Building Labor's Constitution

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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,”

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* 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.


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.


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. 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. 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. 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. They direct

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*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, 1551–33 (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.


12. See *infra* Part I.


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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{18} Court hostility to worker movements continues today.\textsuperscript{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.\textsuperscript{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.\textsuperscript{21}

\textsuperscript{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).

\textsuperscript{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.


\textsuperscript{19} See infra notes 126–29 and accompanying text.

\textsuperscript{20} See infra notes 140–142 and accompanying text.

\textsuperscript{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. 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. 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. 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

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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


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. In broad terms, it “governs workers’ efforts to advance their own shared interests” through self-organization and collective action. 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. Many state laws, and some state constitutions, provide similar protections for public-sector workers, though others restrict the extent of their employees’ collective labor rights.

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. These operate independently of any collectivization in the workplace. 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.

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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. I, § 6.
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. 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.

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. It provides some protection for labor picketing, although less than is provided for many other forms of protest. Indeed, some commentators have referred to the field of labor as a constitutional “black hole.”

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


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).


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).

understood to speak to problems of economic welfare and concentrations of private power generally, 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.” Labor rights are key mechanisms to redress “economic inequality, domination, and dependency.” They are a prerequisite to the democratic and egalitarian society promised, or at least anticipated, by the Constitution. 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.

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-


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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{47} Congress, after passing the NLRA, made clear that it too understood the rights to organize and bargain collectively as First Amendment rights.\textsuperscript{48} Even the Supreme Court, in a plurality opinion in \textit{Hague v. CIO},\textsuperscript{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.\textsuperscript{50}

Others have suggested that the Thirteenth Amendment is the “natural starting point in the search for a constitutional theory of labor liberty.”\textsuperscript{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

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


\textsuperscript{47} Laura M. Weinrib, \textit{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).

\textsuperscript{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)).


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

\textsuperscript{51} Pope, supra note 39, at 1096; see also James Gray Pope, \textit{What's Different About the Thirteenth Amendment, and Why Does It Matter?}, 71 MD. L. REV. 189, 189 (2012) [hereinafter Pope, \textit{What's Different}].}
explicitly protects against private concentrations of power.\textsuperscript{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.\textsuperscript{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”\textsuperscript{54} for all persons of “whatever race, color, or estate.”\textsuperscript{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,\textsuperscript{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.\textsuperscript{57} Risa Goluboff has documented how lawyers in the Department of Justice Civil Rights Division invoked the Thirteenth

\textsuperscript{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 . . . .”).


\textsuperscript{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:

[1]In 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.

\textsuperscript{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.


\textsuperscript{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).


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. 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.

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. 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. 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. Ultimately, they can help bring into being the understanding that judges will later read into the text of the Constitution.

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 Context: Gender and the Constitution From a Social Movement Perspective, 150 U. PA. L. REV. 297, 312–13 (2001) [hereinafter Siegel, Text in Context] (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. They are calling for a base wage of fifteen dollars an hour and the right to form a union. 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.

The claims made by the Fight for $15 are rights based: workers are demanding a living wage and union rights as fundamental entitlements. Yet constitutional arguments barely register. 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, but with rare exception, they do not invoke the Constitution or its particular provisions.

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. The Domestic Workers Alliance has won, in several localities, new laws that set minimum standards in the domestic work industry. Though the


70. Brown, supra note 69.


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 %Eauthor [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./106004294026287/?type=3&theater [https://perma.cc/XC6Z-8HSC].

75. See @fightfor15, supra note 73.


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-
to-life movement have all laid claim to the Constitution—and they did so even before their arguments had footholds in the doctrine. So too the gay rights and reproductive rights movements invoked the Constitution even before their claims persuaded courts. 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.

Fishkin and Forbath attribute the absence of constitutional argumentation about economic inequality as a “Great Forgetting.” They mine a rich history of earlier constitutional claims and urge contemporary actors to recall that history and to draw on it. 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. So too many of the worker–participants are undoubtedly familiar with high-level constitutional principles such as the promise of equal protection and


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).


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. 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. Our Constitution is prominent in public discourse, and its relatively brief text is accessible to a general audience. Actors throughout the government engage in constitutional interpretation, as do popular movements. And courts are often responsive to popular sentiment regarding the Constitution.

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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/knowing_by_heart.pdf] (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, Architecture, 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).

Nonetheless, as scholars have documented, courts today play an outsized role in defining the scope and content of the Constitution, particularly its rights provisions.\textsuperscript{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.\textsuperscript{98} As recently as 2012, in Coleman \textit{v. Maryland},\textsuperscript{99} the Court reiterated that Congress may not decree the substance of constitutional rights.\textsuperscript{100}

The Court’s insistence on judicial supremacy over constitutional decision making is not without consequence.\textsuperscript{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.\textsuperscript{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

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

\textsuperscript{96}Barry Friedman, \textit{Mediated Popular Constitutionalism}, 101 MICH. L. REV. 2596, 2599–2612 (2003); see also Jack M. Balkin, \textit{Constitutional Redemption} 70–71 (2011) (discussing “constitutional catholicism”—the view that the courts are the central authority in interpreting the Constitution).

\textsuperscript{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, \textit{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, \textit{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, \textit{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).

\textsuperscript{98}United States \textit{v. Morrison}, 529 U.S. 598, 615–19 (2000); City of Boerne \textit{v. Flores}, 521 U.S. 507, 519 (1997); cf. Marbury \textit{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.”).


\textsuperscript{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).

\textsuperscript{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, \textit{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).

\textsuperscript{102}The leading constitutional law textbooks, organized almost entirely around Supreme Court cases, illustrate the point. \textit{E.g.}, Geoffrey R. Stone \textit{et al.}, \textit{Constitutional Law} (7th ed. 2013); Kathleen M. Sullivan \& Noah Feldman, \textit{Constitutional Law} (18th ed. 2013).
means—at least in particular cases. 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, 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. 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. They used conspiracy and antitrust law, even after Congress attempted to foreclose application of those doctrines to labor. 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. By one count, at least 4,300 injunctions were issued against union activity between 1880 and 1930, and hundreds of statutes were invalidated.

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


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.


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.”

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. But locating labor rights in statutes proved to be insufficient to shield labor from court sanction.

The fall of *Lochner* is widely heralded as ushering in a constitutional settlement. Holmes’s view won out: economic theory would be left to the democratic process. 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. By the time Congress passed the Taft–Hartley Act in 1947, widely considered to be an antilabor bill, the Supreme Court had already significantly narrowed the original Wagner Act. 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.

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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).


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.\textsuperscript{123}

Public-sector employees fared no better. There, unlike in the private sector, workers indisputably could claim constitutional rights—their employers were state actors.\textsuperscript{124} Yet, courts carved out exceptions from generally applicable First Amendment doctrine, leaving public employees with comparatively few speech rights.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{128} The threat of such RICO suits has led unions to drop some of their public campaigns.\textsuperscript{129}


\textsuperscript{124} See Cynthia Estlund, \textit{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).


\textsuperscript{127} \textit{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 \textit{American Meat}).

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. 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. Thus, even progressive gains, when achieved via courts, have often entrenched current distributions of power. 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. 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. 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. Third,

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


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.\footnote{Schiller, supra note 35, at 4, 57–72 (showing how courts came to privilege rights of individuals over the rights of organized groups).} Finally, constitutional adjudication tends to strive for consistency with past practice and precedent.\footnote{West, De-Constitutionalizing Abortion Rights, supra note 130, at 1414.} As a result, progressive victories achieved through the courts are inherently limited.\footnote{Id.}

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 \textit{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.\footnote{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).} 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.\footnote{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).} 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.\footnote{See Cross, supra note 135, at 863–74 (showing that, under current doctrine, the Constitution provides only negative rights with some narrow exceptions).} Finally, more robust constitutional protection for
collective labor rights would pull in the opposite direction of the largely individualistic First Amendment.\textsuperscript{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.\textsuperscript{143} The California Supreme Court’s approach to free speech and property rights in \textit{Robins v. Pruneyard Shopping Center}\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{147}

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

\textsuperscript{143} See Estlund, \textit{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).

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

\textsuperscript{145} See RUTH DUDES, 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, \textit{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).

\textsuperscript{146} See Dukes, supra note 145, at 31 (discussing parallels between the institution of economic democracy and the institution of political democracy).

\textsuperscript{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. 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. 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.

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. 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.”

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.

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 Nclaime, 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.

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. 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.

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. As Ian Shapiro notes, “[a]spirations do not form in vacuums.” 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.”

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,” it should not be surprising that we see so little constitutional-rights consciousness in today’s labor movement. The

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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).


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. 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. 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.

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. They are employees at will who lack protection against

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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).

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

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. 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, 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. They are insisting that a union and a living wage are rights of all persons. 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.

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. 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).


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-statute 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 quasi-constitutional status); Estlund, supra note 28, at 1530–32 (discussing the ossification of U.S. labor law).


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”).

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. 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.

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. 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. They have also helped bring about new Department of Labor regulations expanding wage entitlements for live-in domestic workers and workers providing companionship services. 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. And like the Fight for $15, they insist on the supremacy of human dignity over market efficiency concerns.

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

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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_victories_tangible_and_intangible_is_getting_longer (reporting the areas where the Fight for $15 movement has sought reform and highlighting what they have sought).


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).


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


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.


182. U.S. Const. pmbl.
equality and freedom of association.\textsuperscript{183} All of these terms have constitutional resonance, and sometimes doctrinal meaning.\textsuperscript{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.\textsuperscript{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.

\textsuperscript{183} See supra notes 72–78 and accompanying text.


\textsuperscript{185} See Tomiko Brown-Nagin, \textit{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”).