

# Articles

## Labor's Constitution of Freedom

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According to the standard story, the basic structure of modern constitutional law emerged from a clash between two great visions of judicial review: the laissez-faire constitutionalism of the so-called *Lochner*<sup>1</sup> Era, and the progressive vision concisely summarized in footnote four of *United States v. Carolene Products*.<sup>2</sup> The conflict is recounted as a human drama with a cast of characters that includes conservative jurists and businessmen on the *Lochner* side and reform-oriented professionals, intellectuals, and businessmen on the *Carolene Products* side.<sup>3</sup> At the climax, Justice Owen Roberts switches to the progressive side and the Wagner Act—centerpiece of the second New Deal—is upheld by a five-to-four vote in *NLRB v. Jones & Laughlin Steel Corp.*<sup>4</sup>

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<sup>†</sup> Professor of Law, Rutgers University School of Law, Newark, New Jersey. In the course of this Article's lengthy period of germination, I have benefited from the insights of many people. The fact that I will omit some here is a comment not on the importance of their contributions, but on the failings of my memory. Donna Dorgan assisted me on research strategy at the project's inception. An early version of the piece was presented at the Philadelphia meeting of the Law and Society Association, where I profited from the thoughtful commentary of Dan Ernst, as well as suggestions from my copanelists. As always, the Rutgers faculty colloquium yielded lively and useful feedback. Bruce Ackerman, Jennifer Hochschild, and Daniel T. Rodgers took on the draft at its most bloated stage and provided badly needed suggestions, as well as encouragement for the enterprise. My colleague Alan Hyde gave crucial strategic advice as well as detailed feedback at more than one stage of the project. Wayne Eastman, John Leubsdorf, Dorothy Roberts, Lew Sargentich, and William Palmer Gardner pinpointed problems that I have tried to correct.

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

2. 304 U.S. 144, 152 n.4 (1938).

3. See, e.g., EDWARD S. CORWIN, *CONSTITUTIONAL REVOLUTION, LTD.* 64 (1941); WILLIAM E. LEUCHTENBURG, *FRANKLIN D. ROOSEVELT AND THE NEW DEAL 1932–1940*, at 231–39 (1963); PAUL L. MURPHY, *THE CONSTITUTION IN CRISIS TIMES 1918–1969*, at 70–110 (1972) [hereinafter MURPHY, *CONSTITUTION IN CRISIS*]; WALTER F. MURPHY, *CONGRESS AND THE COURT 46–62* (1962) [hereinafter MURPHY, *CONGRESS*]; GEOFFREY R. STONE ET AL., *CONSTITUTIONAL LAW* 167–68, 180–81, 802–04 (2d ed. 1991); LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 8-6 (2d ed. 1988).

4. 301 U.S. 1 (1937).

The standard story's embrace of human agency stops short of the working class. True, the great strike wave of 1934 provided the impetus for the Wagner Act and stiffened the Democrats' determination to regulate the national economy despite the Supreme Court's resistance. Workers usually appear, however, not as conscious human agents intervening in constitutional politics, but as a kind of natural force, devoid of independent constitutional thought.<sup>5</sup> When labor's constitutional ideology does make a cameo appearance in the standard story, it is as an undifferentiated ally either of progressive constitutionalism or, paradoxically, of its laissez-faire adversary.<sup>6</sup>

The standard story omits a third great constitutional vision: labor's constitution of freedom. In the early twentieth century, many American unionists poured their thoughts, energies, hopes, and sometimes their lives into the struggle for fundamental rights: the rights to organize, to assemble, to speak freely, and—above all—to strike. Unionists advanced their own interpretations of the Constitution, usually in opposition to those of the Supreme Court. Antistrike laws were said to violate the Thirteenth Amendment's prohibition against involuntary servitude, while antipicketing laws infringed the First Amendment freedoms of speech and assembly. Labor activists came to embrace a sweeping, if unsystematic, vision of labor's place in the constitutional order. This vision centered on the idea of "effective freedom," which encompassed the ability not only to influence the conditions of working life, but to do so consciously, in combination with one's coworkers, using forms of action that yield immediate, unambiguous evidence of personal and collective potency.<sup>7</sup> Because this vision was embedded in narratives of slavery, emancipation, and freedom, I call it labor's constitution of freedom.<sup>8</sup>

Unionists did not wait for judicial approval to put their constitutional vision into practice. Having declared laws unconstitutional, they endeavored to strike them down through noncompliance and direct action. By 1909, not only did the radical International Workers of the World (IWW) direct its

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5. Irving Bernstein and William Leuchtenburg, for example, tell a story of working class "eruption" followed by the Wagner Act. See IRVING BERNSTEIN, *THE TURBULENT YEARS* 217-351 (1969); LEUCHTENBURG, *supra* note 3, at 239-42.

6. See, e.g., MURPHY, *CONSTITUTION IN CRISIS*, *supra* note 3, at 69 (noting "militant labor leaders'" support for constitutional reform); TRIBE, *supra* note 3, § 8-6, at 580 (noting labor unions' attack on judicial review, consistent with progressive constitutionalism); CLEMENT E. VOSE, *CONSTITUTIONAL CHANGE* 165 (1972) (noting opposition of American Federation of Labor (AFL) leader Samuel Gompers to governmental intervention in labor relations).

7. See *infra* text accompanying notes 122-51, 347-63.

8. Here, as elsewhere, I am indebted to William Forbath's pathbreaking work. Forbath recognized that the labor movement had developed its own constitutional vision, and called it "labor's constitution." WILLIAM E. FORBATH, *LAW AND THE SHAPING OF THE AMERICAN LABOR MOVEMENT* 135 (1991). In Forbath's story, however, labor's constitution appears not as a third great constitutional vision, but as a collective variant of business's laissez-faire constitution. As will become apparent later, my addition of the term "freedom" reflects a basic departure from Forbath's story.

members to "disobey and treat with contempt all judicial injunctions,"<sup>9</sup> but the normally staid American Federation of Labor (AFL) maintained that a worker confronted with an unconstitutional injunction had an imperative duty to "refuse obedience and to take whatever consequences may ensue."<sup>10</sup>

Unlike the right to picket, the right to strike posed squarely the question of labor's place in the constitutional order.<sup>11</sup> The treatment of labor as a commodity subject to the rules of the marketplace is a defining feature of capitalism.<sup>12</sup> The claim of a constitutional right to strike—a right to interdict the free competition of individuals in the buying and selling of labor power—obviously imperiled the ideology and practice of commodity labor. The right to strike could not be justified without addressing the question of labor liberty *per se*.

Unionists found constitutional support for collective labor liberty in the Thirteenth Amendment. In *Bailey v. Alabama*,<sup>13</sup> the Supreme Court had proclaimed that the purpose of the Amendment was "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."<sup>14</sup> Workers argued that in a society where workers depended on employers for jobs, the only way to prevent employer coercion and control was through collective organization, including the right to strike. Economic, philosophical, and political justifications supported this core principle.<sup>15</sup> It was embodied in a vivid constitutional narrative that reflected the felt experience of union activists in emancipating themselves from unbridled employer domination through collective struggle and sacrifice.<sup>16</sup>

I propose to examine the struggle for labor's freedom constitution as one instance of a broader phenomenon: constitutional insurgency. By "constitutional insurgency" I mean a social movement that: (1) rejects current constitutional doctrine, but rather than repudiating the Constitution altogether, draws on it for inspiration and justification; (2) unabashedly confronts official legal institutions with an outsider perspective that is either absent from or marginalized in official constitutional discourse; and (3) goes outside the

9. *Id.* at 143.

10. AMERICAN FED'N OF LABOR, REPORT OF THE PROCEEDINGS OF THE TWENTY-NINTH ANNUAL CONVENTION 313 (1909) [hereinafter AFL TWENTY-NINTH CONVENTION].

11. Because picketing involved verbal communication, progressive legalists and reformers were able to recognize it as a form of "speech." Thus unionists could ally themselves with progressives in their eventually successful campaign to invigorate the First Amendment. This Article focuses instead on the right to strike, where progressive and labor constitutional visions stand in sharp relief.

12. See KARL MARX, CAPITAL 35–83 (Frederick Engels ed., Samuel Moore & Edward Aveling trans., Int'l Pubs. 1967) (1867); KARL POLANYI, THE GREAT TRANSFORMATION 75 (1957); cf. MAX WEBER, THE PROTESTANT ETHIC AND THE SPIRIT OF CAPITALISM 21 (Talcott Parsons trans., Routledge 1992) (1930) (observing that distinguishing feature of occidental capitalism is "the rational capitalistic organization of (formally) free labour").

13. 219 U.S. 219 (1911) (invalidating Alabama's debt peonage law).

14. *Id.* at 241.

15. See *infra* Section II.C.

16. See *infra* Part IV.

formally recognized channels of representative politics to exercise direct popular power, for example through extralegal assemblies, mass protests, strikes, and boycotts.

From the American revolution through the Virginia and Kentucky resolutions, the nullification movement, constitutional abolitionism, populism, the civil rights movement, and down to the recent rise of right-wing citizen "militias," constitutional insurgencies have exerted a pervasive influence on American constitutionalism. Until very recently, however, legal scholars have considered them exogenous to the field of legal studies. Everything about constitutional insurgency—legally untrained activists developing their own constitutional ideas, promoting them through extralegal channels, and acting in derogation of official law—seems antithetical to the professional culture of law.

In his pathbreaking article, *Nomos and Narrative*,<sup>17</sup> Robert Cover argued that the legal thought and practice of outsiders to the official court system can be just as important to the study of law as that of insiders. Cover distinguished jurisprudence, the analytic science of law, from jurisgenesis, the creation of legal meaning. In contrast to the technical language of jurisprudence, jurisgenesis thrives on narrative. Legal and popular culture are linked through storytelling. Cover argued that legal rules and principles take on meaning by virtue of their location in socially resonant narratives. Although elites might control the technical discourse of law, they do not and cannot control the generation of narratives about law. All Americans share a constitutional text, but we do not share an authoritative historical account. Even if we did, "we could not share the same account relating each of us as an individual to that history."<sup>18</sup> Considering the Reconstruction Amendments, for example, "[s]ome of us would claim Frederick Douglass as a father, some Abraham Lincoln, and some Jefferson Davis," with very different implications for interpretation.<sup>19</sup> Even after the Supreme Court has ruled, social movements and communities continue not only to generate their own interpretations, but also—if their commitment is strong—to live by them. Unofficial constitutional visions are thus worthy of study not only because they might become official, but also because they can shape the consciousness and action of adherents in the here and now.<sup>20</sup>

To capture the dynamics of jurisgenesis, it will be necessary to assemble information on the constitutional thought and action of all relevant constituencies ranging from local movement activists to the Justices of the

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17. Robert M. Cover, *The Supreme Court, 1982 Term—Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4 (1983).

18. *Id.* at 18.

19. *Id.*

20. See Martha Minow, *Interpreting Rights: An Essay for Robert Cover*, 96 YALE L.J. 1860, 1867 (1987).

United States Supreme Court. This information is readily available for judges, lawyers, and top movement officials—the leading characters in previous models of constitutional insurgency. It is far more difficult to find for the local activists who occupy center stage in jurisgenesis. Worse, most of the texts left by activists are painfully laconic. To draw out their constitutional significance requires a detailed examination of both the conditions and events that form their context.

This need for depth and detail dictates the methodology of the case study. Fortunately, there is an obvious choice for the case. In January of 1920, the Kansas state legislature enacted the Kansas Industrial Court Act, the most ambitious piece of American labor legislation prior to the Wagner Act. The Act prohibited strikes in key industries and established an Industrial Court to resolve the underlying disputes.<sup>21</sup> Although the Industrial Court ruled in favor of workers more often than not, ten thousand Kansas coal miners staged a four-month winter strike “against the political powers of the state of Kansas, monopoly, [and] the industrial court law.”<sup>22</sup> In the course of the struggle, local union activists generated an extraordinarily rich collection of writings about the Act and the resistance movement. Leading national proponents of all three competing constitutional visions were drawn into the fray. Out of the conflict came not only the leading U.S. case on the constitutional right to strike, *Dorchy v. Kansas*,<sup>23</sup> but also the leading case on constitutional resistance prior to the civil rights movement, *Howat v. Kansas*.<sup>24</sup>

This Article proceeds as follows. Part I lays out the theoretical framework. It critiques the treatment of labor's freedom constitution under three previous models of constitutional insurgency, specifies the model of jurisgenesis, and floats hypotheses for the case study.

Part II recounts the enactment of the Kansas Industrial Court Act and introduces the consequent constitutional conflict. Instead of the two great constitutional visions of the standard story, we will see three: the laissez-faire constitution embraced by procrustean elements of the business community; the progressive constitution of middle-class reformers and intellectuals; and the constitution of freedom propounded by the Act's most committed opponents within the labor movement.

In Part III, we see union miners fashioning an alternative legal world in which the Industrial Court had no existence. A series of escalating tests of commitment culminated in the constitutional strike. Drawing on statements generated in the crucible of struggle, Part IV reconstructs the constitutional narratives that gave meaning to each of the three competing constitutional visions.

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21. See *infra* text accompanying notes 100–04.

22. *Miners Vote [To] Stop Work*, PITTSBURG DAILY HEADLIGHT, Oct. 3, 1921, at 1

23. 272 U.S. 306 (1922).

24. 258 U.S. 181 (1921).

Part V recounts the clash between the progressive constitution of middle-class reformers and the freedom constitution of labor activists. In the eyes of local union activists, labor's freedom constitution both reflected and sustained practices of freedom.

As the resistance campaign wore on, rifts appeared within the labor movement. Part VI explains how the growing gap in interest and experience between union officials and local activists was reflected in their constitutional thought. Labor's corporate constitution and labor's progressive constitution—pale and distorted versions of the laissez-faire and progressive constitutions—are introduced in contrast to the freedom constitution embraced by most local activists. Meanwhile, in the coal fields, the level of conflict escalates sharply as women eschew the domestic role, organize as an autonomous force, and intervene in the strike.

Consistent with the bottom-up perspective, lawyers and government are left for last. Part VII describes the linkages between the constitutional resistance movement and official legal institutions. Between unionists and the state, a vibrant professional culture of law is interposed. The performance of union attorneys calls into question the image of lawyers as "representatives" of social movements.

## I. CONSTITUTIONAL INSURGENCY AS JURISGENESIS

If labor's freedom constitution was so important that it amounted to a third great constitutional vision, then why has it been denied this role in half a century's worth of historical accounts? From a classical, Langdellian point of view, the omission is unremarkable. Labor's freedom constitution was largely missing from the case reporters—the primary source material for classical legal thought.<sup>25</sup> Moreover, the social locations where labor's freedom constitution thrived—workplaces, union halls, and the streets—were exogenous to the classical model. It has been quite some time, however, since the pioneering scholars of the law-and-society movement began to apply political science to constitutional lawmaking. These scholars ignored or downplayed labor's freedom constitution not because of any illusions about apolitical legal thought, but because they looked at history through theoretical lenses that directed their attention elsewhere.

Labor's freedom constitution has been ignored or downplayed in three previous models of constitutional insurgency. Although the proponents of these models fight fiercely among themselves, the models are more usefully thought of as ideal types,<sup>26</sup> each of which may approximate some constitutional

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25. See *infra* text accompanying notes 287–90, 368–70, and 553–72.

26. On the concept of the "ideal type," see MAX WEBER, "*Objectivity*" in *Social Science and Social Policy*, in *THE METHODOLOGY OF THE SOCIAL SCIENCES* 49, 90 (Edward A. Shils & Henry A. Finch eds. & trans., 1949) (1904).

insurgencies. Each proceeds from a different set of assumptions about the power relations between dominant groups and insurgents. Where the assumptions correspond to reality, the ideal type may provide a useful framework for thinking about constitutional insurgency. A brief review of these models and their treatment of labor's freedom constitution will provide the background necessary for the discussion of jurisgenesis that follows.

#### A. *Insurgent Constitutionalism as Pressure Group Pathology*

First, suppose that constitutional insurgents have full access to the representative political process.<sup>27</sup> Like everyone else, they can form interest groups and political parties, build coalitions, and deploy resources to advance their self-interest.<sup>28</sup> Constitutional politics is merely a special case of pressure group politics.<sup>29</sup> Judges are the most important decisionmakers, and influence can be exerted upon them through legal briefs, law review articles, and participation in the judicial appointment process.<sup>30</sup>

Constitutional insurgency appears deviant in this world of free and open political competition. If insurgents enjoy full access to the representative system, then they have no legitimate excuse for exercising direct popular power outside that system. And if, as Robert Dahl once suggested, disruptive protest usually backfires by alienating potential allies,<sup>31</sup> then it is a symptom of group irrationality—better studied by psychologists than political scientists.<sup>32</sup> The insurgents' passionate rights talk likewise appears out of place in a system driven by the rational pursuit of self-interest. As James Willard Hurst reckoned, rights rhetoric serves only to paper over the real motivations for political action, which are invariably economic in nature, and to disguise the fact that every political decision necessarily involves a distributional policy choice.<sup>33</sup>

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27. See, e.g., DAVID TRUMAN, *THE GOVERNMENTAL PROCESS* 510–15 (1951).

28. See, e.g., JAMES WILLARD HURST, *THE GROWTH OF AMERICAN LAW* 3–4, 237 (1950), GLENDON SCHUBERT, *CONSTITUTIONAL POLITICS* 8, 69–82 (1960); Jack W. Peltason, *A Political Science of Public Law*, *SW. SOC. SCI. Q.*, Sept. 1953, at 51.

29. See, e.g., HURST, *supra* note 28, at 128–34; MURPHY, *CONGRESS*, *supra* note 3, at 251–56, WALTER F. MURPHY & C. HERMAN PRITCHETT, *COURTS, JUDGES, AND POLITICS* 274–81 (1961), SCHUBERT, *supra* note 28, at 37–44, 72–78; VOSE, *supra* note 6, at xxxiv–xxxvii, Peltason, *supra* note 28, Clement E. Vose, *Litigation as a Form of Pressure Group Activity*, 319 *ANNALS AM. ACAD. POL. & SOC. SCI.* 20 (1958).

30. See, e.g., MURPHY & PRITCHETT, *supra* note 29, at 274–76, SCHUBERT, *supra* note 28, at 37–40, VOSE, *supra* note 6, at 236–37, 330–38.

31. See ROBERT A. DAHL, *PLURALIST DEMOCRACY IN THE UNITED STATES* 24, 329 (1967).

32. See, e.g., RUDOLF HEBERLE, *SOCIAL MOVEMENTS* 417 (1951), ERIC HOFFER, *THE TRUE BELIEVER* (1951). For a critical review of this literature, see DOUG MCADAM, *POLITICAL PROCESS AND THE DEVELOPMENT OF BLACK INSURGENCY, 1930–1970*, at 7–11 (1982).

33. Hurst took on the most mythologized of constitutional events, the Revolution: "Men wanted national independence largely for economic reasons, but they said they wanted it because their legal rights were invaded. Since the pressures they fought against were first imposed by law, it was a natural way to express their resistance." HURST, *supra* note 28, at 3. Rights claims invariably involved distributional policy choices because for every right recognized in one person, there would be a corresponding duty created in

Pressure group theory directs attention away from constitutional insurgencies. In choosing case studies, its proponents have avoided struggles that featured disruptive social movements—for example, the Founding, Reconstruction, and the New Deal—and focused their attention on conflicts that were resolved in orderly fashion through the formal procedures of amendment and Supreme Court litigation.<sup>34</sup> From this perspective, the labor movement's tumultuous crusade for constitutional rights presents a problem "too vast" to study.<sup>35</sup>

### B. *Constitutional Insurgency as Countermobilization of Bias*

Now suppose that the concerns of the constitutional insurgents are systematically excluded from the agenda of representative politics. While elites resolve conflict among themselves in the arena of pressure group competition, most social conflict is excluded from the public agenda by making it "so private that it is almost completely invisible."<sup>36</sup> E.E. Schattschneider labelled this process "mobilization of bias."<sup>37</sup>

As explained by Peter Bachrach and Morton Baratz, person A might exercise political power over person B by "creating or reinforcing social and political values and institutional practices that limit the scope of the political process to public consideration of only those issues which are comparatively innocuous to A."<sup>38</sup> Much of labor law, for example, consists of rules, like restrictions on sympathy strikes, designed to privatize class conflict by limiting participation in labor disputes to narrow, isolated groups of workers.<sup>39</sup> Legal discourse itself can also contribute to the privatization of issues.<sup>40</sup> Prior to the New Deal, for example, industrial relations were coded as "economic" and thus immunized from political intervention by natural law, either of property and contract rights or of the more prosaic supply-and-demand variety.<sup>41</sup>

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another. *See id.*

34. For example, Hurst tallied instances of state constitutional lawmaking and showed that the overwhelming majority followed the pattern of politics-as-usual, while Vose collected numerous federal case studies that featured elite reformers. *See* HURST, *supra* note 28, at 237–43; VOSE, *supra* note 6. One of Vose's studies did involve an issue resolved during the New Deal, the constitutionality of minimum wage legislation, but the political upheavals that preceded the decisive Supreme Court case were treated not as constitutional politics but as external influences. *See* VOSE, *supra* note 6, at 197–239.

35. *See* VOSE, *supra* note 6, at xvi.

36. E.E. SCHATTSCHNEIDER, *THE SEMISOVEREIGN PEOPLE: A REALIST'S VIEW OF DEMOCRACY IN AMERICA* 7 (1960).

37. *Id.* at 71.

38. Peter Bachrach & Morton S. Baratz, *Two Faces of Power*, 56 AM. POL. SCI. REV. 947, 948 (1962).

39. *See* SCHATTSCHNEIDER, *supra* note 36, at 10.

40. *See* NANCY FRASER, *UNRULY PRACTICES* 103–04 (1989); SCHATTSCHNEIDER, *supra* note 36, at 8. This discovery gave rise to a large and fertile body of legal scholarship. *See, e.g.*, Karl E. Klare, *The Public/Private Distinction in Labor Law*, 130 U. PA. L. REV. 1358 (1982). For a review of the literature, see MARK KELMAN, *A GUIDE TO CRITICAL LEGAL STUDIES* 269–95 (1987).

41. *See* FRASER, *supra* note 40, at 166–71.



In this world of mobilized bias, constitutional insurgency no longer appears deviant. The exercise of direct popular power by social movements, viewed as an aberration in the pressure group model, now becomes a necessary and sometimes legitimate means of overcoming a mobilization of bias.<sup>42</sup> By fomenting open struggle, as by marching, boycotting, and striking, insurgents can activate groups normally excluded from politics, force elites to pay attention, and thus break through the prevailing mobilization of bias.<sup>43</sup> Constitutional rights talk ceases to appear merely obfuscatory, as it now serves to stimulate participation and thrust issues onto the public agenda.<sup>44</sup> The major constitutional upheavals that were marginalized by pressure group theory—including the Founding, the Jacksonian democratic upsurge, the Reconstruction amendments, the populist upheaval, and the New Deal—now take center stage.<sup>45</sup>

Donning the lens of counterbias, labor's constitutionalism begins to emerge from the mist. Workers can now be seen as effective constitutional actors. Karen Orren shows how strike action—much of it in defiance of law—provided the main impetus for the victory of progressive constitutionalism, and thus for the final demise of the state of courts and parties and its replacement by the modern liberal state.<sup>46</sup> William Forbath provides a detailed account, depicting labor's rights talk and constitutional resistance as reactions to a potent mobilization of institutional and ideological bias against collective labor action. We see judges repeatedly using the power of judicial review to invalidate labor's legislative victories, thereby discouraging political action and turning the labor movement toward voluntarism.<sup>47</sup> While insulating industrial relations from legislative control,

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42. See, e.g., ROGER W. COBB & CHARLES D. ELDER, PARTICIPATION IN AMERICAN POLITICS 64–80 (1972); Michael Lipsky, *Protest as a Political Resource*, in POWER AND CHANGE IN THE UNITED STATES 161, 162–66 (Kenneth M. Dolbeare ed., 1969); Jack L. Walker, *A Critique of the Elitist Theory of Democracy*, 60 AM. POL. SCI. REV. 285, 293–95 (1966).

43. See SCHATTSCHNEIDER, *supra* note 36, at 8, 141–42.

44. As Schattschneider observed, “[u]niversal ideas in the culture, ideas concerning equality, consistency, equal protection of the laws, justice, liberty, freedom of movement, freedom of speech and association and civil rights tend to socialize conflict” by inviting intervention and motivating appeals to public authority. *Id.* at 7–8; see also STUART A. SCHEINGOLD, THE POLITICS OF RIGHTS 131–35 (1974) (suggesting that strategic use of rights claims can help to activate quiescent citizenry and to organize groups into effective political units).

45. See Bruce A. Ackerman, *The Storrs Lectures: Discovering the Constitution*, 93 YALE LJ 1013, 1051–52 (1984). Ackerman's story is consistent not only with the counterbias model, which it implicitly invokes, see *id.* at 1040–41, but also with jurisgenesis. In particular, Ackerman shows that official as well as unofficial constitutional law is situated in popularly constructed narratives. See 1 BRUCE ACKERMAN, WE THE PEOPLE: FOUNDATIONS 34–44 (1991).

46. See KAREN ORREN, BELATED FEUDALISM: LABOR, THE LAW, AND LIBERAL DEVELOPMENT IN THE UNITED STATES (1991). Because Orren is more interested in institutional constraints than in human intentionality, her illuminating account stops short of addressing the question of whether labor's constitutional “accomplishment,” as she calls it, came about through intentional action guided by constitutional thought. See *id.* at 16, 163.

47. See FORBATH, *supra* note 8, at 38, 177–92; VICTORIA C. HATTAM, LABOR VISIONS AND STATE POWER 153–61 (1993).

judges erect their own regime of labor law: "government by injunction."<sup>48</sup> Unionists fight back, using rights discourse and direct action to thrust their concerns onto the public agenda.<sup>49</sup> Resistance provokes repression, and gradually middle-class reformers and legislators become convinced that government by injunction lacks even the modicum of worker consent necessary for industrial stability. Finally, the Norris LaGuardia Anti-Injunction Act, with parts of labor's constitutional ideology incorporated in its preamble, passes with huge margins in both houses of Congress.<sup>50</sup>

### C. *Constitutional Insurgency as Hegemonic Co-optation*

Next, imagine that elites are able to shape the consciousness of would-be insurgents. In this view, A might exercise power over B not only by excluding her grievances from the public agenda, but also by preventing her from recognizing them as remediable problems, or even by convincing her that she is not the kind of person who is capable of defining and acting on grievances.<sup>51</sup> In Murray Edelman's example, an assembly-line worker might be so deprived of "any feeling of satisfaction, accomplishment, or autonomy," that he would begin to think of himself as the employer's "machine and not as a man."<sup>52</sup> Elites would seek to reinforce the resulting quiescence by manipulating symbols. If workers picketed, for example, employers and their allies could classify the picketing not as a form of expression, but as a form of pressure, "a quite different thing, in a different universe of objects, differently evaluated."<sup>53</sup>

This vision is consistent with Antonio Gramsci's theory of hegemony.<sup>54</sup> Hegemonic ideas and practices form the terrain of social struggle and provide the basic language and symbology for political discourse, usually in a way that advantages the ruling class or stratum. Hegemony is a "lived system of meanings and values—constitutive and constituting—which as they are experienced as practices appear as reciprocally confirming."<sup>55</sup> For example, the notion that a worker can sell his labor power like a commodity without selling his personal freedom, a nasty fiction according to labor's freedom

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48. Forbath shows how this regime privatized labor disputes by selectively prohibiting broad forms of collective action like sympathy strikes and citywide boycotts, while permitting primary strikes by the employees of a particular employer. See FORBATH, *supra* note 8, at 62–105.

49. Rights rhetoric proves useful both in persuading potential allies and in justifying defiance. See *id.* at 144–47.

50. See *id.* at 159–63. As we shall see, Forbath also goes beyond the counterbias model to discuss the role of law in shaping the consciousness of unionists.

51. See JOHN GAVENTA, *POWER AND POWERLESSNESS* 12–13 (1980); STEVEN LUKES, *POWER* 23 (1980).

52. MURRAY EDELMAN, *THE SYMBOLIC USES OF POLITICS* 182 (1976).

53. *Id.* at 131.

54. See ANTONIO GRAMSCI, *SELECTIONS FROM THE PRISON NOTEBOOKS OF ANTONIO GRAMSCI* 245–46 (Quintin Hoare & Geoffrey Nowell Smith eds. & trans., 1971).

55. RAYMOND WILLIAMS, *MARXISM AND LITERATURE* 110 (1977).

constitution,<sup>56</sup> is rarely challenged not only because the capitalist-controlled media and institutions of socialization constantly reinforce it, but also because it corresponds to the worker's experience at the moment of accepting the terms of employment.<sup>57</sup> Legal rituals, symbols, and language can function as forms of hegemony provided they supply enough experiences of evenhandedness to command social conformity.<sup>58</sup>

Hegemony casts constitutional insurgency in an entirely new light. Far from the dangerous pathology of the pressure group model or the empowering destabilizer of the counterbias model, constitutional insurgency now appears as a form of social co-optation. As in the counterbias model, rights discourse serves to mobilize social movements and politicize issues.<sup>59</sup> But in hegemony, this apparently empowering effect ultimately reinforces elite domination. Social movements are lured to participate in a form of discourse that forecloses radical change and undermines movement power.<sup>60</sup> Even such apparently destabilizing rights as freedom of expression actually reinforce tendencies toward quiescence by unleashing groups to engage in "predatory" conflict over transient issues, thus creating the appearance of democracy without the reality of popular control.<sup>61</sup> Rights talk, it is argued, fosters radical individualism, selfishness, and an artificial distinction between public coercion and private freedom.<sup>62</sup>

From the perspective of hegemony, labor's constitutional ideology provides an ideal case study. William Forbath, Christopher Tomlins, and Leon Fink have produced vivid accounts.<sup>63</sup> They see labor's constitutionalism not as a third great constitutional perspective, but as a misbegotten offshoot of the laissez-faire vision. Confronted with a legal regime that protected collective rights of corporate capital, unionists were drawn to demand similar rights for labor.<sup>64</sup> Instead of challenging laissez-faire constitutionalism, they sought the

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56. See *infra* text accompanying notes 291–92.

57. See NANCY C.M. HARTSOCK, *MONEY, SEX AND POWER* 96–100 (1983); CAROLE PATEMAN, *THE SEXUAL CONTRACT* 142–43, 229 (1988).

58. See EUGENE D. GENOVESE, *ROLL, JORDAN, ROLL: THE WORLD THE SLAVES MADE* 27 (Vintage Books 1976) (1974); E.P. THOMPSON, *WHIGS AND HUNTERS: THE ORIGIN OF THE BLACK ACT* 263 (1975). Various mechanisms by which law is said to "legitimate" the social order are analyzed in KELMAN, *supra* note 40, at 269–95.

59. See SCHEINGOLD, *supra* note 44, at 131–35.

60. See *id.* at 91.

61. See EDELMAN, *supra* note 52, at 18–19, 138. Stuart Scheingold argues similarly that the "myth of rights" reassures Americans that the political system will respond to just grievances. Although the myth sometimes works in favor of change by providing critical standards for the assessment of government performance, "its dominant tendency is surely to reinforce the status quo." SCHEINGOLD, *supra* note 44, at 91.

62. See MORTON J. HORWITZ, *Rights*, 23 HARV. C.R.-C.L. L. REV. 393, 399–400, 402–03 (1988). For similar critiques advanced from a very different political perspective, see MARY ANN GLENDON, *RIGHTS TALK* (1991).

63. See LEON FINK, *IN SEARCH OF THE WORKING CLASS* (1994); FORBATH, *supra* note 8; CHRISTOPHER L. TOMLINS, *THE STATE AND THE UNIONS* (1985).

64. Forbath explains that the "most devastating" effect of judge-made law came not directly from injunctions, but indirectly through the capacity of law to shape popular discourse about unions. Judicial

extension of its benefits to labor. Analogies to corporate property rights entailed acceptance of those rights. From there, it was only a short step to the rejection of class-wide organization and political action in favor of the voluntarist "gospel" of free contract.<sup>65</sup> Thus labor's rights talk "rested on premises that ratified many of industry's asymmetries of power" and closed off more radical ways of critiquing the industrial order.<sup>66</sup>

Consistent with the theory of hegemony, Forbath, Fink, and Tomlins find strengths as well as weaknesses in labor's legal discourse.<sup>67</sup> As we have seen, Forbath shows constitutional discourse serving the counterbias functions of justifying resistance and dramatizing labor's position to middle-class reformers and legislators.<sup>68</sup> Fink suggests that labor's constitutionalism might have provided a "shrewd" path to legitimacy given the configuration of American legal and constitutional restraints.<sup>69</sup> To Tomlins, constitutional rights consciousness was better than the state-centered vision that ultimately prevailed—one that imposed so many limits on collective action that workers ended up with "no more than the opportunity to participate in the construction of their own subordination."<sup>70</sup>

#### D. *Constitutional Insurgency as Jurisgenesis*

Finally, suppose, along with Michel Foucault, that power and resistance are formed at once and in the same location—not at some power center or enclave of resistance, but "right at the point where relations of power are exercised."<sup>71</sup> Here, where power "becomes capillary, that is, in its more regional and local forms and institutions,"<sup>72</sup> it no longer fits the pattern of "A exercises power over B." Instead, subordinates actively participate in an ongoing process of constructing and reconstructing power relations.<sup>73</sup> Thus, as Catharine MacKinnon observes, subordinates are not bereft of power

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language, symbolism, and imagery were picked up by the antilabor press, employers, and officials, and used with great effect to instill in the public mind a vision of unions as inherently violent, criminal "conspiracies." See FORBATH, *supra* note 8, at 125–26. In the midst of this onslaught, legal discourse beckoned as "the surest framework within which to contend for legitimacy and relief." *Id.* at 7.

65. See *id.* at 130–35; FINK, *supra* note 63, at 154–57. Without making any causal claim, Tomlins observes that the AFL began to behave politically like "an economic interest group" rather than a "popular movement." TOMLINS, *supra* note 63, at 76.

66. FORBATH, *supra* note 8, at 135; see also FINK, *supra* note 63, at 154–58.

67. On the capacity of disempowered groups to use legal discourse to their own ends, see GENOVESE, *supra* note 58, at 30, 46; and THOMPSON, *supra* note 58, at 261–65.

68. See *supra* text accompanying notes 47–50.

69. See FINK, *supra* note 63, at 157.

70. TOMLINS, *supra* note 63, at 327.

71. MICHEL FOUCAULT, *POWER/KNOWLEDGE* 142 (Colin Gordon ed. & Colin Gordon et al. trans., 1980).

72. *Id.* at 96.

73. From a bottom-up perspective, this aspect of Foucault's theory has the advantage of revealing "both the potential fragility of power and the ways in which it is vulnerable to disruption." Steven L. Winter, *The "Power" Thing* 17 (1995) (unpublished manuscript, on file with author).

because "within the necessity of their compliance is a form of power."<sup>74</sup> Guises of subservience may hide dynamic cultures of resistance.<sup>75</sup>

In this world of socially constructed power, constitutional insurgency appears not as pathology, or as instrument of counterbias, or as hegemonic distortion, but as an authentic and potentially transformative element of social movement formation and identity. Disruptive noncompliance is the quintessential form of subordinate group power. Lacking the informational, organizational, and financial resources to compete with elites in the representative political process, subordinate groups exercise direct power by withholding cooperation from existing institutions.<sup>76</sup> Even localized, spontaneous defiance can have important consequences throughout the system.<sup>77</sup>

Rights claims now play a vital role in the "cognitive liberation" of social movements from fatalism.<sup>78</sup> For members of disempowered groups, rights "imply a respect that places one in the referential range of self and others, that elevates one's status from human body to social being."<sup>79</sup> The process of inventing rights claims can help to counter hegemony by providing an occasion for activists and lawyers to specify needs and self-conceptions.<sup>80</sup> Nor does participation in mainstream constitutional culture necessarily tend to reinforce domination; "the acceptance of a broad, idealized version of the reigning ideology" may provoke rather than prevent conflict.<sup>81</sup> As outsiders to

74. CATHARINE A. MACKINNON, *TOWARD A FEMINIST THEORY OF THE STATE* 101 (1989); see also MICHAEL SCHWARTZ, *RADICAL PROTEST AND SOCIAL STRUCTURE* 172-73 (1976) (describing ability of subordinated groups to alter power relations through noncompliance).

75. See JAMES C. SCOTT, *DOMINATION AND THE ARTS OF RESISTANCE* 3-4 (1990) During the 1930s, for example, numerous employers were genuinely astonished when their seemingly loyal and satisfied employees embraced outside unions en masse the moment that they appeared capable of surviving employer retaliation.

76. See generally MCADAM, *supra* note 32 (evaluating models of twentieth-century African-American insurgency); FRANCES FOX PIVEN & RICHARD A. CLOWARD, *POOR PEOPLE'S MOVEMENTS* (1977) (examining protest movements of oppressed groups in mid-twentieth-century America); JAMES C. SCOTT, *WEAPONS OF THE WEAK* (1985) (documenting historical struggles of peasants worldwide)

77. Case studies have fleshed out the contention that disruptive exercises of direct popular power were central to most American social movements, including populism, industrial unionism, the civil rights movement, and the welfare rights movement. See, e.g., MCADAM, *supra* note 32, at 37-38; PIVEN & CLOWARD, *supra* note 76, at 1-13; SCHWARTZ, *supra* note 74, at 173

78. See MCADAM, *supra* note 32, at 50; see also PIVEN & CLOWARD, *supra* note 76, at 3-4 Hendrik Hartog describes rights consciousness as an antidote for fatalism, "an intense persuasion that we have rights—that when we are wronged there must be remedies, that patterns of illegitimate authority can be challenged, that public power must contain institutional mechanisms capable of undoing injustice." Hendrik Hartog, *The Constitution of Aspiration and "The Rights That Belong to Us All"*, in *THE CONSTITUTION AND AMERICAN LIFE* 353, 354 (David Thelen ed., 1988); see also John Bringham, *Right, Rage, and Remedy: Forms of Law in Political Discourse*, in *2 STUDIES IN AMERICAN POLITICAL DEVELOPMENT* 303, 309 (1987). Charles Tilly suggests that the link between rights claims and social protest is not unique to America. See Charles Tilly, *Collective Violence in European Perspective*, in *1 VIOLENCE IN AMERICA* 5, 16, 24 (Hugh Davis Graham & Ted Robert Gurr eds., 1969).

79. PATRICIA J. WILLIAMS, *THE ALCHEMY OF RACE AND RIGHTS* 153 (1991)

80. See, e.g., Elizabeth M. Schneider, *The Dialectic of Rights and Politics: Perspectives from the Women's Movement*, 61 N.Y.U. L. REV. 589, 610-11 (1986).

81. See SCOTT, *supra* note 75, at 74. Samuel Huntington has proposed a general theory of how this occurs in the American political arena. See SAMUEL P. HUNTINGTON, *AMERICAN POLITICS: THE PROMISE*

institutional power, subordinates can view law critically as a tool for elite domination; as insiders to a culture that values law, they may also draw upon law as a source of rights and egalitarian norms.<sup>82</sup> According to Sean Wilentz, for example, the Jacksonian-era union movement constructed a philosophy centered on a "property" right to dispose of labor that was as radical as anything put forward by the contemporary British or French movements.<sup>83</sup>

Robert Cover's concept of jurisgenesis, the creation of legal meaning,<sup>84</sup> provides the foundation for a theory about the role of legal thought and practice in sustaining resistance, and thus for an ideal type of constitutional insurgency that proceeds from localities to the center. Like hegemony (and unlike the traditional concept of jurisprudence, which envisions legal thought as a science), jurisgenesis is a cultural process that occurs in a wide range of social settings, many of them outside official legal institutions.

A jurisgenerative movement is characterized by three elements, each of which was present in the early twentieth-century American labor movement. First, the participants share a common body of legal thought and narrative.<sup>85</sup> Unions enacted constitutions and other laws governing member conduct. These texts were associated with a narrative, such as a story recounting how the members rose out of a condition of slavery through collective organization and observance of the laws of the union. Even in nonunion shops, many workers (especially skilled tradesmen) embraced an informal ethical code governing output, the obligations of solidarity, and the proper attitude toward the boss.<sup>86</sup>

Second, there is a set of rituals for educating members into the movement.<sup>87</sup> For example, some unions maintained an apprenticeship program, in which the principles of unionism were taught alongside the skills of the craft. In nonunion shops, new workers were taught the basics of resistance and solidarity by old hands.<sup>88</sup>

OF DISHARMONY 31-33 (1981).

82. See MICHAEL W. MCCANN, RIGHTS AT WORK 232-33 (1994); Mari J. Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARV. C.R.-C.L. L. REV. 323, 338 (1987). For accounts of this process in action, see STAUGHTON LYND, THE FIGHT AGAINST SHUTDOWNS 141-47 (1982); and Randall Kennedy, *Martin Luther King's Constitution: A Legal History of the Montgomery Bus Boycott*, 98 YALE L.J. 999, 999-1002 (1989).

83. See SEAN WILENTZ, CHANTS DEMOCRATIC 242-47 (1984). Similarly, in Victoria Hattam's account, the AFL evidenced not conservatism but a tough-minded form of class consciousness when it demanded rights of collective action equivalent to those enjoyed by capital. See HATTAM, *supra* note 47, at 155-56. Gary Gerstle's vivid study of Rhode Island textile workers shows unionists using Americanist discourse to overcome ethnic divisions, forge class unity, and develop "militant, even radical attacks on capitalism." GARY GERSTLE, WORKING-CLASS AMERICANISM 194 (1989).

84. See Cover, *supra* note 17, at 11.

85. See *id.* at 12-14.

86. See DAVID MONTGOMERY, WORKERS' CONTROL IN AMERICA 13-18 (1979); FREDERICK WINSLOW TAYLOR, SCIENTIFIC MANAGEMENT 79-85 (1947).

87. See Cover, *supra* note 17, at 12-14.

88. See CARTER GOODRICH, THE MINER'S FREEDOM 59-61 (1925); MONTGOMERY, *supra* note 86, at 13.

Third, there is a more or less institutionalized commitment on the part of the members to live by their shared legal understandings.<sup>89</sup> Many unions maintained a system of trial boards to adjudicate alleged violations of union law and to impose formal sanctions such as fines or expulsion. In both union and nonunion shops, informal sanctions ranging from sour comments to ostracism were meted out for failure to live by the principles of solidarity.

A jurisgenerative movement may spawn a constitutional insurgency. The movement appropriates the official constitutional text as part of its legal corpus, interpreting it in accordance with the group's experience through the creation of an unofficial narrative. Where the group is already engaged in a vibrant process of lawmaking, its constitutional interpretation defends the jurisdiction of its autonomous legal process within the official order. In the period of our story, labor's lawmaking bodies contended with employers and government for jurisdiction over the labor process.<sup>90</sup> A few unions (most notably the International Typographers Union) maintained a regime of pure union legislation, in which the workers unilaterally legislated the conditions under which they would work.<sup>91</sup> Although this regime had disappeared in most industries by the 1920s, the collective agreements that replaced union rules often retained a form of lawmaking.<sup>92</sup>

The ideal type of jurisgenesis does not claim to displace the other three types; not all constitutional insurgencies involve jurisgenerative movements. Rather, it raises the possibility of a fourth story and in so doing alters the list and priority of questions to be asked about any particular constitutional insurgency.

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89. See Cover, *supra* note 17, at 12–14.

90. Employers also thought of themselves as lawmakers, and official legal institutions generally acted to protect their jurisdiction. See FORBATH, *supra* note 8, at 59–66 (describing use of injunctions to enforce employer proscriptions of unionism); CHRISTOPHER L. TOMLINS, LAW, LABOR, AND IDEOLOGY IN THE EARLY AMERICAN REPUBLIC 278–90 (1993) (recounting courts' delegation to employers of power to enact workplace codes of behavior).

91. In this type of regime, unions simply regulated their own members' conduct. Since members were bound by union law to refrain from working under any but the approved conditions, work stoppages were triggered by the employer's refusal to accept union conditions. For a vivid account of this legislative process in a union of iron rollers, see DAVID MONTGOMERY, THE FALL OF THE HOUSE OF LABOR 9–13 (1987).

92. For example, the famous Central Competitive Field agreement in the bituminous coal industry—celebrated by social scientists as the wave of the future—was hammered out in a “joint conference” attended by 32 elected union delegates (eight from each of the four states in the field) and 32 employer delegates apportioned on the same basis. See LOUIS BLOCH, LABOR AGREEMENTS IN COAL MINES 76–77 (1931). The process began months in advance with local unions adopting resolutions proposing terms. Next, the national union convention embraced a program of demands, which tended to constitute “a compromise of the resolutions submitted by the local unions.” *Id.* at 74–75. The joint conference was conducted in accord with parliamentary procedure, and an agreement required a unanimous vote of the delegates as well as “adoption” by a referendum vote of the union membership. See *id.* at 79–81. Once adopted, the agreement became a “law” of the union, and members faced union sanctions not only for scabbing (i.e., working for an employer who did not accept the agreement as law), but also for violating the union's obligations under the agreement.

### 1. *Instrumental vs. Constitutive Functions*

In the pressure group model, rights discourse is dysfunctional. In each of the other models, however, it serves important functions. The counterbias model sees constitutional rights discourse serving the external, instrumental purposes of soliciting official intervention, attracting the attention and winning the support of outside constituencies, and justifying movement activities, especially the defiance of official law. This model makes no assumption that the use of rights discourse evidences rights consciousness; language and symbology are simply resources to be deployed. In this view, we would expect to find more use of rights discourse in communications directed to outsiders than in internal, movement communications.

In the models of hegemony and jurisgenesis, on the other hand, rights discourse performs internal, constitutive functions that are at least as important as the external, instrumental functions posited by the counterbias model. By engendering and mobilizing rights consciousness in subordinate groups, rights discourse exerts a shaping influence on their conceptions of their own collective identities, capabilities, and grievances. Accordingly, we would expect to find a robust discussion of rights in internal movement communications as well as in communications directed to outsiders. We would also expect to find committed activists living in accordance with their understanding of the law even when doing so conflicts with instrumental concerns. The issue of instrumental versus constitutive functions becomes central to the story of the constitutional strike in Parts III and IV, which tell of unionists creating and abiding by principles grounded in their own experiences.

### 2. *Hegemonic vs. Empowering Constitutive Functions*

Because they do not recognize the constitutive dimension of rights discourse, the pressure group and counterbias models have nothing to say about its effects. In the hegemony model, rights discourse strengthens elite domination by influencing subordinate groups' construction of reality. Constitutional rights consciousness is said to detract from the group's sense of solidarity, capability, and purpose. On this view, we would expect to find rights consciousness to be stronger among conservative than among radical members of subordinate groups. We would also expect a negative correlation between rights discourse and proposals for radical change.

In the model of jurisgenesis, legal thought and practice play formative roles in constructing group identity and developing the capacity for collective action. Where the experiences and interests of a subordinate group diverge widely from those of dominant groups, we would expect to find critical rights discourse. Given a constitutional culture with broad, aspirational norms like "equal protection of the laws" and "freedom of speech," we would not expect



to find any negative correlation between rights discourse and radicalism, or any bias toward narrow forms of solidarity. The question of hegemonic versus empowering constitutive functions enters the story in Part V, which recounts local activists' use of labor's freedom constitution to nurture solidarity and mobilize resistance.

### 3. *Local vs. Central Origins*

The pressure group, counterbias, and hegemonic models all posit that rights consciousness develops in reaction to official rights discourse. Subordinate groups imitate elites, appropriate their rights discourse, and—on some accounts—modify it to their purposes. Accordingly, we would expect to find more evidence of constitutional rights consciousness in the statements of movement leaders, who routinely deal with courts and lawyers, than in those of local activists, who interact with legal institutions only sporadically. We would also expect that when local activists do advance rights arguments, they would follow the pattern set by their leaders.

By contrast, jurisgenesis posits that a wide variety of social groups are capable of generating legal meaning without any particular prodding or assistance from official legal institutions. We would expect to find rights consciousness flourishing even where exposure to courts is limited. Furthermore, the contrasting experiences and conflicting interests of officials and local activists would lead us to suspect that these two groups might embrace disparate forms of rights consciousness. The greater the gap in experiences and interests between leadership and rank-and-file, the greater would be the expected contrast in their ideas. Assuming that the most potent form of power for subordinates is the unruly sanction of disruption, while leaders depend on official legality and a steady flow of financial support,<sup>93</sup> we would expect the contrast to be quite sharp. The issue of local versus central origins of rights consciousness becomes crucial to the story in Part VI, where we see national union officials rejecting labor's freedom constitution in favor of views grounded in their different experiences as union functionaries.

### 4. *Linkage: The Role of Lawyers*

If rights consciousness develops in reaction to judicial commands and discourse, as in all of the models except jurisgenesis, we would expect to find that movement lawyers play a key mediating role both in transmitting official rights discourse to the movement and in developing legal theories to turn that discourse to movement purposes.

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93. See GAVENTA, *supra* note 51, at 6–7; MCADAM, *supra* note 32, at 54–56; PIVEN & CLOWARD, *supra* note 76, at xxi–xxiii.

Jurisgenesis, on the other hand, assumes that any group with shared experiences and interests may create its own world of legal meaning. If legal consciousness can develop from the bottom up, then movement lawyers may well find themselves on the opposite side of a cultural divide from their clients. Lawyers and judges are embedded in a robust professional culture that sets them apart from movement leaders as well as activists. Robert Gordon has suggested that the primary social role of the legal profession is "the production of ideology" that reconciles corporate clients' aims and activities with a widely accepted structure of justice.<sup>94</sup> This process encompasses more than the translation of particularistic client interests into legal language by individual lawyers. The entire cultural apparatus of law, from law schools to courts, generates language, symbology, and rituals that reflect elite values and support elite interests. Gordon shows how, in the late nineteenth and early twentieth centuries, this professional culture cut across lines both of specialty and political orientation.<sup>95</sup> On this view, we would not be surprised to find a sharp disjuncture between the legal consciousness of a jurisgenerative social movement and that of its lawyers. This problem takes center stage in Part VII, in which union lawyers eschew labor's freedom constitution for views more compatible with mainstream professional discourse.

## II. THREE CONSTITUTIONS COLLIDE

In December 1919, the American Federation of Labor hosted a conference of unions and farmers' organizations claiming to represent nearly five million workers. Although the labor movement had reached a new high in membership and influence, the delegates were in a gloomy mood. The most ambitious and thorough union organizing campaign in American history had culminated in a nationwide steel strike that—under a barrage of injunctions, arrests, and military interventions—was teetering on the brink of total defeat. A general strike in Seattle and a wave of police strikes had raised fears of insurrection, turning public opinion against unionism. Sensing an opening, state and federal legislators had introduced scores of bills prohibiting or restricting strikes and mandating procedures for industrial dispute resolution.<sup>96</sup>

In response, the conference delegates framed the issue of strikes not as a question of economics or ethics, but as one of constitutional law. "Autocratic, political and corporate industrial and financial influences in our country have

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94. See Robert W. Gordon, *Legal Thought and Legal Practice in the Age of American Enterprise, 1870–1920*, in PROFESSIONS AND PROFESSIONAL IDEOLOGIES IN AMERICA 70, 77, 81 (Gerald L. Geison ed., 1983).

95. See *id.* at 72–81.

96. See JAMES R. GREEN, *THE WORLD OF THE WORKER* 93–97 (1980); SELIG PERLMAN, *A HISTORY OF TRADE UNIONISM IN THE UNITED STATES* 250–51 (1929); PHILIP TAFT, *ORGANIZED LABOR IN AMERICAN HISTORY* 341–51, 355–60 (1964).

sought," they warned, "to infringe upon and limit the fundamental rights of the wage-earners guaranteed by the constitution of the United States."<sup>97</sup> These rights were to be found not in the Fourteenth Amendment's widely litigated guarantee of "liberty," but in the Thirteenth Amendment's judicially moribund Involuntary Servitude Clause.<sup>98</sup> The right to strike, proclaimed the conference statement, meant the difference between voluntary and involuntary servitude, between freedom and slavery.<sup>99</sup>

Kansas Governor Henry J. Allen, a Bull Moose Republican and strong believer in active government, was not impressed. One month after the conference, he induced the Kansas state legislature to pass the Kansas Industrial Court Act, the most ambitious piece of American labor legislation prior to the New Deal. The Act prohibited strikes in industries "affected with a public interest," which included all of the state's industries that were unionized or threatened with unionization.<sup>100</sup> It established an Industrial Court to resolve the underlying disputes, and empowered the court to set wages and working conditions.<sup>101</sup> Workers were to receive "a fair wage and have healthful and moral surroundings" at work.<sup>102</sup> If the court determined that an illegal cessation of operation threatened the public peace or health, it could initiate proceedings to "take over, control, direct and operate" the company.<sup>103</sup> The court consisted of three judges appointed by the governor for three-year terms.<sup>104</sup>

From the outset, supporters and opponents of the Act couched their arguments in constitutional terms not only in court, but also in public debate. The ensuing struggle threw three competing constitutional visions into sharp relief: the dominant laissez-faire constitution, the rising progressive constitution, and the insurgent constitution of freedom. I call these visions "constitutions" because each served its supporters not only as a source of arguments, but also as a guide to action.

#### A. *Business's Laissez-Faire Constitution*

When Governor Allen proposed the Industrial Court, Colonel John S. Dean, a corporate lawyer, quickly emerged as the most outspoken person

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97. *Labor, Its Grievances, Protests and Demands*, 27 AM. FEDERATIONIST 33, 33-34 (1920) (publishing conference declarations).

98. U.S. CONST. amend. XIII, § 1.

99. See *Labor, Its Grievances, Protests and Demands*, *supra* note 97, at 35.

100. See Kansas Industrial Court Act, ch. 29, §§ 3(a), 6, 1920 Kan. Spec. Sess. Laws 38, 39. After invoking this broad language, apparently drawn from *Munn v. Illinois*, 94 U.S. 113, 126 (1876), the legislature then specified the five industries so "affected": food processing; clothing manufacturing; mining and production of fuel; transportation of food, clothing, and fuel; and public utilities and common carriers.

101. See Kansas Industrial Court Act §§ 1, 7, 8, at 36-37, 39-41.

102. *Id.* § 9, at 41.

103. See *id.* § 20, at 45.

104. See *id.* § 1, at 36-37.

claiming to represent business. Speaking before a legislative committee, he argued that the bill violated the constitutional right of workers and employers to make contracts free from governmental interference. The court's power to take over and operate private companies amounted to "state socialism."<sup>105</sup> Dean gave a nod toward labor, arguing that the state's power to fix wages would reduce individual workers to involuntary servitude, but he strongly supported the bill's prohibition of strikes.<sup>106</sup>

Dean did not need any creative legal theories to make his constitutional case. Of the three competing constitutions, business's laissez-faire version fit best with contemporary legal doctrine. The era of economic due process was still in full swing, and both state and federal courts routinely struck down legislative interferences with liberty of contract and property rights. By 1920, the United States Supreme Court had invalidated far less intrusive infringements of contractual freedom than the Industrial Court and its power to fix wages and hours.<sup>107</sup>

#### B. *The "Public's" Progressive Constitution*

Although progressivism is more usefully viewed as a set of shared discourses than as a programmatic ideology,<sup>108</sup> the movement did produce a coherent ideology in the field of constitutional law. To progressive reformers and intellectuals, both business's laissez-faire constitution and labor's constitution of freedom were obstacles to enlightened government. They argued that answers to industrial problems were to be found not in the Constitution, but in economics and social science.<sup>109</sup> On this view, constitutional rights in the economic sphere blocked adaptation to change. Adherence to fundamental principles interfered with pragmatic bargaining. Strikes and boycotts amounted to "industrial warfare" that should give way to peaceful administration.<sup>110</sup>

105. Thomas L. Monninger, *The Fight of Alexander Howat for the Right To Strike* 27 (1946) (unpublished M.S. thesis, Kansas State Teachers' College) (on file with author).

106. See DOMENICO GAGLIARDO, *THE KANSAS INDUSTRIAL COURT* 38-39 (1941).

107. See, e.g., *Coppage v. Kansas*, 236 U.S. 1 (1915) (striking down state prohibition against yellow dog contracts—agreements obligating workers to refrain from joining union); *Adair v. United States*, 208 U.S. 161 (1908) (invalidating federal prohibition against yellow dog contracts); *Lochner v. New York*, 198 U.S. 45 (1905) (invalidating state maximum hours law). Only the five-to-four decision in *Wilson v. New*, 243 U.S. 332 (1917), seemed to offer support for the Act, and it could be distinguished on two compelling grounds. In *New*, the Court upheld the Adamson Act, a federal law temporarily fixing wages for railroad workers. But the Act was limited to the railroad industry, which had long been subject to regulation on the ground that it was "in a sense a public business." *Id.* at 347. Moreover, the *New* Court emphasized that Congress had passed the Adamson Act only under the threat of a nationwide railway strike that posed an imminent danger of "infinite injury to the public interest." *Id.* at 348.

108. See Daniel T. Rodgers, *In Search of Progressivism*, *REV. AM. HIST.*, Dec. 1982, at 113-32.

109. The progressive attack on fundamental rights thinking is vividly recounted in MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW 1870-1960* (1992).

110. See Gary Dean Best, *President Wilson's Second Industrial Conference 1919-20*, 16 *LAB. HIST.* 505, 519 (1975); see also *infra* notes 299-307 and accompanying text.

Accordingly, Governor Allen exhorted both capital and labor to give up their "liberty" objections to economic regulation.<sup>111</sup>

As for labor's Thirteenth Amendment claim, many progressives held that the Act's guarantee of the individual right to quit conclusively negated any analogy to slavery or involuntary servitude.<sup>112</sup> Others, less sanguine about the labor market as a guarantor of freedom, counted on the Industrial Court itself to play that role. Presaging the modern *Carolene Products* paradigm of constitutional law, they argued that labor could not be enslaved as long as workers retained the right to vote, and thus the ability to influence the composition of the Industrial Court.<sup>113</sup>

The Act's leading proponents were fully aware that it was of doubtful constitutionality. They envisioned themselves as participants in a struggle to change prevailing case law. "We lawyers think nothing is constitutional unless some court has said it is constitutional," observed W.L. Huggins, the chief drafter of the Act, "but if we should stop where the court stops we would never be able to make any progress."<sup>114</sup> Allen agreed, noting that "the way to constitutional change is paved by statutory enactments."<sup>115</sup> Neither Allen nor Huggins contemplated open resistance; their view was, rather, that by "stepping out a little bit farther"<sup>116</sup> they could induce the court to accept one more step in what William Allen White called the "'age-old process of bringing under control, because of the public interests involved, matters that formerly were of private concern only.'"<sup>117</sup>

In progressive discourse, the "public" consisted of everyone except "special interests" like capital and labor. Colonel Dean's opposition, offered on behalf of business, bolstered Allen's claim that the Act protected the public against capital as well as labor.<sup>118</sup> In fact, however, business was divided on the issue. At the same time that Allen was claiming the enmity of capital, he was receiving correspondence that belied his claim. Employers across the country reported on their efforts to secure the passage of similar laws in their

111. See HENRY J. ALLEN, *THE PARTY OF THE THIRD PART: THE STORY OF THE KANSAS INDUSTRIAL RELATIONS COURT* 140 (1921).

112. See 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); W.L. Huggins, Speech Before the Kansas State House of Representatives (Jan. 1920), in ALLEN, *supra* note 111, at 83; *The Judicial Adjustment of Industrial Controversies*, 43 BENCH & B. (n.s.) 151, 152 (1920); Sidney Post Simpson, *Constitutional Limitations on Compulsory Industrial Arbitration*, 38 HARV. L. REV. 753, 784-85 (1925); J.S. Young, *Industrial Courts: With Special Reference to the Kansas Experiment*, 5 MINN. L. REV. 353, 354-55 (1921).

113. See *The Industrial Court*, N.Y. TIMES, Feb. 18, 1921, at 10; *The Kansas Challenge to Unionism*, NEW REPUBLIC, June 1, 1921, at 3.

114. Huggins, *supra* note 112, at 85. Here, Huggins followed Walter Bagehot's admonition that in order to accommodate progress, the Constitution would have to be adjusted in the style of "trustees carrying out a misdrawn will." WOODROW WILSON, *CONGRESSIONAL GOVERNMENT* 164 (Mendian Books 1956) (1885).

115. ALLEN, *supra* note 111, at 156.

116. Huggins, *supra* note 112, at 85.

117. Quoted in GAGLIARDO, *supra* note 106, at 39-40.

118. See *Says Kansas Public Backs Labor Court*, N.Y. TIMES, Feb. 26, 1922, at 14.

states.<sup>119</sup> Business groups opened their meetings and publications to Allen's views.<sup>120</sup> In effect, Allen was attempting to do for business what Robert F. Wagner would later do for labor: taking the lead in constructing a conception of group interests that included a heavy dose of state intervention in industrial relations.<sup>121</sup>

### C. *Labor's Constitution of Freedom*

From the start, unionists opposed the Act on constitutional grounds. Railroad locals petitioned Allen not to "legalize involuntary servitude,"<sup>122</sup> and reminded him that "slavery was abolished in the year 1865."<sup>123</sup> Before judges and mass meetings alike, Alexander Howat, leader of the Kansas miners, pounded home the argument that the law resurrected slavery and involuntary servitude in violation of the Thirteenth Amendment.<sup>124</sup> After an impassioned speech by Howat, the delegates to the 1920 AFL convention passed resolutions declaring that the Act transgressed the Thirteenth Amendment, and that it was intended to put "the working class . . . in the position that the negro workers were in before the abolition of chattel slavery."<sup>125</sup> There was no open opposition.

Later in the struggle, it would become clear that this appearance of unity hid deep rifts within the labor movement, rifts of central importance in understanding the dynamics of labor's jurisgenesis. We will see that both business's laissez-faire constitution and the "public's" progressive constitution found support, albeit in modified form, within the movement. For the moment, however, it will be useful to present a concise summary of the predominant constitutional vision, the one held by the most important leaders of the

119. See, e.g., Letter from T.J. Alvin, President, Northern Kentucky Employers Ass'n, to Henry J. Allen, Governor of Kansas (Nov. 16, 1920) (Papers of Henry J. Allen, on file with Manuscript Division, Library of Congress) [hereinafter Allen Papers], box B31; Letter from D.M. Kitselman, Vice President, Kitselman Brothers (Indiana), to Henry J. Allen (Jan. 6, 1921), in Allen Papers, *supra*, box B33; Letter from Theo. A. Randall, Secretary, National Brick Manufacturers Ass'n (Indiana), to Henry J. Allen (Nov. 27, 1920), in Allen Papers, *supra*, box B29; Letter from Charles B. Smith, Attorney (Ohio), to Henry J. Allen (Nov. 20, 1920), in Allen Papers, *supra*, box B30.

120. See, e.g., Henry J. Allen, *What About the Public?*, NATION'S BUS., June 1920, at 18; John A. Fitch, *Industrial Peace by Law—The Kansas Way*, SURVEY, Apr. 3, 1920, at 7.

121. See Mark Barenberg, *The Political Economy of the Wagner Act: Power, Symbol, and Workplace Cooperation*, 106 HARV. L. REV. 1379, 1431–39 (1993).

122. Petition of 34 Employees of the Atchison, Topeka & Santa Fe Railway to Henry J. Allen (Jan. 8, 1920) (Frank P. Walsh Papers, on file at New York Public Library) [hereinafter Walsh Papers], box 9, file 60.

123. Letter from Leo T. Smith, Local Chairman, Order of Railroad Telegraphers (Chanute, Kansas), to Frank P. Walsh, Attorney (Jan. 8, 1920), in Walsh Papers, *supra* note 122, box 9, file 60.

124. See, e.g., *Howat Speaks at Hutchinson*, WORKERS CHRON., Aug. 19, 1921, at 1; *Mine Worker Officials Arrested for Contempt*, WORKERS CHRON., Feb. 11, 1921, at 11; *Mine Worker Officials Given One Year Each*, WORKERS CHRON., Feb. 18, 1921, at 1; *Six Months in Jail and \$500 Fine*, WORKERS CHRON., July 15, 1921, at 1.

125. AMERICAN FED'N OF LABOR, REPORT OF PROCEEDINGS OF THE FORTIETH ANNUAL CONVENTION 378 (1920).

constitutional resistance: Alexander Howat, leader of Kansas's United Mine Workers (UMW) District 14; John Hunter Walker, President of the Illinois State Federation of Labor; and—at least in his bolder moments—AFL President Samuel Gompers.

Of the three competing constitutions, labor's found the least support in the case law. A few court decisions had made reference to slavery or involuntary servitude en route to invalidating antistrike injunctions, but the general practice was to treat the right to strike as a narrowly circumscribed exception to the general prohibition against "conspiracies."<sup>126</sup> To make up for this shortage of favorable holdings, unionists turned to more abstract legal language.

Unlike the Bill of Rights, the Thirteenth Amendment spoke systemically: "Neither slavery nor involuntary servitude, except as a punishment for crime . . . shall exist within the United States . . ."<sup>127</sup> The Amendment did not specify what rights and protections would be necessary to negate a condition of slavery or involuntary servitude. For once, labor's constitutionalists agreed with the Supreme Court's stated answer: The 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."<sup>128</sup> This formulation, however, left room for a wide range of positions on collective activity. At one end of the spectrum, most courts followed the Garrisonian abolitionists in holding that individual liberty of contract would suffice. No matter how large or powerful an employer might be, the worker could always quit and go elsewhere.<sup>129</sup>

At the other end of the spectrum, unionists responded by challenging the economics, the theory, and the metaphorical underpinnings of the vision of freedom as the right to quit. The notion that a lone worker could avoid employer control by quitting was, argued Samuel Gompers, a "subterfuge": "[J]ust imagine what a wonderful influence such an individual would have, say for instance [on] the U.S. Steel Corporation . . ."<sup>130</sup> One reason for this lack of influence was the phenomenon known to economists as "monetary exchange asymmetry." "The average employer can discharge one man without noticing it," wrote John Hunter Walker, but "it costs the man and his wife and children

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126. See *infra* notes 288–90 and accompanying text. For a list of cases invalidating strike injunctions on Thirteenth Amendment grounds, see James Gray Pope, *Labor and the Constitution: From Abolition to Deindustrialization*, 65 TEX. L. REV. 1071, 1097 n.179 (1987).

127. U.S. CONST. amend. XIII, § 1.

128. *Bailey v. Alabama*, 219 U.S. 219, 241 (1911) (invalidating Alabama's debt peonage law).

129. See William E. Forbath, *The Ambiguities of Free Labor: Labor and the Law in the Gilded Age*, 1985 WIS. L. REV. 767, 795–800; Pope, *supra* note 126, at 1083–85.

130. DEBATE BETWEEN SAMUEL GOMPERS AND HENRY J. ALLEN AT CARNEGIE HALL, NEW YORK, MAY 28, 1920, at 15 (1920) [hereinafter GOMPERS-ALLEN DEBATE]. This argument is presented in a more polished form in *Duell-Miller Industrial Relations (Anti-Strike) Bill: Hearings Before the Joint Labor and Indus. Comm.* (N.Y. Mar. 1, 1922) (testimony of Samuel Gompers, President, American Federation of Labor), reprinted in 29 AM. FEDERATIONIST 253, 259–61 (1922) [hereinafter Gompers Testimony].

everything that they have.”<sup>131</sup> Moreover, a worker who quit his job might find that he had to leave his community to find work—not a viable course of action for the many workers who depended on the emotional support and material solidarity of tight-knit working class communities.<sup>132</sup>

The core of labor’s argument, however, focused not on market malfunctions, but on the concept of freedom. No matter how well the impersonal market mechanism might discipline employers, workers could not experience freedom unless they could exercise a degree of conscious control over their own work lives. Gompers explained that when the worker lost the ability to make a complete article with his own tools, he also “lost his identity and lost his power.”<sup>133</sup> He could regain neither by the mute act of “walk[ing] the streets in search of work.”<sup>134</sup> As John Fitch concluded, “[i]n his individual freedom to quit he can get such improved conditions only by stumbling on them, if he should be so fortunate. He may not, with his fellows, make such conditions for himself.”<sup>135</sup> Similarly, in arguing against yellow dog contracts, labor advocates insisted that whether a worker “gets work elsewhere or whether he does not has nothing to do with” the issue.<sup>136</sup> To neoclassical economists, this argument makes no sense; after all, a worker could go elsewhere and get out from under a yellow dog contract. But to labor’s constitutionalists, mere “freedom as act”—the freedom to take or leave a contract—could never substitute for the freedom to shape the conditions of daily life.<sup>137</sup> Labor’s constitutional challenge to the Act thus involved “the legal right of all workers to control their own lives.”<sup>138</sup>

Finally, unionists made a conceptualist argument that the Act established a form of slavery by granting employers property rights in human beings.<sup>139</sup> Denial of the right to strike was “an invasion of man’s ownership of himself and of his labor power, and is a claim of some form of property right in the

131. J.[H.] Walker, *Only Worker Suffers*, WORKERS CHRON., Apr. 29, 1921, at 3.

132. See *infra* text accompanying note 509.

133. Gompers Testimony, *supra* note 130, at 260.

134. *Id.*

135. Fitch, *supra* note 120, at 8. Similarly, Victor Olander of the Seamen’s Union wrote that “freedom is real only when it can be made effective.” 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.” Victor A. Olander, *Compulsory Arbitration*, SHOE WORKERS J., July 1920, at 6.

136. *Individual Contract Is Named “Yellow Dog”*, WORKERS CHRON., May 27, 1921, at 2.

137. The phrase “freedom as act” originates with Carole Pateman. Pateman provides a theoretical foundation for the labor movement’s somewhat inarticulate arguments in PATEMAN, *supra* note 57, at 146–49.

138. Frank P. Walsh, *Henry All[en]’s Industrial Court*, WORKERS CHRON., June 11, 1920, at 3.

139. This argument was originally developed as a challenge to labor injunctions. Since equity jurisdiction could be exercised only to protect “property” rights, the labor injunction necessarily rested on the view that a strike violated some property right of the employer. See FORBATH, *supra* note 8, at 85–88. Hence, unionists argued, the labor injunction was analogous to chattel slavery because both recognized property rights in human labor.



workmen."<sup>140</sup> The notion that a worker could sell his labor power without losing his liberty was, according to Victor Olander, patently absurd:

Labor is man himself, an attribute of life, it increases with health, diminishes with sickness and ceases at death. . . . 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.<sup>141</sup>

Just as the individual right to quit was no guarantee of freedom, neither was the right to vote. Unionists prefigured modern theorists of power in arguing that people may be conditioned into a state of powerlessness unless they come to recognize themselves as effective actors on a day-to-day basis. Without organization, argued John Hunter Walker, the worker's "mind and that of his family will be trained and molded to suit the wishes of the employer from the point of view of making an obedient subservi[en]t, willing work animal."<sup>142</sup> An Industrial Court would cause unions to become "flabby" and "soft" for lack of exercise in striking.<sup>143</sup> In effect, antistrike laws were designed to "recreate a dependent spirit in labor," so that workers would "again accept the inferior mark that was their badge for ages; to have all their progress come from above—from a kind and gracious master or a benevolent ruler."<sup>144</sup> Like individual freedom of contract, mere voting-booth liberty provided workers with the appearance but not the reality of freedom.

Labor's claim to a constitutional right to strike could not have been more absolutist. "There can be no interest," proclaimed the Parsons, Kansas Central Labor Body, "which is paramount to the rights of the workers to with[h]old their labor power under conditions to which they cannot agree."<sup>145</sup> Workers enjoyed the right to strike, maintained Gompers, "whatever consequences or suffering may be involved."<sup>146</sup> In defense of this absolutism, unionists invoked the principles of civic republicanism. There could be "no involuntary servitude without destroying the whole American conception of civil life and government."<sup>147</sup> Strikes might impose serious costs on the public but, warned

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140. GOMPERS-ALLEN DEBATE, *supra* note 130, at 4; *see also* *Judicial Usurpation Again Shown by High Court*, WORKERS CHRON., Jan. 21, 1921, at 1 ("Labor cannot be sold unless the man is sold")

141. Olander, *supra* note 135, at 7. For a similar statement by Gompers, *see* JOHN P. FREY, THE LABOR INJUNCTION 91, 98 (n.d.) (printing excerpt of President Gompers's 1922 annual report to AFL convention) [hereinafter 1922 Gompers Report].

142. J.H. Walker, *The Union or "Closed Shop"*, WORKERS CHRON., Dec. 24, 1920, at 1

143. *See So That's That*, CARPENTER, June 1925, at 30.

144. "Can't-Strike" Laws Intended To Break Labor's Spirit, WORKERS CHRON., Feb. 24, 1922, at 2

145. *Parsons' Labor Body Endorses Howat*, WORKERS CHRON., Oct. 28, 1921, at 1

146. GOMPERS-ALLEN DEBATE, *supra* note 130, at 10. This argument became more polished and occupied a larger role in Gompers's argument over time. *See* Samuel Gompers, Address Before the Joint Session of the New York State Legislature (Mar. 30, 1920), in SAMUEL GOMPERS ON THE KANSAS COURT OF INDUSTRIAL RELATIONS LAW 17, 21-23 (1920), *reprinted in* ALLEN, *supra* note 111 (Arno Press ed. 1971) [hereinafter GOMPERS ON THE KANSAS COURT]; Gompers Testimony, *supra* note 130, at 259-61

147. *Parsons' Labor Body Endorses Howat*, *supra* note 145, at 1

Gompers, "[t]here are some things in this world much worse than strikes," namely the kind of "degraded, demoralized and servile manhood" that could sap the strength of the United States just as it had the Roman Empire.<sup>148</sup> It was true that society had rights, "but freedom offers the best protection of these rights in the long run."<sup>149</sup> Both the incentive and the capacity of workers to abuse the right to strike were constrained by the fact that they themselves would suffer the most severe personal detriment: complete loss of income.<sup>150</sup> Finally, the notion that a governmental tribunal would be more successful at controlling strikes than the workers themselves was based on an unreasoned fear of workers and on the prejudiced notion that "there is some superior class that is going to preserve the country from economical annihilation."<sup>151</sup>

While employers were permitted to violate the Act as they waited for their constitutional challenges to reach the Supreme Court, strikers were confronted with the prospect of judicial injunctions followed by immediate imprisonment for contempt of court. Thus, from the outset, unionists were presented with a clear-cut and unavoidable choice between compliance and open defiance.

### III. AN ALTERNATIVE LEGAL WORLD

All this talk about inability to enforce the law in Kansas is nonsense, gentlemen. This is a land of law and order, and when this law is enacted it will be enforced . . . .<sup>152</sup>

—W.L. Huggins, Framer,  
Kansas Industrial Court Act, January 1920

[T]here are two laws in Kansas, the state law and the "soviet" law of Howat and Dorchy . . . .<sup>153</sup>

—W.L. Huggins, Presiding Judge,  
Kansas Court of Industrial Relations, October 1921

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148. Samuel Gompers, Address Before a Joint Session of the Legislature of the State of New Jersey (Mar. 22, 1920), in *GOMPERS ON THE KANSAS COURT*, *supra* note 146, at 3, 7; *see also* *GOMPERS-ALLEN DEBATE*, *supra* note 130, at 103; ANDREW FURUSETH, *LABOR AND FREEDOM* 14 (1920), in *Walsh Papers*, *supra* note 122, box 119 (pamphlet printing address before Constitutional Convention of Illinois, Apr. 7, 1920).

149. John A. Freeman, *Forgetting American Principles—Fallacies in Anti-Strike Agitation*, 29 AM. FEDERATIONIST 838, 839 (1922).

150. *See* Walker, *supra* note 131.

151. Proceedings of Public Hearings Before the Senate and House of Representatives of the State of Kansas on House Bill No. 1, at 88 (Jan. 8, 1920) [hereinafter *Kansas Hearings*], in *Walsh Papers*, *supra* note 122, box 9.

152. ALLEN, *supra* note 111, at 82.

153. *Worland Mines To Remain on Strike*, PITTSBURG DAILY HEADLIGHT, Oct. 7, 1921, at 1.

It is taken for granted today that constitutional rights are enforced by the courts. Both critics and proponents of rights discourse generally assume that when a social movement chooses a strategy centered on constitutional rights, it necessarily selects the judicial system as the institutional focus of its efforts. To labor's constitutionalists, however, this linkage of rights and courts was entirely alien. In their experience, the judicial branch was the worst constitutional offender. Courts, not legislatures, had developed the labor injunction and used it to usurp not only the legislative and executive powers of elected officials, but also the power of juries to determine guilt or innocence. According to the AFL, *Marbury v. Madison*<sup>154</sup> had been wrongly decided, and the federal courts' purported power of judicial review over acts of Congress itself violated the Constitution.<sup>155</sup>

Through the eyes of modern lawyers, the labor movement was caught in a contradiction: trying to maintain the legal supremacy of constitutional over statutory law, while at the same time urging the institutional supremacy of the legislative over the judicial branch. If courts would not enforce labor's constitution, who would?

As government by injunction entered its fourth decade, this question took on increasing importance for labor's constitutionalists. The obvious alternative to courts was the legislative branch. For decades, unionists had urged their constitutional arguments on legislators and legislative committees.<sup>156</sup> State lawmakers had responded by enacting dozens of anti-injunction and anticonspiracy laws, and in 1914 the labor movement claimed a new Magna Carta when Congress passed sections 6 and 20 of the Clayton Act, which appeared to bar most federal court labor injunctions.<sup>157</sup> Unfortunately for unionists, however, courts invalidated most of the state laws<sup>158</sup> and effectively nullified sections 6 and 20 by construing them narrowly.<sup>159</sup> Worse yet, many legislatures began themselves passing or considering laws—such as the Kansas Industrial Court Act—that blatantly violated labor's freedom constitution.

With courts and legislatures both threatening labor rights, there remained only one possible way to implement labor's constitution of freedom: the

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154. 5 U.S. (1 Cranch) 137 (1803).

155. See AMERICAN FED'N OF LABOR, REPORT OF PROCEEDINGS OF THE FORTY-FIRST ANNUAL CONVENTION 125 (1921) [hereinafter AFL FORTY-FIRST CONVENTION], John P. Frey, *Shall the People or the Supreme Court Be the Final Voice in Legislation?*, 29 AM. FEDERATIONIST 629, 633–35 (1922) (The labor movement was not alone in this view; a variety of social movements campaigned for the abolition of judicial review. See WILLIAM G. ROSS, A MUTED FURY: POPULISTS, PROGRESSIVES, AND LABOR UNIONS CONFRONT THE COURTS, 1890–1937, at 27, 32 (1994).

156. See FORBATH, *supra* note 8, at 147–48, 154–56.

157. See *id.* at 156–58.

158. See *id.* at 150–52, 200–03.

159. See, e.g., *Duplex Printing Press Co. v. Deering*, 254 U.S. 443, 468–75 (1921) (holding that sections 6 and 20 merely codified preexisting common law). Even prior to *Duplex*, the lower federal courts found other means to uphold injunctions notwithstanding the two sections. See FELIX FRANKFURTER & NATHAN GREENE, THE LABOR INJUNCTION 165 (1930).

exercise of direct popular power. As early as 1909, the AFL urged unionists to defy unconstitutional injunctions and "take whatever consequences may ensue."<sup>160</sup> Seven months before the constitutional strike, an AFL-sponsored conference of 109 labor organizations issued the strongest call for defiance yet, declaring that labor injunctions were "without sanction either in the Constitution or in the fundamental law of the land" and that the "only possible and practical remedy . . . lies in a flat refusal on the part of labor to recognize or abide by" their commands.<sup>161</sup> Despite all the verbiage, however, only one union leader of national stature served a substantial jail sentence for engaging in resistance during this period: Alexander McWhirter Howat of Kansas.

### A. *The Duty and Strategy of Resistance*

Howat immigrated to the United States from Scotland as a young child. By the age of ten, he was working as a trapper boy in a Braidwood, Illinois, coal mine. Deprived of formal education, he spent his formative years immersed in a vibrant and powerful rights culture. The British miners who immigrated to towns like Braidwood formed the backbone of the early United Mine Workers. They brought with them a deep-rooted commitment to democratic rights and freedoms derived from their experience in the Chartist and trade union movements at home.<sup>162</sup> Though struck with admiration for the American system of universal manhood suffrage, they feared the rise of economic slavery in their new home. Long before labor leaders and lawyers began to invoke the Thirteenth Amendment against injunctions, local union activists in Braidwood and other mining areas were citing the Civil War and the abolition of chattel slavery as precedents for their own struggles for freedom.<sup>163</sup>

Howat developed his ideas about rights and freedom deep in the mines. There, far from the prying eyes of supervisors, experienced miners instructed newcomers in the exercise of the "miner's freedom," a work culture of autonomy, dignity, and solidarity. A real man would set his own hours and work pace. (For tonnage miners, of course, shorter hours or slower work would result in lower pay.) He would respond to arbitrary exercises of employer authority by insisting not only on his own "rights," but also on those of his

160. AFL TWENTY-NINTH CONVENTION, *supra* note 10, at 313.

161. *Labor in Defiant Mood*, KAN. CITY STAR, Feb. 24, 1921, at 1.

162. See PRISCILLA LONG, WHERE THE SUN NEVER SHINES: A HISTORY OF AMERICA'S BLOODY COAL INDUSTRY 88-89 (1989); John H.M. Laslett, *Svan Song or New Social Movement? Socialism and Illinois District 12, United Mine Workers of America, 1919-1926*, in SOCIALISM IN THE HEARTLAND 170 (Donald T. Critchlow ed., 1986); Alan Jay Singer, "Which Side Are You On?": Ideological Conflict in the United Mine Workers of America, 1919-1928, at 22 (unpublished Ph.D. dissertation, Rutgers University, New Brunswick, N.J.) (on file with Univ. Microfilms Int.).

163. See HERBERT G. GUTMAN, POWER & CULTURE: ESSAYS ON THE AMERICAN WORKING CLASS 126-27 (1987).

fellow miners. Imperious bossing and other forms of disrespect would be met with immediate resistance.<sup>164</sup> Building on this culture of defiance, union pit committees exercised considerable control over the timing, methods, and distribution of work.<sup>165</sup>

Howat gained national notoriety because of his militant defense of the right to strike. After 1900, UMW contracts increasingly contained clauses that obligated union officials to help enforce no-strike obligations.<sup>166</sup> Howat refused to do so. Confronted with a wildcat strike, he would maintain that since he had not ordered the strikers out, he could not order them back. Howat sustained this policy despite the protests of employers, and—as the U.S. Coal Commission was forced to admit—he “usually won.”<sup>167</sup> By the early 1920s, Howat’s uncompromising stance had earned him a reputation as “one of the most powerful labor leaders in the country.”<sup>168</sup>

Howat was a charismatic leader in the civic republican mold. Even his critics acknowledged his unshakable integrity and devotion to the miners’ cause.<sup>169</sup> Lacking the skills of an economic expert or back room politician,<sup>170</sup> he spoke the language and nurtured the practice of the miners’ freedom.<sup>171</sup> Radical commentator James Cannon captured part of Howat’s appeal when he praised the Kansas leader for managing, despite nineteen years as a union officer, to avoid learning “the profession of labor leadership” and to continue thinking “like a coal digger.”<sup>172</sup> Howat had charismatic appeal because of his willingness to confront ever higher authorities with the hidden transcript of the miners’ freedom.<sup>173</sup> His greatest weakness was a stubbornness that prevented him from heeding advice from even his most loyal supporters, for “[i]f he believed a thing right, he could see it no other way.”<sup>174</sup>

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164. See GOODRICH, *supra* note 88, at 56–57, 74–78. On the paucity of direct supervision in the mines, see KEITH DIX, *WORK RELATIONS IN THE COAL INDUSTRY* 51–52 (1977), and Singer, *supra* note 162, at 23–24.

165. See GOODRICH, *supra* note 88, at 79–89.

166. See DIX, *supra* note 164, at 58–59.

167. U.S. COAL COMM’N, *REPORT OF THE UNITED STATES COAL COMMISSION* 1307 (1925).

168. *Industrial Relations Court*, N.Y. TIMES, June 14, 1921, at 14.

169. See GAGLIARDO, *supra* note 106, at 24.

170. See MCALISTER COLEMAN, *MEN AND COAL* 88–89 (1943), MELVYN DI BOFSKY & WARREN VAN TINE, *JOHN L. LEWIS: A BIOGRAPHY* 115 (1977).

171. See, e.g., JOHN BROPHY, *A MINER’S LIFE* 142 (1964) (quoting speech given by Howat in support of miners’ rights); Singer, *supra* note 162, at 116.

172. James Cannon, *The Story of Alexander Howat*, *LIBERATOR*, Apr. 1921, at 25.

173. Howat provides a fine illustration for James Scott’s theory of the relationship between charisma and “hidden transcripts” of resistance. Scott suggests that individuals develop charismatic appeal to a dominated group when they give voice to “a shared hidden transcript that no one had yet had the courage to declare in the teeth of power.” SCOTT, *supra* note 75, at 20, 221–22. While most UMW leaders tended to compromise the miners’ freedom as they ascended the ladder of union officialdom, Howat’s commitment remained unshaken. On the tendency of officials to forsake the miners’ freedom, see Singer, *supra* note 162, at 44–48.

174. GENE DEGRUSON, *GOAT’S HOUSE* 31 (1986) (poem based on recollections of miners who knew Howat).

With only 10,000 members in an otherwise largely nonunion state, the Kansas miners would need strong allies in their challenge to the Industrial Court. Howat found them in Illinois, where several industrial court proposals were under consideration by the Illinois state constitutional convention. Leading labor's opposition was John Hunter Walker, president of the Illinois State Federation of Labor and a former leader of the 100,000-member Illinois District 12 of the UMW. Like Howat, Walker was a self-educated coal miner who participated in the early organizational battles and rose to union leadership through a succession of elective positions. Although Howat and Walker occasionally had their differences, they shared a strong commitment to the miners' freedom.<sup>175</sup>

According to the Illinois Federation's official historian, Walker was a "man of strong emotions" who left "the subtleties of constitutional law to others."<sup>176</sup> This assessment reflects the progressive view of law as a field for technical expertise, not visceral commitments. Walker saw no such disjuncture. In the midst of the Kansas struggle, he took a break from delivering emotional diatribes against the Kansas "slave law" to embark on a comprehensive study, under the tutelage of Felix Frankfurter, of the origins, effects, and constitutionality of the labor injunction. Walker had enough self-confidence as a legal thinker to relish the prospect of engaging in argument with Frankfurter about courts and the labor injunction.<sup>177</sup>

Far from separating emotion and constitutional law, Howat and Walker saw the two as inseparably intertwined. The freedom promised by the Thirteenth Amendment had to be experienced and felt on a day-to-day basis or it would be lost. Even a moment's compliance with the Industrial Court Act would belie their claim that it was a "slave" law, for no self-respecting citizen would submit to slavery. "[W]hether the law is declared constitutional or not," Howat wrote Walker, "we have made up our minds that we would rather go to prison than to be a party to enslaving the workers of this State."<sup>178</sup> Walker embraced this position as "the only one that we can take and retain our self-

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175. For a description of Walker's role in securing miners' rights in Illinois, see John H. Keiser, *John H. Walker: Labor Leader from Illinois*, in *ESSAYS IN ILLINOIS HISTORY* 75, 78-79 (Donald F. Tingley ed., 1968). See also EUGENE STALEY, *HISTORY OF THE ILLINOIS STATE FEDERATION OF LABOR* 308 (1930).

176. STALEY, *supra* note 175, at 308-09. John Keiser similarly observes that Walker "saw issues as right or wrong, personalized and idealized them." He notes that Walker thrived in the "moralistic climate" of the progressive era, but was less successful after World War I. See Keiser, *supra* note 175, at 78.

177. See, e.g., Letter from John H. Walker, President, Illinois State Federation of Labor, to Felix Frankfurter, Professor, Harvard University Law School (May 28, 1921) (John H. Walker Papers, on file with Illinois Historical Survey, Urbana, Ill.) [hereinafter Walker Papers], folder 106; Letter from John H. Walker to Felix Frankfurter (Aug. 5, 1921), in Walker Papers, *supra*, folder 110; Letter from Felix Frankfurter to John H. Walker (Sept. 2, 1921), in Walker Papers, *supra*, folder 112. Walker also had the experience of drafting legislation that was enacted into law. See Keiser, *supra* note 175, at 79.

178. Letter from Alexander Howat, President, District 14, United Mine Workers of America, to John H. Walker (Mar. 8, 1921), in Walker Papers, *supra* note 177, folder 103.

respect."<sup>179</sup> Speaking before a mass meeting of strikers, he warned that "[w]hen men accept such a law, they admit that they are slaves."<sup>180</sup>

This position of principle was coupled with a strategic vision that relied on the spirit and vitality of the movement rather than the beneficence of courts or legislatures. Howat foresaw that if the miners complied with the Act while awaiting the outcome of a test case, it would prove extremely difficult to do an about-face and defy the law after losing in court. "[I]f the decision went against us," he observed, "we would be expected to respect the Law and observe it, and continue in the future like that many slaves."<sup>181</sup> By contrast, the policy of open defiance would, Walker wrote, inspire "all good men and women in our country . . . to fight with greater vigor than ever before to prevent the assassination of our Republic."<sup>182</sup>

The resistance leaders displayed a deeply ambivalent attitude toward courts. On the one hand, they counted on the miners to form their own constitutional opinions and to reject those of the courts. Legal precedent might "provide plausible pretexts whereby servile and time serving judges" could uphold the Act, "but the workers' minds" would strike it down, "and no court can convince them to the contrary."<sup>183</sup> Constitutional liberty would be defended not by courts, which routinely abused it, but by "the fighting spirit and through the sacrifice[] and determination of men who believe in justice."<sup>184</sup> In Howat's view, courts, legislatures, and corporations had "joined together to chain men to their jobs and crush the life out of organized labor of the entire country."<sup>185</sup> A test case would almost certainly go against the miners for, as District 14 attorney Phillip Callery warned, challenging the Industrial Court law in the Supreme Court would be like "taking a case against the devil to Hell."<sup>186</sup> On the other hand, activists often spoke as if it were a foregone conclusion that the courts would strike down the law and "emancipate" the workers. Even at the mass meeting that launched the constitutional strike, some speakers expressed confidence that the Supreme Court would rule for the miners.<sup>187</sup>

179. Letter from John H. Walker to Alexander Howat (Mar 10, 1921), in Walker Papers, *supra* note 177, folder 103.

180. *Give Strikers Full Support, Walker Says*, PITTSBURG DAILY HEADLIGHT, Nov. 21, 1921, at 1.

181. Letter from Alexander Howat to John H. Walker (July 19, 1921), in Walker Papers, *supra* note 177, folder 109.

182. Letter from John H. Walker to Alexander Howat (Feb. 21, 1921), in Walker Papers, *supra* note 177, folder 102.

183. *Refusing To Be Shackled*, WORKERS CHRON., Aug. 12, 1921, at 1.

184. Letter from Alexander Howat to John H. Walker (July 19, 1921), in Walker Papers, *supra* note 177, folder 109.

185. *Industrial Court Bares Its Teeth to Labor*, WORKERS CHRON., Feb. 18, 1921, at 1, *see also* Oscar Ameringer, *Kansas Battle a Prologue to Greater Fight*, WORKERS CHRON., Dec. 2, 1921, at 1 (observing that "[i]n a society divided into rich and poor, law is the expression of the will of the rich").

186. *Give Strikers Full Support, Walker Says*, *supra* note 180, at 8.

187. *See Miners Vote [T]o Stop Work*, *supra* note 22, at 1.

In the eyes of the resistance leaders, both views were right: The courts were deeply hostile, but they would eventually invalidate the Act. To produce this result, however, it would take more than rational persuasion. The leadership planned to "break down the law" before it could be tested in the higher courts.<sup>188</sup> Challenging the law in court without first demonstrating that the workers "would absolutely refuse to recognize such a law and . . . [thereby] submit to being made serfs and slaves of," argued Walker, "would result in its being declared constitutional."<sup>189</sup> "The strike of the miners," explained attorney Callery, would provide "the argument necessary" for a court victory—namely that the Industrial Court law was "inoperative, and ineffective."<sup>190</sup> The same was true for legislative action. Since labor was severely disadvantaged in Kansas politics, by both its small numbers and its geographic concentration, ordinary lobbying would not suffice.<sup>191</sup> Legislative repeal could be expected only after the workers had demonstrated that the law would not work.<sup>192</sup>

### B. *Two Laws in Kansas*

An admirer later described Kansas District 14's strategy as "centering the guns of labor" upon the Industrial Court by "completely ignoring it."<sup>193</sup> It would be more accurate to say that the union willed itself to proceed as if the court did not exist, a feat that required paying it very careful attention. In effect, the miners constructed an alternative legal world in which the Industrial Court had no existence. In March 1920, the District convention held that the Act imposed involuntary servitude, and authorized Howat to call a strike "'at any time he may see fit.'"<sup>194</sup> The delegates also amended their district constitution to prohibit members from using the Industrial Court on pain of fines of \$50 for member violations and \$5000 for officer violations.<sup>195</sup> James Cannon opined that the miners had "repealed" the Industrial Court law and that Kansas was now "split between two authorities—the government of Kansas and the Miners' Union of Kansas."<sup>196</sup>

The Industrial Court's first official action was an investigation of the coal mining industry. In April 1920, Howat and other District 14 officials were

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188. See *The A.F. of L. Backs up the Miners' Fight*, WORKERS CHRON., Apr. 16, 1920, at 1.

189. J.H. Walker, *The Kansas Strike Situation*, WORKERS CHRON., Dec. 9, 1921, at 6.

190. *Give Strikers Full Support, Walkers Says*, *supra* note 180, at 8 (reporter's paraphrase).

191. See Hon. Redmond S. Brennan, Chief Counsel, Kansas Mine Workers, Address to the Twenty-Ninth Consecutive and Fourth Biennial Convention, District No. 12, U.M.W. of A. 4-5 (Nov. 14, 1921) [hereinafter Brennan Address], in Walsh Papers, *supra* note 122, box 63.

192. See *The A.F. of L. Backs up the Miners' Fight*, *supra* note 188.

193. *Pres. Howat Spoke at Parsons*, WORKERS CHRON., Mar. 18, 1921, at 1.

194. *Howat Is Voted Full Support in Any Strike*, PITTSBURG DAILY HEADLIGHT, Mar. 9, 1920, at 1 (quoting convention resolution).

195. See GAGLIARDO, *supra* note 106, at 173.

196. Cannon, *supra* note 172, at 25.



subpoenaed to testify. They refused and were convicted of contempt of court.<sup>197</sup> When their officials were jailed, the miners ceased work "to show the defiance of labor to the law."<sup>198</sup> Several thousand demonstrators marched to the prison behind American flags and a parade band. Fearing a jail rescue, the sheriff permitted Howat to address the crowd. Howat promised never to recognize the slave law, and vowed that Governor Allen would "'learn once for all that the days of slavery in Kansas are past.'"<sup>199</sup> The miners returned to work after Howat was released on bail.<sup>200</sup>

For the next ten months, the struggle simmered. A summer of wildcat protests against Saturday work failed to produce a showdown.<sup>201</sup> Howat ran for the UMW vice presidency, losing narrowly to John L. Lewis's candidate, Phillip Murray.<sup>202</sup> At last, on February 4, 1921, the District 14 Executive Board called 200 miners out on the first official strike since the effective date of the Industrial Court Act.<sup>203</sup> This protest, known as the "Mishmash Strike," eventually led to Justice Brandeis's opinion in *Dorchy v. Kansas*,<sup>204</sup> still cited as the leading opinion on the constitutional status of strikes.

To progressive proponents of the Industrial Court, the Mishmash strike presented a sweet opportunity to demonstrate the tribunal's effectiveness both in stopping strikes and in resolving industrial disputes. State Attorney General Richard Hopkins filed criminal charges against Howat and August Dorchy, Vice President of District 14, for violating the antistrike provisions of the Industrial Court Act.<sup>205</sup> While Hopkins moved to control the miners, the Industrial Court held a hearing on the underlying dispute. Karl Mishmash claimed that he was due \$187.40 in back wages for work done in 1917–1918.<sup>206</sup> For over two years, his claim had been stalled in the contractual grievance procedure. As a large audience watched, witnesses established to the satisfaction of all that Mishmash's claim had merit, and the Industrial Court promptly awarded him back pay with interest.<sup>207</sup>

197. See *Howat and Other Officials of U.M.W.A. Are Sent to Jail*, PITTSBURG DAILY HEADLIGHT, Apr 9, 1920, at 1.

198. *The A.F. of L. Backs up the Miners' Fight*, *supra* note 188.

199. *Howat out of Jail To Make Speech; Calls Allen Skunk*, PITTSBURG DAILY HEADLIGHT, Apr 12, 1920, at 1; see also *Howat Greets Mass Meeting*, WORKERS CHRON., Apr 16, 1920, at 2.

200. See GAGLIARDO, *supra* note 106, at 176; *Raise All Questions as to Court Law Tomorrow*, PITTSBURG DAILY HEADLIGHT, Apr. 26, 1920, at 1.

201. See GAGLIARDO, *supra* note 106, at 134–36.

202. See DUBOFSKY & VAN TINE, *supra* note 170, at 65.

203. See *Arrest Howat State's Move*, PITTSBURG DAILY HEADLIGHT, Feb 5, 1921, at 1.

204. 272 U.S. 306 (1926).

205. See *Felony Charge Against Howat*, PITTSBURG DAILY HEADLIGHT, Feb 17, 1921, at 1. Hopkins also obtained contempt convictions against Howat and five other officials for violating a previously issued strike injunction, a story recounted below in Sections VII.A and VII.C.

206. The miners and their opponents did not disagree on the basic facts of the case, which are fully described by a judge of the Industrial Court in Clyde M. Reed, *The Kansas Court of Industrial Relations*, NATION, Apr. 6, 1921, at 505, 505–06. See also *The History of the Mishmash Case*, WORKERS CHRON., July 29, 1921, at 1.

207. See *Finds for Boy and Orders Pay*, PITTSBURG DAILY HEADLIGHT, Feb 18, 1921, at 1.

Meanwhile, Howat and the Kansas miners meticulously adhered to their own law, under which the Industrial Court had no legal existence. Howat ignored the court's summons to testify.<sup>208</sup> He refused to accept service of the court's order granting Mishmash's claim, explaining to the deputy sheriff that he meant no personal disrespect.<sup>209</sup> When Mishmash's check was deposited at a local courthouse for collection, Howat insisted that the strike would not end until Mishmash picked up the check directly from the operators.<sup>210</sup> When Mishmash did collect his money from the company, he refused to accept the \$32.78 in interest that had been awarded, explaining that no interest was due under the contract.<sup>211</sup> Howat declared that "[n]either injunctions nor the industrial court can stop strikes,"<sup>212</sup> and most miners in the district bore him out by striking from the day of his hearing until Mishmash collected his back pay from the operators.<sup>213</sup>

Nevertheless, in a period of less than two weeks, the state had initiated criminal proceedings against the strike leaders and the Industrial Court had resolved the underlying dispute. Progressives contrasted the court's successful use of reason with the strikers' unreason. The *New York Times* ridiculed the "invincible" Howat for calling a strike that was "reckless in its triviality," and praised the Industrial Court for "pioneering to good purpose in the difficult field of industrial relations."<sup>214</sup> The *Nation* gave Industrial Court judge Clyde M. Reed three pages to make his case that the story illustrated perfectly "the advantage that a fair-minded and impartial tribunal clothed with the power of the State" had over the strike weapon.<sup>215</sup>

The criminal trial of Howat and Dorchy was set for late June 1921. The Kansas Federation of Labor proclaimed it "the most historic trial, so far as human rights are concerned, since the trial of Dred Scott,"<sup>216</sup> and the miners shut down the coalfields for the week of the trial.<sup>217</sup> The actual proceedings did not live up to their billing. The prosecution confined itself to proving what had already been admitted: that Howat and Dorchy had called the strike. When defense attorney Jake Sheppard attempted to analogize the Industrial Court Act to the Fugitive Slave Law, Judge Boss interrupted and ruled him out of order.

208. *See id.*; *Labor Court Calls Howat as Witness*, PITTSBURG DAILY HEADLIGHT, Feb. 17, 1921, at 1.

209. *See Asserts Boy Will Not Collect Pay in Court*, PITTSBURG DAILY HEADLIGHT, Feb. 19, 1921, at 1.

210. *See id.*

211. *See Mishmash Refuses To Accept \$32 Interest*, PITTSBURG DAILY HEADLIGHT, Feb. 23, 1921, at 1.

212. *Howat Declares I.C. Can Not End Strikes*, PITTSBURG DAILY HEADLIGHT, Feb. 16, 1921, at 6.

213. *See Asserts Boy Will Not Collect Pay in Court*, *supra* note 209; *Finds for Boy and Orders Pay*, *supra* note 207; *Miners Had To Go on Stand*, PITTSBURG DAILY HEADLIGHT, Feb. 15, 1921, at 1.

214. *The Industrial Court*, *supra* note 113.

215. Reed, *supra* note 206, at 506.

216. *Plan Labor Rally at Columbus Trial*, PITTSBURG DAILY HEADLIGHT, June 13, 1921, at 1 (printing call to assemble).

217. *See Miners Returning Slowly*, PITTSBURG DAILY HEADLIGHT, July 5, 1921, at 1.

With the miners' only defense thus excluded, the jury returned a verdict finding them guilty of a misdemeanor. Each defendant was sentenced to six months in prison and a fine of \$500.<sup>218</sup>

Undaunted, the union continued to construct an alternative legal process. Attributing the jury's verdict to the judge's narrow instructions, the union approached the jurors after the trial and solicited a second, unrestricted ruling. At least eleven of the twelve jurors signed an affidavit declaring that they were "absolutely and positively opposed . . . to the industrial court law," that they believed that the defendants had done no wrong, and that they had arrived at their verdict only because they had sworn to "be governed by the law as set forth in the court's instructions."<sup>219</sup>

### C. *No Ordinary Strike*

On September 30, 1921, Howat and Dorchy went to jail.<sup>220</sup> Several thousand miners and spouses gathered for a mass meeting in the heart of the coal district.<sup>221</sup> They packed the hall tightly and overflowed outside. They stood throughout the meeting, pressing forward to hear what was said. Women stood on chairs to get a better view. Often, several would-be speakers sought the crowd's attention at once.<sup>222</sup> After months of observing the Industrial Court in action, the community of miners was ready to pass judgment.

None of Kansas's progressive leaders were present, but they had already prepared their case and laid it before the miners. In their view, the labor movement consisted of two strata: rank-and-file workers, who would benefit from the Industrial Court; and labor leaders, who "live[d] off the exploitation of labor controversies"<sup>223</sup> and deliberately misled workers into opposing the court against their interests. Thus the immediate objective was to pull rank-and-file workers out from under the sway of their union officials.<sup>224</sup> Court supporters anticipated that workers would learn to appreciate the advantages of an industrial tribunal by experiencing its results. In its first two years of operation, the court had established what appeared to be an impressive

218. See GAGLIARDO, *supra* note 106, at 179; \_\_\_\_ *Jury \_\_\_\_ Case*, PITTSBURG DAILY HEADLIGHT, June 29, 1921, at 1 (title partially legible); \_\_\_\_ *Jury \_\_\_\_ Night*, PITTSBURG DAILY HEADLIGHT, June 30, 1921, at 1 (title partially legible); \_\_\_\_ *Finds \_\_\_\_ Guilty*, PITTSBURG DAILY HEADLIGHT, July 1, 1921, at 1 (title partially legible); *Jail Term and a Fine of \$500*, PITTSBURG DAILY HEADLIGHT, July 8, 1921, at 1.

219. *Jury Disagrees with the Law*, WORKERS CHRON., July 8, 1921, at 1 (printing affidavit). The *Workers Chronicle* reprinted the affidavit with all 12 names, but according to Gagliardo, only 11 signed. See GAGLIARDO, *supra* note 106, at 179.

220. See *Howat and Dorchy Committed to Jail*, WORKERS CHRON., Sept. 30, 1921, at 1.

221. See *Kansas Miners on Strike Industrial Court Impotent*, WORKERS CHRON., Oct. 7, 1921, at 1.

222. See *Miners Vote [T]o Stop Work*, *supra* note 22.

223. STATE OF KANSAS, THE COURT OF INDUSTRIAL RELATIONS 3 (1920) (preliminary statement of Governor Henry J. Allen).

224. See ALLEN, *supra* note 111, at 272-73; Herbert Feis, *The Kansas Court of Industrial Relations, Its Spokesmen, Its Record*, 37 Q.J. ECON. 705, 708-09 (1923).

proworker record. Of fifteen cases brought by workers and unions seeking wage increases, twelve fully or partly succeeded, and two of three cases brought to block wage reductions were partly successful.<sup>225</sup>

In the coal fields, the court's actions seemed cleverly calculated to pit rank-and-file miners against their leaders. The court imposed restrictions on the union's use of the dues checkoff to collect fines from individual miners.<sup>226</sup> It prohibited operators from charging usurious rates on small cash advances, a practice that the union had not attempted to remedy,<sup>227</sup> and—in the most highly publicized coal case—granted Karl Mishmash's claim for back pay.<sup>228</sup> The court carefully avoided any action against unauthorized strikes, which would have necessitated direct proceedings against ordinary miners.<sup>229</sup> Instead it patiently refrained from enforcing the strike prohibition for over a year, until Howat finally authorized the Mishmash strike. By the time of the great mass meeting, the court had established a strong record of favoring individual miners in disputes both with operators and with their union officials.

Judging by the tenor of the meeting, however, the miners were not impressed. An African-American unionist took the floor and told how he had left the nonunion fields of West Virginia because he realized that "he was held in slavery there. . . . 'I hadn't ever enjoyed my work digging coal, until I came to this state twenty years ago. And now, the industrial court law has made slaves of the Kansas miners.'"<sup>230</sup> Another miner declared that he would rather go to jail for the rest of his life than see his children suffer slavery under the Industrial Court. Because this was "no ordinary strike," he argued, "no precedent should be followed."<sup>231</sup> All trades should strike, in place of the usual practice of permitting the maintenance crews to perform work necessary to prevent serious damage to the mines. Other speakers took a similarly absolutist stance. A resolution to confine the strike to the Kansas fields, in order to permit the out-of-state members to earn money and contribute to the strike fund, received only a single audible "aye."<sup>232</sup> A question as to whether the union should mine coal for waterworks and power plants met with a chorus of "no"s.<sup>233</sup> These hardline decisions were later reversed,<sup>234</sup> but they

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225. See BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, BULL. NO. 332, KANSAS COURT OF INDUSTRIAL RELATIONS 9–11 (1923); GAGLIARDO, *supra* note 106, at 60, 73–77, 79–82.

226. See GAGLIARDO, *supra* note 106, at 123–24.

227. See *id.* at 122–23.

228. See *Finds for Boy and Orders Back Pay*, *supra* note 207.

229. See GAGLIARDO, *supra* note 106, at 94, 98.

230. *Miners Vote [T]o Stop Work*, *supra* note 22.

231. *Id.* (reporter's paraphrase).

232. See *id.*

233. See *id.*

234. See *Lewis Suspends District No. 14*, PITTSBURG DAILY HEADLIGHT, Oct. 13, 1921, at 1; *Miners' Convention Finishes Its Work*, PITTSBURG DAILY HEADLIGHT, Oct. 5, 1921, at 1; *Miners Who Work To Help Finance Strike*, PITTSBURG DAILY HEADLIGHT, Oct. 8, 1921, at 1; Letter from John H. Walker to V.A. Olander, Secretary-Treasurer, Illinois State Federation of Labor (Oct. 26, 1921), in Walker Papers, *supra* note 177.

indicated the temperament of the meeting.

For the first time, the miners struck for the explicit purpose of overturning the Industrial Court Act. The mass meeting unanimously passed a resolution declaring that District 14 was engaged in a "life and death struggle against the political powers of the state of Kansas, monopoly, [and] the industrial court law."<sup>235</sup> The miners resolved that the strike would continue until Howat and Dorchy were released from jail or the Industrial Court Act was repealed.<sup>236</sup>

In the lead quotations to this Part, we saw William Huggins, framer and presiding judge of the Industrial Court, forced to make an embarrassing about-face. But on one point, his otherwise contradictory statements were consistent. Kansas was indeed a "land of law and order"; it was just that there were two laws and two orders, one official and one unofficial. The leadership of District 14 constructed an alternative legal regime in which the Industrial Court did not exist. When the state finally accepted the challenge and jailed their leaders, rank-and-file miners accepted the law of the union and rejected that of the state. The Industrial Court's progressive supporters had made a serious strategic error. Their two-tiered portrait of the union polity—"aristocratic" union officials on the one hand, and bread-and-butter workers on the other—unduly flattened the reality. A third, intermediate stratum had sustained the resistance movement and controlled the strike meeting: local union activists.

#### IV. THREE CONSTITUTIONAL NARRATIVES

In the midst of the constitutional strike, a young economist named Herbert Feis journeyed to the Kansas coal fields to find out exactly why miners opposed the Industrial Court. After an exhausting series of interviews, Feis was perplexed. He had failed to elicit concrete, specific demands. Instead, much of the miners' opposition seemed to be visceral and emotional.<sup>237</sup> Professor John Hugh Bowers fared no better. "When we interview one who does fail to approve the Industrial Court," he complained, "he usually declines to give any reason at all for his attitude."<sup>238</sup>

Feis and Bowers were progressive intellectuals who sincerely believed that the Industrial Court could serve the workers' interests. They were trying to distill out of the miners' opposition a set of specific, instrumental demands that could be dealt with in an administrative framework. Finding none, Bowers heard no reasons at all, while Feis heard so many that "you can find" in the union's opposition to the court "anything you are hunting for."<sup>239</sup> Subsequent

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235. *Miners Vote [To] Stop Work*, *supra* note 22, at 2.

236. *See Kansas Miners on Strike Industrial Court Impotent*, *supra* note 221

237. *See Feis*, *supra* note 224, at 722-24.

238. JOHN HUGH BOWERS, *THE KANSAS COURT OF INDUSTRIAL RELATIONS* 95-96 (1922)

239. Feis, *supra* note 224, at 722.

accounts have followed in Bowers's and Feis's footsteps. The miners are shown either as behaving stubbornly and irrationally by failing to pursue what progressive intellectuals considered to be their immediate self-interest, or as being manipulated by Howat for factional purposes in the UMW.<sup>240</sup> Both contemporary and subsequent accounts are unanimous in ignoring or summarily dismissing the unionists' own explanations for their actions.

Through the theoretical lens of jurisgenesis, those same explanations take center stage. In Part II, we considered the argumentative structure of labor's freedom constitution as articulated by the resistance leaders. Now, we will broaden the scope of the inquiry in two dimensions: content and constituency. First, the theory of jurisgenesis posits that outsiders to the official legal system create legal meaning not through technical legal argument, but through storytelling. Instead of limiting our inquiry to legal argument, as in Part II (or to the economic discourse of preferences and interests, as did Feis and Bowers), we will listen for the literary language of narrative and metaphor.<sup>241</sup>

Second, the theory of jurisgenesis warns against the assumption that the ideas of a social movement can be gleaned from the statements of its leaders. Where the experiences of leaders and activists vary significantly, we would not be surprised to find variations in legal consciousness. Instead of focusing primarily on leadership ideas, we will give special attention to texts authored by local activists.

#### A. *Labor's Constitutional Narrative of Freedom*

While Feis and Bowers had the benefit of personal interviews, we must rely on the written record. Thanks mainly to the Pittsburg, Kansas *Workers Chronicle*, which printed numerous letters and local union resolutions, statements from more than sixty local activists and groups have been preserved.<sup>242</sup> Looking at these statements, it is easy to see why Feis and Bowers, with their rationalistic predispositions, were so frustrated. Some consist of little more than an epithet, like "Kansas slave law," or "Allen's Court of Industrial Slavery." Even when activists waxed eloquent, they often

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240. To Domenico Gagliardo, the principal scholar of the Industrial Court, Howat had become so accustomed to power that he was afflicted with a "boldness which frequently appeared dictatorial and brazen," so that he fought the court "bitterly, courageously, blindly." GAGLIARDO, *supra* note 106, at 25. Dubofsky and Van Tine portray Howat as an inept factionalist who "posed as the defender of the rank and file" and was "unable to distinguish between strikes for good cause and those without reason." DUBOFSKY & VAN TINE, *supra* note 170, at 115. To Maier Fox, the UMW's most recent official historian, the Industrial Court fight soon became "merely the backdrop for an internal union struggle." MAIER B. FOX, *UNITED WE STAND* 217 (1990).

241. The analysis of narrative presented here and in Parts V–VII is informed by the framework set forth in Patricia Ewick & Susan S. Silbey, *Subversive Stories and Hegemonic Tales: Toward a Sociology of Narrative*, 29 L. & SOC'Y REV. 197 (1995).

242. My designation "local activists" includes local unions and individual activists who did not hold union positions above the local union level.

seemed more intent on verbalizing passion than on identifying specific flaws in the legislation. They pushed the limits of language in expressing their outrage against "the enslaving coils of the industrial court reptile"<sup>243</sup> and the "cancerous tentacles" of the industrial court octopus, with its "lecherous fangs" in the body politic.<sup>244</sup>

If, however, we abandon the progressives' search for specific demands, the statements convey a coherent story. In sharp contrast to judges, who told tales about the individual worker exercising his market right to "sell his labor for what he thinks best . . . just as his employer may sell his iron or coal,"<sup>245</sup> activists spoke of slavery and emancipation. An abundance of colorful metaphors—chains, shackles, fetters, and lashes—gave testimony to the salience of bodily subjugation.<sup>246</sup> If the miners were to submit to the Industrial Court, they would be "driven like Uncle Tom."<sup>247</sup>

Labor's freedom constitution cast workers as part of an intergenerational movement for freedom, carrying on the work of their forebears and preserving the promise of freedom for their children. "Each age and generation since the beginning and all the way down the succeeding year," wrote one miner, "the human family can expect a struggle" against slavery.<sup>248</sup> Activists envisioned the strike as a continuation of the Civil War to abolish slavery. Period phrases like "the battle cry of freedom"<sup>249</sup> and "half slave and half free"<sup>250</sup> floated through their writings. Howat stood in the shoes of John Brown or Abraham Lincoln, while the Industrial Court Act was the new Fugitive Slave Law.<sup>251</sup>

The Thirteenth Amendment's proscription of slavery and involuntary servitude provided a direct link between the workers' antislavery language and the Constitution. Some unionists joined their employer opponents in holding that the Amendment dealt only with chattel, not industrial, slavery. The 1912 AFL convention rejected a resolution that would have committed the

243. Chas. Frohne, Letter, *J. ELECTRICAL WORKERS & OPERATORS*, Jan. 1923, at 90.

244. Local Union 3101, Resolution, *Ill. Miners Practice True-Blue Unionism*, *WORKERS CHRON.*, Dec. 10, 1920, at 1.

245. *Godcharles v. Wigeman*, 6 A. 354, 356 (Pa. 1886).

246. See, e.g., Local Union 146, Resolution, *WORKERS CHRON.*, Nov. 18, 1921, at 4 ("efforts to chain organized labor to the block of chattel slavery"); Jim Lyle, Letter, *Answers Crockett*, *WORKERS CHRON.*, Sept. 16, 1921, at 2 ("shackle our union officials"); John Loftus, Poem, *Slavery*, *WORKERS CHRON.*, Mar. 11, 1921, at 1 ("bind us/In fetters more tight"); Local Union 3777, Resolution, *WORKERS CHRON.*, Jan. 9, 1920, at 1 ("drive men under a lash").

247. Georgette M. Bulot, Letter, *A Letter from a Little Girl*, *WORKERS CHRON.*, Dec. 30, 1921, at 4.

248. H.W. Fairchild, Letter, *WORKERS CHRON.*, Dec. 30, 1921, at 2, see also *Topeka Industrial Council Endorses Howat and Dorchy*, *WORKERS CHRON.*, Oct. 21, 1921, at 2 ("[T]he history of the working class is one continual struggle now and that there ha[ve] been strikes for liberty and justice against its oppressors.").

249. John Loftus, Poem, *Freedom*, *WORKERS CHRON.*, Mar. 11, 1920, at 1.

250. *Topeka Industrial Council Endorses Howat and Dorchy*, *supra* note 248.

251. See, e.g., Bulot, *supra* note 247; Mike Kerley, Letter, *WORKERS CHRON.*, Sept. 16, 1921, at 4, Joe Termine, Letter, *Justice Shall Soon Prevail*, *WORKERS CHRON.*, Jan. 20, 1922, at 4, *Topeka Industrial Council Endorses Howat and Dorchy*, *supra* note 248; *WORKERS CHRON.*, Mar. 4, 1921, at 2 (untitled editorial).

Federation to campaign for a constitutional amendment prohibiting "wage-slavery and voluntary servitude."<sup>252</sup> IWW activists in Kansas maintained that the Industrial Court Act stopped short of violating the Amendment because it permitted individual workers to quit.<sup>253</sup>

Far more commonly, however, workers claimed the Constitution for their own conceptions of labor liberty. In the face of contrary court decisions, numerous local activists steadfastly maintained that the Act deprived the workers of their constitutional rights.<sup>254</sup> Some went beyond positive law to protest the violation of "God given liberties,"<sup>255</sup> but natural law was invoked far less frequently than the Constitution. In sharp contrast to the antebellum period, when many antislavery activists found it necessary to invoke natural law against the Constitution, labor's constitutionalists could plausibly assume that the Constitution—through the Thirteenth Amendment—embodied natural law.<sup>256</sup> The Bible and the Constitution were on the same side, and Jesus could join John Brown, Abraham Lincoln, and Eugene Debs in labor's pantheon of antislavery heroes.

To middle-class observers, the workers' language of freedom and slavery amounted to nothing more than empty sloganeering. Given that workers enjoyed not only the individual right to quit work, but also the right to vote, they could hardly claim to share the condition of chattel slaves. The "bogey of 'involuntary servitude,'" sneered Feis, was "too well known to require comment."<sup>257</sup> As the anthropologist Clifford Geertz would later observe, however, labor's slavery slogan was intended not as a literal label, but as a

252. AMERICAN FED'N OF LABOR, REPORT OF PROCEEDINGS OF THE THIRTY-SECOND ANNUAL CONVENTION 185 (1912) [hereinafter AFL THIRTY-SECOND CONVENTION].

253. See INTERNATIONAL WORKERS OF THE WORLD, YOU KANSAS COAL MINERS! (1921), in Allen Papers, *supra* note 119, box B34. This narrow construction contrasted sharply with the IWW's expansive view of First Amendment rights. See David M. Rabban, *The IWW Free Speech Fights and Popular Conceptions of Free Expression Before World War I*, 80 VA. L. REV. 1055 (1994).

254. See, e.g., T.R. Ferguson, *Two Notable Criminal Bills*, WORKERS CHRON., Apr. 23, 1920, at 4 (Act denies workers their "American constitutional rights" and is "unconstitutional, illegal, [and] un-American"); Local Union 3777, Resolution, *supra* note 246 (arguing that Act "seeks to deprive us of our right to act collectively, either in the matter of consenting or refusing to work," thereby "virtually repeal[ing] that section of the Bill of Rights of the State of Kansas and also the 13th [A]mendment to the Federal Constitution, prohibiting 'Involuntary servitude, except as a punishment for crime'"); Joe Termine, *The Fight Is On*, WORKERS CHRON., Nov. 4, 1921, at 3 (contending that purpose of Industrial Court is to take away workers' "constitutional guaranteed rights as free men and women," specifically "the right to strike for rights or against the oppression of the brutal capitalist class of the country"); Chas. Woolridge, Letter, WORKERS CHRON., Nov. 25, 1921, at 6 (asserting that Act "abridges our rights as American citizens").

255. Fairchild, *supra* note 248; see also Local Union 2671, Resolution, WORKERS CHRON., Jan. 13, 1922, at 6.

256. As one activist put it, the Act not only violated the "first law of nature," but also constituted involuntary servitude. See R.R. Henderson, Letter, *Illinois Railroaders Will Support Miners*, WORKERS CHRON., Nov. 4, 1921, at 2.

257. Herbert Feis, *Kansas Miners and the Kansas Court*, 47 SURVEY 822, 824-25 (1922); see also *supra* notes 112-13 and accompanying text; *infra* text accompanying notes 299-307. To Columbia instructor A.F. Hinrichs, the miners' constitutional claim was "of only passing interest" since so-called "inalienable and natural rights" actually changed along with institutional needs. See A.F. HINRICH, THE UNITED MINE WORKERS OF AMERICA AND THE NON-UNION COAL FIELDS 181-82 (Columbia Studies in History, Economics, & Public Law No. 246, 1923).



trope or metaphor. And a metaphor might "draw its power from its capacity to grasp, formulate, and communicate social realities that elude the tempered language of science."<sup>258</sup> For all its abstract sound, the activists' talk of freedom and slavery was rooted in lived experiences of power and powerlessness.

### B. *Experiences of Freedom and Slavery*

Deep in the ground, coal miners carried on the tradition of the "miner's freedom," a set of ideas, symbols, and practices that sustained "manhood" and staved off "enslavement."<sup>259</sup> Only a slave would let the operator tell him when or how to do his job, and no real man would fail to support his union brothers in a dispute with management. Employer rules and collective bargaining agreements to the contrary, many miners set their own quitting times, and as late as the 1920s, union committeemen not only determined when the mines should close for safety reasons, but also enforced a right of consultation on the introduction of new technology.<sup>260</sup>

Mineworker activists saw vivid examples of slavery both in the past and in the unorganized coalfields of their time. Activists of British origin, who dominated the early UMW, passed down stories of the days when their ancestors had been bought and sold like chattels.<sup>261</sup> Even in the United States, miners had been enslaved by the coal operators under the regime of company stores, scrip payment, and armed suppression of strikes.<sup>262</sup> African-American miners, who spoke with special authority on the subject, pointed out that these conditions continued to persist in nonunion West Virginia. Testifying before a congressional committee on the suppression of a West Virginia coal strike, black coal miner and union activist George Echols commented that he "'was raised a slave . . . and I know the time when I was a slave, and I feel just like we feel now.'"<sup>263</sup> Another black striker told the committee that "'here . . . a man is the same as being in slavery.'"<sup>264</sup> At the mass meeting

258. CLIFFORD GEERTZ, *THE INTERPRETATION OF CULTURES* 210 (1973).

259. See GOODRICH, *supra* note 88, at 56–57, 75–78. Skilled workers in other industries maintained similar traditions. See MONTGOMERY, *supra* note 86, at 13–15.

260. See GOODRICH, *supra* note 88, at 90.

261. See LONG, *supra* note 162, at 14–16.

262. See, e.g., ALEXANDER HOWAT, REPORT OF PRESIDENT HOWAT TO THE EIGHTEENTH CONSECUTIVE AND FOURTH BIENNIAL CONVENTION, DISTRICT NO. 14 UNITED MINE WORKERS OF AMERICA 30 (1920); H.W. Fairchild, Letter, *WORKERS CHRON.*, Feb. 10, 1922, at 2 (observing that employers had no need for Industrial Court when there were no radicals around, "just common slaves that lived in huts" and were paid in scrip); Frank Lofty, Letter, *WORKERS CHRON.*, Apr. 21, 1922, at 2 ("Working men were at one time not organized and consequently were slaves to all intents and purposes, and that was the condition that best suited the purpose of the capitalist element.")

263. Quoted in JOE WILLIAM TROTTER, JR., *COAL, CLASS, AND COLOR* 114 (1990), see also FORBATH, *supra* note 8, at 138–39 ("Let us call your attention to the Thirteenth Amendment. It grew out of the suffering of our race.") (quoting black unionist). See generally RONALD L. LEWIS, *BLACK COAL MINERS IN AMERICA* (1987).

264. Quoted in TROTTER, *supra* note 263, at 114.

that launched the Kansas constitutional strike, G.W. Van Hook, a black union activist, stood up and told of leaving West Virginia "because he found that he was held in slavery there."<sup>265</sup>

In his influential work, *Power and Powerlessness*, John Gaventa studied a Tennessee coal mining area similar in many respects to the "slave" districts of West Virginia. Gaventa reported no violations of the rights to quit work or to vote by secret ballot. Yet despite gross poverty and inequality, the poor people of the area made virtually no effort to improve their condition through economic or political action.<sup>266</sup> Comparing the various communities in the area, Gaventa found that the degree of quiescence in each was related to its "index of vulnerability": the extent of its people's dependence on elites for food, shelter, and channels of education and communication.<sup>267</sup> Where coal companies owned the housing, controlled retail trade through the company store, provided schools, and funded churches, the people meekly followed elite direction.<sup>268</sup> This pliability might seem surprising, given that many of the miners were members of the Tennessee district of the UMW. But the district had lost its autonomy, and the officials appointed by the International's president governed in an autocratic fashion calculated to reinforce quiescence.<sup>269</sup> Lacking any experiences of effective action, many miners internalized the elites' view that they were born followers, incapable of independent thought and action. Gaventa captured their condition with a metaphor not entirely dissimilar from that of slavery: internal colonization.<sup>270</sup>

Measured on Gaventa's vulnerability index, the Kansas and Illinois miners of the early 1920s were far from the vulnerable end of the scale. Only about 18.5% of miners in Kansas, and 9% in Illinois, lived in company owned housing, compared with approximately 70% in Tennessee.<sup>271</sup> Both District 14 (Kansas) and District 12 (Illinois) were strongly organized by the UMW.<sup>272</sup> District 14 sponsored a weekly newspaper, the *Workers Chronicle*, which covered national and international labor news as well as local developments, and District 12 began publishing its own paper, the *Illinois Miner*, during this period.

Both union districts sustained robust internal democracy. District 14 was divided into about 140 local unions, averaging approximately seventy members

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265. *Miners Vote [T]o Stop Work*, *supra* note 22.

266. *See* GAVENTA, *supra* note 51, at 39.

267. *See id.* at 161.

268. *See id.* at 93-96.

269. *See id.* at 193-94.

270. *See id.* at 43.

271. *See* U.S. COAL COMM'N, WHAT THE COAL COMMISSION FOUND 139-40 (Edward Eyre Hunt et al. eds., 1925).

272. Eighty-eight percent of Kansas miners and one hundred percent of Illinois miners belonged to the UMW in 1918. *See* U.S. COAL COMM'N, *supra* note 167, at 1052.

each.<sup>273</sup> These small units elected their own officers and decided issues of great concern to the membership, including the disposition of grievances and the calling of wildcat strikes. In the deep mines, the local unions were supplemented by elected pit committees with jurisdiction over such vital matters as ensuring the accurate weighing of coal (of obvious importance to miners paid by the ton), overseeing mine safety, and arranging a fair distribution of cars.<sup>274</sup> Howat and his allies generally won the district elections by large margins, but there were some close contests and one incumbent board member was unseated in 1919.<sup>275</sup> Meanwhile, union politics in Illinois District 12 were lively and contentious as President Frank Farrington, a wily business unionist with his eye on the UMW presidency, struggled to maintain a precarious edge over a coalition of radicals.<sup>276</sup>

As Gaventa's model would predict, the Kansas and Illinois miners intervened vigorously in the political arena. Before the war, Howat and other District 14 leaders belonged to and vigorously promoted the Socialist Party. Eugene Debs carried the Kansas coal counties in the 1912 presidential election, and the party won numerous local and county-level offices.<sup>277</sup> Socialists were also influential in Illinois District 12, where prominent party members Duncan MacDonald and Adolph Germer, as well as John Hunter Walker, held district-wide offices.<sup>278</sup> As the Socialist Party declined, it was replaced by what John Laslett has called a "new social movement."<sup>279</sup> In District 12, radicals maneuvered around Farrington to implement a program that included a drive to nationalize the coal industry, campaigns for regulatory legislation, and an

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273. Cf. 2 UNITED MINE WORKERS OF AMERICA, PROCEEDINGS OF THE TWENTY-EIGHTH CONSECUTIVE AND FIFTH BIENNIAL CONVENTION 803-05 (1921) [hereinafter UMW TWENTY-EIGHTH CONSECUTIVE CONVENTION] (listing 86 District 14 locals); *Miners' Convention Meets in Kansas City, Mo.*, WORKERS CHRON., Mar. 5, 1920, at 1 (listing 109 District 14 locals, including 37 not listed in UMW TWENTY-EIGHTH CONSECUTIVE CONVENTION, *supra*, and indicating that list omitted some 20 locals) (Not all locals sent delegates to the UMW conventions from which these rosters were compiled. Members were distributed relatively evenly among these locals, as evidenced by the fact that only a few locals claimed a membership of more than 100, which entitled them to a second vote at the International Convention. See UMW TWENTY-EIGHTH CONSECUTIVE CONVENTION, *supra*).

274. See GOODRICH, *supra* note 88, at 78-89; MONTGOMERY, *supra* note 91, at 336.

275. See, e.g., *Election Returns for District 14 Officers*, WORKERS CHRON., Dec. 19, 1919, at 1, *Many Dist. 14 Officials Re-elected First Ballot*, WORKERS CHRON., Dec. 12, 1919, at 1, *Mine Workers Endorse President Howat's Stand*, WORKERS CHRON., Dec. 14, 1917, at 1, *Result of Election*, WORKERS CHRON., Jan. 16, 1920, at 1.

276. See Singer, *supra* note 162, at 109, 116. At the 1921 district convention, for example, Farrington staved off a motion that would have eliminated his power to hire and fire district organizers by a vote of only 478 to 462. See *Close Call for Farrington*, PITTSBURG DAILY HEADLIGHT, Nov. 17, 1921, at 1.

277. See FAILURE OF A DREAM? ESSAYS IN THE HISTORY OF AMERICAN SOCIALISM 332-34 (John H.M. Laslett & Seymour Martin Lipset eds., 1974); JAMES R. GREEN, GRASS-ROOTS SOCIALISM 201-02, 264 (1978).

278. Although the district organization never formally endorsed the Socialist Party, its candidates ran relatively strongly among the miners, winning local office in 13 mining towns. See Laslett, *supra* note 162, at 167, 170-72.

279. *Id.*

effort to bring retail and wholesale trade under working class control through the establishment of cooperative stores.<sup>280</sup> District 14 followed suit.<sup>281</sup>

Districts 12 and 14 thus presented a stark contrast to the "slavery" of the nonunion fields. The miner's freedom had overflowed the pits into the public arena. Through a set of workplace and community-based institutions and practices, the people of the coal mining communities had gained a measure of collective control over their daily lives.

### C. *Business's Constitutional Narrative of Commercial Exchange*

The experience and language of industrial slavery set worker activists apart from the dominant legal culture. From the 1890s to the 1930s, most courts joined employers in assimilating industrial relations to the narrative model of the commercial transaction: rationally self-interested workers would seek to maximize their wages and working conditions by exercising their freedom to contract in the labor market. Continuing a middle-class abolitionist tradition, labor was viewed as a commodity to be bought and sold like any other.<sup>282</sup> As the Pennsylvania Supreme Court put it, a worker "may sell his labor for what he thinks best, . . . just as his employer may sell his iron or coal."<sup>283</sup>

In this way, the commodity model of labor supported a vision of the individual labor contract as a symmetrical relationship.<sup>284</sup> Individual freedom of contract was, according to the Supreme Court, "as essential to the laborer as to the capitalist."<sup>285</sup> Workers exercised their freedom at the instant of contract formation, when they enjoyed the same formal right as the employer to enter or decline to enter the employment relation.<sup>286</sup> From that moment until the termination of employment, the relationship was one of master and servant, as the worker was deemed to have conceded control of her daily activity in exchange for material rewards. The commodity metaphor thus corresponded not only to the life experience of the business classes, whose work activities centered around commercial transactions of one kind or

280. See John H.M. Laslett, *Labour Party, Labor Lobbying, or Direct Action? Coal Miners, Immigrants, and Radical Politics in Scotland and the American Midwest, 1880-1924*, in *THE POLITICS OF IMMIGRANT WORKERS* 71, 88-90 (Camille Guerin-Gonzales & Carl Strikwerda eds., 1993); Laslett, *supra* note 162, at 184-97.

281. See HOWAT, *supra* note 262, at 4, 20; *Labor Party Organized at the Chicago Convention*, *WORKERS CHRON.*, Nov. 28, 1919, at 1; Lawrence Todd, *Railroad Workers Are Now Ready for Action*, *WORKERS CHRON.*, July 16, 1920, at 1.

282. On the abolitionist conceptualization of labor as a commodity, see Eric Foner, *Abolitionism and the Labor Movement in Antebellum America*, in *ANTI-SLAVERY, RELIGION, AND REFORM* 254, 259 (Christine Bolt & Seymour Drescher eds., 1980); and William E. Forbath, *The Ambiguities of Free Labor: Labor and the Law in the Gilded Age*, 1985 *WIS. L. REV.* 767, 785-86.

283. *Godcharles v. Wigeman*, 6 A. 354, 356 (Pa. 1886).

284. See HARTSOCK, *supra* note 57, at 100. The classic non-Marxist analysis of the "fictive" character of the labor commodity is POLANYI, *supra* note 12.

285. *Coppage v. Kansas*, 236 U.S. 1, 14 (1915) (invalidating state yellow dog statute).

286. Carole Pateman has termed this freedom as act. See PATEMAN, *supra* note 57, at 229.

another, but also to the experience of workers at the moment of accepting employment.

The commodity metaphor implied a problematic role for unions. If workers were commodity sellers, then unions were cartels of commodity sellers, or "labor trusts."<sup>287</sup> Federal judges deployed market imagery in holding that labor combinations could be "in restraint of trade" under the antitrust laws.<sup>288</sup> State judges applied the common law "unlawful objectives" test to prohibit broad, solidaristic forms of union action like sympathy strikes while preserving a narrow sphere of legality for forms of collective action that closely resembled corporate business activity, such as primary strikes for higher wages.<sup>289</sup> In Christopher Tomlins's apt phrase, this regime conferred only "contingent legitimacy" on unionism as a limited, collective exception to the preferred model of the individual labor market in which individual workers sold their fictional labor commodity to fictional corporate "persons."<sup>290</sup>

Unionists resolutely repudiated this model. In their experience, the purported "sale" of labor gave the employer a right to command the worker in his daily activity. Far from selling a detachable labor commodity, workers sold their "hands and muscles."<sup>291</sup> "A man may exercise his labor power in the interest of another," explained Victor Olander, "but he cannot give or sell it to any other person without at the same time surrendering his own body."<sup>292</sup>

Many labor activists understood that the outcome of the clash between market and power narratives, though only a matter of words, could exert a shaping influence on their lives. Without the benefit of modern cognitive psychology or cultural theory, they maintained that the commodity metaphor reflected deeply entrenched patterns of thought that influenced action. The

287. Murray T. Quigg, *Function of the Law in Relation to Disputes Between Employers and Employees*, 9 A.B.A. J. 795, 799–800 (1923) (arguing that unions are "labor trust[s]" that seek to substitute their control for that of employer).

288. See, e.g., *Loewe v. Lawlor*, 208 U.S. 274, 292 (1908) (holding that combinations of laborers obstructing free flow of commerce violated Sherman Act). Many Gilded Age judges came by this position honestly; as committed antimonopolists, they disapproved of both capital and labor trusts. See Forbath, *supra* note 282, at 791; Herbert Hovenkamp, *Labor Conspiracies in American Law, 1880–1930*, 66 TEX. L. REV. 919, 921, 925–26 (1988).

289. See JAMES B. ATLESON, *VALUES AND ASSUMPTIONS IN AMERICAN LABOR LAW* 10 (1983); FORBATH, *supra* note 8, at 133–35; Pope, *supra* note 126, at 1083–85.

290. See TOMLINS, *supra* note 63, at xiii. This contingency was succinctly expressed in the venerable principle that although conspiracies were presumptively illegal, they might be "justified" if motivated by narrow self-interest. See ATLESON, *supra* note 289, at 68–70.

291. *Thank the Illinois Miners*, PITTSBURG DAILY HEADLIGHT, Dec. 2, 1921, at 11 (printing resolution of Locals 33, 2330, 3696, and 4329); see also *supra* text accompanying notes 291–92.

292. Olander, *supra* note 135, at 7. For a similar statement by Gompers, see 1922 Gompers Report, *supra* note 141, at 98. On this point, unionists echoed Marx's observation that upon leaving the sphere of commodity exchange,

we can perceive a change in the physiognomy of our dramatis personae. He, who before was the money-owner, now strides in front as the capitalist; the possessor of labour-power follows as his labourer. The one with an air of importance, smirking, intent on business, the other, timid and holding back, like one who is bringing his own hide to market and has nothing to expect but—a hiding.

MARX, *supra* note 12, at 176.

view that labor could "be bought without buying the man," explained the *Workers Chronicle*, went "into the roots of our social structure."<sup>293</sup> Its operation could be seen when laborers were referred to as "hands" or "brawn workers" or when a group of workers was called a "gang."<sup>294</sup> The commodity theory had a "cause and effect" relationship with the labor injunction; anyone who failed to understand this "would be astonished when a lighted match explodes gunpowder."<sup>295</sup> To labor leaders like Samuel Gompers and Andrew Furuseth, the operational consequences of the commodity metaphor were so clear that section 6 of the Clayton Act—declaring in abstract terms that "the labor of a human being is not a commodity or article of commerce"<sup>296</sup>—could serve as the "Magna Charta of American labor."<sup>297</sup> When a similar provision was included in the Versailles Treaty, William Green celebrated it as the "idea which has been the beacon and hope of the countless millions who toil."<sup>298</sup>

#### D. *The "Public's" Constitutional Narrative of Progress*

In place of the unionists' narrative of emancipation, progressives offered one of progress in which social scientists, government officials, and other purportedly disinterested experts would guide "partial" interests like labor and capital toward a better society.<sup>299</sup> In contrast to workers, who were powerless even to understand—much less solve—economic problems, these experts would find ways to rectify the causes of industrial unrest.<sup>300</sup>

293. *Freedom for All Workers Is First Essential*, WORKERS CHRON., Feb. 11, 1921, at 2.

294. *Id.*

295. *Id.*

296. Clayton Act, ch. 323, § 6, 38 Stat. 731 (1914) (codified as amended at 15 U.S.C. § 17 (1994)).

297. *Labor Is Not a Commodity*, NEW REPUBLIC, Dec. 2, 1916, at 112, 114; see also Dallas L. Jones, *The Enigma of the Clayton Act*, 10 INDUS. & LAB. REL. REV. 201, 214 (1957); Stanley I. Kutler, *Labor, the Clayton Act, and the Supreme Court*, 3 LAB. HIST. 19, 20 (1962).

298. *Fundamental Rights of Miners Must Be Protected in Any System for Regulation of Coal Industry*, UNITED MINE WORKERS J., Feb. 1, 1921, at 3 (printing speech of William Green, International Secretary, United Mine Workers of America).

299. See RICHARD HOFSTADTER, *THE AGE OF REFORM 131–73* (1955); ROBERT H. WIEBE, *THE SEARCH FOR ORDER, 1877–1920* (1967). The rise of professionalism in the early twentieth century was associated with efforts to bring knowledge under the control of a credentialed elite organized in authoritative hierarchies. The agenda centered on progress, efficiency, and order. See THOMAS L. HASKELL, *THE EMERGENCE OF PROFESSIONAL SOCIAL SCIENCE* (1977); Gordon, *supra* note 94. The rising social scientists conflated their success with that of the country.

300. See Newton D. Baker, *Labor Relations and the Law*, 8 A.B.A. J. 731, 732, 736 (1922). Felix Frankfurter called for

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. Mr. Gompers will learn that "intellectuals" may have as deep a social sympathy and understanding as men who work at crafts.

The "*Law*" and *Labor*, NEW REPUBLIC, Jan. 26, 1921, at 245, 248 (unsigned article attributed to Frankfurter by Philip Kurland), reprinted in FELIX FRANKFURTER ON THE SUPREME COURT 68, 76 (Philip B. Kurland ed., 1970).

Progressive reformers tried to convince unionists that the entire enterprise of struggling over metaphor was misguided. Edwin Witte chastised unionists for engaging in "abstract" discussions about commodity labor when labor problems were "economic in their nature."<sup>301</sup> The *New Republic* berated unionists for "crying industrial slavery" when facts, not concepts, would point the way toward a satisfactory law.<sup>302</sup> Feis and Bowers took this position to its logical conclusion when they turned deaf ears to the Kansas miners' outpouring of metaphorical arguments.

Even as they scolded unionists for wasting time on abstractions, however, middle-class reformers vigorously advanced their own. They added a gloss of political language to the market model. In this vision, workers were "citizens," not merely commodity sellers. William Allen White maintained that when the public set wages, it was "interested, not in labor as a commodity, but in labor as a citizen."<sup>303</sup> To W. Jett Lauck, the establishment of government wage tribunals was a "repudiation of the theory that labor is a commodity."<sup>304</sup>

Despite this anticommodity rhetoric, progressive thought retained the market model, albeit in a more limited role. When reformers claimed to repudiate the notion that labor was a commodity, they meant that labor would not be subject to the unregulated operation of the market. But that did not distinguish labor from ordinary commodities; reformers wanted to regulate both. Labor would continue to be treated like nonhuman commodities, but now the rights of all sellers of commodities—human and nonhuman—would be contingent on the vagaries of ordinary legislative politics. Labor's efforts to separate out a class of labor rights for continued constitutional protection were emphatically rejected: If combinations of capital were to be deprived of protection, then so must combinations of labor.<sup>305</sup> To unionists, this was merely another application of the commodity metaphor, one that substituted governmental for employer domination.<sup>306</sup> As if to underscore this point, progressives referred to their own preferred rights, those of free speech and

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301. Edwin E. Witte, *The Doctrine That Labor Is a Commodity*, 69 ANNALS AM. ACAD. POL. & SOC. SCI. 133, 139 (1917); see also FORBATH, *supra* note 8, at 167.

302. See *Forced Labor in Kansas*, NEW REPUBLIC, Jan. 25, 1922, at 239, 239. This critique was embedded in what progressive legal thinkers claimed was an impartial and general critique of "conceptualism" and the power of metaphorical reasoning. See HORWITZ, *supra* note 109, at 202-05.

303. ALLEN, *supra* note 111, at 90.

304. W. Jett Lauck, *Living Wage Theory Upheld as Obligation of Society*, N.Y. TIMES, Dec. 17, 1922, § 8, at 6.

305. See HINRICHS, *supra* note 257, at 182 ("Considered from the point of view of the public, the inalienable right to strike is almost as individualistic as the extreme conceptions of freedom of contract"), Herbert Rabinowitz, *The Kansas Industrial Court Act*, 12 CAL. L. REV. 1, 5-7 (1923) (discussing Kansas Court's upholding of Industrial Court's power to "compel settlement" of disputes of labor and management alike).

306. See, e.g., *Freedom for All Workers Is First Essential*, *supra* note 293 ("The commodity theory operates where the food, the education, the clothing, the amusements of workers are standardized by state edict, through minimum wage boards."); *Time To Wake Up*, UNITED MINE WORKERS J., Feb. 15, 1921, at 6-7 (contending that government wage-setting is inconsistent with principle that labor is not commodity).

free press, as "personal" rights in contrast to the "economic" rights of capital and labor.<sup>307</sup>

## V. CONSTITUTION OF EMPOWERMENT

Depending on the beholder's view of power, labor's freedom constitution could appear to have empowering, debilitating, or even pathological consequences for the labor movement. As we have seen, progressive intellectuals chided unionists for focusing on abstract concepts (like commodity labor) instead of economic facts, for talking about fundamental rights rather than distributional effects, and for looking to the Constitution instead of social science for solutions. In this view, labor's freedom constitution impeded unionists from participating effectively in the particular power processes most valued by progressive reformers: parlaying organizational, financial, and informational resources into favorable policymaking by employers and government officials.

Most labor activists, however, were less concerned with manipulating public officials than with sustaining movement power on the ground. For these activists, jurisgenesis provided a way of constituting workers as a group capable of collective action. For groups that are not endowed with official authority, the difference between alternative lawmaking and legal fantasizing lies in the commitment of group members to live by their own law.<sup>308</sup> Without commitment, group members might well fight for their privileges, but they would not "be disobedient to any articulable principle were they to capitulate," nor could they "hold someone blameworthy—lawless—were he to give in."<sup>309</sup> For activists, then, fostering commitment—not marshalling resources—was the key to movement power.<sup>310</sup>

William Forbath and Leon Fink have observed that labor's constitutionalism could serve to mobilize workers and justify unionism.<sup>311</sup> Nevertheless, they ultimately conclude that the turn to constitutionalism undermined working class power by co-opting unionists into corporate ideology, narrowing the sphere of solidarity, and turning workers away from political action.<sup>312</sup> These conclusions, which are consistent with the model of constitutional insurgency as hegemonic co-optation, contrast sharply with

307. See, e.g., LEARNED HAND, *Chief Justice Stone's Concept of the Judicial Function*, in *THE SPIRIT OF LIBERTY: PAPERS AND ADDRESSES OF LEARNED HAND* 201, 205-06 (Irving Dilliard ed., 2d ed. 1952).

308. See Cover, *supra* note 17, at 47 (arguing that success of civil rights sit-in movement stemmed from ability to conform public behavior to movement's own interpretation of Constitution).

309. *Id.* at 45 (discussing need for objectifying commitments).

310. Interestingly, Selig Perlman—even as he scolded unionists for failing to accept assistance from the "daring" intellectuals who had developed an "economic interpretation of the Constitution"—understood that the reason they resisted had something to do with the fact that they had "given years and years to building up a united fighting morale in the army of labor." PERLMAN, *supra* note 96, at 291.

311. See FINK, *supra* note 63, at 154; FORBATH, *supra* note 8, at 144-47.

312. See FINK, *supra* note 63, at 154-57; FORBATH, *supra* note 8, at 130-35.



those posited by the model of jurisgenesis. Where the experiences and interests of a subordinate group differ widely from those of dominant groups, we would expect to find critical rights discourse that need not tend to undermine solidarity or radical political action.<sup>313</sup> Forbath and Fink looked primarily at the constitutional thought and action of national union officials, and—as we will see in Part VI—their accounts are accurate as to those officials. But when we focus on local activists, whose experience differed from that of dominant groups far more dramatically than did that of union officials, a very different picture emerges.

Embodied in the constitutional narrative of slavery and emancipation were approaches to five problems typically faced by insurgent social movements: (1) co-optation by dominant groups; (2) legal repression; (3) barriers to collective action; (4) negative group identity; and (5) depoliticization. Constitutional rhetoric went hand-in-hand with appeals to class solidarity and political action. Each of these approaches was contested by the opposing narrative of commodity labor, especially in its progressive variant.

#### A. *Avoiding Co-optation*

Labor activists saw unionism as a vehicle for worker empowerment. The ability of a labor movement to play that role is, as Alain Touraine has observed, “threatened by two opposite dangers: subordination to political action on one side and self-limitation to piecemeal claims and monetary gains on the other.”<sup>314</sup> The proponents of labor’s freedom constitution sought to avoid both dangers. They did not go so far as to reject ordinary politics and collective bargaining outright (as did the IWW),<sup>315</sup> but instead relegated them to a subordinate, instrumental status. Worker activists struggled to generate a movement culture that could both sustain movement autonomy and power and keep considerations of immediate material gain at bay.

Constitutional law provided a framework for this two-tiered structure of values.<sup>316</sup> Unionists elevated the struggle for direct, collective action above ordinary lobbying and collective bargaining. They refused participation in unconstitutional institutions even when nonparticipation entailed material sacrifice. Gompers, for example, severely criticized unionists who sought

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313. See *supra* Subsection I.D.2.

314. Alain Touraine, *Unionism as a Social Movement*, in *UNIONS IN TRANSITION* 151, 157 (Seymour Martin Lipset ed., 1986).

315. See Vincent St. John, *Political Parties and the IWW*, in *REBEL VOICES: AN IWW ANTHOLOGY* 43, 43–44 (Joyce L. Kornbluh ed., 1964); William Trautmann, *Why Strikes Are Lost*, in *REBEL VOICES*, *supra*, at 18, 21.

316. Labor’s freedom constitution was an example of what Bruce Ackerman has called “dualist” constitutionalism. As Ackerman observes, people may engage in forms of constitutional politics that evince a high level of commitment to long-term, fundamental issues quite distinct from the narrowly self-interested, short-term dynamics of ordinary interest group politics. See ACKERMAN, *supra* note 45, at 230–35.

injunctions against employers, even though the stratagem could yield substantial material rewards.<sup>317</sup> District 14 and the Kansas Federation of Labor maintained a strict boycott of the Industrial Court long after it had established a pattern of ruling for workers and unions in most wage cases.<sup>318</sup>

This priority of rights and freedoms over immediate material gain ran strongly through the writings of local union activists. The strikers were said to be fighting for "human rights,"<sup>319</sup> for "justice and freedom,"<sup>320</sup> for "honor"<sup>321</sup>—values that were incommensurate with financial gain. Allen's Industrial Court was doomed, predicted one miner-poet, because it had collided with "a bunch of men/Who would not sell their souls."<sup>322</sup> Howat was "locked up in jail," wrote a coalfield area woman, "because he stood up for the rights of the laboring man and didn't have his eye fixed on the dollar."<sup>323</sup> One activist unflinchingly contemplated the destruction of his community:

Our district is ruined. This little town of Arcadia, Kansas, which was noted for its activities in the financial and industrial world, is now facing a downward trend. Mines near here that were the life of the town are now making preparations for pulling rails . . . But we are willing to be called "radicals," "reds," put in jail, . . . and like John the Revelator, banished to the island of Patmos before we will surrender our rights as American citizens.<sup>324</sup>

## B. *Overcoming Collective Action Problems*

This same dualist structure provided an approach to the thorny problem of free riders. From the perspective of a rationally self-interested worker, union activity could entail enormous risks: loss of job, imprisonment, or even injury or death at the hands of vigilantes, police, or troops. On the other hand, there was very little likelihood that participation would bring any instrumental benefits since, in actions of any size, no single individual's participation would perceptibly affect the outcome. Individuals had every incentive to free ride on

317. See FORBATH, *supra* note 8, at 125.

318. On the favorable decisions of the Industrial Court, see *supra* note 225 and accompanying text.

319. Thos. Cunningham, Letter, WORKERS CHRON., Sept. 30, 1921, at 3; see also Julia Marlier, *We Are Wee, But Are Mighty*, WORKERS CHRON., Nov. 18, 1921, at 4 (stating that miners are "stand[ing] up for their rights as free men and free women").

320. Termine, *supra* note 254. The theme of fighting for freedom ran through most of the activist statements. See *infra* Table 1.

321. Loftus, *supra* note 246.

322. John Loftus, Poem, *The Kansas Miners*, WORKERS CHRON., Dec. 16, 1921, at 4; see also Local Union 3101, Resolution, WORKERS CHRON., July 1, 1921, at 4 (stating that miners will never "surrender their rights as free Americans" although "we realize that it has taken and will continue to take probably large sums of money to carry on the fight to a finish against this rotten industrial court law. It is money well spent . . .").

323. Mrs. Eunice Hyatt, Letter, *A Defense of Howat*, PITTSBURG DAILY HEADLIGHT, Dec. 1, 1921, at 4.

324. Woolridge, *supra* note 254.

the effort of others. Strong unions might dispense selective incentives—like the carrot of union office or the stick of ostracism—but these incentives could not explain the dedication and commitment of the core of activists who sustained resistance in times of weakness. These workers sought other kinds of compensation.

In place of private, pecuniary rewards, labor's freedom constitution offered the public satisfactions of meaningful public action, historic immortality, and social interconnection.<sup>325</sup> It fostered the aspiration to be one of those people "[w]ho would not sell their souls,"<sup>326</sup> who did not have their eyes "fixed on the dollar,"<sup>327</sup> and who would rather go to jail than "surrender our rights as American citizens."<sup>328</sup> "The name of Alexander Howat will live and be spoken from the lips of the working men and women of this country," wrote a Teamster from Illinois, "long after his persecutors have been forgotten and only remembered in contempt."<sup>329</sup> To transcend the logic of individual self-interest, worker activists invoked their connection to communities based on social movement, class, nation, and spirituality. Coal district women protested the "law to enslave our children,"<sup>330</sup> and activists urged their fellows to "bear in mind the children you are raising are depending to live under the conditions you are going to leave them in."<sup>331</sup> Howat was acclaimed as a "belligerent . . . in the great class war"<sup>332</sup> who "live[d] in the heart of every loyal soldier of the class struggle."<sup>333</sup> Strikers declared that they were "fighting for the entire organized workers of America,"<sup>334</sup> and their supporters outside Kansas agreed.<sup>335</sup>

325. This Section draws heavily on the pathbreaking work of Albert O. Hirschman. Hirschman suggested that although a person might have a (first-order) preference for free riding, she might also have a (second-order) preference about that preference, for example, a desire not to be the kind of person who takes free rides on the efforts of others. These second-order preferences help to explain individual participation in collective action that would seem—as a matter of selfish calculation—to be irrational. See ALBERT O. HIRSCHMAN, *SHIFTING INVOLVEMENTS: PRIVATE INTEREST AND PUBLIC ACTION* 86–91 (1982). For a useful and insightful case study along these lines, see DENNIS CHONG, *COLLECTIVE ACTION AND THE CIVIL RIGHTS MOVEMENT* (1991).

326. Loftus, *supra* note 322.

327. Hyatt, *supra* note 323.

328. Woolridge, *supra* note 254, at 6.

329. Martin A. Dillmon, Letter, *Miners Not Only Ones To Condemn Lewis*, WORKERS CHRON., Dec. 30, 1921, at 4; see also John Loftus, Letter, WORKERS CHRON., Jan. 30, 1920, at 3 (noting that "the law makers and fine gentry" crucified Christ, but their names, not his, "perished from the earth").

330. *Miners' Wives Pass Resolutions*, WORKERS CHRON., Dec. 16, 1921, at 4 (printing resolution).

331. Kerley, *supra* note 251.

332. Local Union 905, Letter, WORKERS CHRON., Jan. 13, 1922, at 2.

333. Dillmon, *supra* note 329.

334. Local Union 1790, Letter, WORKERS CHRON., Nov. 18, 1921, at 4.

335. See, e.g., Local Union 493, Resolution, WORKERS CHRON., Feb. 10, 1922, at 1 (Ill.); Local Union 1286, Resolution, WORKERS CHRON., Dec. 30, 1921, at 4 (Stewartsville, Ohio); Local Union 1806, Resolution, WORKERS CHRON., Mar. 10, 1922, at 4 (Coulterville, Ill.); Local Union 4285, Resolution, WORKERS CHRON., Apr. 7, 1922, at 5 (Triadelphia, W. Va.); Local Union 4376, Resolution, WORKERS CHRON., Feb. 3, 1922, at 2 (Dines, Wyo.); *Resolution of Minneapolis Trades & Labor Assembly*, WORKERS CHRON., Nov. 18, 1921, at 4 (Minneapolis, Minn.); Theo. Robinson, Letter, WORKERS CHRON., Aug. 20, 1920, at 1 (Lexington, Mo.).

Class rhetoric went hand-in-hand with constitutional argument. The same activist who referred to loyal soldiers of the class struggle also lauded "the Howat spirit which animates the labor movement today, which is that 'neither slavery nor involuntary servitude' shall be perpetrated upon the working class."<sup>336</sup> According to the Topeka Industrial Council, the Industrial Court Act sought "to enslave the laboring class in direct violation of its constitutional rights."<sup>337</sup>

While activists struggled to elevate rights of collective protest above issues of immediate material gain, progressives did their best to convince workers that these rights were really nothing more than a means to the end of greater material comfort. In this progressive view, the right to strike had nothing to do with freedom or democracy and everything to do with obtaining a better bargain for the sale of labor power. By filing a claim with the Industrial Court, workers could get "all the benefits which might be gained by a strike, and even more, without the necessity of striking."<sup>338</sup> Even pro-union progressives blithely assumed away the problem of engendering collective action. To Robert Hoxie, for example, collective action was the "natural consequence" of the tendency for workers who shared a social and economic environment to develop a "group psychology."<sup>339</sup> Selig Perlman similarly held that the "true psychology" of the wage laborer was to be found partly in "his desire for solidarity," which in turn resulted from the shared experience of labor market participation.<sup>340</sup>

### C. *Surviving Legal Repression*

A few years before the constitutional strike, Robert Hoxie had observed that American law was so permeated with individualism that unionism was "in its very essence a lawless thing, in its very purpose and spirit a challenge to

336. Martin A. Dillmon, Letter, *WORKERS CHRON.*, May 5, 1922, at 2; see also *infra* note 377 and accompanying text.

337. *A Topeka Resolution*, *WORKERS CHRON.*, Apr. 30, 1920, at 2; see also *Bloomington, Illinois Trades Assembly in an Endorsement of Howat*, *WORKERS CHRON.*, Oct. 28, 1921, at 1 (referring to "the constitutional rights of the working class").

338. Charles Thaddeus Terry, *Law and Order in Industrial Disputes*, 9 A.B.A. J. 115, 122 (1923); see also *Courts of Industrial Relations*, 27 *LAW NOTES* 3 (1923) (characterizing workers' concerns as centering on wages and working conditions); William L. Huggins, *A Few of the Fundamentals of the Kansas Industrial Court Act*, 7 A.B.A. J. 265, 268 (1921) (maintaining that workers had been provided "compensation" for right to strike by provision of "impartial tribunal into which labor may go at any time without cost"); William Reynolds Vance, *The Kansas Court of Industrial Relations with Its Background*, 30 *YALE L.J.* 456, 472 (1921) ("A careful examination of the arguments made by labor leaders against this Act shows that they all rest upon a fear that the court will be controlled by the employers and therefore hostile to union claims."); Comment, *Present Day Labor Litigation*, 31 *YALE L.J.* 86, 88 (1921) (opining that "[t]he struggle of the employee rests essentially on an economic basis and therefore it is necessary to understand clearly the objects for which he is striving, i.e., (1) better working conditions, and (2) increased economic reward").

339. See ROBERT F. HOXIE, *TRADE UNIONISM IN THE UNITED STATES* 59 (1919).

340. See SELIG PERLMAN, *A THEORY OF THE LABOR MOVEMENT* 246 (1928).

law."<sup>341</sup> Hoxie was scarcely exaggerating. Although peaceful primary strikes for higher wages or better working conditions remained legal in theory, it was a rare strike that was so devoid of tainted means or ends as to be free from the risk of injunctive action at the hands of a judiciary that largely agreed that "[t]here is and can be no such thing as peaceful picketing."<sup>342</sup> Under this regime of law, widespread and routine lawbreaking was essential to labor movement survival. "The men who established the Miners' Union were not too good or too cowardly to go to jail," noted one miner's circular, and if "they had been we would not have had a union at all."<sup>343</sup>

At the same time, unionists forcefully declined to accept the status of outlaws.<sup>344</sup> Labor's freedom constitution explained why law-abiding citizens were under an affirmative duty to violate restrictions on collective action. "The Constitution itself places our sacred rights above this government,"<sup>345</sup> observed one strike supporter, while a local union resolved that Howat and Dorchy had "merely done their duty and exercised their rights as American citizens."<sup>346</sup>

#### D. Cognitive Liberation

As John Gaventa has observed, the experience of defeat coupled with negative socialization can foster a "sense of powerlessness," a feeling that one is simply not the kind of person who can effect change.<sup>347</sup> Before the normally fatalistic members of a social group can form a social movement, they must undertake what Douglas McAdam has called "cognitive liberation," a reinterpretation of their situation that leads to a "new sense of efficacy."<sup>348</sup>

341. HOXIE, *supra* note 339, at 23, 30; *see also* Thorstein Veblen, *Absentee Ownership and Business Enterprise in Recent Times*, in *THEORIES OF THE LABOR MOVEMENT* 245, 247 (Simeon Larson & Bruce Nissen eds., 1987) ("Being not grounded in ownership, [the unions'] legal right of conspiracy in restraint of trade is doubtful at the best.").

342. *Atchison, Topeka & Santa Fe Ry. v. Gee*, 139 F. 582, 584 (S.D. Iowa 1905), *see also* *American Steel Foundries v. Tri-City Cent. Trades Council*, 257 U.S. 184, 205 (1921) ("The name 'picket' indicated a militant purpose, inconsistent with peaceable persuasion."). For a scholarly account, *see* Dianne Avery, *Images of Violence in Labor Jurisprudence: The Regulation of Picketing and Boycotts, 1894-1921*, 37 *BUFF. L. REV.* 1 (1989).

343. *Circular to All United Mine Workers of America*, *WORKERS CHRON.*, Aug. 20, 1920, at 4.

344. *See* FORBATH, *supra* note 8, at 145-46.

345. R.N. Wiltse, Letter, *An American Disagrees with Judge*, *WORKERS CHRON.*, July 22, 1921, at 1.

346. Local Union 1212, Resolution, *WORKERS CHRON.*, Mar. 11, 1921, at 5, *see also* Local Unions 264, 4938, 848, 685 & 826, Resolution, *WORKERS CHRON.*, May 12, 1922, at 4 (expressing "profound sorrow" that Howat and Dorchy were jailed "for asserting your constitutional right to strike"); Local Union 3101, *supra* note 322 ("We think the district officers have proceeded in a regular, orderly and lawful way in the way of conducting our affairs."); *Pennsylvania Miners Send Resolutions*, *WORKERS CHRON.*, Apr. 16, 1920, at 1 (condemning "imprisonment of Alex Howat and his associates . . . for no other reason than the exercising of his rights given him by the constitution of the United States of America")

347. *See* GAVENTA, *supra* note 51, at 16-17.

348. MCADAM, *supra* note 32, at 50-53. Gaventa includes this in the stage of "conscientization," in which the powerless "develop their own notions of interests and actions, and themselves as actors." GAVENTA, *supra* note 51, at 257.

Accordingly, scholars of power have suggested that a key factor in determining the capacity of disempowered groups to engage in resistance is the development of a positive group identity, one that depicts group members as effective actors.<sup>349</sup> Traditionally, labor leaders and politicians had evoked the honorable identity of producer; workers rallied as those who knew the "rhetoric of pride."<sup>350</sup> In the face of mechanization, deskilling, and increasingly intensive supervision, however, the language of producer pride became less an affirmation of personal effectiveness than a regret for power lost.<sup>351</sup>

Labor's constitution of freedom shifted the problem of identity from the economic to the political realm. It cast workers as "free men and women" charged with the historic mission of saving the Republic from industrial slavery.<sup>352</sup> The narrative of slavery and emancipation could supply a coherent structure to a bewildering and complex set of events, casting the various participants in roles charged with significance, specifying the basic relationships among them, and, most importantly, assigning to workers and unionists the overriding and definitive task of self-emancipation.

Unionists claimed rights to act—not merely to be treated in certain ways by others. A strike prohibition would reduce workers to a "degraded, demoralized and servile manhood"<sup>353</sup> unfit for citizenship in a democracy. Unlike the ordered forms of representative politics, the right to strike could be exercised at the job site, where workers were assembled at the moment of collective passion.<sup>354</sup> From this perspective, the state-centered proposals of progressive experts and statist socialists threatened to substitute one form of domination for another. "None of them want workers to save themselves," observed the *Workers Chronicle*. "All of them preach 'democracy' and 'liberty,' but they do not practice it—when wage earners are involved."<sup>355</sup>

### E. *Politicizing Industrial Relations*

Both laissez-faire judges and progressive reformers used the commodity metaphor to depict industrial relations as a depoliticized zone of social activity.<sup>356</sup> In the hands of laissez-faire judges, the metaphor relegated industrial relations to the private sphere of the marketplace, where the natural

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349. See STOKELY CARMICHAEL & CHARLES V. HAMILTON, *BLACK POWER* 37–38 (1967); MACKINNON, *supra* note 74, at 93, 103–04.

350. DANIEL T. RODGERS, *THE WORK ETHIC IN INDUSTRIAL AMERICA, 1850–1920*, at 180 (1978).

351. See *id.*

352. See *supra* text accompanying notes 242–65.

353. Gompers, *supra* note 148, at 3, 7.

354. On the concept of rights as claims to act, see Richard Dagger, *Rights, in* *POLITICAL INNOVATION AND CONCEPTUAL CHANGE* 292, 294 (Terrence Ball et al. eds., 1989).

355. *Freedom for All Workers Is First Essential*, *supra* note 293.

356. Nancy Fraser has observed that dominant discourses tend to code the concerns of subordinated groups as nonpolitical, and thus not subject to collective intervention. See FRASER, *supra* note 40, at 166–68.

law of supply and demand, rather than human-made law, was said to govern.<sup>357</sup> To progressive reformers, on the other hand, the market sphere called for human intervention, but not of a politicized type. They urged purportedly nonpolitical, expert control exercised either by government officials (as in the Industrial Court Act) or by corporate and union officials involved in "voluntary" collective bargaining.<sup>358</sup>

Labor's freedom constitution countered both the reprivatizing discourse of employers and the expert discourse of progressive reformers.<sup>359</sup> By depicting the individual labor contract as an institution of subjugation amounting to slavery, it excluded the possibility of leaving industrial relations to the spontaneous operation of natural economic laws. And by framing the issue as one of fundamental rights and justice, it protected a sphere of worker thought and action against the encroachments of expert discourse. Self-educated worker activists might not see themselves as the equals of scientists where technology was concerned, or of economists where optimal wage rates were concerned. But with their long tradition of union "legislation," they considered themselves fully competent to decide questions of justice.

The *Workers Chronicle* might have been speaking directly to Feis and Bowers when it castigated

self-styled "liberals" who affect a patronizing attitude toward wage earners . . . . They class themselves with educators, physicians, surgeons, engineers, investigators and other scientists . . . . They cannot understand when labor talks of liberty. "What does labor want?" they innocently inquire, while the wage earners thunder against industrial autocracy, labor injunctions, judicial usurpation and legislative encroachment. . . . The right to organize, to have a voice in working conditions and be represented by persons of their own choosing, is of first importance to the workers. . . . No other movement, no other program, raised the workers from the status of serfs.<sup>360</sup>

In the Kansas strike, it seemed that unionists had found a splendid vehicle for demonstrating their commitment to rights and freedoms. Confronted for the

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357. The commodity metaphor supported the judicial invalidation of numerous labor laws. Cf. FORBATH, *supra* note 8, at 167.

358. See Daniel R. Ernst, *Common Laborers? Industrial Pluralists, Legal Realists, and the Law of Industrial Disputes, 1915-1943*, 11 LAW & HIST. REV. 59, 67-68 (1993); *supra* text accompanying notes 299-307.

359. Fraser teases out three types of political discourse. Subordinated groups typically utilize what she calls oppositional discourses to politicize issues. Oppositional discourses arise from below, and contribute to the formation of group identity. They are distinguished from reprivatization discourses, which seek to depoliticize issues (typically by claiming that they are subject to "natural" laws like the law of supply and demand), and from expert discourses, which translate politicized issues into potential objects of state intervention (and, in the process, contribute to the formation of professional class identity). See FRASER, *supra* note 40, at 171-75.

360. *Freedom Is First Demand in Labor's Program*, WORKERS CHRON., July 8, 1921, at 2.

first time with a direct challenge, the Industrial Court's strongest supporters divided. Presiding Judge Huggins declared that the strike was an emergency and that the Industrial Court was duty bound to intervene.<sup>361</sup> Governor Allen not only disagreed but appeared to usurp the court's authority when he announced that the state would not act in any way unless there were a severe coal shortage.<sup>362</sup> The *Workers Chronicle* exulted that Howat's prophecy of the court's failure had proven correct.<sup>363</sup>

But if the court's supporters were split, the mine workers were far more seriously divided. For months, a dispute had been brewing between Howat and UMW President John L. Lewis. On October 12, 1921, just as the strike gathered momentum, Lewis summarily suspended the entire elected leadership of District 14 and replaced it with appointees. The newly installed acting president, an opponent of Howat, promptly ordered the strikers back to work.<sup>364</sup>

## VI. CONSTITUTIONAL QUARREL IN THE HOUSE OF LABOR

During the early 1920s, the United Mine Workers of America was by far the largest and most powerful union in the United States. Between August 1921 and August 1922, the union went through a four-month nationwide strike and a virtual civil war in West Virginia, pitting twenty thousand armed miners against five thousand police and company guards. The organization's supreme body, the international convention, met twice during that period. On both occasions, the delegates spent most of their time and energy passionately debating not national strike issues nor West Virginia but the propriety of a walkout by forty workers at an obscure Kansas mine. Most historians have accepted John L. Lewis's assessment<sup>365</sup> that the miners were fiddling while Rome burned. It is possible, however, that they were struggling over issues of deep importance not only to the UMW, but also to the entire labor movement and even to the constitutional order of the United States.

The clash among the laissez-faire, progressive, and freedom constitutions in the polity at large was replicated within the labor movement in more subtle form. As we have seen, labor's freedom constitution reflected the experience and nurtured the power of local union activists. As the theory of jurisgenesis would predict, national union officials, whose day-to-day activity more closely resembled that of business managers than ordinary unionists, developed their

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361. See GAGLIARDO, *supra* note 106, at 139; see also WILLIAM L. HUGGINS, *LABOR AND DEMOCRACY* 111-13 (1922).

362. See GAGLIARDO, *supra* note 106, at 139.

363. See *Kansas Miners on Strike Industrial Court Impotent*, *supra* note 221.

364. See *Lewis Suspends District No. 14*, *supra* note 234.

365. See UNITED MINE WORKERS OF AMERICA, *PROCEEDINGS OF THE RECONVENED TWENTY-EIGHTH CONSECUTIVE AND FIFTH BIENNIAL CONVENTION 25* (1922) [hereinafter *UMWA RECONVENED TWENTY-EIGHTH CONVENTION*].



own distinctive constitutional views. Some tried to modify business's laissez-faire constitution to union purposes. A smaller group did the same with the progressive constitution. The first approach I call "labor's corporate constitution," the second "labor's progressive constitution." Both were to play important roles, not only in the constitutional strike, but also in the transition from the *Lochner* to the *Carolene Products* regimes of constitutional law.

#### A. *Labor's Corporate Constitution*

If labor was a commodity, then—according to conservative judges—unions were illegitimate labor cartels or combinations in "restraint of trade."<sup>366</sup> But commercial metaphors could also support a legitimating model of unions. If capital could form huge, legally sanctioned organizations to sell commodities, then why not labor? In defending the right to strike for higher wages, for example, one skilled tradesman proclaimed that it was "merely a case of the price of the only commodity we have to sell—our Labor!"<sup>367</sup> Labor advocates scored most of their rare court victories by remaining within this commercial model. To make the move from individual laissez-faire to union rights, they analogized union to corporate activities.<sup>368</sup> "Organized labor is organized capital, consisting of brains and muscle" and thus enjoys equivalent rights, opined one responsive court.<sup>369</sup>

The Industrial Court Act, with its restrictions on both labor and capital, offered a golden opportunity for unionists to associate union rights with corporate rights. Some union officials did. They tried to bootstrap protection for the right to strike onto the doctrine that restrictions on freedom of contract infringed liberty in violation of the Due Process Clause of the Fourteenth Amendment. This theory hinged on analogizing labor rights to business economic rights that had received strong protection in a multitude of state and federal court decisions, exemplified by the Supreme Court's invalidation of maximum hours legislation in *Lochner v. New York*.<sup>370</sup> In this view, the Kansas law was unconstitutional not simply because it affected labor freedom, but also because it would infringe upon "the freedom of employers and destroy the conception of private property."<sup>371</sup> Government could no more restrict

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366. See *supra* notes 287–88 and accompanying text.

367. *Concerted Action*, PATTERN MAKERS' J., Sept.–Oct. 1920, at 19.

368. For more detailed discussions of this point, see FORBATH, *supra* note 8, at 130–33, and Pope, *supra* note 126, at 1083–86.

369. *Alaska S.S. Co. v. International Longshoremen's Ass'n*, 236 F. 964, 969 (W.D. Wash. 1916); see also *Arthur v. Oakes*, 63 F. 310, 319–20 (7th Cir. 1894) (Harlan, J.) (invalidating portions of strike injunction on ground that workers enjoyed right to insist on particular wage rate just as employers enjoyed right to fix rate they would pay); *Hall v. Johnson*, 169 P. 515, 518 (Or. 1917) (invalidating municipal strike ban, reasoning that worker's right to strike was equivalent to employer's right to discharge employees).

370. 198 U.S. 45 (1905).

371. Matthew Woll, *How the Kansas Plan Defies Fundamental American Freedom*, 29 AM FEDERATIONIST 317, 319 (1922).

capital strikes than it could labor strikes. This embrace of corporate property rights led easily into critiques of the act as a "Socialist-Bolshevik" plot.<sup>372</sup> The *United Mine Workers Journal*, under the editorship of a former publicist for the Chamber of Commerce, opposed the Act from the perspective of labor's corporate constitution, analogizing the worker's right to strike to the employer's right to shut down a facility.<sup>373</sup>

Although union officials inveighed against the commodity metaphor of labor when it was used to justify government restraints on unions, they implicitly accepted it when they defined labor liberty as the right of unions to make contracts for the purchase and sale of labor power.<sup>374</sup> This kind of labor liberty corresponded to the experience of union functionaries, who spent most of their time dealing with employers over the terms and enforcement of labor contracts. By the time of the Industrial Court struggle, all major UMW contracts required union officials at every level to assist employers in enforcing the no-strike obligation.<sup>375</sup> For officials involved in this process, inspirational talk of the workers' "inalienable" right to strike could have ominous implications. Contract rights and commercial metaphors had a special appeal for labor leaders who ran (or dreamed of running) their unions like business enterprises rather than like democratic associations. Just as corporations operated hierarchically, so would unions. With worker empowerment eliminated as a purpose, organized internal opposition became a "luxury most unions cannot afford."<sup>376</sup>

Local activists did not share their national officials' attraction to the corporate model. While officials invoked "property" rights and corporate analogies, activists were—as the table below shows—more likely to combine appeals to higher law with talk of class struggle. Contrary to the notion that legal talk is inherently individualistic and conservative, activists found it natural to employ the language of rights to frame collective, class grievances. One Kansas miner, for example, warned that the Act was intended "to oppress the laboring class and to take away their constitutional guaranteed rights . . . to strike for rights or against the oppression of the brutal capitalist class of the country."<sup>377</sup>

372. Freeman, *supra* note 149, at 838.

373. See, e.g., *Maybe Allen Can Answer*, UNITED MINE WORKERS J., July 1, 1920, at 6; *The Other Ox Gored*, UNITED MINE WORKERS J., Jan. 15, 1921, at 6. Earlier, the *United Mine Workers Journal* had criticized the Act as an unconstitutional attempt to establish involuntary servitude. See *That Kansas Law*, UNITED MINE WORKERS J., Feb. 15, 1920, at 7.

374. See TOMLINS, *supra* note 63, at 76–77; SARAH LYONS WATTS, *ORDER AGAINST CHAOS: BUSINESS CULTURE AND LABOR IDEOLOGY IN AMERICA 1880–1915*, at xi, 175 (1991).

375. See DIX, *supra* note 164, at 58–59.

376. PHILIP TAFT, *THE STRUCTURE AND GOVERNMENT OF LABOR UNIONS* 239 (1954).

377. Termine, *supra* note 254; see also *supra* text accompanying notes 336–37.

TABLE 1. PERCENT OF SPEAKERS (N=36) COMBINING HIGHER-LAW CLAIMS WITH CORPORATE AND CLASS RHETORIC<sup>178</sup>

	LOCAL ACTIVISTS, LEADERS & BODIES	REGIONAL OFFICIALS & BODIES	NATIONAL OFFICIALS & BODIES	TOTAL
CLASS <sup>379</sup>	85%	78%	14%	56%
BOTH	0%	0%	21%	8%
CORPORATE <sup>380</sup>	15%	22%	64%	36%
TOTAL	100%	100%	100%	100%

Activists eschewed the rhetoric of antisocialism. The *Workers Chronicle* published numerous articles urging the nationalization of key industries.<sup>381</sup> In a front page article in the midst of the constitutional strike, a miner explained that the union's nationalization plan, which called for owners to be compensated, would be held constitutional if the workers made "the courts hustle by showing that 500,000 miners mean business in regard to

378. For the methodology and sources of this table, see Appendix. Columns may not add to 100 as a result of rounding. Despite the small size of the sample (n=36), the contrast among local, regional, and national speakers is statistically significant at the 0.01 level (chi square=16.89 with four degrees of freedom). The relationship remains significant at that level if we control for the speaker's geographic location and the structural type of his union. Regressing the speaker's rhetoric (either class or corporate language) against his or her level (local, regional, or national), location (inside or outside the District 14 area), and union type (craft, industrial, or mixed) obtains the following coefficients, standard errors, and *t* values using White/Huber standard errors:

	COEFF.	STD. ERROR	<i>t</i>
LEVEL	0.50	0.17	2.87
LOCATION	-0.25	0.35	-0.73
UNION TYPE	-0.17	0.20	-0.85

These results show that even when the speaker's geographic location and union type is taken into account, the contrast among the levels of the union remains significant.

379. This category includes all references to class conflict, whether the conflict was characterized as worker-capitalist (as in nearly all of the cases) or as producer-nonproducer. As an example of a borderline case, a statement referring to the struggle of the "entire organized workers of America" was excluded because it encompassed only unionized workers.

380. This category includes statements in which antistrike laws were criticized as infringing upon rights of property or contract, including the right to set the price of labor, or as failing to give unions the same rights as corporations. For example, a general rejection of state wage-setting is included, but a critique of state wage-setting based on particularities of the legislation, such as the partiality of Industrial Court judges, is not.

381. See, e.g., Laurence Todd, *Incompetency of Private Ownership of Railroads*, *WORKERS CHRON.*, May 28, 1920, at 1; Laurence Todd, *Railroad Workers Are Now Ready for Action*, *WORKERS CHRON.*, July 16, 1920, at 1.

nationalization."<sup>382</sup> Of course, any nationalization scheme would have to allow for the right to strike.<sup>383</sup>

In the view of activists, unions could scarcely serve as vehicles for workers' freedom if they themselves operated autocratically. Thus it was not unusual to hear activists deploying labor's freedom constitution against their own union officials. To express his unhappiness with Lewis's "autocratic rule," for example, one activist demanded that "the rights of the rank and file shall predominate, and the master be placed in his position of servant, and the servant become master."<sup>384</sup>

Because the Industrial Court Act violated both labor's corporate and freedom constitutions, conservative business unionists like Matthew Woll could find common cause with radicals like Howat. Even in June 1921, after Howat and Dorchy had been convicted of contempt of court and charged with a criminal violation of the Act, the delegates to the AFL convention were unanimous in commending the Kansas miners "for so courageously opposing this law in the face of injunctions and threats of imprisonment."<sup>385</sup>

Despite this affirmation of unity, John L. Lewis petitioned the Executive Council of the AFL for an order directing its affiliates to cease aiding the Kansas strikers.<sup>386</sup> Lewis and his supporters believed that they had found an issue that would split the seam between the corporate and freedom constitutions: a strike that violated not only the Industrial Court Act, but also the UMW's contract with the Southwestern Coal Operators Association.

### B. *The House of Labor Rules*

Judging from AFL tradition, Lewis's confidence was well placed. Howat had been suspended for refusing to order forty wildcat strikers back to work

382. Ed Jackson, *Nationalization Now*, WORKERS CHRON., Nov. 25, 1921, at 1.

383. At the 1919 UMW convention, 46 delegates from Kansas District 14 and 444 from Illinois District 12 participated in the adoption by unanimous voice vote of a resolution calling for nationalization, but only with the prior assurance that any proposed bill would preserve the right to strike. See 2 UNITED MINE WORKERS OF AMERICA, PROCEEDINGS OF THE TWENTY-SEVENTH CONSECUTIVE AND FOURTH BIENNIAL CONVENTION 847-48, 942 (1919). The *Workers Chronicle* printed an article by James Maurer, the socialist President of the Pennsylvania Federation of Labor, warning that even if industry were not run for profit, surrender of the right to strike "would eventually mean servitude." J.H. Maurer, *The Workers Must Not Surrender Their Strike Right*, WORKERS CHRON., Sept. 3, 1920, at 6.

384. A Loyal Union Man, Letter, WORKERS CHRON., Nov. 11, 1921, at 1; see also W.M. Applegate, Letter, *Van Bittner's Publicity Not Popular*, WORKERS CHRON., Dec. 9, 1921, at 3 ("I wonder sometimes if some men ever read the Constitution of the U. S. Especially, where it says all men shall be 'Free and Equal.'"); John P. Hansen et al., Letter, *Wyoming Miners Send Resolutions*, WORKERS CHRON., Jan. 13, 1922, at 6 (resolution of Local Union 2671) (criticizing UMW leadership for "denying the workers of the district the rights and privileges of American men and workers"); Local Union 4650, Resolution, WORKERS CHRON., Apr. 7, 1922, at 5; Henry Whitehurst et al., Letter, *Iowa Miners Condemn Lewis*, WORKERS CHRON., Mar. 17, 1922, at 3 (resolution of Local Union 2470).

385. AFL FORTY-FIRST CONVENTION, *supra* note 155, at 379.

386. See PHILIP TAFT, *THE A.F. OF L. IN THE TIME OF GOMPERS* 412 (1957). Although the AFL had little formal authority over its affiliates (which included the UMW), its declarations carried considerable moral force within the labor movement.

at the Dean and Reliance mines, an apparent breach of the miners' contractual no-strike obligation negotiated by the UMW.<sup>387</sup> This refusal was consistent with Howat's view that the right to strike belonged to workers, not union officials, and that it was inalienable. But to the proponents of labor's corporate constitution, the right to strike was valuable precisely because it could be traded away for better wages and working conditions. The obligation to comply with no-strike bargains was held sacred by the AFL, and by Samuel Gompers in particular.<sup>388</sup> Indeed, to Gompers, the entire purpose of the struggle for rights was to enable unions to negotiate binding contracts.<sup>389</sup>

On December 3, 1921, Gompers sent Lewis the Executive Council's ruling. This remarkable document perhaps represents the high point of support for the freedom constitution within the AFL leadership. Gompers reminded Lewis that the Council had previously condemned the Industrial Court Act as an attempt to establish involuntary servitude, and that the AFL Convention had voted unanimously to commend District 14 for its resistance to the law after the Dean and Reliance strikes had commenced.<sup>390</sup> He further informed Lewis that the Council was "fully persuaded that the effort to obtain a favorable decision from the judiciary as to the constitutionality of the Kansas Industrial Law will prove futile and that the only hope for the repeal of that infamous statute lies in action by the organized workers of Kansas."<sup>391</sup> As for the sanctity of contract, the Council declared unambiguously that the strikes were justified even if they were in breach of contract. "Whatever you or we may say," wrote Gompers, "the strikes of the miners in Kansas are understood by the workers and the people generally as a fight against the industrial court law of that state."<sup>392</sup> Accordingly, the Board declined to issue any statement of disapproval.

Some historians have found it difficult to accept that Gompers would support such a notorious radical as Howat for reasons of principle.<sup>393</sup> While Lewis's sanctity of contract was close to Gompers's heart, however, so was

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387. Whether the contract had in fact been violated was open to argument. For the official point of view, see *Official Action of the International Executive Board on Two Kansas Cases*, UNITED MINE WORKERS J., Sept. 21, 1921, at 14. For the Howat Board's counterarguments, see Alexander Howat, Letter, *International Imposing on District No. 14*, WORKERS CHRON., Apr. 29, 1921, at 1. See also Alexander Howat, *Contender for Justice*, WORKERS CHRON., Oct. 28, 1921, at 2; W.M. Prince, *Statement of Facts*, WORKERS CHRON., Nov. 4, 1921, at 1; *What Do They Want?*, WORKERS CHRON., Oct. 28, 1921, at 1.

388. See TAFT, *supra* note 386, at 412; Samuel Gompers, *A Legalistic Anesthetic*, 29 AM FEDERATIONIST 116, 118 (1922) ("No honorable person will excuse or condone a violation of contract.")

389. See Samuel Gompers, *Union Labor and the Enlightened Employer*, 28 AM FEDERATIONIST 469, 472 (1921).

390. See Letter from Samuel Gompers, President, American Federation of Labor, to John L. Lewis, President, United Mine Workers of America (Dec. 3, 1921) (Van A. Bittner Papers, on file with West Virginia and Regional History Collections, West Virginia University, Morgantown, W. Va.), box 6.

391. *Id.* at 3.

392. *Id.* at 2-3.

393. These historians have speculated that the Council ruled against Lewis as a way of chastising him for his run against Gompers at the 1921 AFL convention. See, e.g., DUBOFSKY & VAN TINE, *supra* note 170, at 119; TAFT, *supra* note 96, at 353.

Howat's defense of labor's freedom constitution. When Kansas Governor Allen toured the country in an effort to export the Industrial Court idea, Gompers dogged his heels, offering rebuttals in front of state legislatures and engaging Allen in a dramatic face-to-face debate at Carnegie Hall.<sup>394</sup> In his speeches, Gompers emphasized not corporate analogies, but the workers' right to strike as protection against slavery. At Carnegie Hall, he made a point of defending the decidedly noncorporate right to engage in political strikes in support of democratic rights.<sup>395</sup> Perhaps, as he passed the age of seventy, the "old man" was finding it increasingly significant that "[h]istory honors none above those who, in the past, have set themselves against unjust laws, even unto the point of rebellion."<sup>396</sup>

Meanwhile, on October 22, the Kansas miners experienced their first payless payday. That same day, Howat headquarters acknowledged for the first time that a few steam shovels were operating, albeit without full crews.<sup>397</sup> Because of short work in the months leading up to the strike, few of the miners had any savings to tide them over. On November 4, relief organizer William Orr reported that aid was desperately needed.<sup>398</sup>

The strikers' immediate future would be determined at the November convention of Illinois UMW District 12, which—alone among Howat's allies—possessed sufficient resources to sustain the strike. Lewis moved quickly to head off the threat. In seeking assistance from the AFL, he had professed an affinity for labor's corporate constitution. But in opposing the Kansas strikers' appeal to District 12, he and his supporters would invoke a new and very different vision of labor's place in the constitutional order—one rooted in progressive discourse.

### C. *The "New" Unionists and Labor's Progressive Constitution*

Four months before the constitutional strike, the editors of the *New Republic* had warned unionists that talk of serfdom and worker freedom would not stop the spread of industrial courts. Unionists would have to convince the public "that general interests as well as class interests are determining their attitude."<sup>399</sup> Orthodox unionists like Gompers had failed woefully at this task. Only an "abnormally philosophical" citizen would accept Gompers's argument

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394. See GOMPERS-ALLEN DEBATE, *supra* note 130.

395. See *id.* at 2–16.

396. Samuel Gompers, *The Courts and Mr. Taft on Labor*, 28 AM. FEDERATIONIST 220, 222 (1921).

397. See *Miners Have First Payless "Pay" Today*, PITTSBURG DAILY HEADLIGHT, Oct. 22, 1921, at 1.

398. See Letter from William Orr, District 12, United Mine Workers of America, to John H. Walker (Nov. 5, 1921), in Walker Papers, *supra* note 177, folder 114.

399. *The Kansas Challenge to Unionism*, NEW REPUBLIC, June 1, 1921, at 3, 4.

that the public should accept some economic disruption as the price of worker freedom.<sup>400</sup>

Fortunately, however, an alternative form of unionism was on the rise, the new unionism of Sidney Hillman and the Amalgamated Clothing Workers. Hillman would ask the public to endure the hardships of labor-capital disputes not for the sake of freedom, enthused the editors, but for the material benefits of a system that promised consumers "better workmanship and more certain supply."<sup>401</sup> He would make his case not with fundamental rights talk, but with economics. Having recognized "that there are definite limits upon the gains that are to be had through the process of reducing hours and raising money wages," the new unionists would seek further gains "from an increase in efficiency—such an increase as could be attained if every laborer felt impelled to do his best."<sup>402</sup> The objection to the Kansas Industrial Court was not that it imposed serfdom—an impossibility as long as workers possessed the right to vote—but that it held unions back from enhancing industrial efficiency through better worker morale.

At first glance, John L. Lewis was worlds apart from Hillman. While Hillman was learning progressivism at the knees of Clarence Darrow and Jane Addams,<sup>403</sup> Lewis was frantically clawing his way up to the UMW presidency, shifting his political allegiances from socialists to voluntarists and back whenever necessary to gain advantage in factional politics.<sup>404</sup> But Lewis was moving, however erratically, toward a stance consistent with the main tenets of progressivism.

Lewis shared the progressives' penchant for professionalism and expert discourse. He rose to prominence through a series of appointive positions, attaining the office of acting international vice president without ever winning election to district or international office. At each stage, he advanced on the strength of his negotiating skills, work discipline, and nimble factional maneuvering.<sup>405</sup> He sought the advice of academically trained experts, and formed a close relationship with the economist and reformer W. Jett Lauck.<sup>406</sup> Playing to his own strengths, he insisted that the union would advance not through the ideas or action of ordinary miners, but through the

400. *Id.* at 5.

401. *Id.*

402. *Id.*

403. On Hillman's progressive tutelage, see STEVEN FRASER, *LABOR WILL RULE: SIDNEY HILLMAN AND THE RISE OF AMERICAN LABOR* 64–65 (1991).

404. Lewis allied himself first with the socialist John Hunter Walker, then with Walker's moderate rival John P. White, then with Samuel Gompers, before nominally endorsing nationalization and uniting with the left in an attempt to unseat Gompers as AFL president in 1920. Shortly afterward, he shifted right again, unleashing a ferocious campaign of red-baiting against radicals in the labor movement. See, e.g., DUBOFSKY & VAN TINE, *supra* note 170, at 21–22, 25–26, 57–58, 76; ROBERT H. ZIEGER, *JOHN L. LEWIS: LABOR LEADER* 15, 20 (1988).

405. On Lewis's shortcomings as an organizer, see DUBOFSKY & VAN TINE, *supra* note 170, at 24–25. On his rise to acting president, see *id.* at 31–33.

406. See *id.* at 34.

leadership's skilled bargaining conducted on a basis of mutual respect with corporate and government officials.<sup>407</sup> To Lewis, the union was not a vehicle for worker freedom or power, but an instrument for the achievement of higher standards of living. He felt comfortable declaring that "the United Mine Workers is a business institution; at least . . . I so advise the coal operators who are parties to the joint contracts."<sup>408</sup>

By the time of the constitutional strike, Lewis had experienced the capacity of government to strengthen the union hierarchy against both employers and local activists. During World War I, he had seen the Wilson Administration pressure employers to accept the right to organize, leading to major membership gains in hitherto nonunion fields. The tripartite Washington Agreement of 1917 had provided large wage increases, albeit at the cost of a "penalty clause" imposing a one dollar fine for each day a miner participated in an unauthorized strike.<sup>409</sup> While Howat and many local activists protested the penalty clause as a harbinger of slavery,<sup>410</sup> Lewis recognized that the clause would strengthen the hand of top union officers in their efforts to control wildcat strikes and reduce the influence of local activists.<sup>411</sup>

At this stage of his career, Lewis accepted the *New Republic's* view that the future of the labor movement hinged on public opinion, and that the rhetoric and practice of labor's freedom constitution would alienate the public. He put these points into practice when Judge Anderson enjoined the 1919 coal strike. While Gompers and Howat urged defiance to force the constitutional issue, Lewis complied on grounds of patriotism.<sup>412</sup> Instead of mobilizing the membership to defend the right to strike, he hired experts and took the union's case for higher wages and shorter hours to President Wilson's Coal Commission. After the Commission issued a disappointing award, Lewis argued that the union had won a symbolic victory, demonstrating to the public that the UMW was "an American institution that believes in and upholds American ideals."<sup>413</sup>

While Lewis's commitment to reform was tentative (he considered the more ambitious proposals—like systematic regulation and nationalization—to

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407. See Singer, *supra* note 162, at 54–57.

408. UMW TWENTY-EIGHTH CONSECUTIVE CONVENTION, *supra* note 273, at 628.

409. See FOX, *supra* note 240, at 183–84.

410. See, e.g., Charles Casey, Letter, WORKERS CHRON., Nov. 9, 1917, at 1; *Mine Workers and Operators' Agreement*, WORKERS CHRON., Oct. 26, 1917, at 1 (printing resolution of Local Union 2498); *The Public Should Know*, WORKERS CHRON., Nov. 9, 1917, at 1.

411. See ZIEGER, *supra* note 404, at 34; Singer, *supra* note 162, at 78–79. Not only did Lewis and other members of the International's negotiating team fail to resist the clause in negotiations, but the record does not exclude the possibility that they proposed it. See Arthur Clark Everling, *Tactics over Strategy in the United Mine Workers of America: Internal Politics and the Question of the Nationalization of the Mines, 1908–1923*, at 120–21 (1976) (unpublished Ph.D. dissertation, Pennsylvania State University) (on file with author).

412. See, e.g., BROPHY, *supra* note 171, at 142; TAFT, *supra* note 386, at 409–11.

413. John L. Lewis, *Coal Miners Are Americans*, UNITED MINE WORKERS J., Jan. 15, 1920, at 1; see also *The Columbus Convention*, UNITED MINE WORKERS J., Jan. 15, 1920, at 6.



be effectively unconstitutional),<sup>414</sup> President John Brophy of the 35,000-member Central Pennsylvania UMW district was a true believer. With help from a progressive think tank, he drafted and campaigned for "The Miners' Program," urging miners to make the UMW's demand for nationalization of the coal industry their highest priority.<sup>415</sup> Brophy shared the progressives' fear of fundamental rights talk, and his nationalization plan made no mention of the right to strike.<sup>416</sup> The main issue facing coal miners, he argued, was not worker freedom or power, but economic and human waste.<sup>417</sup> "The miners are consumers," he proclaimed, and "are as anxious as any other group of people to find a way . . . [to] get the greatest amount of coal at the least expense."<sup>418</sup>

In short, Lewis and Brophy reversed the freedom constitution's priority of fundamental rights over material gain, and shifted the terrain of argument from the popular language of rights to the technical terminology of economics. They responded to the Industrial Court Act with silence. When Howat requested the UMW's assistance for District 14's campaign of resistance, Lewis put him off.<sup>419</sup> With the Illinois District 12 convention—and its decisive vote on support for the Kansas strike—fast approaching, however, the Lewis administration would have to take a stand.

#### D. *Trustworthy Courts and Prejudiced Workers*

District 12's president, Frank Farrington, had invited Lewis to attend the convention, but Lewis sent his great conciliator, Secretary-Treasurer Green, in his place. Stumbling over himself to avoid offense (he denied ever criticizing Howat and claimed, incredibly, that he would have done the same thing in Howat's place),<sup>420</sup> Green nevertheless struck at the heart of labor's freedom constitution. He joined Howat's supporters in opining that the Industrial Court

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414. See Everling, *supra* note 411, at 163. Lewis was not alone among progressives in his constitutional conservatism. Herbert Croly, for example, believed that many of labor's demands were unconstitutional. See HERBERT CROLY, *THE PROMISE OF AMERICAN LIFE* 129, 394 (1963).

415. See DISTRICT NO. 2, UNITED MINE WORKERS OF AMERICA, *WHY THE MINERS' PROGRAM?* (1921); Everling, *supra* note 411, at 172–73.

416. See NATIONALIZATION RESEARCH COMM., UNITED MINE WORKERS OF AMERICA, *HOW TO RUN COAL* 15–16 (1922). The right to strike was, however, mentioned in an appendix on the British Miners' Bill, which did preserve the right. See *id.* at 30.

417. See DISTRICT NO. 2, UNITED MINE WORKERS OF AMERICA, *THE GOVERNMENT OF COAL* 7–19 (1921).

418. JOHN BROPHY, *FACTS! AN ADDRESS DELIVERED BEFORE THE PUBLIC OWNERSHIP LEAGUE* 3 (1921). Thus, the miners' interest was "in line with the public interest," for "[e]very bit of inefficiency and waste that injures a public service is an attack on the workers." DISTRICT NO. 2, *supra* note 417, at 24.

419. See Letter from Alexander Howat to John L. Lewis (Mar. 4, 1920), in ILLINOIS STATE FED'N OF LABOR, *PROCEEDINGS OF THE THIRTY-NINTH ANNUAL CONVENTION* 56–58 (1921), in Walsh Papers, *supra* note 122, box 120; Letter from John L. Lewis to Alexander Howat (Mar. 10, 1920), in *id.* at 58–59.

420. See DISTRICT 12, *DISCUSSION ON POLICY OF THE RECENT INTERNATIONAL CONVENTION OF UNITED MINE WORKERS OF AMERICA AND OF THE KANSAS SITUATION* 56–57 (1921), in Walsh Papers, *supra* note 122, box 120.

Act was unconstitutional, but then denied that his—or any other unionist's—judgment could challenge that of the Supreme Court. The fundamental rights of labor were “defined by the courts”; Green's own opinion was “only” that of a layman and a union member, and thus “prejudiced and biased.”<sup>421</sup> Before striking, Green argued, the mineworkers should bring a test case against the law, which would instruct them as to “whether or not it squared with the constitution of the state and of the nation.”<sup>422</sup> The *United Mine Workers Journal* reassuringly predicted that “the laws of this land will protect the rights of every citizen.”<sup>423</sup>

Lewis loyalists argued that resistance to government was un-American and futile.<sup>424</sup> Henry McAnarney provided a concise, constitutional rationale in the *United Mine Workers Journal*. Resistance, he argued, was unnecessary in the American system because no “great legal principle can be made effective against the interests of the people and enforced against their will.”<sup>425</sup> Why not? Because the people enjoyed the progressives' preferred “personal” rights of political participation and free speech: “[T]hey have the power of changing their representatives at frequent intervals, and they have the right of declaring their opinions through party conventions, public assemblage, petition, and the press.”<sup>426</sup>

The Illinois delegates took the decision seriously. Farrington warned that support for Howat and the Kansas miners could cost District 12 its charter and the members their jobs.<sup>427</sup> After a lively discussion, however, the convention voted 535-15 to support the Kansas strike and to assess each Illinois local one dollar per member each month for relief, a total of \$90,000 per month.<sup>428</sup>

Two weeks later, the Lewis-appointed leadership of District 14 expelled the Kansas strikers from the UMW.<sup>429</sup> Over the next few days, the deposed Howat board staunchly insisted that only a handful of strikers had returned to work,<sup>430</sup> but on December 1, 1921, the state mine inspector reported that

421. *Id.* at 19.

422. *Id.* at 18; see also *International Union Will Attack the Industrial Court Law of Kansas in Suit Soon To Be Filed*, UNITED MINE WORKERS J., Nov. 15, 1921, at 12 (awaiting definitive court decision to “find out whether that law is sound or unsound”).

423. *The Peril Is Here*, UNITED MINE WORKERS J., Oct. 1, 1921, at 6, 7.

424. See, e.g., INTERNATIONAL EXECUTIVE BD., UNITED MINE WORKERS OF AMERICA, OFFICIAL STATEMENT IN REGARD TO THE KANSAS CONTROVERSY 10-12 (1921); *District 21 To Vote on Kansas Row Friday*, PITTSBURG DAILY HEADLIGHT, Nov. 17, 1921, at 1; *Union's Laws Are at Stake*, PITTSBURG DAILY HEADLIGHT, Oct. 26, 1921, at 1.

425. Henry A. McAnarney, *Orderly Government*, UNITED MINE WORKERS J., Mar. 15, 1920, at 10.

426. *Id.*

427. See DISTRICT 12, *supra* note 420, at 65.

428. See *Allen Says State Will Not Interfere in Row*, PITTSBURG DAILY HEADLIGHT, Nov. 12, 1921, at 1; *Orders Relief Payments End*, PITTSBURG DAILY HEADLIGHT, Dec. 8, 1921, at 1.

429. Eighty-three local union charters were revoked, thereby expelling roughly 2500 workers. See *Expels Howat and Supporters Today*, PITTSBURG DAILY HEADLIGHT, Nov. 26, 1921, at 1; *Rebellious Miners of Kansas Are Expelled Through Revocation of Charters of Their Local Unions*, UNITED MINE WORKERS J., Dec. 1, 1921, at 1.

430. See *Howat Asserts Only Two Percent Working*, PITTSBURG DAILY HEADLIGHT, Dec. 1, 1921,

2689 Kansas miners were working<sup>431</sup> (compared with about 8500 before the strike). Two days later, the coal district was hit with its first major snowstorm of the winter.<sup>432</sup> A Howat board member admitted that many strikers' families lacked shoes, and their children were unable to attend school because of inadequate clothing.<sup>433</sup> After weeks of silence, coal operators began reporting that strikers were returning to work in substantial numbers.<sup>434</sup>

At this juncture, a powerful new force made its first public intervention in the struggle. Not long after the Industrial Court Act was passed, Governor Allen had observed that "the wives of workingmen were taking a keener interest in the law than the men themselves."<sup>435</sup> The governor anticipated that these women, who bore "the brunt of grief and want" during strikes, would support his new court.<sup>436</sup> Until December, however, the women of the mining camps had taken no public action to fulfill or frustrate Allen's hopes.

### E. *Shoulder to Shoulder*

Hours before sunrise on December 12, 1921, the business area of Franklin, Kansas, was brilliantly illuminated. Cars shuttled back and forth, bringing women and men from the surrounding coal camps. As the hour of work approached, about 1000 women, many with babes in arms, formed a line and began marching toward the nearby Jackson-Walker mine. At the head of the procession several women carried flags; at the rear, a crowd of men lagged behind. Even the Republican *Pittsburg Daily Headlight* admitted that the march was "a picturesque spectacle."<sup>437</sup> The men remained in the background as the women blocked workers from entering the mine. Would-be strikebreakers arriving on the interurban streetcar found themselves unable to dismount. With only a few deputies to assist him, the sheriff stood by helplessly. After repelling 120 miners, the women moved on to other mines.<sup>438</sup>

The women's march had been planned the day before at a meeting attended by between 500 and 1200 women.<sup>439</sup> Men were excluded. The

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at 1.

431. See *Survey Shows 2,689 Kansas Miners Work*, PITTSBURG DAILY HEADLIGHT, Dec. 2, 1921.

at 1.

432. See *Most of Kansas Is Under Snow Blanket*, PITTSBURG DAILY HEADLIGHT, Dec. 3, 1921, at 1.

433. See *Ringo Prepares Clothing List*, PITTSBURG DAILY HEADLIGHT, Dec. 8, 1921, at 10.

434. See *Miners Will Receive Large Sum Saturday*, PITTSBURG DAILY HEADLIGHT, Dec. 7, 1921, at 1; *More Work at Frontenac*, PITTSBURG DAILY HEADLIGHT, Dec. 8, 1921, at 1; *Report Gain of 100 Miners*, PITTSBURG DAILY HEADLIGHT, Dec. 6, 1921, at 1.

435. ALLEN, *supra* note 111, at 5.

436. *Id.*

437. *Women March on J-W No. 17*, PITTSBURG DAILY HEADLIGHT, Dec. 12, 1921, at 1.

438. See *id.*

439. See GAGLIARDO, *supra* note 106, at 140; Ann Schofield, *The Women's March: Miners, Family, and Community in Pittsburg, Kansas, 1921-22*, 7 KAN. HIST. 159, 164 (1984); Art Shields, *Fighting the Industrial Court in Kansas*, LAB. AGE, Feb. 1922, at 3, 5; *Women March on J-W No. 17*, *supra* note 437.

meeting adopted a resolution that added a maternal twist to the standard strike rhetoric. Because their husbands were "striking against a law to enslave our children," the women considered it their duty to stand—not behind—but "shoulder to shoulder" with their men.<sup>440</sup> For three days, the women marched from mine to mine, blocking workers from entering and pulling out crews already on the job. On the second day, 2500 women organized in four squadrons visited the largest mines in Crawford County.<sup>441</sup> A car was stoned and destroyed, and a number of nonstriking miners assaulted.<sup>442</sup> The next day, the women organized a procession of automobiles over a mile in length, but their main target had already been shut down in anticipation of the march.<sup>443</sup>

In their public statements, the women embraced the miners' rhetoric of rights, freedom, and antislavery.<sup>444</sup> After remaining silent for months while the strikers were maligned in the press as radical foreigners, the women placed the American flag at the center of their activities. Each march was led by flag-bearing women. At one point, a flag was stretched across a street to block cars carrying workers to a mine.<sup>445</sup> The women demanded not only that working miners rejoin the strike, but also that they seal their promises by kissing the flag.<sup>446</sup> Joining other working class Americans, the marchers had their own interpretation of the flag. After a group of marchers asked mine foreman Bob Murray to kiss the flag, a bewildered reporter commented that the "reason for this was not clear as Murray is known as a thoroughly patriotic American."<sup>447</sup> A marcher explained that "Mr. Murray knew he had been bossing so we had to make him over."<sup>448</sup> To the marchers, the American flag was the "flag of liberty," and the marching was designed to secure "our democracy that we was to receive after the World War."<sup>449</sup>

The women called off their marches after Governor Allen ordered three companies of National Guard troops to the coal district.<sup>450</sup> For the next two

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440. *Women March on J-W No. 17*, *supra* note 437 (quoting resolutions of women's meeting).

441. See Shields, *supra* note 439, at 5.

442. See *Marchers Use More Violence*, PITTSBURG DAILY HEADLIGHT, Dec. 13, 1921, at 1.

443. See *Women Raid Many Mines*, PITTSBURG DAILY HEADLIGHT, Dec. 14, 1921, at 1.

444. See, e.g., Mrs. Felix Azamber, Letter, *About Mr. Clarkson*, PITTSBURG DAILY HEADLIGHT, Dec. 9, 1921, at 8; Hyatt, *supra* note 323; Mrs. Ira Walden, Letter, *Raps Howat Critics*, PITTSBURG DAILY HEADLIGHT, Dec. 1, 1921, at 4; Fannie Wimler, Letter, *A Mob Member is Defiant*, PITTSBURG DAILY HEADLIGHT, Dec. 15, 1921, at 4.

445. See GAGLIARDO, *supra* note 106, at 140.

446. See Effie C. Didlott, Letter, *Assails Van A. Bittner*, PITTSBURG DAILY HEADLIGHT, Dec. 16, 1921, at 14; Wimler, *supra* note 444.

447. *Marchers Use More Violence*, *supra* note 442.

448. Didlott, *supra* note 446.

449. *Women March on J-W No. 17*, *supra* note 437 (quoting resolutions of women's meeting); see also Wimler, *supra* note 444.

450. See *Plan Arrest of Rioters*, PITTSBURG DAILY HEADLIGHT, Dec. 15, 1921, at 1; *Troops Coming To Quell Rioting*, PITTSBURG DAILY HEADLIGHT, Dec. 14, 1921, at 1 (morning extra).

days, operators joined Lewis loyalists in claiming that as many miners were working as before the marches.<sup>451</sup> They soon lapsed into silence, however, as it became apparent that the women had succeeded in reviving the strike. On December 17, Walker reported that only 702 men were on the job, including bosses and watchmen.<sup>452</sup> On Christmas Eve, four boxcars of provisions arrived, including candy and fruit for the strikers' children.<sup>453</sup> Even the perennially discouraged John Steele felt that "things look brighter for us."<sup>454</sup>

#### F. *A Test of Commitment*

Until the women marched, the Industrial Court's supporters had been hoping that the combined efforts of the UMW International and the coal operators would end the strike without state intervention. By dashing that hope, the marchers raised the stakes of struggle. Their commitment to a vision of American democracy, demonstrated through collective defiance of law, challenged the state's commitment to the Industrial Court Act.<sup>455</sup> If the state failed to undertake effective enforcement, the Act would be exposed as ineffective.

While the Industrial Court itself remained divided and paralyzed, State Attorney General Hopkins rose to the challenge. To force the miners back to work, Hopkins directed local governments to enact and enforce vagrancy laws calling for the imprisonment of any person found "loiter[ing] without visible means of support."<sup>456</sup> He interpreted the term "visible means of support" not to include strike benefits or personal credit. On January 7, police began selectively arresting union activists for vagrancy.<sup>457</sup>

Many progressives declined to follow Hopkins down the road of escalating commitment. With the passage of the vagrancy ordinances, the specter of involuntary servitude no longer seemed far-fetched. To the editors of the *New Republic*, the ordinances established conclusively the Industrial Court's reliance

451. See *Miners Respond to Work Orders Today*, PITTSBURG DAILY HEADLIGHT, Dec. 16, 1921, at 1; *Report 3,000 Kansas Miners Work Today*, PITTSBURG DAILY HEADLIGHT, Dec. 17, 1921, at 1.

452. See Letter from John H. Walker to Thomas Myerscough, President, Local Union 1198, United Mine Workers of America (Dec. 17, 1921), in Walker Papers, *supra* note 177, folder 116.

453. See *Treat Strikers' Children*, PITTSBURG DAILY HEADLIGHT, Dec. 27, 1921, at 1. Letter from William Orr to John H. Walker (Dec. 24, 1921), in Walker Papers, *supra* note 177, folder 118.

454. Letter from John Steele, Acting Secretary-Treasurer, District 14, to John H. Walker (Dec. 26, 1921), in Walker Papers, *supra* note 177, folder 118. Steele maintained a voluminous correspondence with John Hunter Walker in which he generally presented a bleak view of the situation.

455. Robert Cover has identified this dynamic of escalating commitment as characteristic of jurisgenesis. See Cover, *supra* note 17, at 53.

456. *The Public and the Strike*, N.Y. TIMES, Feb. 9, 1922, at 16.

457. On that date, Jack Toschi, a reputed radical with three children, was jailed despite the fact that he was gainfully employed distributing strike relief. Hopkins publicly announced that he would continue gathering evidence to support charges against "the more radical leaders." *Jack Toschi Jailed Under Vagrancy Law*, PITTSBURG DAILY HEADLIGHT, Jan. 7, 1922, at 1.

on "the principle of forced labor."<sup>458</sup> Writing in the *Nation*, Charles Driscoll tagged the period as "the Industrial Court's reign of terror."<sup>459</sup> The *New York Times* editorialized that "[f]or once Mr. Gompers has the color of a pretext for his long-familiar outcry against 'enslaving' the workers."<sup>460</sup> Even Herbert Feis concurred, opining that the ordinances came "pretty near realizing Mr. Gompers' bogey of 'involuntary servitude.'"<sup>461</sup>

Though costly to the Industrial Court's national image, the vagrancy ordinances achieved quick results in the coal fields. By January 7, 1922, Hopkins could note with satisfaction that there was "'much less loitering of idle men around pool halls and other places where red agitators had been meeting to put out their mischevious propaganda.'"<sup>462</sup> For the first time in weeks, the operators claimed that a substantial number of strikers were returning to work.<sup>463</sup>

Five days later, Howat advised the remaining strikers to return to work, claiming that there was no need for further suffering because the Industrial Court had been "'thoroughly discredited.'"<sup>464</sup> The operators, however, refused to accept the strikers back. "I am afraid," wrote John Steele to Walker, "we waited that day too long."<sup>465</sup> The miners' hopes, continued Steele, hinged on assistance from the upcoming UMW convention.<sup>466</sup>

### G. Delegates Howling Like Madmen

On February 14, 1922, the UMW International Convention reconvened for the announced purpose of planning strategy for upcoming national contract negotiations. Instead, the Kansas question dominated the proceedings and touched off the most robust and raucous exercise of national union democracy in the UMW's history.

No sooner had Lewis gavelled the convention to order than Howat rose to appeal the International's actions against District 14. Lewis and Howat proceeded to display their skills of legal advocacy in a lengthy point-counterpoint debate over various procedural obstacles to the appeal (such as Howat's lack of delegate credentials). Lewis was ultimately unable to avert a discussion of the merits.<sup>467</sup> Fresh from a trip to Kansas, the legendary

458. *Forced Labor in Kansas*, *supra* note 302, at 240.

459. Charles B. Driscoll, *The Kansas Industrial Court—Gassed*, *NATION*, Apr. 25, 1923, at 489, 490.

460. *The Public and the Strike*, *supra* note 456.

461. Feis, *supra* note 257, at 825.

462. *Jack Toschi Jailed Under Vagrancy Law*, *supra* note 457.

463. See, e.g., *Mines Gain 56 Men Today*, *PITTSBURG DAILY HEADLIGHT*, Jan. 7, 1922, at 1.

464. *Miners Advised To Return to Work*, *WORKERS CHRON.*, Jan. 13, 1922, at 1; see also *Howat Tells Miners To Resume Old Jobs*, *PITTSBURG DAILY HEADLIGHT*, Jan. 13, 1922, at 14.

465. Letter from John Steele to John H. Walker (Jan. 17, 1922), in *Walker Papers*, *supra* note 177, folder 120.

466. *Id.*

467. See *UMWA RECONVENED TWENTY-EIGHTH CONVENTION*, *supra* note 365, at 15–27.

Mother Jones tried to intervene on Howat's behalf, likening him to John Brown and praising him for his noble fight against the Kansas slave law. She blunted the force of her speech, however, by exhorting the miners to "muzzle up" and remedy the leadership's mistakes in "a business-like way."<sup>468</sup>

For five days, the delegates ignored this advice, shouting, heckling the chair, and occasionally punching each other.<sup>469</sup> Howat won a preliminary floor vote, 977-864, but his opponents mustered the strength necessary to force a roll-call.<sup>470</sup> On the day of the decisive tally, Lewis retreated to his office, declining to chair the convention or even to cast his vote.<sup>471</sup> The final count showed 2073 votes for Lewis, and 1955 against.<sup>472</sup> The margin was composed of votes from phantom Appalachian locals, delegates on the International payroll, and the Kansas delegation, which represented the international administration rather than local miners.<sup>473</sup> As reported by the *New York Times*, the convention adjourned "[a]mid wild disorder, with hundreds of delegates howling like madmen, bewailing the defeat of Alexander Howat."<sup>474</sup>

In the heat of the debate, Howat had warned that if his suspension were upheld, "in time to come this is going to be a one-man organization."<sup>475</sup> True to this prediction, District 14's suspension "was almost literally the end of responsible second-echelon government in the United Mine Workers of America."<sup>476</sup> By 1948, twenty-one of the thirty-one districts had been suspended.<sup>477</sup> Lewis was thus freed to pursue his program of shifting power from pit committees to the central union bureaucracy.<sup>478</sup>

As the winter grew colder, these long-run concerns were not uppermost in the minds of the locked-out miners. Shortly after the convention, President Frank Farrington of Illinois District 12 offered to continue financial support for the Kansas strike,<sup>479</sup> but the long-term outlook was bleak. With the strike largely broken and no help forthcoming from the International, the miners were reduced to hoping for succor from a very unlikely source: the courts of law.

468. *Id.* at 84-86.

469. See DUBOFSKY & VAN TINE, *supra* note 170, at 120; *Lewis Beats Howat by Narrow Margin*, N.Y. TIMES, Feb. 18, 1922, at 9.

470. See UMW RECONVENED TWENTY-EIGHTH CONVENTION, *supra* note 365, at 53.

471. See DUBOFSKY & VAN TINE, *supra* note 170, at 121.

472. See UMW RECONVENED TWENTY-EIGHTH CONVENTION, *supra* note 365, at 188.

473. See DUBOFSKY & VAN TINE, *supra* note 170, at 121.

474. *Miners To Vote on Strike April 1 if Demands Fail*, N.Y. TIMES, Feb. 19, 1922, at 1; see also DUBOFSKY & VAN TINE, *supra* note 170, at 121.

475. UMW RECONVENED TWENTY-EIGHTH CONVENTION, *supra* note 365, at 37-38.

476. JOSEPH E. FINLEY, *THE CORRUPT KINGDOM: THE RISE AND FALL OF THE UNITED MINE WORKERS* 55 (1972).

477. See *id.*

478. See Singer, *supra* note 162, at 158.

479. See DUBOFSKY & VAN TINE, *supra* note 170, at 121.

## VII. LAWYERS, COURTS, AND THE PROBLEM OF LINKAGE

At the height of the Kansas struggle, John L. Lewis wrote an "Official Letter" to the UMW membership. "There are but two ways in which the Industrial Court law may be beaten," he wrote, "[b]y action of the State Legislature in repealing the measure or by seeking a judicial determination of its provisions which labor holds to be unconstitutional."<sup>480</sup> Lewis meant this as an argument against direct action, which he claimed would alienate legislators, judges, and the voting public. But its undeniable kernel of truth poses a serious strategic problem for activists committed to a strategy of direct action and resistance. This problem may best be described as one of articulating or meshing the gears of the movement's lawmaking processes with those of the state. The gear metaphor, developed by theorists seeking ways to link workplace democracy with nationwide democratic institutions,<sup>481</sup> embodies four assumptions that fit well with the model of jurisgenesis. First, it assumes (contrary, for example, to the metaphor of a transmission belt) that there are two processes going on, each with its own dynamic. Second, these processes are at least relatively autonomous; that is, in the absence of successful, conscious efforts to link them, the cogs on their wheels may mesh imperfectly or not at all. Third, even if the cogs mesh, the metaphor is neutral on which process will drive the other. Finally, there is no implication that the role of driver could not shift back and forth or that both might not drive simultaneously, as with two linked locomotives.

Three closely related features distinguish judicial from legislative linkages. First, disempowered groups must formulate their claims in terms that are cognizable in legal discourse. As we have seen, union activists needed no special prompting to frame their demands in legal terms. The Thirteenth Amendment theory of collective labor rights was already deeply embedded in the political culture of the Kansas and Illinois miners. Second, the institutional structure of the court system requires legal outsiders to present their claims through lawyers, who share a robust professional culture with judges. This linkage would prove to be a source of trouble throughout the struggle. Third, the judicial system is structured—sometimes intentionally, sometimes not—to deflect linkages with jurisgenerative movements because alternative legal-interpretive communities pose an obvious threat to courts that claim a monopoly on authoritative interpretation. To protect their interpretive monopoly, modern courts have tended not only to exclude the defense of justifiable disobedience,<sup>482</sup> but also to authorize state violence against

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480. John L. Lewis, *Official Letter*, UNITED MINE WORKERS J., Nov. 1, 1921, at 7.

481. See, e.g., NANCY GINA BERMEO, *THE REVOLUTION WITHIN THE REVOLUTION: WORKERS' CONTROL IN RURAL PORTUGAL* 165–70, 212 (1986).

482. See Steven M. Bauer & Peter J. Eckerstrom, Note, *The State Made Me Do It: The Applicability of the Necessity Defense to Civil Disobedience*, 39 STAN. L. REV. 1173, 1173 (1987).



resisters who defy illegal court rulings.<sup>483</sup>

#### A. *Honest Lawyers Whose Hearts Are Right on Labor*

During the heyday of the labor injunction, unionists' distrust of judges extended to the legal profession in general. In typically unrestrained language, the 1913 AFL convention flayed the private bar as "shyster lawyers" engaged in "fleecing and defrauding the poor."<sup>484</sup> Unionists were unhappy even with the union bar. Union lawyers appeared to be more interested in legal technicalities than in the long-term project of advancing labor's constitutional position in court. In 1913, the AFL Executive Committee complained that union lawyers tended to rely on "practices and precedents rather than fundamental and essential principles."<sup>485</sup>

Frustrated at unionists' lack of strategic control over their lawyers, Walker called for the establishment of an AFL legal department composed of "men in the legal profession who were honest and whose hearts were right on labor matters."<sup>486</sup> The 1913 AFL convention authorized the Executive Council to establish a department, but no action was taken.<sup>487</sup> As a result, the labor movement entered the 1920s without any organizational mechanism to provide strategic guidance for its extensive constitutional litigation. Instead, labor organizations dealt individually with lawyers through the market in legal services. Theoretically, unions could obtain attorneys who would adhere to "fundamental essential principles" by firing those who did not. In practice,

483. See, e.g., *Walker v. City of Birmingham*, 388 U.S. 307 (1967) (upholding punishment of petitioners who defied state court injunction against organizing parade), *Howat v. Kansas*, 258 U.S. 181 (1922) (upholding state court judgment against defendants who ignored subpoena issued by administrative tribunal).

484. AMERICAN FED'N OF LABOR, REPORT OF PROCEEDINGS OF THE THIRTY-THIRD ANNUAL CONVENTION 315 (1913) [hereinafter AFL THIRTY-THIRD CONVENTION].

485. *Id.* at 73. This issue had come to a head the year before during an impassioned discussion of the Danbury Hatters case, *Loewe v. Lawlor*, 208 U.S. 274 (1908), at the AFL convention. After the hatters' lawyer reported his plan to win the case on a technicality, John Hunter Walker bitterly objected, arguing that "we should not dodge the real issue" of the constitutional right to boycott because the labor movement's very "right to live" was at stake. AFL THIRTY-SECOND CONVENTION, *supra* note 252, at 280. On the historical context of the Danbury hatters case, see DAVID BENSMAN, *THE PRACTICE OF SOLIDARITY: AMERICAN HAT FINISHERS IN THE NINETEENTH CENTURY* (1985).

486. The quotation is from Walker's recollection of his efforts, reported during a speech at the 1921 UMW Convention. See UMW TWENTY-EIGHTH CONSECUTIVE CONVENTION, *supra* note 273, at 847. The heavily edited AFL proceedings for 1912 do not report Walker's endeavor, but do show him arguing that the AFL should finance and direct the defense of the Danbury Hatters' case. See AFL THIRTY-SECOND CONVENTION, *supra* note 252, at 280.

487. See AFL THIRTY-THIRD CONVENTION, *supra* note 484, at 73, 300. In 1914, the Executive Committee noted that it was investigating the process of setting up a legal department, but was not yet ready to report. See AMERICAN FED'N OF LABOR, REPORT OF PROCEEDINGS OF THE THIRTY-FOURTH ANNUAL CONVENTION 97 (1914). No report was ever made. Instead, the Federation set up a "Legal Bureau of Information," which copied and distributed court decisions affecting labor. See AMERICAN FED'N OF LABOR, REPORT OF PROCEEDINGS OF THE THIRTY-SEVENTH ANNUAL CONVENTION 123 (1917). Not until 1922 did the Federation take the modest step of establishing a brief bank on labor issues. See AMERICAN FED'N OF LABOR, REPORT OF PROCEEDINGS OF THE FORTY-THIRD ANNUAL CONVENTION 43, 268-69 (1923).

however, labor's constitutionalists faced formidable obstacles in their efforts to control lawyers. Unions did not generate enough legal business to call into existence a labor bar with its own professional culture.<sup>488</sup> To the extent that there was a field called "labor law," it was a minor branch of tort law.<sup>489</sup> By the time they joined the bar, lawyers had undergone years of intensive socialization into the dominant professional culture. Few shared the experiences that made labor's freedom constitution so vivid to unionists. Worse yet, virtually all of the lawyers who might be politically sympathetic to labor—including Democrats, progressive Republicans and even socialists—were immersed in progressive thought and discourse.

Although progressives remained a minority on the Supreme Court, they already dominated the legal profession's major organs of opinion formation. By an overwhelming margin, legal writers praised the Industrial Court idea and defended its constitutionality.<sup>490</sup> Workers and unionists were depicted alongside employers as partisan interests to be manipulated by experts—mainly legal experts. Not only was the lawyer "coming into his own as the ruler of the world," enthused *Law Notes*, but he was ascending to that lofty position for the benign reason that he "alone of all the orders of men represents not force but justice, not caprice but law."<sup>491</sup> Even authors who had doubts about the particular configuration of the Kansas law praised it as part of "the tendency of civilization to draw into the domain of law that which was before settled by private combat."<sup>492</sup>

Like Feis and Bowers, most legal commentators treated labor's freedom constitution as meaningless noise. Only a handful mentioned the Thirteenth Amendment challenge, and most of those summarily dismissed it on the

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488. Until the mid-1930s, only a handful of lawyers specialized in representing unions. See JEROLD S. AUERBACH, *UNEQUAL JUSTICE: LAWYERS AND SOCIAL CHANGE IN MODERN AMERICA* 217–18 (1976). Despite the recurrent legal conflict between unionists and companies in southern West Virginia, for example, it seems that only one practice was sustained in significant part by unions. See Frank Munger, *Miners and Lawyers: Law Practice and Class Conflict in Appalachia, 1872–1920*, in *LAWYERS IN A POSTMODERN WORLD* 185, 216 (Maureen Cain & Christine B. Harrington eds., 1994).

489. See AUERBACH, *supra* note 488, at 217.

490. See, e.g., *At Last—The Industrial Court*, 14 ILL. L. REV. 585 (1920); Ernest C. Carman, *The Outlook from the Present Legal Status of Employers and Employees in Industrial Disputes*, 6 MINN. L. REV. 533, 555–59 (1922); Homer Hoch, *The Kansas Experiment*, 52 CHI. LEGAL NEWS 252 (1920); *The Judicial Adjustment of Industrial Controversies*, *supra* note 112, at 151–53; Moorfield Storey, *The Right To Strike*, 32 YALE L.J. 99, 104 (1922); Terry, *supra* note 338; Vance, *supra* note 338; J.S. Young, *Industrial Courts: With Special Reference to the Kansas Experiment* (pts. 1–4), 4 MINN. L. REV. 483, 504 (1920), 5 MINN. L. REV. 39, 54 (1920), 5 MINN. L. REV. 185, 215 (1921), 5 MINN. L. REV. 353, 364 (1921); cf. *Industrial Relations Courts*, 26 LAW NOTES 1, 1 (1922). The perspective of business's laissez-faire constitution, still dominant in the courts, appeared in only one text, John S. Dean, *The Fundamental Unsoundness of the Kansas Industrial Court Law*, 7 A.B.A. J. 333, 336 (1921).

491. *The Era of Law*, 23 LAW NOTES 1, 1 (1919). With no apparent self-consciousness, lawyers described themselves as "the conservators of the Constitution, the constructive Force in all lawmaking," and the only dispassionate seekers of solutions to industrial strife. See F. Dumont Smith, *Strikes, Strikers and Stricken—The Kansas Industrial Court*, 91 CENT. L.J. 443, 451 (1920); see also Baker, *supra* note 300, at 731.

492. *Industrial Relations Courts*, *supra* note 490, at 2; see also *At Last—The Industrial Court*, *supra* note 490, at 585–86.

ground that individual workers were not prevented from quitting work.<sup>493</sup> Of the two who endorsed the challenge, one—John T. Clarkson—was a lawyer for the strikers.<sup>494</sup> Not a single author other than Clarkson even attempted to recount, much less to analyze, labor's argument that strike bans effectively deprived workers of their freedom.

Somewhere in a profession dominated by this progressive ethos, labor activists would have to find lawyers who could carry labor's freedom constitution into the courts. Howat turned to one he trusted based on past performance. Frank P. Walsh, who served as lead counsel early in the struggle, was a nationally prominent labor attorney and political reformer who had successfully represented Howat in the past. If any lawyer could claim to have a heart right on labor matters, it was Walsh. For ten years before joining the bar, he had held such working class jobs as railroad construction water boy, stove-carrier in a wire mill, and shoe factory worker.<sup>495</sup> He read law at night and was admitted to the Missouri bar. Walsh quickly built a successful trial practice representing corporate interests, but on New Year's Day, 1890, he resigned every corporate representation to devote himself to other clients and to reform politics.<sup>496</sup>

Appointed by President Woodrow Wilson to chair the United States Commission on Industrial Relations, Walsh overrode the business representatives and the so-called neutral members (progressive social scientists like John R. Commons) to turn the Commission into a "tribune for the oppressed American worker."<sup>497</sup> He hauled John D. Rockefeller, Jr. before the Commission and publicly chastised him for his involvement in the Ludlow massacre.<sup>498</sup> His activities as chair provoked the president of the Pittsburg Employers' Association to blurt out publicly that Walsh "should be assassinated."<sup>499</sup> Walsh had become, in the words of a UMW staffer, the coal miners' "ideal in public life."<sup>500</sup>

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493. See *supra* note 112. One author argued that the provision of a tribunal obviated the need for the strike, see Terry, *supra* note 338, at 122, while another suggested that there was no constitutional problem in forcing individuals to work in essential industries, see F. Dumont Smith, *Police Power and the Kansas Industrial Court*, 7 A.B.A. J. 415, 418 (1921).

494. See John T. Clarkson, *The Industrial Court Bill*, 6 IOWA L. BULL. 153, 154 (1920). The other concurred less out of agreement than because he was convinced that worker opposition would undermine the legitimacy of the court. See Philip Wager Lowry, *Strikes and the Law*, 21 COLUM. L. REV. 783, 795, 799 (1921).

495. See Sister Maria Eucharist Meehan, *Frank P. Walsh and the American Labor Movement* 9 (1962) (unpublished Ph.D. dissertation, New York University) (on file at Sterling Memorial Library, Yale University).

496. See *id.* at 12–13.

497. MONTGOMERY, *supra* note 91, at 361.

498. See LONG, *supra* note 162, at 316. The Ludlow massacre occurred on April 20, 1914, when troops of the Colorado National Guard attacked a tent colony occupied by striking miners and their families. Two women and eleven children were among those killed. See TAFT, *supra* note 96, at 261–62.

499. MONTGOMERY, *supra* note 91, at 326.

500. *Id.* at 361.

Walsh's early involvement in the Kansas imbroglio gave every indication that he would faithfully assert labor's freedom constitution. In January 1920, he spoke to the special session of the Kansas Legislature that was deliberating on the Industrial Court bill. In four hours of testimony, he forcefully asserted the workers' Thirteenth Amendment challenge.<sup>501</sup> Pushed to admit that there could be some limit on the right to strike, he responded: "You are proceeding, from my line of thought, upon the idea that there is some superior class that is going to preserve the country from economical annihilation."<sup>502</sup> The workers, he argued, suffered most from strikes and thus could best be trusted to limit them.<sup>503</sup>

Two months after Walsh's testimony, and nearly a year before District 14 finally called the Mishmash strike, several newspapers reported that Howat had threatened a strike of Kansas miners to occur in early April 1920.<sup>504</sup> State Attorney General Hopkins promptly obtained a temporary restraining order barring District 14 from calling any strike in violation of the Industrial Court Act.<sup>505</sup> Walsh dropped his other commitments and arrived from New York on the eve of the temporary injunction hearing.<sup>506</sup>

The miners' lawyers were now forced to confront the deep problems in District 14's legal representation—namely, the dearth of judicial precedent supporting labor's freedom constitution, and the likelihood that the miners' open defiance of law would trigger a hostile reaction from judges. There was an easy way out of the case law problem: simply abandon labor's freedom constitution and rest the legal challenge on labor's corporate constitution instead. "Judge" John T. Clarkson, a UMW lawyer temporarily on loan from the Iowa district, took this route. "The real question," he argued, "is the relative scope of the right of contract and the state's police power."<sup>507</sup> This course enabled Clarkson to draw on *Coppage v. Kansas* and other decisions overturning labor's legislative victories.

Walsh resisted the easy resort to labor's corporate constitution. In defending the right to strike, he argued that the issue was one of liberty and fundamental rights, not economics: "Though the court were so beneficent it would give each miner a castle and perfect living conditions from the material standpoint . . . the principle would still be objectionable."<sup>508</sup> When the state's attorney pointed out that the law did not restrict the miners' individual right

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501. See ALLEN, *supra* note 111, at 68–79.

502. Kansas Hearings, *supra* note 151, at 88.

503. See *id.* at 4, 15–16, 35–36, 88.

504. See, e.g., *Kansas Strike Will Be Called Early in April*, PITTSBURG DAILY HEADLIGHT, Mar. 26, 1920, at 1.

505. See *State Enjoins Mining Strike*, PITTSBURG DAILY HEADLIGHT, Mar. 30, 1920, at 1.

506. See *Raise All Questions as to Court Law Tomorrow*, *supra* note 200.

507. *Injunction Trial Took Form of Roundtable*, PITTSBURG DAILY HEADLIGHT, Apr. 27, 1920, at 1 (reporter's paraphrase).

508. *Walsh Makes a Bitter Attack on Court Law*, PITTSBURG DAILY HEADLIGHT, Apr. 28, 1920, at 1 (reporter's paraphrase).

to leave work, Walsh queried, "'What do you mean by 'leave?' Leave the town or community?'"<sup>509</sup> While carefully distancing his own views on resistance from those of the miners ("If the[y] took my advice," he averred, "'they would obey the law.'"),<sup>510</sup> Walsh did not leave them without a defense. He pointed out that property owners were permitted to violate statutes pending appeal. Furthermore, he argued, resistance was no longer cause for shame, as shown by the examples of John Brown and of women suffragists "who are proud of having been jailed," and whose action influenced President Wilson's decision to support the Nineteenth Amendment.<sup>511</sup>

The Industrial Court's attorney, F.S. Jackson, used mockery to underscore his view that heroic narratives of resistance had no place in a court of law: "Mr. Walsh is entitled to high rank as a romancer and poet. He won this position by dragging John Brown from his grave and having him march down the streets of Washington with militant suffragists."<sup>512</sup> What did have a proper place in court, judging from Attorney General Hopkins's speech, was a straightforward discussion of labor policy. In fine progressive style, Hopkins argued that the miners simply did not know what was good for them; the Industrial Court provided the union with a new way to obtain justice, and within a few years the miners would recognize that fact.<sup>513</sup>

The judge concurred with Hopkins, granted the injunction, and later made it permanent.<sup>514</sup> In a serious oversight, Howat's lawyers failed to appeal the permanent injunction, with the result that when the District 14 Board called the Mishmash strike in February of 1921,<sup>515</sup> it was confronted with an unappealed strike injunction. After a raucous hearing in a tightly packed courtroom, Howat and five other officials were convicted of contempt of court.<sup>516</sup> This time, the miners appealed to the Kansas Supreme Court. Once again, they sought help from Frank Walsh.

## B. *Union Lawyers Immersed in the Progressive Constitution*

Shortly after the preliminary injunction hearing, Walsh had written Clarkson that, "[t]he more I look over the situation, the more I believe that we are in a history-making case."<sup>517</sup> Soon, however, Walsh began to distance

509. *Quoted in Injunction Trial Took Form of Roundtable, supra* note 507.

510. *Quoted in id.*

511. *Walsh Makes a Bitter Attack on Court Law, supra* note 508 (reporter's paraphrase)

512. *Id.* (reporter's paraphrase).

513. *See Injunction Hearing Is Nearing the End, PITTSBURG DAILY HEADLIGHT, Apr. 29, 1920, at 1*

514. *See Injunction Trial Took Form of Roundtable, supra* note 507; *Curran Upholds Law and Grants Injunction, PITTSBURG DAILY HEADLIGHT, Apr. 30, 1920, at 1; State Presses Demand for Mine Injunction, PITTSBURG DAILY HEADLIGHT, Sept. 14, 1920, at 1.*

515. *See supra* text accompanying notes 203–13.

516. *See Howat Again Found Guilty, PITTSBURG DAILY HEADLIGHT, Feb. 16, 1921, at 1*

517. Letter from Frank P. Walsh to John T. Clarkson, Attorney (May 5, 1920), in *Walsh Papers, supra* note 122, box 9.

himself from the case, pleading other commitments.<sup>518</sup> Finally, on March 23, 1921, Walsh turned down the miners' request for help on their appeal and formally terminated his involvement in the case. His life had become too deeply rooted in the East, Walsh explained, for him to take on matters in Kansas.<sup>519</sup>

This may have been part of the reason, but Walsh's life had been centered in the East for a number of years, and it is unlikely that one additional year there could account for his loss of enthusiasm. More likely, a shift in his priorities was responsible. Walsh had been working to build a prolabor caucus within the Democratic Party. In this effort, he backed off from the strong stand he had taken before the Kansas legislature. Even as he prepared to travel to Kansas for the injunction hearing, he was circulating a proposed "Industrial Constitution," which guaranteed the rights to organize and engage in collective bargaining, but also barred workers from using "coercive measures of any kind" to "induce employers to bargain" with them.<sup>520</sup> In a draft of this constitution, Walsh had explained that labor could be deprived of the right to strike, provided it were first guaranteed an "industrial bill of rights" including a living wage, a reasonable workday, and other principles that had been adopted by the federal government during World War I.<sup>521</sup>

William Jennings Bryan, then the front-runner for the Democratic presidential nomination, endorsed "every plank" of Walsh's industrial constitution but wanted to know if Gompers and other labor leaders would support it.<sup>522</sup> In response, Walsh made a sharp distinction between labor leaders, who would want to add protections for collective action, and the "rank and file of all labor," who would endorse his Industrial Constitution without change. Distancing himself from the labor movement, he proclaimed that his Industrial Constitution was "intended to be a peace [sic] of industrial-political statesmanship" proposed "by a party, and not by either labor or capital."<sup>523</sup> Although Walsh remained sympathetic to labor, his position on fundamental rights of collective action was now closer to that of the progressives than to that of the miners; he disagreed mainly on how many labor protections it would take to compensate for a strike ban.

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518. See Letter from Frank P. Walsh to H.S. Julian, Attorney (Aug. 9, 1920), in Walsh Papers, *supra* note 122, box 63; cf. Letter from Frank P. Walsh to Alexander Howat (Aug. 3, 1920), in Walsh Papers, *supra* note 122, box 63; Letter from Frank P. Walsh to Philip H. Callery, Attorney (Mar. 11, 1921), in Walsh Papers, *supra* note 122, box 10 (reporting Walsh to be unable to attend).

519. See Letter from Frank P. Walsh to Alexander Howat (Mar. 23, 1921), in Walsh Papers, *supra* note 122, box 10.

520. Letter from Frank P. Walsh to Bainbridge Colby, Secretary of State (Apr. 13, 1920), in Walsh Papers, *supra* note 122, box 9; see also Letter from Frank P. Walsh to James A. Reed, U.S. Senator (Apr. 14, 1920), in Walsh Papers, *supra* note 122, box 9.

521. See Draft (n.d., circa Apr. 1920), in Walsh Papers, *supra* note 122, box 64.

522. Letter from W.J. Bryan to Joseph W. Folk, Attorney (Apr. 26, 1920), in Walsh Papers, *supra* note 122, box 9.

523. Letter from Frank P. Walsh to Joseph W. Folk (May 4, 1920), in Walsh Papers, *supra* note 122, box 9.

Walsh's progressive skepticism toward labor's freedom constitution was shared by other union lawyers. Jake Sheppard, a prominent Socialist who represented Howat and Dorchy at their trial in the Mishmash strike case, supported the idea of an Industrial Court and opposed only the criminal penalties for striking.<sup>524</sup> Donald R. Richberg, whose railroad union clients vigorously opposed industrial courts on constitutional grounds, endorsed the concept provided that capitalists as well as workers were compelled to provide services.<sup>525</sup> The general counsel of the United Brotherhood of Maintenance-of-Way Employe[e]s secretly wrote Governor Allen to complain about his union's backward stance and to encourage Allen to continue battling for his industrial ideas.<sup>526</sup> Unionists' distrust of lawyers who eschewed labor's "fundamental and essential principles"<sup>527</sup> seemed well placed.

### C. *Union Lawyers Immersed in the Corporate Constitution*

With Walsh out of the case, the miners turned to their local and regional lawyers. In addition to Clarkson, there were Phillip Callery, an active Socialist who served as District 14's regular counsel, and Redmond S. Brennan, a member of Walsh's old Kansas City law firm.

Lacking Walsh's historical vision, these lawyers retreated into precedent. Callery's brief to the Kansas Supreme Court relied solely on the right, "endowed by nature, and not by Government," of freedom of contract.<sup>528</sup> He argued that strikers were merely exercising their right to contract with other union members not to "sell their services to their employer for less than a stipulated price."<sup>529</sup> Callery then proceeded to draw on such antilabor decisions as *Adair v. United States*,<sup>530</sup> *Hitchman Coal & Coke*,<sup>531</sup> and *Coppage v. Kansas*,<sup>532</sup> the last of which, he enthused, was "squarely in point."<sup>533</sup> The brief made no mention of the Thirteenth Amendment.

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524. See *J.I. Sheppard Dies at Fort Scott Home*, PITTSBURG DAILY HEADLIGHT, Oct. 19, 1921, at 1, Proceedings of Public Hearings Before the Senate and House of Representatives of the State of Kansas on House Bill No. 1, at 29-30 (Jan. 9, 1920), in Walsh Papers, *supra* note 122, box 64.

525. See Donald R. Richberg, *Developing Ethics and Resistant Law*, 32 YALE L.J. 109, 118 (1922).

526. See Letter from U.S. Bratton, General Attorney, United Brotherhood of Maintenance-of-Way Employe[e]s and Railway Shop Laborers, to Henry J. Allen (June 15, 1921), in Allen Papers, *supra* note 119, box B32.

527. AFL THIRTY-THIRD CONVENTION, *supra* note 484, at 73.

528. Phillip H. Callery, Brief of Defendants at 7-8, *State ex rel. Hopkins v. Howat*, 198 P. 686 (Kan. 1921), in Walsh Papers, *supra* note 122, box 63.

529. *Id.* at 15.

530. 208 U.S. 161 (1908) (invalidating federal prohibition against yellow dog contracts).

531. *Hitchman Coal & Coke Co. v. Mitchell*, 172 F. 963, 968-70 (N.D. W. Va. 1909) (refusing to dissolve injunction against union organizing among miners bound by yellow dog contracts), *rev'd*, 214 F. 685 (4th Cir. 1914), *rev'd*, 245 U.S. 229 (1917).

532. 236 U.S. 1 (1915) (invalidating state yellow dog statute).

533. *Id.* at 16-22.

Brennan showed little more interest in labor's freedom constitution. All but two pages of his fifty-page brief could have been drafted by corporation lawyers. He cited Kansas Supreme Court opinions striking down laws that had been enacted at the behest of District 14.<sup>534</sup> Brennan urged the court to give expansive readings to hated decisions like *Coppage v. Kansas* and *Adair v. United States*, while narrowing to their facts friendly precedents like *Wilson v. New* and *Muller v. Oregon*.<sup>535</sup> The involuntary servitude argument was relegated to a single grudging paragraph near the end of a long string of throwaway arguments.<sup>536</sup>

The Kansas Supreme Court made short work of Callery and Brennan. Declining to decide the case on a technicality in "order that the defendants may not feel a rule of procedure has prevented full consideration of their case," the court launched into a stunningly frank and comprehensive manifesto of progressive jurisprudence.<sup>537</sup> In its twenty-two page opinion, the court invoked all of the key principles of progressive legal thought, quoting not only Herbert Hoover and Woodrow Wilson, the leading progressive politicians of the day, but also the progressive magazine the *Survey*. Writing for a unanimous court, Justice Burch contrasted the hard, clear world of facts with the passion and ignorance of fundamental rights talk. "Sometimes under stress of genuine emotion, sometimes in rant, and sometimes in misguided ignorance," the court lamented, "labor speaks of its 'right' to strike as God-given."<sup>538</sup> Just as "God-given" property rights could be regulated in the public interest, however, so could the rights of labor.<sup>539</sup>

Since the court could not dispense with rights altogether, it gave them new foundations and myths of origin. In place of the heroic founding narrative of the struggle against slavery, the court told a story of pragmatic response to worker preferences: "Quitting work, first permanently, and then with the expectation of resuming, was found by experience to produce a result which served an end. The practice of quitting work grew as the satisfaction was more often desired."<sup>540</sup> Why not tell a similar story for the practice of ceasing work in concert? Because progress had already eliminated the need for

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534. See Redmond S. Brennan, Supplementary Brief of Defendants at 24-27, *State v. Howat*, 191 P. 585 (Kan. 1920), in Walsh Papers, *supra* note 122, box 63. Brennan's brief cites *Coffeyville Vitrified Brick & Tile Co. v. Perry*, 69 Kan. 297 (1904) (striking down statute that prohibited employers from discharging employees in retaliation for union membership); *State v. Haun*, 61 Kan. 146 (1899) (invalidating "Scrip Law" that required employers to pay wages in cash rather than in scrip redeemable only at company stores); and *State v. Wilson*, 61 Kan. 32 (1899) (Smith J., dissenting) (criticizing majority for upholding law prohibiting coal mine owners from cheating workers by underweighing coal).

535. See Supplementary Brief of Defendants, *supra* note 534, at 28-34 (citing *Wilson v. New*, 243 U.S. 332 (1917) (upholding federal law temporarily fixing railroad wages); *Muller v. Oregon*, 208 U.S. 412 (1908) (upholding law fixing maximum work hours of women in laundries)).

536. See *id.* at 49.

537. *State ex rel. Hopkins v. Howat*, 198 P. 686, 690-91 (Kan. 1921).

538. *Id.* at 699.

539. See *id.*

540. *Id.*



striking; with the Industrial Court "to appeal to, disputants have no moral right, and have no economic excuse, for fighting after failing to agree."<sup>541</sup>

Justice Burch's manifesto made no impression on District 14's lawyers. Neither Callery nor Brennan departed from their pattern during the five years that they repeatedly briefed and argued challenges to the Industrial Court law. Their briefs to the United States Supreme Court not only in *Howat*, but also in their appeal of *Howat* and *Dorchy*'s convictions under the Industrial Court Act, relied on the same notorious antilabor decisions.<sup>542</sup> Unabashedly drawing on the commodity theory of labor, Callery and Brennan argued that an individual laborer enjoyed the constitutional right to "sell his labor for what he thinks best . . . just as his employer may sell his iron or coal."<sup>543</sup> The Thirteenth Amendment theory reached the Court only once, in a single paragraph breezily asserting, without any supporting argument, that strikes could not be banned without reducing workers to a condition of involuntary servitude.<sup>544</sup>

Why did such dedicated friends of labor as Clarkson, Brennan, and Callery advance labor's corporate constitution instead of the constitutional vision held by their clients? Did they simply make a tactical decision that it would be hopeless, or were there deeper reasons? Five months after Justice Burch's manifesto, Brennan delivered a speech to the Illinois miners' convention. His mission was to help Walker persuade the delegates to provide financial assistance to the strikers. The change of audience and purpose did not alter the substance of his constitutional argument. He portrayed himself as a clever strategist making use of probusiness precedents to defeat probusiness legislation.<sup>545</sup> Brennan adhered to the corporate constitution despite his awareness that he was speaking to an audience of labor constitutionalists. "I know your thoughts at this moment," he told the miners. "'What about free speech?'; 'The right of assemblage?'; 'The right to assemble and petition?'; and all the other sections of the Bill of Rights which you think this Act violates. Well, were I . . . to single them out and discuss each, there would be no end to the tale."<sup>546</sup> In a speech that went on for twenty-two printed pages, Brennan had no time to discuss the miners' constitutional views. A second attempt at an explanation revealed more explicitly his view of the relationship

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541. *Id.*

542. See Brief of Plaintiff in Error at 9-13, 19, 21-22, *Dorchy v. Kansas*, 264 U.S. 286 (1924) (No. 163); Brief of Plaintiffs in Error at 26-31, 57, 62-66, *Howat v. Kansas*, 258 U.S. 181 (1922) (No. 154). The second time that the *Dorchy* case went up to the Supreme Court, Brennan and Callery relied exclusively on the *Wolff Packing* cases and the previous *Dorchy* decision. See Brief of Plaintiff in Error at 8-13, *Dorchy v. Kansas*, 272 U.S. 306 (1926) (No. 119).

543. Brief of Plaintiff in Error at 30, *Howat v. Kansas*, 258 U.S. 181 (1922) (No. 154) (quoting *Godcharles v. Wigeman*, 6 A. 354, 356 (Pa. 1886)); see also Brief of Plaintiff in Error at 13, *Dorchy v. Kansas*, 264 U.S. 286 (1924) (No. 163).

544. See Brief of Plaintiff in Error at 23, *Dorchy v. Kansas*, 264 U.S. 286 (1924) (No. 163).

545. See Brennan Address, *supra* note 191, at 14.

546. *Id.* at 8.

between his own and the miners' legal knowledge: "I might refer to the other points, but you, my friends, are not attending a law school . . . ." <sup>547</sup>

Clarkson expressed his own, similar views in an article on the Act for the *Iowa Law Bulletin*. <sup>548</sup> Like labor's constitutionalists, he quoted *Bailey v. Alabama* <sup>549</sup> for the proposition that the words "involuntary servitude" were included in the Thirteenth Amendment to prohibit "that control by which the personal service of one man is disposed of or coerced for another's benefit which is the essence of involuntary servitude." <sup>550</sup> Instead of focusing on the role of strikes in avoiding that control, however, he argued that strike prohibitions must violate the Amendment because they had the effect of forcing workers back to work. <sup>551</sup> This position was consistent with the Kansas Supreme Court's theory that the constitutional guarantee of labor liberty encompassed only the right to "escape servitude," <sup>552</sup> not labor's position that it assured to workers a degree of effective control over their work life.

Neither Clarkson nor Brennan understood or believed in labor's freedom constitution as a serious lawmaking project. Both had a court-centered vision of the law in which precedent reigned supreme. Neither saw the Kansas struggle as part of a long-term campaign to transform constitutional law. Nor did either sense, despite a veritable treatise from the Kansas Supreme Court, that laissez-faire activism might be weakening, much less that a struggle loomed over what vision should replace it. Callery seems to have bifurcated his identity, playing the socialist militant outside of court and the precedent-bound lawyer inside. In short, by the time the strike cases reached the Supreme Court, labor's freedom constitution had already been defeated in the law offices of labor's attorneys—an arena from which there was no avenue of appeal.

#### D. *Denouement: The Supreme Court Speaks*

Chief Justice Taft's unanimous opinion for the United States Supreme Court in *Howat v. Kansas* <sup>553</sup> declined to address the constitutionality of the Act. <sup>554</sup> Instead, the Court upheld Howat's and Dorchy's convictions for contempt on the theory that an injunction, "however erroneous," must be obeyed until it is reversed "by orderly review," not collateral attack. <sup>555</sup> This

547. *Id.* at 15.

548. See Clarkson, *supra* note 494.

549. 219 U.S. 219 (1911).

550. *Id.* at 241, quoted in Clarkson, *supra* note 494, at 154.

551. See Clarkson, *supra* note 494, at 155–57.

552. *State ex rel. Hopkins v. Howat*, 198 P. 686, 700 (Kan. 1921).

553. 258 U.S. 181 (1922).

554. See *id.* at 186, 190.

555. *Id.* at 189–90. The defendants' attack was considered collateral, see *id.* at 189, because they had

rule applied, Taft added, even where the error consisted of applying a "void law going to the merits of the case."<sup>556</sup> Such erroneous orders were "to be respected, and disobedience of them is contempt of [the court's] lawful authority, to be punished."<sup>557</sup> The harm of breaking the erroneous court's monopoly on interpretation apparently outweighed the harm of punishing citizens for engaging in lawful activity.

A more successful court challenge to the Industrial Court Act was brought by business. In *Charles Wolff Packing Co. v. Court of Industrial Relations*,<sup>558</sup> the Supreme Court unanimously invalidated the provisions of the Act that empowered the Industrial Court to fix wages.<sup>559</sup> Because the Act curtailed the constitutional right to contract, it could be justified only by "exceptional circumstances" not present in the case.<sup>560</sup> The Court went out of its way to embrace labor's corporate constitution. The state had argued that because no worker or union was before the Court, the Justices could not consider the Act's impact on employees. Taft rejected this argument, reasoning that because the entire statutory scheme hinged on the "joint compulsion" of both employer and employee to refrain from interfering with arbitration, the impact on both was relevant.<sup>561</sup> Despite the fact that the Act permitted individual workers to quit, its prohibition on quitting in concert or inducing others to quit amounted to a curtailment of the right to contract.<sup>562</sup> The worker was "compelled to give up that means of putting himself on an equality with his employer which action in concert with his fellows gives him."<sup>563</sup> Indeed, the requirement of continuous production involved "a more drastic exercise of control . . . upon the employee than upon the employer."<sup>564</sup>

Meanwhile, the appeal of Howat and Dorchy from their criminal convictions under the Industrial Court Act wound its way through the courts, finally reaching a resolution on the merits in 1926. The great progressive jurist Louis Brandeis wrote the opinion in *Dorchy v. Kansas*<sup>565</sup> for a unanimous

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failed to appeal the permanent injunction at the time it was issued, *see supra* text accompanying notes 514–15.

556. 258 U.S. at 190.

557. *Id.*

558. 262 U.S. 522 (1923).

559. *See id.* at 544.

560. *Id.* at 534, 541–44. The Court suggested that a wage-fixing order might have been valid if there had been a legislative determination that the strike would lead to a food shortage, and if the owner and the workers had assumed an obligation of continued service when they entered the business. *See id.* at 542–43. Since neither of those conditions was present, the court's wage-fixing power was unconstitutional. *See id.* at 542–44. For a time, the Industrial Court's supporters clung to the hope that its power to fix hours and working conditions might remain valid. This hope was laid to rest in *Charles Wolff Packing Co. v. Court of Industrial Relations*, 267 U.S. 552, 569 (1925) (invalidating Industrial Court Act's "system of compulsory arbitration," including power to fix hours).

561. *See Charles Wolff Packing Co.*, 262 U.S. at 541.

562. *See id.* at 534.

563. *Id.* at 540.

564. *Id.* at 541.

565. 272 U.S. 306 (1926).

court. He framed the issue narrowly, not as whether the state could prohibit strikes, but as whether it could prohibit the Mishmash strike in particular—a strike in which there had been no current dispute over wages, hours, or working conditions.<sup>566</sup>

The entire legal argument was compressed into the final paragraph of the opinion. In sharp contrast to his First Amendment opinions of this period, Brandeis proceeded not from the asserted constitutional right, but from the common law. And the common law right he chose to emphasize was not the right to quit or strike, but the “right to carry on business—be it called liberty or property,” which could not be infringed without just cause.<sup>567</sup> A strike might constitute just cause, but it could nevertheless be unlawful because of its purpose, “however orderly the manner in which it is conducted.”<sup>568</sup> Applying this rule, Brandeis concluded that “[t]o collect a stale claim due to a fellow member of the union who was formerly employed in the business is not a permissible purpose.”<sup>569</sup> Like Taft in *Howat*, Brandeis saw the miners’ jurisgenesis as a threat to the courts’ exclusive jurisdiction; a party to a disputed claim could properly insist that it be resolved by a court, not through the “coercion” of a strike. As for the strikers’ constitutional argument on the merits, it entered into Brandeis’s reasoning only in the last sentence of the opinion: “Neither the common law, nor the Fourteenth Amendment, confers the absolute right to strike.”<sup>570</sup> Not surprisingly, in view of the fact that it was omitted from their brief, Brandeis did not mention the miners’ Thirteenth Amendment theory.

#### E. *Competing Precedents for the Future*

The big winners in the Industrial Court Act cases were the proponents of the corporate constitution. In *Wolff Packing*, the procrustean business opposition had induced the Court to invalidate the Act as a violation of the freedom to contract. And in *Dorchy*, Louis Brandeis—the progressive “friend of labor”—had reaffirmed the old common law principle that strikes unlawfully infringed business rights unless they could be affirmatively justified. Moreover, in *Howat*, the Court had effectively ensured that labor would be punished for resistance while business could defy the law pending a final resolution on the merits.<sup>571</sup> Since all of the decisions were unanimous, the prospects for their

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566. *See id.* at 309.

567. *Id.* at 311.

568. *Id.*

569. *Id.*

570. *Id.*

571. This result inhered in the tendency of courts to enjoin labor defiance as involving irreparable harm, while declining to enjoin business defiance on the ground that it could be remedied later, after a final ruling on the merits. For example, the *Wolff Packing* Company was permitted to defy the Industrial Court Act pending the resolution of its constitutional challenge by the U.S. Supreme Court, while *Howat* and

continued vitality appeared good.

Despite the Act's demise, proponents of the progressive constitution could find reason to celebrate. Although the Industrial Court Act had gone too far for the Supreme Court, there was evidence of progress both in the overwhelmingly favorable commentary from the legal press and in the progressive manifesto issued by the Kansas Supreme Court in upholding the Act. Moreover, progressive reformers could join the proponents of the corporate constitution in celebrating the Supreme Court's protection of official jurisdiction against the miners' alternative interpretive community in *Howat* and *Dorchy*.

In all the judicial verbiage, proponents of labor's freedom constitution could hear only a deafening silence on their arguments. None of the opinions cited the Thirteenth Amendment. The only judge to mention involuntary servitude, Justice Burch of the Kansas Supreme Court, was laboring under the mistaken impression that the Clause was located in the Fourteenth, not the Thirteenth Amendment.<sup>572</sup> This was a failure of linkage on a sensational scale.

In the view of many miners, however, the courts were not the only source of constitutional precedent. These miners hoped that the strike would itself serve as a precedent akin to the abolitionist movement, and that it would come to stand for the proposition that strike bans would be met with insurmountable popular resistance. From his jail cell, Howat proclaimed that the strike would "stand as a beacon light, streaming its golden rays down the pathway of justice, shining the light in the road that leads to emancipation of the toiling masses of the nation."<sup>573</sup> Mother Jones joined numerous others in declaring that Howat would go down in history along with John Brown and other abolitionists as a fighter for human rights.<sup>574</sup> Howat and Walker maintained that the strike had demonstrated conclusively that American workers would never acquiesce in such a law.<sup>575</sup>

### VIII. CONCLUSION: REALISTIC ROMANTICISM

According to one of today's very best labor law scholars, the notion of a constitutional right to strike rests on a "romanticized" view of industrial

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other District 14 leaders were enjoined from doing likewise.

572. See *State ex rel. Hopkins v. Howat*, 198 P. 686, 695 (Kan. 1921) (discussing and rejecting theory that Act "contravenes the Fourteenth Amendment to the Constitution of the United States, in that it destroys liberty of contract and permits involuntary servitude on the part of workingmen")

573. Alexander Howat, Letter, *President Howat Answers Lewis*, WORKERS CHRON., Nov. 11, 1921, at 4.

574. See UMWA RECONVENED TWENTY-EIGHTH CONVENTION, *supra* note 365, at 86; Dillmon, *supra* note 329 (suggesting that Howat would be remembered by working people "long after his persecutors have been forgotten and only remembered in contempt"); Loftus, *supra* note 329 (noting that "law makers and fine gentry" crucified Christ, but their names, not his, "perished from the earth")

575. See, e.g., *Howat Greets Mass Meeting*, WORKERS CHRON., Apr. 16, 1920, at 2; *Miners Advised To Return to Work*, WORKERS CHRON., Jan. 13, 1922, at 1; Walker, *supra* note 189, at 6

relations.<sup>576</sup> Up to a point, the story of labor's freedom constitution confirms this insight. Labor activists' constitutional narrative of slavery and emancipation, with its celebration of grand principle and human freedom, did emphasize aspiration over reason and emotion over intellect.

Our scholar, however, meant to critique romanticism as an "unrealistic" approach. Like the progressive reformers who assailed labor's freedom constitution, he equated realism with the scientific analysis of empirical "facts." As we have seen, however, the dogged adherence of labor activists to their constitutional vision reflected a realistic appreciation of its capacity to sustain their movement in the face of legal repression and cultural marginalization. Labor's romantic narrative located workers' experiences of subjugation and resistance in a world-historical struggle for freedom, in which they—not middle-class reformers or professional experts—were the leaders. Labor activists saw the role of emancipator as one worth playing—even at the risk of discharge, jail, and bodily injury. They deployed their constitutional narrative to rise above the temptations of interest group bargaining, to overcome free-rider problems, to justify the repudiation of official law, and to nurture a positive group identity as effective actors.<sup>577</sup>

The clash between romanticism and positivism, then, is a struggle over power. The point is well illustrated in a vignette by Martin Levitt, a self-described "union buster." Having determined that his audience of miners was "in need of a little reeducation," Levitt challenged them:

"What is a union?" I scanned the faces, blistered by the sun. Already many eyes had softened. A few volunteered definitions: workers fighting for their rights; an organization that could negotiate a contract on behalf of the workers.

Wrong, I told them.

A union was a business just like we were.<sup>578</sup>

Levitt understood that part of his job as an anti-union consultant was to deromanticize the union, to depict it as a business out for its own profit, to move his audience from a narrative model of rights and solidarity to one of profits and self-interested calculation.

The story of labor's freedom constitution fits the model of constitutional insurgency as jurisgenesis. The narrative of emancipation arose from below,

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576. See Paul C. Weiler, *The Charter at Work: Reflections on the Constitutionalizing of Labour and Employment Law*, 40 U. TORONTO L.J. 117, 178–79 (1990). Professor Weiler's argument, though made in the context of the Canadian Charter of Freedoms, is fully applicable to the American context as well.

577. See *supra* Part V. This study thus supports the proposition that there is nothing inherently individualistic about rights talk. See also Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131 (1991) (arguing that most rights in Bill of Rights were conceived as collective rights); Staughton Lynd, *Communal Rights*, 62 TEX. L. REV. 1417, 1423–24 (1984) (pointing to statutory right of workers to engage in "concerted activity" as example of collective right).

578. MARTIN JAY LEVITT, *CONFESSIONS OF A UNION BUSTER* 15 (1993).

as an interpretation of local experience. Constitutional ideas entered not primarily through adaptations of judicial language, but through the text of the Thirteenth Amendment and the popular mythology of the Civil War as a struggle for freedom. The notion that conservative contract and property doctrines trickled down into the labor movement from courts is not wrong, but it holds only for labor's corporate constitution—a distinct vision far more salient to top union officials than to local activists.

Unionists did not limit themselves to spinning constitutional stories; they demonstrated their commitment by creating an alternative legal regime in which antistrike laws did not exist. This regime extended to minute details, like refusing to accept the interest on Karl Mishmash's back pay award, as well as splashy symbolism, like obtaining an "unrestricted" ruling from the jury in the trial of Howat and Dorchy. Rank-and-file miners followed the law of the union and rejected that of the state. Thousands maintained their solidarity over a four-month period for a long-term, noneconomic objective. Their determination was not broken even after the international union gave them the opportunity to return to work as official union miners. The women of the mining community went further, meeting as a collective body on their own, escalating the level of resistance, and thereby testing the limits of the state's commitment to its law.

In this Article, I have emphasized—perhaps excessively—the creative and empowering aspects of jurisgenerative insurgency. This tilt was intended to compensate for the understatement of those features in previous accounts both of labor's constitutional vision and of constitutional insurgency in general. It should be clear, however, that just as rational calculation and pressure group politics have their limitations, so do solidaristic narrative and insurgency. While labor's constitutional jurisgenesis fostered solidaristic commitment, it never meshed with the lawmaking processes of the state. This failure of linkage occurred not in court, but in the law offices of labor's attorneys. Immersed in the professional culture of law, union lawyers saw only the mainstream alternatives of the corporate and progressive constitutions. Despite their often selfless devotion to what they saw as labor's cause, union lawyers refused to carry their clients' legal views into the official court system.

At the beginning of this Article, I made the claim that labor's constitution of freedom amounted to a third great constitutional vision in competition with business's corporate constitution and the "public's" progressive constitution. I hope that this claim has been sustained, at least as to its originality of perspective, its authenticity as a reflection of working class experience and interpretative thinking, its cognitive depth, and its implementation in collective action evincing strong commitment.

APPENDIX: METHODOLOGY AND SOURCES FOR TABLE 1<sup>579</sup>

Quantitative content analysis is used here not as a primary methodology, but as a check on qualitative interpretation.<sup>580</sup> Content analysis strives for objectivity, which is reflected in stated rules and procedures for each step, and systematic scope, which requires the analyst to search for evidence that goes against her hypothesis as well as for it.<sup>581</sup> Thus, when the methodology fails—which, admittedly, is often—the errors are out in the open for critique.

The table includes only speakers who both invoked higher law (usually constitutional law, although the table also includes some speakers who referred to natural law), and who mentioned corporate or class themes. The context unit for the table—that is, the largest amount of text that may be searched to find a theme—consists of all of the writings of a single speaker. For most speakers, only one text was available. A maximum of three texts was searched for each speaker.

The categories of the table are defined as follows: (1) Local: local unions, activists and leaders who did not hold union positions above the local union level. Women who, though not union members, participated in the movement at the local level are included in this category; (2) Regional: union bodies and officials who held union positions above the local level but below the national level. Regional bodies include union districts, municipal and state labor federations, and multi-local mass meetings; (3) National: union bodies and officials who held office at the national level. National bodies include national and international unions and the American Federation of Labor. A statement was identified as coming from a national organization if it was adopted by an authoritative body like a convention or executive council, or if it was published as an editorial in an official union newspaper.

## SOURCES

## I. Local Activists, Leaders, and Bodies

## A. Class Conflict

Thos. Ballantyne & Hugh Bates, Letter, *WORKERS CHRON.*, Jan. 13, 1922, at 2 (Local 905, Reliance, Wyo.).

N.E. Bulot, Letter, *WORKERS CHRON.*, Dec. 16, 1921, at 2.

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579. See table accompanying notes 378–79.

580. This combination of quantitative and qualitative methods is no longer particularly controversial: “The best content analytic studies use both qualitative and quantitative operations on texts. Thus, content analysis methodology combines what are usually thought to be antithetical modes of analysis.” ROBERT PHILIP WEBER, *BASIC CONTENT ANALYSIS* 10 (1985).

581. See OLE R. HOLSTI, *CONTENT ANALYSIS FOR THE SOCIAL SCIENCES AND HUMANITIES* 3–4 (1969).



Martin A. Dillmon, Letter, WORKERS CHRON., Jan. 13, 1922, at 6; Martin A. Dillmon, Letter, WORKERS CHRON., May 5, 1922, at 2 (Teamsters, Bloomington, Ill.).

H.W. Fairchild, Letter, WORKERS CHRON., Dec. 30, 1921, at 2; H.W. Fairchild, Letter, *Must the Radical Go?*, WORKERS CHRON., Feb. 10, 1922, at 2 (District 14, UMW, Mindenmines, Mo.).

T.R. Ferguson, *Two Notable Criminal Bills*, WORKERS CHRON., Apr. 23, 1920, at 4.

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From Laurel Lodge No. 195, RAILWAY CARMEN'S J., Feb. 1920, at 97-98 (resolution of Lodge No. 195, Laurel, Mont.).

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B. Both Class and Corporate (None)

C. Corporate Rights

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S. Schutt, Letter, J. SWITCHMEN'S UNION OF N. AM., June 1925, at 237 (Local No. 46, Birmingham, Ala.).

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A. Class Conflict

*Bloomington, Illinois Trades Assembly in an Endorsement of Howat*, WORKERS CHRON., Oct. 28, 1921, at 1.

ALEXANDER HOWAT, REPORT OF PRESIDENT ALEXANDER HOWAT TO THE EIGHTEENTH CONSECUTIVE AND FOURTH BIENNIAL CONVENTION, DISTRICT NO. 14, UNITED MINE WORKERS OF AMERICA (1920); *Howat Speaks at Hutchinson*, WORKERS CHRON., Aug. 19, 1921, at 1, *Prison Sentence Does Not Change Principle*, WORKERS CHRON., Feb. 18, 1921, at 1 (reporting statements of Alexander Howat).

*Thank the Illinois Miners*, PITTSBURG DAILY HEADLIGHT, Dec. 2, 1921, at 11 (resolutions of Local Unions 33, 2330, 3696, & 4329).

*Parsons' Labor Body Endorses Howat*, WORKERS CHRON., Oct. 28, 1921, at 1 (resolution of Parsons, Kan. Central Labor Assembly).

*Trades Council Backs District 14*, WORKERS CHRON., Oct. 28, 1921, at 3 (resolution of Pittsburg, Kan. Trades Council).

*President Howat's Policy Endorsed*, WORKERS CHRON., May 27, 1921, at 1 (printing resolution of Topeka Industrial Council); Topeka Indus. Council, *A Topeka Resolution*, WORKERS CHRON., Apr

30, 1920, at 2; *Topeka Industrial Council Endorses Howat and Dorchy*, WORKERS CHRON., Oct. 21, 1921, at 2.

Comments of Delegate Walker, in UNITED MINE WORKERS OF AMERICA, PROCEEDINGS OF THE TWENTY-EIGHTH CONSECUTIVE AND FIFTH BIENNIAL CONVENTION 687-92 (1921); John H. Walker, *Labor Day*, WORKERS CHRON., Sept. 3, 1920, at 1.

B. Both Class and Corporate (None)

C. Corporate Rights

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III. National Officials and Bodies

A. Class Conflict

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M.W. Martin, "Under What Form of Government Do We Live?", BUTCHER WORKMAN, Feb. 1922, at 3.

B. Both Class and Corporate

*The Freedom We Seek*, BUTCHER WORKMAN, Feb. 1922, at 4 (editorial); *It All Depends Whose Ox Is Gored*, BUTCHER WORKMAN, Jan. 1922, at 4 (editorial).

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