

DAVID E. FELLER MEMORIAL LABOR LAW LECTURE

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Peril and Possibility: Strikes, Rights, and Legal Change in the Age of Trump

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Thank you, I am delighted to be here. When Professor Fisk and the editors of the Journal asked if I would be willing to give the Feller Lecture this year, I did not hesitate for a moment. It goes without saying that, for a labor law professor, to give a lecture that commemorates David Feller is truly a special honor. While I never had the chance to meet him, his work as an advocate and scholar serves as an example for everyone in the field. I am grateful to the Journal and to the Feller family for the opportunity to be with you, and I am particularly grateful for the opportunity to be with you *today*, in this moment in our country's history.

Everyone in this audience is well aware of the problems plaguing working people in America. Income inequality in the United States is at stunningly high levels, leading commentators to term this era the “new Gilded Age.”¹ The statistics are by now familiar, but they are worth

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1. Mark Price & Estelle Sommelier, *The New Gilded Age? It's Everywhere*, AM. PROSPECT, Aug. 14, 2018, <http://prospect.org/article/new-gilded-age-its-everywhere>. See also THOMAS PIKETTY, CAPITAL IN THE TWENTY-FIRST CENTURY 24 (Arthur Goldhammer trans., Belknap Press 2014).

reiterating. The wealthiest one percent of Americans takes home nearly a quarter of our national income and owns forty percent of the nation's wealth.²

The problem is not just the widening gap between the rich and poor, but the daily experience of most Americans. Real wages have barely budged in recent years,³ and nearly fifteen percent of the nation's population lives below the poverty line.⁴ One recent study estimates that thirty to forty percent of workers do not have secure employment, but rather serve as contractors, temps, seasonal workers, or in other contingent relationships.⁵ Working people also have less economic mobility than in past decades,⁶ and they have shockingly little influence at every level of politics and government.⁷ For African-Americans and immigrant workers, by nearly every measure, the picture is even worse.⁸

2. See, e.g., PIKETTY, CAPITAL IN THE TWENTY-FIRST CENTURY at 300, 348; see also ESTELLE SOMMEILLER ET AL., ECON. POLICY INST., INCOME INEQUALITY IN THE U.S. BY STATE, METROPOLITAN AREA, AND COUNTY 2, 7 (2016), <http://www.epi.org/files/pdf/107100.pdf> (discussing the gap between the top 1% and bottom 99%).

3. See Claudia Goldin & Lawrence F. Katz, *Long-Run Changes in the Wage Structure: Narrowing, Widening, Polarizing*, 2 BROOKINGS PAPERS ON ECON. ACTIVITY 135 (2007); LAWRENCE MISHEL ET AL., ECON. POLICY INST., WAGE STAGNATION IN NINE CHARTS (2015), <http://www.epi.org/files/2013/wage-stagnation-in-nine-charts.pdf>; Thomas Piketty et al., *Distributional National Accounts: Methods and Estimates for the United States* 3 (Nat'l Bureau of Econ. Research, Working Paper No. 22945, 2016).

4. U.S. CENSUS BUREAU, P60-252, INCOME AND POVERTY IN THE UNITED STATES: 2014 12–13 (2015).

5. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-15-168R, CONTINGENT WORKFORCE: SIZE, CHARACTERISTICS, EARNINGS, AND BENEFITS (2015), <https://www.gao.gov/assets/670/669899.pdf>.

6. Raj Chetty et al., *The Fading American Dream: Trends in Absolute Income Mobility Since 1940*, 356 SCIENCE 398, 398 (2017).

7. See generally, LEE DRUTMAN, THE BUSINESS OF AMERICA IS LOBBYING: HOW CORPORATIONS BECAME POLITICIZED AND POLITICS BECAME MORE CORPORATE (2015); MARTIN GILENS, AFFLUENCE AND INFLUENCE: ECONOMIC INEQUALITY AND POLITICAL POWER IN AMERICA (2012); KAY LEHMAN SCHLOZMAN ET AL., THE UNHEAVENLY CHORUS: UNEQUAL POLITICAL VOICE AND THE BROKEN PROMISE OF AMERICAN DEMOCRACY (2012); Martin Gilens & Benjamin I. Page, *Testing Theories of American Politics: Elites, Interest Groups, and Average Citizens*, 12 PERSP. ON POL. 564, 576–77 (2014); see also Kate Andrias, *Separations of Wealth: Inequality and the Erosion of Checks and Balances*, 18 U. PA. J. CONST. L. 419 (2015) (collecting and analyzing literature).

8. See, e.g., Neil Irwin et al., *America's Racial Divide, Charted*, N.Y. TIMES: THE UPSHOT, Aug. 19, 2014, <https://www.nytimes.com/2014/08/20/upshot/americas-racial-dividecharted.html> (showing how, across a wide array of economic and demographic indicators, the “chasm” between black and white Americans remains “as wide as ever”); Rakesh Kochhar & Anthony Cilluffo, *Income Inequality in the U.S. Is Rising Most Rapidly Among Asians*, PEW RESEARCH CTR.: SOCIAL TRENDS (July 12, 2018), <http://www.pewsocialtrends.org/2018/07/12/income-inequality-in-the-u-s-is-rising-most-rapidly-among-asians/> (examining the effect of the immigrant experience on economic profiles); JEFFREY P. THOMPSON & GUSTAVO A. SUAREZ, BD. OF GOVERNORS OF THE FED. RESERVE SYS., FINANCE AND ECONOMICS DISCUSSION SERIES 2015-076, EXPLORING THE RACIAL WEALTH GAP USING THE SURVEY OF CONSUMER FINANCES (2015), <http://dx.doi.org/10.17016/FEDS.2015.076> (studying the racial wealth gap and finding that “the mean and median wealth (net worth) of white families has consistently been much greater than that of black and Hispanic families, and the gap has increased in recent years”); VALERIE WILSON & WILLIAM M. ROGERS III, ECON. POLICY INST., BLACK-WHITE WAGE GAPS EXPAND WITH RISING WAGE INEQUALITY (2016), <https://www.epi.org/publication/black-white-wage-gaps-expand-with-rising-wage-inequality/> (“As of 2015, relative to the average hourly wages of white men with the same education,

A chief cause of these problems is the decline of unions. Today, labor unions represent only about eleven percent of American workers, down from a highpoint of about thirty-five percent in the 1950s.⁹ In the process, the United States has lost a critical mechanism for counter-balancing the economic and political power of corporations.

There is little question that weaknesses in American labor law have contributed to unions' decline. As numerous scholars, including previous Feller lecturers, have documented, American labor law frequently privileges employers' common law property rights over workers' rights to organize, bargain, and strike.¹⁰ Insofar as the National Labor Relations Act (NLRA) provides employees with rights, its enforcement mechanisms and penalties are far too weak to disincentivize violations of law. The statute excludes from its protections numerous categories of workers, including some of the nation's most vulnerable.¹¹ Meanwhile, because the law is oriented around the relationship between employers and employees at individual worksites, it is fundamentally mismatched to the contemporary economy, with its globalized and highly fissured corporations.¹²

The failures of American labor law have been well known for at least a generation, and the challenges facing American workers have been mounting for decades.

Nonetheless, this moment in time is distinctive.

We are living through what is simultaneously a moment of extraordinary peril and a moment of extraordinary possibility—for workers and for labor law. The peril is evident. The last few years witnessed unrelenting attacks on workers and on what is left of organized labor. This followed a period of relative indifference to the demise of labor from much of the Democratic Party.¹³ The Trump Administration, with support of members of Congress,

experience, metro status, and region of residence, black men make 22.0 percent less, and black women make 34.2 percent less. Black women earn 11.7 percent less than their white female counterparts.”).

9. See JAKE ROSENFELD, WHAT UNIONS NO LONGER DO, at 10–30 (2014); cf. RICHARD B. FREEMAN & JAMES L. MEDOFF, WHAT DO UNIONS DO? (1984) (describing, as of the mid-1980s, the role of trade unions in the United States); see also Press Release, Bureau of Lab. Stat., U.S. Dep’t of Lab., Union Members—2017 (Jan. 19, 2018), <https://www.bls.gov/news.release/pdf/union2.pdf> (providing data about union membership).

10. On the weaknesses of labor law, see, e.g., Kate Andrias, *The New Labor Law*, 126 YALE L.J. 2 (2016); Paul Weiler, *Promises to Keep: Securing Workers' Rights to Self-Organization Under the NLRA*, 96 HARV. L. REV. 1769 (1983).

11. National Labor Relations Act § 2(3), 29 U.S.C. § 152 (2012) (excluding agricultural workers, domestic workers, and independent contractors from definition of “employee”).

12. See Andrias, *supra* note 10.

13. Eric Levitz, *Democrats Paid a Huge Price for Letting Unions Die*, NY MAG.: DAILY INTELLIGENCER, Jan. 26, 2018, <http://nymag.com/daily/intelligencer/2018/01/democrats-paid-a-huge-price-for-letting-unions-die.html> (“[U]nder Jimmy Carter, Bill Clinton, and Barack Obama[,] Democrats failed to pass labor law reforms that would [] bolster the union cause. In hindsight, it’s clear that the Democratic Party didn’t merely betray organized labor with these failures, but also, itself.”).

has sought to roll back numerous wage and hour protections¹⁴ and has stepped up raids on immigrant workers.¹⁵ Trump appointees to the NLRB have sought to reverse rulings that protect workers' fundamental right to engage in concerted activity, for example by narrowing the definition of joint employment¹⁶ and rescinding the right of smaller groups of workers to unionize.¹⁷ Meanwhile, the conservative majority on the Supreme Court recently overruled *Abood v. Detroit Board of Education*, the longstanding precedent that permitted public sector employers and unions to require workers to pay fair-share fees. Such fees covered the costs of union representation and bargaining, and thereby facilitated well-funded, independent worker organizations and avoided the free-rider problem inherent in a system of exclusive representation.¹⁸ The Court also curtailed the ability of workers to engage in concerted legal action, holding that employers may force workers to sign arbitration agreements with class action waivers.¹⁹ With a new Trump-appointed Justice on the Court, the picture is only likely to get worse.

Threats to workers and labor law abound at the state level as well. Lawmakers in several states have enacted right-to-work statutes, while also restricting or banning collective bargaining among public sector workers. This retrenchment has occurred even in once union-dense states like Michigan, where I live. The effect has been not only to undermine bargaining, but to weaken the influence of working people in politics.²⁰

It gets worse. At both the state and federal level, the assault on working people extends beyond the realm of labor and employment law. It includes the repeal of regulations that rein in big banks, the passage of a tax reform

14. See, e.g., Noam Scheiber, *Labor Dept. Plan Could Let the Boss Pocket the Tip*, N.Y. TIMES, Feb. 4, 2018, <https://www.nytimes.com/2018/02/04/business/economy/tips-rule.html>.

15. See, e.g., Natalie Kitroeff, *Workplace Raids Signal Shifting Tactics in Immigration Fight*, N.Y. TIMES, Jan. 15, 2018, <https://www.nytimes.com/2018/01/15/business/economy/immigration-raids.html>.

16. In *Browning-Ferris Industries of California, Inc.*, 362 N.L.R.B. No. 186 (2015), the Board held that a common law employer qualifies as a joint employer when it retains control over employees' essential terms and conditions; such control need not be exercised directly or immediately. The D.C. Circuit recently issued an opinion affirming the *Browning-Ferris* standard, *Browning-Ferris Industries of California v. NLRB*, 911 F.3d 1195 (D.C. Cir. 2018), but the Trump Board continues to seek to narrow the standard for joint-employment. See The Standard for Determining Joint Employer Status, 83 Fed. Reg. 46681 (proposed Sept. 14, 2018) (to be codified at 29 C.F.R. ch. 1); see also Joint Employer Status Under the Fair Labor Standards Act (proposed Apr. 1, 2019) (to be codified at 29 C.F.R. pt. 791).

17. See PCC Structural, Inc., 365 N.L.R.B. No. 160 (2017), overruling Specialty Healthcare & Rehab. Ctr. of Mobile, 357 N.L.R.B. 934 (2011).

18. *Janus v. Am. Fed'n of State, Cty., and Mun. Emps.*, 138 S. Ct. 2448 (2018).

19. *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612 (2018).

20. See James Feigenbaum et al., *From the Bargaining Table to the Ballot Box: Political Effects of Right to Work Laws* (Nat'l Bureau of Econ. Research, Working Paper No. 24259, 2018), <http://www.nber.org/papers/w24259.pdf>; see also *supra* note 7.

bill designed to benefit the very wealthiest in our country, and the undermining of health care programs on which working people depend.²¹

In light of all this, it is hard not to despair about the direction of the country and the future facing workers in America.

But while the threats are significant, in my view, there is also reason for optimism. In the last few years, economic inequality and problems facing workers have moved from the periphery of the public debate to the center. The political conversation is shifting. In the face of that shift, and in the face of the mounting problems facing working Americans, there are growing demands for change among working people. From restaurant servers to airport cleaners, from university instructors to elementary school teachers, workers are increasingly organizing against the prevailing regime of low-wages, minimal benefits, and a lack of rights and dignity at work.²²

These efforts have important implications for law. Even though victories have been limited to date, the worker organizing efforts are illuminating how labor law should change. And they are beginning a process that could, I believe, result in reshaping understandings about the fundamental rights to which all Americans are entitled.

Fight for \$15

I have previously written about the efforts of low-wage workers organizing as part of the “Fight for \$15.”²³ This campaign began with a few hundred workers in New York but is now national in scope.²⁴ It includes fast food, airport, and retail workers, federal contractors, home health aides, and adjunct professors—all of whom now demand substantially higher wages and union rights.²⁵ Notably, the campaign has pulled off bold strikes across the country. These are unusual strikes.²⁶ They are short in duration and typically involve only a minority of workers at any one workplace.²⁷ They do not succeed in shutting down production, nor do they seek to.²⁸ Instead, they serve an expressive function that has nonetheless proven quite significant.²⁹

21. See Kate Andrias, *The Fortification of Inequality: Constitutional Doctrine and the Political Economy*, 93 IND. L.J. 5, 8 (2018).

22. Another example is the recent decision of voters in Missouri to reject the Republican state legislature’s attempt to impose open-shop or “right to work” on all workplaces. See, e.g., Noam Scheiber, *Missouri Voters Reject Anti-Union Law in a Victory for Labor*, N.Y. TIMES, Aug. 7, 2018, <https://www.nytimes.com/2018/08/07/business/economy/missouri-labor-right-to-work.html>.

23. Andrias, *supra* note 10.

24. *Id.* at 47–51.

25. *Id.*

26. *Id.*

27. *Id.*

28. *Id.*

29. *Id.*

Thousands of workers in hundreds of cities, across racial, ethnic, and industrial divides, are risking their jobs in support of an ambitious set of demands.³⁰ And while the Fight for \$15 campaign builds on years of similar organizing by worker centers and segments of the labor movement, in this era of inequality, the new movement has had unusual success in the political arena.³¹ It has succeeded in raising wages and improving benefits and working conditions, while shifting the terms of public debate.³² Just a few years ago the demand of \$15 an hour as a minimum was considered laughable.³³ Now, a minimum wage of \$15 is law in a number of localities and states.³⁴ It has also been adopted by numerous corporations and championed by political leaders, both those long committed to worker rights and those previously ambivalent or tepid.³⁵

The Fight for \$15's efforts to win wage increases and union rights contain the seeds of a promising new labor law regime.³⁶ This is because, at bottom, the campaign rejects much of the system of labor relations that has been in place since the New Deal. It does not seek to win union elections at a handful of worksites and to bargain incremental changes through private collective bargaining. It does not seek to proceed only through the NLRB's administrative system with the government serving as neutral arbiter. Instead, the campaign demands significant changes for workers on a sectoral basis. It makes its demands both to employers and in the political sphere, calling on the government to serve as a defender of workers' interests.³⁷ And ultimately, it seeks not just wage increases but a reconceptualization of the fundamental rights to which all workers are or should be entitled.³⁸

West Virginia

The recent teachers' strike in West Virginia, together with subsequent actions by teachers in Colorado, Kentucky, Oklahoma, and Arizona, provides another (even more surprising) example of how new movements among workers are marking a path for reforming labor law—and, potentially, for redefining conceptions of rights.

Though West Virginia has a long and proud history of union activity, its teachers, and its public-sector workers more generally, have no legal right to

30. *Id.* at 52–57.

31. *Id.*

32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.*

36. See *id.* at 7–10, 57–69.

37. *Id.*

38. See Kate Andrias, *Building Labor's Constitution*, 94 TEX. L. REV. 1591, 1595–96 (2016).

bargain collectively. They also have no legal right to strike.³⁹ While the state was once solidly progressive in orientation, in more recent years its legislature has enacted a right-to-work statute, repealed the state's prevailing wage law, and slashed corporate taxes, among other anti-worker reforms.⁴⁰ In the 2016 election, West Virginia voted overwhelmingly for Trump.⁴¹

Indeed, in many ways, West Virginia epitomizes the trends I mentioned earlier: collapsing unions, rising low-wage work, declining mobility, and a shrinking middle class. West Virginia has a poverty rate of more than 17% and many of the 277,000 students in the state qualify for free breakfast and lunch.⁴² West Virginia teachers are some of the lowest paid teachers in the country. Before the strike, they ranked 48th in salaries, ahead of only Oklahoma, Mississippi, and South Dakota.⁴³ One leader of the strike is reported to have made just \$39,000 a year after 19 years on the job. She works as a cashier on the weekends to make ends meet.⁴⁴ Others pick up fast food shifts to pay their bills or file for food stamps to feed their children. Teachers also face rising costs in health insurance,⁴⁵ have been subjected to policies that intrude on their personal health decisions,⁴⁶ and have been

39. *W.Va. Attorney General 'Prepared to Act' in Teacher Strike*, WSAZ3 NEWS CHANNEL, Mar. 1, 2018, <http://www.wsaz.com/content/news/WVa-Attorney-General-releases-statement-declaring-work-stoppage-illegal-474758253.html>; 63 W. Va. Att'y Gen. Op. 27 (Mar. 8, 1990), 1990 WL 596845; see also MILLA SANES & JOHN SCHMITT, CTR. FOR ECON. & POL'Y RES., REGULATION OF PUBLIC SECTOR COLLECTIVE BARGAINING IN THE STATES 8 (2014), <http://cepr.net/documents/state-public-cb-2014-03.pdf> (describing state laws on public employee bargaining and strikes).

40. Elizabeth Catte, *West Virginia Teachers Are Resurrecting the State's Rich History of Labor Activism*, NATION, Mar. 6, 2018, <https://www.thenation.com/article/west-virginia-teachers-won-but-at-what-cost/>; Lacie Pierson & Taylor Stuck, *New Laws to Take Effect in West Virginia*, HERALD-DISPATCH, May 22, 2016, http://www.herald-dispatch.com/news/new-laws-to-take-effect-in-west-virginia/article_0b1cf9bb-232c-57fe-85fe-6996e0453345.html.

41. *West Virginia Presidential Race Results: Donald J. Trump Wins*, N.Y. TIMES, Aug. 1, 2017, <https://www.nytimes.com/elections/results/west-virginia-president-clinton-trump>.

42. Valerie Strauss, *Why the Remarkable West Virginia Teachers Strike Is Not Over After Eight Days*, WASH. POST, Mar. 5, 2018, <https://www.washingtonpost.com/news/answer-sheet/wp/2018/03/05/why-the-remarkable-west-virginia-teachers-strike-is-not-over-after-eight-days/>.

43. NAT'L EDUC. ASS'N, RANKINGS OF THE STATES 2016 AND ESTIMATES OF SCHOOL STATISTICS 2017 32 (2017), http://www.nea.org/assets/docs/2017_Rankings_and_Estimates_Report-FINAL-SECURED.pdf.

44. Steven Greenhouse, *The West Virginia Teacher Strike Was Just the Start*, N.Y. TIMES, Mar. 7, 2018, <https://www.nytimes.com/2018/03/07/opinion/teachers-west-virginia-strike.html>.

45. Jess Bidgood, *West Virginia Raises Teachers' Pay to End Statewide Strike*, N.Y. TIMES, Mar. 6, 2018, <https://www.nytimes.com/2018/03/06/us/west-virginia-teachers-strike-deal.html>.

46. Phil Kabler, *Delegates Criticize WV PEIA Wellness Program as 'Invasion of Privacy'*, CHARLESTON GAZETTE-MAIL, Jan. 17, 2018, https://www.wvgazettemail.com/news/legislative_session/delegates-criticize-wv-peia-wellness-program-as-invasion-of-privacy/article_4e96bb8b-cf41-5539-9d16-cd5fc0979b81.html; Benjamin Wallace-Wells, *The New Old Politics of the West Virginia Teachers' Strike*, NEW YORKER, Mar. 2, 2018, <https://www.newyorker.com/news/news-desk/the-new-old-politics-of-the-west-virginia-teachers-strike> (discussing requirement that teachers download application that would track their step count).

threatened with legislation proposing to lower qualifications and eliminate seniority protections.⁴⁷

In February of this year, the Governor of West Virginia signed into law a bill that gave teachers a 2% pay increase starting over the summer, followed by 1% increases in 2020 and 2021. The bill did nothing about the problem of rising health care costs or any of the teachers' other grievances. This was unsurprising and consistent with past experience.

What was surprising was that this year, the teachers said, "No." For nine days in February and March, nearly twenty thousand teachers, organized with both the National Education Association and the American Federation of Teachers, and organizing on their own, refused to work.⁴⁸ Not just at one school or in one county, but in all 55 counties throughout the state.⁴⁹

As the teachers began their strike, they gathered at the state capital to confront the state's political leaders. The teachers wore red—the same color worn by coalminers in the 1921 Battle of Blair Mountain when they engaged in a pitched battle with strikebreakers and law enforcement.⁵⁰ The teachers gathered at the statehouse—the same place where 40,000 coal miners stood in 1969 protesting against the refusal of mining companies and the state legislature to address the devastating black lung disease.⁵¹ They were joined by parents, students, school bus drivers, and supportive workers from other industries.⁵² All the schools in the state were closed. Legislators who had

47. Mike Elk, *West Virginia Teachers Stage Walkout over Wages and Benefits*, GUARDIAN, Feb. 22, 2018, <https://www.theguardian.com/education/2018/feb/22/teacher-walkout-west-virginia-strike-pay-cuts-protest>; Ryan Quinn, *WV Legislature Likely to Address Teacher Seniority Issue*, CHARLESTON GAZETTE-MAIL, Jan. 5, 2018, https://www.wvgazettemail.com/news/education/wv-legislature-likely-to-address-teacher-seniority-issue/article_266e0899-b73b-50ef-84af-5531c961c56d.html; Taylor Swaak, *Why Are West Virginia's Teachers Not in School? Statewide Walkouts Explained*, NEWSWEEK, Feb. 26, 2018, <http://www.newsweek.com/west-virginia-walkouts-explained-820534>.

48. See Emily Stewart, *All of West Virginia's Teachers Have Been on Strike for over a Week*, VOX, Mar. 4, 2018, <https://www.vox.com/policy-and-politics/2018/3/3/17074824/west-virginia-teachers-strike-justice-union> (stating that West Virginia's 680 public schools employ 19,488 classroom teachers, and that school districts were closed in all 55 counties). See also Strauss, *supra* note 42 (estimating that 22,000 teachers in all 55 school districts participated).

49. Stewart, *supra* note 48; see also Mark Curtis, *West Virginia Teacher Strike Continues Monday*, WOWKTV.COM, Feb. 23 2018, <http://www.wowktv.com/news/west-virginia-teacher-strike-continues-monday/988954748>.

50. ROBERT SHOGAN, *THE BATTLE OF BLAIR MOUNTAIN* 169 (2006).

51. See Bob Powell, *February 18, 1969: Against UMWA Wishes, Raleigh Co. Miners Protest to Have Black Lung Recognized*, W. VA. PUB. BROAD., Feb. 18, 2015, <http://wvpublic.org/post/february-18-1969-against-umwa-wishes-raleigh-co-miners-protest-have-black-lung-recognized>.

52. E.g., Matt Berical, *Why West Virginia's Parents and the PTA Supported the Teacher Strike*, YAHOO!, Mar. 7, 2018, <https://www.yahoo.com/lifestyle/why-west-virginia-parents-pta-003352051.html>; Caity Coyne, *WV Students Stand in Solidarity with School Employees*, CHARLESTON GAZETTE-MAIL, Feb. 21 2018, https://www.wvgazettemail.com/news/education/wv-students-stand-in-solidarity-with-school-employees/article_5d9e658c-be2a-5f3c-aced-7b5a963bf7f8.html; Sophie Kasakove, *As the Strike Continues, West Virginia Students Stand by Their Teachers*, NATION, Mar. 1, 2018, <https://www.thenation.com/article/as-strike-continues-west-virginia-students-stand-by-their-teachers/>; Dan Klein, *Many Parents Support Teacher Strike, Some Scramble*, WSAZ NEWS CHANNEL, Feb. 21,

long ignored the teachers' demands were forced to confront their plight. Union leaders, too, were pushed. At one point, state union officials reached a tentative agreement, but the teachers rejected the deal as too conditional and vowed not to return to work until the legislature had endorsed the deal.⁵³

On March 6, nine days after they began, the teachers prevailed. They won a 5% raise, not only for themselves, but for all state employees. It is still too early to tell whether West Virginia's teacher strike will have long-lasting ramifications. Yet, teachers in other parts of the country, including in Oklahoma, Kentucky, and Arizona, have already begun similar actions.⁵⁴ Rather than focusing on the transferability of the teachers' organizing to other industries, or on the various organizing strategies they employed, I want to focus on the legal issues inherent in the teachers' actions.

How should we think about the legal status of the strike? And what might the West Virginia experience, along with that of other movements like the Fight for \$15, tell us about the relationship of strikes to legal change and to conceptions of rights in this moment of peril and possibility?

Law of public sector strikes

Public sector workers in West Virginia, including teachers, lack the statutory rights to bargain collectively and to strike.⁵⁵ The state has declined to enact laws providing collective bargaining rights or protecting concerted action, and the Supreme Court has held that the Constitution permits states to deny such rights.

West Virginia is not alone.⁵⁶ North Carolina and Virginia both prohibit public employee collective bargaining.⁵⁷ Texas law declares it to be against public policy for any state, county, or municipal officials to enter into a collective bargaining agreement with a labor organization,⁵⁸ though it creates

2018, <http://www.wsaz.com/content/news/Many-parents-support-teacher-strike-some-scramble-474765113.html>; Chris Lawrence, *School Bus Drivers Say There Is Solidarity with Teachers*, W. VA. METRONETWORKS, Mar. 2, 2018, <http://wvmetronews.com/2018/03/02/school-bus-drivers-say-there-is-solidarity-with-teachers/>.

53. Jess Bidgood & Campbell Robertson, *West Virginia Walkouts a Lesson in the Power of a Crowd-Sourced Strike*, N.Y. TIMES, Mar. 8, 2018, <https://www.nytimes.com/2018/03/08/us/west-virginia-teachers-strike.html>.

54. Moriah Balingit, *First It Was West Virginia. Then, Kentucky and Oklahoma. Now Arizona and Colorado Teachers Prepare to Walk Out*, WASH. POST, Apr. 26, 2018, <https://www.washingtonpost.com/news/education/wp/2018/04/26/first-it-was-west-virginia-then-kentucky-and-oklahoma-now-arizona-and-colorado-teachers-prepare-to-walk-out/>.

55. See SANES & SCHMITT, *supra* note 39, at 65.

56. See *id.* (collecting state statutes). For a history of public sector unions, see JOSEPH E. SLATER, PUBLIC WORKERS: GOVERNMENT EMPLOYEE UNIONS, THE LAW, AND THE STATE, 1900–1962 (2004). On the history of teacher unionism, see MARJORIE MURPHY, BLACKBOARD UNIONS: THE AFT & THE NEA, 1900–1980 (1992); DIANE RAVITCH, THE GREAT SCHOOL WARS: NEW YORK CITY, 1805–1973 (1974).

57. N.C. GEN. STAT. ANN. §§ 95–98 (2017); VA. CODE ANN. §§ 40.1–57.2 (2017).

58. TEX. GOV'T CODE ANN. § 617.002 (2018).

an exception for local fire and police departments.⁵⁹ Texas even provides that public employees who strike will lose all civil service and reemployment rights, as well as their public employee benefits.⁶⁰ Moreover, in the last few years, several states that once permitted public sector bargaining, like Wisconsin, Indiana, and Michigan, have eliminated many of the rights previously conveyed to public employees.⁶¹ Even the more progressive states that allow collective bargaining among public sector workers tend to prohibit strikes.⁶² Only about a dozen states allow non-emergency public sector workers to go on strike.⁶³

Against this background, and given the declining power and militancy of unions generally, it is not surprising that teacher strikes have been few and far between. The last teacher strike in West Virginia was 30 years ago.⁶⁴ In earlier periods, strikes were more frequent. From 1945 to 1950, there were around 60 work stoppages by educators around the country.⁶⁵ In that era, schools were underfunded, classrooms overcrowded, and teachers underpaid; in the context of the postwar economic boom, teachers sought to match private sector wage growth.⁶⁶ The 1960s and 70s also witnessed major teacher strikes, including one in New Haven, Connecticut where nearly 100 teachers were jailed. In that action, and others in major cities, unionized teachers sought both better wages and benefits and better learning conditions for their students.⁶⁷

But in recent decades, teachers and their unions have been on the defensive, following criticism by Republicans as well as by some leading Democrats.⁶⁸ Critics depict teachers as concerned about salaries and job protection at the expense of children. In their view, teacher tenure, rather

59. TEX. LOC. GOV'T CODE ANN. § 174.002(b); *see* Jefferson Cty. v. Jefferson Cty. Constables Ass'n, 546 S.W.3d 661 (Tex. 2018) (applying § 174.002 and stating that firefighters and police officers have the right to organize for collective bargaining, though *not* to strike).

60. TEX. GOV'T CODE ANN. § 617.003(b) (2018).

61. *Unions Are Confronted with an Existential Threat*, ECONOMIST, Feb. 24, 2018, <https://www.economist.com/united-states/2018/02/24/unions-are-confronted-with-an-existential-threat>.

62. *See* SANES & SCHMITT, *supra* note 39, at 8.

63. *Id.*

64. Strauss, *supra* note 42.

65. Josh Eidelson, *Could Wildcat Teachers' Strikes Spread to Other States?*, BLOOMBERG NEWS, Mar. 6, 2018, <https://www.bloomberg.com/news/articles/2018-03-06/could-west-virginia-s-wildcat-teachers-strike-spread/>.

66. *Id.* (quoting historian Joseph A. McCartin); *see also* MURPHY, *supra* note 56.

67. Kate Andrias, *Lessons of a Different Sort: The New Haven Teachers' Strike of 1975* (1977) (unpublished B.A. thesis, Yale College) (on file with author).

68. *See, e.g.*, Valerie Strauss, *Why Many Democrats Have Turned Against Teachers Unions*, WASH. POST, July 5, 2014, <https://www.washingtonpost.com/news/answer-sheet/wp/2014/07/05/why-many-democrats-turned-against-teachers-unions/> (highlighting the push towards charter schools led by President Obama and Education Secretary Arne Duncan, as well as the high-profile departure of two former spokesmen for President Obama who left to lead a national PR campaign to support challenges to teacher job protections).

than chronic underfunding and lack of professional treatment, is the cause of schools' ills.⁶⁹ For many years, the hostility to teacher strikes, even from liberals, was palpable.⁷⁰

Civil disobedience, legal change, and the small-c constitution

There is a slogan that comes from the 1960s and 70s, back when strikes were more common: "There is no illegal strike, just an unsuccessful one."⁷¹

To a great extent, this is descriptively accurate. Despite the absence of legal rights, when strikes have been big enough in scope and where workers have had the support of their communities, legal penalties have rarely been imposed and ultimately improvements have been won.⁷² The West Virginia strike is a vivid illustration of this phenomenon. As such, one might conclude that law is irrelevant to the periodic efforts of workers to transform their working conditions. Strikes are about power. Workers win or lose depending on the breadth and strength of their action, not on the law's sanction. On this account, law and law reform are not all that important.

But there is another way to understand the slogan, "there is no illegal strike"—another way to understand the collective action by teachers in West Virginia, Oklahoma, Kentucky, and elsewhere. That is: the teachers do not deny the law's import, rather, they offer condemnation of the law as unjust. Ultimately, they aim to change the set of practices, institutions, norms, and traditions that structure American society.⁷³ The teacher strikes should be understood in this light, and as part of the venerable tradition of nonviolent civil disobedience undertaken with the goal of legal, social, and, ultimately, *constitutional* transformation.

Civil disobedience can be defined as "a conscientious and communicative breach of law designed to demonstrate condemnation of a law or policy and to contribute to a change in that law or policy."⁷⁴

69. See *id.*; see also Valerie Strauss, *Chris Christie Wants to Punch the Teachers Union in the Face. But He Isn't the Only Candidate Attacking Educators*, WASH. POST, Aug. 3, 2015, <https://www.washingtonpost.com/news/answer-sheet/wp/2015/08/03/chris-christie-wants-to-punch-the-teachers-union-in-the-face-but-he-isnt-the-only-candidate-attacking-educators/>.

70. Corey Robin, *Liberals and the Strike*, JACOBIN, Apr. 5, 2018, <https://www.jacobinmag.com/2018/04/oklahoma-teachers-strike-democratic-party-liberalism>.

71. Joe Burns, "There is No Illegal Strike, Just an Unsuccessful One," JACOBIN, Mar. 6, 2018, <https://www.jacobinmag.com/2018/03/public-sector-unions-history-west-virginia-teachers-strike>; see also JOE BURNS, *STRIKE BACK: USING THE MILITANT TACTICS OF LABOR'S PAST TO REIGNITE PUBLIC SECTOR UNIONISM TODAY* (2014).

72. Burns, *There is No Illegal Strike*, *supra* note 71.

73. See Richard Primus, *Unbundling Constitutionality*, 80 U. CHI. L. REV. 1079, 1082, 1133–34 (2013) ("[T]he 'constitution' (with a lowercase 'c') is the web of documents, practices, institutions, norms, and traditions that structure American government."); see also Andrias, *supra* note 38 (analyzing worker movements and small c-constitutionalism).

74. Jessica Bulman-Pozen & David E. Pozen, *Uncivil Obedience*, 115 COLUM. L. REV. 809, 812 (2015).

Here, teachers did just that.

They undertook a conscious breach of law in an effort to change a system that consigns them to a life of near-poverty—to low wages and costly benefits—and that grants them little respect for the important work they do. They undertook a conscious breach of law to express condemnation for a legal regime that denies them the right to have a voice in their working conditions—that denies them the legal right to bargain and strike. In so doing, they appealed to a higher law, to a conception of fundamental rights. They sought to change the basic rules by which we constitute ourselves as a nation.

When a journalist asked Dale Roberts, the President of the West Virginia Education Association, if the strike was illegal, Roberts responded: “We have a right to have our voices heard.”⁷⁵ At the state capital rally, the President of the United Mine Workers, celebrating the striking teachers and their leaders, analogized them not only to the legendary mineworker leader John Lewis, but also to Martin Luther King and Gandhi. The nearly all white and largely female audience of striking teachers erupted in applause.⁷⁶

In rejecting the policies that undervalue their work and in condemning the law that deprives them of their right to strike, the teachers were also challenging a legal regime and a social order that frequently posits rights as individual, rather than as collective. By striking en masse the teachers asserted their collective rights and needs as teachers. They also defined themselves as sharing interests with other working people, repeatedly invoking the history of mineworkers, seeking common cause with their students and the parents of their students, and, ultimately, winning raises not only for themselves, but for all public sector workers in the state.

As such, the teachers also challenged the devaluing of education and public goods. They resisted the austerity policies that have characterized our politics for recent decades. Prior to the strike, West Virginia had so many vacant teaching positions that, “in many schools, grades had been combined for efficiency, and teachers were teaching subjects for which they were not certified or trained.”⁷⁷ Teachers put these educational issues at the center of their fight—and they won widespread support from their students.

In response, conservatives tried to pit teachers against poor citizens of the state. The President of the State Senate, in reluctantly signing the final bill, argued it would lead to painful cuts in other parts of the state budget,

75. The Real News, *West Virginia Teachers Strike Redefines Teacher Unionism*, YOUTUBE, Feb. 27, 2018, <https://www.youtube.com/watch?v=hesEvKAKufc>.

76. Greg Cruey, *Cecil Roberts, President of the United Mine Workers of America*, YOUTUBE, Feb. 27, 2018, <https://www.youtube.com/watch?v=SLwo20JgpEE>.

77. Benjamin Wallace-Wells, *The New Old Politics of the West Virginia Teachers’ Strike*, NEW YORKER, Mar. 2, 2018, <https://www.newyorker.com/news/news-desk/the-new-old-politics-of-the-west-virginia-teachers-strike>.

including possibly Medicaid.⁷⁸ Nonetheless, the striking workers insisted that the choice was not Medicaid recipients or their own salaries. The state, they argued, must find a way to provide for all its citizens.

At their state capital rally, the teachers claimed their position as citizens as well as workers. Nearly all raised their hands when Roberts asked who had a family member serving in the military. And nearly all joined their voices in demanding that the government “stand up for us.”⁷⁹ “We will remember,” they chanted, “in November.”⁸⁰

In short, the West Virginia teachers’ strike functioned not only as an indication of the limits of law, but also of its power and import. The teachers’ actions condemned the existing law and offered a fundamentally different vision of the rights to which all Americans should be entitled.

Their vision of legal change is instructive. It is most relevant for public sector workers. It suggests a recipe for law reform that would grant teachers and other public sector workers the right to bargain and to strike, and that would recognize these rights as fundamental—maybe even constitutionally guaranteed.⁸¹

Though such arguments seem farfetched today, they were not always so. The California Supreme Court has held it is not unlawful for public employees to engage in concerted work stoppages as long as those stoppages do not pose an imminent threat to public health and safety.⁸² Concurring in that opinion, former Justice Rose Bird saw a constitutional right as well. She drew on numerous Supreme Court opinions, including by such Justices as Brandeis, Holmes, and Murphy, and concluded that, “the right to strike must be counted among those constitutionally protected ‘liberties’ that are essential to human freedom.”⁸³ The right to strike, she argued, derives from the Thirteenth Amendment’s prohibition against involuntary servitude and

78. Jess Bidgood, *West Virginia Raises Teachers’ Pay to End Statewide Strike*, N.Y. TIMES, Mar. 6, 2018, <https://www.nytimes.com/2018/03/06/us/west-virginia-teachers-strike-deal.html>; Jake Zuckerman & Ryan Quinn, ‘We Have Reached a Deal’: WV Schools Reopening After Justice Signs Pay Raise Bill, CHARLESTON GAZETTE-MAIL, Mar. 6, 2018, https://www.wvgazettemail.com/news/legislative_session/we-have-reached-a-deal-wv-schools-reopening-after-justice/article_7939c12d-7b0c-5929-972b-6b0864c60da8.html.

79. Cruey, *supra* note 76; Julian Perdue, Manar Hesino & Jazmine Aliff, *What WV Students Learned from the Teacher Strike*, CHARLESTON GAZETTE-MAIL, Mar. 25, 2018, https://www.wvgazettemail.com/opinion/gazette_opinion/op_ed_commentaries/what-wv-students-learned-from-the-teacher-strike/article_786337b6-aeb0-504a-9ba6-88d21f207208.html.

80. Jake Zuckerman, *Will WV Teachers ‘Remember in November’?*, CHARLESTON GAZETTE-MAIL, Mar. 31, 2018, https://www.wvgazettemail.com/2018_wv_teachers_strike/will-wv-teachers-remember-in-november/article_14323138-a063-527e-a9ba-84ef52df8211.html.

81. See Cty. Sanitation Dist. No. 2 v. L.A. Cty. Emps.’ Ass’n Local 660, 699 P.2d 835, 855–56 (Cal. 1985) (Bird, C.J., concurring).

82. *Id.* at 849–50 (majority opinion).

83. *Id.* at 860 (Bird, C.J., concurring).

its commitment to guaranteeing real freedom for all laborers.⁸⁴ It is “also an incident of the fundamental freedoms of association and expression.”⁸⁵

The teachers’ struggle also has relevance for private sector workers. Although the NLRA formally protects the right to bargain and to strike, in practice, private sector workers also have very limited rights. Indeed, their rights are particularly limited when it comes to broad, cross-workplace strikes with ambitious aims—like the solidarity practiced by the West Virginia strikers.⁸⁶ The NLRA, after all, prohibits secondary boycotts;⁸⁷ offers only limited protection for politically-focused strikes; restricts mass picketing and recognitional picketing;⁸⁸ and allows the use of permanent replacements.⁸⁹

All of these rules are being contested by today’s struggles. The teachers, and the workers in the Fight for \$15 and other similar movements, are, by implication of their actions, condemning these rules as unjust and demanding that the law change.

In short, the teachers, and other workers involved in today’s labor struggles, are outlining the blueprint of a new labor law—a labor law that moves away from narrow, bureaucratic, and legalistic forms of worker representation toward more sectoral, worker-driven, and political forms of organization. And they are helping force a shift in the way our society conceives of labor rights and social rights—from wages to education to health care. Ultimately, in seeking to change the web of practices, institutions, norms, and traditions that structure our society, they are engaging in small c-constitutionalism: they are working to change our constitutional order.⁹⁰

* * *

Despite all of the peril, I hope you, like me, will see this as a moment of possibility, maybe even of promise.

On the subject of promise, I wanted to close by acknowledging that one week ago today, on March 29, 2018, the country lost one of its greatest jurists: Judge Stephen Reinhardt. I lost a mentor and a dear friend.

84. *Id.* at 858 (Bird, C.J., concurring).

85. *Id.* at 860 (Bird, C.J., concurring).

86. See Alia Wong, *The Ripple Effect of the West Virginia Teachers’ Victory*, ATLANTIC, Mar. 7, 2018, <https://www.theatlantic.com/education/archive/2018/03/west-virginia-teachers-victory/555056/> (discussing how the success of the West Virginia teacher strikes depended on the broad, cross-school nature of the strikes and the solidarity of teachers from across the country).

87. National Labor Relations Act § 8(b)(4), 29 U.S.C. § 158(b)(4).

88. *Id.* § 8(b)(7), 29 U.S.C. § 158(b)(7).

89. NLRB v. Mackay Radio & Tel. Co., 304 U.S. 333, 345–46 (1938).

90. See Andrias, *supra* note 38; Primus, *supra* note 73.

A former labor lawyer himself, the Judge was well aware of peril, pointing out injustices at every opportunity, both in his opinions and in personal conversations. Even so, he never lost sight of possibility. In a *Michigan Law Review* essay, he wrote: “I am an optimist. I still believe that ‘the arc of the moral universe is long, but it bends toward justice.’”⁹¹

Judge Reinhardt was committed to “a Constitution dedicated to promoting the general welfare, ensuring the equality of all individuals, and guaranteeing liberty and justice to all—a Constitution that lives and breathes as our great nation evolves in light of the moral, economic, and scientific forces that shape our destiny.”⁹² He never stopped working to achieve that vision. Though he waged difficult battles, witnessed painful lapses, and endured stinging defeats, he nonetheless saw “a trend toward progress and social justice.”⁹³ He believed in our democracy. He believed in law. He believed that, in the end, the law’s errors would be “corrected as the arc of history unfolds.”⁹⁴

In this moment of peril and possibility, I hope that you will join me in working to prove him right.

91. Stephen R. Reinhardt, *The Demise of Habeas Corpus and the Rise of Qualified Immunity*, 113 MICH. L. REV. 1219, 1254 (2015).

92. *Id.*

93. *Id.*

94. *Id.*