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#### Business recovery is strong. Business confidence is high.

Halloran ’9-14 [Michael; 2021; M.B.A. from Carnegie Mellon University, former aerospace research engineer, Equity Strategist; Janney, “Despite Potential Headwinds, Key Labor Market Indicators Bode Well for the Economy,” https://www.janney.com/latest-articles-commentary/all-insights/insights/2021/09/14/despite-potential-headwinds-key-labor-market-indicators-bode-well-for-the-economy]

However, we remain encouraged by the recovery that has been unfolding since the economy began reopening. We continue to see improvement in important cyclical sectors of the economy while consumers are historically healthy and still have pent-up demand. Business confidence has rebounded with strong corporate profits that should support further capital spending and hiring (there are now more job openings than there are unemployed people by a record amount).

We expect to see further improvement in the international backdrop, supported by unprecedented fiscal and monetary stimulus and accelerating rates of vaccination. Although the impact of the Delta wave is still being felt, recent evidence confirms the effectiveness of vaccines in limiting deaths and hospitalizations. With the pace of vaccination now picking up in the areas most impacted by this wave—Asia and Australia—the case for fading headwinds leading to improving economic growth later this year remains positive.

The signals from financial markets themselves remain positive. Despite consolidating last week, stocks remain near record highs while the 10-year Treasury remains well above the lows of earlier this summer when concerns about Delta first emerged.

These factors support our view of a durable economic recovery from the pandemic that should continue supporting stock prices. A healthy labor market is a critical element for a sustainable recovery that supports profit growth and last week’s news from the labor market remains encouraging.

#### Unions devastate growth and worsen inequality – gains for workers shift costs to other parts of the economy

Epstein 20 [Richard A. Epstein Peter and Kirsten Bedford Senior Fellow @ the Hoover Institution. "The Decline Of Unions Is Good News." https://www.hoover.org/research/decline-unions-good-news]

This continued trend has elicited howls of protest from union supporters who, of course, want to see an increase in union membership. It has also led several Democratic presidential candidates to make calls to reconfigure labor law. Bernie Sanders wants to double union membership and give federal workers the right to strike, as well as ban at-will contracts of employment, so that any dismissal could be subject to litigation under a “for cause” standard. Not to be outdone, Elizabeth Warren wants to make it illegal for firms to hire permanent replacements for striking workers. They are joined by Pete Buttigieg in demanding a change in federal labor law so that states may no longer pass right-to-work laws that insulate workers from the requirement to pay union dues in unionized firms. All of these new devices are proven job killers.

The arguments in favor of unions are also coming from some unexpected sources in academia, where a conservative case has been put forward on the ground that an increase in union membership is needed to combat job insecurity and economic inequality.

All of these pro-union critiques miss the basic point that the decline of union power is good news, not bad. That conclusion is driven not by some insidious effort to stifle the welfare of workers, but by the simple and profound point that the greatest protection for workers lies in a competitive economy that opens up more doors than it closes. The only way to achieve that result is by slashing the various restrictions that prevent job formation, as Justin Haskins of the Heartland Institute notes in a recent article at The Hill. The central economic insight is that jobs get created only when there is the prospect of gains from trade. Those gains in turn are maximized by cutting the multitude of regulations and taxes that do nothing more than shrink overall wealth by directing social resources to less productive ends.

#### Recessions cause global crises – ensuring continued growth is key

Baird ’20 [Zoe; October 2020; C.E.O. and President of the Markle Foundation, Member of the Aspen Strategy Group and former Trustee at the Council on Foreign Relations, J.D. and A.B. from the University of California at Berkeley; Domestic and International (Dis)order: A Strategic Response, “Equitable Economic Recovery is a National Security Imperative,” Ch. 13]

A strong and inclusive economy is essential for American national security and global leadership. As the nation seeks to return from a historic economic crisis, the national security community should support an equitable recovery that helps every worker adapt to the seismic shifts underway in our economy.

Broadly shared economic prosperity is a bedrock of America’s economic and political strength—both domestically and in the international arena. A strong and equitable recovery from the economic crisis created by COVID-19 would be a powerful testament to the resilience of the American system and its ability to create prosperity at a time of seismic change and persistent global crisis. Such a recovery could attack the profound economic inequities that have developed over the past several decades. Without bold action to help all workers access good jobs as the economy returns, the United States risks undermining the legitimacy of its institutions and its international standing. The outcome will be a key determinant of America’s national security for years to come.

An equitable recovery requires a national commitment to help all workers obtain good jobs—particularly the two-thirds of adults without a bachelor’s degree and people of color who have been most affected by the crisis and were denied opportunity before it. As the nation engages in a historic debate about how to accelerate economic recovery, ambitious public investment is necessary to put Americans back to work with dignity and opportunity. We need an intentional effort to make sure that the jobs that come back are good jobs with decent wages, benefits, and mobility and to empower workers to access these opportunities in a profoundly changed labor market.

To achieve these goals, American policy makers need to establish job growth strategies that address urgent public needs through major programs in green energy, infrastructure, and health. Alongside these job growth strategies, we need to recognize and develop the talents of workers by creating an adult learning system that meets workers’ needs and develops skills for the digital economy. The national security community must lend its support to this cause. And as it does so, it can bring home the lessons from the advances made in these areas in other countries, particularly our European allies, and consider this a realm of international cooperation and international engagement.

Shared Economic Prosperity Is a National Security Asset

A strong economy is essential to America’s security and diplomatic strategy. Economic strength increases our influence on the global stage, expands markets, and funds a strong and agile military and national defense. Yet it is not enough for America’s economy to be strong for some—prosperity must be broadly shared. Widespread belief in the ability of the American economic system to create economic security and mobility for all—the American Dream— creates credibility and legitimacy for America’s values, governance, and alliances around the world.

After World War II, the United States grew the middle class to historic size and strength. This achievement made America the model of the free world—setting the stage for decades of American political and economic leadership. Domestically, broad participation in the economy is core to the legitimacy of our democracy and the strength of our political institutions. A belief that the economic system works for millions is an important part of creating trust in a democratic government’s ability to meet the needs of the people.

The COVID-19 Crisis Puts Millions of American Workers at Risk

For the last several decades, the American Dream has been on the wane. Opportunity has been increasingly concentrated in the hands of a small share of workers able to access the knowledge economy. Too many Americans, particularly those without four-year degrees, experienced stagnant wages, less stability, and fewer opportunities for advancement.

Since COVID-19 hit, millions have lost their jobs or income and are struggling to meet their basic needs—including food, housing, and medical care.1 The crisis has impacted sectors like hospitality, leisure, and retail, which employ a large share of America’s most economically vulnerable workers, resulting in alarming disparities in unemployment rates along education and racial lines. In August, the unemployment rate for those with a high school degree or less was more than double the rate for those with a bachelor’s degree.2 Black and Hispanic Americans are experiencing disproportionately high unemployment, with the gulf widening as the crisis continues.3

The experience of the Great Recession shows that without intentional effort to drive an inclusive recovery, inequality may get worse: while workers with a high school education or less experienced the majority of job losses, nearly all new jobs went to workers with postsecondary education. Inequalities across racial lines also increased as workers of color worked in the hardest-hit sectors and were slower to recover earnings and income than White workers.4

The Case for an Inclusive Recovery

A recovery that promotes broad economic participation, renewed opportunity, and equity will strengthen American moral and political authority around the world. It will send a strong message about the strength and resilience of democratic government and the American people’s ability to adapt to a changing global economic landscape. An inclusive recovery will reaffirm American leadership as core to the success of our most critical international alliances, which are rooted in the notion of shared destiny and interdependence. For example, NATO, which has been a cornerstone of U.S. foreign policy and a force of global stability for decades, has suffered from American disengagement in recent years. A strong American recovery—coupled with a renewed openness to international collaboration—is core to NATO’s ability to solve shared geopolitical and security challenges. A renewed partnership with our European allies from a position of economic strength will enable us to address global crises such as climate change, global pandemics, and refugees. Together, the United States and Europe can pursue a commitment to investing in workers for shared economic competitiveness, innovation, and long-term prosperity.

The U.S. has unique advantages that give it the tools to emerge from the crisis with tremendous economic strength— including an entrepreneurial spirit and the technological and scientific infrastructure to lead global efforts in developing industries like green energy and biosciences that will shape the international economy for decades to come.

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#### The right to strike is a dangerous distraction that prevents the labor movement from challenging systems at the root cause of class inequality and that make it structurally impossible for legal institutions to protect workers. Empirically “right to strike” legislation hamstrings actual strikes via circumventive policies that jail strikers for engaging in theft, violence, etc while allowing for a façade of acceptance and forcing union representation, wages, and economic equality to plummet. The AFF results in scattered, ineffective, and “respectable” strikes and labor disputes re-routed towards legal arbitration while increased legal incorporation results in more tools for the elite to constrain the labor movement -- turns case and kills workers’ movement writ large. Vote NEG for a “direct endorsement of militancy and a turn away from the law and instead towards a political program that might advance the interests of the working class regardless of what the law might hold”

White 18 (Ahmed White – Nicholaus Rosenbaum Professor of Law @ University of Colorado Law School, “Its Own Dubious Battle: The Impossible Defense of an Effective Right to Strike”, https://scholar.law.colorado.edu/cgi/viewcontent.cgi?article=2369&context=articles , 2018, pgs. 1065-1073, EmmieeM)

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

INTRODUCTION

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

Recently adapted to film in a movie that is notably long on stars but short on distribution,4 the novel is considered one of Steinbeck’s finest.5 It is also perhaps the most powerful depiction of a labor strike in American literature. A bitter reflection on the intense interpersonal conflicts, moral dilemmas, and political impasses that are central to labor struggles, and based on the author’s acquaintances with workers and organizers in the region, the book tells the tragic story of a fruitpickers strike led by radicals in Depression-era California.6 In Dubious Battle broaches a set of crucial issues, which are seldom discussed anymore, concerning the nature of strikes and the acceptable limits of class struggle and workers’ protests in liberal society.7

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

The Wagner Act purported, for the first time in American history, to extend a definite, readily enforceable right to strike to most American workers. Not coincidentally, the years surrounding its enactment featured the most intense wave of labor conflict in the country’s history. When the statute became effective in 1937 (having been widely ignored by employers and blocked by hostile courts), the violence of strikes began to diminish, though not so much their frequency. For much of the period after the Second World War, strikes remained common even as they also became less ambitious in their aims and less militant in their conduct. Beginning about forty years ago, things changed again. Strikes suddenly became rare as well, to the point that workers today basically do not strike at all. From 1947 through 1976, the government documented an average of just over 300 “major work stoppages” (strikes and lockouts involving at least 1000 workers) every year; over the last decade, the annual average was only 14.10 Even the much-ballyhooed mini-strike wave of 2018 appears to be largely an illusion built on a combination of wishful thinking and a convenient misconstruction of a string of well-reported, and sometimes impressive, strikes, as a trend.11 In any event, militancy of the sort that was commonplace when Steinbeck wrote his book, along with the open strife and bloodshed that made the novel a work of undeniable realism, are nearly unheard of today.

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

Nevertheless, in most quarters the decline in strikes has been taken in stride, if noticed at all. For most people, strikes are hardly more than historical relics or quaint curiosities that seldom affect their daily lives or command much of their attention. Ironically, this is probably one reason the very modest labor conflict of the last year has been so overcharacterized. Once a preoccupation of newspaper editorialists, lawyers, and other commentators, a concern of government, and the subject of numerous hearings and reports, abundant litigation, and seemingly endless attempts at legislation, strikes are now rarely of any interest in any of these quarters. Where judges, politicians, and editorialists once worried greatly over how to deal with strikes of the kind that Steinbeck fictionalized, how to protect the economy (not to mention the interests of individual capitalists) from the disruptive effects of labor unrest, and sometimes how to preserve the ability of workers to strike in meaningful ways, their successors stand mute in the context of the near extinction of this form of protest. It has been two decades since Congress, which once grappled with these issues on a regular basis, has seriously confronted the question of strikes.12 Its last engagement with the right to strike attempts, in the early 1990s, to enact modest changes in the law relative to employers’ use of replacement workers during strikes. And even this effort, which collapsed in the mid 1990s, hardly seemed possessed of the kind of urgency that characterized earlier forays on these issues.13

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

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

Early on, this attempt to defend an effective right to strike was the object of mean-spirited criticism by more conventional scholars who, in the guise of unmasking its interpretative shortcomings, rejected its radicalism and recoiled at its underlying supposition that law is not only malleable and untethered to its formal, elite iterations, but within the province of workers to reshape around their own interests and visions.17 Despite these efforts, which focused on the work of Klare and Katherine Stone, whose critique of post-war “industrial pluralism” shared a similar reasoning—or maybe, to some extent, anyway, because of them—support for this campaign to restore the right to strike seems like a mandate among scholars and commentators who purport to take seriously the interests of workers.18 And yet for all its appeal, this project nevertheless suffers from a remarkably negligent oversight, one that has nothing to do with morality of its pretense that the law is malleable and that workers can remake it—a proposition that is broadly true and eminently defensible. Instead, it has to do with its practical feasibility. In fact, as this Article argues, a critical reflection on this question suggests that the effort to realize an effective right to strike is actually quite impossible and that attempts to do so, however earnest and thoughtful they may be, represent as dubious a battle as the hopeless walkout dramatized in Steinbeck’s book.

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

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

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

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

From this perspective, the quest for an effective right to strike emerges as a fantasy—an appealing fantasy for many, but a fantasy no less, steeped in a misplaced and exaggerated faith in the law and a misreading of the class politics of modern liberalism. The campaign to resurrect such a right appears, too, not only as a dead-end and a distraction, but an undertaking that risks blinding those who support viable unionism and the interests of the working class to the more important and fundamental fact that liberalism and the legal system are, in the end, antithetical to a meaningful system of labor rights. It is for this reason that the call for an effective right to strike should be set aside in favor of more direct endorsement of militancy and a turn away from the law and instead towards a political program that might advance the interests of the working class regardless of what the law might hold.

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

#### There is no strike wave, just media smoke tricks. Empirics on current strike trends and outcomes of “Right to Strike” legislation go heavily NEG – you cannot legalize revolution and all legislation is merely a ruse to constrain the workers’ movement through the guise of “legal management”

White 18 (Ahmed White – Nicholaus Rosenbaum Professor of Law @ University of Colorado Law School, “Its Own Dubious Battle: The Impossible Defense of an Effective Right to Strike”, https://scholar.law.colorado.edu/cgi/viewcontent.cgi?article=2369&context=articles , 2018, pgs. 1124-1131, EmmieeM)

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

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

To be sure, these were not the views of ordinary people. But the public’s perspective did not seem to vary all that much from those of elites. Although overall approval of union membership as measured in Gallup surveys slipped noticeably after 1937, it remained quite high— well above fifty percent right through the 1940s.299 Nevertheless, Gallup surveys taken in June 1937, after the big wave of sit-strikes had waned noticeably, but while mass picketing and overall levels of labor militancy remained high, revealed that fifty-seven percent supported the proposition that the militia should “be called out whenever strike trouble threatens.”300

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

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

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

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

A simple exercise in counterfactual speculation bears similar fruit in regard to other, more basic, limitations on the right to strike, including those imposed relative to sit-down strikes, mass picketing, and secondary boycotts. Shrill and self-interested though it was, all the testimony from employers and their allies during the hearings on TaftHartley or Landrum-Griffin about the perils posed by these tactics, was fundamentally correct. For were workers able to make unfettered use of sit-down strikes, mass picketing, and general strikes and sympathy walkouts, they could have very much challenged the sovereignty of capitalists in and about the workplace, and with this the bedrock institutions and norms of liberal society. As Jim Pope puts it, Charles Evans Hughes’ opinion in Fansteel established the maxim that “the employer could violate the workers’ statutory rights without sacrificing its property rights, while the workers could not violate the employer’s property rights without sacrificing their statutory rights.”305 This is unquestionably true. But equally unquestionable is that neither this court nor any other important arbiter of legal rights in this country was ever prepared to endorse the contrary view that property rights might be sufficiently subordinate to labor rights as to justify the kinds of tactics by which workers could routinely defeat powerful employers on the fields of industrial conflict

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

CONCLUSION

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

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

The proof of this is readily evident, not only in the dramatic decrease in strikes since the 1970s, but in the sad regularity with which even the most vibrant strikes have ended in defeat for workers. Phelps Dodge (1983), Greyhound (1983 and 1990), Hormel (1985-1986), Caterpillar (1992, 1993, and 1994-1995), Detroit Daily News/Daily Free Press (1995-1997)—these are but the most notable of a litany of vibrant strikes since the 1970s that ended in failure.306 They are, in fact, the definitive labor struggles of this period, overshadowing a much smaller number of comparable disputes, like the strikes at United Parcel Service in 1997 and Verizon in 2016 that—often shaped by uniquely favorable labor dynamics—ended in something resembling victory for the union.307 Each of these big and unsuccessful strikes was motived by very modest, in fact anti-concessionary, goals and well-supported by workers and the larger public alike. And each featured mass picketing and other attempts at militancy. But these tactics were met with injunctions, civil suits, mass arrests, and criminal prosecutions, which ended the protests and left the employers free to exert their vast advantages in material wealth and political power, end the disputes on their terms, and leave thousands of strikers unemployed.308

It is true that the last year or so has witnessed what many people have declared to be a miniature strike wave, that has been widely celebrated by unionists and their allies as a welcome departure from past trends and portent, many hope, of a sustained resurgence of labor activism.309 Headlined by statewide teachers strikes in West Virginia, Oklahoma, and Arizona, all in the first part of 2018, the strikes commanded a great deal of media coverage, at least compared to what labor disputes usually receive nowadays.310 However, closer inspection suggests that this wave is mainly an artifact of wishful thinking exacerbated by the novelty for many people nowadays of seeing these strikes reported in the media. For in fact, the number of strikes over the last couple of years has remained close to the level that has prevailed for several decades now.311

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

There is little hope within the prevailing political and juridical order that things could ever be any different. Perhaps the right to strike could be made effective if it were fundamentally reconfigured in illiberal, corporatist terms. The right could conceivably be reconfigured such that the government might intervene more aggressively and make the workers protests effective—for example, stepping in to decide by adjudication, mediation, or arbitration which side should win a strike. Elements of this approach, which was vigorously opposed by IWW and AFL unionists alike in the early twentieth century, can be found internationally, in industry-specific statutes like the Railway Labor Act, and in labor statutes that apply to government workers, although most often when the law goes down this path it all but dispenses with the right to strike anyway, treating it as a redundancy, a tool without a purpose. As Senator Wagner himself perceived, alignment between the excessive reliance on the authority of the state to manage labor relations and the denigration of the right to strike was both dysfunctional and dangerous. As he put it back in the summer of 1937, defending the recently-passed statute that bore his name and the right that he placed at the center of it, [t]he outlawry of the right to strike is a natural concomitant of authoritarian governments. It occurs only when a government is willing to assume definitive responsibility for prescribing every element in the industrial relationship—the length of the day, the size of the wage, the terms and conditions of work.313

Clearly no such regime will be instituted in any event, not least because, as interest in such schemes in the twentieth century makes clear, support for this kind of corporatist intervention in labor disputes has itself been an elite reaction against strike militancy that currently does not exist. Where does this leave workers and unions, possessed of a right they cannot afford to surrender but cannot rely on as a means of advancing their interests and standing in society? Are they bound like Steinbeck’s strikers to meet defeat, albeit in a more peaceful way? Maybe. In one of his many commentaries on the sit-down strikes as they raged across the country in the spring of 1937, Walter Lippmann took time to analyze one of the speeches in which James Landis had argued that the tactic might well become a new right, in the same way that the right to strike in general had been created through its persistent assertion in the face of opposition and incredulity. No revolutionary, Lippmann nonetheless understood what Landis apparently did not: that the right Landis spoke of was revolutionary in its conception, and therefore not just an impracticality but a contradiction. “Never in the history of the law has rebellion been made lawful. Only the rights demanded by the rebels have been legalized,” said Lippman.314

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