



SPEAKING COLLECTIVELY: THE FIRST AMENDMENT, THE PUBLIC SECTOR,
AND THE RIGHT TO BARGAIN AND STRIKE

*Kate Andrias**

How is it that the Supreme Court has understood collective bargaining and strikes among public sector workers to fall outside the First Amendment's ambit? Public sector union activity involves expression, assembly, association, and petitioning. Workers' ability to form unions and to engage in concerted action in support of their shared goals is an important part of democratic governance. Through unions, workers engage in active citizenship; through association with one another, they express their views collectively and engage the government and the public on issues of public concern. Indeed, in the context of protecting the putative speech rights of union objectors, the Court has recognized that public sector collective bargaining is closely intertwined with politics and governance. Yet, with virtually no analysis, the Supreme Court and numerous lower courts have dismissed arguments for First Amendment protection of public sector bargaining and strikes, even allowing states to prohibit bargaining and criminalize strikes.

This Essay traces the history of the doctrine, contrasting it with public sector unions' own understanding of their First Amendment rights. It ar-

* Patricia D. and R. Paul Yetter Professor of Law, Columbia Law School. Thanks to Sam Lebovic, Katherine Bass, and the Knight Institute for organizing the symposium at which this paper was presented. I am grateful to the symposium participants and to Margaret Hassel and Jeremy Kessler for helpful feedback; to Louis Dugré, Margaret Hassel, Henry Merschat, Lydia Murray, Harmukh Singh, and Neha Sundaram for excellent research assistance; and to the Columbia law librarians for help with sources. This article was prepared for the Knight First Amendment Institute Symposium, *Permission to Speak Freely? Managing Government Employee Speech in a Democracy*, and posted online as part of that symposium.

gues that although the Supreme Court is unlikely to recognize public employee rights to bargain and strike, and although the executive branch has recently undertaken unprecedented attacks against federal workers and their unions, public sector workers are collectively exercising their First Amendment rights, engaging in a form of constitutional lawmaking from the bottom up. Theirs is the more persuasive interpretation, and one that Congress, state legislators, and other elected leaders could protect.

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INTRODUCTION

The First Amendment, as interpreted by the federal courts, provides government workers a right to associate in unions but no right to bargain collectively or to strike.¹ Indeed, it is a crime for employees of the federal government and of many states to participate in a strike or even to join an organization that asserts the right to strike against the government.² In some states, public sector workers are also

¹ See *infra* section III.A.

² 5 U.S.C. § 7311(3)–(4) (stating that “[a]n individual may not accept or hold a position in the Government of the United States . . . if he . . . participates in a strike, or asserts the right to strike . . . or . . . is a member of an organization of employees of the Government of the United States . . . that

prohibited from engaging in collective bargaining.³ States can discipline and fire workers who seek to bargain collectively about their working conditions or who, along with their coworkers, withdraw their labor in protest of their conditions.⁴

Yet, this interpretation sits uneasily with the text of the First Amendment, its purposes, and the Supreme Court’s First Amendment doctrine in other contexts. The amendment protects “the freedom of speech, . . . [and] the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.”⁵ The Court has found “a corresponding right to associate with others,” including “in pursuit of . . . political, social, [and] economic . . . ends.”⁶ And the primary purpose of the First Amendment, the Court has held, is to advance democratic self-governance.⁷

How is it that the Court has not understood collective bargaining and strikes among public sector workers to fall within the First Amendment’s ambit? Public sector union activity involves expression, assembly, association, and petitioning.

he knows asserts the right to strike against the Government”); 18 U.S.C. § 1918 (imposing fines or imprisonment); *Schapansky v. Dep’t of Transp.*, 735 F.2d 477, 484 (Fed. Cir. 1984) (upholding permanent removal of an air traffic controller who was a member of the union that struck and who stayed out of work, even though did not participate in a picket). For an overview of state laws, see MILLA SANES & JOHN SCHMITT, CTR. FOR ECON. & POL’Y RSCH., REGULATION OF PUBLIC SECTOR COLLECTIVE BARGAINING IN THE STATES 8–9 (2014), <https://cepr.net/documents/state-public-cb-2014-03.pdf>; *Collective Bargaining*, NAT’L CONF. OF STATE LEGISLATURES, <https://www.ncsl.org/civil-and-criminal-justice/collective-bargaining-database> (last updated June 28, 2022).

³ See SANES & SCHMITT, *supra* note 2, at 4–6.

⁴ It is important to note that while the First Amendment does not protect the right to bargain and strike, several states protect workers’ collective rights through their state constitutions, including some that have been recently amended. See Kate Andrias, *Constitutional and Administrative Innovation Through State Labor Law*, 2024 WISC. L. REV. 1467.

⁵ U.S. CONST. amend. 1.

⁶ *Roberts v. U.S. Jaycees*, 468 U.S. 609, 622 (1984).

⁷ See *Whitney v. California*, 274 U.S. 357, 374–75 (1927) (Brandeis, J., concurring). Scholars share this view. See OWEN M. FISS, *THE IRONY OF FREE SPEECH* (1996); ALEXANDER MEIKLEJOHN, *POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE* (1960); see also ASHUTOSH BHAGWAT, *OUR DEMOCRATIC FIRST AMENDMENT* (2020) (focusing on the entirety of the First Amendment and how it works to protect democracy); CASS R. SUNSTEIN, *DEMOCRACY AND THE PROBLEM OF FREE SPEECH* 121–65 (1993) (contending that free speech is a “precondition” for democracy); Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 20–35 (1971) (arguing that freedom of speech is central to “democratic organization”).

Workers' ability to form unions and to engage in concerted action in support of their shared goals is an important part of democratic governance. Through unions, workers engage in active citizenship; through workers' association with one another, they express their views collectively and engage the government and the public on issues of public concern.⁸ Indeed, in the context of protecting the putative speech rights of union objectors, the Court has recognized that public sector collective bargaining is closely intertwined with politics and governance.⁹ Yet, with virtually no analysis, the Supreme Court and numerous lower courts have dismissed arguments for First Amendment protection of public sector bargaining and strikes.¹⁰

The Supreme Court's parsimonious approach is long-standing. But, as this essay shows, public sector workers have for generations advanced a different—and more persuasive—interpretation of the Constitution. As early as the 1800s, federal government workers engaged in collective speech, assembly, and petition by striking and lobbying the government to redress their low wages and poor labor conditions.¹¹ Though they made little progress for over a century and often faced significant repression, during the 1960s and 1970s, strikes by tens of thousands of public sector workers led state legislators to pass new laws that enabled collective bargaining.¹² In a few jurisdictions, states also passed laws that protect the right to strike.¹³ And although the constitutional doctrine endured, numerous dissenting judges powerfully laid out the contrary case.

Since 2018, substantial numbers of public sector workers have, once again, engaged in pickets, protests, and strikes, even in states in which doing so is illegal.¹⁴ In so doing, they are reopening the question whether such activity should be considered beyond government proscription and protected as a fundamental right. Some cities and states have sought to restrain workers, including by enacting new

⁸ See *infra* notes 171–178 and accompanying text.

⁹ See *Janus v. Am. Fed'n of State, Cnty. & Mun. Emps., Council 31*, 585 U.S. 878, 925 (2018); see also *infra* text accompanying notes 135–142.

¹⁰ See, e.g., *infra* note 106 and accompanying text.

¹¹ See *infra* notes 22–25 and accompanying text.

¹² See *infra* notes 38–56 and accompanying text.

¹³ See *infra* note 55 and accompanying text.

¹⁴ See *infra* notes 182–190 and accompanying text.

laws that limit picketing, reduce union resources, and restrict the scope of bargaining, as well as by seeking injunctions against particular strikes.¹⁵ More recently, the second Trump Administration has launched an unprecedented assault on government unions. Through a series of executive orders, it has sought to reclassify thousands of federal workers as at-will employees;¹⁶ banned collective bargaining in numerous agencies where union rights have long been in place;¹⁷ refused to process automatic union dues deductions from employee paychecks;¹⁸ prohibited pro-union posters in some federal worksites;¹⁹ and terminated numerous existing collective bargaining agreements, ultimately stripping a million federal workers of union rights.²⁰ The future of free speech and association rights for federal government workers is very much up for grabs.

This Essay explores the First Amendment issues pervading public sector unions' organizing, bargaining, and strikes. Part I looks at the history of public sector unionism, highlighting the extent to which these union efforts have implicated core

¹⁵ See *infra* notes 33–54 and accompanying text.

¹⁶ Restoring Accountability to Policy-Influencing Positions Within the Federal Workforce, Exec. Order No. 14,171, 90 Fed. Reg. 8,625 (Jan. 31, 2025); Improving Performance, Accountability and Responsiveness in the Civil Service, 91 Fed. Reg. 5,580, 5,580 (Feb. 6, 2026) (codified at 5 C.F.R. pts. 210, 212, 213, 302, 432, 451, 537, 575, 752); Implementing Schedule Policy/Career in the Excepted Service, Exec. Order No. 14,410, § 5(b), 91 Fed. Reg. 34,893 (June 10, 2026.).

¹⁷ Exclusions From Federal Labor-Management Relations Programs, Exec. Order No. 14,251, 90 Fed. Reg. 14,553, 14,553–56 (Apr. 3, 2025); Further Exclusions from the Federal Labor-Management Relations Program, Exec. Order No. 14,343, 90 Fed. Reg. 42,683 (Sept. 3, 2025). See also Cong. Rsch. Serv., *National Security Exclusions from the Federal Service Labor-Management Relations Statutes*, CRS Legal Sidebar No. 11367 (updated Mar. 10, 2026) (explaining that E.O. 14,251 excluded forty agencies and subdivisions from federal labor-management statutes recognizing collective-bargaining rights for most federal employees).

¹⁸ Exec. Order No. 14,251, *supra* note 17; Exec. Order No. 14,343, *supra* note 17; see also Erich Wagner, *Trump Administration Ends Union Dues Collection for Most Feds Without Notice*, GOV'T EXEC. (Apr. 9, 2025).

¹⁹ Chris Marr, *Treasury Union Sues to Block IRS Ban on Pro-Labor Posters*, BLOOMBERG LAW (June 15, 2026).

²⁰ Exec. Order No. 14,251, *supra* note 17; Exec. Order No. 14,343, *supra* note 17; Eileen Sullivan, *Trump Orders Have Stripped Nearly Half a Million Federal Workers of Union Rights*, N.Y. TIMES (Sept. 1, 2025); Aurelia Glass, *The Trump Administration Ended Collective Bargaining for 1 Million Federal Workers*, CTR. FOR AM. PROGRESS (updated Oct 1, 2025).

First Amendment concerns.²¹ Part II examines how it came to be accepted doctrine that public sector employees lack a constitutional right to bargain and strike, although they have a right to unionize. Part III draws from dissents by federal and state court judges to elaborate the case for a First Amendment right to bargain and at least a qualified right to strike. It locates that right in the First Amendment's text, history, and democratic purposes, and in existing Supreme Court doctrine governing analogous contexts—and it explains why arguments to the contrary cannot withstand scrutiny. Part IV turns to the rise of public sector labor militancy since 2018, as well as to the Trump Administration's unprecedented recent attacks against public sector unions. It shows that, although the Supreme Court is unlikely to recognize public employee rights to bargain and strike, government workers and their unions are collectively exercising their First Amendment rights, engaging in a form of constitutional lawmaking from the bottom up. They have already won some support from political leaders. Ultimately, Congress, states, and a future President could make real the First Amendment's promise, notwithstanding the Supreme Court's erroneous doctrine.

I. HISTORY OF COLLECTIVE SPEECH, ASSEMBLY, AND PETITIONING AMONG PUBLIC SECTOR WORKERS

Although public sector strikes were illegal in every jurisdiction in the United States until the late 1960s, employees of state and federal governments have long engaged in collective labor action, with over 1,000 public sector strikes having occurred from the 1830s through 1940.²² Union efforts among government workers in these early years—and corresponding repressive efforts by the government—went to the core of the First Amendment. That is, workers built associations; they

²¹ This Essay does not explore the history of police and other law enforcement unions nor does it consider whether the Constitution protects their right to bargain or strike. Such unions, because they wield the coercive authority of the state, raise distinct issues. For an exploration of the issues around police unions, see Benjamin Levin, *What's Wrong with Police Unions?*, 120 COLUM. L. REV. 1333 (2020).

²² JOE BURNS, *STRIKE BACK: USING THE MILITANT TACTICS OF LABOR'S PAST TO REIGNITE PUBLIC SECTOR UNIONISM TODAY* 16 (2014). One of the earliest strikes occurred in the 1830s, when federal workers in naval shipyards struck, arguing for a 10-hour day; President Andrew Jackson intervened and granted the demand. See RICHARD C. KEARNEY & PATRICE M. MARESCHAL, *LABOR RELATIONS IN THE PUBLIC SECTOR* 14 (5th ed. 2014); JOSEPH E. SLATER, *PUBLIC WORKERS: GOVERNMENT EMPLOYEE UNIONS, THE LAW, AND THE STATE, 1900–1962*, at 16 (2004).

engaged in collective expression; and they assembled in groups and sought to petition the government regarding their grievances, including how it would spend its resources. For the most part, the government responded by suppressing their collective efforts.

In the late 1800s, for example, postal workers, organized under the auspices of the National Association of Letter Carriers, sought to petition the government for better wages and working conditions.²³ In 1895, Postmaster General William L. Wilson issued an order prohibiting any postal worker from even visiting Washington, D.C., to lobby.²⁴ When postal workers continued to petition the government nonetheless, the postal service banned union membership, and President Theodore Roosevelt subsequently imposed a gag order limiting federal workers from advocating for unionization.²⁵ The letter carriers' association protested the infringement on their constitutional right to petition the government.²⁶

After years of agitation by the labor movement, Congress eventually overturned Roosevelt's executive order with the Lloyd-LaFollette Act of 1912.²⁷ That Act nullified the gag rules forbidding federal employees to seek to influence legislation and recognized a limited right of federal government employees to associate.²⁸ The new law provided that "[t]he right of employees, individually or collectively, to petition Congress or a Member of Congress, or to furnish information to either House of Congress, or to a Committee or Member thereof, may not be interfered with or denied" and that "[e]ach employee shall have the right to form, join, or assist any labor organization . . . freely and without fear of penalty or reprisal."²⁹

²³ KEARNEY & MARESCHAL, *supra* note 22, at 14.

²⁴ *Id.* For an excellent exploration of this history, see Sarah Milov, *Gags and Grievance: The Labor Origins of Whistleblowing*, 7 J. FREE SPEECH L. 181 (2024).

²⁵ KEARNEY & MARESCHAL, *supra* note 22, at 14; STERLING D. SPERO, GOVERNMENT AS EMPLOYER 122 (1948).

²⁶ See KEARNEY & MARESCHAL, *supra* note 22, at 14–15; SPERO, *supra* note 25, at 123–25.

²⁷ See KEARNEY & MARESCHAL, *supra* note 22, at 14–15.

²⁸ See *id.* at 15.

²⁹ 5 U.S.C. § 7211, 7102; see also Carol Agger, *The Government and Its Employees*, 47 YALE L.J. 1109 (1938) (discussing how the LaFollette Act was considered a magna carta for labor when passed but ultimately offered weak protections).

However, it limited the right to participate in unions to organizations that did not impose a strike.³⁰

Notwithstanding the postal workers' success in overturning the gag rule, subsequent decades saw numerous restrictions imposed by both the federal government and state governments on employees' right to form unions, to bargain with their employers, and to strike. Efforts to unionize the public sector languished even when the private sector saw a rapid rise in unionization during the New Deal.³¹

In the aftermath of World War II, however, a massive strike wave occurred across the country.³² Though the bulk of the strikers worked in the private sector, they were joined by teachers and other public sector workers whose salaries had been eroded due to post-war inflation.³³ State governments responded aggressively to the rise in public sector union activity, passing numerous anti-strike laws designed to penalize government workers who struck.³⁴ For example, an ordinance passed in Dallas, Texas, in the 1940s declared, "It shall be unlawful for any . . . employee, or any group of them, of the city of Dallas, to organize a labor union, organization or club of city employees . . . [that seeks to demand changes to] working conditions or compensation . . . of the City of Dallas."³⁵ The Texas courts upheld the statute.³⁶

During the quarter century after World War II, public sector employment increased dramatically.³⁷ With the growth of the public sector also came a substantial increase in public employee union activity, with membership rising from about 400,000 in 1955 to 4 million in the 1970s.³⁸ In order to win recognition for their unions and to obtain collective bargaining agreements, public sector workers went

³⁰ See 37 Stat. 555.

³¹ See SLATER, *supra* note 22, at 74.

³² ROBERT ZIEGER, *AMERICAN WORKERS, AMERICAN UNIONS* 145, 148 (3d ed. 2002).

³³ ROGER V. SEIFERT, *TEACHER MILITANCY: A HISTORY OF TEACHER STRIKES 1896–1987*, at 59–60 (1987).

³⁴ See SLATER, *supra* note 22, at 94; SPERO, *supra* note 25, at 32–36.

³⁵ SPERO, *supra* note 25, at 30–31 (citing *PUBLIC MGMT.*, May 1946, at 150).

³⁶ *Id.* at 31 (citing *Cong. of Indus. Orgs. v. City of Dallas*, 198 S.W.2d 143 (Tex. Civ. App. 1946)).

³⁷ NELSON LICHTENSTEIN, *STATE OF THE UNION: A CENTURY OF AMERICAN LABOR 181–82* (2002).

³⁸ ZIEGER, *supra* note 32, at 163.

on strike, even though doing so was prohibited in every jurisdiction in the United States.³⁹

Teachers led the efforts in most jurisdictions. In New York City, for example, the United Federation of Teachers (UFT), a chapter of the American Federation of Teachers (AFT), organized a major strike that resulted in the city agreeing to establish collective bargaining for teachers in 1960.⁴⁰ After several additional strikes, New York teachers won significant wage increases and improved working conditions during the 1960s.⁴¹ By the early 1970s, teacher salaries in New York had quadrupled.⁴² Building on the UFT's work, teachers across the nation began striking for recognition, and 112 strikes occurred in public schools and libraries in 1968.⁴³

But strikes were not limited to teachers. Sanitation workers, air traffic controllers, social workers, municipal workers, and others struck in northern and southern states alike.⁴⁴ In many cases, as in the Memphis, Tennessee, sanitation strike at which Martin Luther King Jr. was assassinated, public workers' efforts were intertwined with those of the Civil Rights and Women's Rights Movements.⁴⁵

Public sector unions during this period often framed their issues as social issues. They understood they needed community support and fared the best when they identified their demands as meeting the needs of all workers and citizens.⁴⁶ They also understood that their efforts were fundamentally political in nature—they were making demands for changed behavior on the part of government. One

³⁹ BURNS, *supra* note 22, at 23–27.

⁴⁰ See *id.* at 30–31; see also DAVID GAFFNEY, *TEACHERS UNITED: THE RISE OF NEW YORK STATE UNITED TEACHERS* 25–27 (2007); MARJORIE MURPHY, *BLACKBOARD UNIONS: THE AFT & THE NEA, 1900–1980*, at 212–14 (1992).

⁴¹ See BURNS, *supra* note 22, at 30–31; GAFFNEY, *supra* note 40, at 25–27.

⁴² See BURNS, *supra* note 22, at 31; John P. Lloyd, *Teachers' Strikes*, in *THE ENCYCLOPEDIA OF STRIKES IN AMERICAN HISTORY* 256, 256 (Aaron Brenner, Benjamin Day & Immanuel Ness eds. 2009).

⁴³ See Sheila C. White, *Work Stoppages of Government Employees*, 92 MONTHLY LAB. REV., no. 12, Dec. 1969, at 32.

⁴⁴ BURNS, *supra* note 22, at 23–24; ZIEGER, *supra* note 32, at 209–12.

⁴⁵ See MICHAEL K. HONEY, *SOUTHERN LABOR AND BLACK CIVIL RIGHTS: ORGANIZING MEMPHIS WORKERS* 287–91 (1993); ZIEGER, *supra* note 32, at 211–12.

⁴⁶ PAUL JOHNSTON, *SUCCESS WHILE OTHERS FAIL: SOCIAL MOVEMENT UNIONISM AND THE PUBLIC WORKPLACE* 11–12, 209–10 (1994).

notable example was the 1978 strike by San Francisco Public Housing workers, which focused on problems of agency mismanagement of public housing, as well as the need for higher wages for workers. Their critique of the agency was joined by the tenants' association, which organized a rent strike in conjunction with the workers' strikes.⁴⁷ When the workers were offered a settlement, they voted to remain on strike until the tenants' association achieved its goals as well. After two more days, the housing authority reached an agreement with both unions.⁴⁸

To be sure, efforts by public sector unions were not always aligned with broader civil rights and community movements. In New York City, the teachers' union engaged in open conflict with the local civil rights movement, including by organizing a strike to oppose community control of schools.⁴⁹ Yet this experience, too, highlighted the deeply political nature of public employee strikes. They were fundamentally an exercise in democracy: How would resources of the community be spent?

Not only were public employee strikes of this time struggles in democracy, they were also understood by the unions to be an exercise of fundamental rights. That is, the unions framed the right to bargain and strike as rights that states did not have the power to restrict or punish, notwithstanding the law on the books.⁵⁰ For example, when the New York state legislature was considering a proposed statute that would penalize public workers for engaging in strikes, major New York unions passed a resolution declaring, "That no one, no body of legislators or government officials can take from us our rights as free men and women to leave our jobs when sufficiently aggrieved: when a group of our members are so aggrieved, then indeed they will strike."⁵¹

The AFT explained in a Q&A pamphlet published in 1970, in answer to the question whether anti-strike laws are unconstitutional, "Many legal authorities in the area of civil liberties believe that such laws and rules violate the 1st, 4th, 13th, and 14th Amendments to the United States Constitution, but it is highly doubtful

⁴⁷ See *id.* at 43–45.

⁴⁸ *Id.*

⁴⁹ JERALD E. PODAIR, *THE STRIKE THAT CHANGED NEW YORK: BLACKS, WHITES, AND THE OCEAN HILL-BROWNSVILLE CRISIS* (2002).

⁵⁰ See BURNS, *supra* note 22, at 98.

⁵¹ *Id.* at 99 (citing STERLING D. SPERO & JOHN M. CAPOZZOLA, *THE URBAN COMMUNITY AND ITS UNIONIZED BUREAUCRACIES* 244 (1973)).

that the Supreme Court would uphold an appeal by teachers at this time.”⁵² The union emphasized that teachers have “the moral right to strike even though the law or a court injunction may forbid it.”⁵³ Because public employees in the 1960s and 1970s believed that restrictions on their right to strike were illegitimate, they contended they were justified in defying judicial injunctions.⁵⁴

Eventually, the public employee unions’ assertion of rights led to changes in the law. In 1966, Vermont loosened restrictions on strike activity for teachers. Hawaii legalized public employee strikes in 1970. In the 1980s, Ohio, Illinois, and California followed.⁵⁵ These legal victories were important. But in many ways legal restrictions on strikes had little bearing on strike activity as employers and the public frequently treated strikes as legitimate even when they were technically illegal.⁵⁶ As important as the law on the books was the collective effort of government workers and the broader political, economic, and social context in which workers struck.

By the 1980s, public sector strikes became less successful and ultimately less common.⁵⁷ The financial crisis of the late 1970s led to budget cuts, hiring freezes, and efforts to clamp down on union negotiations.⁵⁸ Cutting public sector worker salaries became popular.⁵⁹ In 1980, President Ronald Reagan fired over 10,000 government employees—air traffic controllers—for conducting an illegal strike.⁶⁰ These actions signaled to public and private sector employers alike the president’s support for union-busting and buoyed already growing efforts to weaken unions.⁶¹

⁵² AM. FED’N OF TEACHERS, SHOULD YOUR TEACHER STRIKE? (OR YOUR MAILMAN? FIREMAN? SANITATION MAN? POLICEMAN?) (1970), <http://www.substancenews.net/articles.php?page=3423>.

⁵³ *Id.*

⁵⁴ See BURNS, *supra* note 22, at 106–07.

⁵⁵ See *id.* at 124–28.

⁵⁶ Joseph A. McCartin, *Context Matters More: A Response to Joe Burns*, 27 LAB. STUD. J. 349 (2013) (emphasizing the limited role of law).

⁵⁷ See Joseph A. McCartin, “Fire the Hell Out of Them”: Sanitation Workers’ Struggles and the Normalization of the Striker Replacement Strategy in the 1970s, 2 LABOR: STUD. WORKING-CLASS HIST. AMS., no. 3, 2005, at 67, 70–71.

⁵⁸ See *id.* at 78–80.

⁵⁹ See *id.* at 80–81.

⁶⁰ See *id.* at 70.

⁶¹ BURNS, *supra* note 22, at 50; JOSEPH A. MCCARTIN, COLLISION COURSE: RONALD REAGAN, THE AIR TRAFFIC CONTROLLERS, AND THE STRIKE THAT CHANGED AMERICA (2011).

The next decades saw capital flight from union-dense regions, first to the non-union South and then overseas, along with increased use of subcontractors and other precarious work arrangements, and greater use of anti-union management tactics. Though on the defensive, public sector unions largely maintained their density, while union membership in the private sector plummeted.⁶²

With the Great Recession of 2008, however, union opponents renewed their attack on public sector unions, advancing the argument that government workers “constituted an ‘elite’ whose pay and pensions were not sustainable.”⁶³ The notion that public sector union contracts were undermining the finances of cities and states gained traction. Against this background, and with an increasingly conservative Supreme Court, the National Right to Work Committee (NRTWC), which had long fought unions,⁶⁴ began a renewed attack on the ability of public sector unions to collect fees.⁶⁵ In 2012, the conservative majority on the Supreme Court took up the cause, granting certiorari in cases presenting the constitutionality of public sector union fees, despite the absence of any circuit splits.⁶⁶ A series of cases culminated in the Court’s holding in *Janus v. AFSCME* that objecting workers have a First Amendment right not to pay fees to a union, even if the union is obligated to

⁶² Lichtenstein, *supra* note 37, at 261.

⁶³ Kate Andrias, *Janus’s Two Faces*, 2018 SUP. CT. REV. 21, 25 (citing DANIEL DiSALVO, GOVERNMENT AGAINST ITSELF: PUBLIC UNION POWER AND ITS CONSEQUENCES (2015)); *see also* STEVEN GREENHUT, PLUNDER!: HOW PUBLIC EMPLOYEE UNIONS ARE RAIDING TREASURIES, CONTROLLING OUR LIVES, AND BANKRUPTING THE NATION (2009); STEVEN MALANGA, SHAKEDOWN: THE CONTINUING CONSPIRACY AGAINST THE AMERICAN TAXPAYER (2010); MALLORY FACTOR, SHADOWBOSSSES: GOVERNMENT UNIONS CONTROL AMERICA AND ROB TAXPAYERS BLIND (2012).

⁶⁴ *See* SOPHIA Z. LEE, THE WORKPLACE CONSTITUTION FROM THE NEW DEAL TO THE NEW RIGHT 123–25, 227–31, 238–42 (2014) (discussing the history of the NRTWC and the related legal defense foundation).

⁶⁵ *See* Joseph A. McCartin, *Public Sector Unionism Under Assault: How to Combat the Scapegoating of Organized Labor*, NEW LAB. F. (Jan. 19, 2016), <https://perma.cc/QJX4-RAUQ>; Moshe Z. Marvit, *For 60 Years, This Powerful Conservative Group Has Worked to Crush Labor*, NATION (July 5, 2018), <https://perma.cc/E3PH-T23U>.

⁶⁶ *See, e.g., Knox v. Serv. Emps. Int’l Union, Local 1000*, 567 U.S. 298 (2012).

represent those dissenting workers in bargaining and grievance procedures.⁶⁷ Justice Alito declared: “Fundamental free speech rights are at stake.”⁶⁸ During this same period, the NRTWC and conservative Republicans pushed for anti-union laws in previously union-friendly states, bringing the total number of states that prohibit agency fees in the private sector to 27.⁶⁹ The right-to-work campaigns were part of a broader, long-running project to undermine unions and to weaken the Democratic Party, with which unions had long been associated.⁷⁰

II. THE SUPREME COURT AND THE FIRST AMENDMENT RIGHT OF PUBLIC EMPLOYEES TO ORGANIZE, BARGAIN, AND STRIKE

Despite the fact that public sector union activity over the last century has consistently implicated core First Amendment values and activity, the Supreme Court has provided it little constitutional protection. Indeed, with the exception of cases on union objectors, the Court’s treatment of public sector unions has been cursory, at best; nearly all of its consideration of collective labor rights has involved private sector workers.

During the early decades of the 20th century, the Court, and the federal judiciary generally, was decidedly hostile to all labor activity. The Court held that both the federal and state governments violated the freedom to contract protected by the due process clauses of the Fifth and Fourteenth Amendments when they

⁶⁷ See *Janus v. Am. Fed’n of State, Cnty., & Mun. Emps., Council 31*, 585 U.S. 878 (2018).

⁶⁸ *Id.* at 886. Indeed, Justice Samuel Alito went further, holding that the First Amendment protects not only a right to opt out of union fees but requires that workers affirmatively consent before any fees can be taken from their paychecks. *Id.* at 930; cf. Aaron Tang, *Janus and the Law of Opt-Out Rights*, HARV. L. REV. BLOG (July 2, 2018), <https://perma.cc/T9WJ-WBG6> (emphasizing the novelty of the opt-out rule).

⁶⁹ *Right to Work States Timeline*, NAT’L RIGHT TO WORK COMM., <https://nrtwc.org/facts/state-right-to-work-timeline-2016> (showing 27 states with right-to-work laws but noting that Michigan repealed its law in 2024); cf. Noam Scheiber, *Missouri Voters Reject Anti-Union Law in a Victory for Labor*, N.Y. TIMES (Aug. 7, 2018).

⁷⁰ See James Feigenbaum, Alexander Hertel-Fernandez & Vanessa Williamson, *From the Bargaining Table to the Ballot Box: Political Effects of Right to Work Laws* (Nat’l Bureau of Econ. Rsch., Working Paper No. 24259, 2018), <http://www.nber.org/papers/w24259.pdf> (describing the political effects of right to work laws).

banned discrimination against union members, and that Congress also lacked sufficient authority under the Commerce Clause to do so.⁷¹ At the same time, federal courts aggressively curtailed strikes and boycotts using their injunctive power, even jailing labor leaders.⁷²

Beginning in the 1920s, the Supreme Court on a few occasions gestured favorably to the right of workers in the private sector to associate and to engage in pickets and strikes. For example, in 1921, newly appointed Chief Justice William Howard Taft rejected a conspiracy action against a union.⁷³ In so doing, he recognized “the right [of workers] to combine for . . . lawful purpose[s].”⁷⁴ Unions, he emphasized, were “essential to give laborers opportunity to deal on equality with their employer.”⁷⁵ And, he wrote, “the strike” is “a lawful instrument in a lawful economic struggle or competition between employer and employees as to the share or division between them of the joint product of labor and capital.”⁷⁶ In 1923, the Taft Court considered the constitutionality of a Kansas state law that established compulsory arbitration for labor disputes, while prohibiting strikes.⁷⁷ In its opinion striking down the statute, Taft emphasized that the law unduly burdened business,

⁷¹ See *Adair v. United States*, 208 U.S. 161, 172 (1908) (striking down federal statute prohibiting yellow dog contracts); *Coppage v. Kansas*, 236 U.S. 1, 13 (1915) (striking down similar state statute).

⁷² AFL president Samuel Gompers twice came before the Supreme Court appealing sentences of imprisonment imposed for contempt after he violated an antiboycott injunction. See *Gompers v. United States*, 233 U.S. 604, 605–06 (1914); *Gompers v. Buck’s Stove & Range Co.*, 221 U.S. 418, 435–36 (1911). For more on courts’ punitive responses to labor action, see generally DANIEL R. ERNST, *LAWYERS AGAINST LABOR: FROM INDIVIDUAL RIGHTS TO CORPORATE LIBERALISM* (1995); WILLIAM E. FORBATH, *LAW AND THE SHAPING OF THE AMERICAN LABOR MOVEMENT* (1991); CHRISTOPHER L. TOMLINS, *THE STATE AND THE UNIONS: LABOR RELATIONS, LAW, AND THE ORGANIZED LABOR MOVEMENT IN AMERICA, 1880–1960*, at 49–52, 61–67 (1985).

⁷³ See *Am. Steel Foundries v. Tri-City Cent. Trades Council*, 257 U.S. 184, 208–10 (1921); see also ROBERT C. POST, *THE TAFT COURT: MAKING LAW FOR A DIVIDED NATION, 1921–1930*, at 1240–42 (2024).

⁷⁴ *Am. Steel Foundries*, 257 U.S. at 209.

⁷⁵ *Id.*

⁷⁶ *Id.* Notably, however, Taft did not repudiate the Court’s holdings in prior cases, like *Duplex Printing*, that allowed injunctions of disfavored secondary labor actions, emphasizing that strikes were protected only if they had lawful purpose under the common law. See POST, *supra* note 73, at 1242, 1247.

⁷⁷ *Chas. Wolff Packing Co. v. Ct. of Indus. Rels. of Kan.*, 262 U.S. 522, 540–41 (1923).

but he also suggested that workers had a corresponding right to strike guaranteed by the Due Process Clause of the Fourteenth Amendment.⁷⁸

Yet the bulk of the Court's opinions during the pre-New Deal era pulled in the opposite direction. In 1921, again with Chief Justice Taft writing, the Court invalidated a state statute limiting judges' authority to issue injunctions in labor disputes, opining that labor picketing constituted "moral coercion" and "a law which operates to make lawful such a wrong . . . deprives the owner of the business and the premises of his property without due process."⁷⁹ A few years later, in 1926, the Taft Court upheld the criminal conviction of a union officer for engaging in a strike, rejecting both constitutional and common law arguments for an "absolute right to strike."⁸⁰ Anti-union court rulings were not issued only by the Supreme Court. Between 1880 and 1930, the courts issued more than 4,000 injunctions against workers' strikes and pickets, imprisoned numerous labor leaders, and struck down hundreds of redistributive local, state, and federal laws under the guise of the U.S. Constitution.⁸¹

The passage of the Norris-LaGuardia Act in 1932 and the National Labor Relations Act (NLRA) in 1935 dramatically changed the landscape for private sector workers. The Norris-LaGuardia Act limited the power of federal courts to impose injunctions in non-violent labor disputes⁸² while the NLRA codified employees' right to engage in concerted action, to bargain, and to strike and established an agency, the NLRB, to enforce those rights.⁸³ Against the background of the Great

⁷⁸ See *id.* For an expansive reading of *Wolff Packing*, see James G. Pope, *The Right to Strike Under the United States Constitution: Theory, Practice, and Possible Implications for Canada*, 15 CANADIAN LABOUR & EMP. L.J. 223, 239–40. (2010).

⁷⁹ *Truax v. Corrigan*, 257 U.S. 312, 328 (1921). Justice Brandeis dissented, writing that "peaceful picketing is not unlawful." *Id.* at 371. See Laura Weinrib, *The Right to Work and the Right to Strike*, 2017 U. CHI. LEGAL F. 513, 521.

⁸⁰ *Dorchy v. Kansas*, 272 U.S. 306, 311 (1926) ("Neither the common law, nor the Fourteenth Amendment, confers the absolute right to strike.").

⁸¹ FORBATH, *supra* note 72, at 193.

⁸² See 47 Stat. 70 (1932).

⁸³ See 49 Stat. 449 (1935). The National Industrial Recovery Act of 1933 had similarly recognized the right of workers to organize unions, though it was ultimately struck down by the Court on other grounds. *Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935).

Depression, President Franklin D. Roosevelt's threat of court-packing, and widespread labor unrest, the Supreme Court did a constitutional about-face and upheld the statutes against Commerce Clause and due process challenges. Moreover, in *NLRB v. Jones & Laughlin Steel Corp.*, while upholding the NLRA as a valid exercise of commerce power, the Court gestured toward an affirmative constitutional right for workers, noting that they have a "fundamental right" to organize.⁸⁴

During this period, it seemed that strikes, in the private sector at least, might win protection under the First Amendment. As Laura Weinrib has documented, the ACLU promoted a First Amendment "'right of agitation': a right of workers to picket, boycott, and strike."⁸⁵ After the Court's 1937 decisions upholding the NLRA and repudiating the use of the Due Process Clause as an anti-labor tool, the First Amendment approach became more popular among labor leaders, as well as among sympathetic government officials. The basis for constitutional protection for labor activity seemed strong: The democratic concerns of the First Amendment and labor rights were closely connected.

Briefly, the view gained support from the Supreme Court. In 1937, Justice Louis Brandeis, writing for a majority, upheld a Wisconsin statute that authorized labor picketing; he emphasized that even without statutory authorization, "members of a union" could "make known the facts of a labor dispute" through peaceful picketing because "freedom of speech is guaranteed by the Federal Constitution."⁸⁶ Then, in 1940, in *Thornhill v. Alabama*, the Court upheld the right to picket as central to the First Amendment's democratic purposes.⁸⁷ In striking down a state statute that criminalized picketing, Justice Frank Murphy wrote: "Free discussion concerning

⁸⁴ *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 33 (1937).

⁸⁵ See Weinrib, *The Right to Work and the Right to Strike*, *supra* note 79, at 526 (quoting ACLU, *THE FIGHT FOR FREE SPEECH* 4–5, 15–18 (1921)); see also LAURA WEINRIB, *THE TAMING OF FREE SPEECH: AMERICA'S CIVIL LIBERTIES COMPROMISE* (2016).

⁸⁶ *Senn v. Tile Layers Protection Union, Local No. 5*, 301 U.S. 468, 478 (1937). Brandeis distinguished *Truax* as having involved "libelous attacks and abusive epithets" as well as "threats and intimidation" which constituted "an admitted tort." *Id.* at 480; see also *Hague v. Comm. for Indus. Org.*, 307 U.S. 496 (1939) (affirming that the right to discuss and inform people concerning the advantages and disadvantages of unions is protected not only as part of free speech but also as part of free assembly).

⁸⁷ 310 U.S. 88, 102–05 (1940).

the conditions in industry and the causes of labor disputes appears to us indispensable to the effective and intelligent use of the processes of popular government to shape the destiny of modern industrial society.”⁸⁸ He explained the connection between labor’s right to picket and the First Amendment’s purposes:

The safeguarding of these rights to the ends that men may speak as they think on matters vital to them and that falsehoods may be exposed through the processes of education and discussion is essential to free government. Those who won our independence had confidence in the power of free and fearless reasoning and communication of ideas to discover and spread political and economic truth. . . . Abridgment of freedom of speech and of the press, however, impairs those opportunities for public education that are essential to effective exercise of the power of correcting error through the processes of popular government.⁸⁹

Thornhill’s companion case, *Carlson v. California*, added that the “liberty of communication” protected by the First Amendment also included the peaceful dissemination of “the facts of a labor dispute . . . by pamphlet, by word of mouth or by banner.”⁹⁰

Building on *Thornhill* and *Carlson*, the Court explicitly recognized a First Amendment right to organize unions in *Thomas v. Collins*, holding that the government could not impose onerous licensing requirements on union organizers.⁹¹ The case involved a criminal prosecution of a labor leader who had made a speech urging union membership without registering in advance with the state as required by Texas law.⁹² The Supreme Court acknowledged “[t]hat the State has power to regulate labor unions with a view to protecting the public interest.”⁹³ But the Court declared that “[s]uch regulation . . . must not trespass upon the domains set apart for free speech and free assembly.”⁹⁴ And, the First Amendment, the Court held,

⁸⁸ *Id.* at 103.

⁸⁹ *Id.* at 95.

⁹⁰ 310 U.S. 106, 113 (1940).

⁹¹ See 323 U.S. 516, 533–34 (1945).

⁹² See *id.* at 520–24.

⁹³ *Id.* at 532.

⁹⁴ *Id.*

protects the employees' attempts to persuade others to join a union.⁹⁵ Notably, the Court read the amendment holistically, emphasizing that the freedom in speech was coupled "with the rights of the people peaceably to assemble and to petition for redress of grievances."⁹⁶

As Laura Weinrib has documented, when these cases were decided, they were thought to be transformative. Lee Pressman, general counsel of the Congress of Industrial Organizations (CIO) who argued *Carlson* in the Supreme Court, announced that "labor action is nothing more or less than the exercise of constitutional rights."⁹⁷ Herbert Wechsler, at the annual meeting of the Association of American Law Schools, announced that the labor picketing cases were of "major significance."⁹⁸

But by the late 1940s, in the context of another wave of mass labor uprisings, this time met with effective countermobilization by business, the Court backed away from robust constitutional protections for labor activity, even for private sector workers. It upheld numerous restrictions on private sector employees' right to picket and strike, including the 1947 Taft Hartley Act's prohibition on secondary strikes.⁹⁹ Although the Court never overruled its prior broad statements of First Amendment protection for labor activity, it allowed states to prohibit a wide swath of labor picketing when such picketing was deemed to be coercive and in violation of state policy.¹⁰⁰ The Court emphasized that picketing was more than pure speech

⁹⁵ *Id.* at 538. However, several Justices concurred on grounds that would later prove fateful to union activity; they emphasized that they believed the constitutional protection extended to those who do "no more than speak." *Id.* at 544 (Douglas, J., concurring).

⁹⁶ *See id.* at 530.

⁹⁷ Weinrib, *The Right to Work and the Right to Strike*, *supra* note 79, at 527 (quoting GILBERT J. GALL, *PURSuing JUSTICE: LEE PRESSMAN, THE NEW DEAL, AND THE CIO* 108 (1999)).

⁹⁸ *Id.* (citing Harry Shulman & Herbert Wechsler, *Symposium on Civil Liberties*, *AALS Annual Meeting, Chicago, Dec. 27, 1940*, 9 AM. L. SCH. REV. 881, 885 (1942)).

⁹⁹ *See, e.g., Int'l Bhd. of Teamsters, Local 695, A.F.L. v. Vogt, Inc.*, 354 U.S. 284, 289–90 (1957); *Int'l Bhd. of Teamsters, Chauffeurs, Warehousemen & Helpers Union, Local 309 v. Hanke*, 339 U.S. 470, 474–75 (1950).

¹⁰⁰ *See Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 503 (1949) (holding that pickets seeking to prevent entity from selling to nonunion businesses could be enjoined under state law without violating constitutional guarantees of freedom of speech).

and that it was economic in nature.¹⁰¹ The result was that the most effective strikes and pickets lost constitutional protection, even though comparable activity outside the labor context remained safeguarded by the First Amendment.¹⁰²

At the same time, the Court signaled in passing that it believed public sector workers were entitled to even fewer labor rights than their private sector counterparts. In the 1947 case, *United States v. United Mine Workers*, it held that the provisions of the Norris-LaGuardia Act did not apply to labor disputes involving mineworkers who had become public sector workers by virtue of the government's seizure of their mine.¹⁰³ In so doing, the Court observed that the purpose of the Norris-LaGuardia Act was to protect workers' rights

to contribute to the worker's "full freedom of association, self-organization, and designation of representatives of his own choosing, to negotiate the terms and conditions of his employment, and that he shall be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives . . . for the purpose of collective bargaining. . . ." ¹⁰⁴

However, according to the Court, "these considerations, on their face, obviously do not apply to the Government as an employer or to relations between the Government and its employees."¹⁰⁵

Even during the massive wave of public sector organizing in the 1960s and 1970s, the Court said very little regarding public sector unions' constitutional rights to bargain and strike. But it continued to assume few such rights existed. In 1971,

¹⁰¹ *See id.*

¹⁰² Weinrib, *The Right to Work and the Right to Strike*, *supra* note 79, at 532–33. For analysis of how strikes lost constitutional protection and the gulf between the First Amendment in the labor context and other contexts, see Catherine Fisk & Jessica Rutter, *Labor Protest Under the New First Amendment*, 36 BERKELEY J. EMP. & LAB. L. 277, 295–300 (2015); James G. Pope, *The First Amendment, the Thirteenth Amendment, and the Right to Organize in the Twenty-First Century*, 51 RUTGERS L. REV. 941 (1999); James G. Pope, *How American Workers Lost the Right to Strike, and Other Tales*, 103 MICH. L. REV. 518 (2004); James G. Pope, *Labor and the Constitution: From Abolition to Deindustrialization*, 65 TEX. L. REV. 1071 (1987).

¹⁰³ 330 U.S. 258, 289 (1947).

¹⁰⁴ *Id.* at 274 (quoting 29 U.S.C. § 102).

¹⁰⁵ *Id.* Justices Murphy and Rutledge dissented vehemently. For Murphy, the key point was that the dispute arose between private mine companies and workers. *Id.* at 337–38 (Murphy, J., dissenting). Rutledge emphasized the importance of the separation of powers. *Id.* at 385 (Rutledge, J., dissenting)

the Court in *United Federation of Postal Clerks v. Blount* affirmed without opinion a three-judge district court's ruling recognizing the First Amendment right to organize unions but holding that the government could condition employment on a promise not to strike.¹⁰⁶ Then, in 1979, the Court in *Smith v. Arkansas State Highway Employees* reversed the Eighth U.S. Circuit Court of Appeals' ruling that the First Amendment provided a right of unions to pursue grievances on behalf of their members.¹⁰⁷ According to the Court, "The public employee surely can associate and speak freely and petition openly, and he is protected by the First Amendment from retaliation for doing so."¹⁰⁸ But, the Court asserted with little explanation or analysis that "the First Amendment does not impose any affirmative obligation on the government to listen, to respond or, in this context, to recognize the association and bargain with it."¹⁰⁹

III. THE DEMOCRATIC FIRST AMENDMENT AND THE RIGHT OF PUBLIC SECTOR WORKERS TO UNIONIZE, BARGAIN, AND STRIKE

A. *Essential Organizational Activity, Fundamental Rights, and the Political Nature of Public Sector Unions*

The Supreme Court has never satisfactorily explained why the First Amendment does not protect public sector employees' rights to bargain (i.e., to present collective demands to the government) and to picket and strike in furtherance of their association's goals. As did the Supreme Court in *Smith*, numerous lower courts have recognized that the right of public sector workers to associate with one another in unions is guaranteed under the First Amendment's protection for association.¹¹⁰ The constitutional right to bargain and strike would seem to flow directly

¹⁰⁶ See *United Fed'n of Postal Clerks v. Blount*, 325 F. Supp. 879, 883 (D.D.C. 1971), *aff'd*, 404 U.S. 802 (1971) (Wright, J., concurring).

¹⁰⁷ See *Smith v. Ark. State Highway Emps., Local 1315*, 441 U.S. 463, 463–64 (1979).

¹⁰⁸ *Id.* at 465 (internal citations omitted).

¹⁰⁹ *Id.*

¹¹⁰ See *Am. Fed'n of State, Cnty. & Mun. Emps., AFL-CIO v. Woodward*, 406 F.2d 137, 140 (8th Cir. 1969) (holding that public employees could not be discharged because they joined a labor union); *McLaughlin v. Tilendis*, 398 F.2d 287, 288 (7th Cir. 1968) ("It is settled that teachers have the right of free association, and unjustified interference with teachers' associational freedom violates the Due Process clause of the Fourteenth Amendment. . . . Unless there is some illegal intent, an individual's right to form and join a union is protected by the First Amendment."); *Atkins v. City of Charlotte*, 296 F. Supp. 1068, 1077 (W.D.N.C. 1969) ("[T]he firemen of the City of Charlotte are

from this well-established right of association. As Judge J. Skelly Wright declared in his concurrence in *Blount*, the rights to bargain and strike are intimately related to the fundamental right to organize: “If the inherent purpose of a labor organization is to bring the workers’ interests to bear on management, the right to strike is, historically and practically, an important means of effectuating that purpose.”¹¹¹ The California Supreme Court concluded the same when considering rights of sanitation workers: “[T]he right to unionize means little unless it is accorded some degree of protection regarding its principal aim—effective collective bargaining. For such bargaining to be meaningful, employee groups must maintain the ability to apply pressure or at least threaten its application. A creditable right to strike is one means of doing so.”¹¹²

The Supreme Court has recognized in other contexts that essential organizational activities are part and parcel of the right to associate; in order to make real the right to associate, other organizational activities must be protected.¹¹³ As Judge Skelly Wright argued, the same applies, or should apply, to the right to strike: “A union that never strikes, or which can make no credible threat to strike, may wither

granted the right of free association by the First and Fourteenth Amendments of the United States Constitution; . . . that right of association includes the right to form and join a labor union”); *see also Blount*, 325 F. Supp. at 883 (holding that the right “to organize collectively and to select representatives for the purposes of engaging in collective bargaining” is “fundamental and constitutionally protected”); *cf. Beilan v. Bd. of Pub. Educ.*, 357 U.S. 399, 405 (1958) (“By engaging in teaching in the public schools, petitioner did not give up his right to freedom of belief, speech or association.”); *Keyishian v. Bd. of Regents*, 385 U.S. 589, 605 (1967) (rejecting the argument that public employment “may be conditioned upon the surrender of constitutional rights which could not be abridged by direct government action”).

¹¹¹ *Blount*, 325 F. Supp. at 885 (Wright, J., concurring).

¹¹² *See Cnty. Sanitation Dist. No. 2 v. L.A. Cnty. Emps. Ass’n, Local 660*, 699 P.2d 835, 851 (Cal. 1985). Thus, while the right to bargain presents some distinct issues from the right to strike under the First Amendment, this Essay broadly treats them together; both are essential organizational activities that flow from the right to associate.

¹¹³ *See Williams v. Rhodes*, 393 U.S. 23, 31 (1968) (holding that Ohio’s election laws impermissibly burdened the right to associate by effectively denying minor party access to the ballot); *United Mine Workers of Am., Dist. 12 v. Ill. State Bar Ass’n*, 389 U.S. 217, 225 (1967) (rejecting a decree that restricted union’s use of an attorney to represent members in workmen’s compensation cases, impairing the associational rights of the Mine Workers).

away in ineffectiveness. That fact is not irrelevant to the constitutional calculations.”¹¹⁴ Then-Chief Justice Thomas H. Roberts of the Rhode Island Supreme Court reasoned similarly:

Obviously, the right to strike is essential to the viability of a labor union, and a union which can make no credible threat of strike cannot survive the pressures in the present-day industrial world. If the right to strike is fundamental to the existence of a labor union, that right must be subsumed in the right to organize and bargain collectively. . . . The collective bargaining process, if it does not include a constitutionally protected right to strike, would be little more than an exercise in sterile ritualism.¹¹⁵

Notably, in the context of civil rights consumer boycotts, the Supreme Court has agreed, recognizing that peaceful collective action is part and parcel of the rights of freedom of association and expression.¹¹⁶ In *NAACP v. Claiborne Hardware*, the Court expressly rejected the common law view that boycotts could be prohibited because of their coercive nature: “Speech does not lose its protected character . . . simply because it may embarrass others or coerce them into action.”¹¹⁷ As other scholars have argued, differential treatment of consumer boycotts and labor strikes runs afoul of the well-established principle of content neutrality; no principled justification divides the two.¹¹⁸

¹¹⁴ *Blount*, 325 F. Supp. at 885.

¹¹⁵ *School Comm. v. Westerly Teachers Ass’n*, 299 A.2d 441, 447–48 (R.I. 1973) (Roberts, C.J., dissenting) (footnotes and internal citations omitted). The Supreme Court of Canada has similarly recognized that freedom of association covers individuals who participate in a democratic organization that “expresses a majority viewpoint” in carrying out that activity. See *Health Servs. & Support–Facilities Subsector Bargaining Ass’n v. British Columbia*, [2007] 2 S.C.R. 391, ¶¶ 26, 28, 82, 86 (Can.); see also Pope, *The Right to Strike*, *supra* note 78, at 227.

¹¹⁶ See *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 907–15 (1982) (holding that a peaceful boycott was protected under the First Amendment freedoms of association and expression); see also *Garner v. Louisiana*, 368 U.S. 157, 201 (1961) (Harlan, J., concurring) (arguing that the First and Fourteenth Amendments protect sit-ins protesting the racial practices of private businesses); *Hughes v. Superior Court*, 198 P.2d 885, 896 (Cal. 1948) (Traynor, J., dissenting) (“In their struggle for equality the only effective economic weapon [Black people] have is the purchasing power they are able to mobilize to induce employers to open jobs to them. . . . Only a clear danger to the community would justify judicial rules that restrict the peaceful mobilization of a group’s economic power to secure economic equality.”).

¹¹⁷ *NAACP*, 485 U.S. at 910.

¹¹⁸ See James G. Pope, *The Three Systems Ladder of First Amendment Values: Two Rungs and a Black Hole*, 11 HASTINGS CONST. L.Q. 189 (1984); see also *Cnty. Sanitation Dist. No. 2 v. L.A. Cnty.*

Indeed, the rights to bargain and strike arguably merit First Amendment protection not only as a corollary to the right to associate but because the activity itself is, at bottom, activity that involves collective expression, assembly, and petitioning. As discussed above, the Supreme Court has recognized the right of private sector workers to strike and picket in furtherance of their collective demands as fundamental, though it has allowed significant limitations on that right.¹¹⁹ Recall Justice Murphy's admonishment that "[f]ree discussion concerning the conditions in industry and the causes of labor disputes appears to us indispensable to the effective and intelligent use of the processes of popular government to shape the destiny of modern industrial society."¹²⁰

Finally, numerous judges have suggested that denying categorically the rights of bargaining and striking to public sector workers while providing them for private sector workers raises equal protection concerns. In *Blount*, Judge Wright wrote:

Hence the real question here, as I see it, is to determine whether there is such justification for denying federal employees a right which is granted to other employees of private business. Plaintiff's arguments that not all federal services are "essential" and that some privately provided services are no less "essential" casts doubt on the validity of the flat ban on federal employees' strikes. In our mixed economic system of governmental and private enterprise, the line separating governmental from private functions may depend more on the accidents of history than on substantial differences in

Emps. Assn., 699 P.2d 835, 861–62 (Cal. 1985) (Bird, C.J. concurring) (arguing that "labor unions are entitled to no less protection than civil rights organizations and environmental groups").

¹¹⁹ For reasons others have explained at length, the restrictions on secondary labor picketing and strikes do not hold up to scrutiny, especially in light of more recent First Amendment decisions. See Richard Blum, *Labor Picketing, the Right to Protest, and the Neoliberal First Amendment*, 42 N.Y.U. REV. L. & SOC. CHANGE 595, 648 (2019); Catherine L. Fisk, *Is It Time for a New Free Speech Fight? Thoughts on Whether the First Amendment Is a Friend or Foe of Labor*, 39 BERKELEY J. EMP. & LAB. L. 253 (2018); Fisk & Rutter, *supra* note 102, at 295–300; Dan Ganin, *A Mock Funeral for a First Amendment Double Standard: Containing Coercion in Secondary Labor Boycotts*, 92 MINN. L. REV. 1539 (2008); Charlotte Garden, *Citizens, United and Citizens United: The Future of Labor Speech Rights?*, 53 WM. & MARY L. REV. 1 (2011); Kate L. Rakoczy, *On Mock Funerals, Banners, and Giant Rat Balloons: Why Current Interpretation of Section 8(B)(4)(ii)(B) of the National Labor Relations Act Unconstitutionally Burdens Union Speech*, 56 AM. U. L. REV. 1621 (2007). For earlier critiques, see Note, *Labor Picketing and Commercial Speech: Free Enterprise Values in the Doctrine of Free Speech*, 91 YALE L.J. 938 (1982); Note, *Peaceful Labor Picketing and the First Amendment*, 82 COLUM. L. REV. 1469 (1982).

¹²⁰ *Thornhill v. Alabama*, 310 U.S. 88, 103 (1940).

kind.¹²¹

In other contexts, the Court has recognized that to allow picketing against some targets, but not others, violates the Equal Protection Clause.¹²² On this account, the government violates the Constitution by prohibiting bargaining and striking for any workers, public or private. But even if the government were not constitutionally required to protect those rights, for the government to protect them for private sector workers while categorically denying them to all public sector workers would violate the Equal Protection Clause.

To be sure, because some public sector workers provide essential services, the state may have compelling justifications for limiting the right to strike in some circumstances, for some workers.¹²³ But no compelling justification exists for a complete and categorical ban on all public sector bargaining and strikes. Again, this argument was well laid out in *Thornhill*:

It is true that the rights of employers and employees to conduct their economic affairs and to compete with others for a share in the products of industry are subject to modification or qualification in the interests of the society in which they exist. This is but an instance of the power of the State to set the limits of permissible contest open to industrial combatants. It does not follow that the State, in dealing with the evils arising from industrial disputes, may impair the effective exercise of the right to discuss freely industrial relations which are matters of public concern.¹²⁴

As Justice Murphy cautioned, “A contrary conclusion could be used to support abridgment of freedom of speech and of the press concerning almost every matter of importance to society.”¹²⁵ That approach would defy the purpose of the First Amendment. “Abridgment of the liberty of such discussion can be justified only where the clear danger of substantive evils arises under circumstances affording no

¹²¹ 325 F. Supp. at 885–86; cf. *Mo. Nat’l Educ. Ass’n v. Mo. Dep’t of Lab. & Indus. Rels.*, 623 S.W.3d 585, 588, 596 (Mo. 2021) (rejecting distinctions based on type of worker where public safety organizations were exempt from various restrictions).

¹²² See, e.g., *Carey v. Brown*, 447 U.S. 455, 457 (1980) (striking down a state statute that “generally bars picketing of residences or dwellings, but exempts from its prohibition ‘the peaceful picketing of a place of employment involved in a labor dispute’”).

¹²³ See REGULATING STRIKES IN ESSENTIAL SERVICES: A COMPARATIVE ‘LAW IN ACTION’ PERSPECTIVE (Moti (Mordehai) Mironi & Monika Schlachter eds., 2019) (examining international and comparative law on regulation of strikes in essential services).

¹²⁴ *Thornhill*, 310 U.S. at 103–04 (footnotes and internal citations omitted).

¹²⁵ *Id.* at 104.

opportunity to test the merits of ideas by competition for acceptance in the market of public opinion,” Murphy wrote.¹²⁶

Numerous state court judges have condemned the categorical ban on public sector strikes. As Chief Justice Roger O. DeBruler of the Indiana Supreme Court wrote in dissent, “If some strikes by workers within the category of public employees would not appreciably disrupt the community or create anarchy, then there is no justification for treating those public employees differently than private employees. . . .”¹²⁷ Likewise, Chief Justice Roberts of the Rhode Island Supreme Court emphasized that while some public employee strikes should not be protected, no basis exists for categorically denying public employees their right to speak collectively, to assemble, and to petition:

I cannot agree that every strike by public employees necessarily threatens the public welfare and governmental paralysis. . . . The fact is that in many instances strikes by private employees pose the far more serious threat to the public interest than would many of those engaged in by public employees. . . . In short, it appears to me that to deny all public employees the right to strike because they are employed in the public sector would be arbitrary and unreasonable.¹²⁸

Indeed, if anything, public sector bargaining and strikes may present an easier case for protection under the First Amendment.¹²⁹ At the most basic level, when public employers penalize workers for seeking to bargain or for engaging in a strike, state action is necessarily present. But there is another reason why public sector bargaining and strikes implicate the First Amendment. The Court has long held that speech on political questions and matters of public concern is due the utmost

¹²⁶ *Id.* at 104–05.

¹²⁷ *Anderson Fed’n of Teachers, Local 519 v. Sch. Comm.*, 251 N.E.2d 15, 21 (Ind. 1969) (DeBruler, C.J., dissenting).

¹²⁸ *Sch. Comm. v. Westerly Teachers Ass’n*, 299 A.2d 441, 446–49 (R.I. 1973) (Roberts, C.J., dissenting).

¹²⁹ To be sure, the doctrines of government speech and managerial prerogative cut in the other direction, but this is in part because the Court has given insufficient weight to the First Amendment’s democratic function. *Compare infra* notes 132–134 and accompanying text (describing Court’s emphasis on managerial prerogative) *with infra* notes 162–178 (detailing democratic purposes of the First Amendment and the role of unions in advancing those goals).

protection.¹³⁰ While all union activity implicates issues of public concern,¹³¹ public sector union activity inevitably and unquestionably implicates questions of democratic governance. Public sector workers' salaries are a matter of public budgets, and their work necessarily involves public services.

The Supreme Court's own jurisprudence on individual public employee speech underscores this point, albeit insufficiently. In *Pickering v. Board of Education*, the Court held that public employee speech on matters of public concern is entitled to First Amendment protection in some circumstances.¹³² As the Court recognized, "free and open debate is vital to informed decision-making by the electorate," and public sector workers, "as a class, are members of [the] community most likely to have informed and definite opinions" regarding "how funds allotted to operation of schools should be spent."¹³³ To be sure, the Court in practice has offered only weak protection to government workers' speech, particularly in the cases that followed *Pickering*. According to the Court's doctrine, public employee speech is protected only if it is outside the scope of official duties; in addition, the government employer can restrict the speech if it can show that expression impairs the effective and efficient functioning of the workplace.¹³⁴ Despite this overly cramped ap-

¹³⁰ See *New York Times v. Sullivan*, 376 U.S. 254, 273 (1964) (describing the ability to criticize government as "the central meaning of the First Amendment").

¹³¹ See *Thornhill*, 310 U.S. at 103 ("Free discussion concerning the conditions in industry and the causes of labor disputes appears to us indispensable to the effective and intelligent use of the processes of popular government to shape the destiny of modern industrial society."); see also *Int'l Ass'n of Machinists v. Street*, 367 U.S. 740, 800 (1961) (Frankfurter, J. dissenting) ("[W]hat is loosely called political activity of American trade unions . . . [is] activity indissolubly relating to the immediate economic and social concerns that are the *raison d'être* of unions.").

¹³² See *Pickering v. Bd. of Ed. of Twp. High Sch. Dist. 205*, 391 U.S. 563, 568 (1968) (holding that employee speech on matters of public concern is protected under the First Amendment unless outweighed by the "interest of the State, as an employer, in promoting the efficiency of the public services it performs").

¹³³ *Id.* at 571–72.

¹³⁴ See *Garcetti v. Ceballos*, 547 U.S. 410, 421–22 (2006) (holding that public employee speech is unprotected if made through traditional employment channels and part of what the employee is paid to do as part of "official duties"); *Connick v. Myers*, 461 U.S. 138 (1983) (holding that some employee speech about the workplace is not of public concern and emphasizing the employer's right to avoid disruption).

proach, however, the Court has maintained the recognition that speech by individual public employees falls within the First Amendment's ambit and plays an important role in public debate.

More recently, the Court has again recognized the particular role public sector workers—and public sector unions—play in important political debates. In *Janus v. AFSCME*, the Court deployed the First Amendment to restrict public sector unions' ability to collect fees necessary to pay for the costs of collective bargaining and representation.¹³⁵ For reasons I have elaborated elsewhere, the Court's decision in *Janus* is wrongly decided.¹³⁶ But the opinion contains an important insight: Collective bargaining in the public sector almost always has a "political valence."¹³⁷ The Court's majority observed that public sector unions engage with "sensitive political topics" that "are undoubtedly matters of profound value and concern to the public. . . . [S]uch speech occupies the highest rung of the hierarchy of First Amendment values and merits special protection."¹³⁸

Ultimately, the *Janus* Court applied "exacting scrutiny" to strike down the system of fair-share fees.¹³⁹ Catherine Fisk has argued that *Janus*' reasoning requires a different approach to union expression: "If anti-union government employees have a First Amendment right to resist paying money to the union to negotiate over working conditions, formal equality would suggest that pro-union government employees have a First Amendment right to discuss their working conditions collectively."¹⁴⁰ By the same logic, if the freedom of association contained in the First Amendment protects the right of a public sector employee not to participate in political speech compelled by his or her employer,¹⁴¹ then it should also protect their

¹³⁵ See *Janus v. Am. Fed'n of State, Cnty. & Mun. Emps., Council 31*, 585 U.S. 878 (2018).

¹³⁶ See Andrias, *Janus's Two Faces*, *supra* note 63; see also, e.g., Catherine L. Fisk, *A Progressive Labor Vision of the First Amendment: Past as Prologue*, 118 COLUM. L. REV. 2057, 2062–63 (2018) (arguing that the *Janus* majority drew a conclusion contradictory to its own distinction between political and economic labor action).

¹³⁷ *Janus*, 585 U.S. at 925.

¹³⁸ *Id.* at 914 (internal quotation marks omitted).

¹³⁹ See *id.* at 916.

¹⁴⁰ Fisk, *Past as Prologue*, *supra* note 136, at 2075.

¹⁴¹ See *Elrod v. Burns*, 427 U.S. 347, 372 (1976) ("[P]atronage dismissals severely restrict political belief and association. Though there is a vital need for government efficiency and effectiveness, such dismissals are on balance not the least restrictive means for fostering that end.").

right to participate in political speech.

Of course, there are limitations to the symmetry under this Court's logic: According to the Court, the union fee cases involve compelled speech. In contrast, a First Amendment right to organized public sector employee expression and association would not involve compelled speech but would rather require the government employer to permit expression and association that are contrary to its own views and (arguably) disruptive of the effective and efficient execution of its public mission.¹⁴² But even under the Court's own logic, some protection for the core rights would be warranted. More importantly, as the next sections of this essay elaborate, an approach to the First Amendment that reads the amendment holistically and foregrounds its democratic purposes would reject the notion that the right of a dissenting member to "exit" a democratic structure deserves greater protection than the collective majority's speech, association, and petition interests. Likewise, it would reject the notion that the managerial prerogative can wholly extinguish workers' First Amendment rights.

B. *Policy Arguments Against a Public Sector Right to Bargain and Strike*

In addition to the arguments that public sector bargaining and strikes lack First Amendment protection due to their economic dimensions or potential for coercion,¹⁴³ opponents of public sector bargaining rights offer a series of policy-based objections that derive from government workers' particular relationship to the state but that wholly ignore the First Amendment's democratic goals.¹⁴⁴

One such argument sounds in sovereignty. On this account, the right to govern belongs exclusively to elected officials. Agreeing to bargain entails inappropriately relinquishing sovereignty insofar as doing so delegates decisions that public officials should be making on their own; put even more strongly, granting a right to strike grants a right to destroy the sovereign. Courts have relied on common law

¹⁴² Cf. *Garcetti v. Ceballos*, 547 U.S. 410, 421–423 (2006) (emphasizing that government can restrict its employees' speech when that speech interferes with the functioning of government); *Rust v. Sullivan*, 500 U.S. 173, 192–94 (1991) (holding that the government may restrict speech as a condition of funding, to effectuate the value judgments reflected in the law granting the funding).

¹⁴³ See *supra* notes 99–102 and accompanying text.

¹⁴⁴ For discussion and critique of these arguments, see Kurt L. Hanslowe & John L. Acierno, *Law and Theory of Strikes by Government Employees*, 67 CORNELL L. REV. 1055 (1982).

for this proposition: For example, an Ohio court in 1949 declared that “the government is a servant of all of the people. And a strike against the public, a strike of public employees, has been denominated . . . as a rebellion against government. The right to strike, if accorded to public employees . . . is one means of destroying government.”¹⁴⁵

This argument falters quickly under inspection. As Chief Justice Roberts of the Rhode Island Supreme Court wrote,

Perpetuation of the doctrine of sovereign immunity in tort law led to a great many inequities, its application affecting many incongruous results. Similarly, the application of the doctrine that one cannot strike against the sovereign leads to unfair results. Clinging to a doctrine that prohibits employees of the government the right to strike denies those individuals their constitutional right while applying an idea that is archaic and no longer logically supportable.¹⁴⁶

Even for jurisdictions that maintain sovereign immunity in tort, the doctrine is inapposite: Public sector bargaining does not undermine sovereignty but rather involves the sovereign engaging in democratic decision-making with its citizens. There is nothing unusual about allowing non-governmental officials to play a role in decision-making. Governments delegate a wide range of decisions through contracting. They also routinely consult with non-governmental officials in making decisions. As the California Supreme Court commented in 1985, the worry about sovereignty is simply “inconsistent with modern social reality.”¹⁴⁷

A second argument is that public employee unions distort the political process: They exercise outsized political power when allowed to bargain because they are then able to affect decision-making both as voters and workers.¹⁴⁸ Yet, empirical

¹⁴⁵ *City of Cleveland v. Div. 268 of Amalgamated Ass’n of Street & Elec. Rwy. & Motor Coach Emps. of Am.*, 90 N.E.2d 711, 715 (Ohio Ct. C.P. 1949); *see also* *Norwalk Teachers Ass’n v. Bd. of Educ.*, 83 A.2d 482, 485 (Conn. 1951) (holding government employees “serve the public welfare and not a private purpose” and that “to say that they can strike is the equivalent of saying that they can deny the authority of government and contravene the public welfare”).

¹⁴⁶ *Sch. Comm. v. Westerly Teachers Ass’n*, 299 A.2d 441, 449 (R.I. 1973) (Roberts, C.J., dissenting).

¹⁴⁷ *Cnty. Sanitation Dist. No. 2 v. L.A. Cnty. Emps. Ass’n*, 699 P.2d 835 (Cal. 1985).

¹⁴⁸ *See* DISALVO, *supra* note 63; HARRY H. WELLINGTON & RALPH K. WINTER, JR., *THE UNIONS AND THE CITIES* (1971); Harry H. Wellington & Ralph K. Winter, *The Limits of Collective Bargaining in Public Employment*, 78 YALE L.J. 1107, 1123 (1969).

work has demonstrated that public employee strikes have no such distorting effects.¹⁴⁹ Rather, as discussed below, sufficient checks on bargaining exist that the outcome of bargaining reflects democratic pressures. Indeed, “legalizing public employee strikes does not cause an increase in strikes and may encourage more realistic bargaining.”¹⁵⁰ In any event, the First Amendment guarantees citizens the right to pressure the government through means other than voting.¹⁵¹ In that respect, public sector workers’ ability to engage in political speech should not be limited to the ballot box any more than that of other citizens.

Relatedly, opponents of public sector unions also argue that, unlike private sector workers, public workers face no market competition and therefore there are no market pressures that keep unions’ demands in check.¹⁵² They also get to pick their bosses through elections. Daniel DiSalvo argues that unions end up picking those who sit across from them.¹⁵³ But of course, the same is true for all others who interact with the government regarding government contracts and benefits. Moreover, as the California Supreme Court has recognized, “wages lost due to strikes are as important to public employees as they are to private employees.”¹⁵⁴ And the “public’s concern over increasing tax rates” and the threat of subcontracting also discipline public unions.¹⁵⁵ Empirical work confirms that laws enabling public sector collective bargaining have not, in practice, led to excessive pay.¹⁵⁶

¹⁴⁹ See Martin H. Malin, *Public Employees’ Right to Strike: Law and Experience*, 26 U. MICH. J.L. REFORM 313, 400–401 (1993); Jeffrey H. Keefe, *Laws Enabling Public-Sector Collective Bargaining Have Not Led to Excessive Public-Sector Pay* (Econ. Pol’y Inst., Briefing Paper No. 409, 2015), <https://tinyurl.com/3m3za8w6>.

¹⁵⁰ Malin, *supra* note 149, at 401; see also McCartin, *Context Matters More*, *supra* note 56.

¹⁵¹ Vincent Blasi, *The Checking Value in First Amendment Theory*, 1977 AM. B. FOUND. RES. J. 523.

¹⁵² DiSalvo, *supra* note 63.

¹⁵³ See *id.*

¹⁵⁴ Cnty. Sanitation Dist. No. 2 v. L.A. Cnty. Emps. Ass’n, 699 P.2d 835, 844 (1985).

¹⁵⁵ *Id.* at 864. See also John F. Burton & Charles Krider, *The Role and Consequences of Strikes by Public Employees*, 79 YALE L.J. 418 (1970) (explaining why economic constraints in the public sector limit the effectiveness of the public strike weapon and enable public officials to resist excessive demands).

¹⁵⁶ Jeffrey H. Keefe, *A Reconsideration and Empirical Evaluation of Wellington and Winter’s, The Unions and the Cities*, 34 COMP. LAB. L. POL’Y J. 251 (2013); Keefe, *Excessive Public Sector Pay*, *supra* note 149.

More generally, arguments that public sector bargaining and strikes are incompatible with democracy or economically ruinous are undermined by the significant jurisdictions that recognize a right to strike in the public sector. Forty-two states and the District of Columbia provide for some collective bargaining for at least some public workers,¹⁵⁷ and a dozen states have granted some of their public employees a right to strike.¹⁵⁸ Looking abroad, nearly all industrial democracies permit bargaining and strikes among most public sector workers, and international law protects the right.¹⁵⁹

That is not to suggest that there must be an absolute right to strike by all workers by any means.¹⁶⁰ As with other First Amendment rights, the right to strike and bargain may be balanced against compelling governmental interests, such as public safety.¹⁶¹ But the courts have largely failed to engage in such analysis. And they have offered no persuasive justification for categorically denying bargaining and strike rights to all public employees, particularly when doing so undermines the core democratic purpose of the First Amendment.

C. *Public Sector Unions and Democracy*

Let us return, then, to the basic goal of the First Amendment and its relationship to public sector bargaining and strikes. Courts and scholars agree that an important purpose, even the primary purpose, of the First Amendment is to advance democratic self-governance.¹⁶² The most prominent proponent of the democracy theory of the First Amendment was Alexander Meiklejohn. He argued that free

¹⁵⁷ See Nat'l Conf. of State Legislatures, *supra* note 2.

¹⁵⁸ See SANES & SCHMITT, *supra* note 2, at 8–9. Most states that grant the right to strike limit it to strikes that will not endanger public health, safety, or welfare. See, e.g., *id.* at 23–24.

¹⁵⁹ See James J. Brudney, *The Right to Strike as Customary International Law*, 46 YALE J. INT'L L. 1, 17–18 (2021); see also Andrea Oates, *The Right to Strike in the Public Sector in Europe*, 26 INT'L UNION RTS. 3 (2019) (describing recent attacks on the right to strike in Europe); REGULATING STRIKES, *supra* note 123 (discussing near universal protection for the right to strike, with limitations for essential services).

¹⁶⁰ See JAMAL GREENE, HOW RIGHTS WENT WRONG (2021) (criticizing rights absolutism).

¹⁶¹ See United Fed'n of Postal Clerks v. Blount, 325 F. Supp. 879, 885 (D.D.C. 1971) (Wright, J., concurring) (“I do not suggest that the right to strike is co-equal with the right to form labor organizations. . . . But I do believe that the right to strike is, at least, within constitutional concern and should not be discriminatorily abridged without substantial or ‘compelling’ justification.”).

¹⁶² See *supra* note 7 and accompanying text.

speech is constitutionally valuable because it produces an informed citizenry that makes democracy work better.¹⁶³ On this account, guaranteeing the freedom of speech enables people to govern themselves in politics. As Owen Fiss put it, “We allow people to speak so others can vote. Speech allows people to vote intelligently and freely, aware of all the options and in possession of all the relevant information.”¹⁶⁴ Robert Post offers an overlapping though distinct account: The First Amendment’s purpose is democratic, but the focus should be on the speaker, not the audience—that is, on the ability of citizens to participate in self-governance through the formation of public opinion.¹⁶⁵

The Supreme Court has recognized the political aims of the First Amendment, though it has focused almost all of its attention on the Free Speech Clause. But as other scholars have demonstrated, and as the Court has occasionally acknowledged, when the Free Speech Clause is read in context of the whole First Amendment, the democratic purposes of the amendment become even clearer. Together, speech, assembly, petition, and press all enable the democracy to function. As the Court wrote in *Thomas v. Collins*, “It was not by accident or coincidence that the rights to freedom in speech and press were coupled in a single guaranty with the rights of the people peaceably to assemble and to petition for redress of grievances. All these, though not identical, are inseparable.”¹⁶⁶ They enable an active citizenry, one that collectively participates in public debate and that engages with the government, not just through speech but through action, in order to shape governance.

Notably, the Assembly Clause and the Petition Clause have special relevance for public sector bargaining and strikes. Although the Supreme Court has not addressed the Assembly Clause in decades,¹⁶⁷ historical research suggests the clause was added to the Constitution by the Framers specifically to protect group mem-

¹⁶³ See MEIKLEJOHN, *supra* note 7.

¹⁶⁴ OWEN M. FISS, LIBERALISM DIVIDED: FREEDOM OF SPEECH AND THE MANY USES OF STATE POWER 13 (1996). See also Blasi, *supra* note 151, at 142 (arguing that free speech serves an essential “checking value” on government).

¹⁶⁵ Robert C. Post, *Participatory Democracy and Free Speech*, 97 VA. L. REV. 477, 482 (2011).

¹⁶⁶ *Thomas v. Collins*, 323 U.S. 516, 530 (1945).

¹⁶⁷ The Court has treated the regulation of public gatherings as a branch of free speech law. See John D. Inazu, LIBERTY’S REFUGE: THE FORGOTTEN FREEDOM OF ASSEMBLY 62 (2012).

bership and to further popular sovereignty; the goal was to enable people to assemble to advocate for the public good.¹⁶⁸ Meanwhile, the Petition Clause was designed to further active political engagement and an ability to influence government, particularly for those who lacked significant political power.¹⁶⁹ Indeed, through much of its history, the Petition Clause was also understood to require a response from the government.¹⁷⁰

Extending First Amendment protection to public sector strikes fits clearly with these overlapping rights of speech, assembly, association, and petition and ultimately serves the First Amendment's democratic purposes. A significant and growing body of scholarship demonstrates that unions strengthen democracy and enable a more robust public debate.¹⁷¹ First, they increase rates of political participation among workers: There is a consistent, positive relationship between union membership and increased political participation; in particular, union members are

¹⁶⁸ See *id.*; Tabatha Abu El-Haj, *The Neglected Right of Assembly*, 56 UCLA L. REV. 543 (2009); Ashutosh Bhagwat, *The Democratic First Amendment*, 110 NW. U. L. REV. 1097, 1104–09 (2016).

¹⁶⁹ Bhagwat, *supra* note 168, at 1109–11; see also RONALD J. KROTOSZYNSKI, JR., RECLAIMING THE PETITION CLAUSE: SEDITIOUS LIBEL, “OFFENSIVE” PROTEST, AND THE RIGHT TO PETITION THE GOVERNMENT FOR A REDRESS OF GRIEVANCES (2012); Jason Mazzone, *Freedom’s Associations*, 77 WASH. L. REV. 639, 729–30 (2002). Like the Assembly Clause, the Petition Clause has been divested of much meaning by the Court. See *id.* at 717–18.

¹⁷⁰ See Catherine Phillips, *The Lost Democratic Institution of Petitioning: Public Employee Collective Bargaining as a Constitutional Right*, 10 FIRST AMEND. L. REV. 652 (2012). However, in *Borough of Duryea v. Guarnieri*, 564 U.S. 379 (2011), the Court recognized the unique history of petitioning and its requirement of a hearing and response, though it imported much of its free speech jurisprudence into its analysis. *Id.* at 394–98 (holding that public employees are not protected from retaliatory actions by their employers when their petitions relate to matters of purely private concern); cf. Maggie McKinley, *Lobbying and the Petition Clause*, 68 STAN. L. REV. 1131, 1142–47, 1184–85 (2016).

¹⁷¹ For further discussion of the relationship between unions and democracy, see Kate Andrias, *Labour and Democracy*, in OXFORD HANDBOOK OF THE LAW OF WORK (Guy Davidov, Brian Langille & Gillian Lester eds., 2024). The following section draws from that essay. See also Asha Banerjee, Margaret Poydock, Celine McNicholas, Ihna Mangundayao & Ali Sait, *Unions Are Not Only Good for Workers, They’re Good for Communities and for Democracy*, ECON. POL’Y INST. (Dec. 15, 2021), <https://www.epi.org/publication/unions-and-well-being>.

more likely to vote, protest, sign petitions, lobby, and join associations.¹⁷² Thus, unions encourage workers to democratically self-govern through an array of approaches, fulfilling the First Amendment's goal of enabling participation in self-governance.

Second, unions aggregate workers' political voice in ways that help fix an imbalance in public debate, in turn producing a more representative government and redistributive policy. They serve as a countervailing force against the disproportionate power that wealthy corporations and elites exercise in politics; they influence the kinds of candidates that succeed and the public policies that prevail.¹⁷³ As such, unions' advocacy informs the citizenry and adds to public discussion, furthering the First Amendment's goal of advancing a robust public debate.

Third, they have the potential to strengthen social ties among different kinds of workers, serving as a bulwark against racial divisions on which anti-democratic forces of authoritarianism and ethno-nationalism prey.¹⁷⁴ The mechanisms here are several: Unions provide opportunities for people of different racial and ethnic identities to interact on a daily basis, undermining prejudice through exposure; members work toward a common goal across racial and ethnic lines, promoting cooperation, enhancing respect and mutuality, and shifting ideas about intergroup

¹⁷² See JAKE ROSENFELD, *WHAT UNIONS NO LONGER DO* 170, 173 (2014); Richard B. Freeman, *What, Me Vote?*, in 1 *SOCIAL INEQUALITY* 703, 714–15 (Kathryn M. Neckerman ed., 2004); Jasmine Kerrissey & Evan Schofer, *Union Membership and Political Participation in the United States*, 91 *SOC. FORCES* 895, 895–96 (2013).

¹⁷³ See Martin Gilens & Benjamin I. Page, *Testing Theories of American Politics: Elites, Interest Groups, and Average Citizens*, 12 *PERSP. ON POL.* 564, 575–76 (2014) (showing that when the interests of the poor and the wealthy diverge, federal legislators show no responsiveness to the poor—except when working people are organized); see also MARTIN GILENS, *AFFLUENCE & INFLUENCE: ECONOMIC INEQUALITY AND POLITICAL POWER IN AMERICA* (2012); KAY LEHMAN SCHLOZMAN, SIDNEY VERBA & HENRY E. BRADY, *THE UNHEAVENLY CHORUS: UNEQUAL POLITICAL VOICE AND THE BROKEN PROMISE OF AMERICAN DEMOCRACY* 360–61 (2012).

¹⁷⁴ See Cynthia Estlund, *Coming Apart: How Union Decline and Workplace Disintegration Imperil Democracy*, in *THE CAMBRIDGE HANDBOOK OF LABOR AND DEMOCRACY* 163 (Angela B. Cornell & Mark Barenberg eds., 2022); Paul Frymer, Jacob M. Grumbach & Thomas Ogorzalek, *Unions Can Help White Workers Become More Racially Tolerant*, in *THE CAMBRIDGE HANDBOOK OF LABOR AND DEMOCRACY*, *supra*, at 180. Unions have not always played this role; many U.S. unions have a shameful history of racial and gender discrimination, now prohibited by law. See SOPHIA Z. LEE, *THE WORKPLACE CONSTITUTION FROM THE NEW DEAL TO THE NEW RIGHT* (2014) (detailing the history of race discrimination in unions and the rise of the duty of fair representation doctrine).

competition.¹⁷⁵ In addition, unions build social solidarity when they urge, and help bring about, broad social welfare reforms.¹⁷⁶ Unions also tend to give workers greater faith in the possibility and promise of democracy. By engaging workers in democratic practice at work and by exercising collective political power, they help counteract the perception that the government serves the elites and is not responsive to ordinary people.¹⁷⁷ Finally, high collective bargaining rates are one of the most effective ways to reduce economic inequality, which researchers have identified as a key threat to democracy.¹⁷⁸ In short, not only are public sector bargaining and strikes acts of expression, assembly, and petition, but protecting those rights advances the democratic goals of the First Amendment.

IV. CONSTITUTIONAL LAWMAKING FROM THE BOTTOM UP

There is virtually no chance the current Supreme Court will conclude that public employees have a First Amendment right to bargain and strike. The conservative super-majority on the Court has shown itself to be deeply hostile to the claims of labor unions and workers' rights¹⁷⁹ and sympathetic to business interests.¹⁸⁰ Nonetheless, history teaches that workers can prevail when they collectively assert their

¹⁷⁵ See Frymer et al., *supra* note 174, at 183.

¹⁷⁶ See Gillian Lester, *Beyond Collective Bargaining: Modern Unions as Agents of Social Solidarity*, in *THE IDEA OF LABOUR LAW 329* (Guy Davidov & Brian Langille eds., 2011).

¹⁷⁷ See Mark Anner, *Labour, Workers' Rights, and Democracy in Latin America*, in *THE CAMBRIDGE HANDBOOK OF LABOUR AND DEMOCRACY*, *supra* note 174, at 237.

¹⁷⁸ On the role of unions in reducing inequality, see RICHARD B. FREEMAN & JAMES L. MEDOFF, *WHAT DO UNIONS DO?* (1984); ROSENFELD, *supra* note 172; David Card, *The Effect of Unions on Wage Inequality in the U.S. Labour Market*, 54 *INDUS. & LAB. RELS. REV.* 296 (2001); Bruce Western and Jake Rosenfeld, *Unions, Norms, and the Rise in U.S. Wage Inequality*, 76 *AM. SOCIO. REV.* 513 (2011); Henry S. Farber, Daniel Herbst, Ilyana Kuziemko & Suresh Naidu, *Unions and Inequality Over the Twentieth Century: New Evidence from Survey Data* (Nat'l Bureau of Econ. Rsch., Working Paper No. 24587, 2018), <https://www.nber.org/papers/w24587.pdf>. On economic inequality as a threat to democracy, see SUZANNE METTLER & ROBERT C. LIEBERMAN, *FOUR THREATS: THE RECURRING CRISES OF AMERICAN DEMOCRACY* (2020).

¹⁷⁹ See, e.g., *Starbucks Corp. v. McKinney*, 602 U.S. 339 (2024); *Glacier Nw., Inc. v. Int'l Bhd. of Teamsters Local Union No. 174*, 598 U.S. 771, 779 (2023); *Cedar Point Nursery v. Hassid*, 594 U.S. 139, 148–50 (2021); *Janus v. Am. Fed'n of State, Cnty. & Mun. Emps., Council 31*, 585 U.S. 878 (2018); *Epic Sys. Corp. v. Lewis*, 584 U.S. 497, 524–25 (2018); see also Kate Andrias, *Constitutional Clash: Labor, Capital, and Democracy*, 118 *NW. U. L. REV.* 985 (2024).

¹⁸⁰ See Lee Epstein, William M. Landes & Richard A. Posner, *How Business Fares in the Supreme Court*, 97 *MINN. L. REV.* 1431 (2013).

fundamental rights, even when the law on the books does not recognize those rights, if they garner sufficient public support. And through collective action, over time and in certain circumstances, social movements have been able to transform the law, including understandings of the Constitution.¹⁸¹

The recent wave of public sector labor activity, along with the response to the Trump Administration's attack on federal workers, has the potential to do just that. In 2018 and 2019, in what came to be known as "Red for Ed," more than 100,000 public school teachers withheld their labor in states across the country, including in states with no bargaining rights for teachers.¹⁸² The West Virginia Education Association led the strike wave, with 35,000 teachers striking in February and March of 2018.¹⁸³ Under West Virginia law, public workers are not permitted to strike or participate in any work stoppage.¹⁸⁴ Public workers in West Virginia also do not have a right to engage in collective bargaining.¹⁸⁵ The teachers struck nonetheless

¹⁸¹ See, e.g., Kate Andrias & Benjamin I. Sachs, *The Chicken-and-Egg of Law and Organizing: Enacting Policy for Power Building*, 124 COLUM. L. REV. 777 (2024) (exploring when collective action has succeeded in changing legal frameworks to protect organizing rights); see also FRANCES FOX PIVEN & RICHARD A. CLOWARD, *POOR PEOPLE'S MOVEMENTS: WHY THEY SUCCEED, HOW THEY FAIL* (1978). For exploration of how social movements have changed constitutional meaning in other contexts, see, e.g., Lani Guinier & Gerald Torres, *Changing the Wind: Notes Toward a Demosprudence of Law and Social Movements*, 123 YALE L.J. 2740, 2749 (2014); 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); Reva B. Siegel, *Text in Contest: Gender and the Constitution from a Social Movement Perspective*, 150 U. PA. L. REV. 297, 312–13 (2001); see also Tomiko Brown-Nagin, *Elites, Social Movements, and the Law: The Case of Affirmative Action*, 105 COLUM. L. REV. 1436, 1442–44 (2005) (discussing the relationship between law and movements that seek social change); Douglas NeJaime, *Constitutional Change, Courts, and Social Movements*, 111 MICH. L. REV. 877, 891–92 (2013) (describing literature on how social movements use the Constitution and how "courts and social movements participate in the complex process of constitutional construction"); Robert Post & Reva Siegel, *Roe Rage: Democratic Constitutionalism and Backlash*, 42 HARV. C.R.-C.L. L. REV. 373, 374 (2007) (explaining how traditions of popular engagement "authorize citizens to make claims about the Constitution's meaning and to oppose their government").

¹⁸² Alexia Fernández Campbell, *Thousands of Oakland Teachers Just Went on Strike. They Want More Than a Pay Raise.*, VOX (Feb. 21, 2019), <https://perma.cc/8PH7-B2AC>.

¹⁸³ *Work Stoppages*, U.S. BUREAU OF LAB. STAT., <https://www.bls.gov/web/wkstp/monthly-listing.htm> (last modified Feb. 21, 2024).

¹⁸⁴ W. VA. CODE § 18-5-45a(2) (2023).

¹⁸⁵ *Id.*

for higher wages and improved education. The West Virginia attorney general threatened to take legal action to stop the strike but ultimately did not do so; instead, the state negotiated a settlement and teachers returned to work.¹⁸⁶

The West Virginia strikes were followed by teacher strikes in numerous other states that provide no right to strike or bargain, including Arizona, Kentucky, North Carolina, and Oklahoma.¹⁸⁷ In several instances, government officials sought injunctions or other penalties, yet the teachers persisted, sometimes expressly invoking the First Amendment, albeit unsuccessfully in court.¹⁸⁸ In subsequent years, strikes also occurred among teachers in states that allow collective bargaining, including California, Washington, New Jersey, Illinois, Massachusetts, Minnesota, and Colorado.¹⁸⁹ There, too, governments often resisted, seeking to repress the unions' speech, assembly, and petition efforts. In California, for example, one school district adopted a rule prohibiting picketing on school property and banned use of signs and banners without prior approval from the school superintendent; the Ninth U.S. Circuit Court of Appeals rejected this ban.¹⁹⁰ Yet, when faced with sufficiently determined workers and supportive communities, state governments, even those with no formal collective bargaining rights, have reached settlements

¹⁸⁶ See Jess Bidgood, *West Virginia Raises Teachers' Pay to End Statewide Strike*, N.Y. TIMES (Mar. 6, 2018); WSAZ News Staff, *UPDATE: W.Va. Attorney General 'Prepared to Act' in Teacher Strike*, WSAZ (Feb. 21, 2018), <https://perma.cc/MC9B-KFV7>.

¹⁸⁷ Campbell, *More Than a Pay Raise*, *supra* note 182; Mike Elk, *In North Carolina, 20,000 Skip School as Teachers Strike Movement Swells*, GUARDIAN (May 16, 2018), <https://perma.cc/C2R2-5JLL>.

¹⁸⁸ Mandy McLaren, *Beshear and JCTA Sue Bevin Administration Over Teacher Subpoenas*, COURIER J. (Apr. 29, 2019), <https://perma.cc/237F-KM2P>; see also *Kentucky ex rel. Beshear v. Dickerson*, No. CV 3:19-033-DCR, 2019 WL 2064500, at *1 (E.D. Ky. May 9, 2019).

¹⁸⁹ *Work Stoppages*, *supra* note 183; see also Dan Borenstein, *How California Teachers Can Bypass State Strike Restrictions*, ORANGE CNTY. REG. (Jun. 4, 2023), <https://www.oregister.com/2023/06/04/borenstein-how-california-teachers-can-bypass-state-strike-restrictions>; Molly Solomon, *Thousands of Southwest Washington Teachers Strike*, NPR (Aug. 30, 2018), <https://www.npr.org/2018/08/30/643246137/thousands-of-southwest-washington-teachers-strike>.

¹⁹⁰ *Eagle Point Educ. Ass'n v. Jackson Cnty. Sch. Dist. No. 9*, 880 F.3d 1097, 1100 (9th Cir. 2018).

that provide higher wages and improved conditions, including better conditions for the communities and students teachers serve.¹⁹¹

All of the recent strikes and bargaining implicate the First Amendment and its democratic function. While many of the strikes focused on teacher pay and funding for public schools—questions of how to allocate school funds within the public schools—they also focused on such policy questions as vouchers for private school tuition and the use of charter schools.¹⁹² Other strikes took on even broader social problems. The Chicago teachers’ union, for example, has made clear that its members aspire not only to win higher wages but to bargain “for the common good”—their strike in 2019 demanded not only smaller class sizes, better wages, and improved school conditions but also changes to housing policy in a city where many students face homelessness.¹⁹³

The rise in public sector strikes has not been limited to teacher strikes. A total of 53,000 University of California workers struck in May 2018.¹⁹⁴ Other large public sector strikes in recent years include health care workers at the University of California, graduate students at the University of Michigan and the University of Illinois, hospital workers in Illinois, service workers in Cook County, Illinois, and academic workers across the University of California system.¹⁹⁵

During some of these strikes, the workers expressly appealed to a broad conception of fundamental rights, claiming that there is no such thing as an “illegal strike.”¹⁹⁶ In other cases, they made claims that were explicitly constitutional. For

¹⁹¹ See Amanda Novello, Richard D. Kahlenberg & Andrew Stettner, *The Chicago Teachers Strike Is a Fight for the Common Good*, CENTURY FOUND. (Oct. 28, 2019), <https://tcf.org/content/commentary/chicago-teachers-strike-fight-common-good>.

¹⁹² See Alexia Fernández Campbell, *Oakland Teachers Return to Class After 7-Day Strike. Here’s What They Won—and Lost.*, VOX (Mar. 4, 2019), <https://tinyurl.com/3znkybam>; Dana Goldstein, *West Virginia Teachers Walk Out (Again) and Score a Win in Hours*, N.Y. TIMES (Feb. 19, 2019).

¹⁹³ See Novello et al., *supra* note 191. For more on “bargaining for the common good,” see Joseph A. McCartin, *Bargaining for the Common Good*, DISSENT (Spring 2016), <https://perma.cc/YL5A-TEJ4>.

¹⁹⁴ *Work Stoppages*, *supra* note 183.

¹⁹⁵ See *id.*

¹⁹⁶ See Kate Andrias, *Peril and Possibility: Strikes, Rights, and Legal Change in the Era of Trump*, 40 BERKELEY J. EMP. & LAB. L. 135, 145 (2018) (quoting Joe Burns, “*There Is No Illegal Strike, Just an Unsuccessful One*”, JACOBIN (Mar. 6, 2018), <https://perma.cc/Y28M-KXXZ>); see also The Real News,

example, after having its strike enjoined,¹⁹⁷ the Clark County Education Association in Nevada filed a lawsuit alleging that Nevada's anti-strike law is unconstitutional; the case is ongoing.¹⁹⁸ Striking graduate students in Michigan made clear their view that "no law or policy can restrict a person's fundamental right to strike. . . . [N]o court can decide to suspend our strike as the decision to strike (or not) is up to the rank-and-file members of our union."¹⁹⁹

Academic workers at Rutgers University made similar claims. In the lead-up to the strike, Rutgers President Jonathan Holloway sent a university-wide email warning that any strike would be unlawful.²⁰⁰ A group of academics from hundreds of universities signed an open letter to Holloway, quoting Dr. Martin Luther King Jr. for the proposition that strikes are core to First Amendment rights and condemning the characterization of the strike as unlawful.²⁰¹ Though the union acknowledged that courts have issued injunctions to stop strikes in the past, it committed to fighting any injunction the university filed.²⁰² After the strike began, Holloway stated again that he would seek legal action if no progress was made in negotiations.²⁰³ New Jersey Governor Phil Murphy asked him to delay any legal action;

West Virginia Teachers Strike Redefines Teacher Unionism, YOUTUBE, at 02:00 (Feb. 27, 2018), <https://www.youtube.com/watch?v=hesEvKAKufc> (interviewing the president of the teachers' union about why he believes the strike should not be considered illegal and why the teachers were risking legal sanction).

¹⁹⁷ See Order Denying Stay, Clark Cnty. Educ. Ass'n v. Clark Cnty. Sch. Dist., No. 87290 (Nev. Sept. 15, 2023); Preliminary Injunction, Clark Cnty. Sch. Dist. v. Clark Cnty. Educ. Ass'n, No. A-23-874996-C (Nev. Dist. Ct. Sept. 13, 2023).

¹⁹⁸ See Complaint, Clark Cnty. Educ. Ass'n v. State, No. A-23-879213-C (Nev. Dist. Ct. Oct. 9, 2023); April Corbin Girus, *Clark County Teachers Inspired Nevada's Anti-Strike Law. They Might Also Upend It.*, NEV. CURRENT (Oct. 13, 2023), <https://tinyurl.com/42rtjc6c>.

¹⁹⁹ The Michigan Daily News Staff, *State Judge Rules that GEO Strike Against UMich Violates Current Contract*, MICH. DAILY (Apr. 7, 2023), <https://perma.cc/GQ9J-HEU3> (partial omission in original).

²⁰⁰ See Uriel Isaacs, *Holloway Addresses Labor Negotiations Amid Faculty Strike Possibility*, DAILY TARGUM (Mar. 22, 2023), <https://tinyurl.com/mwke8ayy>.

²⁰¹ See Scholars, *In the Spirit of Paul Robeson: An Open Letter to Rutgers President Jonathan Holloway*, <https://perma.cc/D5Z6-3SHG?type=image>.

²⁰² See Christian Wade, *Rutgers University Faculty on Strike*, CTR. SQUARE (Apr. 13, 2023), <https://perma.cc/CRB4-797Y>.

²⁰³ See Carly Baldwin, *Rutgers President Warns He May Take Legal Action to Break the Strike*, PATCH (Apr. 11, 2023), <https://perma.cc/VNF9-4DLW>.

Holloway honored the request and ultimately did not file for an injunction.²⁰⁴ A union spokesperson defended the strike, referencing the workers' "fundamental right of free speech and free assembly."²⁰⁵ The parties reached an agreement before any legal action was taken.

Even where the unions made no explicit rights-based claims, "their actions rejected the existing statutory and judge-made constitutional law, instead offering an alternative vision of rights—and of how we should constitute ourselves as a nation."²⁰⁶ They echoed efforts of past generations of workers who, as James Pope has shown, engaged in conscious, collectively organized rule creation and enforcement through a form of lawmaking-through-lawbreaking from below.²⁰⁷

The Trump Administration's recent attacks on federal-worker unions bring the constitutional struggle into even sharper relief. In 2025 and 2026, the Administration moved on several fronts against federal workers, including by reclassifying numerous workers as exempt from key civil service protections; banning collective bargaining in several agencies; refusing to process automatic payroll dues deductions; banning some forms of union expression in federal workplaces; and terminating or refusing to honor existing collective bargaining agreements.²⁰⁸ These actions did not merely alter technical features of federal labor law. They attacked the institutional infrastructure through which federal workers speak, associate, petition, and contest the policies of the government that employs them.

The federal unions responded by filing suit, raising both statutory and constitutional claims. For the most part, they have not argued that the First Amendment affirmatively requires the federal government to bargain.²⁰⁹ Existing Supreme

²⁰⁴ *Id.*

²⁰⁵ *Id.*

²⁰⁶ Andrias, *Constitutional Clash*, *supra* note 179, at 1020–21.

²⁰⁷ See James G. Pope, *Worker Lawmaking, Sit-Down Strikes, and the Shaping of American Industrial Relations, 1935–1958*, 24 LAW & HIST. REV. 45, 48 (2006).

²⁰⁸ See *supra* notes 16–20 and accompanying text.

²⁰⁹ See Am. Fed'n of Gov't Emps., AFL-CIO v. Trump, No. 3:25-cv-03070-JD, slip op. at 21 (N.D. Cal. June 24, 2025) ("The fact that plaintiffs do not have a First Amendment right to collective bargaining . . . is beside the point. Plaintiffs are not claiming any such right under the First Amendment . . ."); Complaint ¶¶ 212–20, Am. Fed'n of Gov't Emps., AFL-CIO v. Trump, No. 3:25-cv-03070-JD (N.D. Cal. Apr. 3, 2025) (alleging that plaintiff unions engaged in protected lawsuits, public criticism, and grievances, and that the Executive Order and OPM memorandum retaliated by

Court doctrine makes that argument difficult.²¹⁰ Rather, the unions contend that the Administration's withdrawal of statutory bargaining rights, contract rights, and dues deduction was unlawful retaliation for protected speech, association, petitioning, and litigation against the Administration's workforce policies. District courts initially credited aspects of those arguments, but appellate panels in the Ninth and D.C. Circuits have stayed or vacated broad preliminary relief, relying, in part, on the President's asserted national-security rationale.²¹¹ The merits remain unsettled, illustrating both the promise and the limits of court-centered constitutionalism: the unions have kept alive a First Amendment account of federal-worker association and petitioning, but the immediate practical protection of bargaining rights has been limited.

Yet, federal-worker unions have also advanced their constitutional claims outside the courts, pressing a broader vision. They have repeatedly described the Administration's actions as efforts to silence workers, punish dissent, and disable collective voice.²¹² They link collective bargaining not simply to wages or workplace

eliminating representative status, excluding bargaining-unit employees from federal labor-law protection, rescinding CBAs, terminating grievances, and chilling First Amendment activity); Complaint ¶¶ 90–95, *Nat'l Treasury Emps. Union v. Trump*, No. 1:25-cv-00935-PLF (D.D.C. Mar. 31, 2025) (alleging that the Executive Order retaliated against NTEU for protected litigation and petitioning activity).

²¹⁰ See *supra* notes 106–109 and accompanying text.

²¹¹ See *Am. Fed'n of Gov't Emps., AFL-CIO v. Trump*, 792 F. Supp. 3d 985 (N.D. Cal. 2025), *stay granted*, 148 F.4th 648 (9th Cir. 2025), *vacated*, 167 F.4th 1247 (9th Cir. 2026), and *vacated*, 178 F.4th 456 (9th Cir. 2026); *Nat'l Treasury Emps. Union v. Trump*, 780 F. Supp. 3d 237 (D.D.C. 2025), *stay granted*, No. 25-5157, 2025 WL 1441563 (D.C. Cir. May 16, 2025); *Am. Foreign Serv. Ass'n v. Trump*, 783 F. Supp. 3d 248 (D.D.C. 2025), *stay granted*, No. 25-5184, 2025 WL 1742853 (D.C. Cir. June 20, 2025).

²¹² See, e.g., AFL-CIO, *Working People Respond to Executive Order Attacking Federal Worker Collective Bargaining Rights* (Mar. 28, 2025) (describing the executive order as stripping workers of “a voice on the job,” as “punishment” for unions’ litigation against the Administration, and as “a blatant attempt to silence us”); AFL-CIO, *AFL-CIO President Applauds District Court Ruling to Block Trump’s Union-Busting of Federal Workers* (June 25, 2025) (describing the order as “explicit retaliation” against federal-worker unions “exercising their First Amendment rights”); AFGE, *Victory for Working People as Judge Blocks Trump’s Efforts to Bust Federal Employee Unions* (June 25, 2025) (describing the challenged order as retaliation for protected First Amendment activity, including “vocal opposition and legal challenges”).

administration, but to the First Amendment values of speech, association, assembly, and petition.²¹³ In doing so, federal workers are advancing a more expansive understanding of public-sector unionism: that workers who join together to press claims on the government are not merely employees seeking private advantage, but citizens engaged in constitutionally protected democratic self-government.

They have won some support from both state officials and Congress. For example, attorneys general from 22 states and the District of Columbia argued in an amicus brief that the Trump Administration's actions stripped federal workers of their constitutionally protected rights; they emphasized the states' desire to "support and preserve the rights of Appellees and their members to engage in constitutionally-protected speech and petitioning activities."²¹⁴

In addition, on December 11, 2025, a bipartisan majority in the House of Representatives voted to pass the Protect America's Workforce Act (H.R. 2550), a bill that would restore collective bargaining rights to one million federal workers by reversing President Trump's March executive order.²¹⁵ Representatives Jared Golden, Democrat of Maine, and Brian Fitzpatrick, Republican of Pennsylvania, sponsored the bill, which reached the House floor through the discharge-petition process and passed 231–195 with bipartisan support.²¹⁶ It represented the first time during Trump's second term that the House of Representatives voted to overturn an executive order.²¹⁷ The bill's text provides that the executive order rescinding collective bargaining rights "shall have no force or effect, and no Federal funds may be obligated or expended to carry out such Executive order," and that any collective bargaining agreement in effect as of March 26, 2025, "shall have full force and effect through the stated term of the . . . agreement."²¹⁸ Two Republican senators, Lisa

²¹³ See sources cited *supra* note 212; see also Emergency Workplace Organizing Comm., *What Are My Union Rights as a Federal Worker?*, <https://perma.cc/7SQE-89VW>.

²¹⁴ Brief of the States of Minnesota et al. as Amici Curiae Supporting Plaintiffs-Appellees at 1, 3, *Am. Fed'n of Gov't Emps. v. Trump*, No. 25-4014 (9th Cir. Aug. 29, 2025).

²¹⁵ Protect America's Workforce Act, H.R. 2550, 119th Cong. (as passed by House, Dec. 11, 2025).

²¹⁶ AFL-CIO, *Labor Movement Delivers Bipartisan Victory as House Passes Bill to Restore Federal Workers' Union Rights* (Dec. 11, 2025), <https://tinyurl.com/9f4rnm9x>.

²¹⁷ *Id.*; Julianna Bragg, *House Overturns Trump Executive Order in Historic Vote*, AXIOS (Dec. 11, 2025).

²¹⁸ H.R. 2550, at §§ 2–3.

Murkowski of Alaska and Susan Collins of Maine, joined Democrats and independents to back the Senate companion bill; still, supporters remained short of the 60 votes needed to overcome the filibuster in that chamber.²¹⁹

While not yet victorious, the response of the unions and their allies to Trump's attacks shows how constitutional meaning can be forged outside the courts. Congress could restore and entrench federal collective-bargaining rights, protect dues deduction and grievance systems, and repeal or narrow the federal prohibition on strikes. State governments could likewise enact or constitutionalize robust bargaining and strike rights for their own employees, protect union access and dues systems, and join public advocacy defending collective bargaining as a democratic freedom. A future President could rescind the executive orders, restore recognition and contracts, and affirmatively commit the executive branch to respecting federal workers' associational and petitioning rights. None of these actions would require the current Supreme Court to change course. Yet each would help make real the better understanding of the First Amendment: that collective worker voice is constitutionally protected and central to democratic self-rule.

CONCLUSION

Ultimately, the constitutional arguments in support of public sector bargaining and strikes are strong. Bargaining and strikes by public workers are fundamentally expressive acts—acts of association, assembly, and petition. And they inevitably engage problems of governance and democracy. As the Court has itself recognized, public sector union speech is inherently political.²²⁰ Yet, the current doctrine gets things backwards—collective speech and protest by majorities of public sector workers deserve just as much First Amendment protection as speech by dissenters, if not more. The doctrine should do more to protect voice—collective voice through democratic organization—rather than simply encouraging exit. At its core, the First Amendment is designed to enable such democratic engagement.²²¹

Although the current Court will certainly not reverse course and recognize even a qualified right to bargain and strike, the recent wave of strikes among public sector workers, as well as the federal government workers' response to the Trump

²¹⁹ See S. 2837, 119th Cong. (2025); Bill Sponsors: S. 2837, Protect America's Workforce Act, LEGISCAN, <https://legiscan.com/US/sponsors/SB2837/2025> (last visited June 15, 2026).

²²⁰ See *supra* notes 135–141 and accompanying text.

²²¹ See *supra* note 7 and accompanying text.

attacks, should be understood as a moment of constitutional lawmaking from the bottom up.²²² Ultimately, a coherent alternative doctrine is emerging from the efforts of worker movements and the nascent congressional and state efforts in support. To be sure, the formal doctrine remains impoverished. The Court continues to treat the public employee's right to associate as constitutionally protected while treating the activities that make association meaningful—bargaining, concerted pressure, and strikes—as largely outside the First Amendment's reach. But public workers have never accepted that cramped view as the final word. From postal workers' petitions against gag rules, to the public-sector strike wave of the 1960s and 1970s, to Red for Ed and the current defense of federal-worker unions, public employees have continued to act on a richer constitutional understanding. Their claim is not only that bargaining and strikes produce better wages or working conditions. It is that collective organization enables workers to speak together, assemble together, petition government together, and participate in shaping public life. The Court may not yet recognize that claim. But Congress, states, executive officials, unions, and workers themselves can make the First Amendment's promise real. As history shows, constitutional meaning is not made by courts alone.

²²² James Pope has referred to this as “constitutional insurgency,” see James Gray Pope, *Labor's Constitution of Freedom*, 106 YALE L.J. 941, 943–44 (1997), while Robert Cover theorized the possibility of constitutional jurisgenesis, see Robert M. Cover, *Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4, 11–19 (1983).