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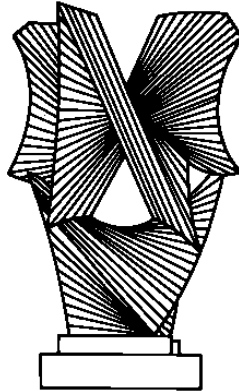
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# CHICAGO

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## *THE RIGHT TO WORK AND THE RIGHT TO STRIKE*

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# The Right to Work and the Right to Strike

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The spring 2016 decision in *Friedrichs v. California Teachers Association*,<sup>1</sup> in which an evenly divided Supreme Court declined to invalidate a California public sector agency shop arrangement on First Amendment grounds, stalled, but did not suspend, an antilabor campaign on behalf of a constitutionally protected “right to work.”<sup>2</sup> Drawing on recent business-friendly First Amendment decisions, opponents of organized labor contend that “fair-share” agency fee agreements, which require non-members of a union to pay their proportionate share of collective bargaining and contract administration expenses, can no longer weather constitutional scrutiny.<sup>3</sup> These advocates argue that the extent to which employees within a bargaining unit are required to contribute to the costs incurred on their behalf by a labor organization designated to represent them should be deferred neither to agreements between unions and employers nor to the legislative process. Rather, they urge the Court to prohibit any such payment as a matter of constitutional law.

Whatever their policy preferences, commentators have regarded the new judicial openness to economically inflected free expression claims of the kind proposed in *Friedrichs* as a departure from, or at least a significant extension of, traditional First Amendment principles. By contrast, this essay demonstrates that advocates articulated similar arguments as early as the 1930s, when the modern First Amendment took shape. Moreover, although they did not yet prevail in court, such arguments helped to garner broad-based support for the Supreme Court’s speech-protective turn at a time when liberals and labor groups were deeply suspicious of court-centered constitutionalism. Yet to the extent they were credited at all, First Amendment right-to-work claims were always a secondary component of the contemplated First Amendment bundle, which also included a robust right to strike. In fact, the right to strike was the core issue around which the interwar civil liberties movement coalesced.

Soon after extending constitutional protection to labor activity, the Supreme Court reversed course, concerned that insulating labor relations from state regulation would exacerbate industrial unrest and replicate the judicial overreaching it so recently had repudiated. Over the ensuing decades, it backed away from strong First Amendment protection in the labor law domain, a retreat that applied to pro- and anti-union activity in equal measure. It denied constitutionally protected status to secondary boycotts, wildcat

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<sup>1</sup> 136 S. Ct. 1083 (2016) (mem.) (per curiam).

<sup>2</sup> In June 2012, a petition for writ of certiorari was filed in *Janus v. AFSCME*, raising the same questions presented in the *Friedrichs* case.

<sup>3</sup> See, e.g., *Harris v. Quinn*, 134 S. Ct. 2618, 2626 (2014).

strikes, and mass picketing even as it restricted the associational autonomy of individual workers. But it always understood its anomalous analysis in First Amendment labor cases as even-handed. When a challenge to public sector agency fees makes its way back to the Supreme Court, the justices would do well to consider the consequences of unraveling a constitutional compromise that has proven stable for more than half a century.

## I. Labor Law and the First Amendment

In the spring of 2016, the eight members of the United States Supreme Court deadlocked over the constitutionality of a central and longstanding feature of public sector labor law. In *Friedrichs*, the Court was confronted with the question whether public sector agency fee arrangements that compel non-members to contribute to a union's contract negotiation and administration expenses are consistent with the First Amendment of the United States Constitution. That was a question the Court had long since answered in the affirmative but that anti-union advocates, prior to Justice Antonin Scalia's death, hoped it might be persuaded to reconsider.<sup>4</sup>

Since the middle of the twentieth century, the Supreme Court has interpreted federal private sector labor law to permit union security agreements but to prohibit a labor organization from requiring employees to become members or contribute financially to its political or ideological activity.<sup>5</sup> In its 1977 decision in *Abood v. Detroit Board of Education*,<sup>6</sup> the Court extended that rule to public sector employees. That is, although *Abood* prevented states from compelling public employees to join a union or to pay toward a union's political expenses, the Court deemed it constitutionally permissible to collect mandatory contributions toward a union's "chargeable expenses,"<sup>7</sup> including the costs of collective bargaining, contract administration, and grievance adjustment.<sup>8</sup> States were therefore free to authorize the same modified agency shop arrangements that were common in private sector workplaces governed by the National Labor Relations Act (NLRA) and Railway Labor Act.<sup>9</sup>

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<sup>4</sup> For the history of the arguments in these cases and the advocates who advanced them, see SOPHIA Z. LEE, *THE WORKPLACE CONSTITUTION FROM THE NEW DEAL TO THE NEW RIGHT* (2014); Joseph A. McCartin, "A Wagner Act for Public Employees": *Labor's Deferred Dream and the Rise of Conservatism, 1970–1976*, 95 J. AM. HIST. 123 (2008).

<sup>5</sup> The early cases involved the Railway Labor Act. *Ry. Emp.'s Dep't v. Hanson*, 351 U.S. 225, 721 (1956) (holding that the union shop agreements permitted by the Railway Labor Act do not violate the First Amendment); *Int'l Ass'n of Machinists v. Street*, 367 U.S. 740, 768–69 (1961) (construing the Railway Labor Act to prohibit the use of non-members' dues for political causes). *Street* was extended to the NLRA in *Communications Workers v. Beck*, 487 U.S. 735 (1988).

<sup>6</sup> 431 U.S. 209 (1977).

<sup>7</sup> In *Knox v. SEIU, Local 1000*, 132 S. Ct. 2277, 2284 (2012), the Supreme Court defined "chargeable expenses" as "the cost of union services related to collective bargaining," as distinct from the union's "political or ideological projects." *Abood*, 431 U.S. at 232, included among chargeable expenses the costs of "collective-bargaining, contract administration, and grievance-adjustment purposes."

<sup>8</sup> *Abood*, 431 U.S. at 232.

<sup>9</sup> 45 U.S.C. §§ 151–88 (2016).

The Supreme Court revisited this issue in *Harris v. Quinn*,<sup>10</sup> a 2014 challenge to a public sector fair-share arrangement involving Illinois home health workers. A five-justice majority ruled for the petitioners, who were assisted by the National Right to Work Legal Defense Foundation, on the narrow factual grounds that they were not full-fledged state employees. Encouraged by dicta in *Harris* that was extremely critical of *Abood*, the right-to-work movement pressed forward.<sup>11</sup> In *Friedrichs*, the non-members argued that there is no constitutionally relevant distinction between lobbying the government and bargaining with the government, because the issues at stake in public sector collective bargaining invariably implicate important public interests.<sup>12</sup> In the weeks before Justice Scalia’s death, many observers anticipated that a five-justice majority would seize the opportunity to overrule its earlier decision and to impose a right-to-work regime on all public sector workers.<sup>13</sup>

The American labor law system is an unusual one, and it reflects a complicated balancing by legislatures and the courts of individual and group rights, as well as broader structural issues.<sup>14</sup> The prevailing approach, which is modeled on the NLRA, allows workers to determine as a group whether union representation will serve their interests.<sup>15</sup> Once a union has attained the support of a majority of employees within a designated bargaining unit, it represents all the workers within the unit on an exclusive basis.<sup>16</sup> Many state governments have opted to bargain with the unions that represent majorities of their workers, just as federal law requires most private sector employers to do.<sup>17</sup> In exchange, employers—whether public or private sector—are usually shielded from contending with demands by competing unions.<sup>18</sup> They need not negotiate or enforce multiple contracts. And they are protected from costly recognitional and secondary strikes.<sup>19</sup>

Of course, employees who object to union representation, whether they favor an alternative union or oppose all unions, are not without recourse. If a majority of

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<sup>10</sup> 134 S. Ct. 2618 (2014).

<sup>11</sup> *Id.* at 2632.

<sup>12</sup> Brief for Petitioners at 10–11, *Friedrichs*, 136 S. Ct. 1083 (No. 14-915), 2015 WL 5261564. The petitioners argued in the alternative that unions should be permitted to collect contributions toward chargeable expenses only from non-members who opted in to payments. *Id.* at 15.

<sup>13</sup> *See, e.g.*, Amy Howe, *Union Fees in Jeopardy: In Plain English*, SCOTUSBLOG (Jan. 11, 2016, 5:08 PM), <http://www.scotusblog.com/2016/01/union-fees-in-jeopardy-in-plain-english> [<https://perma.cc/T8HX-TH2A>].

<sup>14</sup> *See generally* Cynthia Estlund, *Are Unions a Constitutional Anomaly?*, 114 MICH. L. REV. 169, 221–24 (2015). Estlund’s insightful analysis focuses on the post Taft-Hartley period. This essay emphasizes that in the labor context, ambivalence over the First Amendment, and especially its relationship to the right to strike and the right to work, stretches back to the earliest days of the NLRA and is rooted in the constitutional cases of the early twentieth century.

<sup>15</sup> *See, e.g.*, *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 221–22 (1977).

<sup>16</sup> NLRA, 29 U.S.C. § 158(a)(5), § 159(a) (2012) (“Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining.”).

<sup>17</sup> The duty to bargain does not, however, “compel either party to agree to a proposal.” *Id.* at § 158(d).

<sup>18</sup> *See, e.g.*, *Emporium Capwell Co. v. W. Addition Cmty. Org.*, 420 U.S. 50, 65–70 (1975) (rejecting the argument that national anti-discrimination policy requires an exception to the principle of exclusive representation where employees “seek to bargain separately with their employer as to the elimination of racially discriminatory employment practices”).

<sup>19</sup> Labor Management Reporting and Disclosure Act of 1959 § 704(c), 29 U.S.C. § 158(b)(7) (recognitional picketing); 29 U.S.C. § 158(b)(4) (secondary activity).

employees are dissatisfied with a union, they can vote to decertify it. If dissenting employees are in the minority, they are free to express their disapproval of union policies, to refuse to participate in strikes, and to withhold payment of fees that exceed what *Abood* and its private sector analogs allowed.<sup>20</sup> Moreover, a mix of state statutes and case law impose on unions a “duty of fair representation,” which prohibits them from retaliating against or otherwise disfavoring non-members.<sup>21</sup> That is, any wage increases or benefits the union negotiates on behalf of its members extend to non-members as well—even when it would advantage members to trade the interests of non-members for enhanced benefits for themselves—and unions are obligated to represent non-members just as vigorously in grievance and arbitration procedures.

The result is the much-debated free rider problem, which Justice Scalia construed a quarter-century ago as creating a “compelling state interest” sufficient to justify a state in “permit[ting] the union to demand reimbursement.”<sup>22</sup> In the absence of a duty of fair representation, employees who desired to share in union-negotiated benefits would have no choice but to join the union. By contrast, employees have little direct incentive to contribute financially to a union that is legally required to represent them just as zealously as members. The fewer the number of dues-paying members, the less effective the union becomes, which in turn renders the remaining members less eager to pay dues. Fair-share agency fees long ago emerged as the most tenable solution.

Opponents of *Abood* point to other areas of First Amendment law in which the Supreme Court has recognized compelled payments and subsidies as unconstitutional. Some of those cases postdate *Abood*, raising the possibility that public sector fair share fees are no longer consistent with First Amendment doctrine.<sup>23</sup> There are plausible arguments to be made on both sides of this debate. And yet, as a matter of First Amendment doctrine, as well as sound public policy, the status of fair share fees cannot be divorced from the broader labor law regime in which they are situated. *Abood* reflects a careful balance between the associational rights of unions and their members, on the one hand, and the rights of non-members to opt out on the other.<sup>24</sup> More starkly, to the

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<sup>20</sup> See, e.g., *Pattern Makers’ League v. NLRB*, 473 U.S. 95, 115–16 (1985) (upholding NLRB’s construction of the NLRA to prohibit a union from fining employees who had tendered their resignation during a strike).

<sup>21</sup> The duty of fair representation originated in *Steele v. Louisville & Nashville Railroad*, 323 U.S. 192, 202–03 (1944).

<sup>22</sup> *Lehnert v. Ferris Faculty Ass’n*, 500 U.S. 507, 556 (1991) (Scalia, J., concurring in judgment in part and dissenting in part); see also *Comm’n Workers v. Beck*, 487 U.S. 735, 753 (1988); *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 224–26 (1977); *Int’l Ass’n of Machinists v. Street*, 367 U.S. 740, 767 (1961).

<sup>23</sup> See, e.g., *United States v. United Foods*, 533 U.S. 405, 415 (2001) (refusing to uphold “compelled subsidies for speech in the context of a program where the principal object is speech itself”); *Knox v. SEIU, Local 1000*, 132 S. Ct. 2277, 2295 (2012) (noting that past holdings permitting closed shop agreements and opt-out billing schemes “have substantially impinged on the First Amendment rights of nonmembers” and rejecting “any further impingement”).

<sup>24</sup> Catherine Fisk and Margaux Poueymirou have persuasively argued that compelled representation of non-members in the absence of agency fees, which is necessarily funded by the payments of members who would prefer not to subsidize non-members, is a First Amendment violation to precisely the same extent as compelled payment of dues by non-members who would prefer not to subsidize the union and its members. That is, either both or neither are unconstitutional. Catherine L. Fisk & Margaux Poueymirou, *Harris v. Quinn and the Contradictions of Compelled Speech*, 48 LOY. L.A. L. REV. 439 (2015); see also Catherine

extent that fair-share fees trench on otherwise insulated First Amendment terrain, they are hardly the worst offenders within the labor law domain. After all, state legislation as well as federal labor law expressly curtail core First Amendment activity that is virtually immune from regulation in other domains, including the ability of workers to picket, boycott, and strike.

In short, from a historical perspective, the question whether compelled contributions toward chargeable expenses by public sector employees is closer to mushroom-growing subsidies<sup>25</sup> or integrated bar dues<sup>26</sup> is somewhat beside the point. The crucial question is why the Supreme Court has proven so reluctant to extend even paradigmatic First Amendment protections to labor unions, employers, and dissenting employees. Understanding today's speech-restrictive labor law regime requires exhuming a historical world that has slipped from view.

A constitutional prohibition on fair-share agency fees would alter a single component of a complicated labor law system without regard to related provisions. In our period of low union density and relative labor quiescence—in which some combination of legal, social, and economic impediments has rendered even simple work stoppages virtually nonexistent<sup>27</sup>—judges and advocates have forgotten a phenomenon that the *Aboud* Court grasped well. In the context of labor law, the First Amendment is a precarious thread, and pulling on it threatens to unravel the whole structure of American labor relations.

## II. Organized Labor in the *Lochner* Era

That the subsidence of American labor unrest has coincided with a new judicial openness to economically inflected First Amendment claims is presumably no accident. The *Friedrichs* case and its inevitable successors are part of a mounting effort to challenge social and economic regulation through the guise of the First Amendment. The past decades have witnessed a marked shift in First Amendment law from the protection of disfavored minorities against state suppression to the insulation of industrial interests against government regulation.<sup>28</sup> That effort has overlapped almost perfectly with the

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Fisk & Benjamin Sachs, *Restoring Equity in Right to Work Laws*, 4 U.C. IRVINE L. REV. 857, 862–68 (2014).

<sup>25</sup> *United Foods*, 533 U.S. 405 (2001).

<sup>26</sup> Like *Aboud*, cases on integrated bar dues have precluded use of compulsory fees for political purposes. *See, e.g.*, *Keller v. State Bar*, 496 U.S. 1 (1990); *Kingstad v. State Bar*, 622 F.3d 708 (7th Cir. 2010).

<sup>27</sup> In 2015, the Department of Labor's Bureau of Labor Statistics recorded twelve major strikes and lockouts involving a total of 47,000 workers. During the mid-twentieth century, annual totals sometimes approached five hundred major strikes and over two million workers. *Economic News Release*, BUREAU OF LABOR STATISTICS, DEPT. OF LABOR, <https://www.bls.gov/news.release/wkstp.t01.htm> [<https://perma.cc/G6HC-R8MM>] (last modified Feb. 9, 2017).

<sup>28</sup> *See, e.g.*, John C. Coates IV, *Corporate Speech and the First Amendment: History, Data, and Implications*, 30 CONST. COMMENTARY 223 (2015). For early analysis of this transformation, see MARK A. GRABER, *TRANSFORMING FREE SPEECH* (1991); OWEN M. FISS, *LIBERALISM DIVIDED: FREEDOM OF SPEECH*

decline in labor’s power, whose symbolic harbinger—President Ronald Reagan’s hiring of permanent replacements in the 1981 air traffic controller strike—came just months after the Supreme Court issued a watershed decision on promotional advertising that signaled its increasing discomfort with the regulation of commercial speech.<sup>29</sup> Today, as labor struggles to redefine its role and relevance and to imagine a legal regime more conducive to its political and economic goals,<sup>30</sup> empirical evidence suggests that almost half of First Amendment victories benefit business corporations and trade groups challenging unwelcome regulatory interventions.<sup>31</sup>

This transformation has aptly been labeled the *Lochnerization* of the First Amendment,<sup>32</sup> on the theory that businesses are using the First Amendment to do the work that substantive due process once performed in the era of *Lochner v. New York*,<sup>33</sup> the notorious 1905 Supreme Court case invalidating a New York maximum-hours law for bakers as an infringement of liberty of contract.<sup>34</sup> That is, like liberty of contract in the early twentieth century, the First Amendment is being used today to dismantle burdensome regulatory regimes.

The literature characterizes this transformation as a new direction in First Amendment law, but from the standpoint of the interwar coalition that litigated the foundational First Amendment cases, it might better be classified as a course correction. As I have argued elsewhere, the *Lochnerization* of the First Amendment began many decades ago. In fact, it began almost the instant that *Lochner* itself was put to rest. *Lochner’s* anti-regulatory constitutionalism was embedded in the First Amendment at the moment that the so called New Deal settlement was struck. And it was integrally related to Progressive Era labor conflict.<sup>35</sup>

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AND THE MANY USES OF STATE POWER (1996); CASS R. SUNSTEIN, *DEMOCRACY AND THE PROBLEM OF FREE SPEECH* (Free Press 1993).

<sup>29</sup> *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n*, 447 U.S. 557 (1980). The Supreme Court had already narrowed the permissible regulation of informational advertising in *Va. Pharmacy Bd. v. Va. Consumer Council*, 425 U.S. 748 (1976). On the significance of the PATCO strike, see JOSEPH A. MCCARTIN, *COLLISION COURSE: RONALD REAGAN, THE AIR TRAFFIC CONTROLLERS, AND THE STRIKE THAT CHANGED AMERICA* (2011).

<sup>30</sup> See, e.g., Kate Andrias, *The New Labor Law*, 126 *YALE L.J.* 1 (2016).

<sup>31</sup> See Coates, *supra* note 28, at 250–52.

<sup>32</sup> See J.M. Balkin, *Some Realism About Pluralism: Legal Realist Approaches to the First Amendment*, 1990 *DUKE L.J.* 375, 384; Morton Horwitz, *Foreword: The Constitution of Change: Legal Fundamentalism Without Fundamentalism*, 107 *HARV. L. REV.* 30, 109–16 (1993) (discussing “The *Lochnerization* of the First Amendment”); Robert Post & Amanda Shanor, *Adam Smith’s First Amendment*, 128 *Harv. L. Rev. F.* 165 (2015); Amanda Shanor, *The New Lochner*, 2016 *Wis. L. Rev.* 133. Recent scholarship has examined the significance of the deregulatory First Amendment in the labor context. See, e.g., Charlotte Garden, *The Deregulatory First Amendment at Work*, 51 *Harv. C.R.-C.L. L. Rev.* 323 (2016); Helen Norton, *Truth and Lies in the Workplace: Employer Speech and the First Amendment*, 100 *Minn. L. Rev.* 31 (2016); Cynthia Estlund, *Truth, Lies, and Power at Work*, 101 *Minn. L. Rev.* 349 (2017).

<sup>33</sup> 198 U.S. 45 (1905).

<sup>34</sup> *Id.* at 64.

<sup>35</sup> See generally LAURA WEINRIB, *THE TAMING OF FREE SPEECH: AMERICA’S CIVIL LIBERTIES COMPROMISE* (2016) [hereinafter WEINRIB, *TAMING*]; Laura Weinrib, *Civil Liberties Outside the Courts*, 2014 *SUP. CT. REV.* 297; Laura Weinrib, *The Liberal Compromise: Civil Liberties, Labor, and the Limits of State Power, 1917–1940* (2011) (unpublished Ph.D. dissertation, Princeton University).



Today, *Lochner*-era jurisprudence is most closely identified with the cases whose facts resemble *Lochner*'s: cases, in which state and federal courts invalidated legislative efforts to improve workplace safety or dictate the terms of employment. For the early labor movement, however, such decisions represented only one component of a broader judicial hostility to workers' rights. For example, the Supreme Court's 1897 decision in *Allgeyer v. Louisiana*,<sup>36</sup> which first read liberty of contract into the Due Process Clause of the Fourteenth Amendment, hamstrung unions as much as or more than progressive legislatures.

During the early decades of the twentieth century, the federal judiciary cabined legislative power to authorize union activity while expanding its own authority to curtail strikes and boycotts.<sup>37</sup> In 1908, the Supreme Court struck down a federal prohibition on anti-union discrimination in the railroad industry for abridging workers' freedom of contract under the Fifth Amendment.<sup>38</sup> In 1915, it extended that holding to the states.<sup>39</sup> Relying on "constitutional freedom of contract" under the Fourteenth Amendment,<sup>40</sup> it invalidated a state law that made it unlawful for an employer to require an employee to enter into an agreement "not to join or become or remain a member of any labor organization or association, as a condition of such person or persons securing employment."<sup>41</sup> Rejecting the state's asserted effort to limit employer "coercion" and to ensure the liberty of workers to join organizations of their choosing, the Court construed the targeted *yellow-dog contracts* as advancing the right of an employee "to work for whom he will."<sup>42</sup> Two years later, it upheld a controversial injunction against the United Mine Workers that encompassed efforts to persuade workers to join the union, because the prospective recruits had exercised their "constitutional rights of personal liberty and private property" by signing yellow-dog contracts.<sup>43</sup> And in 1921, the newly appointed chief justice William Howard Taft issued an opinion in *Truax v. Corrigan*,<sup>44</sup> which was castigated by labor for its apparent partiality to employers. Invalidating a state statute that limited the authority of judges to issue injunctions in labor disputes, the majority denounced labor picketing as "moral coercion by illegal annoyance and obstruction" and concluded that "a law which operates to make lawful such a wrong . . . deprives the owner of the business and the premises of his property without due process."<sup>45</sup>

Even as the Supreme Court invalidated anti-yellow dog laws for abridging liberty of contract, it denied constitutional protection to labor tactics, including the boycott and the strike. In *Gompers v. Buck's Stove & Range Co.*,<sup>46</sup> the Court rejected out of hand the

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<sup>36</sup> 165 U.S. 578 (1897).

<sup>37</sup> See generally DANIEL R. ERNST, *LAWYERS AGAINST LABOR: FROM INDIVIDUAL RIGHTS TO CORPORATE LIBERALISM* (1995); WILLIAM E. FORBATH, *LAW AND THE SHAPING OF THE AMERICAN LABOR MOVEMENT* (1991); CHRIS TOMLINS, *THE STATE AND THE UNIONS: LABOR RELATIONS, LAW, AND THE ORGANIZED LABOR MOVEMENT IN AMERICA, 1880-1960* (1985).

<sup>38</sup> *Adair v. United States*, 208 U.S. 161, 172 (1908).

<sup>39</sup> *Coppage v. Kansas*, 236 U.S. 1, 13 (1915).

<sup>40</sup> *Id.*

<sup>41</sup> *Id.* at 6.

<sup>42</sup> *Id.* at 23.

<sup>43</sup> *Hitchman Coal & Coke Co. v. Mitchell*, 245 U.S. 229, 251 (1917).

<sup>44</sup> 257 U.S. 312 (1921).

<sup>45</sup> *Id.* at 328.

<sup>46</sup> 221 U.S. 418 (1911).

notion that the American Federation of Labor's (AFL's) "We Don't Patronize List," which cataloged employers that the AFL considered "unfair," was protected First Amendment expression.<sup>47</sup> As a spokesperson for the National Association of Manufacturers (NAM) explained, it was every bit as legitimate "to enjoin the use of [a man's] hands or his feet or his head to do some unlawful thing" as it was "to use the injunction in connection with the use of the tongue."<sup>48</sup>

The same reasoning undergirded the Taft Court's decisions during the 1920s. In 1926, three years after invalidating a state compulsory arbitration statute for unduly burdening businesses,<sup>49</sup> the Court upheld the criminal conviction of a union officer under the same law for engaging in a strike.<sup>50</sup> The majority opinion decisively rejected labor's attempt to ground the right to strike in either the common law or the Constitution.<sup>51</sup> Indeed, according to the courts, laws prohibiting strikes and boycotts served rather than impeded personal liberty. "The labor unions and [their] officers," reflected a lower court in *Buck's Stove*, "meddle into a member's daily affairs deeper than does the law; restrict him in matters that the law leaves free."<sup>52</sup>

In the face of such decisions, labor leaders and their allies charged the courts with hypocrisy.<sup>53</sup> Increasingly, they accused the judiciary of erecting a labor law regime best characterized as "Heads, I win; Tails, you lose."<sup>54</sup> During the 1910s, progressives launched a frontal assault on the courts, along with common law legalism and constitutionalism.<sup>55</sup> Establishment lawyers and politicians introduced various proposals to curb judicial overreaching, and many states enacted provisions for the democratic recall of judges. Concerns about the courts were sufficiently pervasive that former president Theodore Roosevelt, campaigning for a return to the White House on the Progressive Party ticket, promoted the "recall of judicial decisions" and pronounced it "absolutely necessary for the people themselves to take control of the interpretation of the constitution."<sup>56</sup> Even some conservatives fretted that the judiciary's fiercely antilabor

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<sup>47</sup> *Id.* at 439.

<sup>48</sup> See U.S. COMM'N ON INDUSTRIAL RELATIONS, FINAL REPORT AND TESTIMONY SUBMITTED TO CONGRESS BY THE COMMISSION ON INDUSTRIAL RELATIONS, S. DOC. NO. 64-415, at 10,823 (Statement of James A. Emery, May 18, 1915).

<sup>49</sup> See *Chas. Wolff Packing Co. v. Court of Indus. Relations*, 262 U.S. 522, 544 (1923).

<sup>50</sup> See *Dorchy v. Kansas*, 272 U.S. 306, 311 (1926).

<sup>51</sup> *Id.*

<sup>52</sup> Transcript of Record at 627, *Gompers v. Buck's Stove & Range Co.*, 221 U.S. 418 (1911) (No. 372).

<sup>53</sup> See WEINRIB, TAMING, *supra* note 35, at ch. 1.

<sup>54</sup> U.S. COMM'N ON INDUSTRIAL RELATIONS, FINAL REPORT, *supra* note 48, at 10,895 (1st Sess. 1916) (Additional Statement of Theodore Schroeder, May 27, 1915).

<sup>55</sup> See DUNCAN KENNEDY, THE RISE AND FALL OF CLASSICAL LEGAL THOUGHT (2006); MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1870-1960: THE CRISIS OF LEGAL ORTHODOXY (1992); MORTON WHITE, SOCIAL THOUGHT IN AMERICA: THE REVOLT AGAINST FORMALISM (1949); WILLIAM M. WIECEK, THE LOST WORLD OF CLASSICAL LEGAL THOUGHT: LAW AND IDEOLOGY IN AMERICA, 1886-1937 187-97 (1998); MICHAEL WILLRICH, CITY OF COURTS: SOCIALIZING JUSTICE IN PROGRESSIVE ERA CHICAGO (2003).

<sup>56</sup> *Progressive Party Platform, 1924*, in GREAT ISSUES IN AMERICAN HISTORY: FROM RECONSTRUCTION TO THE PRESENT DAY, 1864-1981, vol. 3, 326 (Richard Hofstadter & Beatrice K. Hofstadter eds., rev. ed. 1982); Letter from Theodore Roosevelt to Herbert David Croly, in Theodore Roosevelt Papers, Manuscripts Division, Library of Congress (Feb. 29, 1912),

jurisprudence was straining popular confidence in the courts and “endanger[ing] imbedded political and constitutional traditions of due process,” along with the American commitment to rule of law.<sup>57</sup>

The campaign to curtail judicial power flagged during the 1920s, when a combination of economic prosperity and state-sanctioned antilabor offensives dampened union influence. In 1924, the plank of the Progressive Party platform urging abolition of “the tyranny and usurpation of the courts, including the practice of nullifying legislation in conflict with the political, social or economic theories of the judges,” found few supporters outside labor circles.<sup>58</sup> But within a decade, judicial inflexibility in the face of the Great Depression made demands for reform more urgent than ever. Notably, a reinvigorated labor movement was instrumental in reviving the attack on *Lochner*-era constitutionalism.<sup>59</sup> After all, in the face of rising labor militancy, a decisive congressional majority passed the NLRA in 1935.<sup>60</sup> As violent strikes roiled the nation, the statute aimed to improve economic conditions and reduce labor unrest by legitimating union activity.<sup>61</sup> Yet business groups actively advised their members to disregard their obligations to bargain with unions under the NLRA, on the theory that the Supreme Court was certain to consider it an unconstitutional incursion on the property rights of employers and an unconstitutional interference with the liberty of antiunion employees.<sup>62</sup>

By the mid-1930s, of course, the very future of judicial review was in jeopardy. President Franklin Roosevelt’s much maligned Court-packing plan met political resistance for its disingenuous reliance on strained judicial resources and its perceived aggrandizement of executive, in place of judicial, power.<sup>63</sup> Other proposals, however, had ample support. And many of them, including calls to abolish judicial review by constitutional amendment, promised far greater inroads on judicial authority. In congressional hearings on the Court-packing plan and in impassioned public debate over the future of the courts, the judiciary’s mistreatment of organized labor played an outsize role. To unions, victory in their decades-long battle against *Lochner*-era constitutionalism at last appeared within reach.

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<http://www.theodorerooseveltcenter.org/Research/Digital-Library/Record/?libID=o224709>  
[<https://perma.cc/SC4S-QJRB>].

<sup>57</sup> Charles O. Gregory, *Peaceful Picketing and Freedom of Speech*, 26 ABA J. 709, 710 (1940).

<sup>58</sup> See, e.g., *La Follette Has No Answer to Charges Made by Dawes*, ST. PETERSBURG, FLORIDA, INDEPENDENT, Sept. 12, 1924; *A Platform of Business Principles*, NATION’S BUSINESS, Dec. 1924, at 37.

<sup>59</sup> JAMES A. GROSS, THE MAKING OF THE NATIONAL LABOR RELATIONS BOARD: A STUDY IN ECONOMICS, POLITICS, AND THE LAW 149–253 (1974); PETER H. IRONS, THE NEW DEAL LAWYERS 201–71 (1982).

<sup>60</sup> NLRA, 29 USC §§ 151–69. On the passage of the NLRA, see CHARLES J. MORRIS, THE BLUE EAGLE AT WORK: RECLAIMING DEMOCRATIC RIGHTS IN THE AMERICAN WORKPLACE 56–80 (2005); GROSS, *supra* note 59; IRONS, *supra* note 59.

<sup>61</sup> IRVING BERNSTEIN, TURBULENT YEARS: A HISTORY OF THE AMERICAN WORKER, 1933–1941 (1969).

<sup>62</sup> The American Bar Association concluded that such advice by the American Liberty League was ethical. See *Professional Ethics Committee Rules Organization and Offer of National Lawyers Committee Not Unethical*, 21 ABA J. 776, 777–78 (1934).

<sup>63</sup> See generally ALAN BRINKLEY, THE END OF REFORM: NEW DEAL LIBERALISM IN RECESSION AND WAR 15–30 (1995); JEFF SHESOL, SUPREME POWER: FRANKLIN ROOSEVELT VS. THE SUPREME COURT (2010); BURT SOLOMON, FDR V. THE CONSTITUTION: THE COURT-PACKING FIGHT AND THE TRIUMPH OF DEMOCRACY (2009).

### III. From the Right to Strike to the Right to Work

Ever since the Supreme Court handed them down, its 1937 decisions in *West Coast Hotel v. Parrish*<sup>64</sup> and *NLRB v. Jones & Laughlin Steel Corp.*<sup>65</sup> have been described as the opening shots of a revolution in constitutional law.<sup>66</sup> As future Supreme Court justice Robert H. Jackson observed, the “avalanche of victories” that unfolded that spring—which constituted “a legal revolution, as real and meaningful as any ever fought on a field of battle”—“were the greatest days in labor’s legal history.”<sup>67</sup> In accepting the constitutionality of minimum wage laws and subsequently of federal labor law, the Supreme Court definitively abandoned its reliance on constitutional liberty and property rights (along with the Commerce Clause) and signaled a new deference to government regulation of the economy.

The esteemed constitutional scholar Edward S. Corwin was among the first commentators to characterize the 1937 decisions as revolutionary, a label he grounded in the Supreme Court’s abandonment of its laissez-faire conception of “liberty.”<sup>68</sup> That is, what made the decisions “so radical” and “so altogether dramatic” was their reconceptualization of liberty “as something that may be infringed by other forces as well as by those of government; indeed, something that may require the positive intervention of government against those other forces.”<sup>69</sup> To be sure, the Court did not identify this new form of liberty as an independent constitutional right. Even after 1937, neither theorists nor advocates ordinarily argued that state assistance for organized labor was constitutionally compelled. Still, Corwin’s insight would prove crucial in interpreting the NLRA and in deflecting subsequent constitutional attacks on the statutory framework.

Looking forward, however, the late 1930s constitutional moment was even more revolutionary than Corwin anticipated. Indeed, what was most revolutionary about the emerging constitutional doctrine was how completely it reversed course. The New Deal Supreme Court did not stop at stripping employers of their *Lochner*-era liberty and property rights. Even as it wrote employers’ antiunion appeals to freedom of contract out of the Constitution, it wrote First Amendment protection for labor’s most powerful tactics in.

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<sup>64</sup> 300 U.S. 379 (1937).

<sup>65</sup> 301 U.S. 1 (1937).

<sup>66</sup> On the constitutional revolution, see BARRY CUSHMAN, *RETHINKING THE NEW DEAL COURT: THE STRUCTURE OF A CONSTITUTIONAL REVOLUTION* (1998); WILLIAM E. LEUCHTENBURG, *THE SUPREME COURT REBORN: THE CONSTITUTIONAL REVOLUTION IN THE AGE OF ROOSEVELT* (1995); RICHARD A. MAIDMENT, *THE JUDICIAL RESPONSE TO THE NEW DEAL: THE UNITED STATES SUPREME COURT AND ECONOMIC REGULATION, 1934–1936* (1991); *AHR Forum: The Debate over the Constitutional Revolution of 1937*, 110 AM. HIST. REV. 1046 (2005).

<sup>67</sup> Robert H. Jackson, “Labor’s New Rights and Responsibilities,” Aug. 24, 1934, Records of the Special Executive Assistant to the Attorney General, 1933–1940, Subject Files, 1933–1940, General Records of the Department of Justice, Record Group 60, National Archives and Record Administration, box 6, folder Jackson.

<sup>68</sup> Edward S. Corwin, *The Court Sees a New Light*, NEW REPUBLIC 354 (Aug. 4, 1937).

<sup>69</sup> *Id.*

In its famous fourth footnote in *United States v. Carolene Products Co.*,<sup>70</sup> the Supreme Court flagged an exception to its new, hands-off approach to constitutional interpretation: it would continue to subject laws to exacting judicial scrutiny where they burdened the rights of minorities or infringed freedom of speech.<sup>71</sup> Although it is typically regarded as a subsequent development, the move to reclassify traditionally economic transactions as expressive ones was part and parcel of the new constitutional regime. In fact, the lawyers and litigants who championed free speech in the years before *Carolene Products* were concerned above all with protecting labor’s rights.<sup>72</sup> The American Civil Liberties Union (ACLU), which unabashedly described itself as a partisan of labor in its founding documents,<sup>73</sup> promoted what it called a “right of agitation”: a right of workers to picket, boycott, and strike.<sup>74</sup> Despite deep ambivalence and even antipathy to constitutional rights based claims among the organization’s early leadership,<sup>75</sup> much of the ACLU’s interwar litigation strategy was meant to make its prolabor agenda palatable to the courts. Over the objections of labor movement allies who regarded the judiciary as an inevitable abettor of industrial interests, the ACLU stubbornly invited the courts to expand First Amendment protection of labor picketing. Although it often emphasized more anodyne pursuits—including its campaigns for academic and artistic freedom—its overarching objective was to render workers’ concerted activity a constitutional right.<sup>76</sup> And particularly after the Supreme Court’s Spring 1937 decisions blunted substantive due process as an antilabor tool, the First Amendment strategy found friendly reception among labor leaders and their New Deal supporters.

It is a largely forgotten feature of constitutional history that this labor vision of the First Amendment briefly prevailed. Today, the notion of a right to strike, picket, and boycott independent of any regulatory regime seems fanciful. But amid the industrial unrest of the 1930s, a wide range of civil liberties advocates within and outside government believed that protecting workers’ collective rights would stave off the more extreme violence associated with labor struggles abroad.<sup>77</sup> Moreover, few issues seemed

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<sup>70</sup> 304 U.S. 144 (1938).

<sup>71</sup> *Id.* at 152 n.4 (1938). On *Carolene Products*, see Felix Gilman, *The Famous Footnote Four: A History of the Carolene Products Footnote*, 46 SOUTH TEXAS L. REV. 163 (2004).

<sup>72</sup> See generally WEINRIB, TAMING, *supra* note 35; Weinrib, *Civil Liberties*, *supra* note 35.

<sup>73</sup> See, e.g., Walter Nelles, “Suggestions for Reorganization of the National Civil Liberties Bureau” (undated), in American Civil Liberties Union Records, The Roger Baldwin Years, 1917–1950, Seeley G. Mudd Manuscript Library, Public Policy Papers, Princeton University, Princeton, NJ (ACLU Papers), reel 16, vol. 120 (“We are frankly partisans of labor in the present struggle.”).

<sup>74</sup> See ACLU, THE FIGHT FOR FREE SPEECH 4–5, 15–18 (1921).

<sup>75</sup> See Laura Weinrib, *From Left to Rights: Civil Liberties Lawyering Between the World Wars*, LAW, CULTURE & HUMANITIES (forthcoming 2017), <http://journals.sagepub.com/doi/full/10.1177/1743872116641871> [https://perma.cc/Q2WU-4XPF].

<sup>76</sup> See generally ACLU, *supra* note 74 (discussing the ACLU’s free speech objectives and focusing on labor rights such as assembly and demonstration, striking, and picketing).

<sup>77</sup> The same impulse was behind the decision in the NLRA to mandate employer bargaining with unions, since the most disruptive strikes often involved demands for employer recognition. NLRA section one justifies the statutory regime in part on the basis that “[t]he denial by some employers of the right of employees to organize and the refusal by some employers to accept the procedure of collective bargaining lead to strikes and other forms of industrial strife or unrest[.]” 29 U.S.C. § 151 (2016).

more central than labor to the democratic concerns of the First Amendment.<sup>78</sup> In *Jones & Laughlin Steel*, Chief Justice Charles Evans Hughes called the right of workers to organize a “fundamental right.”<sup>79</sup> The following month, Justice Louis Brandeis issued an opinion in *Senn v. Tile Layers Protection Union*.<sup>80</sup> In upholding a Wisconsin statute that authorized labor picketing, Brandeis explained that union members were entitled to publicize the facts of a labor dispute because “freedom of speech is guaranteed by the federal Constitution.”<sup>81</sup> And the first case to invoke the speech-protective theory of footnote four of *Carolene Products* was a 1940 labor case, *Thornhill v. Alabama*,<sup>82</sup> in which Justice Frank Murphy upheld the right to picket as an expression of ideas.<sup>83</sup> “Free discussion concerning the conditions in industry and the causes of labor disputes appears to us indispensable to the effective and intelligent use of the processes of popular government to shape the destiny of modern industrial society,” Murphy reasoned.<sup>84</sup> *Thornhill*’s companion case, *Carlson v. California*,<sup>85</sup> added that the “liberty of communication” protected by the First Amendment also included the peaceful dissemination of “the facts of a labor dispute . . . by pamphlet, by word of mouth or by banner.”<sup>86</sup> Although these cases are relegated to footnotes in most contemporary constitutional law casebooks, they were considered monumental in their time. Lee Pressman, the erstwhile anti-judiciary general counsel of the Congress of Industrial Organizations (CIO) who argued *Carlson* in the Supreme Court, expressed increasing confidence in the argument that “labor action is nothing more or less than the exercise of constitutional rights.”<sup>87</sup> In 1941, Herbert Wechsler adjudged the Supreme Court’s decision incorporating the Free Exercise Clause of the First Amendment to be far less important than the labor picketing cases, to which he attributed “major significance.”<sup>88</sup>

In many respects, the First Amendment strategy for advancing labor’s rights was a risky one. As labor and industry both understood, there were deep affinities between the effort to secure constitutional protection for workers’ concerted activity and business leaders’ appeal to liberty of contract.<sup>89</sup> In fact, the ACLU secured conservative support for free speech on precisely that basis, and the unlikely coalition that resulted was instrumental in persuading the courts to expand the scope of protected First Amendment activity. For example, in the run-up to the Court-packing plan, the American Bar

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<sup>78</sup> By contrast, see *Harris v. Quinn*, 134 S. Ct. 2618, 2632 (2014) (“In the public sector, core issues such as wages, pensions, and benefits are important political issues, but that is generally not so in the private sector.”).

<sup>79</sup> *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 33 (1937).

<sup>80</sup> 301 U.S. 468 (1937).

<sup>81</sup> *Id.* at 478.

<sup>82</sup> 310 U.S. 88 (1940).

<sup>83</sup> *Id.* at 102–05.

<sup>84</sup> *Id.* at 103.

<sup>85</sup> 310 U.S. 106 (1940).

<sup>86</sup> *Id.* at 113; *see also* *Bakery & Pastry Drivers Local 802 v. Wohl*, 315 U.S. 769, 774 (1942) (recognizing the constitutional right “to express a grievance in a labor matter by publication unattended by violence, coercion, or conduct otherwise unlawful or oppressive”).

<sup>87</sup> Quoted in GILBERT J. GALL, *PURSUING JUSTICE: LEE PRESSMAN, THE NEW DEAL, AND THE CIO* 108 (1999).

<sup>88</sup> Harry Shulman & Herbert Wechsler, *Symposium on Civil Liberties, AALS Annual Meeting, Chicago, Dec. 27, 1940*, 9 AM. L. SCH. REV. 881, 885 (1938–1942).

<sup>89</sup> *See* WEINRIB, *TAMING*, *supra* note 35, at ch. 6.

Association concluded that the best way to preserve judicial review from democratic curtailment was to persuade the public of the importance of the handful of civil liberties victories that the ACLU had litigated and the ABA had long opposed.<sup>90</sup> The ABA's civil liberties campaign did not forestall the Supreme Court's spring 1937 decisions, which the organization's next president decried as "the most devastating destruction of constitutional limitations upon Federal power."<sup>91</sup> Still, the civil liberties campaign helped to improve the bar's negative reputation. And the positive publicity—coupled with the swift realization that after the demise of *Lochner*-era liberty, civil liberties protections might provide an alternative basis for constitutional argumentation when "the rights denied or the privacy invaded were those of the business corporation"—led the ABA to create a new Committee on the Bill of Rights in 1938.<sup>92</sup> Among that committee's first tasks was to submit an amicus brief in a foundational First Amendment labor case, *Hague v. Committee for Industrial Organization*.<sup>93</sup> The brief proved to be a public relations triumph, and the ABA believed that it exerted considerable influence on the Court.<sup>94</sup>

The new fondness for free speech quickly extended from conservative lawyers to their corporate clients. Although media advocates had long defended their business practices as extensions of the freedom of the press, other pre-New Deal industrialists were content to rest on their property rights, and they typically impugned free speech claims for their subversive potential. But the Great Depression eroded the old allure of private property as the anchor of American freedom, and so, increasingly, businesses began to denounce government regulatory efforts as infringements of First Amendment freedoms instead. By the end of the 1930s, the pamphlets and public addresses of the National Association of Manufacturers and Chamber of Commerce of the United States were rife with references to the First Amendment. After all, Justice Brandeis's decision in *Senn* had compared labor picketing to advertising, implicitly "invest[ing] both types of publicity pressures with the dignity of freedom of speech."<sup>95</sup>

The shift was swift and sweeping. In 1938, the NAM defended its anti-New Deal lobbying as an exercise of free expression.<sup>96</sup> Just months after *Thornhill* was decided, the Chamber of Commerce highlighted the potential benefits of constitutional protection for commercial speech.<sup>97</sup> Above all, conservatives hoped that the First Amendment might

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<sup>90</sup> *Id.*

<sup>91</sup> Frank J. Hogan, *Important Shifts in Constitutional Doctrines*, 25 ABA J. 629, 630 (1930).

<sup>92</sup> Frank J. Hogan, "Justice, Sure and Speedy, for All," Address to the Annual Meeting of the ABA, 29 July 1938, Papers of Grenville Clark in the Dartmouth College Library, ML-7, Rauner Special Collections Library, Hanover, NH, box 83, folder 45.

<sup>93</sup> 307 U.S. 496, 516 (1939) (holding unconstitutional an ordinance requiring a permit for public assembly because the ordinance gave officials broad power for "arbitrary suppression of free expression"); *see also* Brief of the Comm. on the Bill of Rights, of the ABA, as Friends of the Court, *Hague v. CIO*, 307 U.S. 496 (1939) (No. 651) 1939 WL 48753.

<sup>94</sup> Grenville Clark to Charles Edmundson, 8 February 1940, Grenville Clark Papers, box 78, folder 93; Frank Hogan to members of the Board of Governors, 14 February 1939, Arthur Vanderbilt Papers, box 123.

<sup>95</sup> *Senn v. Tile Layers Protection Union*, 301 U.S. 468, 478 (1937); Gregory, *supra* note 57, at 712.

<sup>96</sup> *De Propaganda Fide*, N.Y. HERALD-TRIBUNE, Mar. 6, 1938.

<sup>97</sup> Garvin Croonquist, Letter to the Editor, *Are Peddlers a Nuisance?*, NATION'S BUSINESS, Sept. 1940, at 51 (noting that free speech protection for door-to-door salespeople not only increases competition but also supports local economies).

chip away at Congress' newly validated protections for organized labor. At the end of the decade, corporate lawyers and business groups denounced the National Labor Relations Board (NLRB) for preventing the Ford Motor Company from distributing antiunion literature to its employees.<sup>98</sup> What the agency characterized as an exercise of coercive interference with the right to organize, Ford's lawyers and supporters deemed an unlawful incursion on free expression. And the ACLU, concerned that any abrogation of free expression on the basis of economic coercion would undermine First Amendment protection for the right to strike, joined business groups in chastising the NLRB for its abridgment of free speech.

It was a short road from a First Amendment defense of the right to oppose union activity to a First Amendment defense of the right to work.<sup>99</sup> Although employers had long argued that union security agreements (as well as strikes and boycotts) abridged the liberty interests of nonmembers—and federal courts proved willing to rely on the common law and antitrust protections to enjoin efforts to secure such concessions—the voluntary nature of bargaining agreements between unions and employers in the pre-New Deal era weakened their link to federal constitutional law. According to antilabor advocates, the NLRA supplied the requisite state action; and, in lieu of liberty of contract, the First Amendment emerged as the most plausible hook for a constitutional claim. By June 1941, Samuel Pettengill counseled his audience at the annual meeting of the U.S. Chamber of Commerce to uphold the “rights of the individual and of the minority” even as he decried the closed shop and declared the right of strikebreakers to cross the picket line.<sup>100</sup> According to Pettengill, the “equal right to work” was “the first right of all.”<sup>101</sup>

Such arguments were not lost on the critics of *Lochner*-era constitutionalism who had so recently enlisted the Supreme Court to their point of view. Charles O. Gregory, a University of Chicago law professor and prominent labor scholar, captured widespread concerns when he criticized the *Thornhill* decision in the *ABA Journal*.<sup>102</sup> According to Gregory, common law restraints on nonviolent union activity had no place in the post New Deal legal order. By the same token, state legislatures might sensibly protect union activity from employer interference; the Supreme Court's constitutional analysis in *Truax v. Corrigan* “still baffle[d] good lawyers.”<sup>103</sup> On the other hand, it was no more legitimate to shield labor picketing from state regulation on First Amendment grounds than it was to insulate employers against state regulation on the basis of liberty of contract. “True liberals in this country no longer look askance at economic compulsion,” Gregory argued, but to “call such coercion constitutionally guaranteed freedom of speech” was a “perversion of an American ideal.”<sup>104</sup> He reflected:

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<sup>98</sup> WEINRIB, TAMING, *supra* note 35, at ch. 8.

<sup>99</sup> On the right-to-work movement and its constitutional claims, see LEE, *supra* note 4.

<sup>100</sup> Samuel Pettengill, *What's Ahead for America?*, NATION'S BUSINESS, June 1941, at 36.

<sup>101</sup> *Id.* at 47.

<sup>102</sup> Gregory, *supra* note 57.

<sup>103</sup> *Id.* at 711. On statutory protections of public sector employees' right to organize, see JOSEPH E. SLATER, PUBLIC WORKERS: GOVERNMENT EMPLOYEE UNIONS, THE LAW, AND THE STATE, 1900–1962 (2004).

<sup>104</sup> Gregory, *supra* note 57, at 714.



For years the “Old Court” was under fire because of its doctrine of “substantive due process” developed to make possible the invalidation of local legislative experiments. It now seems from the picketing cases of last Spring that the “New Court” is perpetuating this error by using the Fourteenth Amendment to establish its conception of the guaranties of liberty set forth in the First Amendment.<sup>105</sup>

To Gregory, *Thornhill* and *Carlson*—like the *Lochner*-era cases before them—were dangerous usurpations of government authority to regulate labor relations. Gregory, in short, was lamenting the *Lochnerization* of the First Amendment.

#### IV. Labor’s Constitutional Compromise

It is a deep irony of the interwar civil liberties movement that its overarching purpose was to inscribe into law a First Amendment right to picket, boycott, and strike, and yet those rights were written out of the First Amendment almost as soon as *Carolene Products* was decided. Presumably the justices of the Supreme Court were weighing assessments like Charles Gregory’s when they sharply limited constitutional protection for labor activity just one year after introducing it. In 1941, the Court issued a decision in *Milk Wagon Drivers Union v. Meadowmoor Dairies, Inc.*,<sup>106</sup> upholding a state court’s injunction against picketing by a union that had previously engaged in property destruction and violence. Writing for the majority, Justice Felix Frankfurter concluded that “utterance in a context of violence can lose its significance as an appeal to reason and become part of an instrument of force,” and that subsequent picketing, even if peaceful, could constitutionally be enjoined.<sup>107</sup> Frankfurter had championed the Norris-LaGuardia Act,<sup>108</sup> the landmark federal legislation that limited the federal courts’ injunctive power in labor disputes, and subsequent commentators have strained to explain his apparent about face.<sup>109</sup> To many of his contemporaries, however, Frankfurter’s reasoning was apparent. Not only would expanding constitutional protection for union speech trench on legislative prerogatives; it would also open the door to First Amendment claims by employers. As Charles Gregory mused, it was “disquieting to hear proponents of organized labor applaud [*Thornhill* and *Carlson*] and then condemn a manufacturer who, contrary to the terms of the Wagner Act, insists upon telling his employees exactly what he thinks of a certain labor union and why.”<sup>110</sup> Some groups, including the ACLU, thought the solution was to safeguard the First Amendment rights of unions and employers alike. Many New Dealers, including many judges, preferred to withhold constitutional protection from both.

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<sup>105</sup> *Id.* at 714–15.

<sup>106</sup> 312 U.S. 287 (1941).

<sup>107</sup> *Id.* at 293.

<sup>108</sup> 29 U.S.C. §§ 101–15 (2016).

<sup>109</sup> See especially FELIX FRANKFURTER AND NATHAN GREENE, *THE LABOR INJUNCTION* (1930).

<sup>110</sup> Gregory, *supra* note 57, at 715.

As the 1940s unfolded, it was the latter approach that prevailed. When strikes or pickets were most effective, and therefore most coercive, they lost their status as constitutionally protected expression.<sup>111</sup> No doubt judges and justices were motivated by a range of competing concerns. Some were driven by an abiding commitment to judicial restraint, lest Lochnerism rear its head. Reflecting backwards, they worried that the invigoration of the First Amendment would lead to judicial usurpation of the police power in the service of industry. Others interpreted the massive strike wave at the end of the Second World War as evidence that the labor law pendulum had swung too far toward organized labor. Before the New Deal, courts had suppressed strikes and boycotts while extending constitutional protection to yellow-dog contracts and extolling the virtues of the open shop. A decade later, strikes were constitutionally protected and union security agreements were not. As union membership skyrocketed and workers voiced the demands they had tabled during the war, many Americans blamed the New Deal labor law regime for excessively inflating union power; some judges presumably agreed. Still others remained personally partial to organized labor but believed that the legitimacy and survival of constitutional liberalism required the Court to avoid the appearance of bias in its application of counter-majoritarian principles. Conservative efforts to embed the right to work in the First Amendment did not directly succeed in the 1940s, at least in the courts, but they may have achieved a more attenuated victory in checking the labor vision of civil liberties. No doubt the specter of a First Amendment right to work affected the litigants, advocates, and judges who engaged with the First Amendment right to strike.

The First Amendment labor cases of the 1940s and 1950s crystalized into a compact that lasted, with some modifications at the margins, for more than fifty years. Over the course of the twentieth century, the Supreme Court unceremoniously denied constitutional protection to the very modes of expression that it pronounced core to First Amendment ideals in other domains. A long list of labor law's First Amendment anomalies is easy to assemble. The same collective bargaining agreements that require non-members to contribute agency fees also require both members and non-members to forgo much more recognizably First Amendment expression, including strikes, while the contract is in effect. Yet the Court has long since deemed no-strike clauses enforceable by injunction, notwithstanding the language of the Norris-LaGuardia Act.<sup>112</sup> Meanwhile, the NLRA directly limits recognitional picketing and secondary activity, along with wildcat strikes.<sup>113</sup> And of course, many states simply prohibit strikes by public sector

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<sup>111</sup> See, e.g., *Carpenters & Joiners Union v. Ritter's Cafe*, 315 U.S. 722 (1942); *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490 (1949); *Hughes v. Superior Court*, 339 U.S. 460 (1950); *Int'l Bhd. of Teamsters, Local 695 v. Vogt, Inc.*, 354 U.S. 284 (1957). The Supreme Court did, however, continue to recognize limited speech rights in the context of labor organizing. See, e.g., *Thomas v. Collins*, 323 U.S. 516 (1945). For explanation and discussion of this trajectory, see James Gray Pope, *How American Workers Lost the Right to Strike, and Other Tales*, 103 MICH. L. REV. 518 (2004); James Gray Pope, *The First Amendment, the Thirteenth Amendment, and the Right to Organize in the Twenty-First Century*, 51 RUTGERS L. REV. 941 (1999); Catherine Fisk & Jessica Rutter, *Labor Protest Under the New First Amendment*, 36 BERKELEY J. EMP. & LAB. L. 277, 295–300 (2015).

<sup>112</sup> *Boys Markets, Inc. v. Retail Clerks Union, Local 770*, 398 U.S. 235 (1970).

<sup>113</sup> See *Int'l Bhd. of Elec. Workers, Local 501 v. NLRB*, 341 U.S. 694, 705 (1951) (“The substantive evil condemned by Congress in § 8(b)(4) is the secondary boycott and we recently have recognized the constitutional right of states to proscribe picketing in furtherance of comparably unlawful objectives. There is no reason why Congress may not do likewise.”).

workers, in terms that far outstrip the usual latitude afforded states in regulating government employees. In the ordinary political context, of course, picketing is quintessential First Amendment activity, and declining to protect it would be virtually unfathomable.<sup>114</sup> Labor picketing, labor boycotts, and union associational activity are all routinely curbed by the state.<sup>115</sup>

## V. Conclusion: Some Lessons from *Lochner*

As the Roberts Court has forged ahead with the *Lochner*ization of the First Amendment, it has begun to expand constitutional protections for employees who object to the payment of union dues. It has curtailed the ability of public sector unions to collect payments toward ideological activity by adjusting the default rules of non-member contributions,<sup>116</sup> and it has reduced the class of state-funded workers covered by *Abood*.<sup>117</sup> Thus far, it has declined to extend reciprocal protection to labor's expressive activity. It has rejected unions' freedom of association claims,<sup>118</sup> and it has accepted statutory restrictions on secondary activity and the right to strike. This outcome would have been a tremendous surprise to interwar advocates and judges. By the end of the New Deal, all the signs pointed the other way. Unions enjoyed burgeoning First Amendment rights, whereas the objections of non-members were of minimal constitutional concern. There were comparatively few advocates for a union's duty of fair representation to bargaining unit employees, whether statutory or constitutional, and, within the New Deal

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<sup>114</sup> For a comprehensive analysis of the inconsistency between the labor and non-labor picketing cases, see Fisk & Rutter, *supra* note 111, at 300–15. Earlier scholarship examining the differential treatment of labor speech includes Cynthia Estlund, *Labor Picketing and Commercial Speech: Free Enterprise Values in the Doctrine of Free Speech*, 91 YALE L. J. 938 (1982); Mark D. Schneider, *Peaceful Labor Picketing and the First Amendment*, 82 COLUM. L. REV. 1469 (1982).

<sup>115</sup> See *supra* note 114. On boycotts, compare NAACP v. Claiborne Hardware Co., 458 U.S. 886 (1982) (extending First Amendment protection to civil rights boycotting), with International Longshoremen's Ass'n v. Allied International, Inc., 456 U.S. 212 (1982) (upholding Congress' authority to prohibit secondary boycotting under the NLRA). The Court has also arguably favored corporations over labor unions in the campaign finance context. See, e.g., Charlotte Garden, *Citizens, United and Citizens United: The Future of Labor Speech Rights?*, 53 WM. & MARY L. REV. 1 (2011); Benjamin I. Sachs, *Unions, Corporations and Political Opt-Out Rights After Citizens United*, 112 COLUM. L. REV. 800 (2012); Catherine Fisk & Erwin Chemerinsky, *Political Speech and Associational Rights After Knox v. SEIU, Local 1000*, 98 CORNELL L. REV. 1023 (2013).

<sup>116</sup> See *Knox v. SEIU, Local 1000*, 132 S. Ct. 2277 (2012).

<sup>117</sup> See *Harris v. Quinn*, 134 S. Ct. 2618 (2014).

<sup>118</sup> See, e.g., *Smith v. Ark. State Hwy. Emps., Local 1315*, 441 U.S. 463, 465 (1979) (“The public employee surely can associate and speak freely and petition openly, and he is protected by the First Amendment from retaliation for doing so. . . . But the First Amendment does not impose any affirmative obligation on the government to listen, to respond or, in this context, to recognize the association and bargain with it.”). Cf. *Wis. Educ. Ass'n Council v. Walker*, 705 F.3d 640 (7th Cir. 2013). Section 1 of the NLRA declares Congress' commitment to “protecting the exercise by workers of full freedom of association.”

administration at least, the closed shop was widely accepted as a legitimate outcome of workplace democracy.<sup>119</sup>

If the Supreme Court ultimately recognizes a First Amendment right to work, a cascade of cases will follow. As an initial matter, the dues-paying members in that new regime may plausibly object that the government is forcing them to subsidize non-members in violation of their First Amendment rights.<sup>120</sup> But the slippery slope is steeper than that. Union members may also feel that an injunction to enforce a no-strike clause is incompatible with the First Amendment. They may argue that they are entitled to express their solidarity with other struggling workers—that picketing over disputes at distant workplaces is protected by the Constitution, even when unions are involved.<sup>121</sup> For their part, the right-to-work forces are almost certain to transpose their argument onto private sector labor law, which the Supreme Court (sidestepping a significant state action question with respect to constitutional claims<sup>122</sup>) has proven inclined to align with its public sector decisions as a matter of statutory interpretation.

One might imagine that the Court’s one-sided First Amendment expansion will prove difficult to contain. In fact, lower courts have already begun to narrow the class of secondary activity subject to regulation. And to the extent the justices hold the line, they will open themselves to the same charges of hypocrisy and antilabor bias that beset their *Lochner*-era forebears. Moving forward, lawyers, litigants, and judges will have to decide whether robust First Amendment review of labor law would ultimately serve their interests, and at what cost.<sup>123</sup>

During the decades after the Constitutional Revolution, the Supreme Court insisted that the First Amendment must occasionally yield to legislative choices about “the competing interests of unions, employers, their employees, and the public at large.”<sup>124</sup> In upholding a state injunction against peaceful picketing in the 1957 decision *Teamsters Union v. Vogt*,<sup>125</sup> Justice Frankfurter explained on behalf of the Supreme Court majority that constitutional protection for free speech did not immunize labor activity from state regulation.<sup>126</sup> In a mournful dissent, Justice Douglas described the decision as a “formal surrender.”<sup>127</sup> “[F]or practical purposes,” he explained, the law had reverted to the “situation . . . as it was when *Senn v. Tile Layers Protective Union* was decided.” Organized labor was protected by statute rather than the Constitution, as it was in the

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<sup>119</sup> As Charles Gregory explained, unions had “won the support of thousands of intellectual leaders who are actuated by the social movement aspects of unionism and who seem to have ignored the dangers of the sort of power which federated universal closed shops may bring.” Gregory, *supra* note 57, at 714.

<sup>120</sup> See Fisk & Poueymirou, *supra* note 24, at 470–72, 482–85.

<sup>121</sup> See Fisk & Rutter, *supra* note 111, at 322–28, for an argument that the NLRB should expand its protection of secondary activity as a matter of statutory interpretation to avoid infringing on the First Amendment. For a broad contemporary defense of the “constitutional right to organize,” see Rebecca E. Zietlow, *The Constitutional Right to Organize* (Working Paper, Sept. 26, 2016), <https://ssrn.com/abstract=2864100> [<https://perma.cc/4PHU-FKNH>].

<sup>122</sup> On the state action problem in private sector labor law, see generally LEE, *supra* note 4.

<sup>123</sup> For a compelling explanation of the contemporary labor movement’s reluctance to embrace a constitutional strategy, see Kate Andrias, *Building Labor’s Constitution*, 94 *Tex. L. Rev.* 1591 (2016).

<sup>124</sup> *Teamsters Union v. Vogt*, 354 U.S. 284, 289 (1957).

<sup>125</sup> 354 U.S. 284 (1957).

<sup>126</sup> *Id.* at 289.

<sup>127</sup> *Id.* at 297 (Douglas, J., dissenting).

brief period been between the Supreme Court’s validation of the NLRA in *Jones & Laughlin Steel* and its subsequent decisions elevating union activity to First Amendment status. That is, labor picketing was subject to government regulation, as it was before the modern First Amendment took shape.<sup>128</sup>

But in accusing the Court of “com[ing] full circle,”<sup>129</sup> Justice Douglas exaggerated the extent of the Court’s retreat. The picketing decisions of the mid-twentieth century reflected a durable compromise, pursuant to which labor and antiunion speech were equivalently inured to First Amendment challenge. Lurking behind labor’s First Amendment exceptionalism was the recognition that the postwar labor law regime, with its complicated balancing of employer and worker rights, had operated to dampen industrial unrest and facilitate American economic growth.<sup>130</sup> To advance these goals—which may have seemed like “compelling government interests,” though the accommodation was rarely framed in conventional doctrinal terms—the courts constrained the operation of the First Amendment in the labor context. Just as an unequivocal right to strike would unleash unpalatable economic power, an unequivocal right to work would disturb the New Deal settlement and impugn the legitimacy of the courts, not to mention the stability of the postwar legal order.

Against this broader backdrop, recognizing a First Amendment obstacle to public sector agency fees threatens to unweave the web. To couch the right to work in the Constitution while licensing courts and legislatures to suppress the right to strike would truly be to “come full circle.” It would replicate the constitutional dynamics of the *Lochner*-era, an approach excoriated by generations of scholars and judges for its lopsided attentiveness to the interests of antiunion workers and employers.<sup>131</sup> It would, in short, mark a return “for practical purposes” to the “situation . . . as it was” before *Jones & Laughlin Steel* was decided. And the situation then, it bears remembering, was a world on the brink of revolution.

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<sup>128</sup> *Id.* at 297.

<sup>129</sup> *Id.* at 295.

<sup>130</sup> The tradeoffs entailed by the NLRB’s state-centered approach are discussed in Karl E. Klare, *Labor Law as Ideology: Toward a New Historiography of Collective Bargaining Law*, 4 BERKELEY J. EMP. & LAB. L. 450 (1981); Karl E. Klare, *Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness, 1937-1941*, 62 MINN. L. REV. 265 (1978); Christopher L. Tomlins, *The New Deal, Collective Bargaining and the Triumph of Industrial Pluralism*, 39 IND. LAB. REL. REV. 19 (1985).

<sup>131</sup> See generally DAVID E. BERNSTEIN, REHABILITATING LOCHNER: DEFENDING INDIVIDUAL RIGHTS AGAINST PROGRESSIVE REFORM 1-7, 108-24 (2011) (characterizing *Lochner* as “the most disreputable case in modern constitutional discourse”); see also Jamal Greene, *The Anticanon*, 125 HARV. L. REV. 379 (2011).