

The Thirteenth Amendment versus the Commerce Clause: Labor and the Shaping of the Post-New Deal Constitutional Order

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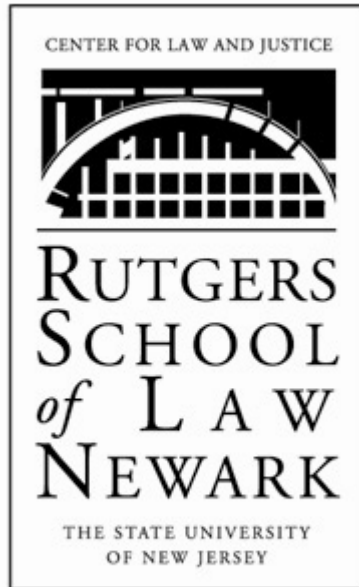
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The Thirteenth Amendment versus the
Commerce Clause: Labor and the Shaping of
the Post-New Deal Constitutional Order, 1921-
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ARTICLE

THE THIRTEENTH AMENDMENT VERSUS THE COMMERCE CLAUSE: LABOR AND THE SHAPING OF AMERICAN CONSTITUTIONAL LAW, 1921–1957

*James Gray Pope**

During the twentieth century, Congress's power to regulate commerce grew sensationally while its human rights powers atrophied. The author traces this phenomenon back to the choice, made by lawyers and politicians in the early 1930s, to base labor rights statutes like the Wagner Act on the Commerce Clause instead of the Thirteenth Amendment. Unions and workers argued that the rights to organize and strike made the difference between freedom and involuntary servitude. But a bevy of progressive lawyers who styled themselves "friends of labor" undermined labor's Thirteenth Amendment theory. The author argues that this clash reflected not merely tactical differences among allies, but fundamentally conflicting constitutional goals. He contends that the Supreme Court upheld the Wagner Act not because of the lawyers' Commerce Clause arguments, but because workers staged a series of sit-down strikes that confronted the swing justices with a choice between industrial peace or war. Afterward, unions and workers interpreted the Wagner Act decisions as victories for labor freedom, but the Act's Commerce Clause foundation pointed in a different direction—one leading to fateful distortions in the jurisprudence of congressional powers.

* Professor of Law, Rutgers University School of Law, Newark, New Jersey. Versions of this Article were presented to workshops at Brooklyn, Emory, Harvard, and Yale, where I benefitted from probing questions and helpful suggestions. I am indebted to Daniel Ernst and Daniel Rodgers for detailed and instructive criticisms that went far beyond the call of duty. Ken Casebeer was generous with his compendious knowledge of the origins of the Wagner Act. Bruce Ackerman, Victor Brudney, and William Forbath pinpointed important problems in the account that I have tried to correct. Numerous lawyers at the National Labor Relations Board Headquarters Conference in October 2000 gave me insightful feedback and encouragement. Last but by no means least, I want to thank Robert Gordon, Anne Lofaso, Serena Mayeri, Richard Parker, Judith Resnik, and Reva Siegel for their criticisms, suggestions, and encouragement.

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INTRODUCTION

This Article looks at an old problem through a new lens. The old problem is the strangely disparate fate of two kinds of congressional powers: the power to regulate interstate commerce and the power to enforce human rights under the Thirteenth and Fourteenth Amendments. As of the early twentieth century, both types of powers were hedged with limitations.¹ Beginning in the 1930s, however, there was a vast expansion of Congress's power to regulate interstate commerce—so vast, in fact, that critics could plausibly charge that the Supreme Court had eliminated any enforceable limit on the power.² Meanwhile, Congress's powers to enforce human rights under the Thirteenth and Fourteenth Amendments continued to be confined within nineteenth-century limits, most prominently the state action doctrine and the notion that the “involuntary servitude” clause of the Thirteenth Amendment protects only the individual

1. On the Commerce Clause, see, e.g., *United States v. E.C. Knight Co.*, 156 U.S. 1, 16 (1895) (drawing a distinction between “manufacture” and “commerce” and holding that the Sherman Antitrust Act could not be applied to a company controlling ninety-eight percent of the nation’s sugar refining capacity because the company’s operations fell into the category of manufacturing, and its control over the industry had only an “indirect” effect on commerce). On the Thirteenth and Fourteenth Amendments, see, e.g., *The Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 69 (1873) (upholding a state sanctioned slaughterhouse monopoly against a Thirteenth Amendment challenge by independent butchers, reasoning that the amendment was intended only “to forbid all shades and conditions of African slavery”); *The Civil Rights Cases*, 109 U.S. 3, 13 (1883) (invalidating the Civil Rights Act of 1875 on the ground that Congress lacked power to protect rights against infringement by private individuals).

2. See, e.g., *NLRB v. Fainblatt*, 306 U.S. 601, 607–08 (1939) (upholding application of the National Labor Relations Act to garment factory employing 60–200 workers, and observing that “[t]here are not a few industries in the United States which, though conducted by relatively small units, contribute in the aggregate a vast volume of interstate commerce”); *Wickard v. Filburn*, 317 U.S. 111, 114, 127–28 (1942) (upholding regulation of farmer’s production of wheat for consumption by his own livestock on the ground that although the impact of the farmer’s individual activity “may be trivial,” it was “far from trivial” when combined with the activity of others covered by the law); *United States v. Darby*, 312 U.S. 100, 115 (1941) (upholding federal wage regulation applied to workers involved in producing goods for interstate shipment and stating that the “motive and purpose of [regulating] interstate commerce are matters for the legislative judgment upon the exercise of which the Constitution places no restriction and over which the courts are given no control”); Robert H. Bork, *The Tempting of America* 56–57 (1990) (describing the Court’s “permissive attitude toward congressional power” in the wake of *Wickard* and how this attitude may lead the Court to abandon its constitutionally ordained role).

Many of the Court’s defenders did not bother to dispute the charge; instead, they argued that there was little or no need for judicially enforceable limits because the states could protect their autonomy through the political process. See, e.g., Jesse H. Choper, *Judicial Review and the National Political Process* 176, 215–16 (1980) (arguing that the effective voice of the states in the national polity provides adequate protection for federalism without judicial review); Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 *Colum. L. Rev.* 543, 558 (1954) (contending that “[f]ar from a national authority that is expansionist by nature, the inherent tendency in our system is precisely the reverse”).

right to quit one's employment.³ These limitations had little practical effect, as the Court upheld human rights statutes as exercises of the commerce power.⁴ But throughout the century, a series of Supreme Court justices and political leaders worried about the "dishonest," "artificial," "cagey," and "distorting" practice of grounding human rights statutes on a constitutional provision that was concerned with commercial matters.⁵

The new lens—which is really just an old lens that was forgotten for awhile—is populist constitutionalism. Populist constitutionalism takes seriously the ideas of constitutional thinkers and activists outside the legal profession.⁶ Viewed through a populist lens, the contrast between the

3. See *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n*, 121 S. Ct. 924, 930–33 (2001) (reaffirming state action requirement as a limit on congressional power); *United States v. Kozminski*, 487 U.S. 931, 944 (1988) (holding that the Thirteenth Amendment protects only against physical or legal coercion of individuals to work).

4. See, e.g., *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 258–62 (1964) (upholding public accommodations provisions of the Civil Rights Act of 1964 as exercises of the commerce power); *Katzenbach v. McClung*, 379 U.S. 294, 304–05 (1964) (same).

5. Commenting on the Child Labor Act of 1916, Justice Oliver Wendell Holmes said: "In my opinion Congress may have what ulterior motives they please if the act passed in the immediate aspect is within its powers—though personally, were I a legislator I might think it dishonest to use powers in that way." Letter from Justice Oliver Wendell Holmes, United States Supreme Court, to Judge Learned Hand, Second Circuit (Apr. 3, 1919), reprinted in Gerald Gunther, *Learned Hand and the Origins of Modern First Amendment Doctrine: Some Fragments of History*, 27 *Stan. L. Rev.* 719, 759–60 (1975). As the commerce power began to grow, others shared this concern. In Richard Cortner's account, Senator Robert Wagner, author of the National Labor Relations Act, believed that the "real purpose of his labor relations act was to make the American worker a 'free man,' and he never entirely accepted the Commerce Clause rationale of the act which emphasized the reduction of obstructions and burdens on commerce caused by strikes as the chief purpose of the act." Richard C. Cortner, *The Jones & Laughlin Case 60* (1970) [hereinafter Cortner, Jones]. Supreme Court justices criticized the Court's decision to rest the constitutional right of interstate travel on the Commerce Clause on the grounds that the movement of persons across state lines "occupies a more protected position in our constitutional system than does the movement of cattle, fruit, steel and coal" and that to measure the rights of a human being by the Commerce Clause would be "likely to result eventually either in distorting the commercial law or in denaturing human rights." *Edwards v. California*, 314 U.S. 160, 177 (1941) (Douglas, J., joined by Murphy & Black, J.J., concurring); *id.* at 182 (Jackson, J., concurring). In 1964, Professor Gerald Gunther and Senator John Pastore of Rhode Island, among others, argued that the Civil Rights Act of that year should be grounded not on the Commerce Clause, but on the Fourteenth Amendment. Gunther declared that he "would much prefer to see the Government channel its resources of ingenuity and advocacy into the development of a viable interpretation of the Fourteenth Amendment, the provision with a natural linkage to the race problem" instead of constructing an "artificial commerce facade." Gerald Gunther & Kathleen M. Sullivan, *Constitutional Law 201–02* (13th ed. 1997) (quoting letter from Gunther to the Justice Department). Senator Pastore explained: "[I] like to feel that what we are talking about is a moral issue. [And] that morality, it seems to me, comes under the 14th Amendment [about] equal protection of the law. [I] am saying we are being a little too careful, cagey, and cautious." *Id.* at 202 (alterations in original) (quoting Senator John Pastore).

6. See, e.g., Richard D. Parker, "Here, the People Rule": A Constitutional Populist Manifesto 54–77 (1994) (depicting and analyzing populist and elitist sensibilities and criticizing the courts for their unthinking embrace of the elitist posture); Mark Tushnet,

infinitely expandable commerce power and the permanently truncated human rights powers appears “dishonest” and “distorting” not only against the baseline of the constitutional text, but also against the baseline of the popular will. The great social movements that sought to expand congressional powers during the twentieth century framed their claims in the language of human rights, not commerce. The labor movement demanded that Congress enforce rights of self-organization and collective action that workers believed had been won in the Civil War and constitutionalized in the Thirteenth Amendment.⁷ Civil rights activists marched and staged sit-ins to realize the freedom and equality promised by the Thirteenth and Fourteenth Amendments.⁸ Feminists demonstrated and established underground abortion clinics to win for women fundamental rights of bodily integrity and equal treatment that many claimed were guaranteed by the Thirteenth and Fourteenth Amendments.⁹ Yet, in one of the great curiosities of American law, the attorneys assigned to defend the constitutionality of the resulting statutes downplayed or eschewed altogether the language of rights and freedoms. Instead, they dressed the statutes in the language of economics so that they could be justified as exercises of the commerce power.¹⁰ By the 1990s, human rights movements had provided the impetus for a stupendous expansion of the commerce power, while the congressional powers that the movements themselves had championed remained unrescued from nineteenth-century limitations.

Taking the Constitution Away from the Courts 6–7 (1999) (proposing a greatly expanded role for the constitutional judgments of legislators); Akhil Reed Amar, *The Bill of Rights: Creation and Reconstruction* 305–06 (1998) (criticizing the role of the judiciary and praising the role of popular movements in shaping constitutional rights); J.M. Balkin, *Populism and Progressivism as Constitutional Categories*, 104 *Yale L.J.* 1935, 1943–50 (1995) (describing and comparing populist and progressive sensibilities); William E. Forbath, *Caste, Class, and Equal Citizenship*, 98 *Mich. L. Rev.* 1, 1–2 (1999) [hereinafter Forbath, *Caste*] (recovering the populist “social citizenship tradition” in American constitutional thought). For my own previous effort along these lines, see James Gray Pope, *Republican Moments: The Role of Direct Popular Power in the American Constitutional Order*, 139 *U. Pa. L. Rev.* 287, 291–293 (1990) (advancing notion that “direct popular power” plays a more important historical role in shaping law than traditional stories of American legal development suggest).

7. See *infra* text accompanying notes 56–63.

8. See, e.g., Martin Luther King, Jr., *Why We Can’t Wait* 25 (1963) (locating the origins of the civil rights “Revolution of 1963” in African Americans’ “rededication to the obvious fact that urgent business was at hand—the resumption of that noble journey toward the goals reflected in the Preamble to the Constitution, the Constitution itself, the Bill of Rights and the Thirteenth, Fourteenth and Fifteenth Amendments”).

9. See, e.g., Kristin Luker, *Abortion and the Politics of Motherhood* 98–100 (1984) (describing women’s use of fundamental rights claims to justify obtaining abortions despite laws prohibiting them); Elizabeth M. Schneider, *Battered Women & Feminist Lawmaking* 39–40 (2000) (recounting the development of constitutional rights claims to equality and reproductive choice).

10. See Gunther & Sullivan, *supra* note 5, at 201–02 (Civil Rights Act of 1964); *infra* notes 407–418 and accompanying text (Wagner Act).

This old problem has been made newly urgent by the Supreme Court's decisions in *United States v. Lopez*¹¹ and *United States v. Morrison*.¹² *Lopez* was the Court's solution to the problem of the infinitely expandable Commerce Clause. In striking down the Gun-Free School Zones Act, the majority purported to distinguish "between what is truly national and what is truly local."¹³ *Morrison*, on the other hand, was the Court's non-solution to what it sees as the nonproblem of the permanently truncated human rights powers. In striking down Congress's attempt to provide a private cause of action for victims of gender motivated violence, the Court reaffirmed its determination to end the infinite expandability of the commerce power while continuing to apply the nineteenth-century limits on the human rights powers. Because crimes of violence motivated by gender "are not, in any sense of the phrase, economic activity," the Court ignored Congress's detailed findings as to their effects on interstate commerce.¹⁴ Assuming that the Court does not retreat from this position, human rights statutes that do not sound in the language of commerce, exchange, and economic self-interest will henceforth be relegated to the Thirteenth and Fourteenth Amendments, with their old limitations.¹⁵

From a federalist point of view, the Commerce Clause holding and the human rights holding of *Morrison* are consistent: Both preserve a zone for state autonomy. From a populist point of view, however, the two rulings clash badly. The Commerce Clause holding begins to correct one half of the distortion caused by the lawyers' failure to transmit the popular movements' human rights claims—namely the infinitely expandable Commerce Clause. But the other half of the distortion—the permanently truncated human rights powers—remains uncorrected. From a populist perspective, the result is even worse than the old, fully distorted regime. Now, human rights statutes are not merely misclassified as exercises of the commerce power; they may fall outside the scope of congress-

11. 514 U.S. 549 (1995).

12. 529 U.S. 598 (2000).

13. *Lopez*, 514 U.S. at 567–68.

14. *Morrison*, 529 U.S. at 613.

15. In *Morrison*, these limitations were sufficient to dispose of the private cause of action for victims of gender motivated violence despite extensive congressional findings as to the inadequacy of state protections for women. *Id.* at 625–27 (holding that the Violence Against Women Act failed to satisfy state action requirement under the circumstances of the case because it neither imposed consequences on state officials nor sought to remedy specified state violations of the Fourteenth Amendment). The Thirteenth Amendment justification dropped out early in the case. The district court opined that the "fact that Congress based this in part on gender discrimination 'prohibited under the [Thirteenth] Amendment' illustrates the straw grasping in which Congress engaged. The Thirteenth Amendment applies to racial, not gender, discrimination." *Brzonkala v. Va. Polytechnic Inst. & State Univ.*, 935 F. Supp. 779, 796 n.3 (W.D. Va. 1996). The Thirteenth Amendment justification did not appear in the appellate decisions. See *Brzonkala v. Va. Polytechnic Inst. & State Univ.*, 132 F.3d 949 (4th Cir. 1997); 169 F.3d 820 (4th Cir. 1999) (en banc).

sional power altogether. And the immediate prospects for revitalizing the human rights provisions are bleak. Having failed to accomplish this objective when their constituents were fully mobilized and their claims broadly supported by public opinion, the popular movements now must start from scratch.

The roots of this problem can be traced back to the choice—made by Senator Robert Wagner and a group of government lawyers in 1935—to ground the National Labor Relations Act (NLRA) in the Commerce Clause instead of the Thirteenth Amendment.¹⁶ At that time, labor activists rejected the notion that their fundamental rights of organization and protest could be classed as commercial matters subject to the Commerce Clause.¹⁷ Andrew Furuseth, the movement's most profound and determined constitutional thinker, argued that the Wagner Act should rest on Section 2 of the Thirteenth Amendment, which empowers Congress to enforce the ban on slavery and involuntary servitude.¹⁸ But Senator Wagner and his staff chose to rely exclusively on the commerce power,¹⁹ and in *NLRB v. Jones & Laughlin Steel Corp.* and two companion cases, the Supreme Court revolutionized Commerce Clause doctrine by upholding the Act as applied to labor relations in manufacturing companies.²⁰ After these decisions, the Commerce Clause beckoned irresistibly as the pragmatic alternative to the more honest and natural, but also more risky, human rights provisions.²¹

Why did government lawyers reject labor's constitutional ideas? Why did key legislators—who, as we shall see, publicly endorsed the substance of labor's Thirteenth Amendment claims—go along with the lawyers' advice? Most accounts assume that the New Deal expansion of the Commerce Clause reflected the popular will. But what if the workers, farmers, and small entrepreneurs who supported constitutional change were more concerned about dethroning “economic royalists” and establishing “industrial freedom” than they were about facilitating interstate com-

16. Not only did the Wagner Act cases bring the commerce power across the line from commerce to manufacturing, but they also extended its application to enterprises that were both local in scope and small in relation to the industry as a whole. See *NLRB v. Friedman-Harry Marks Clothing Co.*, 301 U.S. 58, 75 (1937) (upholding the Act as applied to a medium-sized clothing manufacturer with local operations).

17. See *infra* notes 71–75 and accompanying text.

18. See *infra* notes 218–222 and accompanying text.

19. See *infra* text accompanying note 260.

20. 301 U.S. 1, 49 (1937) (upholding the Wagner Act as applied to a large steel corporation with interstate operations both on the supply and distribution ends); *NLRB v. Fruehauf Trailer Co.*, 301 U.S. 49, 57 (1937) (upholding the Wagner Act as applied to a large trailer manufacturer with an interstate distribution network); *Friedman-Harry Marks Clothing Co.*, 301 U.S. at 75 (upholding the Wagner Act as applied to a medium-sized clothing manufacturer with local operations).

21. See *Gunther & Sullivan*, *supra* note 5, at 201–02 (reporting the decision—made by government lawyers against the advice of Gerald Gunther and others—to defend the Civil Rights Act of 1964 solely as an exercise of Congress's commerce power instead of relying on Section 5 of the Fourteenth Amendment).

merce?²² What if political leaders like Senator Wagner were “dishonest” and “cagey” in seeking to ground a labor rights statute on the Commerce Clause?²³ And what if the government lawyers who rejected labor’s constitutional ideas were pursuing their own agenda, responding to their professional interests and perceptions rather than to those of the people? (Or what if those lawyers simply failed to understand that, as Mark Tushnet has observed, even victorious constitutional claims can impair the long-term prospects for change because of “the ideological implications of the *way* in which the legal claims were made”?)²⁴ If any of these propositions are true, we might have to qualify the celebratory account of the New Deal constitutional revolution. The Court’s validation of the New Deal statutes could still be defended as an expression of popular will, but the shape of the constitutional regime that followed would be suspect.²⁵

22. The critique of “economic royalists” and the goal of “industrial freedom” were important themes in President Roosevelt’s 1936 reelection campaign. See *infra* notes 354, 365–371 and accompanying text. If the New Deal constitutional revolution had been primarily about expanding government regulatory power, then Wagner’s turn to the Commerce Clause would be unremarkable. But recent scholarship suggests that, like the Reconstruction amendments, the New Deal constitutional revolution was about freedom first, and governmental power mainly as a means to realize that freedom. “Like the Civil War,” explains Eric Foner, “the New Deal recast the idea of freedom by linking it to the expanding power of the national state.” Eric Foner, *The Story of American Freedom* 196 (1998).

23. Cf. Lino A. Graglia, *United States v. Lopez: Judicial Review Under the Commerce Clause*, 74 *Tex. L. Rev.* 719, 739–40 (1996) (contending that the Wagner Act “was hardly less of a pretextual use of the commerce power than the Mann Act; its purpose and effect were not to facilitate trade, but to advance the welfare of the working class”). This fits Karen Orren’s startlingly original account, according to which *Jones & Laughlin* ended the feudal relationship of master and servant and commenced the modern regime of liberal democracy. Karen Orren, *Belated Feudalism: Labor, the Law, and Liberal Development in the United States* 33, 209 (1991).

24. Tushnet, *supra* note 6, at 142.

25. William Forbath has suggested that there was a “gulf” between the New Deal’s constitutional mandate, which included a series of “social citizenship” rights like the right to a decent job, and its actual constitutional output. Forbath, *Caste*, *supra* note 6, at 6, 64–75. Forbath explains this gulf by pointing to the success of southern Democrats at blocking key elements of proposed legislation—a success made possible by the nation’s constitutional “bad faith” in failing to enforce the Reconstruction amendments and thereby permitting the disfranchisement of southern blacks and poor whites. *Id.* at 76–80. The present account addresses an additional aspect of the gap between the New Deal’s constitutional mandate and output. While President Roosevelt joined popular movements in calling for effective economic freedom, the lawyers’ turn to the Commerce Clause ensured that their concept of freedom would be excluded from the judicial opinions that codified the New Deal constitutional revolution. Some of the same thinkers who helped to open this gap by attacking the idea of constitutional labor freedom also provided cover for the continuing constitutional “bad faith” that enabled southern conservatives to block the recognition of social citizenship rights. The two themes came together in *Bailey v. Alabama*, where Oliver Wendell Holmes dissented from the Court’s invalidation of Alabama’s debt peonage law on Thirteenth Amendment grounds. 219 U.S. 219, 245–51 (1911). While the majority opinion spoke of the effective right of laborers to protect themselves against “that control by which the personal service of one man is disposed of or

None of these concerns show up in the received accounts. Instead, Senator Wagner's turn to the Commerce Clause appears natural and obvious. We see progressive lawyers developing clever strategies for steering the Act through the courts toward ultimate constitutional vindication.²⁶ In this story, the main characters are lawyers and politicians, the mode of legal thought is jurisprudence (the science of law), and the process of constitutional change is monist (meaning that transformative constitutional litigation does not differ fundamentally from ordinary litigation). Attorneys and courts drive constitutional change, remaining within the limited set of possibilities generated by precedent, doctrine, and accepted modes of legal reasoning. Lawyers assigned to defend the constitutionality of statutes are concerned first and foremost with the crafting of arguments that can win judicial approval, taking the judges' attitudes to be predictable from past behavior. Peter Irons, Richard Cortner, and James Gross all recount—with one crucial exception—the twists and turns of the Wagner Act's drafting and constitutional defense as if these generalizations held true.²⁷

The exception comes when all three of these historians acknowledge that, however brilliant the lawyers might have been, they won because "they rode on a tide of forces for change which the Court could no longer resist," a tide that included the "wildfire spread of labor militance across the country."²⁸ If true (as Part IV below affirms), this observation

coerced for another's benefit," Holmes took the formalistic position that the state could criminalize a "fraudulent" contract violation and impose involuntary servitude as a punishment for the crime. *Id.* at 241, 247. He denied that the race of the affected workers (black) made any difference even though his opinion hinged on the assertion that juries (all white in Alabama) would not "act with prejudice against the laboring man." *Id.* at 246, 248. Later, the involuntary servitude clause would play a central role both in labor's campaign for constitutional rights, see *infra* Part I, and in early efforts to protect black civil rights. See Risa L. Goluboff, *The Thirteenth Amendment and the Lost Origins of Civil Rights*, 50 *Duke L.J.* 1609, 1639–40 (2001). For another example of the two themes coming together, see Herbert Croly, *The Promise of American Life* 129–30 (Northeastern Univ. Press 1989) (1909) (rejecting labor's rights claims); *id.* at 81 (affirming that Southerners were correct "in believing that the negroes were a race possessed of moral and intellectual qualities inferior to those of the white men").

26. See Richard C. Cortner, *The Wagner Act Cases* 106–40 (1964) [hereinafter Cortner, *Wagner Act Cases*]; 1 James A. Gross, *The Making of the National Labor Relations Board* 166–211 (1974); Peter H. Irons, *The New Deal Lawyers* 229–30, 254–71 (1982).

27. Cortner, *Wagner Act Cases*, *supra* note 26; 1 Gross, *supra* note 26; Irons, *supra* note 26.

28. Irons, *supra* note 26, at 289, 272; see also Cortner, *Wagner Act Cases*, *supra* note 26, at 176–77 (arguing that Chief Justice Charles Evans Hughes and Justice Owen Roberts, the swing votes in the Wagner Act cases, "had indeed 'taken back' some of their earlier views," and suggesting that it was "to both Hughes' and Roberts' credit . . . that, when the forces of political and social unrest beat upon the court in the spring of 1937, they did not feel bound to a rigid adherence to previous utterances in the hope of maintaining reputations for constitutional consistency"); 1 Gross, *supra* note 26, at 227 (concluding that "it is reasonable to discount the effect of the board's strategy and arguments and to give major credit to environmental conditions—that is, to the 'facts of industrial

undermines the presuppositions of the standard story and, along with them, the notion that Senator Wagner's turn to the Commerce Clause was natural and successful. It suggests that the Wagner Act cases cannot be understood as instances of ordinary litigation, in which the important actors and ideas are to be found within the legal profession, but rather as part of a larger process centered outside the legal profession and potentially generating a wider range of possible outcomes than those acceptable to the mainstream of the profession at the time. If the Court were responding to outside pressure, then there is no a priori reason to believe that—had the justices been presented with an argument based on the Thirteenth Amendment instead of the Commerce Clause—they would not have chosen to uphold the Act on that ground.

Accordingly, the story told below features legal outsiders in leading roles. The forms of legal thought include not only the professional mode of jurisprudence, but also the popular mode of jurisgenesis (the creation of legal meaning through storytelling).²⁹ And the process of constitutional change is dualist (meaning that major constitutional change takes place not through ordinary litigation, but through widespread and intense popular mobilization leading to constitutional amendments or transformative judicial opinions).³⁰

relations," namely extensive employer violations of the right to organize and the strike wave precipitated by those violations).

29. See Robert M. Cover, *The Supreme Court, 1982 Term—Foreword: Nomos and Narrative*, 97 *Harv. L. Rev.* 4, 11 (1983). As distinct from *jurisprudence*, the scientific development and explication of law by legal technicians, *jurisgenesis* involves storytelling about law by ordinary people. *Id.* A full-fledged *jurisgenerative* movement includes three elements: (1) a common body of legal thought and narrative, (2) a set of rituals for initiating new members into the movement, and (3) a more or less institutionalized commitment to abide by the shared legal understandings of the movement. *Id.* at 12–14. In the early twentieth century, the American labor movement sustained a vigorous *jurisgenerative* tradition encompassing each of these elements. While employers, backed by official law, sought to enforce an order of individual competition in the labor "market," worker activists struggled to establish a regime of solidarity. See John R. Commons, *Legal Foundations of Capitalism* 304–05 (Univ. Wis. Press 1968) (1924); Christopher L. Tomlins, *The State and the Unions: Labor Relations, Law, and the Organized Labor Movement in America, 1880–1960*, at 58–62 (1985). Labor unions (1) enacted constitutions and passed "laws" governing member conduct, for example, laws barring members from working under nonunion conditions; (2) conducted a variety of rituals for integrating new members, including the swearing of oaths, the "breaking in" of new members by experienced unionists, and the operation of formal apprenticeship programs; and (3) utilized constitutionally specified procedures for bringing charges against members for violating union laws, for trying those charges, and for meting out punishment. James Gray Pope, *Labor's Constitution of Freedom*, 106 *Yale L.J.* 941, 954–55 (1997) [hereinafter Pope, *Labor's Constitution*]. For a vivid account of worker *jurisgenesis* in action, see David Montgomery, *The Fall of the House of Labor* 13–22 (1987).

30. Bruce Ackerman's dualist model of constitutional change provides a framework for understanding externally impelled constitutional change. Ackerman suggests that there are two lawmaking tracks in the United States: a lower track characterized by interest group politics and incremental change and a higher track characterized by broad popular mobilization seeking major change on issues of principle. 1 Bruce Ackerman, *We The*

Thirty years ago, Clement Vose wrote a pioneering volume of case studies analyzing constitutional change as a product of political action by pressure groups and social movements.³¹ To explain why he omitted the story of labor's crusade for constitutional rights, he opined that it presented a problem "too vast" for his volume.³² The length of the present Article reflects my failure to avoid this difficulty. The story that follows has a large cast of characters and a variety of settings ranging from courts and law offices to labor conventions and factory floors. Part I describes the labor movement's Thirteenth Amendment theory of labor legislation and recounts its growing popularity among legislators and others during the early twentieth century. But labor's ideas ran into hostile and determined opposition, not only from employers, but—far more importantly—from progressive lawyers who styled themselves "friends of labor." Led by Harvard Law Professor Felix Frankfurter, these lawyers battled labor's constitutionalists for decades. Part I covers the struggle up to the enactment of the Norris-LaGuardia Anti-Injunction Act of 1932, while Part II continues the story through Senator Wagner's uneasy decision to rely solely on the Commerce Clause. These Parts suggest that the lawyers hijacked the power of the workers' movement to their own project of empowering government regulators and intellectuals—including progressive lawyers—at the expense of both labor and capital.

Part III describes the emergence of "two laws" in the United States. Employers declared the Wagner bill unconstitutional during initial legislative hearings, and they put their views into practice by defying the Act after President Roosevelt signed it into law. Unions and workers were united in holding the bill constitutional, but deep divisions soon arose over how to win the point. While labor's old generation of constitutional thinkers faltered, a new generation of industrial unionists took up the challenge of making labor "its own Supreme Court." Notwithstanding the lawyers' turn to the Commerce Clause, these worker activists continued to mobilize under the banner of industrial freedom.

In Part IV, the gap between the popular movement for constitutional change (with its slogan "human rights over property rights") and the professional culture of law (with its focus on the Commerce Clause) widens as the constitutional crisis reaches its resolution. The Supreme Court's

People: Foundations 6–7 (1991) [hereinafter 1 Ackerman, Foundations]. In order to prevail on the higher track, a social movement must resist the temptation to bargain away its long term objectives for the more modest gains obtainable on the lower track. See Bruce Ackerman, *The Storrs Lectures: Discovering the Constitution*, 93 *Yale L.J.* 1013, 1040–41 (1984). When the movement succeeds in putting its proposals on the political agenda, there ensues a "constitutional moment," a time when large numbers of people are drawn into intense debate over constitutional fundamentals. Ackerman ranks the New Deal (along with the Founding and Reconstruction) as one of three successful constitutional moments in United States history. *Id.* at 1022, 1051–52.

31. Clement E. Vose, *Constitutional Change: Amendment Politics and Supreme Court Litigation Since 1900* (1972).

32. *Id.* at xvi–xvii.

decision in *Carter v. Carter Coal Co.*³³ left Senator Wagner's Commerce Clause strategy in shambles. With litigation seemingly hopeless, the proponents of constitutional change turned to electioneering and direct action. Part IV then reassesses the much-debated constitutional significance of the 1936 election,³⁴ focusing on labor's claim that it amounted to a "referendum on industrial democracy." It recounts the sharp escalation in both frequency and militancy of sit-down strikes following the election and the onset of pitched battles between police and strikers for possession of occupied factories.³⁵ At the same time, the disjuncture between popular and legal professional viewpoints is dramatized as government lawyers try to convince the Supreme Court to uphold the Wagner Act as if it were an antistrike law. Part IV concludes with an argument that the Court validated the Act not because of the lawyers' Commerce Clause arguments but because of pressure from the sit-down strikes.

In Part V, labor's constitutional ideas finally reach the Supreme Court. During and after World War II, many states joined Congress in passing restrictive labor laws. The labor movement condemned these as "slave labor laws," and union lawyers advanced their claims in court. With much fanfare, unionists announced that labor would never comply with the Taft-Hartley "Slave Labor" Act. Part V recounts the resulting conflict and the incorporation of labor into the emerging post-New Deal regime of constitutional jurisprudence.

I. THE THIRTEENTH AMENDMENT AND THE CAMPAIGN FOR ANTI-INJUNCTION LEGISLATION, 1921-1932

In the standard story of the New Deal constitutional revolution, two great constitutional visions contended: Employers and their lawyers fought to preserve the laissez-faire constitutionalism of the so-called *Loch-*

33. 298 U.S. 238 (1936).

34. Compare, e.g., 2 Bruce Ackerman, *We The People: Transformations* 310-11 (1998) [hereinafter 2 Ackerman, *Transformations*] (arguing that the 1936 election provided a mandate for the Supreme Court to issue transformative opinions), with Michael J. Klarman, *Constitutional Fact/Constitutional Fiction: A Critique of Bruce Ackerman's Theory of Constitutional Moments*, 44 *Stan. L. Rev.* 759, 771 (1992) (arguing that Ackerman's thesis is problematic both because it overemphasizes the role of the Court as an issue in the election and because measuring the scope of any presidential mandate would be "impossible").

35. Steve Fraser has argued that during the 1930s, political shifts preceded and gave rise to union mobilization. Steve Fraser, *The "Labor Question," in The Rise & Fall of the New Deal Order, 1930-1980*, at 55, 67-68 (Steve Fraser & Gary Gerstle eds., 1989) (contending that "[t]he mass political mobilization of the thirties, enlisting legions of new voters from among the new immigrant working class . . . and shaking the Democratic Party to its foundations, should be considered ontologically prior to the mass labor struggles of the period"). Fraser goes so far as to argue that "[s]trikes and union organizing were in effect attempts to implement purported presidential policy." *Id.* at 68. Without accepting Fraser's prioritization of electoral politics over social movements, Part IV does bear out the claim of a relationship.

ner era,³⁶ while progressive reformers and government lawyers battled to establish what would later be known as the *Carolene Products* regime of constitutional law.³⁷ At the congressional hearings on the Wagner labor disputes bill, however, three—not two—constitutional positions were advanced.

Two of the three fit the standard story. First, James A. Emery, General Counsel of the National Association of Manufacturers, framed the case that would justify employer opposition throughout the struggle. He contended that the bill sought to “regulate relations exclusively local” between employers and employees, thus exceeding the reach of Congress’s power to regulate interstate commerce and invading the zone of state autonomy protected by the Tenth Amendment.³⁸ Moreover, the bill sought to abrogate the “natural” contractual relationship between individual workers and employers, thus depriving both of the liberties guaranteed by the Due Process Clause of the Fifth Amendment.³⁹

In response, Senator Wagner—himself a lawyer and former judge—accepted Emery’s framing of the issues. On the question of congressional power, Wagner argued that strikes affected interstate commerce and therefore that congressional efforts to eliminate their causes fell within the scope of the interstate Commerce Clause.⁴⁰ Moreover, collective bargaining rights would strengthen commerce by increasing workers’ purchasing power.⁴¹ As for the due process problem, Wagner took issue with Emery’s concept of liberty, arguing that Congress was entitled to protect the right of workers to organize and act collectively and that the individual labor liberty favored by employers was nothing more than a “trade name for exploitation.”⁴²

The third position—omitted from the standard story—was advanced by William Green, President of the American Federation of Labor. Green’s testimony, drafted by the AFL’s attorney, acknowledged the em-

36. See *Lochner v. New York*, 198 U.S. 45 (1905).

37. See *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938).

38. To Create a National Labor Board, 1934: Hearings on S. 2926 Before the S. Comm. on Educ. and Labor, 73d Cong. (1934) [hereinafter Hearings on S. 2926] (statement of James A. Emery), reprinted in 1 NLRB, Legislative History of the National Labor Relations Act 374, 424 (photo. reprint 1977) (1949) [hereinafter Legislative History].

39. *Id.* at 374, 375–76, 432–34. The charge that the bill interfered with “natural” relations ran throughout Emery’s lengthy argument. See, e.g., *id.* at 391 (contending that the bill “would outlaw and prohibit the natural and normal intercourse between employer and employee”); *id.* at 415 (warning that the bill would “develop bitterness, discord, and conflict by outlawing the natural development of intercourse through conference and cooperation in other forms of collective bargaining” [i.e. company unions]).

40. National Labor Relations Board, 1935: Hearings on S. 1958 Before the S. Comm. on Educ. and Labor, 74th Cong. (1935) [hereinafter Hearings on S. 1958] (statement of Senator Robert F. Wagner), reprinted in 1 Legislative History, *supra* note 38, at 1408, 1429–31; *id.* at 1636–38 (statement of James A. Emery).

41. *Id.* at 1430–31 (statement of Senator Robert F. Wagner).

42. *Id.* at 1422, 1429–30.

ployers' argument that the bill exceeded the reach of Congress's commerce power, but suggested "that the power of Congress to legislate in matters of this sort arises out of provisions of the Constitution other than the interstate commerce clause."⁴³ Curiously, from our perspective at the turn of the millennium, the statement located the source of congressional power in Section 4 of Article IV, which provides: "The United States shall guarantee to every State in this Union a republican form of government"⁴⁴ The statement explained:

Recent history and present conditions in many countries of the world, all of them within the knowledge of well-informed men . . . clearly show the tendency toward, either (1) the preservation of a republican form of government; or (2) creation of dictatorships.

It is also perfectly clear, from recent and present experiences, that the preservation of industrial democracy is essential to the preservation of a republican form of government.

The whole purpose and tendency of these bills are to preserve industrial democracy; and if this be admitted it is clear that the Congress has the right to enact these bills into law and that they are valid and constitutional.⁴⁵

The notion that labor rights legislation could be grounded on the Republican Government Clause had rarely been heard, and would soon drop from sight. But the AFL's rejection of the Commerce Clause, and its focus on fundamental principles of democracy and freedom—as opposed to pragmatic needs for economic regulation—continued a strong tradition of labor rights thinking. Seamen's Union President Andrew Furuseth, long the AFL's most profound and determined constitutional thinker, urged Senator Wagner to rely on the traditional vessel for labor's constitutional aspirations: the Thirteenth Amendment.⁴⁶ For decades, workers and unions had resisted injunctions, nullified antistrike laws, and sought legislation under the banner of the Thirteenth Amendment.⁴⁷ Moreover, according to Senator Wagner and his congressional allies, the Wagner bill was founded on the same theory that supported labor's vision of the Thirteenth Amendment: In a modern industrial society, the rights to organize, bargain collectively, and engage in collective action made the difference between freedom and slavery.⁴⁸ The factual predicate for this view was incorporated into the bill's statement of purpose, which asserted that "[t]he tendency of modern economic life toward integration and centralized control has . . . rendered the individual, unorganized worker

43. Hearings on S. 2926, *supra* note 38, at 139 (statement of William Green).

44. U.S. Const. art. IV, § 4.

45. Hearings on S. 2926, *supra* note 38, at 139–40 (statement of William Green).

46. See *infra* notes 218–222 and accompanying text.

47. See *infra* text accompanying notes 51–63.

48. See *infra* text accompanying notes 223–228.

helpless to exercise actual liberty of contract, to secure a just reward for his services, and to preserve a decent standard of living.”⁴⁹

Why, then, was this human rights statute grounded on the Commerce Clause rather than on the Thirteenth Amendment’s guarantee of human freedom? After decades of adhering to the Thirteenth Amendment in the teeth of government and employer repression, why did the labor movement suddenly allow it to be shoved aside at the moment of success? Why did the same senators and representatives who were consecrating the Wagner Act as a guarantee of industrial freedom rely solely on the Commerce Clause to support its constitutionality? Why did government lawyers prefer the Commerce Clause over the Thirteenth Amendment? To find the answers to these questions, it will be necessary to go back to the 1920s, when labor’s Thirteenth Amendment ideas could not be ignored.

A. *Labor’s Freedom Constitution and the Drive for Labor Legislation*

To unionists, the rights to organize, boycott, strike, and picket were fundamental rights that predated the New Deal statutes.⁵⁰ Their source was to be found not in ordinary legislation, but in the Constitution, especially the First and Thirteenth Amendments.⁵¹ Not only did unionists develop their own constitutional interpretations, but they also put them into practice. The delegates to the 1919 Convention of the American Federation of Labor resolved unanimously to “stand firmly and conscientiously on our rights as free men and treat all injunctive decrees that invade our personal liberties as . . . illegal as being in violation of our constitutional safeguards, and accept whatever consequences may follow.”⁵²

49. Hearings on S. 2926, *supra* note 38, at 1.

50. See, e.g., William Green, *What Rights Do Workers Have?*, 38 *Am. Federationist* 19, 20 (1931) (“Workers have a legal right to union membership and collective bargaining. . . . Does one man because he owns property have the right to deny more than 4,000 the inalienable rights of free men—the right to choose what organization they shall join, the right to unite to promote their happiness and welfare?”); see also *infra* note 57.

51. See Frank Morrison, *Annual Labor Day Message*, *Summit County Lab. News*, Sept. 3, 1937, at 1 (observing that labor’s rights to organize and protest were “inherent under guarantees of the constitution of the United States”); William E. Forbath, *Law and the Shaping of the American Labor Movement* 135–41 (1991) [hereinafter *Forbath, Law and Labor*] (describing unionists’ views of the First and Thirteenth Amendments); Pope, *Labor’s Constitution*, *supra* note 29, at 962–66 (describing unionists’ views of the Thirteenth Amendment). At times, unionists repudiated positive law and grounded their claims in natural law. See, e.g., Editorial, *Have the Workers a Right to Organize?*, *Justice*, Sept. 17, 1920, at 4 (observing that “if the workers depended on the law they would have always lost” and that the “only bit of luck is that the workers have their organization which protects their right to organize, law or no law”). But natural law themes were less prominent than reliance on the Constitution, and they were usually combined with references to constitutional themes. See Pope, *Labor’s Constitution*, *supra* note 29, at 979–80.

52. AFL, *Report of Proceedings of the Thirty-Ninth Annual Convention of the American Federation of Labor* 361 (1919). Since 1909, the AFL had maintained that a worker confronted with an unconstitutional injunction had an “imperative duty” to “refuse

Local activists across the country defied injunctions and, as recounted by William Forbath, their resistance helped to undermine the legitimacy of the labor injunction.⁵³ Although conservative union leaders rarely engaged in resistance themselves, they proudly backed open defiance of “unconstitutional” laws by local activists.⁵⁴ In what was perhaps the single most dramatic campaign of resistance, the AFL declared the Kansas Industrial Court Act of 1920 unconstitutional, and Alexander Howat led the Kansas district of the United Mine Workers in a four-month political strike against the law.⁵⁵ Conservative voluntarists like Samuel Gompers and Matthew Woll supported the notorious radical Howat in his campaign of resistance.⁵⁶

To unionists, then, the statutory protections for self-organization in the Wagner Act and its predecessor, the National Industrial Recovery Act, had merely created “a new legal body” for “an old labor right.”⁵⁷ The

obedience and to take whatever consequences may ensue.” AFL, Report of Proceedings of the Twenty-Ninth Annual Convention of the American Federation of Labor 313 (1909).

53. See Forbath, *Law and Labor*, supra note 51, at 159–63. However, not all unionists endorsed the policy of defiance even in theory. See, e.g., Letter from A.J. Conners, Secretary, Local 5, Machine Stone Workers Rubbers and Helpers, to Senator George W. Norris (Feb. 20, 1932), in *Norris Papers*, Library of Congress, box 285 (arguing that the *Bedford Cut Stone* doctrine “compelling a man to work against his will, is only a law that should be made for serfs and slaves,” but holding that, “as law abiding citizens,” unionists must comply).

54. For example, John Frey, a conservative craft unionist who wrote a book on the labor injunction, celebrated the resistance of Cleveland building trades workers to an injunction:

I am proud as a citizen of Ohio that the building tradesmen of Cleveland determined that their rights were set down in the constitution of the United States and not confined to the conscience of an injunction-granting judge. I stand with them, and I know the American Federation of Labor will approve of the stand of free American citizens in refusing to go to work when a judge orders them to do it.

AFL, Report of Proceedings of the Forty-Sixth Annual Convention of the American Federation of Labor 308 (1926) [hereinafter 1926 AFL Report of Proceedings].

55. See Domenico Gagliardo, *The Kansas Industrial Court: An Experiment in Compulsory Arbitration* 138–45 (1941); Pope, *Labor’s Constitution*, supra note 29, at 975–77.

56. Samuel Gompers and the AFL Executive Council maintained that the Kansas law was an attempt to establish involuntary servitude and that the only way to defeat it was through “action by the organized workers of Kansas.” Letter from Samuel Gompers, President, AFL, to John L. Lewis, President, United Mine Workers (Dec. 3, 1921), in *Van A. Bittner Papers*, West Virginia and Regional History Collections, West Virginia Univ., Morgantown, W. Va., box 6. For Woll’s views, see Matthew Woll, *How the Kansas Plan Defies Fundamental American Freedom*, 5 *Am. Federationist* 317, 319 (1922); Matthew Woll, *Editorial Comment*, *The Am. Photo-Engraver*, Dec. 1921, at 22–24 [hereinafter Woll, *Editorial Comment*].

57. *National Industrial Recovery Act*, ch. 90, 48 Stat. 195 (1933); Matthew Woll, *Editorial*, *Experience a Good Teacher*, *The Am. Photo-Engraver*, July 1935, at 532–33; see also Len De Caux, *A Right That Had To Be Won*, *Union News Serv.*, Apr. 17, 1937, at 1 (observing that in upholding the Wagner Act and “finally putting its O.K. on the right to organize, the Supreme Court has simply ratified a right which American workers have long

role of such statutes was to make possible the effective enjoyment of rights that had previously been guaranteed in theory only.⁵⁸ From this point of view, the obvious place to look for a source of congressional power to enact labor legislation was among the rights affirming provisions of the Constitution.

Unionists turned to the Thirteenth Amendment, the constitutional provision that most directly addressed the question of labor freedom. They quoted the Supreme Court's decision in *Bailey v. Alabama* for the proposition that the Thirteenth Amendment was intended "to make labor free by prohibiting that control by which the personal service of one man is disposed of or coerced for another's benefit."⁵⁹ By himself, they argued, the individual worker was helpless in dealing with a large-scale corporate employer.⁶⁰ While the discharge of one worker meant nothing to the company, it meant the loss of "the means of sustaining life" to the worker and his family.⁶¹ More fundamentally, even if the cumulative threat of losing workers through individual quits did force employers to improve conditions, it could not give the worker the experience of freedom—of joining "with his fellows [to] make such conditions for himself."⁶² Thus interpreted, the Thirteenth Amendment provided solutions

possessed theoretically, but which it took the C.I.O. to establish in actuality"). In 1933, section 7(a) of the NIRA had been greeted in similar fashion. "President Roosevelt signed the bill," explained one Pennsylvania coal miner, "which restored your constitutional rights and industrial freedom." William F. Donovan, Local Union No. 280, Monongahela, Pa., District 5 Aflame, *United Mine Workers J.*, July 15, 1933, at 7.

58. See, e.g., John L. Lewis, President Lewis' Labor Day Message, *United Mine Workers J.*, Sept. 1, 1933, at 12 (observing that the NIRA had made labor "free to assert the rights that it always possessed but never before was permitted to enjoy"); Charles P. Howard, President's Pages, *Typographical J.*, July 1933, at 9 (stating that the NIRA "extends to the workers rights which have always been theirs and which they should have been permitted to enjoy"); Tate Defends Strike Action, *Summit County Lab. News*, Sept. 28, 1934, at 3 ("In theory American labor has always had the right to organize. In practice, labor organizations have been fought by a hundred different means. . . . Clause 7-A of the N.R.A. code is only a statement of the elementary right of labor to organize.").

59. 219 U.S. 219, 241 (1911) (invalidating Alabama's debt peonage law).

60. Debate Between Samuel Gompers and Henry J. Allen at Carnegie Hall, New York, N.Y., May 28, 1920, at 15 (Samuel Gompers rejecting the notion that a lone worker could avoid employer control by quitting: "[J]ust imagine what a wonderful influence such an individual would have, say for instance [on] the U.S. Steel Corporation . . ."); Woll, Editorial Comment, *supra* note 56, at 24 ("Common sense and experience, however, sufficiently demonstrate that industrial justice cannot be obtained by one or even two men quitting work. It has long been recognized that a strike justly called is an industrial argument for securing justice."); see also Pope, *Labor's Constitution*, *supra* note 29, at 962-66 (describing this argument in detail, with additional quotations).

61. J. [H.] Walker, Only Worker Suffers, *Workers Chron.*, Apr. 29, 1921, at 3; see also *Labor's Right To Organize Is Defended By Dalrymple*, *Akron Beacon J.*, Feb. 28, 1936, at 13 (quoting Sherman Dalrymple, President of the United Rubber Workers as stating that "[v]ery little freedom of contract can exist between an employe[e] who has nothing but his labor to sell and a company which can do without the labor of any particular individual").

62. John A. Fitch, *Industrial Peace by Law—the Kansas Way*, *The Survey*, Apr. 3, 1920, at 7, 8. Similarly, Victor Olander of the Seamen's Union wrote that "freedom is real only

for the three main constitutional problems that bedeviled labor's legislative proposals.

1. *Congressional Power.* — First, Section 2 of the Thirteenth Amendment empowered Congress to enforce Section 1's prohibition on slavery and involuntary servitude through "appropriate legislation."⁶³ Unlike the Fourteenth Amendment, which applied only to state action, the Thirteenth made no distinction between governmental and private conduct, and thus could support legislation banning employers as well as government from interfering with labor rights.⁶⁴ Admittedly, the results of many Supreme Court decisions conflicted with labor's theory of collective rights,⁶⁵ but because the Court had yet to address the Thirteenth Amendment issue, there was no adverse precedent squarely on point. Moreover, a few lower courts had held that the Thirteenth Amendment protected collective labor rights.⁶⁶ And by the 1920s, even the justices of the Su-

when it can be made effective." Victor A. Olander, *Compulsory Arbitration*, *Shoe Workers J.*, July 1920, at 6. By "effective," Olander meant more than the instrumental capacity to influence employers. He found intrinsic value in the right of individuals to "act with other individuals in matters concerning their personal relationship with them." *Id.*

63. U.S. Const. amend. XIII, § 2.

64. *The Civil Rights Cases*, 109 U.S. 3, 20 (1883) (stating that legislation enacted pursuant to the Thirteenth Amendment is "primary and direct in its character; for the amendment is not a mere prohibition of State laws establishing or upholding slavery, but an absolute declaration that slavery or involuntary servitude shall not exist in any part of the United States"). Prior to the 1930s, this feature was important mainly in regard to labor's efforts to obtain legislative relief from yellow dog contracts. For example, Pennsylvania AFL President James Maurer proposed national legislation banning the yellow dog contract which, he maintained, "'means nothing more than involuntary servitude, and comes in direct conflict with'" the Thirteenth Amendment. Letter from Francis B. Sayre to John W. Edelman, Research Dep't, Am. Fed'n of Full Fashioned Hosiery Workers (Nov. 16, 1927), microformed on *The Papers of Felix Frankfurter*, Library of Congress, Manuscript Division, reel 94, frame 839 (1983) [hereinafter *Frankfurter Papers*] (quoting Maurer's proposal); see also *Limiting Scope of Injunctions in Labor Disputes: Hearings before a Subcomm. of the S. Comm. on the Judiciary, 70th Cong. 670-71 (1928)* [hereinafter *Limiting Injunctions*] (testimony of John P. Frey, Secretary and Treasurer of the AFL Metal Trades Department) (arguing that yellow dog contracts could be prohibited on the authority of the Thirteenth Amendment); *The Measure Proposed in Lieu of the Amended Substitute Bill: An Act for the Enforcement of the Thirteenth Amendment in Relation to Injunctions in Labor Disputes and for Other Purposes, Injunctions in Labor Disputes*, S. Doc. No. 71-327, at 11 (3d Sess. 1931) (bill, drafted by three lawyers in consultation with Andrew Furuseth, asserting an "inalienable right" under the Thirteenth Amendment to organize, bargain collectively, and engage in collective action).

65. See, e.g., cases cited *infra* note 69 (applying federal antitrust statutes to restrict collective action by labor).

66. *Arthur v. Oakes*, 63 F. 310, 319-20, 327 (7th Cir. 1894) (Harlan, Circuit Justice) (overturning parts of an antistrike injunction partly on the ground that workers enjoyed the right, guaranteed by the Thirteenth Amendment, "to confer with each other upon the subject of the proposed reduction in wages, . . . to withdraw in a body from the service of [the employer] because of the proposed change," and "to demand given rates of compensation as a condition of their remaining in the service"); *Kemp v. Div. No. 241, Amalgamated Ass'n of St. & Elec. Ry. Employees of Am.*, 99 N.E. 389, 392 (Ill. 1912) (overturning an injunction that prohibited a union from calling a strike, partly on

preme Court were giving labor's freedom theory lip service, albeit under the Due Process Clause of the Fourteenth Amendment rather than the Thirteenth Amendment. "A single employee was helpless in dealing with an employer," conceded Chief Justice Taft, and so "[u]nion was essential to give laborers opportunity to deal on equality with their employer."⁶⁷ In *Charles Wolff Packing Co. v. Court of Industrial Relations*, the Court struck down a state compulsory arbitration law partly because its ban on strikes deprived the worker of "that means of putting himself on an equality with his employer which action in concert with his fellows gives him."⁶⁸ Unionists also took heart when Justice Brandeis wrote, in dissent, that an injunction against a peaceful sympathy strike "reminds of involuntary servitude."⁶⁹

In comparison to the Thirteenth Amendment, the Commerce Clause seemed an unnatural and dangerous source of power for labor rights legislation. The Sherman Antitrust Act, passed under the com-

Thirteenth Amendment grounds); cf. *Hopkins v. Oxley Stave Co.*, 83 F. 912, 937, 939 (8th Cir. 1897) (Caldwell, J., dissenting) (declaring that a denial of the right to strike and boycott amounted to wage slavery).

67. *Am. Steel Foundries v. Tri-City Cent. Trades Council*, 257 U.S. 184, 209 (1921) (holding that injunction should issue limiting pickets to one per gate). The entire quotation reads:

Labor unions . . . were organized out of the necessities of the situation. A single employee was helpless in dealing with an employer. He was dependent ordinarily on his daily wage for the maintenance of himself and family. If the employer refused to pay him the wages that he thought fair, he was nevertheless unable to leave the employ and to resist arbitrary and unfair treatment. Union was essential to give laborers opportunity to deal on equality with their employer. They united to exert influence upon him and to leave him in a body in order by this inconvenience to induce him to make better terms with them.

Id.

68. 262 U.S. 522, 540 (1923) (upholding employer's constitutional challenge to a Kansas law that prohibited strikes and provided for labor disputes to be adjudicated in an industrial court).

69. *Bedford Cut Stone Co. v. Journeymen Stone Cutters' Ass'n*, 274 U.S. 37, 65 (1927) (Brandeis, J., dissenting); AFL, Report of Proceedings of the Forty-Seventh Annual Convention of the American Federation of Labor 293, 302 (1927) [hereinafter 1927 AFL Report of Proceedings] (statement of delegates Andrew Furuseth and Chauncy A. Weaver, president of musicians' union) (approving of Justice Brandeis's comparison of an injunction against a peaceful strike with involuntary servitude); AFL, Report of Proceedings of the Forty-Ninth Annual Convention of the American Federation of Labor 319 (1929) [hereinafter 1929 AFL Report of Proceedings] (statement of delegate John P. Frey) (approving of Justice Brandeis's dissent in *Bedford Cut Stone*). Although union lawyers did not make the Thirteenth Amendment argument in their briefs in *Bedford Cut Stone*, Justice Brandeis had undoubtedly heard an earful about labor's Thirteenth Amendment theory from Andrew Furuseth, who was an occasional dinner guest at Brandeis's house. See Letter from Mae E. Waggaman, former private secretary to Furuseth, to Silas Axtell (Feb. 25, 1947), reprinted in A Symposium on Andrew Furuseth 35, 37 (Silas B. Axtell ed., 1948) (recalling that Furuseth "always seemed pleased to spend an evening with Justice Brandeis in his home where special dishes were prepared for him" and that she "often took the messages over the 'phone when the invitations were extended to him").

merce power, had spawned court injunctions and treble damage awards against strikers and boycotters on the theory that they were conspiring to restrain interstate commerce.⁷⁰ Unionists protested that labor combinations had nothing to do with commerce because labor power could not be separated from the worker and thus could not be a commodity or article of commerce:

We protest against the use of such definitions for the purpose of bringing labor, employment and industrial relations under the power granted to Congress to regulate interstate commerce, and under guise of such definition place labor, the service of free men, under the same restraints and limitations as well as under the same classification as articles of trade to be bargained for in like principles and practices as commodities of commerce. Under such strained definition and construction both the reserved constitutional rights of all American freemen as well as powers exclusively delegated to our several state governments may be trespassed upon, limited or denied at any time and at will by those temporarily in governmental authority.⁷¹

Labor's aversion to the Commerce Clause extended only to the direct regulation of labor rights and not to regulations of the channels or instrumentalities of commerce. Unionists contended that Congress could control child labor by excluding its products from the channels of interstate commerce and did not object to Congress's regulation of railway labor as an incident of the railroads' status as instrumentalities of commerce.⁷² They approved the National Industrial Recovery Act, which authorized the President to approve codes of fair competition drawn up by "trade organizations," a term construed by the AFL to include unions.⁷³ They even proposed that Congress could protect the right to or-

70. See, e.g., *Bedford Cut Stone*, 274 U.S. at 54 (holding that union's strikes constituted a "course of conduct which directly and substantially curtailed, or threatened thus to curtail, the natural flow in interstate commerce" in violation of the Antitrust Act); *Coronado Coal Co. v. UMW*, 268 U.S. 295, 310 (1925) (describing alleged destruction of mining properties by union as an unlawful restriction of interstate commerce under the Antitrust Act); *Loewe v. Lawlor*, 208 U.S. 274, 304-05 (1908) (finding that hatter's union formed a "conspiracy or combination" to "directly restrain plaintiffs' [interstate] trade"); Herbert Hovenkamp, *Labor Conspiracies in American Law, 1880-1930*, 66 *Tex. L. Rev.* 919, 921 (1988) (arguing that judicial opposition to the labor movement in the early 1900s derived in part from a particular view of political economy that perceived any collusion as harmful to the public interest).

71. Supplemental Report of the Executive Council, 1929 AFL Report of Proceedings, *supra* note 69, at 194.

72. See generally Ruth O'Brien, *Workers' Paradox: The Republican Origins of New Deal Labor Policy, 1886-1935*, at 140-43 (1998) (describing labor's support for the Railway Labor Act of 1926); Philip Taft, *Organized Labor in American History 408-09* (1964) (recounting labor's support for the Child Labor Act).

73. National Industrial Recovery Act, ch. 90, 48 Stat. 195, 196-97 (1933). Rather than viewing the Act as regulation, the AFL saw it as "carrying out the idea of voluntary cooperation under governmental leadership." AFL, Report of Proceedings of the Fifty-Third Annual Convention of the American Federation of Labor 410, 412 (1933). With this

ganize by imposing a federal licensing requirement on corporations engaged in interstate commerce and then revoking the licenses of corporations that interfered with worker rights.⁷⁴ But when Senator Wagner unveiled his bill, which applied directly to labor relations rather than to channels or instrumentalities of commerce, unionists balked. As we have seen, the AFL countered with the Republican Government Clause while Andrew Furuseth renewed labor's plea for legislation under the Thirteenth Amendment.⁷⁵

2. *Economic Due Process.* — Second, the Thirteenth Amendment provided a base from which to attack the doctrine of economic due process.⁷⁶ In *Adair v. United States*, the Supreme Court had struck down a federal statute protecting railroad workers against discrimination based on union membership, reasoning that the statute infringed the individual liberty of contract guaranteed by the Fifth Amendment Due Process Clause.⁷⁷ The liberty to sign a yellow dog contract (in which the employee agreed not to join a union) was, declared the Court in a later case, “as essential to the laborer as to the capitalist.”⁷⁸ Labor constitutionalists conceded that these decisions might have been justifiable when the Fifth Amendment was enacted; after all, slavery and involuntary servitude were constitutionally sanctioned in those days.⁷⁹ But the Thirteenth Amendment, which declared simply that “[n]either slavery nor involuntary servitude . . . shall exist within the United States,”⁸⁰ precluded workers from selling themselves into a condition of involuntary servitude like that rep-

gloss, the Federation did not object to the extension of the “principle of public interest . . . to all industries affecting interstate commerce.” *Id.*

74. Minutes of the Meeting of the Executive Council (AFL, Washington, D.C.), Jan. 23–Feb. 6, 1934, at 41 [hereinafter Minutes of Executive Council] (reporting discussion of licensing bill drafted by John Frey).

75. See *supra* note 45, *infra* notes 218–222 and accompanying text.

76. Thus, Henrik Shipstead, Farmer-Labor Senator from Minnesota and a strong supporter of labor's freedom constitution, charged that the courts had been using the Fifth and Fourteenth Amendments, which dealt with property rights, “to nullify the first and thirteenth amendments,” which dealt with “human liberty and human rights.” *Limiting Injunctions*, *supra* note 64, at 169.

77. 208 U.S. 161, 172 (1908) (invalidating section 10 of the Erdman Act, which made it a federal crime for an interstate carrier to discharge an employee for union membership).

78. *Coppage v. Kansas*, 236 U.S. 1, 14, 26 (1914) (striking down Kansas's anti-yellow dog statute).

79. Andrew Furuseth, “Does The Thirteenth Amendment To The Constitution Amend The Fifth? Did Man Become Free?” (n.d.), *in* Norris Papers, *supra* note 53, box 198, at 1–3 [hereinafter Furuseth, Thirteenth Amendment] (observing that when the Fifth Amendment was adopted, “slavery of human beings, regardless of color, was recognized and in general practice,” and citing the Fugitive Slave Clause of the Constitution, art. IV, § 2, ¶ 3); Letter from Andrew Furuseth, President, International Seamen's Union of America, to Senator George W. Norris (Dec. 2, 1931), *in* Norris Papers, *supra* note 53, box 285, at 2 (acknowledging that “the ownership of man—be he black, yellow or white—was proper if bought or born in bondage” at the time that the Fifth Amendment was enacted).

80. U.S. Const. amend. XIII, § 1.

resented by the yellow dog contract.⁸¹ And because the Thirteenth Amendment was enacted subsequently to the Fifth, it operated “by implication as a repeal of the fifth amendment, in so far as any property in a human being was recognized by that amendment.”⁸²

3. *Class Legislation.* — Labor’s most frequent and influential use of the Thirteenth Amendment came not in the areas of congressional power or economic due process—the problems subsequently highlighted by historians—but on the question whether statutes protecting labor rights constituted “class legislation” in violation of the constitutional principle of equality. This issue raised the deeper question whether there was something distinctive about labor organization and protest that justified treating it differently from other invasions of common law business rights—a question that would later become crucial in the shaping of the post–New Deal constitutional order.⁸³ Beginning around the turn of the century, employers argued—with considerable success—that to exempt labor from antitrust laws or injunctive remedies was to grant an unjustifiable special privilege.⁸⁴ In *Truax v. Corrigan*, the Supreme Court invalidated an Arizona statute that barred courts from enjoining peaceful striking and picketing.⁸⁵ According to the Court, the statute violated the Equal Protection Clause of the Fourteenth Amendment because there was no justification for distinguishing between striking workers and “other tortfeasors.”⁸⁶ The Court suggested in *Truax* that federal (as opposed to state) anti-injunction legislation might survive constitutional scrutiny because the Equal Protection Clause did not apply to the national government.⁸⁷ But in *Duplex Printing Press Co. v. Deering*, the Court

81. See Limiting Injunctions, *supra* note 64, at 670–71 (testimony of John P. Frey, Secretary and Treasurer of the AFL Metal Trades Department) (arguing that yellow dog contracts violate the Thirteenth Amendment); Letter from Francis B. Sayre to John W. Edelman, *supra* note 64, at 2 (quoting argument by James Maurer, President of the Pennsylvania State Federation of Labor, that the yellow dog contract amounted to a condition of involuntary servitude).

82. Winter S. Martin, A Memorandum on the Substitute Bill S. 2497, Injunctions In Labor Disputes, S. Doc. No. 71-327, at 2, 13 (3d Sess. 1931); Furuseth, Thirteenth Amendment, *supra* note 79, at 3 (charging that the decisions in *Adair*, *Adkins*, *Coppage*, *Bedford Cut Stone*, *Duplex*, *Truax*, *Hitchman*, and *American Foundries* “rest upon the Fifth Amendment as if the Thirteenth Amendment had not modified the meaning of the word ‘property’ as construed in the Dred Scott decision”).

83. See *infra* Part V.B.

84. Federal courts had struck down state attempts to exempt unions from antitrust lawsuits as “class legislation.” Forbath, Law and Labor, *supra* note 51, at 151 (citing *Niagara Fire Ins. Co. v. Cornell*, 110 F. 816, 825 (D. Neb. 1901) and *Connolly v. Union Sewer Pipe Co.*, 184 U.S. 540, 565 (1902)).

85. 257 U.S. 312, 342 (1921).

86. *Id.* at 336, 339.

87. *Id.* at 332 (observing that “the equality clause does not appear in the Fifth Amendment and so does not apply to congressional legislation,” and that although the due process clause “tends to secure equality of law in the sense that it makes a required minimum of protection for every one’s right of life, liberty and property, which the Congress or the legislature may not withhold,” the “framers and adopters of [the

narrowly construed the anti-injunction provisions of the Clayton Act so as to permit the enjoining of secondary boycotts on the ground that they imposed an “exceptional and extraordinary restriction . . . in the nature of a special privilege or immunity to a particular class.”⁸⁸

Unionists took a diametrically opposite position. Far from a constitutionally suspect “special privilege,” differential treatment of capital and labor was constitutionally *compelled*. Samuel Gompers contended that it was “an outrage upon our language” to treat a combination of property owners in the same category as a combination of workers, “who own nothing but themselves and undertake to control nothing but themselves and their power to work.”⁸⁹ Unlike dominion over things, dominion over one’s own labor was essential to personal liberty. “[H]uman labor . . . grows with the growth of the child or boy or young man, it lessens in sickness and it ceases at death,” argued labor constitutionalists, “and no one inherits it, no one can buy it, no one can sell it without buying or selling the body in which that labor power is.”⁹⁰ The Thirteenth Amendment gave this distinction constitutional sanction by prohibiting the sale of the body into a condition of slavery or involuntary servitude. “If you

Fourteenth] Amendment were not content to depend on a mere minimum secured by the due process clause, or upon the spirit of equality which might not be insisted on by local public opinion” and “therefore embodied that spirit in a specific guaranty” directed against “individual or class privilege”).

88. 254 U.S. 443, 471 (1921). *Duplex* was decided prior to *Truax*, and the narrower construction given to the Clayton Act in *Duplex* was cited in *Truax* as a reason why *Truax* did not effectively strike down the Clayton Act’s labor provisions. *Truax*, 257 U.S. at 340 (distinguishing the Clayton Act on the grounds that (1) “the equality clause of the Fourteenth Amendment does not apply to congressional but only to state action,” and (2) the Clayton Act did not have the same effect as the Arizona Supreme Court gave the Arizona statute).

89. 51 Cong. Rec. 9166 (1914). This outrage stemmed from the fact that labor was not a commodity and could not be property; the contrary principle contravened the Thirteenth Amendment. “Governmental regulations, trust laws, may rightfully apply to the products of labor,” maintained Gompers, “but they do not rightfully apply to the labor power of a free man.” Samuel Gompers, *Labor Not a Commodity*, reprinted in *id.* at 16,340; see also Testimony of Samuel Gompers, President, American Federation of Labor, before Joint Labor and Indus. Comm. of the New York State Legislature on the Duell-Miller industrial relations (antistrike) bill, Assembly Chamber, Capitol, Albany, N.Y., Mar. 1, 1922, reprinted in 29 *Am. Federationist* 253, 253–54 (1922) (denying that labor and capital should have equal rights and citing Lincoln on the priority of labor over capital); Forbath, *Law and Labor*, *supra* note 51, at 137–38, 154–55 (noting arguments of Gompers, Olander, and Furuseth that labor is distinct from capital and is protected by the Thirteenth Amendment); Pope, *Labor’s Constitution*, *supra* note 29, at 964–65 (noting labor’s arguments that denying workers freedom to strike and control over their work is akin to slavery).

90. 1926 AFL Report of Proceedings, *supra* note 54, at 311 (statement of Andrew Furuseth); see also Olander, *supra* note 62, at 7 (observing that a “man may exercise his labor power in the interest of another but he cannot give or sell it to any other person without at the same time surrendering his own body”); John P. Frey, *The Labor Injunction* 98 (n.d.) (quoting similar statement in President Gompers’s 1922 annual report to AFL convention).

make labor into property because you construe labor as being property and the . . . right to labor a property right,” concluded Andrew Furuseth, “then the Thirteenth Amendment goes into the waste basket entirely.”⁹¹

Labor’s language of freedom and slavery found a receptive audience among legislators. During the debates over the Clayton bill and other early attempts at anti-injunction legislation, numerous senators and representatives echoed unionists’ claims that the labor injunction violated the Thirteenth Amendment, and that combinations of labor could not be equated to combinations of commodity owners.⁹² In fact, these themes were so prominent that some lawyers ended up with the impression that the labor provisions of the Clayton Act had been passed “in support of the Thirteenth Amendment rather than under the Interstate Commerce [Clause] of the United States Constitution.”⁹³ By the early 1930s, most

91. 1929 AFL Report of Proceedings, *supra* note 69, at 345. Furuseth also argued this point to legislators considering anti-injunction legislation. *Limiting Injunctions*, *supra* note 64, at 146–48.

92. See, e.g., 51 Cong. Rec. 9672 (1914) (Statement of Rep. Buchanan) (noting that there was a “difference between commodities and living human beings; in other words, that . . . humanity was in a different class from a ton of coal, a bolt of cloth, or a pile of bricks, and [that he] therefore did not consider this to be class legislation of any sort, or any special privilege,” and arguing that it was time to give labor “that freedom of activity guaranteed by the Constitution”); *id.* at 9565 (Statement of Rep. Lewis) (“Labor is never in truth a commodity; labor can never under our institutions be property. . . . Under our Constitution, property in human beings has forever ceased. . . . The legal attribute of a commodity is property; but the legal attribute of the workingman is citizenship.”); *id.* at 9559 (Statement of Rep. Casey) (observing that “labor power or patronage can not be property, but aside from this we have the thirteenth amendment to the Constitution prohibiting slavery and involuntary servitude”); *id.* at 9173 (Statement of Rep. Sherwood) (“Labor demands and has the right to demand that laws be enacted making a fundamental difference between labor power and property. Labor power is not property, because it can not be separated from the laborer.”); 48 Cong. Rec. 6457 (1912) (Statement of Rep. Graham) (“Property rights are getting too much recognition at the expense of human rights, and this bill is simply an attempt to get back to where Abraham Lincoln would have us; it is simply an assertion of the rights of men as against the rights of property.”); *id.* at 6446 (Statement of Rep. Wilson) (“The personal relationship between man and man comes clearly within the jurisdiction of the law courts and has no place in the courts of equity, unless upon the assumption . . . that man is property, an assumption repugnant to . . . all civilized communities and specifically forbidden by the thirteenth amendment.”).

93. Letter from Harold A. Henderson, General Counsel to District 11, UMWA, to John L. Lewis, District 14 Correspondence (Apr. 11, 1922), *in* UMWA Records (commenting that “Congress was justified in enacting the Clayton law in support of the Thirteenth Amendment rather than under the Interstate Commerce provisions of the United States Constitution”). Similarly, Frank P. Walsh, who was involved in labor’s lobbying campaign for the enactment of the Clayton Act, claimed that labor unions were exempted from the antitrust laws because Congress “recognized the activities of these men consisted of the personal service which they rendered to the industry, and that any inhibition on their right to quit individually or in concert was an assault upon the Thirteenth Amendment of the Constitution of the United States.” Henry J. Allen, *The Party of the Third Part: The Story of the Kansas Industrial Relations Court* 78 (1921).

Americans accepted labor's claim that, in an economy dominated by giant corporations, collective organization was essential to labor freedom.⁹⁴

While labor's freedom constitution was gaining ground among legislators and the general public, however, it remained anathema to another highly influential group: legal professionals.

B. *Labor's General Staff of Progressive Lawyers*

Until the 1920s, pro-labor congressmen generally deferred to the AFL in shaping legislative proposals protecting labor rights.⁹⁵ During that decade, however, a cadre of elite, progressive lawyers and scholars centered in the legal academy mounted a sustained effort to displace unionists as Congress's main source of ideas about labor legislation. Harvard Law professors Felix Frankfurter and Francis B. Sayre, Columbia Law professor Herman Oliphant, Chief Librarian Edwin Witte of the Wisconsin Legislative Library, and Donald Richberg, a railroad labor attorney and legal scholar, made up the core of the group. Their effort to win control of the campaign for labor legislation set off a bitter clash between the movement culture of labor and the professional culture of legal progressivism—a clash that would have far-reaching ramifications for constitutional politics during the New Deal period.

As these lawyers saw it, the battle resulted not from any genuine conflict of interest, but from the failure of unionists to realize that they should trust lawyers to guide the movement for labor law reform. Writing anonymously, Felix Frankfurter urged labor to accept progressive intellectuals as a "general staff" for labor.⁹⁶ "Mr. Gompers will learn," he vowed, "that 'intellectuals' may have as deep a social sympathy and understanding as men who work at crafts."⁹⁷ Donald Richberg wrote a thinly disguised autobiographical novel in which the protagonist, a young lawyer, goes to court and provides a brilliant defense for inarticulate workers who would have been lost without an advocate like himself.⁹⁸ Francis

94. See Daniel Ernst, *The Yellow-Dog Contract and Liberal Reform, 1917–1932*, 30 *Lab. Hist.* 251, 273 (1989) [hereinafter Ernst, *Yellow-Dog*] (reporting that by 1932, "most Americans agreed . . . that 'actual liberty of contract' could no longer exist between an individual employee and a corporate employer").

95. See Forbath, *Law and Labor*, supra note 51, at 154, 156 (describing some of AFL's successes in persuading congressmen to sponsor labor-friendly bills); Felix Frankfurter & Nathan Greene, *The Labor Injunction* 142 (1930) [hereinafter Frankfurter & Greene, *Injunction*] (recounting the exemption of labor organizations from the Clayton Act at the request of the AFL).

96. Felix Frankfurter, *The "Law" and Labor* (unsigned editorial from the *New Republic*, Jan. 26, 1921), reprinted in Felix Frankfurter on the Supreme Court 68, 76 (Philip Kurland ed., 1970) ("There is need of a general staff to do continuous thinking for labor, trained writers and speakers to interpret the needs and the methods of labor to the general public, and, finally, skilled technicians dealing with special problems.").

97. *Id.*

98. Donald Richberg, *A Man of Purpose* 295–304 (1922). Thomas Vadney aptly described this tale: "Richberg painted a romantic picture of the role of the lawyer in defending what were portrayed as the downtrodden laboring masses, voiceless without a

Sayre advised unionists to give up the idea of enacting national legislation under the Thirteenth Amendment and proposed instead that they should hire “the best legal talent available” to conduct studies and draft state legislation, an approach that would require “a considerable expenditure of money, but I believe in the end it would be money well spent.”⁹⁹ Less ambitiously, one union lawyer reacted to Andrew Furuseth’s theorizing by complaining: “if you have an automobile and it needs fixing you take it to an automobile mechanic . . . and if you have a legal ill you necessarily go to a lawyer.”¹⁰⁰

The progressive lawyers sincerely and wholeheartedly supported labor’s immediate objective of anti-injunction legislation. But their long-term constitutional aims contrasted starkly with those of unionists. While workers experienced labor injunctions and economic due process as threats to labor freedom on the ground, lawyers experienced them as threats to the integrity of the judicial system and obstacles to the influence of professionals, including themselves, over economic policy. They saw judges purporting to decide cases on the basis of formalistic reasoning from absolute property rights, while, in fact, they were making policy based on their own economic sympathies.¹⁰¹ From this point of view, the importance of labor law reform stemmed less from its impact on workers than from the opportunity it offered to attack legal formalism at a glaring weak point, where judicial doctrine was especially out of step with “the facts.”¹⁰² Following Oliver Wendell Holmes, the lawyers argued that the solution to this problem was to avoid fundamental rights thinking altogether and to investigate facts and balance the interests of capital and labor instead.¹⁰³ This, in turn, was a policymaking task for the legislative

spokesman like Richberg.” Thomas Vadney, *The Wayward Liberal: A Political Biography of Donald Richberg* 50 (1970).

99. Letter from Francis B. Sayre to John W. Edelman, *supra* note 64.

100. Letter from Joseph O. Carson, Attorney at Law, to Frank Duffy, General Secretary, United Brotherhood of Carpenters (Dec. 23, 1931), *in* Norris Papers, *supra* note 53, box 198.

101. See Morton J. Horwitz, *The Transformation of American Law 1870–1960*, at 156–67 (1992) (recounting the dismantling, by legal progressives and realists, of the formalistic concept of property, and its resulting representation as a “creature of social choice”); Ernst, *Yellow-Dog*, *supra* note 94, at 265 (noting that, for legal realist scholars, the Supreme Court’s upholding of injunctions to enforce yellow dog contracts “was one of the great horrors of legal formalism”).

102. These lawyers saw labor law reform merely as one component of a broader assault on the prevailing jurisprudential regime of legal formalism. See O’Brien, *supra* note 72, at 30; Daniel R. Ernst, *Common Laborers? Industrial Pluralists, Legal Realists, and the Law of Industrial Disputes*, 11 *Law & Hist. Rev.* 59, 69 (1993). Their mentor, Oliver Wendell Holmes, had targeted the law of labor disputes as a weak point in the formalist system. See Oliver Wendell Holmes, *Privilege, Malice and Intent*, 8 *Harv. L. Rev.* 1, 7–8 (1894). “From the beginning, economic struggle was, for Holmes,” Morton Horwitz explains, “the best example of the weakness of a theory of rights.” Horwitz, *supra* note 101, at 135.

103. Felix Frankfurter & Nathan Greene, *Congressional Power Over The Labor Injunction*, 31 *Colum. L. Rev.* 385, 405–06 (1931) [hereinafter Frankfurter & Greene,

branch,¹⁰⁴ and labor—as well as capital—would have to give up its fundamental rights claims.¹⁰⁵

Accordingly, the progressive lawyers proposed to overcome the three big constitutional obstacles to labor legislation not by strengthening labor's rights of collective action, but by expanding the zone for policymaking by legislatures and administrative agencies.

1. *Congressional Power.* — To the lawyers, there was nothing wrong with relying upon the commerce power to support labor legislation. While unionists complained that human labor could not be treated as an article of commerce, the progressive lawyers relegated labor matters to the category of “economics,” not human freedom. Edwin Witte chided unionists for attacking the “abstract” concept of commodity labor when labor problems were “economic in their nature” and thus called for social scientific solutions.¹⁰⁶ Felix Frankfurter criticized the Supreme Court's Commerce Clause jurisprudence not for classifying labor as commerce, but for failing to recognize that decisions under that clause were “at bottom acts of statesmanship” that depended “upon a judgment about practical matters and not upon a knowledge of the Constitution.”¹⁰⁷

Congressional Power] (arguing that the answer to the problem of labor injunctions “calls for something more than the rhetoric of abstractions” and claiming that the Norris bill's statement of policy “merely reflects a belief widely entertained by economists as well as by workers, and frequently acted upon by employers themselves, that the workmen engaged in every division of a single industry are bound by a common economic bond”). Holmes, no progressive himself, but an inspiration to the progressive lawyers, opined that in cases of industrial conflict, the outcome often depended on the “economic sympathies” of the judge. Horwitz, *supra* note 101, at 132, 135 (quoting Holmes).

104. See, e.g., Frankfurter & Greene, *Congressional Power*, *supra* note 103, at 405 (observing that the “creation of rights is the business of legislatures; so also is the task of defining with particularity the area within which rights may be exercised”).

105. Edwin E. Witte, *The Government In Labor Disputes 59–60* (1932) (arguing that labor's claims of “absolute” constitutional rights are “no more a solution of the problems which arise in the law of labor disputes than are the theories that are employed in decisions adverse to labor,” and proposing that “[w]hat is needed is an examination of the facts and a study of how the law is actually working out, rather than *a priori* reasoning, nice deductions, and reversion to old doctrines and phrases”). See generally Horwitz, *supra* note 101, at 105, 112 (quoting Pound's observation that there are “not ‘rights,’ but ‘interests’” and describing Holmes's project as one of freeing law from natural rights so that it could be used instrumentally); Daniel T. Rodgers, *Contested Truths: Keywords in American Politics Since Independence 177, 211* (1987) (analyzing the shift in political discourse from fundamental rights and abstract truths to contingent states of fact).

106. Edwin E. Witte, *The Doctrine that Labor is a Commodity*, 69 *Annals Am. Acad. Pol. & Soc. Sci.* 133, 139 (1917); see also Ernst, *Yellow-Dog*, *supra* note 94, at 265 (quoting Walter Wheeler Cook's assertion that the yellow dog contract presented “a problem of economic and social policy, conceal it how we will” and Thomas Reed Powell's assertion that “[w]e are not likely to get a satisfactory solution of the problem of collective bargaining through the jurisprudence of abstract conceptions”).

107. Felix Frankfurter, *Taft and the Supreme Court* (reprinting unsigned editorials from the *New Republic*, Oct. 27, 1920, Jan. 18, 1922 & Jan. 25, 1922), reprinted in Felix Frankfurter on the Supreme Court, *supra* note 96, at 49, 62–63.

The progressive lawyers adopted a curious approach toward labor's Thirteenth Amendment theory. Given their general skepticism about fundamental rights thinking, it is not surprising that everything they said about it was negative, sometimes in language dripping with contempt.¹⁰⁸ What is surprising, however, is that these legal intellectuals—who usually liked nothing better than to explain in detail the logic of their views—studiously refrained from explaining the reasons for their opposition. In Felix Frankfurter's voluminous writings on the injunction question, one looks in vain for any discussion of the issue.¹⁰⁹ Edwin Witte and Donald Richberg also ignored it.¹¹⁰ Francis Sayre once offered a refutation of sorts, but it was oddly out of step with the progressives' usual approach to legal issues. Responding to labor's idea of grounding anti-yellow dog legislation on the Thirteenth Amendment, Sayre wrote that "so far as I know, no court has ever held that labor under a contract which the employee has been forced to sign through the force of circumstances or by the press of economic needs would constitute such involuntary servitude as the Constitution forbids."¹¹¹ Considering that the progressive lawyers made their reputation criticizing court decisions and calling for new interpretations, this uncritical acceptance of institutional inertia rings hollow.

Looking beyond the elite group, many legal commentators summarily rejected labor's Thirteenth Amendment theory on the ground that the individual right to quit by itself sufficed to eliminate any question of involuntary servitude.¹¹² But the elite lawyers did not deploy that argument. To the contrary, they agreed with unionists that "the individual

108. See Letter from Edwin E. Witte, Chief, Legislative Reference Dep't, to Roger N. Baldwin, Director, ACLU (Dec. 24, 1931), in *Norris Papers*, supra note 53, box 285 (arguing that "there is no simple formula such as 'involuntary servitude' . . . which would accomplish this purpose [of ending labor injunctions]"); see also *infra* notes 183–187 and accompanying text.

109. Philip Kurland's compendium of Frankfurter's extrajudicial commentary on the Supreme Court and the Constitution, which contains extensive discussion of labor matters, does not mention labor's Thirteenth Amendment theory. See Felix Frankfurter on the Supreme Court, supra note 96. Frankfurter's opus on the labor injunction, co-authored with Nathan Greene, quoted one of the rare decisions overturning a strike injunction on Thirteenth Amendment grounds, but otherwise said nothing about the Amendment. See Frankfurter & Greene, *Injunction*, supra note 95, at 90 n.36.

110. Witte did not address the question in his detailed treatment of yellow dog contracts and labor injunctions. See Witte, supra note 105, at 120, 220–30. Richberg discussed compulsory arbitration without mentioning labor's view that compulsory arbitration violated the Thirteenth Amendment. See Donald R. Richberg, *Developing Ethics and Resistant Law*, 32 *Yale L.J.* 109, 119–21 (1922).

111. Letter from Francis B. Sayre to John W. Edelman, supra note 64, at 3.

112. See, e.g., Ernest C. Carman, *The Outlook from the Present Legal Status of Employers and Employees in Industrial Disputes*, 6 *Minn. L. Rev.* 533, 557–58 (1922) (arguing that strike ban did not violate Thirteenth Amendment because the individual worker retained the right to quit); Sidney Post Simpson, *Constitutional Limitations on Compulsory Industrial Arbitration*, 38 *Harv. L. Rev.* 753, 784–85 (1925) (same); Editorial, *Judicial Adjustment of Industrial Controversies*, 43 *Bench & Bar*, New Series 151, 153 (Nov.

unorganized worker is commonly helpless to exercise actual liberty of contract and to protect his freedom of labor, and thereby to obtain acceptable terms and conditions of employment.”¹¹³ Thus, progressive lawyers were in the odd position of endorsing the factual predicate for labor’s Thirteenth Amendment theory while rejecting the theory itself without explanation. The logic behind this puzzling approach may become clearer when we revisit it at the climax of the story.¹¹⁴

2. *Economic Due Process*. — The elite lawyers were not above mustering technical arguments to distinguish their legislative proposals from those that had been invalidated by the Supreme Court on due process grounds.¹¹⁵ But in their franker moments they acknowledged that they, like their labor allies, were engaged in a transformative project. The problem was “one to be tested primarily by present day conditions,” and the lawyers were confident that their perception of those conditions would prevail.¹¹⁶ Witte predicted that “now that the purposes and results of such [yellow dog] ‘contracts’ appear so clearly, it is not too much to expect the United States Supreme Court” to reverse itself and declare them void against public policy.¹¹⁷ As for *Truax*, it was a decision so disastrous as to warrant immediate overruling. To Frankfurter, it was “destined to become even more classic than the *Lochner* case—a challenge is offered to all who find intolerable authoritarian rule by five men in contested fields of social policy.”¹¹⁸

1920) (opining that “[t]here is no slavery” about a strike ban because “[a]ny individual workman can leave his job any time he wants to”).

113. Frankfurter & Greene, *Injunction*, supra note 95, at 280–81 (reprinting proposed anti-injunction bill drafted by Frankfurter, Witte, Sayre, Richberg, & Oliphant); see also Letter from Francis B. Sayre to John W. Edelman, supra note 64, at 1 (agreeing with James Maurer that an employee “is often in the world of actual fact completely at the mercy of the large employer when it comes to arranging the terms of the contract of employment”).

114. See *infra* text accompanying notes 187–204.

115. See Frankfurter & Greene, *Injunction*, supra note 95, at 213–14 (distinguishing *Adair* on the ground that the Norris bill, unlike the statute at issue in *Adair*, did not make it a crime to enter into a yellow dog contract or nullify such contracts altogether; it merely denied them force in federal courts); *id.* at 220 (distinguishing *Truax* on the ground that it “is hardly to be assumed that the application given in *Truax v. Corrigan* to the equal protection clause of the Fourteenth Amendment will be imposed upon the due process clause of the Fifth Amendment”).

116. Frankfurter & Greene, *Congressional Power*, supra note 103, at 400 (quoting *United Rys. v. West*, 280 U.S. 234, 249 (1930)); see also *id.* (“The *Adair* and *Coppage* cases in no wise bar acceptance of a view which is consistent with the experience both of life and of law.”); *Limiting Injunctions*, supra note 64, at 164 (quoting ACLU counsel Morris Ernst’s testimony against the Shipstead bill and in support of the substitute bill: “Times change. It seems to me that the classification of singling out industrial disputes, so-called, might now be deemed to be a reasonable classification in connection with the question of using the injunctive process.”).

117. Edwin E. Witte, “Yellow Dog” Contracts, 6 *Wis. L. Rev.* 21, 30 (1930).

118. Felix Frankfurter, Unsigned Editorial (from the *New Republic*, Jan. 25, 1922), reprinted in Felix Frankfurter on the Supreme Court, supra note 107, at 49, 62.

3. *Class Legislation.* — The class legislation obstacle could be attacked in two ways, with the choice having huge significance for the place of labor in the constitutional order. While unionists argued that the Constitution precluded equivalent treatment of capital and labor,¹¹⁹ progressive reformers contended that legislators should have discretion to formulate legislative classifications—favorable or unfavorable—concerning both capital and labor. Following Oliver Wendell Holmes, they insisted that the legal status of labor organization and collective protest was a matter of economic policy that should be resolved by elected legislators, not appointed judges. “[T]hat which is reasonably defensible on economic or social grounds, whether or not it accords with our individual notion of economics,” declared Felix Frankfurter, “cannot be offensive on constitutional grounds.”¹²⁰ Under this approach, the constitutional status of labor rights was equivalent to that of business rights: Both could be altered through the ordinary political process subject only to deferential review by the courts.¹²¹

C. *The Laughing Stock of Washington: Andrew Furuseth and the Shipstead Bill*

The stage for conflict was set in 1921, when the Supreme Court effectively nullified the labor provisions of the Clayton Act, making it clear to unionists that new legislation would be needed to protect workers from federal court injunctions.¹²² At the request of the AFL, several progressive lawyers, including Francis Sayre and Edwin Witte, submitted proposals imposing various limitations on the issuance of injunctions in labor disputes.¹²³ But Andrew Furuseth vehemently renounced these offerings, arguing that they failed to confront the underlying issue of principle:

[T]here is no half loaf on fundamental principles. If you go on in certain directions and can get a little today and a little tomorrow, that is fine, but there are some things in which that won't apply, and that won't apply to the question of personal liberty. Whether a man or woman shall belong to himself or herself or not is fundamental, as is the question whether or not that man or woman shall have a right to combine with others for the purpose of mutual aid, for the purpose of bearing each

119. See *supra* text accompanying notes 89–91.

120. Felix Frankfurter, *The Zeitgeist and the Judiciary*, Address at the Harvard Law Review Twenty-Fifth Anniversary Dinner (1912), *in* Felix Frankfurter on the Supreme Court, *supra* note 96, at 1, 5.

121. For quotations from progressive reformers to this effect, see Pope, *Labor's Constitution*, *supra* note 29, at 961, 987.

122. *Duplex Printing Press Co. v. Deering*, 254 U.S. 443, 468–71 (1921) (holding that sections 6 and 20 of the Clayton Act did no more than codify the existing common law); Witte, *supra* note 105, at 273 (noting that *Duplex* “disillusioned organized labor as to the value of the Clayton Act” and prompted renewed thought on promoting anti-injunction legislation).

123. O'Brien, *supra* note 72, at 151.

other's burdens, for the purpose of healing each other's wounds, for the purpose of doing collectively what you can't do individually.¹²⁴

In Furuseth, the progressive lawyers found a determined and experienced constitutional adversary. Born in Norway in 1854, Furuseth went to sea at the age of nineteen.¹²⁵ At that time, a sailor could be convicted of desertion if he left his employer while under contract, no matter how intolerable conditions had become.¹²⁶ In sixteen years at sea, Furuseth likely witnessed the injustices of this system, including physical beatings meted out at the whim of a master.¹²⁷ He turned to trade union organizing, and by the late 1880s, he was based in San Francisco, devoting most of his time to union affairs. Convinced that sailors enjoyed a constitutional right to quit under the Thirteenth Amendment, the union organized a lawsuit to challenge the arrest of a deserter.¹²⁸ But in *Robertson v. Baldwin*, the Supreme Court held that the Thirteenth Amendment was not intended to alter the ancient maritime law.¹²⁹ Undaunted, Furuseth relentlessly campaigned for legislation permitting sailors to quit, taking his constitutional argument to legislators and audiences across the country. When Congress rewarded his efforts by passing the LaFollette Seamen's Act of 1915, Senator LaFollette proclaimed that the Thirteenth Amendment had become "a covenant of refuge for the seamen of the world."¹³⁰ But to Furuseth, the Amendment's promise of freedom went further. Mere individual liberty would not suffice; only the rights to organize and strike could ensure labor freedom.¹³¹

In today's terminology, Furuseth's constitutionalism was dualist and populist. His response to the progressive lawyers prefigured Bruce Ackerman's bifurcation of political change into two "tracks": a lower track of

124. 1927 AFL Report of Proceedings, *supra* note 69, at 292.

125. Hyman Weintraub, Andrew Furuseth: Emancipator of the Seamen 2 (1959).

126. *Id.* at 28–30; Walter Macarthur, The Seaman's Contract, 1790–1918, at 110–17 (1919).

127. Weintraub, *supra* note 125, at 3–4.

128. *Id.* at 35.

129. 165 U.S. 275, 282–83, 287–88 (1897).

130. La Follette Seamen's Act of 1915, 38 Stat. 1164 (codified as amended at 22 U.S.C. § 258 (1994), 33 U.S.C. §§ 365–366 (1994), 46 U.S.C. §§ 222, 481, 569, 596, 597, 599, 601, 656, 660–661, 672–673, 683, 688, 701, 703, 712, 713 (1994)); Weintraub, *supra* note 125, at 132 (quoting LaFollette); see also Letter from Andrew Furuseth to George W. Norris, *supra* note 79, box 285, at 5 (asserting that with the adoption of the Seamen's Act of 1915, the "Thirteenth Amendment was recognized as having so modified the Fifth Amendment that there could be no property right in man in any sense").

131. See Letter from Andrew Furuseth to George W. Norris, *supra* note 79, at 5–6 (stating that "[h]aving been made free by [the Seamen's Act], the seamen were promptly tossed into the lap of equity and tied hand and foot by injunction," and protesting that "[i]f we . . . undertake to combine for the presumed purpose of withholding of labor or patronage, we are met by the injunction, the violation of which means imprisonment"); see also *supra* note 79, *infra* note 135 (citing writings by Furuseth).

ordinary politics and a higher one of constitutional politics.¹³² For most issues, the give and take of ordinary politics—of getting “a little today and a little tomorrow”—would be fine.¹³³ But not for questions of personal liberty, including collective labor rights. On those “fundamental” issues, there could be no compromise of principle, no “half loaf.”¹³⁴ Furuseth brought his dualist vision to life by recounting human history as a series of heroic struggles for freedom, first in the field of religion, then of politics, and finally of industry.¹³⁵ At the nation’s founding, the United States had embraced religious and political freedom, and the Declaration of Independence and Bill of Rights had promised freedom to all.¹³⁶ But the design had been flawed. “By denying the humanity of the colored man, it became possible for a time to deny him the equal freedom promised or guaranteed all men; but . . . the United States paid for that betrayal with a Civil War, after which another amendment was adopted, the Thirteenth.”¹³⁷ Now, the historic mission of the labor movement and of Congress was to ensure that the Thirteenth Amendment’s promise of labor freedom was realized.¹³⁸ At convention after convention of the AFL, Furuseth exhorted the delegates to keep their eyes on this prize. In his surviving photographs, Furuseth seems almost to caricature the constitutional dualist as he glares fiercely at the camera with an expression at once deeply aggrieved and resolute.

Furuseth saw popular movements, not legal elites, driving constitutional change. Religious dissidents had won religious freedom, political dissidents had won political freedom, and now it was time for industrial

132. See 1 Ackerman, *Foundations*, *supra* note 30, at 6–7 (proposing the concept of a “dualist democracy”).

133. 1927 Report of Proceedings, *supra* note 69, at 292.

134. *Id.*

135. Furuseth wrote:

The working man . . . may have a vague idea of the development of freedom in the last sixteen hundred years. [He] has a hazy idea that it was first in the religious field and that ultimately freedom won; it was then on the political field, and again the freedom won. On the religious field it was carried on by religious organizations, based upon religious discontent. On the political field it was carried on by political organizations, based upon political discontent. If the evolution is to proceed and human brotherhood attained, the struggle on the industrial field must be carried on by organizations based upon industrial discontent. . . . Men gave their labor, their sweat and their blood to attain the freedom that we have reached. As it was obtained so it must be protected and developed.

Andrew Furuseth, *Company Unions*, *Am. Federationist*, May 1928, at 541, 543–44 [hereinafter *Furuseth, Company Unions*]; Andrew Furuseth, *Labor and Freedom*, Remarks at the Illinois Constitutional Convention 4–5 (Apr. 7, 1920) [hereinafter *Furuseth, Labor and Freedom*] (telling the same story).

136. Andrew Furuseth, Memorandum on Government by Law *vs.* Government by Equity (n.d.), in *Norris Papers*, *supra* note 53, box 285, at 3.

137. *Id.* at 3–4.

138. See Furuseth, *Labor and Freedom*, *supra* note 135, at 12–14.



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dissidents to win industrial freedom.¹³⁹ In this struggle to realize the promise of the Declaration of Independence and the Constitution, legal professionals—whether of the ordinary or the robed variety—were entitled to no deference. Far from disinterested technicians, lawyers were members of a legal “cult” with an interest in preserving its power. “Very

139. See, e.g., Furuseth, *Company Unions*, supra note 135, at 541, 543–44 (making reference to political and religious freedom movements); Furuseth, *Labor and Freedom*, supra note 135, at 4–5 (making same point).

few lawyers are big enough to criticize their own profession; very few men are strong enough to resist the development of a cult, especially if they are, or hope to be members of it.”¹⁴⁰ To rely on a professor of equity for an opinion about injunctions would be like relying on a Catholic priest for an opinion about Catholicism.¹⁴¹ Accordingly, Furuseh and his allies counted more on Congress than on the courts to move constitutional interpretation forward. They argued that Section 2 of the Thirteenth Amendment conferred upon Congress “a broad discretion in determining the exact scope of necessary legislation,” including “a proper discretion as to the ultimate meaning and scope of the term ‘involuntary servitude.’”¹⁴² If the courts balked at Congress’s interpretation, then it would be time for drastic measures, “to go to the country . . . just as . . . at the time of the Civil War.”¹⁴³

Furuseh warned that the progressive proposals, most of which attempted to limit federal court jurisdiction to issue injunctions in labor disputes, would be held unconstitutional as “class legislation” under *Truax v. Corrigan*.¹⁴⁴ Both to correct this problem and to address what he saw as the fundamental issue, Furuseh drafted his own bill and had it introduced in Congress by Senator Henrik Shipstead, the Farmer-Labor Senator from Minnesota.¹⁴⁵ The Shipstead bill consisted of one sentence providing that federal courts had jurisdiction to issue injunctions “to pro-

140. Letter from Andrew Furuseh, President, International Seamen’s Union, to Senator George W. Norris, (Jan. 7, 1932), in Norris Papers, *supra* note 53, box 198, at 2.

141. See AFL, Report of Proceedings of the Fiftieth Annual Convention of the American Federation of Labor 360 (1930) [hereinafter 1930 AFL Report of Proceedings] (“If you . . . have some question to ask . . . about the Holy Trinity or about the Immaculate Conception, would you go to a Catholic priest for it? The Catholic priest will tell you what he believes.”) (quoting Andrew Furuseh).

142. Martin, *supra* note 82, at 15–16; see also AFL, Report of Proceedings of the Fifty-First Annual Convention of the American Federation of Labor 463 (1931) [hereinafter 1931 AFL Report of Proceedings] (quoting Andrew Furuseh as stating that “Section 2 of the Thirteenth Amendment gives to Congress the right to construe the amendment”).

143. Limiting Injunctions, *supra* note 64, at 712 (reporting AFL Attorney Winter S. Martin’s response to Senator Norris’s request for assurance that the courts would not strike down Furuseh’s proposed anti-injunction legislation); cf. 1931 AFL Report of Proceedings, *supra* note 142, at 458. At the AFL’s fifty-first convention, Furuseh stated:

When Charles I of England wanted to be the state the people said, “No, you won’t do anything of the kind,” and there followed some blood letting in England, and amongst the blood that was let was that of Charles I.

I am not standing here advocating any violence, but if the men who have all the rights that free men have under the Constitution of the United States they have the right to refuse to labor until the employer has talked it over and adjusted their grievances.

Id.

144. 257 U.S. 312, 351–52 (1921). For a discussion of *Truax* see *supra* notes 85–87 and accompanying text. Furuseh argued that progressive lawyers were “putting us in the position, in passing that bill, of a privileged class asking for special privileges.” 1929 AFL Report of Proceedings, *supra* note 69, at 323; see also *id.* at 324 (quoting delegate Ramsey making the same point).

145. Weintraub, *supra* note 125, at 187.

tect property when there is no remedy at law,” but that “nothing shall be held to be property unless it is tangible and transferable.”¹⁴⁶ Labor constitutionalists held that labor injunctions—whether directed at speech, assemblies, or the quitting of work—necessarily rested on the notion that the employer owned some kind of property interest in the workers’ conduct.¹⁴⁷ By repudiating this notion, argued Furuseth, the Shipstead bill implemented the Thirteenth Amendment’s principle that labor power could not be property.¹⁴⁸ At its 1927 convention, the AFL endorsed Furuseth’s bill.¹⁴⁹

Immediately, the bill collided head-on with one of the main items on the progressive lawyers’ agenda for legal change: the expansion of intangible property rights. As Morton Horwitz has observed, a central problem for legal thinkers in the late nineteenth and early twentieth centuries “was how to articulate a conception of property that could accommodate the tremendous expansion in the variety of forms of ownership spawned by a dynamic industrial society.”¹⁵⁰ Progressive lawyers were deeply involved in this project, rejecting physicalist conceptions of property and deconstructing the very notion of property rights.¹⁵¹ They argued that the Shipstead bill would “throw out the baby with the bath,” eliminating injunctive protection for all kinds of beneficial, intangible property rights including patents and copyrights—interests specifically mandated by the Constitution.¹⁵² In response, the bill’s proponents amended their proposal to permit injunctive protection of interests that were tangible *or* transferable, a category that would include patents and copyrights.¹⁵³

The clash between lawyers and unionists escalated sharply in early 1928 when a subcommittee of the Senate Judiciary Committee, chaired by Senator George W. Norris, held hearings on the Shipstead bill. The day before the hearings were to commence, the AFL convened a special conference to mobilize support for the bill.¹⁵⁴ None of the progressive lawyers were scheduled to speak, but Donald Richberg appeared unan-

146. Frankfurter & Greene, *Injunction*, supra note 95, at 279 (reprinting text of S. 1482).

147. *Limiting Injunctions*, supra note 64, at 33–35 (essay of Andrew Furuseth entitled “Equity Power and its Abuse” introduced into record); *id.* at 137–38 (testimony of John P. Frey); *id.* at 145 (testimony of William Green).

148. *Id.* at 19, 148. This argument is set forth in supra text accompanying notes 90–91.

149. 1927 AFL Report of Proceedings, supra note 69, at 308–09.

150. Horwitz, supra note 101, at 145.

151. See *id.* at 145–46.

152. Letter from Felix Frankfurter, Professor, Harvard Law School, to William Green, President, AFL (July 9, 1928), in *Frankfurter Papers*, supra note 64, reel 36, frame 485; Frankfurter & Greene, *Injunction*, supra note 95, at 207–08.

153. *Limiting Injunctions*, supra note 64, at 697.

154. Proceedings of Conference of Representatives of National and International Organizations Called by Executive Council of the American Federation of Labor, Feb. 7, 1928, in Victor A. Olander Papers, Chicago Historical Society, Chicago, Ill., box 24 [hereinafter Olander Papers].

nounced. "It may seem that my remarks are ungracious because I have come here at the eleventh hour to take up the matter," he acknowledged, but he proceeded nonetheless to recite the standard progressive criticisms of the bill in an attempt to derail the conference from its planned objective.¹⁵⁵ Matthew Woll retorted that the Federation had "solicited many, many lawyers, including Brother Richberg, and I dare say his proposal is by far even weaker than the one submitted this time."¹⁵⁶ But the lawyers had only begun to fight. Although none of the elite lawyers were present at the hearings the next day, their colleagues in the labor-side bar did not hesitate to attack the bill. Henry Warrum and William Glasgow, both counsel to the United Mine Workers, and Joseph Padway, General Counsel of the Wisconsin Federation of Labor, all rejected the Shipstead bill in favor of other remedies.¹⁵⁷ Of the many lawyers who testified, only one—Winter S. Martin, representing the AFL—defended the bill.¹⁵⁸

After this impressive display of professional unity, the subcommittee headed by Senator Norris—himself a lawyer—asked Frankfurter, Sayre, Witte, Oliphant, and Richberg to draft a substitute for the Shipstead bill.¹⁵⁹ This "committee of experts" promptly caucused in Washington for three days and emerged with a new bill. Instead of redefining property, the bill imposed detailed limitations on the jurisdiction of federal courts to issue injunctions in labor disputes, and declared yellow dog contracts to be void against public policy and unenforceable in federal courts.¹⁶⁰ It finessed the problem of congressional power by relying on Congress's authority to limit the jurisdiction of the federal courts.¹⁶¹ As an aid to interpretation, the bill included a statement of "the public policy of the United States" which appeared to endorse the labor movement's theory of freedom:

155. *Id.* at 19–20.

156. *Id.* at 20.

157. *Limiting Injunctions*, *supra* note 64, at 587 (testimony of William Glasgow); *id.* at 603 (testimony of Henry Warrum, as described by T.C. Townsend). Padway argued that the Shipstead bill would fail to prevent labor injunctions and endorsed the progressive approach of eliminating federal court jurisdiction to issue injunctions in labor disputes. *Id.* at 575–76 (testimony of Joseph Padway). Former Governor Alex J. Groesbeck of Indiana, who represented the Street Railway Employees, also bluntly criticized the bill, stating: "I do not think it ought to become law, and that if it did become law it would not change the situation in any respect from what it is at the present time." *Id.* at 225 (testimony of Alex J. Groesbeck).

158. *Id.* at 697–732 (testimony of Winter S. Martin).

159. Witte, *supra* note 105, at 274.

160. Frankfurter & Greene, *Injunction*, *supra* note 95, at 280–88 (reprinting text of substitute bill).

161. *Id.* at 210–11 (explaining that "the underlying constitutional theory of the proposed act . . . is an application of the doctrine that the federal courts are creations of Congress and that 'the authority of Congress, in creating courts and conferring on them all or much or little of the judicial power of the United States, is unlimited by the Constitution'" (footnote omitted)).

Whereas under prevailing economic conditions, developed with the aid of governmental authority for owners of property to organize in the corporate and other forms of ownership association, the individual unorganized worker is commonly helpless to exercise actual liberty of contract and to protect his freedom of labor, and thereby to obtain acceptable terms and conditions of employment, wherefore it is necessary that he have full freedom of association, self-organization, and designation of representatives of his own choosing, to negotiate the terms and conditions of his employment, and that he shall be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection. . . .¹⁶²

William Green sent the draft out to lawyers and reported that their reaction “generally favored the proposed bill.”¹⁶³ Unimpressed, the delegates to the 1928 AFL convention unanimously reaffirmed the Federation’s support for the Shipstead bill.¹⁶⁴ But the Norris subcommittee was not prepared to endorse the bill. Even Andrew Furuseth had to admit that it “could hardly be expected that [the senators] would favor a remedy that was rejected by every attorney who spoke for labor, save one.”¹⁶⁵ With the subcommittee embracing one bill and the AFL another, anti-injunction legislation would have to await a new Congress.¹⁶⁶

To Furuseth, this setback simply called for more determination on the part of labor. Entrenched in the mindset of a long term struggle over fundamentals, he insisted that mere numbers of lawyerly opinions could “not change a principle, if it be sound.”¹⁶⁷ But Furuseth’s colleagues were more sensitive to short-run concerns. Matthew Woll pointed out that the Norris subcommittee was “a most friendly one . . . perhaps the friendliest we have ever had,” and worried that continued rejection of its bill might poison relations with the senators.¹⁶⁸ Thomas Kennedy of the mine workers recalled that the labor movement had been the “laughing-stock of Washington” because of its disunity over the Shipstead bill, and

162. *Id.* at 280–81 (reprinting text of substitute bill).

163. AFL, Report of the Executive Council, Report of Proceedings of the Forty-Eighth Annual Convention of the American Federation of Labor 113 (1928).

164. *Id.* at 252. “While we do not doubt the friendliness of the sources from which the substitute bill emanated,” explained Victor Olander, “it is our opinion that . . . the time is here when the Congress of the United States can be prevailed upon to provide a really adequate remedy for the injunction evil.” *Id.* at 251.

165. Letter from Andrew Furuseth to Senators George W. Norris, Thomas J. Walsh, and John J. Blaine (June 7, 1928), reprinted in *Limiting Injunctions*, *supra* note 64, at 878.

166. Witte, *supra* note 105, at 275.

167. *Limiting Injunctions*, *supra* note 64, at 878.

168. Letter from Matthew Woll, Vice President, AFL, to Victor Olander, Secretary-Treasurer, The Illinois State Federation of Labor (Apr. 15, 1929), in *Olander Papers*, *supra* note 154, box 25. “Is not the Sub-committee liable to feel that it has exhausted all its ability,” Woll queried, “and . . . will it not be likely to disavow our future plans and act in a more or less passive manner?” *Id.*

urged unity behind the Norris bill.¹⁶⁹ Moreover, the progressive lawyers had pointed out a serious flaw in the Shipstead bill. Although the bill banned injunctions to protect the employer's intangible property interest in labor, it would not stop courts from enjoining activities that inflicted damage on tangible property interests, such as perishable goods stranded by striking warehouse or transportation workers.¹⁷⁰ After a lengthy debate, the delegates to the 1929 AFL convention endorsed the Norris Bill.¹⁷¹

But the AFL's endorsement did not bring quick success. As predicted by Furuseth, employer lawyers—who had not made the charge of “class legislation” against the Shipstead bill—made it the centerpiece of their attack on the substitute bill.¹⁷² The American Bar Association's Committee on Jurisprudence and Law Reform joined in, condemning the bill as conveying “special privileges” and constituting “class legislation” in violation of the Constitution.¹⁷³ In June of 1930, the Senate Judiciary Committee voted ten to seven against the bill, concluding that it deprived employers of their rights under the Due Process Clause of the Fifth Amendment and invaded the states' prerogative to set industrial policy within their boundaries.¹⁷⁴

As the substitute bill faltered, Furuseth found himself presented with an opportunity to seize the initiative. After a final tirade against lawyers for torpedoing the Shipstead bill on the strength of “a few days in law school,”¹⁷⁵ he settled down to develop a new approach.

D. *Too Silly for Any Practical Lawyer's Use: The Thirteenth Amendment and the Norris-LaGuardia Act*

Furuseth turned to Winter S. Martin, the one lawyer who had defended the Shipstead bill before the Norris subcommittee. Martin drafted “[a]n Act for the Enforcement of the Thirteenth Amendment in Relation to Injunctions in Labor Disputes and for Other Purposes.”¹⁷⁶ This bill accepted the progressives' approach of expressly restricting the

169. 1929 AFL Report of Proceedings, *supra* note 69, at 350–51.

170. See *id.* at 332, 344, 350.

171. Only Furuseth was recorded in opposition. *Id.* at 353.

172. See *Limiting Injunctions*, *supra* note 64, at 737–38 (testimony of Walter Gordon Merritt, representing the League for Industrial Rights); *id.* at 823–24 (testimony of Leon B. Lanfrom, representing the Wisconsin Manufacturers' Association and the Milwaukee Employers' Council).

173. *Id.* at 813–15.

174. O'Brien, *supra* note 72, at 162; Frankfurter & Greene, *Congressional Power*, *supra* note 103, at 390, 397–400 (quoting committee report).

175. 1930 AFL Report of Proceedings, *supra* note 141, at 360.

176. *The Measure Proposed in Lieu of the Amended Substitute Bill: An Act for the Enforcement of the Thirteenth Amendment in Relation to Injunctions in Labor Disputes and for Other Purposes*, in *Injunctions in Labor Disputes*, S. Doc. No. 71-327, pt. 3, at 11 (3d sess. 1931).

jurisdiction of federal courts to issue labor injunctions.¹⁷⁷ But the Martin bill departed from the Norris bill in its constitutional approach. Instead of singling out “labor disputes” for special treatment, the bill asserted the existence of affirmative, collective labor rights under the Thirteenth Amendment and prohibited the courts from interfering with those rights.¹⁷⁸ In March 1931, Senator Shipstead presented the Martin bill to Congress in the form of a senate document.¹⁷⁹

Attracted by the new bill, yet unwilling to risk a breach with Senator Norris, the AFL now endorsed a version of the Norris bill that incorporated the Martin bill’s express reliance on the Thirteenth Amendment.¹⁸⁰ The first paragraph of its statement of purpose, drawn verbatim from the Martin bill, provided that the interpretation of the proposed act would be guided by the following public policy:

[E]very human being has under the Thirteenth Amendment to the Constitution of the United States an inalienable right to the disposal of his labor free from interference, restraint or coercion by or in behalf of employers of labor, including the right to associate with other human beings for the protection and advancement of their common interests as workers, and in such association to negotiate through representatives of their own

177. *Id.* at 11–12.

178. *Id.* The remainder of the bill withdrew jurisdiction from the federal courts to interfere with the exercise of those rights, outlawed yellow dog contracts, and prohibited boycott injunctions. *Id.* The principle that labor could not be “property” appeared in the bill’s statement of policy, but only in the role of constitutional justification and without any attempt to provide a comprehensive definition of property. *Id.* at 11 (asserting that “employers have in many cases been regarded by the courts as possessing a property right in the uninterrupted continuance of employment” which amounted to an “alleged property right in the labor of human beings”).

179. Witte, *supra* note 105, at 276.

180. Text of the Anti-Injunction Bill Approved by the Executive Council of the American Federation of Labor 1 (1931) [hereinafter AFL Bill]. Matthew Woll, John P. Frey, and Victor Olander explained that this addition would “place the provisions upon more basic considerations than the language” drafted by Richberg. Letter from Matthew Woll, John P. Frey & Victor Olander to William Green, President, AFL 2 (Aug. 12, 1931), reprinted in Minutes of the Meeting of the Executive Council (AFL), Aug. 6–19, 1931, at 54, 55. At the 1931 AFL convention, Furuseth indicated his willingness to support the AFL bill, but only if certain provisions of the underlying Norris bill were deleted, most importantly section 7, which authorized courts to issue injunctions under limited circumstances. 1931 AFL Report of Proceedings, *supra* note 142, at 456–57. Furuseth feared that the courts would construe this provision so broadly that it would swallow the outright prohibitions on injunctions contained in other sections. *Id.* Always the constitutional warrior, Furuseth was worried that, so construed, it could backfire and lead to a narrower interpretation of the Thirteenth Amendment. See *id.* at 457 (arguing that the Executive Council bill would “get the essence of the Thirteenth Amendment to the Constitution and make it . . . subservient to the equity power”). After a spirited discussion, during which both sides claimed that their approach best implemented the Thirteenth Amendment, the delegates endorsed the Executive Council bill unchanged. *Id.* at 462–65. Furuseth refused to accept defeat and continued to criticize the bill. See Andrew Furuseth, Injunction Legislation Is It? An Anti-Injunction Bill or a Pro-Injunction Code 13 (n.d., c. Nov. 1931).

choosing concerning the terms of employment and conditions of labor, and to take concerted action for their own protection in labor disputes. . . .¹⁸¹

The progressive lawyers ignored this paragraph in public, instead criticizing the Martin and AFL bills on other grounds.¹⁸² Meanwhile, however, Felix Frankfurter maneuvered behind the scenes. He confided to Roger Baldwin that he felt “particularly strongly” about the AFL bill’s embrace of the Thirteenth Amendment theory.¹⁸³ “[T]he talk about the Thirteenth Amendment,” he scoffed, “is too silly for any practical lawyer’s use.”¹⁸⁴ Worse, it would “nullify the aim that lay behind the formation of the ‘public policy,’” presumably to empower Congress to balance the competing interests of capital and labor.¹⁸⁵ Baldwin conveyed Frankfurter’s opinion to Senator Norris with the admonition that it must, “of course,” remain confidential since Frankfurter “would not want to put himself in a position publicly of attacking the A.F. of L. bill.”¹⁸⁶ Frankfurter also moved to head off the possibility that Senator Shipstead might introduce the Martin bill. “The notion that the Thirteenth Amendment can serve as an obstruction to the evils against which we are contending,” he warned the Senator, “seems to me of a simplicity that borders on the fantastic.”¹⁸⁷ The professor did not pause to explain why unionists’ ideas were so “silly” or “fantastic.”

Frankfurter’s surreptitious maneuvers reflected the strengths and weaknesses of the progressive lawyers’ position. On the terrain of open, democratic debate, they found themselves at a severe disadvantage.

181. AFL Bill, *supra* note 180, at 1.

182. At the request of the ACLU’s Committee on Injunctions, Edwin Witte analyzed the Martin bill and the AFL bill and critiqued them on other grounds. Ignoring the fact that the Martin bill rectified most of the lawyers’ public criticisms of the Shipstead bill, Witte characterized the bill as “the latest dress” for the intangible property idea embodied in the Shipstead bill. Letter from Edwin E. Witte to Roger N. Baldwin, *supra* note 108; see also Witte, *supra* note 105, at 276 (observing darkly that, “while phrased differently,” the Martin bill was “strongly suggestive of the original Shipstead bill”). As for the AFL bill, it simply went too far (for example, by attempting to eliminate damages as well as injunctive remedies). Letter from Edwin E. Witte, Chief, Legislative Reference Dep’t, to Dr. Alexander Fleisher, Secretary, ACLU Committee on Labor Injunctions (Oct. 14, 1931), *in* Norris Papers, *supra* note 53, box 285.

183. Letter from Felix Frankfurter, Professor, Harvard Law School, to Roger N. Baldwin, Director, ACLU (Dec. 9, 1931), *in* Norris Papers, *supra* note 53, box 285.

184. *Id.*

185. *Id.* On the progressive lawyers’ goal of freeing up Congress see *supra* text accompanying notes 101–105.

186. Letter from Roger N. Baldwin, Director, ACLU, to Senator George W. Norris (Dec. 10, 1931), *in* Norris Papers, *supra* note 53, box 285.

187. Letter from Felix Frankfurter, Professor, Harvard Law School, to Senator Shipstead (Mar. 23, 1931), *in* Norris Papers, *supra* note 53, box 285. Frankfurter also charged that the Martin bill adopted the untenable notion that “the criteria of law and of policy regarding the actions of individuals are coextensive with the criteria applicable to the actions by men in concert.” *Id.* This letter did not plead confidentiality, perhaps because—at the time it was written—the AFL had yet to endorse the Martin bill’s language on the Thirteenth Amendment.

Their own bill's statement of policy appeared to endorse the substance of labor's Thirteenth Amendment theory. If the "individual unorganized worker" were "helpless to exercise actual liberty of contract" or to "protect his freedom of labor," as their bill declared,¹⁸⁸ then it would seem that he would be in a condition of involuntary servitude under Section 1 of the Thirteenth Amendment, and Congress would have the authority to protect rights of self-organization under Section 2. Labor's freedom constitution had long enjoyed substantial support in Congress,¹⁸⁹ and Senator Norris himself had endorsed labor's view that antistrike injunctions amounted to slavery and involuntary servitude in violation of the Thirteenth Amendment.¹⁹⁰

The lawyers were no better off on the terrain of legal doctrine. They asserted that courts would reject labor's theory, but never explained why.¹⁹¹ Had they wished to make a case based on precedent, they might have followed the lead of Walter Gordon Merritt, a leading employer-side lawyer and strategist. Merritt acknowledged that in the *Wolff Packing* case,¹⁹² the Supreme Court had recognized "a constitutional right to quit work in a body for certain purposes" (a reading of *Wolff* that even Frankfurter endorsed, albeit not under his own name)¹⁹³ but pointed out that the Court had relied on the Fourteenth, not the Thirteenth Amendment.¹⁹⁴ Unable to find any on-point authority against the theory, Merritt relied primarily on the fact that the judiciary's *practice* of affirming labor injunctions conflicted with the existence of Thirteenth Amendment rights to organize, strike, and picket.¹⁹⁵ From Merritt's perspective as a defender of the status quo, there was nothing wrong with relying exclu-

188. Frankfurter & Greene, *Injunction*, supra note 95, at 280–81 (reprinting text of substitute bill).

189. See supra text accompanying notes 92–93.

190. 75 Cong. Rec. 4502 (1932) (statement of Senator Norris) (charging that labor injunctions brought about "involuntary servitude on the part of those who must toil in order that they and their families may live"). During the congressional hearings, Norris had defended labor's view that injunctions prohibiting workers from combining to quit work violated the Thirteenth Amendment. See *Limiting Injunctions*, supra note 64, at 672 (commenting, with regard to the right to persuade workers to strike that "[w]e have got to leave that liberty to the citizen or we will have slavery, it seems to me, and we can not inquire into his motive, it seems to me, if he does it peacefully").

191. See supra text accompanying notes 108–114.

192. *Charles Wolff Packing Co. v. Court of Indus. Relations*, 262 U.S. 522, 540 (1923) (discussed supra note 68).

193. Frankfurter, *Taft and the Supreme Court*, supra note 107, at 141 (reprinting unsigned editorial in the *New Republic*, June 27, 1923, in which Frankfurter observed that "[t]he right to strike, generally, is in the *Wolff Packing Company* case recognized as a constitutional right").

194. *Limiting Injunctions*, supra note 64, at 308–09.

195. *Id.* at 311–12. Thus, to prohibit workers from combining to restrain commerce was sound law and "nothing approaching involuntary servitude." *Id.* at 308. As for labor's argument that a single worker was helpless to protect himself against organized capital, Merritt retorted: "Helpless for what? Helpless to violate the law of Congress; that is all." *Id.*

sively on court practice. From the progressives' point of view as advocates of change, however, Merritt's method of uncritical reliance on court rulings would be just as fatal to their own ambitions as to labor's. Since the progressives sought legal change, they would have to explain why courts would be more likely to accept their transformative theories than those offered by labor. And they would have to make this explanation against the background of their own public endorsement of labor's theory that the "individual unorganized worker" was "helpless to exercise actual liberty of contract" or to "protect his freedom of labor."¹⁹⁶

Lacking persuasive arguments, the elite lawyers fell back on the unadorned power of their professional position. Progressive legal thinkers had already developed the habit of summarily dismissing labor's Thirteenth Amendment theories with little or no explanation.¹⁹⁷ Instead of offering substantive rebuttals, which would have conceded labor's theory a place on the constitutional agenda, elite lawyers deployed the rhetoric of disdain.¹⁹⁸ By using adjectives like "silly" and "fantastic," they implied that labor's ideas were too ridiculous to merit discussion and that anyone who thought otherwise must be ignorant. Moreover, their scorn conveyed an implicit threat. Unlike the AFL, which represented an important democratic constituency, the lawyers could not openly threaten to sabotage the reform effort if they did not get their way. But the intensity of the lawyers' derision effectively conveyed the same warning, and there was little doubt that a united front of progressive lawyers and old guard legalists could effectively veto reform legislation, as they had done with the Shipstead bill.¹⁹⁹

It might be objected that this portrayal of the progressive lawyers is simply too negative and one-sided. In reaction to an earlier draft of this Article, William Forbath argued that the progressives did address the merits of labor's Thirteenth Amendment claim, but that labor never responded in kind. The progressive response, he claimed, was that an intelligent labor policy could be developed only by assessing shifting facts and complex consequences, including the harm caused by union coercion, and not by trumpeting timeless abstract principles or claiming an "abso-

196. Frankfurter & Greene, *Injunction*, *supra* note 95, at 280–81 (reprinting text of substitute bill).

197. See *supra* text accompanying notes 108–114; see also Herbert Feis, *Kansas Miners and the Kansas Court*, 47 *Surv.* 822, 824–25 (1922) (asserting that the "bogey of 'involuntary servitude' is too well known to require comment").

198. As we have seen, Frankfurter described labor's Thirteenth Amendment theory as "too silly for any practical lawyer's use" and as "of a simplicity that borders on the fantastic." See *supra* notes 183, 187. Edwin Witte derided Furuseth's proposals as "meaningless." Letter from Edwin E. Witte to Roger N. Baldwin, *supra* note 108. He had so little regard for the AFL's legal thinking that he speculated that the Federation's failure to endorse the Norris bill unchanged "was really due to oversight." Letter from Edwin E. Witte, Chief, Legislative Reference Dep't, to Dr. Alexander Fleisher, Secretary, ACLU (Oct. 14, 1931), *in* Norris Papers, *supra* note 53, box 285.

199. See *supra* text accompanying notes 154–165.

lute” right to strike. Labor’s constitutionalists, he contended, lost in part because they could not or would not beat the progressives on their own ground of facts, consequences, and policy.²⁰⁰ This critique brings to mind Thomas Kuhn’s observation that the proponents of competing paradigms cannot speak to one another because their conceptual vocabularies do not mesh.²⁰¹ Certainly, labor’s constitutionalists believed that they were talking about facts and consequences when they argued that without rights of self-organization and collective action, workers were helpless to influence their conditions of work or to protect themselves against starvation wages. But they also believed that these facts characterized the entire era of industrial capitalism, and therefore that they were durable enough to support constitutional rights of self-organization and collective action. It is no answer to say that the coercive element of union activity rendered these rights nonabsolute; there was nothing stopping the lawyers from accepting the constitutional rights to organize and strike while simultaneously denying that they were “absolute,” as many progressive thinkers did for the freedom of speech.²⁰² Nor is it any answer to say that the field of industrial relations was peculiarly unsuited for the exercise of judicial review; there was nothing stopping the lawyers from endorsing the constitutional rights to organize and strike while simultaneously embracing the position—advocated by Furueth and others—that those rights should be defined and enforced primarily by the legislative and executive branches.²⁰³ In short, the record leaves us with only one possible conclusion: The progressive lawyers set out to scuttle the constitutional rights to organize and strike without according labor’s constitutional leaders the respect of a response on the merits. If there were any reasons other than professional self-interest and elite sensibilities for this stance, none has survived in the historical record.²⁰⁴

200. These views are amplified in William Forbath’s essay, *The New Deal Constitution in Exile*, 51 *Duke L.J.* 165 (2001).

201. See 2 Thomas S. Kuhn, *International Encyclopedia of Unified Science: The Structure of Scientific Revolutions* 93–94 (2d ed. 1970).

202. In one of the classic early free speech opinions, for example, Justice Brandeis observed that “although the rights of free speech and assembly are fundamental, they are not in their nature absolute.” *Whitney v. California*, 274 U.S. 357, 373 (1927) (Brandeis, J., concurring).

203. See *supra* note 142 and accompanying text. As Forbath himself has made clear, it is possible to advocate for constitutional rights without intending that their scope and enforcement be controlled by courts. See William E. Forbath, *Constitutional Welfare Rights: A History, Critique and Reconstruction*, 69 *Fordham L. Rev.* 1821, 1827–28 (2001) [hereinafter Forbath, *Constitutional Welfare Rights*].

204. This assertion has provoked strong reactions from readers. Two prominent historians, for whose work I have nothing but respect, instructed me that I must acknowledge that the progressive lawyers opposed the Thirteenth Amendment theory because they were worried that it would go down to defeat in the courts. However, I found no evidence for this proposition. The lawyers touted the virtues of their own approach, but maintained total silence on the legal merits or demerits of labor’s approach not only in their scholarly writings, but also in their anonymously published editorials and private letters. They were willing to take on some risks but not others, and it strains credulity to

In response to Frankfurter's missive, Senator Norris wrote that he opposed any attempt to incorporate the AFL's proposed changes in the final bill, not because of their merits, but because of the danger that opponents of the bill would then "clamour for hearings and delays."²⁰⁵ Sensing victory, Frankfurter thanked Norris for taking this stand and commended him on his "disinterested citizenship."²⁰⁶ After a series of discussions with Norris, William Green agreed—over the vigorous dissent of Victor Olander—to go along with the senator's strategy of reintroducing the old bill rather than incorporating new amendments.²⁰⁷ Not long

believe—in the absence of evidence to the contrary—that their choice to accept risky arguments that would empower lawyers and other professionals, while rejecting risky arguments that would empower unions and workers, was mere coincidence.

Several readers suggested that the dispute between labor and the elite lawyers reflected genuine differences over policy and could not be reduced to a clash of interests. No doubt, as one put it, the lawyers recoiled from the idea of an unlimited right to strike and believed that enlightened middle class progressives like themselves should set some generous outer limits. My point is simply that this stance tended to empower professionals and other experts, including lawyers, at the expense of workers and unions, and that this result was no coincidence. Progressives like Herbert Croly—Editor of the *New Republic* when Frankfurter was writing his unsigned editorials—did not mince words in justifying this outcome, opining that "[t]he average union laborer . . . becomes in the interests of his organization a bad citizen, and at times an inhuman animal," and that unions posed as great a threat to the public interest as corporations. Croly, *supra* note 25, at 130–31. Not only did Frankfurter and his allies refrain from this kind of open criticism, but they also claimed to constitute a "general staff" for labor. See *supra* text accompanying notes 96–100. In my view, any lawyer who was sincerely interested in serving the cause of the labor movement would have given voice to the movement's legal ideas instead of surreptitiously undermining them. See Pope, *Labor's Constitution*, *supra* note 29, at 1016–17 (describing Frank Walsh's efforts to articulate labor's views during the constitutional strike against the Kansas Industrial Court).

205. Letter from Senator George W. Norris to Roger N. Baldwin, Director, ACLU (Dec. 12, 1931), in *Norris Papers*, *supra* note 53, box 285. Somewhat contradictorily, Norris wrote:

I agree with [Frankfurter] and have always felt that, while some of the changes that have been suggested would not, from my standpoint, be objectionable . . . yet I think I realize much more than the men do who propose these amendments the difficulty of the situation and the danger of trying to bring about some of the changes which they want.

Id.

206. Letter from Felix Frankfurter, Professor, Harvard Law School, to Senator George W. Norris (Dec. 16, 1931), in *Norris Papers*, *supra* note 53, box 285.

207. Minutes of the Meeting of the Executive Council (AFL, Washington, D.C.), Feb. 2–12, 1932, at 28. Victor Olander, Vice President of the International Seamen's Union and Secretary of the Illinois Federation of Labor, had served on the committee (along with Matthew Woll and John Frey) that drafted the AFL bill. Olander insisted that the AFL's changes were "essential to put the bill in proper shape," and suggested that they be proposed from the floor in order to reduce the potential for delay. Letter from Victor Olander to Matthew Woll (Dec. 11, 1931), in *Olander Papers*, *supra* note 154, box 47; Letter from Victor Olander to William Green (Dec. 11, 1931), in *Olander Papers*, *supra* note 154, box 47.

afterward, the bill passed both houses of Congress by huge margins and was enacted into law as the Norris-LaGuardia Anti-Injunction Act.²⁰⁸

The AFL's failure to obtain specific language grounding the Norris-LaGuardia Act on the Thirteenth Amendment marked the beginning of what was to become a widening gap between the constitutional ideas of workers and unions and the constitutional ideas used by courts and lawyers to uphold the constitutionality of their legislative victories. Within the movement culture of labor, the Norris-LaGuardia Act could plausibly be viewed as a triumph for labor's freedom constitution. By persistently defying what they considered to be unconstitutional injunctions, workers had undermined the legitimacy of the labor injunction and set the stage for legislation.²⁰⁹ Although their own bills had failed, the one drafted by the progressive lawyers had incorporated the substance of the movement's theory of collective labor freedom,²¹⁰ and Senator Norris had confirmed that the effect of labor injunctions was "slavery" and "involuntary servitude on the part of those who must toil in order that they and their families may live."²¹¹ Nonlabor commentators joined unionists in celebrating the emancipation of labor.²¹² If the courts upheld and implemented the Act, then the movement could celebrate both relief from the labor injunction and Congress's imprimatur on its theory of labor freedom.

Within the professional culture of law, however, the Norris-LaGuardia Act was a victory for the progressive tenet that the rights of capital and labor were commensurate values to be balanced by legislators. Far from constitutionalizing rights of collective labor action, the Act's statement of policy reduced those rights to matters of "policy" subject to the shifting outcomes of ordinary politics. When, six years and one constitutional regime shift later, the Supreme Court finally upheld the law, its opinion would say nothing about labor freedom while declaring the

208. Norris-LaGuardia Anti-Injunction Act of 1932, 47 Stat. 70 (codified at 29 U.S.C. §§ 101-115 (1994)). The margin in the House was 363-13, and in the Senate 75-5. O'Brien, *supra* note 72, at 168-69.

209. Forbath, *Law and Labor*, *supra* note 51, at 159-63.

210. See *supra* text accompanying note 188. "While the [Norris] bill may not have specifically mentioned the Thirteenth Amendment," argued Woll, "a careful reading of the minority committee's report indicates clearly that it predicated its bill and its report on the Thirteenth Amendment and that it is not a new conception." 1931 AFL Report of Proceedings, *supra* note 142, at 460.

211. See *supra* note 190.

212. See, e.g., Editorial, *Striking the Irons from Labor*, 46 *America* 543, 543 (1932) (predicting that the Supreme Court would uphold the Norris-LaGuardia Act because "[a]fter the bitter experience of industrial warfare lasting for more than half a century, the country is ready to admit that the yellow-dog contract and the arbitrary use of the injunction have no place under the Constitution," and quoting Pope Leo XIII's statement that no person could "give up his soul to servitude"); Editorial, *Capital versus Labor*, 15 *Commonweal* 589, 591 (1932) (approving the Norris-LaGuardia Act's recognition of "labor's innate right to form associations" as a "visible, responsible and orderly means for adjudication of differences of interest between labor and capital").

authority of Congress to set policy for the federal courts in sweeping terms.²¹³ In the meantime, the constitutional fate of the Norris-LaGuardia Act would soon be caught up in a much broader struggle over the place of labor in the constitutional order.

II. THE THIRTEENTH AMENDMENT AND THE WAGNER ACT, 1933–1935

A mere fifteen months after President Herbert Hoover signed the Norris-LaGuardia Act, workers and unions were celebrating yet another “Magna Charta” for labor. Section 7(a) of the National Industrial Recovery Act (NIRA) appeared to go beyond the Norris-LaGuardia Act by prohibiting employers from discriminating against union workers or requiring membership in company dominated unions.²¹⁴ But the NIRA provided only weak enforcement mechanisms, and the Roosevelt administration failed even to use these vigorously, leaving it up to workers to enforce their own rights.²¹⁵ In 1934, the country was shaken by four strikes that erupted into open class conflict. West Coast longshoremen, Minneapolis truckers, Toledo automobile workers, and Southern textile workers staged strikes and engaged in obstructive mass picketing to enforce their section 7(a) right to organize.²¹⁶ Efforts to break their picket lines escalated into pitched battles in which thousands of workers from many trades and industries joined the strikers in fighting police, vigilantes, and soldiers.

Meanwhile, Senator Robert Wagner of New York worked to develop a new statute that would correct the failings of the NIRA. Constitutional problems loomed so large that, at one time or another, Wagner was urged to ground his bill on no fewer than five congressional powers: (1) the power to “guarantee to every State in this Union a Republican Form of Government,” (2) the power to enforce the Thirteenth Amendment’s

213. By 1938, when the Supreme Court finally addressed the issue, a new constitutional world had come into being and no one doubted the law’s validity. See Forbath, *Law and Labor*, supra note 51, at 163. Reviewing the constitutionality of section 7 of the Norris-LaGuardia Act, which imposed strict procedural requirements on the issuance of injunctions in labor disputes but not other kinds of disputes, the Court simply asserted: “There can be no question of the power of Congress thus to define and limit the jurisdiction of the inferior courts of the United States.” *Lauf v. E.G. Shinner & Co.*, 303 U.S. 323, 330 (1938). In one of his many bitter dissents of the period, Justice Butler cited *Truax* and insisted that the law was unconstitutional. *Id.* at 340 (Butler, J., dissenting).

214. National Industrial Recovery Act, ch. 90, § 7(a), 48 Stat. 195, 196–97 (1933).

215. See Irving Bernstein, *The New Deal Collective Bargaining Policy 57–60* (1950) [hereinafter Bernstein, *New Deal*].

216. On these strikes, see Paul Eiel, *The Waterfront and General Strikes*, San Francisco, 1934, at 1–2 (1934) (West Coast longshoremen); Mike Quin, *The Big Strike* 146 (1949) (same); Charles Rumford Walker, *American City* 113–28 (1937) (Minneapolis truckers); Irving Bernstein, *Turbulent Years: A History of the American Worker 1933–1941*, at 220 (1969) (Toledo auto workers) [hereinafter Bernstein, *Turbulent Years*]; Janet Irons, *The Challenge of National Coordination: Southern Textile Workers and the General Textile Strike of 1934*, in “We Are All Leaders”: *The Alternative Unionism of the Early 1930s* 72, 72–101 (Staughton Lynd ed., 1996).

prohibition on slavery and involuntary servitude, (3) the power to enforce the Fourteenth Amendment's guarantee of due process, (4) the power to "provide for . . . the general welfare of the United States," and (5) the power to "regulate Commerce . . . among the several States."²¹⁷

A. *Labor's Freedom Constitution and the Wagner Bill*

In the Spring of 1935, Andrew Furuseth, President of the International Seamen's Union and one of the AFL's leading constitutional thinkers, wrote Robert Wagner a twelve page letter in which he urged Wagner to ground his labor disputes bill on Section 2 of the Thirteenth Amendment.²¹⁸ He situated Wagner's bill in a story of freedom that stretched back to the Christian principle that "God created man in his own image," which, in Furuseth's view, amounted to a repudiation of slavery.²¹⁹ This "Christian principle of evolution from slavery to freedom" was embodied in the Declaration of Independence in the clauses asserting that "all men are created equal; that they are endowed by their Creator with certain inalienable rights; that amongst these are life, liberty and the pursuit of happiness."²²⁰ Echoing AFL President William Green's testimony before Congress, Furuseth wrote that the Wagner Bill would preserve democracy by "incorporat[ing] the industrial workers in the polity of the United States" as a "check upon the power of 'Big Business.'"²²¹ In addition, the bill would make possible the pursuit of happiness, as decreed by the Declaration of Independence: "With some 15 to 20 million idle, living on charity with no possible chance of self-employment and with the necessity to accept any kind of employment there can be no pursuit of happiness; not even marriage."²²²

Judging from the rhetoric of the bill's proponents, Furuseth might have expected his proposal to receive serious consideration. Senator Wagner invoked all of the essential elements of labor's Thirteenth Amendment theory in defense of the bill. The individual right to quit, he argued, would not suffice to protect labor freedom because economic as well as physical duress could bring about a condition of slavery:

The law has long refused to recognize contracts secured through physical compulsion or duress. The actualities of present-day life impel us to recognize economic duress as well. We are forced to recognize the futility of pretending that there is equality of freedom when a single workman, with only his job

217. See *supra* text accompanying notes 43–45 (Republican Government Clause); *infra* text accompanying notes 218–221 (Thirteenth Amendment), 257 (Fourteenth Amendment), 244 (General Welfare Clause), 246–247 (Commerce Clause).

218. Letter from Andrew Furuseth, President, International Seamen's Union, to Senator Robert F. Wagner (Apr. 16, 1935), *in* Robert F. Wagner Papers, Labor Series, box 4, folder 39, Georgetown Univ. Special Collections [hereinafter Wagner Papers].

219. *Id.* at 3.

220. *Id.* at 4–5.

221. *Id.* at 6–7.

222. *Id.* at 10.

between his family and ruin, sits down to draw a contract of employment with a representative of a tremendous organization having thousands of workers at its call. Thus the right to bargain collectively, guaranteed to labor by section 7(a) of the Recovery Act, is a veritable charter of freedom of contract; without it there would be slavery by contract.²²³

Like Furuseth, Wagner situated his bill in the long sweep of history as “the next step in the logical unfolding of man’s eternal quest for freedom.”²²⁴ He repeatedly likened the nonunion workplace to feudalism and slavery, and promised that government enforcement of the right to organize would bestow upon workers “emancipation from economic slavery and . . . an opportunity to walk the streets free men in fact as well as in name.”²²⁵ He defended the bill’s absolute ban on company dominated unions by echoing Furuseth’s charge that workers who joined company unions were contracting into slavery.²²⁶ Other leading legislators also spoke in terms of slavery, freedom, and inherent rights.²²⁷ “As Lincoln

223. 78 Cong. Rec. 3679 (1934) (Address by Senator Wagner), reprinted in 1 Legislative History, supra note 38, at 20.

224. 79 Cong. Rec. (1935), reprinted in 2 Legislative History, supra note 38, at 2321, 2321.

225. Id. at 2284 (address by Senator Wagner); see also Hearings on S. 2926, supra note 38, at 498, 501–02 (quoting Senator Wagner’s insistence that “all [the bill] does is to make the worker a free man”); id. at 47 (“[I]t is simply absur[d] to say that an individual . . . is on an equality with his employer in bargaining for his wages. . . . The only way that the worker will be accorded the freedom of contract to which . . . he is entitled, is by the intrusion of the Government. . . .”); 79 Cong. Rec. (1935), reprinted in 1 Legislative History, supra note 38, at 1312 (observing that the bill “seeks merely to make the worker a free man in the economic as well as the political field” and that “[c]ertainly the preservation of long-recognized fundamental rights is the only basis for frank and friendly relations in industry”).

226. Mark Barenberg, *The Political Economy of the Wagner Act: Power, Symbol, and Workplace Cooperation*, 106 Harv. L. Rev. 1379, 1445–47 (1993) (quoting Wagner’s critique of company unions that “[t]here can be no freedom in an atmosphere of bondage. No *organization can be free* to represent the workers when it is the mere creature of the employer”); Kenneth M. Casebeer, *Holder of the Pen: An Interview With Leon Keyserling on Drafting the Wagner Act*, 42 U. Miami L. Rev. 285, 329 (1987) [hereinafter Casebeer, *Holder*] (quoting Keyserling’s recollection that Wagner “made fun of the company union, which he called the marionette of the employer, and the dictator of the terms of the labor agreement,” and that he “always argued, ‘All I am trying to do is make the worker a free man’”); see also Letter from Senator Robert Wagner to Daniel J. Tobin, President, International Brotherhood of Teamsters (Dec. 20, 1935), in *Wagner Papers*, supra note 218, box 4 (observing that company unions were established “for the purpose of keeping the workers in virtual economic slavery”); cf. Furuseth, *Company Unions*, supra note 135, at 541–44 (“‘Company’ unions stand squarely in the way of the development of that industrial freedom and equality.”).

227. William Connery, the bill’s floor leader in the House, contended that the ban on company unions permitted workers to “say ‘I am master of my soul, I am not an industrial slave.’” 79 Cong. Rec. (1935) (statement of Rep. Connery), reprinted in 2 Legislative History, supra note 38, at 3093, 3116. Senator Shipstead likened employers who denied workers the right to select their own representatives to “the old-time slave owner.” 78 Cong. Rec. (1934) (statement of Senator Shipstead), reprinted in 1 Legislative History, supra note 38, at 1224, 1241. Representative Beiter of New York repeated unionists’

freed the blacks in the South,” summarized Representative Truax, “so the Wagner-Connery bill frees the industrial slaves of this country from the further tyranny and oppression of their overlords of wealth.”²²⁸

As introduced, the bill contained the core of labor’s theory of freedom. “The tendency of modern economic life toward integration and centralized control has long since destroyed the balance of bargaining power between the individual employer and the individual employee,” declared the bill’s statement of purpose, “and has rendered the individual, unorganized worker helpless to exercise actual liberty of contract, to secure a just reward for his services, and to preserve a decent standard of living”²²⁹ But the terms “slavery” and “involuntary servitude” were missing, leaving the bill’s theme of labor freedom without any grounding in the constitutional text. Instead, the bill relied on the General Welfare Clause and the Commerce Clause. Labor’s subjugation was constitutionally significant not in itself, but because it led to strikes and inadequate mass purchasing power with “consequent detriment to the general welfare and the free flow of commerce.”²³⁰

Wagner’s omission of Thirteenth Amendment language was not due to any lack of commitment to the goal of worker freedom. If any of the bill’s three goals—realizing worker freedom, increasing worker purchasing power, and fostering industrial peace—was primary to Wagner, it was that of worker freedom. “I would not buy peace,” he said, “at the price of slavery.”²³¹ His bill had the ultimate end of achieving effective worker freedom, and the means to that end was protection for self-organization and collective action.²³² “What he always said,” recalled Leon Keyserling,

arguments that labor “must no longer be treated as a commodity” and “that men and women must be counted as persons, not as mere hands and that they must have some active part in the control of the industry to which their lives are given.” *Id.* at 1148–49 (statement of Rep. Beiter). Representative Carpenter of Nebraska maintained that the “worker’s right to form labor unions and to bargain collectively is as much his right as his right to participate through delegated representatives in the making of laws which regulate his civic conduct. Both are inherent rights.” *Id.* at 1147 (statement of Rep. Carpenter). For other quotations, see Barenberg, *supra* note 226, at 1446 n.297.

228. 79 Cong. Rec. (1935) (statement of Rep. Truax), reprinted in 2 Legislative History, *supra* note 38, at 3093, 3185.

229. Hearings on S. 2926, 73d Cong. tit. 1 § 2 (1934), reprinted in 1 Legislative History, *supra* note 38, at 1.

230. *Id.*

231. 78 Cong. Rec. (1934) (statement of Senator Wagner), reprinted in 1 Legislative History, *supra* note 38, at 1224, 1241.

232. See Barenberg, *supra* note 226, at 1449 (suggesting that “the primary objective of the Wagner Act was to achieve workers’ ‘substantive freedom’ by eliminating duress in workers’ consent to managerial authority” and that the “means to that end was the facilitation of collective action in the labor market in order to enhance workers’ bargaining power”); see also Craig Becker, Democracy in the Workplace: Union Representation Elections and Federal Labor Law, 77 Minn. L. Rev. 495, 502 (1993) (suggesting that the aim of democratizing the workplace was “[a]t the forefront of the goals professed by” supporters of the Wagner Act). Viewed in terms of simple content analysis, it would be difficult to ascribe a “primary” goal to the Wagner Act. As James

Wagner's legislative assistant, "was that his purpose was to make the worker a free man, and that always went over well with the audiences."²³³ Wagner was especially concerned that, in case of conflict, the goal of worker freedom be given priority over that of industrial peace. To ensure that courts did not interpret the Wagner Act as a mandate to suppress strikes, the drafters inserted what became section 13: "Nothing in this [Act] . . . shall be construed so as either to interfere with or impede or diminish in any way the right to strike."²³⁴ To Wagner, the freedom to strike was an "inalienable" right and an integral component of democracy incommensurate with the goal of industrial peace:

The spirit and purpose of the law is to create a free and dignified workingman who had the economic strength to bargain collectively with a free and dignified employer in accordance with the methods of democracy. The abolition or curtailment of the right to strike is a denial of the principles of democracy and a substitution of the methods of the authoritarian state. The design of the Labor Relations Act is to reduce the number of strikes by eliminating the main wrongs and injustices that cause strikes. The imposition of legal restrictions upon the right to strike, instead of removing these wrongs, would merely deprive the worker of his inalienable right to protest against them.²³⁵

In short, proponents of the Wagner bill did not hesitate to echo labor's language of freedom and slavery, and section 13 of the bill itself put the goal of worker freedom above that of facilitating commerce by affirming the right to strike. It remained to be seen, however, how the goal of freedom would be handled in the constitutional defense of the bill.

Brudney points out, the "economic goals of reducing strife and promoting purchasing power were highlighted in the debates before enactment," but the "prominence of the two economic objectives may reflect strategic judgments, both as to what would persuade congressional colleagues and what would pass constitutional muster when challenged in the Supreme Court." James J. Brudney, *A Famous Victory: Collective Bargaining Protections and the Statutory Aging Process*, 74 N.C. L. Rev. 939, 950-51 n.30 (1996).

233. Casebeer, Holder, *supra* note 226, at 329. Keyserling's own recollection of the Wagner Act's purposes gave economics a greater role:

Senator Wagner's central argument for his bill was always on general economic and social grounds. He never valued the measure primarily as a mere weapon for negating industrial strife, but rather as an affirmative vehicle for the economic and related social progress to which his life-long efforts were devoted.

Leon H. Keyserling, *The Wagner Act: Its Origin and Current Significance*, 29 Geo. Wash. L. Rev. 199, 218 (1960).

234. National Labor Relations Act § 13, 29 U.S.C. § 163 (1994).

235. Hearings on National Labor Relations Act and Proposed Amendments: Before the S. Comm. on Educ. and Labor, 76 Cong. 17 (1939) (statement of Senator Robert F. Wagner) (quoted in *The Wagner Act: After Ten Years* 31 (Louis G. Silverberg ed., 1945)); see also Hearings on S. 2926, *supra* note 38, at 10-11, reprinted in 1 *Legislative History*, *supra* note 38, at 40-41 (defending the right-to-strike provision against the charge that it would encourage discord by asserting that the bill "will prevent strikes by the only feasible and just method; that is, by insuring fair treatment to all parties and by establishing a powerful and trustworthy agency for the settlement of disputes").

B. *A Great Controversy*

As in the campaign for anti-injunction legislation, there was a sharp debate among the bill's proponents over the choice of constitutional foundations. This time, however, the AFL dropped out early. By February 1935, the Federation had given up on the Republican Government Clause, tacitly accepting the General Welfare and Commerce Clause theories.²³⁶ The cause of this shift is not clear, but it might have had something to do with the influence of AFL counsel Charlton Ogburn. Although Ogburn had drafted the Federation's argument in favor of the Republican Government Clause, he had no enthusiasm for the theory. The day before Green testified in its favor, Ogburn—appearing in his capacity as General Counsel for the Street and Electric Railway Employees—praised the bill uncritically without mentioning the Republican Government Clause.²³⁷ Departing sharply from the AFL's view that government sponsored arbitration threatened slavery and involuntary servitude, he envisaged the NLRB as "a great labor tribunal, a court of arbitration" that would induce the unions to forego strikes and submit their demands to government officials for resolution.²³⁸

Still, Ogburn's progressivism alone could not account for the AFL's acquiescence; the Federation had often rejected lawyerly opinions in the past. But the situation had changed since the heyday of labor's freedom constitution. Samuel Gompers had been replaced by William Green, a former progressive legislator who had always been deferential toward lawyers.²³⁹ Meanwhile, Andrew Furuseth's bruising battles with progressive

236. In February 1935, AFL counsel Charlton Ogburn wrote Senator Wagner to present the point of view of the American Federation of Labor on the bill. Letter from Charlton Ogburn, Attorney and Counselor at Law, to Senator Robert Wagner (Feb. 4, 1935), in Leon Keyserling Papers, Georgetown Univ. Special Collections, Washington, D.C., box 1 [hereinafter Keyserling Papers]. He presented seven proposed changes, none of which touched on the statement of purpose. *Id.*

237. Hearings on National Labor Relations Act: Before the S. Comm. on Educ. and Labor, 76 Cong. 1 (1939) (statement of Charlton Ogburn, General Counsel, Street and Electric Railway Employees), in Wagner Papers, *supra* note 218, box 4.

238. *Id.*

239. Green had long discouraged workers from exercising independent legal judgment. In 1921, when the AFL declared the Kansas Industrial Court Act unconstitutional, Green argued that the fundamental rights of labor were properly "defined by the courts," not by "prejudiced and biased" workers. Discussion on Policy of the Recent International Convention of United Mine Workers of America and of the Kansas Situation, Twenty-ninth Consecutive and Fourth Biennial Convention (District 12, Peoria, Ill.), Nov. 1921, at 19 [hereinafter Discussion on Policy]. For the context of this statement, see Pope, *Labor's Constitution*, *supra* note 29, at 1005–07. In sharp contrast to his predecessor, Green strove mightily to avoid criticizing the legal merits of court opinions. In responding to the *Red Jacket* and *Bedford Cut Stone* injunctions, for example, he described the views of workers from a distance: "These injunctions restrain working men from doing what they feel they have a perfect right to do." William Green and Walter G. Merritt, *Editorial, Labor Injunction Opposed and Defended*, *N.Y. Times*, Aug. 28, 1927, reprinted in 9 *Law & Lab.* 239, 239 (1927). He described the Supreme Court's holding in *Bedford Cut Stone* as a "strange doctrine" that "[w]orking people cannot understand . . . or

lawyers over anti-injunction legislation had cost him much credibility. At subsequent AFL conventions, the delegates sat politely while he thundered on about labor freedom, but they gave his proposals scant consideration.²⁴⁰ He got little help from labor's other constitutional leaders, who were mired in a conservative voluntarism that made them suspicious of the Wagner Act. Unlike Furuseth, who had long lobbied for affirmative regulation of seamen's working conditions,²⁴¹ Matthew Woll, John Frey, and Victor Olander had trouble adapting to the idea that government power could be used to enforce labor rights. They urged the Federation to oppose the provisions of the Wagner bill that conferred jurisdiction on federal courts to issue injunctions enforcing orders of the National Labor Relations Board (NLRB).²⁴² When rebuffed by the Executive Council, they found themselves at sea. Woll mourned the sacrifice of principle for expediency, while Olander confessed that he did "not know how to successfully blow hot and cold on a given subject at the same moment."²⁴³ With Furuseth isolated, and labor's other constitutional leaders unenthusiastic about the bill, it is not surprising that the Federation failed to insist that the bill be based on democracy and human rights rather than the General Welfare Clause (to which unionists had no objection) or the Commerce Clause.²⁴⁴

Even with labor out of the picture, there ensued what Keyserling called a "great controversy about the preamble."²⁴⁵ Labor Department Solicitor Charles Wyzanski, a protégé of Felix Frankfurter, wanted to reduce the statement of purpose to a single constitutional theory: The pur-

accept." *Id.* at 240. Like the progressive lawyers, he cast himself as an enlightened observer who saw in worker attitudes a threat to the legitimacy of the courts: "When those who work in factories or mines, who know the power exercised by employers . . . , are told by a Judge that they must not try to get all the workers to join the union . . . can they believe the injunction of the Judge is impartial justice . . . ?" *Id.* at 239.

240. See, e.g., AFL, Report of Proceedings of the Fifty-fifth Annual Convention of the American Federation of Labor 449 (1935) [hereinafter 1935 AFL Report of Proceedings] (reporting that following a lengthy and passionate speech by Furuseth opposing a motion, the motion carried without further discussion by a show of hands).

241. See Weintraub, *supra* note 125, at 28-44, 133-42.

242. See, e.g., Letter from John P. Frey to Victor Olander (Oct. 27, 1939), in Frey Papers, Manuscript Division, Library of Congress, box 13 ("Matt Woll was gravely disturbed over this feature of the Act as well as the undersigned. In fact, I started a little rebellion but found it would get me nowhere.").

243. *Id.*; Letter from Victor A. Olander to John P. Frey (Oct. 25, 1939), in Frey Papers, box 13.

244. The bill's reference to the General Welfare Clause (which was later deleted) might have weakened labor's determination to insist on a provision sounding in human rights or democracy. Although the general welfare theory did not promote the constitutionalization of worker freedom, it did avoid the pitfalls of the Commerce Clause. Unionists spoke favorably of it, and there is no record of unionist opposition. See, e.g., Editorial, Labor and the Constitution, *Garment Worker*, July 12, 1935, at 4 (stating that "one of the objects of the government . . . is to 'promote the general welfare,' [and] Congress met this just demand of the workers by the National Recovery Act").

245. Casebeer, Holder, *supra* note 226, at 308.

pose of the bill was to facilitate the flow of interstate commerce by putting an end to strikes.²⁴⁶ He and his staff pointed out that the Supreme Court had upheld the application of the commerce power to labor disputes and urged Wagner “to stick as closely as possible to the precedent already established.”²⁴⁷ Locked in a legalistic mindset of incremental change, they worried that the “broad language” referring to the worker’s freedom and standard of living would anger employers and undermine the industrial peace rationale.²⁴⁸ But Wagner and Keyserling insisted that the statement of policy retain its references to inequality of bargaining power and inadequate consumer purchasing power. Unlike the precedent-bound Labor Department lawyers, they were engaged in a forthrightly transformative project.²⁴⁹ They believed that if the deficient purchasing

246. Throughout this period, Frankfurter and Wyzanski maintained an active correspondence, with Frankfurter dispensing advice and praise. See, e.g., Letter from Felix Frankfurter, Professor, Harvard Law School, to Charles Wyzanski, Solicitor, Labor Department (Sept. 22, 1933), *in* Wyzanski Papers, Harvard Law School, Cambridge, Mass., box 1 [hereinafter Wyzanski Papers] (reporting his “deep satisfaction that you are in the stream of important affairs and that your scholarly standards and resourceful sagacity will contribute their important share in the endeavor to find light through the darkness”); Letter from Felix Frankfurter to Charles Wyzanski (June 2, 1934), *in* Wyzanski Papers, supra, box 1 (commending Wyzanski for “the maturity and the wisdom with which [he was] discharging [his] Solicitorship,” and advising him not to support federal incorporation legislation—the form of legislation then supported by the AFL—as a means of regulating corporations).

247. Labor Department, Section 205 (typed comments clipped to draft of Wagner bill, n.d. c. 1934), *in* Keyserling Papers, supra note 236, box 1 [hereinafter Section 205]; see also Casebeer, Holder, supra note 226, at 308 (reporting Keyserling’s recollection of Wyzanski’s position that the constitutional foundation should be “limited to the traditional grounds that violation of the Act caused industrial disputes and stoppages that reduced the flow of commerce”). At one point, Wyzanski proposed a draft bill that limited the NLRB’s jurisdiction to unfair labor practices that “led or tends to lead to a labor dispute that might burden commerce, or obstruct the free flow of commerce, or dissipate natural resources, or affect the general welfare.” Kenneth Casebeer, *Drafting Wagner’s Act: Leon Keyserling and the Precommittee Drafts of the Labor Disputes Act and the National Labor Relations Act*, 11 *Indus. Rel. L.J.* 73, 105–06 (1989) [hereinafter Casebeer, Precommittee Drafts] (reprinting draft proposed by Wyzanski).

248. See Section 205, supra note 247, box 1 (arguing that “the broad language used in the bill . . . weakens it from a constitutional viewpoint”); Bernstein, *New Deal*, supra note 215, at 64 (recounting that the Department of Labor “regarded the economic concentration argument as legally gratuitous” and “certain to arouse employer resentment”); Keyserling, supra note 233, at 218 (recalling that “[s]ome of the technicians, especially in the Labor Department, who could think along the traditional and well marked out paths of avoiding the evil of work stoppages, and never along the newer and relatively uncharted paths of promoting the general economic health,” argued that the broader language was “mere ‘gobbledy gook’” that would weaken the bill’s constitutional justification).

249. Keyserling, who drafted the bill, confessed to Kenneth Casebeer that:

[A]part from the constitutional law that I had studied when I was at Harvard regarding the general question of the scope of the commerce clause and so forth, I really hadn’t consulted all the recent Court decisions on the subject. I wasn’t really reading Court opinions when writing that preamble. I was trying to make constitutional law.

power of workers “was a real factor in the burdening of commerce, then it should enter into the preamble.”²⁵⁰ After a series of battles over this and other issues in 1934, Wagner excluded the Labor Department from the drafting process when Congress reconvened in 1935.²⁵¹

In response to Furuseth’s missive advocating the Thirteenth Amendment, Wagner wrote simply that he had “greatly enjoyed your scholarly discourse on my Labor Relations Bill and your fine analysis of its background.”²⁵² As in the anti-injunction struggle, labor’s human rights approach was rejected without any attempt at an explanation. No sooner had Wagner put off Furuseth, however, than his bill’s Commerce Clause foundation was severely shaken by the Supreme Court.

C. Senator Wagner’s Commerce Clause Bet

On May 27, 1935, the day known as “Black Monday” to supporters of the New Deal, the United States Supreme Court issued its unanimous decision in *A.L.A. Schechter Poultry Corp. v. United States*, invalidating the National Industrial Recovery Act.²⁵³ *Schechter* not only gutted the Roosevelt administration’s economic program, but it also placed a constitutional obstacle in the path of any attempt to legislate a replacement. Under the Court’s reasoning, any activity that had only an “indirect” effect on interstate commerce—a category that, under the Court’s previous decisions, included most manufacturing—lay outside Congress’s power to regulate.²⁵⁴ *Schechter* had a “shock effect” on the proponents of the Wagner bill, convincing many that the bill could not be sustained under the commerce power.²⁵⁵

With the Commerce Clause theory in jeopardy, Furuseth again importuned Wagner to rely on the Thirteenth Amendment, this time citing *Bailey v. Alabama* to emphasize the breadth of the congressional power conferred.²⁵⁶ Others pointed to the Fourteenth Amendment. Professor Robert Binkley urged Wagner to proceed under the theory that the “liberty” protected by the Due Process Clause of the Fourteenth Amendment included the “freedom to join labor organization[s] without being sub-

Casebeer, Holder, *supra* note 226, at 311–12.

250. *Id.* at 309 (quoting Keyserling’s recollection of Wagner’s position).

251. Casebeer, Precommittee Drafts, *supra* note 247, at 95.

252. Letter from Senator Robert Wagner to Andrew Furuseth, President, International Seamen’s Union (May 10, 1935), *in* Wagner Papers, *supra* note 218.

253. 295 U.S. 495, 541–42 (1935).

254. *Id.* at 546–47.

255. See Bernstein, *New Deal*, *supra* note 215, at 120 (quoting newspapers); Drew D. Hansen, *The Sit-Down Strikes and the Switch in Time*, 46 *Wayne L. Rev.* 49, 63–64 (2000) (quoting newspapers and congressional record); see also 1 Gross, *supra* note 26, at 144 (describing the “shock effect [of *Schechter*] on the proponents of the Wagner Act”).

256. Letter from Andrew Furuseth, President, International Seamen’s Union, to Senator Robert Wagner (May 28, 1935), *in* Wagner Papers, *supra* note 218.

jected to economic coercion.”²⁵⁷ A local union officer claiming to speak for 6,000 cemetery workers complained to Wagner that it was “doubtful if *any* of the work performed by cemetery employes [sic] could in *any* manner be legitimately classified directly or indirectly as interstate or foreign commerce” and to propose using what he called the “‘Life, Liberty and Pursuit [sic] of Happiness clause of the constitution” instead.²⁵⁸ The AFL was missing from this little chorus of protest, however, as the Executive Committee accepted Charlton Ogburn’s advice that the Wagner bill would pass muster under the Commerce Clause because violations “would directly affect the flow of interstate commerce in which we can show that 80% of the workers of this country are involved.”²⁵⁹

Wagner did send his bill back to the drafters for revision in light of *Schechter*. But the resulting changes (which included dropping the references to the General Welfare Clause) were designed solely to buttress the Commerce Clause theory.²⁶⁰ Instead of taking Furuseth seriously, Wagner breezily replied that he had “no doubt that the bill . . . will be sustained by the courts.”²⁶¹ Why did Wagner so confidently proclaim—contrary to the weight of public and lawyerly opinion—that the Wagner Act would be upheld under the Commerce Clause? According to Leon Keyserling, Wagner’s constitutional strategy amounted to a “bet” that the Supreme Court would depart from precedent and give the commerce power a new, expansive reading.²⁶² Despite Wagner’s sanguine predictions, Keyserling’s account rings true. It is highly unlikely that the bill’s supporters adhered to their Commerce Clause theory primarily out of

257. Letter from Robert C. Binkley, Professor, Case Western Reserve University, to Senator Robert Wagner (June 1, 1935), *in* Wagner Papers, *supra* note 218, box 4.

258. Letter from H.P. Gallagher, Secretary, Cook County Cemetery Employees Union, AFL Local 19065, to Senator Robert Wagner (June 26, 1935), *in* Wagner Papers, *supra* note 218, box 4.

259. Letter from Charlton Ogburn, Counsel, American Federation of Labor, to William Green, President, American Federation of Labor (June 5, 1935), reprinted in Minutes of the Executive Council Meeting (AFL, Washington, D.C.), June 6–7, 1935, at 3, 5.

260. Bernstein, *New Deal*, *supra* note 215, at 121–22.

261. Letter from Senator Robert Wagner to Andrew Furuseth, President, International Seamen’s Union (June 7, 1935), *in* Wagner Papers, *supra* note 218, box 4. The Senator did pay Professor Binkley the compliment of a substantive response, namely that it had “been repeatedly held by the Supreme Court that [the Fourteenth] [A]mendment operates only against the state, its officers and agents.” Letter from Senator Robert Wagner to Robert C. Binkley, Professor, Case Western Reserve University (June 19, 1935), *in* Wagner Papers, *supra* note 218, box 4. As for the cemetery union leader, Wagner predicted reassuringly “that as time goes on the courts will take a broader and broader view of what affects interstate commerce until it will embrace practically all activities on a large scale.” Letter from Senator Robert Wagner to H.P. Gallagher, Secretary, Cook County Cemetery Employees Union, Local 19065 (July 3, 1935), *in* Wagner Papers, *supra* note 218, box 4.

262. See Irons, *supra* note 26, at 229–30 (outlining strategy of Keyserling and others to push the bounds of both Commerce Clause and substantive due process jurisprudence).

confidence in its success in the courts.²⁶³ Whether based on the Commerce Clause or the Thirteenth Amendment, the Wagner Act's validation would clearly call for a major change in the Court's jurisprudence.²⁶⁴ On the other hand, Wagner was well aware that, within the legal profession, reformers strongly favored the Commerce Clause over the Thirteenth Amendment.²⁶⁵ Although he evidenced a strong concern with what Oliver Wendell Holmes would have called the "honesty" of the bill's statement of purpose, insisting that his public justifications of worker freedom and increased worker purchasing power be retained despite the possibility that they might undermine the strongest constitutional defense available under the prevailing case law, he apparently saw no need to extend that honesty into *constitutional law*.²⁶⁶ He made no attempt to incorporate Thirteenth Amendment language to reflect his goal of labor freedom, and he agreed to delete the reference to the General Welfare Clause after *Schechter*. Judging from his actions, Wagner shared the progressives' monist view of constitutional law as merely another zone for policymaking.²⁶⁷

263. It could be argued that the progressives had faith in the ultimate outcome because their view of the Commerce Clause corresponded to the reality of ever expanding interstate commerce and economic interdependence. Cf. Akhil Reed Amar, *The Constitutional Virtues and Vices of the New Deal*, 22 Harv. J.L. & Pub. Pol'y 219, 224 (1998) ("We have, in my view, broader congressional power to regulate interstate commerce after 1937, not because of some amendment-equivalent adopted as a result of a constitutional moment, but just because, in the real world, a lot more things are interstate due to improvements in transportation and communication technology."). But it is equally arguable that the view held by both the labor movement and the progressive lawyers about the necessity of collective labor rights to make possible effective labor freedom also corresponded to objective reality. By 1935 both Congress and the Supreme Court had endorsed this view in unambiguous terms. See *supra* notes 67–69, 162, 188–190 and accompanying text.

264. The Supreme Court had never upheld the application of the commerce power to manufacturing operations. For the Act to fulfill its intended purpose of establishing a new system of industrial relations for the United States, it would have to be upheld not only as applied to major national manufacturers like Jones & Laughlin Steel, but also to middling, local employers like the Friedman-Harry Marks Clothing Company, whose constitutional challenge would be decided the same day as *Jones & Laughlin*. See *infra* Part IV.E.

265. See *supra* Part I.B; see also Pope, *Labor's Constitution*, *supra* note 29, at 1014–15 & 1015 nn.493–494 (describing the reaction of progressive legal thinkers to labor's Thirteenth Amendment challenge to the Kansas Industrial Court Act of 1920).

266. See *supra* text accompanying notes 249–250.

267. Wagner was firmly situated in the progressive tradition, including its commitments to empiricism, pragmatism, professional expertise, social science, changeability, and administration. See Barenberg, *supra* note 226, at 1412–18 (describing and analyzing Wagner's views on these issues); Daniel T. Rodgers, *In Search of Progressivism*, 10 Rev. Am. Hist. 113, 123–27 (1982) (analyzing progressivism as a set of discourses that privileged expertise, social science, administration, and other themes).

D. A Menace to Industrial Peace That Cannot Be Exaggerated

Immediately after *Schechter*, it appeared that President Roosevelt would take the lead in a direct attack on the Court. He berated the justices for adopting a “horse and buggy” view of interstate commerce, joined labor leaders in likening *Schechter* to *Dred Scott*, and called upon the members of Congress to proceed with his legislative program notwithstanding their constitutional doubts.²⁶⁸ At the same time, however, Felix Frankfurter—now Roosevelt’s constitutional confidant—warned against an immediate constitutional confrontation.²⁶⁹ He proposed that Roosevelt first obtain the passage of bills then pending, including the Wagner bill and the Social Security bill, and then confront the Supreme Court over them.²⁷⁰ This advice must have looked increasingly attractive to Roosevelt as he endured a hail of criticism charging that his aggressive response to *Schechter* overstepped the presidential role and endangered the independence of the Supreme Court.²⁷¹ For the next year and a half, the President would maintain near total silence on the Court and the Constitution.²⁷² Meanwhile, on June 4, he announced that the New Deal program would go forward, and that the Wagner bill was now on his “must” list of immediate legislation.²⁷³

Roosevelt’s sudden silence left the labor movement to work out its own response to the constitutional crisis. One week after *Schechter*, the Executive Council of the American Federation of Labor met in emergency session. “It is inconceivable that in a Republic such as ours,” the Council declared, “the people, vested with the power of self-government, will [accept] that the Constitution in its present form stands as a barrier

268. 4 The Public Papers and Addresses of Franklin D. Roosevelt 205, 218, 221 (Samuel I. Rosenman comp., 1938) [hereinafter Roosevelt Public Papers]; Charles W. Hurd, President Says End of NRA Puts Control Up to People, N.Y. Times, June 1, 1935, at 1.

269. Letter from Felix Frankfurter to President Franklin D. Roosevelt (May 29, 1935), in Roosevelt and Frankfurter: Their Correspondence, 1928–1945, at 272, 272 (Max Freedman ed., 1967).

270. “Put *them* up to the Supreme Court,” Frankfurter advised. “Let the Court strike down any or all of them next winter or spring, especially by a divided Court. *Then* propose a Constitutional amendment giving the national Government adequate power to cope with national economic and industrial problems.” *Id.*

271. See William E. Leuchtenburg, When the People Spoke, What Did They Say?: The Election of 1936 and the Ackerman Thesis, 108 Yale L.J. 2077, 2081–82 (1999) [hereinafter Leuchtenburg, When the People Spoke] (reviewing wave of Republican criticism that followed Roosevelt’s response to *Schechter*).

272. *Id.* at 2082–85.

273. Bernstein, New Deal, *supra* note 215, at 121. Until *Schechter*, the Roosevelt administration had been insisting on major modifications to the Wagner bill. Roosevelt did not endorse the Wagner bill until May 24, after it had been passed by the Senate and reported favorably by the House Committee on Labor. Even then, the Department of Justice and the National Recovery Administration insisted on changes so drastic “that Wagner could not have accepted [them] without radical revision of his bill.” *Id.* at 117–19.

to social and economic progress.”²⁷⁴ To remove this barrier, the Council called upon the labor movement to “assume leadership” and “serve as a spear-head” in securing the enactment of a constitutional amendment.²⁷⁵ More ominously, the Council warned that—pending new legislation—the workers would be forced to rely on “their own economic strength and united solidarity” both to protect the right to organize and to maintain NRA labor standards.²⁷⁶

By the time the AFL Council spoke, unionists were already following this directive. John L. Lewis ordered a national strike of 400,000 coal miners effective midnight June 16, the terminal date of the NIRA.²⁷⁷ In Philadelphia, delegates from 400 local unions met under the auspices of the Central Labor Union to prepare for a “wave of strikes” to defend NRA standards.²⁷⁸ Joseph P. Ryan, President of the New York Central Trades and Labor Council, raised the spectre of a nationwide general strike.²⁷⁹ Thousands of workers paraded through New York’s garment district singing songs like “Nine Old Men” (to the tune of “Three Blind Mice”) and carrying banners bearing such slogans as “Congress Cannot Legislate HOURS & WAGES BUT WE CAN.”²⁸⁰

Meanwhile, despite determined opposition from the National Association of Manufacturers, the Wagner bill moved rapidly through the House-Senate conference process and, on July 5, 1935, Roosevelt signed it into law.²⁸¹ Some scholars have argued that the Wagner Act was not a response to the threat of mass protest. They point out that the strike wave of 1934 subsided months before the law was enacted and conclude that the main impetus for legislation came from policy entrepreneurs within the state.²⁸² This argument, grounded in chronology, itself ig-

274. Declaration of the Executive Council of the American Federation of Labor, Minutes of the Executive Council Meeting, (AFL, Washington, D.C.), June 6–7, 1935, at 20.

275. *Id.*

276. *Id.* at 18.

277. Louis Stark, Coal Strike Looms While Textile Leader Urges Defiance of Wage Cuts, *N.Y. Times*, May 29, 1935, at 12; Louis Stark, Soft Coal Strike June 16 Ordered, *N.Y. Times*, June 2, 1935, at 1 [hereinafter Stark, Soft Coal].

278. Philadelphia Unions Get Ready for Strike, *N.Y. Times*, June 3, 1935, at 2.

279. See Business Advised To Keep Wages Up, *N.Y. Times*, June 3, 1935, at 1 (“The [AFL] has a present membership of 7,500,000 people, in addition to which there are millions more who would rally to its call. The threat of a general strike is not a pleasant thought. That which happened in California can be made to happen in forty-eight States.”).

280. See Steven Fraser, Labor Will Rule: Sidney Hillman and the Rise of American Labor 326 (1991) (reporting that a quarter of a million workers marched); Demonstration That Excited Press and Entire City, *Justice*, June 15, 1935, at 5 (depicting banners); Workers’ Parade Fights Wage Cuts, *N.Y. Times*, June 9, 1935, at 26.

281. See Bernstein, *New Deal*, supra note 215, at 110 (describing National Association of Manufacturers’ mobilization).

282. See, e.g., Kenneth Finegold & Theda Skocpol, State, Party, and Industry: From Business Recovery to the Wagner Act in America’s New Deal, in *Statemaking and Social Movements: Essays in History and Theory* 159, 181 (Charles Bright & Susan Harding eds., 1984) (“To explain the remarkable passage of the Wagner Act, we must . . . look to more

nores the timing of the *Schechter* decision. It was the combination of the threat of strikes and the judicial nullification of Roosevelt's industrial program that ensured the Wagner bill's smooth passage through Congress.²⁸³ True, the 1934 strike wave had ebbed, but the National Recovery Administration had played a crucial role in that process. AFL President William Green had narrowly averted major strikes in the automobile and rubber industries as recently as the spring of 1935 on the promise of government intervention pursuant to the NIRA, and the workers' grievances in those industries remained unresolved.²⁸⁴ Against this backdrop, the loud chorus of union threats to replace the NRA with a regime of union enforced standards—threats endorsed even by the hitherto compliant Green—appeared to constitute “a menace to industrial peace that cannot be exaggerated.”²⁸⁵

III. TWO LAWS IN THE UNITED STATES, 1935–1936

The constitutional regime shift of the 1930s came about partly through the familiar mechanisms of political mobilization, protest, voting, and litigation—all of which have been vividly described by historians. But there was also another engine of change, one that social scientists usually associate with revolution rather than reform. In addition to pres-

strictly intragovernmental developments that came together in 1935 to allow advocates of strong legal support for unionization finally to get their way in the legislative arena.”); see also Theda Skocpol, *Political Response to Capitalist Crisis: Neo-Marxist Theories of the State and the Case of the New Deal*, 10 *Pol. & Soc'y* 155, 182–99 (1980) (“[I]t cannot be plausibly argued that these strikes directly produced the Wagner Act of 1935.”); Timothy G. Massad, *Disruption, Organization, and Reform: A Critique of Poor People's Movements*, 27 *Dissent* 81, 86 (1980) (arguing that the labor strikes did not “provoke passage of the Wagner Act”).

283. After *Schechter*, the administration faced a possible strike wave with absolutely no industrial relations policy in place. See Thomas Ferguson, *Industrial Conflict and the Coming of the New Deal: The Triumph of Multinational Liberalism in America*, in *The Rise and Fall of the New Deal Order, 1930–1980*, supra note 35, at 3, 19, 29 n.38; see also David Plotke, *Building a Democratic Political Order: Reshaping American Liberalism in the 1930s and 1940s* 104–06 (1996) (stating that “the Supreme Court’s nullification of the NIRA . . . created a void in labor relations”). Other aspects of the state centered explanation have been contradicted persuasively by a number of scholars. See Michael Goldfield, *Worker Insurgency, Radical Organization, and New Deal Labor Legislation*, 83 *Am. Pol. Sci. Rev.* 1257, 1273–77 (1989); Theda Skocpol, Kenneth Finegold & Michael Goldfield, *Explaining New Deal Labor Policy*, 84 *Am. Pol. Sci. Rev.* 1297, 1304–09 (1990) (Goldfield’s rebuttal to Finegold’s and Skocpol’s critiques); Frances Fox Piven & Richard A. Cloward, *Poor People’s Movements* 129–33 (1977); Thomas Ferguson, *From Normalcy to New Deal: industrial structure, party competition, and American public policy in the Great Depression*, 38 *Int’l Org.* 41, 86–88 (1984).

284. During the hearings, William Green recounted his efforts—then in progress—to defuse the auto strike, while President John House of the Goodyear rubber workers local recounted the danger of a strike in the rubber industry. See *Hearings on S. 2926*, supra note 38, at 110 (statement of William Green); *Hearings on S. 1958*, supra note 40, at 1941–47 (statement of John D. House).

285. H.R. Doc. No. 1147, at 7, reprinted in 2 *Legislative History*, supra note 38, at 3046, 3053 (report to accompany S. 1958).

sureing authorities for action, the members of an insurgent movement may attempt to will a new order into being by establishing and operating it on their own even while the functionaries of the old order continue to claim authority.²⁸⁶ This dynamic can occur not only at the level of the nation-state, but also in any subdivision of society, be it a village, a school, or a workplace. Of course, there was no such challenge to the authority of the United States government during the 1930s. But the constitutional revolution of that period was inextricably intertwined with a regime shift in mass production industry from individual labor market competition to union solidarity. This shift included moments of dual sovereignty, with unions challenging corporations for control over working conditions, wages, and the pace of work. Within months of *Schechter* it would be no exaggeration to say that two laws—each with a set of principles addressing issues all the way from the constitutional powers of Congress to the conduct of individual workers on the shop floor—were contending for authority in the industrial centers of the United States.

A. *The Wagner Act as Nullity*

Employers wasted no time testing the constitutional commitment both of the Roosevelt administration and of the labor movement. No sooner had the President signed the Wagner Act into law than employers announced that they would defy it.²⁸⁷ United States Steel's Vice President of Industrial Relations declared that he would "go to jail or be convicted as a felon" rather than obey the Wagner Act, whereupon the American Management Association awarded him a medal for "outstanding and creative work in the field of industrial relations."²⁸⁸ A committee of fifty-eight prominent lawyers assembled by the American Liberty League issued a brief, 132 pages in length, declaring the law unconstitutional under the Commerce Clause and the Due Process Clause of the Fourteenth Amendment.²⁸⁹ According to its author, Earl F. Reed, this brief

286. See Cover, *supra* note 29, at 35–40 (observing that self-governing, jurisgenerative groups may seek to extend their regime to all of society through "redemptive" lawmaking from below); Charles Tilly, *Does Modernization Breed Revolution?*, 5 *Comp. Pol.* 425, 439 (1973) (positing the emergence of dual sovereignty as a precursor to revolution). For example, the American colonists established dual power structures long before reaching the conclusion that there was no alternative to declaring independence from the Crown. See Pauline Maier, *From Resistance to Revolution: Colonial Radicals and the Development of American Opposition to Britain, 1765–1776*, at 24–26 (1972). In this type of transformative politics, there may be little, if any, disjuncture between means and ends. See C. Edwin Baker, *The Process of Change and the Liberty Theory of the First Amendment*, 55 *S. Cal. L. Rev.* 293, 295–99 (1982).

287. Bernstein, *Turbulent Years*, *supra* note 216, at 349.

288. William E. Leuchtenburg, *Franklin D. Roosevelt and the New Deal 177* (1963) (quoting *Faces of the Month*, *Fortune*, July 1935, at 140) [hereinafter Leuchtenburg, *FDR*].

289. Subcomm. on Indus. Relations and Lab. Legislation, Nat'l Law. Comm. of the Am. Liberty League, *Report on the Constitutionality of the National Labor Relations Act* iii–xi (Sept. 5, 1935). Recognizing the greater salience of rights—as opposed to

was authority enough to nullify the law. “When a lawyer tells a client that a law is unconstitutional,” Reed declared, “it is then a nullity and he need no longer obey that law.”²⁹⁰ The National Association of Manufacturers, the American Newspaper Publishers Association, and the League all launched campaigns of lawsuits seeking to enjoin the newly created National Labor Relations Board from enforcing the Act.²⁹¹

For the next two years, employer lawyers “tied the NLRB into legal knots” with a combination of injunction suits and constitutional challenges to NLRB orders.²⁹² During those crucial years, the only agent with any realistic hope of enforcing the law was the labor movement itself. The question whether the AFL would take up this challenge soon became an issue in the rapidly escalating struggle between craft and industrial unionists—a struggle that would eventually split the House of Labor in two.

B. *The AFL: Spearhead to Nowhere*

The AFL Executive Council that called upon the labor movement to serve as the “spearhead” of the struggle for constitutional change was dominated by craft unionists. Labor’s foremost constitutional thinkers—Samuel Gompers of the Cigar Makers, John Frey of the Molders, Matthew Woll of the Photo-Engravers, and Victor Olander and Andrew Furuseth of the Seamen—had all come from this sector of the movement. In the past, these leaders had not shied away from urging workers to defy what they considered to be unconstitutional injunctions and antistrike laws, or even from supporting radicals who engaged in resistance.²⁹³ By 1935, however, this once-proud cadre of craft union constitutionalists had—with the exception of Andrew Furuseth—lost the tough independence that had characterized their campaigns against antistrike laws and injunctions. William Green, who replaced Gompers as AFL chief in 1924, had long opposed constitutional resistance.²⁹⁴ Under his leadership, the AFL turned away from strike action and adopted a posture of respectability

commerce—outside the legal profession, the report emphasized the employers’ rights claims in its popular summary, while stressing the Commerce Clause in the body of the argument. Rights claims came first and occupied more pages (four versus three) in the summary, but they followed the Commerce Clause and took up fewer pages in the body (twenty versus sixty-two). *Id.* at iii–xi, 44–126.

290. Irons, *supra* note 26, at 245; A Conspiracy by Lawyers, *Nation*, Oct. 2, 1935, at 369.

291. Cortner, *Wagner Act Cases*, *supra* note 26, at 96–99; Irons, *supra* note 26, at 243–44.

292. Bernstein, *Turbulent Years*, *supra* note 216, at 646. Although most of the injunction suits were unsuccessful, they did succeed in tying up NLRB resources. *Id.* at 647; Irons, *supra* note 26, at 247–48. The remainder of the NLRB’s resources were focused on its campaign to bring test cases to the Supreme Court. *Id.* at 254–71.

293. See *supra* notes 52–56 and accompanying text.

294. See *supra* note 239.

and cooperation with employers.²⁹⁵ AFL leaders tried to sell unionism to employers as agents of enhanced efficiency.²⁹⁶ They went into the banking and insurance businesses; Matthew Woll, among others, became a business executive as well as a trade union leader.²⁹⁷ By 1929, Furuseth had lost patience with these officials: "Don't tell me that you have the guts to go to jail, because you haven't," he snorted. "The best of you have refused."²⁹⁸ Although they continued to profess militant constitutionalism, the day to day practice of concessionary bargaining and collaboration with employers ill suited them to head a confrontational campaign against the Supreme Court.

Even as the Executive Council appointed itself the spearhead of the movement to rectify *Schechter*, its statement adopted a deferential posture toward official law and processes. "Without criticizing the Supreme Court," it demurred, "the Executive Council is of the opinion that it can with perfect propriety appraise the effect of the court's decision"—namely "a most damaging blow" to social justice and economic welfare.²⁹⁹ Legal thought was the Court's domain; unionists would restrict themselves to commenting upon justice and economic consequences. The statement was equally respectful of formal legal processes. All of the actions called for—passage of the Wagner bill, legislation to replace the NIRA codes, and a constitutional amendment to give Congress the necessary power—lay safely within official legal channels.³⁰⁰

Even within those discrete limits, the AFL leadership vacillated. At the Federation's 1935 Convention, delegates presented ten resolutions proposing two basic types of amendments. The first group, mostly submitted by industrial union delegates, sought to create new congressional powers to enact social legislation.³⁰¹ The second, not attributable to any particular constituency, urged restrictions on the power of judicial re-

295. Irving Bernstein, *The Lean Years: A History of the American Worker 1920–1933*, at 97 (1960).

296. *Id.* at 97–98.

297. *Id.* at 103–04; James R. Green, *The World of the Worker* 123 (Eric Foner ed., 1980).

298. Weintraub, *supra* note 125, at 187.

299. Declaration of Executive Council of the American Federation of Labor, Minutes of the Executive Council Meeting, (AFL, Washington, D.C.), June 6–7, 1935, at 17, 19.

300. *Id.* at 18–21.

301. 1935 AFL Report of Proceedings, *supra* note 240, at 789–92 (documenting, for example, Resolution No. 41, submitted by Delegate Wyndham Mortimer of United Automobile Workers Union No. 18463; Resolution No. 84, submitted by the top leadership of the International Ladies Garment Workers Union; Resolution No. 188, submitted by Delegate Emil Costello, Federal Labor Union No. 18456). Some endorsed this concept in general terms, but most favored the Workers' Rights Amendment, which had been introduced in Congress by Representative Vito Marcantonio of New York. The Workers' Rights Amendment empowered Congress to regulate child labor, maximum hours, and minimum wages; to provide relief from a variety of sources (this was designed to support the Social Security Act); and to nationalize industry "for the benefit of the people." *Id.* at 790. Oddly, the Workers' Rights Amendment contained no provision designed to support the constitutionality of the Wagner bill. This may have reflected the Communist Party's

view.³⁰² The delegates tabled the resolutions without discussion, leaving the Executive Council a clear field.³⁰³ But conservative craft unionists on the Council were apprehensive about constitutional change. Joined by Green, they rejected the idea of a power-creating amendment out of fear that the Supreme Court might interpret it to authorize Congress to fix wages and hours, thus invading the labor movement's "freedom to deal with these questions in its own right."³⁰⁴ They worried that even restrictions on the power of judicial review might return to haunt them if, as in Europe, a movement for dictatorship were to gain ground in the United States.³⁰⁵ Not until May 1936 did the Executive Council finally decide to ask the upcoming conventions of the Democratic and Republican parties to seek an amendment requiring a two-thirds vote of the Supreme Court to invalidate an act of Congress.³⁰⁶ After both parties declined to endorse any amendment, this proposal was quietly forgotten.³⁰⁷ On the is-

opposition to the bill, as Marcantonio—though not a member—listened to the Communist Party on many issues.

302. None of these resolutions proposed specific language. Some called for an end to the Supreme Court's power to nullify legislation enacted in the interests of labor, whether by state or federal legislatures. *Id.* at 790–91. One recommended abolishing the power of any court to declare any law unconstitutional. *Id.* at 788–89. The most conservative provided that an act of Congress could be invalidated only by a seven to two majority of the Court. *Id.* at 791.

Labor's menu of proposals differed from those under discussion outside the movement primarily in that it did not include any call for cutting back on protections for individual rights. According to Bruce Ackerman, the public debate centered on three kinds of proposed amendments: (1) amendments creating new federal powers; (2) amendments cutting back on constitutional safeguards for property and contract rights; and (3) amendments altering institutional arrangements. 2 Ackerman, *Transformations*, *supra* note 34, at 338–40. The second category was conspicuous by its absence among the labor proposals.

303. 1935 AFL Report of Proceedings, *supra* note 240, at 793.

304. Minutes of the Meeting of the Executive Committee (AFL, Miami, Fla.), Jan. 22, 1936, at 132–33, 136 [hereinafter AFL-EC Minutes, Jan. 1936]; Minutes of the Meeting of the Executive Committee (AFL, Atlantic City, N.J.), Aug. 5–16, 1935 at 49–50. Matthew Woll was the only member recorded as objecting to the amendment on federalism grounds. Minutes of the Meeting of the Executive Committee (AFL, Washington, D.C.), May 5–20, 1936, at 229–30 [hereinafter AFL-EC Minutes, May 1936].

305. AFL-EC Minutes, Jan. 1936, *supra* note 304, at 133. At the 1936 AFL Convention, President Weaver of the Musicians' Union delivered a lengthy address on this theme, in which he warned that if the Supreme Court's independence were damaged, "[t]he death knell of liberty as we have known it in this country for 150 years will have been sounded; and America will be eligible to take her place alongside of those Old World dictatorships, where democracy can no longer claim either a local habitation or a name." AFL, Report of Proceedings of the Fifty-Sixth Annual Convention of the American Federation of Labor 699 (1936) [hereinafter 1936 AFL Report of Proceedings]. Weaver went on to ask, rhetorically, "Who ever hears of the Supreme Courts of Russia, Italy, or Germany?" *Id.* at 707.

306. AFL-EC Minutes, May 1936, *supra* note 304, at 230.

307. The proposal was not submitted to the 1936 AFL Convention for approval. See 1936 AFL Report of Proceedings, *supra* note 305, at 695–97. By the time of the AFL's 1936 convention, the Federation was absorbed in its dispute with the newly formed Committee

sue of injunctions—the main obstacle to self-enforcement of labor’s claimed rights—the leadership suggested lobbying for state anti-injunction laws to supplement the Norris LaGuardia Act.³⁰⁸

To Andrew Furuseth, this course was equivalent to suicide. The Supreme Court, he warned, was not about to uphold the Act.³⁰⁹ Always ready for a constitutional fight, Furuseth berated the delegates for forgetting fundamentals:

I think we are on the wrong track entirely on the question of labor disputes. . . . Are we going to quit the struggle for human freedom? If we are, let us say so and be through with it. If we are not, let us go on with the fight as men should.

The struggle for equality on the religious field took centuries, and more blood was shed than anybody can dream of. The struggle to get equality before the law took two hundred more years for the same kind of struggle, and now we are in the midst of a struggle to extend those fundamental Christian principles of human equality upon our industrial field, and all of a sudden we seem to stop there.³¹⁰

This was to be Furuseth’s last oration at an AFL convention. In the eyes of many labor activists, the octogenarian sailor was a pathetic remnant of a bygone era. During the 1934 maritime strike, his stubborn opposition to united action of seamen and longshoremen had earned him the contempt of waterfront militants, who ridiculed him as “Andy Barnacle” and “Weeping Willow Andy Feroshus.”³¹¹ Furuseth’s constitutional commitments had grown out of an earlier upsurge of unionism, one that spawned craft union jurisgenesis.³¹² Unlike other craft unionists, however, Furuseth retained not only the form, but also the passion,

for Industrial Organization (CIO), and the matter was once again delegated to the Executive Council for its “careful study and appropriate action.” *Id.* at 697.

308. 1935 AFL Report of Proceedings, *supra* note 240, at 448.

309. Furuseth argued:

I don’t believe there is anybody here who has any recollection of the Supreme Court decisions, particularly the decision dealing with the stone cutters’ case, in which the men were forced to work against their will, who can have any doubt as to what will come from the Supreme Court on the question of the Labor Disputes Bill.

Id. at 449.

310. *Id.*

311. Weintraub, *supra* note 125, at 195; Quin, *supra* note 216, at 140. In the days that Furuseth earned his living in the coastal lumber trade, longshore work was performed by sailors. Furuseth never overcame his resentment at longshoremen for taking over this work. Weintraub, *supra* note 125, at 8. Furuseth also adhered to the tradition of white chauvinism promoted by many west coast unionists, seeking legislation to exclude Asian sailors from American ships. *Id.* at 112–13.

312. For an account of this period, see Weintraub, *supra* note 125, at 11–27 (describing Furuseth’s role in the formation and early struggles of the Sailors Union of the Pacific in the 1880s and 1890s). Although there was some collective bargaining in this period, the more typical form of union wage setting was by unilateral adoption of union laws specifying the wage under which members were permitted to work.

commitment, and independent spirit of his movement's early days. Now, his message struck a chord in unexpected quarters. While Furuseth's craft union compatriots were glad to hear the last of this zealot, Wyndham Mortimer, Communist automobile worker and soon to be Vice President of the United Automobile Workers Union, drew on Furuseth's speech. "I think, as Brother Furuseth said, we are altogether on the wrong track in this business," he declared, and called on unionists "to mass picket a place in spite of injunctions."³¹³ Not by his own choice, Furuseth's constitutional torch passed to the militant industrial unionists who—in the months to come—would serve as battering rams for constitutional change.

C. *The CIO: Labor's Own Supreme Court*

At the time, Furuseth's and Mortimer's speeches were sideshows to the main issue at the convention: the conflict between craft and industrial unionism. Most of the unions in the AFL had been formed by craft workers and organized along craft lines.³¹⁴ Since 1933, however, local activists in mass production industries like rubber and automobile had organized themselves on an industrial basis. Now, craft unions like the Machinists, whose AFL-certified jurisdiction included small but significant numbers of workers in mass production shops, insisted on pulling these workers out of the new industrial formations. John L. Lewis, leader of the AFL's largest industrial union, led the fight to grant industrial charters in the mass production industries.³¹⁵ Lewis lost the key vote, but the convention is remembered for his one punch fight with Carpenters Union President William Hutcheson, which dramatized Lewis's determination to proceed with industrial organizing notwithstanding AFL resistance. Less than one month after the convention, eight union presidents met at UMW headquarters to form the Committee for Industrial Organization.

At first glance, the CIO seemed an unlikely candidate to assist in a revival of labor's freedom constitution. Its two most prominent leaders, John L. Lewis and Sidney Hillman, were early converts to progressive reform. Both had undercut labor's resistance to antistrike laws and injunctions. Lewis, a progressive Republican, had drawn the wrath of labor's constitutionalists in 1919, when a federal judge issued a nationwide in-

313. 1935 AFL Report of Proceedings, *supra* note 240, at 454.

314. For example, machinists fell into the jurisdiction of the International Association of Machinists regardless of the industry in which they worked.

315. The events recounted in this paragraph are all well told in the standard histories. See Bernstein, *Turbulent Years*, *supra* note 216, at 386–98; Melynn Dubofsky & Warren Van Tine, *John L. Lewis: A Biography* 217–21 (1977); Robert H. Zieger, *The CIO 1935–1955*, at 22–29 (1995).

junction prohibiting the UMW from striking.³¹⁶ Samuel Gompers and the AFL Executive Council had publicly offered to support the miners in defying the injunction.³¹⁷ Not only did Lewis obey the court, but he impugned Gompers's patriotism by proclaiming that as a good American, he could not strike against the government.³¹⁸ Two years later, when the AFL declared the Kansas Industrial Court Act unconstitutional and backed Kansas UMW leader Alexander Howat in a political strike against the law, Lewis sent operatives to break the strike and depose Howat, whose popularity threatened Lewis's hold on the UMW presidency.³¹⁹

Sidney Hillman, who came from a European socialist background, had learned the tenets of progressivism from reformers like Jane Addams and Clarence Darrow. As President of the Amalgamated Clothing Workers, he chiseled at the foundations of labor's independent constitutionalism by pushing workers to seek the goal of security rather than freedom, to think in terms of scientific solutions rather than fundamental rights, and to build power in electoral and legislative arenas rather than on the shop floor.³²⁰ Breaking the AFL's call for a total boycott on the use of "unconstitutional" labor injunctions, his union accepted the advice of progressive lawyers and experimented with injunction suits against employers.³²¹ By the 1930s Hillman had painstakingly built up a reputation as labor's foremost "statesman."

But *Schechter* shook Hillman's faith in progressive reform. For guidance in the crisis, he turned back to his pre-progressive, revolutionary roots.³²² He recalled that "it was my privilege when just a boy of sixteen to go to jail fighting against tyranny in Czarist Russia,"³²³ and delivered a blistering attack on the Supreme Court: "Whatever the . . . constitutional experts may think of it," he declared, "there are no two opinions about its meaning in so far as the labor movement is concerned."³²⁴ Echoing

316. See John Brophy, *A Miner's Life* 142 (1964) (expressing outrage at Lewis's position); Dubofsky & Van Tine, *supra* note 315, at 57-58 (explaining AFL Executive Council's reaction to Lewis's surprise announcement).

317. See Philip Taft, *The A.F. of L. in the Time of Gompers* 409-11 (1957).

318. See Brophy, *supra* note 316, at 142.

319. See Pope, *Labor's Constitution*, *supra* note 29, at 996. Lewis argued, along with William Green (then Secretary-Treasurer of the UMW), that workers should refrain from resistance and instead join with the government of Kansas to craft a test case. John L. Lewis, *Official Letter, United Mine Workers J.*, Nov. 1, 1921, at 7 (open letter from Lewis to all UMW members in Kansas); Pope, *Labor's Constitution*, *supra* note 29, at 1005-07, 1012.

320. See Fraser, *supra* note 280, at 320-22, 330; Pope, *Labor's Constitution*, *supra* note 29, at 1002-03.

321. See Forbath, *Law and Labor*, *supra* note 51, at 122-25.

322. Fraser, *supra* note 280, at 322-25.

323. *Id.* at 325.

324. *President Hillman Calls for Membership Mobilization in Defense of Amalgamated Standards*, *Advance*, June 15, 1935, at 3. At the level of jurisprudence, Hillman criticized the justices for turning to "legalistic logic versus the logic of life." *Hillman Stirs Union to Action in Defense of Labor Standards*, *Advance*, June 15, 1935, at 3. He charged that this legalism was rooted in "[i]nterpretations of the mind of the framers

Furuseth and other adherents of labor's freedom constitution, Hillman located that meaning in a constitutional narrative of freedom and slavery. Although *Schechter's* crucial holding rested on the Commerce Clause, Hillman portrayed it as a human rights case on a par with *Dred Scott*:

The issue then was, whether or not Negro slavery shall prevail in this country. . . . Congress had taken action which fixed the boundaries in which slavery was permitted to continue. Then as now those who favored the unchecked continuance of slavery took resort to the Supreme Court. The court was ready to serve.³²⁵

To Hillman, the Commerce Clause was merely a battleground in the struggle for rights, not an independent source of constitutional law. "If you want government to fight labor," he charged, "[the industry] is interstate; if you want the government to help labor, [the industry] is intrastate."³²⁶ To reorder the Supreme Court's misplaced priorities, Hillman recalled that government was established to provide for the welfare of the people, and that the Declaration of Independence "proudly proclaims our right to 'life, liberty and the pursuit of happiness.'"³²⁷

Like Furuseth and Mortimer, Hillman called openly for direct action in defiance of official law. He urged workers to follow the precedent of the Amalgamated's fight against the Philadelphia clothing injunction of 1929: "The injunction was issued on Saturday; on Monday we were on the picket line."³²⁸ He recalled that the Philadelphia judge had been helpless to stop the picketers and opined that "Philadelphia is not the only place in the United States where a court may not know just what to do with strikers who mean to strike."³²⁹ Joseph Schlossberg, the Amalgamated's General Secretary, announced that the time had come for the labor movement "to declare itself its own Supreme Court, to say it is going to make its own decisions and carry them out."³³⁰ Hillman went so far as to raise the specter of a new civil war to end wage slavery: "People in power thought that the *Dred Scott* decision had settled the slavery

of the United States Constitution one hundred and sixty-five years ago," and that the justices were permitting the "dead hand of the past . . . to block all traffic in social progress." President Hillman Calls for Membership Mobilization in Defense of Amalgamated Standards, *supra*, at 3; see also Editorial, Labor's Duty In The Present Crisis, *Advance*, June 1935, at 2 (ridiculing the notion "that any one in his mind could be expected to believe that the framers of the Constitution . . . could know about, understand, or think of what would happen one hundred and sixty years hence").

325. Hillman Stirs Union to Action in Defense of Labor Standards, *supra* note 324, at 3. For more on the analogy between *Schechter* and *Dred Scott*, see New York Mobilizes For Industrial Action, *Advance*, June 15, 1935, at 4; Gertrude Weil Klein, Men's Clothing Workers Ready For Big Battle, *New Leader*, June 8, 1935, at 1.

326. Hillman Stirs Union to Action in Defense of Labor Standards, *supra* note 324, at 3.

327. *Id.*

328. *Id.*

329. *Id.*

330. Klein, *supra* note 325, at 1 (quoting Schlossberg).

question, but four years later the Civil War had wiped out not only the decision, but slavery as well. We can do the same for wage slavery.”³³¹

Other unionists joined Hillman in rejecting Green’s deferential stance and in criticizing *Schechter* not in the Court’s language of “commerce,” but in the labor movement’s language of human rights.³³² Among them were leaders of the International Ladies’ Garment Workers Union (ILG) and the International Typographical Union (ITU), who were soon to join with Hillman and Lewis to form the Committee for Industrial Organization.³³³ Julius Hochman of the ILG and Woodruff Randolph of the ITU charged that *Schechter* was only the latest in a long line of cases that “set property rights above human rights.”³³⁴ The ILG newspaper predicted that the Supreme Court would declare the Wagner Act unconstitutional and that the amendment process would take “long and tardy years.”³³⁵ In the meantime, labor would “leave nothing undone in the defense of the Wagner Laws” and “no quarter will be asked or given.”³³⁶ Randolph concurred.³³⁷

331. New York Mobilizes For Industrial Action, *supra* note 325, at 4; see also Klein, *supra* note 325, at 1. Klein quotes Hillman as stating:

The Supreme Court said . . . that the Constitution prohibited Congress from interfering with slavery. Those in power rejoiced. Everything was settled, they thought. But in less than four years civil war was declared in the country. And we say to the Wall Street crowd, to the speculators, the sweatshoppers, the big corporations, it is too soon to rejoice, too soon for champagne parties!

Id.

332. In addition to sources cited *infra* notes 334–337, see, e.g., Demand for Constitutional Reform Grows, *J. Elec. Workers & Operators*, Aug. 1935, at 320, 356–58 (contending that the Supreme Court usurped the power to outlaw social legislation and comparing the current situation with that confronted by Abraham Lincoln after *Dred Scott*); Labor and the Constitution, *supra* note 244, at 4 (charging that, for working men and women, *Schechter* meant that “so far as protection for decent wages, hours and work conditions is concerned, they are alien to the Constitution, but that employers who wish to establish low labor standards in order to increase profits are thoroughly safeguarded by that document in the prosecution of their nefarious policy”).

333. Later, it would become significant that the ITU did not formally affiliate as an organization. But in the crucial early stages, before the newly created industrial unions in rubber, automobile, and steel grew large enough to give the CIO credibility, the ITU was regarded as being in the CIO camp. ITU President Charles Howard served as CIO Secretary-Treasurer, and ITU Secretary-Treasurer Woodruff Randolph was a vigorous proponent of the CIO. Walter Galenson, *The CIO Challenge to the AFL* 21–22, 27–28 (1960).

334. Union Always Held Correct NRA Policy, *Justice*, June 15, 1935, at 6 (quoting Hochman). Hochman was General Manager of the huge New York Joint Board of the ILG. See also Woodruff Randolph, *Our Reliance On Unionism Protects Against Disappointments*, 86 *Typographical J.* 515, 516 (1935) (observing that *Schechter* is another case that stretches property rights at the expense of human rights, and concluding that it “seems that a very different conception of the purpose of law must be instilled in the minds of legislators and jurists”).

335. Editorial, *The Fight Begins On The Wagner Law*, *Justice*, Aug. 1, 1935, at 16.

336. *Id.*

337. See Randolph, *supra* note 334, at 515 (observing that the Supreme Court, “in adopting an attitude of strict construction as regards interstate commerce seems to

Among the unions that would found the CIO, John L. Lewis's United Mine Workers union was conspicuous in its early failure to question the authority of the Supreme Court. After *Schechter*, the *United Mine Workers Journal* lamented the demise of the NIRA, but showed the same deference to legal authority as Green's statement for the AFL Executive Council: "[T]he Supreme Court says it was unconstitutional, and that settles it."³³⁸ Lewis had one more round to play before moving to the level of constitutional politics. By threatening a nationwide coal strike, he induced Congress to pass the Guffey Coal Stabilization bill, an NIRA replacement for the coal industry.³³⁹ Not until the Court invalidated the Guffey Act³⁴⁰ did the UMW openly challenge its supremacy in the field of constitutional interpretation. Then, the *United Mine Workers Journal* accused the Court of reducing labor to the status of an "outcast" with "no rights" and concluded: "We do not believe in that kind of law, and we do not believe the American people believe in it, no matter what the Supreme Court may say."³⁴¹ John L. Lewis charged that the United States was saddled with a "corporate dictatorship" that had "made a mockery of our vaunted American democracy by reducing the industrial workers to a condition of involuntary economic servitude, by denying to them the fundamental rights of self-organization and collective bargaining."³⁴²

This new constitutional independence was not as precise in substance, as elaborate in justification, or as closely tied to the text of the Constitution as the older tradition of labor's freedom constitution. Its sweeping narrative of emancipation was capacious enough to smooth over underlying divisions that would later become salient. Nevertheless, for the first time since the Gompers era, mainstream labor leaders of national stature not only repudiated official constitutional law but also evinced a willingness to implement their own oppositional vision. It re-

preclude any national [regulation] . . . until the constitution is amended," and calling on organized labor "to make strenuous efforts within each state to punish those employers who have used every possible means of coercion in preventing their employees from organizing into effective labor unions").

338. Supreme Court Declares NRA Unconstitutional, *United Mine Workers J.*, June 1, 1935, at 4.

339. Lewis set midnight June 16 as the deadline for a nationwide strike of 450,000 soft coal miners. Maier B. Fox, *United We Stand: The United Mine Workers of America 1890-1990*, at 322 (1990). Since the coal operators would not agree to extend NRA conditions, the Guffey bill represented the only hope of heading off a strike. Louis Stark, *Coal Parley Fails In Final Stage*, *N.Y. Times*, May 29, 1935, at 12; Louis Stark, *Soft Coal*, *supra* note 277, at 1. Roosevelt named it his top legislative priority. Turner Catledge, *Guffey Coal Bill Is Made 'No. 1 Must,' N.Y. Times*, June 17, 1935, at 1. The strike was postponed to give Congress time to act. Fox, *supra*, at 319, 322.

340. *Carter v. Carter Coal Co.*, 298 U.S. 238, 308-17 (1936) (discussed *infra* notes 347-353 and accompanying text).

341. Editorial, *Labor's Only Hope*, *United Mine Workers J.*, June 15, 1936, at 8; see Editorial, *The Guffey Decision*, *United Mine Workers J.*, June 1, 1936, at 8.

342. John L. Lewis, *The Future of Labor* (Sept. 7, 1936), in *Vital Speeches of the Day* 22, 23 (1936).

mained to be seen whether these verbal declarations would be backed up by action.

IV. FREEDOM IN THE STREETS AND FACTORIES; COMMERCE IN THE COURTS, 1936–1937

While the AFL vacillated and the CIO braced for self-enforcement, the constitutional conflict escalated in three arenas: the courts, the general election campaign, and the factories. In the courts, lawyers argued about protecting commerce and preventing strikes. But on the hustings and in the factories, the talk was of freedom and democracy first, and industrial peace only as a by-product. Thwarted in one of these three arenas, the proponents of change demonstrated the breadth of their support and the strength of their commitment in the other two.

A. *An Icy Certainty*

The Supreme Court's decision in *Schechter* had left the constitutionality of the Wagner Act in grave doubt.³⁴³ The newly created National Labor Relations Board had difficulty recruiting staff because of the widespread belief that the law it had been created to enforce would soon be declared unconstitutional.³⁴⁴ The hearty lawyers who did accept employment with the NLRB anxiously awaited the Supreme Court's ruling on the constitutionality of the Guffey Act. Because the Guffey Act's labor provisions were modeled closely on the Wagner Act, the case was widely seen as a predictor of the Wagner Act's constitutional fate.³⁴⁵ Government lawyers relied on the same constitutional argument that they were making in the Wagner Act cases: namely, that Congress could protect labor's right to organize as a way to prevent the disruptive effects of labor disputes on interstate commerce.³⁴⁶

On May 18, 1936, the Supreme Court issued its decision in *Carter v. Carter Coal Co.* striking down the Guffey Act.³⁴⁷ Six justices agreed that the labor provisions exceeded the reach of Congress's power to regulate interstate commerce, and none dissented on this point.³⁴⁸ Justice

343. See *supra* notes 253–255 and accompanying text.

344. 1 Gross, *supra* note 26, at 149.

345. On the parallel between the labor provisions of the Guffey and Wagner Acts, see *id.* at 197; Irons, *supra* note 26, at 248.

346. See 1 Gross, *supra* note 26, at 197.

347. 298 U.S. 238, 308–17 (1936).

348. The case involved a challenge to the price fixing provisions. In an opinion by Justice Sutherland, five justices held that those provisions could not be severed from the labor provisions and went on to hold that the labor provisions—and thus the entire statute—could not be sustained under the commerce power. *Id.* at 312, 307. Chief Justice Hughes agreed with the majority that the labor provisions were invalid, but would have held that they were severable from the price fixing provisions. *Id.* at 318–19, 321 (Hughes, C.J., concurring). The three liberals would have upheld the restrictions on coal prices, but they refrained from challenging the majority's invalidation of the labor rights provisions: “No opinion is expressed either directly or by implication as to those aspects of the case.”

Sutherland's opinion for the Court held that coal mining was local activity, labor relations were local relations, and strikes had only an indirect effect on interstate commerce. The reasoning appeared wholly applicable to the Wagner Act:

Much stress is put upon the evils which come from the struggle between employers and employees over the matter of wages, working conditions, the right of collective bargaining, etc., and the resulting strikes, curtailment and irregularity of production and effect on prices; and it is insisted that interstate commerce is *greatly* affected thereby. But . . . the conclusive answer is that the evils are all local evils over which the federal government has no legislative control. The relation of employer and employee is a local relation. . . . The employees are not engaged in or about commerce, but exclusively in producing a commodity. And the controversies and evils, which it is the object of the act to regulate and minimize, are local controversies and evils affecting local work undertaken to accomplish that local result. Such effect as they may have upon commerce, however extensive it may be, is secondary and indirect.³⁴⁹

Confronted with this language, even strong proponents of the Wagner Act now acknowledged with "icy certainty" that the federal government was powerless to regulate labor conditions.³⁵⁰ John L. Lewis was convinced that "the majority of the Supreme Court do not intend to change their viewpoint, and that they intend to nullify any act of Congress which infringes upon or intrudes on the territory they have defined in their several opinions."³⁵¹ The decision had a "devastating" effect on the government lawyers charged with defending the Wagner Act in court, and the NLRB cut back sharply on its efforts to enforce the law against manufacturing concerns.³⁵² After *Carter*, six out of six federal circuit courts of appeal to address the issue held unanimously that the Act was unconstitutional as applied to manufacturing concerns, and six out of six district courts did likewise.³⁵³ In all, twenty-four federal judges agreed

Id. at 324 (Cardozo, J., dissenting). As Matthew Woll observed, Chief Justice Hughes's position was worse for labor than that of the conservative majority; it would have left workers without protection while permitting the operators to combine to inflate prices. Matthew Woll, *Labor's Re-awakening*, Am. Photo-Engraver, June 1936, at 471, 473.

349. *Carter*, 298 U.S. at 308–09.

350. Lawrence Lucey, *Labor and Law*, Commonweal, July 3, 1936, at 257; see also Thomas Reed Powell, *The Next Four Years: The Constitution*, New Republic, Jan. 13, 1937, at 317, 319 (observing that it was "almost certain that the Wagner Labor Act will be denied application to manufacturing concerns by six votes and possibly by nine"); David A. Pepper, *Against Legalism: Rebutting an Anachronistic Account of 1937*, 82 Marq. L. Rev. 63, 118 n.342 (1998) (providing additional citations).

351. John L. Lewis Tells Why Labor Supports FDR, *Advance*, July 1936, at 6.

352. Irons, *supra* note 26, at 252; see 1 Gross, *supra* note 26, at 200.

353. *Myers v. Bethlehem Shipbldg. Co.*, 88 F.2d 154, 155–56 (1st Cir. 1937), *aff'g* 15 F. Supp. 915 (D. Mass. 1936) (citing *Carter* for the proposition that Congress lacked the power to regulate the labor relations of manufacturing concerns); *Foster Bros. Mfg. Co. v. NLRB*, 85 F.2d 984, 988–89 (4th Cir. 1936) (same); *Fruehauf Trailer Co. v. NLRB*, 85 F.2d

without dissent that the Wagner Act could not be applied to manufacturing companies. In light of this unanimity, it would be pure fantasy to imagine that *Carter* hinged on the poor draftsmanship of the Guffey Act as opposed to the relatively precise crafting of the Wagner Act.

While the Commerce Clause theory foundered in the courts, the central themes of labor's freedom constitution overflowed the mines and mills to take center stage in the national political debate. First in the electoral arena and then in industry, the Court's opponents mobilized and prepared for confrontation.

B. *A National Referendum on Industrial Democracy*

In the summer and fall of 1936, Franklin Roosevelt campaigned for reelection against his Republican challenger, Governor Alf Landon of Kansas. Openly abandoning any pretense of forging an all-class alliance, he launched a crusade against the "economic royalists" who sought to impose a "new industrial dictatorship."³⁵⁴ Fearing that an overt attack on the Supreme Court would distract attention from the substance of the New Deal program, Roosevelt kept a near total silence on the Court and its decisions.³⁵⁵ But Landon and his supporters made certain that both would be central issues in the campaign.³⁵⁶ The Republican platform charged that the Roosevelt administration had "usurped" the powers of Congress, "flouted" the authority of the Supreme Court, "violated" the liberties of American citizens, substituted regulated monopoly for individ-

391, 392 (6th Cir. 1936) (per curiam) (same); *Pratt v. Stout*, 85 F.2d 172, 180 (8th Cir. 1936), aff'g 12 F. Supp. 864 (W.D. Mo. 1935) (same); *NLRB v. Friedman-Harry Marks Clothing Co.*, 85 F.2d 1, 2 (2d Cir. 1936) (per curiam) (same); *NLRB v. Jones & Laughlin Steel Corp.*, 83 F.2d 998, 999 (5th Cir. 1936), rev'd, 301 U.S. 1 (per curiam) (same); *Pepper*, supra note 350, at 125 n.378 (citing these six cases, and observing that "[m]ost of these opinions were short and decisive; apparently, with *Carter* and *Schechter* in the immediate background, these were cases not worthy of long-winded explanations"); *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 77 n.a (1937) (McReynolds, J., dissenting) (citing six district court decisions holding that the Wagner Act could not constitutionally apply to manufacturing concerns and observing that "[n]o decision or judicial opinion to the contrary has been cited, and we find none"); *Oberman & Co. v. Pratt*, 16 F. Supp. 887, 888 (W.D. Mo. 1936), rev'd, 89 F.2d 786 (8th Cir. 1937) (refusing to recognize congressional regulation of a manufacturer's labor relations); *Bethlehem Shipbldg. Corp. v. Meyers*, 15 F. Supp. 915, 920 (D. Mass. 1936), aff'd, 88 F.2d 154 (1st Cir. 1937); *Eagle-Picher Lead Co. v. Madden*, 15 F. Supp. 407, 408 (N.D. Okla. 1936); *El Paso Elec. Co. v. Elliott*, 15 F. Supp. 81, 90 (W.D. Tex. 1936), rev'd, 88 F.2d 505 (5th Cir. 1937); *Bendix Prods. Corp. v. Beman*, 14 F. Supp. 58, 65 (N.D. Ill. 1936), rev'd, 89 F.2d 661 (7th Cir. 1937); *Stout v. Pratt*, 12 F. Supp. 864, 871 (W.D. Mo. 1935), aff'd, 85 F.2d 172 (8th Cir. 1936).

354. Alan Dawley, *Struggles For Justice: Social Responsibility and the Liberal State* 387 (1991); Foner, supra note 22, at 204; Leuchtenburg, *FDR*, supra note 288, at 183-84.

355. See Leuchtenburg, *When the People Spoke*, supra note 271, at 2084-87.

356. See 2 Ackerman, *Transformations*, supra note 34, at 306-09; William E. Forbath, *Caste, Class, and Equal Citizenship*, in *Moral Problems in American Life* 167, 187 (Karen Haltunen & Lewis Perry eds., 1998); Leuchtenburg, *When the People Spoke*, supra note 271, at 2091-92.

ual initiative, infringed the rights reserved to the states, and “insisted on the passage of laws contrary to the Constitution.”³⁵⁷ As the campaign progressed, Landon and his supporters intensified their emphasis on these themes, closing in a crescendo of speeches attacking the New Deal administration for regimenting the individual and treating the Supreme Court with contempt.³⁵⁸ While Roosevelt’s silence tended to blur the issue, his supporters tried to keep it in focus. Quietly encouraged by Roosevelt, farm groups and labor unions bitterly attacked the Court, while journalists and Congressmen debated means of curbing it.³⁵⁹ In Aliquippa, Pennsylvania, home of the Jones & Laughlin Steel Corporation, CIO supporters marched behind a banner lumping Landon with the conservative bloc of four justices: “Vote for F.D. Roosevelt; Defeat ‘The Four Horsemen’; Landon-‘Liberty League’-Hearst-‘Steeltrust.’”³⁶⁰

On November 3, 1936, Roosevelt won reelection by the largest popular landslide in history.³⁶¹ Although the President could claim a general mandate to proceed with the New Deal program, his failure to propose a solution to the constitutional obstacle left the import of the election on that issue open to interpretation.³⁶² Workers and unions, who had pro-

357. The Republican Platform of 1936 (June 11, 1936), reprinted in 2 Documents of American History 353, 354 (Henry Steele Commager ed., 9th ed. 1973).

358. See Landon Assails Roosevelt As Seeking ‘Planned Society’; 50,000 at Los Angeles Rally, N.Y. Times, Oct. 21, 1936, at 1; Landon’s Speech Warning on New Deal Laws, N.Y. Times, Oct. 22, 1936, at 21; Text of the Address Made by Gov. Landon at Los Angeles, N.Y. Times, Oct. 21, 1936, at 22; The Text of Governor Landon’s Attack in St. Louis on the New Deal, N.Y. Times, Nov. 1, 1936, at 45. Landon’s Democratic supporters were even more vehement than the candidate himself. See, e.g., Text of Alfred E. Smith’s Address at Albany, His Final Campaign Attack on the President, N.Y. Times, Nov. 1, 1936, at 43 (charging Roosevelt with attacking the Constitution, linking him to Communism, and lecturing at length about separation of powers and individual rights).

359. See Leuchtenburg, *When the People Spoke*, supra note 271, at 2097–2103. Roosevelt’s public papers contain only two references to the Supreme Court during the period of the campaign. In a greeting to Labor’s Non-Partisan League, he observed that it “is a notable fact that it was not the wage earners who cheered” when the Court struck down economic legislation. *A Greeting to Labor’s Non-Partisan League (Aug. 3, 1936)*, in 5 Roosevelt Public Papers, supra note 268, at 280, 280–81. He went on to predict that this “return to reactionary practices” would be short-lived because, “[h]aving tasted the benefits of liberation, men and women do not for long forego those benefits.” *Id.* at 281. The second reference to the Court came when Roosevelt complained about the cost of the Court’s invalidation of the Agricultural Adjustment Act. See Presidential Statement on the Summation of the 1937 Budget (Sept. 2, 1936), in 5 Roosevelt Public Papers, supra note 268, at 316, 316–17.

360. Robert R.R. Brooks, *As Steel Goes 120 (1940)* (photograph depicting workers marching behind banner); cf. *Advance*, Nov. 1936, at 9 (“The Supreme Court Has Supremely Failed to Understand the Spirit of Our Time, the Needs of Our People, the Social Responsibilities Implied in the Democratic Nature of our Government. Vote Against the Horse-and-Buggy Mind. VOTE FOR ROOSEVELT.”).

361. Leuchtenburg, *When the People Spoke*, supra note 271, at 2108.

362. See *id.* at 2113–14.

vided a large share both of his war chest and his votes,³⁶³ promptly celebrated Roosevelt's victory as a popular mandate for a new regime of industrial freedom. "The people of our nation have just participated in a national referendum," announced John L. Lewis. "By an overwhelming majority they voted for industrial democracy, and elected its champion, Franklin Delano Roosevelt."³⁶⁴

Was the 1936 election in fact a "national referendum" on "industrial democracy"? Roosevelt's campaign oratory certainly gave farmers, small business owners, and industrial workers reason to think so. Beginning with his acceptance speech, Roosevelt not only placed the concept of freedom at the center of his campaign,³⁶⁵ but he also wove it into a constitutional narrative that—like labor's freedom constitution—told a story of struggle first for political and then for economic freedom. "In 1776 we sought freedom," he declared, "from the tyranny of a political autocracy—from the eighteenth century royalists who held special privileges from the crown."³⁶⁶ Since then, however, the rise of machine production, the invention of new forms of transportation and communication, and the spread of mass production and mass distribution had transformed society and spawned a new threat to freedom that could not have been anticipated by the Founding Fathers:

For out of this modern civilization economic royalists carved new dynasties. New kingdoms were built upon concentration of control over material things. Through new uses of corporations, banks and securities, new machinery of industry and agriculture, of labor and capital—all undreamed of by the fathers—the whole structure of modern life was impressed into

363. See, e.g., Bernstein, *Turbulent Years*, supra note 216, at 449–50 ("Roosevelt had made organized labor a decisive element in his New Deal political coalition.").

364. John L. Lewis, "Employer Trouble," and not "Labor Trouble" Is Facing the American Nation Today (NBC radio address, Dec. 31, 1936), reprinted in *United Mine Workers J.*, Jan. 15, 1937, at 3, 4 [hereinafter *Lewis Radio Address*]; see also Editorial, 1937, *Detroit Lab. News*, Jan. 1, 1937, at 4 (proclaiming that the 1936 election "was as significant [sic] as Lincoln's election before the Civil War—only [this time] Labor revolted against a vicious industrialist system").

365. As Bruce Ackerman has explained, the Supreme Court's constitutional invalidation of the first New Deal in cases like *Schechter* led Roosevelt to reconsider his first administration's emphasis on centralized planning. With the constitutionality of the Wagner Act and the rest of the second New Deal hanging in the balance, the President took a new tack. Shifting his emphasis from planning to liberty, Roosevelt set forth a new concept of freedom that would be implemented "not . . . in opposition to the state, but . . . through the democratic control of the marketplace." 2 Ackerman, *Transformations*, supra note 34, at 310.

366. Franklin D. Roosevelt, *Acceptance of the Renomination for the Presidency* (June 27, 1936), in 5 *Roosevelt Public Papers*, supra note 268, at 230, 231 [hereinafter *Acceptance Speech*].

this royal service. . . . And as a result the average man once more confronts the problem that faced the Minute Man.³⁶⁷

Rejecting the classical liberal view that government-mandated economic security and equality come at the cost of liberty, Roosevelt drew instead on traditions of civic republicanism long embraced by the labor movement.³⁶⁸ He called for economic rights not as a paternalistic substitute for individual initiative, but as a precondition of freedom. “Necessitous men are not free men,” he observed. “Liberty requires opportunity to make a living—a living decent according to the standard of the time, a living which gives man not only enough to live by, but something to live for.”³⁶⁹ Freedom could be threatened not only by government, but also by private economic power; hence, a degree of economic equality was essential to effective liberty:

For too many of us the political equality we once had won was meaningless in the face of economic inequality. A small group had concentrated into their own hands an almost complete control over other people’s property, other people’s money, other people’s labor—other people’s lives. For too many of us life was no longer free; liberty no longer real; men could no longer follow the pursuit of happiness.³⁷⁰

To Roosevelt, the constitutional role of government was best described not in the language of interstate commerce, but in that of slavery and freedom, tyranny and democracy:

[T]he royalists of the economic order have conceded that political freedom was the business of the Government, but they have maintained that economic slavery was nobody’s business. They granted that the government could protect the citizen in his right to vote, but they denied that the Government could do anything to protect the citizen in his right to work and his right to live. . . . In their blindness they forget what the Flag and the Constitution stand for. Now, as always, they stand for democracy, not tyranny; for freedom, not subjection; and against a dictatorship by mob rule and the overprivileged alike.³⁷¹

367. *Id.* at 232. In particular: “The hours men and women worked, the wages they received, the conditions of their labor—these had passed beyond the control of the people, and were imposed by this new industrial dictatorship.” *Id.* at 233.

368. On the role of civic republicanism in labor’s constitutional ideology, see Tomlins, *supra* note 29, at 57–59; William E. Forbath, *The Ambiguities of Free Labor: Labor and the Law in the Gilded Age*, 1985 *Wis. L. Rev.* 767, 800–12.

369. Acceptance Speech, *supra* note 366, at 233. Roosevelt had also emphasized this theme in his 1932 campaign. See Forbath, *Constitutional Welfare Rights*, *supra* note 203, at 1832.

370. Acceptance Speech, *supra* note 366, at 233; see also Campaign Address at Chicago, Ill. (Oct. 14, 1936), *in* 5 *Roosevelt Public Papers*, *supra* note 268, at 480, 486 (recalling “the warning of Thomas Jefferson that ‘widespread poverty and concentrated wealth cannot long endure side by side in a democracy’”).

371. Acceptance Speech, *supra* note 366, at 233–34.

Outside of the acceptance speech and a few others, Roosevelt spent fewer words calling for economic freedom than detailing the economic gains made by his first administration. But references to freedom and democracy were scattered throughout. A typical stump speech might go on for paragraphs about economic recovery, and then remind the audience that the “underlying issue in every political crisis in our history has been between those who, laying emphasis on human rights, have sought to exercise the power of the Government for the many and those, on the other hand, who have sought to exercise the power of Government for the few.”³⁷² Not surprisingly, Roosevelt most consistently raised this theme in speeches to audiences in industrial cities like Chicago, but he also took it to Wilmington, Delaware, the home of the DuPonts, where he quoted Abraham Lincoln on the definition of liberty and opined that in 1936, as in Lincoln’s time, “the people . . . have been doing something to define liberty.”³⁷³ In short, Roosevelt’s campaign speeches gave workers, farmers, and small business owners reason to believe that he was embarked on a struggle to achieve a new kind of economic freedom: One that emphasized not formal rights to be free from government interference, but effective rights to pursue happiness; one that depicted the guarantee of minimum conditions of economic security by government not as the paternalistic antithesis of freedom, but its precondition; and one that adjudged a degree of economic equality not as an infringement of individual liberty, but as a bulwark against plutocracy.

C. *The Famed Boomerang*

After the election, Roosevelt’s supporters turned their attention to the problem of the Supreme Court.³⁷⁴ Unionists indicated a pragmatic willingness to support a wide variety of formal mechanisms including court packing and formal constitutional amendments.³⁷⁵ While defer-

372. Campaign Address at Cleveland, Ohio (Oct. 16, 1936), *in* 5 Roosevelt Public Papers, *supra* note 268, at 502, 506; see also Campaign Address at Detroit, Mich. (Oct. 15, 1936), *in* 5 Roosevelt Public Papers, *supra* note 268, at 495, 499 (charging that the Republicans “put dollars above human rights”); Campaign Address at Chicago, Ill. (Oct. 14, 1936), *in* 5 Roosevelt Public Papers, *supra* note 268, at 480, 486 (decrying the “concentration of wealth and power” that “has been built upon other people’s money, other people’s business, other people’s labor”).

373. Campaign Address at Wilmington, Del. (Oct. 29, 1936), *in* 5 Roosevelt Public Papers, *supra* note 268, at 557, 558.

374. See, e.g., Editorial, *Roosevelt Is No Dictator*, *Nation*, Nov. 14, 1936, at 565 (observing that the Supreme Court stood in the way of the election mandate to continue the New Deal legislative program and speculating on whether congressional action or constitutional amendment would be used to overcome its resistance); Maury Maverick, *The Next Four Years*, *New Republic*, Nov. 25, 1936, at 99 (observing that in the election “the people gave a tip to the Supreme Court,” but not specifying how that “tip” would be translated into action).

375. See *Washington Notes*, *New Republic*, Nov. 25, 1936, at 110, 110–11 (reporting that union leaders were considering court packing, constitutional amendments, and adding clauses to legislation purporting to exempt the legislation from judicial review).

ring to Roosevelt on this question, workers and unions quickly took the lead in demonstrating their commitment to change, both verbally and in action. “[T]he American people should turn their chief public attention to smashing the autocracy of the courts,” editorialized the *Butcher Workman*. “It will take some smashing; but the absolute need of it is too clear to be denied.”³⁷⁶ John L. Lewis called on Congress to “brush aside the negative autocracy of the federal judiciary, exemplified by a Supreme Court which exalts property above human values.”³⁷⁷ To the *New Republic*, the fact that labor leaders were now “prepared for a showdown” with the Supreme Court was “the most significant development since the election.”³⁷⁸

While union leaders awaited Roosevelt’s marching orders, local union activists interpreted his victory as an authorization to step up their level of militancy.³⁷⁹ In December 1936, workers staged eighteen sit-down strikes idling more than 39,000 workers—doubling the previous monthly record for sit-downs and tripling that for workers idled.³⁸⁰ More remarkable than the surge in numbers, however, was the change in the quality of sit-downs. Before the election, nearly all of the sit-downs had been brief in duration and limited in scope to a department or two.³⁸¹ Even when the protest was factory-wide, workers did not contemplate prolonged occupations.³⁸² But beginning in mid-November, workers at three large auto parts manufacturers staged week-long factory occupations.³⁸³ These strikes were settled for concessions short of exclusive rec-

376. Editorial, *The Autocracy of the Courts*, *Butcher Workman*, Jan. 1, 1937, at 4.

377. Lewis Radio Address, *supra* note 364, at 4.

378. Washington Notes, *supra* note 375, at 110.

379. In addition to the timing of the sharp escalation in the frequency and duration of sit-down strikes following the election, see *infra* notes 380–387 and accompanying text, there is some anecdotal evidence on the influence of Roosevelt’s victory. Asked why the General Motors sit-downs occurred when they did, one striker responded simply “Roosevelt, Murphy.” Joseph North, *The Social Magic of the Sit-Down*, *New Masses*, May 4, 1937, at 13, 14. Frank Murphy, a strong New Deal supporter, had been elected Governor of Michigan on the day of Roosevelt’s landslide.

380. National Labor Relations Act and Proposed Amendments: Hearings Before the S. Comm. on Educ. and Labor, 70th Cong. 597 (1939) (reporting monthly statistics on sit-down strikes for 1936–1938, and showing previous highs of nine strikes involving 11,522 workers in September, and two strikes involving 12,146 in June 1936).

381. See generally Daniel Nelson, *American Rubber Workers & Organized Labor, 1900–1941*, at 204–14 (1988) (describing sit-downs in the rubber industry); Louis Adamic, *Sitdown: II*, *Nation*, Dec. 12, 1936, at 702, 703 (describing “quick strikes” in the auto industry). These brief actions harked back to the IWW’s tradition of “folded-arm” strikes. Louis Adamic, *Sitdown*, *Nation*, Dec. 5, 1936, at 652, 654.

382. For example, in the Akron General Tire sit-down of 1934, one of the earliest in the rubber industry, local leaders “had not counted on a prolonged siege and were unsure of their next step if [management] closed the factory.” Nelson, *supra* note 381, at 139. Because of this uncertainty, they were relieved to accept management’s invitation to meet with the workers outside the plant building. *Id.*

383. Sidney Fine, *Sit-Down: The General Motors Strike of 1936–1937*, at 128–32 (1969).

ognition for the union, but by demonstrating the power of collective action, they triggered explosive gains in membership.³⁸⁴

Next came General Motors, the first of the Big Three auto manufacturers to be hit with a full-blown factory occupation. At the end of December 1936, workers at the Cleveland Fisher Body plant and the Flint, Michigan Fisher Body No. 2 plant sat down over local issues. UAW President Homer Martin and First Vice President Wyndham Mortimer seized the opportunity to bring on a national confrontation with GM, and by the evening of December 30, the union had shut down the body manufacturing operations for about three-fourths of the company's production.³⁸⁵ The GM strike has been called "the 'most critical labor conflict' of the 1930's and perhaps in all of American history."³⁸⁶ Before its successful conclusion six weeks later, nearly all of GM's 200,000 workers would be idled,³⁸⁷ and the sit-down tactic—hitherto a curiosity—would become a national crisis in the public mind.

With employers defying the Wagner Act and courts blocking enforcement with constitutional rulings, the sit-down strike became a form of constitutional politics. "[Employers] tell us that the Wagner bill is unconstitutional and we don't come under the interstate commerce," complained one local union leader, "so what else can we as workers do but apply the system that is most effective?"³⁸⁸ When Governor Harold Hoffman of New Jersey threatened to order troops against sit-down strikers, UAW President Homer Martin asked "where Hoffman was during the past four years when the Supreme Court of the United States was on a sit-down strike against labor legislation!"³⁸⁹ The *Detroit Labor News* proclaimed that "'Now we are engaged in a great Civil War . . . ' to see just who constitutes this nation, the men who work and pay most of the taxes, or the rich who pool all the money and try to dodge the taxes."³⁹⁰ Unfortunately, the bosses had failed to absorb the message of the 1936 election—"the warning that we gave when we marked our ballots—so we are

384. *Id.* at 128–29, 131–32.

385. *Id.* at 142–44; Galenson, *supra* note 333, at 136.

386. Fine, *supra* note 383, at 338 (quoting Galenson, *supra* note 333, at 134); see also Dubofsky & Van Tine, *supra* note 315, at 254 (opining that the GM strike made 1937 "a decisive year for United States labor history"); Edward Levinson, *Labor on the March* 149 (2d ed. 1938) (describing the GM strike of 1937 as "the most significant industrial battle since labor's defeat at Homestead" in 1892).

387. Galenson, *supra* note 333, at 136.

388. Letters to the Editor, *Approve the Sitdown*, Letter from A.P. Lee, President, Chemical Workers Union 19019, *Akron Business Journal*, Feb. 18, 1936, at 4; see also *Typos Reject Henry's Open Shop Policy; Stage Sit-Down*, *Detroit Lab. News*, Mar. 19, 1937, at 1 (reporting that workers occupied printing plant after the owner refused to recognize the union on the ground that the Wagner Act was unconstitutional).

389. Mr. Martin's Speech at Newark, N.J. (Feb. 26, 1937), in Homer Martin Collection, Wayne State Univ. Archives of Labor and Urban Affairs, Detroit, Mich., box 3, at 4, 9 [hereinafter *Homer Martin Collection*].

390. Editorial, *We Got 'Em on the Run*, *Detroit Lab. News*, Mar. 12, 1937, at 8 (quoting the Gettysburg Address).

telling them again,” this time “with strikes.”³⁹¹ One worker-poet portrayed the sit-down as a boomerang launched by the Supreme Court:

Who furnished the clues for the sit-downers’ strike?
 Who started the siege that the pikers don’t like?
 The public should know how this all came about,
 So credit (or blame) can be justly dealt out. . . .

The sit-downers’ tactics were first put to test,
 By nine long-haired judges who needed a rest;
 They locked themselves in and threw out every bill
 Designed to keep folks off the road o’er the hill.

The workers they wronged even shouldered the cost,
 Through taxes and wage cuts, but since they’ve been ‘crossed,’
 The scheme used by them, coming back with a bang,
 Sweeps all in its path, like the famed boomerang.³⁹²

In keeping with the unionists’ view that the Wagner Act was a human rights statute, activists portrayed the sit-down strikes as the latest chapter in a series of historic struggles for freedom. Echoing Andrew Furuseth, UAW President Homer Martin told strikers they were fighting for the third member of “the Holy Trinity of Democracy”—consisting of religious, political, and industrial freedom—and against the anti-union “policy of industrial servitude.”³⁹³ Strikers were fighting not only for an “American standard of living,” but also for “the breaking off of the shackles of Labor Slavery!”³⁹⁴ Workers sat down “as wage slaves” but

391. *Id.*

392. Harry P. Vannatter, *The Boomerang*, *Detroit Lab. News*, Mar. 5, 1937, at 8; see also Martin, in *Jersey, Defends Sit-Downs*, *N.Y. Times*, Feb. 27, 1937, at 1 (quoting Martin complaining that “the United States Supreme Court was on a sit-down strike against the rights of the workers”).

393. Homer Martin, *Speech Delivered over Radio Station WRJN, Racine, Wis.* (Dec. 11, 1936), in *Homer Martin Collection*, supra note 389, box 3, at 2; see also Mr. Martin’s *Speech at Newark, N.J.*, supra note 389, box 3, at 5–6; Mr. Martin’s *Speech at Pontiac, Mich.* (May 1, 1937), in *Homer Martin Collection*, supra note 389, box 3, at 1. In his speech in Pontiac, Martin stated:

When I come into a place like Pontiac and find a great, thriving union with all of its various phases of activity, 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.

Id.

394. Steve Babson, *Building the Union: Skilled Workers and Anglo-Gaelic Immigrants in the Rise of the UAW 184* (1991) (quoting union member Fred Roe); see also DeSoto Local of UAW, *Dodge Main News*, Mar. 25, 1937, at 1 (“We are . . . only continuing our fight our forefathers began for social and economic freedom against the British Royalist [sic] of 1776. The only difference is that *today we are fighting against* [sic] *the Royal Economists of 1937* who are ruthless and brutal in destruction of life, liberty and pursuit of happiness.”); *Sit-Down Illegal*, *Detroit News*, Jan. 28, 1937, at 22 (letter from “Industrial Democrat” to editor stating that “[t]hese sit-down strikers are the crusaders in the battle to obtain a magna charta for the industrial slave” and that “[o]ther men before them have fought and died in this cause, but the battle goes on”); Norman Thomas, *Socialist Call*, Feb. 13, 1937, at 2 (Socialist Party leader Norman Thomas stating that the issue involved in the sit-down strikes was “the end of industrial slavery through collective

“went back to their jobs as men.”³⁹⁵ Sit-down strikes were “as illegal as the Boston Tea-Party or the Underground Railroad.”³⁹⁶ A worker-poet wrote:

We are veteran Union boys
We uphold the Constitution,
. . . .
We fought in 1861
To free this world from slavery
. . . .
We fought in 1916 then
For Wall Streets [sic] many millions
. . . .
And now we have to fight again
But this time for our Freedom
From being General Motors Slaves³⁹⁷

By early February, the GM strike was dominating national headlines. The sit-down was becoming a major national political issue—just at the moment that President Roosevelt at last broke his long silence on the Supreme Court. On February 5, he announced the first major legislative initiative of his second term: a bill that would authorize him to appoint one additional Supreme Court justice for each sitting justice aged seventy or more who had served at least ten years.³⁹⁸ Since six of the sitting justices met these criteria, the bill would give the President more than enough appointments to swing the Court into the New Deal camp. In a fireside chat a month later, he offered his own reading of the Constitution. The scope of national powers should, he argued, be considered in light of the Preamble’s declaration that the purpose of the Constitution was to “form a more perfect Union and promote the general welfare.”³⁹⁹ As for a specific enumerated power, he mentioned the Commerce

bargaining and the winning for the workers as against absentee owners of a large share of the income and leisure that great machinery makes possible in the automobile industry”); Letter from Michael Toth, Union Representative, to Frances Perkins, Secretary of Labor (Jan. 11, 1937), *in* Records of the Federal Mediation and Reconciliation Service (RG280), entry 14, National Archives, box 419 (“Abraham Lincoln freed the colored people from slavery, and now we are slaves. So please help the union to win. Because if we don’t win now we’ll be lost forever. Please help to keep the white people from slavery. Today in the factory’s [sic] one man does the work of five men.”).

395. Gains Marked Since Sit-Downs, *United Auto Worker*, Jan. 22, 1937, at 5 (referring to Kelsey-Hayes strikers); see also *Flash!! Sit-Downers Stand Up!*, Punch Press, No. 16, Feb. 12, 1937, at 1 (“WAVING the battle-worn and honored banner of the UAWA, sitdowners marked the birth of industrial freedom and the death of industrial slavery as they marched proudly out of the first of three occupied plants, Fisher No. 1 yesterday.”).

396. *Voice of Labor* (official organ of Local 206, UAW, Grand Rapids, Mich.), Mar. 27, 1937, at 4 (reprinting letter from reader, F.Y., to Grand Rapids Press).

397. Cecil Hubel, *Union Veterans Song* (Feb. 11, 1937), *in* Kraus Papers, Wayne State Univ. Archives of Labor and Urban Affairs, Detroit, Mich., box 9, folder 31.

398. See James T. Patterson, *Congressional Conservatism and the New Deal: The Growth of the Conservative Coalition in Congress 1933–1939*, at 86 (1967).

399. Franklin Roosevelt, *Fireside Chat on the ‘Court Packing’ Bill*, Mar. 9, 1937, *in* Franklin D. Roosevelt: Selected Speeches, Messages, Press Conferences, and Letters 171, 174 (Basil Rauch ed., 1957) [hereinafter *Selected Speeches*].

Clause, but gave far more emphasis to Congress's power "to levy taxes . . . and provide for the common defense and general welfare of the United States."⁴⁰⁰ The Framers inserted this clause, he suggested, in order to provide Congress with the power necessary to deal with "problems then undreamed of [that] would become national problems."⁴⁰¹ Indicating his disdain for the Court's constitutional views, Roosevelt's invocation of the General Welfare Clause came less than a year after the Supreme Court had held that the Constitution granted no power "to legislate substantively for the general welfare."⁴⁰²

D. *The Working People Will Never Really Understand*

While workers staged sit-down strikes and FDR promoted his court-packing plan, the Supreme Court deliberated on the constitutionality of the Wagner Act. From February 9 to 11, the day the General Motors strike settled, the Court heard oral argument in the six Wagner Act cases. None of the eighteen attorneys scheduled to appear represented either workers or unions. Instead, as provided by the Act, each case pitted government lawyers representing the NLRB against corporate lawyers representing an employer that had refused to comply with a Board order.⁴⁰³ AFL attorney Charlton Ogburn protested the exclusion of labor's attorneys from the defense of "this Magna Charta of labor," but to no avail.⁴⁰⁴ Morris Ernst—noted civil libertarian and attorney for a union involved in one of the cases—pleaded that the "working people of the country will never really understand why they are denied an opportunity to be heard in the Supreme Court."⁴⁰⁵ But the government refused to relinquish any of its time.

It is easy to imagine why. Ernst had hoped to convince the Court that the question centered not on government oppression of employers but on employer oppression of employees⁴⁰⁶—a theme consistent with both Roosevelt's vision of freedom and labor's freedom constitution. But the NLRB's attorneys had a very different agenda. While Roosevelt envisioned government protecting workers and farmers against economic roy-

400. *Id.*

401. *Id.*

402. *Carter v. Carter Coal Co.*, 298 U.S. 238, 292 (1936) (striking down the Guffey Coal Act and rejecting the constitutional rationale, advanced in the Act's preamble, that it was intended to promote the general welfare).

403. See Arguments in the cases arising under The Railway Labor Act and The National Labor Relations Act before the Supreme Court of the United States, S. Doc. No. 75-52, at 1, 29, 53, 75, 135, 157 (1st Sess. 1937) [hereinafter Oral Arguments].

404. Ogburn had unsuccessfully proposed that unions be made parties to unfair labor practice proceedings. Letter from Charlton Ogburn, General Counsel, AFL, to Senator Robert F. Wagner (Feb. 19, 1935), in Keyserling Papers, *supra* note 236, box 1. The Federation later placed this provision at the top of its list of desired amendments to the Act. See Tomlins, *supra* note 29, at 139.

405. Irons, *supra* note 26, at 283.

406. *Id.*

alists, his administration's lawyers sought to bootstrap the Wagner Act on what they saw as Congress's unquestioned power to "control" and "punish" strikes under the Commerce Clause.⁴⁰⁷ To establish the existence of this power, they cited approvingly an array of the Court's decisions that—to workers and unions—exemplified the corporate bias and moral bankruptcy of the judiciary; among them were *In re Debs*,⁴⁰⁸ *Loewe v. Lawlor*,⁴⁰⁹ *Duplex Printing Press Co. v. Deering*,⁴¹⁰ and *Bedford Cut Stone Co. v. Journeyman Stone Cutters' Ass'n of North America*.⁴¹¹ Even Judge John J. Parker's notorious opinion in the *Red Jacket Coal* injunction case,⁴¹² which cost him his nomination to the Supreme Court, was cited extensively for its "considered statements" on the issues.⁴¹³

Judging from the Board's arguments, the Wagner Act might have been entitled the "Wagner Anti-Strike Law." In order to drive home their point that strikes interfered with interstate commerce, government lawyers deployed the language of fear with the same enthusiasm exhibited by judges in injunction decisions.⁴¹⁴ Strikes "disrupted" markets, "crippled" business, and caused "disorganization, obstruction, or even paralysis of interstate commerce."⁴¹⁵ Strikes to defend the right to organize or to win union recognition, which tended to be "notoriously bitter and prolonged because of the fundamental issues at stake,"⁴¹⁶ were especially pernicious. Federal military actions against strikers—viewed by workers and unions as

407. See Oral Arguments, *supra* note 403, at 124 (reporting Reed's argument that Congress has "control power" over strikes); *id.* at 171 (reporting Madden's argument "that the power of Congress clearly includes the power to prevent a strike—rather, to punish a strike—called with the intent of affecting commerce"). Senator Wagner's purchasing power theory completely dropped out of the lawyers' case.

408. 158 U.S. 564, 599 (1895) (upholding omnibus injunction against railroad strikers); see Oral Arguments, *supra* note 403, at 122–23.

409. 208 U.S. 274, 292–93 (1908) (holding that the Sherman Act prohibited workers from engaging in consumer boycotts); see Oral Arguments, *supra* note 403, at 122, 126; Brief for National Labor Relations Board at 13–14, 27–28, 39–42, *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937) (No. 419).

410. 254 U.S. 443, 478 (1921) (holding that Sherman Act prohibited workers from engaging in secondary labor boycotts despite Clayton Act amendments); see Oral Arguments, *supra* note 403, at 122, 126; Petitioner's Brief at 13–14, 27–28, 40–42, 78, *Jones & Laughlin* (No. 419).

411. 274 U.S. 37, 55 (1927) (upholding injunction against peaceful withholding of labor unaccompanied by picketing); see Oral Arguments, *supra* note 403, at 122, 126; Petitioner's Brief at 13–14, 27–28, 40–44, 78, *Jones & Laughlin* (No. 419).

412. *Int'l Org., United Mine Workers of Am. v. Red Jacket Consol. Coal & Coke Co.*, 18 F.2d 839, 844 (4th Cir. 1927) (upholding injunction against labor organizing on the theory that it was intended to induce breaching of yellow dog contracts).

413. Petitioner's Brief at 44–48, 70–71, *Jones & Laughlin* (No. 419). On the role of the *Red Jacket* decision in the debates over Parker's nomination, see O'Brien, *supra* note 72, at 160–62.

414. On the use of metaphors of intimidation in antilabor court decisions, see Gary Minda, *The Law and Metaphor of Boycott*, 41 *Buff. L. Rev.* 807, 867–82 (1993) (discussing role of metaphors of violence and coercion in shaping understanding of boycotts).

415. Petitioner's Brief at 21–24, *Jones & Laughlin* (No. 419).

416. *Id.* at 43–44.

partisan strikebreaking—were depicted as “efforts to bring about industrial peace.”⁴¹⁷ So zealous were the Board’s attorneys in their defense of government power to control strikes that they breezily dismissed any notion that workers might retain some rights of collective action. In response to a question from Justice McReynolds about the extent of Congress’s control over workers, Warren Madden repudiated labor’s freedom constitution in no uncertain terms:

I should say that if they said to a man there, “You cannot quit your job,” you would be in difficulties there with the thirteenth amendment to the Constitution. I should say that if you said to a group of men there, “You cannot enter into an agreement to quit your jobs, although individually you may quit them,” there you would face no problem of constitutional power at all, but merely a problem of the wisdom of its exercise.⁴¹⁸

Labor organizations filed four amicus briefs, only one of which claimed a congressional power to enforce labor rights. Bowing to the logic of the Commerce Clause strategy, the AFL’s two briefs largely echoed the Board’s, differing mainly in their diminished enthusiasm for the strike control theory.⁴¹⁹ In line with its white collar constituency, the Newspaper Guild told a story of progressive reform advancing from violent and costly strikes, depicted as “primitive recourse to arms,” and “trial by battle,” to the “the civilized appeal to reason” provided by legal regulation.⁴²⁰ Instead of citing labor defeats like *In re Debs*, *Duplex*, or *Loewe*, the Guild brief addressed itself “to certain impelling aspects of our economic life” as revealed in academic studies and congressional reports, most written by progressive social scientists.⁴²¹ Labor’s view of the Wagner Act as a charter of freedom made it to the Court only in a single, curious little brief submitted by Arthur Markel, Deputy President of the Commercial Telegraphers’ Union.⁴²² Granting only lip service to the Commerce

417. *Id.* at 28 (citing, inter alia, the use of federal troops in the Pullman strike of 1894 and the steel strike of 1919 as examples of federal government “efforts to bring about industrial peace”).

418. Oral Arguments, *supra* note 403, at 115.

419. The AFL’s brief cited and relied upon *In re Debs*, *Loewe*, *Duplex*, and *Bedford Cut Stone*. Brief of Amicus Curiae American Federation of Labor at 13–18, *NLRB v. Fruehauf Trailer Co.*, 301 U.S. 49 (1937) (nos. 420 & 421); see also Brief of Amici Curiae American Federation of Labor and Amalgamated Association of Street, Electric Railway & Motor Coach Employees of America at 7, *Wash., Va., & Md. Coach Co. v. NLRB*, 301 U.S. 142 (1937) (No. 469) (taking similar approach to AFL brief in *Fruehauf*).

420. Brief of Amicus Curiae American Newspaper Guild at 12, *Associated Press v. NLRB*, 301 U.S. 138 (1937) (No. 365) (quoting Henry Winthrop Ballantine, *Evolution of Legal Remedies as a Substitute for Violence and Strikes*, 69 *Annals Am. Acad. Pol. & Soc. Sci.* 140, 147 (1917)).

421. *Id.* at iii–iv, 3. The Constitution was portrayed not as a guarantee of rights, but as an effort to avoid the necessity for suppressing economic unrest, as in Shays rebellion, by imposing “a strong central control of commerce.” *Id.* at 11.

422. Brief of Amicus Curiae Arthur Markel, Deputy President of Commercial Telegraphers’ Union, On Behalf of Commercial Telegraphers’ Union, *Associated Press* (No. 365).

Clause theory, it contended that Congress was empowered to enforce the workers' constitutional right to bargain collectively under the Due Process Clause of the Fifth Amendment.⁴²³ The Act "gives the employees nothing to which they are not entitled under the Constitution," claimed Markel. "It would be vain to say that the employees must be protected in their rights to collective bargaining but that Congress cannot make this protection effective."⁴²⁴

From a technical legal perspective, it might seem unremarkable that lawyers defended the Wagner Act not as a labor rights statute, but as an exercise of Congress's power to suppress strikes. After all, decisions like *Loewe, Duplex*, and *Bedford Cut Stone*—though widely discredited—had yet to be overruled.⁴²⁵ On the other hand, if we consider the New Deal not as a time of technical legal adjustment, but as a period of sweeping constitutional change, then the decision to adhere to these already suspect remnants of the *Lochner* Era appears as a highly significant value choice. Once Roosevelt's court packing plan preempted efforts to enact a constitutional amendment,⁴²⁶ legal professionals were assured of control over the process of generating the authoritative legal texts—namely, Supreme Court decisions—that would specify the content of the New Deal constitutional revolution. In sharp contrast to the reconstruction period, when Congress consciously strove to insulate its newly created rights protections against erosion by ordinary politics,⁴²⁷ the New Deal lawyers renounced any attempt to constitutionalize their era's rights protections. Instead, they carried forward the longstanding progressive project of en-

423. *Id.* at 3. The right to bargain collectively was described as "a necessary incident to the constitutional right of the employee to join an organization of his own choice without interference." *Id.* at 5.

424. *Id.* at 4.

425. The last of them would eventually be overruled in an opinion by Justice Frankfurter that—in an unusually strained attempt to provide a legal justification for a political outcome—claimed that the Norris-LaGuardia Anti-Injunction Act terminated the application of antitrust laws to collective action by labor not only in suits seeking injunctions, but also in suits seeking damages or penalties. *United States v. Hutcheson*, 312 U.S. 219, 233–37 (1941).

426. Numerous constitutional amendments were presented and discussed in Congress. See 2 Ackerman, *Transformations*, *supra* note 34, at 337–40. Some created new congressional powers; others defined rights; still others qualified the Supreme Court's power of judicial review. *Id.* None of the proposals that were taken seriously in Congress attempted to propound a list of economic rights, as Roosevelt would later propose in his famous "Economic Bill of Rights" of January 1944. See Message on the State of the Union (Jan. 11, 1944), *in* *Selected Speeches*, *supra* note 399, at 339, 347–48. However, the proposals were so many and varied, and the debate so embryonic, that it is simply impossible to predict the outcome had the Court continued its resistance long enough to force an amendment. One thing is certain: None of the serious proposals would have classified protections of labor freedom as regulations of "commerce" or hinged Congress's power to protect labor rights on the notion that strikes constituted a disruptive evil that Congress must be empowered to regulate.

427. See Daniel A. Farber & Suzanna Sherry, *A History of the American Constitution* 305–17 (1990).

larging the government's power to expand—or shrink—economic freedom in response to the demands of policymaking based on “facts” collected and analyzed by progressive social scientists.⁴²⁸ Thus, the lawyers in the Wagner Act cases did their best to confront the Supreme Court with an either/or choice between expanded government power and the old vision of individual economic freedom; the alternative concept of economic freedom held by the labor movement and trumpeted by Roosevelt was missing from the menu.

E. *An Echo from the Supreme Court*

By late March, reporters were jamming the courtroom each Monday morning, hoping to hear the long awaited rulings. In the meantime, the Court upheld Washington's minimum wage law and a set of amendments to the Railway Labor Act.⁴²⁹ These liberal victories signaled a clear shift in the Court's due process jurisprudence to eliminate the “no-man's land”—decried by Republicans and Democrats alike⁴³⁰—where neither state nor federal government could engage in economic regulation. The Railway Labor Act case also confirmed what many already expected: The Wagner Act would probably be upheld as applied to companies engaged in the business of interstate transportation or communication.⁴³¹ But neither decision said anything about the far more controversial question of whether Congress could constitutionally regulate labor relations in the manufacturing industries—seedbed of the sit-down strikes.⁴³²

428. On the progressives' downgrading of fundamental rights in favor of “policymaking” based on the social scientific analysis of “facts,” see Pope, *Labor's Constitution*, supra note 29, at 986–87.

429. *West Coast Hotel Co. v. Parrish*, 300 U.S. 379, 399–400 (1937) (upholding Washington's minimum wage law against due process challenge); *Virginian Ry. Co. v. Sys. Fed'n No. 40*, 300 U.S. 515, 553–59 (1937) (upholding amendments to the Railway Labor Act against Commerce Clause and due process challenges).

430. The year before, when the Court had invalidated New York's minimum wage law for women in *Morehead v. New York ex rel. Tipaldo*, 298 U.S. 587, 618 (1936), Republicans had joined Democrats in criticizing the creation of a “no-man's land” where neither the federal nor the state government could regulate. See Leuchtenburg, *When the People Spoke*, supra note 271, at 2101–03 (describing the storm of criticism against *Tipaldo* by Republicans, Democrats, and even the anti-New Deal press). Indicating its apparent contempt for *Tipaldo*, the Republican Party had adopted a plank in its 1936 platform calling for the enactment of state laws establishing minimum wages for women and opining: “We believe that this can be done within the Constitution as it now stands.” The Republican Platform of 1936, in 2 Documents of American History, supra note 357, at 355.

431. In the two pending cases of this type, one involving a national wire service and the other a bus line, the government's position had prevailed below on the strength of earlier precedent upholding the Railway Labor Act. *NLRB v. Associated Press*, 85 F.2d 56, 59–60 (2d Cir. 1936); *NLRB v. Wash., Va. & Md. Coach Co.*, 85 F.2d 990, 993–94 (4th Cir. 1936). Consequently, government lawyers were confident that the Supreme Court would follow suit. See Irons, supra note 26, at 254–55.

432. Thus, the *New Republic* opined that *West Coast Hotel* was an advance, but only “a slight one.” *The Court Faces About*, *New Republic*, Apr. 7, 1937, at 252. Because the *Virginia Railway* case involved workers employed in maintaining and operating

This question came before the Court in three cases, spanning a range of fact patterns. The arguments and opinions in these cases provide compelling evidence on the role of the sit-down strikes in their outcomes. The most promising of the cases from the Board's point of view was against the Jones & Laughlin Steel Corporation, which conducted integrated mining, manufacturing, and distributive operations crossing numerous state lines, and which accounted for a substantial proportion of the total output of its industry.⁴³³ The second case, against the Fruehauf Trailer Company, involved a much smaller enterprise that did not control its sources of supplies. The company did, however, conduct marketing operations in numerous states, led its industry in sales, and received most of its supplies and shipped most of its output in interstate commerce.⁴³⁴ Finally, the Friedman-Harry Marks case involved a medium-sized clothing manufacturer as to which, in the words of NLRB attorney Philip Levy, "the volume of interstate inflow and outflow was small in relation to the total in the industry and insignificant in relation to the whole industrial complex of industry and commerce in the United States," but which received most of its supplies and shipped most of its products in interstate commerce.⁴³⁵

In each of these cases, unanimous panels of the courts of appeal had ruled against the Board on the sweeping ground that the commerce power did not reach labor relations in manufacturing enterprises.⁴³⁶ In each case, the reasoning consisted simply of a terse citation to *Carter v. Carter Coal Co.*, the Supreme Court's recent decision striking down the labor provisions of the Bituminous Coal Conservation Act.⁴³⁷ Most officials of the Roosevelt administration, including the Board lawyers themselves, expected defeat in all three cases; they hoped only that the three

instrumentalities of interstate commerce, its Commerce Clause holding had little bearing on the question of whether the Wagner Act could be constitutionally applied to manufacturing enterprises. Accordingly, the *Los Angeles Times* observed that "the court did not so appear to widen the interstate commerce clause as to let the Wagner Act through." Hansen, *supra* note 255, at 117 n.306 (quoting *No Man's Land Wiped Out*, *L.A. Times*, Mar. 30, 1937, at B4). Most observers accordingly viewed the Wagner Act cases as the true test of the Court's incipient liberalism and expressed "wonder and utter surprise" when the Court eventually did uphold the Act. See *id.* at 132 & n.359 (quoting *The Court Rules on Itself*, 25 *Commonweal* 707, 708 (1937) and citing other sources).

433. *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 25-28 (1937). The corporation employed 22,000 people. *Id.* at 85 (McReynolds, J., dissenting).

434. *NLRB v. Fruehauf Trailer Co.*, 301 U.S. 49, 53-54; *id.* at 86 (McReynolds, J., dissenting) (observing that Fruehauf employed 900 workers).

435. Irons, *supra* note 26, at 263; *NLRB v. Friedman-Harry Marks Clothing Co.*, 301 U.S. 58, 86 (McReynolds, J., dissenting) (observing that Friedman-Harry Marks employed 800 of 150,000 workers employed in the industry).

436. *NLRB v. Jones & Laughlin Steel Corp.*, 83 F.2d 998, 998 (5th Cir. 1936) (*per curiam*); *Fruehauf Trailer Co. v. NLRB*, 85 F.2d 391, 392 (6th Cir. 1936) (*per curiam*); *NLRB v. Friedman-Harry Marks Clothing Co.*, 85 F.2d 1, 2 (2d Cir. 1936) (*per curiam*).

437. 298 U.S. 238, 316-17 (1936); *supra* text accompanying notes 347-353.

liberal justices would dissent in at least one, thereby undermining its legitimacy.⁴³⁸

Accordingly, the Board's lawyers did their best to provide the Court with a set of options that would allow each justice to extend the commerce power exactly as far as he desired, and no further.⁴³⁹ As to *Jones & Laughlin*, they argued that because the steel company owned its source of supplies, processed them into finished products, and marketed the products, its manufacturing operations constituted a "throat" in the stream of interstate commerce.⁴⁴⁰ In the alternative, they contended that the corporation's operations involved so much interstate communication and shipment that any workers conducting a strike could be presumed to *intend* to disrupt interstate commerce, thus giving Congress power to prohibit the strike under the old case of *Coronado Coal*.⁴⁴¹ With that established, the Court would need only to extend *Coronado Coal* to permit Congress to legislate *preventively* as well as *prohibitively*.⁴⁴²

The Board's lawyers conceded that these arguments were less persuasive as applied to *Fruehauf* and *Friedman-Harry Marks*.⁴⁴³ Recognizing that these cases called not merely for incremental changes but for a break

438. See Blair Moody, Strike Problem Adds a New Aspect to Debate on Court Proposal, *Detroit News*, Mar. 28, 1937, at 7 ("If the three liberals stand with Mr. Roosevelt against an adverse majority on the Government's right to regulate labor, the White House is certain to redouble its pressure on the Senate to shuffle the court."); William E. Leuchtenburg, *The Supreme Court Reborn* 216–17 (1995) [hereinafter Leuchtenburg, *Supreme Court*] (reporting evidence that commentators and government officials continued to expect a government defeat in the manufacturing cases even after the Court's decision in *West Coast Hotel*). Even the government lawyers assigned to the case—with one exception—expected defeat. See 1 Gross, *supra* note 26, at 193–94; Irons, *supra* note 26, at 252–53, 280. After oral arguments, Labor Department Solicitor Wyzanski predicted that the Board would lose all of the manufacturing cases, although he nurtured hopes that the Court might be divided in *Jones & Laughlin*. *Id.* at 286.

439. See 1 Gross, *supra* note 26, at 194. Gross recounts:

[B]ecause the board's prospects were grim, it was decided to present the test cases to the Supreme Court in a manner which "gave the Court the opportunity to draw the line of constitutionality in various places; against all the cases; against the manufacturing cases but not against the interstate communications and transportation cases; against the small clothing manufacturing case but not against the large steel and automotive cases."

Id.

440. Oral Arguments, *supra* note 403, at 172–73. The concept of a "throat" of commerce originated in *Stafford v. Wallace*, 258 U.S. 495, 516 (1922) (holding that Congress could regulate the operations of a stockyard because it constituted a "throat" in the stream of commerce).

441. Oral Arguments, *supra* note 403, at 175–80 (citing *United Mine Workers v. Coronado Coal Co.*, 259 U.S. 344 (1922)).

442. Brief for National Labor Relations Board at 26–33, *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937) (No. 419).

443. Oral Arguments, *supra* note 403, at 172 ("It may be that a well defined stream of commerce exists only in those cases where a single enterprise controls the source of supplies, does the processing, and controls the outlets, so that the processing is a 'throat' with respect to that enterprise's flow of commerce."); *id.* at 171 (quoting Wyzanski's observation that "on the 'intent' argument, [*Jones & Laughlin*] is the strongest case").

with precedent, they developed two novel theories. First, they argued that the Fruehauf Trailer Company's weight in its industry was so great that a strike there would have the "necessary effect" of interfering with commerce.⁴⁴⁴ Unfortunately, the "necessary effect" theory, as distinct from the "intent" theory, had little or no support in the case law.⁴⁴⁵ Nevertheless, the Board hopefully suggested that the principle might be extended to a case "where the effect of a dispute would be to interrupt a substantial volume of goods, although not a substantial amount of the commerce in a commodity"—a principle that would cover even Friedman-Harry Marks.⁴⁴⁶ In the alternative, the government lawyers offered another new theory, one that would eventually transform Commerce Clause doctrine. They suggested that the effects of many small events—here, recurring labor disputes—could be aggregated to determine whether the impact on interstate commerce was sufficient to support regulation.⁴⁴⁷ With these theories to choose from, the justices could extend the commerce power to some but not all of the manufacturing industry, drawing the line between Jones & Laughlin and Fruehauf, or between Fruehauf and Friedman-Harry Marks.

On April 12, 1937, the Supreme Court announced its decisions. As expected, the justices upheld the Wagner Act as applied to enterprises engaged in the interstate transportation and communications businesses, and, on the Commerce Clause issue, they did so unanimously.⁴⁴⁸ Shocking most observers, the Court also upheld the Wagner Act as applied to the Jones & Laughlin Steel Corporation, this time by a five to four margin

444. *Id.* at 172 (quoting Wyzanski's argument that *Fruehauf* was "a case very much in point" for the "necessary effect" theory).

445. On this point, the government lawyers indulged in a shell game. They contended that the intent and "necessary effect" theories presented two different grounds for decision. However, their only claim of support for the notion that a "necessary effect" on commerce would suffice to place an activity within the commerce power came primarily from the following language in the *Coronado Coal* case:

Coal mining is not interstate commerce and obstruction of coal mining, though it may prevent coal from going into interstate commerce, is not a restraint of that commerce unless the obstruction to mining is intended to restrain commerce in it or has necessarily such a direct, material and substantial effect to restrain it that the intent reasonably must be inferred.

Id. at 113 (quoting *Coronado Coal*, 259 U.S. at 410–11). This quotation obviously characterizes the necessary effect as evidence of intent, precisely the argument that the Board made as to *Jones & Laughlin*. Yet the Board claimed to derive from the quotation the idea that the "necessary effect" theory was distinct from any notion of intent. *Id.* (listing three theories including the "intent" and "necessary effect" theories).

446. *Id.* at 173 (quoting Wyzanski's suggestion that this theory would apply to "all the cases at bar").

447. Irons, *supra* note 26, at 286 (describing the NLRB's contention that the fact that "labor disputes recur frequently" could justify regulation of smaller businesses like Friedman-Harry Marks).

448. *Wash., Va. & Md. Coach Co. v. NLRB*, 301 U.S. 142, 147 (1937); *Associated Press v. NLRB*, 301 U.S. 103, 138 (1937).

with Hughes and Roberts defecting from the *Carter Coal* majority.⁴⁴⁹ In a lengthy opinion, Chief Justice Hughes declined to limit himself to the stream of commerce or intent theories.⁴⁵⁰ Instead, he concluded that in view of the steel corporation's "far-flung activities" and the "plainest facts of our national life," including the organization of industries "on a national scale," Congress must have the power to regulate labor relations "when it is necessary to protect interstate commerce from the paralyzing consequences of industrial war."⁴⁵¹ Hughes distinguished *Schechter* and *Carter Coal* on the ground that the impact of a strike at the giant steel corporation "would be immediate and might be catastrophic."⁴⁵²

Given the "icy certainty" that the Court would rule against the government even in *Jones & Laughlin*, it is not surprising that *Fruehauf* and *Friedman-Harry Marks* received little attention at the time. But from our point of view today, it is these two decisions that appear truly remarkable.⁴⁵³ The Court, by the same five to four margin, upheld the Act's application to both the trailer company and the clothing factory, completing an astonishing sweep for the Board and the Act.⁴⁵⁴ Still more remarkably, the Court ignored the lawyers' abundant menu of incremental options, choosing instead to refrain from providing any rationale at all other than terse citations to *Jones & Laughlin*.⁴⁵⁵

What accounts for these decisions? Labor militants credited the workers' creation and self-enforcement of the right to organize. "In finally putting its O.K. on the right to organize," bragged the CIO's publicity director, veteran labor radical Len De Caux, "the Supreme Court has simply ratified a right which American workers have long possessed theoretically, but which it took the C.I.O. to establish in actuality."⁴⁵⁶ Only after the movement had already instituted the right in practice did there come "an echo from the Supreme Court."⁴⁵⁷ On this point, even some

449. *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937).

450. *Id.* at 36 ("We do not find it necessary to determine whether these features of defendant's business dispose of the asserted analogy to the 'stream of commerce' cases."); *id.* at 40–41 (describing the intent theory, but declining to rely on intent in explaining why labor relations at Jones & Laughlin Steel Corporation had such a "close and intimate" relation to interstate commerce as to fall under the commerce power).

451. *Id.* at 41.

452. *Id.*

453. As Bruce Ackerman has observed, *Friedman-Harry Marks*, far more so than *Jones & Laughlin*, involved a clear "rupture" with past doctrine. 2 Ackerman, *Transformations*, *supra* note 34, at 363. This insight put me on the track of the argument developed below.

454. *NLRB v. Fruehauf Trailer Co.*, 301 U.S. 49, 57 (1937); *NLRB v. Friedman-Harry Marks Clothing Co.*, 301 U.S. 58, 75 (1937).

455. *Fruehauf*, 301 U.S. at 57; *Friedman-Harry Marks*, 301 U.S. at 75.

456. De Caux, *supra* note 57, at 1.

457. *Id.*; see also Roy E. Burt (National Secretary of Socialist Party), *Labor Puts Teeth Into Wagner Act*, *Socialist Call*, Apr. 17, 1937, at 1 ("[W]e think it clear that the militancy of the labor movement in the past few months was undoubtedly a major reason for the action of the Supreme Court."); Editorial, *The Wagner Act*, *United Automobile Worker*, May 8, 1937, at 4 (commenting, regarding the Wagner Act decisions, that "anyone not walled up in a tomb" could tell from the strike wave that automobile workers would no

government lawyers appeared to agree. “Yes,” went a quip circulating among the Labor Department lawyers, “after some labor pains the Court gave birth to quintuplets.”⁴⁵⁸

This story certainly meets the threshold test of narrative plausibility. Going back to 1933, when section 7(a) of the National Industrial Recovery Act placed the workers’ right to organize on the national political agenda, there had been a series of dramatic confrontations as workers exercised their newly proclaimed right in the face of determined employer resistance.⁴⁵⁹ Now, emboldened by Roosevelt’s landslide victory, worker activists had developed and refined the sit-down strike in defiance of trespass laws and judicial injunctions.⁴⁶⁰ At the time of the Court’s deliberations on the Wagner Act cases, local and state governments had failed—despite several violent eviction attempts—to end the threat.⁴⁶¹ Meanwhile, the President refused even to comment upon the tactic while he pushed his court packing plan.⁴⁶² Congress produced much noise but no legislation, as some senators and representatives demanded a favorable Supreme Court decision on the Wagner Act as a prerequisite to action against the sit-down.⁴⁶³ In this situation, another *Schechter* would,

longer tolerate employer denials of collective bargaining); Editorial, *The Wagner Labor Act, United Rubber Worker*, Apr. 1937, at 6 (reporting the Wagner Act decisions and noting that “[l]abor demanded its rights in no uncertain terms”). These after the fact summations echoed the views expressed by the sit-down strikers themselves during the struggle. See *supra* text accompanying notes 393–397.

458. Letter from Charles Wyzanski, Labor Solicitor, to Felix Frankfurter, Professor, Harvard Law School (Apr. 14, 1937), in *John Knox Papers*, Harvard Law Library, Manuscript Division, Cambridge, Mass., box 1 [hereinafter *Knox Papers*] (reporting quip by one Lubin).

459. See *supra* note 216 and accompanying text.

460. See *supra* text accompanying notes 379–383.

461. According to John Knox, a law clerk to Justice McReynolds, the Supreme Court held its conference on the Wagner Act cases “not long after” the oral argument, and the justices divided five to four in favor of upholding the Act. John Knox, *Some Comments on Chief Justice Charles Evans Hughes* (unpublished manuscript, 1980), in *Knox Papers*, *supra* note 458, box 1, at 8–9. As of that time, police had suffered several embarrassing defeats attempting to evict sit-downers, and they had yet to conduct a single successful eviction against a plant held by substantial numbers of workers. See James G. Pope, *A Legal History of the Sit-Down Strike, 1936–1939*, at 93–94 (Oct. 2001) (unpublished manuscript, on file with the *Columbia Law Review*) [hereinafter *Pope, Legal History*] (recounting the successful defense of occupied factories in Detroit, Flint, and Waukegan, and noting the first successful eviction on February 26). Although police did conduct a number of successful evictions in late February and March, sit-downers retained the upper hand in Detroit—center of the movement and focus of national attention—until after the Wagner Act decisions were announced. See *id.* at 94–100 (reporting the complete cessation of police evictions in Detroit after 50,000 people attended a mass rally protesting evictions and supporting the right to strike).

462. See Patterson, *supra* note 398, at 135–36; Walter L. Eisenberg, *Government Policy in Sitdown Strikes 88–89 (1959)* (unpublished Ph.D. dissertation, Columbia University) (on file with the Columbia University Library).

463. The Senate managed only a nonbinding “joint” resolution that condemned both the sit-down strike and employer violations of the Wagner Act, while the House failed to act at all. See Patterson, *supra* note 398, at 137, 168. Senator Hook explained:

at one stroke, vindicate employer defiance of the Wagner Act, leave CIO leaders with no choice but to continue supporting factory occupations, and corroborate Roosevelt's claim that the Court must be packed in order to remove it as an obstacle to essential legislation. On the other hand, a decision going the other way would undercut employer resistance, call the bluff of the many unionists who had so loudly blamed the sit-down strikes on the Court's constitutional resistance,⁴⁶⁴ and leave Congress with no excuse for failing to address the problem. "Industrial peace—or war," summed up Alpheus T. Mason, "seemed to hang in the balance."⁴⁶⁵

The unionists' story has two main competitors. The first holds that neither the sit-down strikes nor the court packing plan had any significant effect on the Court; instead, the decisions resulted from an incremental process of autonomous judicial reasoning.⁴⁶⁶ Whatever validity

Both labor and agriculture are national problems and nothing could illustrate this any stronger than the present sit-down strikes, that are in their nature nothing more or less than outright anarchy. I pray to our Lord that the President's proposal to reorganize the courts will be enacted with all haste so that we here in Washington will be able to pass legislation to cope with this serious condition which threatens the very foundation of our democratic government.

81 Cong. Rec. 2379 (1937) (Statement of Senator Hook). For additional quotations and a more detailed account of congressional debates, see Pope, *Legal History*, supra note 461, at 104–11.

464. See, e.g., *Loyal Men Claim 'Property Rights'*, N.Y. Times, Mar. 24, 1937, at 18 (quoting Emil Rieve, President of the American Federation of Hosiery Workers, whose members were enthusiastic practitioners of the sit-down tactic, as stating that "[i]f the Wagner act could be put in operation and upheld by the Supreme Court, I think it would solve 80 per cent, if not more, of the present-day labor trouble").

465. Alpheus Thomas Mason, *Harlan Fiske Stone: Pillar of the Law* 457 (1956); cf. Charles A. Leonard, *A Search for a Judicial Philosophy: Mr. Justice Roberts and the Constitutional Revolution of 1937*, at 108–09 (1971) (speculating that the strikes, which he characterizes as "increasingly violent," might have acted as a "stimulant" in the Court's shift).

466. This law-centered story began with the majority justices themselves. Their opinions, of course, admitted of no outside pressures, instead depicting the decisions as flowing from precedent and the application of legal principles to the facts of the case. See supra notes 448–455 and accompanying text. This rendering has been backed by a line of legalist scholars who contend that the transformative opinions of 1937 merely capped a series of rulings that began several years earlier. See *Tex. & New Orleans R.R. Co. v. Bhd. of Ry. & S.S. Clerks*, 281 U.S. 548, 571 (1930) (upholding, against Commerce Clause and due process challenges, provisions of the Railway Labor Act prohibiting railroad employers from establishing company unions); *Nebbia v. New York*, 291 U.S. 502, 539 (1934) (upholding, against Fourteenth Amendment due process challenge, New York statute regulating the milk industry); *Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398, 447–48 (1934) (upholding, against Contracts Clause and Fourteenth Amendment due process challenge, Minnesota statute providing debtors with relief against bank foreclosures); Barry Cushman, *Rethinking the New Deal Court: The Structure of a Constitutional Revolution* 42–43 (1998); Richard D. Friedman, *Switching Time and Other Thought Experiments: The Hughes Court and Constitutional Transformation*, 142 U. Pa. L. Rev. 1891, 1892–93 (1994); Larry Kramer, *What's a Constitution for Anyway? Of History and Theory*, Bruce Ackerman and the New Deal, 46 Case W. Res. L. Rev. 885, 918 (1996).

this explanation might have as applied to *Jones & Laughlin* (not much, judging from the literature),⁴⁶⁷ it cannot account for *Fruehauf* or *Friedman-Harry Marks*. By focusing solely on *Jones & Laughlin*, the legalists fail to notice that these “other” Wagner Act opinions contain what amounts to a confession that legal doctrine and reasoning had nothing to do with the results. To hear this confession, it is not necessary to give *Jones & Laughlin* a clever new reading; all that is required is to read that decision alongside those in *Fruehauf* and *Friedman-Harry Marks*. The Court began its analysis in *Jones & Laughlin* by declaring that if the NLRA had to be upheld or overturned “in its entirety,” it “would necessarily fall” because of the inherent limits of the Commerce Clause and because of the Tenth Amendment.⁴⁶⁸ Fortunately for the Act, however, it empowered the NLRB to sanction only unfair labor practices “affecting commerce,” thereby allowing for case-by-case determinations of constitutionality.⁴⁶⁹ Thus, Commerce Clause challenges to the Act would hinge on

467. To accept this story, we would have to believe that it was just a coincidence that the election landslide, the court packing plan, and the sit-down strikes intervened between *Carter Coal*, the last of the Court’s restrictive Commerce Clause decisions, and the Wagner Act decisions, which signaled the beginning of the new era of virtually unbounded Commerce Clause deference. It took only one decisive term for Chief Justice Hughes and Justice Roberts to shift their overall voting patterns from allegiance with the right bloc (composed of the four horsemen—Van Devanter, McReynolds, Sutherland and Butler) to allegiance with the left bloc (composed of the three liberals—Brandeis, Stone, and Cardozo). Schubert’s statistical analysis of voting patterns (which, for some reason, has been ignored in the debate among legal scholars) shows that, in the five years prior to the decisive term, Hughes and Roberts were the swing votes on a Court with two highly cohesive blocs: one of four conservatives and one of three liberals. See Glendon A. Schubert, *Constitutional Politics 160–61* (1960) (reporting that during those five years, “Hughes and Roberts showed consistently high-to-moderate over-all interagreement with all four members of the right bloc, while [their] interagreement . . . with left bloc members was low”). During the decisive term, however, both Hughes and Roberts moved sharply to the left, forming a new and dominant five member, left center bloc. *Id.* at 168.

Moreover, at the start of the decisive term, the decisions touted in the law centered story as early harbingers of change—including *Texas & New Orleans Railroad*, *Blaisdell*, and *Nebbia*—appeared more dead than alive. The Court had been ignoring or narrowing them for years as it struck down economic regulations on due process and Commerce Clause grounds. See Pepper, *supra* note 350, at 104–27. Then, suddenly in the winter and spring of 1937, they were revived and put to work justifying the Court’s transformative opinions. *Id.* at 127–36. Not surprisingly, then, the judges, lawyers, and commentators who lived through the period, and who read the relevant opinions in their historical context, overwhelmingly perceived the Court to be drastically changing its position in response to outside pressure. Leuchtenburg, *Supreme Court*, *supra* note 438, at 142–43, 217–18; Hansen, *supra* note 255, at 130–33; Pepper, *supra* note 350, at 137–39; see also 2 Ackerman, *Transformations*, *supra* note 34, at 345–82 (presenting a detailed and compelling account of the transformation as a response to popular mobilization); Laura Kalman, *Law, Politics, and the New Deal(s)*, 108 *Yale L.J.* 2165, 2170–85 (1999) (providing a balanced review of the debate between Ackerman and the legalists).

468. *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 29–30 (1937).

469. *Id.* at 30–31 (citing NLRA § 10(a), 29 U.S.C. § 160(a) (1994)). The Court construed this provision to extend the reach of the Act as far as the Constitution would permit, and no further. *Id.* at 31.

whether the “particular action does affect commerce,” an issue to be determined not in a single, sweeping decision, but “as individual cases arise.”⁴⁷⁰ This approach was familiar to all concerned, as the Court had established the limits of the Sherman Antitrust Act by the same method of case-by-case adjudication complete with detailed, fact-specific reasoning.⁴⁷¹ In *Jones & Laughlin* itself, the Court applied the method, taking several pages to describe and assess the evidence concerning the connection between labor conditions at the steel corporation and interstate commerce.⁴⁷²

No sooner had Chief Justice Hughes set up and applied the new method in *Jones & Laughlin*, however, than he proceeded to ignore it in *Fruehauf* and *Friedman-Harry Marks*. Neither opinion contained *any* reasoning on the Commerce Clause issue other than a terse citation to *Jones & Laughlin*.⁴⁷³ This omission could mean only one of two things. Either the majority justices felt that the facts of the three cases were substantially identical, or they were deliberately choosing to ignore their own, newly announced rule of law. The first explanation is not plausible in light of what the Board lawyers had conceded was “a distinct difference between the enterprises which are at bar.”⁴⁷⁴ Almost none of the many facts recited by the Court to justify its holding as to the steel corporation had any analogue in the other two cases. The trailer manufacturing industry at issue in *Fruehauf* was hardly “one of the great basic industries of the United States,” and it had no history of strikes with “far-reaching consequences” like the 1919 steel strike.⁴⁷⁵ Although the trailer company arguably did engage in “far-flung activities”⁴⁷⁶ (albeit not nearly so far-flung as the steel corporation’s, and only on the marketing end), the same could not be said of the clothing manufacturer in *Friedman-Harry Marks*, which operated only one factory and one sales office. Under no stretch of the imagination could the Court’s conclusion that the effect on inter-

470. *Id.* at 32. The full quotation reads:

Whether or not particular action does affect commerce in such a close and intimate fashion as to be subject to federal control, and hence to lie within the authority conferred upon the Board, is left by the statute to be determined as individual cases arise. We are thus to inquire whether in the instant case the constitutional boundary has been passed.

Id.

471. See Cortner, *Wagner Act Cases*, *supra* note 26, at 27–31; Frankfurter & Greene, *Injunction*, *supra* note 95, at 10–11.

472. *Jones & Laughlin Steel Corp.*, 301 U.S. at 34–36, 41–43.

473. *NLRB v. Fruehauf Trailer Co.*, 301 U.S. 49, 57 (1937) (“The questions relating to the construction and validity of the Act have been fully discussed in our opinion in [*Jones & Laughlin*]. We hold that the principles there stated are applicable here.”); *NLRB v. Friedman-Harry Marks Clothing Co.*, 301 U.S. 58, 75 (1937) (“For the reasons stated in our opinion in [*Jones & Laughlin*], we hold that the objections raised by respondent to the construction and validity of the National Labor Relations Act are without merit.”).

474. Oral Arguments, *supra* note 403, at 171 (quoting Charles Wyzanski).

475. *Jones & Laughlin*, 301 U.S. at 43.

476. *Id.* at 41.

state commerce of a strike at the steel corporation would be “immediate and might be catastrophic”⁴⁷⁷—the Court’s sole ground of distinction between *Jones & Laughlin* on the one hand and *Schechter* and *Carter* on the other—be applied to either the trailer company or the clothing manufacturer.

In short, the results in *Fruehauf* and *Friedman-Harry Marks* simply outstripped the Court’s willingness to provide any principled justification. This leaves the question: Why was the Court so anxious to rule for the Board in *Fruehauf* and *Friedman-Harry Marks* that it did so despite its own inability or unwillingness to provide a rationale? In their efforts to explain *Jones & Laughlin*, historians have pointed to three external factors operating on the Court: Roosevelt’s 1936 election landslide, the threat of his court packing plan, and the crisis of order brought about by the sit-down strikes.⁴⁷⁸ Although rubber workers and automobile workers were already using the sit-down tactic before November 1936, it seems clear that Roosevelt’s election victory emboldened them to escalate both the frequency and the militance of their strikes.⁴⁷⁹ It also seems highly likely that the sit-downs, in turn, had at least some positive effect on the drive for the court packing plan by confirming the urgency of a national approach to the problem of labor disputes.⁴⁸⁰ Similarly, it is hard to imagine that the justices gave no consideration whatever to the likely consequences of their decision for the sit-down crisis.⁴⁸¹ What is more difficult to assess, however, is the weight of each of these effects as compared with

477. *Id.*

478. See, e.g., Melvyn Dubofsky, *The State and Labor in Modern America* 145 (1994) (“The sources of this constitutional revolution were clear. One was the voters’ mandate . . . [a]nother was Roosevelt’s plan to ‘reform’ the Court. And most important was the rise of the CIO, the growing assertiveness of militant workers, and the spread of industrial warfare.”); Irons, *supra* note 26, at 272–73, 289 (noting that “[t]hese events—the court packing plan that emerged from Roosevelt’s sessions with Cummings, the Court’s review of the minimum wage case, and the wildfire spread of labor militance across the country—obviously affected the climate in which the Wagner Act cases were argued and decided,” and concluding that although the government lawyers meticulously prepared and brilliantly argued their cases, they won because “when they came before the Supreme Court they rode on a tide of forces for change which the Court could no longer resist”); Robert G. McCloskey, *The American Supreme Court* 175 (1960) (listing three factors—the election, the strikes, and the court packing plan—and concluding that “[n]o one, perhaps not even Justice Roberts, could say which of these circumstances was decisive for him; but it is hard to doubt that they played a part in the new tone of judicial decision that began to be sounded in the early months of that year”).

479. See *supra* text accompanying notes 379–383.

480. See Gregory A. Caldeira, *Public Opinion and the U.S. Supreme Court: FDR’s Court-Packing Plan*, 81 *Am. Pol. Sci. Rev.* 1139, 1148 (1987) (observing that the Wagner Act decisions were salient to the court packing issue “because of the recent sit-down strikes”); Hansen, *supra* note 255, at 100–08 (noting that contemporary observers felt “the sit-downs would provide a vivid example of America’s discontent with the Supreme Court, giving President Roosevelt ammunition for his court packing plan on the assumption that only a reconstituted Court would be sympathetic to the grievances that were producing the sit-downs”).

481. See *supra* text accompanying notes 459–465.

the others. Because of their close proximity in time, it is hard to separate the impact of the court packing threat from that of the sit-down strikes. Both operated as pressures on the Court during the key period of deliberations on the case, and both subsided markedly immediately after the decisions were announced.⁴⁸²

Perhaps the best way to isolate the effect of the sit-downs is to imagine what would have happened had they never occurred.⁴⁸³ Given the salience of the constitutional issue in the 1936 election campaign, the Roosevelt landslide would still have put the Court under considerable pressure.⁴⁸⁴ It is even possible that the Supreme Court would have upheld the Act as applied to the Jones & Laughlin Steel Corporation in order to defuse the court packing threat.⁴⁸⁵ But it seems highly improbable that the Court would have ruled as it did in *Fruehauf* and *Friedman-Harry Marks*. Given the widespread predictions that the Court would rule against the government in all of the manufacturing cases, Board victories in one or two out of three would have been viewed as a major concession on the Court's part, and would have gone far to weaken the claim that the Court was stuck in a "horse and buggy" conception of interstate commerce. Having appeased public opinion, the Court could have drawn the line between *Jones & Laughlin* and *Fruehauf*, or *Fruehauf* and *Friedman-Harry Marks*, thereby defusing the dissent's strongest argument: that upholding the Act as applied to the clothing company placed the Court on a slippery slope toward extending the commerce power "into almost every field of human industry."⁴⁸⁶

Putting the sit-downs back in, the picture changes dramatically. In the face of the strike crisis, even the dramatic, symbolic concession of crossing the line from commerce to manufacturing in *Jones & Laughlin* would not suffice to defuse the court packing threat. The median sit-down strike involved about 100 workers, far fewer than the 800 employed

482. See Eisenberg, *supra* note 462, at 317 (reporting the incidence of sit-downs as a percentage of all strikes for 1937: Jan.—14.6%; Feb.—22.3%; Mar.—27.7%; Apr.—9.7%; May—11.9%; June—4.8%; July—4.2%; Aug.—5.1%; Sept.—3.6%; Oct.—3.1%; Nov.—4.6%; Dec.—3.1%); see also National Labor Relations Act and Proposed Amendments, *supra* note 380, at 598 (showing that sit-downs accounted for 19% of all strikes from January through April, as compared to 6% from May through December); Caldeira, *supra* note 480, at 1148 ("Upholding the Wagner Act, a contemporary linchpin of the New Deal and salient because of the recent sit-down strikes, helped enormously in building opposition to the president's measure. As a result of *NLRB v. Jones & Laughlin Steel*, FDR and his allies lost more than 4% of the public . . .").

483. This method was suggested by Drew Hansen. See Hansen, *supra* note 255, at 131–33.

484. See *supra* text accompanying notes 357–361.

485. Some scholars accord the election and the court packing threat a role without mentioning the sit-downs. See Schubert, *supra* note 467, at 159–68. But see Hansen, *supra* note 255, at 131 (setting forth a plausible argument that without the sit-downs, the Court's reliance on "common experience" in *Jones & Laughlin* would have been impossible).

486. *NLRB v. Friedman-Harry Marks Clothing Co.*, 301 U.S. 58, 94 (1937) (McReynolds, J., dissenting).

by Friedman-Harry Marks.⁴⁸⁷ Moreover, most of the manufacturing workforce toiled in enterprises employing 500 or fewer wage earners.⁴⁸⁸ As NLRB General Counsel Charles Fahy recognized, the viability of the NLRB—and thus of Congress’s attempt to transform industrial relations—“would stand or fall” on this type of case.⁴⁸⁹ To the extent that the Court “upheld the Wagner Act” on April 12, 1937, then, *Fruehauf* and *Friedman-Harry Marks* were just as essential as *Jones & Laughlin*. 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.

In short, the Supreme Court plainly and simply bowed to pressure from strikers. But for the sit-down strikes, it is highly unlikely that the Wagner Act would have been upheld. No doubt, this account will strike some readers as crude; surely it does not accord sufficient respect to the relative autonomy of the federal judiciary. But the principal evidence comes from the judicial opinions themselves. Only a great urgency could induce five justices to announce a new doctrine in a highly visible case, and then fail to apply it—or to provide any other reasoning—in two other cases decided the same day. The best explanation is that the justices were being forced into a paradigm shift; they could see the necessity for upholding the Wagner Act as applied to the trailer company and the clothing manufacturer, but had yet to envision the doctrinal structure that would support those results. Thus, the answer to Bruce Ackerman’s question, “Who is Hughes trying to fool?”⁴⁹⁰ is “nobody.” Instead, Hughes was obtaining the immediate results that he needed while keeping his options open for the future. Two years later, when confronted by another Wagner Act case involving a clothing factory—this one employing only 60–200 workers—the Court was finally ready to accept the aggregation theory that the Board lawyers had developed for *Friedman-Harry*

487. Based on data from Investigation of Un-American Propaganda Activities in the United States: Hearing Before Special House Comm. on Un-American Activities, 75th Cong. 1609, 1614 (1938) (reprinting list of sit-downs in Detroit compiled by the Detroit Police Department with number of workers affected by sit-downs). Friedman-Harry Marks employed about 800 workers. *Friedman-Harry Marks*, 301 U.S. at 83 (McReynolds, J., dissenting).

488. See Bureau of the Census, U.S. Dep’t of Commerce, Census of Manufactures 1939, at 120 (1942) (reporting that 64.8% of the manufacturing workforce toiled in establishments of 500 wage earners or less in 1939, while 62.9% did so in 1929).

489. Irons, *supra* note 26, at 263.

490. 2 Ackerman, *Transformations*, *supra* note 34, at 363.

Marks.⁴⁹¹ The case that we remember today, *Wickard v. Filburn*, was merely icing on the cake.⁴⁹²

V. CONSTITUTIONAL FARCE: THE TAFT-HARTLEY “SLAVE LABOR” ACT, 1937–1957

To the union workers of Aliquippa, Pennsylvania—home to the massive Aliquippa Works of the Jones & Laughlin Steel Corporation—the meaning of the Supreme Court’s decision in *Jones & Laughlin* was clear. Upon hearing the news, they piled into cars and paraded through town, horns blaring. Signs on the first two cars reported the immediate result: “We Are the Ten Men Fired for Union Activity by J. & L. We Are Ordered Back to Work by the Supreme Court.”⁴⁹³ A third sign drew enthusiastic greetings from bystanders with a broader interpretation: “The Workers of Aliquippa Are Now Free Men.”⁴⁹⁴ To these unionists, freedom meant the ability to exercise their “legal and constitutional rights to join an organization of their own choosing. . . . so that working conditions and living standards can be bettered, and so that [their] employer can be made to live up to the laws of the land, and not disregard and violate them like highly publicized gangsters do.”⁴⁹⁵ Labor leaders and activists across the country joined the steel workers in celebrating the “new day” of industrial freedom and democracy.⁴⁹⁶

491. *NLRB v. Fainblatt*, 306 U.S. 601, 603, 607 (1939) (“There are not a few industries in the United States which, though conducted by relatively small units, contribute in the aggregate a vast volume of interstate commerce.”). The Board’s aggregation argument in *Friedman-Harry Marks* is described *supra* text accompanying note 447.

492. 317 U.S. 111, 127–28 (1942) (upholding the Agricultural Adjustment Act of 1938 as applied to a farmer who grew wheat for consumption on his own farm). The *Wickard* court cited *Fainblatt* and explained: “That appellee’s own contribution to the demand for wheat may be trivial by itself is not enough to remove him from the scope of federal regulation where, as here, his contribution, taken together with that of many others similarly situated, is far from trivial.” *Id.*

493. Rose M. Stein, *Aliquippa Celebrates*, *Nation*, Apr. 24, 1937, at 466.

494. *Id.*

495. Kenneth Casebeer, *Aliquippa: The Company Town and Contested Power in the Construction of Law*, 43 *Buff. L. Rev.* 617, 666 (1995) (quoting Manifesto by discharged workers and providing a contextualized account of the effort to organize the Aliquippa mill as a struggle for freedom); see also *id.* at 645 (quoting Declaration By Workers, Homestead Rally (July 6, 1936)). This declaration stated:

We are free Americans. We shall exercise our inalienable rights to organize into a great industrial union, banded together with all our fellow steelworkers. Through this union we will win higher wages, shorter hours, and better standards of living. . . . We shall make real the dreams of the pioneers who pictured America as a land where all might live in comfort and happiness.

Id.

496. Editorial, *The Supreme Court Decision On The Wagner Labor Act*, *Detroit Lab. News*, Apr. 16, 1937, at 1. Morris Watson, a union activist who was ordered reinstated in one of the other Wagner Act cases, *Associated Press v. NLRB*, 301 U.S. 103, 123–24, 133 (1937), reacted: “I was always sure that the fundamental human right—the right of workers to join themselves together for economic betterment—would be upheld.” *Labor Here Looks to “Era of Peace,” N.Y. Times*, Apr. 13, 1937, at 20; see also Editorial, *The*

The Supreme Court, of course, took a very different view of its ruling. The Court's opinions upheld the Wagner Act not as a human rights measure, but as an effort to eliminate strikes and their attendant disruptions to interstate commerce.⁴⁹⁷ Nevertheless, the opinions left open the possibility that the workers' vision might prevail. The Court had not been presented with the Thirteenth Amendment theory, and its opinions did not mention it. Moreover, in rejecting the employers' substantive due process challenge, the Court had declared that the workers' freedom to organize was "a fundamental right."⁴⁹⁸ In the process, the Court repeated Chief Justice Taft's admonition that "union was essential to give laborers opportunity to deal on an equality with their employer."⁴⁹⁹ The question whether labor's "essential" and "fundamental" right to organize would receive meaningful constitutional protection remained to be answered.

The test was not long in coming. After World War II, as after World War I, there was a postwar strike wave, an antilabor backlash, and a determined employer drive to parlay the backlash into restrictive legislation.⁵⁰⁰ Again, union leaders deployed the rhetoric of antislavery and talked of defiance. This time, however, labor's claims received a very different response from the courts.

A. *Thank God for the Federal Court*

On the first day of the Eightieth Congress, no fewer than seventeen restrictive labor bills were submitted, and that was only the beginning.⁵⁰¹ AFL and CIO leaders decried the flood of "slave labor" bills.⁵⁰² They charged that the Hartley bill was a "flagrant violation" of the Thirteenth Amendment.⁵⁰³ Taft-Hartley would open "the door to fascism in America by impairing freedoms basic to the American way of life."⁵⁰⁴ Specifically,

Wagner Labor Act, *supra* note 457, at 6 (proclaiming that a "new era" had begun as the "right to organize and to bargain collectively was finally recognized by the highest court in this land").

497. See *supra* text accompanying notes 449–455.

498. *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 33 (1937).

499. *Id.* at 33 (quoting *Am. Steel Foundries v. Tri-City Cent. Trades Council*, 257 U.S. 184, 209 (1921)). For the full quotation, see *supra* note 67 and accompanying text.

500. See generally Harry A. Millis & Emily Clark Brown, *From the Wagner Act to Taft-Hartley* 311–15 (1950) (documenting the upsurge in popular support for antistrike legislation resulting from the postwar strikes); Taft, *supra* note 72, at 579 (noting that the "sharp rise in labor disputes . . . created a widespread public demand for remedial action").

501. Millis & Brown, *supra* note 500, at 363.

502. See Executive Council Launches All-Out War on Slave Bills, *Am. Federationist*, May 1947, at 3; CIO, Proceedings of the Annual Convention 1947, at 186 (Resolution No. 3 "Taft-Hartley Slave-Labor Act").

503. George Meany, *The Mandate of Big Business*, *Am. Federationist*, May 1947, at 5.

504. Executive Council Launches All-Out War on Slave Bills, *supra* note 502, at 3; see also Nat'l Maritime Union, *In the Back: NMU Analysis of the Taft-Hartley Law in Pamphlets: Our American Workers 1935–1949*, at 2, 6–7 (1947) (describing Taft-Hartley as an "assault on our democratic rights" that "spells Fascism for America"); Erwin S. Mayer,

provisions banning secondary boycotts and jurisdictional strikes would enact “forced labor” and violate the fundamental right to strike.⁵⁰⁵ Proposals to outlaw the closed union shop were said to violate the involuntary servitude clause and the freedom of contract.⁵⁰⁶ Unionists contended that the sixty day cooling off period for national emergency strikes rendered the right to strike ineffective in violation of the Thirteenth Amendment.⁵⁰⁷ Finally, two proposals were said to infringe First Amendment rights: one banning union political expenditures and another requiring union officers to submit anticommunist affidavits as a condition for participating in NLRB elections or filing unfair labor practice charges.⁵⁰⁸

In sharp contrast to the pre–New Deal period, when labor’s own lawyers often rejected the movement’s constitutional claims,⁵⁰⁹ union attor-

Union Attitudes Toward the Taft-Hartley Act, 1947–1954, at 64, 88 (1956) (unpublished Ph.D. dissertation, University of Washington) (on file with the *Columbia Law Review*) (study of 1500 articles about Taft-Hartley appearing in union publications, reporting frequent charge that the law was “fascist”).

505. See Labor Relations Program Hearings on S. 55 and S.J. Res. 22: Before the S. Comm. on Labor and Public Welfare, 80th Cong. 1159 (1947) [hereinafter Senate Hearings on Labor] (memorandum of Lee Pressman, General Counsel, CIO) (contending that the proposed secondary boycott prohibition “has as its purpose the requirement of forced labor upon pain of fine, damages, and injunction,” that it “necessarily includes the direction of similar sanctions against not merely a strike but all the activities in support of a strike such as picketing, the distribution of leaflets, and the like,” and that “[i]n view of the fact that the activities sought to be repressed enjoy an established and time-honored status, the attempt embodied in this legislation to repress it makes it peculiarly vulnerable to constitutional challenge”); *id.* at 2017–18 (statement of John L. Lewis, President, UMW) (arguing that banning secondary strikes, jurisdictional strikes, and organizational strikes would violate the “fundamental right” to strike).

506. *Id.* at 998 (statement of William Green, President, AFL) (arguing that the closed shop “proposal constitutes an arbitrary interference with the freedom [of] contract guaranteed by our Federal Constitution, thereby undermining the very foundation of our free enterprise system”); Research Dep’t Report: The Right to Work—and the Right to Strike, *Machinists Monthly J.*, Mar. 1947, at 104 (criticizing the closed shop prohibition and querying: “Does not one-sided power in the hands of the employer virtually mean ‘involuntary servitude’ for the worker?”).

507. Senate Hearings on Labor, *supra* note 505, at 974 (statement of William Green, President, AFL) (contending that the cooling off period “is an unjustified invasion of an essential liberty, the right to strike, and violates the spirit, if not the letter, of the thirteenth amendment prohibiting involuntary servitude”); *id.* at 1150 (statement of Lee Pressman, General Counsel, CIO) (contending that the cooling off period violated the involuntary servitude clause because it rendered the right to quit ineffective at altering employment conditions); William Green, The A.F. of L.’s Position on Anti-Labor Proposals, *Am. Federationist*, May 1947, at 3, 30; Labor versus Taft and the N.A.M., *Am. Federationist*, June 1947, at 4, 29 (remarks by William Green in debate with Taft).

508. See Joseph Padway, The New Law, *Am. Federationist*, Aug. 1947, at 4, 6, 27; Statement of CIO Executive Board, *CIO News*, June 30, 1947, at 3.

509. See *supra* text accompanying notes 95–105; see also Pope, Labor’s Constitution, *supra* note 29, at 1013–22 (recounting failure of union lawyers to advance labor’s Thirteenth Amendment claims in court).

neys now embraced and promoted their clients' legal theories.⁵¹⁰ Courts began to take these ideas seriously, provoking Musicians Union President James Petrillo to express a sentiment that would have been inconceivable a decade before: "Thank God for the Federal Court."⁵¹¹ The occasion for Petrillo's exclamation was a federal district court ruling overturning, on Thirteenth Amendment and other grounds, his criminal prosecution for calling a radio strike in violation of the Federal Communications Act.⁵¹² This decision was no anomaly; although many courts rejected labor's constitutional theories, a substantial number accepted them. In the decade between *Jones & Laughlin* and the enactment of the Taft-Hartley Act, unionists obtained rulings from state and lower federal courts invalidating statutory and judge-made restrictions on strikes,⁵¹³ secondary la-

510. CIO General Counsel Lee Pressman and AFL Counsel Joseph Padway advanced labor's constitutional theories to legislators and the public. See, e.g., supra notes 505, 507-508 and accompanying text (describing the constitutional arguments of Padway and Pressman against Taft-Hartley); Joseph A. Padway, In Florida's Footsteps, *Am. Federationist*, Jan. 1947, at 6 (announcing AFL plans to challenge anti-union state laws on various constitutional grounds); Taft, supra note 72, at 582 (quoting Padway's charge that the House version of what became Taft-Hartley "effectively destroys every constitutional right of workers such as the right to organize, the right to be free from employer domination, the right to bargain collectively for improved working conditions"). In light of the "slow and cumbersome" NLRB procedures, argued Pressman, "[t]he one legal approach to labor action which may well prove useful is the growing realization and acceptance of the fact that labor action is nothing more or less than the exercise of constitutional rights." Lee Pressman, *The Norris-LaGuardia Act and the National Labor Relations Act, 1940 Nat'l Law. Guild Q.* 236, 243.

511. U.S. Judge Rules 'Anti-Petrillo' Law Unconstitutional, *N.Y. Times*, Dec. 3, 1946, at 1.

512. *United States v. Petrillo*, 68 F. Supp. 845, 849 (N.D. Ill. 1946), rev'd on other grounds, 332 U.S. 1 (1947).

513. *Traffic Tel. Workers' Fed'n of N.J. v. Driscoll*, 71 F. Supp. 681, 683 (D.N.J. 1947) (enjoining enforcement of New Jersey statutory prohibition on certain strikes because the equities—including the constitutional status of the right to strike—weighed in favor of the union); *France Packing Co. v. Dailey*, 67 F. Supp. 841, 843 (E.D. Pa. 1946) (narrowly construing War Labor Disputes Act not to prohibit workers from striking, partly because a contrary construction would impose involuntary servitude in violation of the Thirteenth Amendment), rev'd, 166 F.2d 751 (3d Cir. 1948); *Stapleton v. Mitchell*, 60 F. Supp. 51, 61 (D. Kan. 1945) (three judge panel) (striking down Kansas statute that prohibited certain strikes on the ground that the "right to peaceably strike or to participate in one" was a fundamental liberty "which the state may not condition or abridge in the absence of grave and immediate danger to the community"), appeal dismissed per stipulation sub nom, *Mitchell v. McElroy*, 326 U.S. 690 (1945); *Hotel & Rest. Employees v. Greenwood*, 30 So. 2d 696, 701 (Ala. 1947) (overturning strike injunction on First Amendment grounds, reasoning that the right to strike is "so enmeshed with the right of free speech" that it cannot be separated out); *Ala. State Fed'n of Labor v. McAdory*, 18 So. 2d 810, 827 (Ala. 1944) (striking down Alabama's statutory prohibition on strikes not authorized by a majority of employees of the struck employer, reasoning that "a strike is one manner in which labor communicates its position on certain questions to the outside world"), cert. dismissed, 325 U.S. 450 (1945); *Kingston Trap Rock Co. v. Int'l Union of Operating Eng'rs*, 19 A.2d 661, 665 (N.J. 1941) (invalidating strike injunction on the ground that it violated the strikers' liberty and property rights under the Fifth and Fourteenth Amendments); *State ex rel. Dairyland Power Coop. v. Wis. Employment Relations Bd.*, 21

bor boycotts,⁵¹⁴ consumer boycotts,⁵¹⁵ and picketing.⁵¹⁶ Unfortunately for labor, these decisions rested on a grab bag of justifications unconnected to any core theory of labor freedom. In addition to the Thirteenth Amendment, courts relied on the First Amendment, the doctrine of substantive due process, and vague references to fundamental constitutional liberties.⁵¹⁷ Whether these decisions signified the emergence of a durable new doctrine of constitutional labor rights or just a temporary reflection of labor's new political and economic power remained to be seen. Ultimately, the outcome would depend on where collective labor rights fit in the Supreme Court's emerging synthesis of the New Deal constitutional transformation.

B. *The Most Important of Current Constitutional Issues*

After the bruising fight over court packing, it appeared for a brief time that the Court might abandon altogether the enterprise of judicial review.⁵¹⁸ But before long, the justices began to identify opportunities for judicial intervention that, in their view, had survived the New Deal onslaught. By the time of Taft-Hartley, a clear pattern had emerged. Where civil liberties are concerned, explained Cornell Law Professor

L.R.R.M. (BNA) 2508, 2510 (Wis. Ct. App. 1948) (holding that a statute prohibiting strikes by employees of public utilities violated the Thirteenth Amendment as well as the Due Process and Equal Protection Clauses of the Fourteenth Amendment).

514. See *Ex Parte Blaney*, 184 P.2d 892, 895–99 (Cal. 1947) (striking down state statutory prohibition of combinations to withhold labor from secondary employers); *Henderson v. Coleman*, 7 So. 2d 117, 121 (Fla. 1942) (invalidating injunction compelling union workers to unload nonunion goods as a violation of the Thirteenth Amendment).

515. See *AFL v. Langley*, 168 P.2d 831, 832 (Idaho 1946) (leaving standing, because not appealed, portion of trial court judgment striking down a boycott prohibition); *AFL v. Mickelson*, 15 L.R.R.M. (BNA) 751, 754 (S.D. Cir. Ct. 1944) (invalidating state statutory prohibition on boycotts of nonunion goods as a violation of federal and state constitutional guarantees of peaceable assembly, freedom of speech, freedom of contract, equal protection, and due process).

516. See, e.g., *Thornhill v. Alabama*, 310 U.S. 88, 104 (1940) (holding that state statute prohibiting all picketing violated the First Amendment); *Carlson v. California*, 310 U.S. 106, 112 (1940) (striking down, on First Amendment grounds, city ordinance that barred picketing near a place of business for the purpose of inducing employees not to work); *AFL v. Swing*, 312 U.S. 321, 325 (1941) (overturning, on First Amendment grounds, state court injunction against picketing by nonemployees of the picketed business); *AFL v. Bain*, 106 P.2d 544, 547, 556 (Or. 1940) (invalidating state statutory prohibition on picketing “unless there is an . . . existing labor dispute”). As early as 1937, the Court had suggested in dictum that workers enjoyed a constitutional right to picket. See *Senn v. Tile Layers Protective Union*, 301 U.S. 468, 478 (1937) (“Members of a union might, without special statutory authorization by a State, make known the facts of a labor dispute, for freedom of speech is guaranteed by the Federal Constitution.”).

517. See *supra* notes 513–516.

518. See Mark Tushnet, *Living in a Constitutional Moment?: Lopez and Constitutional Theory*, 46 Case W. Res. L. Rev. 845, 867 (1996) (“Relying on their recollection of the events immediately surrounding the crisis of 1937, the justices’ first synthesis was a general theory of judicial restraint, articulated most forcefully by Felix Frankfurter.”).

Arthur Sutherland, the Court freely intervened, but where economic liberties like business property and contract rights were concerned, the Court held back, leaving legislatures free to regulate.⁵¹⁹ To Sutherland, the question whether the new judicial deference in economic matters would apply to anti-union legislation was “the most important of current constitutional issues.”⁵²⁰

This question recapitulated the old debate about class legislation. If labor rights were classified as commercial rights, then they would be entitled to no more constitutional protection than business rights—very little in the emerging *Carolene Products* regime. But if they fell into the category of human or “civil” rights, then they could rise up along with the Court’s new, expansive interpretations of the First Amendment. Once again, it appeared that—as Samuel Gompers and Andrew Furuseth had argued—the constitutional status of labor organizing and collective action hinged on their classification as commercial or noncommercial activity.⁵²¹ And once again, the Thirteenth Amendment—which provided for labor rights but not business property rights—beckoned as the textual basis for elevating labor above business rights. But unionists now found themselves in a difficult position. Having failed to ground either the Norris-LaGuardia Act or the Wagner Act on the Thirteenth Amendment when they were in a position to exert influence, they now found themselves fighting to vitalize the amendment at a time when public opinion and political mobilization were running strongly against them. Professor Sutherland showed his disdain by noting labor’s Thirteenth Amendment claim and then ignoring it in his analysis.⁵²²

Early on, it appeared that the Supreme Court might nevertheless elevate labor rights over business property rights. Newly appointed Justice Frank Murphy—who, as Governor of Michigan, had refused to deploy state troops against the Flint sit-down strikers—did his best to accomplish this end. In *Thornhill v. Alabama*, the justices voted to strike down a state statute prohibiting picketing, and Murphy was assigned to write the opin-

519. Arthur E. Sutherland, Jr., *Reasons in Retrospect: Reflections on the Labor Laws of 1947, and on the Doctrine that Judges Should not Meddle with Social and Economic Arrangements Made by Legislators*, 33 *Cornell L.Q.* 1, 5–6 (1947). Sutherland summed up:

In effect the Supreme Court has said, “When business is in question we shall not set our own ideas of social policy over those of a legislature. Business must be regulated; let the legislators go to it. But individual freedom is different. Individual liberty is so important that we are going to repel every threat to it, even at the risk of being called a super-legislature.”

Id. at 6.

520. Id. at 14.

521. For the arguments put forth by Gompers and Furuseth, see *supra* notes 89–91 and accompanying text.

522. Sutherland, *supra* note 519, at 17, 19.

ion of the Court.⁵²³ In his first draft, Murphy argued that labor rights merited a higher position on the scale of constitutional values than business rights because “satisfactory hours and wages and working conditions in industry and a bargaining position which makes these possible have an importance which transcends the interests of those in the business or industry directly concerned.”⁵²⁴ But Chief Justice Hughes and Justice Stone persuaded him to substitute “is not less than” for “transcends,” thereby placing business and labor “interests” on the same level.⁵²⁵ Murphy settled for classifying labor picketing as a civil liberty. In accord with the famous footnote 4 of Stone’s opinion for the Court in *Carolene Products*,⁵²⁶ Murphy wrote that “labor relations are not matters of mere local or private concern,” and that “[f]ree discussion concerning the conditions in industry and the causes of labor disputes [is] . . . indispensable to the effective and intelligent use of the processes of popular government to shape the destiny of modern industrial society.”⁵²⁷ In addition to its protection of picketing in *Thornhill*, the Supreme Court issued decisions enforcing the right of unionists to speak in public⁵²⁸ and to advertise the advantages of union membership.⁵²⁹

By itself, however, the First Amendment provided an insecure foundation for collective labor rights. Workers and unions staged strikes, picketed, and boycotted in order to exert collective power on employers. The workers’ need for power in the employment relationship fit comfortably with the Thirteenth Amendment, which—as stated by the Supreme Court—sought “to make labor free, by prohibiting that control by which the personal service of one man is disposed of or coerced for another’s benefit.”⁵³⁰ But in the world of “free speech,” the power aspect of collective action was troubling. “Banning the use of secondary strikes and boycotts,” observed Archibald Cox, “is primarily a prohibition against eco-

523. 310 U.S. 88, 101 (1940). The Court had previously indicated in dictum that workers enjoyed a First Amendment right to picket. *Senn v. Tile Layers Protective Union*, 301 U.S. 468, 478 (1937) (Brandeis, J.) (discussed supra note 516).

524. Sidney Fine, Frank Murphy, the *Thornhill* Decision, and Picketing as Free Speech, 6 Lab. Hist. 99, 109 (1965) (quoting draft opinion).

525. *Id.*; *Thornhill*, 310 U.S. at 103.

526. *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938).

527. *Thornhill*, 310 U.S. at 103.

528. *Hague v. CIO*, 307 U.S. 496, 512 (1939). In *Hague*, the Supreme Court upheld an injunction barring city officials from interfering with unionists speaking in a public park. *Id.* at 516–18.

529. *Thomas v. Collins*, 323 U.S. 516, 532, 540 (1945) (overturning state statute requiring union organizers to register with the government before soliciting members).

530. *Bailey v. Alabama*, 219 U.S. 219, 241 (1911); see also *Pollock v. Williams*, 322 U.S. 4, 17–18 (1944) (stating that the Thirteenth Amendment right to quit is a “defense against oppressive hours, pay, working conditions or treatment”). In *Pollock*, the Court explained the involuntary servitude clause in terms of worker power: “When the master can compel and the laborer cannot escape the obligation to go on, there is no power below to redress and no incentive above to relieve a harsh overlordship or unwholesome conditions of work.” *Id.* at 18.

conomic pressures; the interference with freedom of persuasion is relatively slight since all avenues of communication except the picket line are left open.”⁵³¹ Only two years after *Thornhill*, Murphy joined in an opinion which asserted that “[p]icketing by an organized group is more than free speech, since it involves patrol of a particular locality and since the very presence of a picket line may induce action of one kind or another, quite irrespective of the nature of the ideas which are being disseminated.”⁵³²

By the time of Taft-Hartley, there were more ominous signs for labor. In *Carpenters & Joiners Union Local No. 213 v. Ritter's Cafe*, the Court rejected a First Amendment challenge to a state prohibition on stranger picketing.⁵³³ Andrew Furuseth's old nemesis, now Justice Felix Frankfurter, wrote for the majority. Frankfurter assigned labor protest not to the category of civil liberties, but to that of self-interested, economic activity commensurate with business activity. Labor law, Frankfurter asserted, involved balancing “the effort of the employer to carry on his business free from the interference of others against the effort of labor to further its economic self-interest.”⁵³⁴ Not even Justice Murphy objected to this characterization of the issue.⁵³⁵

Worse yet, in *United States v. United Mine Workers*, the Court rejected the union's Thirteenth Amendment challenge to a strike injunction.⁵³⁶ The plurality and concurring opinions followed Frankfurter's old practice of dismissing labor's Thirteenth Amendment claims without deigning to acknowledge their existence, much less addressing them on the merits. In opinions that took up more than 120 pages of the *U.S. Reporter*, only one sentence responded to the constitutional claims: “We have examined the other contentions advanced by the defendants but have found them to be without merit.”⁵³⁷ Reading these signs, legal scholars predicted that, with the exception of the political expenditure provisions and the anticommunist affidavit requirement, the Act was beyond constitutional attack.⁵³⁸ If unionists were to prevail on their constitutional

531. Archibald Cox, *Some Aspects of the Labor Management Relations Act, 1947*, 61 *Harv. L. Rev.* 1, 26–27 (1947).

532. *Bakery & Pastry Drivers Local 802, Int'l Bhd. of Teamsters v. Wohl*, 315 U.S. 769, 776–77 (1941).

533. 315 U.S. 722, 726 (1942) (upholding state prohibition against picketing conducted at one facility by employees employed at another, industrially unrelated facility, owned by the same employer).

534. *Id.* at 724.

535. *Id.* at 729–30 (Black, J., joined by Douglas & Murphy, J.J., dissenting) (dissenting on the ground that the picketing did not sufficiently injure the restaurant to justify the restraint); see Cox, *supra* note 531, at 26 n.108 (observing that Justice Murphy had apparently abandoned his position in *Thornhill*, leaving only Justice Reed defending the view that picketing could be equated with free speech).

536. 330 U.S. 258, 307 (1947). This decision was announced on March 6, 1947, in the midst of the legislative debates over Taft-Hartley.

537. *Id.* (Vinson, C.J., plurality opinion).

538. See Arthur E. Sutherland, Jr., *The Constitutionality of the Taft-Hartley Law*, 1 *Indus. & Lab. Rel. Rev.* 177, 183, 188–91 (1948) (suggesting that there might be viable

claims, they would have to provide the justices with reasons powerful enough to reverse an already established trend. Judging from past experience, that kind of persuasion was more likely to come from activity in the factories and on the streets than from lawyerly arguments in the courtroom.

C. *A Haired-Over Neck*

In the months leading up to Taft-Hartley, labor leaders threatened a campaign of constitutional resistance that would dwarf previous struggles. In April 1947, the AFL Executive Council issued a declaration of “all-out war” against Taft-Hartley and thundered that American workers would “never submit to slavery.”⁵³⁹ On April 16, the day before the House vote on the Hartley bill, 20,000 Chicago Packinghouse workers staged a one-hour work stoppage and public demonstration.⁵⁴⁰ A week later in Iowa, between 100,000 and 200,000 AFL and CIO members struck for one day to protest antilabor legislation pending before the state legislature.⁵⁴¹ On April 24, in what has been called “the greatest outpouring of labor” in Detroit’s history, auto plants employing nearly 500,000 workers were shut down so that workers could participate in a mass demonstration. As many as 200,000 people gathered in Cadillac square to hear speakers decry anti-union legislation.⁵⁴² The leaders of eight CIO international unions and a number of local labor councils including the New York City Building Trades Council and the Los Angeles County Federation of Labor called for a one-day general strike of all trades and industries.⁵⁴³ Twelve thousand coal miners in southwest Pennsylvania staged a protest strike.⁵⁴⁴ In New York, unionists claimed participation by 100,000 in the “biggest labor demonstration Manhattan ever has seen.”⁵⁴⁵

challenges to the “civil liberties” provision like the political expenditure restriction, while characterizing restrictions on collective action as largely beyond constitutional attack); Cox, *supra* note 531, at 26, 35 (opining that there would seem to be little foundation for a serious challenge to the constitutionality of the secondary boycott prohibition because it was “primarily a prohibition against economic pressures,” while declining to express an opinion on the anticommunist affidavit requirement). Sutherland did classify the prohibition of secondary boycott advocacy as a civil liberties issue, but concluded that “on the whole it seems unlikely” that the Court would strike it down. Sutherland, *supra*, at 186.

539. Executive Council Launches All-Out War on Slave Bills, *supra* note 502, at 4.

540. Art Preis, Labor’s Giant Step 313 (1964); 20,000 Packinghouse Workers Denounce Antilabor Bills, Mourn Roosevelt, *Federated Press, E. Bureau*, Apr. 17, 1947, at 3.

541. *Id.*; Iowa Workers Protest Anti-Labor Proposals, *Am. Federationist*, May 1947, at 7.

542. Preis, *supra* note 540, at 313; Martin Halpern, Taft-Hartley and the Defeat of the Progressive Alternative in the United Auto Workers, 27 *Lab. Hist.* 204, 211 (1986).

543. Preis, *supra* note 540, at 313; Nationwide AFL Stoppage Asked By N.Y. Building Trades Council, *Federated Press, E. Bureau*, Apr. 17, 1947, at 3; Out California Way, *Am. Federationist*, Mar. 1947, at 15, 29.

544. Miners ‘Veto’ Strike Tapers Off, *Federated Press, E. Bureau*, June 12, 1947, at 1; 12,000 Miners Out in Slave Bill Protests, *Federated Press, E. Bureau*, June 10, 1947, at 1.

545. N.Y. Sparks Rallies Against Taft Bill, *CIO News*, June 16, 1947, at 3.

Nevertheless, in late June, the Taft-Hartley Act was passed over President Truman's veto. This was the moment of truth for labor's freedom constitution. If union leaders truly believed that the law would reduce workers to a condition approximating slavery, then they could not—consistently with self-respect—comply with the law.⁵⁴⁶ Alabama coal miners took the lead, launching a protest strike that quickly spread to more than 200,000 miners in ten states.⁵⁴⁷

What happened next recalls Karl Marx's quip that history repeats itself, "the first time as tragedy, the second as farce."⁵⁴⁸ The first time, in this case, was labor's campaign of opposition to the wave of repressive legislation that followed World War I. Then, as in 1947, labor leaders had called for constitutional defiance. In the most dramatic act of resistance, the AFL had declared the Kansas Industrial Court Act unconstitutional and Alexander Howat had led the Kansas coal miners in a four-month winter strike against the law. Instead of supporting the strike, UMW President John L. Lewis seized the opportunity to expel Howat, his strongest rival for the UMW leadership, allegedly for violating the no-strike obligation of the Kansas miners' collective bargaining agreement.⁵⁴⁹ William Green, then UMW Secretary-Treasurer, had tried to serve as Lewis's emissary while simultaneously praising Howat.⁵⁵⁰ Meanwhile, UMW Vice President Philip Murray, newly elected to that position by a slim (and questionable) margin over Howat,⁵⁵¹ avoided the dispute.

Now, in 1947, these three leaders found themselves at the head of the entire labor movement as it faced another test of constitutional commitment: Green as President of the AFL, Murray as President of the CIO, and Lewis as the best known and most feared labor leader in the country, as well as the President of its most prestigious union. Green took Lewis's old role, urging exclusive reliance on ordinary political action and court challenges. He asserted that the task for organized labor was to discipline the "spontaneous surge" of worker resistance. "We must fight our enemies not with ill-considered strikes," he argued, "but with ballots, in the peaceful, democratic and American way."⁵⁵² He urged workers to wait

546. This was the view of Alexander Howat and his ally, John H. Walker, during the resistance to the Kansas Industrial Court. See Pope, *Labor's Constitution*, supra note 29, at 970-71 (quoting Howat and Walker).

547. 50,000 Miners Out in Slave Bill Protest, *Federated Press*, E. Bureau, June 24, 1947, at 1; 220,000 Miners Walk Out on Slave Bill, *Federated Press*, E. Bureau, June 25, 1947, at 1.

548. Karl Marx, *The Eighteenth Brumaire of Louis Bonaparte*, in *Karl Marx and Frederick Engels, Selected Works* 97, 97 (Progress Publishers 1968) (1852).

549. See Dubofsky & Van Tine, supra note 315, at 112-21.

550. See Pope, *Labor's Constitution*, supra note 29, at 1005-06.

551. See Dubofsky & Van Tine, supra note 315, at 65.

552. William Green's Labor Day Message, *Am. Federationist*, Sept. 1947, at 4; cf. *It's Still Legal to Vote*, 59 *Machinists Monthly J.* 233, 267 (1947) ("Labor unions must be cool at this time and should warn all members against panic, anger, or any emotion that might result in a foolish striking back at an imagined injustice."); Editorial, *A Good Rule To Adopt*, *Carpenter*, Aug. 1947, at 16 ("The Taft-Hartley Bill is now law. Over the President's

for election day, when “a tidal wave of opposition will roll up against [the law] and crash down upon the head of its sponsors and supporters.”⁵⁵³ Saddled with a more militant constituency, Murray initially supported resistance, but soon fell silent on the issue.⁵⁵⁴

Lewis, on the other hand, had come so far since the days of the Kansas imbroglio that he was now prepared to step into the shoes of his old rival, Howat. Excluded from the halls of power during World War II, Lewis had turned to direct action.⁵⁵⁵ In 1943, the man who had once held that unjust laws should be opposed by cultivating public opinion and bringing law suits now found himself boycotting the National War Labor Board and leading the miners into what may well have been the most unpopular strike in United States history.⁵⁵⁶ Three years later, the miners struck again despite President Truman’s seizure of the mines. This time Lewis, who in 1919 had declared that he could not strike against the government, defied a federal court injunction ordering him to end the strike.⁵⁵⁷ Cited for contempt of court, he appealed to the Supreme Court which, in upholding the contempt, relied heavily on its previous decision affirming Howat’s contempt citation in 1922.⁵⁵⁸

veto, Congress enacted it and put it on the statute books. . . . We have to live with it, so we might as well look it squarely in the eye and make our plans accordingly.”).

553. William Green’s Labor Day Message, *supra* note 552, at 4.

554. See Murray Warns Labor Will Use Every Moral Means to Kill T-H, CIO News, Sept. 22, 1947, at 5. This article quotes Murray as saying:

Spokesmen for the CIO say without fear or trembling that there are certain phases of the Taft-Hartley law which will be resisted through noncompliance on constitutional grounds. Efforts will be made, of course, to brand us as rebels against our government. We are not in resistance to our government; we are endeavoring to make that government fill its proper function under the democratic process, and certainly its highest function is protecting the rights of the people.

Id.

Murray’s subsequent pronouncements were silent on the question of resistance to all but the political expenditures provision. See, e.g., Text of T-H Statement, CIO News, Oct. 13, 1947, at 3 (reprinting statement authored by Murray and approved by the CIO Executive Board that did not mention resistance, but called for testing the constitutionality of Taft-Hartley in court).

555. See Dubofsky & Van Tine, *supra* note 315, at 417 (recounting that wartime government policy “threatened to reverse [Lewis’s] life-long struggle to attain for labor an equal position with capital in the chambers of power”).

556. See Pope, Labor’s Constitution, *supra* note 29, at 1012 (describing Lewis’s opposition to constitutional resistance during the 1920s); Fox, *supra* note 339, at 387–98 (recounting the 1943 strike).

557. See Dubofsky & Van Tine, *supra* note 315, at 59, 466–67.

558. *United States v. UMW*, 330 U.S. 258, 293 (1947) (citing *Howat v. Kansas*, 258 U.S. 181, 190 (1922), for the proposition that an injunction could be attacked only on appeal, and thus that a person subject to an invalid injunction could be held in contempt for violating the invalid injunction).

Whether Lewis appreciated the irony is unknown, but it did not go unnoticed in Kansas.⁵⁵⁹

Lewis now proposed that the labor movement conduct a boycott of the NLRB. He pointed out that the Act itself provided an easy mechanism for boycott enforcement.⁵⁶⁰ Under section 9(h), any union whose officers failed to submit a sworn affidavit denying that they were members or supporters of the Communist Party or any other organization that promoted revolution was denied the right to participate in NLRB processes except as a defendant.⁵⁶¹ If the top officers refused to sign, then all subordinate bodies of the union would be legally barred from using the NLRB's processes. Initially, the top officers of both the AFL and the CIO declared that they would not submit affidavits.⁵⁶² Neither federation, however, took an official position urging its constituent unions to do the same.

In August, the Carpenters Union announced that it would submit affidavits.⁵⁶³ Teamster President Daniel Tobin went one further, threatening to take the Teamsters out of the AFL if the Federation's officers did not follow suit.⁵⁶⁴ The International Association of Machinists filed in late August, followed by various smaller AFL unions and a handful of CIO unions.⁵⁶⁵ But Lewis, one of fifteen AFL vice presidents, held firm and refused to sign, thereby blocking all AFL affiliates from NLRB access.⁵⁶⁶

The issue came to a head at the AFL convention in October. John L. Lewis gave a scathing speech reasserting labor's freedom constitution and opposing compliance. Not only did Taft-Hartley deprive workers of their freedom, but it placed upon them an "iron collar" that set them apart from their fellow man.⁵⁶⁷ Lewis argued that the rank and file would lose heart for the struggle if they saw "their great leaders, with all the pomp and ceremonials of a great convention kneeling in obeisance."⁵⁶⁸ Had the AFL boycotted the Taft-Hartley Board from the start, he claimed, the Board would have been discredited as an employer tool.⁵⁶⁹ Ordinary po-

559. See Dwight Pennington, *Action Against Lewis Recalls the Fight That Broke His Rival, Howat of Kansas*, *Kansas City Times*, Nov. 22, 1946 (unpaginated copy) (on file with the *Columbia Law Review*).

560. See Dubofsky & Van Tine, *supra* note 315, at 474.

561. Pub. L. No. 80-101, § 9(h), 21 Stat. 136 (1947).

562. Millis & Brown, *supra* note 500, at 546.

563. See *A Good Rule to Adopt*, *supra* note 552, at 16 (announcing that it is time for the labor movement to start "living under the law as best it can").

564. Daniel J. Tobin, *Teamsters May Leave AFL, Int'l Teamster*, Oct. 1947, at 2.

565. See Millis & Brown, *supra* note 500, at 547.

566. See Dubofsky & Van Tine, *supra* note 315, at 474.

567. AFL, *Report of Proceedings of the Sixty-Seventh Annual Convention of the American Federation of Labor* 489 (1947) [hereinafter 1947 AFL Report of Proceedings].

568. *Id.*

569. *Id.* at 490; cf. Robert Schrank, *This is Aimed at You: An Exposé of the Taft-Hartley Plot to Bust the Unions and Hi-Jack the American People* 25 (1948) (noting that "[h]ad the two major bodies of the labor movement refused to sign, the law would have gone down the drainpipe with the rest of the sewage where it belonged").

litical action would not destroy the law; if Congress saw that labor was “on the run,” even worse restrictions might follow.⁵⁷⁰ Lewis invoked the precedent of labor’s freedom constitution, reminding the delegates that compliance would amount to a repeal of the 1919 injunction policy,⁵⁷¹ namely that it was the duty of all unionists to violate unconstitutional injunctions. “[O]n this particular issue, I don’t think that the Federation has a head,” he concluded. “I think its neck has just grown up and haired over.”⁵⁷²

AFL Secretary George Meany delivered the administration’s response. Five months before, Meany had charged that Taft-Hartley transgressed the Thirteenth Amendment and warned that American workers would inevitably resist “such a flagrant” violation of the Constitution. The resulting “bitter strife” would, he cautioned, “torpedo” America’s international crusade against communism.⁵⁷³ At that time, Meany’s support for labor freedom dovetailed with his lifelong opposition to communism. Now that the bill had been enacted into law, however, the imperatives of anticommunism and labor freedom diverged. Taft-Hartley would torpedo the anticommunist crusade only if workers actually resisted its “flagrant” constitutional violations. Meany did his best to ensure that no such disaster would occur. Despite his public position that Taft-Hartley was unconstitutional, Meany claimed that unionists who submitted affidavits were merely “complying with the law of the land.”⁵⁷⁴ How could Taft-Hartley be the law of the land if it were unconstitutional? Because the labor movement had lost in a fair fight:

Whether you like it or not, whether the National Association of Manufacturers and the representatives of the reactionary employers bought the Republican party or not, as someone seems to think, the fact remains that they counted the votes in Washington, and the Taft-Hartley Law is on the statute books. No one asked for a recount. Our representatives were there when the votes were cast, and no matter what the reason, whether it is the sinister reason attributed here today or not, the fact remains that they did pass this law. It is now the law of the land.⁵⁷⁵

To Meany, constitutional resistance simply had no place: “We know it is a bad law, but it was placed on the statute books by our representatives under the American democratic system, and the only way it is going

570. 1947 AFL Report of Proceedings, *supra* note 567, at 491.

571. *Id.* at 492.

572. *Id.*

573. Meany, *supra* note 503, at 5. Moreover, the bill would “bring more recruits into the ranks of those opposed to the American way of life than the Communist Party of the United States has been able to enroll in thirty years.” *Id.* at 6. Truman echoed Meany on these points in his veto message. Harry S. Truman, Veto Message (H. Doc. No. 334) [hereinafter Truman, Veto Message], reprinted in 1 NLRB, Legislative History of the Labor-Management Relations Act, 1947, at 915, 921 (1948).

574. 1947 AFL Report of Proceedings, *supra* note 567, at 495.

575. *Id.* at 495.

to be changed is by our representatives under that system.”⁵⁷⁶ Daniel Tobin of the Teamsters agreed that this “is a law that we will resent, but there is a certain legal procedure to change the law, and it isn’t by revolution.”⁵⁷⁷

In the vote that followed, Meany’s position prevailed by a wide margin.⁵⁷⁸ The progressives had won; even in the House of Labor, workers had no rights of collective action that could trump the outcomes of the ordinary political process. The difference between freedom and slavery was no longer power on the job, but the right of citizens to vote.⁵⁷⁹ Constitutional law had become the exclusive prerogative of the judiciary—a branch of government that, according to labor’s freedom constitution, was a tool of business interests and a usurper of power.⁵⁸⁰ A number of days later, the CIO declared that the decision whether to submit affidavits would be left to the discretion of the affiliated unions.⁵⁸¹ A few CIO unions held out until 1949, with only the AFL Typographers and the again independent Mine Workers (Lewis pulled the Miners out of the AFL over the issue) lasting beyond that year.⁵⁸²

Signaling their conversion to the *Carolene Products* hierarchy of constitutional values, AFL and CIO leaders did recommend open disobedience of one provision of Taft-Hartley: the ban on union political expenditures.⁵⁸³ Unionists described it as the “[m]ost infamous” of the act’s provisions, and charged that it deprived unions of “fundamental rights under the US Constitution.”⁵⁸⁴ Immediately following the override of Truman’s veto (which had argued that the expenditure provision—but

576. *Id.*

577. *Id.* at 493.

578. *Id.* at 505. The delegates circumvented Lewis by demoting the AFL vice presidents to Executive Council members, a classification that would remove them from the category of “officers” required to sign anticommunist affidavits under Taft-Hartley. See *id.* at 483.

579. Gary Gerstle links this shift to the earlier mobilization of Americanism during World War II:

The state’s efforts to reappropriate Americanism in the 1940s . . . aimed at stabilizing industrial relations and at whipping up support for the war effort in ethnic communities, cost American labor a good deal of its ideological independence. In particular it undermined working-class efforts to make capital-labor relations the true test of the nation’s democratic character.

Gary Gerstle, *Working-class Americanism: The Politics of Labor in a Textile City, 1914–1960*, at 331 (1989).

580. See generally William G. Ross, *A Muted Fury: Populists, Progressives, and Labor Unions Confront the Courts, 1890–1937*, at 27, 32 (1994) (discussing labor’s opposition to the federal courts’ power to review the constitutionality of legislation).

581. Text of T-H Statement, *supra* note 554, at 3 (reaffirming policy of permitting constituent unions to decide their policy toward the anticommunist affidavit requirement).

582. See Millis & Brown, *supra* note 500, at 547–48; Preis, *supra* note 540, at 318.

583. Padway, *supra* note 508, at 6; Statement of CIO Executive Board, *supra* note 508, at 3.

584. Potofsky Says: Slave Law Violates Civil Rights, *Advance*, July 1, 1947, at 1; Nat’l Maritime Union, *supra* note 504, at 8.

no other provision—was unconstitutional⁵⁸⁵), the CIO Executive Board resolved not to “comply with the unconstitutional limitations on political activity.”⁵⁸⁶

D. *More Echoes from the Supreme Court*

By the end of October 1947, both affected Houses of Labor had rejected protest strikes or other resistance and authorized their affiliates to comply with all of the purportedly unconstitutional provisions of Taft-Hartley except the ban on political expenditures. In spite of all the “slave labor” bluster, the AFL and the CIO had, as Meany explained, accepted Taft-Hartley as a simple political defeat that would have to be reversed through the ordinary political process. Nevertheless, they went through the motions of challenging the law in the courts.

The Supreme Court’s response appeared to vary with the labor movement’s intensity of opposition. The Court upheld the ban on secondary labor boycotts and approved, without dissent, state laws banning the closed union shop, as authorized by section 14(b).⁵⁸⁷ The anticommunist affidavit requirement passed muster over Justice Black’s blistering dissent.⁵⁸⁸ Only the political expenditure provision ran into serious trouble. The majority construed the provision narrowly—despite extensive legislative history to the contrary—not to prohibit unions from publishing political advocacy, reasoning that a contrary construction would raise “the gravest doubt” of the statute’s constitutionality.⁵⁸⁹ Four concurring justices castigated the Court for failing to reach the constitutional issue, and argued that the provision violated the First Amendment.⁵⁹⁰

585. Truman, Veto Message, *supra* note 573, at 921.

586. Statement of CIO Executive Board, *supra* note 508, at 3. Not only had Congress attacked labor, but it had attempted to “commit the perfect crime” by preventing the people “from shaking off this yoke of want and repression” through the political process. *Id.* As the Supreme Court would have put it, Congress had tried to restrict “those political processes which can ordinarily be expected to bring about repeal of undesirable legislation.” *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938).

587. *Int’l Bhd. of Elec. Workers v. NLRB*, 341 U.S. 694, 705–06 (1951) (upholding secondary boycott prohibition as applied to secondary picketing urging workers to withhold services from job site over opinionless dissent of Justices Reed, Douglas, and Jackson); *Lincoln Fed. Labor Union v. Northwestern Iron & Metal Co.*, 335 U.S. 525, 529–37 (1949) (unanimously upholding state right to work law of the type authorized by section 14(b) of the Taft-Hartley Act).

588. *Am. Communications Ass’n v. Douds*, 339 U.S. 382, 415 (1950); *id.* at 445–53 (Black, J., dissenting) (arguing that there was not “the least vestige of support for . . . holding that the Commerce clause restricts the right to think”).

589. See *United States v. CIO*, 335 U.S. 106, 121 (1948) (reading the Taft-Hartley Act not to ban union from soliciting and spending funds for publication of periodical advocating congressional candidacy).

590. See *id.* at 139, 155 (Rutledge, J., joined by Black, Douglas & Murphy, J.J., concurring) (arguing that the majority “presumed to override the plainly and incontrovertibly stated judgment of all participants in the legislative process” in order to avoid the constitutional issue, and further contending that the provision should have been invalidated on First Amendment grounds).

All that remained of labor's freedom constitution was the yet unaddressed issue of the Thirteenth Amendment right to strike and the diminished but still surviving *Thornhill* picketing doctrine. In 1949, Justices Murphy and Rutledge declared that the question of the Thirteenth Amendment right to strike was "momentous."⁵⁹¹ But before the year was out, both justices had died. Felix Frankfurter's approach eventually prevailed, as the Court proceeded to deflect labor's Thirteenth Amendment claim without ever addressing it on the merits.⁵⁹² Meanwhile, the *Thornhill* doctrine was finally laid to rest in the 1957 case of *International Brotherhood of Teamsters, Local 695 v. Vogt, Inc.*⁵⁹³ Frankfurter's triumphant eulogy recounted that the Court had gradually come to realize that the picketing cases "involved not so much questions of free speech as review of the balance struck by a State between picketing that involved more than 'publicity' and competing interests of state policy."⁵⁹⁴

CONCLUSION: THE PATH OF CONSTITUTIONAL HONESTY

On the eve of the New Deal constitutional revolution, proponents of national labor legislation faced the momentous choice whether to ground their legislation on the Commerce Clause or on the Thirteenth Amendment. Since the early 1900s, the labor movement had claimed the rights to organize and strike under the Thirteenth Amendment.⁵⁹⁵ Labor constitutionalists argued that these rights were essential for workers to exercise actual liberty of contract in an industrial economy dominated by large corporations. By the early 1930s, this core theory had won wide acceptance, and legislators routinely echoed labor's claim that restrictions on worker self-organization and protest amounted to slavery and involuntary servitude.⁵⁹⁶

But labor's constitutionalists encountered stubborn opposition from the movement's own friends within the legal profession. During the cam-

591. *AFL v. Am. Sash & Door Co.*, 335 U.S. 538, 559 (1949) (Murphy, J., concurring).

592. Aside from the *UMW* case (discussed *supra* notes 536–537 and accompanying text), the closest the Court came was in *UAW Local 232 v. Wis. Employment Relations Bd.*, 336 U.S. 245 (1949). The Wisconsin Employment Relations Board had barred workers from any "concerted efforts to interfere with production . . . except by leaving the premises in an orderly manner for the purpose of going on strike." *Id.* at 250. The Court held that this order, as applied to ban the union from calling meetings at irregular times during working hours, did not violate the Thirteenth Amendment: "Our only question is . . . whether it is beyond the power of the State to prohibit the particular course of conduct described." *Id.* at 251. The Thirteenth Amendment issue was also mentioned, but avoided on procedural grounds, in *United States v. Petrillo*, 332 U.S. 1, 12–13 (1947) (rendering no decision regarding possible violations of the Thirteenth Amendment since that issue was not appropriately presented by the record).

593. 354 U.S. 284, 289 (1957) (Frankfurter, J.) (finding that "the broad pronouncements . . . of *Thornhill* had to yield 'to the impact of facts unforeseen' or at least not sufficiently appreciated" (citation omitted)).

594. *Id.* at 290.

595. See *supra* Part I.A.

596. See *supra* Parts I.A, II.A.

paign for anti-injunction legislation that culminated in the passage of the Norris-LaGuardia Act of 1932, a group of elite, progressive lawyers led by Professor Felix Frankfurter undercut labor's constitutional claims by refusing to acknowledge their existence in public while maneuvering behind the scenes to exclude them from legislative consideration.⁵⁹⁷ Their determined opposition to labor's freedom claims reflected not a tactical disagreement among allies, but a fundamental conflict over long-term, constitutional goals. While labor constitutionalists sought power for unions and workers, progressive lawyers sought power for social scientists and other professionals, including themselves.⁵⁹⁸ Over a period of six years, this cagey and well-connected opposition wore down labor's constitutional leaders. In the winter of 1931–1932, when presented with what appeared to be a choice between insisting on their constitutional theory of freedom and achieving anti-injunction legislation in the here and now, labor leaders chose the latter. Two years later, when Senator Robert Wagner proposed his labor disputes bill, unionists sought a constitutional foundation sounding in democracy and human rights, but again failed to force the issue.⁵⁹⁹

The result was to sever the popular demands for industrial freedom from the legal-professional campaign to validate the Wagner Act. Unionists embraced the Wagner Act as labor's latest "Magna Charta" and declared that if the courts would not enforce it, the workers would.⁶⁰⁰ In his 1936 reelection drive, President Roosevelt campaigned against economic royalism and for industrial freedom, apparently endorsing the core of labor's theory.⁶⁰¹ Roosevelt's landslide victory emboldened workers to stage full-blown factory occupations to enforce what they saw as their constitutional rights to organize and strike.⁶⁰² The factory occupations, in turn, forced the Supreme Court to uphold the Wagner Act—a victory that workers across the country promptly celebrated as a "new era" of industrial freedom.⁶⁰³

Meanwhile, however, government lawyers had been urging the courts to uphold the Wagner Act not as a human rights statute, but as an exercise of Congress's power to "control" and "punish" strikes under the Commerce Clause.⁶⁰⁴ And it was this view, not the popular vision of the statute as a human rights measure, that the Supreme Court embraced in the Wagner Act decisions. The Court did leave open the possibility that collective labor rights might be constitutionally protected, and—for a time during the 1940s—workers and unions won a number of decisions

597. See *supra* Parts I.C, I.D.

598. See *supra* Part I.B.

599. See *supra* Part II.

600. See *supra* Part III.C.

601. See *supra* Part IV.B.

602. See *supra* Part IV.C.

603. See *supra* Part IV.E; *supra* notes 493–496 and accompanying text.

604. See *supra* Part IV.D.

protecting the rights to organize, strike, boycott, and picket.⁶⁰⁵ But by the mid 1950s, labor's constitutional victories had been appropriated by others. Under the leadership of Justice Felix Frankfurter, the Supreme Court upheld a battery of restrictive labor laws.⁶⁰⁶ By the time the Court was finished, the new civil liberties won by unions and workers had been reshaped into a doctrine that, as Robert McCloskey famously put it, had the "smell of the lamp about it."⁶⁰⁷ The Constitution, it seemed, protected reasoned discussion about ideas, not appeals to labor solidarity.⁶⁰⁸ In class terms, then, the constitutional revolution of the 1930s represented the triumph within constitutional jurisprudence of what might be called the "knowledge class" over the previously dominant business class.⁶⁰⁹ The role of the working class was to provide the foot soldiers for change.

Why did labor's constitutional vision lose out at the moment of the movement's greatest triumph? Most immediately, the union leaders and pro-labor politicians who were in a position to shape legal outcomes saw no need for constitutional honesty—no need for consistency between popular goals and constitutional rationales. Following Andrew Furuseth, CIO leaders such as Sidney Hillman and John L. Lewis inveighed against industrial slavery and called upon workers to rebel against the "*Dred Scott*" decisions of the Supreme Court.⁶¹⁰ Unlike Furuseth, however, these leaders exploited the mobilizing rhetoric of labor's freedom constitution without pursuing the populist project of enshrining it in official constitutional law. They left the substance of constitutional doctrine to lawyers and judges—in accord with the progressive view of law as a technical field requiring professional expertise. As for Furuseth himself, his prestige and influence had suffered such a crushing blow during the campaign for anti-injunction legislation—when progressive lawyers undercut his constitutional leadership in humiliating fashion—that his passionate pleas to ground the Wagner Act on the Thirteenth Amendment were ignored not only by Senator Wagner, but also by the AFL itself.

605. See *supra* Part V.A.

606. See *supra* Part V.D.

607. Robert G. McCloskey, *Economic Due Process and the Supreme Court: An Exhumation and Reburial*, 1962 *Sup. Ct. Rev.* 34, 46. The lamp referred to was the intellectual's late night lamp.

608. See *supra* Part V.D.

609. Pierre Bourdieu has noted the conflict among class fractions based on their relative holdings of economic capital and "cultural capital." Richard Jenkins, *Pierre Bourdieu* 139–45 (1992). Those who are rich in cultural capital and less well off in economic capital genuinely believe that their learning elevates them above the members of the business class in social status, despite the latter's superior wealth. In constitutional theory, this analysis helps to explain the populist-sounding, but elite-protecting, anger of business class allies like Robert Bork against the liberal intellectuals who defend the main contours of the post–New Deal constitutional order. See, e.g., Bork, *supra* note 2, at 8 (charging that judges are "members of the intellectual class," which is imbued with "liberal culture").

610. See *supra* notes 325–337 and accompanying text.

Like Hillman and Lewis, Senator Wagner adopted a progressive approach to constitutional change. He did have a strong commitment to legal honesty—but only within the zone of statutory law. In the “great controversy” over his bill’s statement of purpose, he insisted on retaining the goals of effective labor freedom and wider distribution of wealth despite the concerns of Labor Department lawyers that these goals would dilute and endanger the Commerce Clause justification.⁶¹¹ But when it came to constitutional law, he made no effort to tie the goal of effective labor freedom to the Thirteenth Amendment, despite his own strong and frequent statements that the denial of the rights to organize and engage in collective action amounted to industrial slavery. Likewise, he acquiesced in the deletion of the general welfare theory even while insisting that its supporting economic theory remain. According to Richard Cortner, Senator Wagner believed that “the real purpose of his labor relations act was to make the American worker a ‘free man,’ and he never entirely accepted the Commerce Clause rationale of the act which emphasized the reduction of obstructions and burdens on commerce caused by strikes as the chief purpose of the act.”⁶¹² Unfortunately for workers, however, Wagner saw no need to rectify this inconsistency.

Did this constitutional dishonesty have any real consequences? Consider the following hypothetical travelogue of the path not taken—the path of constitutional honesty. In 1931, Senator Norris agrees to add the AFL’s Thirteenth Amendment preamble to his anti-injunction bill, which passes—perhaps with a somewhat less overwhelming margin of victory than in real life.⁶¹³ Bolstered by this success, the AFL seeks to ground the Wagner labor disputes bill in the Thirteenth Amendment, not the Republican Government Clause. Wagner agrees and modifies the statement of purpose to proclaim not only that the individual, unorganized worker had become “helpless to exercise actual liberty of contract, to secure a just reward for his services, and to preserve a decent standard of living,” as in the enacted version, but also—echoing his own speeches—that the denial of the rights to organize and strike placed workers in a condition of involuntary servitude and “slavery by contract.”⁶¹⁴ The Supreme Court

611. This paragraph summarizes the account of Wagner’s thought and action contained in *supra* Parts II.A., II.B., and II.C.

612. Cortner, Jones, *supra* note 5, at 60.

613. The margin in the House was 363-13, and in the Senate 75-5. See *supra* note 208.

614. See *supra* notes 223–226, 229 and accompanying text. Acceptance of the AFL’s preamble would have been eased by the fact that the Thirteenth Amendment theory did not conflict with or preclude the alternative ground of Congress’s authority to regulate the jurisdiction of federal courts. By contrast, the Thirteenth Amendment theory *did* conflict with efforts to support legislation on the commerce power because its presence in a statute’s statement of purpose would provide strong evidence that Congress actually intended to protect workers in their relations with employers, a local matter under the Court’s decisions, rather than to protect interstate commerce against disruption. Cf. *Hammer v. Dagenhart*, 247 U.S. 251, 271–72 (1918) (striking prohibition on the interstate

upholds the Act on this theory not because of its legal merits but because—as in real life—President Roosevelt’s court packing plan, made urgent by the sit-down strikes, sways the swing justices.⁶¹⁵ Soon, the statute’s freedom foundation, along with the Supreme Court’s decision validating it, begins to generate possibilities that diverge from the path actually taken. First, there is no necessity to inflate the Commerce Clause beyond recognition. The Fair Labor Standards Act can now be upheld under the Thirteenth Amendment, on the rationale that a living wage has long distinguished freedom from slavery.⁶¹⁶ As a result, the Court never holds (as it did in the real life FLSA case, *United States v. Darby*) that Congress can use the commerce power for any motive or purpose whatsoever.⁶¹⁷ Then comes *Wickard v. Filburn*, addressing the constitutionality of the Agricultural Adjustment Act of 1938 as applied to a farmer growing wheat for consumption by his own livestock. In real life, the Court upheld this application, apparently signaling that there was no longer any activity so local that it lay beyond the commerce power. The opinion relied on the labor case of *NLRB v. Fainblatt*, in which the Court belatedly provided a rationale for *Friedman-Harry Marks* by adopting the NLRB’s theory that many small effects on interstate commerce could be aggregated to pass the substantial effects test.⁶¹⁸ But in our hypothetical story, without *Friedman-Harry Marks* or *Fainblatt* to smooth the way, it seems downright absurd to extend the interstate commerce power to a farmer growing wheat for consumption by his own livestock. Nor is there any agricultural equivalent of the sit-down strikes to force the Court to take this extreme position. The fate of most other New Deal statutes remains unchanged. There is, as in real life, a substantial expansion of the com-

shipment of products produced by child labor on the ground that the statute was actually a regulation of labor and not of commerce).

615. See *supra* Part IV.E.

616. On this dimension of the historical distinction between freedom and slavery, see Amy Dru Stanley, *From Bondage to Contract: Wage Labor, Marriage, and the Market in the Age of Slave Emancipation* 153–57 (1998); Lea S. VanderVelde, *The Labor Vision of the Thirteenth Amendment*, 138 U. Pa. L. Rev. 437, 499–500 (1989). The historical picture here is not entirely rosy from a human rights perspective, as the wage that distinguished freedom from slavery was often described as a family wage—a wage large enough to enable the male worker to support his family without additional income from his wife, thus enabling him to be the “master” of his wife’s labor at home. *Id.* at 140. The notion that the Thirteenth Amendment required minimum standards regarding wages and working conditions was actively pursued by the Department of Justice during the 1940s. See Goluboff, *supra* note 25, at 1661–65, 1668–80.

617. 312 U.S. 100, 124 (1941).

618. 306 U.S. 601, 607–08 (1939) (upholding application of the NLRA to a garment factory employing 60–200 workers, and observing that “[t]here are not a few industries in the United States which, though conducted by relatively small units, contribute in the aggregate a vast volume of interstate commerce”); *Wickard v. Filburn*, 317 U.S. 111, 127–28 (1942) (citing *Fainblatt* and upholding regulation of farmer’s production of wheat for consumption by his own livestock on the ground that although the impact of the farmer’s individual activity “may be trivial,” it was “far from trivial” when combined with the activity of others covered by the law).

merce power; it simply does not extend to the extremes of *Darby* or *Wickard*. The Securities and Exchange Act, for example, is upheld on the rationale that the stock exchange is a “throat” of interstate commerce, like the stockyard in *Stafford v. Wallace*.⁶¹⁹

In our counterfactual story, not only would the commerce power stop short of infinite expandability, but also the human rights powers might escape permanent truncation. Confronted by the post war legislative assault on unionism, courts could turn to the newly reinvigorated Thirteenth Amendment. As in real life, the Supreme Court recognizes a constitutional right to picket, but that right now rests on the Thirteenth Amendment and not on the unstable foundation of the First Amendment free speech clause. And, as in real life, a number of state and lower federal courts overturn restrictions on the rights to strike and boycott, but now more consistently on Thirteenth Amendment grounds.⁶²⁰ By the time members of Congress come to debate the Taft and Hartley bills, they confront a very different situation. To pass constitutional muster, labor bills must be justifiable as measures to promote labor freedom and not simply to facilitate the free flow of commerce. Not only does this change the quality of the congressional debates, but it also emboldens unionists to conduct larger and more forceful protests against the bills.⁶²¹ The result is a Taft-Hartley Act that lacks some of the blunderbuss restrictions contained in the real life version. For example, section 8(b)(4) now prohibits only secondary boycotts aimed at forcing employers to recognize unions not chosen by their employees—the core purpose of the real life section 8(b)(4)—instead of secondary boycotts for all purposes. Once passed, the Taft-Hartley Act is resisted with greater determination. As in real life, the rapidly chilling Cold War foments deep divisions within the labor movement, but the incorporation of collective labor rights into the constitutional canon strengthens the resistance movement in all fora. Ultimately, many restrictive provisions are upheld, for example the general prohibition against union coercion of workers and the guarantee of employer free speech.⁶²² But others that passed muster in real life are now overturned or narrowly construed to avoid constitutional problems, in-

619. 258 U.S. 495, 516 (1922).

620. The real life cases referred to in this paragraph are described in *supra* Part V.A.

621. On the capacity of legal declarations to mobilize social movements, see generally Samuel Bowles & Herbert Gintis, *Democracy and Capitalism* 152–75 (1986) (emphasizing that “struggle over discourses . . . are . . . a key to understanding the formation and solidarity of collective social actors”); Stuart A. Scheingold, *The Politics of Rights* 131–35 (1974) (noting that “a declaration of rights tends to politicize needs by changing the way people think about their discontents”); Frances Kahn Zemans, *Legal Mobilization: The Neglected Role of Law in the Political System*, 77 *Am. Pol. Sci. Rev.* 690, 697 (1983) (observing that the declaration of legal norms “changes the citizenry’s perceptions of their interests”).

622. National Labor Relations Act §§ 8(b)(1), 8(c), 29 U.S.C. §§ 158(b)(1), 158(c) (1994).

cluding the anticommunist affidavit requirement and the restrictions on so-called “national emergency” strikes.⁶²³

A revitalized Thirteenth Amendment might also have opened new paths of development for civil rights law. Even in real life, the Department of Justice interpreted the involuntary servitude clause to prohibit not only physically forced labor, but also more subtly coerced labor as well as peonage-like working conditions and living standards.⁶²⁴ With the support of the Wagner Act cases and other Thirteenth Amendment labor precedents, we could imagine that these arguments now encounter more success. As a result, the Thirteenth Amendment plays a much greater role in the rise of civil rights. Instead of relying exclusively on the strategy of elevating black workers’ conditions to white levels, there is also an element of raising the conditions of all workers to meet the Thirteenth Amendment standard.⁶²⁵ For example, the agricultural and domestic workers excluded from the FLSA are protected by direct prosecutions under the peonage laws and the Thirteenth Amendment.

Fast forward to 1964, time for legislators to choose a constitutional foundation for the Civil Rights Act. As in real life, people like Professor Gerald Gunther and Senator John Pastore argue that the Civil Rights Act is about human rights, not commerce, and that it should be defended on the authority of the Fourteenth Amendment—“the provision with a natural linkage to the race problem”—not behind an “artificial commerce facade.”⁶²⁶ Without the infinitely expandable commerce power, and with

623. *Id.* § 9(h), 29 U.S.C. § 159(h), repealed by Pub. L. 86-257, §201(d) (1957); Labor Management Relations Act §§ 206–209, 29 U.S.C. §§ 176–180 (1947).

624. See Goluboff, *supra* note 25, at 1648.

625. Thus, the hypothetical story provides a possible happy counterfactual for William Forbath’s story about the Civil Rights Movement’s failure to complete the New Deal’s agenda of universal social citizenship, a failure which was certain to leave African Americans—in Bayard Rustin’s words—“bound to [an economic] servitude.” Forbath, *supra* note 6, at 86 (quoting Bayard Rustin, Address to Democratic National Convention, Atlantic City, N.J. (Aug. 1964)). In real life, by contrast, the tradition of combining civil rights and labor claims has “largely disappeared.” Goluboff, *supra* note 25, at 1685.

626. See *supra* note 5. But see Judith Resnik, *Categorical Federalism: Jurisdiction, Gender, and the Globe*, 111 *Yale L.J.* (Nov. 2001) (manuscript at 49–50, on file with the *Columbia Law Review*) (presenting a plausible argument that legislation addressing women’s rights could be sustained under the commerce power without distorting either women’s rights claims or Commerce Clause doctrine). Professor Resnik points out that the *Morrison* Court’s categorization of violence against women as “noneconomic” is indefensible given both (1) the painful irony that the Court has “many times acknowledged that women can be treated as commodities,” for example in the Mann Act cases, and (2) the central importance of economic rights to women’s equality and freedom. *Id.* at 25–26. Despite its power as a critique of *Morrison*, however, this argument does not support the choice of the Commerce Clause over the human rights powers as the foundation for women’s rights legislation. Article I gives Congress the power to regulate “commerce . . . among the several states,” not to protect economic rights. U.S. Const. art. I, § 8. Read in context, this clause was meant to facilitate interstate trade. In my view, legislation to institute economic freedom and equality for women falls more appropriately under the Thirteenth or Fourteenth Amendments, which are, both in text and historical purpose, clearly concerned with economic freedom and equality.

the example of labor's successful campaign to revitalize the Thirteenth Amendment, this argument prevails. As in real life, civil rights activists keep up the pressure, and the Supreme Court upholds the Act—but this time the movement's energy is channeled into an extension of Congress's power to enforce human rights, not to regulate interstate commerce.⁶²⁷ In addition to Justices Douglas, Goldberg, and Black (who, in real life, volunteered that they would have upheld the public accommodations provisions on Fourteenth Amendment grounds if Congress and government lawyers had advanced the theory), Justices William Brennan and Earl Warren now endorse the first Justice Harlan's view that the state action requirement is “a subtle and ingenious verbal criticism” that sacrifices “the substance and spirit” of the Fourteenth Amendment.⁶²⁸

Nearing the present, *United States v. Lopez* never happens, because no self-respecting member of Congress would think of attempting to usurp the local police power on the now farfetched theory that the presence of guns near schools substantially affects interstate commerce.⁶²⁹ And *United States v. Morrison*⁶³⁰ never goes past the district court, which holds—uncontroversially—that the federal tort action for gender based violence falls within Congress's power to enforce the Equal Protection Clause of the Fourteenth Amendment. In place of the distended commerce power and truncated human rights powers of real life, we now have a constitutional jurisprudence that respects both federalism and the hard won congressional powers to enforce human rights.

Like any counterfactual tale, this one can be challenged at numerous points. For one thing, how could the choice of a constitutional justification make such a big difference on the ground? Surely the economic, social, and political forces unleashed by economic depression and war would not have been redirected by a few words in some legal texts. My

627. As Robert Post and Reva Siegel have recounted, a combination of social movement pressure and public discussion very nearly produced this result in real life. Robert C. Post & Reva B. Siegel, *Equal Protection by Law: Federal Antidiscrimination Legislation after Morrison and Kimel*, 110 *Yale L.J.* 441, 496–502 (2000).

628. *The Civil Rights Cases*, 109 U.S. 3, 26 (1883) (Harlan, J., dissenting). Justice Douglas argued that the Court should have upheld the Act's application to a hotel and a lunch counter, both privately owned, on Fourteenth Amendment grounds. *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 280 (1964) (Douglas, J., concurring). Justice Goldberg stated that Congress “clearly had authority” to regulate both enterprises under the Fourteenth Amendment as well as the Commerce Clause. *Id.* at 293 (Goldberg, J., concurring).

In *Daniel v. Paul*, Justice Black dissented from the Court's holding that a private amusement club could be regulated under the “affect[ing] commerce” rationale, but opined that he would have upheld the Act as applied to the club had it been based on the Fourteenth Amendment rather than the Commerce Clause. 395 U.S. 298, 309 (1969) (Black, J., dissenting). See generally Gunther & Sullivan, *supra* note 5, at 205–06 (describing Justices Black, Douglas, and Goldberg's views on the Commerce Clause and Fourteenth Amendment rationales for regulating private activity).

629. 514 U.S. 549 (1995) (discussed *supra* notes 10–12 and accompanying text).

630. 120 U.S. 1740 (2000) (discussed *supra* notes 14–15).

response to this objection is twofold. First, I take it that the capacity of words—especially words inscribed in legal texts—to affect social practice has been established by the explosion of scholarship on the power of legal narrative and symbolism. Words in legal texts can inspire social movement mobilization, dispense symbolic incentives, undermine the legitimacy of established social norms, and produce numerous other effects.⁶³¹ The hypothetical story's claim that the choice of the Thirteenth Amendment over the Commerce Clause would have contributed to labor movement mobilization and altered the dynamics of debate in legislative and judicial fora should not be controversial. The contrary claim—that the choice would have made little or no difference—casts not only Andrew Furuseth, but also Felix Frankfurter and his progressive legal allies, as lunatics fighting over nothing. Second, the changes in the hypothetical story as it runs up to the present—though huge to constitutional lawyers and, perhaps, to the labor movement—are not really so earth shaking overall. Aside from the narrowing of the Taft-Hartley Act, the *results* of past cases—as opposed to the constitutional rationales and doctrines—change mainly at the margins.⁶³²

Another objection comes from the opposite direction. If the choice of the Thirteenth Amendment would have made an important difference, it goes, then why wouldn't the Supreme Court have resisted it more strongly than the commerce theory? And if so, then why were the progressive lawyers not justified in saving the labor movement from a doomed theory? There is, of course, no way of knowing for certain how the Court would have resolved the constitutionality of a Wagner Act grounded on the Thirteenth Amendment. It is conceivable that the combination of the sit-down strikes and the court packing plan—though forceful enough to induce a favorable holding under the Commerce

631. In addition to the sources cited *supra* note 621, see, e.g., Alan Hyde, *A Theory of Labor Legislation*, 38 *Buff. L. Rev.* 383, 384–92 (1990) (discussing the symbolic role of the law); Lawrence Lessig, *The Regulation of Social Meaning*, 62 *U. Chi. L. Rev.* 943, 1008–14 (1995) (describing ways in which legal texts alter social meanings and behaviors); Cass R. Sunstein, *Social Norms and Social Roles*, 96 *Colum. L. Rev.* 903, 916–17 (1996) (discussing the power of law to change behavior by altering reputational consequences).

632. In the counterfactual scenario, Congress can no longer reach such local activities as a farmer producing wheat for his own dairy cows or, perhaps, an endangered species existing entirely within one state. (Most environmental regulations would be sustained on the theory that rivers, air currents, and aquifers cross state lines.) And Congress is no longer blocked from reaching gender-motivated violence or, for that matter, union violence against nonunion workers, which are already prohibited by state law. On the latter, compare the hypothetical result with *United Brotherhood of Carpenters v. Scott*, 463 U.S. 825, 830, 835–36 (1983) (holding that § 1985(3), providing a federal cause of action against private conspiracies to deprive a person of civil rights, does not reach violent attacks by unionists on nonunion workers in part because the Thirteenth Amendment applied only to race, and that the nonunion workers' First Amendment freedom to decline association with unionists was protected only against state action). In the hypothetical story, the Thirteenth Amendment would apply because labor freedom was involved, and there would be no state action requirement to limit the nonunion workers' First Amendment claim.

Clause⁶³³—would not have produced the same result under the Thirteenth Amendment. However, the available evidence suggests that the justices would not have rejected a congressional finding that rights of self-organization and collective action were essential to negate a condition of involuntary servitude. Just as the interconnectedness of the modern economy had become a commonplace, so had the idea that labor freedom necessarily included the rights to organize and strike.⁶³⁴ By 1937, this idea had been endorsed by Congress in the Norris-LaGuardia and Wagner Acts (which, in the hypothetical story, explicitly invoke the Thirteenth Amendment) and even by the Supreme Court, albeit in words rather than deeds.⁶³⁵ In contrast to the Commerce Clause theory, which had been repudiated in the recent and on point case of *Carter v. Carter Coal Co.*, there was no explicit precedent standing in the way of the Thirteenth Amendment theory.⁶³⁶ It is true that the Thirteenth Amendment's broad language could have raised fears of a new judicial activism akin to *Lochner* era economic due process. But the Court could have calmed these fears by adopting—as in real life, it would three decades later—Andrew Furuseth's position that the Court should defer to Congress's rational judgment on the scope of the amendment.⁶³⁷ From our vantage point today, it is easy to forget that the majority justices of the late 1930s and early 1940s were comfortable asserting the constitutional rights of worker self-organization and collective action. In the process of upholding the Wagner Act against due process attack, they described the workers' right to organize as "fundamental" and affirmed that "[u]nion was essential to give laborers opportunity to deal on an equality with their employer."⁶³⁸ Far from shying away from rights of collective labor action, the Court was seeking a textual home for them. In 1937, the Court asserted in dictum that workers enjoyed a First Amendment right to picket, and by 1941 it was enforcing the new right.⁶³⁹ The cause of labor rights was driving the resurgence of the First Amendment, and not the other

633. See *supra* Part IV.E.

634. Bernstein, *New Deal*, *supra* note 215, at 18–22 (documenting the rise of this idea and its adoption by legislatures, courts, and administrative agencies).

635. See *supra* text accompanying notes 67–69, 162, 188–190, 229.

636. 298 U.S. 238 (1936) (discussed *supra* notes 347–349); see *supra* text accompanying notes 193–195.

637. See *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 440 (1968) (asserting that "[s]urely Congress has the power under the Thirteenth Amendment rationally to determine what are the badges and incidents of slavery").

638. *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 33 (1937) (citing *Am. Steel Foundries v. Tri-City Cent. Trades Council*, 257 U.S. 184, 209 (1921)). The justices also went beyond deference to legislators to deplore the "exploitation of a class of workers who are in an unequal position with respect to bargaining power." *West Coast Hotel Co. v. Parrish*, 300 U.S. 379, 399 (1937) (upholding state minimum wage law for women against due process challenge, and criticizing the "exploitation of a class of workers who are in an unequal position with respect to bargaining power and are thus relatively defenceless against the denial of a living wage").

639. See *supra* note 523.

way around.⁶⁴⁰ There is no reason to believe that—absent decades of relentless opposition from labor’s own legal allies—it could not have done the same for the Thirteenth Amendment.

640. See Geoffrey D. Berman, Note, A New Deal for Free Speech: Free Speech and the Labor Movement in the 1930s, 80 Va. L. Rev. 291, 293–94 (1994) (recounting role of the labor movement and labor issues in the rise of free speech in the 1930s); David Kairys, Freedom of Speech, in *The Politics of Law* 140, 156–63 (David Kairys ed., 1982) (describing the central role of workers and unions in the transformation of free speech law culminating in the 1930s); Michael J. Klarman, Rethinking the Civil Rights and Civil Liberties Revolutions, 82 Va. L. Rev. 1, 39–42 (1996) (explaining how free speech gained acceptance partly because of its connection to the labor movement). For a comprehensive account of the labor movement’s role in the rise of free speech, look for Karl Swidorski’s forthcoming book on the subject.