

“They Outlawed Solidarity!”*

*Richard Blum***

Neither slavery nor involuntary servitude . . . shall exist within the United States, or any place subject to their jurisdiction.¹

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* Frances Fox Piven, a radical sociologist and expert on social movement politics, frequently used this phrase when she denounced the Taft-Hartley Act or the Labor-Management Relations Act; in particular, the Act’s prohibitions against secondary union activity. *See generally* Labor-Management Relations Act (Taft-Hartley Act), Pub. L. No. 80-101, 61 Stat. 136 (1947) (codified at 29 U.S.C. § 158(b)(4) (2012)); Richard Blum, *They Outlawed Solidarity* (2015) (unpublished capstone paper, M.A. in Labor Studies, Murphy Institute, City University of New York) (on file with author).

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1. U.S. CONST. amend. XIII, § 1.

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INTRODUCTION

My active interest in the Thirteenth Amendment began several years ago when I assisted in the representation of ten Filipino nurses being prosecuted, along with their lawyer, for conspiring to endanger residents of the nursing home where the nurses had worked. My colleague and I, both staff attorneys in the Employment Law Unit of The Legal Aid Society in New York, assisted a pair of criminal defense attorneys who had taken on the nurses' and the lawyer's cases. The nurses were being prosecuted because they had collectively quit their jobs at the nursing home after being advised of their right to do so by their lawyer (all were off duty at the time they stopped working). Prior to quitting, the nurses had repeatedly and unsuccessfully complained about a variety of labor abuses and unconscionable working conditions at the nursing home and felt they had run out of options. In response to their quitting, the nursing home owners failed to convince the state licensing authorities that the nurses were guilty of misconduct and failed to obtain a civil injunction against the nurses. However, the owners were successful in persuading the Suffolk County district attorney to prosecute both the nurses and their lawyer for conspiracy.

The overt acts alleged in the indictment were that the nurses had met with the lawyer and, on his advice, had agreed to file a discrimination complaint against the nursing home; that the lawyer had subsequently filed a discrimination complaint on their behalf with the Department of Justice; and that the nurses had quit their jobs.

One of the most interesting developments in the case came well before I got involved, when the trial court denied the nurses' motion to dismiss the indictment. The judge rejected the nurses' argument that the District Attorney, in prosecuting them for quitting, sought to compel their continued employment in violation of the Thirteenth Amendment. He also ruled that

[w]hile a nurse may, often times, have a right to unilaterally resign from his or her position of employment, the actions of these defendants, acting together with forethought and planning, was not a simple resignation from a nursing position. The consequences of their

mass resignation could have had disastrous consequences for the very patients with whose care they were entrusted.²

The judge repeatedly stated that it was precisely because the nurses had acted en masse that there was sufficient evidence that the nurses had committed a crime.³ I found this decision very troubling. It struck me intuitively that if one person has the right to withhold her labor, then acting in concert to withhold labor, whether as a quit or a strike, should be constitutionally and statutorily protected as well.

In the end, we were able to obtain a writ of prohibition from a state appellate court enjoining the trial judge and prosecutor from proceeding with the prosecution on the grounds that it violated the Thirteenth Amendment rights of the nurses and the First Amendment rights of both the nurses and their lawyer.⁴

More recently, I turned again to Thirteenth Amendment questions as a result of writing a First Amendment critique of the National Labor Relations Act’s (NLRA) ban on secondary labor picketing in support of consumer boycotts under NLRA § 8(b)(4)(ii)(B).⁵ I came to see that most writers on this issue limited their critique to that ban, and chose not to address the ban on secondary strikes in the companion § 8(b)(4)(i)(B),⁶ even though the latter ban is both more sweeping and consequential for unions than the former.

Striking—that is, the withholding of labor—is the ultimate weapon of unions, both because it is often an effective tool against employers and because there exists a solidaristic tradition of honoring picketing lines. Section 8(b)(4)(i)(B)’s strike ban not only prohibits labor organizations from engaging in certain secondary strikes, it even prohibits them from

2. *People v. Vinluan*, Indictment No. 769A-07 at 2–3 (Suffolk Co. Sept. 28, 2007). The State Education Department, the agency responsible for investigating and adjudicating allegations of nurse misconduct, had already cleared all of the defendants of wrongdoing.

3. *Id.*

4. *See Vinluan v. Doyle*, 873 N.Y.S.2d 72, 79–81 (N.Y. App. Div. 2009). *See generally* ROBERT J. STEINFELD, COERCION, CONTRACT, AND FREE LABOR IN THE NINETEENTH CENTURY (2001). I would be remiss if I did not mention the centrality of Professor Robert Steinfeld’s work in the papers that we filed in this case. At our request, Professor Steinfeld wrote to the governor to request the appointment of a special prosecutor to take over the case because of its Thirteenth Amendment implications.

5. 29 U.S.C. § 158(b)(4)(ii)(B) (2012). Secondary picketing is the picketing of a party other than the employer of the union members who are picketing. A union picketing a business to ask the public to boycott the business in order to pressure it not to use nonunion contractors is an example of a secondary picket. The nonunion contractors would be the primary target, and the business being picketed would be the secondary target.

6. *Id.* § 158(b)(4)(i)(B). Secondary striking entails striking a party other than the employer of the union members who call the strike. For example, a union striking a general contractor to get it to stop using a nonunion subcontractor would be a secondary strike. The general contractor would be considered a secondary target and the nonunion subcontractor would be the primary target.

“induc[ing]” or “encourag[ing]” such strikes.⁷ Clearly, in trying to clip labor’s wings, the 1947 and 1959 Congresses which adopted these statutes wanted to make sure that unions could not deploy their most important source of power. Thus, Congress basically placed a gag order on unions as a sweeping prophylactic to prevent them from collaborating and initiating joint work stoppages that go beyond the immediate employer. In effect, this greatly inhibited the overall potency of unions in the United States.

In attacking § 8(b)(4)(ii)(B)’s ban on secondary labor picketing in support of a consumer boycott as a violation of the First Amendment, critics have repeatedly condemned the Supreme Court’s reliance on a supposed distinction between “pure speech” and “speech plus conduct,” such as a picket.⁸ The Court’s invocation of an “unlawful objectives” doctrine to defend banning speech contrary to public policy has also been repeatedly criticized.⁹ After all, picketing has been recognized as protected expressive activity¹⁰ and it is entirely lawful for consumers to choose to boycott the target of a picket.¹¹ However, commentators have not sought to argue that striking is protected under the First Amendment.¹² If striking can be deemed an unlawful objective, it is harder to argue against a ban on inducing or encouraging a strike, particularly by picketing. While I understood that the First Amendment arguments concerning appeals for a public boycott did not translate simply to the strike ban, it seemed to me that such a fundamental ban on the most basic aspect of collective power and expression called out for constitutional scrutiny, in

7. Section 8(b)(4)(ii)(B), in contrast, bans unions from actions that “threaten, coerce, or restrain” others from engaging in a boycott.

8. See, e.g., Mark D. Schneider, *Peaceful Labor Picketing and the First Amendment*, 82 COLUM. L. REV. 1469, 1488–95 (1982).

9. See, e.g., Cynthia Estlund, *Labor Picketing and Commercial Speech: Free Enterprise Values in the Doctrine of Free Speech*, 91 YALE L.J. 938, 942–44 (1982); Schneider, *supra* note 8, at 1476–77; see also Catherine Fisk & Jessica Rutter, *Labor Protest Under the New First Amendment*, 36 BERKELEY J. EMP. & LAB. L. 277, 318–20 (2015) (applying a similar critique to bans on recognition picketing).

10. See *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 907–08 (1982); *Thornhill v. Alabama*, 310 U.S. 88, 101–02 (1940).

11. See *Claiborne*, 458 at 907; see also *In re United Bhd. of Carpenters Local Union No. 1506 (Eliason & Knuth)*, 355 N.L.R.B. 797 (2010).

12. Michael Harper has argued expressly that secondary picketing to induce strikes is not entitled to First Amendment protection, in contrast to secondary picketing in support of consumer boycotts. See Michael C. Harper, *First Amendment Protection for Union Appeals to Consumers*, 27 WIS. J.L. GENDER & SOC’Y 176, 182–85 (2012). *But see* James Gray Pope, *The Three-Systems Ladder of First Amendment Values: Two Rungs and a Black Hole*, 11 HASTINGS CONST. L.Q. 189, 243–45 (1984) (providing a rebuttal to Harper’s arguments). Estlund identified but did not address certain First Amendment issues that she thought picketing directed at employees rather than consumers might raise. Estlund, *supra* note 9, at n.2.

particular, under the Thirteenth Amendment’s prohibition against involuntary servitude.

Building primarily on James Gray Pope’s work on the Thirteenth Amendment and strikes,¹³ in particular, his discussion of the significance of the right to quit in evaluating a Thirteenth Amendment critique of antistrike prohibitions, I am seeking to demonstrate that the Thirteenth Amendment, buttressed by the First Amendment, calls into question the NLRA’s sweeping ban on secondary strikes, as well as on union communications to induce or encourage such strikes. Specifically, I scrutinize antistrike injunctions under the NLRA to consider how, in application, antistrike injunctions directly or indirectly coerce workers into servitude, regardless of the ability of workers to quit their jobs rather than return to work. I also look critically at the distinction that has been made between mass quits and strikes, as well as the reality of both an employer’s goals in seeking government intervention against a strike and the government’s role in aiding employers. In doing so, I argue that § 8(b)(4)(i)(B)’s prohibition on secondary strikes is enforced in a way that implicates the Thirteenth Amendment prohibition against involuntary servitude, and also the strikers’ and the picketers’ First Amendment rights to express and seek solidarity, respectively.

I. LABOR RIGHTS AND THE PROHIBITION AGAINST INVOLUNTARY SERVITUDE

Over one hundred years ago, in *Bailey v. Alabama*,¹⁴ the Supreme Court relied on the Thirteenth Amendment—and the federal Anti-peonage Act implementing it—to strike down an Alabama statute aimed at keeping poor workers from quitting their jobs if they were unhappy with their working conditions.¹⁵ The case arose after Bailey was prosecuted because he had worked just over a month under a contract of service when he quit and he had not repaid the advance he had received.¹⁶ The law made it a crime in Alabama to “fraudulently induce” receipt of an advance payment for a contract of service without then performing the work or repaying the advance, and it treated the refusal to perform the work or repay the employer as prima facie evidence of intent to defraud.¹⁷ Essentially, the statute enabled the state to prosecute workers who accepted an advance from an employer and then quit before their

13. See generally James Gray Pope, *Contract, Race, and Freedom of Labor in the Constitutional Law of “Involuntary Servitude,”* 119 YALE L.J. 1474 (2010) (discussing the significance of the right to quit through a Thirteenth Amendment critique of antistrike prohibitions).

14. 219 U.S. 219 (1911).

15. *Id.* at 244–45.

16. *Id.* at 228–30.

17. *Id.* at 227–28.

agreed upon term of service had ended.¹⁸ The Court found that the law violated the Thirteenth Amendment and the federal Anti-peonage Act. In striking down the Alabama statute, the *Bailey* Court declared:

The plain intention [of the Thirteenth Amendment] was to abolish slavery of whatever name and form and all its badges and incidents; to render impossible any state of bondage; 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.¹⁹

The Court also declared that “[w]hile the immediate concern [of those who enacted the Thirteenth Amendment] was with African slavery, the Amendment was not limited to that. It was a charter of universal civil freedom for all persons, of whatever race, color, or estate, under the flag.”²⁰

Three decades later, in *Pollock v. Williams*,²¹ the Supreme Court struck down a similar criminal statute under the Thirteenth Amendment, reiterating that the aim of the Thirteenth Amendment and the federal Anti-peonage Act “was not merely to end slavery but to maintain a system of completely free and voluntary labor throughout the United States.”²² In a critical passage, the Court declared that

in 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. Resulting depression of working conditions and living standards affects not only the laborer under the system, but every other with whom his labor comes in competition.²³

In keeping with these principles, the Court held the statute to be invalid not only because of the presumption of intent, but also because a statute “may not make failure to labor in discharge of a debt any part of a crime. It may not directly or indirectly command involuntary servitude, even if it was voluntarily contracted for.”²⁴

It is important to note that in both the *Bailey* and *Pollock* cases, the Court not only justified its decisions as necessary to vindicate the rights

18. ALA. CODE § 4730 (1896), as amended by 1903 Ala. Acts 345 & 1907 Ala. Acts 636.

19. *Bailey*, 219 U.S. at 241.

20. *Id.* at 240–41.

21. 322 U.S. 4 (1944).

22. *Id.* at 17.

23. *Id.* at 18.

24. *Id.* at 24.

of the individuals involved, but also to ensure a system of free labor, of “universal civil freedom for all.”²⁵ Absent a worker’s ability to quit without fear of prosecution, there would be no systemic check on the ability of employers to coerce personal service or to impose a “harsh overlordship or unwholesome conditions of work.”²⁶ A worker’s ability to quit is necessary to enable all workers to labor freely.

Following *Pollock*, the Court issued a decision ruling that a statute banning intermittent unannounced strikes did not violate the Thirteenth Amendment, but noted that nothing in the statute at issue made it a crime “to abandon work individually or collectively.”²⁷ Thus, the Court left open the question of what types of “abandon[ing] work individually or collectively” remain protected under the Thirteenth Amendment.²⁸

The question I hope to address in this Article is how, in light of these decisions and their understanding of free labor, the Thirteenth Amendment and the Free Speech Clause of the First Amendment protect workers against antistrike injunctions sought by the government at the behest of employers or targeted businesses with the objective of compelling workers to return to work. I intend to demonstrate that abandoning work through unprotected strikes does not differ in constitutionally relevant ways from mass quitting—an activity that is unquestionably protected under these precedents.

II. SECONDARY STRIKES AND NLRA ANTISTRIKE INJUNCTIONS

A. Statutory Law

Section 8(b)(4)(i)(B) of the NLRA makes it an unfair labor practice for a labor organization (generally a union)

to engage in, or to induce or encourage any individual employed by any person engaged in commerce . . . to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services . . . where . . . an object thereof is . . . (B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the

25. *Bailey*, 219 U.S. at 241.

26. *Pollock*, 322 U.S. at 18.

27. *UAW Local 232 v. Wis. Emp’t Relations Bd.*, 336 U.S. 245, 251 (1949) (*WERB*), *overruled on other grounds by* *Lodge 76, Int’l Ass’n of Machinists v. Wis. Emp’t Relations Comm’n*, 427 U.S. 132 (1976) (citation omitted).

28. *Id.* (citation omitted); *see* Pope, *supra* note 13, at 1544–46 (interpreting the decision in *WERB*).

products of any other producer, processor, or manufacturer, or to cease doing business with any other person.²⁹

This sweeping prohibition is followed by the proviso that “nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing.”³⁰

In short, this provision of the NLRA makes it an unlawful labor practice for a union to strike an employer or refuse to do certain work for an employer in order to force or require that employer to cease doing business with another company. In other words, it is unlawful for a union to strike a business with which it does not have a direct dispute over wages or working conditions, the supposedly neutral or secondary target, in order to make that business cut off or put pressure on the real target of the union campaign. Not only may a union not engage in a secondary strike, it is also prohibited from inducing or encouraging “any individual” from engaging in a secondary strike.

The secondary strike is a powerful tool by which unions can put pressure where they have power in order to pressure their ultimate target, even when they lack the power to directly pressure that target. We live in a society with increasingly “fissured workplaces,” in which work is outsourced and divided up among many different actors through the use of subcontracting, temporary employment agencies, franchises, and conversion of employees into independent contractors.³¹ In such a context, it is not surprising that workers might want to strike or boycott a vulnerable point in a supply chain in order to influence the conduct of another point in the supply chain where the workers lack power. International labor solidarity campaigns use this sort of strategy frequently. By targeting name brands in the United States with bad publicity or boycotts to influence the labor practices of their foreign suppliers whose workers have been unable to effect change, workers in the United States have sought to function as labor allies.³² However, through the prohibitions on second-

29. 29 U.S.C. § 158(b)(4)(i)(B) (2012). For a detailed explanation of the evolution of this provision from the 1947 Taft-Hartley Act to the Labor-Management Reporting and Disclosure Act of 1959 (Landrum-Griffin Act), Pub. L. No. 86-257, 73 Stat. 519, see Richard A. Bock, *Secondary Boycotts: Understanding NLRB Interpretation of Section 8(B)(4)(b) of the National Labor Relations Act*, 7 U. PA. J. LAB. & EMP. L. 905, 913–16 (2005).

30. 29 U.S.C. § 158(b)(4)(i)(B) (2012).

31. See DAVID WEIL, *THE FISSURED WORKPLACE: WHY WORK BECAME BAD FOR SO MANY AND WHAT CAN BE DONE TO IMPROVE IT* (2014); see also INT’L TRADE UNION CONFEDERATION, *FRONTIERS REPORT 2016 – SCANDAL* (2016), available at <http://www.ituc-csi.org/frontlines-report-2016-scandal?lang=en>.

32. See, e.g., INT’L LAB. RIGHTS F., <http://www.laborrights.org/our-work> (last visited May 14, 2015); UNITED STUDENTS AGAINST SWEATSHOPS, <http://usas.org/> (last visited May 14, 2015); CLEAN CLOTHES CAMPAIGN, <http://www.cleanclothes.org/ranaplaza> (last visited May 14, 2015). But see GAY W. SEIDMAN, *BEYOND THE BOYCOTT: LABOR RIGHTS, HUMAN RIGHTS, AND*

ary pickets and strikes, United States labor law greatly curtails such solidaristic action when it is undertaken by a union or group of unions representing workers of a particular employer or employers to promote use of union labor or union labor standards by another employer within the United States.³³

B. Scenarios

Most of the case law concerning secondary strikes³⁴ developed through disputes in the construction industry. Long before the “fissuring” of the United States workplace, construction jobs, by their very nature, involved workers from a variety of trades working on the same job site at the same time for a variety of contractors or subcontractors.³⁵ If some workers on a site were union members and others were not, one union, or a confederation of unions, might have decided to oppose the use of nonunion labor at that site, even if the dispute was not with the employer of the union or union’s members.

In the most typical scenario in secondary strike cases, a union or union confederation orders its members to picket a construction site where both union and nonunion labor is being used. The picket serves as a signal to union members—often from a variety of locals in different construction trades—not to work on that site until the dispute is resolved. Typically, the purpose of the strike is to pressure a general contractor to cease using a nonunion subcontractor or to require adherence to union

TRANSNATIONAL ACTIVISM (2007) (critiquing international campaigns that do not focus on supporting local labor campaigns).

33. There is an exception to the ban on secondary activities known as the “ally doctrine,” under which an employer other than the primary is not treated as secondary because of its close relationship with the primary employer. *See* Bock, *supra* note 29, at 957–61. Recently, the NLRB has expanded the standard for determining “joint employment” under the NLRA. *See* Browning-Ferris Indus. of Cal., 362 N.L.R.B. No. 186 (2015). As a result, some employers considered secondary in the past will now be treated as primary because, if they qualify as joint employers with the primary target, they will no longer be seen as independent of the primary target and are therefore neutral. However, under any scenario, conflicts over secondary picketing and striking will remain.

34. I use the phrase “secondary strikes” to refer to situations in which a union calls on workers to withhold labor from a secondary target, in contrast to the broader phrase “secondary boycott,” which is sometimes used interchangeably with “secondary strike.” “Secondary boycotts” include instances in which a union calls on consumers not to buy products or services from a secondary target. As noted above, both myself and others have addressed First Amendment issues related to secondary picketing in support of consumer boycotts elsewhere. *See supra* note 9 and accompanying text; *see also supra* article title and accompanying footnote.

35. There is an extensive body of law, based on the NLRB’s decision in *In re Sailors’ Union of the Pacific* (Moore Dry Dock), 92 N.L.R.B. 547 (1950), on what union conduct is permitted in common situs situations—such as construction sites—where the primary target is performing work at the premises of a secondary business.

labor standards.³⁶ Shortly after the enactment of the Taft-Hartley Act, the Supreme Court ruled that in such scenarios, the general contractor is considered a secondary target and that such actions are to be treated as unlawful secondary strikes under the NLRA.³⁷

Other common fact patterns involve transportation unions (such as those representing truckers) that direct their members not to handle goods transported by nonunion drivers, often at construction sites.³⁸ Such actions put pressure on warehouses, or other businesses to which the deliveries were made, to cease doing business with the nonunion deliverers. A union local might also strike distributors with which they have no direct dispute in order to put pressure on a manufacturer that is in negotiations with a sister local.³⁹

In all of these disputes, a union or confederation of unions is seeking to enforce the solidaristic value that all of the labor at the work site be union labor or to assist another union in enforcing its position on labor standards.⁴⁰ In general, the unions are not primarily making a demand of

36. See *NLRB v. Denver Bldg. & Constr. Trades Council*, 341 U.S. 675 (1951); see also *NLRB v. Local 74, United Bhd. of Carpenters*, 341 U.S. 707 (1951); *Int'l Bhd. of Elec. Workers, Local 501 v. NLRB*, 341 U.S. 694 (1951). All three decisions enforcing § 8(b)(4) were issued on the same day, along with one other decision, *NLRB v. Int'l Rice Milling Co.*, 341 U.S. 665 (1951), which limited the application of § 8(b)(4). These decisions formed the foundation of jurisprudence on § 8(b)(4) and secondary strikes.

37. *Denver Bldg. & Const. Trades Council*, 341 U.S. at 689–90.

38. See, e.g., *NLRB v. Local 294, Int'l Bhd. of Teamsters*, 273 F.2d 696 (2d Cir. 1960); *NLRB v. Local 691, Int'l Bhd. of Teamsters*, 270 F.2d 696 (7th Cir. 1959); *NLRB v. Local 47, Int'l Bhd. of Teamsters*, 234 F.2d 296 (5th Cir. 1956); *McMahon v. Local No. 600, Truck Drivers & Helpers*, 123 F. Supp. 303 (E.D. Mo. 1953).

39. See *NLRB v. Wine, Liquor & Distillery Workers Union, Local 1*, 178 F.2d 584 (2d Cir. 1949).

40. The NLRA contains what is commonly known as the “construction industry proviso,” found in 29 U.S.C. § 158(e), which creates an exception to a general rule making it an unfair labor practice for “any labor organization and any employer to enter into any contract or agreement, either express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or cease doing business with any other person.” 29 U.S.C. § 158(e). Such agreements are generally deemed unenforceable and void. *Id.* The construction industry proviso states that this general rule does not apply to “an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction, alteration, painting, or repair of a building, structure, or other work.” *Id.* However, as the Supreme Court has ruled, this proviso does not create an exception to the prohibitions of § 8(b)(4), so that a union cannot enforce such a valid rule against nonunion labor at a construction work site through secondary pickets and strikes, for example against the general contractor for using nonunion subcontractors. See *Local 1776, United Bhd. of Carpenters v. NLRB*, 357 U.S. 93 (1958) (holding that “hot cargo” contractual provisions that workers on construction project are not required to handle nonunion material not a defense to an unfair labor practice charge against a union under § 8(b)(4)). In contrast, the “garment industry proviso,” in the same section, exempts garment industry unions from some of the restrictions of § 8(b)(4), specifically in actions against “a jobber, manufacturer, contractor, or subcontractor working on the goods or premises of the of the jobber or manufacturer or performing parts of an integrated process of production in the apparel and clothing industry.”

their employers concerning the wages or the other terms or conditions of employment of their members. Rather, the courts look at whether the employer can actually satisfy the union’s demand in determining whether an action is primary or secondary; that is, if it was really directed at a neutral target.⁴¹

In sum, in cases enjoining secondary strikes, the union is accused of having its members withhold labor or inducing or encouraging other unions’ members to withhold labor in order to pressure employers not to do business with the primary target. From a business perspective, all of these cases involve efforts to confine a labor dispute to the immediate combatants.⁴² In contrast, from a labor perspective, these cases limit the ability of unions to act in solidarity to prevent the use of nonunion labor or the undermining of labor standards, even when the unions that are striking do not stand to gain directly by the action.⁴³

29 U.S.C. § 158(e). In short, the NLRA uniquely recognizes the fissured nature of the garment production process, though it nods at that aspect of the construction industry.

41. The Supreme Court has described the line between primary and secondary activity as “more nice than obvious.” *Local 761, Int’l Union of Elec., Radio & Machine Workers v. NLRB*, 366 U.S. 667, 674 (1961). Even where unions argue that they are merely enforcing contractual work preservation agreements, see *Nat’l Woodwork Mfrs. Ass’n v. NLRB*, 386 U.S. 612, 629–31 (1967), the Board and the courts have found refusals to handle nonunion products to be unlawful secondary activity where the object of the action is to pressure a secondary target and not to enforce the contract itself, because the primary target does not have the power to satisfy the union’s demand. See, e.g., *NLRB v. Enter. Ass’n of Steam, Hot Water, Hydraulic Sprinkler, Pneumatic Tube, Ice Machine & Gen. Pipefitters of N.Y., Local Union No. 638*, 429 U.S. 507, 515 (1977) (union-instigated refusal to handle certain materials was unlawful secondary activity, notwithstanding contractual work preservation agreement, where union’s objective was in reality to influence the general contractor by exerting pressure on subcontractor, an employer with no power to award work to union); see also *Douds v. Int’l Longshoremen’s Ass’n, Indep.*, 224 F.2d 455, 459 (2d Cir. 1955) (distinguishing secondary activity from the Supreme Court’s 1951 trilogy of secondary strike cases by noting that in those cases, striking employees were neither supporting primary action nor did they have dispute with own employer as to conditions of work by finding, “On the contrary, their only ‘object’ was to promote the general solidarity of unionism by refusing to work with non-union men, even though these were in a different craft from theirs.”) (emphasis added).

42. The courts understand the prohibition not only as serving the interests of supposedly neutral businesses, but the public interest as well. See, e.g., *NLRB v. Local 11, United Bhd. of Carpenters*, 242 F.2d 932, 936 (6th Cir. 1957) (holding that Congress’ primary purpose in enacting prohibition against secondary strikes was “to protect the public interest from strikes or concerted refusals interrupting the flow of commerce at points removed from primary labor-management disputes. To allow the acquiescence of a single employer to validate conduct contrary to the express language of the statute would be to frustrate this Congressional purpose.”); *Alpert v. United Bhd. of Carpenters*, 143 F. Supp. 371, 375 (D. Mass. 1956) (protection of Board order against secondary strike is intended for more than the employer who is primary target because the public at large “is interested in not having strikes extend far afield”). Therefore, as noted above, even where the secondary target has contractually agreed not to use nonunion labor under the construction industry proviso, 29 U.S.C. § 158(e), a union cannot enforce that commitment through picketing and strikes. *Local 1976*, 357 U.S. at 104–06.

43. The Supreme Court has even approved an injunction against a secondary boycott that was motivated entirely by a union’s political position. See *Int’l Longshoremen’s Ass’n, v. Allied Int’l*,

C. Remedies

There are two types of remedies for violations of § 8(b)(4)(i)(B): (1) the primary or secondary employer may file an unfair labor practice charge with the National Labor Relations Board (NLRB) and ask the NLRB to seek immediate temporary injunctive relief under § 10(l),⁴⁴ and (2) the aggrieved party may sue for damages under § 303 without involving the Board.⁴⁵ If the employer files an unfair labor practice charge, the statute requires that the “preliminary investigation of such charge shall be made forthwith and given priority over all other cases.”⁴⁶ Moreover, if the regional Board office determines after investigation that it has “reasonable cause” to believe the charge is true and that a complaint should issue, it “shall” petition a federal district court for injunctive relief pending the Board’s final adjudication of the matter.⁴⁷ If the Board ultimately finds that the union committed an unfair labor practice, it may, among other things, issue a cease and desist order and seek enforcement in a circuit court of appeals, which the union can appeal.⁴⁸ Of course, if the union violates a court order, it is subject to civil and criminal contempt penalties.

III. NLRB CEASE AND DESIST ORDERS AGAINST UNIONS AND THEIR MEMBERS

Since the NLRA’s secondary strike prohibition runs against unions, it is to be expected that the Board’s cease and desist orders also run against unions and their representatives. This enforcement approach raises the question of whether these orders implicate the rights of members.

Inc., 456 U.S. 212, 226 (1982) (upholding injunction where the union opposed the Soviet Union’s invasion of Afghanistan). For a Thirteenth Amendment critique of that decision, see Seth Kupferberg, *Political Strikes, Labor Law, and Democratic Rights*, 71 VA. L. REV. 685, 734 (1985).

44. 29 U.S.C. § 160(l) (2012). The provisions allowing for injunctive relief against secondary strikes and other secondary activities by unions created an exception to the removal of federal court jurisdiction to issue labor injunctions in the Norris-LaGuardia Act of 1932. 29 U.S.C. §§ 101–15 (1998). In *United States v. Hutcheson*, 312 U.S. 219 (1941), the Court struck down an antitrust indictment for instituting primary and secondary strikes, applying both the labor exemptions in the antitrust laws and the Norris-LaGuardia Act. In advancing what became the Taft-Hartley Act, Senator Taft noted that the provisions concerning secondary boycotts reversed the effect of the Norris-LaGuardia Act. See *NLRB v. Denver Bldg. & Const. Trades Council*, 341 U.S. 675, 686 (1951) (citation omitted).

45. 29 U.S.C. § 187. A § 303 action can be brought by “whoever shall be injured in his business or property” by a union’s violation of § 8(b)(4). *Id.* § 187(b). Recovery is limited to damages sustained by the party suing and costs of the suit. *Id.* The issue of possible constitutional limitations on remedies available under this section is beyond the scope of this Article.

46. *Id.* § 160(l).

47. *Id.*

48. *Id.* § 160(e).

Some cases have interpreted *Pollock* or *Wisconsin Employment Relations Board* to mean that any order that does not prohibit workers from quitting—either individually or collectively—does not run afoul of the Thirteenth Amendment.⁴⁹ As we shall see, this interpretation does not bear out under scrutiny.

NLRB v. Wine, Liquor & Distillery Workers Union, (Local 1),⁵⁰ presents a classic secondary strike and antistrike injunction under the first version of the § 8(b)(4) prohibition against secondary strikes. The unions at issue in these cases were engaging in work stoppages at the warehouses of independent liquor distributors in order to pressure Schenley, the producer of the whiskey, who was being struck by a sister local. The Board found a violation of the then-new secondary strike prohibition and issued a cease and desist order requiring the unions and their agents to

[c]ease and desist from engaging in, or inducing the members of Local 1 to engage in, a strike or concerted refusal in the course of their employment to perform services for any employer, where an object thereof is to require any employer or other person to cease doing business with Schenley Distillers Corporation.⁵¹

The Second Circuit upheld the injunction and dismissed Thirteenth Amendment arguments against it by citing to the *WERB* decision without further comment.⁵²

This type of cease and desist order is typical of Board orders in secondary strike cases. Following the prohibition in the statute, the order runs only against the union and its agents, not the members. It orders the union not to engage in, or induce its members to engage in, strikes against secondary targets, but does not appear to coerce any given worker to provide labor against her will. Indeed, the point of the Second Circuit’s cite to *WERB* is presumably to show that the order not to strike

49. See, e.g., *NLRB v. Nat’l Mar. Union of Am.*, 175 F.2d 686, 692 (2d Cir. 1949) (“We think that, under Supreme Court decisions, the ‘involuntary servitude’ provision of the Thirteenth Amendment is inapplicable here. For the Board’s order does not expressly forbid employees to leave their jobs, individually or in concert. It is directed only against the Union and its agents.”) (citing *Pollock v. Williams*, 322 U.S. 4, 17–18 (1944)).

50. 178 F.2d 584 (2d Cir. 1949).

51. *In re Wine, Liquor & Distillery Workers Union, Local 1*, 78 N.L.R.B. 504, 508 (1948).

52. *NLRB v. Wine, Liquor & Distillery Workers Union, Local 1*, 178 F.2d 584, 587 (2d Cir. 1949). The Second Circuit also dismissed First Amendment arguments, citing *Giboney v. Empire Storage Co.*, 336 U.S. 490, 502 (1949), for the proposition that otherwise unlawful conduct is not protected because it is executed using speech. For a critique of *Giboney*’s application with respect to labor picketing, see Estlund, *supra* note 9, at 943, and Schneider, *supra* note 9, at 1476–80. I will return at the end to the question of whether inducing or encouraging a secondary strike by picketing is protected activity under the First Amendment if the strike itself is constitutionally protected and not properly unlawful.

does not offend the Thirteenth Amendment because the workers are still free to “abandon” their work individually or collectively. But that reading of *WERB* itself is as highly problematic as the blithe assumption that the order does not coerce the workers.

First, it is not clear that the *WERB* decision supports the *Local 1* court’s implicit interpretation of it. The *WERB* Court found intermittent and unannounced strikes to be unprotected, but did not address full-on strikes. That distinction has become critical to the question of whether primary strikes are protected or not, and should not be treated as trivial in this context.⁵³ It should require more than an assumption to establish that the *WERB* holding applies to a full-on strike in which workers “abandon” their work for the duration of the strike.⁵⁴

Second, it is simply inaccurate, for a variety of reasons, for courts to assert that injunctions against unions do not implicate the rights of their members. First, members have deep associational interests in the union and its activities, particularly strikes in which they participate.⁵⁵ Ordering workers’ representatives to rescind decisions made and actions taken on their behalf implicates their own freedom to act. In addition, members have a direct financial stake in whether their unions are fined because unions are funded by their dues.

Finally, and most importantly, § 10(l) injunctions do sometimes directly enjoin members not to strike. District courts in Florida and New Jersey⁵⁶ have issued § 10(l) injunctions against the longshoremen and the

53. See, e.g., *Henricks Realty*, 119 L.R.R.M. (BNA) 1308, 1309 (Advice Memorandum, May 31, 1985) (“[T]he Board has consistently held that a work stoppage that is intermittent or recurrent constitutes an unprotected partial strike.”); see also Craig Becker, *Better than a Strike: Protecting New Forms of Collective Work Stoppages Under the National Labor Relations Act*, 61 U. CHI. L. REV. 351, 354 (1994).

54. My own view is that the Thirteenth Amendment (and the NLRA) should be read to protect intermittent strikes, but I do not believe that the Court’s position to the contrary in *WERB* necessitates a holding that no collective work stoppages short of mass quits have constitutional protection. By its own terms, *WERB* stands at most for the proposition that even after *Pollock*, the right to “abandon work” is not absolute, leaving the question of its precise contours for another day. See Pope, *supra* note 13, at 1545 (interpreting *WERB*’s use of “abandon work” as more ambiguous and possibly broader than just quitting, whether individually or collectively).

55. Even while taking the position that an injunction against the union and not workers themselves did not implicate “involuntary servitude,” the court in *Dayton Co. v. Carpet, Linoleum & Resilient Floor Decorators’ Union, Local No. 596*, 39 N.W.2d 183, 197 (Minn. 1949), *appeal dismissed*, 339 U.S. 906 (1950), recognized that “consideration of the question of involuntary servitude can relate only to those defendants who might be affected by having to work alongside nonunion men if they choose to remain in the employ of plaintiff.” The court thereby acknowledged the associational interests of workers with respect to their union.

56. *Dowd v. Int’l Longshoremen’s Ass’n*, 781 F. Supp. 1565, 1566–67 (M.D. Fla. 1991); *Pascarella v. Local 560, Int’l Bhd. of Teamsters*, No. 90-3993, 1990 WL 168861 (D. N.J. Oct. 29, 1990). These cases involved § 8(b)(4) injunctions due to jurisdictional disputes, but the subject matter of the dispute is irrelevant to the court’s use of injunctions directly against union members, as well as their unions.

teamsters that included language prohibiting members from engaging in strikes, as well as inducing or encouraging them.

Moreover, even if the cease and desist order facially runs only against the union, the union must comply with it by rescinding picketing or strike orders to its workers. It must also act as an enforcer for the Board and the court, making sure that workers do not engage in a strike if it wishes to avoid a contempt finding and the corollary penalties.⁵⁷ Essentially, the Board and the courts kick the worker coercion ball down the road when they order the union not to engage in, induce, or encourage a strike. This enforcement role is not simply theoretical. If a strike continues, with or without union compliance with an order to rescind the strike order and picketing, the union could find itself in contempt proceedings facing harsh penalties. Furthermore, a contempt order could be issued against individual members for engaging in a strike.

In *Roth v. United Union of Roofers, Waterproofers & Allied Workers*,⁵⁸ for example, the court’s contempt order provided that the union,

its officers, agents, representatives, servants, employees, attorneys and all members and persons acting in concert or participating with it, be and hereby are enjoined and restrained from in any manner picketing, causing to picket, threatening to cause a work stoppage, causing a work stoppage, or otherwise inducing or encouraging any individual employed by any person engaged in commerce or in industry affecting commerce, to refuse to handle or work on goods or perform services where an object of such activity is to remove or exclude [the employer at issue] from the construction site.⁵⁹

In short, while the Board and courts may couch their initial orders as not implicating the right of workers to abandon their work, it is clear that the courts’ enforcement powers also implicate workers’ rights directly. In effect, the cease and desist order against a union during a secondary strike presents union members with the option of returning to work or quitting their jobs permanently.

57. The Supreme Court has articulated a very broad standard for determining when a union has induced or encouraged a strike, even outside of the context of contempt proceedings. “The words ‘induce or encourage’ are broad enough to include in them every form of influence and persuasion.” *Int’l Bhd. of Elec. Workers v. NLRB*, 341 U.S. 694, 701–02 (1951); *see also* *NLRB v. Local 3, Int’l Bhd. of Elec. Workers*, 477 F.2d 260 (2d Cir. 1973) (citing *United States v. United Mine Workers*, 77 F. Supp. 563, 566 (D.D.C. 1948) (“If a nod or a wink or a code was used in place of the word ‘strike,’ there was just as much a strike called as if the word ‘strike’ had been used.”)).

58. *Roth v. United Union of Roofers, Waterproofers, & Allied Workers, Local No. 11*, No. 94 C 7308, 1995 WL 12259 (N.D. Ill. Jan. 11, 1995). This case was brought under § 8(b)(7) of the NLRA, but the subject matter is irrelevant to the point about the relief available.

59. *Id.* at *9 (emphasis added).

The Fifth Circuit was explicit about this coercive choice under public sector federal labor law in *United States v. Martinez*.⁶⁰ In affirming criminal contempt rulings against officers of the PATCO union for failing to report to work in violation of an injunction against the union, the court stated:

As appellants emphasize, the district court's restraining orders *did not, indeed could not, order these individuals to return to their jobs*. The court could and did order them, however, *to choose between returning to work and quitting their employment*. We have observed before that this "work or quit" option is a permissible means of enjoining illegal strikes without offending the Thirteenth Amendment's protection against involuntary servitude.⁶¹

Thus, when evaluating the Thirteenth Amendment implications of antistrike injunctions against unions under the NLRA, we must look beyond their face to the implicit injunctions against workers striking.

IV. ANTISTRIKE INJUNCTIONS IMPLICATE THE THIRTEENTH AND FIRST AMENDMENTS EVEN IF WORKERS CAN PERMANENTLY QUIT THEIR JOBS

That NLRB antistrike injunctions under §§ 8(b)(4) and 10(l) coerce workers not to strike still leaves the fundamental question whether state coercion of workers not to strike violates the Thirteenth Amendment or at least invites strict scrutiny under the Thirteenth Amendment. The key challenge in the case law is whether availability of the right to quit a job and change employers is sufficient to provide the "power below" and the "incentive above" to prevent a "harsh overlordship" or "unwholesome conditions."⁶² To answer that question, it is worth determining whether there is a principled basis to distinguish constitutionally between abandoning work by quitting or by striking.

A. Quitting Individually v. Quitting Collectively

The *WERB* decision strongly implies that the Thirteenth Amendment protects the right to quit both individually and collectively. In rejecting a Thirteenth Amendment attack on the rule at issue in that case, the Court, citing *Pollock*, distinguished between the types of actions prohibited by that rule on the one hand, and abandoning work individually

60. See *United States v. Martinez*, 686 F.2d 334, 345 (5th Cir. 1982).

61. *Id.* (emphasis added) (citing *New Orleans Steamship Ass'n v. Gen. Longshore Workers*, 626 F.2d 455, 463 (5th Cir. 1980) (citing *WERB*). The defendants in the PATCO case were officers of the union, but the action for which they were cited for contempt was failing to report to work. See *id.* at 337-38.

62. See Pope, *supra* note 13. For cases overturning strike bans or antistrike injunctions on Thirteenth Amendment grounds, see *id.* at 1546 n.285.

or collectively on the other. Thus, the Court implies that banning workers from abandoning work either individually or collectively would raise Thirteenth Amendment objections. The *Vinluan* court also implicitly adopted that view by not following the trial judge’s reasoning that the nurses’ resignations lost Thirteenth Amendment protection because they were undertaken collectively.⁶³

The policy statements in both the Norris–LaGuardia Act⁶⁴ and the NLRA⁶⁵ reveal that Congress did not believe that individuals’ ability to express their voice through the market mechanism of exit was sufficient to prevent a “harsh overlordship” or “unwholesome conditions.”⁶⁶ These laws involve state interventions in the labor market to grant workers procedural protections to enable them to gain necessary bargaining power through concerted action. Notwithstanding several court decisions to the contrary,⁶⁷ the ability of individuals to quit their jobs and change employers is insufficient to satisfy the Thirteenth Amendment’s mandate to “maintain a system of completely free and voluntary labor throughout the United States.”⁶⁸ At a minimum, the ability to quit collectively must be available.

B. *Quitting En Masse v. Striking*

Case law has also distinguished quitting permanently from quitting temporarily to apply specific targeted pressure to the employer. In several cases, the courts have declared that the Thirteenth Amendment does not protect collective withholding of labor on a temporary basis.⁶⁹ It is

63. *See In re Vinluan v. Doyle*, 60 A.D.3d 237, 245–47 (N.Y. App. Div. 2009).

64. 29 U.S.C. § 102 (2012) (“Whereas under prevailing economic conditions, developed with the aid of governmental authority for owners of property to organize in the corporate and other forms of ownership association, the individual unorganized worker is commonly helpless to exercise actual liberty of contract and to protect his freedom of labor, and thereby to obtain acceptable terms and conditions of employment, wherefore, though he should be free to decline to associate with his fellows, it is necessary that he have full freedom of association, self-organization, and designation of representatives of his own choosing, to negotiate the terms and conditions of his employment, and that he shall be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection; therefore, the following definitions of and limitations upon the jurisdiction and authority of the courts of the United States are enacted.”).

65. *Id.* § 151 (referring to “[t]he 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”).

66. *See Pope*, *supra* note 13, at 1552.

67. *Id.* at 1546 n.286 and accompanying text.

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

69. *See, e.g., France Packing Co. v. Dailey*, 166 F.2d 751, 753 (3d Cir. 1948) (“The contention that a limitation of the right to strike under the specified narrow conditions of Section 8 partakes of involuntary servitude is not substantiated by the cases. To the contrary, there is a wide distinction

not obvious why the distinction between being able to quit permanently and being able to withhold labor temporarily is relevant to a Thirteenth Amendment analysis.⁷⁰ Given the history of the Amendment⁷¹ and the language of the text, it is not at all a foregone conclusion that the Amendment does not protect at least some strike activity.

Before examining why the Thirteenth Amendment may protect at least some strikes, it is important to look critically at the Supreme Court's analysis of the distinction between quitting and striking in *Textile Workers Union of America v. Darlington*.⁷² In *Darlington*, the Court held that an employer has an absolute right under the NLRA to close a business entirely for any reason, including anti-union motives, but that the same unfettered right does not apply to closing part of the business.⁷³ In reaching this conclusion, the Court analogized the difference between a total closing and a partial closing to that between a quit en masse and a strike. The Court stated:

One of the purposes of the Labor Relations Act is to prohibit the discriminatory use of economic weapons in an effort to obtain future benefits. . . . Although employees may be prohibited from engaging in a strike under certain conditions, no one would consider it

between a worker quitting his job, for any reason or no reason, on the one hand, and a cessation of production by workers who seek to win a point from management, on the other hand.”); Pope, *supra* note 13, at 1546 n.287 and accompanying text; *see also* Dayton Co. v. Carpet, Linoleum & Resilient Floor Decorators' Union, Local No. 596, 39 N.W.2d 183, 198 (Minn. 1949) (“The principal distinction between the conception of a strike and the right of an individual to work for whom he chooses is that in a strike the employe [sic] does not sever his relationship with his employer, but merely suspends his services for the purpose of putting pressure upon the employer, hoping thereby to induce him to accede to the demands of the employe [sic].”).

70. *See* Kupferberg, *supra* note 43, at 734 (critiquing the distinction, for Thirteenth Amendment purposes, between a strike and a group quit). The distinction between striking and quitting takes on significance under labor statutes in ways that are not relevant to this discussion. *See, e.g.*, NLRB v. KSM Indus., Inc., 682 F.3d 537, 545–46 (7th Cir. 2012) (finding that striking employees, who resigned because they needed to access their 401(k) accounts during unfair labor practice strike, did not intend to permanently abandon their employment and were therefore entitled to remedial backpay); *Limbach Co. v. Sheet Metal Workers Int'l Ass'n*, 949 F.2d 1211, 1217–18 (3d Cir. 1991) (“[S]econdary boycott provisions prohibit a union from inducing employees to refuse to perform services during the course of employment but do not preclude inducements to quit, as quitting is not a refusal to perform services during the course of employment.”); *Bd. of Trustees, Packinghouse Workers & Meat Cutters, Local 630 v. Crown Packing Co.*, No. 5-72432, 1978 WL 1751, at *2 (E.D. Mich. June 19, 1978) (approving differentiation in treatment of pension benefit contributions for employees who quit and those who strike). Whether or not labor law prohibits unions from inducing workers to quit, for example, does not determine whether or not the law can constitutionally preclude them from inducing workers to strike or to engage in a strike. *See Crown Packing Co.*, 1978 WL 1751, at *1-2.

71. Lea S. VanderVelde, *The Labor Vision of the Thirteenth Amendment*, 138 U. PA. L. REV. 437, 437 (1989) (discussing that the congressional debates on the Thirteenth Amendment addressed what constitutes fair and just labor relations).

72. *Textile Workers Union of Am. v. Darlington Mfg. Co.*, 380 U.S. 263 (1965).

73. *Id.* at 275.

a violation of the Act for the same employees to quit their employment en masse, even if motivated by a desire to ruin the employer. The very permanence of such action would negate any future economic benefit to the employees. The employer’s right to go out of business is no different.⁷⁴

This analogy between workers and businesses does not hold for a variety of reasons,⁷⁵ including that the Thirteenth Amendment right to quit is not equally applicable to employers and employees. Unlike the First Amendment, the Thirteenth Amendment is not neutral as to parties, but rather protects workers and limits the power of bosses.

The *Darlington* Court was not wrong to observe that there is a difference between severing a relationship permanently and not doing so. However, the most significant aspect of the *Darlington* Court’s reasoning, when comparing quitting and striking under the Thirteenth Amendment, lies in the recognition that quitting has a significant impact on an employer even though the separation is ostensibly permanent. The *Darlington* Court’s opinion suggests that employees quitting en masse could ruin an employer, but fails to recognize the significance of this observation.

It is precisely because of that potential impact of quitting that the *Pollock* Court found constitutional significance in the ability to quit. In the view of the *Pollock* Court, voting by exit gives an incentive above to prevent a “harsh overlordship” and “unwholesome conditions.”⁷⁶ Thus, the right to quit en masse lies not only in the importance of separation itself. Perhaps paradoxically, it lies also in the impact of separation on ongoing relationships between remaining workers and bosses and, as a result, the effect of the right to exit on creating or protecting a system of free labor.⁷⁷ In other words, protecting exit is critical to ensuring the bargaining position of any remaining or future workers at that particular work site and in the labor system as a whole. In addition, the freedom and capacity to abandon work, whether by quitting en masse or by strik-

74. *Id.* at 272.

75. At its most basic, it treats business assets and human labor as equivalent, which is morally, politically, and legally problematic. See 15 U.S.C. § 17 (“The labor of a human being is not a commodity or article of commerce.”). Of course, a business closing has an ongoing impact on workers, particularly in a community that depended heavily on the business. I therefore believe that *Darlington* was incorrectly decided. But the issue I am concerned with is whether the *Darlington* Court identified a constitutionally significant distinction between permanently quitting, even en masse, and striking. I do not believe that it did.

76. See *supra* text accompanying note 23.

77. See Pope, *supra* note 13, at 1517.

ing, is at least as significant in providing a check on employers' power as the actual act of abandoning work.⁷⁸

Secondary strikes, which, by definition, do not seek direct improvements in wages and working conditions from the secondary target,⁷⁹ highlight the constitutional resemblance between striking and quitting en masse as forms of "abandoning work." In both cases, abandoning work gives workers the "power below" to redress violations of accepted labor norms on behalf of other workers, and creates the incentive above to comply with those norms.⁸⁰

This critique of the supposed distinction between mass quitting and striking points to Pope's "functional approach" to the Thirteenth Amendment, or what I would call a systemic approach.⁸¹ This approach looks to determine the rights necessary to create a system of free labor. "The workers' power and the employers' incentive are generated not at the individual level, between a particular laborer and employer, but in the aggregate, through the workings of the free labor system."⁸² After all, unlike the Fourteenth Amendment, the Thirteenth Amendment is not written in terms of the rights of individuals (e.g., to equal protection of the laws or due process of law) but rather declares that the institutions of slavery and involuntary servitude "shall not exist."⁸³ For this reason, involuntary servitude *cannot* play a role in our system of labor relations.

As Pope argues, the question is whether protecting strikes is necessary to providing the "power below" and the "incentive above" to prevent a "harsh overlordship" and "unwholesome conditions,"⁸⁴ and thereby to maintaining "a system of completely free and voluntary labor throughout the United States."⁸⁵ With that in mind, let us examine what is really going on when an employer applies for injunctive relief from the Board and, through it, the courts.

78. As both Pope and Steinfeld observe, for the freedom to quit to relieve a worker of involuntary servitude, the worker has to have viable options. See Pope, *supra* note 13, at 1527; STEINFELD, *supra* note 4, at 284.

79. See *supra* note 41 and accompanying text.

80. In theory, for the specific workers involved, striking against a primary target, at least, should be better suited than mass quitting to securing better working conditions with the employer being struck, because they hope to have an ongoing relationship with that employer. But that fact militates toward the need for greater constitutional protection of the strike (the temporary abandonment of work, as a weapon against conditions of servitude), and not, as the *Darlington* Court's reasoning seems to imply, a justification to limit it.

81. Pope, *supra* note 13, at 1517.

82. *Id.*

83. *Pollock v. Williams*, 322 U.S. 4, 17 (1944) (holding that we must "maintain a system of completely free and voluntary labor throughout the United States").

84. *Id.*

85. *Id.*

C. Secondary Strikes and the Pollock Principle

When an employer faces an unprotected secondary strike, it has the legal option of firing the striking workers. If the employer or the business that is the ultimate target of the secondary strike turns to the government—specifically, the NLRB and, through it, the courts—for injunctive relief, it does so in order to coerce the workers to return to work. The argument that the workers have the right to quit, either individually or collectively, misses the goal of the complaining employer and the government to force the strikers back to work. This goal has been justified by the need to maintain production of goods or services by relieving the pressure on both the “neutral” and the ultimate target. This is precisely the public interest that the courts cite in justifying injunctions even where the secondary target has acquiesced to the strikers’ demands.⁸⁶ Thus, as demonstrated, the antistrike order has the power to coerce workers back to work. Judging from the dearth of examples of recent secondary strike court cases, it would seem that the employer and government’s power to wield such injunctions has proved highly successful.

Antistrike injunctions are both coercive—in ways that implicate the Thirteenth Amendment—and suppressive of expression—in ways that implicate the First Amendment. With unprotected strikes, the striking employee’s only legal connection to the place of employment lies in the possibility that the employer will, in the end, choose unequivocally to condone the strike and grant the workers the right to return with whatever stake they had in the company (e.g., seniority, credit toward vesting of a pension) intact.⁸⁷ In other words, the workers potentially do have something to lose if they quit instead of striking. However, what the workers have during the strike is highly dependent on their employers in the end, since they have no legal claim to anything from the employer that has not already vested. Whether quitting or striking, the employer can always seek to take them back to settle the dispute or after the dispute is settled. Either way, the workers are abandoning work en masse without any legal guarantee of the right to return to work.

This legal situation leaves secondary strikers subject to coercion by the government because, as a practical matter, they may still have something to lose by quitting. This is particularly so if the “neutral” employer otherwise wishes to maintain a productive ongoing relationship with the union or unions in question, as is often the case in the construction indus-

86. *See supra* note 42.

87. *See Exum v. NLRB*, 546 F.3d 719, 727 (6th Cir. 2008) (upholding a Board finding that the employer did not condone the strike).

try.⁸⁸ But, as discussed more below, it also means that from a legal point of view, the difference between their striking instead of quitting is largely expressive. In striking, workers express a desire to have an ongoing future relationship once the dispute is resolved. By quitting, they renounce a future relationship with that employer. Thus, to the extent a Board or court order against striking relies on the workers' stake in the possibility of regaining their status due to the employer condoning the strike, the order is highly coercive. This coercion undermines the "power below" and "incentive above" that the workers have to pressure their bosses, whether on their own behalf or on behalf of other workers.

This level of coercion affects more than the particular workers in any given dispute. Taking a "functional" or systemic approach to the issue, all union members are vulnerable to being coerced back to work by the government, whether implicitly or explicitly, which undermines the system of free labor. It is one thing for an individual employer, with the possible exception of a giant like Wal-Mart, to fire or otherwise punish workers for engaging in an unprotected strike. It is quite another for the state, through its legislative and enforcement powers, to stop or prevent such labor strikes systemically.

Although the Thirteenth Amendment applies equally to private and government conduct, neither can participate in nor facilitate slavery or involuntary servitude. The impact of a generally applicable, enforceable, and enforced government rule on the bargaining power of workers is far greater than the decisions of any given employer. For that reason, the availability and use of antistrike injunctions in the NLRA deals a serious blow to the power of workers to prevent conditions of servitude. Furthermore, because the results of the government's actions are system-wide, its antistrike legislation makes any resulting servitude anything but voluntary.⁸⁹ As Pope argues, without viable options, servitude becomes involuntary.⁹⁰

88. As discussed below, the line between quitting and striking in the construction industry is particularly blurry, since the employment relationship involved is inherently temporary in any event.

89. It is worth noting that Taft-Hartley bans on secondary activity cannot properly be seen as a congressional interpretation of the limits of any Thirteenth Amendment right to strike. As Pope has detailed, the NLRA was enacted pursuant to Congress's power to regulate interstate commerce, not under the Thirteenth Amendment. See James Gray Pope, *The Thirteenth Amendment Versus the Commerce Clause: Labor and the Shaping of American Constitutional Law, 1921-1957*, 102 COLUM. L. REV. 1, 6 (2002). Therefore, the NLRA is not owed any deference under the Thirteenth Amendment.

90. See Pope, *supra* note 13, at 1527; STEINFELD, *supra* note 4, at 284.

D. Secondary Strikes and the First Amendment

Returning to the dynamics of the scenario in which workers are engaging in or threatening to engage in an unprotected strike, the unprotected nature of the strike points to First Amendment problems with antistrike injunctions. To the extent that the workers have no legal claim on their jobs unless or until the employer condones the strike, the difference between a mass quitting and a strike is fundamentally expressive. The workers are taking a solidaristic stand rather than walking away permanently. The difference between declaring themselves strikers rather than quitting, if any at all, is purely in the expression of that claim and not in any enforceable right. By deploying antistrike injunctions, rather than letting employers sort out the situation on their own, the government is suppressing expressive activity, precisely because of its viewpoint. This raises significant First Amendment problems.

This argument has even greater force in construction cases. Construction workers generally have no lasting relationship with a specific employer. Their relationship is with the union and the type of work. Their pensions, benefits, and seniority are not bound to a particular job. For this reason, the difference between mass quitting and striking cannot be characterized easily as a material one. Construction workers’ secondary strikes are temporary in that the workers return when their demands are satisfied or they are replaced. But legally, they have no more stake in the job they have left than someone who has left it permanently. They have only the possibility of returning if the dispute is settled. Someone who “quit” to honor a picket line might also return once the dispute is over. In this context, the difference between quitting, striking, and, in particular, honoring a picket line, is merely one of expression.

Commentators on the fallacy of the speech-conduct distinction in pure § 8(b)(4)(ii)(B) secondary picketing cases have not explored whether their critique is just as available in the context of secondary strikes under § 8(b)(4)(i)(B). One concern of critics may be that striking, unlike peaceful picketing, goes beyond expressive activity to an act of direct economic coercion. However, as the *Darlington* Court pointed out, quitting en masse can ruin an employer. It is economically coercive, and yet it is also constitutionally protected under the Thirteenth Amendment. Therefore, the fact that striking is coercive cannot be decisive in determining whether it is protected constitutionally. And if, as set forth above, the difference between the constitutionally protected behavior of permanently quitting en masse and the prohibited behavior of temporarily striking is fundamentally one of expression, the distinction begins to look like

viewpoint-based discrimination. This is also impermissible under the First Amendment.⁹¹

One might object that the difference between secondary strikes and secondary picketing in support of a boycott is that secondary boycotts are lawful, whereas secondary strikes are unlawful. Therefore, *Giboney v. Empire Storage Company*⁹² and its progeny⁹³ would seem to justify outlawing secondary strikes as well as picketing or other activities that induce or encourage the strikes.⁹⁴ However, this argument is somewhat circular: the First Amendment does not protect this expressive conduct from being made unlawful because it is already unlawful. As long as the objective of the strike itself is lawful (for example, raising an employer's labor standards or settling a primary strike) the unlawful objectives argument cannot overcome the First Amendment protections.⁹⁵

Thus, because the difference between mass quitting and striking in an unprotected strike⁹⁶ is fundamentally expressive, the government should have to show that its actions in curtailing any non-expressive aspects of striking are necessitated by a substantial and legitimate state interest. This interest cannot be related to suppression of expression, and

91. See, e.g., *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 828–29 (1995) (reciting cases establishing that viewpoint discrimination violates the First Amendment); *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992) (ordinance in cross-burning case stricken as facially unconstitutional under First Amendment because it imposes special prohibitions on speakers who express views on disfavored subjects, and includes viewpoint discrimination).

92. See *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 498 (1949) (“It rarely has been suggested that the constitutional freedom for speech and press extends its immunity to speech or writing used as an integral part of conduct in violation of a valid criminal statute.”).

93. See *Int'l Bhd. of Teamsters, Local 695 v. Vogt*, 354 U.S. 284 (1957); *Local Union No. 10, United Ass'n of Journeymen Plumbers v. Graham*, 345 U.S. 192 (1953); *Bldg. Serv. Emps. Int'l Union, Local 262 v. Gazzam*, 339 U.S. 532 (1950); *Int'l Bhd. of Teamsters Local 309 v. Hanke*, 339 U.S. 470 (1950); see also *NLRB v. Wine, Liquor & Distillery Workers Union, Local 1*, 178 F.2d 584, 587 (2d Cir. 1949) (citing *Giboney* to reject the First Amendment challenge to ban secondary strikes).

94. See, e.g., *Local 1*, 178 F.2d at 587.

95. See *Estlund*, *supra* note 9, at 943 (critiquing the illegal objective test, as it had developed, as circular). At the same time, *Estlund* has also observed that a picket calling on employees to strike might raise questions of breach of contract and hence of whether the strike might, in that way, break the law. *Id.* at n.2. As noted above, see *supra* note 45 and accompanying text, this Article does not address whether there are any constitutional limitations on the damages remedies available under Section 303 of the NLRA, for example, for breach of contract. However, this Article does argue that the remedy of injunctive relief should be no more constitutionally available against secondary strikes than against quitting en masse, which could also result in breach of contract but which is unquestionably constitutionally protected. Moreover, that either action, striking or quitting, could result in damages for breach of contract should not be sufficient to strip it of constitutional protection against injunctive relief. See *infra* note 97.

96. It is important to note the difference between a strike (or any other unprotected activity) and being unlawful. Lawful activity may still be unprotected. My argument is that this activity should not be subject to state sanction, not that employers are constitutionally prohibited from responding with self-help. I leave that argument to someone else.

its restrictions would have to be narrowly tailored to address those interests.⁹⁷ It is difficult to see how an outright ban on expressive activity could satisfy that level of scrutiny.

E. Inducing or Encouraging Secondary Strikes, the NLRA’s Gag Rule, and the First Amendment

Finally, if these arguments are correct, then the gag rule imposed on unions under § 8(b)(4)(i)(B) looks suspect under the First Amendment as well. If secondary strikes enjoy a measure of constitutional protection against injunctions, whether under the Thirteenth or the First Amendment, then the act of inducing or encouraging a strike should also enjoy First Amendment protection. The unlawful objectives argument, for example, is unavailable unless the strike itself has an independently unlawful objective, such as forcing an employer to discriminate racially. Just as unions should be allowed to act in solidarity with one another, they should also be able to call on other unions or members of other unions to act in solidarity.

Subjecting the ban on inducing or encouraging secondary strikes to stricter scrutiny is critical to the ability of unions to exercise the right to engage in secondary strikes argued for above. In most instances, the Board and the courts seek to stop unions from calling strikes. Without a call for a strike—whether a directive to members, a public statement, or a picket line—the right to engage in the strikes themselves would be a dead letter. The call for solidarity is critical to the exercise of the right to act in solidarity. Presumably, that is precisely why Congress enacted the sweeping language “inducing or encouraging” and why the courts have interpreted the ban so broadly. At a minimum, the broad standard for inducing or encouraging a strike that includes a “nod or a wink”⁹⁸ should be subjected to stricter scrutiny. It is difficult to imagine such an extreme suppression of speech surviving that scrutiny.

CONCLUSION

Employment relations in our society are becoming increasingly fragmented. With this fragmentation, labor standards abuses are increas-

97. *See, e.g.,* United States v. O’Brien, 391 U.S. 367, 376–77 (1968) (finding that “when ‘speech’ and ‘nonspeech’ elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify *incidental limitations* of First Amendment freedoms,” and the governmental interest involved must be “unrelated to the suppression of free expression” and the “incidental restriction” on First Amendment freedom must be “no greater than is essential to the furtherance of that interest”) (emphasis added).

98. *See supra* note 57.

ingly pervasive.⁹⁹ Unions' ability to use secondary picketing and strikes to support each other and target vulnerable points in a supply, distribution, or other commercial chain is critical for rebuilding labor's "power below" in order to overhaul "incentives above." Enjoining a union or its members to return to work from a solidarity strike remains highly coercive, even with the right to quit permanently. The systemic coercion created by the NLRA prohibition against secondary strikes and its enforcement mechanisms is inconsistent with the states' obligation to "maintain a system of completely free and voluntary labor throughout the United States."¹⁰⁰ Moreover, unprotected secondary strikes differ from constitutionally protected mass quitting, largely in their expressive content. Distinguishing between the two, and banning the strikes, should trigger First Amendment scrutiny applied to content-based distinctions. For this reason, there should be a strong constitutional presumption against enjoining strikes and coercing workers back to work. Furthermore, to the extent that strikes have the protection of the Thirteenth and First Amendments, the prohibitions against inducing or encouraging strikes also implicates the First Amendment and should be subjected to strict scrutiny as well.

In short, when "they outlawed solidarity," they broke the law.¹⁰¹ It is high time, even terribly late, that we invoke the "labor vision" of the Thirteenth Amendment, as well as the promise of the First Amendment, to protect the secondary strike and the solidarity it both realizes and expresses.

99. WEIL, *supra* note 31; *see also* ANNETTE BERNHARDT ET AL., NAT'L EMP'T LAW PROJECT, BROKEN LAWS, UNPROTECTED WORKERS 7 (2015), *available at* <https://www.nelp.org/content/uploads/2015/03/BrokenLawsReport2009.pdf?nocdn=1>.

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

101. *See supra* article title and accompanying footnote.