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FREE LABOR TODAY

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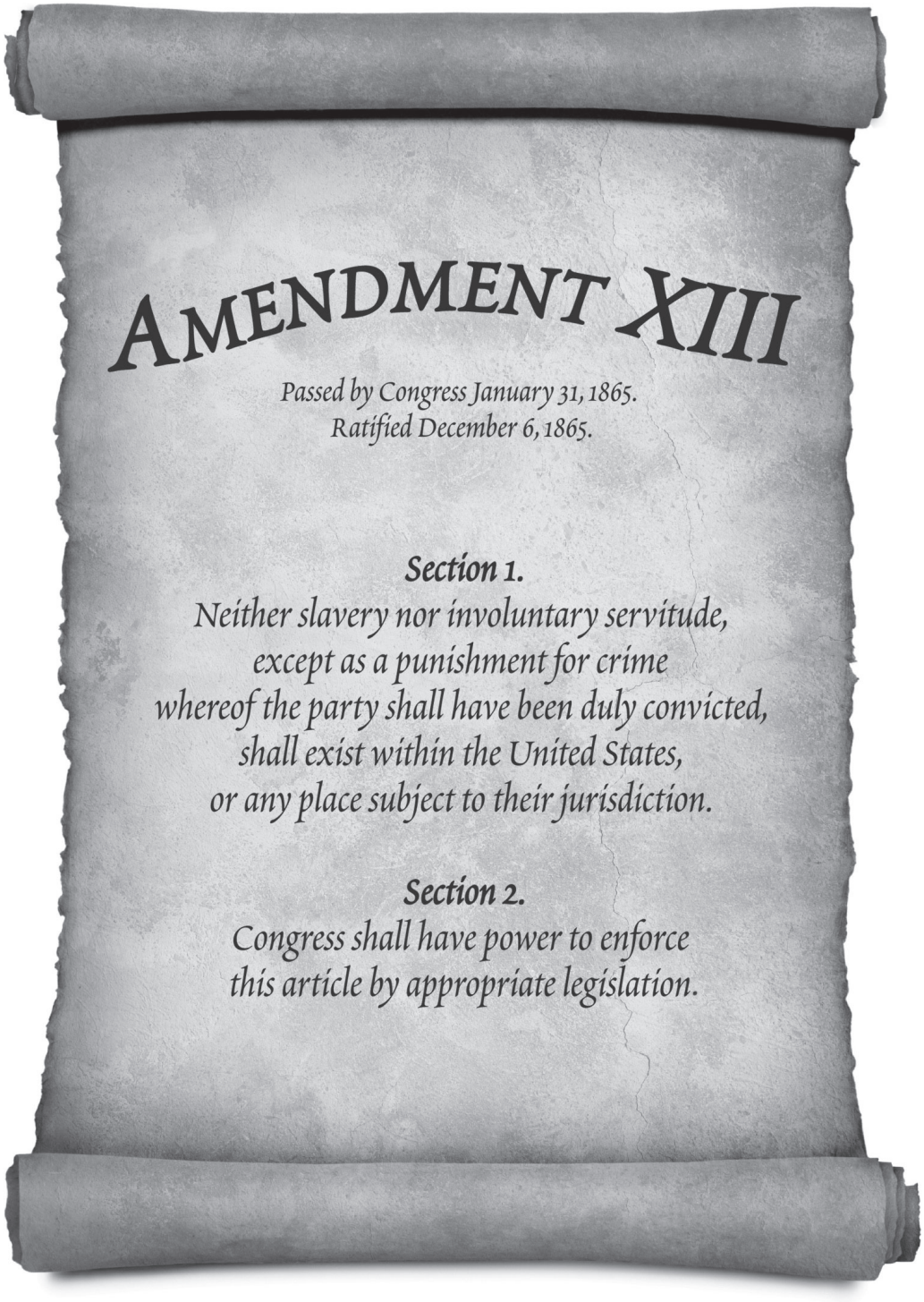
Abstract

During the first half of the 20th Century, the period when all of the United States' major workers' rights statutes were enacted, the American labor movement claimed the rights to organize and strike under the Thirteenth Amendment to the U.S Constitution. Beginning in 1909, it was the official policy of the American Federation of Labor that a worker confronted with an unconstitutional injunction had an "imperative duty" to "refuse obedience and to take whatever consequences may ensue." At a time when union institutions were as weak as they are today, every attack on workers' rights was met with an impassioned defense of the constitutional rights to organize and strike. At the same time, the movement took a long-term approach to legislative reform, demanding the full freedom to associate in organizing unions and staging strikes. In recent decades, by contrast, the movement has often shied away from defending the right to strike at moments of conflict (the 2005 New York subway strike being a prominent example), and has shaped its legislative proposals to fit what it sees as the short-run possibilities (for example, the Employee Free Choice Act, which makes no attempt to protect the right to strike). This article suggests that elements of the old labor movement's constitutional strategy might be useful in the struggle for workers' rights today.



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By James Gray Pope,
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IMAGINE THE GUN RIGHTS MOVEMENT WITHOUT THE SECOND AMENDMENT, AND YOU get some idea how strange it is for the labor movement to be limping along without the Thirteenth. Until the 1950s, the Thirteenth Amendment—known then as "The Glorious Labor Amendment"—sustained workers' rights in much the same way that the Second Amendment supports gun rights today. When employers or the government interfered with the rights to organize and strike, labor leaders and activists invoked the Thirteenth Amendment.[1] They declared yellow-dog contracts, labor injunctions, and antistrike laws unconstitutional. They sought labor rights legislation to enforce the Amendment. If the American Federation of Labor had had its way, the Norris-LaGuardia Anti-Injunction Act would have commenced with this declaration:

> *Every human being has under the Thirteenth Amendment to the Constitution of the United States an inalienable right to the disposal of his labor free from interference, restraint or coercion by or in behalf of employers of labor, including the right to associate with other human beings for the protection and advancement of their common interests as workers, and in such association to negotiate through representatives of their own choosing concerning the terms of employment and conditions of labor, and to take concerted action for their own protection in labor disputes.*[2]

Like the gun rights movement today, the old labor movement did not turn to the Constitution expecting court victories in the short run. Nor did the movement use the Constitution to appear more respectable in the eyes of "the public." Instead, workers and unions invoked their constitutional rights in order to mobilize supporters, stiffen their resolve, justify confrontational and even illegal tactics, and signal elites that workers were fighting over issues of fundamental principle that would not be traded away for a wage hike. Beginning in 1909, it was the official policy of the American Federation of Labor that a worker confronted with an unconstitutional injunction had an "im-

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perative duty" to "refuse obedience and to take whatever consequences may ensue." Every attack on workers' rights was met with an impassioned defense of the constitutional rights to organize and strike. When the state of Kansas banned strikes in key industries, for example, the AFL declared the law unconstitutional and ten thousand coal miners staged a four-month protest strike. Conservative business unionists like Samuel Gompers backed radicals like Alex Howat, the Kansas miners' fiery leader, in their open defiance of "unconstitutional" laws.[3]

Many intellectuals—including some who claimed to be "friends of labor"—joined employers in pooh-poohing the movement's Thirteenth Amendment claims. They pointed to the text of the Amendment, which states: "Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction." How in the world, they sneered, could workers be in a condition of "slavery" or "involuntary servitude" when they enjoyed the individual right to quit their jobs? But labor leaders and activists held firm and insisted that without the rights to organize and strike, workers could not be free. They charged that the employers' argument missed the whole point of the right to quit, which is—according to the Supreme Court—to give workers the "power below" and employers the "incentive above to relieve a harsh overlordship or unwholesome conditions of work."[4] In an economy dominated by large corporations, the right of a lone worker to quit offered nothing more than the opportunity to exchange one relation of servitude for another; either way, the worker ended up in servitude. Only by organizing could workers rise above servitude. As CIO General Counsel Lee Pressman explained: "The simple fact is that the right of individual workers to quit their jobs has meaning only when they may quit in concert, so that in their quitting or in their threat to quit they have a real bargaining strength."[5] African-American workers testified to the slavery-like domination made possible by labor injunctions. "I was raised a slave," commented George Echols of the United Mine Workers, "and I know the time when I was a slave, and I feel just like we feel now."[6]

Gradually, labor's Thirteenth Amendment theory gained ground. Members of Congress echoed it during debates over workers' rights legislation. Senator George Norris charged that anti-union injunctions brought about "involuntary servitude on the part of those who must toil in order that they and their families may live." Senator Robert Wagner contended that without legal protection for the right to bargain collectively, there would be "slavery by contract."[7] The Norris-LaGuardia Anti-Injunction Act of 1932 and the Wagner (National Labor Relations) Act of 1935 did not specifically mention the Thirteenth Amendment, but they did incorporate the core idea that without organization the individual worker was "helpless to exercise actual liberty of contract and to protect his freedom of labor." By mid-century, lower courts were beginning to cite the Amendment to justify invalidating antistrike laws and injunctions, and leading legal scholars like Archibald Cox and Charles O. Gregory had conceded the logic of the Thirteenth Amendment right to strike.[8]

Unfortunately, that was the high point—not only of labor's constitutional vision, but also of the movement itself. The turning point came with the Taft-Hartley Act of 1947. At first, the AFL and the CIO denounced the Act as a "Slave

Labor Law" and threatened a campaign of constitutional resistance that would dwarf previous struggles. But the onset of the Cold War soon derailed these plans. With the labor movement singled out as a hotbed of Communism, most union leaders were more anxious to demonstrate their patriotism than to enforce the Constitution. William Green and George Meany took the lead, arguing that compliance was the "American way" and unionists should put their energies into lobbying and electioneering. This provoked John L. Lewis to issue his now legendary retort that on the issue of constitutional resistance the AFL had no head: "I think its neck has just grown up and haired over."[9] For the next half century, the movement not only complied with the Slave Labor Law, but accepted the Cold War Supreme Court's validation of its constitutionality.

Today, the situation is once again ripe for the Thirteenth Amendment. After decades of meekly obeying Taft-Hartley and other anti-labor laws, labor leaders and activists are taking a more critical view. As Stephen Lerner put it, "Obeying the law reduces us to walking, in small circles, in front of facilities running on scab labor."[10] The strike—no less essential today than in the past—appears to be withering away due to legal restrictions and the permanent replacement rule, which permits employers to permanently replace workers who strike for better wages and conditions.[11] The right to organize is in no better shape. The most successful unions organize outside the NLRB election process, using tactics that push up to—and often over—the line of legality.

So far, however, most labor leaders and activists have downplayed the legal crisis, especially when public attention is focused on the issue. In December 2005, for example, New York City transit workers courageously struck in the face of New York's Taylor Law, which prohibits public employee strikes. Politicians and media outlets ranging from Fox News to the *New York Times* couldn't say the word "strike" without sticking "illegal" in front of it. Union president Roger Toussaint held firm, likening the strikers to Rosa Parks and Martin Luther King. "There is a higher calling than the law," he declared. "That is justice and equality." For a precious moment, public attention was riveted on the plight of workers who lack the right to strike. The old labor movement seized on such moments to assert the Thirteenth Amendment right to strike, and national labor leaders like Samuel Gompers honored strikers for upholding the constitutional rights of all workers. But today's labor leaders have lost that tradition, and the moment passed without anybody daring to assert the right to strike. This experience leaves us with a serious question: If union leaders and activists don't take workers' rights seriously, then why should politicians, judges, or the public?

Consider Roger Toussaint's analogy to Rosa Parks. Like Parks, the transit strikers bravely defied an unjust law. And like Parks (who had worked with both the NAACP's Montgomery Chapter and the Brotherhood of Sleeping Car Porters) the transit strikers were part of a broader movement that was positioned to support their struggle. Unlike Parks, however, the transit workers were severed from their movement's tradition of struggling for fundamental rights. The NAACP claimed that Parks was exercising her Fourteenth Amendment right to equal protection of the laws.[12] The AFL-CIO and Change to Win could have claimed that the transit strikers were exercising their Thirteenth Amendment right to strike. That

approach was implemented during the famous Memphis sanitation strike of 1968. Many people remember that when Martin Luther King was assassinated, he was in Memphis supporting an "illegal" strike by city sanitation workers. Few recall, however, that the Memphis strikers' union denied that the strike was illegal. AFSCME field director P.J. Ciampa maintained that workers need not submit to "indentured servitude," and that, as free Americans, they could cease work until they obtained decent wages and conditions.[13]

Beyond protecting the right to strike, the Thirteenth Amendment could, for the first time, bring the Bill of Rights into the workplace. As it is now, workers leave behind their constitutional rights of free speech and association when they enter company property. This is because the First Amendment does not bind private employers. "*Congress* shall make no law," it declares, "abridging the freedom of speech … or the right of the people peaceably to assemble" (emphasis added). Thus, employers are free to fire workers merely for expressing their opinions. In one case, for example, a court ruled that it was perfectly legal for an employer to fire an employee for saying the words: "Black workers have rights too."[14] The Thirteenth Amendment, on the other hand, protects against both government and private actors. It prohibits slavery and involuntary servitude regardless of who is to blame. In the words of the Supreme Court, it guarantees those rights that are necessary to provide workers with the "power below" to prevent a "harsh overlordship or unwholesome conditions of work." We contend that free speech is one of those rights.[15]

Here, the Thirteenth Amendment gives voice to a widely held intuition. Most people are shocked to discover that employers can legally fire workers for engaging in free speech. Why should the Bill of Rights stop at the corporation's doorstep? Employers are quick to respond that it is a question of property rights. They own the property, so they can conduct antiunion propaganda on work time while prohibiting union supporters from doing the same. They own the property, so they can keep union organizers out while inviting antiunion consultants in. They own the property, so they can compel workers to listen to captive audience speeches. They own the property, so they can order supervisors to campaign against the union or be fired.[16] Add up all these property rights, and you get a property right to control the workers, and that is what the Thirteenth Amendment prohibits.

Could the Thirteenth Amendment idea win the support of labor activists today as it did in the early twentieth century? We have reason to believe that the answer is yes. In 2002, the Labor Party (a national organization composed of international unions and regional and local labor organizations) endorsed an updated version of the idea as a proposal for discussion.[17] When the New Jersey Industrial Union Council presented it to two hundred local union lead-

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ers and activists at its 2003 annual meeting, the response was strongly positive. Twenty of the participants volunteered to attend a full-day training workshop to learn how to pass the Thirteenth Amendment idea on to others.

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Suppose that the labor movement were to revive the Thirteenth Amendment idea. How would its activity change? First and foremost, it would function as a rights movement, seizing every opportunity to claim and justify the constitutional rights to organize and strike. Every year, thousands of workers exercise their rights in defiance of unconstitutional laws and employer policies. Each of these courageous moments of resistance presents a precious opportunity to assert constitutional rights—as the NAACP did with Rosa Parks, and as the Gompers-led AFL did with workers who defied injunctions and antistrike laws. The New York City transit strike, for example, should have been an occasion for labor leaders to celebrate the strikers' resistance and affirm their right to strike. When labor leaders publicly charge that a law is unconstitutional and void, they remove an important prop from the system of labor control. If the charge sticks with workers, then the law is reduced to the status of an arbitrary command backed up by threats of punishment—the fate of antistrike laws and the labor injunction in the early twentieth century. Regardless of what courts do, the forceful assertion and exercise of a right can go a long way toward establishing it on the ground. The

> old labor movement built up such a strong rights consciousness that—even though the Supreme Court had announced the permanent replacement rule in 1938—it was not until the 1980s that employers could openly give strikers' jobs to scabs. In the meantime, an unofficial norm operated to nullify the rule.[18] Projects like Jobs With Justice and American Rights at Work are positive steps toward reviving this rights consciousness, but they would be greatly strengthened if today's labor leaders and activists followed the old labor movement's tradition of asserting the constitutional rights of workers during moments of confrontation, when public attention is focused on the issue.

Second, the movement would approach the struggle for labor law reform not as a matter of wheeling and dealing for the best bill that can be won at a particular time, but as a long-term, principled struggle for workers' rights legislation. This was the approach of the Gompers-era movement, which campaigned for the total abolition of antistrike and antiorganizing injunctions until Congress finally passed the Norris-LaGuardia Anti-Injunction Act of 1932, arguably the most effective workers' rights statute ever enacted in the United States.[19] By contrast, the labor movement of recent decades has tended to lurch from one ad hoc bill to another each time the Democrats make big gains (for example, the Labor Law Reform bill of 1978 and the striker replacement bills of 1992-94). The movement's cur-

rent bill, the Employee Free Choice Act (EFCA), is a mish-mash of provisions, some of which aid in the protection of workers' rights (for example, mandating monetary penalties and injunctions against employers that discriminate against unionists during organizing drives), and some of which outright violate those rights. Most importantly, the EFCA relies on compulsory arbitration to help unions obtain first contracts instead of strengthening the right to strike. As the old labor movement recognized (and as Roger Toussaint reaffirmed during the transit strike), compulsory arbitration forces workers to labor under terms that they never approved—a denial of basic labor freedom. Furthermore, the EFCA reaffirms Taft-Hartley's mandatory injunction against secondary boycotts—a provision that violates not only the Thirteenth Amendment but also international human rights norms. And although the Act's provision for card check recognition would help union organizers in the short run, it also reaffirms Taft-Hartley's requirement that workers organize in fixed, government-approved representation units—a provision that is increasingly out of step with today's rapidly changing economy.[20]

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The EFCA's proponents justify these provisions on the ground that nothing better can be achieved at this time. But this position ignores the dynamics of labor law reform. Meaningful workers' rights legislation happens only rarely, when extraordinary events upset the routine of ordinary politics. This is because business, by far the most powerful interest group in the United States, invariably unites in ferocious opposition to workers' rights legislation and, although unions continue to exert influence in urban states, there are enough senators from rural states to filibuster even "realistic" labor law reform—the fate of the Labor Law Reform bill of 1978 and the striker replacement bills of 1992-1994.[21]

It would be far better to draw up a bill that would actually remedy the principal injustices of the Taft-Hartley Act and then insist on it until conditions (judging from history, most likely an upsurge in worker activity) make passage possible. Such a bill might be defeated when first proposed, but—as in the campaign for anti-injunction legislation—each effort would add to public awareness of the issue. The bill should include, at a minimum, abolition of the permanent replacement rule, repeal of the flat ban on secondary boycotts, and effective protection for the rights to organize and engage in concerted activities—all of which are necessary to bring U.S. law into line with international standards.[22] (For more on the international dimension of the Thirteenth Amendment idea, see the article by Jeremy Brecher et al. in this issue.)

Some people say that the Thirteenth Amendment idea is outrageous. We freely admit that it is—in the sense that it offends the currently dominant view that workers can be free without the rights to organize and strike.

If Roger Toussaint had argued that the Taylor Law violated the Thirteenth Amendment, he probably would have been ridiculed by politicians and the press, just as Samuel Gompers and other AFL leaders were ridiculed early in the twentieth century. But being outrageous is not necessarily a bad thing. The outrageousness of a claim may simply reflect the prevailing balance of power, and not the actual merits of the claim. An outrageous claim attracts public attention to the fundamental issue of principle, and signals that the movement will stand up for that principle even if it makes other people uncomfortable.

The Thirteenth Amendment has three crucial advantages over other possible sources of workers' rights. First, unlike other constitutional provisions, the Thirteenth Amendment squarely addresses the issue of labor freedom. As Mark Dudzic has pointed out, the Thirteenth Amendment is the only constitutional provision that goes beyond limiting government power "to place a positive responsibility on government to eliminate a system of labor."[23] In the words of the Supreme Court, the Amendment was intended "to make labor free by prohibiting that control by which the personal service of one man is disposed of or coerced for another's benefit which is the essence of involuntary servitude."[24] By contrast, the First Amendment deals primarily with "speech"—not power or control—and does not bind private employers unless in combination with the Thirteenth. Far worse is the commerce clause, which was chosen, over the AFL's opposition, to be the constitutional foundation for the National Labor Relations Act. As a result of this choice, the NLRA protects workers' rights only as a *means* to the end of eliminating "certain substantial obstructions to the free flow of commerce," namely strikes. This subordination of workers' rights to commerce has tilted the Act's interpretation toward employer interests, contributing to such judicial creations as the right of employers to permanently replace economic strikers (what better way to protect commerce than by making it difficult to strike?), the denial of any NLRB power to deter unfair labor practices (who cares about workers' rights if unions are not strong enough to threaten commerce?), and the punishment of workers who respond to employer unfair labor practices with forceful forms of protest like sit-down strikes (why permit disruptive self-help when the primary purpose of protecting workers' rights is to prevent disruptions to commerce?).[25]

Second, the Thirteenth Amendment responds to the American reality that the worst labor oppression is reserved for workers who, like Irish-Americans in the nineteenth century and African-Americans throughout, are considered to be nonwhite.[26] Not only does the Amendment prohibit involuntary servitude, but it also empowers Congress to eliminate what the Supreme Court has called the "badges

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and incidents of slavery," meaning inequalities based on race.[27] From the outset, this combination has enhanced the possibilities for principled unity among workers of all colors. After the Thirteenth Amendment was ratified, white workers could no longer "derive satisfaction from defining themselves as 'not slaves,'" and the struggle of black workers for freedom from slavery became a model for many. Although this moment of opportunity was soon terminated by a resurgence of white racism, echoes remained in the labor movement's bitter denunciations of "Dred Scott decisions" (labor injunctions and other court rulings denying labor rights) and "Fugitive Slave Laws" (antistrike and antipicketing laws).[28] In order to accept that the Thirteenth Amendment was relevant to their situation, white workers had to abandon the comforting thought that their racial status immunized them from such a lowly condition as involuntary servitude. At the same time, black workers drew on the Thirteenth Amendment to insist that full emancipation required not just nondiscrimination (as some black entrepreneurs and professionals maintained), but also effective labor freedom. Members of the all-black Brotherhood of Sleeping Car Porters held that the Thirteenth Amendment would remain a "dead letter" until white employers dealt on an equal basis with black workers through their chosen union. Only by organizing could they win full citizenship and avoid the "lash of the master." Thus, the Thirteenth Amendment offered the possibility of fusing civil rights and labor rights into a powerful new vision of freedom. The Department of Justice pursued this possibility for a time during and after World War II, developing "a definition of civil rights that included rather than disdained labor freedom alongside racial equality." For example, the Department maintained that the grossly substandard wages and conditions of African-American agricultural laborers constituted evidence of involuntary servitude in violation of the Thirteenth Amendment.[29] Had this effort prevailed, then we might have ended up with a concept of civil rights that included minimum labor standards and effective workers' rights as well as anti-discrimination.

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Finally, the Thirteenth Amendment covers *all* workers including farm workers, domestic workers (paid and unpaid), government workers, so-called "independent contractors," and so-called "supervisors" who are excluded from the National Labor Relations Act and the Railway Labor Act. Also included are undocumented workers, some of whom are covered under the NLRA but whose rights are at the mercy of employers and the government. Now that the labor movement has abandoned its traditional hostility to new immigrants, the Thirteenth Amendment could provide a constitutional foundation for full citizenship and workplace rights for immigrant workers. (See Maria Ontiveros's article in this issue.)

We freely admit that, as Joshua Freeman put it, the Thirteenth Amendment provides no "magic bullet" for the labor movement. But it does supply a public, legal justification for the intuition—shared by many workers—that the rights to organize and strike are fundamental. No doubt Freeman is right that "most Americans, including most workers, think that if you can quit your job whenever you want, you are not in involuntary servitude."[30] But that is precisely the problem. American workers today are bereft of any legal theory to explain the injustice and illegitimacy of our labor law. When, for example, the public school teachers of Middletown, New Jersey, stood up one by one in open court to defy the state's flat ban on public employee strikes, each was left to his or her own resources to develop and put forth a justification. The labor movement is blessed with hundreds of Rosa Parkses every year. Each time that one steps forward without the movement's constitutional backing and moral support, a precious moment of leadership is squandered. ■

Notes

1. William E. Forbath, *Law and the Shaping of the American Labor Movement* (Cambridge: Harvard U. Press, 1991), pp. 135-41; James Gray Pope, "Labor's Constitution of Freedom," *Yale Law Journal* 106 (1997): pp. 941-1031; James Gray Pope, "The Thirteenth Amendment versus the Commerce Clause: Labor and the Shaping of American Constitutional Law, 1921-1957," *Columbia Law Review* 102 (2002): pp. 1-122.

2. AFL Executive Council, *Text of the Anti-Injunction Bill Approved by the Executive Council of the American Federation of Labor* (1931), p. 1.

3. AFL, *Report of the Proceedings of the Twenty-Ninth Annual Convention* (1909), pp. 313-14; AFL, *Report of the Proceedings of the Thirty-Ninth Annual Convention* (1919), pp. 361-62; Pope, "Constitution of Freedom," pp. 962, 988-96.

4. Pollock v. Williams, 322 U.S. 4, 17 (1944).

5. Lee Pressman, "Memorandum on Ball-Taft-Smith Bill (S.55)," in *Hearings before the Committee on Labor and Public Welfare, U.S. Senate, on S. 55 & S.J. Res. 22,* 80th cong., 1st sess. (1947), p. 1150.

6. Joe William Trotter, Jr., *Coal, Class, and Color* (Urbana: U. Ill. Press, 1990), p. 114. For other quotations from black workers, see *id.*; Forbath, *Law and Shaping*, pp.138-39; Pope, "Constitution of Freedom," pp. 981-82.

7. *Limiting Scope of Injunctions in Labor Disputes: Hearings' before the Subcommittee of the Senate Committee on the Judiciary*, 70th cong., 1st sess. (1928) at 672; 75 Cong. Rec. 4502 (1932); 78 Cong. Rec. 3679 (1934). For more quotations from legislators, see Pope, "Thirteenth Amendment," pp. 24, 45, 47-50.

8. Archibald Cox, "Strikes, Picketing and the Constitution," *Vanderbilt Law Review* 4 (1951): pp. 574, 576-77 (1951); Charles O. Gregory, *Labor and the Law* (New York: W.W. Norton, 1949), p. 420. For case citations, see Pope, "Thirteenth Amendment," pp. 100-01.

9. Pope, "Thirteenth Amendment," pp. 105-10; American Federation of Labor, *Proceedings of the Sixty-Seventh Annual Convention* (1947), p. 492.

10. Stephen Lerner, "Reviving Unions," *Boston Review*, April/May 1996, pp. 3, 4.

11. Josiah Bartlett Lambert, *"If the Workers Took a Notion": The Right to Strike and American Political Development* (Ithaca: ILR Press, 2005), pp. 1-5, 151-54. The permanent replacement rule was announced by the Supreme Court in NLRB v. Mackay Radio, 304 U.S. 333, 345-46 (1938).

12. Randall Kennedy, "Martin Luther King's Constitution: A Legal History of the Montgomery Bus Boycott," *Yale Law Journal* 98 (1989): pp. 999, 1022.

13. Ciampa took this position in a speech to the strikers that was captured in the film *At the River I Stand* (David Appleby, Allison Graham & Steven Ross dir., 1993).

14. Bigelow v. Bullard, 901 P.2d 630, 632 (Nev. 1995).

15. Because the First Amendment bans only "Congress" from abridging the freedom of speech, it must be "incorporated" into another provision before it can apply to anyone but the national government. We maintain that the Thirteenth Amendment "incorporates" the First against employers in the same way that the Fourteenth Amendment incorporates it against the states. The quoted language is from Pollock v. Williams, 322 U.S. 4, 17 (1944).

16. Peter Kellman, *Divided We Fall: The Story of the Paperworkers' Union and the Future of Labor* (New York: Apex, 2004), p. 122.

17. Jim Pope, Peter Kellman & Ed Bruno, *Toward a New Labor Law* (DC: Debs-Jones-Douglass Institute, 2003), available at http://www.djd

institute.org/laborlaw.pdf.

18. Jack Barbash, The *Practice of Unionism* (New York: Harper & Bros., 1956), p. 229.

19. Leon Fink, *In Search of the Working Class: Essays in American Labor History and Political Culture* (Urbana: U. Ill. Press, 1994), p. 162; *see also* David Brody, Workers in Industrial America: Essays on the 20th Century Struggle (New York: Oxford U. Press, 1980), p. 145 (observing that many unions benefited more from Norris-LaGuardia's protections of the rights to strike and boycott than from the NLRA).

20. Pope, Kellman & Bruno, *Toward a New Labor Law*, p. 19 (available at http://www.djdinstitute.org/laborlaw.pdf); Katherine V.W. Stone, *From Widgets to Digits: Employment Regulation for the Changing Workplace* (New York: Cambridge U. Press, 2004), p. 208.

21. Richard Freeman & James Medoff, *What Do Unions Do?* (New York: Basic Books, 1984), pp. 200-02; Cynthia L. Estlund, "The Ossification of American Labor Law," *Columbia Law Review* 102 (2002): pp. 1527, 1532-42.

22. Human Rights Watch, *Unfair Advantage: Workers' Freedom of Association in the United States Under International Human Rights Standards* (2000), pp. 18, 31, 171-90, 209-213.

23 .Mark Dudzic, "Saving the Right to Organize: Substituting the Thirteenth Amendment for the Wagner Act," *New Labor Forum*, Spring 2005, p. 64.

24. Bailey v. Alabama, 219 U.S. 219, 241 (1911).

25. NLRA sec. 1, 29 U.S.C. 151 (1935); James Gray Pope, "How American Workers Lost the Right to Strike, and Other Tales," *Michigan Law Review* 103 (2004): pp. 518, 522-23, 529-31, 537-38; Bartlett, *Right to Strike*, p. 104.

26. Bill Fletcher Jr., "How Race Enters Class in the United States," in Michael Zweig ed., *What's Class Got to Do With It?* (Ithaca: ILR Press, 2004), pp. 35-44.

27. Civil Rights Cases, 109 U.S. 3, 20 (1883); Jones v. Alfred H. Mayer Co., 392 U.S. 409, 439 (1968).

28. David Roediger, *The Wages of Whiteness: Race and the Making of the American Working Class* (London: Verso 1991), pp. 170, 173-76.

29. Beth Tompkins Bates, *Pullman Porters and the Rise of Protest Politics in Black America, 1925-1945* (Chapel Hill: UNC Press, 2001), pp. 89-90, 92-93; Maria L. Ontiveros, "Immigrant Workers' Rights in a Post-Hoffman World - Organizing Around the Thirteenth Amendment," 18 *Georgetown Immigration Law Journal* (2004): pp. 651, 670; Risa L. Goluboff, "The Thirteenth Amendment and the Lost Origins of Civil Rights," *Duke Law Journal* 50 (2001): pp. 1609, 1676, 1685.

30. Joshua B. Freeman, "The Thirteenth Amendment is No Magic Bullet: Joshua B. Freeman Replies to Mark Dudzic," *New Labor Forum*, (Spring 2005): pp. 72-73.