondary Boycott*, 15 WASH. L. REV. 137 (1940).

right to strike does not include the right to commit assaults, destroy property, deprive other people of the right to earn their living in the place where they are employed.²¹⁴

The year before, the Indiana Supreme Court employed very similar rhetoric in a case involving criminal charges against a striker charged with pushing around a worker who attempted to get through a picket line.²¹⁵ Citing other precedent, the court declared simply that

the right to strike and the right to picket do not include the right to block entrances and by force, or threats of force, deny other persons the right to go in or upon their own property or to enter the premises to which they have been invited, expressly or by implication.²¹⁶

As was the case with the sit-down strikes, the courts' position in such cases reduced to the idea that injunctions, criminal charges, and the like, which limited mass picketing or other affronts to property or disorder, were not in the least bit inconsistent with the right to strike—they were complements of it, in its legitimate incarnations, at least.²¹⁷

Nor was it only courts that took this position. Dozens of states in this period legislated their own limits on labor rights, including, in this period before federal preemption doctrine was much settled, rights otherwise covered by the Wagner Act.²¹⁸ And mostly they sought in this way to limit labor rights, enacting laws that constrained the right picket, to engage in secondary boycotts, or to strike. And as with the courts, the legislatures consistently justified these moves as mandates of public safety and social order.²¹⁹

In the year following *Jones & Laughlin*, Congress had considered scores of bills intended to limit labor rights, including the right to strike.²²⁰ The central theme in these efforts was the supposed need to restrict labor militancy, including the now-rare and clearly unlawful sit-down strikes, as well as mass picketing and secondary boycotts.²²¹ The

214. *Wis. Emp't Relations Bd. v. Allis-Chalmers Workers' Union, Local 248*, 30 N.W.2d 183, 186–87 (Wis. 1947).

215. *Blue v. State*, 67 N.E.2d 37 (Ind. 1946).

216. *Id.* at 379.

217. *See, e.g., Carnegie-Ill. Steel Corp. v. United Steelworkers of Am.*, 45 A.2d 857, 864 (Penn. 1946).

218. H.A. Millis & H.A. Katz, *A Decade of State Labor Legislation: 1937-1947*, 15 U. CHI. L. REV. 282, 282 (1948).

219. *Id.* at 295–304; HARRY A. MILLIS & EMILY CLARK BROWN, FROM THE WAGNER ACT TO TAFT-HARTLEY: A STUDY OF NATIONAL LABOR POLICY AND LABOR RELATIONS 332–33, 337–38 (1950).

220. White, *supra* note 130, at 88–90.

221. *Id.*

hearings concerning these efforts featured lurid testimony about these tactics and their violence as well as their impositions on property rights.²²² None of these bills were enacted though, at least not at first. Although the New Deal was dead as a political movement, Congress was still largely controlled by Democrats and labor-friendly liberals like Robert Wagner still wielded considerable influence. Moreover, the war was producing for big capitalists enormous windfall profits that were underwritten by the government, making them reluctant to press too hard for reforms. And of course the war was an important distraction in its own right, one whose urgency counseled against generating the kind of rancor that serious revision of the Wagner Act would produce. Nevertheless, a change was at hand. The few bills that sought to better protect labor rights, like the Oppressive Labor Practices Act, first proposed in 1939, also got nowhere. And meanwhile, all this anti-labor legislation and the hearings conducted in support of it established a record on which further efforts could be based while also subjecting the NLRB to effective pressure to limit its tolerance of union militancy.²²³

By 1947, these pressures had resulted in the removal of most leftists from the NLRB and the agency's retreat from many of its more labor-friendly decisions concerning the right to strike.²²⁴ By this time, too, the war was over and the Congress was dominated by business-friendly Republicans and Democrats. That summer, Congress easily enacted one of the most important statutes of the twentieth century, the Taft-Hartley Act, which significantly amended and augmented the Wagner Act.²²⁵ Among sections of the "Slave Labor Act," as unionists called it,²²⁶ were several that restricted mass picketing and other forms of strike militancy. Section 8(b)(1)(A), one of a host of provisions establishing, for the first time, unfair labor practices that could be

222. *Id.*; see also *Labor Disputes Act of 1946: Hearings on H.R. 4908 Before the Subcomm. of the S. Comm. on Educ. & Labor*, 79th Cong. (1946); H.R. REP. NO. 1902 at 59–60 (1940); *National Labor Relations Act: Hearings on H.R. 258 Before the H. Special Comm. to Investigate Nat'l Labor Relations Bd.*, 76th Cong. 59–60 (1940); *Proposed Amendments to the National Labor Relations Act: Before the H. Comm. on Labor* (1940); *National Labor Relations Act and Proposed Amendments: Hearings on S. 1000, S. 1264, S. 1392, S. 1550, S. 1580, & S. 2123 Before the S. Comm. on Educ. & Labor* (1939).

223. The one exception to this was the enactment of the War Labor Disputes (Smith-Connally) Act in 1943, which banned wartime strikes. Pub. L. No. 78-89, 57 Stat. 163 (codified at 50a U.S.C. § 1501).

224. MILLIS & BROWN, *supra* note 219, at 244–45.

225. Labor Management Relations (Taft-Hartley) Act of 1947, Pub. L. 80-101, 61 Stat. 136 (codified at 29 U.S.C. §§ 141-197 (2012)).

226. Jack Barbash, *Chapter 6: Unions and Rights in the Space Age*, U.S. DEP'T OF LABOR, <https://www.dol.gov/general/aboutdol/history/chapter6> [<https://perma.cc/R7XH-UZCK>].

charged against a union or its agents,²²⁷ made mass picketing subject to injunction by the Board. This provision was also enacted with the understanding that it be construed to establish the outer boundaries of “protected” conduct on the part of strikers, regardless of whether their conduct was, or even could be, prosecuted as an unfair labor practice. This provision was embedded in a broader condemnation of “misconduct” which encompassed strike violence and coercion of all kinds. The changes in the law directed at mass picketing prohibited any kind of conduct in the course of picketing or striking that was substantially coercive. No overt violence or threat of violence is necessary. The anticipation or apprehension of such is more than enough.²²⁸ Notably, all this was done with specific reference to cases like those arising from the Little Steel Strike (as well as, by extension, the sit-down strikes) in which the agency had not, in the Congress’ view, been sufficiently protective of public order and private property.²²⁹

This change in the law works in hand with another, in particular Taft-Hartley’s amendments to § 7 of the Wagner Act, its normative center, to qualify the basic labor rights that the Wagner Act had accorded workers (the right to form unions, to provoke collective bargaining, and to protest as by striking) so as to include a right of workers to refrain from such activities and to dissent from their fellow workers’ expressions of solidarity. It is this right that the prohibition of strike-related misconduct usually directly protects, and from which the labor law’s protection of employers from strike militancy derives.

Besides prohibiting strikes on the basis of misconduct or other judgments about how they are conducted, the Taft-Hartley Act also affirmed the labor law’s antipathy to some strikes on the basis of the overall circumstances under which they are undertaken. A good example of this can be found in the law’s prohibition of secondary boycotts, a tactic that, despite not being inherently violent in any way, nor dependent on any express intrusion on property rights, had long been condemned for being both. Section 8(b)(4) of the Taft-Hartley Act imposed a broad ban on secondary boycotts, thus effectively prohibiting sympathy strikes and general strikes.²³⁰ Such strikes were made enjoinable, subject to damage lawsuits, and made the bases for the discharge of workers who participated in them. Nor did Taft-Hartley’s assault on the right to strike stop there. Section 8(d) limited the circumstances under which strikes could be launched during the term of

227. Labor Management Relations (Taft-Hartley) Act of 1947 § 8(b)(1)(A).

228. White, *supra* note 130, at 111–15.

229. *Id.* at 88–102.

230. Labor Management Relations (Taft-Hartley) Act of 1947 § 8(b)(4).

a collective bargaining agreement.²³¹ Sections 206 through 210 established procedures by which a strike affecting national security could be suspended and subjected to compulsory investigation, mediation, and settlement.²³²

In fact, it is both lucky for the labor movement and revealing of what Taft-Hartley actually represented that the statute did not go even further on these fronts. The bill that passed the House specifically barred a long list of unlawful forms of “concerted activity,” including the use of force to impede passage on picket lines as well as sit-down strikes, sympathy strikes, and other “concerted interference with an employer’s operations.”²³³ Violation of these proscriptions would have subjected those responsible to civil lawsuit and “deprivation of rights” under the labor laws, including the right to reinstatement. Economic strikes, which is to say all strikes not motivated by employers’ violations of the labor law, would have been barred, too, unless the workers involved voted to approve the strike and the strike adhered to notice and “cooling off” requirements. Evidently, the preferences of moderate Congressmen, their fear of provoking a Presidential veto (which occurred anyway), and their unwillingness to offend more moderate unionists who otherwise accepted some of the reforms prevented these provisions being adopted in conference.²³⁴ In this light, they might have been seen as further proof of the fundamentally unexceptional politics of the statute that was finally enacted.

B. The Law and the Outlawing of Strike Militancy

This program of antiunion reform was dramatic and its inroads on the right to strike stark. But it was not the revolution that many have assumed it to be. As Chris Tomlins has pointed out, and as Harry Millis and Emily Clark Brown did before him, Taft-Hartley in many ways codified and federalized limitations on labor rights, including the right to strike, that had been set in place over the decade preceding its enactment.²³⁵ Witnesses *against* the act emphasized this; they consistently premised their opposition to the legislation on the fact that sit-down strikes were already unlawful, that mass picketing was already being reined in by police enforcing state and local laws of general

231. § 8(d).

232. §§ 206–210.

233. H.R. 3020, 80th Cong. § (2)(13).

234. MILLIS & BROWN, *supra* note 219, at 382–84; H.R. 3020, § 12, 80th Cong. (1947), *reprinted in* 1 NLRB, LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT, 1947 (1948).

235. CHRISTOPHER TOMLINS, THE STATE AND THE UNIONS: LABOR RIGHTS AND THE ORIGINS OF THE LABOR MOVEMENT IN AMERICA, 1880-1960, at 197–243 (1985); MILLIS & BROWN, *supra* note 219, at 316–62.

application, and that the states had gone a long way toward directly barring the practice with their own collective bargaining laws—“Baby Wagner Acts”; with laws that specifically criminalized mass picketing; and with state court injunctions.²³⁶ Not unlike the NLRB in the sit-down strike and mass picketing cases, and not unlike the judges who sympathized with it in those cases, these opponents of Taft-Hartley also knew that there was no hope of successfully defending the fundamental legitimacy of these tactics; and so, instead, they hoped to convince the Congress that further legislation was simply unnecessary. This of course did not work.

Nor were opponents of the statute successful in preventing the Congress from codifying the rule that employers could fire workers who struck in violation of the terms of their collective bargaining agreement.²³⁷ Earlier in the 1940s, the NLRB had expanded on the principle that illegal strikes motivated by an unlawful objective, like that of challenging the agency’s authority to “certify” another union, were unprotected. This principle, too, was affirmed by the new law.²³⁸ This, too, tends to confirm the degree to which the new statute conformed to already-dominant norms about labor rights.

In the wake of Taft-Hartley, other limits on the right to strike emerged. In the 1950 case *Elk Lumber*,²³⁹ the NLRB ruled that an employer could discharge strikers who engaged in a slowdown, even though such strikes were not illegal under the Taft-Hartley Act.²⁴⁰ In other cases, the NLRB and the courts also determined that strikers who engaged in so-called hit-and-run tactics were unprotected, even if they had minimal knowledge of the nature of those tactics.²⁴¹ And then later that decade, the Taft-Hartley amendments were augmented by several provisions of the Labor-Management Reporting and Disclosure (Landrum-Griffin) Act of 1959.²⁴² In addition to imposing myriad administrative burdens on unions and toughening Taft-Hartley’s prohibition on secondary boycotts, Landrum-Griffin added § 8(b)(7), which barred most picketing for the purpose of organizing or pressing an employer to recognize a union.²⁴³

236. White, *supra* note 130, at 102–10.

237. *NLRB v. Sands Mfg.*, 306 U.S. 332 (1939); *Am. News Co.*, 55 N.L.R.B. 1302 (1944).

238. See, e.g., *Columbia Pictures*, 64 N.L.R.B. 490 (1945); see also MILLIS & BROWN, *supra* note 219, at 316–32; White, *supra* note 130, at 102–04.

239. 91 N.L.R.B. 333 (1950).

240. *Id.*

241. See, e.g., *NLRB v. S. Silk Mills*, 209 F.2d 155 (6th Cir. 1953).

242. Labor Management Reporting and Disclosure (Landrum-Griffin) Act of 1959, 29 U.S.C. ch. 11, §§ 401–531 (2012).

243. § 8(b)(7).

It was around the time of Landrum-Griffin that still another important limitation on the right to strike began to take shape—the doctrine eventually centered on the *Boys Market* decision.²⁴⁴ Premised on the pluralistic ideas that labor unions were essentially equal in bargaining power to employers and could therefore meaningfully bargain away the § 7 and § 13 rights of their members, and imbued with the idea that that strikes were fundamentally undesirable alternatives to more peaceful means of resolving labor conflict, the new doctrine established that strikes were also illegal if they occurred over issues submitted by collective bargaining agreements to arbitration, even in the absence of any particular provision in the contract prohibiting such strikes.²⁴⁵ Strikes of this sort could therefore be enjoined and those who engaged in them could be fired by their employers without recourse. As critics have pointed out, this doctrine was nowhere mandated by the terms of the Wagner Act or even Taft-Hartley or Landrum-Griffin and seemed to violate the Norris-LaGuardia Act. It was invented by the courts—and particularly by liberal justices of the Warren Court, including, quite revealingly, Justices William Brennan and William O. Douglas.²⁴⁶

What emerged from all of this was a right to strike that was remarkable for how little it permitted beyond the prerogative to quit work and publicize grievances. To quote labor scholar Jack Getman and former Labor Secretary Ray Marshall, together these reforms had the effect of making “strikes and picketing unlawful or unprotected in virtually all situations other than a strike by a recognized union to achieve a new collective bargaining agreement or a strike to protest an employer’s unfair labor practice. Even in these situations, strikers can [often] be permanently replaced.”²⁴⁷ What Getman and Marshall might also have noted is the ironic degree to which these limits on the right to strike, drastic though they were, remained firmly within a framework of government-sponsorship of the right to strike inaugurated by § 7(a) and the Wagner Act in the first place. What the government gave, it could take away; what it protected, it could leave unprotected.

Of course, to say this begs the question, why had these tactics ever been tolerated in the first place? And why did the law need to change to rein them in? The answer, which our account already anticipates, consists of several factors. One of these was the specific politics of the New Deal itself, of a sort already anticipated in this story. When the NLRB decided key cases like *Fansteel*, *Jones & Laughlin*, and *Republic*

244. *Boys Market, Inc. v. Retail Clerks Union, Local 770*, 398 U.S. 235 (1970).

245. *Id.*

246. For a critical review of this doctrine, see Atleson, *supra* note 137.

247. Getman & Marshall, *supra* note 14, at 718.

Steel,²⁴⁸ important positions at the agency, including two of three board members, were held by Communist sympathizers, Socialists, and other pro-labor leftists who had managed to take up these posts in an agency that few thought would survive long anyway. Their presence comported with the most progressive feature of the Roosevelt Administration, which was its willingness to accommodate a measure of political pluralism, decentralization, and experimentation across various branches of government. Within a few years, the NLRB's leftists would all be purged and the agency would never again be so influenced by the likes of them.²⁴⁹ In hindsight, this was inevitable, as in its last years the New Deal itself coalesced around a more business-friendly political economy while steadily giving ground, after 1937, to conservatives and antiradicals in Congress.²⁵⁰ But in the meantime, these men and women played a key role in ensuring a temporary lenience towards strike-winning tactics.

For many elites of the time, including Roosevelt himself, Frank Murphy, and quite a number of judges, there was value, especially prior to *Jones & Laughlin*, in allowing militant strikes to play out for a time, even if they did not fundamentally support the tactics they involved. This was, in a different sense, the mechanism by which the strike militancy influenced the decision in *Jones & Laughlin* in the first place. In a similar vein, there was also the sui generis nature of the New Deal itself, as well as the war years. This extended period was in every sense an emergency situation in which the traditional rules of governance and political economy were more easily suspended. The depth of economic crisis, the unprecedented (but temporary) weakening of capital as a consequence, the threat of communism and the sense that this threat would flourish in the absence of effective reform, the predominance of a Fordist system of production amenable to externally imposed organizational norms, and the mandates of wartime production—these were but the most prominent of a large number of factors that diminished and delayed effective capitalist resistance to deviant and erstwhile unlawful forms of labor militancy.²⁵¹ Not that the strikes and the upsurge in labor activism were less than remarkable feats of worker-authored activism. But they occurred amid circumstances unique enough to beg another important question: Could they possibly have a home in this country absent such conditions?

248. 98 N.L.R.B. 219 (1938).

249. GROSS, *supra* note 77, passim.

250. ALAN BRINKLEY, *THE END OF REFORM: NEW DEAL LIBERALISM IN RECESSION AND WAR* (1996); HAWLEY, *supra* note 65.

251. JEFFERSON COWIE, *THE GREAT EXCEPTION: THE NEW DEAL AND THE LIMITS OF AMERICAN POLITICS* (2016).

III. PROPERTY, ORDER, AND THE LIMITS OF THE RIGHT TO STRIKE IN LIBERAL SOCIETY

A decade ago Jim Pope made the observation, which he highlighted with a frank passage from an opinion by Supreme Court Justice William Rehnquist, that an archaic, common law-notion of the property rights of employers has consistently been invoked to trump the rights once accorded workers by the labor law.²⁵² Pope's broader point was that courts have imposed constitutional norms of this sort on the labor law, and done so in an underhanded, intellectually dishonest way that, among other things, deprived workers of the right to act in "self-defense," as by invalidating sit-down strikes and endorsing the use of permanent replacement workers.²⁵³

Pope's perspective is typical of those who argue for the restoration of an effective right to strike. In particular, his critique is in rough alignment with two other important studies of the Wagner Act by James Atleson and Karl Klare. In his 1983 book *Values and Assumptions in American Labor Law*, Atleson argues that the Wagner Act was systematically perverted by the unwarranted insertion of values not inherent in "the language of the statute or its legislative history."²⁵⁴ Klare's contention, featured in a 1978 article, is that the Act, which "was susceptible of an overtly anticapitalist interpretation," was recast by the Supreme Court as it "embraced those aims of the Act most consistent with the assumptions of liberal capitalism and foreclosed those potential paths of development most threatening to the established order."²⁵⁵

Like Pope, both Atleson and Klare develop their claims with specific reference to the right to strike, including once again sit-down strikes and the replacement worker doctrine, as well as, in Atleson's case, slowdowns.²⁵⁶ Getman makes very similar claims, asserting that the right to strike was the victim of judicial overreach and manipulation.²⁵⁷ Needless to say, what these scholars have in mind when they demand the restoration of an effective right to strike is not merely the right of workers to quit work, which the law broadly supports, but which is of so little value to most workers. One of the great virtues of their work, in fact, is its success in refuting the idea that such an emasculated right to strike could ever mean much in a context where workers are relatively easily replaced and, compared to

252. Pope, *supra* note 14, at 519.

253. *Id.* at 518.

254. ATLESON, *supra* note 14, at 2.

255. Klare, *supra* note 14, at 285, 292.

256. ATLESON, *supra* note 14, at 19-34, 44-66.

257. GETMAN, *supra* note 14, at 52-68.

employers, have little in the way of financial reserves; and where unions incur great difficulty maintaining solidarity among hard-pressed workers who feel, quite reasonably, that by striking they are putting the jobs and financial fortunes at risk with little hope of getting much in return. Instead, these scholars have in mind right a right to strike that entails the ability to put real pressure on employers without the workers unduly sacrificing their jobs or needlessly compromising their material well-being. They envisage a right to strike that is at once practical, functional, and legally legitimate, and not merely an artifact of rhetoric or the kind of thing that workers might occasionally pull off, but only in defiance of the law.

Early on, this scholarship was attacked rather viciously from the right by people who argued that it went too far and transgressed moral boundaries. Klare in particular was the victim of charges that he was, in essence, defending criminals, perhaps even the moral equivalent of “rapists.”²⁵⁸ Besides its intemperate character, such criticism is entirely captive to its own morally questionable assumptions that, when push comes to shove, capital and property must prevail over labor. In fact, the problem with the right to strike scholarship is not that it goes too far but rather that it does not go far enough in following through on the implications of its critique. For embedded in its proponents’ work, summarized so well in Klare’s judgment that the right to strike was sacrificed to the “assumptions of liberal capitalism,” is something far more essential than a series of dubious judicial or legislative sleights of hand, or lost opportunities. Rather, it seems, the fate of the right to strike was the product of an official adherence to mandates of the current legal and political order that were, from the perspective of just about every judge or legislator in the country, simply inviolate. In depriving workers of the right to engage in sit-down strikes or mass picketing, denying them the prerogative to engage in secondary boycotts, pushing them into litigation and arbitration in lieu of strikes, and subjecting them to permanent replacement if they go out on strike, courts and legislatures have not so much betrayed a radical potential in the labor law as kept the law anchored to liberal values that are simply anathema to an effective right to strike, and in a way that is incompatible with a robust and functional system of labor rights.

Of course workers have not been passive objects in this process. Their activism has shaped, or threatened to shape, the law in this realm even as it has been shaped by the law. From this vantage, which draws on the pioneering insights of social historians of labor like E.P. Thompson, they have quite correctly depicted the right to strike as a

258. Klare’s defense of sit-down strikes, for instance, drew charges that he was defending criminals, perhaps even the equivalent of “rapists.” Finkin, *supra* note 17, *passim*; Schwartz, *supra* note 17, at 443–44.

fluid and contested thing whose meaning and boundaries workers have also claimed, defended, and sought to legitimate in the face of rival efforts of the business community and their allies. Klare and Pope have persuasively described the struggle surrounding the sit-down strikes in these terms. And this writer has made similar arguments about mass picketing and other types of strike militancy.²⁵⁹ But to acknowledge that workers struggled in these ways to claim and defend a robust and effective right to strike is not to say that they succeeded, or more to the point, that they ever had a real chance of succeeding.

This reading of how the law evolved is entirely consistent with how the sit-down strikes in particular were treated outside of the courts, the NLRB, and the Congress. Following in the path of CIO leaders themselves, who viewed the strikes as useful expedients that nonetheless presented a risk to their own authority to control the timing and politics of labor protest, some legal scholars and commentators supported the strikes but did so reluctantly and contingently.²⁶⁰ Ironically, in so doing they offered powerful proof of just how deviant the strikes were. The strikes, they said, were a necessary and excusable response to extraordinary circumstances in which open shop employers not only flouted the Wagner Act but fended off unions with extraordinary, sometimes terroristic means of repression.²⁶¹ It was in this frame that legal scholar Henry Hart joined with coauthor Edward Prichard, a young protégé of Felix Frankfurter, in penning a compelling defense of the Board's handling of the *Fansteel* case.²⁶² Lloyd Garrison, dean of Wisconsin Law School, former New Deal official, and a principle in a failed attempt to mediate the Little Steel Strike, advanced a similar argument, supporting the strikes but conceding that the courts would never honor the practice as a right.²⁶³

Others did go somewhat further in justifying the sit-down strikes. Leon Green, dean of Northwestern Law School, depicted the strikes as legitimate means of negotiating a relationship between workers and employers that no longer contemplated the former being fired *en masse*—any more than a wife could “fire her husband, a parent his child.”²⁶⁴ “It is thus,” he concluded, “that employees may peacefully sit

259. See generally WHITE, *supra* note 78; White, *supra* note 130.

260. Pope, *supra* note 94, at 62–64.

261. *Id.*

262. Henry M. Hart, Jr. & Edward F. Prichard, Jr., *The Fansteel Case: Employee Misconduct and the Remedial Powers of the National Labor Relations Board*, 52 HARV. L. REV. 1275 (1939).

263. Lloyd K. Garrison, *Government and Labor: The Latest Phase*, 37 COLUM. L. REV. 897, 905 (1937).

264. Leon Green, *The Case for the Sit-Down Strike*, NEW REPUBLIC, Mar. 24, 1937, at 199–200.

and wait until their complaints are ironed out through negotiations.”²⁶⁵ James Landis, who chaired the Securities and Exchange Commission and was dean-elect of Harvard Law School at the time, argued passionately in two different speeches delivered at the height of the wave of sit-down strikes that, even if unlawful under existing laws, the strikes might well represent the making of a new right.²⁶⁶ Just as the right to picket or the right to strike in a conventional way had to be forged in this manner, so might the right to a sit-down strike be unfolding.²⁶⁷

Landis’ argument is intriguing, compelling even, but only by its own terms, which is to say the terms of one willing to compromise on his faith in prevailing notions of property and order. Most legal scholars were not. Even if they defended the strikes they did so in the fashion of Hart, Prichard, and Green. Like the NLRB and Justice Reed, and probably like most scholars today, these more typical defenders of sit-down strikes made no pretense of endorsing their broad use—as for instance to redress minor violations of the labor law by employers, let alone to aid workers in winning run-of-the-mill contract disputes of the sort they so often lose in the face of the intrinsic weakness of conventional strikes and the massive disparity in economic power between the parties to these disputes. Instead, they validated the strikes as extreme but semi-legitimate responses to extraordinary provocations. And even this was far too much for most. Sentiments at the time among legal scholars mostly ran against the strikes and the Board’s handling of them.²⁶⁸ Outside of CIO and left-wing circles, Landis and Green were widely condemned for defending the strikes. Dean Dinwoodey, law professor and editor of *U.S. Law Week*, spoke for most legal scholars when he declared in the *New York Times* that “under well settled principles of property law, the employer has a legally protected right to the exclusive possession of his factory or plant, just as the householder

265. *Id.*

266. James M. Landis, Chairman, Fed. Exch. Comm’n, Address before the Harvard Club of Boston (Mar. 17, 1937); James M. Landis, Address before the Eastern Law Students Conference (Mar. 20, 1937).

267. B.W. Patch, *Control of the Sit-Down Strike*, EDITORIAL RES. REP., Mar. 26, 1937.

268. *See, e.g.*, David Lawrence, *Laws or Men*, 17 *DICTA* 5, 8 (1940); Chester Ward, *Discrimination under the National Labor Relations Act*, 48 *YALE L.J.* 1152, 1162 (1939); Robert S. Spilman, Jr., *Labor and the Law*, 44 *W. VA. L.Q.* 87, 100–02 (1938); George B. Weisiger, *Reinstatement of Sit-Down Strikers*, 23 *MINN. L. REV.* 30 (1938).

has to the exclusive possession of his home.”²⁶⁹ In this sense, Dinwoodey said, the strikers were really nothing but trespassers.²⁷⁰

Newspapers were the dominant media of the time. And most were ardently opposed to the sit-down strikes as well. They expressed this position in hundreds, perhaps even thousands of editorial and editorialized news stories about the strikes. Among dozens of examples from the *Washington Post* were declarations that the tactic was a “social menace,” “a close parallel to the methods by which the Russian Soviets took over industry,” and an “act of war”; and the newspaper celebrated the apparent increase in opposition to the practice.²⁷¹ The *New York Herald Tribune* deemed the strikes “a violation of human rights,” by which the paper’s editors meant not only property rights and the right of public to uninterrupted production of good but also, in line the then-expanding politics of the “right to work,” “the right of a man to do his job.”²⁷² The very moderate *Christian Science Monitor* also condemned the strikes, concluding that they were bound to “place public compensation and seizure above the law.”²⁷³ Perhaps most revealingly, the *New York Herald Tribune* declared the strikes “a euphemism for dictation.”²⁷⁴ Although a few liberal papers like the *St. Louis Post-Dispatch* were very judicious in their coverage of the sit-down strikes, and the strikes were endorsed by leftist papers like the *Daily Worker* and various CIO publications, no major mainstream paper ever came close to saying the strikes were legitimate.²⁷⁵ Always an abiding faith in property and order stood in the way.

Polling was in its infancy at the time, but what there was suggests that a majority of the public also opposed the tactic. A survey by *Fortune* magazine completed in the summer of 1937 showed that very few members of the public (and of business community) thought it

269. Dean Dinwoodey, *Sit-Down Strike’s Legality Debated*, N.Y. TIMES, Jan. 17, 1937, at 64.

270. *Id.*

271. Mark Sullivan, *A Soviet Parallel: The Sit-Down Strikes*, WASH. POST, Mar. 10, 1938, at X11; Editorial, *The Sit Down and Mr. Ford*, WASH. POST, Apr. 9, 1937, at 8; Editorial, *Shall Sit-Downs Be Legalized?*, WALL. ST. J., Feb. 1, 1937, at 4; Editorial, *The Sit Down Strike*, WASH. POST, Jan. 27, 1937, at 8.

272. Editorial, *A Violation of Human Rights*, N.Y. HERALD TRIB., Mar. 20, 1937, at 16.

273. Editorial, *Wanted: A Policy on Sit-Down Strikes*, CHRISTIAN SCI. MONITOR, Feb. 26, 1937, at 20.

274. *Euphemism for Dictation*, N.Y. HERALD TRIB., Jan. 19, 1937, at 16.

275. Pope, *supra* note 94, at 64–65, 76–77; *How to Conduct a Successful Sit-Down Strike*, DAILY WORKER, Apr. 1, 1937, at 5; Mike Gold, *Please, Boss, Do a Sit-Down*, DAILY WORKER, Mar. 15, 1937, at 7; S.W. Gerson, *Sit-Down: Labor’s Strongest Weapon*, DAILY WORKER, Feb. 27, 1937, at 4.

worth bloodshed to repress the sit-down strikes.²⁷⁶ However, the majority disapproved of them. In fact, even a majority of *workers* appeared to reject the tactic and wanted it banned by law.²⁷⁷ A similar survey by Gallup taken around the same time showed that two-thirds of respondents favored outlawing the strikes.²⁷⁸

Well before the wave of sit-down strikes began to abate later in 1937, the business community and its allies in Congress were pushing legislation to bar them. Although it did produce a resolution condemning the practice, the effort to ban the strikes failed, probably because its impetus was dissipated by a recognition on the part of liberals who fundamentally opposed the tactic that employers were culpable in provoking the strikes, and that the fate of the Wagner Act and the New Deal was uncertain and might depend on the strikes succeeding.²⁷⁹ As the sit-downs faded in frequency later in the year, the concern with them was also displaced by a broader campaign against strike militancy, one focused more and more on mass picketing. Nevertheless, some states did explicitly outlaw sit-down strikes—a few in 1937, others in the years that followed.²⁸⁰

Like every other aspect of Taft-Hartley, the 1947 amendments to the Wagner Act that directly touched on mass picketing and other forms of strike militancy were strongly supported by the business community, including prominent employers and business associations like the National Association of Manufacturers, the American Iron and Steel Institute, and the U.S. Chamber of Commerce.²⁸¹ Promoted by these groups, witness after witness regaled the Congress with stories of how mass picketing, along with secondary boycotts and other militant tactics, gave unions too much power, eroded the power of owners and their supervisors, and threatened the American way.²⁸² Time and again, senators and representatives expressed their support for new restrictions on the right to strike as mandates of a common faith, a commitment of the nation itself, to the principles of property and order. “They are a veritable pronouncement of contempt of law and order, private capitalism, and ownership of property, competition, and everything that even smacks of liberty,” said Ohio Representative Frederick Smith, speaking of NLRB positions that seemed to contumace an expansive

276. Pope, *supra* note 94, at 76 (discussing the poll conducted by *Fortune* magazine).

277. FINE, *supra* note 144, at 413–14 n.54.

278. GALLUP POLL: PUBLIC OPINION, VOLUME I: 1935-71, at 31, 49, 52, 55, 62–63 (1972).

279. Pope, *supra* note 94, at 94–95; Patch, *supra* note 267.

280. MILLIS & BROWN, *supra* note 219, at 127–28.

281. White, *supra* note 130, at 88–97.

282. *Id.*

view of the right to strike.²⁸³ “He has been required to employ or reinstate individuals who have assaulted him and his employees and want only to destroy his property,” said New York Representative Ralph Gwinn, in defense of employers supposedly ravaged by such strikes.²⁸⁴ Under prevailing law, such employers endured “respectable robbery without liability,” Gwinn said.²⁸⁵

We in America prize human individual liberty even above the state. We believe that property rights are natural to man. The best protection of those property rights and of that liberty is in the balancing of the rights of our workers and the rights of our businessmen so that the great majority of our citizens will enjoy that private property and that human liberty,

said Representative Charles Kersten of Wisconsin, condemning mass picketing of the sort that had recently featured at the Allis-Chalmers plants in his state.²⁸⁶ Consider, too, the remarks of Representative John Robson of Kentucky:

There have been cases in this country where literally thousands of persons have picketed a plant and engaged in violence. In my honest opinion, labor nor management never did help its cause by engaging in lawlessness, violence, and the destruction of the property of others, and under this bill and the law the company cannot mistreat, browbeat and engage in violence and lawlessness against the workers.²⁸⁷

Nor was it only conservatives who joined in this, as evidenced by remarks of Utah Senator Elbert Thomas, who had supported the New Deal and the work of the La Follette Committee, on which he had served, and who had joined with Robert La Follette Jr. in 1939 in sponsoring a pro-labor amendment to the Wagner Act. For a worker, he said,

to interpret his right to strike as being an absolute right, entitling him to quit work while the water is turned on in the plant, for instance, thus destroying his employer’s property, or for him to interpret the right to strike as permitting him to quit work while leaving in a mine certain equipment in such a

283. 93 CONG. REC. 3471–72, *reprinted in* 1 NLRB, *supra* note 234, at 594–95.

284. *Id.* at 3553–54, *reprinted in* 1 NLRB, *supra* note 234, at 647–48.

285. *Id.* at 3553, *reprinted in* 1 NLRB, *supra* note 234, at 647.

286. *Id.* at 3578, *reprinted in* 1 NLRB, *supra* note 234, at 678.

287. *Id.* at 7507, *reprinted in* 1 NLRB, *supra* note 234, at 927.

way as to result in costly destruction, would obviously be most improper. No person has a right to do such things. No one has a right to act against society. No one has a right to destroy it.²⁸⁸

And so it went, the references to the inviolate values of property and order in defense of the legislation much too numerous to exhaustively cite. It is easy to dismiss these contentions, even from moderates like Thomas, as the contrived utterances of people who were singularly committed to advancing their narrow class and political interests. To some extent, they surely were that. But these views were hardly outside the mainstream of American politics, particularly among elites, broad swathes of the middle class, and important elements of the working class. Indeed, they comported very conveniently with commonplace views about the virtues of property and order and resonated with what much of the public believed at the time—this is what made them so resonant. And whether contrived or not, they performed an important function. By invoking the virtues of property and order in this way, these Congressmen and the witnesses before them who favored restricting mass picketing and other forms of coercive protest were conspicuously able to couch this position as something other than a malicious attack on the “legitimate” rights of labor. Instead, theirs was a mission to realign the labor law with fundamental American values, to save it from those who had allowed labor policies and the habits of union to stray beyond this field. In this way they were able to deflect, if not disprove, the all-too-apt contention by the legislation’s opponents, repeated many times in the process, that what Taft-Hartley was really about was elevating property rights over human rights.

Added proof that strike militancy was actually indefensible can be found in the fact that no scholars would justify it, not even mass picketing—at least not beyond the point at which it became coercive, which was of course the very point at which it was employed in an effective way. In the wake of the Memorial Day Massacre, most all the major papers sided with the police, declaring the strikers enemies of public order who brought the violence upon themselves. Initially, this stance was premised on distorted readings of the events of that day that charged the strikers with various acts of provocation. But even when the La Follette Committee publicized a Paramount Pictures newsreel (which the company had suppressed) and unearthed other evidence that proved that most all of the blame for what happened that day rested on

288. *Id.* at 4416, reprinted in 2 NLRB, LEGISLATIVE HISTORY OF LABOR MANAGEMENT RELATIONS ACT, 1947, at 1158 (1948).

the police, most of the papers still adhered to this reading of the events.²⁸⁹

This attitude toward mass picketing was a centerpiece of revived interest in the right to strike in the major papers, one that extended from the mid 1930s into the 1940s and exceeded the surge in interest of the late 1910s and early 1920s. In 1941, for instance, the *New York Herald Tribune* described pending legislative attempts to limit mass picketing as “too thoroughly justified to require argument.”²⁹⁰ In 1946 the *New York Times* summoned up the rhetoric used to condemn the sit-down strikes and declared mass picketing a “seizure” that was “by its very nature illegal because it infringes both individual and property rights.”²⁹¹ Conservative though he was, newspaperman David Lawrence, founder of *U.S. News and World Report*, spoke for many when he declared mass picketing an act of “violence” by which unionists were seeking to take the law into their own hands.²⁹² In fact, Lawrence’s judgement that mass picketing was an affront to civil liberties aligned with that of the American Civil Liberties Union, long a champion of labor rights, which, as the *New York Times* was keen to note, also condemned the tactic in these terms.²⁹³

Such views fit with a broader tendency to criticize the right to strike as being too aggressively employed by unionists and too generously construed by the courts and the NLRB. In the decade between the validation of the Wagner and the passage of Taft-Hartley, newspapers gave voice to a criticism of mass picketing and other erstwhile excessive forms of strike behavior, one that typically described the Wagner Act as having gone too far in protecting workers’ prerogatives to protest. A typical example of the content and tenor of these pieces is a 1941 editorial in the *Chicago Daily Tribune*:

“The right to strike” is now used frequently to mean the right of union leaders to force men who don’t want to strike to do so. It is used to justify the seizure of industries and the blockading of factories by mass picketing to prevent the entrance of workers who are satisfied with their working conditions and the movement of goods in and out of the plants. “The right to strike” in this sense means not only that

289. WHITE, *supra* note 78, at 137–43.

290. *To Stop Mass Picketing*, N.Y. HERALD TRIB., Jun. 21, 1941, at 14; cf. *Mass Picketing Continues*, HARTFORD COURANT, Feb. 26, 1946, at 8.

291. *Mass Picketing*, N.Y. TIMES, Feb. 28, 1946, at 18.

292. David Lawrence, *Mass Picketing Abridges Primary Civil Liberties*, PITT. POST-GAZETTE, Feb. 21, 1947, at 8.

293. *Intimidation Is Not a Right*, N.Y. TIMES, Jan. 22, 1946, at 24.

every strike is right but that every measure which may be adopted to win a strike is right.²⁹⁴

In fact, at this crucial moment it was common for elites of all stripes to claim that they supported the right to strike and yet to assert that it was being abused by unionists who insisted on winning every labor dispute and using coercive and disorderly methods to do so. In 1946, Hebert Hoover, who might well have denied just such a thing fifteen years earlier, inveighed that “Nobody denies that there is a ‘right’ to strike”; but that right, he said, had been abused to the detriment of the public interest.²⁹⁵ Although considerably more liberal than Hoover, Walter Lippmann, the extremely popular political commentator, offered a similar judgement about a railroad strike that same year, concluding “we must henceforth refuse to regard the right to strike as universal and absolute, and as one of the inalienable rights of man.”²⁹⁶ Also writing in 1946, Henry Ford II, whose father had used a small army of thugs and toughs to enforce the open shop at his plants and bitterly fought unionization until 1941, now purported at once to support the right to strike—and to believe that it should be limited.²⁹⁷ “There is no longer any question of the right of organized workers to strike, but that right,” he said, “is being misused.”²⁹⁸

Like Taft-Hartley’s supporters in Congress, figures like Hoover, Lippmann, and Ford did not trouble themselves to confess that such tactics as they so blithely condemned might actually be necessary to counterbalance the power of employers and give life and meaning to a statute that did not take adequate account of this basic reality, let alone that they were essential in establishing the idea that workers enjoyed *any* enforceable right to strike. But they did not have to, either; for they honestly did not believe that labor should generally prevail. Liberal or conservative, it did not matter; these were capitalists in a capitalist society, contented, consistent with their values, with a right to strike that went little further than a right to withhold one’s labor.

To be sure, these were not the views of ordinary people. But the public’s perspective did not seem to vary all that much from those of elites. Although overall approval of union membership as measured in

294. Editorial, *The Right to Strike*, CHI. DAILY TRIB., May 22, 1941, at 14.

295. Herbert Hoover, Editorial, *The Right to Strike: The Former President Sets Forth His View on One of the Hottest Issues Facing the Nation Today*, L.A. TIMES, Dec. 29, 1946, at G7; see also Leo Walmon, *Right to Strike Okay, But Public Needs Labor Law Protection*, WASH. POST, Jul. 8, 1945, at B5.

296. Walter Lippmann, Editorial, *The Right to Strike*, DAILY BOS. GLOBE, May 25, 1946, at 8.

297. *Bigger Output by Men, Tools Urged by Ford: Assails Misuse of Right to Strike*, CHI. DAILY TRIB., Sept. 17, 1946, at 31.

298. *Id.*

Gallup surveys slipped noticeably after 1937, it remained quite high—well above fifty percent right through the 1940s.²⁹⁹ Nevertheless, Gallup surveys taken in June 1937, after the big wave of sit-strikes had waned noticeably, but while mass picketing and overall levels of labor militancy remained high, revealed that fifty-seven percent supported the proposition that the militia should “be called out *whenever* strike trouble *threatens*.”³⁰⁰

As with the sit-down strikes, too, the status of mass picketing and other forms of strike militancy can also be gauged by the way these tactics were defended. During the hearings on Taft-Hartley, only a few labor leaders stood against the torrent of criticism of these practices by businessmen, conservative unionists, and congressmen and senators, and tried to parry the move to prohibit the strikes. With only a couple of exceptions, most of them consistently qualified their defense of these tactics by downplaying their coercive qualities—again the very thing that made them so effective in the first place—while also describing them as expedients, presumably temporary, that were justified by the unreasonable stances of some employers.³⁰¹

While the political motivations and implications of this campaign against these forms of strike militancy might be as dubious as the attacks on the sit-down strikes, their value in expressing dominant political judgments concerning these tactics is not. Repeatedly, it was taken for granted that workers could not be allowed to excessively coerce their fellow workers, that they should be obliged to adhere to their contractual obligations, that they did not own the streets or the workplace, and that whatever the right to strike was, it was surely, as Brandeis had insisted, not an absolute right. Of course, all of this was controversial for many unionists. But unionists were almost the only ones to really push back against these measures. Even President Harry Truman’s dramatic veto of Taft-Hartley is widely regarded as a political move taken with the expectation that Congress would override the veto anyway.³⁰² It is also notable that despite dedicating itself to this aim, the labor movement has never come close to repealing the Taft-Hartley Act, or even securing the enactment of favorable amendments to any of its provisions.

And then there is the replacement worker doctrine where, if anything, the change in the law even more clearly reflected the depth

299. *Labor Union*, GALLUP, <http://news.gallup.com/poll/12751/labor-unions.aspx> [<https://perma.cc/A5EG-KWPS>]; see also George Gallup, *Voters Favor Labor Unions and Support the Right to Strike*, DAILY BOS. GLOBE, Aug. 31, 1947, at C9.

300. GALLUP POLL, *supra* note 278, at 63 (emphasis added).

301. White, *supra* note 130, at 97–99.

302. GROSS, *supra* note 77, at 258–59.

and power of liberal norms. For the rule established in *Mackay Radio* came out of the blue. It was set forth in a case which required no such question to be resolved, in a manner that drew no support from the text of the Wagner Act, and on the basis of legislative history that was ambiguous at best. Worse, as Getman points out, the rule is in direct conflict with the very statutory principle of barring discrimination on the basis of a worker's assertion of the basic labor rights laid out in § 7 that it was, itself, supposedly derived from.³⁰³

As an exercise in statutory construction and administration, *Mackay Radio* makes no sense; but as a defense of property rights it makes all the sense in the world. One way to see this is to consider what would have happened had the Court decided the matter in a fundamentally different way. If employers were barred from replacing economic strikers, it seems likely that strikes would have proliferated to an extraordinary extent, as workers could at least plausibly have expected to be able to strike under a broad array of circumstances and yet be restored to their jobs no matter the outcome. But precisely because such a doctrine would have given workers so much power, Congress would almost certainly have stepped in with its own rule, codifying employers' right to permanently replace striking workers and bringing this to an end. Ultimately, it is difficult to imagine a much more liberal alternative to the *Mackay Radio* rule surviving for very long—a point that also draws support from labor's failure to repeal the rule in Congress in the early 1990s.³⁰⁴

A simple exercise in counterfactual speculation bears similar fruit in regard to other, more basic, limitations on the right to strike, including those imposed relative to sit-down strikes, mass picketing, and secondary boycotts. Shrill and self-interested though it was, all the testimony from employers and their allies during the hearings on Taft-Hartley or Landrum-Griffin about the perils posed by these tactics, was fundamentally correct. For were workers able to make unfettered use of sit-down strikes, mass picketing, and general strikes and sympathy walkouts, they could have very much challenged the sovereignty of capitalists in and about the workplace, and with this the bedrock institutions and norms of liberal society. As Jim Pope puts it, Charles Evans Hughes' opinion in *Fansteel* established the maxim that "the

303. GETMAN, *supra* note 14, at 55.

304. On these efforts, see *The Striker Replacement Bill: Hearing on H.R. 5 Before the Subcomm. on Labor-Mgmt. Relations of the Comm. on Educ. and Labor*, 102d Cong. passim (1991); *Collective Bargaining and the Hiring of Permanent Replacement Workers: Hearing on H.R. 5 Before the Subcomm. on Hous. & Emp't. of the Comm. on Gov't Operations*, 102d Cong. 2 (1992) (opening statement of Rep. Lantos, Chairman, Comm. on Gov't Operations); *Preventing Replacement of Economic Strikers: Hearing on S. 2112 Before the Subcomm. on Labor of the Comm. on Labor and Human Res.*, 101st Cong. passim (1990).

employer could violate the workers' statutory rights without sacrificing its property rights, while the workers could not violate the employer's property rights without sacrificing their statutory rights."³⁰⁵ This is unquestionably true. But equally unquestionable is that neither this court nor any other important arbiter of legal rights in this country was ever prepared to endorse the contrary view that property rights might be sufficiently subordinate to labor rights as to justify the kinds of tactics by which workers could routinely defeat powerful employers on the fields of industrial conflict.

Significantly, there is no reason to believe that any of this has changed or is poised to change today. Quite the contrary: In a culture and political system more immersed than ever in the veneration of order and control, mediated by criminal law and police work, by the celebration of property rights, and by a readiness to punish violence, it is all but unthinkable that the courts or the NLRB would deign to give legal sanction to workers to engage in any sustained way in the kinds of tactics that might make going on strike a worthwhile thing to do.

CONCLUSION

One of the outstanding ironies in a story rich with many is that the very things which made the prospect of an effective right to strike seem for a time so viable—the unlawful, illiberal, and altogether intolerable coerciveness of sit-down strike and mass picketing, especially—are also what made this concept impossible to ever realize. As we have seen, effective strikes could build the labor movement, validate the Wagner Act, secure the New Deal, and in many ways change America. But they could not make themselves legitimate.

So it is that workers have found themselves with a right to strike that equals little more than a right to quit work—and maybe lose their jobs or their houses and savings in the balance. They have a right to strike, as Steinbeck's character, Mac, complained, but they "can't picket"—at least, not in a way that is really apt to change anything. And so they do not strike—in fact, under these circumstances they usually *should not* strike.

The proof of this is readily evident, not only in the dramatic decrease in strikes since the 1970s, but in the sad regularity with which even the most vibrant strikes have ended in defeat for workers. Phelps Dodge (1983), Greyhound (1983 and 1990), Hormel (1985-1986), Caterpillar (1992, 1993, and 1994-1995), Detroit Daily News/Daily Free Press (1995-1997)—these are but the most notable of a litany of

305. Pope, *supra* note 94, at 246.

vibrant strikes since the 1970s that ended in failure.³⁰⁶ They are, in fact, the definitive labor struggles of this period, overshadowing a much smaller number of comparable disputes, like the strikes at United Parcel Service in 1997 and Verizon in 2016 that—often shaped by uniquely favorable labor dynamics—ended in something resembling victory for the union.³⁰⁷ Each of these big and unsuccessful strikes was motivated by very modest, in fact anti-concessionary, goals and well-supported by workers and the larger public alike. And each featured mass picketing and other attempts at militancy. But these tactics were met with injunctions, civil suits, mass arrests, and criminal prosecutions, which ended the protests and left the employers free to exert their vast advantages in material wealth and political power, end the disputes on their terms, and leave thousands of strikers unemployed.³⁰⁸

It is true that the last year or so has witnessed what many people have declared to be a miniature strike wave, that has been widely celebrated by unionists and their allies as a welcome departure from past trends and portent, many hope, of a sustained resurgence of labor activism.³⁰⁹ Headlined by statewide teachers strikes in West Virginia, Oklahoma, and Arizona, all in the first part of 2018, the strikes commanded a great deal of media coverage, at least compared to what labor disputes usually receive nowadays.³¹⁰ However, closer inspection

306. LICHTENSTEIN, *supra* note 108, at 17, 249–50, 273–74.

307. Steven Greenhouse, *Teamsters and U.P.S. Agree on a 5-Year Contract Plan to End Strike After 15 Days*, N.Y. TIMES (Aug. 19, 1997), <https://www.nytimes.com/1997/08/19/us/teamsters-and-ups-agree-on-a-5-year-contract-plan-to-end-strike-after-15-days.html>; Noam Scheiber, *Verizon Strike to End as Both Sides Claim Victories on Key Point*, N.Y. TIMES (May 30, 2016), <https://www.nytimes.com/2016/05/31/business/verizon-reaches-tentative-deal-with-unions-to-end-strike.html>.

308. On the course of these strikes, see PHILIP DRAY, *THERE IS POWER IN A UNION: THE EPIC HISTORY OF LABOR IN AMERICA* 641–53 (2010); PETER RACHLEFF, *HARD PRESSED IN THE HEARTLAND: THE HORMEL STRIKE AND THE FUTURE OF THE LABOR MOVEMENT* (1999); JONATHAN ROSENBLUM, *COPPER CRUCIBLE: HOW THE ARIZONA MINERS' STRIKE OF 1983 RECAST LABOR MANAGEMENT RELATIONS IN AMERICA* (1998); CHRIS RHOMBERG, *THE BROKEN TABLE: THE DETROIT NEWSPAPER STRIKE AND THE STATE OF AMERICAN LABOR* (2012); *see also* RICHARD D. BRISBIN, JR., *A STRIKE LIKE NO OTHER: LAW AND RESISTANCE DURING THE PITTSBON COAL STRIKE OF 1989-1990* (2002).

309. *See, e.g.*, Steve Greenhouse, *West Virginia Teacher Strike Was Just the Start*, N.Y. TIMES (Mar. 7, 2018), <https://www.nytimes.com/2018/03/07/opinion/teachers-west-virginia-strike.html>; Mike Elk, *Wave of Teachers' Wildcat Strikes Spreads to Oklahoma and Kentucky*, GUARDIAN (Apr. 2, 2018), <https://www.theguardian.com/us-news/2018/apr/02/teachers-wildcat-strikes-oklahoma-kentucky-west-virginia> [<https://perma.cc/B7ZX-W85V>].

310. Dana Goldstein, *Teacher Walkouts: What to Know and What to Expect*, N.Y. TIMES (Apr. 3, 2018), <https://www.nytimes.com/2018/04/03/us/teacher-walkouts-strikes.html>; Caitlin Emma, *Teachers Are Going on Strike in Trump's America*, POLITICO (Apr. 12, 2018),

suggests that this wave is mainly an artifact of wishful thinking exacerbated by the novelty for many people nowadays of seeing these strikes reported in the media. For in fact, the number of strikes over the last couple of years has remained close to the level that has prevailed for several decades now.³¹¹

Perhaps more significant in putting these strikes in proper context is a reflection on their character. None have been organizing strikes. All of these strikes have been over contracts and working conditions, with many driven by workers' opposition to concessions and ended with less than spectacular gains by the strikers.³¹² Moreover, the strikes which comprise this supposed wave have been disproportionately mounted by government workers—teachers, mainly—who are not covered by the National Labor Relations Act. For this reason, several of the strikes have been unlawful, as state law typically denies such workers the right to strike anyway. But at the same time—and this may be the most crucial point—none of these strikes has unfolded in an especially militant way, at least by historical standards. There have been no big sit-down strikes, no threatening episodes of mass picketing, no routing of “scabs,” no destruction of property. Which is all to say that the kinds of strikes that built the labor movement eighty or more years ago remain thoroughly in check.

<https://www.politico.com/magazine/story/2018/04/12/teacher-strikes-oklahoma-city-kentucky-west-virginia-217849> [<https://perma.cc/3FZ6-3JWJ>]; Josh Eidelson, *West Virginia Teachers Didn't Want to Strike, Now They Won't Stop*, BLOOMBERG (Mar. 2, 2018), <https://www.bloomberg.com/news/articles/2018-03-02/biggest-wildcat-strike-in-decades-hints-at-new-u-s-labor-unrest> [<https://perma.cc/2KUM-BDK5>]; see also Noam Scheiber, “*This Is About Good Jobs*”: *AT&T Workers Begin Strike in Contract Impasse*, N.Y. TIMES (May 19, 2017), <https://www.nytimes.com/2017/05/19/business/at-wireless-strike-union.html>.

311. Henwood, *supra* note 11.

312. For instance, the West Virginia teachers' strike ended with a modest increase in wages paid for by cuts elsewhere in the state budget. Jess Bidgood, *West Virginia Raises Teachers' Pay to End Statewide Strike*, N.Y. TIMES (Mar. 6, 2018), <https://www.nytimes.com/2018/03/06/us/west-virginia-teachers-strike-deal.html>. A strike by Arizona teachers ended with an agreement calling for modest wage increases but not for all workers. Natasha Bach, *Striking Arizona Teachers Win a 20% Raise, But It's Not a Complete Victory*, FORTUNE (May 4, 2018), <http://fortune.com/2018/05/04/arizona-teacher-strike-ends/> [<https://perma.cc/K5VM-DJBJ>]. Striking Oklahoma teachers also returned to work after modest gains that fell short of their goals. Dana Goldstein & Elizabeth Dias, *Protest in Oklahoma Ends, but Without Adding to Modest Gains in Funding*, N.Y. TIMES (Apr. 12, 2018), <https://www.nytimes.com/2018/04/12/us/oklahoma-teachers-strike.html>. As of the August, a strike by Spectrum-Time Warner Cable employees had gone on for five months without favorable resolution. Luis Ferré-Sadurní, *Strike by Spectrum Workers Approaches the 5-Month Mark*, N.Y. TIMES (Aug. 25, 2018), <https://www.nytimes.com/2017/08/25/nyregion/spectrum-workers-strike-approaches-5-month-mark.html>.

There is little hope within the prevailing political and juridical order that things could ever be any different. Perhaps the right to strike could be made effective if it were fundamentally reconfigured in illiberal, corporatist terms. The right could conceivably be reconfigured such that the government might intervene more aggressively and make the workers protests effective—for example, stepping in to decide by adjudication, mediation, or arbitration which side should win a strike. Elements of this approach, which was vigorously opposed by IWW and AFL unionists alike in the early twentieth century, can be found internationally, in industry-specific statutes like the Railway Labor Act, and in labor statutes that apply to government workers, although most often when the law goes down this path it all but dispenses with the right to strike anyway, treating it as a redundancy, a tool without a purpose. As Senator Wagner himself perceived, alignment between the excessive reliance on the authority of the state to manage labor relations and the denigration of the right to strike was both dysfunctional and dangerous. As he put it back in the summer of 1937, defending the recently-passed statute that bore his name and the right that he placed at the center of it,

[t]he outlawry of the right to strike is a natural concomitant of authoritarian governments. It occurs only when a government is willing to assume definitive responsibility for prescribing every element in the industrial relationship—the length of the day, the size of the wage, the terms and conditions of work.³¹³

Clearly no such regime will be instituted in any event, not least because, as interest in such schemes in the twentieth century makes clear, support for this kind of corporatist intervention in labor disputes has itself been an elite reaction against strike militancy that currently does not exist. Where does this leave workers and unions, possessed of a right they cannot afford to surrender but cannot rely on as a means of advancing their interests and standing in society? Are they bound like Steinbeck's strikers to meet defeat, albeit in a more peaceful way? Maybe. In one of his many commentaries on the sit-down strikes as they raged across the country in the spring of 1937, Walter Lippmann took time to analyze one of the speeches in which James Landis had argued that the tactic might well become a new right, in the same way that the right to strike in general had been created through its persistent assertion in the face of opposition and incredulity. No revolutionary, Lippmann nonetheless understood what Landis apparently did not: that the right Landis spoke of was revolutionary in its conception, and

313. Robert F. Wagner, *Wagner Challenges Critics of His Act*, N.Y. TIMES. MAG., Jul. 5, 1937, at 1.

therefore not just an impracticality but a contradiction. “Never in the history of the law has rebellion been made lawful. Only the rights demanded by the rebels have been legalized,” said Lippman.³¹⁴

As the labor scholars who call for the restoration of an effective right to strike have all understood, the tactics that made such strikes possible were tolerated only so long as there was not a functional system of labor rights in place, one that could stand alone in courts and hearing rooms. Once this was the case—once the rebel unionists’ aims, or at least those imputed to them, were realized—the sit-down strikes were predictably banned, and then so were mass picketing, secondary boycotts, and so forth. Thus it is that in cases like *Fansteel* and the debates on Taft-Hartley, sit-down strikers, mass picketers, and the like were presented as enemies of the labor law. Even more recent attacks on the right to strike, such as complaints in the 1980s about union violence going uncensored and the modest moves by the NLRB to rein in this, too, have been inevitably justified not in terms of overthrowing the system of labor rights but managing it, reconciling its virtues with the normative and juridical mandates of liberal society. And so it is that the right to strike—the right to an effective strike—has been sacrificed not in the name of capitalist hegemony but on liberalism’s altar of labor peace. Unfortunately, so far as the interests of workers go, these are the same thing.

314. Walter Lippmann, *Mr. Landis and the Legality of the Sit-Down Strikes*, DAILY BOS. GLOBE, Apr. 6, 1937, at 18.