

# Workers' Rights and the Distributive Constitution

WILLIAM E. FORBATH

*Progressives have forgotten* how to think about the constitutional dimensions of economic life. Work, livelihood, and opportunity; material security and insecurity; poverty and dependency; union organizing, collective bargaining, and workplace democracy: for generations of American reformers, the constitutional importance of these subjects was self-evident. Laissez-faire, unchecked corporate power, and the deprivations and inequalities they bred were not just bad public policy—they were constitutional infirmities. Today, with the exception of employment discrimination, such concerns have vanished from progressives' constitutional landscape.

That has to change. For constitutionalism is the language Americans most often use to talk about the rights of citizens and the duties and purposes of government. It supplies the "higher law" against which existing social arrangements and the laws upholding them are judged so wrong as to warrant extraordinary engagement and even disruption in the name of supplanting them. For most of U.S. history, the popular constitutionalism of social movements has been the seedbed of congressional and court constitutionalism. And the highbrow oppositional constitutionalism of academics and policy experts is a dress rehearsal for the arguments of courts and lawmakers, when the political moment is ripe.

The air today is thick with constitution talk. But nearly all of it, both popular and highbrow, is on the right. The Tea Party and its legislative and judicial allies have brought the old laissez-faire constitutional case against

public provision from the right-wing blogosphere and the work of the libertarian intelligentsia into congressional debate and the opinions of federal judges. The argument that Obamacare is an unconstitutional interference with individual freedom, which once seemed absurd, is now a plausible view that the Supreme Court just might embrace.

Right-wingers are bent on reviving the anti-redistributive, laissez-faire tradition in constitutional law and politics. Many of them are "originalists," for whom history obliges us to return to the political economy embodied in early twentieth-century opinions such as *Lochner v. New York*, which, in 1906, struck down a maximum hours law for bakers.

The originalist theory of constitutional interpretation is bunk. But originalists are correct in their practical understanding of constitutional politics. Movements for basic change need an account of past constitutional contests and commitments that add up to a vision of the nation that the Constitution promises to promote and redeem; and conservative revivalists have constructed such an account. Their Constitution promises to restore an America fundamentally committed to rugged individualism, personal responsibility, godliness, and private property safe from state interference and redistribution. And this story has aroused citizens, lawmakers, and judges on the right to act boldly on its behalf.

Progressives' common response to this story line has been defensive: the Constitution, they declare, does not speak to the rights and wrongs of economic life; it leaves all that to the give and take of ordinary politics. This may be understandable, but it is wrong as a matter of constitutional history and wrong in principle. And it is bad politics.

Historically, there is a venerable rival to the laissez-faire tradition: the rich, reform-minded *distributive* tradition of constitutional law and politics. We need to remember this tradition and examine why it is now all but invisible.

It does a better job than current progressive constitutional discourse at capturing the kind of nation the Constitution promises to all Americans. It also offers new paths for the development of judge-made law. But it does not call on courts to take heroic actions against the other branches. Rather, it reminds lawmakers that there are constitutional stakes in attending to the economic needs of ordinary Americans, their dread of poverty and want, and their worries that mounting inequalities are eroding our democracy and its promise of equal opportunity. And so it provides a sturdier basis on which to uphold regulations that the Right has begun, once more, to assail. At the same time, it offers a baseline of popular constitutional commitment to all Americans—alongside the courts' necessary interventions on behalf of callously excluded minorities and vulnerable fellow citizens.

The gist of the distributive tradition is simple: gross 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 democracy, in the context of gross material inequality. Gross economic inequality produces an oligarchy in which the wealthy rule; and insofar as it produces deprivation and a lack of basic social goods among those at the bottom, gross inequality destroys the material independence and security that democratic citizens must have in order to think and act on their own behalf and participate on a roughly equal footing in political and social life. Finally, access to basic goods such as education and livelihood is essential to standing and respect in one's own eyes and in the eyes of the community.

For their part, the Framers believed that personal liberty and political equality demanded a measure of economic independence and material security. They declared that the new national Constitution, plus equality of rights and liberty at the state level, would ensure that measure for all hard-working white men and their families. Eighty

years later, this same political economy of citizenship animated the Fourteenth Amendment. Its main aim was to give African American men the same rights of contract and property that were thought to guarantee to white men the opportunity to pursue a calling and earn a decent living.

In the wake of industrialization and urbanization, generations of reformers declared that the United States needed a "new economic constitutional order" securing the old promises of individual freedom, opportunity, and well-being. Amid these turn-of-the-century battles over economic life, the growing concentration of power in corporations, and widening class inequalities, Progressivism was born. Its heart lay in the contest between "Wealth" and "Commonwealth." This struggle prompted popular interpreters of the Progressive constitution to proclaim that in industrialized America "social justice" was indispensable for "legal justice." Figures such as Theodore Roosevelt, Louis Brandeis, Jane Addams, and William Jennings Bryan insisted that the United States could not remain a constitutional republic without social and economic reform. America was becoming a corporate oligarchy; working people were wage slaves, ciphers and servants, ill-equipped for democratic citizenship.

*The New Deal* brought this progressive constitutional vision to partial fruition. FDR and the New Dealers claimed not only that Congress had the power to enact New Deal legislation, it had the duty to do so. In speeches and radio addresses, Roosevelt set out to win the nation's support for what he termed a "redefinition of [classical liberal] rights in terms of a changing and growing social order." In the pre-industrial past, FDR explained, when the "Western frontier" was open and land "substantially free," the Constitution's guarantee of equal rights "in acquiring and possessing property" joined with the ballot and the freedom to live by one's "own lights" to ensure the Constitution's promise of "liberty and equality." Not so today. The "turn of the tide" came with the close of the frontier and the rise of great "industrial combinations."

The "terms" of our basic rights "are as old

as the Republic," FDR proclaimed, but new conditions demanded new readings. "Every man has a right to life," and a "right to make a comfortable living." The "government," he went on, "formal and informal, political and economic, still owes to everyone an avenue to possess himself of a portion of [the nation's wealth] sufficient for his needs, through his own work." Alongside education, "training and retraining," decent work, and decent pay, FDR's Second Bill of Rights set out rights to decent housing and social insurance, including health care.

*But social rights* were not enough. No less central to the New Deal Constitution was the old Progressive idea that "political democracy" was impossible without what reformers called "industrial democracy." Industrialization had turned a citizenry of artisans and farmers into property-less wage earners locked in what the New Deal Court and Congress called "inherently unequal" and "dependent" relations with industrial employers. The problem was not only material want. It was dignity, the tyranny of the boss or foreman, the wage earner's lack of freedom, voice, or authority in the workplace. Wage slaves could not function as democratic citizens.

To "maintain a republican form of government," the great New Deal senator Robert Wagner explained, we must bring "constitutional democracy to industry." Workers had fundamental rights to form unions, engage in "concerted [economic and associational] activity," and bargain collectively with their employers. These were constitutional claims resting on freedom of speech, assembly, and association and on the economic liberties enshrined in the Thirteenth and Fourteenth Amendments. Long before the New Deal, state legislatures and Congresses embraced these arguments, enacting pro-union measures only to have them overturned by obdurate state and federal judges.

With the 1935 National Labor Relations Act (NLRA), Congress passed a new and robust set of protections for labor rights. The contradiction between "our republican form of government," declared Wagner, the act's sponsor, and the "serfdom" in "our factories,

mills, and offices" was "over." The responsibilities and expectations of citizenship—due process, free speech, assembly, and petition—would find their place at work. The lower courts condemned the Wagner Act, but with Congress's and the White House's prodding, the Supreme Court made its famous "switch in time" and upheld the statute. The Wagner Act's safeguards against reprisals for talking union, joining the union, or going on strike, along with its requirement that employers bargain with workers' duly chosen representatives, were seen as *constitutional* safeguards, even though they ran against employers and not the government.

These rights lie in ruins today. The future of the distributive Constitution may hinge on re-inventing and restoring them. Still, the New Deal was only half a victory for the distributive Constitution. The main legislative embodiments of Roosevelt's "second Bill of Rights"—the National Labor Relations Act and the Fair Labor Standards and Social Security Acts of the 1930s—were great achievements, but they were crafted to exclude African Americans. The same Southern Democrats who insisted on these exclusions joined forces with conservative Republicans to thwart FDR's later efforts to enact national health insurance, remedy the many gaps and exclusions in the New Deal statutes, and create a federal commitment to full employment. Thus, the constitutional bad faith—on the part of both parties and most of white America—that had earlier led all three branches of the federal government to abandon Reconstruction and condone Jim Crow and black (and poor white) disenfranchisement in the South continued to deprive black Americans of civil and political rights. And it also prevented all Americans from securing the full benefit of Roosevelt's Second Bill of Rights.

After the 1940s, social rights talk fell into disuse. New industrial unions had emerged as the only powerful, organized constituency for social and economic rights. Frustrated at every legislative crossroads in their efforts to join forces with FDR to "complete the New Deal" by enacting a more encompassing and inclusive welfare state, industrial union leaders began constructing a robust *private* welfare state via collective agreements with

large corporate employers in the prosperous core of the postwar economy. Contract unionism became a vehicle for private entitlements to job security, cost-of-living adjustments, private health care, and pension plans for union members. In that prosperous core, a vast new American "middle class" took shape, as union workplaces set a standard that even adamantly anti-union firms adopted.

In the prosperous post New Deal decades, progressive constitutional lawyering and politics focused on racial and gender justice. In the realm of work and social provision, that meant overcoming the exclusions that blighted the labor market, the private welfare state, and the caste-ridden system of social insurance and public assistance bequeathed by the New Deal. "Civil rights" became synonymous with these struggles. During this prosperous era, progressives forgot the distributive tradition and its core idea that the Constitution speaks to harsh class inequalities and the deprivation and domination they breed.

Today, the New Deal settlement is dead. The nation's once ample supply of stable, secure, decently paid unskilled or semi-skilled jobs has dried up, and the divided system of public and private social provision is vanishing. The end of welfare has melded the "undeserving poor" into the "working poor" and the long-term unemployed. In the thick of a Great Recession, we see the results of a decades-long crusade against corporate and governmental responsibility for individual welfare, which swept like a grim reaper through pension plans, health insurance, and labor standards, cutting the bonds of social solidarity and shifting the burdens of and responsibilities for economic risk from government and corporations to workers and their families.

Standard explanations for these developments hinge on globalization and heightened international competition. Yet, other nations have done well in meeting these challenges over the past three decades without succumbing to America's mounting inequality and abandoned social bonds. But those nations still have an institution that we lost: robust private sector unionism. Since the 1970s, U.S. union density has plummeted from roughly 40 percent to less than 10

percent of the private work force, thus weakening the political clout of working people. More than any other factor, political scientists and seasoned journalists agree, the erosion of organized labor explains Congress's failures to counteract the growing inequalities and inequities of the past few decades.

If the distributive tradition is right, and constitutional democracy depends on a measure of social democracy, then we are living through a constitutional crisis in slow motion: a crisis that today's attacks on public sector unions are sure to worsen. Intriguingly, while private sector union density has declined, public sector unionism has grown to 37 percent of the public work force. This has not offset the sharp diminution of organized labor's political heft, but it has mitigated it.

*What explains* the striking contrast between the decline of private sector unionism and the strong and still growing presence of public sector unions? The legal landscape has played a critical role. Different bodies of law govern in the two sectors. A key difference is that in the public sector, you don't put your job and paycheck on the line by "talking union" or getting involved in union activity. In the private sector, where the NLRA governs, the odds are good that you'll be fired, and neither the law nor the union will be able to do much about it.

The NLRA has become a toothless lion, which no longer provides any meaningful protection for the rights it enshrined. Beginning in the 1980s, as corporations began dismantling the postwar private welfare state, they also mounted aggressive efforts to thwart organizing and prevent union election victories. These anti-union campaigns are rife with textbook violations of the NLRA. Firing union activists is flatly illegal, but it carries no significant penalties. If Labor Board sanctions finally arrive, they are treated as a paltry cost of doing business, a small price to pay for defeating the union.

The reason you do not put your job on the line by "talking union" at a government workplace is that most public sector workers, at state and federal levels, are covered by civil service law and cannot be fired without "just

cause." If a union organizer or activist is fired in the midst of an organizing campaign, the public employer has the burden of showing that the firing was not in retaliation for taking part in the campaign. As a consequence of these laws (and the culture they have shaped), retaliatory firings and serious workplace reprisals for union activity are rare in the public sector.

Private employers, by contrast, are free to fire employees at any time for any reason at all—good, bad, or indifferent—as long as the reason is not forbidden by some other body of law, such as race or sex discrimination law—or like the NLRA, which, in theory, outlaws firings or reprisals for union activity. It is the worker's burden to show that the firing was to thwart the union campaign, but the employer can always claim that the reason for the firing was "malingering" or "insubordination" or "lateness" or literally anything else. And even if a Labor Board official eventually determines that union involvement motivated the firing, and a court upholds it, the sanction is trivial.

*What is to be done?* Organizing the unorganized should not be so enormously costly and perilous. Progressive labor and employment-law scholars and policy mavens are brimming with good ideas for fixing our broken framework of labor rights. Astonishingly, though, during the seventy-five years since the Wagner Act was passed, there has been only one significant set of changes to the statute, the Taft-Hartley Act of 1947, and it was anti-union. Since the New Deal, organized labor's many legislative successes have involved pushing through Congress laws that benefited working people across the board, union and non-union alike, which is surely a good thing. But organized labor has failed repeatedly to overcome the intense and unified opposition of employers to even modest pro-union reforms; and that failure has grown into a calamity.

The Civil Rights Act of 1964 and the Voting Rights Act of 1965 were not passed until the civil rights movement had mounted mass protests and mobilized support throughout the country—the case won't be different here. Labor law reform will happen if and when the

labor movement once more takes on the aspect of a civil rights movement.

Fortunately, among the most dynamic private sector unions, organizing campaigns show promise of doing just that. For example, the Service Employees International Union (SEIU) and HERE, the hotel and restaurant union, have won decent pay and benefits, worked with employers to fashion meaningful job ladders and training opportunities, and helped their predominantly new immigrant and African American members gain political clout in cities as disparate as Los Angeles, El Paso, Philadelphia, Las Vegas, New York, and Atlanta. These unions have turned to bold, industry-wide, community-based strategies. Operating outside the broken legal framework of the NLRA, they have reinvented the kinds of mass organizing campaigns and political alliances forged by unions of unskilled new immigrant workers at the turn of the last century. Their victories have demonstrated the restiveness and organizing prowess of these workers. But they also confirmed the extraordinary hurdles that the nation's legal order puts in the way of union organizers.

HERE and SEIU have developed canny new strategies aimed at today's national and international corporate structures. SEIU's Justice for Janitors campaigns, for example, do not simply negotiate and bargain with the office-building service contractors in the cities where its members work. Instead, the union has tracked the growing consolidation of building maintenance companies and of the ownership of high rises around the nation. Members of one local union fly across the country to sit in at bargaining sessions of another local, and a nationwide bond has developed among the janitors. If the local on strike in Los Angeles sends one picket to a building cleaned by the same employer or owned by the same real estate investment trust in New York, the New York janitors will not clean the building. Often, building owners bring fierce pressure on contractors to settle. Meanwhile, the wages of L.A.'s downtown janitors have risen from the minimum wage prior to unionization to roughly seventeen dollars an hour today. The union locals' immigrant members have mastered the arts of democratic self-rule in union governance and



mutual aid and advocacy in grievances against employers; they also played a signal role in electing that city's first Hispanic mayor in more than a century.

Working in hotels, especially house-keeping and food and beverage work, is seen as the classic low-wage, dead-end job. Yet, in many U.S. cities, HERE has fashioned labor-management partnerships that have changed the architecture of work, benefiting both hotel companies and workers. The logic of these partnerships has been to provide job security, solid pay, continued job training, and genuine career ladders for hotel workers (often recent immigrants and former welfare recipients), while, at the same time, overcoming severe recruitment, retention, flexibility, and skill deficit problems on hotel management's side. These union-management consortia have become known as premier sources of training and good jobs; they are also premier examples of social citizenship.

But we shouldn't be deluded by these union success stories. Employers greet labor's innovative political maneuvering and blistering publicity and boycott campaigns with libel and conspiracy suits and restraining orders; they meet strikers, pickets, and protests with injunctions and mass arrests. Surprisingly, these attacks have opened opportunities to change these labor contests into civil rights struggles.

These campaigns may be the context in which federal courts finally recognize the constitutionally protected status of boycotts of "unfair" businesses and resurrect the short-lived constitutional right to picket over a labor grievance—a right they recognized briefly in the 1940s, but interred in the 1950s. The mounting vigor of the Roberts Court's commitment to robust First Amendment protection for all manner of expression, from business advertising and corporate campaign spending to cross burning, anti-abortion demonstrations, and sex on the Internet, suggests that its interest in consistency here may outweigh its anti-labor bias. Consider the Court's eight-to-one vote last term in favor of full First Amendment protection for the "raucous," in-your-face, anti-gay pickets at a soldier's funeral, and it seems possible that doctrinal development has reached a point where the Court, whose most forceful conserva-

tives pride themselves on doctrinal consistency, may be ready to revisit labor picketing.

Union organizing without effective legal and constitutional safeguards remains a Herculean task. Like labor picketing, the scanty First Amendment protection enjoyed by labor boycotts as compared to civil rights boycotts rests on notions that fitted the doctrinal landscape decades ago, but not today. Above all, the rationale for not extending First Amendment protection to labor boycotts has been that they involve one self-interested economic actor seeking to inflict economic injury on another, whereas civil rights boycotts involve matters of common public concern. This vexed notion seems especially vulnerable in the face of organizing campaigns such as those waged by HERE and SEIU.

*The organizing campaigns* they wage and the boycotts they promote depend on labor-community alliances that dramatize the artificiality of the opposition of "economic" versus "political" or labor versus civil rights protest. These campaigns involve predominantly African American or Hispanic and new immigrant workplaces; they engage the local NAACP, local politicians, clergy and community leaders, and immigrant rights organizations, all of whom view the boycotting in support of workers in terms of community uplift and civil rights.

Campaigns like these may enable progressive attorneys to revive the Court's short-lived understanding of the public, political nature of labor grievances and weave the strands of First Amendment protection enjoyed by community-based pickets and civil rights protestors back into labor law. It is not hard to imagine Justice Scalia and some of the other conservative justices adopting such a view in the name of doctrinal consistency and a vibrant First Amendment across the board: a tit for tat in the wake of *Citizens United's* controversial new First Amendment safeguard for unlimited corporate spending in the electoral arena. If the Justices go down this path, they will give organized labor a golden opportunity to focus the media spotlight on the basic freedoms and civil liberties at stake in labor struggles.

But whether or not the justices oblige labor in this fashion, union activists at all levels understand the urgency of harnessing popular discontent to rebuild the labor movement. Let's imagine the door is open once again to labor law reform. What kinds of reforms will be on the table? First of all, firing workers for talking union should face the same kind of tough sanctions as other illegal firings based on race or sex. There is a modest enough way to accomplish this. A private right of action against anti-union discrimination would mean that labor law enforcement no longer rested solely with the weak NLRB. Individual and aggregate suits could be brought in federal courts, where the prospect of large damage judgments would enlist the private plaintiffs' bar and make employers pay attention.

*Other reform paths* are also possible—and essential. Some progressive advocates champion legally mandated forms of worker participation and labor representation with unions playing a more resolutely cooperative role inside the firm. Others hope to rekindle traditional unionism and collective bargaining through a combination of strengthened protections for union activity and “quicky elections” less subject to employer interference. Some aim instead to revive an older labor reform ideal of “collective laissez-faire” through a grand bargain: broader freedom of collective action exchanged for fewer legal safeguards than exist under the present NLRA (which keep established unions insulated from challenge). Still others suggest that our laws should offer employers a choice: either adopt robust and effective worker participation measures inside your business or submit to a reinvigorated framework of union representation.

But none of these pro-union measures will pass Congress unless the labor movement once more takes on the aspect of a civil rights movement. That may call for great internal changes in the more stodgy and autocratic unions—to bring movement energy, aspirations, and rights claims into their campaigns and restore the link between labor rights and American liberties. Meanwhile, liberals and progressives in public debate could respond

to right-wing constitutional politics with a rekindled account of the broader commitments embodied in the distributive Constitution for which organized labor has done the heavy lifting.

The former constitutional law professor in the White House has spoken eloquently about the Constitution and its commitments. In characteristically muted fashion, Barack Obama's familiar narrative echoes the account of the progressive Constitution I have sketched. It starts by proclaiming fidelity to the Founders, the “brave band of settlers” and “colonists.” In the next breath, though, it affirms that the Constitution is a work-in-progress, transformed by Civil War and Reconstruction and later amendments. And recall the key words in Obama's constitutional phrase book: “a more perfect union.” Progressives could gain a firmer footing on the contested ground of racial justice in the twenty-first century by attending to what Obama has had to say about the “part of our union that we have yet to perfect.”

When he talks in this constitutional key, he is evoking the tangled knot of race and class at the heart of the narrative: “the complexities of race in this country that we have never really worked through.” The president recounts the New Deal programs that provided unions, good jobs, housing loans, and other opportunities for white America and left blacks in the cold, with a legacy of poverty many have not yet overcome. Today, however, many white Americans, abandoned by a plutocratic government and “a corporate culture rife with . . . greed . . . [and] economic policies that favor the few over the many,” have come to resent affirmative action and civil rights laws. Obama laments that they now see opportunity “as a zero sum game, in which your dreams come at my expense.”

The Constitution, then, promises real equality of opportunity; it calls on all three branches of the national government to ensure that *all* Americans enjoy a decent education and livelihood, a measure of freedom and dignity at work, a chance to engage in the affairs of their communities and the larger society, and a chance to do something that has value in their own eyes. These are key parts of the liberty and equality that America promises

everyone. It means that Congress has not only the authority but the duty to underwrite these promises; and the judiciary has the duty to ensure that the vulnerable are not callously excluded.

*This broad constitutional* narrative is no less venerable and resonant than the Republicans' story of rugged individualism, free enterprise, and the rights of property. And like the latter in the hands of conservatives, this progressive narrative may flow from the broader realm of constitutional politics and culture into the interpretive judgments of a liberal-minded justice, as she decides not only headline-grabbing constitutional issues, but questions of statutory construction, federal preemption, and the like.

Our national constitutional dialogue is still without a strong defense of the basic precepts of the progressive constitutional tradition. If these problems are not addressed, the deep fears of hitherto secure "middle class" Americans that they or their offspring will end up in poverty may well produce illiberal and authoritarian responses. All the policy ideas that address our current impasse face severe political obstacles. Progressives need to argue that there are constitutional stakes in overcoming them. They need to demand that we address our unequal and unfair society as though our constitutional democracy depended on it. After all, it does.

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