The Right to Strike Under the United States Constitution: Theory, Practice, and Possible Implications for Canada

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Given the importance of the question, one might expect that the United States Supreme Court would have issued an authoritative opinion or opinions concerning the status of the right to strike under the U.S. Constitution. But the merits of the claim have been squarely addressed only once, in 1923. That decision, Charles Wolff Packing Company v. Court of Industrial Relations, recognized the right and overturned key provisions of an anti-strike law. For reasons discussed below, however, Wolff Packing never gave rise to a viable constitutional doctrine. Instead, the Court subsequently upheld a variety of restrictions on strikes without ever confirming or denying the existence of the right. Most recently, in the 1988 case of Lyng v. International Union, the Court assumed that the right existed but held that the statute at issue (which denied food stamps to the families of striking workers) did not violate the right.¹

U.S. law concerning the right to strike is characterized by a sharp disjuncture between theory and practice. The government has repeatedly claimed that international human rights norms, including the right to strike, are adequately protected by U.S. statutory and constitutional law.² Authoritative U.S. legal texts are full of statements that seem to recognize the

¹ Lyng v. Auto Workers, 485 U.S. 360, 368 (1988) (reasoning that “the strikers’ right of association does not require the Government to furnish funds to maximize the exercise of that right”).

fundamental character of the rights to organize and strike, for example the Supreme Court’s assertion, quoted in *BC Health*, that unions “were organized out of the necessities of the situation; that a single employee was helpless in dealing with an employer; that he was dependent ordinarily on his daily wage for the maintenance of himself and family; that if the employer refused to pay him the wages that he thought fair, he was nevertheless unable to leave the employ and resist arbitrary and unfair treatment.” In this same opinion, the Court referred to the right to organize as “fundamental.” Similar statements abound in labour statutes as well as court opinions.

In practice, however (with the sole exception of the *Wolff Packing* case, discussed below), the Supreme Court has upheld restrictions on the right to strike without considering their effect on the ability of workers to influence their conditions of employment. As a result, U.S. law is extraordinarily unprotective of the right to strike. The Court has, for example, approved the privilege of employers to permanently replace economic strikers, upheld a flat prohibition on secondary strikes, and sustained flat bans on public employee rights. The ILO’s Committee on Freedom of Association has concluded that each of these outcomes violates international standards. Scholars have suggested that the permanent replacement rule, in

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3  Health Services and Support, para. 84 (quoting N.L.R.B. v. Jones & Laughlin Steel Corp., 301 U.S. 1, 33 (1937)).

4  301 U.S. at 33.

5  See infra text accompanying notes 53-54.


particular, has contributed to a drastic decline in strike activity in the U.S. Once labor’s great equalizer, the threat of a strike has been appropriated by management both in negotiations, where employers are more likely to threaten permanent replacement than unions are to threaten a strike, and in organizing drives, where the threat of permanent replacement is “Exhibit Number One” against unionizing.

In a sense, none of this is salient to the question whether the right to strike is protected under the Constitution of Canada. In *Health Services and Support—Facilities Subsector Bargaining Association v. British Columbia*, the Canadian Supreme Court departed decisively from the U.S. model by recognizing and enforcing a constitutional right to bargain collectively. Unless *BC Health* is to be overruled, Canada is already committed to a doctrine of constitutional labour rights that has been – in that one decision alone – far more firmly grounded and thoroughly explained than any parallel doctrine developed in the courts of the United States. Nevertheless, it is possible that the U.S. experience might be of some use, or at least interest. As recounted in *BC Health*, Canadian labour law has been heavily influenced by U.S. labour law in the past. This inevitably raises the question whether U.S. law should be influential this time around, if not as a positive example then perhaps as a negative one. In addition, it might be of

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interest to provide a U.S. outsider’s view of the debate over BC Health.

The remainder of this essay is divided into two parts. Part I provides a rough-and-ready outsider’s comment on the viability of BC Health as a foundation for the right to strike. Part II reports on the U.S. experience – judicial and legislative – with the constitutional right to strike.

I. A Brief Comment on BC Health and the Right to Strike

From the perspective of this U.S. observer, the right to strike appears to flow easily and straightforwardly from the same considerations advanced by McLachlin C.J. and LeBel J. to justify the right of collective bargaining. Indeed, a strong case could be made that the right to strike precedes – chronologically, logically, and functionally – the right to bargain collectively. While collective bargaining predated the major labour statutes of Canada and the United States, striking predated both unions and collective bargaining.\(^\text{11}\) Even after the advent of unionism, assemblies of members unilaterally enacted rules specifying wages and prohibiting members from working for less. Collective bargaining came later.\(^\text{12}\) As for logic, the Charter values of dignity, personal autonomy, equality and democracy – all of which have been central to the case for labour rights in the United States as well – appear to be more directly served by the right to strike, an activity engaged in by workers themselves, than by collective bargaining through union representatives. As recounted below, unionists in the U.S. stressed the fundamental

\(^\text{11}\) The labour strike, in clearly recognizable form, famously dates back at least to the construction of the tombs of the Pharaohs. John Romer, Testament: The Bible and History 116-25 (1988).

right of the individual worker to withhold his personal labor, and argued that unless that right could be exercised in association with others, it could not serve its purpose of empowering them to avoid exploitation and domination. Finally, from a functional point of view, the strike provides the bargaining power necessary to drive meaningful and fair collective bargaining. As McLachlin C.J. and LeBel J. make clear, collective bargaining serves Charter values because it gives workers “the opportunity to influence the establishment of workplace rules and thereby gain some control over a major aspect of their lives, namely their work.” But the procedural right of collective bargaining merely brings the parties to the table without requiring either to give ground. If workers cannot withhold their labour, then employers have little, if any, incentive to make concessions. The right to strike provides a procedural solution (in the sense that judges need not be involved in assessing substantive outcomes) to the problem of actual or substantive equality of workers and employers.

Given the strength of *BC Health* as a precedential foundation for the right to strike, I find it astonishing and fascinating that the decision has come under harsh criticism from proponents of constitutional workers’ rights. I fully expect that, at the conference, I will come to see the logic behind this criticism. After all, the significance of the judgment can be assessed only against a baseline of expectations about the range of alternative possibilities and the likely

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13 *See infra* text accompanying notes 49-54.

14 The quotation refers to the values of dignity, liberty and autonomy, but the point obviously applies also to the value of equality, which is concerned with enabling workers to overcome “inherent inequalities of bargaining power in the employment relationship and to protect themselves from unfair, unsafe, or exploitative working conditions” and democracy, which involves “gain a voice to influence the establishment of rules that control a major aspect of their lives.” *BC Health*, paras. 84 & 85.

15 *See, e.g.*, LAMBERT, *supra* note 8, at 97-98.
impact of the decision in the Canadian context, about which I am woefully ignorant. But let me fulfill my role as ad hoc U.S. rapporteur by throwing out some crude, unfiltered reactions. Consider this abbreviated tale. After decades of rejecting claims to rights of collective bargaining and economic protest under the Charter, the Canadian Supreme Court suddenly reverses course, recognizes a constitutional right to bargain collectively, and enforces it despite urgent government claims of crisis and emergency. The judgment and the opinions reflect not only a remarkable willingness to admit mistakes, but also the courage to do so in a politically charged case. More impressive yet, the lead opinion goes straight to the heart of the matter: power in the employment relation. In a startling reversal of classical liberal thought (exemplified in the U.S. by Arthur Corwin’s rejection of the constitutional right to strike on the ground that “‘When men act in concert, liberty is power’”\textsuperscript{16}), the Canadian court protects the right of collective bargaining precisely because it gives workers a degree of “control” and “influence” sufficient to offset “inherent inequalities of bargaining power in the employment relationship.”\textsuperscript{17} Furthermore, the lead opinion unambiguously affirms that this exercise of power reflects not only the values of equality and industrial democracy, but also the quintessential liberal values of dignity, liberty and autonomy.\textsuperscript{18} The notion that these values hinge on the effective exercise of control over one’s life course unmistakably repudiates laissez-faire constitutionalism, which condemned protections for worker organization as paternalism and held that the freedom to enter into a yellow dog contract was “as essential to the

\textsuperscript{16} Edward Corwin, Total War and the Constitution 91 (1947) (quoting Edmund Burke, Reflections on the Revolution in France).

\textsuperscript{17} BC Health, paras. 82, 84, 85.

\textsuperscript{18} Id. para. 82.
laborer as to the capitalist.” It also rejects the idea that because workers seek economic gain, collective bargaining is a matter of economic policy that should be left to the legislative branch – an idea that has contributed importantly to the desuetude of constitutional labor rights in the U.S.

Presented with this apparently splendid victory for labor freedom, how do Canadian labour law scholars respond? With fear and loathing. (Okay, I am exaggerating. But that’s what it seemed like when I first scanned the reactions expecting to find accolades. And I am speaking only of criticisms that tend to undermine the judgment, not criticisms that fault the Justices for not going far enough.) First, the Court got its history wrong; there was no legally enforceable collective bargaining right until the 1940 statute. Given the expertise of the critics, I have no reason to believe that this is not true as a matter of fact. But I wonder if the critique engages the argument of the judgment’s authors. McLachlin C.J. and LeBel J. were, I think, making a broad cultural claim – that “collective bargaining was recognized as a fundamental aspect of Canadian society” – not a precedential claim that a particular form of collective bargaining was enshrined in law. They were writing a new chapter in the history of workers’ rights under the Charter, and they were fitting it not into an imaginary “one true

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19 Coppage v. Kansas, 236 U.S. 1, 14 (1915) (overturning a state statutory prohibition on yellow dog contracts).

20 BC Health, paras. 82, 26; Carpenters & Joiners Union, Local No. 213 v. Ritter’s Café, 315 U.S. 722, 724 (1942) (upholding a restriction on stranger picketing partly on the ground that labor law consists of balancing “the effort of the employer to carry on his business free from the interference of others against the effort of labor to further its economic self-interest”).

narrative,” but into a story that highlights “the traditions from which [the country] developed” while repudiating “the traditions from which it broke.”

It may be true that the freedom to bargain collectively was honored mainly in the breach, just as it is true that the U.S. tradition of free speech coexisted with the equally venerable tradition of riding dissenters out of town on a rail. But one of these traditions has been celebrated and embraced, while the other has been disapproved. That the lead opinion in BC Health chose the tradition of labor freedom over that of suppression seems cause for celebration and reinforcement.

BC Health has also been criticized for embracing a contextual approach to the freedom of association.

It may be true that, in general, Canada would be better off with an across-the-board doctrine that does not distinguish between book clubs and labor unions (or, presumably, between labor unions and golfing associations). I am skeptical, however, that – whatever the stated doctrine – courts will treat all forms of association the same. Labor protest entails highly visible short-run costs that can be and are routinely exaggerated to fan fears of economic and social paralysis.

If judges do not perceive an affirmative value in the exercise

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22 BC Health, para. 41.

23 The quoted language is from Justice John Marshall Harlan’s dissent in Poe v. Ullman, 367 U.S. 497 (1961), often cited as an accurate summary of the appropriate role of tradition in the derivation of fundamental rights under the U.S. Constitution; see also RONALD DWORKIN, FREEDOM’S LAW (1996).


26 Under the Taft-Hartley Act, for example, courts may enjoin “national emergency strikes” – defined as strikes that “imperil the national health” – for a period of eighty days. Judges have granted four out of five requests for such injunctions. Yet, when delayed strikes finally happen, the actual harm turns out to be diminutive compared to the courts’ “hasty fact-findings in the full glare of public opinion.” Michael H. LeRoy & John H. Johnson IV, Death by Lethal Injunction:
of group power by workers, it is unlikely that they will find the courage to protect it in the face of public outrage and political pressure. By focusing on the affirmative constitutional value of labor protest, *BC Health* may provide a more effective foundation for the right to strike than a non-contextual freedom of association. It seems odd, if not impossible, to embark on a project of ensuring that workers enjoy the same freedom to associate in striking that fishermen enjoy to associate in fishing. No doubt, I am missing something important here.

The common theme in my commentary is a concern with the status of labor rights in the political and legal culture. From this point of view, *BC Health* appears exemplary in many respects. A judicial endorsement of a fundamental right – especially in a politically charged context – can, arguably, exert considerable influence on political and legal culture which, in turn, can influence the development of enforceable legal norms. Though moribund in U.S. courts, for example, the constitutional right to strike thrived among workers and unions. From the early 1900s to the 1950s, the U.S. labour movement not only claimed, but also exercised the right to strike under the U.S. Constitution.27 Workers and unions drew inspiration from the Supreme Court’s assertion that the Thirteenth Amendment (which prohibits slavery and involuntary servitude) 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

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Having declared laws unconstitutional, workers and unions endeavored to strike them down through noncompliance and direct action. Beginning in 1909, the American Federation of Labor held that a worker confronted with an unconstitutional injunction had an “imperative duty” to “refuse obedience and to take whatever consequences may ensue.”

Thousands of workers defied court orders, undermining the legitimacy of the labour injunction and spurring Congress to pass the Norris-LaGuardia Anti-Injunction Act of 1932. Legislators increasingly echoed workers’ claims that denial of the rights to organize and strike amounted to industrial slavery. Senator George Norris, leading sponsor of the Norris-LaGuardia Act, 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, who shaped the Wagner (National Labor Relations) Act of 1935, contended that without legal protection for the right to bargain collectively, there would be “slavery by contract.”

When it came time to assess the constitutionality of the Wagner Act, the Supreme Court embraced the view, quoted in *BC Health*, that the right to organize was essential to enable workers to resist arbitrary and unfair treatment. Without holding up this experience as a model, it nevertheless does illustrate the possibility that a constitutional right may arise not solely from enforceable judicial rulings, but also from an interplay among courts, social movements, and legislatures. In light of U.S. labor history, *BC Health* appears as a victory for the workers’

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28 Id. at 241.


30 FORBATH, SHAPING, supra note 27, at 158-63.

31 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.
I. U.S. Law Governing the Constitutional Right to Strike

The U.S. Constitution does not mention the freedom of association. At various times, courts have recognized a constitutional right to strike under the due process clause of the Fourteenth Amendment, the involuntary servitude clause of the Thirteenth Amendment, and the speech and assembly clauses of the First Amendment, which have been held to support a constitutional right to freedom of association.\(^{32}\) The second of these theories, which was passionately advocated and implemented by U.S. workers in the first half of the twentieth century, may be of particular interest. Assuming that the Canadian Supreme Court does not locate the right to strike in unions as opposed to workers,\(^{33}\) this theory might offer further support for the proposition that the right to strike implicates the Charter value of liberty.

A. The Due Process Cases

In the 1923 case of *Charles Wolff Packing Company v. Court of Industrial Relations*,\(^{34}\) the U.S. Supreme Court addressed the constitutionality of a Kansas state law that prohibited strikes in key industries and established an industrial court to resolve the underlying disputes. An employer had challenged an order of the industrial court requiring an increase in wages.

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\(^{32}\) U.S. Const. amends. XIV sec. 1 (“nor shall any State deprive any person of life, liberty, or property, without due process of law”), XIII sec. 1 (“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”), I (“Congress shall make no law . . . abridging the freedom of speech, . . . or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances”).

\(^{33}\) For persuasive critiques of this approach, see Fudge; Langille.
The state argued that because no worker was before the Court, the Justices could not consider the Act's impact on employees. The Court rejected this argument, reasoning that because the entire statutory scheme hinged on the “joint compulsion” of both employer and employee to obey the industrial court, the impact on both was relevant.35 Although “the worker is not required to work, at the wages fixed, he is forbidden, on penalty of fine or imprisonment, to strike against them, and thus is compelled to give up that means of putting himself on an equality with his employer which action in concert with his fellows gives him.”36 Thus, the requirement of continuous production involved “a more drastic exercise of control... upon the employee than upon the employer.”37 Such a requirement could not be forced on either in the absence of “a conventional relation to the public somewhat equivalent to the appointment of officers and the enlistment of soldiers and sailors in military service.”38 Accordingly, the wage-fixing provisions violated the right to contract, guaranteed by the due process clause of the Fourteenth Amendment.39 As Felix Frankfurter, an influential scholar and future Supreme Court Justice, observed: “the right to strike, generally, is in the Wolff Packing Company case recognized as a constitutional right.”40

In *Dorchy v. Kansas*, decided three years after *Wolff Packing*, the Court cast doubt on the

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34 262 U.S. 522 (1923).
35 *Id.* at 541.
36 *Id.* at 540.
37 *Id.* at 541.
38 *Id.*
39 *Id.* at 534, 544.
vitality of the right. August Dorchy had been convicted of violating the Kansas industrial court law for calling a strike of 200 coal miners with the objective of collecting $187.40 in wages allegedly owed to a former miner for work performed three years earlier. The Court framed the question narrowly, not as “whether the legislature has power to prohibit strikes,” but as “whether the prohibition . . . is unconstitutional as here applied” to a strike that involved no dispute over wages, hours, working conditions, discipline, or employment of non-union labour.41 Instead of starting from Wolff Packing’s endorsement of the right to strike, the Court led with the proposition, embodied in the common law of that era, that the employer’s “right to carry on business - be it called liberty or property” could not be infringed without just cause.42 A strike might constitute just cause, but it could nevertheless be unlawful because of its purpose, “however orderly the manner in which it is conducted.” Applying this rule, the Court concluded that “to collect a stale claim due to a fellow member of the union who was formerly employed in the business is not a permissible purpose.”43 The Court did not address the question of a constitutional right to strike until the last sentence of the opinion: “Neither the common law, nor the Fourteenth Amendment, confers the absolute right to strike.”44

As of 1926, then, it appeared that the U.S. Constitution provided some protection for the right to strike out of a concern for the ability of workers to deal “on an equality” with their employers. The right was not, however, “absolute,” and it did not apply to strikes staged for the purpose of collecting a “stale claim.” Further, the cursory treatment of the issue in Dorchy did

42 Id. at 311.
43 Id.
44 Id.
not bode well for the future of the right.

With the onset of the Great Depression in the 1930s, the notion of a due process right to freedom of contract began to fall out of favor. Judges became more responsive to claims that economic regulation could serve the public interest. In 1949, the Supreme Court disapproved Wolff Packing’s holding concerning wage-fixing and renounced “the due process philosophy enunciated in the Adair-Coppage line of cases.”\(^{45}\) Wolff Packing’s treatment of the right to strike has never, however, been disapproved. It did not partake of the philosophy of Adair and Coppage, which invalidated legislative protections for union organizing partly on the ground that inequalities between employees and employers were not only “natural,” but “legitimate.”\(^{46}\) To the contrary, Wolff Packing’s concern with equality resonated with New Deal decisions like NLRB v. Jones & Laughlin Steel Corporation, which upheld protections for union organizing partly on the ground that the right to organize was “a fundamental right” and that “union was essential to give laborers opportunity to deal on an equality with their employer.”\(^{47}\)

Jurisprudentially, Wolf Packing’s treatment of the right to strike belonged not with the due process cases, but with those decided under the involuntary servitude clause of the Thirteenth Amendment.

**B. The Involuntary Servitude Cases**

Beginning in the early 1900s, the U.S. labour movement claimed the right to strike under


\(^{46}\) Adair v. United States, 208 U.S. 161 (1908); Coppage v. Kansas, 236 U.S. 1, 17 (1915).

\(^{47}\) 301 U.S. 1, 33 (1937) (upholding the National Labor Relations Act of 1935).
the involuntary servitude clause of the Thirteenth Amendment. The American Federation of Labor maintained that “[e]very human being has under the Thirteenth Amendment . . . 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 labour, and to take concerted action for their own protection in labour disputes.”

Labour leaders argued that the rights to organize and strike flowed from the same reasoning that the Supreme Court had applied to justify the Thirteenth Amendment right to change employers. In *Bailey v. Alabama*, decided in 1911, the Court had overturned a debt peonage law despite the fact that the plaintiff laborer had voluntarily agreed to satisfy his debt with labour. The Court explained that the Thirteenth Amendment was intended not only to abolish slavery, but also to prohibit “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.”

The Court elaborated on this point in *Pollock v. Williams*, another peonage case: “[I]n general the defense against oppressive hours, pay, working conditions, or treatment is the right to change employers. When the master can compel and the laborer cannot escape the obligation to go on, there is no power below to redress and no incentive above to relieve a harsh overlordship or unwholesome conditions of work.”

Under *Bailey* and *Pollock*, the case for the right to strike was simple and straightforward.

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48 See *supra* note 27.


50 219 U.S. 219, 241 (1911).
As explained by one influential legal scholar, “it may be urged with considerable force that in terms of the purposes of the Thirteenth Amendment the strike is the modern counterpart of the right to change employers.”\(^5^2\) In an economy dominated by large corporations, the individual right to quit was not enough; only by organizing and collectively withholding their labour could workers gain sufficient “power below” to give employers the “incentive above” to avoid a “harsh overlordship.” By 1935, both the U.S. Supreme Court and Congress had endorsed this conclusion in other legal contexts. A single employee without organization was, in the words of the Court, “helpless in dealing with an employer.” The worker “was dependent ordinarily on his daily wage for the maintenance of himself and family,” so that if “the employer refused to pay him the wages that he thought fair, he was nevertheless unable to leave the employ and to resist arbitrary and unfair treatment.”\(^5^3\) Congress repeated the point in the Norris-LaGuardia Act of 1932 and the National Labor Relations Act of 1935 (NLRA), stressing the “inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association.”\(^5^4\)

A number of lower courts overturned anti-strike injunctions and statutory strike prohibitions on Thirteenth Amendment grounds\(^5^5\) and, in 1949, Supreme Court Justices Wiley

\(^5^1\) 322 U.S. 4, 17 (1944).

\(^5^2\) Archibald Cox, *Strikes, Picketing and the Constitution*, 4 VAND. L. REV. 574, 577 (1951)

\(^5^3\) American Steel Foundries v. Tri-City Central Trades Council, 257 U.S. 184, 209 (1921); *see also* Charles Wolff Packing Company v. Court of Industrial Relations, 262 U.S. 522, 540 (1923) (discussed above).


\(^5^5\) *See, e.g.*, United States v. Petrillo, 68 F. Supp. 845, 849 (N.D. Ill. 1946), *rev’d on other*
Rutledge and Frank Murphy declared that the question of the Thirteenth Amendment right to strike was “momentous.” But the Supreme Court has never addressed the merits of the claim. It came closest in *UAW Local 232 v. Wisconsin Employment Relations Board (WERC)*, which held that the Thirteenth Amendment did not prohibit a state from outlawing intermittent, unannounced strikes. The Court explained that because the state had not made “it a crime to abandon work individually . . . or collectively,” there had been no “purpose or effect of imposing any form of involuntary servitude.” This reasoning implied that workers might enjoy the right to abandon work collectively, but – despite various opportunities to do so – the Court has never addressed that issue on the merits.

Meanwhile, a growing majority of lower courts held that the Amendment does not reach the right to strike, either because strikers cease work collectively instead of individually, or grounds.

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because they quit work temporarily instead of permanently. None of the lower court opinions – pro or con – contained any reasoning to explain why the right to strike either was or was not necessary to negate a condition of involuntary servitude. The potentially relevant Supreme Court precedents, including Wolff Packing, Bailey, and Pollock, were ignored or peremptorily distinguished. In sum, there is ample case law rejecting the Thirteenth Amendment right to strike, but none that addresses the substance of labour’s claim. If, as the Court once declared, “a decision without principled justification would be no judicial act at all,” then the precedential authority of these decisions is open to question.

C. The Freedom of Association Cases

The notion that the U.S. Constitution affirmatively protects the freedom of association did not arise until after the principal due process and Thirteenth Amendment cases had been decided. In Lyng v. Auto Workers, the Supreme Court considered the constitutionality of a federal statutory provision that denied food stamps to the families of workers out on strike. The trial court had invalidated the provision, partly on the ground that it infringed the right of the affected strikers to associate with their fellow strikers and union members. The Supreme Court, however, held that the denial of benefits did not “directly and substantially interfere” with

60 See, e.g., NLRB v. National Maritime Union, 175 F.2d 686, 692 (2d Cir. 1949); United States v. Martinez, 686 F.2d 334, 345-46 (5th Cir. 1982).

61 In NLRB v. National Maritime Union, for example, the Second Circuit Court of Appeals upheld an administrative order barring union officials from calling a strike. The court distinguished Pollock on the ground that the administrative order did not “expressly forbid employees to leave their jobs, individually or in concert.” The court failed, however, to explain why that factual distinction should make a legal difference in light of the claim that the order deprived workers of the power below and employers of the incentive above to avoid servitude. NLRB v. National Maritime Union, 175 F.2d 686, 692 (2d Cir. 1949).

the strikers’ freedom of association. The statute did “not ‘order’ appellees not to associate together for the purpose of conducting a strike”; nor did it “‘prevent’ them from associating together.”64 The Court acknowledged that the denial of food stamps made it “harder for strikers to maintain themselves and their families during the strike” and exerted “pressure on them to abandon their union.” Instead of focusing on the selective denial of benefits to strikers, however, the Court characterized the food stamps as a gratuity: “Exercising the right to strike inevitably risks economic hardship, but we are not inclined to hold that the right of association requires the Government to minimize that result by qualifying the striker for food stamps.”65

D. Case Law Concerning the Constitutional Right to Strike in the Public Sector

Employees of the U.S. government are prohibited from striking under a statute that excludes from federal employment any person who “participates in a strike . . . against the Government of the United States.” In Postal Clerks v. Blount (1971), a three-judge panel of the D.C. federal district court upheld this provision against a challenge based on the First Amendment freedom of association. Two judges agreed that “Public Employees Have No Constitutional Right to Strike.”66 According to these judges, even private employees enjoyed no right to strike until granted it by the National Labor Relations Act of 1935. Starting from this erroneous proposition, it seemed to them “clear that public employees stand on no stronger footing in this regard than private employees and that in the absence of a statute, they too do not

65  Id. at 368.
possess the right to strike.”67 Given the large number of federal and state decisions approving restrictions on public employee strikes, the two judges concluded that “there is a unanimity of opinion on the part of courts and legislatures that government employees do not have the right to strike.”68

This unanimity did not extend to the third judge on the panel, J. Skelly Wright, an influential jurist sitting by designation from the D.C. Circuit Court of Appeals. Wright suggested that the right to strike is “intimately related to the right to form labor organizations, a right which . . . is generally thought to be constitutionally protected under the First Amendment -- even for public employees.” Given that “the inherent purpose of a labor organization is to bring the workers' interests to bear on management, the right to strike is, historically and practically, an important means of effectuating that purpose.” Although Wright disclaimed the view that “the right to strike is co-equal with the right to form labor organizations,” he did conclude that it “is, at least, within constitutional concern and should not be discriminatorily abridged without substantial or ‘compelling’ justification.” Under that critical standard, the government’s justification of protecting essential services was questionable: “In our mixed economic system of governmental and private enterprise, the line separating governmental from private functions may depend more on the accidents of history than on substantial differences in kind.”69 Nevertheless, Wright concurred in the result on the ground that if public employees were to enjoy the right to strike “with all its political and social ramifications,” that

67 Id. The error in the proposition is evident from decisions like Wolff Packing (discussed above). It is true that strikers were not protected against retaliatory discharge until the National Labor Relations Act.

68 Id.

69 Id. at 885 (Wright, J., concurring).
determination should be made by the U.S. Supreme Court, “which has the power to reject established jurisprudence and the authority to enforce such a sweeping rule.”

Instead, the U.S. Supreme Court affirmed Blount without opinion, and today – nearly four decades later – the federal government and most states continue to ban public employee strikes. On the other hand, whatever “unanimity” there might have been in 1971 has since collapsed. A number of states have legalized public employee strikes with apparently favorable results.

III. Conclusion

Having arrived at the end, I must confess that I am not certain whether this essay will be of any value whatever in assessing the status of the right to strike under the Charter. From my perspective, Canada has already gone far beyond whatever lessons the United States might have to offer.

70 Id. at 886.