

## “There Is No Such Thing as an Illegal Strike”: Reconceptualizing the Strike in Law and Political Economy

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**ABSTRACT.** In theorizing the lack of strikes in recent decades, legal scholars have focused on the rules that make striking difficult, even counterproductive, for workers. But while American law on striking is ambivalent at best, the impact of legal restrictions on labor protest has always been mediated by broader political economy. One hundred years ago, as the critique to Gilded Age inequality raged, strikes by emergent labor unions made the stakes of the “labor question” apparent. These strikes were subject to massive legal repression, and in the shorter term, were often seen as failures. In the longer term, though, they laid the foundation for the New Deal order and its modest compression of economic inequality.

That particular compromise—built in part on a depoliticization of unions’ role in the workplace—proved unable to withstand the neoliberal turn. Yet, in today’s new Gilded Age, workers are tentatively rediscovering the power of the strike, bad law notwithstanding. Labor activists have long proclaimed, “There is no such thing as an illegal strike, only an unsuccessful one,” inviting the question of how strikes can be successful today, in spite of an inhospitable legal regime. Strikes are not just “economic weapons”; they are political protest. And the success of strikes today should be measured not only by their immediate economic wins, but also by their longer-term sociopolitical ones—to the extent they help upend the dominant regulatory and discursive impulses of recent decades, and like the strikes of the Progressive Era, legitimate a new vision of law and political economy.

## INTRODUCTION

In the wake of the 2020 killing of George Floyd by a Minneapolis police officer—in the midst of a pandemic that had already resulted in 100,000 deaths<sup>1</sup> and prompted forty million Americans to apply for unemployment<sup>2</sup>—massive protests erupted in Minneapolis and then nationwide. As protestors exercised their constitutional rights in the streets, union bus drivers sought to protest *on the job*. In an online petition, bus drivers proclaimed, “We are willing to do what we can to ensure our labor is not used to help the Minneapolis Police Department shut down calls for justice.”<sup>3</sup> Drivers refused to transport arrested protestors to jail.<sup>4</sup>

The Amalgamated Transit Union, the international affiliate of the workers’ local union, quickly weighed in with a statement of support. The union’s president spoke out against racism in policing, but he also framed the employees’ refusal to work more narrowly. He emphasized worker safety rather than solidarity with a broader struggle: “[O]ur members—bus drivers—have the right to refuse work they consider dangerous or unsafe during the pandemic.”<sup>5</sup> While arguably lacking the moral force of the drivers’ statement, the president’s frame was legally important. In seeking to protest not just as polity members, but as workers, the bus drivers had entered the complex world of labor law and its distinct logic regarding when, why, and how protest is sanctioned.<sup>6</sup> When it comes

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1. *U.S. Death Toll Tops 100,000*, NBC NEWS (May 28, 2020, 4:17 AM EDT), <https://www.nbcnews.com/health/health-news/live-blog/2020-05-27-coronavirus-news-n1215286> [<https://perma.cc/KHE7-GDD4>].
  2. Jeff Cox, *Another 2.1 Million File Jobless Claims, but Total Unemployed Shrinks*, CNBC (May 28, 2020, 5:19 PM EDT), <https://www.cnbc.com/2020/05/28/weekly-jobless-claims.html> [<https://perma.cc/DBB3-JBPT>].
  3. *Sign the Petition: Union Members for #JusticeForGeorgeFloyd*, [https://docs.google.com/forms/d/e/1FAIpQLScpv6V1R2DVjUWulp1NQWP\\_034OowQanGcoOCE6FL6PgmRnKA/view-form?fbclid=IwARogV533rbpGD\\_gCSifVX1L619giJZtPdA1I92-XgvdLCVvqSmXRJ4D5bE](https://docs.google.com/forms/d/e/1FAIpQLScpv6V1R2DVjUWulp1NQWP_034OowQanGcoOCE6FL6PgmRnKA/view-form?fbclid=IwARogV533rbpGD_gCSifVX1L619giJZtPdA1I92-XgvdLCVvqSmXRJ4D5bE) [<https://perma.cc/53K4-H65H>].
  4. See, e.g., Lauren Kaori Gurley, *Minneapolis Bus Drivers Refuse to Transport George Floyd Protesters to Jail*, VICE (May 29, 2020, 11:57 AM), [https://www.vice.com/en\\_us/article/bv8zaw/minneapolis-bus-drivers-refuse-to-transport-george-floyd-protesters-to-jail](https://www.vice.com/en_us/article/bv8zaw/minneapolis-bus-drivers-refuse-to-transport-george-floyd-protesters-to-jail) [<https://perma.cc/C4XQ-FDUH>].
  5. *ATU: George Floyd’s Words a Reminder of the Racism and Hatred Yet to Be Overcome*, ATU (May 28, 2020), <https://www.atu.org/media/releases/atu-george-floyds-words-a-reminder-of-the-racism-hatred-yet-to-be-overcome> [<https://perma.cc/UTX4-B7F9>].
  6. A common labor law principle is that a refusal to work because of significant workplace health or safety concerns is neither an improper work stoppage nor insubordination. 29 U.S.C. § 143 (2018); see also *Gateway Coal Co. v. Mine Workers*, 414 U.S. 368, 385-87 (1974) (setting forth the principle under the National Labor Relations Act (NLRA)). Minneapolis bus drivers were some of the first workers to engage in on-the-job protest related to police violence against

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to protest in the public sphere, the First Amendment protects political expression above all.<sup>7</sup> But strikes occur in the context of ongoing economic relationships; they implicate questions of property and contract, not just liberty.<sup>8</sup> As such, when it comes to strikes, legal protections are far narrower, prioritizing the “economic” over the “political.”<sup>9</sup>

Strikes were once relatively common in the United States, as a tactic through which working people sought to increase their power in the employment relationship, and periodically, as a fulcrum of massive social change.<sup>10</sup> Strikes were a causal factor in the enactment of American labor law, and in helping it withstand constitutional challenge.<sup>11</sup> Over the past several decades, however, strike activity has dwindled down to the lowest level in 150 years.<sup>12</sup> In theorizing this

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Black people. They were followed by many others. *See infra* notes 186-190 and accompanying text.

7. *E.g.*, *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943).
8. Given the partial privatization of the public workplace by Supreme Court rulings, which have construed the First Amendment as inapplicable to on-the-job speech by public employees, this conceptual mapping applies to both public and private workplaces. *See Garcetti v. Ceballos*, 547 U.S. 410, 418 (2006) (“Government employers, like private employers, need a significant degree of control over their employees’ words and actions; without it, there would be little chance for the efficient provision of public services.”). *But see infra* notes 107-113 and accompanying text (describing the alternate understanding of the political in the public-sector workplace).
9. As I discuss below, existing line drawing between these concepts is a legal accommodation which is increasingly difficult to sustain. It is also underspecified, as the terms have not been defined clearly or consistently. In this Essay, I focus on interrogating the idea, partly constructed by law, that the “economic” is a self-contained realm that operates pursuant to rules that are apolitical and asocial, that is, outside the boundaries of collective societal decision-making and moral commitments.
10. Given the paucity of strike activity in recent decades, many Americans have no first-hand experience with strikes, and may not even have a clear understanding of what they are. *Cf.* Brishen Rogers, “*Hey Google, What’s a Strike?*,” LPE PROJECT (Nov. 2, 2018), <https://lpeblog.org/2018/11/02/hey-google-whats-a-strike> [<https://perma.cc/L66J-DW6G>] (explaining strikes). At its most basic, striking is a collective, temporary refusal to work by workers seeking to use this leverage in furtherance of some strategic purpose (usually to change employer behavior, although that orientation is itself shaped by existing law).
11. *See, e.g.*, James Gray Pope, *The Thirteenth Amendment Versus the Commerce Clause: Labor and the Shaping of American Constitutional Law, 1921-1959*, 102 COLUM. L. REV. 1, 59 (2002).
12. U.S. Bureau of Labor Statistics, *25 Major Work Stoppages in 2019 Involving 425,500 Workers*, U.S. DEP’T LAB. (Feb. 14, 2020), <https://www.bls.gov/opub/ted/2020/25-major-work-stop-pages-in-2019-involving-425500-workers.htm> [<https://perma.cc/5LG3-QLZ4>] (showing a drastic decline in “major work stoppages” (involving more than 1,000 workers) from 1947 through the early twenty-first century, with an uptick in 2018 and 2019). Although it is more difficult to directly compare data prior to 1947, the number of workers involved in strikes in the early 2000s still appears to be the lowest in 140 years of recorded data. For instance, in 1881, as strikes were just beginning to emerge as a form of protest, 130,000 workers struck. U.S. DEP’T OF COMMERCE, *HISTORICAL STATISTICS OF THE UNITED STATES, 1789-1945*, at 73

decline, legal scholars have focused on the rules that make striking difficult, even counterproductive, for workers. But while American law on striking is ambivalent at best, the impact of these rules on labor protest has always been mediated by political economy—the policies, social practices, and beliefs that constitute the arena of social life we have cordoned off as the “economy.”<sup>13</sup>

In this Essay, I present a brief history of the strike within American law and political economy, through four eras of transition and contingency—the Gilded Age-into-Progressive Era, the New Deal, the neoliberal turn, and today. Given the shorter-form of the piece, I paint with broad strokes, sometimes sacrificing granularity for the sake of clarity. At the end of the nineteenth century, strikes—borne of the new circumstances of industrial wage labor—politicized the employment relationship; they rendered private employment an arena of public concern, appropriate for state regulation. Notwithstanding legal impediments and many short-term failures, these strikes enabled New Deal labor law and its limited but meaningful redistributive effects. The contours of that regime rendered it particularly vulnerable to changing political economy. When the neoliberal turn undermined the economic case for unions, labor found itself restricted not just by an increasingly archaic legal regime, but by an underspecified normative claim. Even as inequality increased and job quality decreased, worker protest dried up.

Today, as a new Gilded Age gives rise to a new Progressive Era, the ossified remains of New Deal labor law discourage striking in a host of ways. Yet, in 2018 and 2019, strikes were suddenly on the rise. Labor activists have long proclaimed, “There is no such thing as an illegal strike, only as unsuccessful one,” inviting the question: “Can strikes be successful, in spite of an inhospitable legal

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(1949), <https://www2.census.gov/prod2/statcomp/documents/HistoricalStatisticsoftheUnitedStates1789-1945.pdf> [<https://perma.cc/FP92-AZGB>]. In contrast, in 2009, even combining U.S. Bureau of Labor Statistics (BLS) data on major work stoppages (12,500 workers) with FMCS data on, reported work stoppages involving less than 1,000 workers (19,435 workers) approximately 32,000 workers struck. U.S. Bureau of Labor Statistics, *Work Stoppages*, U.S. DEP'T LAB. (Mar. 11, 2020), <https://www.bls.gov/web/wkstp/annual-listing.htm> [<https://perma.cc/Z77H-GX25>]; *Work Stoppages Ended 2005-2014*, FED. MEDIATION & CONCILIATION SERV. (May 6, 2015), [https://www.fmcs.gov/wp-content/uploads/2015/07/Work\\_Stoppages2005-2014.xls](https://www.fmcs.gov/wp-content/uploads/2015/07/Work_Stoppages2005-2014.xls). These absolute numbers obscure even greater differences in percentage of workers striking, given the growth of the labor force over the time period.

13. The term “political economy” has historically been the preferred term for discussing economics as a function of political (and social) commitments. In the words of K. Sabeel Rahman, the term evokes “a moral and institutional conception of how our politics and economics relate to one another, how they are structured by law and institutions, and how they ought to be structured in light of fundamental moral values.” K. Sabeel Rahman, *Domination, Democracy, and Constitutional Political Economy in the New Gilded Age: Towards a Fourth Wave of Legal Realism?*, 94 TEX. L. REV. 1329, 1332 (2016).

regime?” Strikes are not just “economic weapons”; they are political protest. And the success of strikes today is about more than their immediate economic wins; their success must be in their longer-term socio-political ones – to the extent they help upend the dominant regulatory and discursive impulses of recent decades, and like the strikes of the Progressive Era, legitimate a new vision of law and political economy.

In Part I, I focus on the construction of the Progressive Era “labor question,” and the divergent responses of Progressive reformers and labor unions. In Part II, I reflect on the jurisprudence of the strike, focusing on current law’s deep ambivalence about labor power, manifest in the socio-legal construction of strikes as hard bargaining, rather than contentious politics. In Part III, I discuss whether and how worker protest today may have the capacity to build a new, and more enduring, social compact. My argument is this: the legal construction of strikes as “economic weapons” has denigrated their role as normative claims-making, as inherently political. And while somber assessments of the ways in which current law deters striking are not inaccurate, legal rules are not the sole determinant of labor’s power, or legitimacy. In this turbulent moment, strikes can be a tipping point for political economic change, bad law notwithstanding. I conclude with some brief thoughts about the role of law in social change.

#### **I. LABOR’S PROGRESSIVE ERA CHALLENGE TO LAISSEZ FAIRE: STRIKES AS PROTEST**

Legal scholars who study organized labor have little choice but to be historians. Labor’s legal regime is old, outdated, and so incompatible with both the modern organization of work and most people’s common-sense beliefs about it, that explaining it requires reconstruction of a world which no longer exists. We have often limited our historical horizons to the New Deal and its unraveling.<sup>14</sup> Yet, the New Deal’s specific regulatory apparatus was built upon the period of socioeconomic change which preceded it – the Gilded Age-turned-Progressive Era.<sup>15</sup>

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14. A host of labor-law classics focus on the enactment of the NLRA and its increasing inefficacy in serving its statutory purposes. See, e.g., Karl E. Klare, *Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness, 1937-1941*, 62 MINN. L. REV. 265, 265-67 (1978); Reuel E. Schiller, *From Group Rights to Individual Liberties: Post-War Labor Law, Liberalism, and the Waning of Union Strength*, 20 BERKELEY J. EMP. & LAB. L. 1, 1-2 (1999); Katherine Van Wezel Stone, *The Post-War Paradigm in American Labor Law*, 90 YALE L.J. 1509, 1513 (1981).

15. Although the exact parameters of these periods are contested, the Gilded Age loosely refers to the last few decades of the 1800s, and the Progressive Era loosely refers to the first few decades of the 1900s. Some historians have expressed dissatisfaction with sharp line drawing between these two eras. For example, Leon Fink states:

This moment is an opportune one to investigate the longer-term origins of present predicaments. Over the past decade, a host of scholars and commentators have claimed that we live in a new Gilded Age.<sup>16</sup> While historical metaphors are necessarily imperfect, there are parallels: rapid technological change; massive economic growth, inequality and instability; a populist challenge to the political establishment; even a pandemic.<sup>17</sup> As the protests of 2020 now augur the rise of a new Progressive Era, there is much to be learned about how the popular activism of one hundred years ago came to shape the institutional order that followed—for all of its successes and failures.

In this Part, I focus on the role of labor protest in the Gilded Age and Progressive Era as a response to the evolving institution of waged labor. Protest made the stakes of what came to be called the “labor question” apparent, rendering the employment relationship *political*. Yet, fearful of a state that had proven hostile to unions, leading Progressive Era labor leaders rejected a political vision of unions and the strike, in turn.

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I currently prefer the option of “The Long Gilded Age” for the entire [Gilded Age Progressive Era] (for convenience, let’s round the years to 1880–1920). Critically inquisitive (if still inevitably somewhat pejorative), the phrase usefully refocuses attention on bursting social inequalities as well as the political management of industrial capitalism across a crucial and formative period of the nation’s development.

LEON FINK, *THE LONG GILDED AGE: AMERICAN CAPITALISM AND THE LESSONS OF A NEW WORLD ORDER* 2 (2015). In this Essay, I use both terms flexibly, referring more to conceptual categories than to exact time periods.

16. See, e.g., LARRY M. BARTELS, *UNEQUAL DEMOCRACY: THE POLITICAL ECONOMY OF THE NEW GILDED AGE* 13 (2008); JANE F. MCALEVEY, *NO SHORTCUTS: ORGANIZING FOR POWER IN THE NEW GILDED AGE* 7–8 (2016); KAY LEHMAN SCHLOZMAN, HENRY E. BRADY & SIDNEY VERBA, *UNEQUAL AND UNREPRESENTED: POLITICAL INEQUALITY AND THE PEOPLE’S VOICE IN THE NEW GILDED AGE* 204 (2018); Kent Greenfield, *Reclaiming Corporate Law in a New Gilded Age*, 2 HARV. L. & POL’Y REV. 1, 5 (2008); Lina M. Khan, Book Review, *The End of Antitrust Revisited*, 133 HARV. L. REV. 1655 (2020) (reviewing TIM WU, *THE CURSE OF BIGNESS: ANTITRUST IN THE NEW GILDED AGE* (2018)).
17. THOMAS PIKETTY, *CAPITAL IN THE TWENTY-FIRST CENTURY* (2014); David Singh Grewal, *The Laws of Capitalism*, 128 HARV. L. REV. 626, 629 (2014) (reviewing PIKETTY, *supra*, and noting the “numerous parallels between current tendencies and those of earlier times, particularly the Gilded Age of the late nineteenth and early twentieth centuries”); see also MICHAEL E. MCGERR, *A FIERCE DISCONTENT: THE RISE AND FALL OF THE PROGRESSIVE MOVEMENT IN AMERICA, 1870–1920*, at xiv (2003) (arguing that “progressivism created much of our contemporary political predicament”).

A. *The “Labor Question”*

Is labor getting its due?” neoclassical economist John Bates Clark asked in 1912.<sup>18</sup> “[H]ow are the men and women who do the daily labour of the world to obtain progressive improvement in the conditions of their labour . . . ?” reflected President Wilson in 1919.<sup>19</sup> Amidst the rapid social change of the late 1800s and early 1900s, these questions – collectively understood as the “labor question” – occupied a central space in theorizing how industrialization and incorporation were reshaping American life.<sup>20</sup>

To be clear, this was not just a question of economic policy; it was “the constitutive moral, political, and social dilemma of the new industrial order.”<sup>21</sup> Historian Rosanne Currhas describes the labor question of the late nineteenth century as whether “democracy [could] survive in industrial America.”<sup>22</sup> The fact that it is hard to imagine a “labor question” as implicating the fate of democracy shows how much is *not* the same today. While there is currently greater concern about the structure of work and its rewards than in decades past, these concerns are not generally thought of as threats to democracy.<sup>23</sup> A century ago, however, the linkage was more palpable.

Prior to rapid industrialization in the 1860s, the northern economy was based primarily on small-scale farming and artisanal production.<sup>24</sup> In the course

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18. THOMAS C. LEONARD, *ILLIBERAL REFORMERS: RACE, EUGENICS, AND AMERICAN ECONOMICS IN THE PROGRESSIVE ERA* 77 (2016).

19. Wilma B. Liebman, “*Regilding the Gilded Age*”: *The Labor Question Reemerges*, 45 *STETSON L.R.* 19, 20 (2015).

20. A quick Google N-Gram search indicates that the phrase “labor question” first began appearing in published materials in the late 1850s and early 1860s. Usage grew exponentially during the 1880s. It then declined from its 1880s peak, with smaller re-ascensions between 1894 and 1900 and 1912 to 1919, until largely falling out of regular use by 1930. “*Labor Question*,” GOOGLE BOOKS NGRAM VIEWER, [https://books.google.com/ngrams/graph?content=%22labor+question%22&year\\_start=1800&year\\_end=2019&corpus=26&smoothing=3&direct\\_url=t1%3B%2C%22%20labor%20question%20%22%3B%2Cco](https://books.google.com/ngrams/graph?content=%22labor+question%22&year_start=1800&year_end=2019&corpus=26&smoothing=3&direct_url=t1%3B%2C%22%20labor%20question%20%22%3B%2Cco) [<https://perma.cc/H7C7-NXF2>].

21. *Id.*

22. ROSANNE CURRARINO, *THE LABOR QUESTION IN AMERICA: ECONOMIC DEMOCRACY IN THE GILDED AGE* 1 (2011).

23. *Compare* ELIZABETH ANDERSON, *PRIVATE GOVERNMENT: HOW EMPLOYERS RULE OUR LIVES (AND WHY WE DON’T TALK ABOUT IT)* 60 (2017) (discussing work as a question of democracy), *with* ARNE L. KALLEBERG, *GOOD JOBS, BAD JOBS: THE RISE OF POLARIZED AND PRECARIOUS EMPLOYMENT SYSTEMS IN THE UNITED STATES, 1970S-2000S*. (2011) (discussing declining job quality as a serious concern for economic and social wellbeing, but not emphasizing it as a threat to democracy).

24. *See* HERBERT GUTMAN, *WORK, CULTURE AND SOCIETY IN INDUSTRIALIZING AMERICA* (1976); Alex Gourevitch, *Labor and Republican Liberty*, 18 *CONSTELLATIONS* 431, 441-42 (2011).

of a generation or so, this mode of production was displaced by the growth of large corporations, and with them, waged labor.<sup>25</sup> This transition to waged labor in the North, as formerly-enslaved African American workers experienced new forms of economic subjugation in the post-Civil War South, challenged confidence in the promises of “free labor.” It did more than create new economic inequalities. It also embedded inequalities of control, independence, and self-determination into economic structures.<sup>26</sup> Small-r republican-minded thinkers worried that these structural inequities harkened back to the European aristocracies many had left behind.<sup>27</sup> The structure of work was accordingly very much a question of democracy.

*B. The “Progressive” Answer*

The Progressive Era involved a diverse set of responses to the problems of the Gilded Age. Its hallmark, however, was a new philosophy of governance. For Progressives, the solution to the labor question was a proactive state; reformers during this period were the first to harness state regulatory authority to benefit workers and consumers. While this instinct may seem common-sensical now, it involved a fundamental rethinking of the logic of state power.

Prior to the Gilded Age, government power — as the most visible form of concentrated resources and coercive authority — was largely conceptualized as something the American people needed protection *from*. But in the late 1800s, the proliferation of the corporate form, along with its use by industrialists to accumulate the massive surpluses of industrialization, created new private centers of power.<sup>28</sup> In response, Progressive reformers began to imagine a new role for government. Rather than being a threat to individual liberty, government could be

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25. See DAVID M. KENNEDY & LIZABETH COHEN, *THE AMERICAN PAGEANT: A HISTORY OF THE AMERICAN PEOPLE* 539-40 (15th ed. 2012).

26. See JEFFERSON COWIE, *THE GREAT EXCEPTION: THE NEW DEAL AND THE LIMITS OF AMERICAN POLITICS* 39-45 (2016).

27. *Id.*; see ALEX GOUREVITCH, *FROM SLAVERY TO THE COOPERATIVE COMMONWEALTH: LABOR AND REPUBLICAN LIBERTY IN THE NINETEENTH CENTURY* 6 (2015) (noting that for labor republicans, “[t]heir starting premise was that ‘there is an inevitable and irresistible conflict between the wage-system of labor and the republican system of government.’ Wage-labor was considered a form of dependent labor, different from chattel slavery, but still based on relations of mastery and subjection”).

28. See generally ALAN TRACHTENBERG, *THE INCORPORATION OF AMERICA: CULTURE & SOCIETY IN THE GILDED AGE* (1982) (exploring how industrialization and incorporation changed American society).

a protector of it, by undertaking a positive role in regulating corporate power and promoting the interests of workers and consumers.<sup>29</sup>

Recasting state regulation as in the general welfare was difficult work.<sup>30</sup> A host of legitimating narratives made the inequalities of the Gilded Age appear just: Spencerian survival of the fittest and Horatio Alger stories in public discourse;<sup>31</sup> and laissez faire and liberty of contract in the legal realm.<sup>32</sup> Legal historian Barbara Fried’s influential recounting of what she calls the “first law and economics movement” details the ways in which legal scholars at the time gradually undermined the laissez-faire view that “liberty in economic affairs” should be beyond government authority.<sup>33</sup> Progressive Era legal scholars emphasized the potential for coercion and unfreedom in the private sphere. “We live . . . under two governments,” Robert Hale argued, “‘economic’ and ‘political,’ the second public and hence visible, the first private and hence invisible.”<sup>34</sup> This reframing changed the terms of the debate about government regulation of the workplace. It meant that “when the government intervened in private market relations to curb the use of certain private bargaining power, it did not inject coercion for the first time into those relations. It merely changed the relative distribution of coercive power.”<sup>35</sup>

While some Progressive Era attempts to use the state to resolve the labor problem fell to *Lochner* Era judicial review, reformers did not give up.<sup>36</sup> Child labor laws, workers’ compensation systems, antitrust laws, and consumer regulations were all Progressive Era legal innovations.<sup>37</sup> Perhaps more importantly, Progressive Era law and political economy set the stage for imagining, and ultimately sustaining, the New Deal.

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29. See generally BARBARA FRIED, *THE PROGRESSIVE ASSAULT ON LAISSEZ FAIRE: ROBERT HALE AND THE FIRST LAW AND ECONOMICS MOVEMENT* (1998) (discussing early progressive justifications for government regulation).

30. See generally SIDNEY FINE, *LAISSEZ FAIRE AND THE GENERAL-WELFARE STATE: A STUDY OF CONFLICT IN AMERICAN THOUGHT, 1865-1901* (1956) (summarizing this intellectual project).

31. See, e.g., CAROL NACKENOFF, *THE FICTIONAL REPUBLIC: HORATIO ALGER AND AMERICAN PUBLIC DISCOURSE* (1994); HERBERT SPENCER, *THE MAN VERSUS THE STATE* (London & Edinburgh, Williams & Norgate 1884).

32. See, e.g., FINE, *supra* note 30, 126-67; Roscoe Pound, *Liberty of Contract*, 18 *YALE L.J.* 454 (1909).

33. FRIED, *supra* note 29, at 30.

34. *Id.* at 36.

35. *Id.*

36. See, e.g., COWIE, *supra* note 26, at 67-72; NATE HOLDREN, *INJURY IMPOVERISHED: WORKPLACE ACCIDENTS, CAPITALISM, AND LAW IN THE PROGRESSIVE ERA* (2020); MCGERR, *supra* note 17, at 107, 109.

37. *Id.*

### C. *Illegal Strikes*

These ideological and legal changes did not take place in a vacuum. If America was born of protest, so too was the modern American state. As historian David Huyssen recently explained, “Although middle-class philanthropists and technocratic politicians gave voice to policies that began to curtail inequality, they did not generate the conditions that made such policies either politically possible or effective.”<sup>38</sup> That, he argues, “took decades of . . . organizing from working people – in labor unions, youth groups, radical political parties, and coalitions of mass protest – from the 1870s through the 1940s.”<sup>39</sup>

Labor unrest was massive during the Gilded Age and Progressive Era. Prior to 1877, most labor conflicts were localized.<sup>40</sup> The large-scale conflicts of the late 1800s were unprecedented, and “the new American state remained unprepared for [what was to come,] the great upheaval of 1885-86, the 1892 Homestead strike, and the 1894 Pullman strike.”<sup>41</sup> Between 1901 and 1910, there were 162 strikes per million nonagricultural workers.<sup>42</sup> During the 1919-1920 strike wave, twenty-two percent of the nonagricultural workforce went on strike.<sup>43</sup> In comparison, in 2015, there were thirteen “major work stoppages” total, involving less than .04% of the nonagricultural workforce.<sup>44</sup>

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38. David Huyssen, *We Won't Get Out of the Second Gilded Age the Way We Got Out of the First*, VOX (Apr. 1, 2019, 8:30 AM EDT), <https://www.vox.com/first-person/2019/4/1/18286084/gilded-age-income-inequality-robber-baron> [<https://perma.cc/2LJC-7CLE>].

39. *Id.*

40. See JOSIAH BARTLETT LAMBERT, “IF THE WORKERS TOOK A NOTION:” THE RIGHT TO STRIKE AND AMERICAN POLITICAL DEVELOPMENT 48 (2018)

41. *Id.*

42. *Id.* at 69.

43. *Id.*

44. U.S. Bureau of Labor Statistics, *Work Stoppages*, U.S. DEP'T LAB. (Mar. 11, 2020), <https://www.bls.gov/web/wkstp/annual-listing.htm> [<https://perma.cc/DFE2-YZNY>]; cf. *BLS Data Viewer*, BLS BETA LABS, <https://beta.bls.gov/dataViewer/view/timeseries/CES000000001> [<https://perma.cc/C9YD-6U3X>] (listing the average number of non-agricultural employees nationally in 2015 at around 1.41 million). The leading official source of data on strikes is maintained by the BLS. Since 1982, it has tracked only “major work stoppages,” which it defines as “[a] strike or lockout involving 1,000 or more workers and lasting for at least one full shift in establishments directly involved in a stoppage.” U.S. Bureau of Labor Statistics, *Work Stoppages: History*, U.S. DEP'T LAB. (Jan. 23, 2019), <https://www.bls.gov/opub/hom/wsp/history.htm#under-the-first-work-stoppage-program-1947-81> [<https://perma.cc/S65T-9KAB>]; U.S. Bureau of Labor Statistics, *Work Stoppages: Concepts*, U.S. DEP'T LAB. (Jan. 23, 2019), <https://www.bls.gov/opub/hom/wsp/concepts.htm> [<https://perma.cc/TF9N-9CP3>].

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These strikes were part of a new strategic repertoire<sup>45</sup> for the incipient labor movement, a form of protest made possible by the unique circumstances of industrial waged labor.<sup>46</sup> Striking was risky, and not all labor unions were initially sanguine about the tool. The Knights of Labor, for instance, first insisted that striking was counter-productive, too prone to backlash.<sup>47</sup> Strikes were largely deemed illegal, as criminal conspiracies and then as antitrust violations, and subject to court injunction.<sup>48</sup> But workers kept striking, anyway. In the 1880s, workers struck throughout the country for the eight-hour day, the ability to share in the improved quality of life rapid growth had enabled. They proclaimed, “Eight hours for work, eight hours for sleep, eight hours for what we will.”<sup>49</sup> In 1902, mine workers in eastern Pennsylvania struck, seeking shorter hours, higher pay, and recognition of their union.<sup>50</sup> In 1912, the well-known “Bread and Roses” strike took place, in reaction to a pay cut. Female textile workers in Lawrence, Massachusetts walked out en masse, proclaiming “Hearts starve as well as bodies; give us bread, but give us roses!”<sup>51</sup>

The immediate outcomes of these strikes were mixed. With the help of government intervention, the 1902 coal strike was a relative victory; workers secured a 9-hour day and a pay raise, albeit no union recognition.<sup>52</sup> But government intervention was usually not neutral. Strikes were deemed unlawful conspiracies, or anti-competitive cartel action. They were subject to massive legal repression by state police, federal military power, and federal courts.<sup>53</sup> In contrast to the Progressive hope for state power, it was employers, not workers, who tended to benefit from state intervention during on-the-ground disputes between capital

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45. CHARLES TILLY, *THE POLITICS OF COLLECTIVE VIOLENCE* (2003). A repertoire is “what [movements] know how to do and what society has come to expect them to choose to do from within a culturally sanctioned and empirically limited set of options.” Sidney Tarrow, *Cycles of Collective Action: Between Moments of Madness and the Repertoire of Contention*, 17 *SOC. SCI. HIST.* 281, 283 (1993) (emphasis omitted).
46. Cf. Ruth Milkman & Stephanie Luce, *Labor Unions and the Great Recession*, 3, RSF: RUSSELL SAGE FOUND. *J. SOC. SCI.* 145, 146 (2017) (noting that unions grew as the economy began to recover from recessions in the 1890s and 1930s).
47. ERIK LOOMIS, *A HISTORY OF AMERICA IN TEN STRIKES* 58-64 (2018).
48. See generally WILLIAM FORBATH, *LAW AND THE SHAPING OF THE AMERICAN LABOR MOVEMENT* (1991) (discussing the legal tools that shaped the strike).
49. LOOMIS, *supra* note 47, at 59.
50. See generally SUSAN BERFIELD, *THE HOUR OF FATE: THEODORE ROOSEVELT, J.P. MORGAN, AND THE BATTLE TO TRANSFORM AMERICAN CAPITALISM* (2020) (providing the complicated history of the strike).
51. LOOMIS, *supra* note 47, at 98-105; Robert J. S. Ross, *Bread and Roses: Women Workers and the Struggle for Dignity and Respect*, 16 *WORKING USA: J. LAB. & SOC’Y* 59-68 (2013).
52. BERFIELD, *supra* note 50.
53. See *infra* notes 66 and 68.

and labor. In the face of employer resistance, facilitated by law, workers often lost.

The “Great Steel Strike” of 1919-20—the last large strike of the Progressive Era—illustrates all that seemed possible, yet turned out not to be, in this Era. In the fall of 1919, more than 350,000 steel workers across the Northeast and Midwest walked off the job, bringing half of American steel production to a halt.<sup>54</sup> But the Russian Revolution of 1917 had turned public opinion against labor, and the federal government opted not to intervene on behalf of the striking workers.<sup>55</sup> State militias and local police imprisoned strikers, and employers brought in strike-breakers, weakening worker solidarity. In some areas, local police rounded up striking workers from their homes and forced them back to work.<sup>56</sup> After this loss, virtually no union organizing occurred in the steel industry for fifteen years.<sup>57</sup>

But these immediate losses were not the end of the story. These strikes grew the labor movement, creating the material (organized workers) and ideological (something must be done about the “labor problem”) infrastructure for the legal reforms to come.<sup>58</sup> Importantly, they changed public consciousness. By ensuring that workers’ experience of the new economy was a part of public discourse, strikes contributed to the Progressive challenge to *laissez faire*. As Louis Brandeis proclaimed following the 1902 coal strike, “The growth in membership has been large, but the change in the attitude toward unions both on the part of the employer and of the community marks even greater progress. . . . That struggle compelled public attention to the trades union problem in a degree unprecedented in this country.”<sup>59</sup>

The path was not linear. During the 1920s, a host of factors—including pandemic fatigue<sup>60</sup>—prompted the country to revert to its Gilded Age habits. But

54. See WILLIAM Z. FOSTER, *THE GREAT STEEL STRIKE AND ITS LESSONS 191* (1920).

55. DAVID BRODY, *LABOR IN CRISIS: THE STEEL STRIKE OF 1919*, at 129 (1965).

56. FOSTER, *supra* note 54, at 135.

57. BRODY, *supra* note 55, at 179 (discussing the resurgence of the movement in the 1930s).

58. Labor-union membership grew significantly during this time period, albeit with periodic gains and losses. Melvyn Dubofsky argues that the two “greatest surges of growth” for the labor movement in history were between 1897-1903 and 1916-1919. Melvyn Dubofsky, Comment, 45 *INDUS. & LAB. REL. REV.* 810, 812 (1992) (reviewing FORBATH, *supra* note 48).

59. Louis D. Brandeis, Address to the Boston Central Labor Union (Feb 5, 1905), <https://louisville.edu/law/library/special-collections/the-louis-d.-brandeis-collection/an-exhortation-to-organized-labor-by-louis-d.-brandeis> [<https://perma.cc/8NKE-KPHR>].

60. Yascha Mounk, *Prepare for the Roaring Twenties*, *ATLANTIC* (May 21, 2020), <https://www.theatlantic.com/ideas/archive/2020/05/i-predict-your-predictions-are-wrong/611896> [<https://perma.cc/EPW4-6QAM>]; Dave Roos, *When WWI, Pandemic, and Slump Ended, Americans Sprung into the Roaring Twenties*, *HISTORY* (Apr. 28, 2020), <https://www.history.com/news/pandemic-world-war-i-roaring-twenties> [<https://perma.cc/S6BR-8BDG>].

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when the Great Depression hit, both the ideas and the on-the-ground power built in the decades prior allowed for rapid deployment of pro-labor legislation at just the moment when it was politically possible to implement it. The Norris-LaGuardia Act became law in 1932. The National Labor Relations Act (NLRA) followed in 1935.

The Great Steel Strike’s legacy extended beyond its immediate aftermath. When the Supreme Court upheld the NLRA against constitutional challenge in 1937, it cited the strike – that massive failure – as evidence of the constitutional propriety of the Act.<sup>61</sup> This “illegal strike” became part of the legitimating narrative for why government intervention in support of unionization was appropriate. “The Government aptly refers to the steel strike of 1919-1920, with its far-reaching consequence,” read the opinion; the “[r]efusal to confer and negotiate has been one of the most prolific causes of strife.”<sup>62</sup> Industrial unrest disrupted the stream of commerce; government regulation to prevent such disruption was constitutional.

### *D. Labor’s Approach to the Political*

Still, the bumpy road to the New Deal changed the labor movement, altering the scope of its demands. The labor movement which emerged at the end of the Progressive Era was different than what it had been, what it seemed it might become. While historians disagree about what exactly had changed and why, their stories are uniformly of paths not taken. In the late 1800s, consistent with the broad framing of the labor question, elements of organized labor fought for broad social and political reform, not just industrial citizenship for those skilled white men able to form unions. “Labor republicans” of the mid-1800s believed that the disparities in wealth and control linked to corporate wealth and waged labor were fundamentally incompatible with democratic governance. Terence Powderly, head of the Knights of Labor, sought “to forever banish that curse of modern civilization – wage slavery.”<sup>63</sup> These reformers demanded “industrial democracy” – a term that once connoted collective ownership of industry, or at least broad political co-determination of its terms. By the end of the Progressive Era, however, industrial democracy was well on its way to becoming synonymous with collective bargaining.<sup>64</sup>

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61. NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 43 (1937).

62. *Id.* at 42.

63. THE LABOR MOVEMENT: THE PROBLEM OF TO-DAY 411 (George E. McNeill ed., Boston, A.M. Bridgman & Co. 1887).

64. JOSEPH A. MCCARTIN, LABOR’S GREAT WAR: THE STRUGGLE FOR INDUSTRIAL DEMOCRACY AND THE ORIGINS OF MODERN AMERICAN LABOR RELATIONS, 1912-1921, at 220, 225 (1997).

Whether due to employer opposition,<sup>65</sup> judicial repression,<sup>66</sup> American individualism,<sup>67</sup> or state violence,<sup>68</sup> the “pure and simple unionism” of the American Federation of Labor (AFL) emerged as the leading vision for the role of labor unions in American society.<sup>69</sup> Pure and simple unionism was less about democracy and more about wages, less about using the state to counterbalance corporate power and more about being left alone to engage in “self-help”<sup>70</sup> – economism and voluntarism, respectively.<sup>71</sup> For this reason, when the Great Depression hit and political opportunity availed itself, labor’s primary request from public law was solitude. The Norris LaGuardia Act, labor’s first big legislative victory of the 1930s, deprived federal courts of jurisdiction over labor conflicts. Three years later, the NLRA gave workers the right to unionize, strike, and engage in other concerted activity *for the purpose of* collectively bargaining. “More” was the AFL’s answer to the labor question – but it was not the “more” of a broad, redistributive state; it was “more” at the bargaining table, by those workers with enough power to command it.<sup>72</sup>

William Forbath sums up the AFL’s ethos in the Progressive Era as, ironically, its own version of *laissez faire*.<sup>73</sup> In an era in which “Progressive” reformers were unified by the “bedrock conviction that positive statism was necessary to remedy the ills of modern life, and that continued negative statism invited disaster,”<sup>74</sup> the AFL insisted that the state could not be trusted to help workers. In other words, the form of organized labor which emerged as dominant by 1920 was not “Progressive” at all.

Built on these foundations, the NLRA ended up codifying a relatively economic and voluntarist understanding of organized labor’s role in a democratic

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65. See KIM VOSS, *THE MAKING OF AMERICAN EXCEPTIONALISM: THE KNIGHTS OF LABOR AND CLASS FORMATION IN THE NINETEENTH CENTURY* 4 (1993) (“[T]he mobilization of employer opposition . . . was the most important reason for the decline of the Knights.”).

66. See FORBATH, *supra* note 48, at 160 n.133 (discussing Justice Brandeis’s views of industrial democracy).

67. See, e.g., SELIG PERLMAN, *A THEORY OF THE LABOR MOVEMENT* 165 (1928).

68. FINK, *supra* note 15, at 38-47; LAMBERT, *supra* note 40, at 44.

69. MCCARTIN, *supra* note 64, at 56.

70. *Id.*

71. *Id.*

72. CURRARINO, *supra* note 22, at 86.

73. FORBATH, *supra* note 48, at 167-73.

74. Glen Gendzel, *What the Progressives Had in Common*, 10 J. GILDED AGE & PROGRESSIVE ERA 331, 337 (2011).

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polity.<sup>75</sup> Historian Leon Fink attributes this directly to the legacy of the Progressive Era:

[F]or all the “triumph” of long-sought principles in the 1930s act, a mortal weakness was also left over from its Long Gilded Age inheritance. Appealing at best to the interstate commerce clause allowing Congress to set appropriate economic policy for the national interest, the Wagner Act was not rooted in deep constitutional principles (such as the Bill of Rights) that would demand respect for unions as a necessary pillar of American democracy.<sup>76</sup>

As I discuss below, the vision of the strike which became codified in the NLRA was similarly shaped by this “mortal weakness” – an apoliticism, in process and substance. With the enactment of the NLRA, the strike became lawful as a bargaining tactic of last resort, not as a political right, necessary for co-determination.

## II. LEGAL AMBIVALENCE TOWARDS THE STRIKE: CONSTRUCTING THE “ECONOMIC WEAPON”

The strike has never fit easily within extant legal categories. According to Craig Becker, “the law has variously categorized strikes as criminal activity, as an invasion of property rights, and as a fundamental component of labor’s right to engage in collective bargaining.”<sup>77</sup> Jurisprudentially, striking has been theorized as either an associational freedom upon which law cannot intrude, or in the alternative, conduct so coercive and disorderly as to be antithetical to the rule of law – industrial vigilante justice.<sup>78</sup> Following enactment of the NLRA, strikes ostensibly became legal for the private sector workers covered by it. But especially

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75. See, e.g., Stone, *supra* note 14, at 1513. But see Seth Kupferberg, *Political Strikes, Labor Law, and Democratic Rights*, 71 VA. L. REV. 685, 701-04 (1985) (arguing that the NLRA as written is capacious enough to protect “political” strikes).

76. FINK, *supra* note 15, at 150; see also, e.g., Jim Pope, *Next Wave Organizing and the Shift to a New Paradigm of Labor Law*, 50 N.Y.L. SCH. L. REV. 515, 539-41 (2005-2006) (arguing, for example, that “[p]rotection for the workers’ ‘full freedom of association’ was strictly a means to the end of facilitating commerce”).

77. Craig Becker, “Better than a Strike”: *Protecting New Forms of Collective Work Stoppages Under the National Labor Relations Act*, 61 U. CHI. L. REV. 351 (1994).

78. Compare STEPHEN SKOWRONEK, *BUILDING A NEW AMERICAN STATE: THE EXPANSION OF NATIONAL ADMINISTRATIVE CAPACITIES, 1877-1920* (1982) (arguing that the “new American state” of the late 1800s treated strikes as insurrections that challenged the state’s monopoly on the legitimate use of force), with JEFFREY VOGT, JANICE BELLACE, LANCE COMPA, KD EWING,

after the 1947 Taft-Hartley Amendments to the NLRA, striking's legality was tied to an increasingly narrow understanding of its purpose. In this Part, I provide a brief overview of how current law – shaped by its Progressive Era mortal weakness – codifies long-lasting legal ambivalence about striking, by constructing the strike as an “economic weapon,” and in so doing, as *apolitical*.

A. *The “Right” to Strike*

Under the NLRA, workers are generally understood to have a “right” to strike. Section 7 of the Act states that employees have the right to engage in “concerted activities for . . . mutual aid or protection,”<sup>79</sup> which includes striking. To drive this point home, section 13 of the NLRA specifies, “Nothing in this [Act] . . . shall be construed so as either to interfere with or impede or diminish in any way the right to strike, or to affect the limitations or qualifications on that right.”<sup>80</sup> Note that it is a testament to deeply-held disagreements about the strike (is it a fundamental right which needs no statutory claim to protection, or a privilege to be granted by the legislature?) that the statute’s language is framed in this way: the law which first codified a right to strike does so by insisting that it does not “interfere with or impede or diminish” a right, which had never previously been held to exist.<sup>81</sup>

To say that a strike is ostensibly legal, though, is not to say whether it is sufficiently protected as to make it practicable for working people. Within the world of labor law, this distinction is often framed as the difference between whether an activity is legal and whether it is protected. So long as the state-as-regulator will not punish you for engaging in a strike, that strike is legal. But given that striking is protest against an employer, rather than against the state-as-regulator, being legal is insufficient protection from the repercussion most likely to deter it—job loss.

Employees *technically* cannot be fired for protected concerted activity under the NLRA, including protected strikes. But in a distinction that Getman and Kohler note “only a lawyer could love—or even have imagined,”<sup>82</sup> judicial construction of the NLRA permits employers to *permanently replace* them in many

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LORD HENDY QC, KLAUS LÖRCHER & TONIA NOVITZ, *THE RIGHT TO STRIKE IN INTERNATIONAL LAW* 158 (2020) (arguing that the right to strike is so well-established as part of the right to freedom of association that it has attained the status of customary international law).

79. 29 U.S.C. § 157 (2018).

80. 29 U.S.C. § 163 (2018).

81. *Id.*

82. Julius G. Getman & Thomas C. Kohler, *The Story of NLRB v. Mackay Radio & Telegraph Co.: The High Cost of Solidarity*, in *LABOR LAW STORIES* 13, 14 (Laura J. Cooper & Catherine L. Fisk eds., 2005).

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cases. Consequently, under the perverse incentives of this regime, strikes can facilitate deunionization. Strikes provide employers an opportunity, unavailable at any other point in the employment relationship, to replace those employees who most support the union – those who go out on strike – in one fell swoop. As employers have increasingly turned to permanent replacement of strikers in recent decades, strikes have decreased.<sup>83</sup> A law with a stated policy of giving workers “full freedom of association [and] actual liberty of contract” offers a “right” which too many workers cannot afford to invoke.<sup>84</sup>

It is not just that the right is too “expensive,” however; it is that its scope is too narrow, particularly following the 1947 Taft-Hartley Amendments to the NLRA. Law cabins legitimate strike activity, based on employees’ motivation, their conduct, and their targets. The legitimate purposes are largely bifurcated, either “economic,” that is to provide workers with leverage in a bargain with their employer, or to punish an employer’s “unfair labor practice,” its violation of labor law (but not other laws). A host of reasons that workers might want to protest are unprotected – Minneapolis bus drivers not wanting their labor to be used to “shut down calls for justice,” for instance. Striking employees also lose their limited protection under the Act if they act in ways that are deemed “disloyal” to their employer,<sup>85</sup> or if they engage in the broad swath of non-violent activity construed to involve “violence,” such as mass picketing.<sup>86</sup> Tactically, intermittent strikes, slow-downs, secondary strikes, and sit-down strikes are unprotected.<sup>87</sup> Strikes are also unprotected if unionized workers engage in them without their union’s approval,<sup>88</sup> if they concern nonmandatory subjects of bargaining,<sup>89</sup> or if

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83. John Logan, *Permanent Replacements and the End of Labor’s “Only True Weapon,”* 74 INT’L LAB. & WORKING-CLASS HIST. 171, 171 (2008).

84. 29 U.S.C. § 151 (2018).

85. See *NLRB v. Local Union No. 1229*, 346 U.S. 464, 472 (1953) (holding that concerted activity, which would otherwise be protected under the NLRA, loses that protection if workers make claims that are so critical of an employer as to be “disloyal[]”).

86. *NLRB v. Fansteel Metallurgical Corp.*, 306 U.S. 240, 253 (1939).

87. See 29 U.S.C. § 158(b)(4) (secondary actions); *NLRB v. Ins. Agents’ Int’l Union*, 361 U.S. 477 (1960) (slow-downs); *Int’l Union v. Wis. Emp. Rel. Bd.*, 336 U.S. 245 (1949), *overruled on other grounds by* *Lodge 76 v. Wis. Emp. Rel. Comm’n*, 427 U.S. 132 (1976) (intermittent strikes); *Fansteel*, 306 U.S. at 248 (sit-downs); *Polytech, Inc.*, 195 N.L.R.B. 695, 696 (1972) (intermittent strikes).

88. *Emporium Capwell Co. v. W. Addition Cmty. Org.*, 420 U.S. 50, 63-64 (1975).

89. See *NLRB v. Borg-Warner Corp.*, 356 U.S. 342, 349 (1958).

they are inconsistent with a no-strike clause.<sup>90</sup> Independent contractors who engage in strikes face antitrust actions.<sup>91</sup> Labor unions who sanction unprotected strikes face massive liability.<sup>92</sup>

The National Labor Relations Board – the institution charged with enforcing the policies of the Act – summarizes these “qualifications and limitations” on the right to strike on its website in the following way:

The lawfulness of a strike may depend on the object, or purpose, of the strike, on its timing, or on the conduct of the strikers. The object, or objects, of a strike and whether the objects are lawful are matters that are not always easy to determine. Such issues often have to be decided by the National Labor Relations Board. The consequences can be severe to striking employees and struck employers, involving as they do questions of reinstatement and backpay.<sup>93</sup>

The “right” to strike, it seems, is filled with uncertainty and peril.

Collectively, these rules prohibit many of the strikes which helped build the labor movement in its current form. Ahmed White accordingly argues that law prohibits *effective* strikes, strikes which could actually be powerful enough to change employer behavior: “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.”<sup>94</sup>

### B. *The Limits of Legal Categories*

Legal scholars have long tried to make sense of the law’s ambivalent treatment of worker power and collective self-determination. Here, I emphasize one point. What makes striking, and the legal apparatus for it, so complicated is that the strike transcends easy legal categorization. In one respect, it is a form of protest, fundamentally normative and political. Yet, that protest takes place within

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90. *Mastro Plastics Corp. v. NLRB*, 350 U.S. 270, 296 (1956) (Frankfurter, J., dissenting).

91. See Sanjukta M. Paul, *The Enduring Ambiguities of Antitrust Liability for Worker Collective Action*, 47 *LOY. U. CHI. L.J.* 969 (2016).

92. 29 U.S.C. § 187 (2018); see Catherine L. Fisk & Diana S. Reddy, *Protection by Law, Repression by Law: Bringing Labor Back into the Study of Law and Social Movements*, 70 *EMORY L.J.* 63, 104-09 (2020).

93. *NLRA and the Right to Strike*, NAT’L LAB. REL. BOARD, <https://www.nlr.gov/about-nlr/rights-we-protect/your-rights/nlra-and-the-right-to-strike> [https://perma.cc/VC87-2JRF].

94. Ahmed White, *Its Own Dubious Battle: The Impossible Defense of an Effective Right to Strike*, 2018 *WIS. L. REV.* 1065, 1127.

an economic space where property and contract law reign supreme.<sup>95</sup> To the extent a strike *looks* like a protest, it approximates the kind of activity that should be a fundamental right. But because it takes place not in the public sphere, but at work—within these “authoritarian, private government[s],” as philosopher Elizabeth Anderson recently described them—such rights do not carry over.<sup>96</sup>

Our eighty-five-year-old labor-law regime circumnavigates these complex jurisprudential issues by conceptualizing the strike as economic activity. In the almost anachronistic language used by the Supreme Court, strikes are “economic weapons in reserve.”<sup>97</sup> And “their actual exercise *on occasion* by the parties, is part and parcel of the system that the Wagner and Taft-Hartley Acts have recognized.”<sup>98</sup>

A full genealogy of the term “economic weapon,” and how it came to such prominence in legal discourse, is beyond the scope of this short Essay.<sup>99</sup> But it is worth noting that in pre-New Deal labor discourse, labor activists used the term to emphasize voluntarism over electoral politics, material power over normative. In 1924, the AFL’s magazine, the American Federationist, reflected on the voluntarism of American unions:

[Electoral politics] is the fatal lure in other countries, the deadly trap, the rock on which labor goes smash, soon or late.

It has never fooled the labor movement in America. The American worker goes into politics and uses his ballot according to his convictions, *but he does not tie his economic weapon into a bundle with his political power* and then find he has made a slapstick at which in the end everybody laughs.<sup>100</sup>

The AFL’s view of the strike, as an “economic weapon” to use on the market battlefield, eventually became the legal understanding. Reflecting on the evolving law of the strike in 1920, Supreme Court Justice Taft proclaimed the strike

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95. For a discussion of the quasi-privatization of the public sector workplace, see *supra* note 8.

96. ELIZABETH ANDERSON, PRIVATE GOVERNMENT: HOW EMPLOYERS RULE OUR LIVES (AND WHY WE DON’T TALK ABOUT IT) 60 (2017).

97. NLRB v. Int’l Union of Ins. Agents, 361 U.S. 477, 489 (1960).

98. *Id.* at 489.

99. A Google N-Gram search of the phrase “economic weapon” shows it coming into usage in 1913 and rapidly increasing in prominence through 1919. Usage peaked again from 1937-1942, and declined rapidly thereafter. “Economic Weapon,” GOOGLE BOOKS NGRAM VIEWER, [https://books.google.com/ngrams/graph?year\\_start=1800&content=economic+weapon&year\\_end=2019&corpus=26&smoothing=3&direct\\_url=t1%3B%2Ceconomic%20weapon%3B%2Cco](https://books.google.com/ngrams/graph?year_start=1800&content=economic+weapon&year_end=2019&corpus=26&smoothing=3&direct_url=t1%3B%2Ceconomic%20weapon%3B%2Cco) [<https://perma.cc/EGP4-T8GA>].

100. Charles Edward Russell, *A. F. of L. Doesn’t Fly Kites*, 31 AM. FEDERATIONIST 55, 55 (1924) (emphasis added).

an instrument “in a lawful economic struggle . . . between employer and employees as to the share . . . between them of the joint product of labor and capital.”<sup>101</sup>

Political scientist Josiah Lambert accordingly argues that law came to protect the strike as a “commercial right,” not a “citizenship right.”<sup>102</sup> Legal scholars similarly highlight that a more expansive, quasi-constitutional view of striking as a “civil right” warred with the purely statutory conception of striking as an “economic[]interest.”<sup>103</sup> The latter won the day, eclipsing early conceptions of a worker as more than “a factor of production” but “a self-governing citizen with rights and duties beyond those enumerated in the labor contract.”<sup>104</sup> While visions of how else a strike might have been conceptualized within American law are varied and inchoate, the common thread is, again, that something else was possible.<sup>105</sup> In 1914, the Clayton Act proclaimed that “[t]he labor of a human being is not a commodity or article of commerce.”<sup>106</sup> By 1937, labor’s commerce-ness had become the source of its rights.

Consistent with the construction of the strike as economic (and not political), public-sector employees excluded from the NLRA largely lack a legally protected right to strike. Most federal and state labor relations laws prohibit strikes by public employees.<sup>107</sup> Where strikes are prohibited by law, workers can not only be fired for them, but they can also face a range of penalties from loss of government benefits, fines, and potentially jail time.<sup>108</sup> Their unions can too.<sup>109</sup> Within a world in which strikes are understood as “a legitimate aspect of the

101. *Am. Steel Foundries v. Tri-City Cent. Trades Council*, 257 U.S. 184, 209 (1920).

102. LAMBERT, *supra* note 40, at 84.

103. Kurt L. Hanslowe & John L. Acierno, *Law and Theory of Strikes by Government Employees*, 67 CORNELL L. REV. 1055, 1058–59 (1982).

104. LAMBERT, *supra* note 40, at 85.

105. See, e.g., *id.*; Hanslowe & Acierno, *supra* note 103, at 1057; see also Alex Gourevitch, *The Right to Strike: A Radical View*, 112 AM. POL. SCI. REV. 905, 905 (2018) (characterizing the right to strike as “a right to resist oppression”).

106. 15 U.S.C. § 17 (2018).

107. See RICHARD C. KEARNEY & PATRICE M. MARESCHAL, *LABOR RELATIONS IN THE PUBLIC SECTOR* 244 (5th ed. 2014).

108. Texas, for instance, provides that any public employee who “strike[s] or engage[s] in an organized work stoppage against the state or a political subdivision of the state . . . forfeits all civil service rights, reemployment rights, and any other rights, benefits, and privileges the employee enjoys as a result of public employment or former public employment.” TEX. GOV’T CODE ANN. § 617.003(a)-(b) (West 2019).

109. See, e.g., Barbara J. Egan, *Damage Liability of Public Employee Unions for Illegal Strikes*, 23 B.C. L. REV. 1087, 1089 (1982).

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market or enterprise economy,” public-sector strikes lack comparable legitimacy.<sup>110</sup> They are “deemed inappropriate because the government is not merely an employer participating in the economy, but is the lawgiver for the economy.”<sup>111</sup> In other words, they are *political*. In *Janus v. AFSCME*, the Supreme Court finally ruled public-sector agency-fee laws unconstitutional, on the ground that line drawing between the economic and the political in the public sector is untenable.<sup>112</sup> And it *is*, but *Janus* does little to bring coherence to the law.<sup>113</sup>

To be clear, there is a way in which categorizing the strike as an economic act is radically pro-labor. According to labor law, the collective withholding of labor, facilitated by law, is neither an illiberal conspiracy nor an anticompetitive restraint of trade. It is a legitimate bargaining tactic.

### C. Alternate Visions

And yet, the pre-New Deal history of the American labor movement reminds us that alternate visions for the strike once existed, and with them, for the role of organized labor in a democratic polity. Legal scholars of the first law-and-economics movements argued that corporations were akin to governments in their coercive power.<sup>114</sup> They did so in order to politicize the private, to render it a legitimate site of democratic governance.<sup>115</sup> Jurisprudentially, much was up for grabs at this point. Corporations might have been analogized to governments, rather than persons, owing constitutional rights *to* their constituents, rather than holders of those rights against government regulation. Consistent with this view of employment as a political relationship, the right to strike could have been a right of a different sort (political? civil? property?), not a commercial one.<sup>116</sup>

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110. Hanslowe & Acierno, *supra* note 103, at 1055.

111. *Id.*

112. *Janus v. Am. Fed’n of State, Cty. & Mun. Emp.*, 138 S. Ct. 2448 (2018).

113. See, e.g., Catherine L. Fisk, *A Progressive Labor Vision Of The First Amendment: Past As Prologue*, 118 COLUM. L. REV. 2057, 2075 (2018) (“If anti-union government employees have a First Amendment right to resist paying money to the union to negotiate over working conditions, formal equality would suggest that pro-union government employees have a First Amendment right to discuss their working conditions collectively. Having reintroduced the First Amendment into the labor field, there is no intellectually respectable way that the Court can insist that the only First Amendment right workers enjoy is the right *not* to join a union or to pay dues.”).

114. FRIED, *supra* note 29, at 5.

115. *Id.* at 9.

116. LAMBERT, *supra* note 40, at 85.

The labor movement which emerged from the Progressive Era, however, did not advance this vision of political economy. Fearing that any broadly conceived “public interest” would prioritize capital over labor, the AFL preferred to build worker-led institutions, organizations that would be corporations’ counterparts. It advanced a corporatist solution rather than a statist one. And within the world of industrial democracy qua collective bargaining, the strike became understood as an economic right, hard bargaining, a last resort in negotiations gone awry.<sup>117</sup>

The limitations of this understanding of the strike did not immediately become apparent. Among other factors, Keynesian political economy gave labor unions legitimacy as agents of a common good.<sup>118</sup> Employers—constrained in part by law, and even more by institutional understandings of what was acceptable—pulled their punches. When the NLRA was first enacted, strike activity, union membership, and worker wages grew concurrently.<sup>119</sup> And even after enactment of the Taft-Hartley Amendments of 1947—in the era of the so-called “labor-capital” accord—strikes continued to occur with some frequency, and to be associated with wage growth for workers.<sup>120</sup>

As I discuss further below, this changed in the 1970s, as the Keynesian political economic commitments that had bolstered labor law gave way. Between 1983 and 2015, the total union membership rate declined by approximately 44%, and the private sector union membership rate declined by 60%.<sup>121</sup> Over a similar period, major work stoppages declined by 90%.<sup>122</sup> And the few strikes that still did occur were qualitatively different. They were “desperate measures,” which failed to advance union objectives.<sup>123</sup> They did not create wage growth, the “more” that Progressive Era labor leaders had envisioned.<sup>124</sup> As an economic weapon, the strike malfunctioned.<sup>125</sup>

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<sup>117</sup>. *Id.* at 8.

<sup>118</sup>. Diana S. Reddy, *Organized Labor and the Law of Apolitical Economy* 12-16 (Jan. 1, 2021) (unpublished manuscript) (on file with author).

<sup>119</sup>. Robin Stryker, *Half Empty, Half Full, or Neither: Law, Inequality, and Social Change in Capitalist Democracies*, 3 ANN. REV. L. & SOC. SCI. 67, 74 (2007).

<sup>120</sup>. Jake Rosenfeld, *Desperate Measures: Strikes and Wages in Post-Accord America*, 85 SOC. FORCES 235, 238-39 (2006).

<sup>121</sup>. Meagan Dunn & James Walker, *Union Membership in the United States*, U.S. BUREAU LAB. STAT. (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/SS83-83KC>].

<sup>122</sup>. See *infra* note 139 for further detail on the decrease in strikes.

<sup>123</sup>. Rosenfeld, *supra* note 120, at 235.

<sup>124</sup>. *Id.*

<sup>125</sup>. See Reddy, *supra* note 118, manuscript at 1, 3 n.3, 11 (noting that public support, which is critical for the success of strikes as an economic weapon, has declined).

### III. LABOR’S TWENTY-FIRST CENTURY CHALLENGE TO NEOLIBERALISM: STRIKING IN A NEW GILDED AGE

#### A. Work Law in Political Economic Context

In analyzing labor’s current predicament, most legal scholarship emphasizes the limitations of law. “So it is,” Ahmed White concludes, “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.”<sup>126</sup> The unstated assumption in many of these pieces is that workers rarely strike *because* the law is bad. And there is little question that current legal impediments powerfully influence unions’ and workers’ calculus about whether striking is worth it. But if the massive labor unrest of the Gilded Age and Progressive Era tells us anything, it is that the relationship between bad law and worker action is not as direct as legalistic accounts suggest. In this Part, I draw from the experiences of labor in the Gilded Age and Progressive Era to discuss the relationship between law, political economy, and social change today, and how strikes may serve the labor movement and the polity—bad law, notwithstanding.

Regulation of the workplace is inexorably connected to political economy.<sup>127</sup> Work law, like all law, is mediated by institutionalized practices and legitimating narratives.<sup>128</sup> And so it is for the law of the strike. Nowhere is this insight better illustrated than in the regulation of “permanent replacements.” In explaining the lack of strikes in recent years, many scholars immediately point to the rule that permits employers to permanently replace economic strikers.<sup>129</sup> Yet, the rule precedes the drastic decline in strikes by *decades*. It was not a reactionary Burger,

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<sup>126.</sup> White, *supra* note 94, at 1127.

<sup>127.</sup> See generally, e.g., Kate Andrias, *The New Labor Law*, 126 YALE L.J. 1, 37 (2016) (describing the limitations of both employment and labor law in the contemporary political economy); Mark Barenberg, *The Political Economy of the Wagner Act: Power, Symbol, and Workplace Cooperation*, 106 HARV. L. REV. 1379, 1416 (1993) (identifying “proto-Keynesian components” of the Wagner Act); Deborah Dinner, *Beyond ‘Best Practices’: Employment-Discrimination Law in the Neoliberal Era*, 92 IND. L.J. 1059 (2017) (examining the relationship between employment discrimination law and neoliberalism); Brishen Rogers, *Three Concepts of Workplace Freedom of Association*, 37 BERKELEY J. EMP. & LAB. L. 177 (2016) (noting the recent ascension of a neoliberal vision of workplace freedom of association).

<sup>128.</sup> See, e.g., CATHERINE RUTH ALBISTON, *THE INSTITUTIONAL CONTEXT OF CIVIL RIGHTS: MOBILIZING THE FAMILY AND MEDICAL LEAVE ACT IN THE COURTS AND IN THE WORKPLACE* (2001) (describing the systems of rights mobilization within social institutions that undermine the rights themselves); LAUREN B. EDELMAN, *WORKING LAW: COURTS, CORPORATIONS, AND SYMBOLIC CIVIL RIGHTS* 3-11 (2016) (describing some of the legitimizing narratives around workplace civil rights).

<sup>129.</sup> See James G. Pope, *How American Workers Lost the Right to Strike, and Other Tales*, 103 MICH. L. REV. 518, 527-28 (2004). The Clean Slate for Worker Power rightly makes ending the rule

Rehnquist, or Roberts Court which construed the NLRA to permit permanent replacement of strikers. Rather, the Supreme Court unanimously adopted this construction of the NLRA *in 1938*, one year after it affirmed the constitutionality of the Act.

In a classic example of what law-and-society scholars describe as the gap between law on the books and law in action,<sup>130</sup> employers largely did not enforce the “right” to permanently replace striking employees until four decades later.<sup>131</sup> As labor scholar John Logan tells it, “The legal status of permanent replacements did not seem terribly important in the 1940s-1960s, as relatively few employers used or threatened to use permanent replacements.”<sup>132</sup> This is partly because unions were powerful during these decades, and it was strategically unwise for employers to escalate labor conflict (not to mention that it was difficult to recruit workers to serve as “scabs”).<sup>133</sup> But it was also because the New Deal changed more than law; it changed the institutional practices and cultural commitments that followed from it.<sup>134</sup> For a time, unions became a relatively unquestioned part

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of permanent replacements central to its vision of an effective right to strike in its comprehensive proposal for labor-law reform. See *The Clean Slate for Worker Power: Building a Just Economy and Democracy*, CLEAN SLATE FOR WORKER POWER, [https://assets.website-files.com/5ddc262b91f2a95f326520bd/5e3096b9feb8524936752feo\\_CleanSlate\\_SinglePages\\_ForWeb\\_noemptyspace.pdf](https://assets.website-files.com/5ddc262b91f2a95f326520bd/5e3096b9feb8524936752feo_CleanSlate_SinglePages_ForWeb_noemptyspace.pdf) [<https://perma.cc/3HKU-Y346>].

130. See, e.g., Jean-Louis Halperin, *Law in Books and Law in Action: The Problem of Legal Change*, 64 ME. L. REV. 45, 46-47 (2011).
131. A Google N-Gram search for “permanent replacements” reveals little usage of the term until approximately 1980, then a rapid spike which peaked in 1991, then rapidly declining usage by 2000 (by which point the lack of strikes made permanent replacements largely unnecessary). “Permanent Replacement,” GOOGLE BOOKS NGRAM VIEWER, [https://books.google.com/ngrams/graph?content=%22permanent+replacements%22&year\\_start=1800&year\\_end=2019&corpus=26&smoothing=3&direct\\_url=t1%3B%2C%22%20permanent%20replacements%20%22%3B%2Cco](https://books.google.com/ngrams/graph?content=%22permanent+replacements%22&year_start=1800&year_end=2019&corpus=26&smoothing=3&direct_url=t1%3B%2C%22%20permanent%20replacements%20%22%3B%2Cco) [<https://perma.cc/V3BT-F5CQ>].
132. Logan, *supra* note 83, at 174.
133. FUNDAMENTALS OF EMPLOYMENT LAW 640 (Karen E. Ford, Kerry E. Notestine & Richard N. Hill eds., 2d ed. 2000) (“Prior to the 1980s, use of the strike replacement weapon was infrequent. In large part, this was due to labor’s ability to maintain respect for picket lines.”).
134. See, e.g., Louis Uchitelle, *New Tactics by Unions Avoid Strikes*, N.Y. TIMES (July 15, 1994), <https://www.nytimes.com/1994/07/15/us/new-tactics-by-unions-avoid-strikes.html> [<https://perma.cc/A786-XYPW>] (“Until the 80’s, a decade when anti-union sentiment increased among corporations and in Washington, replacing strikers was considered unacceptable by both workers and managers.”).

of the status quo.<sup>135</sup> This is not to say that the scope of their purview was uncontested; it always was. Their fundamental legitimacy, however, was not in question, as it has been of late.

The labor-capital accord ended with the neoliberal turn.<sup>136</sup> And while “neoliberalism” can be a frustratingly capacious term, its analytical purchase here is in situating labor’s current struggles in relation to regulatory and discursive changes that have prioritized the “free” market over other forms of ordering, like unions. Under neoliberalism, existing arguments for why unions served a common good were subject to epistemic erasure.

Labor’s historical antipathy to the “political” rendered it particularly vulnerable to the neoliberal turn. Labor’s New Deal accommodation, born of its Progressive Era “mortal weakness,” made an economic case for labor unions, and left the normative case for them underspecified. Keynesian demand-side economic policy and industrial peace were the NLRA’s rationales.<sup>137</sup> Neoliberal political economy undermined both. It flipped the Keynesian script, depicting capital as the driver of economic well-being, rather than worker income-qua-consumer spending. And, a few crushed strikes provided a watered-down version of industrial peace. Ronald Reagan’s decision to use the power of the federal government to end the 1981 federal air controllers’ strike (an illegal *and* unsuccessful strike) by firing striking workers, replacing them, and decertifying their union,<sup>138</sup> dramatized this shift. Private employers began replacing workers on strike too. Workers in turn stopped striking.<sup>139</sup> And for some, this was taken as

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135. See NELSON LICHTENSTEIN, *A CONTEST OF IDEAS: CAPITAL, POLITICS, AND LABOR* 18 (2013) (describing the time period from the 1930s to the 1970s as an era of political economy “characterized by Democratic Party dominance, Keynesian statecraft, and a trade union movement whose power and presence was too often taken for granted”).

136. See Jedediah Britton-Purdy, David Singh Grewal, Amy Kapczynski & K. Sabeel Rahman, *Building a Law-and-Political-Economy Framework: Beyond the Twentieth-Century Synthesis*, 129 *YALE L.J.* 1784 (2019); David Singh Grewal & Jedediah Purdy, *Introduction: Law and Neoliberalism*, 77 *LAW & CONTEMP. PROBS.* 1 (2014); see also WENDY BROWN, *Neoliberalism and the End of Liberal Democracy*, in *EDGEWORK: CRITICAL ESSAYS ON KNOWLEDGE AND POLITICS* 37 (2005) (describing neoliberalism as “the repudiation of the Keynesian welfare state economics” and promotion of “a radically free market”).

137. 29 U.S.C. § 151 (2018) (providing rationales for the NLRA).

138. See generally JOSEPH A. MCCARTIN, *COLLISION COURSE: RONALD REAGAN, THE AIR TRAFFIC CONTROLLERS, AND THE STRIKE THAT CHANGED AMERICA* 14 (2011).

139. In early 2017, the BLS reported as follows:

Over the past four decades (1977-1986 to 2007-2016) major work stoppages declined approximately 90 percent. (See chart 1, table A, and table 1.) The period from 2007 to 2016 was the lowest decade on record, averaging approximately 14 major work stoppages per year. The lowest annual number of major work stoppages was 5 in 2009.

proof that labor law had done its job of achieving industrial peace, and was no longer needed.<sup>140</sup>

And so, while there is a tendency to see hostile law as the reason for worker quiescence, it is not formal law alone that is the problem. The problem is equally an economic and cultural milieu which renders these rules cognizable, legitimate, and enforceable. In recent decades, a vision of capital as the driver of economic growth and unions as rent-seeking interest groups has enabled the permanent replacement of strikers, the deployment of union avoidance consultants, and host of anti-union practices that used to be illegitimate, but not necessarily illegal. Labor lost “the contest of ideas.”<sup>141</sup>

At one level, the importance of political economy is acknowledged in the literature. Craig Becker concedes in a footnote that “[t]o emphasize the law’s role is not to imply that the efficacy of strikes rests solely on formal legal rights, for strikes were waged with success prior to the advent of legal protection.”<sup>142</sup> And White notes that law can be “malleable and . . . within the province of workers to reshape around their own interests and visions.”<sup>143</sup> Still, through emphasis on formal legal rules, legal scholarship has at times failed to recognize the magnitude of neoliberalism’s impact, not just as a material change in conditions, but as an ideological change in what is possible to imagine.<sup>144</sup>

Reflecting a more nuanced approach to the relationship between formal legal rules and what happens on the ground, labor organizers are themselves ambivalent about how much bad law matters. A well-known maxim within the movement says that “there is no such thing as an illegal strike, only an unsuccessful

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See News Release, U.S. Bureau of Labor Statistics, Major Work Stoppages in 2016 (Feb. 9, 2017), [https://www.bls.gov/news.release/archives/wkstp\\_02092017.pdf](https://www.bls.gov/news.release/archives/wkstp_02092017.pdf) [<https://perma.cc/U3M8-778T>].

140. Michael L. Wachter, *The Striking Success of the National Labor Relations Act*, in RESEARCH HANDBOOK ON THE ECONOMICS OF LABOR AND EMPLOYMENT LAW 429 (Cynthia L. Estlund & Michael L. Wachter eds., 2012).

141. LICHTENSTEIN, *supra* note 135, at 3, 168-70 (describing the “ideological success of the laissez-faire triumphalists” in the late twentieth century as part of an ongoing “contest of ideas” between capital and labor about political economy).

142. See Becker, *supra* note 77, at 353 n.13.

143. See White, *supra* note 94, at 1070.

144. See Eric Tucker, *Can Worker Voice Strike Back? Law and the Decline and Uncertain Future of Strikes*, in VOICES AT WORK 455, 463 (Alan Bogg & Tonia Novitz eds., 2014) (“Perhaps even more fundamentally, neoliberalism involved a cultural revolution that undermined the ‘infrastructures of dissent’ that had sustained the limited forms of union and working-class solidarity in an earlier era. The ability to imagine it was possible to challenge the neoliberal order was being lost.”).

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one.”<sup>145</sup> Labor-movement activists speak matter-of-factly about a union’s strategic choice to disregard legal rules:

A union that decides to break anti-worker laws should do so united, and with a plan for the consequences.

Is your leverage great enough to make the law moot? (They can’t fire us all.) Do you have lawyers on hand for the fallout?

Can you make withdrawal of legal charges part of the strike settlement? Will the public put the fear of God into politicians or police chiefs that try to harm the union? Balance the potential risks against the possible gains.<sup>146</sup>

Law is one source of leverage, activists proclaim, but it is not the only one.

This more nuanced account of the relationship between law, power, and culture is particularly important in the current historical moment. While the law of the strike has not changed in recent years, public consciousness about economic inequality and the potential role of labor unions in combatting it has changed—dramatically.<sup>147</sup> Sociological research traces the origins of this shift, in significant part, to the Occupy Wall Street protests of 2011. These broad, public-facing protests did not change law, but they did propel economic inequality back into public discourse.<sup>148</sup> Given that awareness of inequality increases support for labor unions,<sup>149</sup> it is perhaps not surprising that public support for labor unions is now at a fifteen-year-high.<sup>150</sup> That this sea change in public consciousness was led *not*

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145. See, e.g., JOE BURNS, *STRIKE BACK: USING THE MILITANT TACTICS OF LABOR’S PAST TO REIGNITE PUBLIC SECTOR UNIONISM TODAY* 16 (2014) [hereinafter BURNS, *STRIKE BACK*] (describing the history of public union strikes, including the fact that “striking was illegal for public employees . . . until the late 1960s”); Kate Andrias, *Peril and Possibility: Strikes, Rights, and Legal Change in the Age of Trump*, 40 *BERKELEY J. EMP. & LAB. L.* 135, 145 (2019) (“There is a slogan that comes from the 1960s and 70s, back when strikes were more common: ‘There is no illegal strike, just an unsuccessful one.’”); Joe Burns, “*There Is No Illegal Strike, Just an Unsuccessful One*,” *JACOBIN* (Mar. 6, 2018), <https://www.jacobinmag.com/2018/03/public-sector-unions-history-west-virginia-teachers-strike> [<https://perma.cc/8SCD-N3RR>].

146. *How to Strike and Win: A Labor Notes Guide*, *LAB. NOTES* 15 (Nov. 2019), <https://www.labornotes.org/sites/default/files/Strike%20special%20issue%20recolored%20red%202.pdf> [<https://perma.cc/4FBL-C4UK>].

147. Sarah Gaby & Neal Caren, *The Rise of Inequality: How Social Movements Shape Discursive Fields*, 21 *MOBILIZATION* 413, 416-17 (2016); Milkman & Luce, *supra* note 46, at 149; Benjamin J. Newman & John V. Kane, *Economic Inequality and Public Support for Organized Labor*, 70 *POL. RES. Q.* 918, 918 (2017).

148. Gaby & Caren, *supra* note 147, at 416.

149. Newman & Kane, *supra* note 147, at 924.

150. Lydia Saad, *Labor Union Approval Steady at 15-Year High*, *GALLUP* (Aug. 30, 2018), <https://news.gallup.com/poll/241679/labor-union-approval-steady-year-high.aspx> [<https://perma.cc/K65Q-FZQ7>].

by the labor movement, but by a motley crew of unorganized middle-class precariat<sup>151</sup> says much about labor's long turn away from the public sphere.

Consistent with an understanding of labor law and political economy as mutually constitutive (but not with a legal formalist account), in the past few years, there has been an uptick in strikes.<sup>152</sup> The trend thus far is meaningful, albeit short. The number of workers who went on strike in 2018 and 2019—485,200 and 425,500 respectively—reflects the largest two-year-average in thirty-five years.<sup>153</sup> Some of these strikes adhere to the narrow confines of labor law; many do not. Yet, like one hundred years ago, the efficacy of these strikes is not defined by their adherence to legal rules.

### B. *Striking as Political*

For those who believe that a stronger labor movement is needed to counterbalance the concentrations of economic and political power in this new Gilded Age, one important question is not just whether the law is bad (it is), but whether strikes can be effective nonetheless. If labor activists are correct that there is “no such thing” as an illegal strike, just an unsuccessful strike, the question follows: what makes a strike successful enough, under current conditions, to transcend legal constraints?<sup>154</sup> To some extent this is an empirical question, and one in which there are many opportunities for generative research. Beginning with the theoretical, however, I suggest that the success of strikes must be measured in more than economic wins in the private sphere. Like their Progressive Era progenitors, their success must be in raising political consciousness in

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151. See generally MICHAEL A. GOULD-WARTOFSKY, *THE OCCUPIERS: THE MAKING OF THE 99 PERCENT MOVEMENT* (2015) (describing the role of precariously-employed millennial workers in the Occupy protests); GUY STANDING, *THE PRECARIAT: THE NEW DANGEROUS CLASS* (2011) (arguing that that rapidly growing number of people who lack secure employment should be understood as a new, and potentially transformative, class – the precariat).

152. See Lee Fang & Nick Surgey, *Anti-Union Operative Warns Business of Historic Rise in Labor Activism*, INTERCEPT (May 1, 2020, 2:17 PM), <https://theintercept.com/2020/05/01/labor-union-lobbyist-coronavirus> [https://perma.cc/T2R4-AQNE]; Noam Scheiber, *In a Strong Economy, Why Are So Many Workers on Strike?*, N.Y. TIMES (Oct. 20, 2019), <https://www.nytimes.com/2019/10/19/business/economy/workers-strike-economy.html> [https://perma.cc/J6SH-JESY].

153. Heidi Shierholz & Margaret Poydock, *Continued Surge in Strike Activity Signals Worker Dissatisfaction with Wage Growth*, ECON. POL'Y INST. (Feb. 11, 2020), <https://www.epi.org/publication/continued-surge-in-strike-activity> [https://perma.cc/U8VV-XRJR].

154. I focus here not only on “illegal” strikes, but on all strikes which deviate from the legal (and cultural) framework for protected activity under the NLRA, as it developed during the mid-twentieth century.

the public sphere—in making the stakes of the twenty-first century labor question apparent.<sup>155</sup>

As noted above, under current labor law, strikes are conceptualized as “economic weapons,” as hard bargaining.<sup>156</sup> And while legal terminology is distinct from on-the-ground understandings, unions have often emphasized the economic nature of the strike as well. Strikes are “[t]he power to stop production, distribution and exchange, whether of goods or services.”<sup>157</sup> A strike works because “we withhold something that the employer needs.”<sup>158</sup> At the same time, there has been a corresponding tendency to dismiss the more symbolic aspects of the strike. To quote White again, “while publicity and morale are not irrelevant, in the end, they are not effective weapons in their own right.”<sup>159</sup>

These arguments are important. A strike is *not* simply protest; it is direct action, material pressure. But with union density lower than ever, ongoing automation of work tasks that renders employees increasingly replaceable, and decades of neoliberal cultural tropes celebrating capital as the driver of all economic growth and innovation, it is a mistake to think of publicity and morale as nice-to-haves, rather than necessities. Instead, striking must be part of building what sociologists have described as the “moral economy,” cultural beliefs about fair distribution untethered to technocratic arguments about what is most efficient.<sup>160</sup> And in that way, striking is and must be understood as *political*.

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155. See Harold Meyerson, Opinion, *Op-Ed: Like Frogs in a Slowly Boiling Pot, Americans Are Finally Realizing How Dire Their Labor Situation Is*, L.A. TIMES (Sept. 3, 2018, 11:20 AM), <https://www.latimes.com/opinion/op-ed/la-oe-meyerson-labor-question-20180903-story.html> [<https://perma.cc/C4GT-GT3F>] (“What should be done about the working class’ smoldering discontent in the wake of industrialization?”); Harold Meyerson, *The Return of the Labor Question*, DISSENT (Summer 2020), <https://www.dissentmagazine.org/article/the-return-of-the-labor-question> [<https://perma.cc/ZL64-KMG5>] (“This, then, is the labor question in 2020: how can unions help propel Democrats to victory in November, and how can they prompt Democrats, if victorious, to reverse a half-century of diminishing worker power and rights?”); Damon Silvers, *Once Again, America Seeks the Answer to the Labor Question*, MOYERS ON DEMOCRACY (Sept. 1, 2016), <https://billmoyers.com/story/america-seeks-answer-labor-question> [<https://perma.cc/E977-KRR9>] (“And so the labor question is back, and that question is: How can the people who do the work in America receive a fair share of the wealth we create, and how can our voices be heard in our politics, our society and our culture?”).
156. See Nat’l Labor Relations Bd. v. Ins. Agents’ Int’l Union, 361 U.S. 477, 489 (1960).
157. Kim Moody, *Striking Out in America: Is There an Alternative to the Strike?*, in NEW FORMS AND EXPRESSIONS OF CONFLICT AT WORK 233, 249 (Gregor Gall ed. 2013).
158. *How to Strike and Win: A Labor Notes Guide*, *supra* note 146, at 2.
159. White, *supra* note 94, at 1072.
160. Bruce Western & Jake Rosenfeld, *Unions, Norms, and the Rise in U.S. Wage Inequality*, 76 AM. SOC. REV. 513, 514, 517-19 (2011); see also Edward P. Thompson, *The Moral Economy of the*

The term political, of course, has many meanings – engendered by law, culture, and the relationship between the two. Building on the work of other scholars, I have argued that neo-Lochnerian readings of the First Amendment which have categorized labor protest as solely economic, and therefore *apolitical*, are one mechanism by which unions have lost legitimacy (and legal protection) as a social movement.<sup>161</sup> Under current law, what precisely constitutes the political is less than clear, though. In distinguishing “political” speech from other kinds of speech for the purpose of First Amendment analysis, the Supreme Court has at times equated the political with: electioneering;<sup>162</sup> speech directed to or about the government;<sup>163</sup> or most broadly, “speech and debate on public policy issues.”<sup>164</sup> Within labor parlance, by contrast, the term “political strike” is specifically used to refer to strikes that are “designed to win a specific political outcome, such as the passage of legislation or a change in regulation.”<sup>165</sup> Consistent with the NLR’s construction of unions (in their representational capacity) as economic entities, strikes which are solely “political” and without sufficient nexus to the employment relationship, are deemed unlawful secondary boycotts.<sup>166</sup>

But my argument here for reconceptualizing the strike as political is not about more “political strikes,” or about electoral politics, or even necessarily about state action. Based on a vision of the “political” as normative engagement directed towards collective decision-making – it is about destabilizing jurisprudential line drawing between the economic and the political in the first place.<sup>167</sup>

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*English Crowd in the Eighteenth Century*, 50 PAST & PRESENT 76, 78-79 (1971) (describing a moral economy as a sense of “social norms and obligations”).

161. Reddy, *supra* note 118, at 40-43; Jedediah Purdy, *Neoliberal Constitutionalism: Lochnerism for a New Economy*, 77 LAW & CONTEMP. PROBS. 195 (2014); Jedediah Purdy, *Beyond the Bosses’ Constitution: The First Amendment and Class Entrenchment*, 118 COLUM. L. REV. 2161, 2172-75 (2018); Amanda Shanor, *The New Lochner*, 2016 WIS. L. REV. 133, 199-200.
162. *Buckley v. Valeo*, 424 U.S. 1, 15 (1976) (“[T]he constitutional guarantee [of the freedom of speech] has its fullest and most urgent application precisely to the conduct of campaigns for political office.” (quoting *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 272 (1971))).
163. *See Meyer v. Grant*, 486 U.S. 414, 422 (1988) (holding that petition circulation is “core political speech” because it involves “interactive communication concerning political change”).
164. *Fed. Election Comm’n v. Wis. Right to Life, Inc.*, 551 U.S. 449, 481 (2007).
165. ENCYCLOPEDIA OF STRIKES IN AMERICAN HISTORY, at xxxix (Aaron Brenner, Benjamin Day & Immanuel Ness eds., 2009). That entry goes on to characterize political strikes as “quite rare in the United States.” *Id.*
166. *Longshoremen v. Allied Int’l, Inc.*, 456 U.S. 212 (1982). *But see Eastex, Inc. v. Nat’l Labor Relations Bd.*, 437 U.S. 556 (1978) (upholding the right of unions to circulate pamphlets opposing “right to work” legislation).
167. SHELDON S. WOLIN, POLITICS AND VISION: CONTINUITY AND INNOVATION IN WESTERN POLITICAL THOUGHT 316 (2016); *see also* SHELDON WOLIN, *Fugitive Democracy*, in FUGITIVE DEMOCRACY AND OTHER ESSAYS 100, 100-13 (Nicholas Xenos ed., 2016) (discussing the nature of political boundaries).

It is recognizing that all strikes are political or have the potential to be—in that all strikes are protest meant to transform collective conditions, not merely bargaining towards immediate, transactional ends. To use political science terminology, strikes are *contentious politics*: “[E]pisodic, public, collective interaction among makers of claims and their objects.”<sup>168</sup> They are a way through which workers engage in claims-making when business and politics as usual have proven nonresponsive.<sup>169</sup> They do not only address the employer; they engage the polity.

The need to reconceptualize the strike as outward-facing towards the public, not just inward-facing towards the employer, is partly a function of material changes, both in economic production and union density. As labor scholar Jane McAlevey points out, “Today’s service worker has a radically different relationship to the consuming public than last century’s manufacturing worker had . . . In large swaths of the service economy, *the point of production is the community*.”<sup>170</sup> For this reason, she argues that effective strikes today must engage the public to be successful.<sup>171</sup> Union density is also many times higher now in the public sector than in the private one, an upending of the realities of unionization mid-century.<sup>172</sup> As illustrated by the Supreme Court’s decision in *Janus v.*

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168. Sidney Tarrow, *Contentious Politics*, in *THE WILEY-BLACKWELL ENCYCLOPEDIA OF SOCIAL AND POLITICAL MOVEMENTS* 1, 1 (David A. Snow, Donatella della Porta, Bert Klandermans & Doug McAdam eds., 2013).

169. The tactics within labor unions’ repertoire become unbundled in doctrinal legal analysis. Within legal categories, it is picketing, rather than the strike per se, which is understood to be normative, expressive, and public-facing, while striking is commercial activity. Under modern jurisprudence, it is difficult to envision how it could be any other way, given the limited scope of the “right” to strike and the under-development of constitutional protection for economic rights. With a different vision of a strike however, these categories might seem less commonsensical.

170. JANE F. MCALEVEY, *NO SHORTCUTS: ORGANIZING FOR POWER IN THE NEW GILDED AGE* 2-3 (2016).

171. *Id.*

172. See, e.g., Michael Goldfield & Amy Bromsen, *The Changing Landscape of US Unions in Historical and Theoretical Perspective*, 16 *ANN. REV. POL. SCI.* 231, 234 (2013) (“Private sector union density went from roughly 43% in 1953 to 6.6% in 2012, with public sector union membership rising from ~10% to almost 40% today.”); see also News Release, U.S. Bureau of Labor Statistics, News Release: Union Members - 2019 (Jan. 22, 2020, 10:00 AM), <https://www.bls.gov/news.release/pdf/union2.pdf> [<https://perma.cc/SVP6-23W4>] (“The union membership rate of public-sector workers (33.6 percent) continued to be more than five times higher than the rate of private-sector workers (6.2 percent).”).

AFSCME, it is easier to see the economic work of unions as political (qua affecting government policy, spending, and debt) in the public sector.<sup>173</sup>

Yet, the shift is also about recognizing that it was a legal and an ideological accommodation that made the work of unions in their representative capacity appear as “economic,” and thus outside politics. The work of unions has been artificially “bifurcated” vis-à-vis the political realm.<sup>174</sup> For years, as Reuel Schiller has argued, they have engaged in “two sets of activities that appear barely related to one another”: private, transaction bargaining in the workplace; combined with broad, public mobilization around electoral politics. But there were always alternate visions of the relationship between the economic and the political within union advocacy and workplace governance.<sup>175</sup> If “establishing terms and conditions of employment [is] a political act involving not just a worker and an employer, but also a union, an industry as a whole, and the state,” then union advocacy is a political act too.<sup>176</sup> Strikes are *part* of the “contest of ideas.”

Reconstructing a purposefully political philosophy, jurisprudence, and tactical repertoire of collective-labor advocacy is a project that is new again; and it will inevitably require deliberation, debate, and compromise.<sup>177</sup> For the time being, though, one thing seems apparent. Strikes must be a part of engaging a broad swath of the public in reconceptualizing political economy.

### C. *New Strategies, New Risks*

In recent years, consistent with this vision, there has been a shift in the kinds of strikes workers and their organizations engage in – increasingly public-facing,

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173. *Janus v. Am. Fed’n of State, Cty. & Mun. Emp.*, 138 S. Ct. 2448 (2018) (“[T]he political debate over public spending and debt . . . have given collective-bargaining issues a political valence that [previous case law] did not fully appreciate.”).

174. REUEL SCHILLER, *FORGING RIVALS: RACE, CLASS, LAW, AND THE COLLAPSE OF POSTWAR LIBERALISM* 27 (2015); see also Katherine Van Wezel Stone, *The Post-War Paradigm in American Labor Law*, 90 *YALE L.J.* 1509, 1580 (1981) (“Industrial pluralism mandates legal arrangements that force workers to fight the daily struggles in the workplace in an invisible, privatized forum, where each dispute is framed in an individuated, minute, economic form. The alternative is to define labor issues as a matter of public concern, and to submit resolution of these issues to the political process.”).

175. *Id.*

176. *Id.*

177. For examples of scholarship constructing a more “political” jurisprudence vis-a-vis unions, see, e.g., Kate Andrias, *Building Labor’s Constitution*, 94 *TEX. L. REV.* 1591, 1595 (2016); Andrias, *supra* note 127, at 1 (arguing that an evolving “new labor law” properly positions “unions as political actors empowered to advance the interests of workers generally”); Benjamin I. Sachs, *The Unbundled Union: Politics Without Collective Bargaining*, 123 *YALE L.J.* 148, 154 (2013).

engaged with the community, and capacious in their concerns.<sup>178</sup> They have transcended the ostensible apoliticism of their forebearers in two ways, less voluntaristic and less economic. They are less voluntaristic in that they seek to engage and mobilize the broader community in support of labor’s goals, and those goals often include community, if not state, action. They are less economic in that they draw through lines between workplace-based economic issues and other forms of exploitation and subjugation that *have* been constructed as “political.” These strikes do not necessarily look like what strikes looked like fifty years ago, and they often skirt—or at times, flatly defy—legal rules. Yet, they have often been successful.

Since 2012, tens of thousands of workers in the Fight for \$15 movement have engaged in discourse-changing, public law-building strikes. They do not shut down production, and their primary targets are not direct employers. For these reasons, they push the boundaries of exiting labor law.<sup>179</sup> Still, the risks appear to have been worth it. A 2018 report by the National Employment Law Center found that these strikes had helped twenty-two million low-wage workers win \$68 billion in raises, a redistribution of wealth *fourteen times greater* than the

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178. See McALEVY, *supra* note 170, at 17-18; Andrias, *supra* note 127, at 48; César F. Rosado Marzán, *Worker Centers and the Moral Economy: Disrupting through Brokerage, Prestige, and Moral Framing*, 2017 U. CHI. LEGAL F. 409, 412-13; Michael M. Oswalt, *Improvisational Unionism*, 104 CALIF. L. REV. 597, 599-606 (2016). In Europe, a similar phenomenon plays out—a decrease in economic strikes, but an increase in general strikes with political aims. Alison Johnston, Kerstin Hamann & John Kelly, *Unions May Be Down, but They’re Not Out: Take Note Governments in Western Europe*, SOC. EUROPE (Oct. 6, 2016), [https://www.socialeurope.eu/unions-may-theyre-not-take-note-governments-western-europe?fbclid=IwAR2NsU7-P8CzVnH2rqOW4Vw\\_BKXdrFTm6cQU7oPMcc1k2R8X8ZD9kd1yq7s](https://www.socialeurope.eu/unions-may-theyre-not-take-note-governments-western-europe?fbclid=IwAR2NsU7-P8CzVnH2rqOW4Vw_BKXdrFTm6cQU7oPMcc1k2R8X8ZD9kd1yq7s) [<https://perma.cc/5EMV-AWCX>].

179. See DAVID ROLF, *THE FIGHT FOR \$15: THE RIGHT WAGE FOR A WORKING AMERICA* 92 (2016); Oswalt, *supra* note 178, at 646-47 (noting use of walk-backs). Although the Fight for \$15 strikes differ from the strikes of mid-century, in that they involve nonunion workers who do not seek to shut down production, their connection to the employment relationship should be clear under current law. Cf. Advice Memorandum from Jayme Sopher, Associate General Counsel, NLRB Division of Advice, to Terry Morgan, NLRB Region 7 Director, on EZ Industrial Solutions, LLC, Case 07-CA-193475 (Aug. 30, 2017), at <https://www.nlr.gov/case/07-CA-193475> [<https://perma.cc/QJX6-RX6X>] (treating “Day without an Immigrant” strikes as protected, given their nexus to the employment relationship). Because, however, they are short and repeated, some argue that they constitute unprotected, intermittent strikes. The National Labor Relations Board (NLRB) under the Trump Administration held that the Our Walmart protests were intermittent strikes, and were unprotected. See *Walmart Stores, Inc.*, 368 N.L.R.B. 24 (2019); see also Michael C. Duff, *New Labor Viscerality? Work Stoppages in the “New Work, Non-Union Economy*, 65 ST. LOUIS UNIV. L.J. (forthcoming 2021), <https://ssrn.com/abstract=3637605> [<https://perma.cc/Y8G4-YMQM>] (arguing that Walmart was wrongly decided).

value of the last federal minimum wage increase in 2007.<sup>180</sup> They have demonstrated the power of strikes to do more than challenge employer behavior. As Kate Andrias has argued:

[T]he Fight for \$15 . . . reject[s] the notion that unions' primary role is to negotiate traditional private collective bargaining agreements, with the state playing a neutral mediating and enforcing role. Instead, the movements are seeking to bargain in the public arena: they are engaging in social bargaining with the state on behalf of all workers."<sup>181</sup>

In the so-called "red state" teacher strikes of 2018, more than a hundred thousand educators in West Virginia, Oklahoma, Arizona, and other states struck to challenge post-Great Recession austerity measures, which they argued hurt teachers and students, alike.<sup>182</sup> These strikes were illegal; yet, no penalties were imposed.<sup>183</sup> Rather, the strikes grew workers' unions, won meaningful economic concessions from state governments, and built public support. As noted above, public-sector work stoppages are easier to conceive of as political, even under existing jurisprudential categories (they affect public budgets).<sup>184</sup> But these strikes were political in the broader sense as well. Educators worked with parents and students to cultivate support, and they explained how their struggles were connected to the needs of those communities.<sup>185</sup> Their power was not only in depriving schools of their labor power, but in making normative claims about the value of their labor to the community.

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180. Yannet Lathrop, *Impact of the Fight for \$15: \$68 Billion in Raises, 22 Million Workers*, NAT'L EMP. L. PROJECT (Nov. 29, 2018), [www.nelp.org/publication/impact-fight-for-15-2018](http://www.nelp.org/publication/impact-fight-for-15-2018) [<https://perma.cc/9UCR-SC87>].

181. Andrias, *supra* note 127, at 47.

182. See Andrew Van Dam, *Teacher Strikes Made 2018 the Biggest Year for Worker Protest in a Generation*, WASH. POST (Feb. 14, 2019, 11:22 AM EST), <https://www.washingtonpost.com/us-policy/2019/02/14/with-teachers-lead-more-workers-went-strike-than-any-year-since/> [<https://perma.cc/E9ZG-AQRU>]. For an inside look into these strikes, see ERIC BLANC, *RED STATE REVOLT: THE TEACHERS' STRIKE WAVE AND WORKING-CLASS POLITICS* (2019).

183. According to Eric Blanc in *Red State Revolt*, "the main reasons governmental leaders avoided punishing the strikers were, above all, *political*: first, repression risked emboldening (rather than intimidating) the strikers and their supporters; and second, it risked further alienating politicians from the public." *Id.* at 54. He quotes one Superintendent, when asked why he did not seek an injunction against the strikers, replying that it would have only "added gas to the fire." *Id.*

184. *Janus v. Am. Fed'n of State, Cty. & Mun. Emp.*, 138 S. Ct. 2448, 2473 (2018).

185. BLANC, *supra* note 182, at 47.

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Most recently, 2020 saw a flurry of work stoppages in support of the Black Lives Matter movement.<sup>186</sup> These ranged from Minneapolis bus drivers’ refusal to transport protesters to jail, to Service Employees International Union’s coordinated Strikes for Black Lives, to the NBA players’ wildcat strike.<sup>187</sup> Some of these protests violated legal restrictions. The NBA players’ strike for instance, was inconsistent with a “no-strike” clause in their collective-bargaining agreement with the NBA.<sup>188</sup> And it remains an open question in each case whether workers sought goals that were sufficiently job-related as to constitute protected activity.<sup>189</sup> Whatever the conclusion under current law, however, striking workers demonstrated *in fact* the relationship between their workplaces and broader political concerns. The NBA players’ strike was resolved in part through an agreement that NBA arenas would be used as polling places or sites of civic engagement.<sup>190</sup> Workers withheld their labor in order to insist that private capital be used for public, democratic purposes. And in refusing to transport arrested

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186. See Milk Elk, *How Black & Brown Workers Are Redefining Strikes in the Digital COVID Age*, PAYDAY REPORT (July 8, 2020), <https://paydayreport.com/how-black-brown-workers-are-redefining-strikes-in-a-digital-covid-age> [https://perma.cc/3L44-TAM9].

187. Barry Eidlin, *Last Week’s Pro Athletes Strikes Could Become Much Bigger Than Sports*, JACOBIN (Aug. 30, 2020), [https://jacobinmag.com/2020/08/sports-strikes-kenosha-racial-justice?fbclid=IwAR1n6yzCHABg\\_KQ7MmeQreG\\_TCZlDpa9CpnyOd9HUGFki\\_kWj9O5STHxwec](https://jacobinmag.com/2020/08/sports-strikes-kenosha-racial-justice?fbclid=IwAR1n6yzCHABg_KQ7MmeQreG_TCZlDpa9CpnyOd9HUGFki_kWj9O5STHxwec) [https://perma.cc/GM3C-MA3J]; Abdul Malik, *The NBA Work Stoppage Is a Perfect Model for a Wildcat Strike*, ORGANIZING WORK (Aug. 27, 2020), <https://organizing.work/2020/08/the-nba-work-stoppage-is-a-perfect-model-for-a-wildcat-strike> [https://perma.cc/JM3V-B67P]; Edward Ongweso, Jr., *Why the NBA Wildcat Strike Is So Important*, VICE (Aug. 27, 2020, 3:11 PM), [https://www.vice.com/en\\_us/article/ep47pj/why-the-nba-wildcat-strike-is-so-important?fbclid=IwARoU2waji-iTzbF4uAOTp2nAUefvUcF2mx3yfXUof39R8ZlzF3i4lUOYfWE](https://www.vice.com/en_us/article/ep47pj/why-the-nba-wildcat-strike-is-so-important?fbclid=IwARoU2waji-iTzbF4uAOTp2nAUefvUcF2mx3yfXUof39R8ZlzF3i4lUOYfWE) [https://perma.cc/T4L3-VDR4].

188. Ongweso, *supra* note 187.

189. See, e.g., Mark J. Foley, Matthew A. Fontana, Conor J. Hafertepe & Maria L.H. Lewis, *Political Strike Guidance for Employers: Preparing for ‘Strike for Black Lives,’* NAT’L L. REV. (July 17, 2020), <https://www.natlawreview.com/article/political-strike-guidance-employers-preparing-strike-black-lives> [https://perma.cc/9ZVM-66B8] (suggesting the strikes would be protected and that employers should not discipline employees who participate). The authors also argue that the NLRA protects “political strikes,” while noting the following limitations on that principle:

The NLRB has interpreted the NLRA’s protection of concerted activity broadly to include strikes for political purposes. The NLRA will protect a political strike if: (1) the purpose of the strike has a “direct nexus” to employee working conditions and (2) the employer has some degree of control over the objective of the striking employees.

*Id.* (emphasis omitted).

190. Press Release, Michele Roberts, NPBA Executive Director & Adam Silver, NBA Commissioner, Joint NBA and NPBA Statement (Aug. 28, 2020), <https://nbpa.com/news/joint-nba-and-nbpa-statement> [https://perma.cc/RX3W-Q8UL].

protestors to jail, Minneapolis bus drivers made claims about their vision for public transport.

Collectively, all of these strikes have prompted debates within the labor movement about what a strike is, and what its role should be. These strikes are so outside the bounds of institutionalized categories that public data sources do not always reflect them.<sup>191</sup> And there is, reportedly, a concern by some union leaders that these strikes do not look like the strikes of the mid-twentieth century. There has been a tendency to dismiss them.<sup>192</sup> In response, Bill Fletcher Jr., the AFL-CIO's first Black Education Director, has argued, "People, who wouldn't call them strikes, aren't looking at history."<sup>193</sup> Fletcher, Jr. analogizes these strikes to the tactics of the civil-rights movements.

As Catherine Fisk and I recently argued, law has played an undertheorized role in constructing the labor movement and civil-rights movement as separate and apart from each other, by affording First Amendment protections to civil rights groups, who engage in "political" activity, that are denied to labor unions, engaging in "economic" activity.<sup>194</sup> Labor unions who have strayed from the lawful parameters of protest have paid for it dearly.<sup>195</sup> As such, it is no surprise that some unions are reluctant to embrace a broader vision of what the strike can be. Under current law, worker protest that defies acceptable legal parameters can destroy a union.

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191. Sociologist Jake Rosenfeld notes that since BLS stopped keeping track of work stoppages involving fewer than 1000 workers, labor researchers have largely relied on data provided by the Federal Mediation and Conciliation Service (FMCS) to study strikes. But FMCS, he notes, only captures official work stoppages, that is, those which labor unions are required to report under section 8(d) of the NLRA. As such, he argues that many of the most important work stoppages in recent years, like the Fight for \$15 protests or illegal teacher strikes, are unlikely to be reflected there. See Jake Rosenfeld, *US Labor Studies in the Twenty-First Century: Understanding Laborism Without Labor*, 45 ANN. REV. SOC. 449, 460-61 (2019).

192. See Elk, *supra* note 186; see also Steven Ashby, *In Defense of the Stunning Fight for Fifteen Movement*, WORK PROGRESS (June 6, 2018), <http://www.wipsociology.org/2018/06/06/in-defense-of-the-stunning-fight-for-fifteen-movement> [<https://perma.cc/ZC8R-AYCP>] ("Fight for Fifteen has been dismissed by progressives in a number of ways as 'pretend power,' a 'march on the media,' a 'public relations campaign,' a 'top down campaign,' and 'media hype.' Progressive pundits have argued that winning is 'virtually impossible' and that 'it's not a unionizing campaign.'"); Kalena Thomhave, *Fighting for \$15—and a Union*, AM. PROSPECT (Oct. 16, 2018), <https://prospect.org/economy/fighting-15-and-union> [<https://perma.cc/55WZ-8HG7>].

193. Elk, *supra* note 186.

194. Fisk & Reddy, *supra* note 92, at 8; see also Nat'l Ass'n for the Advancement of Colored People v. Claiborne Hardware Co., 458 U.S. 886 (1982) (distinguishing between economic activity and politically motivated boycotts).

195. Fisk & Reddy, *supra* note 92 (manuscript at 76-84).

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Recasting the strike—and the work of unions more broadly—as political is *risky*. Samuel Gompers defended the AFL’s voluntarism and economism not as a matter of ideology but of pragmatism; he insisted that American workers were too divided to unite around any vision other than “more.”<sup>196</sup> He did not want labor’s fortunes tied to the vicissitudes of party politics or to a state that he had experienced as protective of existing power structures. Now, perhaps more than ever, it is easy to understand the dangers of the “political” in a divided United States. Through seeking to be apolitical, labor took its work out of the realm of the debatable for decades; for this time, the idea that (some) workers should have (some form of) collective representation in the workplace verged on hegemonic.

And yet, labor’s reluctance to engage in a public-facing “contest of ideas” has inhibited more than its cultivation of broader allies; it has inhibited its own organizing. If working people have no exposure to alternate visions of political economy or what workplace democracy entails, it is that much harder to convince them to join unions. Similarly, labor’s desire to organize around a decontextualized “economics” has always diminished its power (and moral authority), given that the economy is structured by race, gender, and other status inequalities—and always has been. During the Steel Strike of 1919, the steel companies relied on more than state repression to break the strike. They also exploited unions’ refusal to organize across the color line. Steel companies replaced striking white workers with Black workers.<sup>197</sup> Black workers also sought “more.” But given their violent exclusion from many labor unions at the time, many believed they would not achieve it through white-led unions.<sup>198</sup>

From this perspective, labor’s “mortal weakness,” derived from its Progressive Era legacy has not just been failing to articulate its moral vision; it has been lacking one sufficiently capacious to build the power necessary for the task at hand. As David Huyssen argues:

Progressives and New Dealers . . . achieved their reforms by reaffirming the Gilded Age’s ideological and legal commitments to white supremacy, imperialism, and xenophobia. . . . Signature New Deal legislation—the Social Security Act and the National Labor Relations Act—discriminated against women and African Americans by excluding domestic and agricultural workers, valorizing the white male family wage earner.<sup>199</sup>

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196. CURRARINO, *supra* note 22, at 86.

197. BRODY, *supra* note 55, at 162-63.

198. *Id.* at 162.

199. Huyssen, *supra* note 38.

“The ‘solutions’ that ended Gilded Age inequality,” he concludes, “became a crucial seedbed for our own era’s historically distinct expressions of inequality.”<sup>200</sup> It is unsurprising, then, that worker protest today so often goes against the grain of those laws.

#### *D. Law and Social Change*

In arguing that strikes can be successful today, in spite of law, my argument is not that law is unimportant; it is that law does not exist independently of other social processes. Political contestation will always be on multiple fronts, and success in one arena shifts the balance of power in others.

Tumultuous times come to an end. Social agitation is difficult to sustain, and the gravitational pull of existing power structures tugs us towards a less tumultuous, if forever altered, new normal. Institutional change is what lasts beyond the tumult. For a new Progressive Era to correct the multiple, overlapping forms of inequality which have led to the current moment, a broad new social compact is necessary. That requires political co-determination and law.<sup>201</sup> Law matters (it is just not the only thing that matters).

Perhaps unsurprisingly, the limitations of labor’s current legal regime have led to a resurgence in labor’s laissez-faire instincts. Legal scholars caution skepticism about the state; they urge labor to seek “freedom” but not “rights.”<sup>202</sup> And they are correct that labor must strategically approach state power from a place of political realism. But whatever those realities, the important work of small-p politics and small-c constitutionalism remains.<sup>203</sup> For better or worse, the Progressive view of the state has won the day, and legal contestation is the crucible in which many public values are built. To hive off the economic from the political, the private from the public, cedes too much.

The phrase “there is no such thing as an illegal strike” can itself be seen as a remnant of labor’s sticky voluntarism, its apoliticism. Having been cast as out-laws in the Gilded Age, union leaders “internalize[d] this negative identity” and

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<sup>200.</sup> *Id.*

<sup>201.</sup> For some of the leading ideas for better protecting all working people through law, see Labor and Worklife Program, *Clean Slate for Worker Power*, HARV. UNIV., <https://lwp.law.harvard.edu/clean-slate-project> [<https://perma.cc/84NJ-BHSG>].

<sup>202.</sup> See, e.g., Matt Dimick, *Counterfeit Liberty*, CATALYST, (Spring 2019) <https://catalyst-journal.com/vol3/no1/counterfeit-liberty> [<https://perma.cc/5AMA-4Y5D>] (building on the work of Christopher Tomlins); see also CHRISTOPHER L. TOMLINS, *THE STATE AND THE UNIONS: LABOR RELATIONS, LAW, AND THE ORGANIZED LABOR MOVEMENT IN AMERICA, 1880-1960*, at 326-28 (1985) (discussing the concept of “counterfeit liberty”).

<sup>203.</sup> See Rahman, *supra* note 13, at 1332.

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have wielded it since.<sup>204</sup> Labor scholars today question why unions’ long history of illegal strikes is not told, alongside the tactics of other movements, as a righteous story of civil disobedience.<sup>205</sup> But law-breaking alone is not civil disobedience. It is through articulating an alternate normative vision—*through law-making*—that illegal strikes can be understood as civil disobedience.

### CONCLUSION

The Progressive Era involved massive protest, and a host of different explanations and proposed solutions for how to reconcile the inequalities of capitalism with the egalitarian commitments of a democracy. The ideas and institutions that stuck helped create the scaffolding for the legal reforms of the New Deal Era. That resolution of the labor question settled on one particular vision of organized labor as a social good: organized labor would be an economic entity that would engage in economic conflict with employers, and, in turn, the strike would be an economic weapon rather than a political one. That vision of labor proved insufficient to counter the challenges of the neoliberal period.

How we understand today’s “labor question” will inform the next legal regime for labor and whatever new normal it ushers in. It took economic devastation and massive protest to bring about the first New Deal, and still it was a partial victory. Workers across the country, including Minneapolis bus drivers, are again risking their livelihoods to bring about something better.<sup>206</sup>

*University of California, Berkeley. I am grateful to Kate Andrias, Catherine Fisk, David Singh Grewal, Deborah Malamud, Yan Fang, Yael Plitmann, and Kavitha Iyengar for their comments on previous drafts of this Essay; to John Logan, Joseph McCartin, and Dylan Penningroth for their counsel; to the editors of the Yale Law Journal for their vision and skillful editing; and to the workers and teachers whose loving care for my two young children in the midst of a pandemic enabled me to take on this project.*

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204. See Stryker, *supra* note 119, at 74.

205. See Andrias, *supra* note 145, at 145; see also Alex Gourevitch, *Decline of the Strike*, 61 *DISSENT* 142 (2014) (reviewing JEREMY BRECHER, *STRIKE!* (1972)).

206. Sarah Lazare, *Union President Says Minneapolis Is Trying to Punish Transit Workers Who Wouldn't Help the Police*, *THESE TIMES* (June 11, 2020), <http://inthesetimes.com/working/entry/22590/bus-workers-atu-minneapolis-george-floyd-protest-solidarity> [<https://perma.cc/Y8U9-FVUR>].