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Labor, Liberty, and the Law: Trade Unionism and the Problem of the American Constitutional Order

Leon Fink

In 1958, American workers—who had first given May Day political currency in 1886—saw the holiday officially assigned a new, public meaning: Law Day. Responding to a spirited campaign by the American Bar Association (ABA), President Dwight D. Eisenhower, in words that would soon be repeated in joint resolutions of Congress, declared that "freedom under law is like the air we breathe. People take it for granted and are unaware of it—until they are deprived of it." Even in the proclamation of Law Day, however, the president tacitly acknowledged other associations with the day. Immediately identifying the canons of jurisprudence with the welfare of the American worker, the proclamation quoted the famous lines of Edmund Burke: "The poorest man may, in his cottage, bid defiance to all the forces of the Crown . . . the storms may enter; the rain may enter—but the King of England cannot enter: all his forces dare not cross the threshold of that ruined tenement!" Beyond protecting rich and poor alike from its own wrath, the state, affirmed the Republican president, had also entered into a new social compact with American working people.

> It has moved to meet the needs of the times. True, it is good that the King cannot enter unbidden into the ruined cottage. But is not good that men should live in ruined cottages. The law in our times also does its part to build a society in which the homes of workers will be invaded neither by the sovereign's troops nor by the storms and winds of insecurity and poverty. It does this not by paternalism, welfarism and hand-outs, but by creating a framework of fair play within which con-

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> scientious, hard-working men and women can freely obtain a just return for their efforts.[1]

While organized labor was not a prime mover in the creation of Law Day, it certainly did not stand in the way. Respect for, even sanctification of, the law and legal procedure had in fact already become incorporated into the public posture of the postwar, newly united American Federation of Labor and Congress of Industrial Organizations (AFL-CIO). Indeed, a year before the ABA went into action, the *American Federationist* dedicated its May 1957 issue to the theme, "Respect for the Law," and prominently quoted from Abraham Lincoln's "Lyceum Speech" of 1838:

> Let every American, every lover of liberty, every well-wisher to his posterity swear by the blood of the Revolution never to violate in the least particular the laws of the country and never to tolerate their violation by others. As the patriots of '76 did to the support of the Declaration of Independence, so to the support of the Constitution and laws let every American pledge his life, his property and his sacred honor. Let every man remember that to violate the law is to trample on the blood of his father and to tear the charter of his own and his children's liberty.[2]

President Eisenhower and the AFL-CIO did indeed seem to be breathing the same air. But like much else about the postwar cultural consensus, the celebration of American law covered over a much more complicated historical relationship between workers and the Constitution as interpreted and administered through the legal system. On the one hand American trade unions had early and persistently celebrated, adopted, and identified with the charter of American liberty as the basis of their own aims and ambitions. On the other hand unions ran into repeated, and often dire, friction with the law as actually administered. How to capture the constitutionalist idiom without being swallowed up by it? How to honor the national political inheritance without being destroyed by it? Those are questions that have bedeviled and continue to bedevil American social movements.

The law, as E. P. Thompson concluded in *Whigs and Hunters*, functions as both institution (courts, statutes) and as ideology (a set of rules and norms "tenaciously transmitted through the community"). Through its dual incarnations, Thompson observed, eighteenth-century English law "in most respects" served and legitimized class power. At the same time the very centrality of the law as a force of order and legitimation made it "a place, not of consensus, but of conflict." From within the legal tradition, for example, the plebian classes erected "alternative norms," demanding the extension of principles of equity. Over time, noted Thompson, the

[1] *Public Papers of the Presidents of the United States, Dwight D. Eisenhower: Containing the Public Messages, Speeches, and Statements of the President, Jan. 1 to Dec. 31, 1958* (Washington, 1959), 362–63. Within two years of its creation, more than seventy-five thousand official observances of Law Day—in schools, churches, and courthouses—were reported across the nation. In 1970 the chief justice of the United States inaugurated an annual "state of the judiciary" address. *The Guide to American Law, Everyone's Legal Encyclopedia* (12 vols., St. Paul 1983–1985), I, 211–12. On the relation of Law Day to the "end of ideology" theme of the 1950s, see Grant Gilmore *Ages of American Law* (New Haven, 1977), 105.

[2] "Respect for the Law," *American Federationist*, 64 (May 1957), 1. See Philip Van Doren Stern, ed., *The Life and Writings of Abraham Lincoln* (New York, 1940), 231–41.

law thus served at once as a powerful hegemonic force for the established order and as a progressive brake on the naked self-interest of the ruling classes.[3]

In American labor history the law has yet to be fully explored in Thompson's terms as a restricting, yet dynamic, force within the workers' world.[4] To be sure, in recent years a great deal of useful attention has focused on the connections between working-class social movements and national political culture. What has been described as "labor republican," "equal rights," or "commonwealth" ideology has been identified with the central tenets of nineteenth-century American workers' movements. Such labor variants of the national political inheritance have been distinguished from the radically bourgeois, entrepreneurial, "law and order," or property-centered variants that usually prevailed in government and industry. Such investigations have rightly helped rejoin American social and political history, clarifying the conflicting meanings and uses of a republican political tradition. While reaching different conclusions—for example, seeing different mixtures of authentic radicalism and liberal hegemony in labor activity—recent studies have approached political culture primarily as an arena of consciousness and world view.[5]

The case of the law and the Constitution, however, presents a distinct problem for labor historians. While equipped with their own perspectives and aspirations, workers, of course, did not live in a world shaped according to their preferred version of Americanism. They had not only to deal with their direct economic antagonists; in addition they often had to deal with encumbrances or even repression imposed by the state. To be sure, with widespread suffrage, workers were sometimes able to mitigate the terms of state intervention through legislative action. They had far less capacity to intervene in the interpretations of the laws. Whatever their own ideals and whatever their political influence, they were subject in the end to the Constitution and the laws as interpreted by the courts.

How workers' movements responded to the bourgeois command over the interpretation and instruments of law is the problem I wish to explore here. How, for example, was a collective movement to justify itself in a land that offered legal sanction only to individual rights? How did unions defend themselves against recurrent charges of conspiracy and restraint of trade? Did an era of injunctions and a crushing

[3] E. P. Thompson, *Whigs and Hunters: The Origin of the Black Act* (New York, 1975), 258–69.

[4] For the most penetrating account of the evolving assumptions in American labor law and industrial relations, see Christopher L. Tomlins, *The State and the Unions: Labor Relations, Law, and the Organized Labor Movement in America, 1880–1960* (New York, 1985). Tomlins's insights establish the point of departure for my own approach to those issues. For pioneering research from which I have benefited, see Victoria Hattam, "Unions and Politics: The Courts and American Labor, 1806–1896" (Ph.D. diss., Massachusetts Institute of Technology, 1987).

[5] For Britain, see Gareth Stedman Jones, *Languages of Class: Studies in English Working Class History, 1832–1982* (Cambridge, Eng., 1983); for France, see William H. Sewell, Jr., *Work and Revolution in France, The Language of Labor from the Old Regime to 1848* (Cambridge, Eng., 1980); and Maurice Agulhon, *La Republique au village* (Paris, 1970). For the U.S., see Herbert G. Gutman, *Work, Culture, and Society in Industrializing America: Essays in American Working-Class and Social History* (New York, 1976); Alan Dawley, *Class and Community: The Industrial Revolution in Lynn* (Cambridge, Mass., 1979); Sean Wilentz, *Chants Democratic: New York City and the Rise of the American Working Class, 1788–1850* (New York, 1984); Steven J. Ross, *Workers on the Edge: Work, Leisure, and Politics in Industrializing Cincinnati* (New York, 1985); Susan Levine, *Labor's True Woman: Carpet Weavers, Industrialization, and Labor Reform in the Gilded Age* (Philadelphia, 1984), 129–53; and Leon Fink, *Workingmen's Democracy: The Knights of Labor and American Politics* (Urbana, 1983).

legal offensive erode labor's "republican" faith? If so, what assumptions took its place? Finally, to what extent did New Deal reforms reconcile labor idealism with the instrument of the state and (to use Ronald Dworkin's term) the "law's empire"?[6]

Within a broad chronological sweep, this essay will concentrate on the labor movement during the generalship of Samuel Gompers. At the height of what many historians have recognized as the "exceptionalist" drift of American labor history—away from class economic and political strategies, toward a homegrown conservative pragmatism—legal issues then took on their most determining historical role. While arguing for the significance of the legal order in American labor history, however, I do not wish to suggest that the outcome was delimited in advance or entirely "from above." The case of Britain, which shared fundamental legal forms and jurisprudential concepts with the United States but nonetheless departed decisively from American industrial relations practice in the twentieth century, will prove particularly instructive on this point.

Workers in the Republic

Throughout American history, workers, perhaps more or less sincerely, have sought to identify their interests and actions directly with national governmental institutions and political principles. This was especially so in the first century of the new republic, when the contested civic concepts of "independence," "equality," "free labor," and "commonwealth" carried a discrete social, as well as a political, meaning. None, for example, were more zealous than the artisan classes in seeking ratification of the United States Constitution. Similarly, as early as 1810 the Declaration of Independence was used to justify a strike. More generally, worker ideology in the antebellum decades has been defined in recent studies as "artisanal republicanism." Even unenfranchised female workers at Lowell found political sustenance as "daughters of free men."[7] Protests at midcentury in New England's shoe factories likewise appealed directly to a political tradition of "equal rights"; not coincidentally the greatest strike up to 1860 occurred on Washington's Birthday. Following the Civil War, a gathering working-class movement again chose the symbols of the Republic as the basis for its critique of corporate capitalism. The nation, argued a prominent spokesman for the Knights of Labor, must choose between "the wage system of labor" and "the republican system of government." The written constitutions of the national trade unions also borrowed from the structure and procedure of the nation's federal institutions.[8]

[6] Ronald Dworkin, *Law's Empire* (Cambridge, Mass., 1986).

[7] Eric Foner, *Tom Paine and Revolutionary America* (New York, 1976); Charles G. Steffen, *The Mechanics of Baltimore: Workers and Politics in the Age of Revolution, 1763–1812* (Urbana, 1984), 81–101; Wilentz, *Chants Democratic*, 61–103; Thomas Dublin, *Women at Work: The Transformation of Work and Community at Lowell, Massachusetts, 1826–1860* (New York, 1979).

[8] Dawley, *Class and Community*, 80; George E. McNeill, "The Problem of Today," in *The Labor Movement: The Problem of Today*, ed. George E. McNeill (Boston, 1887), 459; Theodore W. Glocker, *The Government of American Trade Unions* (Baltimore, 1913), 140–41, 197, 236–37. Although trade-union constitutionalism may have paralleled, rather than copied, governmental constitutionalism, there were also direct influences, although not en-

Labor's connection to state-related values appears particularly definitive when other intellectual sources to which the movement might have turned are considered. Republicanism, after all, was not the only political ideal available to justify labor solidarity. One of the most significant alternatives was the tradition of craft and occupational culture. In their classic study of British trade-union development, for example, Beatrice Webb and Sidney Webb cited initial attempts by the skilled crafts to seek guildlike protection of their existing stake in society through "the doctrine of vested interests." Thus, in 1845 the British Amalgamated Society of Engineers (ASE) compared its members to physicians who held diplomas or to authors who were protected by copyright. Arguments from "vested interest" or corporate occupational communities, however, succumbed to legal and philosophical attack and soon disappeared from labor's public political identity even in Britain. The group discipline and avowed regulatory purpose of the older "combination" quickly gave way, at least rhetorically, to the more voluntaristic intentions of the "union." "United to protect, not combined to injure," proclaimed the British brush makers in 1840. While the Webbs suggested that the argument of vested interests was succeeded by pragmatic arguments based on middle-class political economy ("the doctrine of supply and demand"), more recent historiography points to an intervening middle passage in which British workers rested their claims on political arguments drawn from a radical reading of eighteenth-century constitutionalism ("the rights of freeborn Englishmen").[9]

In their reliance on broader national political assumptions, British and American workers seem to have had much in common. Very early in the course of industrial development both groups detached themselves from economic theories that explicitly justified the use of collective action to control or govern the marketplace. Instead, they placed their faith in a looser tradition of individual "rights" that linked their interests and freedom of maneuver to those of the citizenry at large. American workers, generally benefiting from the breakdown of the British mercantile order, were rarely tempted to resurrect a corporatist or guildlike justification of their activities. Instead, they looked confidently to the principles of the new nation itself to safeguard and justify their legitimate interests.[10] For both British and American

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tirely one way. Glocker, for example, saw the influence of national political traditions in trade-union respect for representative forms of government and in a "federal" approach to national associations, that is, "federations" of labor. The internal judicial systems of the unions mirrored the hierarchical appeals process from lower to higher authority found in the national institutions. American unions more zealously guarded local sovereignty than their British counterparts. However, American unions experimented with the secret ballot system before its adoption by state and municipal governments, and at the turn of the century, labor unions were among the most active advocates of direct-government reforms such as referendum and recall.

[9] Lloyd Ulman, *The Rise of the National Trade Union: The Development and Significance of Its Structure, Governing Institutions, and Economic Policies* (Cambridge, Mass., 1955), 586; Sidney Webb and Beatrice Webb, *Industrial Democracy* (London, 1920), 559–99; John V. Orth, "English Combination Acts of the Eighteenth Century," *Law and History Reviews*, 5 (Spring 1987), 175. Jones, *Languages of Class*, 90–178; James Epstein, "The Constitutionalist Idiom: Radical Reasoning, Rhetoric, and Action, 1790–1850," paper delivered to the National Humanities Center, Research Triangle Park, N.C., Sept. 1986 (in Leon Fink's possession). See also E. P. Thompson, *The Making of the English Working Class* (New York, 1964).

[10] See Wilentz, *Chants Democratic*, 61–103.

workers such a claim on the central political culture of the nation reflected their real gains and felt promise. On the other hand identification with the constitutional order also posed risks. Could labor defend its version of the legal-political order in the face of adversity? If not, might it not lose a sense of purpose, its vision of the future, as well as its capacity to persuade others to its side?

To be sure, American trade unionists occasionally called upon certain currents of collective reasoning. Commitment to the "working class" of classical socialist theory offered an alternative to republicanism, as in German Marxism, or a collectivist fusion with it, as in French socialist-republicanism or American Debsian socialism. The former was evident, for example, in Samuel Gompers's initial exposition of the "principles of trade unionism" in 1888, which, without any republican reference, appealed to "the natural law of collective action" and "working-class unity" as the "germ of the future state." Likewise, the fraternalism of voluntary societies and varieties of Christian communalism influenced American trade unionism in ways that ignored or extended the boundary of "rights" consciousness. While not insignificant, however, such currents remained for the most part subordinate to the more common theme of workers as American citizens, at once pursuing their interests, defending their rights, and safeguarding the Republic.[11]

Problems of Republicanism

Unfortunately, workers' understanding of republican rights often differed from that of those officially entrusted with the interpretation of the Constitution. Together, a residual animus of the common law and a developing "moral authority" granted, in American jurisprudence, to the "force of liberated individuality" posed a frontal legal challenge to labor's freedom of maneuver. As J. R. Pole concluded in his study of consitutional equality, "It is the individual whose rights are the object of the special solicitude of the Constitution and for whose protection the Republic had originally justified its claim to independent existence." From the sanctity of the individual, moreover, as Morton Horwitz has indicated, it was not far to the sanctity of the entrepreneur.[12]

In the first decade of the nineteenth century, the conspiracy and restraint-of-trade verdicts against journeymen's associations indicated that workers' collective endeavors would have to be weighed against the right of individuals to pursue their interests freely in the marketplace. The journeymen's groups hailed before the

[11] Tomlins, *State and the Unions*, 32–33. Nineteenth-century British trade-union structures derived, according to Sidney and Beatrice Webb, directly from friendly societies, which probably borrowed the "spirit of association, clothing itself in more or less similar picturesque forms" from the Freemasons and the Odd Fellows. In the post-Civil War era in the United States, the Noble and Holy Order of the Knights of Labor was only the most successful of numerous secret labor societies that appropriated the structure and ritual of the fraternal orders. Sidney Webb and Beatrice Webb, *The History of Trade Unionism* (London, 1920), 19–20; Charles W. Ferguson, *Fifty Million Brothers: A Panorama of American Lodges and Clubs* (New York, 1937), 175–76. See also, Gutman, *Work, Culture, and Society*, 79–117.

[12] J. R. Pole, *The Pursuit of Equality in American History* (Berkeley, 1978), 147, 358; Morton J. Horwitz, *The Transformation of American Law, 1780–1860* (Cambridge, Mass., 1977).

courts in those early skirmishes had assumed that American justice would simply throw out the common law inhibitions on worker activity as so much "superstitious idolatry" of the Old World.[13]

They would have no such luck, however, for the restrictive conspiracy and restraint-of-trade doctrines, even when divorced from British master-and-servant acts and Combination Laws, remained embedded in American jurisprudence. Thus, as early as 1837, inaugurating nearly a century of similar vain appeals, the artisan-linked Locofocos of New York City made a demand for judicial restraint part of their party platform. To be sure, there was some improvement for workers in the precedent-setting *Commonwealth v. Hunt* decision of 1842, which treated the formation of trade unions as a justifiable exercise of rights of voluntary association, rather than as an illegal conspiracy. The right of freely contracting individuals to form unions, however, still did not clarify unions' rights of action as representative bodies. "The authority of the union to make and enforce rules as an embodiment of the aggregated free wills of its members," observes Christopher Tomlins, "remained illegitimate and open to prosecution as criminal conspiracy." A predilection to view control as an essential condition of property ownership, faith in a free marketplace as a precondition for economic well-being, and a fear of factions operating outside the constituted sovereignty of public authority all figured in the early judicial suspicion of trade-union activities. To a remarkable extent, the basic issues identified in the conspiracy cases would continue to pose problems for labor through the twentieth century.[14]

[13] For a review of the early regulation of English labor, see Orth, "English Combination Acts," 176–211. On "idolatry," see Wilentz, *Chants Democratic*, 98. The case of the New York journeymen cordwainers, 1809, offers an eloquent example of the early skirmishing over core legal and philosophical concepts. The city's master shoe workers had charged trade-union leaders with conspiracy for their part in a general strike aimed at increasing piece rates and controlling access to the trade. The defendants' lawyer, William Sampson, raised the case to epic political principles: "Those who framed the constitution under which we live . . . abrogated all of the common law that should prove in contrariety with the constitution they established. . . . the constitution of this state is founded on the equal rights of man, and whatever is an attack upon those rights is contrary to the constitution. Whether it is or is not an attack upon the rights of man, is, therefore, more fitting to be inquired into, than whether or not it is conformable to the usages of Picts, Romans, Britons, Danes, Jutes, Angles, Saxons, Normans, or other barbarians, who lived in the night of human intelligence." Insisting on a close analysis of the events at hand, the prosecution turned aside the defendants' ideological attack: "certainly, the restriction of illegal combinations to raise the price of articles of necessity, is as congenial to our constitution as any other parts of the common law."

The verdict offered a political victory and a constitutional defeat for the journeymen. They were found guilty of having violated the rights of others but merely fined one dollar plus court costs. John R. Commons, et al., eds., *A Documentary History of American Industrial Society* (3 vols., Cleveland, 1910), III, 278–79, 318.

[14] The Locofocos proposed electing judges for fixed terms and limiting the use of common law precedents in American cases. See Hattam, "Unions and Politics," 109; Tomlins, *State and the Unions*, 43–44. In *Commonwealth v. Hunt*, defense counsel Robert Rantoul, Jr., appealed—in the tradition of the early conspiracy cases—for a renunciation of common law labor doctrines: "We might as well be governed by England as to adopt blindly in mass her laws which grow out of her institutions and state of society. Her government is founded upon property. Her laws restraining laborers from interfering with trade sacrificed them to the ruling classes. They are repugnant to the Constitution and to the first principles of freedom." Judge Lemuel Shaw's appeals court decision threw out the defendants' original conviction on conspiracy grounds. While adopting much of Rantoul's argument, Shaw did not preclude further legal action against effective labor organizations. *Commonwealth v. Hunt*, 4 Metcalf 111 (Mass., 1842). Walter Nelles, "Commonwealth v. Hunt," *Columbia Law Review*, 32 (Nov. 1932), 1145, 1151; Harry H. Wellington, *Labor and the Legal Process* (New Haven, 1968), 7–13. See also Leonard Williams Levy, *The Law of the Commonwealth and Chief Justice Shaw* (Cambridge, Mass., 1957). William E. Forbath, "The Ambiguities

During the renewed labor conflict of the Gilded Age, the conspiracy doctrine reemerged as an inviting tool for legal actions against organized workers. After 1880 employers increasingly brought suits for damages and sought injunctive relief from strikes or boycotts; such actions usually rested on an initial charge of conspiracy. In all such cases the courts began by assuming the existence of a free, unobstructed marketplace, an assumption which cast suspicion on trade union-inspired "disruptions." An occasional finding that workers were exercising rights superior to those they were violating (as in Justice Oliver Wendell Holmes's "just cause" doctrine of 1894) depended, as Holmes noted, on the rare "economic sympathies" of the judge. The main current of justice was indicated in a single statistic. Between 1880 and 1931 more than eighteen hundred injunctions were issued against strikes. In that period, a 1945 study concluded, "The power of the courts was invoked to assist in defeating most of the more important strikes . . . and only a smaller proportion of the relatively less important ones." By 1910 the most elemental forms of trade-union response to corporate power, the strike and boycott, were either (in the latter case) effectively curtailed or (in the former case) severely handicapped by judicial censure. Legislative attempts to redress the balance proved all but useless. While the scale of the legal impediment varied over time and place, the basic problem remained the same: The suasion that an organized body of workers might exercise over their workmates, as well as their potential replacements, contradicted the voluntaristic assumptions, individual sovereignty, and respect for property embedded in the law.[15]

Experience with the law and with ineffectual legislative remedies placed the American labor movement in both a strategic and an intellectual quandary. Even as an industrial economy placed new pressures on workers, stimulating the impulse to organize, the Republic to which they looked for ultimate protection bristled with hostility. From the 1880s through the 1920s organized labor recurringly puzzled over the problem of its relation to state authority. Two broad lines of response, neither in the end very successful, were adopted.

The first impulse, most effectively represented by the Knights of Labor, stretched republican idealism to new political limits. Their rhetoric suffused with appeals to community and nation, the Knights sought to regenerate American life and institu-

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of Free Labor: Labor and the Law in the Gilded Age," *Wisconsin Law Review* (no. 4, 1985), 767–817, esp. 799, elaborates on the intellectual and judicial foundations of the dominant Gilded Age ethic, that "individual ownership—of one's capacity to labor in the worker's case, of the (putative) fruits of one's industry in the capitalist's—was the essence of personal right and freedom." On the ambivalence of free-labor ideology embedded in nineteenth-century legal doctrines, see also Brian Greenberg, *Worker and Community: Response to Industrialization in a Nineteenth-Century American City* (Albany, 1985), 25–41.

[15] On the use of the courts against strikes, see Harry A. Millis and Royal E. Montgomery, *Organized Labor* (New York, 1945), 505–6, 630–31. Both the substance and the procedure of injunction law were stacked against labor. In 118 labor injunction cases in the federal courts between 1901 and 1928, 70 restraining orders were granted on the basis of *ex parte* proceedings, i.e. affidavits from one side without notice to the defendants or even the opportunity to be heard. Wellington, *Labor and the Legal Process*, 39. See *ibid.*, 568–70 on the relative uselessness, or even hostility, to labor of the Sherman and Clayton Antitrust Acts and the draconian implications of *Loewe v. Lawlor* (the Danbury hatters' case), 208 U.S. 274 (1908).

tions through a radical activation of citizenship. By defining their contemporary enemies as a new "slave power" (thus invoking both the recent Civil War and instinctual American hatred of feudal serfdom), the Knights cast themselves as the last, best defenders of a true republic of individual liberties. As the labor editor, John Swinton, characteristically put it, the United States had been blessed with perfect institutions until "the robbers got into our country" and "shattered its grand constitution. Out with the piratical crew!" Typical of the Knights' self-image was their 1886 message of support to the Ohio Woman's Suffrage Association, which defined the Knights' aims entirely within the tradition of natural rights and human liberty. The "real mission" of their order, affirmed the General Assembly, "is the complete emancipation and enfranchisement of all those who labor. It is imbued with the lofty spirit of the Declaration of Independence."[16]

An implicit preference for the Declaration of Independence over the Constitution allowed Gilded Age labor at once to identify with the national purpose and to invoke transcendent "rights" beyond the reach of complicated, ambivalent, or hostile judicial interpretation. Even Gompers (who normally rested his claims on other grounds) caught the fever of "aroused republican citizenship" while campaigning for Henry George in 1886. Responding to his opponents' charges of anarchism, Gompers lashed back: "If they tell us to appeal to the ballot-box and when we do so they call us Anarchists, then anarchy is not wrong. . . . We have yet left to us certain inalienable rights."[17]

Stirred by the appeal to equal rights, the Knights, perhaps not surprisingly for an organization that denied lawyers membership, generally held the courts and their intricate legal reasoning in righteous, if somewhat ignorant, disdain. Even when attempting a serious defense of the legitimacy of the boycott in 1886, for example, Knights' executive officer George McNeill showed little patience for fine points of legal doctrine:

> Recent decisions of judges upon the question of conspiracy and boycotting are new revelations of an old fact, that the interpretation of law rests largely upon the public sentiment of the wealthy part of the community. The Dred-Scott decision was declared infamous by those who were lifted to the level of the spirit of our institutions; yet, nevertheless, that decision was a confession that the controlling classes were under the subtle influence of the slave-power. . . . So, too, the attempts now made to prevent the working people from using the great power of the boycott will be found to be in contradiction, not only of individual, but of constitutional rights. A man has not only the right to buy where he pleases, but has the right to advise another man to buy or not to buy of friend or enemy; *and whether the exercise of the boycott is judicious or injudicious, justifiable or unjustifiable in cer-*

[16] For elaboration of the theme of the Knights' republicanism, see Fink, *Workingmen's Democracy*, 3–37. See also Barry H. Goldberg, "Beyond Free Labor: Labor, Socialism, and the Idea of Wage Slavery" (Ph.D. diss., Columbia University, 1979). John Swinton, *Striking for Life: or Labor's Side of the Labor Question* (n.p., 1894), 296. On the changing dimensions of post–Civil War worker republicanism, see Forbath, "Ambiguities of Free Labor," 800–814. *Labor, Its Rights and Wrongs* (Washington, 1886), 204–6.

[17] Stuart Bruce Kaufman, "Haymarket and the Federation of Labor," in *Haymarket Scrapbook: A Centennial Anthology, 1886–1986*, ed. Dave Roediger and Franklin Rosemont (Chicago, 1986), 134.

> *tain instances,* the innate right of man to the privilege of exercising his moral power and social influence in the direction of trade, or to withhold trade, cannot be safely denied.[18]

By the 1890s radical reform zeal, whether exercised at the workplace or at the ballot box, had run into a virtual stone wall of judicial interference. Renunciation of fraudulently inflated railroad bonds by state legislatures, the regulation of working hours and conditions, and progressive income taxes had all been ruled unconstitutional. State laws intended to limit applications of the conspiracy doctrine in labor disputes had likewise failed to elicit respect from the bench. Beginning with the Debs case growing out of the Pullman strike of 1894, the United States Supreme Court helped redirect the animus of the Sherman Antitrust Act from business monopolies to the actions of labor unions. In important respects, the pivotal presidential campaign of 1896 pitted the forces of producer republicanism against a Supreme Court mindful of the security of corporate and finance capital. Indeed, perhaps more radical than any economic changes that William Jennings Bryan's Populist-Democratic forces proposed were the Democrats' platform commitments promising an end to "government by injunction," proposing jury trials in all contempt cases, opposing life tenure for federal officials, and even suggesting "reconstituting" (adding new members to) the Supreme Court. As Texas Gov. J. S. Hogg explained, "This protected class of Republicans proposes now to destroy labor organizations . . . proposes through Federal courts, in the exercise of unconstitutional writs, to strike down, to suppress and overawe these organizations."[19]

The collapse of the political initiatives launched during labor's great upheaval of the 1880s and the Populist crusade of the 1890s raised the ante for those who clung to the republican tradition. The old forms had become so thoroughly compromised that they would require structural, and not merely moral, renovation. As the Western Federation of Miners (WFM) complained in 1902, "The document of national liberty, the federal Constitution and the organic law of every state of the Union seem to be helpless in placing the strong arm of protection around the rights and liberties of that army of men and women who are camped on the industrial field." For Eugene Debs and others on labor's left flank in the 1890s, a new, socialist, constitutionalist departure was in order. "Socialism," declared one WFM delegate, "has written a declaration of independence which will gather together the scattered shreds of liberty." Invoking a similar vision of social democracy for the twentieth century, Henry Demarest Lloyd called before the 1893 AFL convention for a "grand international constitutional convention in which a new magna charta, a new declara-

[18] George E. McNeill, "Declaration of Principles of the Knights of Labor," in *Labor Movement*, ed. McNeill, 488–89. Italics added.

[19] On the courts' role in Pennsylvania and New York, see Hattam, "Unions and Politics," 133–68. As Hattam demonstrates, such frustration at the hands of the judiciary directly encouraged development of Samuel Gompers's antipolitical, "voluntarist" position. See *ibid.*, 193–201. *In re Debs*, 158 U.S. 564 (1895). Alan Westin, "The Supreme Court, the Populist Movement and the Campaign of 1896," *Journal of Politics*, 15 (Feb. 1953), 3–41, esp. 33.

tion of independence, a new bill of rights shall be proclaimed to guide and inspire those who wish to live the life of the commonwealth."[20]

But while political adversity carried some to a more radical elaboration of labor republicanism, it left others disillusioned and groping for alternative visions. Terence Powderly, former leader of the Knights of Labor, for example, was one of the tired ones. After the turn of the century, he looked back on the Knights' republican enthusiasm as a form of innocent naiveté:

> Maybe we placed a too implicit faith in what the Declaration of Independence held out to us. Perhaps some lingering, belated wind from the scenes of the early days of the French Revolution carried to our minds the thought that equality could be won, so far as rights and duties went, without reddening our record with a single drop of human blood.[21]

The AFL and the "British" Road to Legitimacy

The young American Federation of Labor disengaged from the tradition of labor republicanism that had identified workers' interests with the rights and welfare of American citizens in general. Ronald L. Filippelli has summarized this development: "Gompers saw that individual freedoms were meaningless in a society consisting of powerful interest groups. . . . To Gompers, individual freedom had no meaning unless protected by collective power."[22]

Both German and British examples nourished the more self-sufficient, politically detached perspective of the new American labor federation. AFL founders, true to their ideological roots in the First International, emphasized working-class organization at the expense of legislative or electoral initiatives. The constituent unions of the Federation of Organized Trades and Labor Unions—which in 1886 became the AFL—meanwhile took their organizational cue from the businesslike, new-model British bodies like the Amalgamated Engineers and the British Trades Union Council. Gompers called the British labor movement "the only one with traditions and historical development." The survival and stability of the trade unions as organizations were the first great accomplishments of the British movement (well before the new political departure of a Labour party), and the example was one that the AFL would struggle to replicate with "pure and simple" priorities. Disillusioned with the political option in America, Gompers and the national AFL leadership had by the 1890s effectively detached labor's agenda from any vision of change for the nation as a whole.[23]

[20] Alan Derickson, "Health Programs of the Hard-Rock Miners' Unions, 1891–1925" (Ph.D. diss., University of California, San Francisco, 1986), 36, 37; Henry Demarest Lloyd, "The Safety of the Future Lies in Organised Labor," 13th Convention, AFL, Dec. 1983, *AFL and CIO Pamphlets, 1889–1955* (Westport, 1977, microfilm), reel 1, item 13.

[21] Terence Powderly, *The Path I Trod* (New York, 1968), 55.

[22] Ronald L. Filippelli, *Labor in the USA: A History* (New York, 1984), 95.

[23] Samuel Gompers, *Seventy Years of Life and Labor: An Autobiography of Samuel Gompers*, ed. Philip Taft and John A. Sessions (New York, 1957), 132. To be sure, in the years after the Danbury hatters' and Buck's Stove cases, the AFL broke with tradition and adopted an energetic legislative program in order to defend its collective

Paradoxically, the AFL's resistance to a transformative political strategy led it to an intimate and unparalleled involvement with American constitutional and legal questions. Seeking to win a place within the established social order, the labor federation was forced to pay close attention to the inner workings and assumptions of a legal and political system skillfully appropriated by employers. Thus, regardless of Gompers' personal dismissal of individual rights, his AFL representatives nevertheless constructed the first serious defense of American trade unionism based on the acceptance of individualist and market-oriented assumptions. In the AFL years the rhetoric and public posture of the labor movement became stamped more than ever before with the imprint of legal entitlement.

The search for an acceptable constitutionalist idiom and a more carefully crafted legal footing for organized labor was already under way in the 1890s. While condemning the prevailing "corruption" of the judiciary, AFL editorialists in 1895 predicted that "courts are to have something to do with solving the labor question, whether the toilers like it or not." A memo from the New York attorney George H. Hart to Gompers in 1896 briefed the federation president on the proper defense of unions from yellow-dog contracts and other intimidating measures. "Today," Hart explained, "the rule is that it is legal to unite and combine with the purpose on the part of the employee to advance his wages and on the part of the employer to reduce the price of wages." The First Amendment, moreover, clearly "secures the right to every individual 'to peaceably assemble'" and thereby renders attempts to prevent employees from assembling a violation of the Constitution. The operating "rule" between disputants, Hart emphasized, was freedom from coercion: "neither must coerce or attempt to coerce or intimidate or injure the other." Citing the authority of the Fourteenth Amendment (otherwise a notorious obstacle to labor interests), the AFL counsel defended the right to organize from any attempt "to deprive a person of his civil rights, his individual liberty and freedom of action."[24]

Hart's message was part of a growing trend toward ideological moderation within the trade-union leadership. Instead of fleeing from the common law with ringing invocations of the Declaration of Independence or other appeals to natural rights doctrine, labor at the turn of the century painstakingly sought to turn inherited legal doctrine to practical advantage. As early as 1893 the AFL gave wide circulation to an essay by the abolitionist-turned-anarchist Dyer Lum, which viewed human history as one great progression from "compulsion" to "voluntary cooperation." Trade unionism, according to this formulation, fit neatly into broader economic and social development toward "free association." As a collection of the voluntary wills of freely participating individuals, organized labor, argued the new AFL line, was perfectly compatible with the dominant doctrines of American jurisprudence. What labor

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bargaining gains from judicial setbacks. Nick Salvatore, "Introduction," in Samuel Gompers, *Seventy Years of Life and Labor: An Autobiography*, ed. Nick Salvatore (Ithaca, 1984), xxxiv–xxxvii; *The Buck's Stove and Range Company v. The American Federation of Labor*, 36 Washington Law Reporter 822 (1908).

[24] James Duncan, "To Purify Our Courts," *American Federationist*, 2 (March 1895), 14; George H. Hart to Samuel Gompers, April 16, 1894, *American Federation of Labor Records: The Samuel Gompers Era* (Sanford, N.C., 1979, microfilm), reel 59, frames 150–59. The reference is courtesy of Stuart Kaufman.

wanted was not to transform or to regenerate the commonwealth, but just to be let alone to go about its business. Thus the American labor leadership came to embrace a version of what British analysts have dubbed "collective laissez-faire."[25]

The likeness was more than coincidental. The British system, which effectively allowed distinct industrial groups to contend for power without the state's interference, had evolved through the parliamentary system of the late nineteenth and early twentieth centuries in recognition both of the need for order in industrial relations and in deference to the unions' growing influence in political affairs. Facing similar threats of conspiracy prosecution and civil damages via injunction from strike-related activities, the British trade-union movement had by 1906 scored a series of legislative victories. Following the statutory legalization of unions themselves in 1871, the Conspiracy and Protection of Property Act of 1875 formally exempted trade disputes from criminal conspiracy charges. Although the breakthrough to legal immunity was narrowed in the 1880s and 1890s by a reassertion of coercive judicial power—a trend capped by the Taff Vale decision of 1901—it set a happy precedent for the future. Backed by a Liberal government seeking trade-union votes, the Trade Disputes Act of 1906 granted the unions immunity from civil law prosecutions just as the 1875 statute had from criminal law prosecutions. As a general rule this legislation and surrounding measures (combined with the customary deference of the British courts toward statutory intent) set the foundation for a judicially insulated industrial relations system that lasted until 1971.[26]

AFL leaders watched the British developments with envy. While advocating anticonspiracy legislation before the New York State Assembly in 1887, Gompers appealed directly to British precedent of the previous decade: "Surely if monarchial England can afford to expunge obnoxious laws from her statutes, the Empire State of the Union can." At the national level labor's commitment to a British-style theory of "judicial abstention" (in equity as well as criminal conspiracy cases) was reflected in the AFL's protracted campaign for congressional relief from the act of injunction. Indeed, from 1894 to 1914, the unions and their friends offered bills to curb equity jurisdiction in every congressional session but one. In testimony in 1904 and 1908,

[25] Dyer Lum, "Philosophy of Trade Unionism," 1892, *AFL and CIO Pamphlets*, reel 1, item 13; Ken Coates and Tony Topham, *Trade Unions in Britain* (Nottingham, 1980), 265.

[26] Coates and Topham, *Trade Unions in Britain*, 264–91; W. Hamish Fraser, *Trade Unions and Society: Struggle for Acceptance 1850–1880* (London, 1974), 185–97; Dominic Strinati, *Capitalism, The State and Industrial Relations* (London, 1982), 32–56. The Trade Disputes Act stated categorically: "An action against a trade-union, whether of workmen or masters, or against any members or officials thereof on behalf of themselves and all other members of the trade-union in respect of any tortious act alleged to have been committed by or on behalf of the trade-union shall not be entertained by any court." John P. Frey, *The Labor Injunction: An Exposition of Government by Judicial Conscience and Its Menace* (Cincinnati, [1923]), 24. The problems with legal "immunity" were recognized by some British contemporaries. An official of the Amalgamated Society of Engineers wrote to Sidney Webb in 1903: "Are we to try to get back to ante-Taff Vale [legal immunity]? . . . The best thing for propaganda purposes at present is ante-Taff Vale. But . . . it seems to me that ante-Taff Vale is after all anti-social and but glorified individualism, inasmuch as it seeks to get for groups of men anti-social rights." Some have argued that a tension between trade-union interests and a larger strategy of popular mobilization, a tension reflected in this early legal issue, endured for decades within the British labor movement and is in part to blame for its current crisis. Henry Pelling, *Popular Politics and Society in Late Victorian Britain* (London, 1968), 80–81; see Jones, *Languages of Class*, 239–56.

for example, Gompers appealed directly to British example to defend the protected realm of employee activity. John P. Frey, editor of the official journal of the Iron Molders' Union of North America, relying on the research of AFL attorney W. B. Rubin, later summarized the labor federation's view that "American courts of equity, in the matter of labor disputes, have set aside the basic rules of equity as they were recognized and applied in Great Britain and observed by equity courts in this country until 1888." In the Pearre Bill of 1907, the Wilson Bill of 1912, and, in somewhat diluted form, the Clayton Act of 1914, organized labor sought, albeit unsuccessfully, an outright proscription on legal intervention in peaceful labor disputes. In 1908 Gompers even collaborated in vain with railroad owners, International Harvester, and the National Civic Federation to ease Sherman Act restrictions on business concentration in exchange for exemption of labor from antimonopoly legislation (in the Hepburn Bill).[27]

Labor's more active "political" posture in the first decade of the twentieth-century, adopted in the face of hostile state intervention, amounted less to abandonment of the self-help doctrine of "voluntarism" than to a search for an officially recognized state neutrality in industrial conflict. In congressional testimony in 1906, for example, AFL counsel Thomas Spelling began by accepting the inevitability of marketplace conflict, both between capitalists for control of the volume of trade and between capitalists and labor for control of wages. But just as capital was left free to resort to "the legitimate and recognized methods of warfare" in the "conflicts of capital against capital," so should labor be allowed its methods of warfare "in its hard and unequal struggle against capital." Discountenancing all meddling by the courts in industrial disputes, Spelling retracted any special claim by labor on the state: "Workingmen are not in the habit of trying to get some court to exceed its jurisdiction. They are fighting this battle between capital and labor bravely—fighting it in the open." The arbitrary and interventionist nature of the injunction, according to this argument, unfairly disrupted the normal and healthy combat of the marketplace. As exercised by American judges, injunctions thus "usurp the

[27] Gompers in 1887 spoke as president of the politically oriented New York State Workingmen's Assembly. Hattam, "Unions and Politics," 168–85. The term "judicial abstention" is drawn from Wellington, *Labor and the Legal Process*, 13–26; Frey, *Labor Injunction*, vii, 21. Gompers favorably cited the British statutes of the 1870s and 1906 before Congress. U.S. Congress, House, Committee on the Judiciary, *Hearing on H.R. 89, A Bill to Limit the Meaning of the Word "Conspiracy" and the Use of Restraining Orders and Injunctions in Certain Cases,* 58 Cong., 2 sess., Jan. 13–March 22, 1904, p. 14; U.S. Congress, House, Committee on the Judiciary *Hearings on the Pearre Anti-Injunction Bill*, 60 Cong., 1 sess., Feb. 5, 1908, p. 45. Assuming that the civil or equity courts operated to protect property rights, both the Pearre and Wilson bills defined "property" to exclude employer-employee relations—in addition to forbidding the use of the injunction except to prevent irreparable injury to property. The Clayton Act carried no such definition of property. (Section 6 of the act, declaring that "the labor of a human being is not a commodity or article of commerce," proved innocuous in the hands of congressional and judicial interpreters.) While cataloging specific acts immune to injunctions (Section 20), it left broad interpretive and definitional powers in the hands of unsympathetic jurists. Thus, in ten of thirteen federal court cases between 1916 and 1920 applying Section 20, an injunction was still held a legal remedy. Felix Frankfurter and Nathan Greene commented on the Clayton Act: "The result justifies an application of a familiar bit of French cynicism: the more things are legislatively changed, the more they remain the same judicially." Felix Frankfurter and Nathan Greene, *The Labor Injunction* (1930; reprint, Gloucester, Mass., 1963), 142–76; James Weinstein, *The Corporate Ideal in the Liberal State, 1900–1918* (Boston, 1968), 78–82.

legislative power and make an *ex post facto* law and crush and destroy one side in a labor dispute."[28]

A world of organized interests had, in the AFL's reasoning, outmoded an argument built on a vision of commonwealth or public interests. Spelling's argument contained only a fleeting reference to an older republican view. Concluding his opening remarks with an emotional appeal, he warned Congress that "when a crisis arises . . . it is not the sons of the steel-trust magnates, or the coal barons, or the Wall Street kings of finance that fight our battles. These fighting men must be drawn from the great mass of the common people, and in that mass labor largely preponderates." Yet, even here, identifying itself as a preponderant interest group distinct from the "mass of the common people," labor sought less to stamp its vision on the Republic than to be allowed its own, self-limited jurisdiction.[29]

Labor's cherished freedom of action in American society received its ultimate formulation in the famous "voluntarism" speech delivered for Gompers by Vice-President William Green in 1924 only months before the AFL founder's death. "I want to urge devotion to the fundamentals of human liberty," wrote Gompers, "the principles of voluntarism. No lasting gain has ever come from compulsion. If we seek to force, we but tear apart that which, united, is invincible." Gompers's penultimate doctrine for American labor should be interpreted not merely as a counterweight to socialist agitation in labor circles, but also as a shrewd, if all too tardily crafted, response to American legal and constitutional restraints.[30]

Into the Wilderness

Despite the wishes of the AFL, American trade unionists in the era of industrial consolidation, unlike their British counterparts, never got to experience true voluntarism or "collective laissez-faire." Statutory restraints on judicial authority proved either internally faulty or were effectively annulled by the power of judicial reinterpretation (witness the fate of the Sherman and Clayton Antitrust Acts). Attempts to grant trade unions an implied statutory immunity from legal intervention repeatedly failed as a result of the American (but not English) practice of judicial review. Indeed, Gompers's address of 1924 on voluntarism appeared against the backdrop of the fiercest judicial volleys yet fired at the trade-union movement. During the decade of the twenties, injunctions rose to a new peak—in the pivotal 1922 railroad shop craft strike alone some three hundred restrictive injunctions were issued. In addition, the injunction power was extended to yellow-dog contracts (in *Hitchman Coal Company v. Mitchell*, 1917), picketing was often judicially restricted, and even the Clayton Act, labor's hoped-for "Magna Carta," was interpreted to deny the

[28] "Legal Rights of Working Men," Opening and Closing Arguments of Thomas Carl Spelling, before the Judiciary Committee of the House of Representatives of the 59th Congress, April 12, May 2, 1906, in *AFL and CIO Pamphlets*, reel 1, item 34, pp. 5, 7, 9–10, 15, 21.

[29] *Ibid.*, 28–29.

[30] William Green, *Labor and Democracy* (Princeton, 1939), 96–97; Louis S. Reed, *The Labor Philosophy of Samuel Gompers* (New York, 1968), 96.

legitimacy of the secondary boycott (*Duplex Printing Press Co. v. Deering*, 1921). "By the end of the 1920s," notes Filippelli, "it was difficult to say with any certainty just what was legal for unions to do."[31]

Lack of immunity placed the AFL in a most exposed position, both politically and intellectually. Having committed itself to work within the framework of American laws and economic institutions, the trade-union federation left itself with little strategic recourse in the face of overwhelming adversity. AFL leaders seethed with resentment against the treatment of unions by the courts. Gompers and John Mitchell almost went to jail for breaking a 1909 injunction in the *Buck's Stove and Range* case. Union meetings rang with militant tones and defiant gestures toward the judiciary. The federation's convention of 1919, for example, declared: "We shall stand firmly and conscientiously on our rights as free men and treat all injunctive decrees that invade our personal liberties as unwarranted in fact, unjustified in law and illegal as being in violation of our constitutional safeguards, and accept whatever consequences may follow."[32] AFL sentiments were rapidly approaching those of the western Industrial Workers of the World (IWW) leader who, when charged with judicial contempt, reportedly responded, "To hell with the court and the judge." Various political responses were contemplated. Challenging antagonistic judges in reelection fights, drafting legislation to permit the recall of judges, and, if necessary, preferring "impeachment against every law-breaking judge" received consideration in 1916.[33]

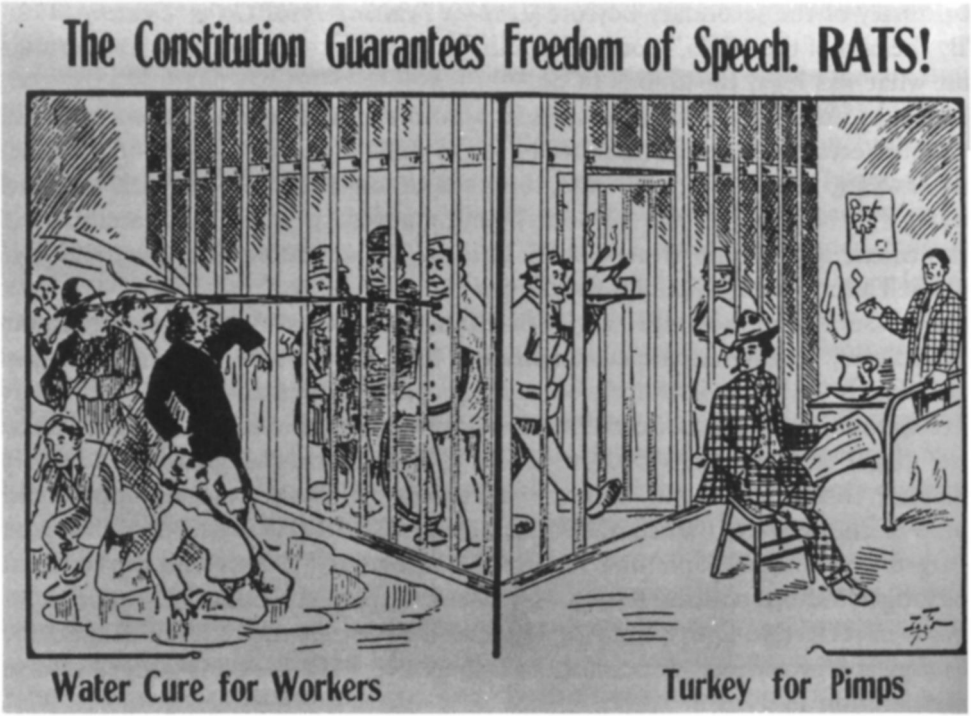
Criticism, indeed, quickly turned from the evil perpetrated by specific judges to the power of the courts as a whole over the American Constitution. In 1922 the AFL attorney W. B. Rubin spoke of John Marshall's original "usurpation" of the Constitution. By overturning child labor laws ("a blow to the very law of nature, the protection of the dependent offspring") and imposing contempt citations without a jury trial, argued Rubin, the courts had vitiated intended constitutional safeguards: "Our Constitution is a wall to protect us against our enemy from without, not a wall to immure us in submission." Believing that the "separation of powers" had already been "torn to shreds," AFL representatives demanded constitutional amendments providing for periodic election of all judges and, drawing on British practice, for restrictions on the courts' powers of statutory review. Unconnected to any larger strategy of working-class organization or political action, however, all such talk, while comforting in principle, was totally ineffectual.[34]

[31] Frankfurter and Greene, *Labor Injunction*, 52; "Labor and the Courts," Statement adopted by the El Paso convention, 1924, *AFL and CIO Pamphlets*, reel 3, item 137; Samuel Gompers, "The Supreme Court at It Again," *American Federationist*, 29 (Jan. 1922), 44–48; Samuel Gompers, "Forward, Onward and Upward in 1922," *ibid.*, 44. *Hitchman Coal Company v. Mitchell*, 245 U.S. 229 (1917); *Duplex Printing Co. v. Deering*, 254 U.S. 443 (1921); Filippelli, *Labor in the USA*, 162.

[32] Gompers, "Supreme Court at It Again," 47. See also Samuel Gompers, "5 to 4 on Slavery," *American Federationist*, 24 (April 1917), 290.

[33] Harry F. Ward, *The Labor Movement: From the Standpoint of Religious Values* (New York, 1917), 170–71; W. B. Rubin, "What Shall Be Done with Judges Who Violate the Constitutional Rights of Labor?" *American Federationist*, 23 (Aug. 1916), 664–68.

[34] W. B. Rubin, "The Constitution and the Supreme Court," *American Federationist*, 29 (Sept. 1922), 675–80; Ernest Crosby, "Jerome and the Judges," *ibid.*, 13 (Feb. 1906), 81. For suggested remedies to judicial antagonism,



Workers embraced rights certified by the Constitution, but they often felt victimized by the official administration of justice, as this Wobbly cartoon illustrates. *Industrial Worker*, Dec. 8, 1910, in *Rebel Voices: An I.W.W. Anthology*, ed. by Joyce L. Kornbluh (Ann Arbor, 1965), 109.

Given the unreceptive climate for voluntarist collective bargaining, it is not surprising that early twentieth-century trade unions in practice sought other means to advance their interests. Even as the national AFL leadership (together with the labor economists around John R. Commons) were placing exalted faith in private collective bargaining contracts as "constitutions for industry," many of their affiliates were advancing more state-oriented strategies of protection. In Illinois, for example, the labor lobby secured a miners' qualification law (ostensibly a safety device, it prevented importation of strikebreakers) and prounion licensing acts for elevator operators, plumbers, stationary engineers, boiler tenders, and barbers; teamsters sought legislation on the size of wagon loads, railway unions demanded full crews on trains, and glass bottle blowers tried to prevent the resale of old bottles from junk heaps (they were opposed by milk wagon drivers); even the Egg Inspectors' Union helped to secure their social function with the help of an egg inspection law

see Jackson H. Ralston, "Judicial Control over Legislatures as to Constitutional Questions," 1919, *AFL and CIO Pamphlets*, reel 2, item 87. Not surprisingly, organized labor leaped to advocate and defend Franklin D. Roosevelt's court-packing plans in the 1930s. See, for example, William Green "Will Our Constitution Bend—Or Break?" *American Federationist*, 43 (Feb. 1936), 135; Victor S. Yarros, "Progress and the Supreme Court," *ibid.*, (June 1936), 616–19; and William Green, "Supreme Court," *ibid.*, 44 (April 1937), 353–54.

in 1919. Although such efforts did not transform labor strategy and ideology overnight, they did indicate that the failure or impossibility of self-reliant solutions to labor's plight would ultimately lead back to a reembrace of government and a stronger public role in labor conflict.[35]

Industrial Democracy and the Legacy of the Wagner Act

In the end, national emergency proved the most skillful midwife to changes in American industrial relations. Drawing on ideas propounded by the Industrial Relations Commissions of 1898–1902 and 1913–1915, the federal government moved during World War I and, more permanently, during the Great Depression to accept responsibility for the stability of collective bargaining, union rights, and worker welfare. Influenced less by labor's traditional rights and self-help rhetoric than by appeals to governmental efficiency, economic rationality, and a social gospel morality, as well as labor's political influence, President Wilson's National War Labor Board promised federal protection for the right to organize as well as standards of wages, hours, and pay. What Milton Derber has called the "American idea of industrial democracy," lost during the 1920s, again found favor during the New Deal and World War II.[36]

In the eyes of reformers, the New Deal initiatives heralded a new state-protected "industrial democracy" alongside American "political democracy." During World War II, the National Labor Relations Act (NLRA, 1935), the Fair Labor Standards Act (1938), wartime contracts, and War Labor Board policies created a continuing mechanism of federal enforcement for the Progressive reform doctrines first exercised during World War I. Governmental administration in industrial relations, moreover, promised more than initial aid in stabilizing collective bargaining practices. The New Deal and World War II developments, according to their chief advocates, would inevitably spark further demands for social democratic changes in American life. The vision of a progressive industrial democracy probably reached its apogee in the liberal formulation of a government-backed "right to employment," a decade after the passage of the National Labor Relations Act sponsored by Robert F. Wagner. Counseling action beyond the NLRA's collective bargaining guarantees, Senator Wagner in 1945 proclaimed:

> America faces a future of infinite possibility. . . . This legislation would put all the power of the Government—which means the power of the people—in back of the proposition that every person able to work and desirous of working shall have the right to useful, remunerative, full-time employment. The actualization of this right will carry with it more than jobs in a limited sense. It will bring, also,

[35] Tomlins, *State and the Unions*, 77–79; John Mitchell, *Organized Labor: Its Problems, Purposes, and Ideals and the Present and Future of American Wage Earners* (Philadelphia, 1903), 82; Eugene Staley, *History of the Illinois State Federation of Labor* (Chicago, 1930), 268, 281–83, 504.

[36] Milton Derber, *The American Idea of Industrial Democracy, 1865–1965* (Urbana, 1970), 10, 75, 82, 87–91, 118–21; see also Valerie Jean Conner, *The National War Labor Board: Stability, Social Justice, and the Voluntary State in World War I* (Chapel Hill, 1983).

> all the good things that jobs involve—expanding markets for the products of agriculture and industry; stable legitimate profits for those who invest; more leisure to contemplate the finer things of life; and more resources available for devotion to better education, better housing, better health and better social security.

Not surprisingly, in that moment of optimistic legislative expectation by the New Deal forces, the labor law itself (interpreted by the War Labor Board and a newly sympathetic Supreme Court) was dealing unions an unprecedented hand in economic disputes. Critics charged the government with "widening as far as possible the immunity for striking" and threatening "a climate of economic absolutism similar—but converse—to that experienced a generation ago."[37]

Such worries, of course, proved unfounded. Justified less as an act of emancipation for unions than as an economic policy yielding "greater economic stability through better economic balance," the Wagner Act placed the politically defined public interest ahead of any inherent rights of labor. Not only political considerations (the prolabor forces were in no position to dictate their own terms), but also constitutional ones (the Supreme Court reaction following the 1935 decision in *Schechter Poultry Corporation v. United States*, which invalidated the National Industrial Recovery Act, was uncertain) doubtless lay behind the legislative strategy. The theme of economic democracy (as an alternative to totalitarianism) also emerged in the Wagner Act's justification, but such concerns consistently took second place to economic considerations and, even when acknowledged, assumed a peculiarly restricted form. Thus, the law's chief architect, Wagner aide Leon H. Keyserling, reduced the lessons of American labor history to "labor's long struggle for the right to organize and bargain collectively." Other struggles—for a universal eight-hour day, nationalization of the railroads, cooperative forms of production, in short, for a redistribution of power within the Republic—were conveniently forgotten. At best, the new and more favorable legal environment for unionism protected certain activities of the labor movement; its legitimated contract bargaining and immediate economic pressures by specific occupational groups. That even labor radicals generally confined their efforts to the same terrain testifies to the power of state action in shaping popular concepts of freedom and rights in American life.[38]

[37] *Schechter Poultry Corporation v. United States*, 295 U.S. 495 (1935). Robert F. Wagner, "Introduction," in *The Wagner Act: After Ten Years*, ed. Louis G. Silverberg (Washington, 1945), 1–2. By reinvigorating Section 20 of the Clayton Act in light of the Norris-LaGuardia Act, the Supreme Court effectively cancelled the application of the Sherman Act to trade unions, assuring them an unprecedented immunity from prosecution under the conspiracy and restraint-of-trade doctrines in the course of their normal activities. See *Apex Hosiery Co. v. William Leader and American Federation of Full-Fashioned Hosiery Workers*, 310 U.S. 469 (1940) and *Thornhill v. Alabama*, 310 U.S. 88 (1940). Irving Bernstein, *The Turbulent Years, A History of the American Worker, 1933–1941* (Boston, 1970), 671–78; Theodore R. Iserman, *Industrial Peace and the Wagner Act: How the Act Works and What to Do about It* (New York, 1947), 20; Charles O. Gregory, *Labor and the Law* (New York, 1946), 376.

[38] To escape the fate of the National Industrial Recovery Act, Wagner tied the Wagner Act (NLRA) to the interstate commerce clause of the Constitution, declaring that collective bargaining "promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest." Iserman, *Industrial Peace*, 7–10. In a recent paper, Daniel R. Ernst subtly explores the political and legal logic of the framers of key New Deal measures like the Norris-LaGuardia Act and NLRA. Avoiding the formalism of rights rhetoric, already captured by the judicial conservatives, prolabor "legal realists" like Donald Richberg and David Lilienthal opted for sociological and public

The Recurrent Dilemma

While temporarily prospering under the new social contract of the thirties, labor never fully escaped its earlier political—and intellectual—conundrum. In the long run, especially given the collapse of the postwar boom, mere immunity from old-fashioned legal harassment together with the machinery of the NLRB has proven wholly insufficient to sustain Eisenhower's vaunted "arena of fair play" for labor. For years historians treated the Wagner Act as something of a Rock of Gibraltar for American trade unionism. But in light of the sharp contemporary decline in union power and influence—a decline significantly exacerbated by perversions of worker protection supposedly guaranteed in the National Labor Relations Act—recent commentaries have tended to question once again the foundations upon which modern-day American industrial relations have been built.[39]

Both Nelson Lichtenstein and Christopher Tomlins, for example, have emphasized that federally chartered industrial relations, from early on, had a restraining character on rank-and-file activity. The seeds of the legalistic and bureaucratic "insurance agent" unionism of the postwar period thus appear to have been sown amid the very cheering for labor's arrival as a permanent institutional force in American society. By 1947, the Taft-Hartley Act even more clearly demonstrated that what government granted on the grounds of economic sufficiency, government might also take away. Emancipation through the state, concludes Tomlins, proved a "counterfeit liberty."[40]

More than a third of a century elapsed between the AFL's angry renunciation of the Supreme Court's authority in the 1920s and its seemingly happy reconciliation with legal institutions in the 1950s. The turning of another thirty years, however, finds American labor again weakened and marginalized as a political force. Instead of singing the praises of Anglo-American liberties, even the extraordinarily cautious AFL-CIO president, Lane Kirkland, was by 1983 castigating "laws selectively enforced, in a style that gives a new and bitter relevance to a verse . . . from a savage period of England's distant history: 'The law locks up both man and woman/ Who steals the goose from off the common, But lets the greater felon loose/ Who steals the common from the goose.' "[41] The very uncertainty of its place in American law and civil society has left labor at the mercy of other, more strongly endowed, institu-

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policy arguments. In effect, they tried a new approach to rescue the public interest from the strangulation of republican rhetoric. Daniel R. Ernst, "His Master's Voice? The Yellow Dog Contract and the League for Industrial Rights," Institute for Legal Studies, University of Wisconsin–Madison, June 1987 (in Leon Fink's possession). Leon H. Keyserling, "Why the Wagner Act," in *Wagner Act*, ed. Silverberg, 5.

[39] By 1980, for example, it had become more cost-effective for business to break the law and fire union organizers (paying meager penalties years later) than to respect the legal right to union organizing. Statistically, one in twenty workers who voted (in a National Labor Relations Board election) for a union was fired. Thomas Byrne Edsall, *The New Politics of Inequality* (New York, 1984), 152.

[40] Nelson Lichtenstein, *Labor's War at Home: The CIO in World War II* (Cambridge, Eng., 1982), esp. 178–202, 233–45; Tomlins, *State and the Unions*, 99–328, esp. 328. On the enduring intellectual problems entailed in assimilating labor relations to the laws of contract or association, see Philip Selznick, *Law, Society, and Industrial Justice* (New York, 1969), 137–82.

[41] *John Herling's Labor Letter*, Oct. 8, 1983 (in Fink's possession).

tions. Unable to stand on their own, unions in the 1970s and 1980s have relied on powerful friends whose affections have proven more temporal than constitutional.

The picture of an era of repressive conspiracy indictments followed by an era of equally demobilizing dependency on government by labor leaves one wondering about possible alternatives. In the current stasis of the labor movement, one ironic solution beckons for attention. We are recalled to that brief, but seminal, half decade in American labor history when industrial relations were governed by the principles of collective laissez-faire for which the AFL unions had so long striven. Perhaps the greatest advances in the autonomous organization of American working people took place between 1932 and 1937, after injunction law had finally been struck down by the Norris-LaGuardia Act (1932) but before the decision (*National Labor Relations Board v. Jones and Laughlin Steel Corporation*, 1937) validating the role of Wagner Act labor boards. In that period of mass strikes, sit-downs, and armed employer resistance, a new labor movement and perhaps even a new culture based on class identity was born. Might a prolabor political bloc, given a second chance, have opted for an extension of legal immunity rather than a government-defined and government-administered list of industrial rights and wrongs?[42]

Unfortunately, even with the gift of hindsight, no such simple judgment can confidently be made. It is not merely that the rank-and-file uprising of the midthirties might have left little lasting imprint without the Wagner Act and subsequent War Labor Board measures.[43] The problem is more systematic. For the highly integrated industrial economies of the twentieth century, the historical question is not whether the state would intervene in industrial relations but how and to what effect. In comparative perspective, the British case, with its statutory insulation of labor conflict, offers a singular exception among Western states. In France, Germany, and Scandinavia, government long played a more intrusive role in industrial relations than in the United States. Even countries partaking of the British colonial inheritance—Canada, Australia, New Zealand—instituted a more interventionist compulsory arbitration or mediation of disputes.[44] In mass democracies possessing coercive power, notions of collective laissez-faire and judicial abstinence are probably no more realizable than a return to a nineteenth-century producers' republic.

[42] *National Labor Relations Board v. Jones and Laughlin Steel Corporation*, 301 U.S. 1 (1937). Such a scenario is implicitly urged by Staughton Lynd, "Beyond 'Labor Relations': 14 Theses on the History of the N.L.R.A. and the Future of the Labor Movement," draft presented at the workshop on Critical Perspectives on the History of American Labor Law, June 10, 1987, Georgetown Law School, Washington, D.C. (in Fink's possession).

[43] Unionization rates in metal manufacturing are suggestive here. In 1935, 10.2 percent of production workers were organized; in 1939, 51 percent. David Brody, *Workers in Industrial America: Essays on the Twentieth Century Struggle* (New York, 1980), 139.

[44] For an introduction to the regulation of industrial relations, see the seminal collection, Walter Galenson, ed., *Comparative Labor Movements* (New York, 1952), 378–80, 393–99 (on France); *ibid.*, 284–88, 298–312 (on Germany); *ibid.*, 137–44 (on Scandinavia). See also Gerald Friedman, "The State and the Making of a Working Class: The U.S. and France," paper delivered at the Social Science History Conference, St. Louis, Oct. 1986 (in Fink's possession). H. D. Woods, *Labour Policy in Canada* (New York, 1973), 19–99; F. J. L. Young, ed., *Three Views of the New Zealand System of Industrial Relations: Papers Presented to Members of the American Association of Arbitrators* (Wellington, New Zealand, 1982). If anything, state intervention has been even more automatic in Greece, Italy, Portugal, and Spain; see Howard J. Wiarda, *From Corporatism to Neo-Syndicalism: The State, Organized Labor, and the Changing Industrial Relations Systems of Southern Europe* (Cambridge, Mass., 1981).

Politics—the application of organized social power—will inevitably have a bearing on social conflicts. Even the relative "immunity" conferred by the Norris-LaGuardia Act was a political expression of a depression-induced decline of faith in corporate welfarism. Such immunity, it is worth noting, still stopped short of recognizing solidaristic actions like the secondary boycott. Overall, it makes sense to assume that labor, like other organized parties, will exact as much influence as the moment allows in using the state to meet its needs. From such a reading, at least, the proper critique of modern-day American labor would seem to lie less in its acceptance of the state labor regulation than in its weakness in adapting to a terrain where labor's political muscle would matter more than ever before.

How to take advantage of the law and the opportunities available through the political structure has long remained a puzzle for the American labor movement. Argument and strategic shifts on these issues have proliferated since the early nineteenth century, when the gap between what workers expected and what they received from the constitutional order first became apparent. Hypothetically, as we noted early on, workers might have gone about their business without concentrating on such matters. But "legal fictions" in fact played a vital role in the real world of American workers. Subject to numerous reformulations, the constitutional order has served—and appeared to serve—labor variously as a lifeline or a hangman's rope. Just as in eighteenth-century England, in the United States law certainly "served and legitimated class power." Similarly, it was "a place not of consensus but of conflict." But there is something more. Thompson suggests that the preeminence of the law as a "central legitimizing ideology" was a temporary thing in England, giving way in the nineteenth century to the ideology of the free market and political liberalism. In the United States, despite numerous changes of substance and interpretation, the political and cultural centrality of the law has hardly diminished with time. Perhaps because American national identity itself is drawn so largely from political and constitutional wellsprings, subaltern social groups have sought to orient themselves according to constitutional principles. For good or ill, legal and constitutional principles have long served as the starting point of labor's public self-definition. As the chastened socialist, William English Walling, wrote in 1926, "We must not think of the American labor movement as existing independently of America's past or present. Our labor movement is not an importation or the result of a theory: it is a typical and representative product of American history. Organized labor has always regarded itself as a product of American democracy." The nature of that democracy, its customs, laws, and capacity to change (as well as to resist change) offers an inviting subject to students of American labor.[45]

[45] Thompson, *Whigs and Hunters*, 263; William English Walling, *American Labor and American Democracy* (New York, 1926), 7.