Student Writing Competition Runner-Up Article: The Straight Jacket on Federal Employees' Right to Strike

By Luis Virgen

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Imagine you are a hard-working federal employee, and the sole provider for your family. You work hard pay your bills, but suddenly, there is a government shutdown. Your employer has deemed your services essential and tells you to come to work, but informs you that you will not be receiving your biweekly paychecks. Although you will eventually receive backpay when the government returns to full operation, that backpay will be split into multiple future paychecks. You know that if you resort to taking out a high-interest loans, borrowing against your retirement accounts, or incurring financial penalties for your missed bills during the shutdown, that backpay would not return you to the same financial position you were in before the shutdown. With your bills looming, what can you do?

According to Black's Law Dictionary, a strike is "an organized cessation or slowdown of work by employees to compel the employer to meet the employees' demand; a concerted refusal by employees to work for their employer, or to work at their customary rate of speed, until the employer grants the concessions that they seek."[1] Historically, the primary reason to go on strike has been to "over awe or intimidate [an employer] by mere force of numbers," as individual actions by employees have had little to no effect.[2]

In the United States, courts have found that federal employees in general do not have the right to strike because of reasons including: (1) strikes against the sovereign state are intolerable, (2) public services are essential, and (3) public employee unions would have both political influence and coercive power and this would lead to a distortion of the political process.[3] However, these justifications are significantly flawed.

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[1] Black's Law Dictionary (10th ed. 2014).
[2] Cogley, *Law of Strikes, Lockouts, and Labor Organization* (1981) 2224 p.3.
[3] Bernstein, *Alternatives to the Strike in Public Labor Relations* (1971) 85 Harv. L. Rev. 459, 462.

With respect to the first justification, strikes against the sovereign state have been considered intolerable because the government is considered the embodiment of the American people's will, and public employees have been entrusted to carry out its functions.[4] Allowing public employees to strike would efface the public welfare.[5] In *Anderson Fed'n of Teachers, Local 519 v. Sch. City of Anderson*, however, the Indiana Supreme Court expressed its opposition this justification.[6] Justice DeBruler's dissenting opinion argued the sovereignty argument was unjustified because the strike was peaceful and minimally disruptive to the public.[7]

With regards to the second justification, public employees are often categorized as essential because their services are vital "to the health, safety, and welfare of the public."[8] Courts have reasoned, "nothing is more dangerous to public welfare than to admit that hired servants of the state can dictate to the Government the hours, the wages, and conditions under which they will carry on essential services vital to the welfare, safety and security of the citizen."[9] However, this justification is flawed because the provision of services to the public do not have to be a government function.[10] For example, in San Francisco, the garbage collection is performed by Recology, a private company.[11] Similarly, other public services, such as utilities, administrative services, and road construction, could be performed by private employees, who have been found to have the right to strike.[12]

With respect to the third justification, giving federal employees the right to strike could be in keeping with several Constitutional rights. The risk of any political distortion by giving federal employees the right to strike should outweighed by the benefits of upholding those foundational Constitutional rights.

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[4] Hanslowe & Acierno, *The Law and Theory of Strikes by Government Employees* (1982) 67 Cornell L. Rev. 1055, 1061.
[5] *Id.*
[6] *Anderson Fed'n of Teachers, Local 519 v. Sch. City of Anderson* (1969) 252 Ind. 558, 564.
[7] *Id.*
[8] White, *Public Sector Strikes: Will the Illinois Legislature Answer the Challenge* (1980) U. Ill. O.F. 869, 885.
[9] *Railway Mail Assn. v. Murphy* (N.Y. Sup. Ct. 1943)180 Misc. 868, 875.
[10] Mathew Guinan, *Alternatives In The Public Sector: The Unreal Distinction Between Public and Private Sectors* (1973) Monthly Lab. Rev., at pp. 35, 46.
[11] Katie Brigham, *How San Francisco sends less trash to the landfill than any other major U.S.* city, CNBC, available at https://www.cnbc.com/2018/07/13/how-san-francisco-became-a-global-leader-in-waste-management.html (last visited April 19, 2019).
[12] Zack, *Are Strikes of Public Employees Necessary* (1967) 53 A.B.A. L.J. 808, 810.

First, the Thirteenth Amendment prohibits involuntary servitude.[13] In the United Supreme Court opinion in *The Civil Rights Cases*, Justice Bradley opined, "… it has only to do with slavery and its incidents."[14] However, this interpretation would substantially limit the Amendment. Section 1 of the Thirteenth Amendment, explicitly states, "*no person* shall work for free, except as a punishment, where the party has been convicted."[15] Justice Bradley's interpretation runs counter the plain language of the Amendment, where "no person," would apply to all citizens of the United States.

Justice Bradley's interpretation also runs counter to the original legislative purpose of the Amendment.[16] President Abraham Lincoln recognized the connection between the right to be free from slavery and the right to strike.[17] In the rest of the opinion of the *The Civil Rights Cases*, the Supreme Court emphasized that the purpose of the Thirteenth Amendment was "… to eradicate *all* forms and incidents of slavery and involuntary servitude."[18]

Other court decisions have supported that the Thirteenth Amendment protects the right to strike, while others have indicated it does not apply because federal employees could simply quit their jobs.[19] However, the "option" of quitting may in fact be a false choice. Federal employment is essentially a contract with the Federal Government in which employees may forgo more lucrative positions to secure steady public sector careers. When the government shuts down, this upsets the initial bargain and the work is no longer secure. Thus, when employees must work due to statute or contract, such work could be tantamount to contemporary slavery.[20]

The First Amendment could also support the right of federal employees to strike. Freedom of association has been defined as "the right of an individual to associate with others, without undue government interference, for the purpose of engaging in activities protected by the

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[13] U.S. Const. XIII Amend. §1.
[14] *The Civil Rights Cases* (1883) 109 U.S. 3, 23.
[15] U.S. Const. XIII Amend. §1 (emphasis added.)
[16] *Slaughter-House Cases* (1872) 83 U.S. 36, 71.
[17] Abraham Lincoln, *Speech at New Haven, Conn.* (Mar. 6, 1860), in 4 *The Collected Works of Abraham Lincoln* 13, 24 (Roy P. Basler et al. eds., 1953)., WORKING MEN AND THE ANTI-SLAVERY MOVEMENT IN THE UNITED STATES 159.
[18] *The Civil Rights Cases* (1883) 109 U.S. at 23.
[19] *Kemp v. Division No. 241, Amalgamated Assn. of Street & Elec. Ry. Employees of Am.* (Ill. 1912) 392, 397; see also, *Arthur v. Oakes* (7th Cir. 1894) 63 F. 310, 319-20.
[20] *Arthur*, 63 F. at 317.

First Amendment, such as speech, assembly, and the exercise of religion."[21] Case law currently does not interpret the First Amendment to supports a federal employee's right to strike because courts have held that strike activity exceeds the constitutional protection of free speech and association.[22] However, without the power to strike, federal employees' freedom of association could become a meaningless right.[23] Without the right to strike, workers are essentially deprived of any bargaining power.[24] The process of collective bargaining would simply be "collective begging."[25] Engaging in, or even threatening to engage in, strike activities ensures that management and labor negotiate and come to a settlement on the terms of employment because the threat of injury of economic loss incentivizes decision-making.[26]

Finally, current case law does not support that Fifth and Fourteenth Amendments' due process rights protect a federal employee while on strike. In fact, in *PATCO v. Federal Labor Relations Auth*., the court did not find that notice was necessary when the government fired 11,000 workers who were out on strike.[27] However, federal employees' interest to live in a way of their choosing is akin to other liberty interests the courts have recognized.[28] As a result, the lack of any safeguards preventing erroneous terminations raises troubling due process concerns.[29]

Because the legal justifications prohibiting federal employees from striking are significantly flawed, there is hope that these rights will be extended to public employees in the future. As a civilized society, we must demand that the courts and legislators prevent inhumane practices towards all employees. To allow these injustices is to take three steps back from what has been accomplished in the last century.

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[21] Black's Law Dictionary (10th ed. 2014).
[22] See, e.g., *Johnson v. City of Albany, Ga.*, (M.D. Ga. 1976) 413 F. Supp. 782, 785.
[23] *United Fed'n of Postal Clerks v. Blount* (Dist. Ct. D.C. 1971) 325 F. Supp. 879, 885.
[24] Bellace, *ILO Convention No. 87 and the Right to Strike in an Era of Global Trade*, (2018) 39 Comp. Lab. L. & Pol'y J. 495, 528.
[25] *Id.*
[26] White, *Public Sector Strikes: Will the Illinois Legislature Answer the Challenge*, 1980 U. Ill. L.F. 869, 885.
[27] *PATCO v. Federal Labor Relations Auth*. (D.C. Cir. 1982) 685 F.2d 547.
[28] *Meyer v. Nebraska* (1923) 262 U.S. 390, 399.
[29] See *Mathews v. Eldridge* (1976) 424 U.S. 319, 335.