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Building Labor's Constitution

Kate Andrias*

Introduction

In recent years, in the face of the Great Recession and skyrocketing economic inequality, there has been a resurgence of economic justice movements among low-wage workers.¹ Take the “Fight for \$15,” which began with a few hundred workers in New York but is now national in scope.² Fast-food workers, airport and retail workers, home-health aides, and even adjunct professors all now demand substantially higher wages and the right to form a union.³ The campaign has pulled off strikes in cities across the country.⁴ It has had stunning success in raising local and state minimum wages, while shifting the terms of the national debate.⁵

The Fight for \$15 and other low-wage worker campaigns are making rights-based claims: they demand higher wages, better conditions, and unions, as of right. They use language like “dignity” and “bills of rights,”

* Assistant Professor, University of Michigan Law School. For helpful conversations and comments, I am grateful to fellow participants at the *Texas Law Review* Symposium on the Constitution and Economic Inequality, and particularly to Willy Forbath and Joey Fishkin. Thanks also to Sam Bagenstos, Daniel Halberstam, Don Herzog, Ellen Katz, Bill Novak, Richard Primus, Ted St. Antoine, and Peter Strauss; participants at the Columbia Law School Public Law workshop; and the editors of the *Texas Law Review*. Caitlin Fitzgerald, Lexi Peacock, and Megan Pierce provided excellent research assistance.

1. See Charles M. Blow, Opinion, *The Year's Biggest Social Justice Stories*, N.Y. TIMES (Dec. 12, 2015), http://www.nytimes.com/2015/12/21/opinion/the-years-biggest-social-justice-stories.html?_r=0 [https://perma.cc/3KWC-ZT8Y] (collecting 2015's top social justice stories—including the fast-food worker strikes).

2. Lydia DePillis, *It's Not Just Fast Food: The Fight for \$15 Is for Everyone Now*, WASH. POST (Dec. 4, 2014), <https://www.washingtonpost.com/news/storyline/wp/2014/12/04/its-not-just-fast-food-the-fight-for-15-is-for-everyone-now/> [https://perma.cc/WVH7-YEUI].

3. *Id.*; Justine Hofherr, *In Boston, the Fight for Better Pay Goes Beyond Fast Food*, BOSTON.COM (Apr. 15, 2015), <http://www.boston.com/jobs/news/2015/04/15/boston-the-fight-for-better-pay-goes-beyond-fast-food/BdDWh0WFRkUIFvVj6NvveP/story.html> [https://perma.cc/BE44-S4JD]. More precisely, the campaign demands the right to form a union “free of intimidation.” See Arun Gupta, *Fight for 15 Confidential: How Did the Biggest-Ever Mobilization of Fast-Food Workers Come About, and What Is Its Endgame?*, IN THESE TIMES (Nov. 11, 2013), http://inthesetimes.com/article/15826/fight_for_15_confidential [https://perma.cc/H36G-BX94].

4. Bruce Horowitz & Yamiche Alcindor, *Fast-Food Strikes Widen into Social-Justice Movement*, USA TODAY (Apr. 15, 2015, 7:32 PM), <http://www.usatoday.com/story/money/2015/04/15/fast-food-strike-fight-for-15-service-employees-international-union/25787045/> [https://perma.cc/GVR3-V4RN].

5. Chris Kirkham & Samantha Masunaga, *Why the Success of the \$15 Minimum Wage Movement Has Surprised Its Leaders*, L.A. TIMES (Nov. 11, 2015, 3:00 AM), <http://www.latimes.com/business/la-fi-1111-minimum-wage-protests-20151111-story.html> [https://perma.cc/324T-THVH].

and they employ similar tactics to those of earlier rights-based social movements: marches, civil disobedience, and mass protests.⁶

But unlike many movements on both the Left and Right, and unlike earlier incarnations of the labor movement, contemporary worker movements make almost no appeal to the Constitution. While an occasional worker or labor leader may articulate his or her claims as based in protections for free speech, or may exclaim against involuntary servitude, worker justice movements in the United States do not invoke the Constitution in any serious or systemic way.⁷

In their important new work, William Forbath and Joey Fishkin seek to change this.⁸ They lament the absence of constitutional argumentation by progressives concerned about economic inequality. They show that during earlier periods of American history the Constitution was understood as central to problems of political economy. They describe a “Great Forgetting” of this past and they exhort political and social actors to once again understand demands for a more egalitarian, inclusive, and democratic political economy as constitutionally grounded.⁹ Forbath and Fishkin are not alone. In the last few years, other scholars have sought to revitalize a range of constitutional arguments against mounting economic inequality generally and the plight of workers in particular,¹⁰ and have urged social movements to adopt those arguments.¹¹

6. See *infra* Part II (describing the Fight for \$15, Domestic Workers Alliance movement, and other low-wage worker campaigns).

7. See *infra* notes 72–83 and accompanying text.

8. JOSEPH FISHKIN & WILLIAM E. FORBATH, THE ANTI-OLIGARCHY CONSTITUTION (forthcoming 2017) (manuscript at 3) (on file with the Texas Law Review) [hereinafter FISHKIN & FORBATH, ANTI-OLIGARCHY CONSTITUTION] (arguing that government has a constitutional obligation to prevent oligarchy, preserve a broad middle class, and construct a democracy of inclusion and opportunity and urging the recovery of a tradition in which issues of political economy are understood as constitutional); accord Joseph Fishkin & William E. Forbath, *The Anti-Oligarchy Constitution*, 94 B.U. L. REV. 669, 672 (2014) [hereinafter Fishkin & Forbath, *Anti-Oligarchy Constitution*]; Joseph Fishkin & William E. Forbath, *The Great Society and the Constitution of Opportunity*, 62 DRAKE L. REV. 1017, 1022–23 (2014) [hereinafter Fishkin & Forbath, *Great Society*]; Joseph Fishkin & William E. Forbath, *Wealth, Commonwealth, & The Constitution of Opportunity: A Story of Two Traditions*, 38 NOMOS (forthcoming 2016) (manuscript at 3) http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2620920 [<https://perma.cc/PU79-YMLW>] [hereinafter Fishkin & Forbath, *Wealth, Commonwealth*].

9. See Fishkin & Forbath, *Wealth, Commonwealth*, *supra* note 8, at 1, 6–7, 28 (recognizing that the problems of economic and political inequality are well known, but arguing that Americans have “forgotten” or “lost the constitutional stakes—the sense that these threats to our democracy of opportunity are threats, as well, to our constitutional order”); see also Fishkin & Forbath, *Anti-Oligarchy Constitution*, *supra* note 8, at 670 (describing “forgotten” tradition and urging recovery); Fishkin & Forbath, *Great Society*, *supra* note 8, at 1023 (recounting how the “Constitution of Opportunity” was “forgotten”).

10. See, e.g., Bertrall L. Ross II & Su Li, *Measuring Political Power: Suspect Class Determinations and the Poor*, 104 CALIF. L. REV. 323, 329 (arguing for an alternative, more holistic, measure of political power that would require reconsideration of the suspect class status of groups like the poor); Ganesh Sitaraman, *The Puzzling Absence of Economic Power in*

I am sympathetic to arguments in favor of a “constitution of opportunity” or an “anti-oligarchy” constitution. At the same time, I want to take seriously the choice of worker movements *not* to lay claim to the Constitution. That is, I want to offer some thoughts as to why they are not doing so—reasons that stem more from conflict and loss than from forgetting—and to suggest that what they are doing instead might be a necessary precondition to the kind of constitutional argumentation that Forbath, Fishkin, and others urge.

So why don't worker movements invoke the Constitution?

The problem is not the lack of a blueprint. Scholars have explained how the Constitution can be read to support rights to decent employment and unionization.¹² The arguments rest on the First, Thirteenth, and Fourteenth Amendments; the Guarantee Clause; as well as the Constitution's overall structure, purpose, and history. Many of these arguments are conceptually sound—at least as sound as other constitutional arguments that form our doctrine.¹³ Some are consistent in principle with the received wisdom regarding the original understanding of the Constitution and the Reconstruction Amendments. And several boast impressive pedigrees. Earlier worker movements have looked to the Constitution as a source of inspiration for their demands. On occasion, such movements have prevailed on elected officials to accept their constitutional vision.

To be sure, courts do not currently embrace these arguments.¹⁴ Yet the absence of supporting precedent is only a partial answer to the question: Why no constitutional argumentation? Successful social movements, past and current, have invoked the Constitution even when their aspirations required changes to the ruling doctrines of constitutional law.¹⁵ They direct

Constitutional Theory, 101 CORNELL L. REV. (forthcoming 2016) (manuscript at 1–3) (critiquing constitutional theory for giving insufficient attention to economic inequality); Nicholas O. Stephanopoulos, *Political Powerlessness*, 90 N.Y.U. L. REV. 1527, 1531–33 (2015) (arguing that a group is relatively powerless and therefore entitled to heightened scrutiny if its “policy preferences are less likely to be enacted than those of similarly sized and classified groups” and arguing, on that theory, for protection of the poor (emphasis omitted)). On recent scholarship regarding labor rights, see *infra* Part I.

11. See, e.g., Marion Crain & Ken Matheny, *Beyond Unions, Notwithstanding Labor Law*, 4 U.C. IRVINE L. REV. 561, 606 (2014) (urging worker groups to invoke constitutional arguments about the freedom of assembly as “a new rhetorical tool in the struggle to win hearts and minds”).

12. See *infra* Part I.

13. Cf. Richard Primus, *Unbundling Constitutionality*, 80 U. CHI. L. REV. 1079, 1133–34 (2013) (describing the gap between the text of the First Amendment and the Equal Protection Clause, and related doctrine).

14. See *infra* Part III.

15. For a recent overview of the legal and sociological literature on constitutional change, courts, and social movements, see Douglas NeJaime, *Constitutional Change, Courts, and Social Movements*, 111 MICH. L. REV. 877, 877–78 (2013); see also *infra* notes 84–87 and accompanying text.

their arguments to the public and to constitutional actors outside the Court—legislators and executives, among others. Such argumentation provides inspiration and a source for organizational strength and legitimacy.¹⁶ And the hope is that, over time, the courts will come to accept the movement's view of the Constitution.

Labor, however, appears to eschew this strategy. To understand why, one must consider the movement's relationship to courts and to legal elites more generally.¹⁷ U.S. courts are not good venues for labor. The history of judicial antagonism dates back over one hundred years, when judges frequently enjoined workers' collective action using conspiracy and antitrust law, while striking down protective employment legislation under a liberty-of-contract theory.¹⁸ Court hostility to worker movements continues today.¹⁹ And the problem goes beyond the hostility of particular judges to unions. The deepest aspirations of the labor movement are fundamentally mismatched with court-derived constitutional rights as they have developed in the United States. The doctrine's strong distinctions between the public and private spheres of life and between negative and positive rights pose significant challenges for constitutional labor rights.²⁰

Indeed, a more fundamental conflict may exist: the goal of labor law, at least from the perspective of the most utopian elements of the labor movement, is to democratize control over workers' lives and, more broadly, over the economy and politics. Appeals to courts are in tension with this aim. Federal courts are, after all, designed to be insulated, elite institutions. Even assuming that courts are often responsive to popular sentiment, court definition of constitutional rights is a largely nondemocratic process—at least under our current system of judicial supremacy.²¹

16. See Douglas NeJaime, *The Legal Mobilization Dilemma*, 61 EMORY L.J. 663, 668 (2012) (recognizing that advocates can "use litigation to . . . obtain leverage with government officials, convince the public, and influence elites," and that benefits may result simply from the act of claiming rights).

17. There are, of course, other explanations for why some of the constitutional arguments on offer may not be taken up. For example, those who seek to apply antislavery arguments to contemporary labor problems may risk being accused of inappropriately appropriating (or even minimizing) the horrific experience of a particular racial group. They also may face wariness from groups of workers who do not wish to be associated with the experience of chattel slavery. Or, quite simply, the problems facing workers today may simply not feel like problems analogous to slavery. This Essay explores one reason for labor's reluctance to make constitutional arguments without suggesting the reason is fully explanatory.

18. See CHRISTOPHER L. TOMLINS, *THE STATE AND THE UNIONS: LABOR RELATIONS, LAW, AND THE ORGANIZED LABOR MOVEMENT IN AMERICA, 1880–1960*, at 44–52, 61–67 (1985) (recounting the courts' treatment of collective action and the conflict between courts and the American Federation of Labor); William E. Forbath, *The Shaping of the American Labor Movement*, 102 HARV. L. REV. 1109, 1185–95 (1989) [hereinafter Forbath, *Shaping American Labor*] (describing the response of courts to labor movements in America).

19. See *infra* notes 126–29 and accompanying text.

20. See *infra* notes 140–142 and accompanying text.

21. See *infra* notes 97–100, 148–50 and accompanying text.

The response of scholars who urge constitutional argumentation is that workers should invoke the Constitution as a source of strength in the political arena, without turning to courts.²² But the labor movement's lived experience is that even when workers direct their constitutional claims to elected officials, courts often end up reviewing—and rejecting—their validity.²³ Against this backdrop, it is no wonder that the contemporary labor movement avoids constitutional argumentation.

In short, the problem might not be so much a great forgetting, but an *acute remembering*. Labor's constitutional vision has been tested through conflict and resoundingly rejected. In that context, constitutional arguments hold little promise and have little purchase.

That does not mean, however, that the constitutional project need be abandoned. One could imagine an alternative world in which constitutional argumentation on behalf of labor's goals would have more purchase—a world in which the Constitution might be read to provide a right to a union and collective bargaining, to decent wages and benefits, to basic dignity and a measure of democracy at work. For that world to exist, however, more of the citizenry—and more of the decision-making class—would have to be favorably disposed toward those goals. The fundamental political commitments of the nation would have to shift along with the posture of the judiciary.

In fact, low-wage worker campaigns like the Fight for \$15 and the Domestic Workers Alliance are attempting to bring about that shift.²⁴ They are seeking to change the nation's basic commitments by making public arguments, by enacting new laws, and by pushing for new regulatory interpretations. Through legislative work, protests, strikes, and the use of social media, they are seeking to persuade the public and elected officials of the rightness of their demands and to enact their vision of labor rights. They are engaging in “small-c” constitutionalism by attempting to change

22. See, e.g., Crain & Matheny, *supra* note 11, at 606 (arguing that “reframing labor rights as assembly rights would offer modern unions and other worker advocacy groups a new rhetorical tool in the struggle to win hearts and minds”); William E. Forbath, *The Distributive Constitution and Workers' Rights*, 72 OHIO ST. L.J. 1115, 1156 (2011) [hereinafter Forbath, *Distributive Constitution*] (arguing that “[w]e need to recall the progressive economic outlook on economic life” in order to remind “lawmakers that there are constitutional stakes in attending seriously to the economic needs of ordinary Americans”); William E. Forbath, *Social and Economic Rights in the American Grain: Reclaiming Constitutional Political Economy*, in *THE CONSTITUTION IN 2020* 55, 57 (Jack M. Balkin & Reva B. Siegel eds., 2009) [hereinafter Forbath, *American Grain*] (arguing that progressive counter narratives to the laissez-faire view of the Constitution can help create political will to achieve legislative change).

23. See *infra* notes 115–25 and accompanying text.

24. See *infra* Part IV.

the web of practices, institutions, norms, and traditions that structure American society.²⁵

Such law reform and social change efforts are essential prerequisites to the development of court-based constitutional labor rights. Without the political and legal changes the movements urge, it is inconceivable that common law courts—faithful to precedent, incremental in approach, and drawn from the elite—will adopt the constitutional arguments that progressive legal scholars urge. For this reason, defending and expanding labor’s ongoing statutory and regulatory reform efforts may, for now at least, be as important as any debate about whether or where in the Constitution to lodge labor rights.

The remainder of this Essay proceeds as follows. Part I outlines the arguments for constitutional labor rights advanced by scholars but currently unused by worker movements. Part II elaborates the claim that contemporary worker movements are not invoking the Constitution. Part III argues that the movements’ relationship to courts and court-derived constitutional law helps explain the silence. Part IV concludes by sketching how the actual practice of today’s worker movements supports an alternative way of approaching the construction of an “anti-oligarchy” Constitution.

I. The Case for Constitutional Labor Rights

Before proceeding, it is important to define more precisely what constitutes “labor rights” and, relatedly, “constitutional labor rights.” By most accounts, workplace law is divided into two main categories, collective and individual, both of which function to protect workers and both of which could potentially be constitutionally derived.²⁶

25. See Primus, *supra* note 13, at 1082 (describing “small-c” constitutionalism and discussing the diversity of small-c constitutional theories). For additional scholarship on the practice of small-c constitutionalism and on how Americans have used statutory and administrative law to construct constitutional meaning, see generally 1 BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* 20 (1991); AKHIL REED AMAR, *AMERICA’S UNWRITTEN CONSTITUTION: THE PRECEDENTS AND PRINCIPLES WE LIVE BY* ix–xi (2012); JACK M. BALKIN, *LIVING ORIGINALISM* 3–6, 69–73 (2011); WILLIAM N. ESKRIDGE JR. & JOHN FERREJOHN, *A REPUBLIC OF STATUTES: THE NEW AMERICAN CONSTITUTION* 1–2 (2013); Karl N. Llewellyn, *The Constitution as an Institution*, 34 COLUM. L. REV. 1 (1934); Keith E. Whittington, *Constructing a New American Constitution*, 27 CONST. COMMENT. 119, 120–25 (2010); Ernest A. Young, *The Constitution Outside the Constitution*, 117 YALE L.J. 408, 415–26 (2007); Stephen M. Griffin, *Understanding Informal Constitutional Change* 1–2 (Tulane Univ. Sch. of Law, Pub. Law & Legal Theory Working Paper Series, Working Paper No. 16-1, 2016), <http://ssrn.com/abstract=2724580> [<https://perma.cc/FVN5-SBGJ>] (considering a possible conflict between “small-c” and “big-C” constitutionalism).

26. See Benjamin I. Sachs, *Employment Law as Labor Law*, 29 CARDOZO L. REV. 2685, 2701–03 (2008) (noting the conventional view that labor law and employment law are dichotomous and contradictory modes of intervention into workplace governance); *infra* note 35 (collecting literature).

The National Labor Relations Act (NLRA) is the primary statute that governs collective labor relations in the private sector.²⁷ In broad terms, it “governs workers’ efforts to advance their own shared interests” through self-organization and collective action.²⁸ It protects, or purports to protect, the right of private-sector workers to choose to bargain collectively with their employers, to organize with other employees in unions or other workplace associations, and to engage in peaceful “concerted activit[y]” by withholding labor or by peacefully picketing.²⁹ Many state laws, and some state constitutions, provide similar protections for public-sector workers,³⁰ though others restrict the extent of their employees’ collective labor rights.³¹

Individual employment rights are treated by a broad range of federal and state employment laws, including the Fair Labor Standards Act, the Occupational Safety and Health Act, and the Family and Medical Leave Act.³² These operate independently of any collectivization in the workplace.³³ They protect the rights of workers to minimum standards and fair treatment, including minimum wages, maximum hours, safe working conditions, a modicum of unpaid leave, and other basic dignities at work.³⁴

27. 29 U.S.C. §§ 151–69 (2012).

28. Cynthia L. Estlund, *The Ossification of American Labor Law*, 102 COLUM. L. REV. 1527, 1527 (2002).

29. 29 U.S.C. § 157.

30. Some state constitutions include a right to bargain collectively that covers public employees. For example, the Florida Constitution states: “The right of employees, by and through a labor organization, to bargain collectively shall not be denied or abridged.” FLA. CONST. art. 1, § 6.

31. *See, e.g.*, Professional Educators Collaborative Conference Act of 2011, TENN. CODE ANN. 49-5-603 (2012) (repealing a 1974 law that authorized collective bargaining for public school teachers and permitting only “collaborative conferencing”); 2011 Wis. Act 10, §§ 210, 219, 2011 Wis. Legis. Serv. 23, 44–45 (West) (prohibiting government employers from collectively bargaining with their general employees over anything except base wages; making it more challenging for general-employee unions to obtain certification as exclusive bargaining agents; and precluding general-employee unions from using automatic payroll deductions and fair-share agreements).

32. *See, e.g.*, Fair Labor Standards Act of 1938, 29 U.S.C. §§ 201–19 (2012); Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651–78 (2012); Family and Medical Leave Act (FMLA) of 1993, 29 U.S.C. §§ 2601–54 (2012).

33. Sachs, *supra* note 26, at 2688.

34. For these purposes, I cabin off the problem of discrimination, addressed by a range of federal and state statutes. *See, e.g.*, Age Discrimination in Employment Act, 29 U.S.C. §§ 621–34 (2012) (dealing with discrimination based on age); Civil Rights Act of 1964, 42 U.S.C. §§ 2000e–2000e-17 (2012) (dealing with discrimination on the basis of race, sex, religion, or national origin); Americans with Disabilities Act, 42 U.S.C. §§ 12101–12113 (dealing with discrimination based on disabilities). Of course, the division between employment law and employment discrimination law is somewhat artificial. *See* Cynthia Estlund, *Rebuilding the Law of the Workplace in an Era of Self-Regulation*, 105 COLUM. L. REV. 319, 376 (2005) (explaining that employee civil rights, “some of them backed with private rights of action, are embedded within many of the labor standards regimes”). But, in contrast to minimum entitlements and collective labor rights, there is a developed line of constitutional law doctrine that tackles problems of discrimination, at least in the public sector.

Labor and employment law scholars dispute the extent to which the two categories of rights, collective and individual, operate in tension with one another, as well as whether the division makes conceptual sense.³⁵ They also question whether the regime actually delivers on its promise to protect workers' rights in the contemporary economy—most scholars and worker advocates believe it does not.³⁶

But there is little dispute that Americans, at least in the private sector, derive most of their workplace rights from statutes, not from the Constitution. The Constitution guarantees neither a right to minimum entitlements at work nor a right to strike or to bargain collectively.³⁷ It provides some protection for labor picketing, although less than is provided for many other forms of protest.³⁸ Indeed, some commentators have referred to the field of labor as a constitutional “black hole.”³⁹

Scholars at this Symposium and elsewhere have challenged various aspects of the Court's approach, arguing that the Constitution should be

35. For leading accounts of the tension between collective and individual rights, see, for example, NELSON LICHTENSTEIN, *STATE OF THE UNION: A CENTURY OF AMERICAN LABOR* 141 (2003); James J. Brudney, *Reflections on Group Action and the Law of the Workplace*, 74 TEXAS L. REV. 1563, 1564–65 (1996); Estlund, *supra* note 34, at 326–55; Reuel E. Schiller, *From Group Rights to Individual Liberties: Post-War Labor Law, Liberalism, and the Waning of Union Strength*, 20 BERKELEY J. EMP. & LAB. L. 1, 4 (1999); Katherine Van Wezel Stone, *The Legacy of Industrial Pluralism: The Tension Between Individual Employment Rights and the New Deal Collective Bargaining System*, 59 U. CHI. L. REV. 575, 593, 637–38 (1992). For an account of how the division between the categories breaks down, see Estlund, *supra* note 34, at 329; and Sachs, *supra* note 26, at 2688–89.

36. The scholarship on this point is significant. Examples include: KATHERINE V.W. STONE, *FROM WIDGETS TO DIGITS: EMPLOYMENT REGULATION FOR THE CHANGING WORKPLACE* (2004); DAVID WEIL, *THE FISSURED WORKPLACE* (2014); Brudney, *supra* note 35, at 1563–64; Estlund, *supra* note 28, at 1596; Paul Weiler, *Promises to Keep: Securing Workers' Rights to Self-Organization Under the NLRA*, 96 HARV. L. REV. 1769, 1769 (1983).

37. In *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937), the Supreme Court gestured toward a fundamental right to engage in union activity, but ultimately upheld the NLRA under Congress's Commerce Clause authority. *Id.* at 36–37. In subsequent years, the Court recognized a constitutional right to join a union in *Thomas v. Collins*, 323 U.S. 516, 533–34 (1945), but not a right to bargain or to process grievances through a union in *Smith v. Arkansas State Highway Employees*, 441 U.S. 463, 464–65 (1979). See also *United Fed'n of Postal Clerks v. Blount*, 325 F. Supp. 879, 883 (D.D.C. 1971) (emphasizing that there is no constitutional right to strike), *aff'd* 404 U.S. 802 (1971).

38. *E.g.*, *Int'l Bhd. of Teamsters, Local 695 v. Vogt, Inc.*, 354 U.S. 284, 294–95 (1957) (allowing state court to enjoin peaceful labor picketing on ground that purpose was coercive and therefore contrary to public policy); see also Alan Hyde, *Exclusion Is Forever: How Keeping Labor Rights Separate from Constitutional Rights Has Proven to be a Bad Deal for American Trade Unions and Constitutional Law*, 15 CANADIAN LAB. & EMP. L.J. 251, 255 (2009–2010) (showing how union picketing is uniquely disfavored).

39. James Gray Pope, *Labor and the Constitution: From Abolition to Deindustrialization*, 65 TEXAS L. REV. 1071, 1074–76 (1987); cf. Cynthia Estlund, *Are Unions a Constitutional Anomaly?*, 114 MICH. L. REV. 169, 177–78 (2015) (arguing that unions are distinct in our legal system and subject to a quid pro quo that both constrains and empowers them in ways that form an essential context for adjudicating related constitutional claims).

understood to speak to problems of economic welfare and concentrations of private power generally⁴⁰, and to problems of labor in particular.

With respect to labor, several theories are available. At a high level of generality, the argument runs, labor rights advance “bedrock constitutional values” such as “equal liberty and respect, dignity, freedom of expression and association, and republican self-rule.”⁴¹ Labor rights are key mechanisms to redress “economic inequality, domination, and dependency.”⁴² They are a prerequisite to the democratic and egalitarian society promised, or at least anticipated, by the Constitution.⁴³ On this account, provisions in the Constitution that grant Congress power to protect civil rights and civil liberties should be interpreted to provide the capacity to guarantee labor rights, and courts should construe statutes to avoid conflict with the fundamental labor rights commitments of the Constitution.⁴⁴

More formal constitutional law arguments exist as well. A starting point is the First Amendment. For example, the Court could easily invalidate state and federal restraints on labor protest, aligning labor-

40. See generally BALKIN, *supra* note 25, at 240–44, 251–52; Akhil Reed Amar, *Forty Acres and a Mule: A Republican Theory of Minimum Entitlements*, 13 HARV. J.L. & PUB. POL’Y 37, 37–43 (1990); Charles L. Black, Jr., *Further Reflections on the Constitutional Justice of Livelihood*, 86 COLUM. L. REV. 1103, 1104–17 (1986); Paul Brest, *Further Beyond the Republican Revival: Toward Radical Republicanism*, 97 YALE L.J. 1623, 1623–31 (1988); Peter B. Edelman, *The Next Century of Our Constitution: Rethinking Our Duty to the Poor*, 39 HASTINGS L.J. 1, 3 (1987); Kenneth L. Karst, *The Supreme Court, 1976 Term—Foreword: Equal Citizenship Under the Fourteenth Amendment*, 91 HARV. L. REV. 1, 2–5 (1977); Goodwin Liu, *Education, Equality, and National Citizenship*, 116 YALE L.J. 330, 334–35 (2006); Frank I. Michelman, *In Pursuit of Constitutional Welfare Rights: One View of Rawls’ Theory of Justice*, 121 U. PA. L. REV. 962, 963, 966–67 (1973) [hereinafter Michelman, *In Pursuit of Constitutional Welfare Rights*]; Frank I. Michelman, *The Supreme Court, 1968 Term—Foreword: On Protecting the Poor Through the Fourteenth Amendment*, 83 HARV. L. REV. 7, 9–12 (1969) [hereinafter Michelman, *The Supreme Court, 1968 Term—Foreword*]. For recent work by scholars who seek to use the Fourteenth Amendment to protect the poor, see generally Ross & Li, *supra* note 10, at 327, 341–82 (assessing the political power of the poor and critiquing the Court’s holdings that the poor are not a suspect class); and Stephanopoulos, *supra* note 10, at 1531–33, 1535, 1577–79 (proposing a new definition of “political powerlessness” for purposes of equal protection doctrine and arguing, based on that definition, that the poor have a compelling claim to suspect status).

41. Forbath, *Distributive Constitution*, *supra* note 22, at 1119; see also *id.* at 1118 (“[G]ross economic inequality produces gross political inequality. You cannot have a constitutional republic, or what the Framers called a ‘republican form of government,’ and certainly not a constitutional democracy, in the context of gross material inequality among citizens. . . .”).

42. *Id.* at 1119; Jacob S. Hacker & Paul Pierson, *Winner-Take-All Politics: Public Policy, Political Organization, and the Precipitous Rise of Top Incomes in the United States*, 38 POL. & SOC’Y 152, 179–80 (2010).

43. Forbath, *Distributive Constitution*, *supra* note 22, at 1118.

44. See generally Fishkin & Forbath, *Anti-Oligarchy Constitution*, *supra* note 8, at 670–72; Fishkin & Forbath, *Great Society*, *supra* note 8, at 1020–23.

picketing doctrine with other areas of free speech law.⁴⁵ Or, in a more significant departure from precedent, the Court could interpret the First Amendment's speech and assembly clauses to give employees greater rights in organizing campaigns, boycotts, and strikes, or at least to authorize Congress and regulators to balance those rights with employer rights.⁴⁶

There are historical antecedents for understanding labor rights to be protected under the First Amendment. Laura Weinrib has shown that, at the time of the New Deal, civil libertarians considered unions to be essential prerequisites to the freedom of speech, press, and assembly.⁴⁷ Congress, after passing the NLRA, made clear that it too understood the rights to organize and bargain collectively as First Amendment rights.⁴⁸ Even the Supreme Court, in a plurality opinion in *Hague v. CIO*,⁴⁹ concluded that it is a "privilege inherent in citizenship of the United States" to discuss the "full freedom of association and self-organization of workers" conferred by the NLRA.⁵⁰

Others have suggested that the Thirteenth Amendment is the "natural starting point in the search for a constitutional theory of labor liberty."⁵¹ That Amendment, after all, is the sole constitutional provision that directly addresses labor relations; it also stands out as the sole rights provision that

45. Pope, *supra* note 39, at 1090; *see also* Catherine Fisk & Jessica Rutter, *Labor Protest Under the New First Amendment*, 36 BERKELEY J. EMP. & LAB. L. 277, 281 (2015) (arguing for changes to labor-picketing doctrine).

46. *See* Marion Crain & John Inazu, *Re-Assembling Labor*, 2015 U. ILL. L. REV. 1791, 1798–805 (arguing that freedom of assembly should be a source of legal protections for labor unions and worker advocacy efforts); Crain & Matheny, *supra* note 11, at 606 (same); Charlotte Garden, *Citizens, United and Citizens United: The Future of Labor Speech Rights?*, 53 WM. & MARY L. REV. 1, 17 (2011) [hereinafter Garden, *Citizens United*] (arguing that recent First Amendment doctrine in campaign finance context calls into question the validity of cases limiting protections for labor speech); Charlotte Garden, *Labor Values Are First Amendment Values: Why Union Comprehensive Campaigns Are Protected Speech*, 79 FORDHAM L. REV. 2617, 2620 (2011) [hereinafter Garden, *Labor Values*] (arguing that labor speech should receive heightened First Amendment scrutiny); Kate E. Andrias, Note, *A Robust Public Debate: Realizing Free Speech in Workplace Representation Elections*, 112 YALE L.J. 2415, 2421–25 & n.19 (2003) (urging greater consideration of the speech rights of employees in organizing campaigns).

47. Laura M. Weinrib, *Civil Liberties Outside the Courts*, 2014 SUP. CT. REV. 297, 326–30; *see also* Pope, *supra* note 39, at 1090 (reporting that civil libertarians in this era regarded striking and picketing as exercises of basic civil rights).

48. *See* Weinrib, *supra* note 47, at 332 (describing Congress's decision to authorize the investigation of violations of free speech and assembly rights and "undue interference with the right of labor to organize and bargain collectively" (internal quotation marks omitted)).

49. *Hague v. Comm. for Indus. Org.*, 307 U.S. 496 (1939).

50. *Id.* at 512–13; *see also* Weinrib, *supra* note 47, at 398 (discussing the plurality opinion in *Hague*).

51. Pope, *supra* note 39, at 1096; *see also* James Gray Pope, *What's Different About the Thirteenth Amendment, and Why Does It Matter?*, 71 MD. L. REV. 189, 189 (2012) [hereinafter Pope, *What's Different*].

explicitly protects against private concentrations of power.⁵² As Lea VanderVelde and Eric Foner have documented, there is at least some evidence that the framers of the Thirteenth Amendment intended the ban on involuntary servitude to provide meaningful protections for worker autonomy.⁵³ Consistent with that view, the Supreme Court, in striking down peonage laws, has recognized that the Thirteenth Amendment reaches not only emancipated African-Americans, but also mandates a “basic system of free labor”⁵⁴ for all persons of “whatever race, color, or estate.”⁵⁵

Though the Court has not, outside of the peonage context, used the Thirteenth Amendment's promise of “free labor” to protect collective or individual labor rights,⁵⁶ earlier social movements and political actors have. James Gray Pope has shown that the Thirteenth Amendment was a tool of pre-New Deal-era unionists who sought to ground the right to unionize in a theory of free labor.⁵⁷ Risa Goluboff has documented how lawyers in the Department of Justice Civil Rights Division invoked the Thirteenth

52. See *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 436–37 (1968) (recognizing the Thirteenth Amendment's reach to private discrimination); Pope, *What's Different*, *supra* note 51, at 189 (“[T]he Thirteenth Amendment stands out as the sole rights guarantee that protects not only against government, but also against private concentrations of power . . .”).

53. ERIC FONER, *FREE SOIL, FREE LABOR, FREE MEN: THE IDEOLOGY OF THE REPUBLICAN PARTY BEFORE THE CIVIL WAR* 40–69 (1995); Lea S. VanderVelde, *The Labor Vision of the Thirteenth Amendment*, 138 U. PA. L. REV. 437, 438, 472–74 (1989). *But cf.* Pamela Brandwein, *The Labor Vision of the Thirteenth Amendment, Revisited*, GEO. J.L. & PUB. POL'Y (forthcoming 2017) (arguing that the free labor vision embraced an equal right to a contracted or market wage but not a right to a minimum or living wage).

54. *Pollock v. Williams*, 322 U.S. 4, 17, 25 (1944) (striking down a Florida peonage law and setting forth its most extensive justification for protecting the inalienable right to quit work under the Thirteenth Amendment). In *Pollock*, the Court wrote:

[I]n general the defense against oppressive hours, pay, working conditions, or treatment is the right to change employers. When the master can compel and the laborer cannot escape the obligation to go on, there is no power below to redress and no incentive above to relieve a harsh overlordship or unwholesome conditions of work.

Id. at 18.

55. *Bailey v. Alabama*, 219 U.S. 219, 241, 245 (1911) (striking down Alabama's debt peonage law); *see also* *Hodges v. United States*, 203 U.S. 1, 17 (1906) (stating that the Thirteenth Amendment reaches “every race and every individual”), *overruled on other grounds by Jones*, 392 U.S. at 441 n.78.

56. James Gray Pope, *Contract, Race, and Freedom of Labor in the Constitutional Law of “Involuntary Servitude,”* 119 YALE L.J. 1474, 1478–79 (2010).

57. *E.g.*, James Gray Pope, *The Thirteenth Amendment Versus the Commerce Clause: Labor and the Shaping of American Constitutional Law, 1921–1957*, 102 COLUM. L. REV. 1, 12–25 (2002) (discussing the pre-New Deal labor movement's use of the Thirteenth Amendment to justify the constitutionality of prolabor legislation); *see also* James Gray Pope, *Labor's Constitution of Freedom*, 106 YALE L.J. 941, 943 (1997) [hereinafter Pope, *Labor's Constitution*] (describing labor's freedom constitution and analyzing it as a form of constitutional insurgency).

Amendment beginning in the 1940s to oppose forms of economic coercion beyond peonage.⁵⁸

Scholars have also marshaled the Fourteenth Amendment in favor of labor rights. The Equal Protection and Due Process clauses could be read to provide rights to minimum economic entitlements, including decent wages and a measure of democracy at work.⁵⁹ Here, again, there is historical precedent. The pre-New Deal labor movement understood the Fourteenth Amendment, along with the First and Thirteenth Amendments and the Constitution's commitment to Republican Government, to protect rights to associate, assemble, and unionize, and to ensure certain minimum economic rights at work.⁶⁰ Though these constitutional claims were repeatedly spurned by the courts, labor brought them again and again to Congress and state legislatures.⁶¹

In short, legal historians have demonstrated that arguments for constitutional labor rights now dismissed by lawyers and judges as lacking foundation were once plausible. And legal theorists have offered several cogent blueprints “for a broad conception of social and economic citizenship” or a right of “free labor” encompassing decent work and a measure of economic democracy.⁶²

58. See Risa L. Goluboff, *The Thirteenth Amendment and the Lost Origins of Civil Rights*, 50 DUKE L.J. 1609, 1647–68 (2001) (discussing how the 1940s Department of Justice lawyers improvised within available constitutional and statutory language, and expanded the meaning and scope of the Thirteenth Amendment to reach other impediments to free labor).

59. For scholarship urging such interpretation, see generally Karst, *supra* note 40; Liu, *supra* note 40; Michelman, *In Pursuit of Constitutional Welfare Rights*, *supra* note 40; Michelman, *The Supreme Court, 1968 Term—Foreword*, *supra* note 40. Cynthia Estlund has also urged a due process framework, in the form of a “just cause” requirement for discharge and a fair hearing. Cynthia L. Estlund, *Free Speech and Due Process in the Workplace*, 71 IND. L.J. 101, 104 (1995); see also Cynthia Estlund, *Free Speech Rights That Work at Work: From the First Amendment to Due Process*, 54 UCLA L. REV. 1463, 1463–64 (2007).

60. William E. Forbath, *Caste, Class, and Equal Citizenship*, 98 MICH. L. REV. 1, 59 (1999).

61. *Id.* at 59; see also *id.* at 60.

62. William E. Forbath, *Why Is This Rights Talk Different from All Other Rights Talk? Demoting the Court and Reimagining the Constitution*, 46 STAN. L. REV. 1771, 1774 (1994) (reviewing CASS R. SUNSTEIN, *THE PARTIAL CONSTITUTION* (1993)). Several foreign legal systems have interpreted similar constitutional provisions to provide labor rights. See, e.g., Rebecca Scott et al., *How Does the Law Put an Analogy to Work? Discerning ‘A Condition Analogous to That of a Slave’ in Contemporary Brazil* (May 2, 2016) (working paper) (on file with author) (discussing Brazil's efforts to identify and prosecute cases of contemporary slavery); see also *Health Servs. & Support, Facilities Subsector Bargaining Ass'n v. British Columbia*, [2007] 2 S.C.R. 391, 393 (Can.) (holding that the right to freedom of association in the Charter of Rights and Freedoms included the right to collective bargaining). *But cf.* Alan Bogg & Keith Ewing, *A (Muted) Voice at Work? Collective Bargaining in the Supreme Court of Canada*, 33 COMP. LAB. L. & POL'Y J. 379, 379 (2012) (discussing the Canadian Supreme Court's subsequent partial retreat). The comparative question of why some legal and constitutional regimes have been more sympathetic to labor rights is beyond the scope of this Essay.

II. The Contemporary Absence of Constitutional Claims

Still, not even the most optimistic supporters of constitutional labor rights believe the current Supreme Court will embrace a labor-rights or anti-oligarchy vision of the Constitution. They are right. When the more liberal members of the current Court offer a defense of union rights or wage and hour laws, they rely almost entirely on *stare decisis* and legislative or administrative prerogative, rather than on any argument that the Constitution protects labor rights.⁶³ And no member of the current Court has embraced the idea that the Constitution should be understood to require the provision of basic economic entitlements.⁶⁴

For this reason, the immediate audience for constitutionalizing labor rights lies outside the courts. Scholars direct their arguments to fellow academics and students—tomorrow's judges, perhaps.⁶⁵ They also write for existing social movements and political actors—those who seek to bring about an alternative regime that guarantees a more equitable distribution of resources and political power.⁶⁶ Social movements, constitutional optimists urge, can gain traction by placing their demands within a constitutional register, by arguing that the Constitution inspires, and perhaps compels, their political objectives.⁶⁷ Ultimately, they can help bring into being the understanding that judges will later read into the text of the Constitution.⁶⁸

Yet, despite the efforts of scholars, contemporary, on-the-ground worker movements are *not* making constitutional arguments in any explicit or sustained way. Consider again the Fight for \$15. Over the course of the

63. See, e.g., *Harris v. Quinn*, 134 S. Ct. 2618, 2645 (2014) (Kagan, J., dissenting) (“I begin where this case should also end—with this Court’s decision in *Abood*”).

64. See Ruth Bader Ginsburg, Associate Justice, Supreme Court of the United States, Address at the University of Michigan, Tanner Lecture on Human Values (Feb. 6, 2015).

65. Forbath, *supra* note 62, at 1772.

66. See, e.g., *id.* at 1772–74 (urging greater reliance on constitutional politics, in place of constitutional adjudication, to advance a vision of equal citizenship); Robin West, *The Missing Jurisprudence of the Legislated Constitution*, in *THE CONSTITUTION IN 2020*, *supra* note 22, at 79 (“I will suggest that progressive lawyers should take this opportunity of their respite from judicial power and attend to the development of that Constitution, so that we might at some point in the future urge fidelity to it on the part of our representatives, rather than continue to attend, with the same intense devotion that still characterizes our current legal zeitgeist, to the adjudicated Constitution.”).

67. E.g., Crain & Matheny, *supra* note 11, at 606; Forbath, *American Grain*, *supra* note 22, at 55, 57; Forbath, *Distributive Constitution*, *supra* note 22, at 118.

68. See, e.g., Reva B. Siegel, *Constitutional Culture, Social Movement Conflict and Constitutional Change: The Case of the De Facto ERA*, 94 CALIF. L. REV. 1323, 1323 (2006) (examining the aftermath of the Equal Rights Amendment (ERA) defeat and showing how constitutional culture channels social movement conflict to produce enforceable constitutional understandings); Reva B. Siegel, *Text in Contest: Gender and the Constitution From a Social Movement Perspective*, 150 U. PA. L. REV. 297, 312–13 (2001) [hereinafter Siegel, *Text in Contest*] (demonstrating that “[c]laims on the text of the Constitution made by mobilized groups of Americans outside the courthouse helped bring into being the understandings that judges then read into the text of the Constitution”).

past several years, low-wage workers in fast food and retail, organized primarily by the Service Employees International Union, have participated in a series of intermittent strikes and protests.⁶⁹ They are calling for a base wage of fifteen dollars an hour and the right to form a union.⁷⁰ The movement has had significant success since it began a few years ago. It has focused attention on the plight of low-wage workers and has succeeded in winning new minimum wage statutes from a number of state and local governments across the country.⁷¹

The claims made by the Fight for \$15 are rights based: workers are demanding a living wage and union rights as fundamental entitlements.⁷² Yet constitutional arguments barely register.⁷³ On social media, in press releases, on picket lines, and in litigation documents, the workers frame their demands as about dignity and respect, or about human or civil rights,⁷⁴ but with rare exception, they do not invoke the Constitution or its particular provisions.⁷⁵

The Domestic Workers Alliance provides another example of a contemporary low-wage worker movement *not* making explicit constitutional claims. It is made up of over fifty local affiliates.⁷⁶ The Domestic Workers Alliance has won, in several localities, new laws that set minimum standards in the domestic work industry.⁷⁷ Though the

69. See, e.g., Jenny Brown, *Fast Food Strikes: What's Cooking?*, LABORNOTES (June 24, 2013), <http://www.labornotes.org/2013/06/fast-food-strikes-whats-cooking> [<https://perma.cc/B53L-LZKZ>]; Steven Greenhouse, *Hundreds of Fast-Food Workers Striking for Higher Wages Are Arrested*, N.Y. TIMES (Sept. 4, 2014), <http://www.nytimes.com/2014/09/05/business/economy/fast-food-workers-seeking-higher-wages-are-arrested-during-sit-ins.html> [<https://perma.cc/E8NE-BC2Q>].

70. Brown, *supra* note 69.

71. Brendan McDermid, *New Year Brings Minimum Wage Hikes for Americans in 14 States*, NEWSWEEK (Jan. 1, 2016, 12:59 PM), <http://www.newsweek.com/new-year-brings-minimum-wage-hikes-americans-14-states-410854> [<https://perma.cc/9TWU-BCW4>].

72. *Id.*

73. See Forbath, *American Grain*, *supra* note 22, at 56 (“Today, however, with the important exception of employment discrimination, work, livelihoods, social provision, and the material bases of citizenship have vanished from the constitutional landscape.”); see also @fightfor15, TWITTER https://twitter.com/fightfor15?ref_src=twsrc%5Egoogle%7Ctwcamp%5Eserp%7Ctwgr%5Eauthor [<https://perma.cc/KY5V-3TRT>] (emphasizing respect and dignity throughout the Twitter campaign, but bearing virtually no mention of the Constitution).

74. See generally @fightfor15, *supra* note 73; Fight for \$15, *When You Can't Even Afford Bus Fare to Get to Work the Economy is Broken*, FACEBOOK (Nov. 20, 2015), <https://www.facebook.com/Fightfor15/photos/pb.580610428636345.-2207520000.1448922360./1060044294026287/?type=3&theater> [<https://perma.cc/XC6Z-8HSC>].

75. See @fightfor15, *supra* note 73.

76. NDWA *Member Organizations*, NAT'L DOMESTIC WORKERS UNITED, <http://www.domesticworkersunited.org/index.php/en/> [<https://perma.cc/DJN4-U33T>].

77. The new laws guarantee privately employed nannies, housekeepers, and elder caregivers at least a day of rest per week, at least three days of rest per year after the first year of employment, and overtime at the regular rate of pay for live-in workers; they also set a day's work at eight hours, provide minimum wage coverage for companions of the sick and elderly, and

movement frames its legislative demands as “bills of rights”, it has not located them within the American constitutional tradition.⁷⁸

The same is true of other contemporary low-wage worker campaigns, such as Our WalMart, a campaign to improve conditions at WalMart;⁷⁹ Warehouse Workers United, a nonprofit dedicated to improving working conditions in the warehouse industry in Southern California;⁸⁰ the Restaurant Opportunities Center United, an organization dedicated to improving wages and working conditions for the nation's restaurant workforce;⁸¹ and the Coalition of Immokalee Workers, a worker-based human rights organization focused on the agricultural industry and tomatoes in particular.⁸² Occasionally these campaigns invoke the freedom of speech or the right to associate, but they do not appeal to the Constitution in any consistent or systematic way.⁸³

The notable lack of appeal to the Constitution as a source of rights stands in contrast not only to previous incarnations of the labor, civil rights, and women's movements,⁸⁴ but also to contemporary social movements on both the Right and Left. The Tea Party, gun rights advocates, and the right-

provide protection to domestic workers from discrimination and harassment. See Domestic Worker's Bill of Rights, ch. 481, 2010 N.Y. Sess. Laws 1315 (McKinney) (codified at N.Y. EXEC. LAW §§ 292, 296-b (McKinney 2014)).

78. E.g., Albor Ruiz, *Domestic Workers Bill of Rights Law Finally Grants Protection for Over 200,000 People*, N.Y. DAILY NEWS (Sept. 10, 2010, 4:00 AM), <http://www.nydailynews.com/new-york/brooklyn/domestic-workers-bill-rights-law-finally-grants-protection-200-000-people-article-1.439548> [<https://perma.cc/CS8P-JMMU>]; see also *Campaigns*, NAT'L DOMESTIC WORKERS ALLIANCE, <http://www.domesticworkersunited.org/index.php/en/our-work/campaigns> [<https://perma.cc/7ZLL-F8WL>]; *Illinois Bill of Rights*, NAT'L DOMESTIC WORKERS ALLIANCE (May 11, 2016), <http://www.domesticworkers.org/illinois-bill-of-rights> [<https://perma.cc/LU5T-5E6T>].

79. OUR WALMART, <http://forrespect.org/> [<https://perma.cc/H5QS-7ZAW>].

80. WAREHOUSE WORKER RESOURCE CTR., <http://www.warehouseworkers.org> [<https://perma.cc/9QEL-3F9Y>].

81. ROCUNITED, <http://rocunited.org> [<https://perma.cc/2U3A-9H32>].

82. COALITION IMMOKALEE WORKERS, <http://www.ciw-online.org> [<https://perma.cc/NL3R-EBGN>]. A conservative organization tracking the activity of worker associations identifies the above groups as the most active. See WORKER CTR. WATCH, <http://workercenterwatch.com/worker-centers/> [<https://perma.cc/FS78-N879>].

83. For a rare example of invocation of constitutional language, see *Declaration for Respect*, OUR WALMART, <http://forrespect.org/the-declaration/> [<https://perma.cc/9RCQ-JXHL>], emphasizing freedom of association, freedom of speech, and equality, among other goals.

84. See Randall Kennedy, *Martin Luther King's Constitution: A Legal History of the Montgomery Bus Boycott*, 98 YALE L.J. 999, 1000–02 (1989) (discussing the Civil Rights Movement's invocation of constitutional rights); Pope, *Labor's Constitution*, *supra* note 57, at 958–66 (outlining earlier labor movements' invocations of the Constitution); Reva B. Siegel, *She the People: The Nineteenth Amendment, Sex Equality, Federalism, and the Family*, 115 HARV. L. REV. 947, 951 (2002) (describing suffragists' constitutional arguments for sex equality); see also Frederick Douglass, *The Constitution of the United States: Is it Pro-Slavery or Anti-Slavery?*, Speech Delivered in Glasgow, Scotland (Mar. 26, 1860), in 2 THE LIFE AND WRITINGS OF FREDERICK DOUGLASS 467–80 (Philip S. Foner ed., 1950) (appealing to the Constitution as an antislavery document prior to the enactment of the Thirteenth Amendment).

to-life movement have all laid claim to the Constitution—and they did so even before their arguments had footholds in the doctrine.⁸⁵ So too the gay rights and reproductive rights movements invoked the Constitution even before their claims persuaded courts.⁸⁶ Over time, after litigation and political struggle, the Supreme Court has come to accept, to different extents, the alternative constitutional visions offered by these movements.⁸⁷

Fishkin and Forbath attribute the absence of constitutional argumentation about economic inequality as a “Great Forgetting.”⁸⁸ They mine a rich history of earlier constitutional claims and urge contemporary actors to recall that history and to draw on it.⁸⁹ But today’s worker movements are led by experienced organizers, researchers, and lawyers. Many are aware of the power of constitutional rhetoric, some are familiar with the labor movement’s own constitutional history, and a number have worked in other movements that rely on constitutional argumentation.⁹⁰ So too many of the worker–participants are undoubtedly familiar with high-level constitutional principles such as the promise of equal protection and

85. See, e.g., THEDA SKOCPOL & VANESSA WILLIAMSON, *THE TEA PARTY AND THE REMAKING OF REPUBLICAN CONSERVATISM* 48–50 (2012) (explaining how the Tea Party uses the Constitution to further its agenda); Joseph Blocher, *Gun Rights Talk*, 94 B.U. L. REV. 813, 814, 819 (2014) (discussing the use of constitutional rhetoric by the gun rights movement); Mary Ziegler, *Originalism Talk: A Legal History*, 2014 BYU L. REV. 869, 871 (discussing the history of antiabortion constitutionalism); see also Robert Post & Reva Siegel, *Originalism as a Political Practice: The Right’s Living Constitution*, 75 FORDHAM L. REV. 545, 554–74 (2006) (describing the use of originalism by a range of political actors).

86. See, e.g., William N. Eskridge, Jr., *A History of Same-Sex Marriage*, 79 VA. L. REV. 1419, 1432–35, 1485–1511 (1993) (arguing that marriage is a socially constructed institution and constructing arguments in support of gay marriage by reinterpreting tradition); Reva B. Siegel, *Roe’s Roots: The Women’s Rights Claims That Engendered Roe*, 90 B.U. L. REV. 1875, 1875–79 (2010) (discussing feminist constitutional arguments in support of abortion in the years before *Roe*); see also Siegel, *Text in Contest*, *supra* note 68, at 303 (distinguishing “constitutional culture” from constitutional “lawmaking” and discussing periods of constitutional mobilization).

87. See, e.g., *Obergefell v. Hodges*, 135 S. Ct. 2584, 2603–04 (2015) (adopting, in part, the gay rights movement’s view of the Fourteenth Amendment); *District of Columbia v. Heller*, 554 U.S. 570, 636 (2008) (adopting, in part, the gun rights movement’s view of the Second Amendment); *Gonzales v. Carhart*, 550 U.S. 124, 157 (2007) (adopting argument of the right-to-life movement that “respect for the dignity of human life” provides a ground for governmental restrictions on abortion).

88. FISHKIN & FORBATH, *ANTI-OLIGARCHY CONSTITUTION*, *supra* note 8 (manuscript at 7).

89. *Id.* (manuscript at 7, 12–13).

90. The General Counsel of the AFL-CIO, for example, was previously a professor of labor law and has published on issues of labor and the Constitution. See, e.g., Craig Becker, *Democracy in the Workplace: Union Representation Elections and Federal Labor Law*, 77 MINN. L. REV. 495, 503 (1993) (explaining how the American Federation of Labor defended the Wagner Act’s constitutionality “not on the basis of the federal government’s power to regulate interstate commerce, . . . but rather on the basis of Article IV, section 4 of the United States Constitution, which guarantees that every state shall have ‘a republican form of government’”). The founder of the Restaurant Opportunities Center United, Saru Jayaraman, is a Yale Law School graduate who has studied and written about labor history. See *Saru Jayaraman*, UC BERKELEY LAB. CTR., <http://laborcenter.berkeley.edu/author/saru-jayaraman/> [https://perma.cc/3MZR-87FX].

right to free speech.⁹¹ A lack of memory thus would seem to be an insufficient explanation for the absence of constitutional claims.

III. Labor and Courts—or Labor's Long Memory

To understand why labor may be reluctant to embrace a constitutional strategy, one must consider the movement's relationship to courts. Scholars emphasize the importance of “the constitution outside the courts,” and a non-judicial constitution clearly does exist.⁹² Our Constitution is prominent in public discourse, and its relatively brief text is accessible to a general audience.⁹³ Actors throughout the government engage in constitutional interpretation,⁹⁴ as do popular movements.⁹⁵ And courts are often responsive to popular sentiment regarding the Constitution.⁹⁶

91. See STEVE FARKAS ET AL., NAT'L CONSTITUTION CTR., KNOWING IT BY HEART: AMERICANS CONSIDER THE CONSTITUTION AND ITS MEANING 14 (2002) http://www.publicagenda.org/files/knowning_by_heart.pdf [<https://perma.cc/6Q85-7U2L>] (finding that while most Americans “have a hazy recall of the specifics, the vast majority have absorbed the basic principles of the Constitution and convey broad acceptance of them”); cf. Nathaniel Persily, *Introduction*, in PUBLIC OPINION AND CONSTITUTIONAL CONTROVERSY 8, 10–15 (Nathaniel Persily et al. eds., 2008) (examining how popular opinion responds to the Supreme Court's constitutional rulings and concluding that in some cases, though not most, public attitudes shift in response).

92. For scholars urging popular and legislative constitutionalism, see NEAL DEVINS & LOUIS FISHER, *THE DEMOCRATIC CONSTITUTION*, at ix (2d ed. 2015); FISHKIN & FORBATH, *ANTI-OLIGARCHY CONSTITUTION*, *supra* note 8 (manuscript at *passim*); LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* 8 (2004); MARK TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* 194 (1999); Robert Post & Reva Siegel, *Popular Constitutionalism, Departmentalism, and Judicial Supremacy*, 92 CALIF. L. REV. 1027, 1043 (2004); West, *supra* note 66, at 79; see also SANFORD LEVINSON, *CONSTITUTIONAL FAITH* 29 (1988) (describing “constitutional protestantism”—the idea that no institution of government, including the Supreme Court, has a monopoly on the meaning of the Constitution); Robert M. Cover, *The Supreme Court, 1982 Term—Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4, 11 (1983) (positing that a wide variety of social groups are capable of generating legal meaning).

93. See Akhil Reed Amar, *Architexture*, 77 IND. L.J. 671, 672, 676, 681 (2002) (arguing that “the federal Constitution was designed to be an open and inviting textual edifice,” “a short document that every citizen could read, understand, and in various ways . . . help interpret” and noting that it “does its work in less than 8000 words” whereas “the average state constitution today sprawls out over some 30,000 words”); cf. David S. Law & Mila Versteeg, *The Declining Influence of the United States Constitution*, 87 N.Y.U. L. REV. 762, 769, 830 & n.168 (2012) (describing the “sheer brevity” of the U.S. Constitution and noting the length of the Indian Constitution, among others).

94. For descriptions of executive, legislative, and administrative constitutionalism, as well as defenses of them, see generally Michael Neal Kumar Katyal, *Legislative Constitutional Interpretation*, 50 DUKE L.J. 1335, 1335–36 (2001) (discussing legislative constitutionalism); Sophia Z. Lee, *Race, Sex, and Rulemaking: Administrative Constitutionalism and the Workplace, 1960 to the Present*, 96 VA. L. REV. 799, 799–801 (2010) (discussing administrative constitutionalism); Gillian E. Metzger, *Administrative Constitutionalism*, 91 TEXAS L. REV. 1897, 1897–1900 (2013) (discussing administrative constitutionalism); Michael Stokes Paulsen, *The Most Dangerous Branch: Executive Power to Say What the Law Is*, 83 GEO. L.J. 217, 227 (1994) (discussing executive constitutionalism); Cornelia T.L. Pillard, *The Unfulfilled Promise of the Constitution in Executive Hands*, 103 MICH. L. REV. 676, 676 (2005) (same).

Nonetheless, as scholars have documented, courts today play an outsized role in defining the scope and content of the Constitution, particularly its rights provisions.⁹⁷ Indeed, under current doctrine the Supreme Court itself contends that defining constitutional rights generally, and the scope of the Fourteenth Amendment in particular, is the exclusive responsibility of the Supreme Court.⁹⁸ As recently as 2012, in *Coleman v. Maryland*,⁹⁹ the Court reiterated that Congress may not decree the substance of constitutional rights.¹⁰⁰

The Court's insistence on judicial supremacy over constitutional decision making is not without consequence.¹⁰¹ In practice, legal education frequently equates constitutional meaning to court interpretation. Even when professors emphasize the existence of popular, executive, and legislative constitutionalism, constitutional law courses are structured around judicial decisions.¹⁰² And while movement actors and elected officials frequently contest Supreme Court decisions and seek to change them, most concede the authority of the Court to say what the Constitution

95. See *infra* notes 114–15 and accompanying text (discussing the attempted use of constitutional arguments during the pre-New Deal period).

96. Barry Friedman, *Mediated Popular Constitutionalism*, 101 MICH. L. REV. 2596, 2599–2612 (2003); see also JACK M. BALKIN, CONSTITUTIONAL REDEMPTION 70–71 (2011) (discussing “constitutional catholicism”—the view that the courts are the central authority in interpreting the Constitution).

97. See Amar, *supra* note 93, at 681 (noting the Court's willingness to ignore the Constitution itself in favor of judicial precedent); Rachel E. Barkow, *More Supreme Than Court? The Fall of the Political Question Doctrine and the Rise of Judicial Supremacy*, 102 COLUM. L. REV. 237, 300 (2002) (exploring “how the Court's inflated opinion of its own interpretive powers has influenced its treatment of Congress's constitutional judgments in cases in which the Court plainly has jurisdiction,” and explaining “how this same view has bled into the Court's evaluation of its own jurisdictional limits”); Larry D. Kramer, *The Supreme Court, 2000 Term—Foreword: We the Court*, 115 HARV. L. REV. 4, 14 (2001) (“The last, faint traces of popular constitutionalism are fading, threatened by a Court that truly sees the Constitution as nothing more than ordinary law.”); cf. Curtis A. Bradley & Trevor W. Morrison, *Historical Gloss and the Separation of Powers*, 126 HARV. L. REV. 411, 412–13 (2012) (showing how historical practice of the political branches plays an important role in controversies relating to the separation of powers).

98. *United States v. Morrison*, 529 U.S. 598, 615–19 (2000); *City of Boerne v. Flores*, 521 U.S. 507, 519 (1997); cf. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) (“It is emphatically the province and duty of the judicial department to say what the law is.”).

99. *Coleman v. Court of Appeals of Md.*, 132 S. Ct. 1327 (2012).

100. See *id.* at 1337 (holding that Congress did not validly abrogate states' sovereign immunity from suits for money damages in enacting the FMLA's self-care provision).

101. See TUSHNET, *supra* note 92, at 7 (arguing that the current system of judicial review and judicial supremacy over constitutional decision making leaves scant room for citizen participation); Larry D. Kramer, *Popular Constitutionalism, Circa 2004*, 92 CALIF. L. REV. 959, 963–64 (2004) (arguing that, since the 1980s, judicial supremacy seems to have “become the norm,” and bemoaning the diminution of popular constitutionalism); cf. Post & Siegel, *supra* note 85, at 1043 (noting that a general decline in political involvement could help explain a decline in popular engagement with the Constitution).

102. The leading constitutional law textbooks, organized almost entirely around Supreme Court cases, illustrate the point. E.g., GEOFFREY R. STONE ET AL., CONSTITUTIONAL LAW (7th ed. 2013); KATHLEEN M. SULLIVAN & NOAH FELDMAN, CONSTITUTIONAL LAW (18th ed. 2013).

means—at least in particular cases.¹⁰³ In light of this background, one cannot consider the possibility of constitutional labor rights without considering labor's relationship to courts.

A. *Court Antagonism to Labor Rights*

Courts and legal elites have been unfriendly to demands of various social movements,¹⁰⁴ but the history of court antagonism toward workers is particularly long and storied. In the years following the Civil War, workers organized by the Knights of Labor suffered extraordinary and violent repression, frequently sanctioned by courts.¹⁰⁵ So too at the turn of the century, when the American Federation of Labor was the dominant labor organization and the Congressional Industrial Organization (CIO) was emerging, courts continued to intervene against workers' collective action.¹⁰⁶ They used conspiracy and antitrust law, even after Congress attempted to foreclose application of those doctrines to labor.¹⁰⁷ At the same time, courts struck down a host of protective labor legislation by invoking liberty of contract and a narrow understanding of congressional power.¹⁰⁸ By one count, at least 4,300 injunctions were issued against union activity between 1880 and 1930,¹⁰⁹ and hundreds of statutes were invalidated.¹¹⁰

As William Forbath has shown, the effects of court sanction were significant, shaping the policy demands the labor movement would make in the future.¹¹¹ The courts' power to exercise judicial review over labor legislation diminished the appeal of broad legal reforms.¹¹² Likewise, the

103. See Post & Siegel, *supra* note 85, at 1036 (explaining that Americans “have generally been committed both to judicially enforceable constitutional rights and to the idea that the Constitution reflects the political self-conception of the nation”).

104. See *infra* subpart III(B) (discussing how social movement demands can be incompatible with court-focused constitutional litigation).

105. See generally CHRIS TOMLINS, *THE STATE AND THE UNIONS: LABOR RELATIONS, LAW, AND THE ORGANIZED LABOR MOVEMENT IN AMERICA, 1880–1960*, at 11–59 (1985) (discussing the role of legal institutions in the development of the labor movement); Forbath, *Shaping American Labor*, *supra* note 18, at 1185–95 (discussing legally sanctioned violence against labor protestors).

106. Forbath, *Shaping American Labor*, *supra* note 18, at 1220–21.

107. *Id.* (describing how courts swept aside the laws limiting conspiracy and antitrust doctrine as “irresponsible and ill-considered legislative tinkering with a realm of law that belonged by right to the judiciary”).

108. *Id.*

109. William E. Forbath, *The New Deal Constitution in Exile*, 51 DUKE L.J. 165, 183 (2001) [hereinafter Forbath, *Constitution in Exile*]; Forbath, *Shaping American Labor*, *supra* note 18, at 1249–52 (estimating the number of injunctions).

110. Forbath, *Shaping American Labor*, *supra* note 18, at 1133 n.78, 1237 (categorizing legislation and tracking court response); see *id.* at 1133 (“During the 1880’s and 1890’s courts were far more likely than not to strike down the very laws that labor sought most avidly.”).

111. *Id.* at 1116.

112. *Id.*

courts' "harshly repressive law of industrial conflict helped make broad, inclusive unionism seem too costly and a more cautious, narrower unionism essential."¹¹³

Court hostility to labor also changed trade unionists' views of what was possible and desirable under the Constitution. During the pre-New Deal period, labor advocates addressed their First, Thirteenth, and Fourteenth Amendment claims to Congress, rather than the Court, out of distrust of judges.¹¹⁴ But locating labor rights in statutes proved to be insufficient to shield labor from court sanction.¹¹⁵

The fall of *Lochner*¹¹⁶ is widely heralded as ushering in a constitutional settlement.¹¹⁷ Holmes's view won out: economic theory would be left to the democratic process.¹¹⁸ Yet, for the labor movement, that settlement was short-lived and only partial. Within just a few years of the fall of *Lochner*, employers had successfully reframed their liberty arguments as First Amendment and property-rights arguments.¹¹⁹ By the time Congress passed the Taft-Hartley Act in 1947, widely considered to be an antilabor bill,¹²⁰ the Supreme Court had already significantly narrowed the original Wagner Act.¹²¹ In subsequent years, it continued to weaken protections for workers' concerted action in favor of managerial rights of control and employers' and nonunion workers' First Amendment interests.¹²²

113. *Id.* Forbath contrasts the American experience with the British, where judicial review was less prominent. William E. Forbath, *Courts, Constitutions, and Labor Politics in England and America: A Study of the Constitutive Power of Law*, 16 LAW & SOC. INQUIRY 1, 1–5 (1991).

114. Forbath, *Constitution in Exile*, *supra* note 109, at 179.

115. See Karl E. Klare, *Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness, 1937-1941*, 62 MINN. L. REV. 265, 268–70 (1978) (describing the impact of Supreme Court decisions on the Wagner Act).

116. *Lochner v. New York*, 198 U.S. 45 (1905).

117. See Cass R. Sunstein, *Lochner's Legacy*, 87 COLUM. L. REV. 873, 874 (1987) (describing how the Court and scholars have subsequently understood the fall of *Lochner* to represent the need for judicial deference to legislative enactments).

118. *Lochner*, 198 U.S. at 74–76 (Holmes, J., dissenting). For the leading scholarly account that *Lochner* was wrong because it represented an illegitimate intrusion by courts into an area reserved to the political branches of government, see generally JOHN HART ELY, *DEMOCRACY AND DISTRUST* (1980).

119. *E.g.*, *Thomas v. Collins*, 323 U.S. 516, 537 (1945); *NLRB v. Va. Elec. & Power Co.*, 314 U.S. 469, 477 (1941); Andrias, *supra* note 46, at 2421–25 & n.19.

120. See Nelson Lichtenstein, *Taft-Hartley: A Slave-Labor Law?*, 47 CATH. U. L. REV. 763, 763–65 (1998) (reviewing debate about whether Taft-Hartley codified existing antilabor positions or was a turning point for further restricting unions).

121. JAMES B. ATLESON, *VALUES AND ASSUMPTIONS IN LABOR LAW* 47 (1983); Klare, *supra* note 115, at 265–68.

122. See ATLESON, *supra* note 121, at 59–66, 106–07 (describing how courts imported notions of managerial rights to narrow protections under the NLRA); SOPHIA Z. LEE, *THE WORKPLACE CONSTITUTION FROM THE NEW DEAL TO THE NEW RIGHT* 233–37 (2014) (discussing how the Court came to enshrine in the First Amendment the right of objecting workers not to pay union fees); Cynthia L. Estlund, *Labor, Property, and Sovereignty After Lechmere*, 46 STAN. L. REV. 305, 308 (1994) [hereinafter Estlund, *Labor, Property, and Sovereignty*]

Meanwhile, in interpreting the NLRA and applicable state law, the Court all but withdrew constitutional protection from certain forms of private-sector labor picketing and protest.¹²³

Public-sector employees fared no better. There, unlike in the private sector, workers indisputably could claim constitutional rights—their employers were state actors.¹²⁴ Yet, courts carved out exceptions from generally applicable First Amendment doctrine, leaving public employees with comparatively few speech rights.¹²⁵

More recently, labor cases have proved fertile ground for the development of corporate-protective First Amendment doctrine. A recent D.C. Circuit decision went so far as to conclude that requiring employers to post the basic contours of labor law constituted unconstitutional compelled speech.¹²⁶ Though that opinion was subsequently overruled by an en banc decision in another case, its holding continues to command support from several judges on the court.¹²⁷

In recent years, courts have also allowed conspiracy statutes to be deployed against collective action by workers in surprising ways. For example, courts have entertained actions brought by employers under the Racketeer Influenced and Corrupt Organizations Act (RICO); these suits aim to stop unions from waging public campaigns that expose bad business practices in an effort to win unionization rights.¹²⁸ The threat of such RICO suits has led unions to drop some of their public campaigns.¹²⁹

(concluding that the Court allowed a “naked property right to trump the substantial statutory interests of organized employees”); Schiller, *supra* note 35, at 57–72 (detailing how courts came to privilege individual liberties over union rights).

123. NLRB v. Retail Store Emp. Union, Local 1001, 447 U.S. 607, 619 (1980) (Stevens, J., concurring) (maintaining that the picketing restriction at issue was consistent with the First Amendment); Int'l Bhd. of Teamsters, Local 695 v. Vogt, Inc., 354 U.S. 284, 289 (1957) (concluding that picketing, even though peaceful, could be enjoined by state courts). For a summary of the Court's jurisprudence on labor picketing and strikes, see Garden, *Citizens United*, *supra* note 46, at 17–26.

124. See Cynthia Estlund, *How the Workplace Constitution Ties Liberals and Conservatives in Knots*, 93 TEXAS L. REV. 1137, 1138 (2015) (reviewing LEE, *supra* note 122) (explaining that, in contrast to the public sector, the private-sector workforce lacks constitutional protection because nearly all of Americans' federal constitutional rights run only against state action, not against purely private infringement).

125. Richard Michael Fischl, *Labor, Management, and the First Amendment: Whose Rights Are These, Anyway?*, 10 CARDOZO L. REV. 729, 731–32 (1989) (arguing that when constitutional rights norms confront labor relations, the constitutional norms almost invariably give way).

126. Nat'l Ass'n of Mfrs. v. NLRB, 717 F.3d 947, 958 (D.C. Cir. 2013), *overruled in part by* Am. Meat Inst. v. U.S. Dep't of Agric. (*American Meat*), 760 F.3d 18 (D.C. Cir. 2014).

127. *American Meat*, 760 F.3d at 36–37 (Henderson, J., dissenting); *id.* at 37 (Brown, J., dissenting); *cf. id.* at 30–33 (Kavanaugh, J., concurring) (emphasizing expansive protections owed to commercial speakers notwithstanding his concurrence in *American Meat*).

128. See, e.g., *Smithfield Foods, Inc. v. United Food & Commercial Workers Int'l Union*, 585 F. Supp. 2d 789, 806 (E.D. Va. 2008) (rejecting unions' First Amendment defense to a RICO lawsuit stemming out of the unions' legislative and regulatory activity). For discussion of the use of RICO against unions, see James J. Brudney, *Collateral Conflict: Employer Claims of RICO*

B. *The Normative Mismatch*

The hesitancy of the labor movement to embrace formal constitutional arguments, however, cannot be explained simply by particular judges' hostility to labor rights. A more fundamental normative problem presents as well: court-defined rights, as they exist in the modern American tradition, are in substantial tension with the commitments and goals of the labor movement.

Scholars have identified several reasons why court-derived rights can be problematic vehicles for progressive social change.¹³⁰ First, according to this well-developed critique, constitutional rights tend to protect pre-existing property and contract rights to shield existing entitlements against political encroachment.¹³¹ Thus, even progressive gains, when achieved via courts, have often entrenched current distributions of power.¹³² Second, because of the state action doctrine, court-generated rights have tended to reinforce a sharp distinction between the public and private spheres of life.¹³³ The notion of a private realm of freedom against which the Constitution does not intervene, versus a public realm of coercion from which the Constitution offers protection, is of limited use to those who hope to challenge private concentrations of power.¹³⁴ Relatedly, court-derived rights in the American tradition have, for the most part, been limited to negative rights; the Constitution is not currently thought to mandate affirmative government action to guarantee fundamental rights.¹³⁵ Third,

Extortion Against Union Comprehensive Campaigns, 83 S. CAL. L. REV. 731, 733 (2010); Garden, *Labor Values*, *supra* note 46, at 2623–32.

129. Garden, *Labor Values*, *supra* note 46, at 2623–26 (discussing RICO lawsuits); Josh Eidelson, *That's RICO*, AM. PROSPECT (Sept. 30, 2011), <http://prospect.org/article/thats-rico> [<https://perma.cc/B4SL-SQ3B>].

130. Robin West, *From Choice to Reproductive Justice: De-Constitutionalizing Abortion Rights*, 118 YALE L.J. 1394, 1412–13 (2009) [hereinafter West, *De-Constitutionalizing Abortion Rights*] (summarizing and analyzing literature); *see also* LOUIS MICHAEL SEIDMAN, ON CONSTITUTIONAL DISOBEDIENCE 5 (2012); Martha Minow, *Interpreting Rights: An Essay for Robert Cover*, 96 YALE L.J. 1860, 1862 (1987); Karen M. Tani, *Welfare and Rights Before the Movement: Rights as a Language of the State*, 122 YALE L.J. 314, 369–74 (2012); Robin L. West, *The Aspirational Constitution*, 88 NW. U. L. REV. 241, 241–46 (1993); Robin L. West, *Tragic Rights: The Rights Critique in the Age of Obama*, 53 WM. & MARY L. REV. 713, 714–15, 719–21 (2011).

131. *See* West, *De-Constitutionalizing Abortion Rights*, *supra* note 130, at 1413–14 (describing scholarship criticizing the tendency of courts to protect the interests, privileges, and entitlements of property owners).

132. *Id.*

133. *Id.*

134. *Id.*

135. *Jackson v. City of Joliet*, 715 F.2d 1200, 1203 (7th Cir. 1983) (asserting that the Constitution “is a charter of negative rather than positive liberties”); David P. Currie, *Positive and Negative Constitutional Rights*, 53 U. CHI. L. REV. 864, 886 (1986) (concluding that, with some limited exceptions, the Constitution is a charter of negative liberties). Scholars have critiqued the distinction between positive and negative rights and have argued for finding positive rights in the Constitution. *See, e.g.*, STEPHEN HOLMES & CASS R. SUNSTEIN, *THE COST OF RIGHTS* 36–39

court-derived rights under our Constitution have tended to be individualistic in nature.¹³⁶ Finally, constitutional adjudication tends to strive for consistency with past practice and precedent.¹³⁷ As a result, progressive victories achieved through the courts are inherently limited.¹³⁸

None of these qualities of court-derived rights are intrinsic to constitutional law; all could be changed. But they are all deeply rooted in doctrine. And for labor, each presents a significant challenge.

Long after *Lochner*, labor rights have continued to run headlong into employers' common law rights of property and contract. For example, courts have repeatedly concluded that employees' statutory rights to engage in concerted action—to meet with union organizers on employer property or to organize without threat of plant closure—must give way to employers' property and managerial rights.¹³⁹ The state action doctrine is also a significant bar to constitutional labor rights. Recognizing as constitutional the right of private-sector workers not to be permanently replaced during a strike or not to be forced to attend employer-mandated captive audience meetings during a union campaign would require a softening, if not a repudiation, of the state action doctrine that insulates most private actors from constitutional attack.¹⁴⁰ Meanwhile, demands for minimum standards of employment as a matter of right rest on a rejection of the negative–positive rights distinction that characterizes the contemporary understanding of rights.¹⁴¹ Finally, more robust constitutional protection for

(1999) (describing the attempt to frame a dichotomy between negative and positive rights as futile); Susan Bandes, *The Negative Constitution: A Critique*, 88 MICH. L. REV. 2271, 2278–79 (1990) (arguing that the conventional wisdom distinguishing government action from inaction is flawed). *But see* Frank B. Cross, *The Error of Positive Rights*, 48 UCLA L. REV. 857, 923–24 (2001) (concluding that judicial enforcement of positive rights would be counterproductive).

136. *See* Schiller, *supra* note 35, at 4, 57–72 (showing how courts came to privilege rights of individuals over the rights of organized groups); John Fabian Witt, *Crystal Eastman and the Internationalist Beginnings of American Civil Liberties*, 54 DUKE L.J. 705, 720 (2004) (describing failed efforts of Progressive-Era intellectuals to direct public discourse away from “tortured inquiries into the rights and duties of employer and employee, toward the aggregate treatment of social needs”).

137. West, *De-Constitutionalizing Abortion Rights*, *supra* note 130, at 1414.

138. *Id.*

139. *See* *Lechmere, Inc. v. NLRB*, 502 U.S. 527, 540–41 (1992) (holding that an employer does not commit an unfair labor practice by barring union organizers from property, as long as some other channel exists to contact employees outside of work); *Textile Workers Union of Am. v. Darlington Mfg. Co.*, 380 U.S. 263, 271–72 (1965) (holding that an employer has an absolute right to close an entire business, even for antiunion motives, though a partial closure for the purpose of chilling other union activity may violate the law).

140. *See* Estlund, *Labor, Property, and Sovereignty*, *supra* note 122, at 317 (describing the Court's jurisprudence that the First Amendment is inapplicable on private property).

141. *See* Cross, *supra* note 135, at 863–74 (showing that, under current doctrine, the Constitution provides only negative rights with some narrow exceptions).

collective labor rights would pull in the opposite direction of the largely individualistic First Amendment.¹⁴²

To be sure, the sanctity of employer common law rights, the state action doctrine, the positive–negative rights distinction, and the antipathy to group rights are not inevitable positions. One could, for example, imagine a legal system in which federal courts understood property rights very differently—perhaps in a way that would allow workers greater ability to protest on employer grounds.¹⁴³ The California Supreme Court’s approach to free speech and property rights in *Robins v. Pruneyard Shopping Center*¹⁴⁴ is just one illustration. But any such movement in federal constitutional law would require a thorough rejection of years of precedent, rather than an extension or expansion of existing rights.

Finally, while labor confronts these familiar obstacles when it relies on constitutional argumentation, it faces an additional hurdle: Labor’s demands may be more incompatible with court adjudication than the individual rights claims of recent identity-based movements, or even than revived efforts to win constitutional rights for the indigent. This is because the goal of labor law, at least from the perspective of the most utopian elements of the labor movement, is not only to guarantee individual rights or to secure freedom for workers from abuses of employer power, but also to enable workers to participate in the formation of conditions that structure their lives.¹⁴⁵ At bottom, many of labor’s demands center on social and economic democratization. Workplace collective action seeks to transfer power over decision making from the employer to the collective.¹⁴⁶ Similarly, when acting in the political sphere, the labor movement seeks to democratize decision making more broadly by harnessing political power away from corporations and elites.¹⁴⁷

142. See Schiller, *supra* note 35, at 57–72 (describing how courts came to privilege First Amendment rights of individuals over those of groups).

143. See Estlund, *Labor, Property, and Sovereignty*, *supra* note 122, at 310 (critiquing current doctrine and urging an alternative approach that would provide greater access rights to union organizers).

144. 592 P.2d 341, 347 (Cal. 1979) (holding that the California Constitution protects speech and petitioning, reasonably exercised, in privately owned shopping centers).

145. See RUTH DUKES, *THE LABOUR CONSTITUTION: THE ENDURING IDEA OF LABOUR LAW* 30 (2014) (drawing from work of German scholar Hugo Sinzheimer and describing aims of labor law as including “the emancipation of working people from their subordination to capital” and the “democratization of the economy”); Cynthia Estlund, *Rebuilding the Law of the Workplace in an Era of Self-Regulation*, 105 COLUM. L. REV. 319, 333 (2005) (contrasting a rights-litigation model that casts employees as victims seeking redress for past wrongs with a collective model that conceives employees as citizens who actively participate in the governance of the workplace).

146. See DUKES, *supra* note 145, at 31 (discussing parallels between the institution of economic democracy and the institution of political democracy).

147. See Hacker & Pierson, *supra* note 42, at 171–72 (describing the necessity of sustained collective action to combat the “winner-take-all” model of American economic inequality).

Appeals to courts and to legal expertise are in substantial tension with these democratic efforts.¹⁴⁸ Federal courts are elite institutions. Even when courts are responsive to popular sentiment, the process of adjudication is fundamentally nondemocratic—at least under our current system of judicial supremacy.¹⁴⁹ Lawyers make arguments. Courts decide them. Labor struggles and protests may affect the background against which cases are decided, and worker movements may capitalize on court decisions, but workers play little direct role in the process of adjudication.¹⁵⁰

C. *The Current Implausibility of Constitutional Labor Rights, Even Outside the Courts*

But why, then, don't workers make constitutional arguments in other spaces? Recognizing the limited capacity of courts to effect social change, scholars have urged the labor movement and other progressive groups to turn, or return, to popular or legislative constitutionalism.¹⁵¹ In the pre-New Deal era, after all, unions and workers addressed their claims to legislators because they believed that social and economic rights, though constitutionally grounded, “did not lend themselves to judicial enforcement.”¹⁵²

One problem may be that, in our current political environment, legislative institutions also are dominated by the elite, and too often not responsive to working people.¹⁵³

148. Alex Gourevitch, *The Contradictions of Progressive Constitutionalism*, 72 OHIO ST. L.J. 1159, 1160 (2011) (arguing that the Constitution is “in some ways a body of established doctrine and law—higher law—that is supposed to limit and shape the further development of normal, democratic lawmaking”); see also Estlund, *supra* note 34, at 319–25 (collecting literature on tension between court-enforced individual employment rights and collective action rights); cf. Risa Goluboff, “*We Live’s in a Free House Such as It Is*”: *Class and the Creation of Modern Civil Rights*, 151 U. PA. L. REV. 1977, 1977–79 (2003) (arguing that reliance on elite-driven litigation contributed to the removal of class-based claims from the civil rights movement’s demands).

149. See *supra* notes 97–103 and accompanying text.

150. See Jennifer Gordon, *Law, Lawyers, and Labor: The United Farm Workers’ Legal Strategy in the 1960s and 1970s and the Role of Law in Union Organizing Today*, 8 U. PA. J. LAB. & EMP. L. 1, 9 (2005) (describing how law and legal strategies can build power for a movement if deployed in particular ways, while recognizing a democracy deficit in litigation); Douglas NeJaime, *Winning Through Losing*, 96 IOWA L. REV. 941, 945 (2011) (arguing that litigation loss can function positively within the process of law and social change if properly used).

151. See, e.g., Fishkin & Forbath, *Wealth, Commonwealth*, *supra* note 8 (manuscript at 32–33) (noting that in our judicialized constitutional culture, Americans have forgotten the idea of affirmative constitutional duties that exist in political and legislative action); see also *supra* notes 65–68 and accompanying text.

152. Forbath, *Constitution in Exile*, *supra* note 109, at 179.

153. See generally LARRY M. BARTELS, *UNEQUAL DEMOCRACY: THE POLITICAL ECONOMY OF THE NEW GILDED AGE* 1–11 (2008); MARTIN GILENS, *AFFLUENCE AND INFLUENCE: ECONOMIC INEQUALITY AND POLITICAL POWER IN AMERICA* 252–67 (2012); KAY LEHMAN SCHLOZMAN ET AL., *THE UNHEAVENLY CHORUS: UNEQUAL POLITICAL VOICE AND THE BROKEN PROMISE OF AMERICAN DEMOCRACY* 26–27 (2012).

But another problem is that courts oversee such institutions. Indeed, as discussed in subpart III(A), when Congress enacted constitutional principles into positive law during the New Deal, courts were soon implicated, exercising judicial review over, and ultimately constraining the scope of, the enacted rights as well as aspirations for a different constitutional order.¹⁵⁴ The passage of the Taft–Hartley Act then cemented the courts’ rejection of labor’s constitutional vision, while subsequent political, economic, and legal developments further undermined labor’s goals.¹⁵⁵

Years later, the gap between labor’s aspirations and constitutional arguments that can plausibly be made to legal elites—whether in courts or legislatures—is substantial. In this context, it makes sense that workers do not invoke the Thirteenth Amendment as a source for a living wage, or the First Amendment as a guarantee for the right to strike, free from permanent replacements, even outside the courts.¹⁵⁶ As Ian Shapiro notes, “[a]spirations do not form in vacuums.”¹⁵⁷ People must be able to picture realistically a set of constitutional rights before they invoke them. “If the gap between where a person is and where he or she might hope to be is too great, certain goods are likely to seem out of reach—and hence outside the range of realistic aspirations.”¹⁵⁸

Indeed, if, as Hendrik Hartog has written, constitutional-rights consciousness is based in a belief “that we . . . have rights—that when we are wronged there must be remedies, that patterns of illegitimate authority can be challenged, that public power must contain institutional mechanisms capable of undoing injustice,”¹⁵⁹ it should not be surprising that we see so little constitutional-rights consciousness in today’s labor movement. The

154. See *supra* notes 111–25, and accompanying text; cf. Gourevitch, *supra* note 148, at 1170 (arguing that even legislative constitutionalism problematically reasserts the supremacy of legal elites).

155. See Lichtenstein, *supra* note 120, at 763–65 (analyzing impact of the Taft–Hartley law on the labor movement); JOSEPH A. MCCARTIN, COLLISION COURSE: RONALD REAGAN, THE AIR TRAFFIC CONTROLLERS, AND THE STRIKE THAT CHANGED AMERICA *passim* (2011) (analyzing President Reagan’s firing of air traffic controllers and its impact on the labor movement); STONE, *supra* note 36, at 7–9 (explaining how globalization has undermined labor unions); WEIL, *supra* note 36, at *passim* (describing how the fissured nature of employers has contributed to declining wages, eroding benefits, inadequate health and safety conditions, and income inequality).

156. Cf. Jamal Greene, *Thirteenth Amendment Optimism*, 112 COLUM. L. REV. 1733, 1753 (2012) (warning against arguments that fail to respect the bounds of conventional usage of language and history).

157. Ian Shapiro, *Why the Poor Don’t Soak the Rich*, DAEDALUS, Winter 2002, at 118, 119.

158. *Id.*

159. Hendrik Hartog, *The Constitution of Aspiration and “The Rights That Belong to Us All,”* 74 J. AM. HIST. 1013, 1014 (1987) (“Constitutional rights consciousness suggests a faith that the received meanings of constitutional texts will change when confronted by the legitimate aspirations of autonomous citizens and groups.”).

experience of worker movements is that effective constitutional remedies do not exist, that patterns of illegitimate activity often cannot be challenged, and that public power frequently lacks institutional mechanisms capable of undoing the injustice the movement perceives.

IV. Conclusion: Re-Constituting Work and Labor Law

To recognize that workers have legitimate reason to eschew constitutional argumentation is not, however, to concede that such arguments are wrongheaded.¹⁶⁰ Nor is it to assert that such arguments would never be advisable. One could imagine an alternative world in which constitutional argumentation on behalf of labor rights would be within the range of realistic aspirations. In that world, the Constitution might be understood to provide a right to collective bargaining, to decent wages and benefits, to basic dignity and a measure of democracy at work. Or perhaps one could simply imagine a world where that picture does not seem so unimaginable as to be not worth drawing.

For that world to exist, however, more of the citizenry and more of the decision-making class would have to embrace the goals of the worker movements. Public values and common sense about the key issues facing labor would have to change. Labor's goals would have to be part of the deep normative commitments that define Americans as a political community.¹⁶¹ And institutional arrangements on the ground would have to evolve in reflection of those norms.

Contemporary worker movements are attempting to bring about such change. In that sense, the movements are in fact making constitutional arguments. Not “big-C constitutional arguments”—arguments adverting to the text of the Constitution or even to values expressly denominated constitutional—but “small-c constitutional arguments”—arguments that aspire to shift the basic terms of the political and legal order they inhabit.¹⁶²

The Fight for \$15 again provides a useful illustration. The campaign's primary target is the fast-food industry, which is made up of nonunion, minimum-wage workers, many of whom work multiple jobs and live at the poverty line.¹⁶³ They are employees at will who lack protection against

160. Cf. Pope, *supra* note 39, at 1135 (criticizing scholars who “have approved the labor black hole on the ground that courts are so hopelessly hostile to labor that judicial efforts to protect labor's rights would eventually backfire” and concluding that “[w]e cannot tell how the courts will respond until they are presented with the challenge”).

161. See BALKIN, *supra* note 25, at 71 (noting the impact of politics on societal values); Friedman, *supra* note 96, at 2599 (discussing responsiveness of courts to popular sentiment); Primus, *supra* note 13, at 1132 (discussing the role of ethos in small-c constitutionalism).

162. See ESKRIDGE & FEREJOHN, *supra* note 25, at 5 (distinguishing between “large-C” and “small-c” constitutional rights); Primus, *supra* note 13, at 1081–84 (same).

163. SYLVIA ALLEGRETTO ET AL., U.C. BERKELEY LABOR CTR., FAST FOOD, POVERTY WAGES: THE PUBLIC COSTS OF LOW-WAGE JOBS IN THE FAST FOOD INDUSTRY 1 (2013), http://laborcenter.berkeley.edu/pdf/2013/fast_food_poverty_wages.pdf [<https://perma.cc/T4SG-66H5>].

termination.¹⁶⁴ They also lack sufficient bargaining power to set the terms and conditions of their employment.¹⁶⁵

The Fight for \$15 is seeking to organize these workers. In a separate piece, I am exploring how the contours of a new labor law are emerging from its efforts and those of other social movements.¹⁶⁶ But whether the Fight for \$15 and other movements are attempting to create a distinct form of labor law, or simply trying to breathe new life into ossified super-statutes of the past,¹⁶⁷ it is clear that they are seeking to change the nation's ethos. Through protests, strikes, the use of social media, and legislative and regulatory efforts, the participating workers are rejecting the existing system of a nonunion, low-wage service industry.¹⁶⁸ They are insisting that a union and a living wage are rights of all persons.¹⁶⁹ They are claiming that workers' wages and working conditions should be determined not by the market to ensure economic efficiency, but by the collective, the public, to ensure human dignity.¹⁷⁰

To advance its vision on the ground, the Fight for \$15 campaign has pushed for a reinterpretation of the definition of employer—to move responsibility for bargaining and liability up the supply chain.¹⁷¹ In

164. *See id.* at 11 (noting that very few fast-food employees have collective bargaining agreements); Scott A. Moss, *Where There's At-Will, There Are Many Ways: Redressing the Increasing Incoherence of Employment at Will*, 67 U. PITT. L. REV. 295, 299 (2005) (noting that employment at will is the formal rule in all states except Montana).

165. ALLEGRETO ET AL., *supra* note 163, at 2; *see also* William Finnegan, *Dignity: Fast Food Workers and a New Form of Labor Activism*, NEW YORKER (Sept. 15, 2014), <http://www.newyorker.com/magazine/2014/09/15/dignity-4> [<http://perma.cc/GU2X-RC97>] (detailing the experience of fast-food workers).

166. *See generally* Kate Andrias, *The New Labor Law*, YALE L.J. (forthcoming 2016) [hereinafter Andrias, *The New Labor Law*].

167. *See* William N. Eskridge, Jr. & John Ferejohn, *Super-Statutes*, 50 DUKE L.J. 1215, 1216 (2001) (defining super-statutes as “a law or series of laws that (1) seeks to establish a new normative or institutional framework for state policy and (2) over time does ‘stick’ in the public culture such that (3) the super-stature and its institutional or normative principles have a broad effect on the law—including an effect beyond the four corners of the statute,” and concluding that super-statutes have quasiconstitutional status); Estlund, *supra* note 28, at 1530–32 (discussing the ossification of U.S. labor law).

168. *E.g.*, FIGHT FOR \$15, HOW TO GO ON A ONE-DAY STRIKE, <http://fightfor15.org/wordpress/wp-content/uploads/2015/02/How-to-Go-On-a-One-Day-Strike.pdf> [<https://perma.cc/ZL4D-UR6B>]; Greenhouse, *supra* note 69; ROC United (@ROCUnited), TWITTER, <https://twitter.com/rocunited> [<https://perma.cc/LN86-BJGB>].

169. Greenhouse, *supra* note 69.

170. *See, e.g.*, *Watch This Mom Tell the NY Wage Board: WE NEED \$15*, FIGHT FOR \$15, <http://fightfor15.org/watch-this-mom-tell-the-ny-wage-board-we-need-15/> [<https://perma.cc/8FNG-DV22>] (providing the testimony of a McDonald's employee, who explains, “I am not expecting to get rich off \$15 an hour . . . just the ability to survive and take care of my family”); Fight for \$15, *supra* note 74 (quoting a Taco Bell and McDonald's employee, who laments, “[s]ometimes I don't even have a way to work because my paychecks are so small, they're gone after paying just one bill”).

171. Andrias, *The New Labor Law*, *supra* note 166; *see* Browning-Ferris Indus. of Cal., Inc., 362 N.L.R.B. No. 186, slip op. at 7–11 (Aug. 27, 2015) (analyzing the employer standard and its

addition, it has sought to engage federal, state, and local governments directly in a form of social bargaining over workers' wages, schedules, and leave policies.¹⁷² The result has been new ordinances, regulations, and statutes that set wages and working conditions far above what the market would dictate, and far above what federal labor law has long required.¹⁷³

The Domestic Workers' Alliance presents a similar effort to reconstitute public commitments. Long excluded from basic employment protections, including federal labor law, domestic workers have, over the past decade, created an energetic worker movement to demand legal protections.¹⁷⁴ Their efforts have resulted in the passage of the New York and California Domestic Workers Bills of Rights and the International Labor Organization's adoption of the Convention and Recommendation Concerning Decent Work for Domestic Workers.¹⁷⁵ They have also helped bring about new Department of Labor regulations expanding wage entitlements for live-in domestic workers and workers providing companionship services.¹⁷⁶ Like the Fight for \$15, the domestic worker movements demand new forms of public decision making and wage setting, as well as an expanded right to engage in industrial collective bargaining.¹⁷⁷ And like the Fight for \$15, they insist on the supremacy of human dignity over market efficiency concerns.¹⁷⁸

It is far from clear that the Fight for \$15, the Domestic Workers' Alliance, or similar movements will be successful in fundamentally

effect on collective bargaining); *NLRB Office of the General Counsel Authorizes Complaints Against McDonald's Franchisees and Determines McDonald's, USA, LLC is a Joint Employer*, NLRB (July 29, 2014), <https://www.nlr.gov/news-outreach/news-story/nlr-office-general-counsel-authorizes-complaints-against-mcdonalds> [<https://perma.cc/YHZ7-MQ3S>] (announcing that the NLRB found merit in charges that McDonald's "violated the rights of employees as a result of activities surrounding employee protests," and accordingly authorized complaints on alleged violations of the National Labor Relations Act).

172. Andrias, *The New Labor Law*, *supra* note 166; *see also* David Moberg, *The List of the Fight for \$15's Victories—Tangible and Intangible—Is Getting Longer*, IN THESE TIMES (June 15, 2015, 1:26 PM), http://inthesetimes.com/working/entry/18070/the_list_of_the_fight_for_15s_victoriestangible_and_intangibleis_getting_lo [<https://perma.cc/L37F-4WLP>] (reporting the areas where the Fight for \$15 movement has sought reform and highlighting what they have sought).

173. Andrias, *The New Labor Law*, *supra* note 166; Moberg, *supra* note 172.

174. For a history of these movements, *see*, for example, EILEEN BORIS & JENNIFER KLEIN, *CARING FOR AMERICA: HOME HEALTH WORKERS IN THE SHADOW OF THE WELFARE STATE* (2012); Hina Shah & Marci Seville, *Domestic Worker Organizing: Building A Contemporary Movement for Dignity and Power*, 75 ALB. L. REV. 413, 413–14 (2011/2012).

175. Shah & Seville, *supra* note 174, at 413–14.

176. 29 C.F.R. §§ 552.3, 552.6 (2015).

177. *Campaigns*, DOMESTIC WORKERS UNITED, <http://www.domesticworkersunited.org/index.php/en/our-work/campaigns> [<https://perma.cc/XD7Z-4J56>].

178. *History & Mission*, DOMESTIC WORKERS UNITED, <http://www.domesticworkersunited.org/index.php/en/about/history-mission> [<https://perma.cc/26NY-288X>].

changing the nation's political commitments or systems of governance.¹⁷⁹ Their statutory and regulatory victories to date are limited and face multiple legal and political challenges, while unionization in any formal sense remains elusive for both groups of workers.¹⁸⁰ Other low-wage worker movements face similar obstacles.¹⁸¹ Thus, it is too early to know whether small-c constitutional change will ensue, let alone change to the big-C Constitution.

But recognizing the movements' efforts as a form of small-c constitutionalism, as opposed to merely a series of policy demands, is nonetheless important. First, the constitutional lens highlights the movements' transformative possibilities. These low-wage worker movements are not simply seeking higher wages or other changes to isolated statutes and regulation. They are attempting to entrench new norms, while creating new institutional frameworks for state policy. They are seeking to universalize labor rights—both the right to work with dignity and the right to participate in economic and political decision making—that are at odds with the governing regime.

Second, identifying the movements' efforts as small-c constitutionalism, as opposed to just ordinary movement politics, highlights the centrality of social and political action to constitutional law. Constitutionalism, after all, involves “We the People,”¹⁸² engaged in political deliberation. By seeking new laws, pushing for new regulatory interpretations, and making demands on entire industries and communities, the contemporary labor movements are doing the work that has too often been ceded to courts. They are attempting to change how we constitute ourselves as a society.

Indeed, one can see the seeds for future, more explicit constitutional argumentation in the language used by movement participants. In support of their demands, workers invoke dignity, bills of rights, and, occasionally,

179. Cf. Karl N. Llewellyn, *The Constitution as an Institution*, 34 COLUM. L. REV. 1, 21–22 (1934) (noting that only practice can demonstrate if something is part of our Constitution and arguing that “*the working Constitution is amended whenever the basic ways of government are changed*”); accord BALKIN, *supra* note 25, at 279.

180. See, e.g., Nat'l Rest. Ass'n v. Comm'r of Labor, Docket No. WB 15-001 (N.Y. Indus. Bd. of Appeals 2015) (adjudicating a challenge to a statewide fast-food minimum wage order).

181. E.g., Aaron Vehling, *Auto Dealer Asks Justices to Correct 9th Circ.'s Grammar*, LAW360 (Mar. 4, 2016, 9:01 PM), <http://www.law360.com/articles/767683/auto-dealer-asks-justices-to-correct-9th-circ-s-grammar> [<https://perma.cc/Y83W-U7Z3>] (detailing arguments at the U.S. Supreme Court as to whether service advisers employed by a car dealership were entitled to receive overtime pay under the Fair Labor Standards Act).

182. U.S. CONST. pmb1.

equality and freedom of association.¹⁸³ All of these terms have constitutional resonance, and sometimes doctrinal meaning.¹⁸⁴

Ultimately, however, the ongoing law-reform and social-change efforts are essential prerequisites to the development of related doctrine. Without the political and legal changes the movements urge, it is inconceivable that common law courts—faithful to precedent, incremental in approach, drawn from the elite—will adopt the constitutional arguments that progressive constitutional law scholars urge.¹⁸⁵ In fact, it is not even clear that court adoption of new labor rights, absent political or on-the-ground instantiation of them, would align with the democratic ethos of the worker movements.

For now, defending and expanding ongoing statutory and regulatory reform efforts may be as important as the debate about where in the Constitution to lodge labor rights or whether to use constitutional rhetoric at all. This small-c constitutional effort—messy, conflictual, and tedious though it may be—is the constitutional change that prepares the ground for the big-C constitutional change scholars urge.

183. See *supra* notes 72–78 and accompanying text.

184. Cf. Leslie Meltzer Henry, *The Jurisprudence of Dignity*, 160 U. PA. L. REV. 169, 179 (2012) (documenting the increased use of the term *dignity* in Supreme Court opinions).

185. See Tomiko Brown-Nagin, *Elites, Social Movements, and the Law: The Case of Affirmative Action*, 105 COLUM. L. REV. 1436, 1527–28 (2005) (arguing that “if lawyers hope to leverage the law to achieve the goals of socially and economically marginalized groups, their advocacy must be preceded by social movements that are not defined by juridical law. . . . [L]aw should be the final arena of struggle over systemic social problems, rather than the first”).