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Worker Lawmaking, Sit-Down Strikes, and the Shaping of American Industrial Relations, 1935–1958

JIM POPE

The following abbreviated citations are used in this essay:

ABJ—Akron Beacon Journal

AFL EC Minutes—American Federation of Labor, *Minutes of the Meeting of the Executive Council 1930–1948* (Microform edition) (Frederick, Maryland: University Publications of America, 1996)

CR—United States Congress, Congressional Record

DLN—Detroit Labor News (official organ, Wayne County Federation of Labor)

DN—Detroit News

FMCS Records—Records of the Federal Mediation and Conciliation Service, Record Group 280, National Archives II, College Park, Maryland

NYT—New York Times

PP—Punch Press (newsletter of sit-down strikers occupying General Motors plants, Flint Michigan, 1937)

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SCLN—Summit County Labor News (official organ, Summit County Federation of Labor, Akron Ohio)

UNS—Union News Service (official organ, Congress of Industrial Organizations)

Wayne State Archives—Wayne State University Archives of Labor and Urban Affairs, Detroit, Michigan.

Between 1936 and 1939, American workers staged some 583 sit-down strikes of at least one day's duration. In the latter year, the United States Supreme Court issued its opinion in *NLRB v. Fansteel Metallurgical Corporation*, resolving the official legal status of the tactic. *Fansteel* made it clear not only that a state could punish sit-downers for violating trespass laws, but also that an employer could lawfully discharge them—even if that employer had itself provoked the sit-down by committing unfair labor practices in violation of the National Labor Relations Act.¹

Fansteel has sparked sharp controversy among legal scholars. Karl Klare argued that the decision was a milestone in a series of Supreme Court rulings that truncated the democratic potential of the Wagner Act. Far from the lawless form of mob action depicted in court decisions, Klare portrayed the sit-down as a form of “legal practice” used by workers to obtain collective bargaining despite “the widespread and often violent refusal by employers to obey” the Wagner Act. Moreover, he argued, the sit-down held forth far more radical possibilities for workplace democracy than the bureaucratized system of collective bargaining that eventually prevailed. According to Klare, the tactic provided mass production workers with the power necessary to break out of their routine subordination, the experience necessary to think of themselves not as passive consumers but as active producers capable of shaping their work lives, and the level of involvement required to keep their unions democratic and solidaristic. Thus, when the Supreme Court disapproved the sit-downs in *Fansteel*, it damaged the prospects for a participatory, democratic industrial order and “bolstered the forces of union bureaucracy in their efforts to quell the spontaneity of the rank and file.”²

Klare’s claims drew harsh criticism. If the sit-downers were engaged in legal practice, charged Louis Schwartz, then so is a “gruesome rapist” whose crime provokes a legislative response. Matthew Finkin forcefully reaffirmed the received wisdom that the sit-down strike was a plainly illegal

1. Walter L. Eisenberg, “Government Policy in Sitdown Strikes” (Ph.D. diss., Columbia University, 1959), 318; 306 U.S. 240, 251–52 (1939).

2. Karl E. Klare, “Law-Making as Praxis,” *Telos* 40 (1979): 123, 124 n.5; Karl E. Klare, “Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness, 1937–1941,” *Minnesota Law Review* 62 (1978): 265, 321, 324–25; see also Jeremy Brecher, *Strike!* 2d ed. (Boston: South End Press, 1997), 235.

tactic directed at the decidedly nonradical goal of achieving union recognition. With collective bargaining established, Finkin argued, unions and workers abandoned the tactic on their own, making the Supreme Court's *Fansteel* decision all but superfluous. Unlike Klare's account, Finkin's had a happy ending; workers ended up with bureaucratized unions that traded shop floor power for higher wages because that is what they wanted. Neither Klare nor his critics undertook the kind of historical research that would be necessary to resolve the debate. As Klare pointed out in his reply to Finkin, he had not set out to write a history of the sit-down strikes.³

The present article seeks to fill that gap, focusing on the claim that the sit-downers were engaged in legal practice. It finds strong evidence that many were, and in five distinct forms of practice. First, the sit-down made it possible for mass production workers to legislate and enforce unilateral rules directly regulating relations of production. These rules concerned such subjects as the pace of production, seniority rights, the obligations of solidarity, the organization of steward systems, and the establishment of dispute resolution procedures. This rulemaking raises the possibility that, had the sit-down not been suppressed or abandoned, unilateral worker regulation might have provided an alternative—or, more likely, a supplement—to the joint employer-union lawmaking of the post-World War II collective bargaining regime.⁴

Second, sit-downers legislated, adjudicated, and enforced rules governing life in the facilities that they had seized. Because the strikers never attempted to run occupied enterprises for their own benefit, this activity never reached the point of presenting an alternative to the collective bargaining regime. However, the sit-downers' practices of self-government do say much about their legal consciousness. Once a company's management had been evicted, the strikers were left free to enact and administer rules—or not. By the choices they made in this void of authority, the strikers revealed much about their vision of a proper legal order.

Third, unlike Schwartz's "gruesome rapist," sit-downers claimed to be exercising a legal right. They formulated, defended, and delimited a legal right of workers to stage a sit-down strike at their place of work. The contours of this right constrained not only corporate and governmental authorities, but also the sit-downers themselves. For the most part, workers

3. Louis B. Schwartz, "With Gun and Camera Through Darkest CLS Land," *Stanford Law Review* 36 (1984): 413, 443–44; Matthew W. Finkin, "Revisionism in Labor Law," *Maryland Law Review* 43 (1984): 23, 30–31; Karl E. Klare, "Traditional Labor Law Scholarship and the Crisis of Collective Bargaining Law: A Reply to Professor Finkin," *Maryland Law Review* 44 (1985): 731, 818–19.

4. Cf. Staughton Lynd, "Introduction," in *We Are All Leaders*, ed. Staughton Lynd (Urbana: University of Illinois Press, 1996), 1, 5–6, 16.

limited themselves to activities that fell within the scope of their justifications for the right.

Fourth, many sit-downers claimed to be engaging in self-enforcement of official law—not only the NLRA itself, but also the United States Constitution. Many employers refused to comply with the Act on the grounds that it exceeded the reach of Congress's commerce power and infringed their economic due process rights of contract and property. Workers and unions held to the contrary and enforced their holdings with sit-down strikes. Parts of this story have been told before, and I have previously argued that the sit-down strikers “plainly and simply” forced the Supreme Court to uphold the NLRA in April 1937.⁵ The present article recounts *how* workers and unions accomplished this. It suggests that they engaged the various levels of government in a series of escalating tests of commitment—a dynamic that, as posited by Robert Cover, is a distinctive feature of lawmaking from below.⁶

Finally, workers used sit-downs to enforce collective bargaining agreements. In this role, the sit-down—depending upon one’s viewpoint—either substituted for the contractually agreed-upon grievance procedure or speeded its operation by forcing a quick resolution at an early stage of the procedure. Emboldened by the effectiveness of the sit-down, many workers refused to submit to the employer’s interpretation of the contract pending a formal resolution. While national union officials joined employers in condemning this practice as inefficient and uncompetitive, it certainly enhanced worker participation and union democracy. Indeed, the opposition of union officials might well have had less to do with efficiency or competitiveness than with enhancing their own authority and tenure in office.

A preliminary objection must be addressed. According to one school of thought, there is no such thing as unofficial “law.”⁷ In this view, worker-made rules do not constitute law, and their rulemaking and enforcement could not amount to legal practice. The present article claims, however, that the sit-downers’ rulemaking, adjudication, and enforcement amounted to legal practice in the sense of conscious, collectively organized rule creation and enforcement. This claim comports with the definition of a legal order as “any normative order which includes secondary rules: that is, exhibits division of labor in any of its aspects, is to any extent institutionalized.”

5. James Gray Pope, “The Thirteenth Amendment versus the Commerce Clause: Labor and the Shaping of American Constitutional Law, 1921–1957,” *Columbia Law Review* 102 (2002): 1, 96.

6. Robert M. Cover, “Foreword: Nomos and Narrative,” *Harvard Law Review* 97 (1983): 1, 53.

7. See, e.g., John Austin, *The Province of Jurisprudence Determined*, ed. H. L. A. Hart (New York: Noonday Press, 1954), xlivi.

Thus, a society can be said to contain multiple legal orders whenever it includes more than one distinct rule of recognition, that is, where two or more bodies of law are “not reducible the one to the other.”⁸ During the first half of the twentieth century, the rules generated by workers and unions existed in tension with the official law of the state, and the worker-made and state-made laws of labor were not in any sense reducible the one to the other.

This article is organized as a narrative, recounting the rise and fall of sit-down strikes and lawmaking by mass production workers. Part I relates the emergence of the sit-down and unilateral worker lawmaking in Akron and Detroit during 1936 and 1937. In Part II, the labor movement divides among three positions on the sit-down issue, one of which claims a fundamental right of workers to occupy their places of work. Part III recounts the development and limitation of the claimed right on the ground. In Part IV, workers and unions hold the Wagner Act constitutional and enforce it with sit-down strikes, challenging the commitment of the various levels of government to the defense of corporate property rights. Part V relates the fate of sit-downs and worker lawmaking before the National Labor Relations Board, in the Supreme Court, and on the shop floor. Part VI speculates on the significance of the outcome.

I. An Explosion of Worker Lawmaking: Akron and Detroit, 1935–1937

On January 27, 1936, the Firestone Tire & Rubber Company suspended Clayton Dicks for one week without pay. Although the Firestone management recognized no union, members of the United Rubber Workers of America had already established an organization in the Akron plant. Dicks, a union committeeman in the tire building department, had been accused of punching and knocking out a nonunion man. Union tire builders complained that the company had appointed itself “prosecutor, judge, and jury” and demanded “a fair trial before an equal number of union and company representatives.”⁹ The company refused and the tire builders responded by stopping work in a body. Ruth McKenny penned this account of what happened next:

8. J. Griffiths, “Four Laws of Interaction in Circumstances of Legal Pluralism: First Steps toward an Explanatory Theory,” in *People’s Law and State Law*, ed. Antony Allot and Gordon R. Woodman (Dordrecht: Foris Publications, 1985), 217, 217.

9. *SCLN*, Jan. 31, 1936, 1.

Instantly, the noise stopped. The whole room lay in perfect silence. The tirebuilders stood in long lines, touching each other, perfectly motionless, deafened by the silence. . . . Out of the terrifying quiet came the wondering voice of a big tirebuilder near the windows: "Jesus Christ, it's like the end of the world." He broke the spell, the magic moment of stillness. For now his awed words said the same thing to every man, "We done it! We stopped the belt! By God, we done it!" And men began to cheer hysterically, to shout and howl in the fresh silence. . . . "John Brown's body," somebody chanted above the cries. The others took it up. "But his soul," they sang, and some of them were nearly weeping, racked with sudden and deep emotion, "but his soul goes marchin' on."¹⁰

The tire builders remained at their machines and announced that they would not resume work until Dicks was reinstated. Union leaders labeled the protest a "sit-down" as opposed to an ordinary strike. Although the term had been heard before, the Dicks sit-down marked its entry into the standard vocabulary of industrial conflict. Fifty-five hours after production ceased, the protest ended with Dicks reinstated with back pay at half his normal rate for the period of the suspension and the sit-downers paid at the same rate for the period of the sit-down.¹¹ A local union leader reported to the CIO that this was "one of the greatest victories ever won by labor" and that it had "done more to build up the Trade Union Movement here than anything we could have even thought of doing."¹² Within days, the Dicks sit-down had sparked similar actions at Akron's other tire-making giants, Goodyear and B. F. Goodrich. Thanks to the sit-down tactic, the legislation and enforcement of work rules—once the exclusive preserve of employers and skilled craft workers—suddenly became a realistic possibility for semi- and unskilled workers in mass production industry.

On the Shop Floor: From Wage Slaves to "Men"

Writing in 1923, John R. Commons—America's leading labor scholar—described what he called a "common law of labor springing from the customs of wage earners." This law consisted "in those practices by which laborers endeavor to achieve their ideals through protection against the economic

10. Ruth McKenny, *Industrial Valley* (New York: Harcourt, Brace & Co., 1939), 261–62.

11. Alfred Winslow Jones, *Life, Liberty, and Property* (1941; New York: Octagon, 1964), 99; Daniel Nelson, *American Rubber Workers and Organized Labor, 1900–1941* (Princeton: Princeton University Press, 1988), 181–82.

12. Tom Owens, Firestone Local 7 activist, to Adolph Germer, CIO organizer, Adolph Germer Papers, State Historical Society of Wisconsin, Microform edition [hereafter Germer Papers], reel 3, frame 344.

power of employers." To Commons, the workers' common law consisted not of mindless or instinctive adaptations, but of norms consciously "formulated in assemblies or groups while dealing with violations and deciding disputes as they arise." The central norm was that of solidarity among workers, which—unfortunately for them—was "exactly opposite to the ideals and customs of business which the courts have been defining and classifying for some 300 years."¹³

Despite the hostility of courts, workers and unions legislated, adjudicated, and enforced their own labor laws during Commons's day. For example, an assembly of craft workers might enact a union "law" establishing a minimum wage for the craft. This law would operate directly on workers, with no involvement by the employer. Workers would simply announce to employers that they were bound by union law to refuse any jobs that paid less than the craft's minimum wage. The employer would either pay the minimum or lose its union workers until the law was repealed or otherwise rendered ineffective. Such unilateral union laws covered a wide variety of employment conditions and practices including, in some cases, production technology and product design.¹⁴ They often co-existed with joint employer-union collective bargaining agreements, addressing matters not covered under those agreements. Even in non-union shops, groups of workers might combine to regulate on such issues as the pace of production or the obligations of solidarity.¹⁵

Unilateral worker lawmaking thrived mainly in the skilled trades, where the scarcity of qualified workers made it difficult for employers to circumvent union rules by hiring non-union workers. But semi- and unskilled

13. John R. Commons, *Legal Foundations of Capitalism* (1923; Madison: University of Wisconsin Press, 1968), 301–5. Quotations are at 304, 301–2, and 305.

14. David Montgomery, *Workers' Control in America: Studies in the History of Work, Technology, and Labor Struggles* (Cambridge: Cambridge University Press, 1979), 15–18; David Montgomery, *The Fall of the House of Labor: The Workplace, the State, and American Labor Activism, 1865–1925* (New York: Cambridge University Press, 1987), 9–13; Daniel T. Rodgers, *The Work Ethic in Industrial America, 1850–1920* (Chicago: University of Chicago Press, 1978), 165–66; Lloyd Ulman, *The Rise of the National Trade Union* (Cambridge: Harvard University Press, 1955), 526, 541–42, 545–46, 551–52; Benson Soffer, "A Theory of Trade Union Development: The Role of the 'Autonomous' Workman," *Labor History* 1 (1960): 141, 152–53.

15. Sumner H. Slichter, *Union Policies and Industrial Management* (Washington, D.C.: Brookings, 1941), 1; Carter Goodrich, *The Miner's Freedom* (Boston: Marshall Jones, 1925), 58–61; Stanley B. Mathewson, *Restriction of Output among Unorganized Workers* (New York: Viking Press, 1931); Montgomery, *Workers' Control*, 13–15; Ronald W. Schatz, *The Electrical Workers: A History of Labor at General Electric and Westinghouse, 1923–1960* (Urbana: University of Illinois Press, 1983), 42–44; Frederick Winslow Taylor, *Scientific Management* (New York: Harper, 1947), 79–85.

workers also aspired to regulate their work lives. "Whenever they came into regular contact on the job, wherever they recognized a common identity," recounts labor historian David Brody, "factory workers formed bonds, legislated group work standards, and, as best they could, enforced these informal rules on fellow workers and on supervisors."¹⁶ During the 1920s and early 1930s, what Commons called the "common law of labor" had flourished—albeit in crude and fragile forms—in the tire-building rooms of the big-three manufacturers, Goodyear, Firestone, and B. F. Goodrich. Lacking a union, the tire builders forged their own shop-floor culture of resistance. Paid by the tire, they could—at least theoretically—earn more money by producing more tires. In the experience of the workers, however, their employers would lower the piece rate if too many builders were exceeding the expected pace of production. In response, the builders joined together to legislate their own tire quotas, which they enforced through social pressure, slowdowns, and strikes.¹⁷

Although Akron's tire builders developed tough patterns of resistance during this period, their struggles were brief, small in scale, and conducted as covertly as possible to avoid employer retaliation. As a result, their common law order was limited in scope and crude in definition. They made no attempt to codify their rules or to create formal, rulemaking organizations. This began to change in 1933, when Franklin Roosevelt's election, the passage of the National Industrial Recovery Act, and a mild economic recovery stimulated a wave of union organization. By the end of the summer, AFL organizer Coleman Claherty claimed to have enrolled more than 40,000 Akron rubber workers, 19,000 of them at Akron's big three tire manufacturers.¹⁸

With union organization came the opportunity for workers to specify their laws in written codes, extend them to cover new situations, and enforce them with formal sanctions. Candidates for union membership were required to "take the obligation" before joining. This entailed pledging to abide by the constitution, laws, and regulations of the union. The principle of solidarity took explicit, legal form in union constitutions and by-laws. The first constitution of the United Rubber Workers (URW), in effect at the time of the events recounted here, barred members from working for

16. David Brody, *Workers in Industrial America* (New York: Oxford University Press, 1980), 205.

17. See John D. House, *Birth of A Union*, Microform (unpublished book manuscript, Ohio Historical Society), 7–8, 12–14; Mathewson, *Restriction of Output*, 54–56; Nelson, *American Rubber Workers*, 86–87, 93–94.

18. Irving Bernstein, *Turbulent Years: A History of the American Worker, 1933–1941* (Boston: Houghton-Mifflin, 1971), 95, 100; Nelson, *American Rubber Workers*, 121.

“any individual or Company declared in difficulty” with the union. Violators could be fined, suspended, or expelled.¹⁹

At the same time that union organization offered new opportunities for self-government, it also posed new threats. Many union officials preferred the orderly, hierarchical structure of business organizations to the passion and tumult of rank-and-file democracy. John L. Lewis, for example, viewed his United Mine Workers union as “a business institution” that could best win higher standards for miners through obedience to his commands.²⁰ Emulating Lewis, AFL President Green ruled that the members of the newly formed URW were not yet ready to choose their own officers. But the rubber workers insisted on elections despite Green’s threat to withhold financial support from their fledgling union. They chose national leaders who, until recently, had labored in the rubber factories.²¹ It was not long before this new leadership was put to the test.

In February 1936, the Goodyear Tire & Rubber Company discharged 137 tire builders for staging a sit-down. Within days, the company’s enormous Akron plant was shut down, with rotating shifts of pickets manning sixty-three posts around its eleven-mile perimeter. Goodyear obtained an injunction barring mass picketing but a crowd of 5,000 workers faced down the 150 officers who had been assigned to open the plant. When the strike ended on March 21, not only had the 137 sit-downers been reinstated, but the URW had won an agreement limiting Goodyear’s discretion to increase hours and granting other concessions without conceding any restrictions on the workers’ right to strike.²² Far from ending the sit-downs, this modest step toward collective bargaining only escalated the struggle for power on the shop floor.

No sooner had operations resumed, than the returning strikers began to enact and enforce their own laws of the shop. The old tradition of informal production quotas emerged into the open in the form of public union legislation. Tire builders limited themselves to fifty-six tires per shift;

19. First Constitution of the United Rubber Workers of America, secs. 18(b) 2, 18(b)(11), November 7, 1935, *American Labor Unions’ Constitutions, Proceedings, Officers’ Reports and Supplementary Documents* (Microform) (Ann Arbor: University Microfilms International, 1986) [hereafter *American Labor Unions’ Constitutions*], Part II, Reel 120.

20. United Mine Workers of America, *Proceedings of the 28th Consecutive and 5th Biennial Convention* 2 (1921), 628; see generally Joseph E. Finley, *The Corrupt Kingdom: The Rise and Fall of the United Mine Workers* (New York: Simon & Schuster, 1972).

21. Bernstein, *Turbulent Years*, 382–83; Jones, *Life, Liberty, and Property*, 86–87; Nelson, *American Rubber Workers*, 164–69.

22. *ABJ*, Feb. 22, 1936, 1, 2; *ABJ*, March 23, 1936, 9; *ABJ*, Feb. 22, 1936, 15; Bernstein, *Turbulent Years*, 594; Jones, *Life, Liberty, and Property*, 99; McKenny, *Industrial Valley*, 301–2; Nelson, *American Rubber Workers*, 191.

heater men to eighteen heats. Unionists in the more militant departments imposed a ban on working with nonstrikers.²³ This rulemaking emulated that of the skilled craft workers who had built the first stable unions in the late nineteenth century, but with a narrower scope and a different mode of enforcement. Unlike their skilled predecessors, mass production workers did not attempt to regulate the methods of production themselves; instead, they sought to control the pay and working conditions associated with new technology. And where the skilled workers had drawn on their monopoly of craft knowledge for the power necessary to support effective lawmaking, semi- and unskilled workers drew primarily on their capacity to stage sit-down strikes.

On May 29, 1936, five weeks after the strike settlement, Goodyear issued a detailed "Sit-Down Report" complaining that there had already been nineteen sit-downs in its Akron plants. Of these, six or seven were efforts to enforce production quotas, while one sought to control the pace of work on newly installed machinery. Four aimed at excluding nonstrikers from departments or choice assignments. Three were efforts to share the available work by reducing hours or eliminating overtime work. The remainder sought objectives ranging from pay for work lost during a previous sit-down to the reinstatement of a lead worker. The sit-down movement continued through 1936 as Akron workers staged at least fifty-two between the Goodyear settlement and the end of the year. Reflecting the high level of tension in the plants, these sit-downs were sometimes accompanied by threats of violence and physical assaults on non-union workers.²⁴

Perhaps the most outstanding feature of these early sit-downs was their effectiveness. Of the seventeen whose outcomes were reported by Goodyear, seven produced complete victory for the workers on the spot, three resulted in compromises, and five ended when management promised to meet promptly with the union committeemen; only two failed to achieve any result. "In most instances," the company summed up, "resumption of production has been accomplished only by substantial concessions on the part of management in the interest of peace and continuing production during the present peak period."²⁵

The experience of success gave many workers a new self-respect grounded in their identity as producers. "Now we don't feel like taking the sass

23. Goodyear Tire & Rubber Co., *What is Happening in Akron* (May 29, 1936) [hereafter *Goodyear Sit-Down Report*], in Germer Papers, reel 26, frame 369, 4–5; *ABJ*, July 14, 1936, 1, 6; *ABJ*, Aug. 7, 1936, 1.

24. *Goodyear Sit-Down Report*, 4–6; Nelson, *American Rubber Workers*, 209.

25. *Goodyear Sit-Down Report*, 1, 4–6. The quotation is at 1.

of any snot-nose college-boy foreman," commented one, while another declared: "Now we know our labor is more important than the money of stockholders, than the gambling in Wall Street, than the doings of the managers and foremen." The sociologist Melvin Vincent observed that the sit-down "makes for greater sociability among the workers," thus creating "a new solidarity among them." After a successful sit-down, the *United Auto Worker* reported "a totally new feeling" among the workers—a feeling that transformed them from "wage slaves" into "men."²⁶ As we have seen, the Dicks sit-downers expressed this sentiment on the spot, chanting lines from "*John Brown's Body*."

Given the sit-down's impressive rate of success, it is not surprising that the tactic soon spread to other industries and localities—most importantly the automobile manufacturing plants in and around Detroit, Michigan.

In the Occupied Factories: The Most Astonishing Feeling of Order

In early 1936, the automobile industry remained a stronghold of anti-unionism. Even without recognized unions, however, automobile workers were already taking advantage of every opportunity to legislate and enforce rules governing their work lives, especially the pace of production. "We did not have any recognition from the company," observed one activist. "We had our own recognition." Occasionally, auto workers staged brief sit-downs similar to the Akron rubber workers' early actions.²⁷

In December 1936, this sporadic activity suddenly gelled into a mass movement. Encouraged by President Roosevelt's smashing re-election victory, auto workers for the first time began to occupy entire facilities and to hold them until a settlement was reached. Along with plant-wide scope came plant-wide demands including union recognition. Week-long

26. Louis Adamic, "Sitdown," *Nation*, Dec. 5, 1936, 654 (quoting workers); Melvin J. Vincent, "The Sit-Down Strike," *Sociology and Social Research* 21 (July-Aug. 1937): 524, 527; *United Automobile Worker*, Jan. 22, 1937, 5; see also Sidney Fine, *Sit-Down: The General Motors Strike of 1936–1937* (Ann Arbor: University of Michigan Press, 1969), 122; Herbert Harris, *American Labor* (New Haven: Yale University Press, 1939), 289.

27. Oral History Interview of Nick DiGaetano by William A. Sullivan, University of Michigan—Wayne State University Institute of Labor and Industrial Relations, April 29 & May 7, 1959, 22. On the auto workers' legislation of production limits, see Brecher, *Strike!*, 204–5; David Gartman, *Auto Slavery: The Labor Process in the American Automobile Industry, 1897–1950* (New Brunswick: Rutgers University Press, 1986), 155–58; Mathewson, *Restriction of Output*, 62, 72, 78–80, 86–88. On the early auto sit-downs, see Brecher, *Strike!*, 206; Fine, *Sit-Down*, 116; Roger Keeran, *The Communist Party and the Auto Workers Union* (New York: International Publishers, 1980), 155; Fred W. Thompson and Patrick Murfin, *The IWW—Its First Seventy Years, 1905–1975* (Chicago: IWW, 1976), 166–69.

factory occupations at three major auto parts manufacturers fell short of winning union recognition, but triggered dramatic gains in union membership and influence. Emboldened by these successes, militant workers in Flint, Michigan proceeded to seize and hold two facilities of the General Motors Corporation, bringing on what has been called “the ‘most critical labor conflict’ of the 1930’s and perhaps in all of American history.” In January and February, workers in a growing list of industries followed their lead.²⁸

Having evicted their bosses, the strikers found themselves in a void of established authority. Without the benefit of hindsight, outsiders might have predicted a wide range of possible responses. Accustomed to occupying the bottom rung of a steep hierarchy, the workers might have felt disoriented and in need of direction. They could have resumed the role of subordinates either by calling upon the outside union hierarchy for guidance or by establishing their own authoritative hierarchy in the plant. Or they might have exulted in the individual freedom and refrained from establishing any order at all.

Instead, the strikers unhesitatingly took up the project of self-government. No sooner did they secure the premises than they began to form committees, make rules, and assign tasks. Their goal was to win the strike; they made no attempt to operate the plants. Reflecting the context of struggle, both the strikers and their audience often described the sit-down organization as “military,” referring to the posting of guards, the organization of patrols, and—at Chrysler—the playing of “Reveille” every morning. But the strikers’ governments bore no resemblance to a military hierarchy. In every shop for which information is available, workers chose the most direct form of democracy that appeared feasible under the circumstances. In Fisher No. 1, for example, a strike committee of about fourteen to seventeen members was elected on the basis of departmental representation, with a five-member executive board (or council) of the strike committee making moment-to-moment decisions. Each day, the strikers met as a body to review the decisions of these committees. This model of an elected strike committee overseen by frequent general meetings became the standard pattern for sit-down governance. At the Dodge Main plant, where a much larger number of strikers were spread out in a huge facility, the main governing body was the Chief Steward’s Committee. Even more

28. Walter Galenson, *The CIO Challenge to the AFL* (Cambridge: Harvard University Press, 1960), 134; see also Edward Levinson, *Labor on the March* (New York: University Books, 1938), 149; Melvyn Dubofsky and Warren Van Tine, *John L. Lewis: A Biography* (New York: Quadrangle/New York Times Book Co., 1977), 254; *Monthly Labor Review*, Aug. 1938, 360–62.

remarkable than the democracy, from a military point of view, almost every task was carried out by committee. Committees organized everything from defense preparations to recreational activities. They provided food, reading material, education, mail services, maintenance, and sanitation.²⁹

Instead of relying on ad hoc policymaking, the strikers enacted rules governing virtually every aspect of life in the occupied factories. Rules directed the performance of assigned duties, prohibited sabotage, specified mandatory sanitary practices (no littering; assist in daily clean-up; return dirty dishes to the kitchen; no foreign objects in toilets), provided for safety (no smoking outside cafeteria; no liquor or guns in the plant), set standards of decorum (no yelling; no talking in sleeping areas), and established security procedures (credentials required for all sit-downers; visitors to be searched).³⁰

Factory occupations ran up against social norms prohibiting the co-habitation of men and women not married to each other. Because of the need for support from the workers' spouses at home, this stimulated strong rulemaking. Where men made up a large majority of the strikers, they usually enacted total bans on women in the plant. Elsewhere, women and men occupied plants together.³¹ On some occasions women strikers nullified men-only rules by refusing to leave.³² Where women and men resided together in the plant, rules provided for separate sleeping quarters, sometimes with a matron in charge. Although a number of factory occupations were conducted primarily by women, there is no record of women finding it necessary to exclude men. "This is a woman's sit-down," explained a strike leader at one cigar factory, where five hundred women and thirty men were in residence. "The men are just around that's all."³³

29. See Hartley W. Barclay, "We Sat Down with the Strikers and General Motors," *Mill & Factory* (Feb. 1937): 33, 37, 40; Frank Marquart, *An Auto Worker's Journal: The UAW from Crusade to One-Party Union* (University Park: Pennsylvania State University Press, 1975), 77; Mary Heaton Vorse, "Detroit Has the Jitters," *New Republic*, April 7, 1937, 256, 257; Fine, *Sit-Down*, 157–58; Keeran, *Communist Party*, 168; Levinson, *Labor on the March*, 177–78; George Morris, "The Sit-Down and How It Grew," *New Masses* (May 4, 1937): 17, 18; Stuart Messan, "The State of Cadillac," *Workers Age*, Feb. 20, 1937, 2; Dodge Main News, March 14, 1937, 1; Steve Jefferys, *Management and Managed: Fifty Years of Crisis at Chrysler* (New York: Cambridge University Press, 1986), 72.

30. Fine, *Sit-Down*, 159–60, 165; Kirk W. Fuoss, *Striking Performances/ Performing Strikes* (Jackson: University Press of Mississippi, 1997), 56; Levinson, *Labor on the March*, 124–25, 177–78; Morris, "The Sit-Down and How It Grew," 17, 18.

31. See, Fine, *Sit-Down*, 156; Keeran, *Communist Party*, 156; *DN*, Feb. 19, 1937, 1; *DN*, Feb. 24, 1937, 4.

32. See *DN*, Mar. 3, 1937, 1, 4; Keeran, *Communist Party*, 169.

33. Morris, "The Sit-Down and How It Grew," 17, 18; *DN*, Feb. 18, 1937, 1 (quoting strike leader); see also *DN*, Feb. 19, 1937, 1, 4; *DN*, April 17, 1937, 2.

Factory occupations crossed race as well as gender lines. Although many black auto workers were wary of the UAW, some did join in the sit-downs. Unlike male-female issues, however, black-white problems did not stimulate any recorded lawmaking in the occupied shops. The UAW Constitution called for all auto workers to "unite in one organization regardless of religion, race, creed, color, political affiliation or nationality." On the whole, this principle appears to have been followed. The written record does not reveal any overt racial disputes among the sit-downers, and August Meier and Elliott Rudwick, who interviewed a number of black participants, attributed the lack of black support not to the behavior of white sit-downers, but to generalized, long-term concerns about union racism.³⁴

In at least two plants, legislative proposals were challenged on the ground that they violated the United States Constitution. Reading newspapers was an important activity for sit-downers, who received a wide variety of dailies on a regular basis. During both the General Motors and Chrysler sit-downs, strikers introduced proposals to ban the Communist *Daily Worker* from the plants. At Fisher Body No. 1, the assembled strikers voted down the proposal after strike chairman (and secret Communist Party member) Bud Simons argued that to censor the readings would violate the workers' constitutional rights. At Dodge Main, where the Communist presence was weaker, the Strike Executive Committee passed an ambiguous motion after a vigorous debate over free speech.³⁵

No sooner would sit-down strikers establish order in an occupied factory than it would begin to unravel. On New Year's Eve, the second night of the Flint Fisher Body No. 1 occupation, workers stretched and violated their newly enacted rules. "According to the flexible rules in vogue in the beginning as to obtaining leave," recalled *Flint Auto Worker* editor Henry Kraus, "almost everybody had some 'good reason' to go out that night, though actually bent on celebrating." Meanwhile, some of the remaining occupiers imbibed liquor and partied with two prostitutes smuggled into the plant. A timely assault by company guards would have ousted the strikers with little difficulty. At the Flint Cadillac plant, discipline had eroded by the third day of the strike. "Some workers are doing all the picket duty, others none at all," reported one striker, "and Big Slim has

34. Constitution of the International Union, United Automobile Workers of America, art. 2 (1936), *American Labor Unions' Constitutions* (Microform); August Meier and Elliott Rudwick, *Black Detroit and the Rise of the UAW* (New York: Oxford University Press, 1979), 34–35.

35. Fine, *Sit-Down*, 162; Keeran, *Communist Party*, 5, 151, 163; "Excerpts from Minutes of Dodge Strike Executive Committee (Official)," *Dodge Main News*, March 25, 1937, 2. According to Steven Jefferys, the *Daily Worker* was eventually excluded from the Dodge Main plant. Jefferys, *Management and Managed*, 78.

lost his voice pleading, cajoling and threatening.” Similar problems arose at Fisher Number 2.³⁶

To deal with these problems, the strikers added a judicial branch to their shop government. “Kangaroo courts” adjudicated rule infractions. The sit-downers sought the same distinctively legal capabilities for their courts as were claimed by the official courts. The Cadillac strikers elected a worker who had studied law to be their prosecutor and chose for their judge the “oldest sit-downer, a venerable Scot of 62 combining a ready wit and much dignity.” At Dodge Main, an especially skilled departmental court was called upon to try a complicated case that the main court could not handle. After the case “was adjusted satisfactorily to all,” the departmental court offered to “gladly assist any department which has no court or which might have a case that is too complicated to try.” In at least one plant, juries composed of workers determined guilt or innocence.³⁷

At the sentencing stage, kangaroo courts made an effort to fit the punishment to the crime. Dereliction of duty would be punished with double duty; failure to obey sanitary rules brought “a big clean up job for the culprit.” A minor technical infraction might lead to a joke sentence, like making a speech to the assembled body. Interference with the legal process brought prompt punishment. At Hudson two men were sentenced to four hours in the Brig and morning K.P. for “intimidating complaining witnesses against them.” Three strikers in Fisher Body No. 2 who failed to carry out their sentences were convicted of contempt of court and lashed with the judge’s belt. The capital punishment of the sit-down community was expulsion from the plant.³⁸

On the whole, the strikers’ legal order appears to have been effective. “The most astonishing feeling you get in the sit-down plants is that of ORDER,” enthused one striker. “The plant has been re-administrated.” Even hostile observers confirmed that the strikers maintained orderly, smoothly functioning communities in the plants.³⁹ Officials from the Michigan State

36. See Henry Kraus, *Heroes of Unwritten Story: The UAW, 1934–39* (Urbana: University of Illinois Press, 1993), 91–92; Messan, “The State of Cadillac,” 2; PP No. 6, n.d. (c. Jan. 27, 1937), 1.

37. Morris, “The Sit-Down,” 2; see also George Morris, “Sitdown Strategy,” *Daily Worker*, Mar. 3, 1937, 6; Levinson, *Labor on the March*, 177; *Dodge Main News*, March 19, 1937, 3; PP No. 6, n.d. (c. Jan. 27, 1937), 1; Hy Fish, “With the Striking Auto Workers in Fisher Body Plant No. 1,” *Socialist Call*, Feb. 13, 1937, 2; Fuoss, *Striking Performances/Performing Strikes*, 54.

38. Messan, “The State of Cadillac,” 2; Fuoss, *Striking Performances/Performing Strikes*, 55–56; see also Francis O’Rourke, “General Motors’ Sit-In Strikers’ Thoughts” (diary of Fisher No. 2 sit-down striker), Francis O’Rourke Papers, Wayne State Archives; *Hudson News*, Mar. 26, 1937, 7; PP No. 7, n.d., 2; Fine, *Sit-Down*, 160.

39. PP No. 7, n.d., 1. For examples of hostile observers acknowledging orderliness of

Department of Health inspected the Flint factories three times and commended the sit-downers on their condition. Breaches did occur; despite strenuous efforts to prevent sabotage, workers did inflict some damage on company property, including the "mutilating" of some car bodies in Fisher Body No. 1. However, the most widely publicized instance of alleged property destruction turned out to be false. According to repeated reports in the *Detroit News*, workers occupying the Newton Packing Company turned off the freezers, allowing \$170,000 worth of frozen meat to spoil. After the strikers were evicted by police, however, it was revealed that they had actually preserved the meat in good condition, a fact that received no publicity.⁴⁰

Confronting Official Law: Everything Hinges on the Hinges

In the auto parts sit-downs, workers had openly defied management orders to depart the plants. And on one occasion, they had defeated management attempts to infiltrate foremen and nonstriking workers into an occupied factory.⁴¹ It remained to be seen, however, whether they would adopt an equally defiant stance toward legally constituted public authorities.

The first test came not in the automobile or rubber industries, but at the Gordon Baking Company in Detroit. Workers occupied the plant in early December 1936 after management refused to negotiate with their union. The company obtained a court order of eviction, but the strikers repulsed the ensuing attack by constables and company guards armed with tear gas. From this experience, the *Detroit Labor News*, organ of the Wayne County Federation of Labor, drew the lesson that henceforth sit-down strikers "must prepare themselves to repel any assault upon them," including arming themselves "with tear gas and guns to protect their lives and persons."⁴²

The next confrontation dwarfed the Gordon Bakery fracas in scale, intensity, and historical significance. On January 11, 1937, police battled

strikers, see Edwin H. Cassels, Attorney for Bendix Products Corp., to Perkins, Nov. 28, 1936, Office Files of Secretary of Labor Frances Perkins, Records of the Department of Labor, Record Group 174, National Archives II, College Park, Md.; Barclay, "We Sat Down with the Strikers," 33.

40. See Fine, *Sit-Down*, 160, 166; *DN*, Mar. 10, 1937, 39; *DN*, Mar. 11, 1937, 2; *DN*, Mar. 13, 1937, 1; *DN*, Mar. 16, 1937, 4; Frank H. Bowen, Director, NLRB, Seventh Region, Sit-Down Strikes in the Detroit Area (typescript report, March. 25, 1937), Robert F. Wagner Papers, Georgetown University Special Collections, Washington, D.C., Labor Series, Box 5.

41. See Nelson Lichtenstein, *The Most Dangerous Man in Detroit* (New York: Basic Books, 1995), 70.

42. Fine, *Sit-Down*, 131; *DLN*, Dec. 18, 1936, 1; *DLN*, Dec. 18, 1936, 1.

strikers for several hours at Flint Fisher Body No. 2 before retiring from the field. The police used firearms and tear gas against the strikers, who retaliated by dousing the officers with a fire hose and bombarding them with a variety of projectiles including two-pound automobile door hinges. Fourteen strikers and supporters were wounded, mostly by gunshot, and eleven officers including Sheriff Wolcott suffered injuries, mostly head wounds from hurled objects.⁴³

This struggle, dubbed “The Battle of the Running Bulls” or “Bulls Run” (the Flint police being the “Bulls”) by the UAW, served notice that many sit-down strikers were willing to risk their lives to defend occupied plants and prevent production. They made no pretense of complying with principles of nonviolence. As Victor Reuther quipped, “everything hinges on the hinges.”⁴⁴ On the other hand, the strikers also declined the *Detroit Labor News*’s invitation to take up firearms. Their implicit rules of engagement—applied with impressive consistency in sit-downs across the country—permitted only the use of non-lethal force in defense against attacks by police or vigilantes on the occupied facilities.

As the sit-downs burgeoned in frequency, scope, and duration, the legitimacy of the tactic came under increasing fire. The General Motors Corporation placed this issue at the center of its strategy. It flatly refused to negotiate with the union until the workers vacated its plants. In taking this stand, GM claimed to be fighting for the rights of every car manufacturer, business, and even homeowner, for the sit-down was “striking at the very heart of the right of possession of private property.”⁴⁵ While employers swiftly united around this position, workers and unions struggled among themselves over the issue.

II. Split in the House of Labor

On New Year’s Eve, the second night of the Fisher Body sit-downs, John L. Lewis delivered a national radio address that set forth the CIO’s agenda for the coming year, an agenda in which law and legal institutions played central roles. Claiming to speak “for the millions of workers exploited by American industry,” he promised that 1937 would “witness an unparalleled growth in the numerical strength of labor in the heretofore unorganized

43. See Fine, *Sit-Down*, 1–8.

44. Fine, *Sit-Down*, 172; see also *Paper Makers’ Journal*, April 1937, 20, 22; *Seamen’s Journal*, Feb. 1, 1937, 27.

45. See *DN*, Jan. 3, 1937, 1; Dubofsky and Van Tine, *John L. Lewis*, 262; Fine, *Sit-Down*, 191 (quoting GM statement).

industries and the definite achievement of modern collective bargaining on a wide front." This growth would be attained despite the illegal efforts of corporate employers "to withhold the rights of a free people." Lewis left no doubt that in the interpretation of these rights, the labor movement would defer neither to the legal profession nor to the Supreme Court itself. He reserved special contempt for "high-powered corporation lawyers" who "cloaked" the employers' labor spying and stockpiling of munitions while maintaining that the Wagner Act was unconstitutional. In answer to the lawyers' constitutional contention, he called upon Congress to "brush aside" the Supreme Court.

Although Lewis's broadcast was triggered by the Flint sit-downs, the tactic itself occupied only one sentence in an oration that went on for twenty-five paragraphs. "The sit-down strike," he asserted, "is the fruit of mismanagement and bad policy towards labor," namely the refusal "to follow modern labor practice, or to obey the law of the land."⁴⁶ Thus, Lewis blamed employers for the sit-downs, but refrained from challenging their contention that the tactic was illegal.

Lewis's reticence reflected deep ambivalence about sit-downs and factory occupations within the labor movement. As the question of legality approached a resolution, unionists would divide into three distinct camps, each corresponding to a broader vision of labor's role in workplace law-making. Because each of these visions assigned lawmaking functions to specified institutions, and because each was intended to become operational immediately (without waiting for official recognition by corporations or the state), I call them "constitutions." The first, labor's progressive constitution, treated the sit-down as an unsavory but useful weapon in the struggle for collective bargaining, a form of joint employer-union lawmaking. The second, labor's corporate constitution, actively opposed it as an assault on the older tradition of unilateral craft union lawmaking. The third, labor's freedom constitution, proclaimed and justified a new fundamental right to stage sit-down strikes as a means of enforcing worker-made laws as well as workers' interpretations of official laws.

Labor's Progressive Constitution: The Sit-Down as the Lesser of Two Evils

With few exceptions, the top leaders of the CIO unions joined John L. Lewis in portraying the sit-down as a regrettable but understandable form of worker protest that would disappear once employers accepted the modern regime of collective bargaining established by the Wagner Act. Writing dur-

46. *United Mine Workers Journal*, Jan. 15, 1937, 3.

ing the rash of sit-downs in Akron in the spring of 1936, President Sherman Dalrymple of the Rubber Workers adopted the pose of a detached observer analyzing “the real reasons and underlying causes” of a phenomenon for which he had no responsibility. “Sit-downs do not occur in Plants where true collective bargaining exists,” he asserted and predicted that “the only way these sit-downs can be avoided in the future is through the proper application of all the rules of true collective bargaining in a spirit of fair play.” Other CIO officials followed suit, blaming employers for the sit-down tactic, but stopping short of defending its legality or morality.⁴⁷ CIO-style unionism was promoted as a form of insurance against sit-downs. “A C.I.O. contract is adequate protection,” promised John L. Lewis, “against sit-downs, lie-downs, or any other kind of strike.”⁴⁸

This position reflected the CIO leaders’ faith in government-sponsored collective bargaining, a faith they shared with progressive labor reformers. Lewis and Hillman were happy to use the factory occupations as a battering ram, but neither the sit-down nor the lawmaking from below that it sustained had any place in their long-run plans. They promoted joint employer-union lawmaking as a replacement for—not a supplement to—unilateral worker lawmaking. Lewis praised the Flint strikers for “carrying through one of the most heroic battles that has ever been undertaken by strikers in an industrial dispute,” but refused to speak on the merits of their tactic. During the period of the sit-down strikes, he personally addressed only one audience of sit-downers, and that was for the purpose of urging them to accept an agreement and refrain from further sit-downs.⁴⁹ Sidney Hillman, who had briefly called for open defiance of the courts after the Supreme Court struck down the National Industrial Recovery Act, was now too busy fostering close relations with the Roosevelt administration to comment on the sit-downs. “Let those who are raising the hue and cry against ‘sit-in strikes,’” summed up CIO Secretary Charles P. Howard, “recognize that of two evils passive resistance is the lesser.”⁵⁰

47. Sherman H. Dalrymple, “Sit-Down Strikes—An Editorial,” *United Rubber Worker*, May 1936, 12; Louis Adamic, “Siddown: II,” *Nation*, Dec. 12, 1936, 702 (quoting CIO Director John Brophy); Oil Workers International Union, *Proceedings of the Eighth Convention*, June 7–12, 1937, 62 (quoting CIO organizer Adolph Germer); International Union, United Automobile Workers of America, *Proceedings of the Second Annual Convention*, Aug. 23–29, 1937, 131 [hereafter *UAW Proceedings 1937*] (quoting ILGWU President David Dubinsky).

48. Galenson, *CIO Challenge*, 145 (quoting Lewis); see also *ABJ*, April 20, 1936, 19; *UNS*, April 12, 1937, 1.

49. Fine, *Sit-Down*, 170 (quoting Lewis); John M. Carlisle, “Lid Clamped on Sit-Downs,” *DN*, April 8, 1937, 1; *NYT*, April 8, 1937, 1, 18.

50. Charles P. Howard, “President,” *Typographical Journal*, Apr. 1937, 327.

Labor's Corporate Constitution: Sit-Downs as Trespass on Union Property

While CIO leaders assessed the sit-down in light of its impact on joint employer-union lawmaking, their counterparts in the American Federation of Labor had different concerns in mind. Like the CIO, the AFL promoted collective bargaining as the centerpiece of the industrial order. Unlike the CIO, however, the AFL sought to preserve a continuing role for unilateral labor lawmaking, and it was this consideration that would ultimately shape the Federation's position on the sit-down.

At first, the conservative craft unionists who dominated the AFL greeted the advent of the sit-down tactic with pragmatic—not moral or legal—concerns in mind. When the rubber workers began experimenting with the tactic, their union was affiliated with the AFL, so that the organizing gains won through sit-downs redounded to the benefit of the Federation. Accordingly, the AFL offered to send its general counsel, Charlton Ogburn, to Akron to assist in the defense of sit-down strikers charged with rioting. And in August 1936, the *American Federationist* reported favorably on the sit-down wave in France and concluded that the tactic was “nothing other than the due answer of the masses of workmen to the oppression and persecution suffered by them during the last few years.”⁵¹

It was not long, however, before the issue of sit-downs became entangled with the question of craft versus industrial unionism, an issue that most craft unionists treated as one of formal legality. The AFL considered itself to be *the House of Labor*, lodging *all* of the legitimate labor organizations of the United States. The Federation issued each constituent organization a charter specifying its jurisdiction. Once a union entity had been granted an AFL charter, it could use the charter for whatever purposes it wished. The jurisdictional entitlement remained fully valid even if the owning union made no effort to organize the workers, and even if the workers themselves preferred to join a different union.⁵²

Nearly all of the AFL's charters were framed on trade or craft rather than industrial lines. In the auto plants, machinists fell under the jurisdiction of the Machinists' Union, electricians under the Electrical Workers' Union, and so forth, leaving the UAW with the semi- and unskilled remainder.

51. *ABJ*, June 4, 1936, 19; *American Federationist*, August 1936, 834–37.

52. See Christopher Tomlins, *The State and the Unions: Labor Relations, Law, and the Organized Labor Movement in America, 1880–1960* (Cambridge: Cambridge University Press, 1985), 172; *AFL EC Minutes*, Feb. 8–19, 1937, 42–43; *Proceedings of Conference of Representatives of National and International Unions Affiliated with the American Federation of Labor*, May 24–25, 1937, 17–20.

Thus, the GM sit-downers, with their demand that the UAW be recognized as the exclusive representative for all trades, were in flagrant violation of AFL law. John P. Frey, leading AFL legalist and president of the AFL Metal Trades Council, promptly wired GM to convey the craft unions' "resentment towards any proposition which would give to the Automobile Workers the right to take away the [AFL] Union's prerogative to represent its own people."⁵³

To the CIO and its supporters, the notion that a craft union could experience "resentment" over intrusions on its "prerogative to represent its own people" was property-rights thinking run amuck. "The idea that certain jobs belong to them underlies the argument of many craft stand-patters," charged one CIO pamphlet. "They say that they have a right to wage-earners who do work over which they claim jurisdiction, some even talking of their property rights." Responding to AFL charges of "trespassing," the CIO's newspaper editorialized: "Millions upon millions of unorganized workers, parceled out before they were born, or before ever their industries came into existence in some cases, between craft unions of which they have never heard and which have never attempted to organize them, may well pray to be subjected to such 'trespassing.'" Most historians have endorsed the CIO view on the AFL unions' claims of entitlement. "Why a movement rooted as the AFL was in a narrow and particularistic section of the American working class should have developed so abiding a sense of exclusive legitimacy remains," summed up David Brody, "one of the great mysteries of American labor history."⁵⁴

The solution to this mystery lies in the fact that the AFL's jurisdictional law arose out of an earlier era when—far from a particularistic obstruction to organization—it was part of an ambitious plan for the creation of a comprehensive order of labor from the bottom up. As Samuel Gompers put it, workers could challenge "the superior forces of united capital" only by joining "all national and international unions in one grand federation, in which each and all trade organizations would be as distinct as the billows, yet one as the sea."⁵⁵ The components of this federation were to emerge not from top-down campaigns by the Federation, but from the self-organization of workers. When the craft workers in a particular trade formed a group, the Federation would provide assistance and—once the new organization was ready—bring it into the House of Labor as the ex-

53. AFL EC Minutes, Feb. 8–9, 1937, 56; Telegram from John P. Frey to H. W. Anderson, GM, Jan. 7, 1937, reprinted in *ibid.*, 43.

54. CIO, *The Case for Industrial Organization* (March 1936), 39; UNS, Feb. 10, 1936, 1; Brody, *Workers in Industrial America*, 27.

55. Tomlins, *The State and the Unions*, 32 (quoting Gompers).

clusive representative of the craft. As self-government spread throughout the trades, the Federation would become—or so Gompers promised—“the germ of a future state.” The AFL Executive Council explained that “by the organization of the workers upon the basis of their trades and callings and the Federation of the various unions in a grand universal union, with the autonomy of each guaranteed by all, will be found the practical realization of aspiration voiced by our lamented President Abraham Lincoln in the memorable sentence—‘The Government of the people, by the people, for the people.’”⁵⁶

Steeped in this tradition, Frey saw the CIO’s violation of AFL law—not the AFL’s disregard of industrial workers’ aspirations—as a blow against democracy. The CIO unions were in rebellion against policies “adopted by majority vote of the duly accredited delegates” at the AFL convention, the highest authority of the House of Labor. To Frey, the question of industrial versus craft unionism had “nothing to do with the issue” in the CIO expulsions. Rather, the sole question was whether the CIO and its constituent unions were dual organizations engaged in “organized insurrection” against the policies of the AFL “as they are contained in its constitution, and as they have been declared by conventions of the American Federation of Labor.”⁵⁷

By early February, Frey had come to see the sit-down tactic as an integral aspect of the CIO’s insurrection. With the GM strikers still occupying the plants, he condemned the sit-down as a ploy of “militant minorities” that was “deliberately intended to destroy self-government by trade unions.” A few weeks later, the AFL Executive Committee ordered an investigation of the tactic and scheduled a discussion for May. As new sit-down strikes proliferated, however, the AFL leadership could not wait to express a position. In late March, Green repudiated the “illegal” sit-down tactic on the ground that the public disapproved and negative public reaction would eventually lead to repressive legislation affecting not only the sit-down, but also the core rights to strike and picket.⁵⁸

Green’s statement had little effect on the ground. AFL unions continued to engage in sit-down strikes. During the week following Green’s statement, five out of nine sit-downs commenced in Detroit were backed by AFL unions. When Green suggested that Edward Flore, president of the Hotel and Restaurant Workers’ Union, should discipline his Detroit organization for staging sit-downs, Flore instead replied “‘God bless ‘em and full speed ahead.’” The Wayne County (Detroit) Federation of Labor,

56. *Ibid.*, 33–34; *ibid.*, 57 (quoting Gompers and AFL Executive Council).

57. *AFL EC Minutes*, Aug. 3, 1936, 4, 128, 129.

58. *DN*, Feb. 3, 1937, 2; *DLN*, March 5, 1937, 5; *NYT*, Mar. 29, 1937, 1.

under the leadership of Frank Martel, a socialist typographer, continued to support the sit-down strikers.⁵⁹

While the AFL leaders' opposition had little apparent effect on worker activists, it did contribute to a growing movement for government intervention to quell the sit-downs. Sit-down opponents quoted the AFL leaders to show that "American" unionists—as opposed to the "Communist" sit-downers—rejected the tactic. They escalated their campaign for government intervention. Chrysler bought a full-page advertisement condemning the capture of its plants as "a form of revolution." The *Detroit News* editorialized on page one that the "majestic law has been slapped in the face, knocked down and trampled on long enough!" Several days later, the front page featured a mug shot of a Retail Clerks organizer who had been arrested (but not charged) for passing a fraudulent check seven years before. Soon, mug-shots and police records of union organizers became a regular feature of newspaper coverage. Banner headlines reported the arrests of fifteen "Labor Hoodlums," all but one of whom were released a few days later without charge. A Gallup poll reported that most Americans favored outlawing the sit-down, with the principal reason being its nature as an illegal seizure of employer property.⁶⁰

The burgeoning law-and-order drive confronted union leaders with a difficult problem. Thus far, CIO officials had avoided taking a clear position on the legality of the sit-down. Fearing that an open endorsement of the tactic would anger both employers and the public, they tried to capitalize on sit-downs to win union recognition without accepting responsibility for the tactic. Now, however, the law-and-order campaign threatened to unleash the National Guard against the sit-downers. In this crisis, UAW President Homer Martin took the lead in asserting and justifying the existence of a legal right to stage a sit-down strike.

59. U.S. Congress, House, Special Committee on Un-American Activities, *Investigation of Un-American Propaganda Activities in the United States*, Hearings before a Special Committee on Un-American Activities, House of Representatives on H. Res. 282, 75th cong., 3d sess., 1938, vol. 2, 1614 (reprinting list of sit-downs in Detroit compiled by the Detroit Police Department) [hereafter *Detroit Police Sit-Down List*]; Levinson, *Labor on the March*, 180; Dorothy Sue Cobble, *Dishing It Out: Waitresses and Their Unions in the Twentieth Century* (Urbana: University of Illinois Press, 1991), 99 (quoting Flore); *NYT*, Mar. 24, 1937, 1 (quoting Martel).

60. *CR*, Mar. 17, 1937, 2338 (Sen. King); *DN*, March 13, 1937, 3 (advertisement); *DN*, March 14, 1937, 1; *DN*, Mar. 18, 1937, 1; Carlos A. Schwantes, "'We've Got 'em on the Run, Brothers': The 1937 Non-Automotive Sit Down Strikes in Detroit," *Michigan History* 56 (1972): 179, 195; *DN*, Mar. 19, 1937, 1; *DN*, Mar. 20, 1937, 5; *DN*, Mar. 23, 1937, 1; George Gallup, "America Speaks: Majority Would Outlaw Sit-Down Strikes," *DN*, Mar. 21, 1937, 10.

Labor's Freedom Constitution: The Right to Stage a Sit-Down Strike

Although he presided over the UAW at a time of historic victories, Homer Martin never won a spot in the pantheon of labor heroes. Historians have painted a remarkably uniform portrait of a powerful orator who lacked any capacity for administration or steady leadership. "He spoke with other worldly fervor; his language was colored by Biblical phrases," wrote B. J. Widick, an organizer with the Rubber Workers. "He made men feel that in organizing a union they were going forth to battle for righteousness and the word of God." But even Benjamin Stolberg, an admirer, joined Widick in portraying him as "a poor administrator" prone to "impulsive" actions and "injudicious" statements. In most accounts, the administrative failings overshadow the inspirational oratory: Martin wanders off on speaking tours while others do the hard work of union-building and collective bargaining.⁶¹ In the history of the sit-down strikes, however, Martin's oratory looms large; he was the only union leader of national stature to engage in a sustained, public defense of the right to stage a sit-down strike. The phenomenal appeal of Martin's speeches to local union activists suggests that he was playing the classic role of the charismatic leader: giving public voice to the hitherto suppressed views of his disempowered constituents. By contrast, John L. Lewis—the only other contemporary labor leader with rhetorical capabilities on Martin's level—systematically withheld his voice from workers engaged in struggle so that he could present himself to employers and government officials as a responsible intermediary.

As described by one reporter, Martin delivered his defense of the sit-down "in thunderous tones," resorting frequently to backwoods phrases.⁶² He drew his main themes from the narrative tradition of labor's freedom constitution, which cast ordinary working people as the agents of their own emancipation from industrial slavery. "When I come into a place like Pontiac and find a great, thriving union with all of its various phases of activity," he declared, "I feel a whole lot like Lincoln must have felt when he went into some of the places and found an emancipated group of slaves, living in the same territory as formerly, but under much different conditions."⁶³

By the time of the showdown in Detroit, Martin had pieced together

61. Irving Howe and B. J. Widick, *The UAW and Walter Reuther* (New York: Random House, 1949), 51; Benjamin Stolberg, *The Story of the CIO* (New York: Viking Press, 1938), 161–62; see also Dubofsky and Van Tine, *John L. Lewis*, 259; Bernstein, *Turbulent Years*, 508; Lichtenstein, *Most Dangerous Man*, 112.

62. *NYT*, Feb. 27, 1937, 1, col. 2.

63. Mr. Martin's Speech at Pontiac, Michigan, May 1, 1937 (typescript), Homer Martin Collection, Wayne State Archives, Box 3, at 1; see also speeches at Racine, Wisconsin and

a multi-pronged case for the right to stage a sit-down strike. He did not invent the arguments; rather, he wove together justifications developed by labor activists and a few legal intellectuals. On March 22, Martin wrote Governor Murphy an open letter urging him not to deploy troops against the Chrysler strikers. In addition to stating the union's position on the merits of the dispute with Chrysler, Martin's letter succinctly put forth the three main elements of the case for the right to stage a sit-down strike.

The effective right to strike. “First, it is our contention that the sit-down strike as such is a strike intended to stop production,” wrote Martin. “The stoppage of production through strike has been recognized for years as legal in the United States.” Here, Martin continued the labor movement’s struggle to transform the legally recognized right to strike—a narrowly circumscribed right of individual workers to combine in withholding labor—into an effective right to veto production. As A. F. Whitney of the Railroad Trainmen explained, the notion that employers were entitled to operate during strikes led inevitably to the “absurd and futile proposition that a working man’s right to strike means nothing more than his right to give up his job to a ‘scab.’” On this view, there was no need to formulate a new right to stage a sit-down strike. “If there is any validity in strikes at all,” reasoned Martin, “the sit-down is perfectly legal.”⁶⁴

Martin did not bother to specify a legal source for the right to strike, but his narrative of freedom and slavery pointed toward the Thirteenth Amendment’s prohibition on slavery and involuntary servitude—the traditional source for labor’s claimed constitutional right to strike. Goodyear Committeeman E. L. Howard made this connection explicit, claiming that the freedom to sit down was “my constitutional right, that no man shall be held in slavery or against his will.”⁶⁵ Most worker activists simply assumed that there was a right to strike and focused their argument on extending it to cover the sit-down.

Newark, New Jersey, also in Box 3. On the narrative tradition of labor’s freedom constitution, see James Gray Pope, “Labor’s Constitution of Freedom,” *Yale Law Journal* 106 (1997): 978–80.

64. “Text of Martin Letter to Murphy on Chrysler Strike,” *NYT*, Mar. 23, 1937, 16; A. F. Whitney, President, Bro. of Railroad Trainmen, “Thinking Clearly on Property Rights,” *Railroad Trainman*, March 1937, 136–37; *DN*, Mar. 21, 1937, 10 (quoting Martin); see also *NYT*, Feb. 27, 1937, 1, col. 2.

65. United Rubber Workers, *Proceedings of the First Convention*, Sept. 15–20, 1936 [hereafter *URW Proceedings 1936*], 425. On the role of the thirteenth amendment in labor’s constitutional thinking, see William A. Forbath, *Law and the Shaping of the American Labor Movement* (Cambridge: Harvard University Press, 1991), 136–39; Pope, “Labor’s Constitution of Freedom,” 962–66; Pope, “Thirteenth Amendment,” 15–24.

Why was the sit-down necessary to make the right to strike effective? Because a strike could succeed only by stopping production, and the only other way for unskilled workers—who could easily be replaced—to halt production was the mass picket line, which was too vulnerable to suppression. “Should a worker leave his job behind and depart from a plant and his skill is not such that his absence stops production,” explained one union journal, “then the corporation brings in guards, strike-breakers, poison gas and machine guns.”⁶⁶ With the picket line broken, the “strikers are just men out of jobs” and the “strike staggers on awhile, collapses and the union dies,” complained the *Summit County Labor News*. “Out of this fact has grown the sit-down strike.” Far from a novel and radical tactic, then, the sit-down was an incremental response to changed conditions—“merely the transfer of the picket line into the plant.”⁶⁷

Just as the sit-down was nothing more than an updated version of old tactics, so was the employers’ property argument against it merely a new iteration of old ideas. “[T]he same argument has been used against OUTSIDE PICKETING also,” observed the *Flint Auto Worker*, “and has frequently been given as an excuse for the issuance of strike-breaking injunctions!” Unionists suspected that employers opposed the sit-down not because of some special affront to their property rights, but because “the strikes were so effective and they were unable to operate their plants with strike-breakers.” Indeed, if property were the real concern, then employers “should feel grateful for the technique of the sit-down strike [because] the worker is protecting his job and consequently will protect the appliances that make that job possible.” As for the charge of sit-down violence, it made no sense in light of the alternative. “Society owes it to itself to bring before its eyes in sharp contrast,” urged CIO organizer Leo Krzycki, the “bitter, bloody conflict” on picket lines in the coal fields and around the steel mills compared to the automobile sit-downs, “where no property has been damaged and no lives have been lost.”⁶⁸

66. *Paper Makers’ Journal*, Feb. 1937, 25; see also *Flint Auto Worker*, Jan. 12, 1937, 8; Wyndham Mortimer, “History of the Sit-Down Strike,” *United Auto Worker*, Jan. 22, 1937, 3.

67. *SCLN*, Feb. 12, 1937, 1; *PP* no. 8(1), n.d. [c. late Jan. 1937], 2; *American Teacher*, May-June 1937, 26; *UNS*, Feb. 17, 1936, 1; *The Hosiery Worker*, Mar. 10, 1939, 2; *NYT*, Feb. 27, 1937, 1; Martin’s Speech at Newark, New Jersey, Feb. 26, 1937 (typescript), Homer Martin Collection, Box 3, at 6.

68. *Flint Auto Worker*, Jan. 12, 1937, 8; see also *SCLN*, Feb. 12, 1937, 1; Substitute For Resolutions Nos. 203 and 238 Sit-Down Strikes, *UAW Proceedings* 1937, 189–90; *DLN*, March 12, 1937, 8; *The Lamp Maker* (newspaper of UAW Local 146), April 15, 1937, 4; Letter from Raymond McCoy to Editor, *DN*, Jan. 31, 1937, 22; *UAW Proceedings* 1937, 10–11 (quoting Krzycki).

As the sit-down controversy escalated, it became apparent that unionists could not derail the employers' property rights argument merely by downplaying it. Politicians, the daily press, and other participants in public debate increasingly accepted the employers' claim that the sit-down constituted an illegal trespass. In his second argument, Martin embraced the concept of property and turned it against the employers.

The workers' communal property right to sit down. Martin wrote Murphy that the "right to strike involves the property right of the worker's job, which is, in our opinion, the most vital property right in America." He predicted that courts and legislatures would soon recognize the right of workers to defend this property right by occupying the job site. This argument reflected the traditional strikers' view that people who worked during strikes were "stealing" their jobs.⁶⁹ After visiting Flint, *New York Times* reporter Louis Stark joined other observers in reporting a hazily defined but deeply embedded property rights consciousness among the workers: "Talks with the sit-down strikers made it clear to me that they felt they had a property in their jobs. They did not use legal terms in giving expression to their views but their meaning was unmistakable. 'Our hides are wrapped around those machines,' was the way one man in the Fisher Body plant expressed it."⁷⁰

At the same time that they claimed a "property" right to sit down, however, unionists argued that "human rights" should take precedence over property rights. "Clearly, the issue involved in this whole controversy," declared Martin, "is whether or not pure property and profit rights shall supersede and preclude the consideration of human rights," namely "the inalienable rights of all workers, to life, liberty and the pursuit of happiness." Angrily responding to the Chrysler injunction, the *Dodge Main News* roared: "'Plaintiff's valuable property rights!!!—The United Auto Workers say, 'HUMAN RIGHTS OVER PROPERTY RIGHTS!!!'"⁷¹

The *New York Times* pointedly observed that the property rights justification for the sit-down was "most aggressively asserted by precisely those persons who used to regret the very existence of 'property rights as opposed

69. "Text of Martin Letter," 16; *NYT*, Feb. 27, 1937, 1, col. 2. On the roots of this claim, see John Fitch, *The Causes of Industrial Unrest* (New York: Harper & Bros., 1924), 221–23; Sidney and Beatrice Webb, *Industrial Democracy*, 559–63 (London: Longmans, Green & Co., 1902).

70. Louis Stark, "Sit-Down," *Survey Graphic*, June 1937, 316, 320; see also William Allen White, "Sit-Down: Harbinger of a New Revolution?" *DN*, April 5, 1937, 1.

71. *NYT*, Mar. 30, 1937, 13; *Dodge Main News*, March 11, 1937, 3; see also J. B. Liven-good, "Human Rights Have Precedence," *Typographical Journal*, April 1937, 338; *Paper Makers' Journal*, April 1937, 20–21.

to human rights.'" But to unionists, there was no inconsistency in claiming property rights while simultaneously trumpeting the superiority of human rights over property rights. The worker's property right to his job was a "human property right," explained A. F. Whitney. "Unfortunately, in the past, the resources of the state have been too largely employed to protect, as against human property rights, an entirely different kind of property right—those of the so-called 'propertied classes.'" Unionists disaggregated the concept of property into distinct functions or origins, some of which had "human" value while others did not. First, unlike corporate property rights, the worker's property right concerned an asset that was essential to human survival. "It's worth more than stocks and bonds and machinery; it's the only right that he has, by which he feeds his family, takes care of his children, provides income to take care of his home," explained Martin. "Anybody who takes his job takes his home and deprives him of his very life." Prefiguring arguments that would later be accepted by courts and legal scholars in other contexts, unionists pointed out that—as a practical matter—a worker's job was his most valuable asset: "Is it any wonder then that the worker who has no unmortgaged tangible property, who does not own stocks or bonds, and who may have a few household possessions, an insurance policy, or even a small savings account, will figure that his 'job' is his property and his only title to economic income?"⁷²

Next, unionists noted that workers, unlike corporate magnates or imported strikebreakers, were immediately and personally connected to the machines that they operated and the jobs they performed. In response to the charge of trespassing, the *Punch Press* snarled: "SO? THE WORKERS WHO SPEND HALF THEIR LIVES IN THE PLANTS, SWEATING OUT THE PROFIT FOR SLOANS WHO NEVER COME NEAR A SHOP, HAVE NO RIGHT TO BE IN THE SHOPS!" Echoing Hegel and prefiguring modern scholarship on property and personhood, unionists argued that by using the machinery productively, workers earned a property right: "After all, the property may belong to the company, but there is something else inside these plants that the workers have earned by years of sweat and toil—and that is THEIR JOBS!" Moreover, the requirements and the experience of performing his job adapted the worker and his conditions of life to that particular job. "These workers, in the great majority of

72. *NYT*, Mar. 30, 1937, 22; Whitney, "Thinking Clearly on Property Rights," 136–37; *Flint Auto Worker*, Jan. 12, 1937, 8; Speech Given by Mr. Martin to the Sit-Down Strikers in the Dodge Plant, Detroit, March 15, 1937, Homer Martin Collection, Box 3, at 3–4; "Text of Martin Letter," 16; *United Automobile Worker*, May 8, 1937, 5; *Paper Makers' Journal*, April 1937, 20; cf. *O'Brien v. O'Brien*, 66 N.Y.2d 576, 489 N.E.2d 712, 498 N.Y.S.2d 743 (Ct. App. 1985) (marital property interest in professional education); C. Edwin Baker, "Property and Its Relation to Constitutionally Protected Liberty," *University of Pennsylvania Law Review* 134 (1986): 741, 745–46.

cases, have spent years in training their hands and minds to their work," observed the *United Auto Worker*, "and in short, have so arranged their lives in order that the plants and machinery of an employer can yield the owner a profit and a living for themselves."⁷³ This "investment in industry" at a minimum elevated the claims of striking workers over those of imported strikebreakers. "It is the height of absurdity to contend that a worker who may have traveled hundreds of miles in quest of the job, or sustained disfigurement or injury in the course of it, or even contributed a substantial part of his strength and energy to his employers enterprise," inveighed one local union resolution, "has the same status as a mischievous stranger or interloper."⁷⁴

While pumping up the property rights of workers, unionists did their best to deflate those of employers. A. F. Whitney found it "astounding" that opponents of the sit-down were analogizing GM's property rights to those of a homeowner. "Mr. Sloan's property right in his own home, which the common law has always held as his castle, is a property right of the highest order of human value," he wrote. Corporate property, on the other hand, could be no one's "castle" because the exclusion of others would render it useless: "His corporation's property rights in the factory have value only as the worker's property right in the job is preserved and respected." This argument shaded into old-style producerism. Sit-down supporters quoted Lincoln on the priority of labor over capital and pointed out that stockholders and bondholders created no value while the workers' labor made their property right the one "which produces wealth and which means more to national prosperity than any other property right in existence."⁷⁵

The workers' claimed property right was triggered solely by collective action. Nobody claimed the right to "strike" as an individual and then return to the job. Though framed as a property right, then, it bore little relation to traditional notions of individual property rights. On the contrary, it belonged to the class of "communal rights"—rights "to act together, to engage in activity commonly and most effectively undertaken by groups."⁷⁶

73. *PP* No. 8(1), n.d. [c. late Jan. 1937], 2; *Flint Auto Worker*, Jan. 12, 1937, 8; *SCLN*, Feb. 12, 1937, 1; *American Teacher*, May-June 1937, 26; *CR*, Mar. 23, 1937, 2642 (Rep. Bernard); *United Automobile Worker*, May 8, 1937, 5; cf. Joseph Singer, "The Reliance Interest in Property," *Stanford Law Review* 40 (1987): 611, 711–18; Margaret Jane Radin, "Property and Personhood," *Stanford Law Review* 34 (1982): 957.

74. Local 157, UAW, Resolution on Sit-Down Strike Legislation (typescript), FMCS Records, RG 280, Entry 14, Box 419; see also *DLN*, April 9, 1937, 1; *United Automobile Worker*, May 8, 1937, 5.

75. Whitney, "Thinking Clearly on Property Rights," 136–37; *DN*, Feb. 11, 1937, 22; *DN*, April 4, 1937, 8; "Text of Martin Letter," 16; *Paper Makers' Journal*, April 1937, 20.

76. Staughton Lynd, "Communal Rights," *Texas Law Review* 62 (1984): 1417, 1423–24.

The sit-down as statutory and constitutional self-help. Finally, Martin reminded Murphy that the Chrysler workers had occupied their factories only after the company violated the Wagner Act by refusing to recognize and bargain with their union, which—unlike the Flint local two months previously—actually represented a clear majority of the company’s employees. Thus, the workers had “used the sit-down method of strike in an effort to establish what was their legal, constitutional and civil right, and to eradicate the impossible working conditions from which they suffered.” Here, Martin echoed arguments made by John L. Lewis and other adherents of labor’s progressive constitution. Unlike Lewis, however, Martin and other open proponents of the sit-down accepted responsibility for factory occupations and publically defended the right of workers to engage in statutory and constitutional self-help. “You[r] threat of violence would be better directed against violators of the national labor relations act,” wrote Chrysler Local 3 to Murphy. “We mean to stay until they observe the law.”⁷⁷

Despite all these arguments, the few courts that had ruled on the sit-down issue by the time of the Chrysler confrontation had emphatically pronounced the tactic illegal.⁷⁸ In the short run, at least, the fate of the sit-down movement would hinge less on argument than on action.

III. Establishing and Shaping the Right to Sit Down

By mid-February 1937, there was a growing gap between official law and social practice. On the 11th, the General Motors strike was settled on terms favorable to the union, triggering an exuberant celebration in Flint. In a speech to the victorious strikers, Socialist Party leader Norman Thomas gloated that despite all the lawyers’ talk about the illegality of sit-downs, GM had been forced to abandon its principled commitment not to bargain until after the workers left the plants. GM “signed on the dotted line while you were sitting there,” he observed. “It looks as if they have actually

77. “Text of Martin Letter,” 16; *NYT*, Mar. 30, 1937, 13; Local 3, UAW to Frank Murphy (n.d., c. March 22, 1937), Kraus Papers, Reel 5, Wayne State Archives; Pope, “Thirteenth Amendment,” 78–80 (citing additional sources).

78. See *The Oakmar*, 20 F. Supp. 650 (D. Md. 1937); *The Losmar*, 20 F. Supp. 887 (D. Md. 1937); *Plecity v. Local No. 37, International Union of Bakery and Confectionery Workers of America*, Superior Ct., Los Angeles County, Cal., 4 U.S.L.W. 898, C.C.H. 16357; *General Motors Corp. v. International Union, United Automobile Workers of America*, Cir. Ct. Genesee County, Mich., 4 U.S.L.W. 678 (1937), C.C.H. 16354; *Chrysler Corp. v. International Union, UAW*, Cir. Ct., Wayne County, Mich., 4 U.S.L.W. 858 (1937), C.C.H. 16358; *Apex Hosiery Co. v. Leader*, 90 F.2d 144 (3d Cir. 1937), *appeal dismissed*, 302 U.S. 656 (1937).

recognized the sitdown." One week later, about one hundred sit-down strikers at the Fansteel Metallurgical Corporation in Waukegan, Illinois, repulsed an attack by one hundred forty police officers after a two-hour battle despite the officers' extensive use of tear gas bombs.⁷⁹ The police had yet to clear an occupied factory against resistance.

Despite these successes, the sit-down movement was in a dangerous position. The workers' justifications for the right to sit-down had yet to prevail either in a single court or before the bar of public opinion, leaving them in the position of openly defying the law. Moreover, the sit-down tactic caused problems for unionists as well as corporations. A few sit-downers in a key department could force thousands of their co-workers out on strike. While staving off the police at the factory gates, workers struggled to solve these problems and shape a viable right to sit down.

Defiance of Old Traditions, of Legal Restraints, and a Hostile Judiciary

The first problem was how to sustain resistance in open defiance of law. Local union activists turned to history for inspiration. "It was once unlawful to picket," recounted one. "Every right, every liberty, every privilege . . . has been won . . . by men who dared to defy some law—by men who dared to be 'illegal.'" It was workers like the sit-down strikers who "in defiance of old traditions, of legal restraints and a hostile judiciary, established the right for labor to organize, to strike, to boycott and to picket," and would "yet establish their right to sit down, stand up or roll over, as suits their fancy, in the plants which the brain and brawn and genius of the working class have brought into being." These stories served not only to justify defiance, but also to stiffen workers' resolve. "Destroy fear of jail," the UAW advised its organizers, "by recalling the prison terms of William Penn, John Brown and other famous Americans."⁸⁰

Since law was dynamic, disobedience of the law as it existed at any particular moment carried no necessary connotation of disrespect for law. "[I]f we are *lawless elements*, as you have falsely whined—Then we are such, only, in the progressive sense that we are determined to revolutionize the present law standards of conventions." Workers' rights, including the right to sit down, invariably "must be established outside the courts before they

79. PP No. 16, Feb. 12, 1937, 2; *Chicago Daily News*, Feb. 19, 1937, 1, 4; *In re Matter of Fansteel Metallurgical Corporation*, 5 N.L.R.B. 930, 942–43 (1938).

80. *Voice of Labor* (newspaper of UAW Local 206), March 27, 1937, 4; Livengood, "Human Rights Have Precedence," 338; Brookwood Labor College, *Pointers for Organizers* (brochure), reprinted in Barclay, "We Sat Down with the Strikers," 48; see also *DN*, Mar. 21, 1937, 10.

will be recognized within the courts." Official law might deny that a worker had a property right in his job, but "government, management and workers, dealing with a practical problem, act as if he did," and sooner or later the law would come into line with the practice. After factory occupations helped the UAW win contracts with auto makers and parts manufacturers, Flint strike leader Kermit Johnson claimed that the right to sit down had been "already established in the struggle of auto workers during the past year."⁸¹

A Recognized Weapon of Last Resort in Industrial Controversy

In the spring of 1937, Johnson's claim did not appear entirely far-fetched. It was true that polling results indicated broad public disapproval of the tactic. But by demonstrating their determination to hold the occupied factories, the strikers had tested the intensity of that sentiment. And according to a poll conducted by *Fortune* magazine, a large majority of the American people was not prepared to countenance the suppression of sit-down strikes if bloodshed were involved. Even business executives were divided on the question.⁸² This posed a dilemma for the forces of law and order. There was strong public support for action against sit-downers in the abstract, but the only method that could reliably break a determined occupation was violent eviction, and violent eviction ran the risk of bloodshed.

It was not necessary, then, for labor's allies to advocate legalizing the sit-down in order to assist in its practical acceptance on the ground. Individual leaders of the ACLU, for example, conceded that the sit-down was a "trespass" on company property. In its organizational activity, however, the union focused solely on protecting sit-downers against ejection. "The Union has constantly opposed any resort to violence and bloodshed to eject 'sit-down' strikers," recounted the annual report for 1936–37, "and has insisted on the processes of negotiation as a means to industrial peace." Also helpful to the strikers was the Lafollette subcommittee of the Committee on Education and Labor of the United States Senate. The subcommittee took no position on the question of legality, but responded to the

81. Draft of Plymouth Local 51 Strike Bulletin, Kraus Papers, Reel 5, Wayne State Archives (1st quotation); *Paper Makers' Journal*, April 1937, 20; Local 157, UAW, Resolution on Sit-Down Strike Legislation (typescript), FMCS Records, RG 280, Entry 14, Box 419 (second and third quotations); *Typographical Journal*, Feb. 1937, 103; Luigi Antonini, "Apropos 'Sit-Downs,'" *Justice*, April 15, 1937, 6; Resolution No. 238, Submitted by Kermit Johnson, Local No. 156, Flint, Mich., *UAW Proceedings 1937*, Appendix III, 97.

82. See *Fortune*, July 1937, 96 (reporting that only 20.1 percent of all respondents and 32.9 percent of executives expressed the opinion that sit-downs "should be stopped, even if bloodshed is necessary").

Flint sit-down by sending investigators to expose the espionage activities of General Motors, thereby undermining efforts to evict the strikers.⁸³

As workers repeatedly demonstrated their willingness to risk bodily harm defending occupied plants, some mainstream commentators and government officials began to admit the possibility that the sit-down was destined to become an accepted tactic in the new industrial order. Three prominent legal realists, Dean Leon Green of the Northwestern University School of Law, SEC Chairman James Landis, and Yale Law Professor Abraham Fortas, went the farthest. Green—a Texan who, like Homer Martin, had been trained as a preacher—defended the sit-down as the workers’ way of protecting their interest in what he called the “common enterprise” of labor and capital. Landis predicted that the fate of the workers’ claimed property right to sit down might depend “on the capacity of our law to devise new concepts and mechanisms to meet the needs out of which this type of economic pressure has been born.” Fortas agreed, opining that—in view of the adaptability of law—the sit-down might not be illegal.⁸⁴

After months of inveighing against sit-downs, the Republican *Akron Beacon Journal* suddenly shifted gears and included sit-downs along with strikes and lockouts among the “recognized weapons of last resort in industrial controversy.” The problem with the sit-down “epidemic,” editorialized the *Journal*, lay simply in the fact that “none of the sitdowns have been authorized in a regular business meeting” of the union. By early 1937, sit-downs had become so routine and so peaceful in Akron that, according to Daniel Nelson, the residents were no longer “particularly perturbed” at the phenomenon. Even in Detroit, after weeks of broadside attacks on the tactic by Mayor Couzens, Assistant Detroit Corporation Counsel James R. Walsh found himself charged with the task of developing policies to distinguish “legitimate” sit-downs from those that were ploys in a “muscle game.”⁸⁵

This task would not be easy. “How would such a law define the seizure

83. See Roger Baldwin, “Organized Labor and Political Democracy,” in Roger Baldwin and Clarence Randall, *Civil Liberties and Industrial Conflict* (Cambridge: Harvard University Press, 1938), 37; American Civil Liberties Union, *Let Freedom Ring: The Story of Civil Liberty, 1936–1937* (New York: ACLU, 1938), 25, 75; Fine, *Sit-Down*, 176; Jerold S. Auerbach, *Labor and Liberty: The LaFollette Committee and the New Deal* (Indianapolis: Bobbs-Merrill, 1966), 110–15, 129–30; Stephen H. Norwood, *Strike-breaking and Intimidation: Mercenaries and Masculinity in Twentieth-Century America* (Chapel Hill: University of North Carolina Press, 2002), 205.

84. Leon Green, “The Case for the Sit-Down Strike,” *New Republic*, Mar. 24, 1937, 90; *NYT*, Mar. 21, 1937, 18; *NYT*, June 15, 1937, 19 (paraphrasing Fortas).

85. *ABJ*, July 16, 1936, 4; Nelson, *American Rubber Workers*, 214; Eisenberg, “Government Policy,” 67, citing *NYT*, Mar. 20, 1937, 4.

of property for ‘collective bargaining’?” demanded the *Detroit News*. “What practical limits could it place on the right thus conferred on labor, and on labor alone?” If workers enjoyed a property right in their jobs, as the sit-downers contended, then wasn’t it ironic—commented the *New York Times*—that “it is the sit-down strike, initiated by minorities, which has repeatedly denied employment to the majority of the workers in seized plants.”⁸⁶ To the *News* and *Times* editors, these were unsolvable problems, raised to demonstrate the impossibility of legalizing the sit-down. Even as they wrote, however, tentative solutions were emerging both as informal summations of practice on the ground and as products of formal union lawmaking and collective bargaining.

Democracy Means Majority Rule

The sit-down strike posed difficulties for unionists as well as employers. Because most segments of the mass production process were interconnected, a sit-down in one department could idle other departments whose workers had neither been consulted nor even informed of the protesters’ objectives. Moreover, for better or worse, sit-downs organized from below undermined the efforts of union leaders to present an image of respectability to employers and the public. In the summer and fall of 1936, the Goodyear Corporation exposed these problems in a highly successful public relations campaign, threatening to move production and jobs to outlying factories because of Akron’s unruly workers. In mid-July, Mayor Schroy declared that the city was “absolutely through with sit-downs,” and URW officials began talking about bringing them to an end. At the peak of this counter-offensive, Local 2 passed a resolution calling on “all individuals, groups or departments to present their grievances to our union representatives and continue at work” pending a resolution.⁸⁷

But suppression was not the only possible union response to the difficulties posed by sit-downs. Another approach was to take control of the new tactic by legislating rules to enhance its effectiveness and prevent abuse. Even as Local 2 tried to bring wildcat sit-downs under control, it affirmed that the tactic had “proven to be one of the most powerful weapons of organized labor” and proposed that the union legislate on the issue. Every unionist to leave a written record of thoughts on this issue agreed that the

86. *DN*, Jan. 28, 1937, 22; *NYT*, Mar. 30, 1937, 22.

87. Nelson, *American Rubber Workers*, 210–11; *ABJ*, April 20, 1936, 19; U.S. Senate, Subcommittee of the Committee on Education and Labor, *Hearings Pursuant to S. Res. 266, Violations of Free Speech and Rights of Labor*, 74th–76th Congs., 1936–1940, Part 45, Exhibit No. 7821, dated July 21, 1936, at 17072 (resolution of Goodyear Local 2).

key to solving this problem was the imposition of majority control on sit-downs. "Democracy means majority rule, not minority rule," explained UAW Vice President Wyndham Mortimer. "And when a small minority of workers disrupt production by a departmental sit-down, they are in effect determining the welfare of many thousands of their fellow workers who were not consulted."⁸⁸

There was disagreement, however, about whether to place the decision at the local or international level. At the URW convention in September 1936 this issue sparked a sharp controversy. Goodyear Local 2 argued that requiring authorization by the International Executive Board "involves too much red tape and undue delay for best results" and therefore proposed "giving the authority to the Executive Board of a Local Union to sanction a sit-down where, in their opinion, it is justified." But URW Vice President Thomas Burns argued forcefully against the entire enterprise of legislating about the sit-down strike. Like John L. Lewis and other CIO leaders, he viewed the sit-down as a public embarrassment. "The amount of adverse publicity we would get over taking any resolution and passing it should be avoided," he argued. E. L. Howard, an influential Goodyear committeeman, responded. What Burns saw as an issue to be swept under the rug, Howard saw as a historic turning point for the labor movement. "The sit-downs today, if properly authorized and supported, are as effective in proportion to a strike as a Thompson machine gun is to an old musket," he charged, "and you don't have the courage to take hold and lead." But the sit-down resolution—already watered down in committee—was defeated by a margin of 35 to 27.⁸⁹

The issue also sparked sharp debate in the UAW. At the 1937 convention, local activists complained that the existing requirement of national approval for all strikes involved too much "red tape" and proposed resolutions placing control at the local level. UAW Vice President Wyndham Mortimer agreed that local authorization would solve the problem, but failed to support the resolution. Homer Martin opposed the resolution, arguing that because the union had been called upon to pay large legal fees on behalf of arrested sit-downers, it must be given a veto. He and UAW Secretary-Treasurer George Addes promised that authorization would be promptly granted under the current expedited procedure, which allowed for approval by the president pending board ratification. After these as-

88. *URW Proceedings* 1936, 440 (resolution submitted by Goodyear Local 2); W. Mortimer, "Need of Caution in Sit-Downs," *United Auto Worker*, April 7, 1937, 3.

89. *URW Proceedings* 1936, 440 (resolution submitted by Goodyear Local 2); *ibid.*, 422 (Burns); *ibid.*, 424 (Howard); *ibid.*, 429; James Keller, "The Rubber Front in Akron," *The Communist*, Mar. 1937, 241, 242.

surances, the existing procedure was retained on a voice vote. In place of the failed proposal for local control, the delegates adopted a resolution endorsing the stay-in strike as “an effective weapon against employers who refuse to recognize the moral and legal rights of the workers to collective bargaining” and as “labor’s most effective weapon against the autocracy of industry.”⁹⁰

Neither the URW nor the UAW, then, enacted national legislation on the specific issue of sit-down strikes. The constitutions of both unions required international approval of all strikes, but these provisions had already proven ineffective in controlling sit-downs. In some areas, local unions stepped into the breach. As we have seen, Goodyear Local 2 passed a resolution barring unauthorized sit-downs. Goodrich Local 5 took a less restrictive approach, requiring that workers notify the local leadership before initiating a sit-down, and that after a sit-down had closed down the entire plant, a local union meeting would be held “to decide whether they shall return to work.” Local 155 of the UAW, which had conducted a week-long factory occupation, enacted a shop rule requiring that any workers “desiring to take decisive action” first obtain authorization from the shop stewards’ committee and the local union meeting.⁹¹ This legislation addressed only the procedural question of who had to be consulted before staging a sit-down, leaving the scope of the emerging right to be developed in practice.

Scope of the Emerging Right

Some limiting principles flowed directly from the justifications advanced in support of the claimed right. If, as unionists argued, the sit-down was merely an exercise of the workers’ right to strike, then employers should suffer no more injury than they would in the event of an effective (meaning effective at withholding labor, but not necessarily victorious) traditional strike. Although workers never formally enacted this principle in union law, it was evident in a number of practices and shop rules. First, in contrast to the Italian factory occupations of 1920, American workers never attempted to operate employer facilities for their own gain.⁹² This comported with

90. See *UAW Proceedings* 1937, 225; *ibid.*, Appendix III, 87 (Resolution submitted by Local No. 217); *ibid.*, Appendix III, 97 (Resolution submitted by Kermit Johnson, Local No. 156); *ibid.*, 226–28 (Mortimer, Addes & Martin), 189–90 (text of enacted resolution).

91. Minutes of the 90th Regular Meeting, Feb. 7, 1937, Local 5 Minutebook, 21, 24, Local 5 United Rubber Workers Collection, University of Akron Archives, Akron, Ohio, Box F-1; *ABJ*, Aug. 3, 1936, 13; UAW Local 155, Midland Shop Rules, reprinted in Barclay, “We Sat Down with the Strikers,” 46.

92. I found only two occasions on which sitdowners ran machinery. On one occasion, striking power plant workers operated the plant in order to supply what they considered

their claim that sit-down strikes were “merely the transfer of the picket line into the plant.” Likewise, sit-downers generally stood ready to evacuate occupied plants on a credible promise by the employer to refrain from re-starting production until collective bargaining was concluded.⁹³ In the meantime, employer property was protected by the promulgation and enforcement of strike rules prohibiting sabotage.

The property-rights justification for the sit-down implied an additional limitation. Only the employees of the struck employer could claim a property interest in their jobs. Accordingly, unionists never contested Governor Murphy’s charge that a sit-down conducted by outsiders was not a legitimate strike, but a kind of banditry. When the Detroit Police conducted a series of eviction raids against facilities that they charged were occupied by outsiders, unionists disputed only the charge, not the propriety of evicting nonemployees. And when Murphy ordered a food blockade of Flint Chevrolet No. 4, where outsiders made up a significant proportion of the sit-downers, the UAW promptly withdrew all nonemployees from the plant. Had there been a threat of attack, the union might have insisted on the right to invite outsiders in to assist in defense, but Murphy had ordered the National Guard to protect the occupied plants.⁹⁴

On the question of defining the acceptable purposes of sit-downs, not all of the three justifications yielded the same answer. If the sit-down were merely an exercise of the right to strike, then the law governing the acceptable purposes of strikes in general would seem to control sit-downs as well. The property-right theory of the sit-down pointed in the same direction and harked back to the labor movement’s tradition of voluntarism. “Since labor thus possesses property rights as well as capital and these rights are essentially of a similar nature . . . ,” resolved one UAW local union, “then it certainly ought to follow that the two contestants should be permitted to settle their differences without the intervention by the courts and the armed forces of the state on the side of one of them.”⁹⁵ Many unionists, however, renounced the use of the sit-down for ordinary labor disputes and tailored the scope of the claimed right to some form of the self-help justification. Some drew the boundary narrowly to encompass only sit-downs “against

to be an essential service. Jones, *Life, Liberty, and Property*, 358–59. On another, striking printers and type-setters published a strike bulletin using the employer’s printing press. They claimed that they were “keeping a strict account of the materials used, and will pay back the company when the strike is settled.” *DLN*, March 19, 1937, 1.

93. See, e.g., *DN*, Mar. 25, 1937, 1 (Chrysler); Fine, *Sit-Down*, 209 (Janesville Fisher Body); *DN*, April 14, 1937, 1 (Yale & Towne).

94. See *DN*, Mar. 23, 1937, 1; Fine, *Sit-Down*, 272–73; *DN*, Feb. 3, 1937, 1.

95. Local 157, UAW, Resolution on Sit-Down Strike Legislation (typescript), FMCS Records, RG 280, Entry 14, Box 419.

an employer who has defied all of the laws set up to protect and aid and equalize the rights of the workers.”⁹⁶ Others took a broader view, approving all sit-downs for the purpose of making the regime shift from the individual labor market—which amounted to “industrial slavery” or “autocracy”—to collective bargaining.⁹⁷

As long as the constitutionality of the Wagner Act remained doubtful, these differences of opinion had little salience. With the National Labor Relations Board tied up by constitutional challenges, it was clear to unionists that the only way to enforce worker rights was through strike action. Those who supported the sit-down tactic only for self-help purposes still had a stake in its continued viability. But the constitutional issue was moving rapidly toward a resolution, and the sit-down strikers were to have a decisive impact on the outcome.

IV. Making Constitutional Law

At the time that GM workers commenced their historic strike, virtually no one expected the Supreme Court to uphold the Wagner Act. Every one of the twenty-four federal judges who had ruled on the issue agreed that the Act could not be applied to manufacturing companies. Lawrence Lucey summed up the prevailing view when he reported with “icy certainty” that the federal government lacked power to regulate labor relations.⁹⁸

But workers and unions persistently declared the Act constitutional and proceeded to enforce it through strikes and factory occupations. “Labor demands,” thundered John L. Lewis on the second night of the Flint sit-down, “that congress exercise its constitutional powers and brush aside the negative autocracy of the federal judiciary.”⁹⁹ On February 5, 1937, President Roosevelt proposed a method for accomplishing this result: packing the Court with new appointees. The CIO promptly endorsed the president’s bill as its top legislative priority.¹⁰⁰ In terms of lobbying and

96. *Paper Makers’ Journal*, April 1937, 20, 22; see also Luigi Antonini, “Apropos ‘Sit-Downs,’” 6.

97. Resolution Adopted By Goodrich Local # 5, U.R.W.A., c. April 17, 1937, Lewis CIO Files, Part I, Reel 11, Frame 353; Substitute For Resolutions Nos. 203 and 238 Sit-Down Strikes, *UAW Proceedings* 1937, 190.

98. See Pope, “Thirteenth Amendment,” 71–72 (collecting cases); Lawrence Lucey, “Labor and Law,” *The Commonwealth* (July 3, 1936): 347.

99. *United Mine Workers Journal*, Jan. 15, 1937, 3; see also Pope, “Thirteenth Amendment,” 78–81 (collecting additional quotations).

100. E. L. Oliver, Vice President, Labor’s Non-Partisan League, to Congressmen and Senators, Feb. 17, 1937, Lewis CIO Papers, Reel 26, Frame 1096; *UNS*, Mar. 15, 1937, 1.

political mobilization, however, the movement's activity did not differ in kind from that of other groups. Labor's unique contribution came in the form of the sit-down strikes.

Some historians have suggested that the sit-downs influenced the Court to uphold the Wagner Act by educating the Justices about the interstate nature of labor disputes. Richard Cortner argues that the sit-downs, some of which had vast and highly publicized nation-wide effects, might have assisted Chief Justice Charles Evans Hughes in realizing that a strike at Jones & Laughlin steel could, as Hughes put it in his opinion for the Court, exert an "immediate" and even "catastrophic" effect on interstate commerce. In a meticulously researched article, Drew Hansen shows that lawyers for the NLRB emphasized this aspect of the sit-downs in their arguments to the Court. He points out that the sit-downs changed the factual context so that when Hughes wrote that the interstate effects of labor disputes were matters of "common knowledge," he could rest assured that no plausible rebuttal would be forthcoming.¹⁰¹

In this section, I suggest that—while the sit-downs undoubtedly eased the path by educating the Justices as Cortner and Hansen claim—it was not education about interstate commerce that induced the Justices to revolutionize the constitutional doctrine of federalism. They were already well aware that strikes in industries classified as "local" under their precedents could wreak havoc with the national economy. Nowhere was this clearer than the coal industry, where a national strike in 1919 (during which Charles Evans Hughes represented the strikers) and threatened national strikes in 1933 and 1934 had triggered sensational news coverage and dire predictions of economic disaster. Yet in 1936, only one year before the Wagner Act cases, Hughes and five other Justices had agreed that the labor provisions of the Guffey Coal Act—modeled after the Wagner Act—violated the commerce clause because the effect of strikes in mining or manufacturing on interstate commerce "however extensive it may be, is secondary and indirect."¹⁰² What had changed since then was not the Justices' understanding of interstate commerce, but the fact that workers had seized hundreds of factories and made it clear that they were willing to risk serious injury or death defending them. This strong commitment on the part of worker activists in turn tested the commitment of public authorities to the defense of corporate property rights. What follows describes how the various levels

101. Richard C. Cortner, *The Wagner Act Cases* (Knoxville: University of Tennessee Press, 1964), 175; Drew D. Hansen, "The Sit-Down Strikes and the Switch in Time," *Wayne State Law Review* 46 (2000): 49, 109–10, 118–19.

102. *Carter v. Carter Coal*, 298 U.S. 238, 309 (1936); *ibid.*, at 318–19, 321 (Hughes, C.J., concurring).

and branches of government, from municipalities to the Supreme Court of the United States, responded to the workers' challenge.

The Criminal Jury: Divided on the General Issue of the Strike

The first attempt to deploy official law against sit-down strikers came in Akron in May 1936. On the night of May 19, tire room workers had downed tools to protest the assignment of a non-union man to lead a crew. Not content to halt production, they imprisoned supervisors and non-union workers in a makeshift enclosure called the "Bullpen" for nearly twelve hours until the company agreed to rescind the non-union man's appointment. Thirty-one participants were charged with violating Ohio's anti-riot act, which required only a showing that the defendants had combined with the intent of committing some unlawful act.¹⁰³ In the ensuing proceedings, nobody contested the fact that the sit-downers had combined with the intent of seizing the facility and imprisoning their opponents.

But unionists argued that the real issue in the case was the right to organize or, as the head of the Goodyear local's defense committee put it: "Can the rubber companies break the unions through the use of legal trickery?" At the first trial, of a tire builder named Jimmy Jones, union attorney Stanley Denlinger relayed this argument to the jury. "You have no right to take the taxpayers' money to fight the battle for the Goodyear company," he asserted. "This was within the four walls of the Goodyear factory [and t]here was nothing here but a dispute between the company and the workers—something that we shouldn't be concerned about." Denlinger's associate followed up by comparing the bull pen sit-down to the Boston Tea Party and John Brown's raid on Harper's Ferry.¹⁰⁴

The judge charged the jurors that they were to disregard their personal views on strikes and unionism and focus solely on the question of whether there was a riot as defined by the statute. Nevertheless, the jury deadlocked six to six, and the prosecutors and defense attorneys all agreed that "evidently the jury is divided on the general issue of the strike, and not the evidence in the case." Charges against the remaining thirty defendants were quietly dropped several months later.¹⁰⁵

The bull pen case demonstrated the limited value of criminal proceedings in controlling sit-downs. Despite the unusual abuses committed by the sit-downers, half of the jurors had refused to vote for criminal penalties.

103. *ABJ*, May 25, 1936, 1, 6; *ABJ*, June 25, 1936, 1, 6; *ABJ*, June 29, 1936, 1, 6.

104. *ABJ*, May 25, 1936, 1, 6; *ABJ*, July 1, 1936, 1, 6.

105. *ABJ*, July 1, 1936, 1, 6; *ABJ*, July 2, 1936, 1, 6; *ABJ*, July 3, 1936, 1, 5; *United Rubber Worker*, Dec. 1936, 5.

Later, a number of sit-downers would be successfully prosecuted for trespass and conspiracy—but not in movement centers like Akron and Detroit, where jurors tended to have considerable exposure to industrial workers and unions.¹⁰⁶ Although the U.S. Supreme Court had yet to recognize a federal constitutional right to jury trials in state criminal proceedings, the states generally honored that right. As in the labor wars at the turn of the century, then, employers would have to find a way to nullify or circumvent the jury requirement.

Lower Court Judges: Fearlessly Disregarding the Popular Mandate

Employers turned to the labor injunction—their traditional means of controlling workers. While strikers could not be punished for trespass or other criminal offenses without a jury trial, state court judges could finesse that requirement by enjoining the crime and then punishing the strikers for contempt of court, which required no jury trial. In Flint, General Motors wasted no time seeking an injunction ordering the sit-downers to depart its plants. At the hearing, the issue centered on the relative weight to be given employer property rights as against the workers' right of self-organization. GM's attorneys argued that if property rights "can be challenged, all rights are gone." Union lawyers countered by invoking the principle that equitable relief cannot be granted to a supplicant with "unclean hands," meaning one that had engaged in unlawful activity related to the suit. They spent several hours presenting evidence that GM had discharged workers for unionism, hired detectives to spy on and intimidate workers, and fostered a company union—all in flagrant violation of the Wagner Act.¹⁰⁷

Acutely aware of the public attention focused on the case, Judge Paul V. Gadola issued a lengthy opinion that went beyond legal reasoning to tell a cautionary tale about the relative roles of courts, electoral politics, and direct action in a period of social turbulence. At the outset, he made it clear that GM's property rights trumped whatever rights the workers might have. When the workers went on strike, he reasoned, they gave up their status as employees and thus any right they might have had to remain on their employer's property. Hence, the sit-down amounted to a straightforward trespass. He disposed of the union's unclean hands argument by restating it as the claim that "one wrong could be righted by another wrong" and then pointing out that the "falsity of that position is apparent by merely the stating of the position." With this bold distortion, Gadola simply bypassed

106. See Eisenberg, "Government Policy," 107–11.

107. See Felix Frankfurter and Nathan Greene, *The Labor Injunction* (New York: MacMillan, 1930), 106–8; *DN*, Feb. 2, 1937, 1, 23.

the fact that the unclean hands doctrine centered not on the relationship of the parties to each other, but on the role of the courts in the dispute. Courts sitting in equity, the doctrine held, should not assist one wrongdoing party against another; both parties should be left to their ordinary, legal remedies. By ignoring this basic feature of the doctrine, Gadola spared himself the necessity of considering GM's alleged violations of the Wagner Act. As critics were quick to point out, however, his reformulation of the unclean hands doctrine amounted to "a denial that there is any such doctrine," at least "when [the unclean hands] were the employer's."¹⁰⁸

However deficient Judge Gadola's opinion might have been in legal reasoning, it provided a powerful narrative at the level of constitutional politics, one that answered John L. Lewis's radio address and supplied the substantive justification for many of the anti-sit-down injunctions that were to follow. Courts, the judge promised, would "fearlessly" enforce property rights regardless of any "clear mandate of the people as expressed in [the election of] 1936." Only legislative action could alter the legal rights of property owners, and if workers believed that Congress had already done so, the courts were "open to the defendants, if they are wronged, and they may have redress therein if they seek the assistance of the courts." This point gave the opinion an unstated but obvious constitutional dimension, for every one of the twenty-four United States judges to address the question had held that the Wagner Act could not constitutionally reach manufacturing enterprises.¹⁰⁹ To remedy GM's unfair labor practices, then, unionists would have to enforce the Act themselves.

Judge Gadola's opinion stood out from other lower court opinions addressing the sit-down issue mainly in its temperate tone and its effort to address labor's arguments. By contrast, other judges fulminated against the "un-American" and "destructive revolutionary" sit-down that, if tolerated, would "strike down American institutions" and "destroy the foundations of government itself."¹¹⁰ And when workers protested that they were engaging in self-help to counter employer violations of the statutory right to organize, courts only became more hostile. One court charged that such claims were "the hand-maid of crime and anarchy," while another referred to a self-help sit-down as a "horrible and dishonorable mess and rape upon

108. *DN*, Feb. 3, 1937, 32 (reprinting text of decision); *I.J.A. Bull.* Mar. 1937, 101–2.

109. *DN*, Feb. 3, 1937, 32; Pope, "Thirteenth Amendment," 71.

110. See, e.g., *Apex Hosiery Co. v. Leader*, 90 F.2d 144, 158 (3d Cir. 1937), *rev'd as moot*, 302 U.S. 656 (1937); *The Losmar*, 20 F. Supp. 887, 891 (D. Md. 1937); *Ohio Leather Co. v. De Chant, Ohio*, 4 U.S.L.W. 951 (Court of Common Pleas, Trumbull County, Ohio 1937); *I.J.A. Bull.*, Feb. 1938, 103.

law and order.”¹¹¹ The few times that union lawyers were bold enough to raise labor’s claim to a property right in a job, courts summarily dismissed the argument.¹¹² After presenting the unclean hands argument to several judges, UAW counsel Maurice Sugar concluded that “their minds have been completely closed” so that even judges “with no mean local reputations as ‘legal minds’ simply do not hear you when you argue.”¹¹³

Judge Gadola gave the workers until 3:00 pm on February 3 to evacuate the Fisher Body plants, with the union to be fined fifteen million dollars in the event of noncompliance. UAW leaders responded by calling on union locals across the midwest for volunteers to reinforce the picket line. Hundreds answered the call, including more than a thousand auto workers from Toledo, coal miners from Pittsburgh, and a contingent of rubber workers from Akron. Informed by National Guard officers that a forced evacuation would inevitably involve bloodshed, Governor Murphy not only declined to order an eviction, but also authorized the Guard to prevent any attempt at enforcement by the sheriff or by vigilantes. Six days later, the strike was settled, with GM agreeing to drop all charges against the sit-downers and union officials.¹¹⁴

Consistent with his determination to enforce the law without regard to political pressure, Judge Gadola refused GM’s request to void the charges, but never succeeded in getting anyone to enforce them.¹¹⁵ Gadola’s experience underscored the problem with judicial injunctions as a means of controlling sit-downs. Though easy to obtain, injunctions were of little practical use unless there was a government agency with the will, the personnel, and the equipment necessary for enforcement.

Local and State Government: Not Enough Force to Evict

According to Carlos Schwantes, “police evictions of sitdowners actually ended the efficacy of the sit down in Detroit several weeks before the Supreme Court sustained the Wagner Act.” Barry Cushman similarly argues

111. The Losmar, 20 F. Supp. 887, 890 (D. Md. 1937); *Fansteel Metallurgical Corp. v. Lodge 66, Amalgamated Ass’n of Iron Workers* (Lake County Circuit Court, No. 37551, June 8, 1937), reprinted in Transcript of Record, *NLRB v. Fansteel Metallurgical Corp.*, 306 U.S. 240 (1939), 1724, 1726, 1732.

112. See *NYT*, Mar. 24, 1937, 18; Eisenberg, “Government Policy,” 121–22.

113. Maurice Sugar, “Is the Sit-Down Legal?” *New Masses* (May 4, 1937): 19, 21.

114. *DN*, Feb. 3, 1937, 1; Art Preis, *Labor’s Giant Step* (New York: Pathfinder, 1964), 60; Fine, *Sit-Down*, 207–8, 293; *DN*, Feb. 11, 1937, 1, 18; *DN*, Feb. 12, 1937, 1.

115. *DN*, Feb. 17, 1937, 4; *Investigation of Un-American Propaganda Activities in the United States*, 1680.

that because the most important sit-downs terminated before the Wagner Act decisions were issued, it is unlikely that they influenced the Court.¹¹⁶ In fact, however, the sit-down movement continued to pose a serious threat to the established order up to April 12, 1937, the day the Supreme Court upheld the Wagner Act.

From February 9th to the 11th, the Supreme Court heard argument on the Wagner Act cases. On the 11th, the General Motors strike was settled, triggering an exuberant victory celebration in Flint. Far from defusing the sit-down threat, the successful conclusion of the Flint strike encouraged other workers to occupy their workplaces. The Department of Labor reported forty-seven sit-downs of one day or more in February and one hundred seventy in March, up from twenty-five in January. The movement spread across the country, as most major cities and industries experienced at least a few sit-downs.¹¹⁷ On March 8, thousands of workers seized the major Chrysler factories in an action that—in numbers of stay-in strikers and plants occupied—dwarfed the Flint strike.

Impressed by the ignominious defeat of the Flint police in the Battle of Bulls Run, most local officials adopted a cautious approach toward sit-downs. Experts urged police to consider the destruction that would result from an eviction attempt, to delay as long as possible, and to refrain from action unless a force could be assembled that would clearly be sufficient for the job. Instead of attacking, urged one critic, the Flint police should have engaged in action just aggressive enough to demonstrate that outside assistance was required.¹¹⁸

On February 19, 1937, sit-down strikers at the Fansteel Metallurgical Corporation repulsed an attack by one hundred forty Waukegan police, apparently confirming the wisdom of caution. This time, however, the defeated officers rose to the challenge. On the advice of Fansteel's attorney, they rigged a two-story assault tower mounted on a ten-ton truck. Arriving before sunrise, the police found the sixty defenders asleep. Officers positioned in the assault tower blasted tear-gas canisters through the factory windows at point-blank range. Within minutes, the plant was filled with gas. A picked force of between forty and sixty police officers battled

116. Schwantes, "'We've Got 'em on the Run,'" 179, 197–98; Barry Cushman, *Rethinking the New Deal Court: The Structure of a Constitutional Revolution* (New York: Oxford University Press, 1998), 32 n.156.

117. See *Monthly Labor Review*, Aug. 1938, 360, 361, 362; Brecher, *Strike!* 229–31; Hansen, "The Sit-Down Strikes and the Switch in Time," 85–86.

118. See Eisenberg, "Government Policy," 60; Miles Arnold, "What a Strike Means to a Police Department," *City Manager Magazine* 19 (Feb. 1937): 44; Donald C. Stone, "What Is the City's Role in Labor Disputes?" *Public Management* 19 (Feb. 1937): 40.

strikers wielding fire hoses and hurling projectiles. After about an hour, the strikers were driven out and the facility secured.¹¹⁹ A few days later, Connecticut state police evicted striking workers from the Electric Boat shipyard at Groton and some three hundred forty sit-downers evacuated the Douglas Aircraft factory in Santa Monica, California, after police equipped with machine guns surrounded the plant.¹²⁰ In the space of a week, law enforcement officers had succeeded in ending three major sit-downs, and they had done so without creating any martyrs.

In Detroit, police had yet to conduct a successful eviction. On March 15, the Chrysler Corporation obtained a court order compelling the evacuation of its eight Detroit-area plants and setting 9:00 a.m. March 17 as the deadline. On that day, between 30,000 and 50,000 workers guarded the plants—10,000 each at the Dodge Main and Chrysler Jefferson Avenue plants, with smaller lines elsewhere. The day passed with no attempt at enforcement. Governor Murphy explained that there was not “enough force here to evict the sit-down strikers in a strike of such magnitude.”¹²¹

Blocked at Chrysler, the police turned their attention to smaller facilities. Prosecutor Duncan McCrea authorized them to enter occupied facilities for the purpose of investigating whether nonemployee “outsiders” were in command. Although this charge was baseless in the manufacturing plants, organizers for the Retail Clerks union had developed the technique of entering a store and calling a sit-down with little participation by employees. On March 18, three hundred Detroit police officers broke into the Frank & Seder Department Store, which had been occupied by sit-downers earlier that day. Following up on this success, police evicted small contingents of workers from a number of retail stores and lumber yards. Three hundred police stretched the “outsider” rationale past its limit in an assault on the Bernard Schwartz Cigar Company where women strikers—none of them outsiders—battled police with heavy wooden molds before succumbing. That same day, forty-nine men and fifteen women at the Newton Packing Company initially shouted defiance but surrendered without a fight after a force of one hundred sixty police broke into the plant under authority of an injunction.¹²²

119. *Chicago Daily News*, Feb. 26, 1937, 1, 3; *Chicago Daily News*, Feb. 26, 1937, 1; *DN*, Feb. 26, 1937, 4; *NYT*, Feb. 27, 1937, 1.

120. *DN*, Feb. 26, 1937, 4; *I.J.A. Bulletin*, Jan. 1938, 85.

121. See *DN*, March 15, 1937, 1; *DN*, Mar. 17, 1937, 1; Brecher, *Strike!* 227; Steve Babson, *Building the Union: Skilled Workers and Anglo-Gaelic Immigrants in the Rise of the UAW* (New Brunswick: Rutgers University Press, 1991), 186; Norwood, *Strike-breaking and Intimidation*, 214; Eisenberg, “Government Policy,” 82–83 (quoting Murphy).

122. Schwantes, ““We’ve Got ‘em on the Run,”” 194; *DN*, Mar. 18, 1937, 1; Eisenberg, “Government Policy,” 67; *DN*, Mar. 21, 1937, 1, 12; *NYT*, Mar. 21, 1937, 1.

The police evictions tested the labor movement's commitment to the sit-down tactic. In Chicago, where the city Federation of Labor was led by conservatives, the movement failed to respond and the police offensive was largely successful.¹²³ But in Detroit, the UAW moved promptly to defend sit-downers in all industries, and the local Federation of Labor, led by the socialist typographer Frank Martel, backed it up. First, Homer Martin telegraphed all Detroit-area auto locals to prepare for a general strike in protest of the "unlawful" police raids on sit-down strikers. Next, the union called a mass demonstration to be held in Cadillac Square on Sunday, March 23. Finally, the union announced the formation of a force of "minute men" to be on alert around the clock to "protect strikers and the right to strike."¹²⁴

The Detroit Police were not impressed. On March 22, the day before the rally, they evicted twenty-five strikers from the Thomas P. Henry printing company and nineteen protesters from a welfare office. Meanwhile, Governor Murphy raised the level of tension by announcing, in what the press called an "ultimatum," that the state government would "employ all necessary and available means in this and similar cases to uphold public authority in this state and protect property rights in the interest of the general public."¹²⁵

On March 23, a crowd estimated by police at 60,000 and by unionists at more than twice that assembled at Cadillac Square. Speakers called for drastic action to stop "police brutality" and the eviction of sit-downers. "From this time on the constitutional rights of this community are going to be respected in the City Hall, the police station and the courts," warned Frank Martel, "or we'll turn them wrongside up." By acclamation, the rally passed resolutions condemning the police and determining that "for every eviction, there be two sit-down strikes." Homer Martin drew cheers when he accused the Supreme Court of going "on a sit-down strike for the last six years" and announced that he was "squarely behind the President in his efforts to put those boys in their proper places!"¹²⁶

After the rally, both Governor Murphy and the Detroit Police abruptly abandoned their law-and-order crusade against the sit-downs. Instead of carrying out his ultimatum, Murphy brokered a truce under which the UAW

123. *Chicago Daily News*, Mar. 24, 1937, 1, 2; *Chicago Daily News*, March 30, 1937, 5.

124. Russell B. Porter, "6,000 Chrysler Sit-ins Defy Gov. Murphy to Use Troops," *NYT*, Mar. 21, 1937, 1; *DN*, Mar. 22, 1937, 1; *Daily Worker*, April 14, 1937, 3.

125. *Daily Worker*, April 14, 1937, 3; *DN*, Mar. 23, 1937, 1.

126. See *NYT*, Mar. 24, 1937, 1; *DLN*, March 26, 1937, 1; *DN*, Mar. 24, 1937, 4; Mr. Homer Martin's Speech in Cadillac Square, March 23, 1937, UAW Local 9 Collection, Box 3, Wayne State Archives.

evacuated the Chrysler plants in exchange for the company's promise not to operate during collective bargaining, with state troops taking over the sit-downers' job of ensuring that it would not attempt to re-start production. With regard to other sit-downs, Murphy refrained from any further ultimatums, instead contenting himself with assisting in arranging settlements. Detroit Mayor Couzens claimed that he was merely reaffirming past policy in announcing that "there will be no interference with peaceful so-called sit-downs . . . where all of the occupiers are employees of the owner" except to enforce court injunctions. During the three weeks following the rally, workers continued to hold a number of plants and commenced a new wave of sit-downs, mostly in the laundry industry.¹²⁷ With one exception, however, the police refrained from action.

The exception occurred at the Yale & Towne Lock Company, manufacturer of door locks for Chrysler automobiles, where some one hundred fifty women and twenty-five men had been in residence since mid-March. According to a union report, a large force of police officers descended on the plant one night intending to evict the strikers. The UAW promptly mobilized its "minute man" network. Hundreds of night-shift workers downed tools and sped to the plant, where they formed a mass picket line five-hundred strong. "Across the street," bragged one unionist, "a hundred cops decided that under the circumstances discretion was the better part of valor."¹²⁸

Except for the four days preceding the Cadillac Square rally, worker activists held the upper hand on the question of sit-downs in Detroit throughout the period of the Supreme Court's deliberations on the Wagner Act cases. The Chrysler strikers had evacuated on March 25th, but National Guard troops continued to abrogate the corporation's right to resume production until the strike was settled on April 6, only four business days before the Supreme Court announced its decisions. More importantly, the UAW had demonstrated its commitment to the defense of stay-in strikers through its minute man network and mass mobilization. Local and state government had been neutralized. Baffled by the difficulties of dealing with sit-downs, many local government officials looked to intervention by the federal government as their "dream of heaven."¹²⁹

The Federal Executive: No Words of Counsel

President Roosevelt greeted the advent of the sit-down strikes with a determined silence. At press conferences, he nimbly dodged reporters' questions

127. *DN*, Mar. 25, 1937, 1; *Detroit Police Sit-Down List*, 1614; *DN*, April 18, 1937, 2.

128. *Local 205 Union Action*, April 1, 1937, 1.

129. Eisenberg, "Government Policy," 56.

about the tactic. As public opinion polls showed increasing hostility to sit-downers, the president's reticence began to cost him politically. Commentators and politicians criticized him bitterly for failing to provide leadership. A. Lawrence Lowell, president emeritus of Harvard University, joined with six prominent Bostonians to charge that Roosevelt could have ended the sit-down wave early on with just "a few words of counsel," but that it had now escalated to an "[a]rmed insurrection" challenging "the supremacy of government itself." Among the New Dealers, Roosevelt's silence sowed even greater dissension than his court-packing plan. In cabinet meetings, Vice President Garner—who considered the sit-downs to be "mass lawlessness"—engaged the president in shouting matches so violent that on one occasion Secretary Perkins was driven to tears, while on another Senate Majority Leader Joe Robinson was forced to impose silence. Meanwhile, in Congress, the sit-down issue threatened to split the New Deal coalition, as southern Democrats joined conservative Republicans in pressing for anti-sit-down legislation.¹³⁰ Yet, the president remained mute.

Why this hush? According to Secretary Perkins, Roosevelt shared the widespread view that the sit-down amounted to an illegal trespass, but believed that "shooting it out and killing a lot of people" was a punishment that did not fit the crime. This stance, which accorded with popular sentiment as reported in public opinion polls, might explain why Roosevelt did not take action against the sit-downers, but it cannot explain why he did not make his views public. According to James Patterson, the president simply regarded the strikes as disputes to be resolved by the unions and employers themselves.¹³¹ Again, this might account for inaction, but it seems unlikely that Roosevelt was so concerned about the autonomy of the parties that he would refrain even from commenting on a tactic that had become a major national issue.

Representative Clare Hoffman of Michigan, a vigorous opponent both of the sit-downs and the court-packing plan, hinted at an alternative explanation for Roosevelt's silence. "Remember that when President Roosevelt needed support for his proposal to change the membership of the Supreme Court of the United States," he observed, "we had a series of sit-down strikes at Flint and Detroit, which since have spread to some 15 states from coast to coast." Senator Van Nuys, another conservative leader, opined that

130. *Ibid.*, 88–89; *DN*, Mar. 27, 1937, 1 (quoting Lowell telegram); James T. Patterson, *Congressional Conservatism and the New Deal: The Growth of the Conservative Coalition in Congress, 1933–1939* (Lexington: University of Kentucky Press, 1967), 135–36; David Plotke, *Building a Democratic Political Order: Reshaping American Liberalism in the 1930s and 1940s* (New York: Cambridge University Press, 1996), 128, 148.

131. Frances Perkins, *The Roosevelt I Knew* (New York: Viking Press, 1946), 321–22; Patterson, *Congressional Conservativism*, 135.

if Roosevelt would call on union leaders to stop the sit-downs, there would be no need for court-packing. Hoffman's and Van Nuys's view that the sit-downs assisted Roosevelt's court-packing effort was apparently shared by its proponents. The bill's supporters in Congress seized on the sit-down wave to dramatize the costs of the Supreme Court's intransigence. Meanwhile, in Court, government lawyers highlighted the sit-downs as proof of the need for national labor legislation.¹³² Had Roosevelt announced his view that the tactic amounted to an illegal trespass, he might have discouraged worker activists from occupying factories, thus depriving his supporters of what they considered to be one of their strongest arguments in favor of constitutional change.

With local authorities overwhelmed and the Roosevelt administration tacitly accepting the tactic, sit-down opponents turned to Congress.

Congress: In a Rather Ridiculous Position

On Capitol Hill, southern Democrats took the lead in proposing legislation declaring the sit-down illegal. Representative Martin Dies of Texas launched the effort by offering a resolution for a thorough investigation of the sit-down phenomenon. A few days later, Senator James Byrnes of South Carolina moved to amend the Guffey coal bill to outlaw sit-downs in the coal industry—a proposal later expanded to include all industries.¹³³

A few senators and representatives opposed legislation on the ground that the sit-down was not illegal. Echoing unionists, they argued that the workers were engaging in self-help either to protect their property right in the job, or to enforce their legal right to organize.¹³⁴ The great majority, however, agreed with the proponents of legislation that the tactic was illegal. The problem for the proponents was to convince this group that Congress should take action. To succeed, they would have to overcome two obstacles. First, some members of Congress were concerned about the possibility of bloodshed. "Since when, Senators," queried Prentiss Brown of Michigan, "did we punish trespassers upon real property by a death sentence, without a trial?"¹³⁵ Second, and more important, many members doubted the justice of condemning the workers' most effective tactic at a time when many employers were violating labor rights protected under

132. *CR*, Mar. 24, 1937, 2728; *NYT*, Mar. 21, 1937, 1; Hansen, "The Sit-Down Strikes and the Switch in Time," 50, 109–10.

133. Patterson, *Congressional Conservativism*, 136–37, 167–68.

134. See *CR*, Mar. 23, 1937, 2642 (Rep. Bernard); *CR*, Mar. 30, 1937, 2925 (Rep. Coffee); *CR*, Apr. 7, 1937, 3247 (Sen. Frazier); *CR*, Apr. 1, 1937, 3038 (Rep. Bradley); *CR*, Apr. 2, 1937, 3074 (Sen. Brown).

135. *CR*, Mar. 19, 1937, 2486; see also *CR*, Mar. 19, 1937, 2491 (Sen. O'Mahoney).

the Wagner Act. Had it not been for the employers' failure to comply with the Act, argued Senator Wagner among others, there would have been no sit-downs.¹³⁶ Some Congressmen joined worker activists in blaming the sit-downs on the Supreme Court's own "sit-down" on the Wagner Act.¹³⁷

Proponents attempted to solve both problems by raising the issue to the level of constitutional politics. They portrayed the sit-down threat as a matter of constitutional principle that trumped subsidiary considerations like the possibility of bloodshed or the workers' right of self-organization. The sit-downers had violated "the very bill of rights provided for in our Constitution" and displayed "the most open and notorious disregard for law and inalienable rights in the whole history of the Nation."¹³⁸ Aware that corporate giants like GM and Chrysler did not play well as helpless victims of sit-downer tyranny, proponents analogized the property rights of corporations in their factories to those of ordinary citizens in their personal residences, clothing, and weapons. They reversed the sit-downers' narrative of emancipation, commanding the farmers of Hershey, Pennsylvania, who had evicted sit-downers from the local candy factory, as the "minute men of 1937."¹³⁹ Great moral issues like the sit-down sometimes "cannot be settled," declared Representative Clare Hoffman of Michigan, "until blood has been shed." As for employer violations of the right to organize, the protection of worker rights could not justify striker trespasses for two reasons: first, because property rights were foundational rights, without which "there can be no rights of any kind," and, second, because striker trespasses threatened law and order itself, and the preservation of law and order was "primary and paramount" to workers as well as others.¹⁴⁰

Despite all these efforts, however, the anti-sit-down forces were unable to disentangle the sit-down question from the constitutional question of the Wagner Act's validity. While Roosevelt himself remained silent, his supporters in Congress explicitly demanded a favorable Supreme Court decision on the Wagner Act as a prerequisite to action against the sit-down.

136. *CR*, April 7, 1937, 3242–43 (Sen. Wagner); *CR*, April 8, 1937, 3282 (Rep. Maverick); see also *CR*, Mar. 30, 1937, 2921 (Rep. Scott); *CR*, Mar. 30, 1937, 2930 (Rep. Colden); *CR*, Apr. 7, 1937, 3234 (Sen. Robinson).

137. *CR*, Apr. 8, 1937, 3296 (Rep. Boileau); *CR*, Apr. 8, 1937, 3283 (Rep. Sadowski); *CR*, Mar. 23, 1937, 2639 (Rep. Harlan).

138. *CR*, Mar. 19, 1937, 2472 (Sen. Ellender); *CR*, Apr. 5, 1937, 3169 (Rep. Anderson); see also *CR*, Mar. 23, 1937, 2637 (Rep. Dies).

139. *CR*, Mar. 19, 1937, 2472 (Sen. Ellender); *ibid.*, 2521 (Rep. Hoffman); *CR*, Apr. 2, 1937, 3072 (Sen. Bailey); *CR*, Apr. 8, 1937, 3280 (Rep. Rich).

140. *CR*, Mar. 19, 1937, 2522 (Rep. Hoffman); see also *CR*, Apr. 2, 1937, 3072 (Sen. Bailey); *CR*, Mar. 17, 1937, 2337 (Sen. Johnson); *CR*, Mar. 23, 1937, 2637–38 (Rep. Dies); *CR*, Mar. 19, 1937, 2485 (Sen. Vandenberg).

"At present we are in the rather ridiculous position of being called upon to take some action with regard to strikes," complained Representative Voorhis, "when the action already taken by this body is itself rendered of no effect by the action of the judicial branch of Government." Representative Engel of Michigan, who had voted against the Wagner Act because he thought it was unconstitutional, now opposed legislation against sit-downs on the same ground: "Should I vote for this resolution I would be taking the position that a man who stands up and works in a factory comes under the intra-state commerce clause of the Constitution, while that same man sitting down in the same factory and refusing to work would immediately come under the interstate commerce clause."¹⁴¹

In an "uproarious session" on April 8, the House voted down the Dies resolution 236–150. Three days before, the Senate had rejected the Byrnes amendment 48–36, but only after Majority Leader Joe Robinson promised that the issue would be addressed in another form. Soon afterward, the Senate adopted a compromise concurrent resolution declaring "the sense of the Congress" on both on the sit-down issue and on the question of employer violations of the Wagner Act. The resolution condemned the sit-down as "illegal and contrary to sound public policy" and declared it to be against public policy for employers to resort to the "industrial spy system," or "to deny the right of collective bargaining, to foster the company union or to engage in any other unfair labor practice as defined in the National Labor Relations Act." Because of its nonbinding character, the resolution did not require presentment to the president, thus permitting him to continue his silence. Even this balanced condemnation remained incomplete, as the House had not acted by the time the Wagner Act decisions were announced, and the resolution subsequently died quietly in a House committee.¹⁴²

The Supreme Court: After Labor Pains, Quintuplets

With President Roosevelt silent, Congress standing by the Wagner Act, and local government lacking the force necessary to suppress sit-downs, all eyes turned to the Supreme Court. If the Court were to strike down the Wagner Act, it would validate continued employer resistance to unionism, leave CIO leaders with no choice but to continue supporting factory oc-

141. *CR*, Mar. 30, 1937, 2922 (Rep. Voorhis); *CR*, Mar. 23, 1937, 2639 (Rep. Harlan); *CR*, Mar. 18, 1937, 2379 (Sen. Brown); *CR*, Apr. 8, 1937, Appendix, 829–30 (Rep. Ellenbogen); *CR*, Apr. 8, 1937, Appendix, 758–59 (Rep. Engel).

142. Patterson, *Congressional Conservativism*, 137, 168; *CR*, April 7, 1937, 3248; Turner Catledge, "Senate Denounces Sit-Ins and Spies," *NYT*, April 8, 1937, 1; *Business Week*, May 1, 1937, 8.

cupations, and—perhaps most important—corroborate Roosevelt's claim that the Court must be packed in order to prevent it from overturning essential legislation. But if the Court were to uphold the Act, it would—at one stroke—undercut employer resistance, put John L. Lewis to his promise that a "C.I.O. contract is adequate protection against sit-downs," and leave Congress with no excuse for failing to address the problem.

On April 12, 1937, the Supreme Court handed down its decisions in the five Wagner Act cases. It came as no surprise that the Justices upheld the Act as applied to enterprises engaged in the interstate transportation and communications businesses. But most observers were shocked to learn that the Court had ruled 5–4 that the Act could constitutionally be applied to the Jones & Laughlin Steel Corporation. In a lengthy opinion, Chief Justice Hughes concluded that in view of the steel corporation's "far-flung activities" and the organization of industries "on a national scale," Congress could constitutionally regulate labor relations in manufacturing "when it is necessary to protect interstate commerce from the paralyzing consequences of industrial war." Hughes distinguished recent precedents striking down New Deal legislation on the ground that the impact of a strike at the giant steel corporation "would be immediate and might be catastrophic."¹⁴³

Far more remarkable than *Jones & Laughlin* were the 5–4 votes upholding the Act as applied to the Fruehauf Trailer Company and the Friedman-Harry Marks Clothing Company. Neither the trailer company nor the clothing manufacturer could produce a strike with national consequences that could conceivably be described as "immediate" and "catastrophic." While Jones & Laughlin Steel employed 22,000 workers in an industry that, in Hughes's words, had a history of strikes with "far-reaching consequences," the trailer company and the clothing company employed nine hundred and eight hundred respectively in industries not known for strikes with national consequences.¹⁴⁴ In their briefs and oral arguments, the government lawyers defending the Act not only acknowledged that their case was weaker in *Fruehauf* and *Friedman-Harry Marks* than in *Jones & Laughlin*, but emphasized the contrasts. They had so little hope of winning votes in any of the manufacturing cases that they carefully

143. Hansen, "The Sit-Down Strikes and the Switch in Time," 131–32; *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 41 (1937) (distinguishing *A. L. A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 [1935], and *Carter v. Carter Coal Company*, 298 U.S. 238 [1936]).

144. *NLRB v. Fruehauf Trailer Company*, 301 U.S. 49 (1937); *NLRB v. Friedman-Harry Marks Clothing Company*, 301 U.S. 58 (1937); *Jones & Laughlin*, 301 U.S. at 43; *ibid.*, 85 (McReynolds, J., dissenting) (reporting the number of workers employed by each company).

distinguished each from the others to enable each individual Justice to draw the line where he pleased.¹⁴⁵ Yet, after declaring in *Jones & Laughlin* that the constitutional reach of the Act would depend upon the particular facts of each case, Chief Justice Hughes provided no reasoning whatever in either *Fruehauf* or *Friedman-Harry Marks* other than a terse citation to *Jones & Laughlin*.

What explains the results in these cases? And what could induce the majority to announce a rule calling for fact-specific determinations in one case and then fail to apply it in two other cases decided the same day? The best answer is that the Court was plainly and simply yielding to pressure from the sit-down strikers. Judging from the lack of reasoning in *Fruehauf* and *Friedman-Harry Marks*, the Court would have been more comfortable drawing the line at *Jones & Laughlin*. But in the face of the sit-down crisis, even the dramatic concession of crossing the line from commerce to manufacturing in *Jones & Laughlin* would not have been enough to defuse the court-packing threat. The median sit-down strike involved about one hundred workers, far fewer even than the eight hundred employed by Friedman-Harry Marks. As NLRB General Counsel Charles Fahy recognized, the viability of the NLRB—and thus of Congress's attempt to solve the industrial crisis—"would stand or fall" on cases like this. Thus, anything short of a Board sweep would have defeated Congress's attempt to resolve the labor crisis and, conversely, only a sweep could have deflated the pressure for court-packing as a means of freeing Congress to resolve that crisis. As a quip circulating in the Labor Department had it, "after some labor pains the Court gave birth to quintuplets."¹⁴⁶

In the months leading up to the Wagner Act decisions, local government, state government, the Roosevelt administration, and Congress had all passed the buck to the Supreme Court. By giving the Board a sweep, the Court passed it along yet again, this time to the National Labor Relations Board and the leaders of the CIO.

145. See James A. Gross, *The Making of the National Labor Relations Board: A Study in Economics, Politics, and the Law* (Albany: State University of New York Press, 1974), 194 (quoting oral history interview with NLRB chairman Warren Madden).

146. Pope, "Thirteenth Amendment," 89–97; *Detroit Police Sit-Down List* (providing data on size of sit-downs); Peter Irons, *The New Deal Lawyers* (Princeton: Princeton University Press, 1982), 263 (quoting Fahy); Letter from Charles Wyzanski, Labor Solicitor, to Felix Frankfurter (Apr. 14, 1937), John Knox Papers, Harvard Law Library Manuscript Div., box 1.

V. Constitutional Trade-Off

While labor leaders and activists celebrated *Jones & Laughlin* and the other Wagner Act cases as a “new day” of industrial freedom and democracy, the Detroit Police set out to establish a new era of law and order. On April 12, the day of the Wagner Act rulings, one hundred seventy-five sit-down strikers at the Yale & Towne Manufacturing Company, scene of a previous confrontation between police and UAW minute men, defied a court order commanding them to evacuate the premises by 9:00 that morning. Two days later, after last-minute peace efforts failed, two hundred police officers and deputy sheriffs appeared at the plant. The UAW again mobilized its minute man network, and workers from nearby shops began arriving just as the officers moved to the attack. The strikers, nearly all of whom were women, barricaded themselves in the plant. While deputies pumped tear-gas shells through windows and skylights, strikers and minute men rained locks, radiator caps, and other projectiles down from the roofs and windows. After a sharp, half-hour battle, the officers took possession of the plant and arrested seventy-nine women and twenty-five men. Minute men continued to arrive, and Walter and Victor Reuther were among those arrested in the ensuing attempt to set up a mass picket line.¹⁴⁷

The Yale & Towne eviction was the first in Detroit since the Cadillac Square rally three weeks before, and the first ever to be successfully conducted against UAW strikers in the Motor City. This new boldness on the part of police was the flip side of labor’s victory in *Jones & Laughlin*. As soon as the Wagner Act decisions were announced, a chorus of commentators and political leaders proclaimed that the Court had eliminated the justification for the sit-down strikes. “Undoubtedly these decisions will serve to transfer the scene of conflict expressed by the sit-in strike,” summarized the Socialist lawyer Louis Waldman, “from the factories and mills to the trial rooms of the Labor Relations Board.”¹⁴⁸ CIO leaders declared that along with labor’s new power came “a new responsibility” to honor contracts and eschew “revolutionary methods.” Meanwhile, it became clear that the new police assertiveness exhibited at Yale & Towne was no anomaly. Throughout the midwest, officers attacked the mass picket lines of striking steelworkers. When Chicago unionists responded with

147. See *DLN*, April 16, 1937, 1; *DN*, April 12, 1937, 4; Lichtenstein, *Most Dangerous Man*, 81; Fred W. Cousins, “Girls of Cleared Plant Are Dubbed ‘Gas Eaters,’” *DN*, April 15, 1937, 1; *DN*, April 15, 1937, 1, 4; *Local 205 Union Action*, April 17, 1937, 4.

148. *NYT*, April 13, 1937, 20; see also Arthur Krock, “Wagner Act Decisions Viewed from Political Angle,” *NYT*, April 13, 1937, 24; Louis Stark, “Sit-Down,” *Survey Graphic*, June 1937, 316, 320. For additional quotations, see Hansen, “The Sit-Down Strikes and the Switch in Time,” 125–26.

a protest rally, police officers perpetrated the infamous “Memorial Day Massacre,” during which ten demonstrators were shot to death and eighty others wounded. The combination of *Jones & Laughlin* and the police offensive dampened labor militance. After forty-seven sit-downs of one day or more in February and one hundred seventy in March, there were fifty-two in April, seventy-two in May, and an average of sixteen per month through the end of the year.¹⁴⁹ The overnight sit-down had declined from a standard to an exceptional tactic.

But these statistics did not tell the whole story. The underlying issue of shop floor power remained unresolved, and quickie sit-downs (shorter than a day, and thus beneath the government’s statistical radar) continued to disrupt production even where unions had agreed to cease all work stoppages. In the end, it would take another Supreme Court decision and two decades of struggle to settle the question.

The UAW: Regimentation Reducing the Influence of Foremen

The Yale & Towne eviction left the strikers’ spirit unbroken; women sang defiantly as they emerged from the factory with eyes swollen shut, they sang “Solidarity Forever” in the patrol wagons carrying them to jail, and they sang in the halls outside the courtroom before their arraignment hearings the next morning. In the days following the eviction, union militants recalled the Cadillac Square resolution, “for every eviction, two sit-downs,” and called for a better-organized and speedier minute man response in the future. For its part, the UAW leadership appeared to be dominated by radical groups, all of which celebrated the sit-down tactic and called for its legalization. In the words of CIO organizer Adolph Germer, the union had become a “Chinese puzzle” of radical factions, with the Communist Party, the Socialist Party, and the Communist Party-Opposition—a small splinter group allied with Homer Martin—competing for dominance. Communist trade union head William Z. Foster summed up the position of the three groups on the sit-down: “To legalize the sit-down strike, the workers must sit down far and wide in industry.”¹⁵⁰

149. See Charles P. Howard, CIO Secretary, “President’s Page,” *Typographical Journal*, May 1937, 435; *NYT*, April 13, 1937, 20; Brecher, *Strike!* 225–26; Bernstein, *Turbulent Years*, 481–97; *Monthly Labor Review*, Aug. 1938, 360, 361.

150. *DN*, April 15, 1937, 1, 4; Norwood, *Strike-breaking and Intimidation*, 220; Art Dobrzynski, “One Eviction—Two Sit-Downs” (poem), *Local 205 Union Action*, April 17, 1937, 4; Letter from “D.” to *Union Action*, ibid., 4; Letter from Noel Johnson, chief shop steward, to *Union Action*, ibid., 4; Germer to Lewis, July 9, 1937, The CIO Files of John L. Lewis (ed. M. Dubofsky), Microform, reel 1, frame 793 [hereafter Lewis CIO Papers]; William Z. Foster, “The Significance of the Sit-Down Strike,” *The Communist*, Apr. 1937, 339; see

During the late spring and summer of 1937, auto workers did just that. Even as politicians, news commentators, and CIO officials predicted that *Jones & Laughlin* would bring about the demise of the sit-down, it was unclear whether the Supreme Court had actually solved the problem. While the Wagner Act did provide governmental processes for enforcing the right to organize, it had little to say about the problem of winning a contract that would permit the union to function on the shop floor. UAW locals proceeded to establish steward systems and dispute resolution procedures through unilateral lawmaking. The Midland Shop Rules, cited by *Mill & Factory* as a typical example, provided for a three-step dispute resolution procedure: (1) negotiations between the authorized steward and the foreman, (2) negotiations between the plant shop stewards committee and the management, and (3) strike authorization by the plant shop stewards committee and the general plant meeting. Individual negotiations between workers and foremen were prohibited, a provision that provoked *Mill & Factory* to complain that “regimentation has taken place, and the influence of the foreman and superintendent has been reduced to a minimum.”¹⁵¹

At Chrysler’s Dodge Main plant, the UAW’s largest local union conducted a forty-five-day strike that forced the company to recognize the union’s steward system, which authorized about one steward for every foreman. This system was codified in the local union’s constitution—“solely within the union’s own internal legal system and not via collective bargaining.”¹⁵² Under such systems, workers brought complaints based not only on collective bargaining agreements, which were brief and limited in coverage, but also on unwritten worker-made standards like a “fair” or “reasonable” day’s work, or a “fair” seniority rota. By the early 1940s, binding arbitration was beginning to replace strike action as the final step in the grievance procedure, but even then—where the shop floor organization was strong, as at Chrysler—workers often rejected the arbitrators’ rule of “obey now grieve later” and insisted that their standard be followed pending an arbitra-

also McAlister Coleman, “Law to Order,” *Socialist Call*, Feb. 13, 1937, 5; George F. Miles, “Trade Union Notes,” *Workers Age* (official organ of the Communist Party-Opposition), Feb. 20, 1937, 2.

151. UAW Local 155, Midland Shop Rules, reprinted in Barclay, “We Sat Down with the Strikers,” 46.

152. See Jefferys, *Management and Managed*, 70, 74–75, 83–86; Jefferys, “‘Matters of Mutual Interest’: The Unionization Process at Dodge Main, 1933–1939,” in *On the Line: Essays in the History of Auto Work*, ed. Nelson Lichtenstein and Stephen Meyer (Urbana: University of Illinois Press, 1989), 100, 114; James B. Atleson, “Wartime Labor Regulation, the Industrial Pluralists, and the Law of Collective Bargaining,” in *Industrial Democracy in America: The Ambiguous Promise*, ed. Nelson Lichtenstein and Howell John Harris (New York: Cambridge University Press, 1996), 142, 153 (quotation).

tion award. At Dodge Main, the local union enacted and enforced solidarity rules prohibiting members from handling the products of employers that violated workers' rights. Some local unions gained unilateral control over such functions as the selection of workers for hiring and layoff.¹⁵³

At General Motors, on the other hand, management tenaciously resisted worker control and refused to recognize the union's unilaterally established steward structure. The strike settlement of 1937 authorized up to nine members of the union's plant committee—but not the far more numerous stewards—to process grievances. It imposed only minimal procedural constraints on management's authority over the pace of work while expressly prohibiting the workers from engaging in work stoppages during the term of the agreement.¹⁵⁴ Fresh from their historic victory, however, GM's workers were in no mood to cede control. According to GM executive William Knudsen, they staged no fewer than one hundred seventy sit-downs between March and June of 1937. By early April, the workers had won a substantial degree of control over the pace of work.¹⁵⁵

The continuing run of sit-downs split the seam between labor's freedom and progressive constitutions. To John L. Lewis, the time for sit-downs and unilateral lawmaking had ended when the auto manufacturers recognized the CIO and signed a contract containing a no-strike agreement. Now, the main task was to demonstrate the union's reliability as a contractual partner by vindicating his famous promise that a "C.I.O. contract is adequate protection against sit-downs, lie-downs, or any other kind of strike." By July 1937, Homer Martin had been won over to Lewis's point of view. Embroiled in a bitter fight with the Communists and Socialists for control of the union, Martin now saw the sit-downs as a threat to his leadership.¹⁵⁶

The issue came to a head in November 1937, when five hundred workers occupied the corporation's Fisher Body Plant at Pontiac demanding the reinstatement of four local activists who had been fired for leading a sit-down. For a moment, it appeared that Pontiac might be another Flint,

153. Jefferys, *Management and Managed*, 98–101, 112–13; Minutes of the Regular Business Meeting, Dodge Local No. 3, April 24, 1938, UAW Local 3 Collection, Wayne State Archives, at 5; Montgomery, *Workers' Control*, 142, 147–50.

154. "Text of GM-Union Constitution," *DN*, March 13, 1937, 4, sections I.A , I.C and V.

155. Bernstein, *Turbulent Years*, 559; Galenson, *CIO Challenge*, 154; Brecher, *Strike!* 223–24; see also Ronald Edsforth, *Class Conflict and Cultural Consensus: The Making of a Mass Consumer Society in Flint, Michigan* (Urbana: University of Illinois Press, 1987), 177–78.

156. Adolph Germer to Lewis, July 18, 1937, Lewis CIO Papers, reel 1, frame 694; Jefferys, *Management and Managed*, 78–80; Ted Morgan, *A Cover Life: Jay Lovestone, Communist, Anti-Communist, and Spy Master* (New York: Random House, 1999), 124 (1999).

this time with the sit-down used not as a means of gaining union recognition but as a way of forcing GM to accept the union's steward system. But Homer Martin and John L. Lewis ordered an end to the strike, and Communist Party chief Earl Browder—anxious to maintain the Party's alliance with Lewis—directed Party members to comply. Wyndham Mortimer accordingly withdrew his support, and the few Communists at the plant disavowed their own leadership role in the strike. Five days after the strike began, Martin persuaded the workers to evacuate.¹⁵⁷

The Pontiac sit-down represented a serious defeat for shop floor activism and worker lawmaking. Because of its leading position in the industry, General Motors "seemed the model upon which others in heavy industry must either mold their internal work regime or face extinction." As long as GM resisted the union's steward system, other companies would be pressured to do the same. For the ensuing eighteen months, the UAW was in no position to challenge GM, as the economy went into a recession and internecine strife escalated.¹⁵⁸ With the factions preoccupied with each other and the sit-downers voiceless and leaderless, the question of the sit-down's legality would be left to the NLRB and the courts.

The NLRB: An Important National Policy against Industrial Strife

Where the courts had been overtly hostile to the sit-downers' legal arguments, the National Labor Relations Board showed mere disinterest. In the *Fansteel* case, which would eventually lead to the authoritative Supreme Court decision on the issue, the workers had staged a sit-down after the corporation planted a labor spy within the union, isolated the union president from other workers, attempted to establish a company-dominated union, refused to bargain with the union after it represented a majority of workers in the shop, and maintained an official policy of refusing to negotiate with any "outside" union (meaning any national union)—all unfair labor practices under the Wagner Act. The company fired many of the sit-downers, and they sought reinstatement to their jobs with back pay.¹⁵⁹ At the

157. Lichtenstein, *Most Dangerous Man*, 119–21; Bernstein, *Turbulent Years*, 563; Brecher, *Strike!* 225; Bert Cochran, *Labor and Communism* (Princeton: Princeton University Press, 1977), 138–39; Galenson, *CIO Challenge*, 158.

158. See Nelson Lichtenstein, "Great Expectations: The Promise of Industrial Jurisprudence and Its Demise," in *Industrial Democracy in America*, ed. Lichtenstein and Harris, 113, 138; Lichtenstein, *Most Dangerous Man*, 122–23.

159. *NLRB v. Fansteel Metallurgical Corp.*, 306 U.S. 240, 247–48 (1939); *Fansteel Metallurgical Corp.*, 5 N.L.R.B. 930, 931, *enforcement denied*, *Fansteel Metallurgical Corp. v. NLRB*, 98 F.2d 375 (7th Cir. 1938), *reversed in part*, 306 U.S. 240 (1939).

hearing, Board attorneys made no effort to solicit justifications from the strikers and stood by while Fansteel's lawyers cut them off:

Q. Did you get permission from the management to go in there and stay in the buildings?

A. I didn't have to get permission—

Q. Answer yes or no.

Q. And they were done [actions taken to preserve the machinery] without consulting any of the officials of the company, were they not?

A. Well, we were holding the buildings in protest because they wouldn't—

Q. You were holding the buildings.

Occasionally, a reason popped out before counsel could intervene:

Q. You refused to admit the sheriff or the company into those buildings, is that right?

A. Yes. We was defending our rights.¹⁶⁰

Though uninterested in the workers' justifications, the Board did order them reinstated with back pay. This result was grounded not on any theory that the sit-down strike was legal or that the employer had violated the law by discharging the strikers, but on the theory that reinstatement was necessary to restore the status quo prior to the employer's unfair labor practices. Ironically, the Board—established as a substitute for the courts' use of equity powers to govern industrial relations—finally brought the equitable doctrine of unclean hands to the law of labor disputes. Responding to the argument that the strikers' unlawful seizure of the factory freed the employer to fire them, the Board observed that Fansteel did "not come before the Board with clean hands" as it was "guilty of gross violations of law, violations which in fact were the moving cause for the conduct of the employees." On the central question of the relative priority of individual property rights and collective labor rights, the Board adapted its position to the commerce clause foundation of the Act. Employer property rights were counterposed not to labor liberty, but to the "important national policy" against disruptions of commerce.¹⁶¹

Although the Board's *Fansteel* decision did not, in theory, recognize a right to sit down in protest of serious unfair labor practices, it had that effect on the ground. In a series of cases, the Board reinstated strikers who had occupied their workplaces in response to employer violations of the Act. "Looking at the matter from a practical standpoint," one commentator noted, "the average employee does not know the technicalities of the

160. Transcript of Record, *NLRB v. Fansteel Metallurgical Corp.*, 306 U.S. 240 (1939), at 302, 1413–14, 523; see also *ibid.*, 277.

161. 5 N.L.R.B. 945, 949, 952–53 (1938); Eisenberg, "Government Policy," 197–98.

Wagner Act, and when reinstated he is of the opinion that his past conduct has been given the stamp of approval.”¹⁶² It remained to be seen, however, whether reviewing courts would accept the Board’s approach.

The Supreme Court: Coppage and Adair Unburied

While government lawyers transmuted labor’s slogan of human rights over property rights into an expansion of the commerce power, employer lawyers faithfully advanced their clients’ claims of constitutional liberty. Fansteel’s lawyers focused on two points, both of which went to the relative priority of employer property rights and worker rights of collective action. First, they argued that the Wagner Act had taken only a small bite out of the employer’s Fifth Amendment right to discharge workers for any reason or no reason at all. In *Jones & Laughlin and Associated Press v. NLRB*, the Supreme Court had held that the Act did not infringe the employer’s liberty of contract only because it left him free to fire a worker “for any cause that seems to it proper save only as a punishment for, or discouragement of, such activities as the act declares permissible” and thus did “not interfere with the normal exercise of the right of the employer to select its employees or to discharge them.” To restrict the employer’s freedom to discharge workers for unlawful activity—a “normal exercise” of the right to discharge—would, then, transgress the employer’s retained liberty of contract.¹⁶³

Having elevated the employer’s interest to the constitutional level, Fansteel’s lawyers went on to downgrade the countervailing interest in reinstatement. They pointed out that the Act directed the Board to apply only such remedies as would “effectuate the policies of the Act” and that the central purpose of the Act was promoting industrial peace. Thus, there was no need to discuss worker freedom except as a means of achieving industrial peace; not even the Board raised the possibility that remedying violations of workers’ rights might have intrinsic value under the statute. Once on the terrain of industrial peace, the employer lawyers had a powerful argument that—far from promoting that objective—the reinstatement of sit-down strikers would encourage workers to resort to

162. See *In re McNeely & Price Co.*, 6 N.L.R.B. 800 (1938); *In re Kuehne Mfg. Co.*, 7 N.L.R.B. 304 (1938); *In re Electric Boat Co.*, 7 N.L.R.B. 572, 573 (1938); *In re Douglas Aircraft Co., Inc.*, 10 N.L.R.B. 242, 248 (1938); *In re Swift & Co.*, 10 N.L.R.B. 991 (1939); Note, “Termination of Relation of Master and Servant,” *Chicago-Kent Law Review* 17 (1939): 290, 293.

163. Brief for Fansteel Metallurgical Corporation, *NLRB v. Fansteel Metallurgical Corporation*, 306 U.S. 240 (1939), 26 (quoting *Associated Press v. NLRB*, 301 U.S. 103, 132 [1937]); *ibid.*, 26 (quoting *Jones & Laughlin*, 301 U.S. at 45–46); *ibid.*, 34.

violent and disorderly self-help in place of the “orderly process” provided by the statute.¹⁶⁴

The Supreme Court upheld the Court of Appeals’ denial of enforcement by a 6–2 margin. Writing for the majority, Chief Justice Hughes embraced the Fansteel lawyers’ approach. The issue, he wrote, was whether the Act abrogated “the right of the employer to refuse to retain in his employ” workers who had illegally seized his property. Both of the employer interests involved—its right to exclude its workers from its property and its right to discharge them—were of the highest magnitude. An intrusion on the corporation’s right of possession was “not essentially different” from an assault on a person. And the corporation’s right to discharge the “wrongdoers” received the respect due to a right of constitutional dimension. “Apart from the question of the constitutional validity of an enactment of that sort,” wrote Chief Justice Hughes in an early version of today’s clear statement rule, “it is enough to say that such a legislative intention should be found in some definite and unmistakable expression.”¹⁶⁵

The countervailing interests gave the Court no reason to find such an expression. The fact that the employer had repeatedly and openly violated the Wagner Act impressed the Court so little that it could describe the sit-down as “an illegal seizure of the buildings in order to prevent their use by the employer in a *lawful* manner.” While describing the workers as “wrongdoers” who had forfeited their statutory rights, the Court never placed the corporation in that category. Although Fansteel’s conduct was “reprehensible,” there was “no ground for saying that it made respondent an outlaw or deprived it of its legal rights to the possession and protection of its property.” The Court did not mention the effects of Fansteel’s violations on the workers’ right to organize; nor did it respond to the Board’s argument that reinstatement was the only effective way to remedy those effects and restore the status quo. These omissions were especially significant in light of the fact that the workers’ unfair labor practice charges, filed five months prior to the sit-down, had produced no action from the NLRB. With management continuing to violate the Act, the union had come under membership pressure to do something or lose support. Fansteel’s spy in the union had attempted to foment a traditional strike, which would have enabled the company to replace the union workers. The sit-down was the union’s response to this situation—apparently the only way to prevent the company from breaking the union. But the Court ignored these facts, instead pointing out that the purpose of protecting rights of self-organiza-

164. *Ibid.*, 35, 35–52.

165. *NLRB v. Fansteel Metallurgical Corp.*, 306 U.S. 240, 252, 253, 255, 259 (1939); *ibid.*, 265 (Stone, J., concurring).

tion was to promote industrial peace and thereby “remove obstructions to the free flow of commerce.” Far from aiding in the accomplishment of this purpose, the reinstatement of sit-down strikers would encourage violent self-help in place of the orderly procedures established in the Act.¹⁶⁶

In effect, then, *Fansteel* sealed the constitutional compromise that had been scripted by the Senate two years before—but with an added twist. At the height of the sit-down crisis, the Senate had refused to condemn the workers’ tactic without issuing a simultaneous condemnation of employer violations of worker rights, thus apparently placing the two on the same level of reprehensibility. The *Fansteel* Court affirmed that both were illegal, but also concluded that the employer could violate the workers’ statutory rights without sacrificing its property rights, while the workers could not violate the employer’s property rights without sacrificing their statutory rights—a return to the hierarchy of values that predated the Wagner Act.

It is a commonplace that the doctrine of economic due process, according to which federal courts would strictly scrutinize legislation that infringed the liberty of contract, died in 1937 with the Supreme Court’s decision in *West Coast Hotel v. Parrish*.¹⁶⁷ It is true that the Court has not invalidated a statute on economic due process grounds since *Parrish*. But *Fansteel* revived the doctrine in labor law. “The surreptitious burial believed by some to have been the fate of *Coppage v. Kansas* and *Adair v. United States*,” commented J. Denson Smith after *Fansteel*, “appears not to have been as enduring as suspected.” Others agreed. On the view that *Fansteel* reflected the pre-New Deal mentality, Arthur Krock confidently predicted that the dissenters’ position—which was “eloquent of New Deal reasoning” in emphasizing the Board’s statutory power to remedy unfair labor practices—would eventually prevail.¹⁶⁸

But by the time of *Fansteel*, the sit-down’s main public supporters had been silenced. Dean Leon Green of Northwestern University and SEC Chairman James Landis, the most prominent members of the legal profession to defend the possibility that the sit-down might be lawful, had

166. 306 U.S. at 256 (emphasis added); *ibid.*, 256–57; *ibid.*, 253; Henry M. Hart, Jr., and Edward F. Pritchard, Jr., “The Fansteel Case: Employee Misconduct and the Remedial Powers of the National Labor Relations Board,” *Harvard Law Review* 52 (1939): 1275, 1280–81.

167. 300 U.S. 379 (1937); Laurence H. Tribe, *American Constitutional Law*, 2d ed., (Mineola, N.Y.: Foundation Press, 1988), 567.

168. J. Denson Smith, “From Nose-Thumbing to Sabotage,” *Louisiana Law Review* 1 (1939): 577, 577, 580; see also Frank Thomas Miller, Jr., “Sit-Down Strikes—Reinstatement of Employees under the Wagner Act,” *North Carolina Law Review* 17 (1939): 438, 439; Note, “Power of the National Labor Relations Board to Order Reinstatement of Sit-Down Strikers,” *California Law Review* 27 (1939): 470, 473; Arthur Krock, “Implications in the Dissents of Reed and Black,” *NYT*, March 1, 1939, 20.

succumbed to pressure from wealthy critics. Dean Green, who had written his defense of the sit-down while on leave, returned to an “icy reception.” Alumni protested so vehemently that the school’s board of trustees was prepared to demand his resignation but for the opposition of two members, both clerics, who threatened to do likewise. Landis, who was preparing to take up the deanship at Harvard Law School, received angry letters from alumni and urgent complaints from Harvard fundraisers.¹⁶⁹ Neither Green nor Landis went so far as to recant, but both fell silent on the issue. Meanwhile, union officials, many of whom had been happy to trade away the sit-down for a favorable decision on the Wagner Act anyway, were on the defensive economically and politically. The decision drew only scattered criticism in the labor press.¹⁷⁰

The Workers: Habits, Nurtured in Successful Practice

By the time of the Supreme Court’s ruling in *Fansteel*, factory occupations were infrequent. From May 1938 to February 1939, the month that *Fansteel* was decided, there had been an average of only 3.2 sit-downs (defined as an occupation lasting one day or more) per month, constituting 1.4 percent of all strikes. Nevertheless, the decision had an effect. Until *Fansteel*, workers could claim that the legal status of sit-downs remained uncertain. But *Fansteel* removed all doubt. Henceforth, any unionist who participated in a sit-down would be engaging in open defiance of a legal prohibition that had been endorsed by the nation’s highest tribunal. In the week following *Fansteel*, at least two employers took advantage of the new ruling to discharge nearly three hundred sit-downers. The Labor Department reported only one sit-down for March 1939, the month after *Fansteel*, and zero sit-downs for each month from April through December 1939, the last month for which statistics were kept. Subsequent factory occupations were rare, although militant workers did manage to win a few as late as the mid-1950s.¹⁷¹ While *Jones & Laughlin* had reduced the factory occupation from a routine to an exceptional but still usable tactic, *Fansteel* all but eliminated it.

169. Willard Wirtz, “Dean Green,” *Texas Law Review* 56 (1978): 571, 574; Donald A. Ritchie, *James M. Landis: Dean of the Regulators* (Cambridge: Harvard University Press, 1980), 84.

170. See, e.g., *Shipyard Worker*, Mar. 10, 1939, 4; Len De Caux, “Looking Ahead,” *UNS*, March 3, 1939, 1; Henry C. Fleisher, “See Wagner Act Amended by Court Ruling,” *UNS*, March 3, 1939, 1.

171. Eisenberg, “Government Policy,” 316–18; *NYT*, Mar. 3, 1939, 18; *Federated Press*, Nov. 3, 1949, 2; *Federated Press*, Jan. 8, 1954, 2; *Federated Press*, Oct. 14, 1954, 3; *Federated Press*, Nov. 17, 1954, 2.

With the suppression of the full-scale factory occupation, semi- and unskilled workers fell back on mass picketing to protect their jobs against replacement workers. Like the factory occupation, obstructive mass picketing was illegal under state law. But mass picketing did not pose any bold challenge to corporate property rights. While the factory occupation involved an open seizure of corporate property by workers acting under claim of right, picket line infractions hinged on messy and contested details like who hit whom first, and how close together the pickets were marching. As a result, the judicial response to mass picketing lacked the ideological bitterness exhibited in the sit-down decisions. Likewise, in the political arena, mass picketing proved less costly. According to the Gallup poll, it was the sit-down's overt violation of employer property rights that—more than any other factor—had made the tactic unpopular.¹⁷² With that element removed, public opinion was more likely to hinge on the details of who did what to whom, or on perceptions of the underlying merits of the dispute.

Although *Fansteel* largely eliminated the sit-down as defined by the Labor Department (an occupation lasting one day or more), most sit-downs were quickies—brief, usually departmentally based actions that rarely involved evicting management from the premises. These quickie sit-downs shaded imperceptibly into other forms of shop-floor action. Workers staged slowdowns, for example, setting the pace of production at the level that they felt they were being paid for. They also conducted intermittent or “stop-and-go” strikes—short, repeated strikes intended to reduce production without providing the employer an opportunity to hire replacements. Early NLRB decisions held many such partial strike tactics protected. None of them violated the criminal law. Nevertheless, as recounted by Craig Becker, *Fansteel* was soon interpreted “to stand for the sweeping proposition that not all work stoppages—even those unaccompanied by other acts and otherwise lawful—were protected.” Applying this approach, the courts and—later—the Board itself overturned early Board decisions protecting partial strikes.¹⁷³

Where collective bargaining was established, contract provisions could pose additional obstacles to sit-downs and other forms of shop-floor action. No-strike obligations and management prerogative clauses (provisions that reserved to management a zone for unilateral control) could be applied to

172. See George Gallup, “America Speaks: Majority Would Outlaw Sit-Down Strikes,” *DN*, Mar. 21, 1937, 10 (reporting that the “chief objection maintains that sit-downs are illegal seizure of company property”).

173. Craig Becker, “‘Better Than a Strike’: Protecting New Forms of Collective Work Stoppages under the National Labor Relations Act,” *University of Chicago Law Review* 61 (1994): 351, 368–69 nn.77, 83.

sit-downs and partial strikes. According to Matthew Finkin, “the eradication of the sit-down by collective agreement occurred well before *Fansteel* was decided.” The evidence, however, belies this assertion on three counts. First, many workers were not covered by collective bargaining agreements during this period. For example, neither the so-called “little steel” companies nor the Ford Motor Company signed collective agreements until 1941. In the case of Ford, workers staged a series of sit-downs culminating in a full-scale occupation of the gigantic River Rouge facility on April 2, 1941. The next day, the UAW authorized the strike, pulled the workers out, and used mass picketing and a vehicle blockade to seal off the plant from nonstrikers.¹⁷⁴ Although there is no way of knowing for certain, it seems likely that the union’s decision to abandon an effective factory occupation might well have resulted from the perceived political costs of openly defying the law as declared in *Fansteel*.

Second, many collective bargaining agreements contained no provisions barring strikes or carving out a zone of management prerogatives, the two most damaging provisions for unilateral worker lawmaking and direct action. Only after 1941, when the United States’ entry into World War II generated enormous pressure for continuity of production, did such clauses become common. Moreover, the available evidence suggests that union acceptance of such clauses hinged less on worker desires or union maturation than on the degree of union leaders’ commitment to worker power on the shop floor. According to an empirical study of CIO collective bargaining agreements in California, Communist-led unions like the United Electrical Workers (which totaled about thirty per cent of the CIO’s membership as of the mid 1940s) were able to resist blanket no-strike and management prerogative clauses into the 1950s. Although the incidence of such provisions did increase over time, it remained below fifty percent through the first half of that decade. By contrast, most unions with anti-Communist leaderships, like the United Steel Workers, conceded these issues in the late 1930s, while unions with mixed leaderships, like the United Auto Workers, fell in between.¹⁷⁵

Finally, neither collective bargaining agreements nor *Fansteel* halted quickie sit-downs or other job actions that lasted less than twenty-four hours and thus slipped beneath the Labor Department’s statistical radar.

174. Finkin, “Revisionism in Labor Law,” 32; Bernstein, *Turbulent Years*, 743–46; Preis, *Labor’s Giant Step*, 103–6.

175. James B. Atleson, *Labor and the Wartime State: Labor Relations and Law during World War II* (Urbana: University of Illinois Press, 1998), 57–66; Judith Stepan-Norris and Maurice Zeitlin, “‘Red’ Unions and ‘Bourgeois’ Contracts?” *American Journal of Sociology* 96 (1991): 1151, 1186.

Even where collective bargaining agreements prohibited strikes and job actions, many workers continued to stage sit-downs, slow-downs, and other partial strikes. Workers who had tasted self-government on the job did not easily acquiesce in renewed hierarchy. Sometimes, as at General Motors, the union's acceptance of a no-strike clause was followed by an increase in sit-down activity. Henry Ford's labor strategists, who hoped that collective bargaining would bring about a decline in union militancy, were sorely disappointed when recognition "touched off a virtual revolution on the shop floor which generated a condition that can only be described as one of industrial 'dual power.'" In 1943, a government panel complained that Goodyear workers continued to stage sit-downs and slow-downs on a routine basis and opined that the "elimination of habits, nurtured in successful practice, from thousands of workers is no over-night task." Tire builders legislated limits on production and enforced them with slowdowns through the 1950s.¹⁷⁶ At Chrysler, workers used sit-downs and slowdowns to achieve a substantial degree of control over shop floor conditions that persisted to the late 1950s. Similar conditions prevailed at Studebaker and other small auto manufacturers. Even in the steel industry, where the union had enthusiastically enforced no-strike obligations from the outset, industry reported 788 wildcat actions during 1956–58. Writing in 1960, Sumner Slichter, the leading labor scholar of his time and no proponent of unilateral worker lawmaking or direct action, reported that "[r]ules may be enforced by older unions unilaterally" and that the newer industrial unions were even more likely to engage in pressure tactics. "Almost all companies have at least some difficulty with slowdowns," he noted, "and in some cases it is extreme."¹⁷⁷

In short, neither no-strike clauses nor *Fansteel* and its progeny brought quickie sit-downs, slowdowns, or partial strikes to a grinding halt. Instead, they contributed to a long-term process of building up what labor historian David Brody has called "the workplace rule of law"—a regime character-

176. See James R. Zetka, Jr., *Militancy, Market Dynamics, and Workplace Authority: The Struggle over Labor Process Outcomes in the U.S. Automobile Industry, 1946 to 1973* (Albany: State University of New York Press, 1995), 34–36; Nelson Lichtenstein, "Life at the Rouge: A Cycle of Workers' Control," in *Life and Labor: Dimensions of American Working-Class History*, ed. Charles Stephenson and Robert Asher (Albany: State University of New York Press, 1986), 237, 242–43; Harold S. Roberts, *The Rubber Workers* (New York: Harper & Bros., 1944), 254; James W. Kuhn, *Bargaining in Grievance Settlement* (New York: Columbia University Press, 1961), 139.

177. Jefferys, *Management and Managed*, 112–13, 140–41; Stephen Amberg, "The Triumph of Industrial Orthodoxy: The Collapse of Studebaker-Packard," in *On the Line*, ed. Lichtenstein and Meyer, 190, 202; Zetka, *Militancy, Market Dynamics, and Workplace Authority*, 113–17; Brody, *Workers in Industrial America*, 204; Sumner H. Slichter, James J. Healy, and E. Robert Livernash, *The Impact of Collective Bargaining on Management* (Washington: Brookings, 1960), 667, 670.

ized by detailed collective bargaining agreements, grievance procedures culminating in binding arbitration, and an obligation on the part of unions and workers to acquiesce in employer violations of the contract pending an arbitration award. In place of the open, union-backed production standards and shop rules that emerged in the late 1930s, workers were forced back to the kind of informal, shop-group rulemaking and enforcement that predated the rise of the CIO. As Brody points out, the contractualist rule of law “effectively forestalled the institutionalization of shop-group activity.” By denying shop-floor legislation and action legitimacy, this workplace rule of law “ate at the vitals of the shop-floor impulse. American workers might engage in pressure tactics, but, as Sumner Slichter remarked, they knew they were breaking the rules. It would be hard to imagine a more insidious check on so fundamental a phenomenon as the self-activity of the work group.”¹⁷⁸

Brody’s analysis is confirmed by Steve Jefferys’ detailed study of industrial relations at Chrysler’s enormous Dodge Main plant. There, workers sustained a vigorous tradition of shop-floor activism and standard-setting until the late 1950s. They established their own “fair” pace of work, which left them about fifteen minutes out of every hour for their own purposes, and their own “fair” seniority rotas. To enforce these standards, they staged sit-downs and slow-downs. They insisted that their rules and contractual interpretations prevail pending a resolution through the grievance procedure, and when management discharged workers in retaliation, they struck. These practices continued long after *Fansteel*, and long after the union agreed to a no-strike clause in its collective bargaining agreement. According to Jefferys, the “strength of Dodge Main workers’ independence from company dictates and international UAW pressure lay in their belief that it was legitimate for them to respond to management’s disregard of workplace-established rules by” staging departmental work stoppages. Not until the late 1950s, when such stoppages were “no longer a legitimate activity in the eyes of most Dodge workers was management able to regain its authority over standards.”¹⁷⁹

VI. Conclusion: Reckoning with Nick DiGaetano

The sit-down movement in the United States opened up hitherto unimagined possibilities for mass production workers to make and enforce law. In

178. Brody, *Workers in Industrial America*, 206, 199–207; see also Gartman, *Auto Slavery*, 268–80.

179. Jefferys, *Management and Managed*, 111, 112–14.

arenas ranging from the shop floor to the Supreme Court, worker activists seized every opportunity to promulgate rules, to interpret official law, and to enforce their rules and interpretations. They set production quotas, made rules governing the obligations of solidarity, and unilaterally established steward systems and grievance procedures. They filled the void of authority in the occupied plants with deliberative forms of self-government complete with legislated rules and adjudicatory procedures. They formulated, justified, and implemented a putative legal right to stage sit-down strikes. They interpreted the Constitution to authorize the Wagner Labor Relations Act and enforced their interpretation through factory occupations.

During the 1940s and 1950s, this burgeoning practice of lawmaking from below was gradually displaced by a system of collective bargaining that left little space for worker initiative. Is this what the workers wanted anyway, as argued by Matthew Finkin and others? Or was it the result of the Supreme Court's anti-democratic policymaking, as argued by Karl Klare? In approaching this issue, I assume—with Finkin—that industrial workers did desire important features of the contractualist rule of law, especially the outlawing of favoritism and arbitrary treatment. And it seems clear that workers could and did use the process of collective bargaining to their advantage, as evidenced by employer concessions on wages, job security, and pensions, to name only a few. But these attractive features of contractualism could, as we have seen, co-exist with a substantial degree of unilateral worker lawmaking and shop floor activism. And Klare's critique is directed not at collective bargaining in general, but at the particular version that prevailed—a version that systematically undercut the foundations of worker lawmaking and shop floor activism.

Consider the case of Nick DiGaetano, a UAW committeeman and chief shop steward from 1940 to 1958. In defense of the contractualist rule of law, David Brody quotes DiGaetano: "I tell you this: the workers of my generation from the early days up to now had what you might call a labor insurrection in changing from a plain, humble, submissive creature in to a man. The union made a man out of him. . . . I am not talking about the benefits. . . . I am talking about the working conditions and how they affected the men in the plant. . . . Before they were submissive. Today they are men."¹⁸⁰

Brody throws out this challenge: "Anyone who characterizes workplace contractualism 'as a vehicle for the manipulation of employee discontent and for the legitimization of existing inequalities of power' will have to reckon with Nick DiGaetano." And DiGaetano, a veteran Wobbly who

180. David Brody, "Workplace Contractualism in Comparative Perspective," in *Industrial Democracy in America*, ed. Lichtenstein and Harris, 176, 204.

understood that “the class struggle took place at the point of production,” ought to know. Brody is right. But context gives DiGaetano’s analysis a double-edged significance. Nick DiGaetano was a shop steward at Chrysler, where the contractual grievance procedure was supplemented by vigorous shop floor action and bargaining. In the system he described, workers “set the production rates” and secured the agreement of the company’s time-study men. Union stewards and workers talked to the foreman “on an equal basis” and had access to top labor relations executives.¹⁸¹ This was a far cry from the situation at General Motors, the paradigmatic contractualist workplace, where unilateral lawmaking was suppressed and the UAW’s stewards ignored. So, to flip Brody’s challenge, anybody who claims that workers ended up with bureaucratic contractualism because that is what they wanted must contend with the persistence of shop-floor rulemaking at Chrysler and other companies in defiance of management, labor arbitrators, and—after the CIO’s purge of Communists and other radicals—the overwhelming majority of national union officials.

181. Ibid., 203–4; DiGaetano Oral History Interview, 14, 74, 71.