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The Renaissance of the Right to Strike in the United States Inside and Outside of Traditional Labour Law

Abstract: The epithets on the grave of the American labour movement have long been written. Yet hope springs eternal. Recent developments, such as the Covid pandemic and the role of artificial intelligence in disrupting traditional work models, have prompted suggestions that labour unions may yet become reinvigorated and have a role in safeguarding worker rights in the face of these changes. This article examines these prospects, particularly through the lens of the strike and other forms of collective action. While traditional union activity – notwithstanding raised hopes – remains hamstrung by regressive US labour law and low prospects for legislative change, collective action in the wider sense does have potential to boost worker rights. Such action includes both lawful and unlawful strikes and protests in key sectors, by union and non-union employees, and even non-employees, such as independent contractors. The subject of these actions may even go beyond traditional employment concerns and include human rights. Potential obstacles under traditional labour law and antitrust law are not insurmountable.

Keywords: strike, unions, artificial intelligence, collective bargaining, human rights, antitrust, independent contractors

Introduction

Membership in American labour unions continues to plummet. In 2024, 5.7% of private sector workers in the US were union members. Unions' share of public-sector employees was higher, at 32.2%, for an overall level of 9.9% of all workers (US DoL, 2025a). These figures represent a severe decline from 1983, when union membership levels stood at 20.1% of the workforce (US DoL, 2025a), and even a bigger drop from the peak in the 1940s of approximately 34.2% (Romero & Whittaker, 2023). Such a long-term and seemingly irreversible slide would seem to condemn American unions into irrelevance as we progress further into the 21st century. Yet there is a notion that in current conditions, unions are essential for the protection of workers' rights, and even more broadly, American society as a whole. To the extent unions were on life support, their immediate resuscitation is required.

Drastic changes in working conditions were made possible by the Covid-19 pandemic and the continued acceleration of the development of artificial intelligence (AI) and its application to the workplace. The pandemic exposed vulnerabilities in the lack of a social safety net for workers (no right to paid sick leave, health insurance connected to employment, minimal unemployment benefits). It also made clear the capacity of employers to effectively move work from a physical office to a virtual one online. AI has amplified the ability of platforms to transform work from an employment model to a gig work or independent contractor model, particularly with respect to ride-sharing and food delivery. Even more ominously (to the extent gig work will be limited to certain fields), AI reveals a potential to automate a wide range of jobs, even those traditionally thought of as white-collar or professional. In the face of this instability, government has either too been slow or even unwilling to help ease workers legitimate concerns and anxieties. As in the late 19th century in response to the excesses of industrialization, independent trade unions are seen as one hope to ensure that workers' rights are protected.

However, to the extent unions can be revived to fulfil this role, they will not do so through the use of traditional labour law mechanisms. Perhaps it is too dramatic to say that the National Labor Relations Act (NLRA)(US Congress, 1947), the primary federal statute governing labour management relations in the US, is a dead letter, but it is close to it. For much of 2025, the National Labor Relations Board (NLRB), the administrative agency charged with enforcing the NLRA, lacked a quorum after President Trump fired its chair, rendering it unable to make any decisions (Weissner, 2025). In any case, even under more benign and ostensibly labour-friendly administrations, the structure of the NLRB and the enforcement of labour law are such that cases often take an interminable time to be resolved. Moreover, where violations are found, penalties are light, giving employers little incentive to obey the law.

Instead, unions – and workers – can only make a difference by pursuing strikes, protests or other, similar industrial actions. Such actions have three effects, where successful. First, they can force employers to directly resolve issues on favourable terms to workers. Second, they can bring attention to an important employment issue: even if the strike did not force a particular employer to make all the concessions sought by the workers, by the publicity generated it may swing public support behind the workers' position. In turn, this might prompt state or federal legislation to correct the problem. Third, industrial action by unions may stimulate unrepresented workers to engage in concerted activity, including withholding work and protesting, to protect themselves or issues that they care about. These issues could include sexual harassment, racism, or even human rights violations abroad that might affect their work. This might lead to direct or indirect change, and ultimately lead to union representation.

This article will demonstrate the viability of this strategy. First, it will be shown that in the immediate post-pandemic years, there was a wave of strikes, at a level not seen in decades. This demonstrates a new need and even demand for industrial action. Next, the existing constitutional and legislative framework for strikes in the US will be examined. Special emphasis will be placed on the legal limitations on the right to strike, which in turn force unions to be innovative and bold in order to succeed. Finally, four (4) examples of union and/or worker collective action (strike, protest or otherwise) provide a roadmap of how these actions may be effective. These examples include strikes against AI; a new California law allowing rideshare drivers to unionize, collectively bargain and engage in concerted activities; protest or concerted activity by unrepresented workers in response to human right violations; and wildcat (unauthorized and even illegal) strikes.

1. The renaissance of strikes in the United States

After decades of decline, strike activity in the United States has recently dramatically increased (LeClercq, 2024, p. 219).[1] This increase has been both qualitative and quantitative, and was a dramatic reversal from the seemingly irreversible downward trend that had set in. Qualitatively, the strike wave of 2023–2024 involved high-profile national industries, mostly in the private sector, and included autoworkers, actors, screenwriters and healthcare workers. For the first time in history, the United Auto Workers (UAW) struck all of the big three American auto manufacturers simultaneously (Ford, General Motors and Stellantis, in a show of strength. Approximately 49,000 workers were on strike for almost five weeks (Rua & Tito, 2024). The Screen Actors Guild–American Federation of Television and Radio Artists (SAG-) and the Writers Guild of America (WGA) went out on strike for five–six months against the major Hollywood film studios and streaming service provides, including Netflix. In October 2023, 75,000 healthcare workers struck Kaiser Permanente. A last-minute settlement averted a strike by 300,000 Teamsters union drivers against UPS, a major US and international delivery service (Reiter, 2023, p. 3). The protagonists of these strikes were all highly visible and the work involved was connected to people's everyday lives – buying cars, watching films, receiving packages and accessing healthcare.

Moreover, the issues involved in these strikes deeply resonated with the American public. SAG and WGA members were fighting against the threat of being replaced

1 'There has been a dramatic resurgence of workplace strife in America, from auto plants to grocery stores to universities to Hollywood, garnering the Summer of 2023 the "Hot Strike Summer". That resurgence has renewed attention on unions and their ability to fight for greater democracy and power at the workplace'.

by Artificial Intelligence (AI), perhaps the most advanced (and even threatening) type of automation yet. As ChatGPT and the increased use of computer-generated imagery (CGI) in film demonstrated, AI could conceivably do a significant portion of work previously done by actors and writers. In the back of the public's mind was the danger that AI could take their jobs away too. The UAW strike represented the future of manufacturing in the US after the pandemic. The government had promised to build back better and to secure American industry in key sectors, especially those related to the green economy. One issue in the UAW strike was ensuring that electric-car manufacturing and the production of car batteries would be well-paid union jobs based in the US. The healthcare strike against Kaiser Permanente involved staffing issues, as nurses and others were asked to care for more and more patients. Again, an employer understaffed and employees overworked was an issue most Americans could relate to.

Quantitatively, the surge in strikes in 2023 was also impressive. Thirty-three major strikes occurred involving 458,000 workers, most of whom were in the private sector (US DoL, 2024b). These strikes caused 16,673 lost workdays. This was the highest number of workdays lost due to strikes since 2000, and prior to that year, since 1989, and the largest number of strikes since 2000. These numbers were in stark contrast to those of the preceding 20 years. In the period 2000–2017, the number of annual strikes had levelled off to its lowest numbers in history. By 2009, there were only five strikes involving approximately 12,500 workers throughout the entire country (US DoL 2024a). In most years during that period, there were less than 20 strikes per year, involving less than 190,000 workers. From 2013, the figures were even worse, with no more than 15 strikes per year involving less than 100,000 workers. In 2017, only seven strikes occurred, idling 25,000 workers. These figures amounted to a dramatic drop-off from the totals during the period 1947–2000. In the post-war period up until 1979, 1 to 2 million workers would be participating in hundreds of strikes in a typical year. From 1980 to 2000, the absolute numbers of strikes per year never passed 100, and the amount of workers on strike typically did not exceed several hundred thousand, itself a significant decline from the previous period, but still a much more robust figure than in the period that would follow (US DoL, 2024a). Put another way, the season of strikes in 2023 was not just a slight statistical anomaly, and it begs a closer analysis.

Mostly, the increase in strike activity in the US was in response or related to the Covid-19 pandemic in 2020–2022. The pandemic, as it did in Europe, had an enormous social and economic impact in the US. Over 1 million Americans died, and many more fell ill, including those who continue to suffer long Covid. This catastrophe led many people, including workers, to consider their own mortality and question their willingness to work in undesirable, underappreciated and even unsafe conditions (Hill, 2023, pp. 359–360; Ressler, 2022, p. 1497). A significant number of older workers opted for early retirement during this period as a result, wondering whether it was worth the risk working a few more years in such an environment (Frankford, 2022, p. 999). At the same time, the federal government pumped huge amounts of money into special programmes and state unemployment insurance schemes that enable people to keep their jobs and income, or receive enhanced unemployment benefits to maintain their standard of living while they were out of work. Indeed, by American standards, these benefits were quite generous, to the extent that they at times exceeded the wages paid for many low-skill jobs. While these benefits ultimately ceased as the pandemic wound down, there was a buffer period in which many individuals had little incentive to accept work that paid less than the benefits they were receiving from the government (Perdue, 2023, p. 249).[2]

Finally, all this massive spending by the federal government, largely to support vulnerable business and workers, eventually had an inflationary effect. Prices for goods and services rose, and wages lagged behind (Vereckey, 2024). But during the time of the pandemic itself, there was limited opportunity for workers to spend their wages or unemployment benefits; a number of sectors of the economy were almost entirely shut down, including the entertainment, restaurant and travel industries. Consequently, workers saved their money, hoping to spend it in better times (Stein, 2022, pp. 75–76).

Taken together, these effects of the pandemic had an important impact on the US labour market. On one hand, there was pent-up consumer demand to spend the money they had saved over the course of the pandemic, not only because it was there, but as a release to celebrate and enjoy the things they had been denied over the long pandemic years. On the other, the 'great resignation' – workers taking early retirement, refusing to return to bad jobs, and remaining on social benefits until the last possible moment rather than taking new work – led to a labour shortage. In other words, there were many new economic opportunities for businesses after the pandemic to meet consumer demand, but these same businesses had difficulties in hiring adequate numbers of staff to operate.

The pandemic also accelerated a re-evaluation of the relative merits of unfettered free trade and globalization. The US was caught backfooted when it found that some basic medical supplies were exclusively imported from China, with no alternative sources of domestic production. After the pandemic subsided, there was an increased commitment to ensuring American production in key sectors of the economy, including industrial output. This circumstance created a strange political convergence of interests, as President Trump's protectionist tendencies over the course of 2016–2020 appeared to be at least partially validated and were in large part kept in place by his successor, Democrat Joe Biden (Bhattarai, 2022; Jacobs, 2024; Wiseman, 2024).

In other respects, however, President Biden significantly diverged from President Trump's other pro-business policies. Biden was an old school, pro-labour Democrat, distinct from Presidents Clinton and Obama and their centrist approach. He openly

2 Summarizing view that enhanced benefits were a disincentive for individuals to return to work; to encourage people to return to work, many states slashed Covid-era unemployment benefits.

supported the cause of labour unions and even walked on a picket line in support of the UAW during its nationwide strike. He also made appointments to the NLRB and the US Department of Labor to ensure both administrative entities would take a more favourable approach towards unions and workers (Nicholas, 2023; Press, 2024).

All these events contributed towards a favourable environment for strikes to take place in 2023. The labour shortage blunted the risk that employers would be easily able to permanently replace striking workers, even in low-skilled fields. There was money to be made in satisfying all the pent-up post-pandemic consumer demand, and employers could not afford to have their businesses idled by strikes. Consequently, employers showed an unusual willingness to go a long way towards meeting striking workers' wage demands as the price to keep their businesses up and running. This led to a positive loop of strikes being resolved on favourable terms towards workers and unions, justifying the decision to go out on strike in the first place and encouraging similar actions going forward. The turn from globalization, and focus on reindustrialization in key US sectors (favouring American businesses in the build back better programme), further lent an aura of security over many sectors of the US economy, emboldening unions to take the risk of industrial action. Finally, these events were presided over by the most pro-union president in decades, lending political support to unions that they had lacked since the 1970s.

The number of strikes declined slightly in 2024, as compared to 2023 (31 to 33), but still well above pre-pandemic levels (US DoL, 2025c). The drop in the number of workers involved in these strikes was more significant, however, going from 458,000 to 271,500 (US DoL, 2025b). Strike data for 2025 was not available at the time this article was completed, so it is not clear what effect the election of President Trump and his assumption of the office in January 2025 have had on the willingness of workers to walk off the job. Trump has been generally hostile to organized labour, and initially paralyzed the NLRB by firing a Biden-appointed board member before her term expired, thereby leaving the NLRB without a quorum and thus unable to act. More recently, he successfully appointed new, pro-business members of the NLRB, and it can be assumed that the newly constituted NLRB will reverse most of the pro-union decisions made by the Biden-era board. At the same time, Trump has pursued an anti-free trade agenda and promised to boost domestic manufacturing, which may give workers more confidence to risk a strike.

2. Legal regulation of the right to strike in the US

2.1. Overview

American law, unlike its European counterparts, does not provide a broad right to strike. Strikes do not receive federal constitutional protection. For private-sector employees, strikes are regulated by the NLRA. Nominally, there is a general right to strike for these employees, but this is undercut by the Supreme Court's decision allowing employers to permanently replace most striking workers. Some state constitutional provisions and a patchwork of federal and state legislation regulates strikes by public-sector employees. Generally, federal employees and most state employees do not have a right to strike. Exceptionally, some states grant certain categories of public employees (such as teachers) a limited right to strike.

This restrictive legal regime creates many challenges for unions and workers considering industrial action. The potential for job loss or fines or penalties for illegal strikes creates a chilling effect, where job action only occurs where the workers believe they have some economic leverage or otherwise feel compelled to take a stand on an important issue, notwithstanding the risk.

2.2. Constitutional issues

In most respects, the right to strike is not a constitutional issue in American law. The US Constitution does not expressly provide for a right to strike, nor has one been implicitly found to exist by the federal courts (US District Court for the District of Columbia, 1971).[3] There have been creative efforts by unions to carve out a constitutional right to strike, mostly focusing on the First and Thirteenth Amendments to the US Constitution, but these have been unsuccessful. The Thirteenth Amendment to the US Constitution prohibits involuntary servitude, and, rather uniquely in the Constitution, this applies to both government and private conduct (the US Constitution is designed to protect people from government action). In a number of different contexts, mostly involving public employees who were prohibited from striking by federal or state law, unions argued that forcing such employees to continue to work, when they desired to strike (or forcing them to return to work after staging an illegal strike), amounted to involuntary servitude. In rejecting these arguments, the courts have held that the Thirteenth Amendment acts as a prohibition against slavery. Government workers are merely prohibited from formal strike action. They receive fair wages for their work and at an individual level, may always choose to permanently resign their employment (California Court of Appeals, 1970; Missouri Supreme Court, 1970).

Arguments based on the First Amendment are focused exclusively on the right to strike for public employees, as this provision (and the rest of the Constitution) acts only as a restriction on state action. The First Amendment provides the rights to free speech, free association and free assembly. Unions have argued that this gives employees the right to join a labour union, i.e. they have the right to associate with a union in order to voice their concerns about working conditions and bargain with their employer. The US Supreme Court, in rejecting this contention, stated that:

3 Holding that there is no constitutional right to strike.

> The First Amendment protects the right of an individual to speak freely, to advocate ideas, to associate with others, and to petition his government for redress of grievances. And it protects the right of associations to engage in advocacy on behalf of their members. The government is prohibited from infringing upon these guarantees
> […] But the First Amendment is not a substitute for the national labour relations laws. […] 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. But 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. (US Supreme Court, 1979) (emphasis added)

Thus, while the First Amendment allows public employees to join and associate with labour unions, there is no corresponding constitutional obligation upon the employer to bargain with (or even listen to) the union. As the First Amendment does not act as a labour law, and provides no right to bargain, it likewise does not provide any right to strike (Supreme Court of Arizona, 1987).[4]

While there is no US *federal* constitutional right to collectively bargain and to strike, several states in the US have placed labour rights in their respective state constitutions. In the US federal system, the US Constitution is the highest law of the land and applies to the states, superseding any conflicting state law. However, each state has its own constitution, which applies to subjects within the competence of the states. One of these competences is to regulate labour relations of certain employees excluded by federal labour law, including state and local public employees, agricultural workers and intrastate workers (i.e. private-sector employees working for employers not involved in interstate commerce, and who are excluded from coverage of the NLRA). Specifically, Florida, Hawaii, Missouri, New Jersey and New York provide for the right to organize and collectively bargain in their respective constitutions (Florida, 1968; Hawaii, 1978; Missouri, 1945; New Jersey, 1947; New York, 2001).

An original threshold problem with some of these state constitutional provisions was whether or not they were self-executing, i.e. whether they could immediately be enforced by the courts, or whether they needed enabling state legislative action in order to be effective. In Missouri, the state Supreme Court originally held that its collective bargaining provisions was not self-executing, but ultimately reversed this decision in 2012. In that case, the Missouri Supreme Court ordered a town to collectively bargain with a police union based on the state constitution, notwithstanding the absence of applicable legislation (Missouri Supreme Court, 2012). The Hawaii Supreme Court reached a similar conclusion under its state constitution. The NLRA

4 ‘[T]here is no First Amendment right to strike.’

was already in effect when Hawaii became a state with its own constitution, as were collective bargaining provisions in state constitutions in New York, New Jersey and Missouri. In this context, the constitutional clause granting the right to collective bargaining 'as defined by law' did not require any additional Hawaiian legislative action. Rather, it was a reference to the scope and meaning of the term 'collective bargaining' as already defined by the NLRA and these other state constitutions (Hawaii Supreme Court, 2002).

A further issue is whether a state constitutional right to strike can be necessarily inferred by a constitutional provision guaranteeing the right to organize and collectively bargain. None of the state constitutional clauses mentioned expressly provides for a right to strike. Indeed, the Florida Constitution states the opposite, indicating that public employees do *not* have the right to strike (Florida Constitution, 1968).[5] The New Jersey Supreme Court has clarified that, at least with respect to private employees, implicit within the state constitutional right to organize and bargain is the right to strike (NJ Supreme Court, 2009).

Considered as a whole, the right to strike is not constitutionally protected in the US, apart from the possibility that some state constitutional provisions may implicitly provide this right as an extension of the right to organize and bargain. Perhaps individual states, particularly those with high union density, will enact or further develop state constitutional causes to protect the right to strike. Unlike labour legislation, such constitutional provisions would be difficult to amend or delete in the future. Moreover, giving strikes constitutional protection would be a signal that it is an important right, on a par with other constitutional protections such as free speech.

2.3. Legislation

The right to strike, where it exists, is mostly a matter of legislative prerogative in the US. At the federal level, the NLRA gives most private-sector employees in the US the right to strike (US Congress, 1935). Important exceptions include supervisors, independent contractors and agricultural employees (US Congress, 1935). The Railway Labor Act (RLA), which covers airline and rail workers, likewise gives these employees a right to strike, albeit with many procedural conditions (LeRoy, 1995). In contrast, employees of the federal government are statutorily prohibited from going out on strike (Cholden-Brown, 2022). Whether or not state and local public-sector employees have a right to strike is determined by the states. In this respect, states have chosen one of two options: prohibiting all public employees from striking, or allowing some public employees in non-essential public services to strike, often under specific limitations and restrictions.

Within these broad categories, the relevant legislation does balance the right to strike with other important legislative and constitutional interests, such as education,

5 'Public employees shall not have the right to strike.'

public safety and even commerce. For private-sector employees covered under the NLRA, there is nominally a very broad right to strike. However, this is largely undercut by Supreme Court precedent permitting employers to permanently replace most striking workers (US Supreme Court, 1938). Technically, there is a slight distinction between being 'permanently replaced' and being fired, but this is a nuance only a lawyer would love (namely, a permanently replaced striker has a right to reinstatement or be placed on a preferential hiring list if their job has already been filled, if they unconditionally offer to return to work) (Reddy, 2021, pp. 436–437). An exception to this principle is when the workers are striking against the illegal conduct of the employer, rather than for purely economic reasons. In that case, the striking workers would have the right to return to work at the conclusion of the strike (Moberly, 2011, pp. 138–139). Even in that instance, it is often difficult for the union to prove its true motivation for the strike, and the issue can be tied up in years of litigation. In the meantime, the workers may be without a job.

There are also various restrictions on the manner in which the strike is conducted. The strike must be total – a complete cessation of work for a block of time. Partial or intermittent strikes are prohibited. Thus employees may not accept some tasks and refuse others under the guise of a strike (US Court of Appeals, DC Circuit, 2015).[6] Similarly, the strike cannot be conducted every other day, or every other Saturday (US Court of Appeals, 8th Circuit, 1999). The timing of the strike is also regulated, by contract and by statute. Most collective bargaining agreements contain a no-strike clause, where the union pledges not to strike for the duration of the agreement (US Supreme Court, 1970);. Indeed, courts have even inferred such a no-strike clause even when the agreement does not expressly contain one (US Supreme Court, 1976, p. 407). The NLRA also requires that unions give 60 days' notice of a strike occurring upon the expiration of a collective bargaining agreement, and as well as notice to relevant federal and state labour mediation bodies (US Congress, 1947).

Healthcare workers have additional, special notice requirements under Section 8(g) of the NLRA. They must give ten days' notice before commencing a strike against a healthcare institution (US Congress, 1974),. This was a legislative compromise to both preserve the right to strike, but also to ensure patient safety. With advance notice, hospitals had the opportunity to reschedule elective procedures and transfer patients who were in need of critical care. In essence, this compromise has been effective – there are no reports of any patient dying as a result of a properly noticed strike by healthcare workers (Davies, 2005, p. 1821). They also must give 90 days' notice of a strike at the expiration of a collective bargaining agreement, as opposed to the usual 60 days' notice required by other workers (US Congress, 1974).

The Taft–Hartley amendments to the NLRA, enacted in 1947, prohibiting secondary boycotts, made the general strike illegal under American labour law. The un-

6 'A strike is protected under the NLRA only if it is a "complete" strike.'

ion must have a primary dispute with the employer in order to lawfully go out on strike (Duff, 2014). Thus the UAW may call a strike against Ford, the employer with which the autoworkers have a primary labour dispute. If the Communications Workers of America (CWA) called a strike against AT&T, a telecommunications company, in support of the UAW, it would be an illegal secondary boycott. The CWA has no primary dispute with Ford.

Certain harmful conduct related to the strike may also be restricted. The Norris–LaGuardia Act (US Congress, 1932) goes so far as to prohibit courts from enjoining or restraining a lawful strike, but even this law contains exceptions which permit courts to limit picketing and other behaviour when the strike has turned violent (US Congress, 1932; US District Court for the Central District of California, 2020). Likewise, the union may be liable for damages when it destroys the employer's property in conjunction with the strike (US Supreme Court, 2023).

For railway and airline workers, the RLA guarantees the right to strike, but places numerous procedural obstacles upon the union before the strike may commence (LeRoy, 1995, p. 3). Under the RLA, labour disputes are divided into two categories, major and minor. Minor disputes are resolved by binding arbitration, and involve the interpretation of language in an existing collective bargaining agreement. A union cannot call a strike over a minor dispute (US District Court for the Northern District of Illinois, 2024). Major disputes involve larger issues connected with wages, hours and other working conditions. Unions have the right to strike over a major dispute, but only after a lengthy statutory 'cooling off' period and efforts at mediation (US Court of Appeals for the 5th Circuit, 2020, pp. 334–335). Even after all these procedures are exhausted, Congress may pass special legislation to enable the president of the U.S to impose final contract provisions (and thereby prohibit a strike) if he or she concludes that the strike poses a threat to the US economy (Garver, 2022). These restrictions on the right to strike represent a balance between it and the harm and inconvenience a transportation strike might impose upon the public and the overall economy.

Various states have different laws on whether state and local public employees have a right to strike. Most states do not permit any public employee strikes, and therefore have made the policy choice that a strike's harm to the public outweighs any notion of a right to strike. A number of other states grant a limited right to strike to some public employees, primarily based on whether they perform essential services or not. Police, firefighters and prison guards, fall on the side of essential services, and do not have a right to strike. Sometimes, in lieu of the right to strike, they are given the opportunity to submit their contract demands to interest arbitration. In this procedure, an arbitrator determines the terms of a collective bargaining agreement between (for example) a police union and a city, often based on comparative data (what compensation do police offers receive in comparable cities) (Summers, 2003, p. 450).

Teachers, in contrast, may or may not be granted the right to strike, depending upon the state's policy judgement. The education of children can be considered an essential public service, and in some states even a constitutional right. Where states have allowed teachers the right to strike, there are normally strict safeguards in place to ensure that the children will still receive their education. In Pennsylvania, for example, a school year must include a minimum of 180 days in the classroom; teachers may strike, subject to the students' ability to complete these number of classroom days. A ten-day strike may result in the school year being extended by ten days into the summer, which would be acceptable. However, a much longer strike could be illegal, if there was not enough time to make up the school days lost to the strike (Pennsylvania Commonwealth Court, 2009).

3. Threading the needle: How unions and workers can still use strikes and concerted action to secure better working conditions

3.1. Strike over high-profile issues, like the use of artificial intelligence

A significant challenge is represented by artificial intelligence which is significantly impacting the right to strike, especially in the USA. A key strike in 2023 involving actors and writers pitted against Hollywood studios and streaming giants should give us reason to reconsider this battle or zero-sum game, of sorts, between essential services and the right to strike. Instead, we should see the issue quite differently. The right to strike is necessary to *preserve* essential services, in the broadest sense of that term. The ability of humankind to continue to work and be gainfully employed is essential to our existence. As explained below, the actors and writers' strike successfully preserved creative work in the face of a threat to replace these jobs by AI. This success demonstrated that unions, and strikes, have a key role in our future in preserving some of our essential characteristics (the ability to engage in meaningful work) in the face of new and sometimes poorly regulated new technologies.

Some of the highest profile strikes in the US over the course of 2023–2024 involved the Screen Actors Guild (SGA) and the Writers Guild of America (WGA) against the main employers in the American motion picture industry. In one sense, they were considered high-profile because they involved well-known Hollywood actors and actresses and the key film production and streaming companies, such as Netflix and Amazon, which were all recognizable household names. But in another, even more important sense, these strikes struck a chord with the public (in the US and internationally) because of what the unions were striking about. A major issue for both the SAG and WGA was the film companies' use of artificial intelligence (AI) to replace actors and screenwriters. For many people, even outside the entertainment industry, this represented an existential threat to work itself, going beyond the previous threats posed by various types of automation (Wilkinson, 2023).

The release of ChatGPT to the general public showed the vast potential of AI for creative writing. Not only could ChatGPT provide short answers to standard internet queries, but it could also write an essay, book or play, sometimes of reasonable quality. This potential was not lost on Hollywood. With further improvements, it was not difficult to imagine that ChatGPT or its successor could generate huge quantities of screenplays and scripts for use in film – for free, or at least for far less than the cost of paying a union screenwriter (Kinder, 2024).

Actors, too, were threatened by the use of new digital imaging and voice sampling technology. Digital avatars of well-known actors could be generated by AI, and could be used on an unlimited basis in future films and series – even after the actor him – or herself was dead (Catanzaro, 2023, p. 4; Curren, 2023, pp. 160–161).

SAG and WGA recognized that AI had the capacity to drastically undermine the future employment opportunities of actors and screenwriters, and sought appropriate protections in its new collective bargaining agreement with the studios. When the studios refused, this became a major issue in the strike. Another big issue was restructuring the manner in which residual payments were paid to actors and writers. Residuals had been an important source of income for actors and writers, particularly where they were involved in a hit television programme which was rerun in syndication for many years after the original run of the show ended. These payments were based on the programmes ratings (i.e. viewership), which determined the advertising rates for commercials shown during these programmes. However, with the rise of streaming, residuals were extremely curtailed. Programmes run on streaming services did not have ratings, in the usual sense. Instead, the streaming services kept internal records as to how many people viewed these shows. Since there were no ratings, there were no residual payments issued to actors and writers involved in these streamed programmes (Morrison, 2024).

The SAG strike lasted from July to November 2023, and the WGA strike from May to September 2023. Both strikes were largely successful. The studios agreed in the respective collective bargaining agreements that followed to limit the use of AI. The studios had to obtain the express, written consent of actors before using their digital image or voice; advance 48 hour notice must be provided by the studios of their intent to use digital replicas or synthetic performers; compensation for their use must be negotiated; and actors should be paid their normal rate for scenes using their digital replicas, to the extent they lost work as a result of their use, among other provisions (Patten, 2023). Likewise, the writers obtained concessions, whereby the studies agreed to limit the use of AI in screenwriting. Writers would receive notice about AI content in any written materials provided to them by the studios; AI cannot not be source material for scripts; cannot be a credited writer, and cannot write or rewrite literary material. These points were key provisions, since a film must have a credited writer and must be based on source material. Consequently, AI cannot replace union screenwriters. Writers, moreover, cannot be compelled to use AI as a supplement to their own writing. The studios retained the right to use scripts owned by them to train AI systems, though the writers did not waive their right to challenge this practice through other legal means (i.e. copyright infringement clams) (Coyle, 2023; Wilkinson, 2023). Finally, both agreements revised the manner in which residuals were paid from streamed shows, ensuring that actors and writers received reasonable bonuses for their work on shows that had large numbers of viewers (Morrison, 2024).

For the labour movement in general, the successful SAG and WGA strikes have many implications. First, unions and workers have the opportunity to control their own fate. AI is a dramatic form of automation, with the potential to eliminate jobs on a scale never seen before. It is also very fast developing. In these circumstances, working people are left with two options: to encourage their legislatures to regulate AI to provide necessary protections, and/or to engage in self-help. Self-help may have many different forms, but a major one is strike action coordinated by unions. The workers and unions accomplished this feat on their own, without the need to wait for government intervention, in an environment in which many observers felt that AI would inevitably lead to job loss. This is proof of the continued power and relevance of the strike. A major advantage of achieving these protections through a strike is that the terms of the settlement are directly negotiated by the unions in the interests of the workers they represent. They are not the result of legislative compromise, influenced and possibly diluted by the interests of other stakeholders.

Second, a strike settlement can be faster than a legislative solution. While too long for the workers involved, the SAG and WGA strikes lasted approximately five to six months before a tentative settlement was reached. By legislative standards, however, this is extraordinarily quick. As AI continues to develop and improve, waiting several years for legislation that may already be obsolete is not a viable option.

Finally, the success of the SAG and WGA strikes gives society notice and hope that what unions do is in the public interest. Historically, authoritative regimes have attacked and tried to eliminate independent trade unions as part of their assault on democracy; these unions were one of the last obstacles to the success of these plans. Now, the unbridled and unrestricted use of AI threatens the future of work and the structure of society itself, and unions again find themselves on the barricades. The public has taken note of what unions have done, and may give them increased support and backing to defend our common interests.

3.2. Push for gig workers and independent contractors to have the right to bargain and engage in concerted activity

Independent contractors are excluded from the definition of ‘employee’ within the meaning of the NLRA. Therefore they do not have the right to join unions, collectively bargain and strike. Theoretically, states could step in and provide legislative protection for independent contractors under state labour law. Farmworkers, for example, are also excluded from the protections offered by the NLRA, but states such as California have filled this gap by enacting their own agricultural labour relations laws that provide them with similar rights. However, even if states where willing to take these steps (and some are, as explained below), there is an additional obstacle – antitrust law. Under antitrust principles, individual business owners are not permitted to agree to set minimum prices. An independent contractor would be considered a small business, and if they colluded to set a minimum wage (i.e. a price for service), this would run foul of US antitrust law. Just as hairdressers could not band together and set a minimum price for a haircut, independent contractors such as Uber drivers could not do so with respect to minimum ride-share fees.

This is not necessarily an insurmountable obstacle. An exception exists in antitrust law whereby a state under certain conditions may regulate an activity, even though the regulation may have an anticompetitive effect. This exception was at issue in *Chamber of Com. of the US v. City of Seattle* (US Court of Appeals for the 9th Circuit, 2018). In that case, Seattle relied on a state law which permitted municipalities to regulate some transportation issues, in order to pass an ordinance that permitted platform drivers (independent contractors) to organize unions and collectively bargain. Even to the extent that this amounted to permitting anticompetitive behaviour, Seattle argued that it was allowed under the state action exception. On appeal, however, the Court ruled that this exception did not apply; specifically, the court found that the state law at issue generally dealt with transportation issues, and did not explicitly authorize Seattle to regulate collective bargaining for platform drivers. Moreover, the state was not significantly involved in overseeing the law at the municipal level. Since the exception did not apply, the Seattle ordinance violated and was preempted by antitrust law (US Court of Appeals for the 9th Circuit, 2018; Delfino & Szymanski, 2024).

Perhaps learning the lessons of the *City of Seattle* case, California recently passed the Transportation Network Company Drivers Labor Relations Act, AB 1340, which went into effect on 1 January 2026. The law allows certain ride-share drivers (i.e. those with a minimum number of weekly rides) to join a union, collectively bargain and engage in concerted activity. Such drivers are considered independent contractors under California law. AB 1340 is innovative in the American context, as it envisages sectoral bargaining between the drivers and the ride-sharing platforms. The platforms must supply information on all drivers who are eligible to join a union to the California Public Employment Relations Board (PERB) (California Legislature, 2025). If a union receives support from 10% of the eligible drivers, an election is conducted. If the union receives support from 30% of eligible drivers, it becomes the certified bargaining representative for all the ride-share drivers working for California ride-share platforms and obtains the right to negotiate a collective bargaining agreement on their behalf. There are additional provisions which allow mediation and even for interest arbitration should negotiations reach an impasse (California Legislature, 2025).

AB 1340 specifically states that:

> The benefit to the state's economy from negotiated agreements between transportation network company drivers and the transportation network companies, including where those agreements are multiparty, sectoral agreements, outweighs the anticompetitive effect of those agreements. It is the state's intent that the state action antitrust exemption to the application of federal and state antitrust laws shall apply to the activities of transportation network company drivers, transportation network company driver organizations, bargaining representatives for transportation network company drivers, and transportation network companies when they are participating in negotiations and other activities as authorized or regulated by this chapter (California Legislature, 2025).

Distinct from the Seattle ordinance, AB 1340 is a state law (and not a municipal ordinance) that expressly is intended to qualify for the state action exemption under antitrust law. On its face, this would appear to directly address the concerns raised by the court in the *City of Seattle* case. Moreover, on a practical level, the main California ride-share companies – Uber and Lyft – supported the passage of AB 1340, thereby making it unlikely that they would subsequently challenge the law in court on antitrust grounds (Romero, 2025).[7]

Nevertheless, some antitrust lawyers have raised doubts that AB 1340 satisfied the state action antitrust exception, as articulated in *City of Seattle*. The thrust of this argument is that the state is not itself engaged in regulating activity in AB 1340 but is simply permitting private actors (unions and ride-sharing firms) to engage in anticompetitive behaviour (Gott, 2025a; Gott, 2025b). This argument appears to be misplaced. The court in *City of Seattle* did not make this point, but instead focused on the lack of specific intent in the relevant state law to regulate collective bargaining and the state's lack of supervision of the application of the law by the city. As noted above, both of these concerns were directly addressed by AB 1340: it is a state law regulating ride-share driver bargaining, and it is enforced by the PERB (a state agency) with specific supervisory guidelines by the state as specified in the law.

Approximately 800,000 ride-share drivers are expected to be covered by AB 1340, who would gain the right to unionize and collectively bargain (Fitzgerald, 2025). The sectoral bargaining structure of the Act, which allows 30% of the eligible drivers to authorize a union to bargain on behalf of all eligible drivers, makes it somewhat easier to organize than the traditional NLRB model (requiring a 50% + 1 majority vote). The right to strike is not expressly granted by AB 1340, although the right to engage in concerted activities (California Legislature, 2025) would be reasonably interpreted

7 Explaining that in exchange for their support of AB 1340, the ride-share companies received relief from maintaining high levels of insurance for their drivers' cars.

to convey that right. In any case, given the interest arbitration provisions in AB 1340, it is most likely that problems in reaching an agreement would in the end by resolved by an arbitrator. Interest arbitration has generally been a favourable process for public employees in safety sensitive positions, such as police and firefighters, who cannot strike under state law (Su et al., 2022).

To the extent that the gig economy remains stable or expands (due to developments in AI and the shift to working online from home or another remote location), AB 1340 is an important legislative development. It empowers independent contractors, who normally would not be able to organize, to form a union and collectively bargain for a fair contract. These workers do not need to wait for further legislation, which may never come, or beneficial court decisions to obtain and defend basic rights at work. With a union and a favourable collective bargaining law (with sectoral bargaining and interest arbitration), the workers can obtain these rights directly themselves (Delfino & Szymanski, 2024; Romero, 2025).[8]

3.3. Stand up for human rights and values

Under American law, there has long been a dichotomy between the general right to protest and demonstrate under free speech/First Amendment principles and the rights of workers to strike and engage in boycotts and protests. The First Amendment offers robust protections to demonstrators but, apart from some application to public employees, no support for employees and unions in the private sector. Instead, their rights of expression and to strike are governed by restrictive labour law principles outlined in section II, infra. These labour law rights stem from Section 7 of the NLRA, which provide a right to strike and to engage in concerted activity for mutual aid or protection. These rights, however, are connected to the union or employees' relationship with their primary employer, i.e. the employer with whom the union and employees have a dispute. They do not amount to a general right of free expression outside of this specific context.

With respect to union activity, this point was made clear by the Supreme Court in *International Longshoremen's Association v. Allied International* (US Supreme Court, 1982). In that case, a dockworkers' union refused to unload shipments originating from the Soviet Union at the main port in Jacksonville, Florida. The union did so as a protest against various human rights violations committed by the Soviet Union. The primary employer of the union at the port filed unfair labour practices charges against the union, alleging that the work stoppage amounted to an illegal secondary boycott under Section 8(b)(4) of the NLRA. The employer argued that the union's main dispute was with the Soviet Union, the source of the cargo that the union refused to unload at the port, and not with the employer itself. The union tried

8 Noting that Massachusetts and New York City have also enacted laws granting ride-share drivers the right to collectively bargain.

to reframe the dispute as one with the employer rather than with the Soviet Union – the union was protesting the *employer's* decision to handle cargo from a country with such a poor human rights record. The Supreme Court sided with the employer, however, concluding that the union's industrial action had a secondary objective, to protest against the Soviet Union. The primary employer was not responsible for the human rights record of the Soviet Union. Consequently, the work stoppage was an illegal secondary boycott that violated the NLRA.

While this decision has received criticism (Ramahi, 2019), it remains good law. It severely limits a union's ability to actively protest human rights violations committed by entities other than the primary employer with whom the union has (or seeks) a relationship. This is particularly relevant in today's times, where Russia's invasion of Ukraine and Israel's actions in Gaza (among other international crises) have troubled many Americans. They would like to express their displeasure in various forums, including at work, particularly where their employer has a relationship with one of these actors (for example, the Russian state or the Israeli military). In the unionized workplace, their union cannot take any concrete steps to voice its members' concerns. To be sure, it is not illegal under the NLRA for the union, without more, to generally voice support for a particular cause, like divestment from the Israeli firms doing business in the West Bank (Ramahi, 2019, p. 153),. But any industrial action or boycott taken by the union in support of these views would be prohibited.

Non-union employees have sometimes spontaneously engaged in action at work, in the form of a protest or work stoppage, to voice their concerns on important social issues. The NLRA does offer both union and non-union employees protection to engage in concerted activities for mutual aid or protection (US Congress, 1935);. The key requirements are that the protest be collective in nature (by a group of employees or dealing with an issue that affects more than one employee) and that it be related to mutual support at work. In the classic example, a group of non-union employees who walked off the job in response to excessively cold temperatures at work were found to have engaged in protected concerted activity (Judgment of the US Supreme Court, 1962; LeClercq, 2024, p. 243). With regard to protests about social or human rights issues, the question would be whether they are collective and are connected to working conditions at the employer to determine if they were protected or not.

Actions taken in support of the #MeToo movement (protesting sexual harassment) and Black Lives Matter (BLM, protesting racial discrimination) are more likely to be found to be protected concerted activity. This is especially where the employee is protesting their own employer's culture of sexual harassment or racial discrimination, or otherwise is attempting to eliminate such behaviour at their workplace. This is a collective issue and directly impacts working conditions (i.e. to be free from harassment or discrimination at work) (Chhoy & Pearce, 2024, pp. 390–391; Tippett, 2018, pp. 251–252; US Court of Appeals for the 8th Circuit, 2024).[9]

Protests connected to human rights abuses in Gaza, over the employer's connection to Israeli firms or the Israeli government, or other abstract human rights issues are a different matter, however. Under a traditional analysis, these questions do not directly impact the employees' wages, hours or terms of conditions of employment. Moreover, American labour law has always given employers huge leeway in making entrepreneurial decisions, such as the nature of the business model and with whom the company does business. These decisions are the exclusive domain of the employer. Moreover, even concerted activity which results in certain kinds of product disparagement may lose protection under the NLRA. Under this standard, Google was within its rights to fire employees who walked off the job in protest at Google's support of the Israeli military (Beydoun, 2025, p. 82; Bresee, 2024; Smith & Crain, 2025, pp. 1517–1519; Stabbert & Ivy, 2025).[10]

While this is the current state of US labour law, in many ways it is archaic when it is applied to social and human rights protests, and it should change. More and more companies connect their brand to certain values. These values could include sustainability, protecting the environment, or even safeguarding human rights in their supply chains. These messages are not only conveyed to consumers and clients, but also to current and prospective employees (Smith & Crain, 2025, pp. 1520–1521). As a result, employees may choose to remain at a given employer, or accept a new position there, on the basis of the values that the employer has professed. When the employer changes its values, or engages in conduct that is contrary to the values it has expressed, this does have an impact on employee working conditions. Along with wages and hours, the employer's values are part and parcel of the employee's working environment. As such, employees (and where applicable, the unions that represent them) should have the right to strike, protest or engage in industrial action when these values are jettisoned by the employer.

Until the law on this point changes, unions would do well to support those social movements that are directly connected to working conditions at their members' employers, such as #MeToo, BLM and whatever the next movement may be. In the case of #MeToo and BLM, the protests started from below, by individual workers, and were only later supported by the labour movement. By getting out in front of these is-

9 The Court of Appeals avoided reaching a decision on whether a worker placing a BLM symbol on his apron at work was concerted activity; even if it was, the Court found that special circumstances existed that permitted the employer to require that the employee remove the symbol.

10 Citing possibility of Pennsylvania employees of losing their jobs for voicing support of Gaza on Instagram.

sues, the unions will be in a better position to support them and also, in turn, be supported by the general public for taking a stand (Szymanski, 2021).[11]

3.4. Engage in wildcat and illegal strikes when necessary

Thus far, union and employee strikes and protests have been examined through the prism of existing US labour law. There are more radical possibilities to consider, however. The president of the AFL-CIO (the main body of American trade unions) in the 1980s, Lane Kirkland, famously stated that unions would be better off with no labour law (UPI, 1984). labour law was so restrictive, it served to shackle the actions of labour unions more than protect them and their members. He may have had a point.

In the late 19th and early 20th centuries, organized labour made most of their gains in spite of the law, and not because of it. Labour relations were governed by civil law, which disfavoured unions, and which in any case was interpreted in a hostile manner by the courts at the time. Unions' success in adding members and convincing employers to enter into collective bargaining agreements was only due to their own efforts and ultimately, public support (Reddy, 2021, pp. 430–433). By 1935, the Wagner Act (the predecessor to the NLRA) stabilized labour relations and brought the organizing and collective bargaining activities within a favourable legal framework. Ultimately, stabilization lead to stagnation and in recent decades, decline.

More recently, American workers revived the concept of the illegal strike on a large scale and achieve significant success. In 2018–2019, teachers in a number of southern states in the US walked off the job, seeking higher pay and better working conditions. Significantly, many of these states did not give teachers the right to collectively bargain, and all of them prohibited teacher strikes. Notwithstanding these legal restrictions, the teachers nevertheless decided to go out on strike. In places where they were members of a union, the union expressly disavowed the strike to avoid legal liability (this is known as a wildcat strike, where the workers decide to strike without the permission of the union). Initially, the strikers were threatened with fines and the loss of their jobs. As time passed, however, the striking teachers received strong support from their communities and above all, from the parents of their students. The parents agreed that the teachers should have a respectable salary, so as to ensure that qualified people were educating their children. Moreover, they had an interest in the strike ending so that their kids could return to school, for educational purposes but also to ease child care problems that arose as a result of classes being cancelled. In the end, the public pressured the school districts and other state and local officials to settle the strike on terms favourable to the teachers (Reddy, 2021, p. 454; Szymanski, 2022).

One should not overstate the relevance of union and worker successes over 100 years ago and in the instance of wildcat teacher strikes in 2018. The legal framework in the US makes strikes difficult and in many situations there is a big risk of strikers

11 Making the point with respect to #MeToo.

losing their jobs or suffering financial harm as a result of an ill-considered industrial action. Still, there are useful lessons. Where workers are pushed to the brink, they need to take action, irrespective of unfavourable labour law. In a scenario where the worst fears of AI are realized, and certain industries face job losses of 70–80%, unions and workers do not have much to lose, and they need to strike to have any chance of saving their jobs. Strikes which also touch on an issue that the public supports also have a greater possibility of success. Again, this may be about the excesses of AI, but also sexual harassment or equal treatment. At the point of no return, unions and workers must make the decision not to be silent (Reddy, 2021, p. 448).[12]

Conclusions

The paradox of American labour relations is that unions are at the brink of oblivion, and at the same time represent the best hope for improving the average American's conditions at work at a time of massive change. This paper is an attempt at squaring that circle. There is strong evidence that workers want higher pay, benefits, job security and a more favourable work environment, and are willing to risk going out on strike to achieve these goals. The immediate post-pandemic period showed an almost 20-year high in the number of major strikes in the US. Thi s surge has taken place notwithstanding the extremely restricting legal regime applicable to strikes and industrial action. There is no federal constitutional right to strike. Legislative protections contained in the NLRA are limited. While there is a broad formal right to strike, strikers may be permanently replaced in most instances, and the nature of strikes are themselves restricted. Most significantly, the general strike (termed a secondary boycott in US labour law) is prohibited: unions may only take action against a primary employer with which they have a dispute.

In this context, where there is a pent-up demand to improve working conditions and even to strike, but strikes themselves are restricted and may put workers and unions in legal jeopardy, unions are placed in a difficult position. But there is a path forward. First, unions should engage in targeted work stoppages over high-profile issues that resonate with the American public, just as SAG-AFTRA and WGA did in their strike over the use of AI in the film industry. This will force change by the employers themselves and also push legislatures to address the issue. At the same time, it will improve unions' public image and garner them more support. Second, gig workers and

12 Posing this excellent question: 'For those who believe that a stronger labor movement is needed to counterbalance the concentrations of economic and political power in this new Gilded Age, one important question is not just whether the law is bad (it is), but whether strikes can be effective nonetheless. If labor activists are correct that there is "no such thing" as an illegal strike, just an unsuccessful strike, the question follows: what makes a strike successful enough, under current conditions, to transcend legal constraints?'

independent contractors should not be forgotten. They represent a significant and expanding segment of the workforce. The key is to promote legislation in sympathetic states that would allow them to organize and collectively bargain and even strike. This was recently accomplished in California with AB 1340, which allowed ride-share drivers to organize and bargain on a sectoral level with Uber, Lyft and similar companies. As a result of this law, 800,000 such drivers are now eligible to be unionized. Third, unions and workers should embrace social and human rights issues and even strike and protest over these issues. There are legal obstacles here, particularly with human rights issues connected with international events (Gaza) that more tangentially impact working conditions. However, it is argued herein that an employer's values, or lack thereof, actually should constitute a condition of employment, especially since employers often shape their identity around their alleged adherence to these values (sustainability, respect for human rights, etc.). As such it should be the legitimate subject and cause of a work stoppage. Again, unions need to take the lead on these issues, instead of being reactive to them (Huq, 2025).[13] Finally, where all else fails, unions and workers should consider unauthorized and even illegal strikes to protect their interests. In these ways, unions may chart a path between Scylla and Charybdis, reclaiming their relevance and acting as a vanguard to protect American workers.

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