STRIKE SEASON: PROTECTING LABOR-MANAGEMENT CONFLICT IN THE AGE OF TERROR

Ross E. Davies

06-12

Published in Georgetown Law Journal, Vol. 93, No. 6, August 2005, pp. 1783-1833

GEORGE MASON UNIVERSITY LAW AND ECONOMICS RESEARCH PAPER SERIES

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Strike Season: Protecting Labor-Management Conflict in the Age of Terror

ROSS E. DAVIES*

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INTRODUCTION

Strikes (and, to a lesser extent, lockouts) are painful but necessary parts of private-sector1 American labor-management relations.2 Even if they weren’t—

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* Associate Professor of Law, George Mason University School of Law; Editor-in-Chief, the Green Bag. © 2005, Ross E. Davies. Thanks to Michelle Boardman, Ofemi Cadmus, Marion Crain, Richard Epstein, Joan Flynn, Emily Frye, Julius Getman, Mark Grady, Iliana Ilieva, Bruce Johnsen, Michael Krauss, Christine Kymn, Leandra Lederman, Nelson Lund, John McCarthy, Alan Moye, Dennis Nolan, Daniel Polsby, Joan Rohlf, Maxwell Stearns, Joseph Zengerle, participants in a Robert A. Levy Fellow Workshop, the George Mason Law & Economics Center, and especially the Critical Infrastructure Protection Project at the George Mason University School of Law. E-mail: rdavies@greenbag.org.

1 Public-sector labor relations is a separate subject beyond the scope of this Article. See infra Part III.

2 Strikes (employees withholding their labor from employers) are more common than lockouts (employers withholding the workplace from employees), and historically have been more important, both in terms of their effectiveness as a tool of collective bargaining and in terms of their impact on the public. This is because, “[i]n ordinary labor negotiations, the risks and costs of a strike are
even if sound public policy called for their eradication—we couldn’t stop them. They are an inevitable byproduct of the conflicting interests and limited resources of organized workers and their employers. 3 History shows that this is true even in times of warfare overseas or crisis at home: labor-management strife lessens at the beginning of a conflict and then bounces back. Now, however, we are confronted with warfare at home, a phenomenon that the United States has not had to deal with since the Civil War—before the rise of today’s unprecedentedly large, complex, and interdependent economy and government.

And history is repeating itself again. After a lull at the beginning of the war with terrorists, work stoppages have returned to their pre-war levels. The overall rate of strike activity is substantially lower than it was during previous wars (it has been slowly declining, along with overall union membership in the private sector, for decades). Today’s war, however, is being fought in part on American soil, and against enemies who operate worldwide, but whose attacks tend to be among the most powerful factors in bringing about an agreement.” Archibald Cox, Strikes and the Public Interest: A Proposal for New Legislation, ATLANTIC MONTHLY, Feb. 1960, at 48, 50. Most commentaries on and regulations of work stoppages have therefore focused on strikes. Nevertheless, strikes and lockouts raise the same sorts of issues with respect to the subject of this Article—reconciling the utility of strikes and lockouts with the associated dangers to critical infrastructure in the age of terror. Thus, while this Article attends more to strikes than to lockouts, the proposal outlined in Part IV treats notice requirements for strikes, lockouts, and replacements as complementary.

It is important to be realistic, however, about the relative significance of strikes and lockouts in the real world. The threat to the public from lockouts is not as serious as the danger of strikes for several reasons, including: (1) lockouts are less common than strikes, see Michael H. LeRoy, Lockouts Involving Replacement Workers: An Empirical Public Policy Analysis and Proposal To Balance Economic Weapons Under the NLRA, 74 WASH. U. L.Q. 981, 1017–21 (1996); and (2) the prospect of tort liability gives employers a strong incentive to avoid labor conflicts and especially lockouts—lockouts being the only ones over which employers enjoy a complete negative—that might harm bystanders, see, e.g., Seth D. Harris, Coase’s Paradox and the Inefficiency of Permanent Strike Replacements, 80 WASH. U. L.Q. 1185, 1264–68 (2002), while the danger of tort liability to unions is weaker, though not nonexistent, see Julius G. Getman & F. Ray Marshall, The Continuing Assault on the Right to Strike, 79 TEX. L. REV. 703, 719–26 (2001).

3 The political consequences of these limitations are reflected in the practical impossibility of radical change of the basic regulatory scheme. For a brief discussion of the popular but apparently unachievable alternative of transferring the power to set the terms of collective bargaining agreements from labor and management to impartial authorities appointed or regulated by the government—commonly called binding-interest arbitration—see infra note 176 and accompanying text.
small and local, seeking advantage from the unpredictability and brutality of the damage they inflict rather than from its scale. Thus, even small, localized, and occasional work stoppages—not just the large-scale strikes that arguably affected the military-industrial complex and thus the war efforts in the past—have the potential to increase risks to critical infrastructure and public safety during the war on terror. In other words, persistent strike activity at current levels poses risks of public harm, albeit risks that are difficult to anticipate with specificity in the absence of much experience or available data. This justifies taking some reasonable precautions, including the proposal made in this Article.

By its very nature, a labor strike increases the vulnerability of that employer’s operations to a terrorist attack. A strike is an act specifically designed to disrupt and weaken an employer’s operations, for the (usually) perfectly lawful purpose of pressing for resolution of a dispute with management. A weakened organization or other entity is, of course, less capable of resisting and surviving exogenous shocks, whether they be commercial competition or terrorist attacks. In the United States, with its fully extended and endlessly interconnected critical infrastructure that touches everything from food processing to energy distribution to water quality, a strike in the wrong place at the wrong time that disrupts and weakens some part of that infrastructure could be decisive in the success or failure of a terrorist attack of the small, local sort described above, on such a weakened link in some infrastructural chain. Of course, none of this is to suggest that any union or its members (or any employer or its managers) would knowingly expose their fellow citizens or their property to a terrorist attack. To the contrary, experience to date suggests that union members are at least as patriotic and conscientious as Americans in general. In fact, the effectiveness of the proposal

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4 Congress has defined “critical infrastructure” as follows: “‘critical infrastructure’ means systems and assets, whether physical or virtual, so vital to the United States that the incapacity or destruction of such systems and assets would have a debilitating impact on security, national economic security, national public health or safety, or any combination of those matters.” 42 U.S.C.A. § 5195e(e) (West 2004); see also Homeland Security Act of 2002, Pub. L. No. 107-296, § 4, 116 Stat. 2135, 2140.


made in this Article is predicated in part on the assumption that neither workers nor their employers will knowingly contribute to the incidence or effectiveness of terrorist attacks. The concern addressed here is, rather, that innocent instigators or perpetuators of a work stoppage might unwittingly facilitate a successful terrorist attack or aggravate its effects.

Thus, the problem is determining how to regulate labor-management strife in a way that recognizes the inevitability (and benefits) of work stoppages and at the same time take steps to protect domestic critical infrastructure and the American people from opportunistic terrorists. This is not as hard as it sounds. The answer lies in the 1974 amendments to the National Labor Relations Act (NLRA). The essential feature of those amendments is a short, easily administered waiting period that has, over the past three decades, protected the health and safety of hospital patients and other health care recipients without unduly gumming up the traditional works of labor-management relations. If slightly modified and then extended from its current limited application in the health care industry to critical infrastructure more generally, the waiting period structure of the 1974 amendments should serve a broader range of critical enterprises quite well. Such a modest and balanced legislative fix for such an unpredictable and potentially important problem should be acceptable to both labor and management interests—especially when the alternative is to leave the public exposed to the risk of a devastating attack which, if were it to happen, would surely trigger a legislative-regulatory backlash against those who knew or should have known of the dangerous conditions they were creating—creating not by engaging in a work stoppage, but by failing to take a simple, low-cost precaution before doing so.

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7 Rev. 1705, 1736–57 (2004) (suggesting that the bonds of loyalty fostered in work are an essential characteristic of full citizenship and give democracy meaning).

8 Improving safety is not the same as guaranteeing safety. The proposal made in this Article seeks relative, not absolute effectiveness. To claim or demand anything more would be unrealistic.


9 See Slater, supra note 5, at 329 (quoting Senator Zell Miller: “They will ask: Why did they put workers’ rights above Americans’ lives?”).
Part I of this Article lays out the unique threat posed by strikes (and, to a lesser extent, by lockouts) in the age of terror. Using American experience during the world wars, Part II shows that there is no way to prevent strikes from happening, forecrowning any argument for a fruitless ban on strikes or for some sort of nostalgic and fictional Greatest-Generation-inspired, “return to a patriotic war footing” regulation of labor-management relations. Part III reviews the generally applicable labor laws currently in force and shows that both

10 In fact, the Greatest Generation was at least as willing as any other generation to engage in work stoppages in wartime. See infra Part II.B.

11 This Article focuses on reform of the NLRA because prospects for applying specialized schemes, such as the Railway Labor Act, 45 U.S.C. §§ 151–188 (2000) (railroads and airlines) and the Federal Service Labor-Management Relations Act, 5 U.S.C. §§ 7101–7106 (2000) (civil service), to the broader private sector covered by the NLRA are so dismal that there is no point in even speculating about them. See, e.g., Michele Kayal, FedEx Challenges Labor Law Extension To Overseas Pilots, J. COM., Sept. 11, 1997, at 17A; Rip Watson & Stephanie Nall, Labor Gaining Ground with Senate over FedEx, J. COM., Oct. 3, 1996, at 2B.

This Article also does not address interesting approaches that might have served under narrow and unusual circumstances not analogous to the broad problems addressed here, such as the nuclear materials and nuclear power industries in the 1940s and 1950s, see, e.g., J. Keith Mann, The Emergency Is Normal—Atomic Energy, in EMERGENCY DISPUTES AND NATIONAL POLICY 167 (Irving Bernstein et al. eds., 1955). Nor does it address approaches that are likely to run afoul of established law, labor and otherwise (such as leaving the problem to the states). The states in particular have had a checkered career in dealing with wartime labor disputes. See, e.g., ALEXANDER M. BING, WAR-TIME STRIKES AND THEIR ADJUSTMENT 264–65 (Arno Press 1971) (1921). Moreover, while the federal courts sometimes permit individual states to deal with striker violence on the basis of local law, see, e.g., Getman & Marshall, supra note 2, at 716–26, it is unlikely that the federal courts would so completely abandon both their longtime commitment to federal preemption under the NLRA of state anti-strike laws, see, e.g., Cannon v. Edgar, 33 F.3d 880, 884–86 (7th Cir. 1994), and their similar treatment of issues touching on national security, see, e.g., Am. Ins. Ass’n v. Garamendi, 539 U.S. 396, 420–22 (2003), that states would be freed to mandate strike and lockout notices and enjoin strikes on critical infrastructure protection grounds, especially against the background of rapidly expanding federal activity in this area, see, e.g., Homeland Security Act of 2002, Pub. L. 107-296, 116 Stat. 2135; USA PATRIOT Act of 2001, Pub. L. No. 107-56, 115 Stat. 272.

None of this is to say that specialized approaches do not work. To the contrary, “[e]xperience under the Railway Labor Act, despite recent failures, and in atomic energy installations seems to show that the best settlement procedures are those devised for a particular industry by its own management and labor, taking into account its peculiar background, technology, customs, and needs.”
experience and precedent limit their prospects for effective regulation of labor-management conflict in the age of terror, with the notable exception of the 1974 health care amendments to the NLRA. Part IV describes a proposed extension of the 1974 amendments to cover critical infrastructure more generally and explains how and why it would serve labor, management, and the American people in the age of terror. It would do so not by directly reducing strikes, lockouts, or the use of replacements (the three forms of risky work-stoppage-related behavior at which the proposed notice rule is directed), but rather by increasing transparency in the use of those weapons of labor-management conflict and thus increasing the opportunities for the parties, the government, and the public to share information and take appropriate precautions to avoid increased risks of effective terrorist attacks. The adoption of the rule proposed here would alter slightly the armaments of both labor and management, but in all likelihood it would do so without affecting the overall balance of power between them in any meaningful way.

I. A MATTER OF TIMING

American labor law is based on the practical but unpleasant idea that strikes are good, or at least that a healthy fear of them is. This is because “[i]n ordinary labor negotiations, the risks and costs of a strike are among the most powerful factors in bringing about an agreement.”12 It is a fundamental tenet of almost all schools of labor-management relations that negotiating in the shadow of a perennially imminent strike or lockout—in other words, with each party holding the commercial equivalent of a gun to the other’s head—is the greatest motivator to reaching a peaceful, mutually acceptable (although perhaps also

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Cox, supra note 2, at 48, 50. Of course, in the world of labor law, everyone decries every regulation for its operational imperfections and its failure to properly favor their interests (which are invariably perfectly aligned with the public interest and sound public policy), but this sort of posturing should be taken with a grain of salt. For example, the RLA is often derided by employers who are or might be subject to it, and by unions representing RLA-covered workers, but the intensity with which they seem to prefer the RLA to the NLRA belies that rhetoric. See, e.g., UPS v. NLRB, 92 F.3d 1221, 1223–28 (D.C. Cir. 1996) (RLA-covered employer striving mightily to shift to RLA coverage); Federal Express, 317 N.L.R.B. 1155, 1155–56 (1995) (RLA-covered employer striving mightily to preserve that status). In any event, even in 1960 Professor Cox recognized the impossibility of creating a Fill-in-the-Blank Labor Act for every particular industry in the United States, see Cox, supra note 2, and instead proposed amendment of the NLRA. This Article follows Cox’s approach, seeking to make the smallest possible—and therefore most legislatively plausible—change to the federal labor laws, consistent with the goal of reducing strikes while preserving the traditional prerogatives of labor and management.

12 Cox, supra note 2, at 51.
mutually ungratifying) agreement on the terms and conditions of employment or the resolution of some particular dispute.\textsuperscript{13}

In the past, however, there have been some limited circumstances in which the “risks and costs” of strikes were deemed so great that government intervention with an eye to precluding or postponing strikes—and thus undermining the overall process of labor negotiations and the balance of power between labor and management—seemed a lesser evil than the danger of public harms that might result from such a strike. In fact, for as long as there have been strong, disciplined unions capable of taking their members out on strike, American lawmakers have recognized the special danger posed by wartime strikes even when against private employers\textsuperscript{14} and, more generally, the potential for some strikes not only to harm lawfully targeted employers but also to endanger bystanders and the general public, whether the country is at war or peace.\textsuperscript{15} But such unions did not evolve into a force to be reckoned with at the national level until after the Civil War,\textsuperscript{16} the last American war with a significant domestic battlefront.\textsuperscript{17} Thus, it should come as no surprise that American labor law—almost entirely a product of the 20th century\textsuperscript{18}—was not designed and has not evolved to meet the challenges of


\textsuperscript{14} See, e.g., PHILIP TAFT, ORGANIZED LABOR IN AMERICAN HISTORY 309–21 (1964) (World War I). Even before the rise of modern, large-scale industries and of correspondingly large labor organizations strong enough to represent workers’ interests, wartime labor disputes and the workers’ occasional refusal to work until their grievances were addressed captured the attention of concerned governments. See, e.g., RICHARD B. MORRIS, GOVERNMENT AND LABOR IN EARLY AMERICA 297–309 (1946) (Revolutionary War); MELVYN DUBOFSKY & FOSTER RHEA DULLES, LABOR IN AMERICA: A HISTORY 82–86 (Harlan Davidson 7th ed. 2004) (Civil War).


\textsuperscript{17} There are frightening exceptions to this generalization, see, e.g., Ex parte Quirin, 317 U.S. 1 (1942) (German saboteurs on American soil during World War II), but they are small and rare and could not have justified the kind of proposal offered here. By “battlefront,” I mean a locus of maiming, killing, and physical destruction, not one of political or ideological dispute. This Article is about defense against threats of physical harm, not conflict with unwelcome ideas.

\textsuperscript{18} Regulation of railway labor relations began in earnest in the late nineteenth century, see, e.g., Arbitration Act of 1888, ch. 1063, 25 Stat. 501 (1888) (repealed 1898); Erdman Act, ch. 370, 30 Stat. 424 (1898) (repealed 1913), but those early
labor relations in a nation exposed to domestic and international terrorists who are willing and able to wage war without warning on American soil.

It is this largely novel problem of time, or the lack of it, that makes strikes in the age of terror uniquely dangerous. The timing problem has, in turn, two basic components. First, due to advances in technology and preservation of American openness and freedom, terrorists are now always next door, either literally or practically. This risk is exacerbated by the fact that the targets of terrorism tend to be local, rather than national, populations and resources. Second, terrorists will attack without notice, rather than declaring war and wearing a uniform. Thus, the United States no longer has the luxury of leaving itself exposed while workers and employers work through differences in ways that sometimes sharply limit the ability of enterprises making up the nation’s critical infrastructure to operate safely. This is not to say that all or even many strikes are necessarily hazardous; rather, it is to say that we need a mechanism for ensuring that protection of critical infrastructure—when it truly is needed—comes first.

First, with respect to the terrorist next door, it is one thing for a nation secure behind the buffering expanses of the Atlantic and the Pacific against the armies of its enemies to leave control of the timing and scope of strikes almost entirely in the hands of labor unions and management. That is the current state of American labor law. It is entirely another matter to do so when the defensive benefits of the great oceans have largely evaporated in the face of widely available advances in transportation and communications technology and resources. Moreover, the very openness and freedom that are essential characteristics of the United States (and are presumed to be sacrosanct for purposes of this Article) provide both homegrown killers in the Timothy McVeigh mold and people who come from overseas to engage in similar behavior, like Sheik Omar Abdel Rahman, tremendous latitude to operate within this country. Thus, while there is not a terrorist around every corner and under every bush, there could be a terrorist around or under almost any one of them. Many of those corners and bushes provide convenient access to critical infrastructure, and there is simply no way to secure them all.

Moreover, unlike past wars, in which strikes were arguably risky business because of the potential for them to interrupt the production of supplies necessary to the war effort (and thus the focus on “national emergencies” in Cold War-era anti-strike legislation19), the war on terror is primarily concerned with attacks on the full range of infrastructures—not only the military-industrial complex, but also communications, sanitation, food, and so on, plus attacks on civilian populations and important symbolic sites. In other words, terrorists attack civilian targets in large part for the same reasons the Allies bombed Dresden and Tokyo

and not particularly effective efforts were overtaken and for the most part wiped out by the exigencies of World War I, which are discussed in more detail in Part II below.

19 See infra Part III.A.
(and Germany bombed London) in World War II—not just to damage the war-making infrastructure, but also to damage other structures necessary for the operation of the economy and the government, and to damage the culture and social fabric of the enemy. As a result of this broad range of possible terrorist targets and the multiplicity of objectives, many of which require only local action to damage or destroy sensitive parts of the country’s critical infrastructure, small, local work stoppages that would not, and generally did not, concern past generations of security and labor policy makers should concern the current generation.

Second, with respect to the sneaky terrorist, it is one thing to defend against an opponent who steps onto the battlefield and operates in accordance with traditional rules of warfare. It is entirely another to deal with a specialist, or a whole undefined army of specialists, in the art of the deadly sucker-punch delivered to innocent civilians. Certainly, the United States has suffered from enough of this sort of violence to become familiar with it. The activities of the Ku Klux Klan, the anarchist attacks and counterattacks of the post-World War I period, the work of the Weather Underground, and the more recent bombings and shootings at abortion clinics come to mind. The critical difference between what might be called the traditional forms of American domestic terrorism and the new, international, 9/11 type is that the former are inspired by narrowly focused hatred—of a race, a government, a procedure—against which a focused defensive response can be at least substantially effective. The 9/11-brand terrorists are moved by hatred of America and Americans generally. Their target is the whole country and almost everyone living in it. This generalized targeting precludes the construction of perimeter defenses around those in danger. We are all in danger.

So in days gone by a strike called by, say, stevedores or satellite communications technicians was unobjectionable when the worst that could be expected was entirely lawful financial devastation of struck employers and “severe inconvenience” to the public. But today, when such a strike could enable terrorists to, for example, ship bombs or poisons into the country or disable

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public safety, health, and emergency response systems, we must be more careful.

Of course, with a dearth of useful and available information about exactly when, where, and how terrorists will attack in the future—and an understandable reticence on the part of the government to disclose in public (and thus to terrorists as well) much of what is known—it is difficult to know what form that care should take, at least with respect to work stoppages, which are themselves difficult to predict. Any public efforts would probably be fruitless, if not downright counterproductive. On the other hand, inability to predict should not be equated with impossibility to occur. As Richard Posner recently pointed out, “[o]fficialdom has repeatedly and disastrously underestimated these [difficult to assess] dangers.” Uncertainty about the likelihood or significance of an overlap between terrorist activity and industrial strife should not dictate that no precautions be taken, at least not when a precaution is as cheap and easy as the one proposed in this Article.

Since the 9/11 tragedy, however, little has been said about the relationship between national security and labor law in the private sector. This lack of interest in the relationship between private employers and organized labor in critical


27 Lake, supra note 5, at 21; Levmore & Logue, supra note 5, at 298–99.

28 This is not to say that there are not some forms of constructive, highly-focused anti-terrorist planning for civilians to do in some areas—urban design, for example. See, e.g., Richard H. Schneider, American Anti-Terrorism Planning and Design Strategies: Applications for Florida Growth Management, Comprehensive Planning and Urban Design, 15 FLA. J.L. & PUB. POL. 129 (2003).

29 See Levmore & Logue, supra note 5, at 298–301 & n.103.

30 Richard A. Posner, Law, Pragmatism, and Democracy 298 (2003); see also id. at 297–99 (reciting a litany of twentieth-century slip-ups). Posner has been criticized for justifying curtailments of civil liberties in wartime in part on the basis of failures to appreciate what may have seemed at the time as extremely improbable national security threats. See Michael Sullivan & Daniel J. Solove, Can Pragmatism Be Radical? Richard Posner and Legal Pragmatism, 113 Yale L.J. 687, 709–11 (2003). This Article, however, argues not for the curtailment of anyone’s civil liberties, but only for a refinement in the rules of engagement between labor and management, without even tilting the battlefield.
industries is understandable. In a policymaking and lawmaking world driven by an excess of crises and a shortage of time and resources, manifested dangers get the bulk of the available attention and investment, dangers that are looming rest on the back burner, and dangers that are merely possible are ignored. Terrorists have not yet benefited from labor-management conflict within American critical infrastructure and strike activity has shrunk to levels not seen since the government began compiling statistics in 1947, so national leaders don’t attend to strikes. But past safety may well have been just a matter of luck. For example, the walkout in August 2002 by employees of a private contractor at the Plum Island Animal Disease Center in New York—a facility formerly operated by the United States Department of Agriculture but now under the control of the Department of Homeland Security—“is a tempting target for terrorists trying to disrupt the agricultural economy,” according to a report by the General Accounting Office, which has been investigating the strike and associated security concerns. Similarly, a threatened strike at the Pilgrim Nuclear Station near Boston triggered requests to the Nuclear Regulatory Commission to shut down the plant on the ground that labor strife at a nuclear power plant so close to the scheduled Democratic National Convention would present an unduly attractive target for terrorists. The NRC refused to close the plant, not because it rejected concerns about terrorism under those circumstances, but rather because “sufficient security measures [were] in place to protect the safety of the plant.” With labor strife—and thus terrorist opportunities—continuing to crop up in such areas as telecommunications, air transportation, shipping, and nuclear power, it may only be a matter of time.

On the other hand, considerable public attention has been paid to questions about the proper treatment of organized labor within the Department of Homeland

33 Anne Trafton, NRC Rejects Request To Close Pilgrim; Groups Cite Terror, Wanted Plant Shut Down for July 4th and for Convention, PATRIOT LEDGER (Quincy, Mass.), July 3, 2004, at 15.
35 See, e.g., Janet Moore, Northwest Pilots Suggest $45 Million in Concessions, STAR TRIBUNE (Minneapolis-St. Paul), June 27, 2003, at 2D.
36 See, e.g., Paul Adams, Customs Goes High Tech in Its War on Terrorism, BALT. SUN, Dec. 1, 2002, at 1C.
37 See, e.g., Joe Walker, Nuclear Workers’ Union To Take Case to Court If Necessary, PADUCAH SUN (Paducah, Ky.), Mar. 19, 2003, at C1.
Security and the federal government workforce overall. But discussions about the role of labor and labor activism in the federal public sector almost by definition has little do to with strikes—because federal workers do not have the right to strike. Furthermore, since the disastrous strike by air traffic controllers in 1981 (disastrous, that is, for the thousands of union members who were fired for violating the law against strikes by federal workers and never rehired), strikes have not been a problem for the federal government. Perhaps it was the memory of the air traffic controllers’ strike—or, more accurately, federal policymakers’ appreciation of the twenty-plus years without a walkout that have followed—that inspired the only substantial government effort to limit the danger of strikes in the age of terror: the federalization of airport baggage screeners under the Transportation Security Administration. The thinking is straightforward: baggage screeners working for private employers could strike; screeners working for the federal government can’t.

Alas, such thinking is both short-sighted and short-memoried, both as a specific matter related to the air traffic controllers and as a more general matter relating to economic and social history in the twentieth century. With respect to the air traffic controllers’ strike, recall that they struck, and they did so knowing they were violating the very law that prohibits strikes by other federal workers, including baggage screeners. They may have been mistaken about their bargaining power and the likelihood that they would be replaced, but those were mistakes about the facts of the particular employment situation, not about what the law said or what it bound them to do. As Part II demonstrates in greater detail, American labor history is one long lesson showing that there is simply no way to reliably prevent strikes by workers who are sufficiently upset with their employers, or sufficiently convinced that nothing short of a strike will achieve the results they seek.

With respect to economic and social history in the twentieth century, and before turning to Part II and the historical unstoppability of strikes in the United States, a cautionary note about not only the ineffectiveness but also the independent dangerousness of the federalization approach: federalization is a turn

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toward the very collectivization (that is, communism) that was one of the greatest social and political failures of the twentieth century, and it certainly won’t work on any large scale to lessen the dangers of strikes. On the question of strikes in particular, experience in Poland has shown that putting everyone (or nearly everyone) to work for the government does not extinguish the problem of strikes. Instead, it converts strikers into revolutionaries. “Solidarity” takes on a whole new meaning when laborers are striking not against a private employer, but rather against a public employer in a centrally-planned economy.

In sum, there is one reason why strikes in the age of terror are especially dangerous to the nation’s critical infrastructure and several reasons why nothing is being done about them. There is a timing problem. Battle lines have never been so close to picket lines. Labor law as it stands today is not well-suited to resolve this new problem—to preserve a meaningful role for the most important tool for vindication of the interests of organized workers (the strike) while at the same time providing for public safety in the age of terror. The war on terror is not going to slow down for labor law, so labor law must become more responsive. The causes of inaction are straightforward: attention is going to more pressing matters, and there appears to be a sense that critical strike risks can be addressed through federalization.

The fact that the timing issue makes strikes in the age of terror more dangerous than ever does not mean that strikes should not occur. Even in times of war and within critical industries strikes—and management’s fear of strikes—have played an important part in labor-management relations. Nor does the fact that other, more obviously urgent matters limit available resources mean that a viable solution is impossible to achieve in the near future. A solution that focuses on the problem—the timing issue—is achievable (a matter addressed in Parts III and IV). But before anyone is going to be willing to grasp the nettle of labor law reform, they must recognize that perfect labor peace is a fantasy, that even if the historically low levels of strike activity persist they still have the potential to enhance the danger and impact of terrorist attacks, and that any government attempt to ban strikes will be at most partially effective. This is one context in which all of the historical evidence supports the same conclusion: there is no stopping strikes.

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42 See, e.g., BING, supra note 11, at 159 (“Unquestionably, strikes and fear of strikes [during World War I] were the chief causes for that amelioration of conditions which strengthened morale and increased efficiency.”); J. Keith Mann, The Emergency Is Normal, in EMERGENCY DISPUTES AND NATIONAL POLICY 167 (Irving Bernstein et al. eds., 1955) (“[T]he necessary incentive toward compromise is missing if there is no possibility of withholding services or denying demands. This is a freedom equally essential to labor and to management.”).
II. 50 YEARS OF STRIKES AND WAR, AND MORE

Government cannot stop strikes. In the short term, and under some circumstances, it can facilitate, buy, or even enforce labor peace. But not for long, even in times of war.

Strikes have been a part of the American economy almost from the moment European colonists began to arrive. As long as American laborers have worked for American businesses, the strike—or the “turn-out” as it was known in bygone days—has been one of workers’ few effective tools for persuading employers to increase pay or improve working conditions. But labor-management conflict, with accompanying strikes, “was practically speaking of major importance only after the Civil War.” Then the half-century following the Civil War turned out to be a period in which the United States was largely at peace with the rest of the world. The nation’s few foreign military adventures in, for example, Cuba, Hawaii, and the Philippines, did not involve any meaningful threat to the territory of the United States and did not demand any substantial marshalling of national resources, human or material. Thus, while labor-management conflict in general and strikes in particular became important issues of national policy and politics, those issues did not overlap with issues of war until the beginning of World War I.

Beginning with the opening days of American involvement in World War I, however, labor-management conflict, and especially strikes, became important factors in military readiness. From that time down to the present day, wartime pressures have shaped federal labor law in fairly consistent ways that reflect the character of the international conflicts involved. In declared wars—World War I and World War II—the law has tended to be intrusive and assertive beginning with appeals to patriotism and then moving toward government-mandated procedures and even terms for settlement of labor-management conflicts that erupt or threaten to erupt into strikes, and then, when all else fails and the

43 Dubofsky & Dulles, supra note 14, at 21–22.
44 Id. at 20–32 (describing early American strikes, including a 1636 “mutany” by Maine fishermen after their employer withheld their wages and a series of strikes in the late 1700s by seamen and journeyman printers in Philadelphia and shoemakers in New York).
45 Friedman, supra note 16, at 553.
47 Curtis A. Bradley & Jack L. Goldsmith, The Constitutional Validity of Military Commissions, 5 Green Bag 2d 249, 255 (2002) (“Congress has declared war only five times (the War of 1812, the Mexican-American War, the Spanish-American War, World War I, and World War II), and it has not issued such a declaration since World War II.”).
enterprise or industry is important, to direct government action to control the means of production. In contrast, American labor law during undeclared wars—Korea, Vietnam, and the Cold War more generally—has tended (with a couple of notable exceptions\textsuperscript{48}) to mirror the contradictory and dilatory character of such conflicts, with legislation facilitating government intervention, but only to prolong pre-strike maneuvering or, at most, to briefly enjoin strikes. This part briefly summarizes the history of strikes during wartime, with an eye to identifying the different methods by which the government sought to stop private-sector strikes, and to demonstrating that while many of these methods might temporarily dampen the rate or intensity of strikes, when it came to stopping strikes, they all failed. There is no stopping strikes, even in wartime.

A. WORLD WAR I

When war broke out in Europe in 1914, the status of unions in the United States was higher than it had ever been,\textsuperscript{49} although still well below the levels of power and influence they would enjoy from 1930s through the 1950s.\textsuperscript{50} Membership was at record levels,\textsuperscript{51} the Clayton Act\textsuperscript{52}—hailed as Labor’s “Magna Carta”\textsuperscript{53}—appeared to have freed unions from the threat of antitrust liability,\textsuperscript{54} and President Woodrow Wilson, who had been elected with the support of the American Federation of Labor (AFL), was in the White House expressing his support for organized labor.\textsuperscript{55} Nevertheless, wages and working conditions for most skilled and unskilled laborers remained poor,\textsuperscript{56} and employer responses to

\textsuperscript{48} See, e.g., Youngstown Sheet & Tube Co. v. Sawyer (The Steel Seizure Case), 343 U.S. 579 (1952).

\textsuperscript{49} Dubofsky & Dulles, \textit{supra} note 14, at 210.


\textsuperscript{51} Id.


\textsuperscript{54} Albeit an appearance that would be revealed as an illusion shortly after the war. See Duplex Printing Press Co. v. Deering, 254 U.S. 443 (1921).

\textsuperscript{55} Dubofsky & Dulles, \textit{supra} note 14, at 186, 189–90.

\textsuperscript{56} See Bing, \textit{supra} note 11, at 1–10 (describing general working conditions in the immediate pre-war years).
unionization and the demands of organized labor ranged from the merely hostile to the downright brutal.\(^{57}\)

On the subject of the war, organized labor was united in its opposition. From the relatively radical Industrial Workers of the World (IWW)\(^ {58}\) to the relatively conservative AFL, the message was pacifist and parochial: war is wrong because of the cost in human lives and suffering; decisions to go to war should be made by popular referendum, and if they were there would be no wars; international

\(^{57}\) An evaluation of the merits of the positions of labor and management with respect to wages and working conditions is beyond the scope of this Article, but it is impossible to ignore the fact that vast numbers of American workers, including many small children, were sorely used by business executives who either did not care about their mass brutalization of their fellow human beings, or did not care to know. See id. at 7–10, 164–69 (describing employer conduct in the period immediately preceding and during World War I); see also, e.g., LON SAVAGE, THUNDER IN THE MOUNTAINS (1984) (history of anti-union violence in the mining industry in the early 20th century). On the other hand, labor strife in the early twentieth century was not a matter of saintly laborers versus demonic employers. Consider, for example, the following:

A case in point was the strike of machinists employed by the General Electric Company (Schenectady Works) in June, 1917, the cause of which was the employment by the company of a negro student to operate a drill press. The company employed very few negroes, and disclaimed any intention of supplanting its skilled men by negro employees. It made a practice, however, of employing a number of college students during the summer vacation, and among those recommended was the negro in question, whom the company refused to discharge or segregate. After about a week, the men returned to work.

BING, supra note 11, at 158 n.1; see also MICHAEL KEITH HONEY, BLACK WORKERS REMEMBER: AN ORAL HISTORY OF SEGREGATION, UNIONISM, AND THE FREEDOM STRUGGLE (1999); MICHAEL K. HONEY, SOUTHERN LABOR AND CIVIL RIGHTS (1993).

\(^{58}\) The IWW is best known as the “Wobblies,” a nickname with mysterious roots: “All of our research has shown so far that the origin of the term Wobbly cannot be determined, and so we have to unfortunately admit that we don’t honestly know the answer. Though the true origin of the epithet “Wobbly” remains a mystery, most of us IWW members gladly use it to describe ourselves, because the term has become an integral part of the IWW’s history and culture. Enough said.” Indus. Workers of the World, The Origin of the Term Wobbly, at http://www.iww.org/culture/myths/wobbly.shtml (last updated Apr. 16, 2005).
organizations of the right sort, including a league of nations, could resolve all international disputes and should be created immediately; and the large standing armies associated with war-making pose a threat to democracy and, more specifically, to organized labor because of the danger that such forces will be used to compel labor to work under unacceptable terms or even to replace workers.\(^59\)

When the United States entered the war in 1917, however, most of organized labor was willing to follow the flag, within certain bounds. Union leaders remained concerned that in past wars, “[l]abor was stripped of its means of defense against enemies at home and was robbed of the advantages, the protections, the guarantees of justice that had been achieved after ages of struggle,” and insisted that the “greatest step that can be made for national defense is not to bind and throttle the organized labor movement but to afford its greatest scope and opportunity for voluntary effective cooperation in spirit and action.”\(^60\)

Despite their misgivings, labor leaders voted at a broad-based meeting in 1917 to support the war effort, but refused to support a proposed commitment that “neither employers nor employees shall endeavor to take advantage of the country’s necessities to change existing standards.”\(^61\) That sounded too much like a freeze imposed on labor (the focus on “standards”) but not on industry (no mention of “prices” or “union-busting”). Patriotism was not to be read to require workers to stand back while industry profited from a war economy, nor to bind labor organizations to sit on their hands just when they were beginning to achieve significant gains in wages, benefits, and working conditions for their members.\(^62\)

Labor’s caution was justified. Wartime spending by the government rose, as did production and prices.\(^63\) Employers were not inclined to pass on shares of profits to their workers,\(^64\) who subsequently went on strike in unprecedented numbers. During 1917 alone, economic warfare broke out on a scale to match the more deadly war in Europe: more than one million workers engaged in more than 4,000 strikes.\(^65\)

Where the two forms of warfare (economic at home and military abroad) converged—when strikes threatened to impede the war effort by cutting off or at least constricting the flow of military supplies—the Wilson administration and

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\(^59\) See, e.g., AM. FED’N OF LABOR, REPORT OF PROCEEDINGS OF THE THIRTY-FOURTH ANNUAL CONVENTION 48–49 (1914).

\(^60\) AM. FED’N OF LABOR, AMERICAN LABOR’S POSITION IN PEACE AND IN WAR, Mar. 12, 1917, quoted in PHILIP TAFT, ORGANIZED LABOR IN AMERICAN HISTORY 310 (1964).

\(^61\) TAFT, supra note 14, at 311.

\(^62\) BING, supra note 11, at 156–57.

\(^63\) Id. at 7.

\(^64\) Id. at 8.

\(^65\) DUBOFSKY & DULLES, supra note 14, at 212.
Congress stepped in. Government approaches to preventing strikes took four basic forms: (1) appealing to the patriotism of both labor and management; (2) creating new agencies and dispute-resolution boards to mediate differences between labor and management; (3) applying negative coercion (such as withholding government largesse from intransigent parties); and (4) exerting force, in the form either of seizure or of police and military force.

In modern times it is a commonplace that presidential popularity goes up when war (or something like it) is declared. Most people give their country’s leadership at least a temporary benefit of the doubt on questions of war and peace, and want to pitch in at the outset. In this sense, the Americans of 1917 were no different from Americans of the twenty-first century, and President Wilson sought to harness that impulse in the service of labor peace in a time of war. As a leading figure in the administration of labor-management dispute resolution during the war put it, “War psychology induced each side to compromise during the war period.” Despite this, “the patriotic motive, although genuine and potent, was not of itself sufficiently strong to overcome the many adverse conditions making for severe industrial conflicts. It was a real element in the situation, but never a determining one . . . .” Unilateral voluntary acquiescence for love of country was not a course, then, that either labor or management was willing to follow, and the lack of agreement on what qualified as just terms for work, let alone mutual trust, made bilateral acquiescence a fantasy.

And thus the strikes began. Where “strikes threatened output in major industries, negotiating panels were appointed by the federal government.” Strikes threatened output at almost every turn, which makes the story of the creation of new administrations, agencies, boards, commissions, committees, and divisions dedicated to dispute resolution and strike prevention read like a preview of the “alphabet soup” of the New Deal. From the Wire Control Board to the Shipbuilding Labor Adjustment Board to the National Harness and Saddlery Adjustment Commission to the eventual super-board, the National War Labor Board, each body focused on a limited field with little more than the very limited powers to persuade:

67 BING, supra note 11, at 151.
68 Id. at 9.
69 HECKSCHER, supra note 66, at 453.
70 See generally BING, supra note 11, at 14–157.
71 Id. at 108–09.
72 Id. at 20.
73 Id. at 63.
74 Id. at 116.
Even the National War Labor Board, which was regarded as the most effective instrument for adjusting disputes, had no legal power to compel either side to submit to its jurisdiction, and there were a substantial number of cases in which employers refused to arbitrate and left to the workers the choice of either submitting or striking.\textsuperscript{75}

In addition, giants of government (including most of the key cabinet officers who served in the Wilson Administration during the war), labor (including AFL leader Samuel Gompers), and industry (including AT&T president Theodore Newton Vail) participated in an unending series of meetings and panels in an effort to organize and facilitate the government’s program to minimize labor-management conflict and strikes.\textsuperscript{76}

The only contexts in which the World War I labor agencies reliably settled disputes were those in which the parties had previously entered an agreement to be bound by the will of the government or where other pressures could be, and were, brought to bear. For example, the relatively consistent success of the Emergency Construction Wage Commission (Commission) in settling disputes and forestalling strikes can be attributed to the fact that the Commission was formed on terms negotiated between the government and the AFL, and that employers within the Commission’s jurisdiction had signed construction contracts with the federal government that bound them to submit labor disputes to the government and abide by the government’s adjustment of those disputes.\textsuperscript{77}

Moreover, under the same contracts, employers were paid on a cost-plus basis, thereby transferring the cost of any mandated improvement in wages or working conditions to taxpayers.\textsuperscript{78} Sometimes the pressures were harsher. For example, in a successful effort to press striking munitions plant workers in Bridgeport, Connecticut to comply with the terms of a National War Labor Board decision, President Wilson gently explained that if the strikers failed to return to work they would lose their occupational exemption from the military draft and be barred from working in any war industry\textsuperscript{79} (essentially guaranteeing unemployment in a nation on a war footing during which even shoe manufacturing might be a war industry\textsuperscript{80}).

\textsuperscript{75} Id. at 157.
\textsuperscript{76} Id. at 15, 108–09; Taft, supra note 14, at 311, 315–16, 318–19, 386.
\textsuperscript{77} Bing, supra note 11, at 15–16.
\textsuperscript{78} Id. at 16.
\textsuperscript{79} Id. at 79.
\textsuperscript{80} See, e.g., Rosenwasser Bros. v. Pepper, 172 N.Y.S. 310 (Sup. Ct. 1918).
Like strikes throughout the twentieth century, most strikes during World War I worked themselves out as the pain got to be too much and the parties settled. Although various federal agencies and boards helped, their inherent lack of power limited them to helping independently motivated parties. When all else failed and a strike posed an immediate threat to the war effort, the government turned to the exertion of force. These instances were extremely rare, largely because of the success of conventional economic warfare, with settlements facilitated in many instances by a strong government position and energetic mediation as described above. Rare does not, however, mean nonexistent. During a strike among loggers in the Pacific Northwest, for example, federal troops were brought in to do the work of strikers. Further, immediately before and during the war Congress broadened the scope of presidential authority by passing several statutes and resolutions authorizing seizures under limited circumstances.

Most significantly, however, the federal government seized control of one of the most important industries of the time—the major railroads. Confronted by numerous strikes on the railroads as well as general disarray in rail operations just as the United States was entering the war, President Wilson issued an order in late December 1917 placing the railroads under his control. Congress had anticipated the problem in 1916—the railroads were in weak financial condition at the time and their relations with the relatively strong and well-organized unions representing many of their employees were quite bad—and provided the President with the power to seize private business operations essential to military functions. It also specifically ratified the seizure of the railroads in the Federal Control Act of 1918. All in all, both labor and management did well in this arrangement. Wages and working conditions improved substantially under federal control, unions solidified their position within the companies, and management was relieved of the cost and trouble of digging the railroads out of the financial hole in which they were operating in 1917. Further, management was paid a nine-figure settlement by the federal government after the return of the roads to

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81 Dubofsky & Dulles, supra note 14, at 213.
82 See Youngstown Sheet & Tube Co. v. Sawyer (The Steel Seizure Case), 343 U.S. 579, 615–17 (Frankfurter, J., concurring) (collecting statutes and resolutions).
85 Id. at 245–49 (reprinting presidential proclamation and statement of Dec. 26, 1917); see also Bing, supra note 11, at 86–87; Ely, supra note 83, at 242.
private control at the end of the war.\textsuperscript{89} It is easy, after the end of the twentieth century, to forget just how important the railroads were a century ago. The seizure of the major railroads was a mammoth exertion of federal power to control private industry and labor-management relations. However, even under the veritable shower of money bestowed on the railroads and rail workers, strikes continued.

The government thus tried everything during World War I—from entreaties to seizures—to subdue the potential for strikes. Moreover,

\[\text{[i]nasmuch as the general principle of ‘no strikes in war time’ was adopted almost unanimously by all parties to labor controversies, it might reasonably have been expected that very few strikes would have occurred during the war. Yet the facts were the precise opposite; more strikes did occur at this time than during any previous period of similar length in the history of the United States.}\textsuperscript{90}\]

Thus, there was no stopping the strikes even in time of war when the differences between labor and management were sufficiently severe and intractable and the government was unwilling or unable to exert enough pressure—whether through patriotic suasion or financial incentives or force of arms—to bring the parties’ behavior in line with the public interest in prosecuting the war.

B. WORLD WAR II

Just as World War I did not turn out to be the “war to end all wars,” so the American experience with wartime strikes in World War I did not turn out to be any sort of lesson-imparting terminus in the struggle to maintain labor peace while the nation did battle overseas. In fact, from the perspective of labor-management strife, the differences between the Second World War and the First were differences not in the types of strikes, nor in the types of solutions that government and the parties brought to bear, but rather mere differences in emphasis and scale.

Between the World Wars, organized labor suffered its worst setbacks and its greatest successes of the twentieth century. The setbacks came first. In 1921, the Supreme Court construed the Clayton Act to offer no new protection to labor, and state and federal courts continued to exercise and even extend their use of injunctions to frustrate organizing drives, strikes, and other union activities.\textsuperscript{91}

\textsuperscript{89} HINES, supra note 84, at 243.

\textsuperscript{90} Id. at 156 (footnote omitted); see also id. at 291–97 (compilation of World War I strike data).

\textsuperscript{91} Truax v. Corrigan, 257 U.S. 312, 330 (1921); Am. Steel Foundries v. Tri-City Cent. Trades Council, 257 U.S. 184, 202–03 (1921); Duplex Printing Press Co. v.
Even the federal government itself began to seek strike injunctions. Meanwhile, employers continued to use the then almost unlimited lawful means to resist unionization, as well as unlawful means when necessary. Membership in the AFL and other major unions plummeted. Then came the Great Depression, and out of that great misfortune widespread public dissatisfaction with the balance of power between laborers and their employers. The great labor successes followed, most prominently the passage of the Norris-LaGuardia Act in 1932 and the Wagner Act in 1935 and union membership skyrocketed. In short, the Norris-LaGuardia Act barred federal courts from issuing strike injunctions, and the Wagner Act—the original NLRA—protected labor rights of organization and collective action, including strikes, from interference by private employers, state courts, and federal courts. Neither law contained, or was interpreted during that time to contain, any restriction on labor rights if they came into conflict with military necessity because the issue was not a live one at the time the laws were enacted.

With the entry of the United States into World War II in December 1941, the danger of strikes during wartime again impressed the federal government, and it turned again to the same four basic measures: (1) appeals to patriotism; (2) creation of new dispute-resolution bodies; (3) negative coercion; and (4) force. Times had changed since World War I, particularly in two respects. First, union support for the war effort was much stronger and broader among both the leadership and the rank-and-file—almost no one in the union movement thought that this war was merely an imperialist exercise in warmongering and war-proflteering in which labor would be no worse off under one victor than another. In other words, organized labor was essentially unanimous in the view


93 See FELIX FRANKFURTER & NATHAN GREENE, THE LABOR INJUNCTION 120–22 (1930).


95 Things had begun to look up for the railroad unions earlier with the passage of the Railway Labor Act in 1926.


that World War II was a good fight with the United States on the right side, and therefore sacrifices were in order. Second, unions had more power at the outset of the second war—more members serving an even more fully war-mobilized nation (and thus more market power), more legal protections (and thus more power in the courts), more experience (and thus a greater appreciation of their status and how to use it), and more wealth (both institutionally and individually).

Like President Wilson in 1917, President Roosevelt in 1941 immediately brought leaders of labor and management together with leading members of his administration for two purposes: to appeal to their patriotism for commitment to avoid strikes during wartime, and to make plans for achieving that goal. Roosevelt succeeded in extracting a no-strike/no-lockout pledge from the leaders of labor and industry, and “[i]t seems clear that, as a matter of fact, the pledge served powerfully to retard the impulse of organized workers to ‘get theirs while the getting was good.’” Again, however, as in World War I, patriotism and early commitments to labor peace could do only so much to prevent strikes. Labor and management remained at loggerheads with sufficient frequency and intensity that while strikes declined substantially from 1941 to 1942, labor stoppages by no means disappeared (the year-to-year decline was from 23 million lost workdays to 4.18 million), and they rose again thereafter.

Cognizant of the failures of strike-prevention measures during World War I, President Roosevelt did not delay in forming a dispute resolution agency, the National War Labor Board (WLB), with nationwide jurisdiction and a composition—four labor members, four management members, and four public members—designed to maximize the likelihood that disputes would be resolved in a manner acceptable to workers and management and credible to the public. The creation of the WLB did not, however, slow the propagation of other, more specialized bodies likewise geared toward forestalling or postponing strikes. Regional mini-WLBs and other bodies arose as needs did.

Negative coercion played a lesser role in World War II than it had in World War I, largely because of the federal government’s greater willingness to skip this step in favor of force (thus creating a greater appreciation by the parties of the severe consequences that could come from a failure to achieve a peaceful settlement of differences). Nevertheless, the prospect of lost war contracts, and the analgesic effects of cost-plus provisions in those contracts on employers and of the fairly steady, if sometimes stingy, WLB-ordered wage and benefit increases

100 See Dubofsky & Dulles, supra note 14, at 314.
102 Id. at 322; see also Melvyn Dubofsky & Warren Van Tine, John L. Lewis 415–20 (1977).
104 See Keezer, supra note 101, at 238.
on employees, played their part in the willingness of management to accede to improvements in wages and working conditions and of labor to accept less than everything it sought.\footnote{105}

With respect to the availability and exercise of force to compel production, President Roosevelt and the Congresses of the war years and the immediately preceding period were more aggressive than federal leaders had been during World War I, but their methods were the same: seizure and the use of troops as laborers. Preparations for seizure of recalcitrant operations began in 1940, before the United States entered the war. Beginning in 1940 and running through early 1944, Congress passed and the President signed several laws authorizing seizures under a variety of circumstances.\footnote{106} The most important of the seizure laws, however, became law over President Roosevelt’s veto in 1943. The War Labor Disputes Act of 1943 empowered the President to seize and operate private businesses at which strikes or lockouts were imminent or underway if those businesses were necessary to the war effort.\footnote{107} The Act was in large part a response to persistent strike activity by the United Mine Workers (UMW) in particular, and to the more general Congressional and public frustration with the apparent impossibility of preventing strikes even at the height of a total worldwide war.\footnote{108} Despite the severe sanctions available under the Act, the actual imposition of large fines against the UMW and its president, John L. Lewis, and Roosevelt’s seizure of more than three-dozen businesses during the war, strike activity dipped only slightly and briefly after the passage of the War Labor Disputes Act. It never returned to the 1942 rate.\footnote{109}

In other words, in World War II as in World War I, there was just no stopping work stoppages. Severe and intractable (at least until the financial pain was great

\footnote{105} DUBOFSKY & DULLES, supra note 14, at 314–16, 323–25.

\footnote{106} See Youngstown Sheet & Tube Co. v. Sawyer (The Steel Seizure Case), 343 U.S. 579, 618–19 (1952) (Frankfurter, J., concurring) (collecting statutes).


enough) differences between labor and management led to strikes when the government was unwilling or unable to exert enough pressure—and sometimes even when it was, as in the case of the UMW.

C. HERE WE GO AGAIN

Generally speaking, then, the American experience with strikes during wartime has been that government efforts to stop them usually fail, regardless of any threat that the Kaiser or Hitler may be posing to the nation, unless the government is willing to (a) pay for practically everything that both labor and management desire (see, for example, the cost-plus contracts during both World Wars); (b) take over the business itself and pump in enough money to pay for practically everything that labor and management desire (see, for example, the railroads during World War I); or (c) use military force to threaten the fundamental welfare and even the lives of its own citizens (see, for example, Wilson’s dealings with munitions workers in Bridgeport, Connecticut during World War I). Given that not even these extraordinary measures were reliably effective in their time, and that none of them is likely to be feasible when applied to the enormous range of domestic critical infrastructure that could be targeted by modern terrorists, the basic lesson for modern policymakers of fifty years of government efforts to halt labor-management strife during wartime is that it can’t be done.

In the years immediately before and after World War II, all three branches of the federal government participated in the establishment of a body of federal labor law that incorporated the most useful features of (and lessons learned from) the ad hoc bodies and systems that had arisen in response to wartime crises. The NLRA and its amendments were—and remain—at the core of this system. The federal labor laws and the administrative structure they brought into being remain on the books and in office buildings all over the country, and they grow with every passing year. Thus, as the United States faces its third world war, albeit one without conventional battlefronts or clear-cut clashes between sovereign states, there is no need to create a system of boards to investigate, mediate, and adjudicate disputes between labor and management. The highly-evolved and very large system overseen by the NLRB covers all of those bases as well as any wartime improvisation could.

So far, labor-management strife is following roughly the same pattern at the opening of this new war as it did in earlier wars, and federal labor law and the institutions devoted to labor-management relations are serving as well as their predecessors did. First, there was a marked lull in the action, with strike activity declining after September 11, 2001, to levels below even the record-setting lows

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110 See 1 THE DEVELOPING LABOR LAW, supra note 94, at 24–48, 67–69; see also supra notes 88–90, 139–140.
of the immediately preceding years.\footnote{See Press Release, \textit{supra} note 31, at 3 tbl.1; 55 FMCS \textsc{Ann. Rep.} 24 (2002).} When labor unrest did pose a potential threat to national security, the government acted quickly, and with very few fires to fight, it was effective—not at dispelling underlying disagreements between labor and management but at postponing the likely day of reckoning.\footnote{See, e.g., Jack Heyman, Editorial, \textit{Port Anti-War Protest: Police Might vs. Civil Rights, Alameda Times-Star} (Cal.), June 17, 2003.} Then, in 2003, strike activity and the acrimonious rhetoric that accompanies it returned (in at least some respects) to pre-war levels.\footnote{See \textit{Press Release, supra} note 31, at 3 tbl.1; 56 FMCS \textsc{Ann. Rep.} 6, 10 (2003); 55 FMCS \textsc{Ann. Rep.} 24 (2002).} Granted, the numbers are small, small absolute changes can make for dramatic proportional changes, and one year is not enough to chart a trend. Today, while some media reports give the impression that strike activity is continuing to rise, it is too soon to tell whether the post-9/11 dip is yet another stairstep down in the decline of union power.\footnote{See \textit{infra} note 218 and accompanying text.} The available data do seem to indicate at the very least that in the wake of 9/11 and open declaration of war on terrorism, strikes will remain a part of the American landscape.

<table>
<thead>
<tr>
<th>Year</th>
<th>1998</th>
<th>1999</th>
<th>2000</th>
<th>2001</th>
<th>2002</th>
<th>2003</th>
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</thead>
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<tr>
<td># Strikes</td>
<td>421</td>
<td>362</td>
<td>400</td>
<td>432</td>
<td>308</td>
<td>289</td>
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<tr>
<td>Intake (CBA)</td>
<td>53,978</td>
<td>40,586</td>
<td>38,242</td>
<td>37,646</td>
<td>45,339</td>
<td>37,844</td>
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<tr>
<td>Strikes/CBA (%)</td>
<td>0.78</td>
<td>0.89</td>
<td>1.05</td>
<td>1.15</td>
<td>0.68</td>
<td>0.76</td>
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<tr>
<td>Avg. strike (days)</td>
<td>43.7</td>
<td>50.5</td>
<td>39.0</td>
<td>40.7</td>
<td>53.7</td>
<td>60.5</td>
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</table>

In addition, as explained in the Introduction, the fact that strikes and union power in general have descended to levels not seen in more than half a century does not mean that they are unimportant. Power is relative. Unions and the power they wield to withhold labor are more significant than might appear at first blush, for at least two reasons.

First, as a general matter, unions possess sheer size. While private sector unionism has been declining for generations, from its high point in the mid-1950s when about one-third of private sector workers were organized, to about 8.6% today, it remains a potent force in American society. Against the background of memories of the tremendous reach and power of unions in the 1950s, the fact that a mere 8,800,000 out of 102,153,000 American workers in private industry are union members today may seem like small potatoes. But nearly nine million union members (not to mention their families and other dependents) are a lot of people. Certainly there are larger interest groups—the American Association of Retired Persons, “America’s Most Powerful Lobby,” has four times as many members—but not many. The widely respected or feared National Rifle Association, for example, has a mere four million members. Moreover, organized labor remains “one of the Democrats’ most powerful constituencies.” In other words, organized labor may be small and weak compared to its former self, but it remains a powerful force in American society.

Second, strikes still happen, and they still matter. While they may no longer be as numerous or as prominent in the public mind, they are more common than is generally appreciated, and they remain an important weapon in industrial conflict. As an initial matter, it is important to bear in mind that for the past two decades, no one has been keeping track of how many strikes or strikers there are in any given year. Before 1982, the Bureau of Labor Statistics did a fairly thorough job of tracking “all work stoppages in the United States that involved six workers or more and continued for the equivalent of a full day or shift or longer,” but since 1982, the BLS has been tracking only “major work stoppages,” meaning those


116 See BUREAU OF LABOR STATISTICS, UNION MEMBERS IN 2003, USDL 04-53, tbl.3 (Jan. 21, 2004).

117 Id.


119 Jill Lawrence & Judy Keen, *Election Is Turning into a Duel of the Manly Men*, USA TODAY, Sept. 22, 2004, at 1A.

“idling 1,000 workers or more for the equivalent of a full day or shift or longer.” The Federal Mediation and Conciliation Service, which is involved every year in the mediation of numerous disputes between labor and management, tracks the work stoppages that come to its attention but it is unlikely that its information is comprehensive because, like the BLS, it lacks the resources to seek out and analyze that information. The switch at the BLS from tracking practically all work stoppages to tracking only major ones may or may not provide a valid basis for comparing relative levels of strike activity from year to year, but the data on major work stoppages are most certainly not a valid measure of all strike activity. The point is that strike activity persists at levels that exceed popular perceptions but are hard to ascertain because of the lack of comprehensive data collection. Untracked strikes—the smaller, localized ones that are unlikely to catch the attention of government officials or others who might aid in preventing a work stoppage from enabling terrorists’ acts or exacerbating their effects—are among the dangers that the proposal in this Article is designed to address.

Furthermore, union leaders and the union members they lead are not fools. They generally do not waste resources or make pointless gestures. And yet they continue to call for strike votes, vote for strikes, and occasionally follow through. There is even less information on the rate of strike votes than there is on the rate of strikes, but there are surely more of the former than there are of the latter. LexisNexis searches for “strike vote” in United States newspapers delivered 883 hits for 2003 and 627 hits for January through September 2004. If the threat of a strike weren’t worth something at the bargaining table, unions would not waste their time with these exercises.

Thus, while it would be inappropriate to exaggerate the likelihood of a dangerous intersection of industrial conflict with the war on terror, it would also be inappropriate to conclude that the decline in union membership, union power, and work stoppages over the past five decades has made labor and its conflicts with management irrelevant to modern security concerns. Assuming for a moment (meaning for the rest of this Article) that history will repeat itself at least in some general way—that is, that strike activity will persist—are there any features of


123 The supposition that the BLS data permit valid comparisons is, to the best of my knowledge, untested, and doubtful in light of the fact that the movement in annual rates of strike activity reported by the BLS and the FMCS do not track each other very well. Compare, e.g., id. at 24 (reporting the number of work stoppages beginning in each of the years from 1999 through 2002 to be 411, 392, 445 and 327, respectively), with Press Release, supra note 31, at 3 tbl.1 (reporting the number of work stoppages beginning in each of the years from 1999 through 2002 to be 17, 39, 29 and 19, respectively).
federal labor law that do offer hope for reconciling strikes with critical infrastructure protection and public safety?

III. COLD WAR, PUBLIC SAFETY, AND PRIVATE STRIKES

The issue of strikes during wartime—discussed in Part II above—is, of course, of imminent concern only when the nation is at war. The issue of strikes and domestic public safety is different: the public is always there, and it always cares about its safety. Thus the attitudes of Presidents, Congresses, and courts on the issue of private sector strikes have been consistently hostile when strikes put some part of the public (meaning interests other than those of the parties to the dispute) in peril. Despite this hostility, and despite a variety of efforts to prevent such strikes, work stoppages that at least arguably endanger the public persist, just as they did during the World Wars, when sweeping no-strike policies were in force.

“There is no right to strike against the public safety by anybody, anywhere, any time.” 124 This was a politically popular sentiment in 1919, when Massachusetts Governor Calvin Coolidge expressed it in a message to Samuel Gompers of the AFL during a strike by police officers in Boston, and it is widely viewed as the statement that first brought Coolidge the national reputation that eventually carried him to the White House in 1923. 125 It was still popular in 1981, when President Ronald Reagan invoked Coolidge in support of his decision to dismiss striking air traffic controllers, 126 and in 1999 when New York Mayor Rudolph Giuliani was fulminating against city transit workers. 127 Coolidge, Reagan, and Giuliani were, however, objecting to strikes or threatened strikes by

124 Telegram from Calvin Coolidge, Governor of Massachusetts, to Samuel Gompers, President of the American Federation of Labor, Sept. 14, 1919, reprinted in CALVIN COOLIDGE, HAVE FAITH IN MASSACHUSETTS: A COLLECTION OF SPEECHES AND MESSAGES 223 (2d ed. 1919).

125 See, e.g., DUBOFSKY & DULLES, supra note 14, at 219; JOHN W. GARDNER, ON LEADERSHIP 29 (1990); DAVID JOSEPH GOLDBERG, DISCONTENTED AMERICA: THE UNITED STATES IN THE 1920S, at 45 (1999); JOHN KENTLETON, PRESIDENT AND NATION: THE MAKING OF MODERN AMERICA 62 (2002); William M. Wiecek, The Legal Foundations of Domestic Anticommunism: The Background of Dennis v. United States, 2001 SUP. CT. REV. 375, 388. Coolidge was elected Vice President on the Harding-Coolidge ticket in 1920, became President in 1923 after Harding’s death, and was elected President in his own right in 1924.


public employees—people who arguably bore special duties to protect the public by eschewing strikes. The strength of this position is reflected in the prevalence and durability of statutory and common-law bans and restrictions on strikes by public-sector workers at all levels of government, as well as by the “enormous popular support” that such provisions and their proponents tend to enjoy. And thus, the default presumption in American labor law has been and remains that public-sector strikes are “against the public safety” and should not enjoy legal protection.

Workers and private industry—the focus of this Article—might reasonably be subject to a different standard, and they are. For the most part, they do not have a history of providing essential public services such as fire and police protection, making the risk of harm to the public from a strike by workers in the private sector much lower. In addition, private employers’ primary goal is profit, not

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128 Coolidge’s strong formulation of what might be called the “public union-public safety doctrine” in labor law might also have been partly inspired by the Red Scare of 1919. See Carrington, supra note 21, at 378–79.


130 See, e.g., Air Controllers: 10 Years Later, Same Dangers, supra note 40 (“Reagan’s strong stand against PATCO received enormous popular support and was seen by many as putting unions in their place.”).

131 See, e.g., State ex rel. Ashcroft v. Kansas City Firefighters Local No. 42, 672 S.W.2d 99, 112 (Mo. Ct. App. 1984) (holding that strike gave rise to intentional tort liability). The sole and prominent exception to this rule is in the state of Louisiana, which does not adhere to the common law rule. In Louisiana, strikes by public-sector unions are lawful so long as they do not endanger the public.
public service, making it unfair to constrain workers but not employers in the name of the public interest (a subject to which we will return when considering the specific terms of the proposed amendments to the health care amendments discussed in Part IV below). Thus, the default presumption with respect to strikes in the private sector is the opposite of that applied in the public sector. And it is a strong presumption. The right to strike in this context has long been recognized as “fundamental” and “an essential of free collective bargaining.” Judicial, economic, demographic, technological, geopolitical, and international forces have, as a practical matter, reduced the effectiveness of this fundamental tool of labor, but the basic right remains unaltered from the form in which it appeared in the Wagner Act in 1935: “Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . . .”

This presumptive right to strike in private industrial conflicts may be overcome, however, and there can be little doubt that at some ill-defined extreme, private-sector strikes that violate Coolidge’s “public safety” formula are as unprotected as those in the public sector. Congress made that clear in 1947 when it passed the Taft-Hartley amendments to the nation’s basic labor law—the NLRA. Congress’s “declaration of purpose and policy” for federal labor law is, if anything, more emphatic than the message of Coolidge and his followers, that “under law . . . neither [an employer nor a union] has any rights in its relations with any other to engage in acts or practices which jeopardize the public health,

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133 29 U.S.C. § 163 (2000) (“Nothing in [the NLRA], except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike, or to affect the limitations or qualifications on that right.”).


135 See, e.g., Nat’l Maritime Union v. NLRB, 342 F.2d 538, 543 (2d Cir. 1965).


safety, or interest.” But these words must be interpreted with caution. The “public health, safety, or interest” does not include public convenience, much less an employer’s economic health or interests.

In any event, it is well-settled that public employees are forbidden to strike (with the exception of some categories of state employees who have by statute been granted that right by individual states), and private employees are generally permitted to strike within certain bounds, none of which are relevant here except for limitations that turn on the extent to which such strikes endanger the public.

Before the passage of the Railway Labor Act in 1926, the Norris-LaGuardia Act in 1932, and the Wagner Act in 1935, questions of private-sector strikes and public safety were in large part subsumed in the more general judicial hostility to strikes and the courts’ readiness to issue strike injunctions at the request of employers and in some cases at the behest of the federal government. For the purposes of this Article, there is little to be gained by the study of the uses of pre-NLRA strike injunctions because that is the one approach that is universally understood today to be precluded by the Norris-LaGuardia Act and the NLRA itself. This is not to say that strike injunctions are forbidden in all cases—injunctions, at least temporary ones to protect the public and permanent ones to prevent violations of both the federal labor law and laws of general application, remain an essential part of workplace regulation—but rather that their use before Norris-LaGuardia and the NLRA has no precedential value and has been specifically discredited by later legislation and adjudication.

And so for purposes of this Article, the study of government efforts to forestall private-sector strikes that endanger the public begins—and ends—with the NLRA. Since the enactment of the NLRA, government efforts to prevent strikes have fallen into three categories: (1) postponement of strikes that do or might create national emergencies (the “national emergency” provisions of the NLRA, discussed in Part III.A below); (2) ad hoc, ex post refusal to protect workers discharged following strikes that create safety hazards (the “reasonable

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144 1 THE DEVELOPING LABOR LAW, supra note 94, at 7–12.
146 See, e.g., S. S.S. Co. v. NLRB, 316 U.S. 31, 46–49 (1942).
precautions” and “indefensible acts” doctrines, discussed in Part III.B below); and (3) mandating notice of strikes that might create safety hazards (the 1974 health care amendments, discussed in Parts III.C and IV below). Only the third category offers any real hope of addressing the problem of strikes affecting critical infrastructure in the age of terror.

A. THE COLD WAR AND NATIONAL EMERGENCIES

If American labor policy during the declared World Wars was to shut down strikes in the service of a nation at war, then its policy during the tense peace that followed World War II was to postpone strikes and soften their impact in the service of a nation on guard. The labor law implementing this policy—the “national emergency” provisions of the NLRA—was somewhat effective in the years immediately following its enactment, but over the longer haul it turned out to be no more reliable in preventing strikes than the wartime measures had been.

The congressional elections of 1946 marked the end of the long and highly successful political run of the Roosevelt New Deal Democrats, an ending brought about in no small part by public hostility to the wave of major strikes that followed the end of World War II. The most tangible and enduring consequence of the role of labor-management strife in that changing of the legislative guard was the Taft-Hartley Act of 1947. The Taft-Hartley amendments added a slew of provisions to the NLRA designed to reduce the power of unions by enhancing protection for dissenting workers and increasing the power of employers. At the same time, Taft-Hartley took a step back from the draconian anti-strike measures of the War Labor Disputes Act of 1943, replacing them with what have come to be known as the “national emergency” provisions of the NLRA.

These new provisions facilitated government intervention in labor-management disputes, but only to prolong pre-strike maneuvering and, at most, to briefly enjoin strikes. The new terms authorized the Attorney General to seek an injunction of no more than eighty days’ duration when a strike or lockout would (a) “affect[] an entire industry or a substantial part thereof” and (b) “imperil the national health or safety.” Labor unions challenged the Taft-
Hartley law on constitutional and other grounds, but to no avail.\textsuperscript{154} Management, on the other hand, had no objection.

\textit{Youngstown Sheet & Tube Co. v. Sawyer},\textsuperscript{155} gets most of the attention, but from a labor standpoint it was an anomaly. In the face of a ballooning nationwide strike by steelworkers, President Truman, still hostile to the relatively tame “national emergency” provisions of the Taft-Hartley law that had been enacted over his veto, refused to follow the Taft-Hartley procedures and instead followed an idiosyncratic path that culminated in his order to seize the nation’s steel mills. The Supreme Court ruled that the seizure was unconstitutional, in part because Congress had already made other arrangements—the “national emergency” provisions of the NLRA—for emergencies involving labor-management conflict.\textsuperscript{156}

In any event, setting aside \textit{Youngstown}, for the twenty-five years following enactment of Taft-Hartley, from 1947 to 1972, the “national emergency” law was the dominant force in direct government efforts to prevent strikes affecting what we would now call critical infrastructure—primarily transportation, energy, aerospace, and basic resources.\textsuperscript{157} During that period, there were thirty-four national emergency disputes.\textsuperscript{158} The federal government enjoyed great success at getting what it wanted in those cases, with federal courts issuing a strike injunction in twenty-nine of the thirty cases in which the government sought one.\textsuperscript{159} In fact, the government had a perfect strike injunction batting average until 1971.\textsuperscript{160}

As a result, for a time, the “national emergency” provisions of the NLRA and the resulting strike injunctions were effective at slowing down strikes. But they were never effective at stopping them. Although the government elicited injunctions from the courts, it did not elicit industrial peace from labor and management. In twenty-five of the twenty-nine national emergency disputes involving a strike injunction, workers were already on strike when the injunction was issued; in seven of those cases the strike resumed following the end of the eighty-day period of the injunction; and in two other cases there was no strike


\textsuperscript{155} 343 U.S. 579 (1952).

\textsuperscript{156} \textit{Id.} at 588–89.

\textsuperscript{157} \textit{See Bureau of Labor Statistics, supra} note 148, at 3.

\textsuperscript{158} \textit{Id.} at 1.

\textsuperscript{159} In four national emergency disputes the government did not seek an injunction. \textit{Id.} at 2.

\textsuperscript{160} \textit{Id.}
before the injunction, but workers eventually went on strike after the
injunction.\textsuperscript{161}

This failure is a result of two features in the law. First, it did not (and still does not) include a notice requirement. As a result, the government is not in a position to anticipate a strike or lockout unless a union or employer that wants an injunction voluntarily provides notice. Second, the law did not (and still does not) provide any incentives for parties to settle their differences. It does not buy them off, as the government sometimes did during World War I, nor does it punish them, as the government sometimes did during both World Wars.

Eventually, the national emergency provisions of the NLRA lost even their effectiveness as a sheet anchor on work stoppages. In 1971,\textsuperscript{162} the federal government enjoyed its last successful motion for a strike injunction under the law, and its first failure.\textsuperscript{163} In 1978, President Jimmy Carter’s invocation of the national emergency provisions to halt a mineworkers’ strike was first flouted by the UMWA and then dismissed by the federal district judge hearing the case.\textsuperscript{164} The strike settled on terms negotiated by the parties. Thereafter, the national emergency injunction became a “mothballed” tool of national labor policy.\textsuperscript{165}

Then, the war on terror reached American shores—or at least the general American consciousness—on September 11, 2001. After a long hibernation, national security restraints on labor-management economic warfare made a comeback, although whether for more than one engagement remains to be seen. On October 16, 2002, the United States District Court for the Northern District of California issued a Taft-Hartley national emergency injunction to halt a lockout of West Coast dockworkers represented by the International Longshore and Warehouse Union (ILWU) by West Coast shippers represented by the Pacific Maritime Association (PMA).\textsuperscript{166} As a formal matter, this invocation of the national emergency law was successful in bringing an end to a work stoppage: the injunction terminated the lockout, and the parties reached a settlement before the injunction expired. Whether the ILWU/PMA case is an isolated event (a reasonable supposition in light of the fact that the federal government has not invoked Taft-Hartley’s provisions again) or a harbinger of a new round of

\textsuperscript{161} \textit{Id.} at 2 tbl.2.

\textsuperscript{162} United States v. Int’l Longshoremen’s Ass’n, 337 F. Supp 381 (S.D.N.Y. 1971).

\textsuperscript{163} \textit{See} \textit{BUREAU OF LABOR STATISTICS, supra} note 148, at 2.


“national emergency” cases, there is no reason, based on past experience with Taft-Hartley in particular or government efforts to halt strikes in general, to believe that the Act’s “national emergency” provisions would be any more effective now than they have been in the past in forestalling strikes over the run of cases.\footnote{167}{For an insightful and amusing inside look at the operation—and practical ineffectiveness—of the national emergency provisions of the NLRA during the ILWU/PMA case, see Dennis R. Nolan, “We Didn’t Have Time To Train the Monkeys!”: The 2002 Presidential Board of Inquiry on the Work Stoppage in the West Coast Ports, in NATIONAL ACADEMY OF ARBITRATORS ANNUAL PROCEEDINGS, 2005 (Paul Gerhart & Steven Befort eds., forthcoming 2006) (on file with the author).}

More importantly, even if the national emergency procedures have begun a new life in the age of terror, they won’t work, because they cannot address the timing problem that lies at the core of the conflict between the inevitability (and necessity) of strikes and the danger to the public from strikes against employers involved in critical infrastructure in the age of terror. They do not mandate notice of strikes and lockouts, and while the PMA voluntarily issued notice (via a credible lockout threat) in the ILWU/PMA case (and a union seeking to thwart a planned lockout might return the favor someday) such cases are surely the exception. In most circumstances, it is the looming threat of a strike or lockout at some undisclosed but not-too-distant time in the future—the hanging sword—that brings the parties to agreement. In fact, the national emergency law includes fact-finding provisions that mandate the creation of a presidential board of inquiry,\footnote{168}{29 U.S.C. § 176 (2000); see also BUREAU OF LABOR STATISTICS, supra note 148, at 1.} which must investigate the dispute and issue its report\footnote{169}{29 U.S.C. §§ 176–177 (2000).} before the President may “direct the Attorney General to petition any district court of the United States having jurisdiction of the parties to enjoin such . . . threatened or actual strike or lock-out.”\footnote{170}{Id. § 178.} All of that work requires the relevant authorities to spend at least a little bit of time—the fastest board of inquiry report took less than one day, while the longest took more than three weeks\footnote{171}{See BUREAU OF LABOR STATISTICS, supra note 148, at 2.}—and after that the Attorney General still has to petition the court, and the court has to conduct its own proceedings and issue a decision. And as Part I of this Article explains, time is the one thing that the government cannot afford to spend when it comes to strikes threatening critical infrastructure in the age of terror.

Moreover, protecting critical infrastructure and the American public from the damaging effects of strikes and lockouts cannot be achieved by stopping strikes and lockouts—an exercise in futility in any event, as the experience of two world

\[\text{\footnotesize{Page 36}}\]
wars and almost forty years under the national emergency procedures shows. Labor-management warfare does not stop on command any more than nation-nation or nation-terrorist warfare. Rather, protection of critical infrastructure must be based on living with labor-management warfare, and that is a reality that the national emergency procedures cannot accommodate.

B. REASONABLE PRECAUTIONS AND INDEFENSIBLE ACTS

Outside of “national emergency” conditions described in Part III.A, and the contexts of violence and sabotage perpetrated by workers within the workplace, neither the NLRB nor the judiciary nor Congress has much of a history of paying attention to the relationship between public safety and labor-management conflict in the private sector. Strikes, lockouts, and other sharp weapons of industrial diplomacy by other means have been proscribed only in the most limited of contexts. Other limits on the use of economic force have been limited for the most part to contexts in which the behavior of a party is “indefensible”—a term which has been vaguely defined to include a bar on actions that reflect a “fail[ure] to take reasonable precautions to protect the employer’s plant, equipment, or products from foreseeable imminent danger due to sudden cessation of work.” The bottom line is that nothing in the NLRA or in the common federal labor law that has evolved under it over the past sixty-plus years directly addresses or resolves the problem of how to reconcile on the one hand evolving concerns about domestic security and critical infrastructure protection with, on the other hand, strong traditions of wide latitude to take mutually harmful action on the part of both labor and management.

Notwithstanding the NLRA’s strongly-worded prohibition on “acts or practices which jeopardize the public health, safety, or interest,” Congress did not follow up by including within the NLRA or any other law a ban on private-sector strikes to match the statutory and common-law bans on public-sector strikes. Congress largely ignored a strong push in the late 1960s and early 1970s toward what may be the only plausible alternative to strikes as the final stage of


173 See infra Part III.C.


private-sector labor-management disputes—binding arbitration, whether mandatory or at the discretion of the government.\textsuperscript{176} Instead, the NLRB and the federal courts have developed, as part of the “common law of labor-management relations” under the NLRA,\textsuperscript{177} a doctrine of “reasonable precautions” and


“indefensible acts.” That doctrine has served, however, only as a vehicle for protecting the interests of employers, not for protecting the public.

Recently, however, the long but thin history of the “reasonable precautions” doctrine took a turn toward critical infrastructure protection. On July 15, 2003, in *International Protective Services, Inc.*, the NLRB ruled that a strike called by a private-sector union representing workers with “critical responsibilities for the protection of persons and property” who “failed to take reasonable precautions to protect the employer’s operations” was not protected by the NLRA and thus the employer could fire the striking workers with impunity. The fired strikers were private security guards working under contract at government buildings where their “critical responsibilities” included “screen[ing] entrants to the . . . buildings, and their belongings, using [x-ray and magnetic] detection devices.” In contrast, an NLRB administrative law judge had held in January 2000 that a surprise strike by pre-board screeners operating x-ray machines and other security equipment at Los Angeles International Airport that left checkpoints unstaffed “would not pose foreseeable harm.” Times have changed.

For the moment, *International Protective Services* is unique, but it may mark the beginning of a trend toward the creation by the NLRB of a common-labor-law bar on strikes that endanger critical infrastructure. Unfortunately, any protection provided by such a doctrine would be largely illusory. Like the national emergency provisions of the NLRA, the “indefensible acts” doctrine is primarily reactive. It does not provide a basis for anticipating work stoppages and avoiding harm to critical infrastructure. Instead, it is merely an opportunity for ex post punishment of organized workers who engage in strike activity that the government decides after the fact crosses the line between vigorous but lawful labor-management and reckless endangerment of the public. It does nothing to give the government and the operators of threatened critical infrastructure the opportunity to invest in mechanisms to protect that infrastructure during a strike—the function that any strike-related law must perform in the age of terror. The time to address a weakening of critical infrastructure by a strike or lockout is before it happens, not afterward, especially when afterward might mean not only after a strike or lockout begins, but also after a terrorist attack made possible by such a strike or lockout.

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178 I refer to this as the “reasonable precautions” doctrine.


180 *Id.* at 1023.

181 Argenbright Security, Inc., 2000 N.L.R.B. LEXIS 41, at *9* (Jan. 27, 2000). The judge reached this conclusion despite his findings that “pre-board screeners perform an important service to airline security” and that “a strike by pre-board screeners could result in terminals being closed, and a substantial disruption to air service.” *Id.* at *10.
Moreover, the “reasonable precautions” doctrine covers only the acts of organized workers (strikes), not the corresponding acts of their employers (lockouts and replacements). As Part IV of this Article explains, addressing the one but not the other is a recipe for political stalemate and a critical infrastructure that remains at greater risk than need be. The best that can be said for the “reasonable precautions” doctrine, even in its new, *International Protective Services* form, is that it could provide an incentive to unions to think twice before striking. But some unions, like some employers, are likely to resist such incentives, even if doing so is illegal and destructive and ultimately commercially irrational, and the courts have shown extraordinary patience before taking stronger action to prevent such behavior.\(^{182}\) In the age of terror, such an uncertain, incomplete and dilatory mechanism will not serve to protect critical infrastructure.

C. THE HEALTH CARE AMENDMENTS OF 1974

In a fit of pragmatism driven by circumstance, Congress passed, and the President approved the 1974 health care amendments to the NLRA.\(^{183}\) The amendments addressed a then-pressing crisis in labor-management relations in nonprofit hospitals that largely dissipated over the next few years. Thirty years later, those same amendments have the capacity (with small modifications) to accommodate strikes and lockouts on the one hand and on the other hand facilitate protection of critical infrastructure in the age of terror.

The motivating circumstance behind the health care amendments was a crescendo of dissatisfaction with a provision of the Taft-Hartley Act of 1947 that excluded private, nonprofit hospitals from the definition of “employer” in the NLRA.\(^{184}\) As a result, employees of those hospitals did not enjoy the numerous protections of the Act, including the right to compel their employers to recognize their lawfully elected and constituted unions. This was a big loophole, covering—actually, denying coverage to—a majority of the hospital industry and its employees. In 1974, when the health care amendments were enacted, fifty-five

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\(^{182}\) Only once has a federal court imposed a permanent strike notice provision on a union, and it took more than a decade of illegal strikes by that union to convince the court that a ten-day notice injunction was an appropriate remedy. And that one instance occurred under the Railway Labor Act, which restricts strikes much more sharply than does the NLRA. Burlington N. & Santa Fe Ry. v. Bhd. of Maint. of Way Employees, 286 F.3d 803 (5th Cir. 2002).

\(^{183}\) Health Care Amendments of 1974, 29 U.S.C. §§ 152(14), 158(d), 158(g) (2000).

percent of hospital workers—more than 1.5 million people employed at more than 3,400 institutions—fell within the private, nonprofit sector and thus outside the protections of the NLRA.

While Congress frequently considered proposals to abolish the nonprofit hospital exemption, it did nothing until the early 1970s, when a variety of social and economic factors—most importantly the evolution of health care into an enormous industry constituting a substantial portion of the national economy, and increasing organizing activity in the health care sector by large and powerful unions—moved the Taft-Hartley hospital employer exemption up the legislative agenda. Even then, nothing but hearings happened. Some version of the health care amendments might well have passed into law during the 1970s, but the lawmaking process was surely accelerated, and the ultimate wording of the amendments influenced, by many hospitals’ persistent use of the exemption to stiff-arm efforts by their employees to organize. In the presence of employer resistance, and in the absence of access to the recognition procedures under the NLRA, the only way for organized workers in such hospitals to gain recognition for their unions was to strike. The result was a rising tide of recognition strikes that culminated in a massive strike of hospitals in New York City in November 1973.

After that, the legislative process picked up speed. Union lobbyists pushed for a straightforward removal of the Taft-Hartley hospital exemption. Hospital lobbyists insisted that removal of the exemption be accompanied by the addition of a ban on strikes at hospitals in order to protect patients whose health and safety would be put at risk by a strike. Legislators struck upon a shockingly sensible middle way.

First, they recognized that there is no stopping strikes, and that this reality made inclusion of a strike ban in the health care amendments an exercise in futility. As Senator Jacob Javits of New York, one of the leading sponsors of the amendments, observed:

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187 See id. at 4.

188 See id. at 14–15.

I agree that there are certain risks involved in depending on voluntary action to avoid disruptions in essential health care services [as opposed to a strike ban and compulsory arbitration of labor-management disputes]. However, it is utterly fallacious to assume that any other course [such as a strike ban and compulsory arbitration of labor-management disputes] would not also involve similar risks. The recent tragic hospital strike in New York this past fall was conducted in direct violation of a Federal court order. A lot of good it does the individual patient if some union leader goes to jail.  

Another supporter of the health care amendments, Senator Robert Taft, Jr., of Ohio (and son of the Taft who co-sponsored the Taft-Hartley Act, with its hospital exemption), bluntly concurred with Senator Javits:

What I am trying to say to the Senator [Peter Dominici of Colorado] is that even if there is a no-strike clause put into effect, it is not going to stop strikes, and it is not going to take care of the patients’ problems. . . . Even with this bill, strikes will not be prevented. . . . Even with a strike ban under this bill, strikes will still occur, under given circumstances.

Thus, no strike ban was included in the health care amendments, but there was a provision removing the hospital exemption: “Be it enacted . . . That . . . section 2(2) of the National Labor Relations Act . . . is amended by striking out ‘or any corporation or association operating a hospital, if no part of the net earnings inures to the benefit of any private shareholder or individual.’”

Second, while supporters of the health care amendments recognized the inevitability of strikes, they also recognized the special danger strikes posed in a hospital setting where even the briefest interruption of regular operations could well be deadly. As the House of Representatives Report on the amendments explained:

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190 See 120 Cong. Rec. 12934, 12940 (1974), reprinted in Legislative History, supra note 185, at 103. Interestingly, the strongly pro-labor Senators from Minnesota sought to preserve their state’s preexisting state-law bans on hospital strikes. See, e.g., 120 Cong. Rec. 12934, 12946 (1974), reprinted in Legislative History, supra note 185, at 117 (comments of Senator Walter Mondale of Minnesota seeking statutory recognition of the Minnesota Charitable Hospitals Act); 120 Cong. Rec. 13560, 13560 (1974), reprinted in Legislative History, supra note 185, at 257 (comments of Senator Hubert Humphrey of Minnesota).


It is in the public interest to insure continuity of health care to the community and the care and wellbeing of patients by providing for a statutory advance notice of any anticipated strike or picketing. . . . The 10-day notice is intended to give health care institutions sufficient advance notice of a strike or picketing to permit them to make arrangements for the continuity of patient care. 193

Again, Senator Taft:

Insofar as protecting patients is concerned, I agree wholeheartedly that that is the primary objective of the legislation, but the only way—I hope I have already pointed out—that we are likely to protect the patients and improve the situation as it currently exists is to improve the method of settling labor-management arguments as they occur in the health care field. We have attempted to do that. That is the purpose of the legislation. 194

Thus, the health care amendments passed with a provision mandating notice before a strike: “A labor organization before engaging in any strike, picketing, or other concerted refusal to work at any health care institution shall, not less than ten days prior to such action, notify the institution in writing and the Federal Mediation and Conciliation Service of that intention . . . .” 195

This provision, the critical piece of the health care amendments of 1974, reflects a concern that is a near-perfect analogy to the timing problem confronting labor law in the age of terror. In 1974, lawmakers were seeking to balance strikes at hospitals with the fact that even the briefest interruption or weakening of essential health care services could result in serious harm or death to any number of people whose injuries or ailments necessitated health care. Today, lawmakers should be seeking and—one way or another, sooner or later—will be seeking to

194 See H.R. REP. NO. 93-1051, reprinted in LEGISLATIVE HISTORY, supra note 185, at 152.
195 Health Care Amendments of 1974, Pub. L. No. 93-360, 88 Stat. 395 (codified at 29 U.S.C. § 158(g) (2000)). In an effort to support Senator Taft’s call to “improve the method of settling labor-management arguments,” the health care amendments also established longer pre-impasse cooling-off periods for collective bargaining in the health care industry than in other sectors of the economy and created elaborate mediation procedures triggered by the end-game of collective bargaining within those extended bargaining periods. See 29 U.S.C. §§ 158(d), 183 (2000). There is no evidence that these provisions have fostered any greater labor-management amity or any fewer instances of strike and lockout activity than the standard procedures applicable to other industries would have achieved.
balance strikes at employers involved in critical infrastructure with the fact that even the briefest interruption or weakening of critical infrastructure could give terrorists opportunities to seriously harm or kill any number of people. The only difference between then and now is the source of the unpredictable deadly danger. In 1974 the danger came from inside, from within an individual’s diseased or damaged body. Today it comes from outside, from terrorists.

Third, supporters of the health care amendments were realistic about the response of labor and management to the new law. They recognized that both sides would seek to turn the amendments to their maximum advantage. This was, after all, still labor-management warfare, no matter how much each side insisted that it was only the other side that cared more for wealth and power than for the needs of patients. And so the legislative history is peppered with admonitions and warnings. To labor: “Repeatedly serving such ten day notices upon the employer is to be construed as constituting evidence of a refusal to bargain in good faith by the labor organization.” To management:

[D]uring the ten-day notice period the employer should remain free to take whatever action is necessary to maintain health care, but not to use the ten-day period to undermine the bargaining relationship that would otherwise exist. For example, the employer would not be free to bring in large numbers of supervisory help, nurses, staff and other personnel from other facilities for replacement purposes. It would clearly be free to receive supplies, but it would not be free to take extraordinary steps to stock up on ordinary supplies for an unduly extended period.

Lawmakers did not try to micromanage these and other maneuvers that labor and management might engage in. Instead, they left the consequences to be worked out on a case by case basis, with the added “hope that parties to a dispute in such an institution would be cognizant of such special problems and take steps, either in advance of any dispute, or during its resolution, to mitigate the effects of a scarcity of alternative local resources.”

The results have been, if anything, more than the sponsors of the amendments could have reasonably hoped for. Organization among hospitals has moved forward apace and labor relations within the hospital industry are pretty much the same as they are in the rest of the private sector. By 1999, the health care industry was about average in terms of the percentage of organized workers, and the

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197 Id. at 274.
198 Id.
199 See BUREAU OF LABOR STATISTICS, UNION MEMBERS IN 2003 Table 3 (USDL 04-53, Jan. 21, 2004).
number of health care union members had grown from 1989 to 1999, although union membership overall is declining. In addition, the most recent statistics from the NLRB indicate that health care is the most active sector of the economy for new organizing. At the same time, since 1974 not a single death or injury of a hospital patient has been linked to a strike by workers subject to the NLRA and the ten-day notice requirement. And yet hospital workers now not only organize, but also threaten to strike employers who resist their demands, and follow through on that threat (with ten days notice) when they think it is necessary.

In other words, the ten-day notice provision does not appear to have harmed labor organization or labor power in any measurable way. That does not mean that it hasn’t had some negative effects that are too costly or complicated to tease out of the complex relationships between employers, unions, workers, and markets. It is difficult to believe that denying a union the power to threaten to strike an employer with little or no notice does not weaken the union’s position at the bargaining table. Surely, unions paid a price for NLRA protection in private hospitals. But the price was not too high. Hospital workers are able to lawfully strike, even though such strikes can generate a real danger of death and other serious harm to many people—all because employers and public authorities have enough fair warning to address that danger. This is the way to reconcile strikes and lockouts with critical infrastructure protection in the age of terror: expand the health care amendments into the critical infrastructure protection amendments.

IV. AMENDING THE AMENDMENTS

Attempts to amend the NLRA almost always fail, but there are reasons why this proposed extension of the health care amendments should have a better

\[200\] See Union Organizing in the Health Care Industry: A BNA Plus Special Report, Fall 2000, at 1.


\[202\] It may also be that some portion of union power in the hospital context stems not from unionization per se, but rather from a relatively strong worker bargaining position based on the skills required for NLRA-covered hospital jobs, and the difficulty employers might have finding replacements with those skills. I thank Marion Crain for this observation.

\[203\] See Ross E. Davies, Remedial Nonacquiescence, 89 Iowa L. Rev. 65, 111 (2003); Cynthia L. Estlund, The Ossification of American Labor Law, 102 Colum. L. Rev. 1527, 1532–44 (2002); Bruce E. Kaufman, Reflections on Six Decades in Industrial Relations: An Interview with John Dunlop, 55 Indus. & Lab. Rel. Rev. 324, 343 (2002) (“I learned from the labor law reform effort in 1979 that getting agreement from the two sides on some ‘consensus’ package of changes to the labor law is not likely.”); see also William B. Gould IV, Labor
chance of becoming law. First, it lacks one key negative attribute of most proposals for labor law reform that contributes to their failure, and second, it shares two positive attributes with the health care amendments themselves that probably played essential parts in the passage of those amendments.

The key negative attribute of most proposals for changes in the federal labor laws is self-serving imbalance by management or labor. Such proposals are invariably efforts by either labor or management to alter the balance of power to their own advantage. Inevitably, the other side sees not reform but rather injustice, financial disaster, and the end of the American way of life. The relative political powers of labor and management may ebb and flow, but they no longer shift far enough in either direction for one side to acquire simultaneously the legislative-branch and executive-branch influence necessary to achieve the changes—changes it characterizes as “reforms” and the other side views as sabotage—it desires.

The two positive attributes that the proposal made in this Article shares with the health care amendments comprise the mirror image of the negative attribute that dooms most proposed labor law amendments: first, its scale—both in terms of words and in terms of impact on labor-management relations—is small, and second, its terms are balanced. Rather than seeking to redirect labor law in some utopian or even optimistically pro-management or pro-labor direction, this Article bows to the reality of Cynthia Estlund’s apt phrase—“The Ossification of American Labor Law”—and seeks to redefine just a few terms within a body of pre-existing, time-tested, and ossified labor law principles and statutory provisions in order to shift the process of labor-management relations just enough to reduce the chances of a disastrous collision with terrorism, while at the same time doing little or nothing to affect the balance of the arsenals of economic weapons available to businesses and their organized employees. In addition, both

Law and Its Limits: Some Proposals for Reform, 49 WAYNE L. REV. 667, 679 (2003) (“In any event, repeal or deregulation is not going to take place.”).

204 See William R. Corbett, Waiting for the Labor Law of the Twenty-First Century: Everything Old Is New Again, 23 BERKELEY J. EMP. & LAB. L. 259, 272, 302 & nn.68, 230 (2002) (listing failed statutory proposals emanating from both labor and management, and scholarly commentary); William B. Gould IV, Employee Participation and Labor Policy: Why the TEAM Act Should Be Defeated and the National Labor Relations Act Amended, 30 CREIGHTON L. REV. 3 (1996) (discussing management-side TEAM Act and labor-side opposing alternatives); cf. Kaufman, supra note 203, at 342–43 (John Dunlop on the Presidential Commission on the Future of Worker-Management Relations that he led in the early 1990s: “I suppose to get more diversity of opinion we could have included some lawyers who were vigorously nonunion, or that sort of thing, but then we could never have reached a consensus.”).

205 Estlund, supra note 203, at 1540–44.

206 Id. at 1527.
labor and management should find something to like and something to hate in roughly equal measures in the proposal, as well as the basic good of aiding in the war on terrorism.

Here is the bill that Congress ought to pass and the President ought to sign into law:

Public Law ___-___
___ Congress, S. [or H.R.], ___
[date]

An Act

To amend the National Labor Relations Act to extend the 10-day notice provision applicable to health care institutions to all employers that are part of the nation’s critical infrastructure, and to their employees organized under the Act.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That

(a) Section 2 of such Act is amended by adding at the end thereof the following new subsections:

“(15) the term ‘critical infrastructure’ shall have the same meaning as it is given in Section 1016(e) of the Critical Infrastructures Protection Act of 2001, Pub. L. No. 107-56, 115 Stat. 400, and the Homeland Security Act of 2002, P.L. 107-296, 116 Stat. 2135 as they may be amended from time to time.”

“(16) the term ‘replacement workers’ shall have the same meaning as it does in *NLRB v. Mackay Radio & Telegraph Co.*, 304 U.S. 333, 345 (1938) (workers hired “to replace the striking employees . . . in an effort to carry on the business”).”

(b) Section 8(g) of such Act is amended by making the following changes, with additions in bold and deletions in strike-through:

“A labor organization before engaging in any strike, picketing, or other concerted refusal to work at any health care institution that is part of the nation’s critical infrastructure, and such an institution before engaging in any lockout or hiring
replacement workers in place of employees who engage in any strike, picketing, or other concerted refusal to work shall, not less than ten days prior to such action, notify the institution or labor organization in writing and the Federal Mediation and Conciliation Service and Department of Homeland Security of that intention . . . . The notice shall state the date and time that such action will commence. The notice, once given, may be extended by the written agreement of both parties.”

That’s it. As Part III.C explains, the other terms of the health care amendments that might be included in this proposed amendment of the health care amendments—the extended cooling-off period and the elaborate and unused mediation provisions—have little or no discernible effect on labor-management relations in the health care industry, and there is no reason to believe they would be any more useful in the broader field of critical infrastructure. Also, adding them would only increase the complexity of the proposal made here, creating additional opportunities for disagreement between labor and management interests, without any realistic prospect of offsetting benefits.

A. PRESERVING BALANCE

In the large-scale, ongoing competition between labor and management for the fruits of the interaction of labor and capital, neither side willingly relinquishes an advantage. In 1974, faced with costly and escalating strike activity, private sector hospitals gave up freedom from the NLRA for relative labor peace, with the added protection of the innovative ten-day notice provision. At the same time, organized labor, faced with a costly and sometimes fruitless war of attrition to organize an industry not bound by conventional rules of labor-management relations, agreed to give at least ten days’ advance notice of strikes in exchange for access to otherwise standard benefits and protection of the NLRA. Finally, both sides surely came to the legislative process with an appreciation for the consequences of failing to achieve a legislative settlement before patients got hurt. In that event, legislation would not be a matter of balancing labor and management interests in the context of possible future public harms from labor-management strife. Instead, it would be a matter of protecting an outraged public from the destructive selfishness of unions and employers who put their interests ahead of the public, even when that meant death and destruction for innocent bystanders—namely, patients.

Under the proposal made in this Article, the public—and more importantly, the government—gains ten days of warning of an impending work stoppage in which to take precautions to protect critical infrastructure, if such precautions are needed. That is the purpose of the proposal. The gains to labor and management are small and balanced.
Employers falling within the United States’ currently capacious national “critical infrastructure” (a term defined in the proposed law and discussed in more detail below) would enjoy the benefit of ten days’ notice of a strike. In most cases, it would not be the ten days themselves that would be valuable to the employer. It would be, instead, the certainty of the outcome after the ten days. After all, under Section 8(d) of the NLRA, when a party to a collective bargaining agreement intends to seek modification or termination of the agreement, it is required to give the other side sixty days’ notice (and the FMCS thirty days’ notice) of its intent and then permit the collective bargaining agreement to “continue[] in full force and effect, without resorting to strike or lock-out, all the terms and conditions of the existing contract for a period of sixty days.” But the sixty-day notice requirement under Section 8(d) is open-ended. It merely requires a party to refrain from striking or locking-out for at least that initial sixty-day period. After the end of that period, a union is generally free to strike, but the delivery of the 8(d) notice and the passage of the sixty days represent neither a commitment to strike nor a commitment to refrain from striking. It is, in fact, quite rare for a strike to follow directly after the end of the sixty-day period. It is much more common for the parties to continue to negotiate, sometimes with a strike authorization vote hanging in the background, until agreement is reached or the union decides that it is time to go out. In contrast, the ten-day notice period under the health care amendments, and thus under the proposal in this Article, is a firm commitment: the union must strike at the end of the ten-day period—no sooner and no later—unless the parties extend the ten-day period by written agreement. If the union does not strike, then it must go through the process of issuing a new notice, with a new ten-day, no-strike waiting period, and even its latitude to issue sequential ten-day notices is questionable.

Unions do not like the ten-day notice rule, even in its narrow application to the health care industry, and they would be even more unhappy with a large—and potentially all but all-encompassing—expansion of the rule to cover all “critical infrastructure.” As the largest in-depth study of the impact of the ten-day notice rule reports,

Some union spokespersons support removal of the ten-day notice requirement. They argue that few management officials bargain seriously until such a notice is sent, and that the 10-day period is not used to arrange alternative accommodations for patients, but for perfecting security arrangements, strike preparations, and hiring of standby “scabs.”

210 See supra text accompanying note 196.
211 U.S. DEP’T OF LABOR, supra note 186, at 276.
More generally, labor would object to the ten-day notice rule and any other mechanism that prolongs a strike or lockout, it being widely understood that delay serves management more often than it serves labor.\textsuperscript{212} For all the same reasons, management would appreciate any extension of the ten-day notice rule, and especially an extension that reaches as far as the definition of “critical infrastructure” outlined in the next paragraph.\textsuperscript{213}

The work of defining “critical infrastructure” has already been done by Congress, and the work of interpretation is well underway in the executive branch. In due course the courts will play their role as well. Congress has defined “critical infrastructure” as follows: “‘critical infrastructure’ means systems and assets, whether physical or virtual, so vital to the United States that the incapacity or destruction of such systems and assets would have a debilitating impact on security, national economic security, national public health or safety, or any combination of those matters.”\textsuperscript{214} More specifically, it means: “power production, generation, and distribution systems, information technology and telecommunications systems (including satellites), electronic financial and property record storage and transmission systems, emergency preparedness communications systems, and the physical and technological assets that support such systems.”\textsuperscript{215} The executive branch has interpreted this language to cover at least the following sectors of the economy: “agriculture and food”; “water”; “public health”; “emergency services”; “defense industrial base”; “telecommunications”; “energy”; “transportation”; “banking and finance”; “chemicals and hazardous materials”; and “postal and shipping.”\textsuperscript{216} In light of the broad terms used by Congress, there is little to prevent this list from growing over time, and in light of the ever-increasing involvement of American business in efforts to combat terrorism\textsuperscript{217} and the apparently limitless willingness of the federal government to treat mundane operations as critical to national security,\textsuperscript{218} there is every reason to believe that the list will grow.

\textsuperscript{212} See Getman & Marshall, \textit{supra} note 2, at 729.

\textsuperscript{213} See \textit{IMPACT OF THE 1974 HEALTH CARE AMENDMENTS}, \textit{supra} note 186, at 276.


\textsuperscript{216} \textit{See THE NATIONAL STRATEGY FOR THE PHYSICAL PROTECTION OF CRITICAL INFRASTRUCTURES AND KEY ASSETS}, \textit{supra} note 26, at 6–8.


To the extent that under the amendments proposed here unions would lose the ability to hold a strike threat over the heads of management indefinitely and then act with little or no notice, and employers would enjoy more concrete information and certainty about the limits and timing of strike threats, it seems only fair (and politically necessary) that employers should make a reciprocal sacrifice. And thus the extension of the ten-day notice requirement to striker-replacement and lockouts. This new facet of the ten-day notice rule would enable unionized workers to go on strike without fear of losing their jobs, at least under some conditions. Just as the strike is the most powerful weapon in the hands of unions, the hiring of replacement workers, especially permanent replacement workers, is the most powerful weapon in the hands of employers. The definition of “replacement workers” is straightforward. They are the people hired by an employer to replace employees who go on strike, or who are locked out by the employer. Hiring replacements is not only the best way to defeat a strike; it is also the best way to break a union. There is no Supreme Court decision in the field of labor law that organized labor would more dearly like to see overruled by statute than NLRB v. Mackay Radio & Telegraph Co., the case that first recognized an employer’s right under the federal labor laws to hire and retain replacements in the event of a strike. Nothing frightens organized workers the way invocation of Mackay does, and the opportunity to be free of its shadow, even if only for brief periods, would be both a moral and a practical victory for organized labor.

While they appear to be the mirror image of strikes, lockouts are a relatively minor factor in labor-management relations, and in any event it is probably a mistake to think of them as a separate weapon because the two so often go hand-in-hand: an employer will lock its employees out and temporarily replace them at the same time. See supra note 2.

304 U.S. 333 (1938).

Most significantly, it would free workers to strike without fear of immediate replacement. Although an employer could sharply limit the effect of this new ten-day notice rule by, for example, transmitting, as soon as it received a ten-day notice of intent to strike from a union, its own notice of intent to replace all strikers, there would still be some lag time, and the union members would be free to strike without fear of replacement during that time. Moreover, it is the extremely rare strike in which an employer replaces all striking workers immediately, and under the new ten-day notice rule, each replacement, no matter when it occurred, would require its own ten-day notice.

So, while the balance of benefits might appear to weigh in favor of the employer at the outset of a strike or immediately beforehand, it could well weigh in favor of the union by the end. On balance, this new notice feature for the benefit of unions, when offset by the extension of the strike-notice requirement to all “critical infrastructure,” shouldn’t alter the overall state of play between labor and management, both because the ten-day notice rule in its established form is a device with which labor and management are familiar, and because it simply does not change much in the labor-management dynamic.

In addition, while it may have appeared unnecessary in 1974 to extend the ten-day notice rule to replacements and lockouts in the health care industry, it makes sense to extend the rule to replacements and lockouts in critical infrastructure because replacements and lockouts, like strikes, are likely to weaken critical infrastructure in ways that terrorists might take advantage of.

The crisis that triggered the health care amendments in 1974 involved strikes, not lockouts or replacements, and so, not surprisingly, the law addressed the problem at hand at the time. Today, however, there is no particular reason to think that a strike would be any more dangerous to critical infrastructure than would a corresponding lockout or use of replacement workers. Any interruption in the normal operation of some link in the nation’s critical infrastructure could create a dangerous opportunity for terrorists, and management is in no better position than labor to know what might create such an opportunity. The federal government, on the other hand, is almost certainly better-equipped than either labor or management to make such a judgment; among other things, it has access to secret information about terrorist threats and potential weak spots in critical infrastructure across multiple enterprises and industries, and it has made an enormous and growing investment in keeping track of threats to and weaknesses of the nation’s critical infrastructure. Any preparations that management might need for a potential strike could be prepared for lockouts or replacements as well.

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222 See, e.g., Ceci Connolly, Bioterror Preparedness Still Lacking, Health Group Concludes, WASH. POST, Dec. 12, 2003, at A2 (quoting Joseph Henderson, associate director for terrorism preparedness and emergency response at the Centers for Disease Control and Prevention, on the reason for concealing the results of a state-by-state assessment of bioterror response preparedness: “We don’t tell the public because we’re afraid it might reveal too many
make in advance of a surprise lockout might well turn out to be ineffective or counterproductive in maintaining critical infrastructure, and would almost certainly be less effective than the level of protection that could be achieved with ten days’ notice and the involvement not only of management, but also the government, the public, and labor. The same reasoning applies to the hiring of replacement workers. The parallels are more difficult to draw in concrete terms because there is very little publicly available research into the relative quality of work performed by replacement workers and the people they replace, and what little there is tends to be contradictory. But for the average American football fan who watched NFL games played with replacements during the 1987 players’ strike, or the baseball fan who watched replacement umpires calling games during the lockout at the beginning of the 1995 MLB season, the commonsense idea that employers tend to hire the best available applicants (an idea reinforced by the fact that the same employers are often the ones who must produce the work when the strike or lockout ends) is reinforced by the increase in the presence of high-performance athletes who are not yet ready to make that jump to the professional level. But for the average American football fan who watched NFL games played with replacements during the 1987 players’ strike, or the baseball fan who watched replacement umpires calling games during the lockout at the beginning of the 1995 MLB season, the commonsense idea that employers tend to hire the best available applicants (an idea reinforced by the fact that the same employers are often the ones who must produce the work when the strike or lockout ends) is reinforced by the increase in the presence of high-performance athletes who are not yet ready to make that jump to the professional level. See generally THE NATIONAL STRATEGY FOR THE PHYSICAL PROTECTION OF CRITICAL INFRASTRUCTURES AND KEY ASSETS, supra note 26.

I therefore propose the Department of Homeland Security be added to the list of entities to be notified of a planned strike, lockout, or replacement. See supra text following note 206 (proposed amendment to the NLRA). Notice to the DHS ought to be no more complicated than adding the Department to the short list of recipients already entitled to the “letter explaining the date and time that the strike or picketing [or lockout or replacement] will begin.” Fed. Mediation & Conciliation Serv., What Are the Requirements for Filing Strike Notice in a Health Care Case?, FAQ ABOUT FMCS NOTICES AND FILINGS, at http://www.fmcs.gov/internet/faq.asp?categoryID=336 (last visited June 9, 2005).


by employers’ tendency to say that they do in fact seek to hire the “most qualified applicant”\footnote{See, e.g., EEOC v. Sara Lee Corp., 237 F.3d 349, 353–55 (4th Cir. 2001); EEOC v. Humiston-Keeling, Inc., 227 F.3d 1024, 1028–29 (7th Cir. 2000); see also Castellano v. City of New York, 142 F.3d 58, 68 (2d Cir. 1998).}, and that replacements will therefore tend to be second-best or less, makes a lot of sense. Even if replacement workers have all the skills and abilities of pre-strike or pre-lockout incumbents, there will almost always be a learning curve at the beginning of a round of worker replacements, and thus a period of relative instability in the workplace at the outset—the very kind of problem that the ten-day notice period is designed to ameliorate. Thus, minimizing the employment of replacement workers—or at least minimizing their employment without notice—would probably help with critical infrastructure protection.

In essence, the proposed critical infrastructure amendments to the health care amendments are designed to reduce the chances that labor and management, while in the course of their perfectly lawful economic attacks on each other, might inadvertently strike a blow against the public instead. By giving the parties, the public, and the government fair warning and a chance to act if action is needed, the amendments should reduce the risk that the impact of work stoppages and related action on the combatants in industrial conflict will weaken critical infrastructure to the benefit of terrorists and the detriment of the American public.\footnote{Requiring both labor and management to give notice of the basic forms of work stoppages within their respective control will also enable the government to add that information to the mix of available information about threats to critical infrastructure, and also enable the government to chime in on the importance (or not) of preventing or postponing a work stoppage and on the appropriate defensive measures to take in the event one occurs.} In addition, by giving a bit and taking a bit from both labor and management, the proposed amendments would also preserve the balance of power in organized workplaces. Unions will no longer enjoy the leverage gained from holding the threat of a strike on little or no notice over employers’ heads, and employers will no longer enjoy the corresponding threats of replacements and lockouts with little or no notice.

B. MORE HARM THAN GOOD

The proposal to expand the ten-day notice provision is vulnerable on at least two fronts. First, it might do more harm than good by providing information that terrorists could take advantage of. Second, it might do more harm than good by somehow disrupting existing patterns of labor-management relations because what has worked well in one industry—health care—might not work well on a larger scale.

Notice to employers of a strike, or notice to employees of a lockout or worker replacement, will also be notice to terrorists (as well as to other less bad but still
bad actors such as industrial spies). Will the danger associated with that sort of signal overwhelm the benefits of fair warning? This seems unlikely for several reasons. First, the whole point of the strike and lockout notice process is to give labor, management, the public, and, if necessary, the government time to respond. Normally, that would mean intensified efforts to resolve the underlying dispute, coupled with identification and preparation of substitutes and defensive measures, where necessary. Under some circumstances, it might be necessary to seek injunctive relief in order to resolve the dispute or gain more time to prepare for it. The government could forestall a strike by obtaining a 10(j) unfair labor practice injunction against illegal behavior under the labor laws, or a national emergency injunction for otherwise lawful but critically dangerous strike or lockout activity. The public could take its own precautions—in the spirit of the color-coded threat reporting system operated by the Department of Homeland Security—or it could exert pressure on the parties to resolve the underlying dispute without a strike. The latter alternative was specifically contemplated by the legislators who passed both the Taft-Hartley national emergency provisions and by those who passed the 1974 health care amendments to the NLRA. Regardless, the ten-day notice is fair warning, and in a nation so well-supplied with human and material resources, not to mention courts and soldiers, it is difficult to imagine a strike or lockout that could not be accommodated within a ten-day notice period, and if there were, a strike or lockout of that scale would surely meet the requirements for a “national emergency” injunction under Taft-Hartley.

The second concern is unintended consequences within the labor-management relations process. It is possible that a statute that has worked well for a single industry will go haywire when applied more broadly. To return to the grounds given at the beginning of this Article for ignoring other industry-specific bodies of labor law, “the best settlement procedures are those devised for a particular industry by its own management and labor, taking into account its peculiar

229 See, e.g., Connolly, supra note 222.


232 See supra notes 151–54 and accompanying text.
background, technology, customs, and needs.” As Part III.C and Part IV.A explain, however, the virtues of the ten-day notice are connected not to distinctive features of the health care industry, but rather to features that the health care industry now shares with critical infrastructure more generally. Moreover, the health care industry is probably as good a microcosm of the American economy as any other industry would be. Health care is a huge, diverse, competitive, and volatile field. Ask any labor or business leader about the industry in which he or she works, and see if they do not describe it the same way. Thus, the results from this real-world laboratory experiment with the ten-day notice rule might reasonably apply elsewhere in the economy. Finally, given the negligible differences between labor-management relations in the health care industry under the ten-day notice rule and labor-management relations in other service sector industries without that rule, the complications resulting from the expanded ten-day rule do not seem so probable that they might outweigh the benefits of critical infrastructure protection.

CONCLUSION

No one can stop labor-management warfare. No one has figured out how to stop terrorism. The United States must live with the one while resisting the other.

With respect to labor-management conflict, the unavoidable conclusion is that either: (a) strikes, lockouts, and replacements are essential and irreplaceable tools for the resolution of disputes between labor and management; or (b) there are always some unions and employers that are so pig-headed that they cannot see past their own animosity and greed to more efficient means of dispute resolution. Or perhaps it is a combination of the two. For purposes of finding a means of dealing with (a) and (b) in the context of a nation bent on protecting itself from terrorism at home, it simply does not matter whether labor or management is doing the right thing, especially when the public, private, and legal pressures of two world wars, a cold war, and a century’s worth of other developments have failed to bring a stop to potentially dangerous work stoppages during moments of crisis. What matters is finding a means of living with labor-management warfare without dying as a result of it.

Where the likely damages from a not-impossible event are devastatingly high, and the time and location of the event are impossible to identify ex ante, prophylaxis can be the most efficient solution, at least where the prophylactic is fairly cheap. The Red Cross screens all blood for HIV, even when collecting from populations with extremely low rates of the disease, and nuclear power

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233 Cox, supra note 2, at 50.


235 Red Cross, What To Expect When Donating Blood, http://www.redcross.org/services/biomed/0,1082,0_553_,00.html (last visited
plant designers engage in massive and pervasive design redundancy.\footnote{\textsuperscript{236}} For the same reason, strikes, lockouts, and worker replacement in critical infrastructure in the age of terror should be subject to some sort of prophylactic. Banning strikes and lockouts won’t work, because labor-management warfare cannot be stopped. An elaborate or dramatic revision of the labor laws won’t work either, because such changes cannot be enacted. The cheapest, most realistic solution, rough and imperfect as it may be, is a waiting period. Ten days has proven to be enough in the health care industry, which has a longstanding sensitivity to service interruptions that serves as a useful proxy for modern critical infrastructure.

It may be true that we have nothing to fear but fear itself, but organized labor and its employers should fear that fear. Even if the fear of terrorism is groundless, sooner or later lawmakers—executive and judicial at the least, and perhaps legislative as well—will act to prevent labor-management conflict from increasing the dangers of terrorism.

At the same time, the proposal outlined here should not be viewed as a cure-all. It is no more than one, or, more likely, a small fraction of one, of the proverbial 100 one-percent solutions to a complex and evolving problem.

It may be that there are more nuanced, less intrusive solutions to the problem of preserving the balance of power in labor-management relations while preserving domestic safety as well. It may be, for example, that Archibald Cox’s proposal that “[e]ach industry in which a labor dispute might affect the national health or safety should be admonished by law to create a standing procedure for resolving disputes which will not yield to the ordinary processes of negotiation,”\footnote{\textsuperscript{237}} would eventually result in industry-specific mechanisms for keeping labor and management on a level playing field and the public safe. But the terrorist threat is here now and there are no indications that Cox’s idea is any closer to fruition now than it was when he made it more than forty years ago. Moreover, as Cox conceded, “there will always be some critical disputes” that cannot be resolved without resort to stronger measures.\footnote{\textsuperscript{238}} Better for labor and


\footnote{\textsuperscript{237} Cox, \textit{supra} note 2.}

\footnote{\textsuperscript{238} \textit{Id.}}
management to support a small modification to the established system—the ten-day notice proposed here—than to gamble on big and uncertain changes. And better for the United States government to take the Fram oil filter approach to protecting our national critical infrastructure—and, indirectly, everyone living in this country—by making a small investment now, rather than paying a big price later.\textsuperscript{239}

\textsuperscript{239} \textit{E.g.}, \textit{Face the Nation} (CBS News television broadcast, Feb. 13, 2005) (statement of Sen. Rick Santorum: “[Y]ou remember the old Fram oil filter commercial, ‘Pay me now or pay me later.’”).