The Dissertation Committee for Allison Marie Martens certifies that this is the approved version of the following dissertation:

A Movement of One's Own? American Social Movements and Constitutional Development in the Twentieth Century

Committee:

Gretchen Ritter, Supervisor

Jeffrey K. Tulis

Hersel W. Perry

Gary J. Jacobsohn

William E. Forbath

A Movement of One's Own? American Social Movements and Constitutional Development in the Twentieth Century

by

Allison Marie Martens, B.A.; M.A.; J.D.

Dissertation

Presented to the Faculty of the Graduate School of

The University of Texas at Austin

in Partial Fulfillment

of the Requirements

for the Degree of

Doctor of Philosophy

The University of Texas at Austin

August, 2007

Dedication

To Mom and Dad, for everything.

Acknowledgements

I owe many debts to those individuals who offered support and guidance during the dissertation research and writing process. I am fortunate to have a wonderful dissertation supervisor and mentor in Gretchen Ritter, who has been a great help to me since my early days as a graduate student. She set both a wonderful example and a high bar for me to meet as an academic professional. Thanks also go to the other members of my dissertation committee for their assistance and their insights. Jeffrey Tulis, H.W. Perry, Gary Jacobsohn and William Forbath were all generous with their time and their support. A special thanks goes to Jeffrey Tulis for doing double duty and ably seeing me through both my master's report and my dissertation. He prodded me to publish my master's report, and I owe him a debt of gratitude for assisting me with my first professional publication, forthcoming next month.

I am also grateful to those organizations that funded my dissertation research and writing. My final year of dissertation writing was generously funded by an American Dissertation Fellowship awarded by the American Association of University Women Educational Foundation. I also received support for my dissertation writing from the Office of Graduate Studies at the University of Texas via the David Bruton, Jr. Graduate Fellowship. Thanks are also due to the Department of Government at the University of

Texas for funding a summer of dissertation research with the Malcolm MacDonald Summer Research Internship.

I am indebted to many others who offered all manner of valuable assistance on my graduate student journey. Thanks to John Higley for providing my first encouragement as a scholar and sending me Down Under to get my first taste of research. Thanks to Wendy Hunter and Beth Moreno for greatly assisting my development as a teacher, and thanks to Beth for the endless supply of good cheer and good wishes. Thanks also to the members of the Gender and Politics Reading Group, particularly Kathleen Sullivan, Jenny Suchland, and Sherry Lowrance, for good conversation and from many of them great advice and support on being a woman in academia. I also want to recognize the support of friends beyond Austin. Special thanks for years of happy friendship to Caroline Mayott, Christine and Andrew Gregson, Dianne and Eric Reis, and Paisley Mason. And, of course, endless thanks to my fellow graduate students here at UT for all their help and good humor. Thanks, in particular, go to Neal Allen, Brian Arbour, Scott Garrison, Julie George, Joe Giammo, Danny Hayes, Mark McKenzie, Natasha Borges Sugiyama, Jeremy Teigen, Mike Unger, and Don Zinman.

My greatest debt is to my family, which has so generously provided me with the support and the inspiration necessary to reach this goal. Thank you to my sister, Kathy, and my brother, Bill, and their families, for all their love and support. Special thanks go to my nephews for all the hugs and smiles. But most of all thank you to my parents, Bob and Ann Martens. They have been my tireless advocates, and they did not flinch (much) when I told them I was going back to graduate school for another degree. I can never adequately express my gratitude for all that they have done for me.

A Movement of One's Own? American Social Movements and Constitutional Development in the Twentieth Century

Publication No._____

Allison Marie Martens, Ph.D.

The University of Texas at Austin, 2007

Supervisor: Gretchen Ritter

This dissertation examines the interaction between American social movements as they pursue their constitutional rights. The public law literature is dominated by a top-down approach to the study of constitutional politics, frequently focusing on the impact of Supreme Court decision-making. Instead, I explore constitutional politics from the bottom-up, analyzing constraints on social movement organizations as they formulate their constitutional strategies. Social movements must always be keenly aware of the actions of their peers who also seek to exploit the Constitution for their own benefit. My findings indicated that social movements recognize this competitive relationship with other social movements and treat their fellow constitutional claimants accordingly, acting to contest claims unfavorable to their cause, co-opt claims of other groups that have shown promise, and even form coalitions with their peers where an adjustment of their own claims to accommodate their coalition partners will likely net a greater return than going it alone. These negotiated constitutional claims have resulted in significant, durable and often ironic or unexpected shifts in constitutional development.

Table of Contents

List of Figures

Chapter One: Introduction

In March 2004 a group of black pastors from the Atlanta area condemned comparisons being made by advocates of the gay rights movement between the gay rights movement and the civil rights movement, particularly on the issue of same-sex marriage. In a letter to the Georgia General Assembly, the pastors argued that "[t]o equate a lifestyle choice to racism demeans the work of the entire Civil Rights Movement."[1] They have not been alone in rejecting the analogy between the evils of discrimination based on race and discrimination based on sexual orientation. In an editorial in the *Daily Standard* in 2006, a black pastor from Massachusetts accused the gay rights movement of hijacking the civil rights legacy, with a "brilliant playing of the race card," in order "to exploit the rhetoric of civil rights to advance the goals of generally privileged groups, however much they wish to depict themselves as victims."[2]

This type of cooption of past constitutional success, and its attendant backlash, is commonplace among social movements in America today. Success breeds imitation, whether the imitated find it flattering or not. The civil rights movement is not alone in serving as a template for success. Mark Henkel, the founder of an evangelical polygamy organization, pointed out to a *Newsweek* reporter in 2006 that, "if Heather can have two

---

[1] Michael Foust, *Atlanta: Black Pastors Rally to Oppose Same-Sex 'Marriage'* (Baptist Press, Jan. 28 2004); available from http://www.bpnews.net/bpnews.asp?ID=17941.

[2] Eugene F. Rivers and Kenneth D. Johnson, *Same-Sex Marriage: Hijacking the Civil Rights Legacy* (NewsCorp, Jun. 1 2006); available from http://www.weeklystandard.com/Content/Public/Articles/000/000/012/285fhdqe.asp. Of course this view is not universally held within the modern civil rights movement. Coretta Scott King spoke often in favor of gay rights and of the linkage to the civil rights movement and her husband's legacy. "Homophobia is like racism and anti-Semitism and other forms of bigotry in that it seeks to dehumanize a large group of people, to deny their humanity, their dignity and personhood," King told a Chicago audience in 1998. "Coretta Scott King Speaks at the Palmer Hilton," *Chicago Defender*, Apr. 1 1998.

mommies, she should also be able to have two mommies and a daddy."[3] Although the gay rights movement has not yet won a decisive victory on marriage, polygamy advocates have pushed the envelope of the social and constitutional successes the movement has won thus far. Lawyers in Utah plan to use the precedent set in the 2003 sodomy case, *Lawrence v. Texas*,[4] which established that individuals have the right to engage in private, sexual conduct without undue government intervention to advance legal protection for polygamous relations.[5] Not surprisingly, gay rights activists are less than thrilled at such analogies, although opponents of gay civil rights happily make the connection for the public.[6] According to the public affairs director for Gay and Lesbian Advocates and Defenders, Carisa Cunningham, she "frankly would not love to see an article [about polygamy advocacy] in *Newsweek* because this is the connection that our opponents make and we feel it's a specious one."[7]

The tensions over the familiar incidents of strategic cooption illustrated above highlight the inherently competitive relationships that exist between American social movements. We are accustomed to recognizing the tensions between direct social movement competitors, movement versus countermovement, abortion rights movement versus pro-life movement etc., but it is easy to overlook the competitive posture of movements that do not promote mutually exclusive beliefs or policies, movements that are simply peers rather than opponents. Nonetheless, these peer movements will often

---

[3] The organization is TruthBearer.org. See Elise Soukup, "Polygamists, Unite!," *Newsweek*, Mar. 20 2006.
[4] 539 U.S. 558 (2003).
[5] The case was dismissed by Utah's Federal District Court and is currently under appeal. See *Bronson v. Swensen*, 394 F.Supp 2d. 1329 (2005).
[6] Former U.S. Senator Rick Santorum gained notoriety in 2003 for making just such connections for the public between requiring protection of homosexual behavior leading to requiring protection of polygamy, adultery, incest, or bestiality in an interview with the Associated Press. The Associated Press (AP), "Excerpt from Santorum Interview," *USA Today*, April 23 2003.
[7] Soukup, "Polygamists, Unite!."

struggle with each other to amass and maintain the resources necessary to accomplish their goals for social and constitutional change leading to conflict between them.

This conflict, however, should not be a surprise. Winning constitutional rights requires substantial resources, and social movements representing the interests of marginalized groups or unpopular ideas are rarely resource rich. The organizations and individuals active in a social movement must be opportunistic in capturing and conserving the resources needed to force constitutional change, and these resources, which can include anything from money, to manpower and membership, to expertise, to public legitimacy, to political clout, to institutional access, to exploitable public policy (existing laws, regulatory enforcement, or interpretive precedents), are limited.

Resource competition between, or possibly within, social movements that are peers rather than opponents does not always manifest as strategic cooption, or poaching, of resources created and/or possessed by others. Cooperative strategies to share resources, such as coalition, are possible where actors share compatible beliefs or policy goals. Where the beliefs or policy goals of social movements are incompatible, strategic contestation by one movement to preempt resource capture by another movement may be necessitated. This tactical choice for dealing with resource competition, be it coalition, contestation, cooption or something else, will impact the narrative crafting of constitutional claims by social movements and their selection of an appropriate forum for those claims. [8]

In this dissertation, I build off this insight about peer resource competition in order to provide a fuller depiction of the politics that shape social movements' constitutional demands, demands which in turn influence and inform American

[8] I will discuss resource competition and its implications for social movements' constitutional strategies in much greater depth in Chapter Two.

constitutional development.[9] In particular, I focus on the constitutional politics of social movement competition during the Progressive and Inter-War Eras, which served as the seedbed for the significant transformation of the Constitution that would occur during the New Deal Era. I examine the constitutional demands, to determine the effects if any of peer resource competition on those demands, of five social movement organizations across three major American social movements active during this period in their fight to secure the economic advancement of workers within their ranks. These movements are the women's movement, the civil rights movement and the labor movement. From the women's movement, I examine the impact of resource competition on the strategies of the Women's Trade Union League (WTUL) and the National Consumers' League (NCL). From the civil rights movement, I examine the impact of resource competition on the strategies of the National Urban League (NUL) and the National Association for the Advancement of Colored People (NAACP). From the labor movement, I examine the impact of resource competition on the strategies of the American Federation of Labor (AFL). By studying the politics that shaped the constitutional insurgency[10] of women, African-Americans, and labor during this period, I offer previously overlooked insights into constitutional development, as well as fresh perspectives on many of the closely held disciplinary narratives of constitutional scholars regarding the reconstruction of the Constitution during the New Deal, particularly the academic preoccupation with *Lochner v. New York*.[11]

---

[9] I use the term politics here in the general sense of indicating the activities and/or interactions of groups or individuals who seek some form of power within a system.

[10] I am indebted to James Gray Pope for the characterization of social movements as constitutional insurgents. See James Gray Pope, "Labor's Constitution of Freedom," *Yale Law Journal* 106 (1997).

[11] 198 U.S. 45 (1905).

CONTRIBUTING TO POPULAR CONSTITUTIONALISM

Social movements are worthy objects of constitutional inquiry. They impact constitutional development in several ways and at several junctures. Their members file lawsuits that bring cases before the courts, enabling ongoing judicial interpretation of the Constitution.[12] For example, the twentieth century litigation campaigns of the NAACP were instrumental in prompting the Supreme Court to alter their reading of the Fourteenth Amendment to mandate school desegregation[13] and prohibit racially restrictive covenants in housing.[14] Social movements not only bring calls for constitutional change before the courts through litigation, but also recommend the shape of that change through legal filings and oral arguments, including the extensive use of amicus briefs that allow movements to have a say in a broad array of constitutional cases.[15]

Social movements also attempt to affect the political and ideological make-up of the federal judiciary, thereby influencing constitutional decision-making. Their members lobby the president and the Senate in order to ensure the appointment of federal judges friendly to their cause or defeat candidates who may prove unfriendly to their interests. For example, liberal interest groups, including elements of the women's movement, fought successfully against the confirmation of conservative jurist Robert Bork to the Supreme Court in the 1980's.

---

[12] Federal courts do not issue advisory opinions. An injured party must bring a claim to their attention. The case or controversy requirement is one of the first things taught in any class on judicial politics or constitutional law.

[13] *Brown v. Board of Education*, 347 U.S. 483 (1954).

[14] *Shelley v. Kraemer*, 334 U.S. 1 (1948).

[15] For a discussion of the use and importance of amicus briefs before the Supreme Court, see Gregory A. Caldeira and John R. Wright, "Amici Curiae before the Supreme Court: Who Participates, When, and How Much?," *Journal of Politics* 52 (1990), James F. II Spriggs and Paul J. Wahlbeck, "Amicus Curiae and the Role of Information at the Supreme Court," *Political Research Quarterly* 50, no. 2 (1997).

The courts do not have sole control over the direction of constitutional development, thus social movements also look beyond the courts to trigger constitutional change. In addition to participating in electoral politics, social movement organizations also lobby Congress and the executive branch, and politically mobilize their members, political parties and the wider public, in order to force constitutional change through legislation, bureaucratic enforcement, or occasionally the passage of constitutional amendments. Movements have frequently succeeded in these political attempts to force constitutional change. For example, the civil rights movement did not rely simply on the litigation campaigns of the NAACP. Civil rights groups also worked diligently to ensure passage of the landmark Civil Rights Act of 1964, which proved to be a significant vehicle for federal protection of civil rights as Congress pressed the limits of both its Fourteenth Amendment enforcement power and its broad regulatory power under the Commerce Clause. In another example of politically based constitutional success, elements of the women's movement worked tirelessly to compel the Equal Employment Opportunity Commission to fully enforce sex equality in the wake of its creation in the 1960's. Finally, groups within the temperance movement managed to use political means to constitutionalize prohibition with the passage and ratification of the Eighteenth Amendment.

Social movements also engage in protest and social activism that targets both public opinion and elite opinion in order to change perceptions about constitutional meaning and constitutional possibility. Movement activists have demonstrated great constitutional creativity in the past, willing if the resources are there to forward new and often controversial interpretations of the Constitution despite adverse authority. In this

way social movements are constitutional Protestants.[16] Jack Balkin and Reva Siegel suggest that social movements can spur the kind of political contestation necessary to cause constitutional principles to become "unstuck."[17] Social movements push the constitutional envelope, advocating fresh interpretations of the Constitution, that often in concert with major socioeconomic or technological changes in society, point to a widening gap between constitutional principles and practice that may spur constitutional elite to action.[18] In essence, social movements, through persistence, can alter our constitutional culture, which in turn may set the stage for constitutional change. Reva Siegel points to the effect of such persistent activism on constitutional culture and elite constitutional interpretation with the effects of the women's movement's ERA struggle on the interpretation of the Equal Protection Clause in the 1970's.[19]

Despite this vital connection between social movement activism and constitutional development, the great bulk of constitutional scholarship, both by political scientists and legal scholars, has focused on what Robert Post and Reva Siegel call the "juricentric Constitution," where constitutional interpretation is treated as the proper province of the judicial branch and where judges are viewed as the principle architects of constitutional change and development.[20] Scholarly reflection on constitutional

---

[16] Sandy Levinson distinguishes between constitutional Catholics, who accept authoritative constitutional interpretations, and constitutional Protestants, who embrace the possibility of multiple constitutional interpreters and interpretations. See Sanford Levinson, *Constitutional Faith* (Princeton, N.J.: Princeton University Press, 1988), Sanford Levinson, "Constitutional Protestantism in Theory and Practice: Two Questions for Michael Stokes Paulsen and One for His Critics," *Georgetown Law Journal* 83 (1994). Hendrik Hartog points to the ability and the history of social movements to imagine and pursue constitutional visions that are in conflict with governing precedent. See Hendrik Hartog, "The Constitution of Aspiration and the Rights That Belong to Us All," *Journal of American History* 74, no. 3 (1987).

[17] Jack M. Balkin and Reva B. Siegel, "Principles, Practices, Social Movements," *University of Pennsylvania Law Review* 154 (2006): 928.

[18] Ibid.: 928-30.

[19] Reva B. Siegel, "Constitutional Culture, Social Movement Conflict and Constitutional Change: The Case of the De Facto Era," *California Law Review* 94 (2006).

[20] Robert C. Post and Reva B. Siegel, "Protecting the Constitution from the People: Juricentric Restrictions on Section Five Power," *Indiana Law Journal* 78 (2003).

interpretation and constitutional politics tends to be court-centered, either in challenging the underlying bases of judicial decision-making, or in examining the effects and the legitimacy of acts of judicial review in a democratic polity.[21] Scholars are not alone in confounding constitutional law with constitutional development. The Rehnquist Court was a particularly strong proponent of the juricentric Constitution, frequently asserting judicial supremacy and reserving for itself the role of telling the rest of the government and the people what the Constitution means.[22]

Perhaps because of this coinciding right turn in constitutional interpretation and increase in institutional fervor by the Supreme Court, the role of non-judicial actors in constitutional politics and their contribution to constitutional development has received increased scholarly attention in recent years.[23] "Popular constitutionalism" has been coined as the name to represent this growing body of constitutional scholarship that

---

[21] Judicial behavior, the legitimacy of judicial review, and the impact and enforcement of judicial decisions have all been important areas of study for constitutional scholars in both the legal and the political science academies. Political scientists interested in judicial behavior have challenged long-held assumptions in the legal academy about the apolitical and legally expert bases of judicial decisions. The legitimacy and specialized contributions of judicial review, by unelected officials in a democracy, fervently argued for by constitutional theorists, are challenged if judicial decision-making is personalized or politicized. For a leading exemplar of this type of scholarship, see Jeffrey Allan Segal and Harold J. Spaeth, *The Supreme Court and the Attitudinal Model Revisited* (Cambridge, UK ; New York: Cambridge University Press, 2002). Political scientists have also concentrated on the legitimacy of judicial review in a democracy, the so-called countermajoritarian difficulty, by probing the incidents of judicial independence of the reigning coalition. Most scholarship suggests that such judicial independence is rare and short-lived. For two early classics in this line of scholarship, see Robert A. Dahl, "Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker," *Jourrnal of Public Law* 6 (1957), Robert G. McCloskey, *The American Supreme Court*, *The Chicago History of American Civilization.* ([Chicago]: University of Chicago Press, 1960). Judicial impact has been another significant source of scholarship. See Gerald N. Rosenberg, *The Hollow Hope : Can Courts Bring About Social Change?* (Chicago: University of Chicago, 1991).

[22] Larry Kramer accuses the Rehnquist Court of pursuing an exaggerated form of judicial supremacy that he dubs "judicial sovereignty." See Larry D. Kramer, "The Supreme Court, 2000 - Term Foreword: We the Court," *Harvard Law Review* 115 (2001): 127. Post and Siegel point to the recent dilution of congressional authority over the Fourteenth Amendment by the Court. See Post and Siegel, "Protecting the Constitution from the People: Juricentric Restrictions on Section Five Power." While Rachel Barkow considers the Court's emasculation of the political question doctrine, particularly in the wake of the 2000 presidential election. See Rachel E. Barkow, "More Supreme Than Court? The Fall of the Political Question Doctrine and the Rise of Judicial Supremacy," *Columbia Law Review* 102 (2002).

[23] Dale Carpenter, "Judicial Supremacy and Its Discontents," *Constitutional Commentary* 20 (2003).

centers on the People, in their many forms, and their elected representatives. Popular constitutionalism seeks to recognize the role of the People and of politicians in the constitutional process, and for those scholars normatively inclined, to restore the People's contribution to constitutional interpretation, development and enforcement.[24] Some studies have focused on the contribution of the political branches to what Keith Whittington calls "constitutional construction."[25] Other scholars, like Bruce Ackerman and Sandy Levinson and Jack Balkin, have focused on the popular legitimation of significant constitutional change authored by the courts through either "constitutional moments" or "partisan entrenchment."[26]

Constitutional scholars have also become increasingly interested in social movements, and their influence on constitutional development. William Forbath and James Gray Pope both examine the constitutional strategies and rhetoric of the labor movement.[27] Jack Balkin and Reva Siegel together point out that social movements,

---

[24] For a thorough canvassing and explanation of the popular constitutionalism literature, see Doni Gewirtzman, "Glory Days: Popular Constitutionalism, Nostalgia and the True Nature of Constitutional Culture," *Georgetown Law Journal* 93 (2005). For two leading contributions to this literature, see Larry D. Kramer, *The People Themselves : Popular Constitutionalism and Judicial Review* (New York: Oxford University Press, 2004), Mark V. Tushnet, *Taking the Constitution Away from the Courts* (Princeton, N.J.: Princeton University Press, 1999). For the philosopher's perspective, see Jeremy Waldron, *Law and Disagreement* (Oxford: Oxford University Press, 1999).

[25] Keith E. Whittington, *Constitutional Construction : Divided Powers and Constitutional Meaning* (Cambridge, Mass.: Harvard University Press, 1999). For attention to constitutional interpretation by Congress, see Louis Fisher, "Constitutional Interpretation by Members of Congress," *North Carolina Law Review* 63 (1985), Bruce G. Peabody, "Congressional Constitutional Interpretation and the Courts: A Preliminary Inquiry into Legislative Attitudes," *Law and Social Inquiry* 29 (2004). For attention to constitutional interpretation by the executive branch, see Risa L. Goluboff, "The Thirteenth Amendment and the Lost Origins of Civil Rights," *Duke Law Journal* 50, no. 6 (2001), Keith E. Whittington, "Presidential Challenges to Judicial Supremacy and the Politics of Constitutional Meaning," *Polity* 33 (2001). For a general survey of American constitutional development beyond the courts, see Neal Devins and Louis Fisher, *The Democratic Constitution* (Oxford ; New York: Oxford University Press, 2004).

[26] Bruce A. Ackerman, *We the People: Foundations* (Cambridge, Mass.: Belknap Press of Harvard University Press, 1991), Bruce A. Ackerman, *We the People: Transformations* (Cambridge, MA: Belknap Press of Harvard University Press, 2000), Jack M. Balkin and Sanford Levinson, "Understanding the Constitutional Revolution," *Virginia Law Review* 87 (2001).

[27] William E. Forbath, "Caste, Class, and Equal Citizenship," *Michigan Law Review* 98, no. 1 (1999), William E. Forbath, *Law and the Shaping of the American Labor Movement* (Cambridge, Mass.: Harvard University Press, 1991), William E. Forbath, "The Ambiguities of Free Labor - Labor and the Law in the

through creative and sustained constitutional contestation, alter the meaning of constitutional principles and push constitutional elites to change constitutional practices.[28] Balkin and Siegel, in their independent work, each outline the impact of the women's movement at different junctures on constitutional development.[29] William Eskridge argues that law and legal actors are critical to understanding the dynamics and the goals of identity politics by social movements.[30] Michael Klarman's recent book provocatively challenges accepted understandings about the legal strategies of the civil rights movement and both the power and the limit of the law as an engine of social change.[31]

I contribute to this growing popular constitutionalism research agenda in two ways. First, by focusing on the activities of social movement organizations, I explore constitutional development through the lens of popular forces demanding change, rather than through the more commonly employed elite lens that privileges the actions and beliefs of lawyers, judges and other constitutional elite in explaining constitutional development. Second, by rooting my study of constitutional development in the actions

---

Gilded Age," *Wisconsin Law Review*, no. 4 (1985), Pope, "Labor's Constitution of Freedom.", James Gray Pope, "The Thirteenth Amendment Versus the Commerce Clause: Labor and the Shaping of American Constitutional Law, 1921-1957," *Columbia Law Review* 102 (2002).

[28] Balkin and Siegel, "Principles, Practices, Social Movements."

[29] Jack M. Balkin, "How Social Movements Change (or Fail to Change) the Constitution: The Case of the New Departure," *Suffolk University Law Review* 39 (2005), Siegel, "Constitutional Culture, Social Movement Conflict and Constitutional Change: The Case of the De Facto Era.", Reva B. Siegel, "She the People: The Nineteenth Amendment, Sex Equality, Federalism, and the Family," *Harvard Law Review* 115, no. 4 (2002), Reva B. Siegel, "Text in Contest: Gender and the Constitution from a Social Movement Perspective," *University of Pennsylvania Law Review* 150, no. 1 (2001).

[30] William N. Eskridge, Jr., "Channeling: Identity-Based Social Movements and Public Law," *University of Pennsylvania Law Review* 150, no. 1 (2001), William N. Eskridge, Jr., "Some Effects of Identity-Based Social Movements on Constitutional Law in the Twentieth Century," *Michigan Law Review* 100, no. 8 (2002). This positive view of law's centrality to social movement activity is challenged by Tomiko Brown-Nagin, who argues that social movements are more likely to achieve their goals outside the constraints of law and lawyers. See Tomiko Brown-Nagin, "Elites, Social Movements, and the Law: The Case of Affirmative Action," *Columbia Law Review* 105 (2005).

[31] Michael J. Klarman, *From Jim Crow to Civil Rights: The Supreme Court and the Struggle for Racial Equality* (Oxford ; New York: Oxford University Press, 2004).

and the agendas of social movement actors themselves, I do not limit myself to the study of constitutional development that occurs through courts. Social movements rarely limit their calls for constitutional change to a courtroom. Scholars may be enamored with the juricentric Constitution, but activists cannot afford to be so limited in selecting forums for their constitutional demands. Thus I provide a wider-ranging analysis of constitutional development than typically offered, by exploring constitutional politics and change from the bottom up. I trace the competitive mediation of demands of constitutional advocates that might be levied anywhere and before any constitutional arbiter. By starting with the construction of a constitutional claim, rather than the authoritative evaluation of a constitutional claim after its submission, I can provide a fresh perspective on constitutional development, one that embraces broader constitutional politics.

Even where past constitutional scholarship has embraced the activities of social movements and their relationship to constitutional change and development, these studies have tended to lack serious attention to social movement theory.[32] I correct for this inattention by explicitly grounding my research in that theory. I also provide a level of analytical precision in evaluating social movements that is typically absent in such work

[32] Michael W. McCann, "Law and Social Movements: Contemporary Perspectives," *Annual Review of Law and Social Science* 2 (2006): 17-8. But see Edward L. Rubin, "Passing through the Door: Social Movement Literature and Legal Scholarship," *University of Pennsylvania Law Review* 150 (2001). This is not to say that there has not previously been theoretically grounded work on law and social movements. The legal mobilization approach to law and social movements began to blossom in the 1990's. I do not draw significantly from this literature because it has not been previously oriented towards explaining constitutional development. Michael McCann provides an excellent review of the legal mobilization literature. See McCann, "Law and Social Movements: Contemporary Perspectives.", Michael W. McCann, "Mobilization of Law," in *Social Movements and American Political Institutions*, ed. Anne N. Costain and Andrew S. McFarland (Lanham, Md.: Rowman & Littlefield, 1998). A few quick points about the legal mobilization research agenda. Legal mobilization scholars embrace a more capacious understanding of law than traditionally studied. They are interested in law not only as institutions and personnel, courts and lawyers, but also as ideology, as norms transmitted to and mediated by the community. Marc Galanter, "The Radiating Effects of Courts," in *Empirical Theories About Courts*, ed. Keith O. Boyum and Lynn M. Mather (New York: Longman, 1983), 127, E. P. Thompson and Great Britain., *Whigs and Hunters : The Origin of the Black Act* (London: Allen Lane, 1975) 258-69. Law therefore can be mobilized by popular forces both formally and informally. Frances K. Zemans, "Legal Mobilization - the Neglected Role of the Law in the Political-System," *American Political Science Review* 77, no. 3 (1983): 700.

on constitutional development. I will discuss the application of social movement theory to this project in much greater depth in Chapter Two.

STUDYING THE WOMEN'S MOVEMENT, THE CIVIL RIGHTS MOVEMENT, AND THE LABOR MOVEMENT DURING THE PROGRESSIVE AND INTER-WAR ERAS

Peer resource competition between social movements is always occurring so long as multiple social movements are active in the political system, therefore, it would be difficult, if not impossible, to fully explore the impact of this competition on constitutional development within the confines of a dissertation. Far too many movements have been active over far too long a period of time to undertake a comprehensive review. Therefore I will limit my study to the constitutional activities and interaction of the women's movement, the civil rights movement, and the labor movement during the Progressive and Inter-War Eras, which stretched roughly from the 1890's through the 1930's and the constitutional reconstruction of the New Deal.[33]

I have selected these social movements for examination because they represent three of the longest-standing and most active social movements in American politics. They are touchstone social movements. Each has been active in at least some rudimentary form since the early days of the American Republic. Ideologically-based movements have come and gone, and new populations have arrived on American shores over the years demanding integration into the political system, but these three populations

[33] Assigning years to mark the beginning and end of the Progressive Era is a difficult proposition. There is no universal consensus by scholars on when this period began and ended. Many mark the start of the era with the beginning of Theodore Roosevelt's presidency in 1901, while other scholars mark the opening of the period with the economic turbulence of the 1890's. Similarly, the end of the era is also subject to dispute. Some scholars mark the end of the period with the advent of World War I in 1914, while other scholars extend the era into the 1920's. I am taking the widest possible view of this period by studying the years from 1890 through to the late 1930's.

have, either in their own name or through their champions, presented social and political challenges to the American system since its formation and remain active today. The women's movement began to take significant form when women began to cut their activist teeth on participation in the abolition movement, but the desire for improvement of the social and political lot of women had been manifest since the birth of the nation, famously illustrated by Abigail Adams' plea to her husband to "remember the ladies" in the founding of the new government.[34] The civil rights movement began as abolitionism, which was already in its infancy during the Revolutionary period, but would eventually transition after the Civil War and Reconstruction from a predominantly white antislavery movement to a predominantly African-American black rights movement. The labor movement has also been a permanent fixture in American politics. Workers played an important role in the Revolution, and the earliest forms of organized labor, guilds and trade societies, had already begun to proliferate at this time.

Since these movements have all been active, and have frequently interacted, across the full sweep of American history, I have limited the scope of my study to only one historical period where women, African-Americans, and organized labor found themselves competing for constitutional change – the Progressive and Inter-War Eras.[35] I have selected this historical period as the focus for my social movement study for a variety of reasons. First, the Progressive and Inter-War Eras were marked by an

---

[34] Writing to her husband, John, while he was away serving in the Continental Congress, Adams requested the following: "By the way, in the new code of laws which I suppose it will be necessary for you to make, I desire you would remember the ladies and be more gracious and favorable to them than your ancestors." John Adams, Abigail Adams, and Charles Francis Adams, *Familiar Letters of John Adams and His Wife, Abigail Adams, During the Revolution* (New York,
Cambridge,: Hurd & Houghton;
The Riverside Press,, 1876), xxxii, 424 p.

[35] These three movements have constitutionally intersected at several points, including abolition, the attempted exploitation of the Fourteenth Amendment in its early years, the battle for civic inclusion and economic survival in the Progressive Era, the period of integration into the welfare state following the New Deal, and the capitalization on new equality commitments won in the 1950's onward.

acceleration and maturation of social movement activity. It was, after all, a great period of reform. As Charles Epp explains, the Progressive Era saw the establishment of the support structure necessary for large-scale legal mobilization.[36] This support structure developed from the modernization of law schools and the social sciences, and an increasingly politically active middle class, that began to engage more fully with movement causes through professions such as social work. Numerous organizations, including the organizations I study in this dissertation, were established during these years to pursue social movement interests, bringing a new structure and level of organized commitment to social activism that provided the roots for modern social movement activity.[37] This proliferation of highly organized social movement actors provides a rich source of cases for studying peer social movement resource competition.

Second, the Progressive and Inter-War Eras witnessed tremendous social upheaval, which was the product of a number of historical factors including rapid industrialization and the reconstruction of capitalism, scientific advancement, the destabilization of world politics and the threat of socialism and communism, and large-scale urban migration and immigration. Robert Wiebe refers to the America of the late nineteenth century as a "society without a core."[38] This social dislocation pushed calls for reform, and social movements stepped up their activities to deal with the pressures of this turbulent period. Social movements, including my case movements, would demand significant social and political change on multiple fronts, including civic inclusion, economic security, civil liberties, and the battle against corruption and other social ills

---

[36] Charles R. Epp, "External Pressure and the Supreme Court's Agenda," in *Supreme Court Decision-Making: New Institutionalist Approaches*, ed. Cornell W. Clayton and Howard Gillman (Chicago: University of Chicago Press, 1999), 277.

[37] The NCL and the WTUL were established in 1899 and 1903 respectively. The NAACP and the NUL were established in 1909 and 1910 respectively. The AFL was established in 1886.

[38] Robert H. Wiebe, *The Search for Order, 1877-1920*, [1st ed. (New York,: Hill and Wang, 1967) 12.

such as alcoholism. This variety in movement causes only enhances the possibility of significant interaction and competition between movement organizations, making this a fruitful period for study of resource competition.

Third, due to the pressures of social, demographic and economic change, the government, particularly the courts, had difficulty adjusting to meet the new social and political realities of a modernizing America. The resulting public frustration, with the courts and even the Constitution itself, was manifest among both mass and elite.[39] George W. Alger wrote dramatically in the *Atlantic Monthly* in 1913 that, in years past, the "courts were the 'Palladium of our liberties,' the 'Guardians of the Ark of the Covenant.' To-day the public attitude has largely changed. These phrases are no longer current. The people are dissatisfied with the guardians, and in some quarters there is dissatisfaction with the ark itself."[40] With the courts weakened as an institution, this created an opportunity for movements to push for significant constitutional change both before the courts and, more importantly, in front of emboldened legislators.

Finally, beyond this acceleration in both social movement activity and in the public urgency for social change, the Progressive and Inter-War Eras represented a period in constitutional history where no social movement had yet won a significant constitutional victory. There was no enticing previous model for constitutional success to co-opt, thus competitive relationships between movement organizations would be marked by a great deal of creativity and variety, in contrast to what we are accustomed to seeing today with large-scale cooption of the civil rights equality narrative, making this a particularly interesting period for the study of movement competition.

---

[39] Formalism came under fire during this period with the rise of legal realism. See Morton Gabriel White, *Social Thought in America; the Revolt against Formalism* (Boston,: Beacon Press, 1957).

[40] George W. Alger, "The Courts and Legislative Freedom," *Atlantic Monthly*, March 1913, 345.

Given the tremendous structural change and turbulence of the period and the escalation in both the need and the demand for major constitutional change to accommodate a radically changed America, it is not surprising that the early years of the twentieth century proved to be the seedbed of a new constitutional order that was put into place with the New Deal. This reconstruction of the constitutional order makes the years leading to this change inherently interesting to constitutional scholars, and the most interesting constitutional feature of this period to constitutional commentators has long been the ascendance and subsequent repudiation of the jurisprudence of what has become known as the *Lochner* era. Julie Novkov refers to *Lochner v. New York* as the case that launched a thousand law review articles.[41] This is hardly an exaggeration. For constitutional scholars, *Lochner* has long been the archetypical case illustrating a dangerously activist judiciary. An out-of-control court that, so goes the disciplinary narrative, was eventually broken by political pressure with the famed "switch in time that saved nine" that came in 1937 with the ruling in *West Coast Hotel v. Parrish* that repudiated *Lochner* and marked the end of judicial obstruction of the new constitutional order that was developing around the New Deal.[42]

In *Lochner*, the Supreme Court struck down a New York law that limited to sixty the number of hours bakers could work per week. The law was intended to protect the health and safety of bakers, but the Supreme Court ruled that the law improperly

---

[41] Julie Novkov, *Constituting Workers, Protecting Women: Gender, Law, and Labor in the Progressive Era and New Deal Years* (Ann Arbor: University of Michigan Press, 2001) 3.

[42] 300 U.S. 379 (1937). Frustrated by the Supreme Court's persistent obstruction of the New Deal, Franklin D. Roosevelt proposed the Judiciary Reorganization Act of 1937, which would permit the president to make a supplemental appointment to the Supreme Court for each justice over 70.5 years of age with at least ten years of experience. This bill was a thinly veiled assault on the power of the elderly, conservatives on the Supreme Court. Although the bill never passed, Roosevelt got his way. Justice Owen Roberts switched away from his previously obstructionist position by voting in favor of New Deal measures beginning in *West Coast Hotel*. This "switch in time that saved nine" by Justice Roberts has been famously attributed to the institutional and political pressure of Roosevelt's court-packing plan. For a colorful investigation of the court-packing plan and its influence on judicial history, see Michael Ariens, "A Thrice-Told Tale, or Felix the Cat," *Harvard Law Review* 107 (1994).

interfered with the right of individuals to freely make employment contracts. No such right to what would become known as liberty of contract is clearly stated in the text of the Constitution, however the Supreme Court reasoned that the liberty guarantee of the Fourteenth Amendment's Due Process Clause included protection of a right to negotiate contracts for labor unmolested by the state.[43] This ruling stopped progressive efforts to win passage of protective labor legislation in state legislatures around the country in its tracks.

Outrage was immediate, and not only from reformers but also from constitutional commentators. The *Lochner* majority was pilloried, even from within the decision itself. Oliver Wendell Holmes, in his famous dissent, accused his brethren of unprincipled behavior in service of laissez-faire economics by deciding the case, "upon an economic theory which a large part of the country does not entertain. … The 14th Amendment does not enact Mr. Herbert Spencer's Social Statics."[44] Subsequent scholars would echo Holmes' frustration and would paint the Court as an intruder into the legislative sphere, manufacturing rights that reflected their own upper class bias and their political affiliations.[45] According to William M. Wiecek, *Lochner* became the "negative touchstone" of modern scholarship for discussing malfunctioning courts that substitute their own preferences for those of a legislature, violating the sanctity of the separation of

---

[43] The Due Process Clause of Section 1 of the Fourteenth Amendment reads as follows: … nor shall any State deprive any person of life, liberty, or property without due process of law …

[44] 198 U.S. 45, 75 (1905).

[45] For an extensive review of this neo-Holmesian assessment in constitutional scholarship, see Howard Gillman, *The Constitution Besieged : The Rise and Demise of Lochner Era Police Powers Jurisprudence* (Durham: Duke University Press, 1993) 3-4. Some early examples of this literature include Alfred Hinsey Kelly and Winfred Audif Harbison, *The American Constitution, Its Origins and Development* (New York,: W. W. Norton, 1948), Carl Brent Swisher and Edward McChesney Sait, *American Constitutional Development* (Boston, New York [etc.]: Houghton Mifflin company, 1943). A more recent illustration of this characterization of the *Lochner* Court can be found in Paul Kens, *Judicial Power and Reform Politics: The Anatomy of Lochner V. New York* (Lawrence, Kan.: University Press of Kansas, 1990).

powers, or put another way, *Lochner* is the emblem for courts that make law rather than interpret it.[46]

Many scholars have pushed back against this negative depiction of the *Lochner* Court. Revisionist accounts of *Lochner* have been popular and have focused primarily on two issues. First, some scholars, right in the wake of the outcry against the Court, zeroed in on the level of Supreme Court commitment to liberty of contract jurisprudence during this period, suggesting that *Lochner* was something of an outlier for the Court and that angst over judicial activism during this period is overblown.[47] Second, other scholars in more recent years focused on the degree to which liberty of contract jurisprudence was drawn from legitimate and significant legal traditions, suggesting that the majority did not craft liberty of contract from whole cloth.[48]

---

[46] William M. Wiecek, *Liberty under Law: The Supreme Court in American Life*, *The American Moment* (Baltimore: Johns Hopkins University Press, 1988) 123-5. Such blatantly political decision-making on the part of appointed, life-tenured justices with the power of judicial review draws such attention, because it constitutes a threat to the propriety of empowered courts in a democratic system of government. Thus *Lochner* has served as a major blemish on the veneer of the judicial legitimacy that justifies the practice of judicial review ever since. Furthermore, the negative connotation of *Lochner* as an example of illegitimate judicial activism has complicated the subsequent development of substantive due process jurisprudence, as the Supreme Court has faced an ongoing struggle to establish the proper ambit of constitutionally protected liberty. In the modern revival of substantive due process, *Griswold v. Connecticut*, Justice Douglas strongly distances himself from the ghosts of *Lochner*. He writes, "we are met with a wide range of questions that implicate the Due Process Clause of the Fourteenth Amendment. Overtones of some arguments suggest that Lochner v. New York should be our guide. But we decline that invitation …. We do not sit as a super-legislature to determine the wisdom, need, and propriety of laws that touch economic problems, business affairs, or social conditions." 381 U.S. 479, 481-2 (1965).

[47] Charles Warren argued that the *Lochner* Court had struck down only two other state regulations, belying any characterization of the justices as reactionary. See Charles Warren, "A Bulwark to the State Police Power - the United States Supreme Court," *Columbia Law Review* 13 (1913), Charles Warren, "The Progressiveness of the United States Supreme Court," *Columbia Law Review* 13 (1913). See also Robert E. Cushman, "Social and Economic Interpretation of the Fourteenth Amendment," *Michigan Law Review* 20, no. 7 (1922), Louis M. Greeley, "The Changing Attitude of the Courts toward Social Legislation," *Illinois Law Review* 5 (1910), Charles M. Hough, "Due Process of Law Today," *Harvard Law Review* 32 (1919).

[48] Eric Foner contends that "freedom of contract" ideals developed out of the anti-slavery tradition and had infused labor rhetoric with a commitment to "self ownership" from that point on. See also Eric Foner, *Free Soil, Free Labor, Free Men: The Ideology of the Republican Party before the Civil War* (New York,: Oxford University Press, 1970), Eric Foner, *Politics and Ideology in the Age of the Civil War* (New York: Oxford University Press, 1980). See also Forbath, "The Ambiguities of Free Labor - Labor and the Law in the Gilded Age.", David M. Gold, "Redfield, Railroads and the Roots of 'Laissez-Faire Constitutionalism'," *American Journal of Legal History* 27 (1983), Charles W. McCurdy, "The Roots of Liberty of Contract

Given this intense and long-standing scholarly interest, the *Lochner* narrative makes an excellent disciplinary trope to explore from a fresh vantage point, starting from the perspective of those social movements that confronted the reality of an economic system governed by liberty of contract jurisprudence, and who competed with their peers to craft a response to these difficult constitutional conditions. To do so, I will focus on the efforts of organizations within the women's movement, the labor movement, and the civil rights movement that fought to win rights for and improve the conditions of workers within the ranks of their movements. Work is an important topic for constitutional study, not only for its relationship to economic survival but also for its relationship to civic status.[49] *Lochner* was a blow then to the citizenship of workers as well as their stomachs.[50] These three movements, through the organizations I highlight, developed three different responses to Lochnerian jurisprudence, and each of these responses would be significantly shaped by peer resource competition with other movement actors.

OUTLINE OF DISSERTATION

Reconsidered: Major Premises in the Law of Employment, 1867-1937," *Supreme Court Historical Society* 1984 (1984), William E. Nelson, "The Impact of the Antislavery Movement Upon Styles of Judicial Reasoning in Nineteenth-Century America," *Harvard Law Review* 87 (1974). Howard Gillman studies in-depth the long-standing constitutional commitment to principles of equality and resistance to class or partial legislation that he argues influenced the *Lochner* Court. See Gillman, *The Constitution Besieged : The Rise and Demise of Lochner Era Police Powers Jurisprudence*. See also Michael Les Benedict, "Laissez-Faire and Liberty: A Re-Evaluation of the Meanings and Origins of Laissez-Faire Constitutionalism," *Law and History Review* 3 (1985), David M. Gold, *The Shaping of Nineteenth-Century Law: John Appleton and Responsible Individualism*, *Contributions in Legal Studies, No. 57* (New York: Greenwood Press, 1990), William E. Nelson, *The Fourteenth Amendment: From Political Principle to Judicial Doctrine* (Cambridge, Mass.: Harvard University Press, 1988), Cass R. Sunstein, "Lochner's Legacy," *Columbia Law Review* 87 (1987).

[49] See Gretchen Ritter, *The Constitution as Social Design : Gender and Civic Membership in the American Constitutional Order* (Stanford, Calif.: Stanford University Press, 2006).

[50] With white working class men, African-Americans and women each confronting a slightly different challenge from their labor difficulties to their civic inclusion. See *ibid.*

In Chapter Two, I offer a fuller discussion and application of social movement theory to this project. I expand on the peer resource competition insight and demonstrate its significance to constitutional inquiry.

In Chapter Three, I explore the response of the labor movement to Lochnerian jurisprudence. The leading labor organization, the AFL, would rebuff efforts by other movements, including the women's movement and the civil rights movement, to pool resources. The AFL would instead develop its own sophisticated constitutional narrative built on the Thirteenth Amendment to contend with the conservative courts of the day, a narrative not open to women or African-Americans due to the closed nature of unions, which has been largely lost to constitutional history. I contend that this constitutional response has been lost to modern scholarship, because it was abandoned by the AFL, out of necessity, in order to sustain a coalition with more politically influential progressives, an elite social movement of the day. The progressives won out in the competition for resources, and their constitutional vision was accepted with judicial sanction of the Wagner Act in *NLRB v. Jones& Laughlin Steel Company*, which paved the way for the New Deal reconstruction of the state.[51] In recovering the constitutional vision of the AFL, I argue that the disciplinary obsession with the excoriation and subsequent modest rehabilitation of the *Lochner* Court, misses the arguably more significant doctrinal path of that era for our constitutional development that ran from the landmark case of *Loewe v. Lawlor*,[52] through *Duplex Printing Company v. Deering*,[53] to *Jones & Laughlin.* Starting constitutional inquiry into this period with the efforts of those clamoring for change, workers themselves, can uncover the significance of what has been previously obscured to constitutional scholars.

---

[51] 301 U.S. 1 (1937).
[52] 208 U.S. 274 (1908).
[53] 254 U.S. 443 (1921).

In Chapter Four, I examine the response of members of the civil rights movement to Lochnerian jurisprudence. African-Americans found themselves in the unusual position of actually benefiting as workers, on balance, from unpopular Lochnerian jurisprudence during the Progressive and Inter-War Eras. This is an insight that has been developed by some recent *Lochner* revisionists, such as David Bernstein and Paul Moreno, who suggest that free contract constitutionalism was not a universal evil for marginalized American populations.[54] This unique position among workers was not lost on African-American activists, and they would at times rally to the defense of the courts and of laissez-faire constitutionalism during this period. However, in studying the failed efforts of the NAACP and the NUL, which formed their own internal movement coalition, to enhance their constitutional resources through the formation of a coalition with the AFL and adoption of labor's constitutional narrative, it becomes clear that this strategic defense of the courts and their jurisprudence during this era by black activists in the NAACP and the NUL represented an expedient rather than a genuine commitment to laissez-faire constitutionalism. Incidental to these failed attempts is the revelation of a deep constitutional irony, as African-Americans found themselves in the odd position of challenging efforts by the AFL to expand the scope of the Thirteenth Amendment.

In Chapter Five, I study the development and legacy of the gendered exception to Lochnerian jurisprudence, created in *Muller v. Oregon*, which would culminate in the rejection of *Lochner* in *West Coast Hotel*.[55] The exception, which permitted state regulation of women workers under the police power, was built on a maternalist rationale and was the product of the constitutional activism of the women's movement itself, led

---

[54] David E. Bernstein, *Only One Place of Redress: African Americans, Labor Regulations, and the Courts from Reconstruction to the New Deal*, *Constitutional Conflicts* (Durham [N.C.]: Duke University Press, 2001), Paul D. Moreno, *Black Americans and Organized Labor : A New History* (Baton Rouge: Louisiana State University Press, 2006).

[55] 208 U.S. 416 (1908).

by the advocacy of the NCL. The NCL was not alone, however, in the extensive legislative campaigns for sex-specific regulations undertaken to exploit the gendered Constitution created in *Muller*. One of its leading partners was the WTUL, which was a SMO with roots in both the labor movement and the women's movement. The WTUL faced a choice after the decision in *Muller* between allocating its resources to the integration of women workers, whose interests the organization represented, into the labor movement, or allocating its resources to the exploitation of the gendered Constitution, which would channel women into a constitutional place apart from the labor Constitution being developed by the AFL. By studying the unsuccessful resource competition between the WTUL and the AFL, as the AFL rebuffed efforts by the WTUL to form a coalition and welcome women workers into unions, we can better understand the strategic tensions and constitutional tradeoffs inherent in embracing the gendered Constitution, which the WTUL subsequently did. These same tensions and tradeoffs created a rift in the women's movement and a heated resource competition between the NCL, WTUL and others with the National Women's Party (NWP) over the Equal Rights Amendment (ERA). This battle would be mirrored by a similar rift between a faction of women workers opposed to the gendered Constitution and the WTUL itself. I study this resource competition between the WTUL and these women workers to further explore the tradeoffs inherent in the gendered Constitution that would have a legacy that reached far beyond the repudiation of Lochnerian jurisprudence in 1937.

In Chapter Six, I will conclude the project by reflecting on how highlighting resource competition between social movement organizations not only assists us in reevaluating our commitment to the *Lochner* narrative as a means to understanding the constitutional development of the critical pre-New Deal years, but also serves as a useful tonic to a juricentric approach to studying constitutional development.

Chapter Two: Theoretical Framework

Studying social movements is complicated by the difficulty of identifying just what a social movement is. There is no one uniform definition for a social movement, nor is there universal agreement on how to measure the actions or political impact of a social movement. Do social movements exist only when mass political activity calling for some form of social change is occurring, or do social movements persist so long as some community that identifies with and promotes that social agenda continues?[1] Similarly, are social movements a set of preferences and demands for social change, a population holding those preferences and making those demands for social change, or sequences of contentious politics triggered by those preferences and demands for social change?[2] Frequently constitutional scholars who incorporate social movements in their work do not attend to these definitional issues, raising questions as to the precise nature of the

---

[1] Jo Freeman and Victoria L. Johnson, *Waves of Protest : Social Movements since the Sixties*, *People, Passions, and Power* (Lanham, MD: Rowman & Littlefield Publishers, 1999) 3. For instance, was the women's movement still technically a social movement between its first wave that witnessed mass activity on behalf of suffrage and its second wave that witnessed mass activity on behalf of equality?

[2] McCarthy and Zald contend that social movements represent preferences for social change, while Tilly and Tarrow each pinpoint episodes of contentious politics as social movements. According to McCarthy and Zald, a social movement is "a set of opinions and beliefs in a population representing preferences for changing some elements of the social structure or reward distribution, or both, of a society." Mayer N. Zald and John D. McCarthy, "Resource Mobilization and Social Movements: A Partial Theory," in *Social Movements in an Organizational Society: Collected Essays*, ed. Mayer N. Zald and John D. McCarthy (New Brunswick, U.S.A.: Transaction Books, 1987), 20. But according to Charles Tilly, a social movement is "a sustained challenge to power holders in the name of a population living under the jurisdiction of those power holders by means of repeated public displays of that population's worthiness, unity, numbers, and commitment." Charles Tilly, "From Interactions to Outcomes in Social Movements," in *How Social Movements Matter*, ed. Marco Giugni, Doug McAdam, and Charles Tilly (Minneapolis, Minn: University of Minnesota Press, 1999), 260. Sidney Tarrow explains that social movements are "sequences of contentious politics that are based on underlying social networks and resonant collective action frames, and which develop the capacity to maintain sustained challenges against powerful opponents." Sidney G. Tarrow, *Power in Movement: Social Movements and Contentious Politics*, 2nd ed., *Cambridge Studies in Comparative Politics* (Cambridge [England] ; New York: Cambridge University Press, 1998) 2.

phenomena they are describing as social movements and the conclusions they draw about them.

In this dissertation, I use the categories of social movement analysis set forth by McCarthy and Zald, whose classic work on resource mobilization would form the backbone of the resource mobilization approach (RM) to the study of social movements. My project draws significantly from RM theory. They define three concepts that are important to the theory and structure of my project: social movement (SM), social movement organization (SMO), and social movement industry (SMI).

McCarthy and Zald define these terms as follows:

- *Social Movement (SM)*: A set of opinions and beliefs in a population representing preferences for changing some elements of the social structure or reward distribution, or both, of a society.[3]
- *Social Movement Organization (SMO)*: A complex or formal organization that identifies its goals with the preferences of a social movement or a countermovement and attempts to implement those goals.[4]
- *Social Movement Industry (SMI)*: All social movement organizations that have as their goal the attainment of the broadest preferences of a social movement.[5]

Upon reviewing these definitions, it appears that McCarthy and Zald could be simply describing issue cleavages and basic interest aggregation by interest groups or political parties. They admit as much, but emphasize that when dealing with social movements one is dealing with ideas and organizations that operate at the margins of the

[3] Zald and McCarthy, "Resource Mobilization and Social Movements: A Partial Theory," 20.
[4] Ibid.
[5] Ibid., 21.

political system.[6] Social or political marginality appears to be the key distinction for many scholars between social movements and interest groups or other ordinary political actors and activity.[7] Paul Burstein expresses great frustration, however, at this indeterminacy. He suggests that attempting to assess where contentious collective action occurs on a continuum of institutionality or conventionality to determine whether a social movement, rather than an interest group or even a political party, is involved is a fruitless enterprise. No meaningful line can be drawn. Instead, he recommends that social movements and their component organizations be treated as interest groups for purposes of study.[8] For the most part, many scholars working in this area have abandoned, out of frustration, the concept of a social movement altogether in favor of the more inclusive and more readily understandable and analyzable concept of contentious politics.[9]

I do not go so far in this dissertation. I do not deny the fluidity and overlap between social movement politics and ordinary interest group politics, but social movement terminology is so well entrenched in our common political understanding that it is useful to continue to employ it in this dissertation. Furthermore, during my period of study of the early twentieth century, it is relatively uncontroversial to describe industrial workers, women, and African-Americans as sufficiently marginalized, both as political

---

[6] Ibid., 20.

[7] Paul Burstein, "Social Movements and Public Policy," in *How Social Movements Matter*, ed. Marco Giugni, Doug McAdam, and Charles Tilly (Minneapolis, Minn: University of Minnesota Press, 1999), 7. Gamson highlights a lack of previous mobilization for the represented population. William A. Gamson, *The Strategy of Social Protest*, 2nd ed. (Belmont, Calif.: Wadsworth Pub., 1990) 16. Tilly isolates the lack of formal representation for the represented population. Charles Tilly, "Social Movements and National Politics," in *Statemaking and Social Movements : Essays in History and Theory*, ed. Charles Bright and Susan Friend Harding (Ann Arbor: University of Michigan Press, 1984), 306. McAdam focuses on the employment of unconventional and disruptive politics by a population. Doug McAdam, *Political Process and the Development of Black Insurgency, 1930-1970* (Chicago: University of Chicago Press, 1982) 25.

[8] Burstein, "Social Movements and Public Policy," 8-9.

[9] Doug McAdam, Sidney G. Tarrow, and Charles Tilly, *Dynamics of Contention*, *Cambridge Studies in Contentious Politics* (Cambridge ; New York: Cambridge University Press, 2001). See also McCann, "Law and Social Movements: Contemporary Perspectives," 23.

activists and in the preferences in society for their social and civic empowerment, that it is fair to apply social movement terminology to their activity, regardless of whether some of the SMOs I study are more institutionalized or conventional in their political approach than others.

Returning to McCarthy and Zald's social movement concepts, this categorization is helpful because it provides theoretical guidance for precise analysis of social movement activity. These categories account for both the ideational and organizational aspects of social movements, and they allow for the possibility of studying social movements along multiple dimensions. While a social movement is a set of opinions or beliefs in a population aimed at creating significant social change, SMOs are the "carriers" of a social movement. They are embedded in a social movement and institutionalize its goals and conceive and carry out the tactics necessary to achieve those goals.[10] For instance, the NAACP is a SMO that works to achieve the goals of the civil rights movement.[11] In order to gain leverage on the question of the impact of social movements on constitutional development, SMOs will serve as my units of analysis because SMOs make the constitutional demands that will be accepted or denied by constitutional arbiters such as the courts or Congress.[12]

McCarthy and Zald's categorization is also helpful because it acknowledges that social movements are characterized by multiple voices and beliefs. Social movements are

---

[10] William A. Gamson, "Introduction," in *Social Movements in an Organizational Society: Collected Essays*, ed. Mayer N. Zald and John D. McCarthy (New Brunswick, U.S.A.: Transaction Books, 1987), 1.

[11] Using McCarthy and Zald's conceptual framework, the civil rights movement is a set of opinions and beliefs in society representing preferences for justice, broadly conceived, for African-Americans. These preferences can be realized through the actions of SMOs.

[12] As discussed in the last chapter, my case SMOs are, from the women's movement, the Women's Trade Union League (WTUL) and the National Consumers' League (NCL), from the civil rights movement, the National Association for the Advancement of Colored People (NAACP) and the National Urban League (NUL), and from the labor movement, the American Federation of Labor (AFL).

rarely subject to hierarchical control.[13] There can exist a spectrum of organizations or localized clusters of individuals, with varying degrees of institutional sophistication, that share the general (though not necessarily identical) beliefs of a social movement and who act independently in furtherance of those beliefs. McCarthy and Zald acknowledge this diversity in representation of a social movement's preferences.[14] As defined above, a SMI is their "organizational analogue" of a social movement.[15] For example, the NAACP is hardly the only organization active in the civil rights movement. The NAACP is one member of a SMI that includes, or has included, other SMOs such as the NUL, the Southern Christian Leadership Conference (SCLC), the Congress of Racial Equality (CORE), and the Student Non-Violent Coordinating Committee (SNCC).

Given this diversity in representation, a social movement will be characterized by multiple (and not always perfectly coherent) beliefs and policy preferences, and likewise a typical SMI will be comprised of multiple SMOs with varied beliefs and varied policy preferences in service of those beliefs that will, once again, not always be coherent or complementary. For example, as will be discussed in some detail later in this dissertation, the women's movement was famously split following the winning of suffrage by a significant policy disagreement between those SMOs that favored support for protective labor legislation for women, such as the NCL and the WTUL, and those

---

[13] Jo Freeman, "A Model for Analyzing the Strategic Options of Social Movement Organizations," in *Waves of Protest : Social Movements since the Sixties*, ed. Jo Freeman and Victoria L. Johnson (Lanham, MD: Rowman & Littlefield Publishers, 1999), 221. See also Mayer N. Zald and John D. McCarthy, "Social Movement Industries: Competition and Conflict among Smos," in *Social Movements in an Organizational Society: Collected Essays*, ed. Mayer N. Zald and John D. McCarthy (New Brunswick, U.S.A.: Transaction Books, 1987), 161.

[14] Many resource mobilization scholars are interested in how this diversity of representation affects the life cycle and efficacy of different social movements. For instance, are social movements that are characterized by greater institutionalization in their SMOs or hierarchical control by their SMOs ultimately more successful or more fully mobilized? See generally Freeman, "A Model for Analyzing the Strategic Options of Social Movement Organizations."

[15] Zald and McCarthy, "Resource Mobilization and Social Movements: A Partial Theory," 21.

SMOs, such as the National Woman's Party (NWP), that favored formal equality for women as a policy goal. These two approaches to achieving justice for women were incompatible at the time, and the women's movement SMI split, as these SMOs were unable to negotiate a policy compromise. The implication of such diversity, illustrated above, is that resource competition will take place between SMOs within a SMI, as well as between SMOs in peer SMIs. Thus the constitutional demands made by a SMO will be channeled by competition with both internal and external peers.

One final observation is pertinent. Many SMOs represent beliefs and pursue policy goals that are consistent with the umbrella beliefs of multiple social movements, and social movements themselves can frequently share overlapping beliefs and policy goals. For instance, it is often difficult to draw meaningful lines between organizations working in the environmental movement, the animal rights movement, and even many peace movements, much less draw lines between the movements themselves. SMIs, therefore, are both highly permeable and subject to overlap, therefore strict assignment of SMOs to one SMI or another may not be possible. For instance, the National Organization for Women (NOW), given its policy commitments, could be classified as a SMO operating in both the women's movement SMI and the abortion rights movement SMI. In fact, it might be possible to characterize the abortion rights movement itself as a sub-movement of the women's movement if one considers the broadest possible preferences of each movement. In my own case studies, this complication is particularly relevant to determining whether a group, such as the NCL, which was dominated by women and pursued protective labor legislation for women but had an overall mission of improving the workplace, properly belongs in the women's movement SMI, the labor

movement SMI, or both.[16] Given such blurring of the lines between many social movements and their SMIs, my study of peer resource competition between SMOs will treat all SMOs as peers who compete, whether that competition is internal or external to their particular SMI.

The resource mobilization approach and the political process approach to the study of social movements are the two primary theoretical influences on this project. These two schools of social movement theory developed in response to the classical model of social movements that emerged in American social science in the years preceding the mass protests of the Civil Rights Era. The classical model emphasizes the psychological state of individuals that take part in social movements. According to this model, some strain in society creates psychological disruption in individuals who turn to some form of extreme collective action to relieve that psychological disruption.[17] Scholars, in the wake of the movement activity of the 1960's, were dissatisfied with this psychological explanation for social movement participation.

Out of this academic dissatisfaction developed the resource mobilization approach (RM) to social movements, from which I borrow social movement terminology. RM theory emphasizes the rationality of individuals involved in social movements.[18] RM theorists do not view social movement actors as discontented individuals working out

---

[16] The NCL was made up of many women that considered themselves social progressives. Thus the NCL may also be categorized as part of the progressive movement's SMI. Assuming of course that the progressive movement can properly be categorized as a social movement, despite common reference to progressives as a movement from this period of history. It was a white, middle class movement, thus it is difficult to consider the progressives sufficiently marginalized to constitute a typical social movement under the McCarthy and Zald categorization. I will take this issue up in greater detail in Chapter Five when I study resource competition between the labor movement and progressive elite.

[17] See generally William Kornhauser, *The Politics of Mass Society* (Glencoe, Ill.,: Free Press, 1959), Neil J. Smelser, *Theory of Collective Behavior* (New York,: Free Press of Glencoe, 1963), Ralph H. Turner and Lewis M. Killian, *Collective Behavior* (Englewood Cliffs, N.J.,: Prentice-Hall, 1957).

[18] See generally Jo Freeman, *The Politics of Women's Liberation: A Case Study of an Emerging Social Movement and Its Relation to the Policy Process* (1973), microform :, J. Craig Jenkins, *The Politics of Insurgency : The Farm Worker Movement in the 1960s* (New York: Columbia University Press, 1985), Zald and McCarthy, "Resource Mobilization and Social Movements: A Partial Theory."

their psychological confusion or dissatisfaction. RM theory, therefore, assumes that movement activity is purposeful and governed by strategic considerations. Purposive, rational behavior on the part of social movement actors is a central assumption of my own theory of resource competition between peer SMOs. As discussed in the last chapter, RM theory also provides a helpful distinction between social movements and their constituent organizations (SMOs), providing greater theoretical leverage on social movement activity and how it might vary and sustain itself.

The political process approach to the study of social movements developed out of RM theory as some scholars became dissatisfied with the organizational focus of RM theory. Political process scholars place more emphasis on the political environment and its effect on social movements. Movements succeed or fail based on the opportunities available to them in the political system, such as elite alliances, institutional or electoral instability, or societal and institutional tolerance of protest.[19] Inherent in my theory of resource competition is an acknowledgment of the wider political environment as a locus for resources that can be exploited. My theory of peer resource competition assumes not only that SMOs behave rationally, but also that environment matters. Regardless of their own entrepreneurial or strategic prowess, SMOs may find themselves unable to amass the resources necessary to be successful. Certainly the organizations I study in this dissertation had difficulty realizing their goals. Nevertheless SMOs will attempt to strategically account for environmental conditions in the formation of their constitutional claims and their interactions with peers.

---

[19] See generally Anne N. Costain, *Inviting Women's Rebellion: A Political Process Interpretation of the Women's Movement* (Baltimore: Johns Hopkins University Press, 1992), William A. Gamson, *The Strategy of Social Protest* (Homewood, Ill.: Dorsey Press, 1975), McAdam, *Political Process and the Development of Black Insurgency, 1930-1970*, Frances Fox Piven and Richard A. Cloward, *Poor People's Movements : Why They Succeed, How They Fail* (New York: Vintage books, 1979), Tarrow, *Power in Movement: Social Movements and Contentious Politics*, Tilly, "Social Movements and National Politics."

RESOURCE COMPETITION AND CONSTITUTIONAL ADVOCACY

Winning constitutional rights requires substantial resources. SMOs cannot expect to have their demands for constitutional change met without a fight, for which they must be suitably armed. Such needed resources can come in many forms, and can include everything from material assets such as money and manpower, to intangible assets such as political connections and public support or receptivity to the message or members of a movement, to targets of opportunity such as favorable existing constitutional precedents that can be exploited. SMOs, since they typically represent the interests of marginalized groups or unpopular beliefs, must be opportunistic in amassing these resources and putting them to use if they hope to force the kind of social and political change necessary to secure a constitutional victory.

As in any environment, resources are limited, and scarcity leads to competition.[20] Like any other organizations in a shared environment, SMOs compete with each other and they must be ready to adapt to that competition if they are to survive and succeed.[21] Therefore, SMOs can be expected to consider, in conjunction with their own ideological beliefs and policy goals, a wide variety of resources available to them in crafting their social, political, and constitutional claims and tactics.[22] These resources can be found within the organization itself, in the wider sociopolitical environment, and in the government.

---

[20] I borrow this insight from the field of ecology.

[21] Charlotta Stern, "The Evolution of Social-Movement Organizations: Niche Competition in Social Space," *European Sociological Review* 15, no. 1 (1999): 91.

[22] Just as a SMO may have resources available to it, such as monetary donations, volunteer manpower or well-placed political contacts, it will also be confronted with constraints, such as hard costs like legal fees or office expenses, negative public opinion, or adverse laws already on the books. I will treat constraints (negative resources) as inherent in the concept of resources.

Figure 1 below illustrates this framework for a SMO's strategy formation as it assesses its organizational resources, the resources present in the wider sociopolitical environment, and relevant governmental resources. Discussion of Figure 1 will follow.

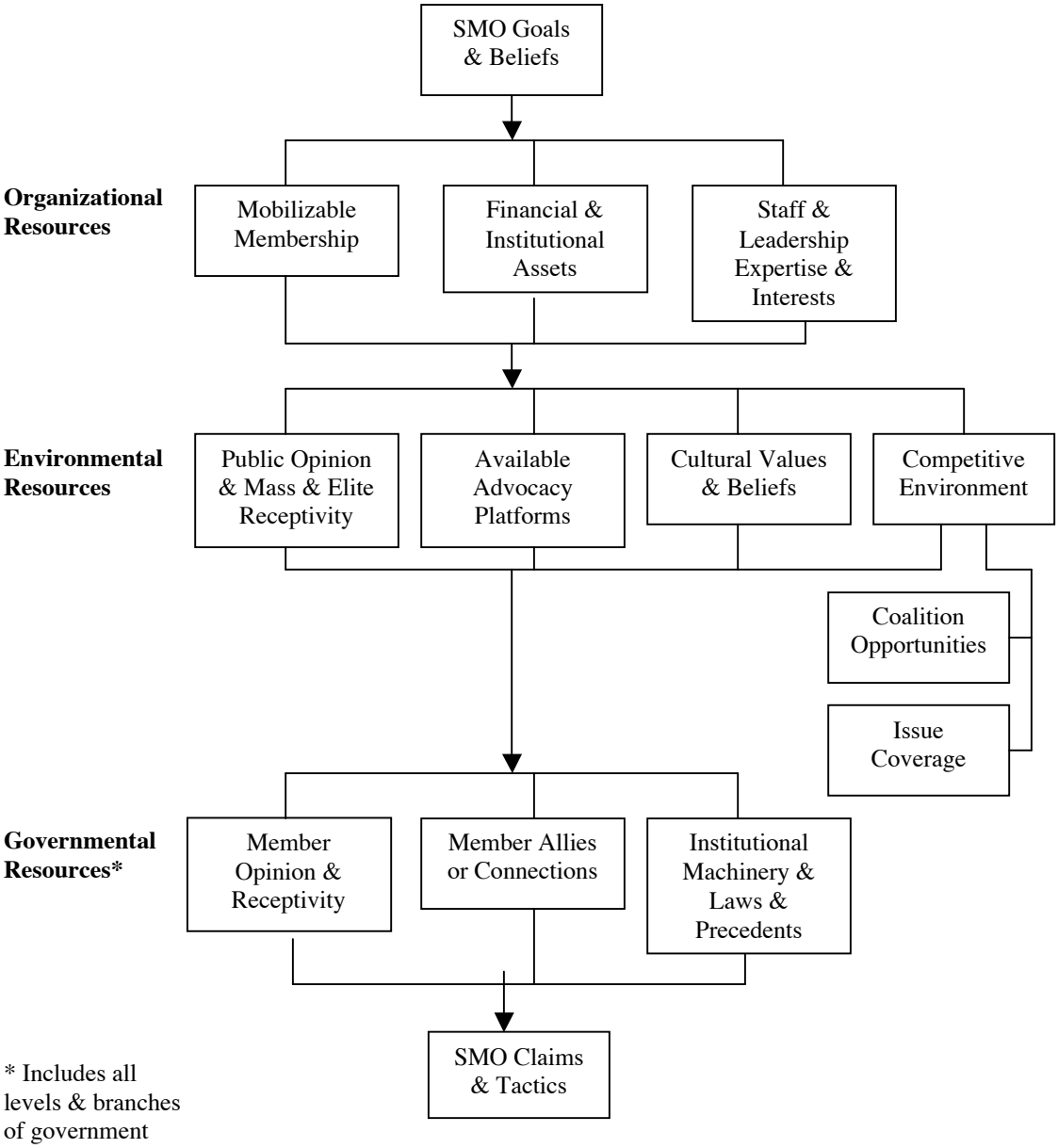

Figure 1: Formation of SMO Strategy[23]

[23] I am indebted to Jeffrey Berry for some of the above terminology. See Jeffrey M. Berry, *Lobbying for the People : The Political Behavior of Public Interest Groups* (Princeton, N.J.: Princeton University Press, 1977) 263. I do not mean to suggest in this figure that SMOs follow a strict progression of resource evaluation, from organizational resources first, to environmental resources second, to governmental resources third, in developing their strategies. Strategy formation is a dynamic and interactive process,

Organizational resources are those assets that can be immediately tapped by a SMO. SMOs will pursue strategies that reflect both what, and who, they know, and what they can afford. The size of a group's membership (or wider ideological adherents that can be mobilized) will affect its ability to engage in mass protest as a tactic, or to engage in other types of mass campaigns like petitions or congressional outreach. Likewise, the wealthier a SMO, or the greater its institutional resources such as office space, professional staffing, or in the modern context computer expertise, the better positioned it will be to support extensive public relations campaigns and other cost-intensive projects. SMOs will also be constrained by the interests and expertise of its leadership and staff. For instance, if a SMO is staffed by a high concentration of lawyers it may be more likely to pursue legal and constitutional strategies than a SMO staffed by a high concentration of social workers, which might focus more on social or economic outreach on behalf of its movement cause. As will be discussed later in this dissertation, just such a division in tactical approach existed between the legally oriented NAACP and the service oriented NUL. Similarly, a SMO led by older or more socially and economically established individuals might tend to more conservative or elite-oriented tactics than SMOs dominated by younger or more socially alienated leadership. Such a contrast in approaches occurred in the women's movement with the tactical divide between the older and more established National American Woman Suffrage Association (NAWSA), led by the likes of Carrie Chapman Catt, which preferred backroom elite persuasion in the fight for suffrage, and the young radicals of the NWP, such as Alice Paul and Lucy Burns, who engaged in aggressive public protest.

---

where SMOs will be simultaneously assessing and husbanding the various available resources in their environment.

Before discussing environmental resources, which include peer SMO activities, I will briefly review the types of governmental resources that may impact SMO strategy formation. Just as mass public opinion can serve as a resource, or constraint, on the tactical and the narrative options of a SMO, so can the opinion of members of government, in any branch or at any level, and their receptivity to a movement's message or population. Sometimes government elite may be a willing audience for movement demands.[24] They may even become movement allies, serving as an active partner in creating constitutional change that favors a particular group. Such an alliance may reflect shared values and beliefs, or it may reflect a shared policy preference. For instance, foreign policy concerns during the Cold War pushed government elite, particularly within the executive, to favor the extension of greater civil rights to African-Americans to blunt communist critique of the lack of equality in the American system.[25] Alliances between government elite and SMOs are not always built on shared beliefs or policy preferences. They may also be based on personal or party or other political connections. Any connection between organization and elite, whether it is ideological or expedient in nature, can provide a SMO with valuable access to the policymaking process. SMOs will typically craft their constitutional strategy to exploit that access. Of course, this access is not always judicial, thus a SMO will not always craft a constitutional strategy that relies on litigation. They will prioritize the branch or level of government where they have the most receptive audience. For instance, as will be discussed later in this dissertation, the AFL had a hostile audience in the courts, thus they crafted their constitutional claims to appeal to congressional power to control the courts under the Constitution.

---

[24] This receptivity to a SMO's claims may not be identical to mass receptivity. SMOs will be sensitive to when they may have an elite inroad.

[25] See Mary L. Dudziak, *Cold War Civil Rights : Race and the Image of American Democracy*, *Politics and Society in Twentieth-Century America* (Princeton, N.J.: Princeton University Press, 2000).

Access to the policymaking process is an important resource for SMOs, and it may come through political connections or allies as discussed above, or it may come via institutional machinery that provides groups with a forum for reaching members of government with their message. Such institutional machinery might include congressional hearings or bureaucratic agencies. For instance, the Equal Employment Opportunity Commission (EEOC) and the President's Commission on the Status of Women (PCSW) were two important access points for movement actors within the women's movement to inform and lobby public officials to their cause during the 1960's and 1970's. Another popular access point for SMOs is the amicus brief, which provides movements with a low-cost opportunity to influence judicial policymaking. The NCL was a pioneer in this area with the creation of the Brandeis Brief.

Laws, regulations, and judicial precedents are also important resources for SMOs seeking constitutional change. Even if an existing law, regulation or precedent does not directly serve a policy preference held by a SMO, it may be exploited by the SMO in an effort to expand its reach to serve the interests of the movement. Typically it is more cost effective to leverage an existing resource than to attempt to create an entirely new resource. This is why cooption is such an appealing tactic for SMOs, particularly where resource creation is especially costly. Laws, regulations and judicial precedents do not all cost the same to create or to leverage. It may be easier to lobby an executive agency to adjust regulatory enforcement than it is to move Congress to make a legislative change. It may be more costly yet to get a court to either create an entirely new precedent or overturn an existing precedent in our incremental, common law system. SMOs must take all these factors into consideration when choosing a forum for their constitutional demands. Women activists first tried (unsuccessfully) to exploit the Fourteenth Amendment to win suffrage in the years following its ratification, before ever

opting for a much more cost-intensive amendment strategy that required winning over both 2/3 of Congress and 3/4 of state legislatures.

As I stated earlier, the flip side of a resource is a constraint, and existing laws, regulations and precedents may sometimes be barriers to certain constitutional demands favored by a SMO rather than possible avenues to realizing those demands. SMOs may determine that some existing laws or precedents are too costly to challenge, therefore prompting strategies to work around these hostile government policies or abandon altogether certain constitutional narratives. Once again, as will be discussed later, the labor movement would encounter just such constraining forces when dealing with the courts during the Progressive Era, prompting the AFL to turn instead to legislative strategies for constitutional change.

Environmental resources available to SMOs are quite varied. Public opinion of a social movement and public receptivity of either movement beliefs or a movement population will govern strategy formation. If a movement is unpopular then a SMO will not be able to select a strategy that relies on high public support for success. Sometimes mass and elite receptivity to a movement may be split. SMOs must be sensitive then to the audience they target when making their appeals. The availability of media opportunities or other advocacy platforms will also impact SMO strategy. The flourishing of the internet has offered a tremendous new and readily accessible media platform to SMOs. SMOs may also find resources, and of course constraints, in American cultural values and beliefs, including constitutional values. Louis Hartz famously lamented that American liberal commitments prevented socialism or other leftist movements from flourishing.[26] Hendrik Hartog has observed the power of

[26] Louis Hartz, *The Liberal Tradition in America; an Interpretation of American Political Thought since the Revolution*, [1st ed. (New York,: Harcourt, 1955).

constitutional values of liberty and equality to inspire otherwise marginalized groups to success.[27]

In addition to these environmental conditions, competitors will also factor into SMO strategy formation. It is the competitive environment that is my focus in this project. At any moment, numerous actors will be actively pursuing social and political influence and control over the direction of American public policy and the distribution of social goods. Thus, a SMO does not form its strategy (or for that matter its goals) in a vacuum. It must take other actors and their ideas into consideration, noting what resources can be captured from competitors and what issues are currently being promoted that may bear on their own interests. Other actors can include corporations, parties, interest groups, other SMOs, both those in the organization's own SMI and those in the SMIs of other movements, religious groups, charitable organizations, foundations, professional associations etc. If any of these actors share consistent or complementary beliefs or goals with a SMO, they may be tapped as coalition partners and their resources shared. If a SMO is so lucky, they may find sponsors, such as foundations, among these other actors, which are willing to donate resources. Similarly, if other groups are promoting ideas or policy proposals that are beneficial to a SMO, the SMO may consider that issue adequately covered without having to expend their own resources for its promotion. The SMO may also be able to co-opt that issue and its success for its own benefit. Just as the flip side of a resource is a constraint, the flip side of cooperation is competition. Thus, where other actors are promoting inconsistent ideas or policies, a SMO may adopt competitive, contesting tactics, such as protest and other forms of negative publicity, pointed political lobbying, or challenging litigation, to blunt the success of those efforts.

---

[27] Hartog, "The Constitution of Aspiration and the Rights That Belong to Us All."

I am particularly interested in these cooperative/competitive relationships between SMOs as these relationships relate to their constitutional claims and tactics.[28] Not surprisingly, organizations embedded in American social movements have a long history of joining forces with each other, borrowing ideas and strategies from one another, and jousting with each other to control the constitutional high ground.

This interaction between SMOs may take many forms depending on whether these peer organizations hold compatible or incompatible goals and beliefs. Figure 2 and Figure 3 below sketch the possible tactical relationships that may develop between peer SMOs given the compatibility of their respective ambitions. Discussion of these figures will follow.

[28] The decision-making framework I have sketched above is not limited in applicability to SMOs, but I will focus my discussion on the concerns relevant to SMOs in this dissertation.

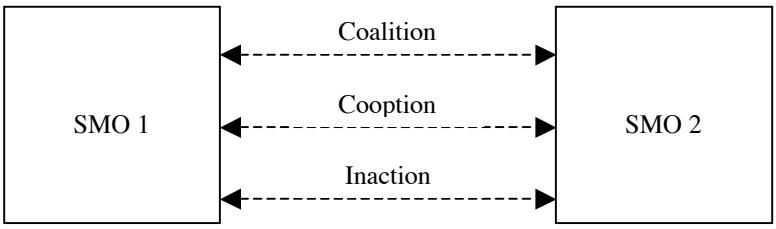

Figure 2: Strategic Options Where Peer SMOs Hold Compatible Belief or Policy Goal

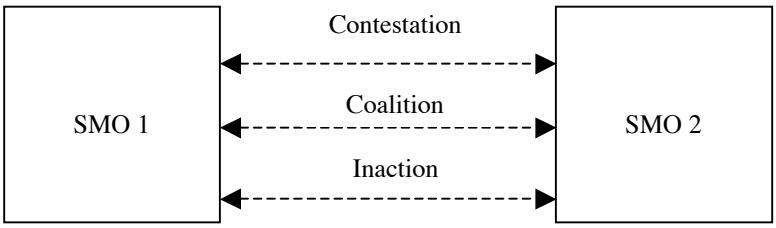

Figure 3: Strategic Options Where Peer SMOs Hold Incompatible Belief or Policy Goal

Where SMOs share compatible beliefs or policy preferences, they can offer important benefits to their activist neighbors. If social movements share complementary beliefs and goals, then the SMOs that represent those movements may be willing to pool their resources and form a coalition. The ability to share funds, offices, workers, expert advisers, membership lists, political connections, public attention and the like can be invaluable to advocacy groups.[29] Of course, this pooling of resources will likely come at the cost of some compromise on goals and tactics, since multiple preferences must be met when a coalition is formed. Although they had joined a coalitional group, the American Equal Rights Association (AERA), formed to advance both the interests of women and of African-Americans in the years following the Civil War, Elizabeth Cady Stanton and Susan B. Anthony would quickly break off to form their own SMO to serve women's interests exclusively, the National Woman Suffrage Association (NWSA), because they could not accept the ideological and tactical compromises necessitated by the AERA coalition.[30] Because tactical and narrative negotiation is an inherent part of coalition, a coalition strategy can be useful for groups that have minor ideological or policy differences that they may be able to comprise on in order to gain the benefits of pooling resources.

---

[29] Jeffrey M. Berry's study of public interest groups identifies coalitions as one of the most popular strategic options for these groups. Berry, *Lobbying for the People : The Political Behavior of Public Interest Groups* 254-61. Coalition is also a likely tactic among SMOs both within a particular SMI and between peer SMIs because they are frequently populated by either an interconnected or similarly trained elite. Karen O'Connor, *Women's Organizations' Use of the Courts* (Lexington, Mass.: Lexington Books, 1980). Often activists are also involved with multiple SMOs also leading to a natural preference for coalitional tactics. This was particularly the case during the Progressive Era. Naomi Rosenthal et al., "Social Movements and Network Analysis: A Case Study of Nineteenth-Century Women's Reform in New York State," *The American Journal of Sociology* 90, no. 5 (1985).

[30] Stanton and Anthony were unmoved by the suggestion that women should give up the fight to have the Fourteenth Amendment drafted to explicitly protect sex because it was the "Negro's Hour," and winning protections against racial discrimination took priority at that time. See Elizabeth Cady Stanton et al., *History of Woman Suffrage* (Rochester, N.Y.: C. Mann, 1887) v.2.

Other SMOs can also serve as useful models for success. If a litigation strategy or legislative campaign has succeeded for a peer SMO, then other SMOs can follow in their footsteps without having to expend the resources necessary to develop an original strategy for constitutional change. Perhaps more important than the cost effectiveness of the adaptation necessary for cooption is the tremendous benefit that flows from the use of analogies to make that adaptation of a winning constitutional strategy work. Constitutional recognition of rights by the government's judicial and/or political elite grants a powerful moral legitimacy to a movement's cause that can motivate broad public support for change in favor of other movements that can convince the public, and members of the government, that they are similarly situated. Analogies are particularly useful when the mobilization of law will be through litigation, as there may be inviting legal precedents available for exploitation. Analogies are also a major tool of legal reasoning, making them even more attractive when mobilizing law.[31] The landmark constitutional victories of the civil rights movement in the mid-twentieth century have created a cottage industry in "like race" analogies for modern SMOs across many social movements.[32] Once again, there has been some dissatisfaction expressed among activists and commentators who chafe at the ideological compromises inherent in such tactics requiring adaptation.[33] Nevertheless, cooption remains an enticing tactic because it is

---

[31] Cass R. Sunstein, "On Analogical Reasoning," *Harvard Law Review* 106, no. 3 (1993).

[32] Janet E. Halley, "Gay Rights and Identity Imitation: Issues in the Ethics of Representation," in *The Politics of Law : A Progressive Critique*, ed. David Kairys (New York, NY: Basic Books, 1998). See also Serena Mayeri, ""A Common Fate of Discrimination": Race-Gender Analogies in Legal and Historical Perspective," *Yale Law Journal* 110, no. 6 (2001).

[33] Catherine A. MacKinnon, "Reflections on Sex Equality under Law," *Yale Law Journal* 100 (1991). For a different view on the proper interpretation and deployment of the Fourteenth Amendment, see Robin West, *Progressive Constitutionalism : Reconstructing the Fourteenth Amendment*, *Constitutional Conflicts* (Durham: Duke University Press, 1994), Robin West, *Re-Imagining Justice : Progressive Interpretations of Formal Equality, Rights, and the Rule of Law*, *Applied Legal Philosophy* (Aldershot, Hants, England ; Burlington, VT: Ashgate, 2003).

difficult for a SMO to independently amass the resources necessary to trigger constitutional change.

Related to the cooption strategy is the choice to assume adequate coverage of issues by other groups. An issue coverage strategy differs from cooption, because when a SMO co-opts an issue, policy or belief that has been promoted by another group, it actively claims that issue, policy or belief for its own use, expending resources in order to capture greater resources. When assuming issue coverage, a SMO will not expend any resources and will not make an explicit claim involving that issue, policy or belief. Inaction becomes its tactic. For example, a SMO dedicated to advancing the interests of unwed mothers may rely in part on the benefits to unwed mothers that flow from the efforts of SMOs or public interest groups dedicated to advancing the interests of children, while choosing to concentrate their own resources on other issues or tactics. However, the greater the salience of an issue, policy or belief to the goals and values of a SMO, the less likely they are to settle for the passive tactic of inaction as against pursuing active strategies such as coalition, cooption, or if the issue or policy being promoted by others cuts against their interests, contestation. In some cases, inaction may be the tactical posture between peer groups either because a SMO is indifferent to the actions of the other or possibly unaware of other groups' preferences or actions. Indifference or ignorance of competitors is more likely where issue salience for a SMO is low or the consequences of inaction are low.

Sometimes peer SMOs do not share compatible beliefs or policy preferences. While SMOs might monitor the activities of other SMOs in order to identify potential coalition partners or targets for resource-saving cooption or issue coverage, they may also monitor the constitutional claims of other groups in order to preserve their own assets and options. The Constitution is not a boundless resource. It is a discrete text, with

demanding limits on attempts at both textual and interpretive expansions of that text.[34] Once legal precedents are set or legislation passed in response to the claims of one movement, this may foreclose the options of other movements. Not only may it be harder to overcome a constitutional precedent in the courtroom, or repeal or replace an existing law, but also SMOs may face the constraints of adverse public opinion and constitutional norms that have been subsequently influenced by the institutionalization of these precedents or laws. While social movements, being the good constitutional Protestants that they are, typically remain ideologically resilient in the face of hostile precedent, it is nevertheless extremely costly, and perhaps untenable, to fight an uphill constitutional battle, particularly if an SMO plans to fight through the courts where precedent controls. In these instances, SMOs may not be able to afford to allow some issues to be covered or policies promoted that are inconsistent with their own interests. Contestation of the ideas or policy proposals of other SMOs becomes necessary.[35]

This constitutional scarcity is illustrated in the fate of the Privileges and Immunities Clause of the Fourteenth Amendment.[36] In the years immediately following the amendment's ratification, a group of white butchers from Louisiana famously attempted to test its scope in *The Slaughterhouse Cases*.[37] The butchers argued that the

---

[34] Amending the Constitution is a difficult, and according to some commentators nearly impossible, task. SMOs therefore need exceptional resources to win a constitutional amendment. See Sanford Levinson, *Responding to Imperfection : The Theory and Practice of Constitutional Amendment* (Princeton, N.J.: Princeton University Press, 1995). Similarly, given the common law system we operate under, with its reliance on judicial precedent, convincing courts to go in a new or contradictory constitutional direction will also require substantial resources.

[35] This point is obvious in competition between movement and countermovement. The point of SMO efforts in oppositional movements is to foreclose the constitutional options of opponent groups. My study focuses, however, on SMOs that are not direct opponents. But even among SMOs that do not share mutually exclusive overall goals or beliefs, there may be times when they pursue particular policies that reduce the resources of their peers, thereby necessitating competition and contestation.

[36] Section 1 of the Fourteenth Amendment reads in part: … No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; ….

[37] 83 U.S. 36 (1873).

Privileges and Immunities Clause protected the right of a citizen to pursue his profession. The Supreme Court reacted strongly to the attempt to apply the Fourteenth Amendment to situations that did not involve racial discrimination, gutting the Privileges and Immunities Clause in its decision and rendering it a dead letter ever since. This had an immediate effect on the related efforts of members of another social movement, as women litigating for both the right to pursue a profession and the right to vote under the guise of the Fourteenth Amendment before the Supreme Court were rebuffed.[38] Since then, this intriguing constitutional resource has been effectively off the table for all subsequent SMOs that might consider its use. Legal scholars like to point to just such constitutional resources as great avenues for social progress, but the reality of precedent, constitutional scarcity, and the scarcity of resources available to SMOs make such adventuresome attempts by SMOs, who create the cases and controversies necessary to involve constitutional decision-makers, to revive or revisit these constitutional provisions unlikely.[39]

Should other SMOs seek to capitalize on analogies to a social movement's winning constitutional claim, this may limit the flexibility or scope of the rights or remedies being coopted. In this instance, SMOs may need to go on the defensive to contest these attempts at cooption. As discussed in the last chapter, many civil rights activists, particularly among the black clergy, have jealously guarded the civil rights legacy against cooption by gay activists. Scholars have also noted that the flexibility and

---

[38] *Bradwell v. Illinois*, 83 U.S. 130 (1873). *Minor v. Happersett*, 88 U.S. 162 (1874).

[39] Richard Aynes recommends just such a revival of the Privileges and Immunities Clause to social movements pursuing progressive social change. See Richard L. Aynes, "Constricting the Law of Freedom: Justice Miller, the Fourteenth Amendment and the Slaughter-House Cases," *Chicago-Kent Law Review* 70 (1994), Richard L. Aynes, "On Misreading Bingham,John and the 14th Amendment," *Yale Law Journal* 103, no. 1 (1993).

fluidity of some constitutional protections won by a particular movement may be lost when coopted by other groups.[40]

Coalition is also a potential tactical relationship between SMOs that hold incompatible beliefs or preferences. As stated above, negotiation is inherent in coalition, therefore it may be possible for groups to compromise on their differences in order to maintain a beneficial cooperative posture rather than a resource-draining competitive posture. However, as also discussed above, negotiating ideological or policy disagreements becomes more difficult the more intense the ideological or policy preferences, or the greater the gain that a group stands to realize by pursuing their unmediated preferences.

Indifference or inaction is, of course, also possible between SMOs that hold incompatible goals or beliefs, but the greater the salience of an issue or policy or belief to the organizations involved, or the scarcer the resources involved (and the Constitution is a particularly scarce resource as discussed above), the more likely there will be some engagement between groups. SMOs can rarely afford to be preempted from promising constitutional narratives, or constrained by hostile constitutional precedents, by ignoring the claims made by other actors in the competitive environment.

These various types of tactical relationships between SMOs are not all equally likely at all times. Cooption is particularly likely as a SMO strategy when powerful constitutional precedents govern. If constitutional decision-makers are strongly committed to a particular constitutional narrative, and that narrative has become embedded in the wider constitutional culture, then a constitutional strategy modeled on that narrative has greater traction and becomes more likely to succeed, while the costs of

[40] See Trina Grillo and Stephanie M. Wildman, "Obscuring the Importance of Race: The Implication of Making Comparisons between Racism and Sexism (or Other -Isms)," *Duke Law Journal* 1991, no. 2 (1991), Halley, "Gay Rights and Identity Imitation: Issues in the Ethics of Representation."

pursuing an inconsistent constitutional claim would rise.[41] When there are not such successful constitutional precedents to draw upon, SMOs will be less likely to rely on cooption, and the competitive environment might witness more complex engagement between SMOs as groups build coalitions and attempt to prevent other unfavorable claims from gaining constitutional sanction. This complexity of engagement may be particularly likely at times when the constitutional order appears to have destabilized, either due to the development of institutional weakness in a constitutional decision-maker, or due to major technological or social upheaval that make prior constitutional precedents unsatisfactory or unworkable in practice.[42] When the constitutional order is destabilized, the costs of forcing constitutional change may decrease, motivating SMOs to pursue diverse constitutional strategies. As discussed earlier, such instability in the constitutional climate of the Progressive and Inter-War Eras is what drew me to its study. Similarly, where the Constitution has been freshly expanded through amendment, SMOs may jockey for the opportunity to exploit that new constitutional space. Such jockeying between activist groups certainly took place in the wake of the ratification of the Fourteenth Amendment.[43]

I should also note that the constitutional decision-making process of SMOs that I depict in the above section is not static. SMOs are operating in a dynamic environment. Assessments of available resources, identification of potential partners or targets for cooption, selection of appropriate advocacy forums, and other tactics will be

---

[41] Charles Hamilton refers to such a strongly established set of constitutional narratives and precedents as a "master frame." Such a master frame has developed around the constitutional victories of the civil rights movement and have in turn triggered widespread cooption by other groups. Charles V. Hamilton, "Social-Policy and the Welfare of Black-Americans - from Rights to Resources," *Political Science Quarterly* 101, no. 2 (1986).

[42] Balkin and Siegel, "Principles, Practices, Social Movements," 928-30.

[43] And led to both the split in the suffrage movement and a longstanding bitterness and distrust between members of the civil rights movement and the women's movement when the AERA broke apart.

continuously changing as SMOs are confronted with the effects of the actions of other members of the sociopolitical system.[44] I conceive of constitutional development as occurring in a continuing feedback loop, therefore SMOs must remain nimble in their response to constitutional change if they hope to succeed.

THE HORIZONTAL CHANNELING OF CONSTITUTIONAL DEMANDS

This theoretical framework that I have sketched above suggests that it is likely that SMOs will engage in some tactical relationship with peers in crafting their constitutional messages and acting upon them. However, academics have largely ignored this competitive engagement when trying to better understand constitutional politics and development. Julie Novkov suggests that constitutional scholars have been preoccupied with solely studying the actions of judges to understand constitutional change. Thus they will frequently miss the fuller political story of the demands made on constitutional decision-makers such as judges. Novkov explains that whether these scholars "have attributed judges' actions to simple preferences about policy, to adherence to competing principles, to institutional pressures, or to some combination of these factors, judges and their institutional context have largely been at the center of the analysis."[45] She recommends taking a wider view to understand constitutional development in recognition of the inherently conflicted nature of constitutional interpretation.

For Novkov, constitutional change is worked out in "nodes of conflict." Nodes of conflict represent the contested narratives that occur when points of constitutional

[44] These members include constitutional arbiters themselves. For instance, every time a court issues a new constitutional opinion relevant to a SMO's goals, that SMO must reassess their own resources and tactics.
[45] Novkov, *Constituting Workers, Protecting Women: Gender, Law, and Labor in the Progressive Era and New Deal Years* 15.

ambiguity become the subject of communication between lawyers, courts and interest groups (often SMOs). Novkov points out that none of these parties are in complete control of this discursive contestation, nor can any of these parties create a node of conflict completely on their own. Changing social conditions may particularly motivate the identification of ambiguities and inconsistencies in existing doctrine, which will enter the constitutional decision-making process through lawyers' briefs. The contested constructions being produced via these interactive nodes of conflict then move constitutional development, and will eventually settle the constitutional ambiguity and close the node of conflict.[46] Novkov's theory highlights the contestation inherent in judges' constitutional decision-making. I am also interested in the contestation inherent in constitutional decision-making, but I widen the analytical node of conflict to include the initial competition between political actors (often SMOs) that results in the constitutional narratives, which will be subsequently presented to constitutional arbiters, that will be subject to the further contestation Novkov depicts. Incidentally, my approach is not limited to the judicial context, like Novkov. As a SMO assesses its resources and undertakes the necessary adjustment of its claims, it may choose to put those claims before another constitutional arbiter, such as Congress.

My approach also builds off the insights of Robert Cover. Cover explains that law is a small part of the normative universe, or nomos, that communities live by. He refers to the urge of communities to generate legal narratives embedded within larger cultural and historical narratives as jurisgenesis. America is constituted by multiple communities, which generate multiple legal narratives that will inevitably collide. Thus it becomes the purpose of the state, through the courts, to suppress these legal narratives and to choose what narratives will constitute the law. This choice among many independently

[46] Ibid. 15-22.

generated legal narratives is what Cover refers to as the jurispathic office of the courts.[47] This jurispathic function is vertical in nature, with development being imposed from above. Most constitutional scholars are preoccupied with this vertical channeling of constitutional development, assuming that SMOs conform to the demands and predispositions of constitutional decision-makers if they hope to succeed. I will explore whether there is also a horizontal analogue to the jurispathic function, meaning that alternative constitutional narratives generated by social movements may be channeled or constrained not just from above by strategic assessments of the courts, or other constitutional arbiters, but also by the narratives of a SMO's constitutional fellow travelers. Figure 4 below illustrates these two dimensions, horizontal and vertical, along which a SMO's constitutional claim can be mediated.

[47] Robert M. Cover et al., *Narrative, Violence, and the Law: The Essays of Robert Cover*, *Law, Meaning, and Violence* (Ann Arbor: University of Michigan Press, 1992).

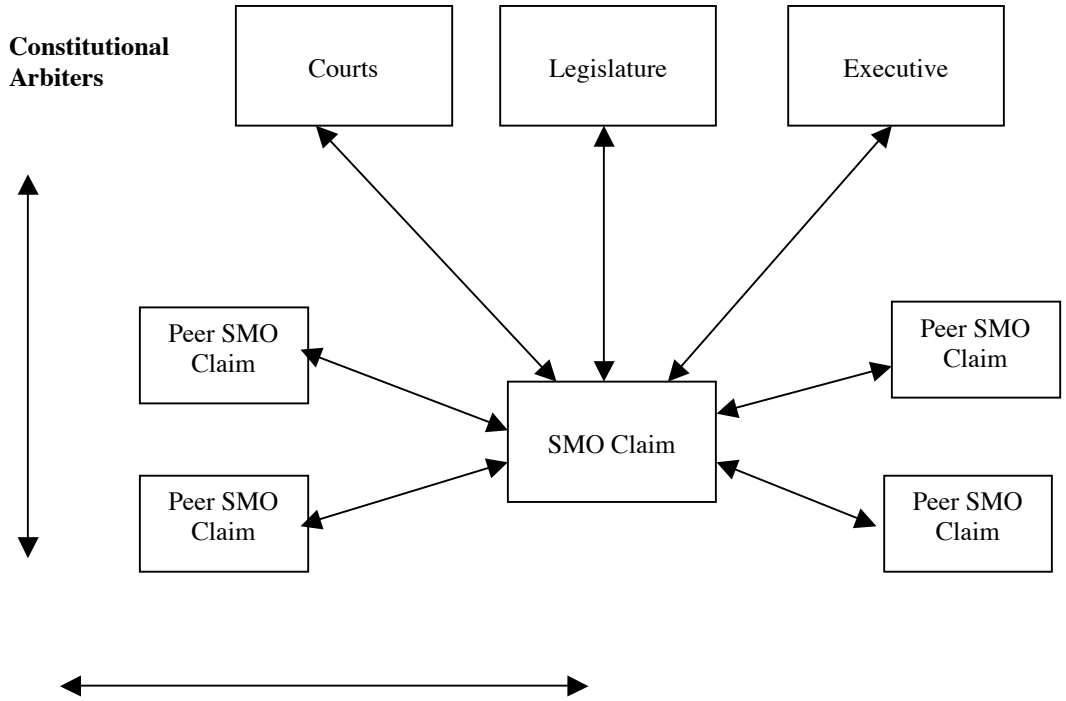

Figure 4: The Vertical and Horizontal Channeling of Constitutional Claims

By exploring this horizontal mediation of the constitutional claims of peer SMOs, I provide a fuller depiction of constitutional development. Also, by tracing these competitive relationships, I can begin to map the political genealogy of constitutional development in America, rather than focus simply on the more commonly studied legal genealogy, or even intellectual genealogy, of constitutional ideas and change.

Although I am exploring the claims made in the name of the Constitution, I do not purport to explain why the Constitution has developed as it has. While I would like to believe that the popular constitutional expressions that I study in the following pages are not all sound and fury signifying nothing, I do not seek to authoritatively demonstrate that the particular mediated calls for constitutional change by the SMOs that I highlight have directly reshaped constitutional development. In many cases these SMOs will fail to force the change they seek. In any event, isolating the impact of social movement actors on policy is a complicated and contested proposition.[48] Instead, I seek to uncover constitutional roads less traveled that may prove instructive for future constitutional reflection, as well as to provide greater attention to the politics that molded our past constitutional culture and informed (if not directly influenced) past constitutional change. Such sensitivity to the constitutional politics of the past also provides us an opportunity to reconsider many of the closely held narratives of modern constitutional scholars and commentators, particularly in regards to their preoccupation with Lochnerian

[48] Marco Giugni, "How Social Movements Matter:Past Research, Present Problems, Future Developments," in *How Social Movements Matter*, ed. Marco Giugni, Doug McAdam, and Charles Tilly (Minneapolis, Minn: University of Minnesota Press, 1999), Tilly, "From Interactions to Outcomes in Social Movements." See also Klarman, *From Jim Crow to Civil Rights: The Supreme Court and the Struggle for Racial Equality*, Rosenberg, *The Hollow Hope : Can Courts Bring About Social Change?*

jurisprudence, who have so often relied on a truncated, juricentric view of constitutional development.

REVISITING THE OUTLINE OF THE DISSERTATION

The figures below illustrate the particular resource competition relationships that I will explore in each of the following case study chapters. The peer competition illustrated will impact the shape and substance of the constitutional responses of each of my case SMOs to Lochnerian jurisprudence during the Progressive and Inter-War Eras. This peer resource competition is, of course, just one feature of the larger resource considerations, such as elite receptivity, organizational wealth and mobilizable membership, or governing constitutional precedents, which factored into the constitutional strategy of each group for contending with laissez faire constitutionalism.

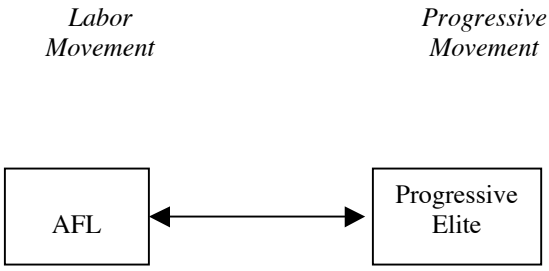

Figure 5: Peer Resource Competition Highlighted in Chapter Three

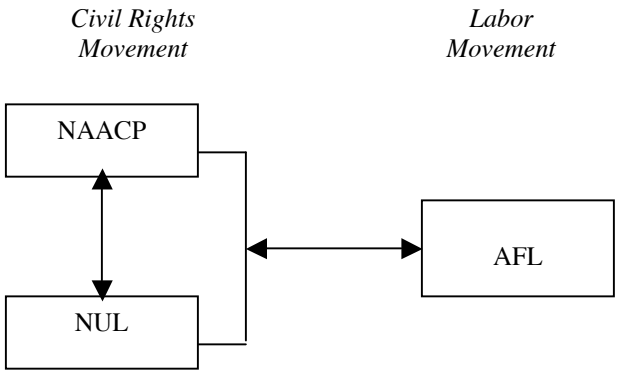

Figure 6: Peer Resource Competition Highlighted in Chapter Four

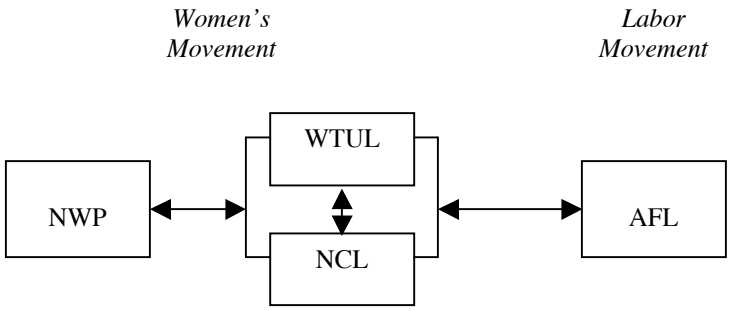

Figure 7: Peer Resource Competition Highlighted in Chapter Five

Chapter Three: The Lost Proto-Corporatist Constitutionalism of the AFL

Workers would face extremely difficult times during the Progressive and Inter-War Eras. The growing pains of industrialization along with rapid urbanization and mass immigration would combine with judicial hostility to reform to create bleak conditions for American labor. Constitutional scholars have particularly focused on *Lochner v. New York*,[1] and its entrenchment of free contract jurisprudence, as the emblem of this judicial hostility to the working class, identifying Lochnerian jurisprudence as the key roadblock to the reform of the constitutional order necessary to cope with the reconstruction of American capitalism. According to this conventional constitutional wisdom, the story of *Lochner* ends in the expedient shame of the "switch in time that saved nine" that occurred in *West Coast Hotel v. Parrish*[2] in 1937, as the chastened Supreme Court bowed to intense public and political pressure to remove the shackles of laissez-faire constitutional principles on states that had prevented them from reforming the workplace and rescuing workers from the excesses of industrial exploitation.

As discussed in Chapter One, many scholars in recent years have challenged this accepted wisdom that the *Lochner* Court had acted on their own capitalistic preferences to construct a theory of free contract liberty that was unsupported by prior constitutional precedents and ideological commitments. However, both the conventional wisdom and these revisionist accounts, that have so greatly absorbed the attention of the academy, overlook the actual constitutional experiences and the constitutional desires of those individuals, workers, that scholars have cast as the *Lochner* Court's victims. The labor

[1] 198 U.S. 45 (1905).
[2] 300 U.S. 379 (1937).

movement was most definitely the victim of a hostile Supreme Court during the Progressive and Inter-War Eras, but *Lochner* (and liberty of contract jurisprudence) was not the key exemplar of this hostility.

By charting the difficult constitutional course of the labor movement through this period, from the point of view of and through the activities of its leading SMO, the AFL, two themes emerge that contrast with conventional constitutional scholarship. First, as suggested above, the free contract jurisprudence that was crystallized in *Lochner* was not the most serious judicial challenge to organized labor during this period. That challenge arose out of judicial sanction of labor injunctions and other impediments to collective bargaining. Second, by tracking the AFL's strategic response to this judicial attack on collective bargaining, a proto-corporatist constitutional vision that attempted to meld individualism with group rights and straddle two constitutional eras is revealed. This unique AFL approach to group rights, which has been largely lost to modern constitutional scholarship, fell victim to resource competition, as the AFL jettisoned this narrative to maintain a coalition with powerful progressive elite who held a statist agenda that was inconsistent with the proto-corporatism of the AFL with its collective freedom of contract theory.

By the time *Lochner* was decided in 1905, the AFL had already changed course away from state protection of labor in favor of privately negotiated collective bargaining. Thus *Lochner*, itself, did not represent a catastrophic blow to the labor movement, nor did its repudiation in *West Coast Hotel* represent the labor movement's eagerly anticipated salvation. The Supreme Court's decisions in *Loewe v. Lawlor*[3] and *Duplex Printing Co. v. Deering*[4] resonated much more deeply in the offices of the AFL and wrought far more

[3] 208 U.S. 274 (1908).
[4] 254 U.S. 443 (1921).

damage to labor interests than *Lochner*. Likewise, the labor movement would more eagerly seek the promised relief in 1937 of *NLRB v. Jones & Laughlin Steel Co.*[5] than of *West Coast Hotel*. Although my study of the constitutional strategy of the AFL leads me to focus on a different doctrinal path and a different tectonic shift in the constitutional development of the New Deal, this does not mean that the revisionist project of rehabilitating the *Lochner* Court becomes irrelevant to the experience of workers who were ostensibly the victims of this activist bench. These devastating decisions against collective bargaining also highlight the tensions between state neutrality and hostility to class legislation, which some revisionist scholars claim influenced the justices of this era, and the raw personal and political preferences for laissez faire economic principles that the conventional *Lochner* account ascribes to the majority justices. To illustrate this point, I will apply in this chapter the work of two such *Lochner* revisionists, Howard Gillman and Cass Sunstein, to the Court's assault on collective bargaining in *Duplex* and its capitulation to state oversight of collective bargaining in *Jones & Laughlin*.[6]

The AFL devised a powerful and ingenious constitutional theory, built on the collectivization of freedom of contract ideals, to support its rights to collective bargaining that were challenged in *Duplex*, but because it was forced to abandon this narrative in order to benefit from a critical coalition with progressives, this theory has been lost. Lost even to revisionist constitutional scholars, such as Ken Kersch, who have attempted to recover the competitive complexity of the relationships between groups fighting to survive laissez-faire constitutionalism in order to puncture the disciplinary commitment to the inevitability of the progressive reconstruction of the Constitution and the

---

[5] 301 U.S. 1 (1937).

[6] See Gillman, *The Constitution Besieged : The Rise and Demise of Lochner Era Police Powers Jurisprudence*, Sunstein, "Lochner's Legacy."

inevitability of the development of modern civil rights from that reconstruction.[7] The AFL's deployment of its unique proto-corporatist constitutional vision, which rested in large measure on the Thirteenth Amendment, and its subsequent abandonment of that vision each occurred primarily in the halls of Congress. It was before legislators, rather than judges, that the AFL advanced its constitutional theory, and it was under pressure from progressive legislators and their allies, not judges, that the AFL backed away from its constitutional theory to embrace the progressive constitutional vision that would find validation in *Jones & Laughlin.* It's hardly surprising that scholars wedded to a juricentric examination of constitutional development would miss the AFL narrative and the sophistication of the competitive relationship between the AFL and progressives. It never manifested itself before the courts. To illustrate this point, I will highlight the resource competition between the AFL and progressive elite that played out in Congress beginning with submission of the Shipstead Bill by an AFL ally in 1927 and the later passage of the Wagner Act, a progressive embrace of a state solution to the difficulties of collective bargaining, in 1935.

THE VERTICAL CHANNELING OF AFL STRATEGY: THE COURTS AND THE LABOR MOVEMENT'S TURN TO COLLECTIVE BARGAINING

With the approach of the Progressive Era, the labor movement was undergoing significant change with the ascension of the AFL as its leading organization. Founded in 1886, the AFL quickly eclipsed the influence of the Knights of Labor (KOL), who had

[7] See Kenneth I. Kersch, *Constructing Civil Liberties: Discontinuities in the Development of American Constitutional Law* (Cambridge, UK ; New York, NY, USA: Cambridge University Press, 2004).

dominated the labor movement during the Gilded Age.[8] While the KOL had emphasized a radical producers' vision of the economy that emphasized decentralization and republicanism, the AFL, under the leadership of Samuel Gompers, had accepted the reality of a permanent wage-earning class in the modern economy and had resolved to develop the economic power necessary to counterbalance big business.[9]

The courts would have a profound effect on the shaping of AFL strategy as their rulings would push the AFL away from state-based labor reform and toward an economic approach to advancing workers' interests, which included tactics such as strikes and boycotts meant to provide the leverage necessary to improve wages and working conditions.[10] This voluntarist approach did not envision a role for government in the establishment and management of relations between capital and labor. Instead, employers and employees were to rely on the economic weapons naturally held at their disposal to set the terms of the working relationship through collective bargaining.[11]

---

[8] The KOL foundered due to infighting and the lack of a coherent program, as it undertook a series of confused and contradictory positions in response to the industrial revolution. See Gerald N. Grob, *Workers and Utopia; a Study of Ideological Conflict in the American Labor Movement, 1865-1900* ([Evanston, Ill.]: Northwestern University Press, 1961).

[9] Victoria Charlotte Hattam, *Labor Visions and State Power: The Origins of Business Unionism in the United States*, *Princeton Studies in American Politics* (Princeton, N.J.: Princeton University Press, 1993). See also Forbath, "The Ambiguities of Free Labor - Labor and the Law in the Gilded Age." For a fuller discussion of the formation of the AFL and the ascendancy of Gompers' vision of trade unionism, see Julie Greene, *Pure and Simple Politics: The American Federation of Labor and Political Activism, 1881-1917* (Cambridge, UK ; New York, NY: Cambridge University Press, 1998).

[10] The classic view of the AFL is that it became strictly apolitical entering the twentieth century, abandoning entirely political action and legislative reform. Julie Greene has argued persuasively that this is a gross overstatement of the AFL's move away from politics. The AFL did engage in party politics and elections and also sponsored legislation regularly, particularly legislation aimed at curbing the judiciary, in order to protect and promote collective bargaining practices. See Greene, *Pure and Simple Politics: The American Federation of Labor and Political Activism, 1881-1917*. See alsoWilliam G. Ross, *A Muted Fury: Populists, Progressives, and Labor Unions Confront the Courts, 1890-1937* (Princeton, N.J.: Princeton University Press, 1994).

[11] The term "voluntarism" to describe Gompers' conservative, trade unionist approach was coined by Michael Rogin. See Michael Rogin, "Voluntarism: The Political Function of an Antipolitical Doctrine," *Industrial and Labor Relations Review* 15, no. 4 (1962).

While early labor history looked beyond the state to explain the AFL's adoption of voluntarism, more recent labor history has focused on the constitutive force of the state in shaping AFL strategy.[12] Victoria Hattam and William Forbath both point to the actions of the courts as driving the eradication, or at least submersion, of radicalism in the labor movement in favor of conservative and apolitical tactics. According to Hattam, given the dispersal of power in the American system of government due to separation of powers and federalism, the courts gained significant control over the regulation of economic life in the Gilded Age. Proving themselves unfriendly to workers, courts long stifled the efforts of organized labor through the application of the common law doctrine of conspiracy against workers, hoping to quell labor protest and with it any burgeoning of class consciousness. Despite legislation passed at labor's behest to control conspiracy trials, courts continually interpreted these laws in such a way as to render them

[12] Traditionally labor historians had looked beyond the state for explanations of the change to an economic approach by the American labor movement. Early in the twentieth century, economist John R. Commons, and later his student Selig Perlman, argued that given the lack of a wider class consciousness in the United States, it was no surprise that labor activism did not coalesce around class as industrialization progressed. See John Rogers Commons et al., *History of Labour in the United States* (New York,: The Macmillan Company, 1918). Perlman explained that, among other things, the absence of a feudal legacy in America combined with a sense of boundless opportunity, relative class mobility, decent wages and working conditions, and the inability of a third party to take root in the two-party system of the United States contributed to the lack of class consciousness and the apolitical nature of the American labor movement once it confronted job scarcity. See Selig Perlman, *A Theory of the Labor Movement* (New York,: The Macmillan Company, 1928) 154-75. Consistent with this view was the assertion by Gerald Grob that trade unions reflected the larger middle class outlook of the United States, and the Marxist-inspired claim by Philip Foner that the movement away from reformist impulses was an inevitable stage of capitalism's development. See Philip Sheldon Foner, *History of the Labor Movement in the United States*, 2d ed. (New York: International Publishers, 1975). While later historians have subsequently argued that the American working class did exhibit its own class-consciousness, most commentators have agreed that an assortment of social and historical factors prevented the development of a comprehensive radical agenda for labor as it progressed into the twentieth century. See David Brody, *Workers in Industrial America: Essays on the Twentieth Century Struggle* (New York: Oxford University Press, 1980), David Montgomery, *The Fall of the House of Labor : The Workplace, the State, and American Labor Activism, 1865-1925* (Cambridge: Cambridge University Press, 1987), Sean Wilentz, *Chants Democratic: New York City & the Rise of the American Working Class, 1788-1850* (New York: Oxford University Press, 1984). Michael Rogin, however, contends that the AFL's voluntarism was actually driven by the labor elite's desire to maintain their control over the movement. See Rogin, "Voluntarism: The Political Function of an Antipolitical Doctrine."

meaningless, and conspiracy trials continued unabated in the decades following the Civil War. This failure by legislatures to curb the courts and their common law attack on organized labor disillusioned Gompers and others and pushed them toward voluntarist solutions to labor's problems. [13]

William Forbath points to a slightly later movement by the courts as spurring the critical reinvention of the labor movement.[14] He charts in detail the persistent failure of protective labor legislation, such as wages and hours and working conditions laws, before the bench, as courts consistently nullified labor's reformist agenda of the late nineteenth century as it emerged from state and federal legislatures in the years leading up to the infamous *Lochner* decision.[15] He points in particular to the 1885 nullification of a New York law that prohibited the manufacture of cigars in tenements as a significant moment in the evolution of Gompers' political thought. Gompers, himself a cigarmaker, had personally lobbied for the passage of this legislation. However, citing individual rights in controlling the terms of the disposition of one's own labor as justification, the court in *In re Jacobs*[16] swiftly undid several painstaking years of effort by Gompers and others to achieve reform.[17]

In *Jacobs*, New York's high court was already expressing its familiarity with and approval of freedom of contract jurisprudence two full decades before *Lochner* served as

---

[13] Victoria Hattam discusses the resurgence of conspiracy prosecutions lasting from 1865-1896. See Hattam, *Labor Visions and State Power: The Origins of Business Unionism in the United States*.

[14] Forbath, *Law and the Shaping of the American Labor Movement*. See also Leon Fink, "Labor, Liberty and the Law: Trade Unionism and the Problem of the American Constitutional Order," *The Journal of American History* 74, no. 3 (1987).

[15] See Appendix A. Forbath, *Law and the Shaping of the American Labor Movement* 177-92. Better than sixty such laws had been nullified prior to *Lochner*.

[16] 98 N.Y. 98 (1885).

[17] Forbath, *Law and the Shaping of the American Labor Movement* 39-42.

its capstone. Justice Earl, echoing the views of Justice Field in his famous pro-laissez-faire dissent in the *Slaughter-House Cases*,[18] explained that:

> Liberty, in its broad sense as understood in this country, means the right, not only of freedom from actual servitude, imprisonment or restraint, but the right of one to use his faculties in all lawful ways, to live, and work, where he will, to earn his livelihood in any lawful calling, and to pursue any lawful trade or avocation. All laws, therefore, which impair or trammel these rights, which limit one in his choice of a trade or profession, or confine him to work or live in a specified locality, or exclude him from his own house, or restrain his otherwise lawful movements … are infringements upon his fundamental rights of liberty, which are under constitutional protection.[19]

As Roscoe Pound pointed out in 1909, liberty of contract was a doctrine that could not be dismissed as an aberrational construct of the Supreme Court to reflect its socioeconomic preferences, as the doctrine had found favor in courts all over the country in the years before and after *Lochner*.[20]

Reflecting on the tenement law and its nullification by the *Jacobs* decision in his autobiography, Gompers observed that:

---

[18] 83 U.S. 36 (1873).

[19] 98 N.Y. 98, 106-7. This argument was reminiscent of Field's views in *Slaughter-House*. Field wrote: This equality of right, with exemption from all disparaging and partial enactments, in the lawful pursuits of life, throughout the whole country, is the distinguishing privilege of citizens of the United States. To them, everywhere, all pursuits, all professions, all avocations are open without other restrictions than such as are imposed equally upon all others of the same age, sex, and condition. The State may prescribe such regulations for every pursuit and calling of life as will promote the public health, secure the good order and advance the general prosperity of society, but, when once prescribed, the pursuit or calling must be free to be followed by every citizen who is within the conditions designated, and will conform to the regulations. This is the fundamental idea upon which our institutions rest, and, unless adhered to in the legislation of the country, our government will be a republic only in name. The fourteenth amendment, in my judgment, makes it essential to the validity of the legislation of every State that this equality of right should be respected. How widely this equality has been departed from, how entirely rejected and trampled upon by the act of Louisiana, I have already shown. And it is to me a matter of profound regret that its validity is recognized by a majority of this court, for by it the right of free labor, one of the most sacred and imprescriptible rights of man, is violated. 83 U.S. 36, 109-10.

[20] Roscoe Pound, "Liberty of Contract," *Yale Law Journal* 18 (1909). Besides *Jacobs*, other cases where state courts struck down protective labor legislation prior to *Lochner* include *Millet v. People*, 177 Ill. 295 (1886), striking down an Illinois law that set the manner of payment in the mining industry; *State v. Goodwill*, 33 W.Va. 179 (1889), striking down a West Virginia law that required payment of wages in lawful money; and *Ritchie v. People,* 155 Ill. 98 (1895), striking down an Illinois maximum hours law for women.

> Securing the enactment of a law does not mean the solution of the problem as I learned in my legislative experience. The power of the courts to pass upon constitutionality of law so complicates reform by legislation as to seriously restrict the effectiveness of that method. … After the Appeal Court declared against the principle of the law, we talked over the possibilities of further legislative action and decided to concentrate on organization work. Through our trade unions we harassed the manufacturers by strikes and agitation until they were convinced that we did not intend to stop until we had gained our point and that it would be less costly for them to abandon the tenement manufacturing system and carry on the industry in factories under decent conditions. Thus we accomplished through economic power what we had failed to achieve through legislation.[21]

As Gompers gained control over the AFL and the AFL in turn gained control over the labor movement, this strategic lesson, learned by Gompers the hard way in New York, to avoid the possibility of judicial review of reform, instructed organized labor's subsequent tactics. Labor opted to treat adverse precedent as an opportunity for a new direction rather than as a continuing obstacle to action. The AFL would now tolerate protective labor legislation only on behalf of perceived weaker groups, such as women and children, or men engaged in the most absolutely dangerous professions such as mining.[22] For most men they now believed that economic action was the best means to achieve real, enforceable reform that would not be watered down by courts or subject to the whims of political parties and the red tape of legislatures.[23] Furthermore, reliance on economic power rather than state power provided well-organized and powerful unions the option of pushing their demands ever higher without being held back by artificial barriers such as a minimum wage. Of the usefulness of legislative reform, Gompers once rhetorically asked:

---

[21] Samuel Gompers and Nick Salvatore, *Seventy Years of Life and Labor: An Autobiography* (Ithaca, NY: ILR Press, New York State School of Industrial and Labor Relations, Cornell University, 1984) 61-2.
[22] Julie Novkov discusses the continued efforts during the *Lochner* era to except women and children from the freedom of contract and uphold protective labor legislation on their behalf. See Novkov, *Constituting Workers, Protecting Women: Gender, Law, and Labor in the Progressive Era and New Deal Years*.
[23] Mollie Ray Carroll, *Labor and Politics* (Boston and New York,: Houghton Mifflin company, 1923).

> Is there anywhere in the experience of our industry, in the experience of workmen organized into trade unions, where they have ever secured anything determining the terms of labor for themselves through legislative enactment that it did not return as a boomerang, that it did not establish the machinery that gave the courts an opportunity to render decisions that created an obstacle in the path of the movement it required years to overcome?[24]

As for the consequences of winning success through the state, he looked abroad for cautionary examples and continued:

> Only eighteen years ago that wonderful system was adopted in Australia and New Zealand. The men there are about as well organized as in any of our countries. Although they control the Parliament at the present time, they have been unable to repeal any legislation they enacted and have since discovered only put brass bands around their movement they could not burst, and have held them backward instead of allowing them to go forward.[25]

Gompers and the AFL had learned the lesson of *Jacobs* and later *Lochner* well; pursuing reform through the state after these earlier disappointments was now akin to accepting gifts from Greeks.[26]

NECESSITY IS THE MOTHER OF INVENTION: THE AFL DEVELOPS COLLECTIVE FREEDOM OF CONTRACT

Gompers and others in the AFL had been leery of individual freedom and atomistic conceptions of rights, believing that individual rights for workers in the context of industrialized America were meaningless without collective power to shield them.[27] Justice Holmes referenced this very difficulty in his dissent in *Coppage v. Kansas*, which nullified a legislative solution to yellow dog contracts, pointing out that liberty of

---

[24] Quoted in Ibid. 65.
[25] Ibid.
[26] "I fear the Greeks even when they bear gifts," commented Gompers in testimony before the Commission on Industrial Relations in 1915 on government wage controls. Quoted in Ibid. 57.
[27] Ronald L. Filippelli, *Labor in the USA : A History* (New York: A.A. Knopf, 1984) 95. See also Fink, "Labor, Liberty and the Law: Trade Unionism and the Problem of the American Constitutional Order."

contract could really only begin when there was an equality of position between the contracting parties.[28] But Holmes was in the minority on this Supreme Court, and its persistent favoritism for atomistic rights such as the liberty of contract forced the AFL to improvise. The new mission was to collectivize freedom of contract to equalize bargaining power and promote collective bargaining that would be carried on in the private sphere.[29] Organized labor now needed the courts to withdraw from policing the economic sphere by accepting the liberty of individual workers to come together to strike or to protest or to withhold patronage as a group in order to establish the terms of their service. This new logic of collective freedom of contract was eloquently explained in a 1917 AFL pamphlet:

> The industrial situation in organization is such that the individual worker has lost his identity. Only through co-operative action is it possible for workers to have individuality. It is therefore necessary to establish for wage-earners the right of voluntary co-operative action. ... We have found that individual rights and liberty can be enjoyed only in associated relations. It is the great purpose of the present age to establish the right of individuals to voluntary collective action.[30]

The AFL embraced collective liberty of contract wholeheartedly in its rhetoric, not only presenting private collective bargaining as a sensible strategy for worker advancement that avoided the perils of court intervention, but also as a fulfillment of constitutional ideals, readily co-opting the preferred judicial narrative that the freedom to contract for one's labor was an essential constitutional right, a critical quality of manhood, and salutary for civic virtue. Compare the suggestion of Justice Peckham in

---

[28] 236 U.S. 1, 27 (1915).

[29] Scholars studying British trade unionism of this era refer to this reinvention of freedom of contract as "collective laissez-faire." Ken Coates and Tony Topham, *Trade Unions in Britain* (Nottingham: Spokesman, 1980) 265. For further discussion of the AFL's new twist on laissez-faire, see Fink, "Labor, Liberty and the Law: Trade Unionism and the Problem of the American Constitutional Order.", Forbath, *Law and the Shaping of the American Labor Movement*.

[30] American Federation of Labor, "Involuntary Servitude in Colorado," (Washington, D.C.: American Federation of Labor, 1917), 47.

Lochner that the intelligence and judgment of bakers should be respected and that they are "in no sense wards of the state,"[31] with the suggestion by Gompers that social welfare legislation does for workers what "they can and ought to do for themselves," thereby sapping their "initiative," which is "the greatest crime that can be committed against the toilers."[32] According to one AFL pamphlet, in exercising freedom of contract the worker develops, "discrimination and strength of will."[33] Even before *Lochner*, the AFL, in its declaration from the 1900 convention, spoke of the toilers having the "sufficient intelligence and manhood to unite for their own and the common protection."[34] For Gompers, trade unions benefited workers not only economically, but also made them better citizens. "The spiritual effect of industrial freedom," he once wrote, "is of incalculable potency in determining the moral fiber of the nation."[35]

For a large swath of the working class, freedom of contract was now a rallying cry. At the time of the *Lochner* decision, the transformation of labor strategy and tactics in response to economic due process was well underway. With labor reform through state legislatures no longer a priority for the AFL, continued judicial allegiance to notions of substantive due process liberty would no longer be a major stumbling block for organized labor.[36] Thus, from the perspective of organized labor, the doctrinal evolution

---

[31] 198 U.S. 45, 57.

[32] From "The Workers and the Eight-Hour Work-Day." Reprinted in Samuel Gompers and Hayes Robbins, *Labor and the Common Welfare*, *American Labor: From Conspiracy to Collective Bargaining* (New York,: Arno Press, 1969) 16.

[33] Labor, "Involuntary Servitude in Colorado," 46.

[34] Reprinted in John P. Frey, *The Labor Injunction : An Exposition of Government by Judicial Conscience and Its Menace* (Thomson Gale, 1923 [cited 25 August 2006]); available from http://galenet.galegroup.com.content.lib.utexas.edu:2048/servlet/MOML?af=RN&ae=F153308006&srchtp=a&ste=14.

[35] From the November 1916 *American Federationist*. Reprinted in Gompers and Robbins, *Labor and the Common Welfare* 22.

[36] One aspect of economic due process jurisprudence that did remain strongly relevant to organized labor was the inability of federal or state laws banning yellow dog contracts to survive judicial review. Yellow dog contracts were agreements signed by workers pledging that they would not join a union. Federal legislation that banned yellow dog contracts was struck down by the Supreme Court on Fifth Amendment

from *Lochner* to *West Coast Hotel* that would work the undoing of freedom of contract was now largely a sideshow of greater interest to progressives than to labor activists. [37]

However, this capitulation to economic due process and redirection in strategy to embrace laissez-faire economics and transform liberty of contract ideals did not spell the end of judicial hostility toward the labor movement. The courts responded cruelly to labor's attempts at collective bargaining. The same interplay of favoritism for big business and long-standing belief in state neutrality that pushed the courts to be skeptical of labor reform through the state would also influence their approach to the enforcement of antitrust laws against unions and the utilization of the equity power of injunction. For scores in the labor movement, the years running up to the 1937 decision in *West Coast Hotel* would be remembered for the judicial assault on collective bargaining, not for the judicial neutering of legislative labor reform that was to be undone in that case.

THE JUDICIAL ASSAULT ON COLLECTIVE BARGAINING

By the 1890's courts had begun regularly using equity injunctions to control organized labor. An 1895 editorial in the AFL's journal, the *American Federationist*, reported that "courts are to have something to do with solving the labor question, whether

---

due process grounds in *Adair v. United States*, 208 U.S. 161 (1908), while state legislation was struck down under authority of the Fourteenth Amendment in *Coppage v. Kansas*, 236 U.S. 1 (1915). This judicial hostility to efforts to disrupt the use of yellow dog contracts would be particularly devastating to organized labor when the Supreme Court permitted injunctive relief against unions attempting to persuade workers who had signed yellow dog contracts to unionize in *Hitchman Coal & Coke Co. v. Mitchell*, 245 U.S. 229 (1917).

[37] Particularly progressive women who had continued the fight for protective legislation on behalf of women and children. I will discuss this issue at greater length in Chapter Five. See Novkov, *Constituting Workers, Protecting Women: Gender, Law, and Labor in the Progressive Era and New Deal Years*, Joan G. Zimmerman, "The Jurisprudence of Equality - the Womens Minimum-Wage, the 1st Equal-Rights-Amendment, and Adkins V Childrens Hospital, 1905-1923," *Journal of American History* 78, no. 1 (1991). I will take this issue up in greater detail in Chapter Five.

the toilers like it or not."[38] Gompers' gamble on voluntarism would not pay off so easily, as the courts followed labor into the private sphere. The labor injunction proved to be a handy tool of control since an equity injunction, which is issued to prevent immediate, irreparable injury to property until there can be a legal resolution of a dispute, could be ordered without a trial, and without the attendant costs of time and sympathetic local influence such as might be found on local juries. Courts during this period began to consider intangible, pecuniary interests, such as a right to profits, protection of business reputation and customer patronage, and maintenance of a labor force, as types of property protected by the common law, effectively crippling collective bargaining tactics by unions that would treat just these types of business interests as bargaining chips.

Use of injunctions against organized labor originated with railroad strikes in the late 1870's. Unrest on the railroads, and with it injunctions of strikes and boycotts, escalated and led to the showdown over the infamous Pullman Boycott of 1894, where the Supreme Court would bless the use of equity injunctions against organized labor by upholding the blanket injunctions and numerous contempt citations that had broken the Pullman strikes.[39] William Forbath conservatively estimates that some 4,330 labor injunctions would eventually be issued by American courts between 1880 and 1930.[40]

Complementing the development of government by injunction and this new understanding of property was judicial enforcement of antitrust legislation against organized labor. Common law conspiracy had been reborn, now codified as a legislative imperative in the 1890 Sherman Anti-Trust Act's prohibition of combinations effected for the purpose of restraining trade. The courts, not surprisingly, were quicker and more

---

[38] James F. Duncan, "To Purify Our Courts," *American Federationist*, March 1895.

[39] See *In re Debs*, 158 U.S. 564 (1895). For a fuller history of the Pullman Boycott and the related railroad injunctions see Forbath, *Law and the Shaping of the American Labor Movement* 66-79, Felix Frankfurter and Nathan Greene, *The Labor Injunction* (New York: Macmillan, 1930) 17-24.

[40] Forbath, *Law and the Shaping of the American Labor Movement* 193-98.

eager to cite unions for illegal restraint of trade than the enormous trusts that had originally inspired the legislation.[41] Daniel Davenport, of the pro-business American Anti-Boycott Association (AABA), would refer to unions as a "labor trust" in a 1904 debate with Gompers, feeding public distaste for the robber barons, and the AABA would play a significant role in ensuring that unions came under the jurisdiction of the Sherman Act by frequently sponsoring litigation against organized labor.[42] Antitrust legislation permitted even wider use of injunctions as businesses flocked to the courts to stay strikes and boycotts until a trial could be had on the merits of whether organized labor had formed an illegal combination to restrain trade, by which time, of course, the strike or boycott in question would have been broken due to large dockets and "the leisurely atmosphere of many American courts."[43] Prosecution under the Sherman Act also brought the sting of the possibility of treble damages for its violation, and unions were hardly in the position in this era to absorb financial penalties of such a magnitude.

Organized labor soldiered on and attempted to flex the muscle of the working class through secondary boycotts and publication of "unfair lists," but in 1908 the Supreme Court, in *Loewe v. Lawler*, a case sponsored by the AABA, struck down a secondary boycott by hatters in Connecticut as violating the Sherman Act's ban on illegal

---

[41] The Supreme Court as part of antitrust enforcement greatly limited an assortment of union practices to force collective bargaining, including: boycotts (*Loewe v. Lawlor,* 208 U.S. 274 [1908] and *Gompers v. Buck's Stove and Range Co.,* 221 U.S. 418 [1911]); sympathy strikes and secondary boycotts (*Duplex Printing Press Co. v. Deering,* 254 U.S. 443 [1921] and *Bedford Cut Stone Co. v. Journeymen Stone Cutters*, 274 U.S. 37 [1927]); and peaceful picketing (*American Steel Foundries v. Tri-City Central Trades Council,* 257 U.S. 184 [1921]).

[42] Quoted in Daniel R. Ernst, *Lawyers against Labor: From Individual Rights to Corporate Liberalism*, *The Working Class in American History* (Urbana: University of Illinois Press, 1995) 90. Davenport would argue the Danbury Hatters Case on behalf of the manufacturer.

[43] Frey, *The Labor Injunction : An Exposition of Government by Judicial Conscience and Its Menace* ([cited). "The tentative truth results in making the ultimate truth irrelevant," wrote Felix Frankfurter and Nathan Greene of the labor injunction. Frankfurter and Greene, *The Labor Injunction* 80.

restraint of trade.[44] The Court refused to exempt combinations of labor from antitrust enforcement. Whatever slim hope Gompers and others had held for the viability of industry-wide collective bargaining as a means to advance the condition of workers was now shattered.

Gompers himself was nearly jailed in 1908 for his efforts to publicize a boycott of an "unfair" iron molder in the *American Federationist* despite an injunction against the boycott. The prosecution of Gompers was a national sensation, and although the Supreme Court eventually overturned the contempt charges, it was clear that unions would not be permitted to threaten customer patronage as a tool of collective bargaining.[45] While workers could peacefully strike their own employers, the courts would deny them the aid of fellow workers in their wider industry or the withholding of the purchasing power of sympathetic customers. Organized labor became desperate. Without the ability to effectively strike in sympathy or to urge boycotts of goods and services produced by recalcitrant employers, collective contract liberty would fail and freedom of contract between equal parties would yet prove itself to be the joke that was so often told by the progressive critics of the *Lochner* Court. Reacting to the *Loewe* decision, Gompers told members of Congress in 1908 that the Supreme Court had done far more than doom the secondary boycott, but had in fact put all organized labor in peril

---

[44] Famously known as the Danbury Hatters Case. In 1902, a Danbury hat manufacturer refused to recognize the local hatters union. The hatters struck, but the manufacturer responded by employing a scab crew. The AFL then published a call for a nationwide boycott of the manufacturer's hats in its journal the *American Federationist*. This boycott call was ruled a combination to create an illegal restraint of trade under the Sherman Act by the hatters themselves and the Supreme Court would later award treble damages under the act (235 U.S. 522 (1915)), further crippling the hatters union.

[45] *Gompers v. Buck's Stove and Range Co.,* 221 U.S. 418 (1911). For a full discussion of the *Buck's Stove* case and its effect on the strategies and activities of the AFL, see Ernst, *Lawyers against Labor: From Individual Rights to Corporate Liberalism* 124-46.

as illegal combinations in restraint of trade. "It is indeed true that under the decision our very organized existence is unlawful," he claimed dramatically.[46]

MANUFACTURING GOLD BRICKS FILLED WITH DYNAMITE: THE AFL TURNS TO THE THIRTEENTH AMENDMENT

Through injunctions and antitrust enforcement, the courts had nearly destroyed organized labor in the early years of the twentieth century. But just as Gompers and the AFL had improvised in the face of economic due process jurisprudence by collectivizing freedom of contract ideals and retreating into the private sphere, they would also respond to hostile courts deploying the common law and federal legislation against them through a series of legislative initiatives meant to curb court jurisdiction and a sophisticated constitutional narrative centered on the Thirteenth Amendment. While organized labor was deeply cynical in their assessment of the motives of judges in their persecution of unions, they nevertheless responded with principled constitutional arguments to rebut judicial outlawry, and in these arguments anchored in the Thirteenth Amendment we find a counterpoint to the very constitutional principles of state neutrality and equality that revisionist scholars of *Lochner* have claimed legitimately constrained the courts of that period in their review of labor issues.[47] Economic due process was not the only constitutional issue that brought the question of judicial motives during this era into focus, and economic due process by the end of the first decade of the twentieth century was no longer the primary object of labor's counter-attack.

---

[46] Quoted in Ibid. 167.

[47] Gompers spoke of injunctions issued by judges as having been "forged by cunning and usurpation for the benefit of property owners." Frey, *The Labor Injunction : An Exposition of Government by Judicial Conscience and Its Menace* ([cited).

The Thirteenth Amendment served as the linchpin of organized labor's arguments against government by injunction and the aggressive enforcement of antitrust laws against unions.[48] As a practical matter, the Thirteenth Amendment appealed to organized labor because it makes no distinction between state, federal and private actors in its application. Involuntary servitude simply cannot exist in the United States, and Congress, courtesy of Section 2, has been given the remedial authority necessary to eliminate or prevent involuntary servitude wherever it exists or might develop. This authority, in theory, could underpin procedural reforms of courts' equity powers and the passage of pointed amendments to antitrust legislation exempting organized labor from their force.

Gompers and his allies offered three powerful arguments rooted in the Thirteenth Amendment against the use of equity injunctions to settle labor disputes and the application of antitrust laws to labor unions employing collective bargaining tactics.[49] First, organized labor argued that given the new economic realities of industrialization, mass production and the consolidation of capital, individual workers could not bargain

---

[48] The Thirteenth Amendment reads: Section 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction. Section 2. Congress shall have power to enforce this article by appropriate legislation. The First Amendment, with its protection of speech and association, was also cited by the AFL as protecting collective bargaining. See Ibid.([cited). Organized labor's employment of the Thirteenth Amendment developed before there was any notable encouragement from the courts that this might be a successful strategy. This creativity and willingness to experiment constitutionally, even without judicial guidance, is an example of Robert Cover's concept of jurisgenesis, which was discussed in Chapter One. See Cover et al., *Narrative, Violence, and the Law: The Essays of Robert Cover*. James Gray Pope examines this issue in depth. See Pope, "The Thirteenth Amendment Versus the Commerce Clause: Labor and the Shaping of American Constitutional Law, 1921-1957." Hendrik Hartog also suggests that social movements can develop and sustain constitutional visions in both the absence of judicial sanction and even the presence of hostile precedent. See Hartog, "The Constitution of Aspiration and the Rights That Belong to Us All."

[49] For a similar discussion of the employment of the Thirteenth Amendment by the AFL, see Pope, "The Thirteenth Amendment Versus the Commerce Clause: Labor and the Shaping of American Constitutional Law, 1921-1957." See also Pope, "Labor's Constitution of Freedom."

effectively with their employers and therefore must form associations with other workers to do so. To enjoin or to criminalize the bargaining tactics of such associations would create conditions of involuntary servitude for workers, a condition now constitutionally prohibited. Thus, the Thirteenth Amendment provided the constitutional justification for the move away from an individualistic interpretation of economic due process that would complement labor's socio-economic argument for collectivization of freedom of contract. To be able to quit a job, boycott goods, or protest employment practices had no force when done individually. To prevent workers from associating to do these things, even if they might do them individually, amounted to conditions of involuntary servitude. It denied them an "effectual voice," and their now "collective or group rights and liberties."[50]

Second, the AFL argued that the Thirteenth Amendment revised Fifth Amendment property guarantees. The courts were unmoved by collective freedom of contract and were regularly redeploying the common law against unions attempting to bargain collectively, but the AFL responded with their own analysis of the proper meaning of property under the common law. The labor power of an individual, according to the AFL, could no longer be considered property, and thus could not be subject to an equity injunction and should not be subject to control by anti-conspiracy doctrines. Judges' efforts to read business interests into the definition of property were not only illogical, but also now unconstitutional. The Declaration of the 1922 AFL Convention makes this argument plain:

> Practically all the decisions of our courts in industrial disputes arising out of the issuance of injunctions are founded upon the legal point of view that the labor power of a human being is property … This conception is … unwarranted in law.

---

[50] 1922 AFL Convention Declaration reprinted in American Federation of Labor, *History, Encyclopedia Reference Book* (Washington, D.C.: American Federation of Labor, 1924) 104.

> It is of modern origin in its application in industrial disputes, not having been seriously contended for until the adoption of the thirteenth amendment …
>
> This legal conception of labor power, taken in connection with anti-combination and anti-conspiracy doctrines, is the cornerstone upon which the equity power of our courts is founded …
>
> Prior to the adoption of the thirteenth amendment, it was not necessary to divide the labor power from a human being from the person in whom it was inherent … The person was bought or raised as a slave, he was contracted for if not a slave; in either case he was a labor power that was desired and obtained.
>
> After the adoption of the thirteenth amendment the employer found it desirable to find some way of maintaining his grip on the labor power, and so through anti-conspiracy laws, and anti-combination laws and the misuse of the equity power of our courts, the employer did, through the advice of attorneys and prompted by the speculative theory of pseudo-political economists, set about to treat labor power as property, separate and distinct from the person, notwithstanding the fact that the labor power of a human being is the most personal of all things, and so absolutely inherent in the person that it grows with his growth, diminishes in sickness and with age, and passes away at death.[51]

Third, labor activists argued that the Thirteenth Amendment conferred a special distinction on labor, thus making a class-based exception to the conspiracy function of antitrust legislation for labor groups acceptable despite equality guarantees in the Fourteenth Amendment. According to the AFL, the Fourteenth Amendment prohibition of class legislation had to be read in concert with the Thirteenth Amendment's special treatment of labor. Labor was the better of capital and deserving of special treatment. Gompers liked to cite Abraham Lincoln on this point. "And as the immortal Lincoln said," he told one audience, "'Capital is the fruit of labor and could not exist if labor had not first existed. Labor, therefore, deserves much the higher consideration.'"[52] The

---

[51] 1922 AFL Convention Declaration reprinted in Ibid. 103.

[52] Samuel Gompers, *Debate between Samuel Gompers, President, American Federation of Labor, and Henry J. Allen, Governor of Kansas, at Carnegie Hall, New York, May 28, 1920* (Thomson Gale, 1920 [cited 25 August 2006]); available from http://galenet.galegroup.com.content.lib.utexas.edu:2048/servlet/MOML?af=RN&ae=F152700198&srchtp=a&ste=14.

Thirteenth Amendment now commanded that higher consideration, with its special recognition of labor and its imperative that involuntary servitude in any form be swept way, even against the baseline equality principle of the Fourteenth Amendment.

These Thirteenth Amendment arguments struck right at the heart of the problem courts were having entering the twentieth century, as they confronted the radical changes in society that had complicated the application of the common law and had created such widely divergent class distinctions as to pressure the traditional application of norms of equality. As Cass Sunstein explains in regards to *Lochner*, courts were accustomed to imposing a constitutional requirement of neutrality that meant preserving society's existing distribution of wealth and entitlements as governed by the baseline of the common law. To approve state actions that would radically rework society would be an illegitimate subsidy of one group or class of citizens at the expense of others.[53] But emancipation and the Thirteenth Amendment had seriously complicated the common law and its governance of the relationships between master and servant.[54] Courts no longer had a comfortable merging of man and labor to govern workplace relations. But as William Forbath points out, in the context of threatening late nineteenth and early twentieth century labor unrest, there were plenty of "familiar mental grooves" into which new notions of common law property could fit, cobbled from traditional understandings of master/servant law and common law conspiracy.[55] Buttressing these familiar mental grooves was the jurisprudence developing from Field's *Slaughter-House* dissent that treated both a man's intangible right to labor and a man's intangible right to his business

---

[53] Sunstein, "Lochner's Legacy," 875.

[54] Karen Orren posits that the American transformation from feudalism to liberalism occurred through the modernization of master/servant law. See Karen Orren, *Belated Feudalism: Labor, the Law, and Liberal Development in the United States* (Cambridge [England] ; New York: Cambridge University Press, 1991).

[55] Forbath, *Law and the Shaping of the American Labor Movement* 86.

or enterprise as species of property.[56] Thus, the common law was being effectively refeudalized by equity judges. Courts could remain in familiar territory when applying equity rules in such a way as to maintain underlying societal distributions of wealth and entitlements. These distributions would surely be upset by judicial embrace of collective laissez-faire. Courts would be loathe to grant what would appear to be a subsidy from society to organized labor by accepting a thoroughgoing revision of the common law.[57]

Nevertheless the AFL pounded home the message that the Thirteenth Amendment had revised Fifth Amendment property guarantees, continuously challenging courts to abandon the common law governance of labor relations. In 1906, Gompers published an article in the *American Federationist*, "No Property Rights In Man: The Essential Principal of Protest Against Injunctions in Labor Disputes," that made this very point. That article was only one of many publications by AFL leaders to emphasize the revision of the common law and the illegitimacy of equity injunctions to protect business' intangible property interests. In 1923, John P. Frey, a labor activist and editor of the *International Iron Molder's Journal*, published a book on the injunction problem, referring to labor injunctions as the "menace" unleashed by government by "judicial conscience."[58] Frey provided an extensive discussion of the misapplication by equity judges of the common law in labor disputes, reviewing at length the history of the common law from the English chancery courts onward. He also catalogued the AFL strategy against government by injunction, which included a strong public relations campaign to raise awareness of the illegitimacy of labor injunctions, a drive to impeach judges who issued injunctions, and finally legislative initiatives aimed at excepting

---

[56] Ibid. 87.
[57] Sunstein, "Lochner's Legacy," 876.
[58] Frey, *The Labor Injunction : An Exposition of Government by Judicial Conscience and Its Menace* ([cited).

organized labor from the Sherman Act which was the authority for many of the injunctions issued against unions.[59] These efforts to curb the courts were not particularly successful, and the Supreme Court continuously disappointed the AFL with its blessing of equity injunctions against labor. It would be difficult to authoritatively establish whether the Supreme Court's motives for ignoring the AFL's arguments rested on conservative economic ideology and a pro-business bias, or on a statesman-like need to adjust the familiar confines of the common law to quell unrest and blunt major societal change, however evidence for both characterizations of the courts can be found in this long battle over government by injunction.

The AFL, which had gotten a slight momentum boost for its Thirteenth Amendment approach from the Supreme Court's attack on debt peonage statutes in the South did not just go after equity courts in their deployment of the Thirteenth Amendment.[60] They also pursued legislation that would exempt union activity from the Sherman Act. This effort would squarely implicate the well-developed American tradition against class or partial legislation that Howard Gillman has argued influenced the decision-making of the *Lochner* Court. Reeling from the *Loewe* and *Buck's Stove* decisions, the AFL turned to Congress for relief. Gompers was insistent that labor should be exempted from antitrust legislation, but he ran into stiff opposition from pro-business

---

[59] Ibid.([cited).

[60] In 1911, the Supreme Court struck down a debt peonage statute, which targeted African-Americans and mandated compulsory service in payment of a debt, as a violation of the Thirteenth Amendment. *Bailey v. Alabama*, 219 U.S. 219. In *Bailey*, the Supreme Court ruled that involuntary servitude had a "larger meaning than slavery," and that the Thirteenth Amendment's "plain intention was to abolish slavery of whatever name and form and all its badges and incidents; 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, which is the essence of involuntary servitude." 219 U.S. 219, 241. The Supreme Court also embraced the enforcement authority of Congress to pass whatever legislation necessary for the amendment's violation "in letter or spirit." 219 U.S. 219, 241. Now organized labor had some evidence, however slim, that the Supreme Court might be receptive to legislation passed by Congress to protect collective bargaining practices and exempt unions from antitrust laws. Certainly courts had not yet had a chance to dampen labor's optimism squarely on this point.

forces. Daniel Davenport of the AABA lobbied legislators with pointed references to "the Jeffersonian maxim of equal rights for all and special privileges for none."[61] Earlier decisions by the Supreme Court would seem to support Davenport's position that special groups could not be exempted from antitrust enforcement. In 1902, in *Connolly v. Union Sewer Pipe Company*, the Court struck down an Illinois antitrust statute that exempted farmers from its reach. According to Justice Harlan, the legislation did not treat similarly situated groups "alike under like circumstances and considerations, both in the privileges conferred, and in the limitations imposed."[62] It was not clear that courts would accept the proposition that capital and labor could be distinguished, and that the differentiation between the right to work and the right to manage would be enough to overcome the Fourteenth Amendment, regardless of the Thirteenth Amendment.

In 1914, after hard lobbying, Congress passed the Clayton Act. Gompers referred to the law as "the Magna Carta upon which the working people will rear their structure of industrial freedom."[63] Section 6 proclaimed that "the labor power of a human being is not a commodity or article of commerce." Gompers and the AFL were thrilled, so thrilled in fact that subsequent history encyclopedias of the AFL would be stamped with this very pronouncement. While the Clayton Act had not been grounded in the Thirteenth Amendment, many in Congress had echoed the rhetoric of the AFL. Representative Casey remarked that "labor power or patronage can not be property, but aside from this we have the thirteenth amendment to the Constitution prohibiting slavery and involuntary servitude."[64] Representative Wilson also spoke in the voice of organized

---

[61] Letter to William E. Borah, Aug. 10, 1914. Quoted in Ernst, *Lawyers against Labor: From Individual Rights to Corporate Liberalism* 166.
[62] 184 U.S. 540, 599.
[63] Samuel Gompers, "The Charter of Industrial Freedom - Labor Provisions of the Clayton Antitrust Law," *American Federationist* 1914, 971-72.
[64] 51 Cong. Rec. 9173 (1914).

labor, as he pointed out that the assumption that man was property was repugnant to "all civilized communities and specifically forbidden by the thirteenth amendment."[65]

However, as Daniel Ernst explains, the Clayton Act was far more ambiguous in its function than the celebrations of the AFL might suggest. It was not entirely clear that the Clayton Act had really done anything at all for the benefit of organized labor.[66] Although the law made it clear that unions themselves could not be construed as illegal combinations or conspiracies within the meaning of the antitrust laws under Section 6, the Clayton Act did not expressly forbid the application of antitrust laws to union activities. While union existence would be protected, the statute did not clearly indicate any protection of some of the more radical tools of collective bargaining such as secondary boycotts and attacks on closed shops, which had been previously viewed by courts as illegal.

Courts had the option to interpret the language of the Clayton Act regarding unions robustly to provide them special protection from the antitrust laws, but to do so would require courts to confront the question of equality and whether the Clayton Act was illegitimate class legislation. Such a robust reading of the Clayton Act to exempt labor from the Sherman Act never came. Consequently the courts did not have to tackle the question of favoritism by the state, at least not in the context of the Clayton Act, for the act had been neutralized by the Supreme Court in 1921 by their decision in *Duplex*. *Duplex* exploited the weakness of the Clayton Act's ambiguous language, which still held unions responsible for illegal activity surrounding employment relations. With *Duplex*, the Supreme Court reviewed an equity injunction that had been issued to stop a national

---

[65] 51 Cong. Rec. 6446 (1914).

[66] For a detailed discussion of the history of the Clayton Act, see Ernst, *Lawyers against Labor: From Individual Rights to Corporate Liberalism* 165-90. According to Ernst, the Clayton Act was the enigmatic product of good old-fashioned interest group politics with the forces of the AFL arrayed against the forces of the AABA.

secondary boycott by the Machinists and reached the conclusion that the statute did not change preexisting law and secondary boycotts would continue to be construed as an illegal activity. The common law would continue to be applied as before, for the Clayton Act, in the words of Justice Pitney, "is but declaratory of the law as it stood before."[67]

To make matters worse for organized labor, the Clayton Act contained a provision to extend equity relief to private parties. Ironically, and devastatingly, the Clayton Act would now support a new flood of labor injunctions, and the AFL would find itself in greater peril than ever before.[68] One correspondent with Senator William Borah would refer to the labor provisions of the Clayton Act, which the AFL had fought so hard for, as not just being "gold bricks," but in fact "gold bricks containing dynamite."[69]

Although the Supreme Court had gutted the Clayton Act by claiming it merely codified the common law, this did not mean that they did not pass on the question of preferential treatment of labor. Shortly after issuing their ruling in *Duplex*, the Supreme Court would review Arizona's state version of the Clayton Act in *Truax v. Corrigan*.[70] The Arizona statute prohibited the issuance of injunctions in labor disputes unless to prevent irreparable harm to property and offered protection of peaceful picketing and persuasion. The Supreme Court would strike this provision down as a violation of both the Fourteenth Amendment's due process clause and equal protection clause since it specially immunized the activities of organized labor and denied businesses the right to pursue equity relief against labor in some circumstances.

---

[67] 254 U.S. 443 (1921), 470. Felix Frankfurter met this decision with disbelief, claiming that, "it is an elementary principle of statutory construction that *some* effect must be given to legislation." Quoted in Ibid. 190.

[68] William Forbath counts more than 2,000 of the 4,330 labor injunctions issued between 1880 and 1930 as being issued during the 1920's. See Forbath, *Law and the Shaping of the American Labor Movement* 193-98.

[69] Quoted in Ernst, *Lawyers against Labor: From Individual Rights to Corporate Liberalism* 190. Ernst attributes this statement to AFL lawyer Thomas Spelling.

[70] 257 U.S. 312 (1921).

Chief Justice Taft wrote the majority opinion in *Truax* and offered extensive argument on the point of the illegitimacy of class legislation. The Supreme Court had not conveniently discovered this principle of equality, but could point to a strong constitutional tradition. Taft writes of the Fourteenth Amendment:

> Our whole system of law is predicated on the general fundamental principle of equality of application of the law. 'All men are equal before the law,' 'This is a government of laws and not of men,' 'No man is above the law,' are all maxims showing the spirit in which Legislatures, executives and courts are expected to make, execute and apply laws. But the framers and adopters of this amendment were not content to depend on a mere minimum secured by the due process clause, or upon the spirit of equality which might not be insisted on by local public opinion. They therefore embodied that spirit in a specific guaranty. The guaranty was aimed at undue favor and individual or class privilege, on the one hand, and at hostile discrimination or the oppression of inequality, on the other. It sought an equality of treatment of all persons, even though all enjoyed the protection of due process.[71]

Taft went on to cite several cases that had rested on equal protection grounds, including *Barbier v. Connolly*, *Hayes v. Missouri*, and *Yick Wo v. Hopkins*.[72]

One tantalizing statement from the opinion is Taft's acknowledgment that a guaranty of equal protection does not constrain the federal government. "The due process clause," wrote Taft, "brought down from Magna Charta was found in the early state constitutions and later in the Fifth Amendment to the federal Constitution … while the equality clause does not appear in the Fifth Amendment and so does not apply to congressional legislation."[73] Thus Arizona was bound to offer all of its citizens their day in court without any exceptions based on class. The federal government, however, might possibly make class-based distinctions in offering injunctive relief to its citizens. Whatever encouragement this may have given organized labor about the possibility of

---

[71] 257 U.S. 312, 332-3.
[72] 257 U.S. 312, 333. Citing 113 U.S. 27 (1884); 120 U.S. 68 (1887); 118 U.S. 356 (1886).
[73] 257 U.S. 312, 331.

federal protection of unions had been cruelly mooted by the evisceration of the Clayton Act earlier that year in *Duplex* with the Court's refusal to rein in the common law to reflect the force of the Thirteenth Amendment.

Oliver Wendell Holmes complained bitterly of Taft's reading of the Fourteenth Amendment, resurrecting the ghosts of *Lochner* and once again questioning the motives and *modus operandi* of the conservatives on the Court. Holmes wrote in his *Truax* dissent:

> Legislation may begin where an evil begins. If, as many intelligent people believe, there is more danger that the injunction will be abused in labor cases than elsewhere I can feel no doubt of the power of the Legislature to deny it in such cases. … There is nothing that I more deprecate than the use of the Fourteenth Amendment beyond the absolute compulsion of its words to prevent the making of social experiments that an important part of the community desires, in the insulated chambers afforded by the several states, even though the experiments may seem futile or even noxious to me and to those whose judgment I most respect.[74]

Felix Frankfurter agreed with Holmes. In an editorial in the *New Republic*, Frankfurter wrote of *Truax* that it was "destined to become even more classic than the Lochner case – a challenge is offered to all who find intolerable authoritarian rule by five men in contested fields of social policy."[75] Was *Truax* an example of judicial preference or constitutional principle? Was the Supreme Court bowing to long established principles of equality, or was the Supreme Court finding convenient cover in the Fourteenth Amendment for its economic ideology in rebuffing labor reform in Arizona? Certainly the long history of resistance to class legislation highlighted by *Lochner* revisionist Howard Gillman was likely on the minds of the Court in 1921 just as much as it had been in 1905, when the Court tapped the due process clause of the Fourteenth

---

[74] 257 U.S. 312, 343-4.

[75] Unsigned editorial from the New Republic, Jan. 25, 1922. Reprinted in Felix Frankfurter and Philip B. Kurland, *Felix Frankfurter on the Supreme Court; Extrajudicial Essays on the Court and the Constitution* (Cambridge, Mass.,: Belknap Press of Harvard University Press, 1970) 49.

Amendment. By the same token, conservatives on the bench, such as Chief Justice Taft, had not hidden their personal distaste for organized labor.[76]

While organized labor had been otherwise occupied developing its voluntarist strategy by the time the Supreme Court had perfected free contract jurisprudence in *Lochner*, all eyes of organized labor were tightly focused on the Supreme Court as it passed on the vitality of state protection of collective bargaining practices in *Duplex* and *Truax*. The AFL's rendition of the history of a Supreme Court hostile to the working man and progressive reform would likely sound quite similar, if not identical, to the rendition of the Progressive Era Court told by constitutional scholars preoccupied with *Lochner*, but these narratives would almost certainly hit upon completely different plot points in telling the story. This difference in emphasis may not much matter except that the histories of this unpopular Supreme Court conclude in two different cases, *West Coast Hotel* and *Jones & Laughlin*, each case sending scholars down very different paths of inquiry that remain deeply relevant to constitutional politics today.

RESOURCE COMPETITION WITH PROGRESSIVES: THE AFL ABANDONS COLLECTIVE FREEDOM OF CONTRACT

The AFL frequently partnered with members of the progressive movement from the 1890's onward in order to pursue labor movement interests, particularly in efforts to curb the power of the courts, which had thwarted the interests of both progressives and

[76] Taft would issue a pioneer injunction against the Brotherhood of Locomotive Engineers while a federal district judge in Ohio in 1893. See 54 F. 730 (C.C.N.D. Ohio 1893). When he joined the Supreme Court as its Chief Justice, he would taunt Oliver Wendell Holmes by claiming that he had been chosen "to reverse a few decisions." Henry F. Pringle, *The Life and Times of William Howard Taft: A Biography* (New York ; Toronto: Farrar & Rinehart, 1939) 1030. He was never shy about expressing antagonism toward unions. In a letter to Horace Taft, dated May 7, 1922, he wrote "[T]he only class which is distinctly arrayed against the court is a class that does not like the courts at any rate, and that is organized labor. That faction we have to hit every little while …" Pringle, *The Life and Times of William Howard Taft: A Biography* 967.

organized labor.[77] As will be discussed at greater length in Chapters Four and Five, the women's movement and the civil rights movement would both attempt to pool resources with the AFL and negotiate a united response to the difficult workplace conditions of the period, but the AFL did not recognize sufficient benefits of a coalition with these peers to either admit them on equal terms, or at all, to unions or to change constitutional course to accommodate their preferences. That was not the case with progressives. The progressives proved to be peers that the AFL could not resist compromise with. This is not surprising. Progressive elite possessed far greater resources that the AFL could capture if they were willing to compromise their constitutional preferences in order to maintain a coalition than the women's movement or the civil rights movement could ever hope to offer.

The progressive movement was well-resourced, because it was a middle class phenomenon. Members of the middle class, which had become increasingly professionalized during this period with the development of the social sciences and the blossoming of professions such as social work that stimulated activism, reacted to the widespread social ills that stemmed from industrialization and urbanization with a reformist agenda that included curbing corporate power, particularly monopolies, ending political corruption and enhancing democracy, battling vice, and educating and protecting the underclass.[78] Progressivism was not a coherent, tightly bound social movement.[79] It

---

[77] For a charting of these court curbing efforts, see Ross, *A Muted Fury: Populists, Progressives, and Labor Unions Confront the Courts, 1890-1937*.

[78] Some wide-ranging examples of progressive reforms during this period include direct election of U.S. Senators (Seventeenth Amendment), the secret ballot, the end of the spoils system, the establishment of settlement houses, trust-busting including passage of the Sherman Act, prohibition (Eighteenth Amendment), regulation of child labor, and the establishment of numerous national parks and wildlife refuges.

[79] In fact, it is a stretch to define progressivism as a social movement at all, despite popular reference to the phenomena as the "progressive movement." Progressivism fails to meet the definitional requirement of a social movement of social marginality, as discussed in Chapter Two. It is difficult to refer to middle class professionals, like lawyers and social workers (at least male ones), public intellectuals and academics, and

represented a more diffuse reformist impulse that permeated the middle class, oriented around a belief in the ability, and even duty, to engineer positive social change, and for progressives that meant a reliance on efficient government tools for engineering this change.

According to Robert H. Wiebe, the heart of progressivism lay in the faith and ambition of the middle class to fulfill its destiny through bureaucratic means.[80] It was on this point that progressives and the AFL under Gompers would diverge. As discussed above, the AFL had grown hostile to state solutions to labor problems, and what little faith they might have held in the sensibility or propriety of bureaucratic engineering of the workplace was easily overwhelmed by the certainty that the courts would intervene to crush any state intervention. The Thirteenth Amendment facilitated a blessedly private solution to labor difficulties. It ensured non-interference with collective bargaining, because labor would be exempted from anti-trust limitations and immunized against overly generous judicial interpretations of property in order to prevent involuntary servitude. But just as the state would be prevented from thwarting labor's collective bargaining tactics, it could not rush in to govern the parameters of any collectively bargained solution to labor strife either. Wages, hours and other working conditions would be set privately between employer and employee (en masse), and in this way the AFL vision remained consistent with an individualistic constitutional order that relied on

---

politicians and other public officials as marginalized or powerless. Progressivism was also more diffuse in its structure and policy goals. To the degree that progressive SMOs did develop, for example settlement houses or temperance groups, they were typically cross-affiliated with other more traditional social movements such as the women's movement or the civil rights movement. But SMOs were often unnecessary to accomplish progressive goals since many progressives already possessed access to policy-makers through their own professional, party, and personal affiliations with government. While the progressive movement does not comfortably fit the criteria for a social movement that my other case movements do, which are built around supporting the interests of a particular marginalized population rather than the promotion of a particular ideology, nonetheless, adherents of progressive ideals did play a crucial role in shaping the strategies of the labor movement that are worth including in this study and are illustrative of peer resource competition.

[80] Wiebe, *The Search for Order, 1877-1920* 166.

rights rather than bureaucratic management of social relations, while it simultaneously acknowledged the importance of integrating groups into the constitutional order given the industrial transformation of society.

Progressives were also convinced of the importance of integrating groups into the constitutional order and labor was the vehicle for this integration, but they did not believe that the old constitutional order that held the state at a distance from individuals should or could be in any way maintained. Competition, be it social, industrial or otherwise was at the core of society and it could not be managed through abstraction but through political management.[81] As Ken Kersch explains, this Social Darwinism of progressive thinkers was not particularly attractive. Industrial democracy, therefore, became a progressive watchword. For progressives like John Dewey, Herbert Croly and Walter Lippman, it was necessary to recast the private sphere of the workplace into a public sphere where workers, through industrial relations, could realize their full ethic and civic potential.[82] In articulating the virtues of industrial democracy, Walter Lippman sounded a great deal like AFL leaders who had spun Lochnerian rhetoric of manhood and the dignity of the empowered individual into a collective form. Lippman writes:

> If labor is apathetic, hostile to efficiency, without much pride, it is because labor is not part of industrial management. People don't take a sympathetic interest in the affairs of the state until they are voting members of the state. You can't expect civic virtue from a disenfranchised class, nor industrial virtues from the industrially disenfranchised.[83]

Progressives generously appropriated the labor movement's resource of social sympathy, and perhaps even more so labor's resource in the social fear generated by labor unrest, in

---

[81] Oliver Wendell Holmes would become a hero to progressives for his attack on absolutist conceptions of rights, and his Darwinist beliefs that law was the product of social struggle, and that nothing stood between the state and the individual. See Morton J. Horwitz, *The Transformation of American Law, 1780-1860* (New York: Oxford University Press, 1992) 109-44.

[82] Kersch, *Constructing Civil Liberties: Discontinuities in the Development of American Constitutional Law* 159-67.

[83] Walter Lippmann, *Drift and Mastery* (New York,: M. Kennerley, 1914) 64.

order to promote a labor gateway to a corporatist state. But the key difference between the collectivism and the industrial republicanism of labor and of progressives would be that the AFL continued to conceive of the workplace as a private sphere, governed only by the protections of constitutional rights, and not a public sphere subject to the paternal intervention of the state.

This tension in the loose ideological coalition between labor and progressives had been palpable in earlier attempts at bureaucratic management of labor strife. Government bureaucrats had always been as much an enemy to the AFL as the courts themselves. State intervention was inconsistent with voluntarist beliefs in the autonomy, dignity and manhood of workers, who would become better citizens, according to the AFL, if left alone to fight their own battles. When Colorado and Kansas had each experimented with state management of collective bargaining earlier in the century by setting up industrial commissions, the AFL had responded fiercely. Workers would not go back to being "wards of the state."[84]

This tension would come to the fore again in the late 1920's, as the AFL challenged Congress to rein in the courts and to do so under the authority of the Thirteenth Amendment. The 1920's had proven to be difficult times for organized labor, which was now faced with the full force of judicial governance by injunction. Andrew Furuseth, one-time head of the Seamen's International Union, and perhaps the most fervent believer in the AFL's Thirteenth Amendment strategy, decided to dispatch with any effort to overcome revised definitions of property at common law or any attempt to justify class-based exceptions from antitrust laws for labor. He was frustrated by the failure of the Clayton Act to restrain hostile courts, as the Supreme Court struck its final

[84] Labor, "Involuntary Servitude in Colorado," 7. For a discussion of the AFL's response to the Kansas Industrial Commission, see Pope, "Labor's Constitution of Freedom."

blow to the law's labor provisions in 1921 in *Duplex* and then added insult to injury in *Truax*. The AFL had scrambled for new proposals to limit the injunctive authority of the courts throughout the 1920's, but Furuseth, complained that these proposals, submitted by various progressive lawyers, did not sufficiently defend the liberty principles underlying labor's pursuit of industrial freedom. Tentative hedges against the courts' injunction powers would not do. There could be "no half loaf on fundamental principles," as far as Furuseth was concerned.[85] Besides, in his view, limits on the jurisdiction of courts to issue injunctions in labor disputes would be subject to the same accusations of class legislation that undid Arizona's anti-trust reform in *Truax*. The courts had shown they would not be swayed on any manner of a labor exemption to anti-trust principles. Instead, Furuseth opted for an extremely simple solution, which would not implicate class favoritism, using Congress' Article III power to set the jurisdiction of the federal courts. Furuseth's friend, Minnesota Senator Henrik Shipstead, introduced Furuseth's bill in December 1927 to the Senate Judiciary Committee. The Shipstead Bill (S. 1482) consisted of only one line: "Equity courts shall have the jurisdiction to protect property when there is no remedy at law; for the purpose of determining such jurisdiction, nothing shall be held to be property unless it is tangible and transferable, and all laws and parts of laws inconsistent herewith are hereby repealed."[86]

This simple, yet drastic, solution to the injunction problem went over like a lead balloon in Congress. Its incredible breadth and vagueness turned off a variety of parties that appeared to testify on the bill at its subcommittee hearings.[87] Felix Frankfurter, who

---

[85] AFL, Report of Proceedings of the Forty-Seventh Annual Convention of the American Federation of Labor (1927) at 292.

[86] Shipstead Bill reprinted in Frankfurter and Greene, *The Labor Injunction* 279.

[87] Even AFL lawyers and other labor affiliates were tepid in their support of this extremely broad swipe at equitable protection of property. Few saw the bill as practical or likely to survive judicial review. See Irving Bernstein, *The Lean Years; a History of the American Worker, 1920-1933* (Boston,: Houghton Mifflin, 1960) 396.

was a committed progressive and a Brandeis acolyte, would condescendingly summarize Furuseth's efforts as follows:

> With indomitable tenacity, Mr. Furuseth has persisted in his own conception of legal history and in the espousal of a reform deemed by him the correct legal tradition. There is much that is gallant in the picture of this self-taught seaman challenging with power and skill an entire learned profession. For, almost without exception, the informed opinion of lawyers, even those most sympathetic with Mr. Furuseth's aims, regards his proposal as an attempt to the throw out the baby with bath. The Shipstead bill condemns many well-settled and beneficent exercises of equitable jurisdiction that do not touch even remotely the interests of labor.[88]

At the conclusion of the hearings, Senator George W. Norris of Nebraska, a progressive, determined that the Shipstead Bill was unacceptable in the form Furuseth offered, so he tapped a group of expert advisers to draft a substitute bill. Frankfurter would campaign to be one of these appointed advisers, bringing closer the confrontation between the AFL's brand of individualistic corporatism with the statist corporatism of progressives.[89] The time was near for this labor-progressive coalition, if it was to remain a coalition that could share resources, to settle on the exact constitutional tenor of corporatist policy.

The substitute bill abandoned efforts to kill the injunction outright by redefining property. Instead, it assembled a detailed set of limitations on court jurisdiction, which is subject to legislative control, to issue injunctions in labor disputes. The substitute bill spoke in the language of the AFL's collective freedom of contract ideals in establishing the public policy of the United States, but it pointedly did not cite the Thirteenth

---

[88] Frankfurter and Greene, *The Labor Injunction* 207. The other experts tapped for service were Donald Richberg, Francis Sayre, Edwin Witte and Herman Oliphant.

[89] See Pope, "The Thirteenth Amendment Versus the Commerce Clause: Labor and the Shaping of American Constitutional Law, 1921-1957," 30-46. for an accounting of Frankfurter's behind the scenes campaign against the Shipstead Bill. I am indebted to Pope for historical details of the legislative adventures of the Shipstead Bill. Pope reads this episode as evidence of the hostility of progressive lawyers, as lawyers, to crush the Thirteenth Amendment constitutional vision of the AFL.

Amendment as authority for this policy. As an aid to interpretation, Section 2 of the substitute bill read:

> Whereas under prevailing economic conditions, developed with the aid of governmental authority for owners of property to organize in the corporate and other forms of ownership association, the individual unorganized worker is commonly helpless to exercise actual liberty of contract and to protect his freedom of labor, and thereby to obtain acceptable conditions of employment, wherefore it is necessary that he have full freedom of association, self-organization, and designation of representatives of his own choosing to negotiate the terms and conditions of his employment, and that he shall be free from the interference, restraint or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization or in other concerted activities for collective bargaining or other mutual aid or protection….[90]

Furuseth was unsatisfied with this "half loaf" approach to the problem of hostile courts. The bill still permitted some equity jurisdiction by courts over labor matters and for him that was an unacceptable breach of the long-husbanded Thirteenth Amendment narrative. The substitute bill, in Furuseth's view, would bring the AFL right back to where they had been, with the courts screaming class legislation and striking down the law, and without the strongest constitutional rebuttal to the class legislation accusation, the Thirteenth Amendment, in play.[91]

Delegates to the 1928 AFL convention did not embrace the substitute bill, but instead reaffirmed support for the original Shipstead Bill. Furuseth's position still held

---

[90] Frankfurter and Greene, *The Labor Injunction* 280-1.

[91] Sure enough, charges of class legislation against the substitute bill did surface. A representative of the League of Industrial Rights, Walter Gordon Merritt, appeared at the hearings on the substitute bill and pointed out this objectionable difference between the substitute bill and the original Shipstead Bill. "We do not recognize, Mr. Chairman, the similarity between this bill and the one which preceded this bill upon which we have had hearings," he testified. "When I was arguing in opposition to the other bill … a committeeman interrupted me by saying this was not a labor bill, and there was no need for emphasizing the labor side of it and the effect upon labor in particular. This is a labor bill, and it is a bill which, whether justifiably or unjustifiably, (which is a question we have to consider here), serves to place the activities of labor organizations in a special class for special treatment in many very grave and important particulars …" Judiciary Committee, *Limiting Scope of Injunctions in Labor Disputes*, 1928, 737-8. The American Bar Association's Committee on Jurisprudence and Law Reform also concluded at the hearings that the substitute bill constituted unfair class legislation. *Limiting Scope of Injunctions in Labor Disputes*, 813-5.

sway over AFL membership. Victor Olander, the secretary-treasurer of the Illinois Federation, explained that the AFL did "not doubt the friendliness of the sources from which the substitute bill emanated, it is our opinion … the time is here when the Congress of the United States can be prevailed upon to provide a really adequate remedy for the injunction evil."[92] But this bravado did not last. As time passed and the substitute bill floundered, AFL officials began to worry over the wisdom of the AFL's position to reject the "half loaf" that had been offered by Norris and his progressive experts. Matthew Woll, the vice-president of the AFL, wrote to Victor Olander in 1929, questioning whether it was wise to squander the friendliness of the Norris subcommittee, a group of politicians he termed "perhaps the friendliest we have ever had." He continued "[I]s not the Sub-committee liable to feel that it has exhausted all its ability, and will it not be likely to disavow our future plans act in a more or less passive manner?"[93] At the 1929 AFL Convention, Thomas Kennedy of the mine workers worried that the AFL not once again show the lack of unity that had marked the original Shipstead hearings that made the labor movement the "laughingstock of Washington."[94] This is the language of resource competition. Members of the AFL recognized the strategic value of the AFL's reputation among the progressive political elite, and the favorable access they had been granted by those elite to the policymaking process. Those were resources they could not afford to squander in order to stick to a specific constitutional narrative. Expedience won out over Furuseth's, and the now-deceased Gompers', principle. The AFL voted in 1929 to endorse the substitute bill and strengthen

---

[92] AFL, Report of the Executive Council, Report of Proceedings of the Forty-Eight Annual Convention of the American Federation of Labor 113, 252 (1928).

[93] Letter from Matthew Woll to Victor Olander dated April 15, 1929, quoted in Pope, "The Thirteenth Amendment Versus the Commerce Clause: Labor and the Shaping of American Constitutional Law, 1921-1957," 37.

[94] AFL, Report of Proceedings of the Forty-Ninth Annual Convention of the American Federation of Labor 319, 350-1 (1929).

their relationship with Norris and other progressive elite such as Frankfurter that held political influence.[95]

The AFL endorsement did not lead to quick passage of the substitute bill. The bill continued to falter.[96] This delay provided Furuseth an opportunity to fight for a legislative embrace of collective freedom of contract built on the constitutional foundation of the Thirteenth Amendment. He would push Winter S. Martin, an AFL attorney who had steadfastly supported his Shipstead Bill, to draft a new bill that would fully and unequivocally embrace the Thirteenth Amendment as the source of broad labor rights in the Constitution. This proposal would represent the most mature expression of the AFL's long-held strategy. It was the full loaf. However, it would also represent the last effective gasp of this constitutional narrative. Senator Shipstead submitted Martin's memorandum on Norris' substitute bill (S.2497) complete with the proposed Thirteenth Amendment bill as a Senate Document in 1931.[97]

Martin's proposed bill rested its authority on Congress' Thirteenth Amendment enforcement power and declared that free labor was an inalienable right and that this right extended to associations of individuals acting in concert to advance their interests. The bill then prohibited injunctions against labor on conspiracy grounds (Sec. 4), prohibited yellow dog contracts (Sec. 5), ended injunctions issued to protect business patronage (Sec. 7), and repealed any conflicting provisions of the Sherman Act and the Clayton Act

---

[95] AFL, Report of Proceedings of the Forty-Ninth Annual Convention of the American Federation of Labor 319, 353 (1929). Furuseth was the only recorded opposition.

[96] In part due to the difficult political conditions created by Hoover's nomination of Charles Evans Hughes to Chief Justice and nomination of Judge John I. Parker to the Supreme Court. The AFL politicized the Hughes nomination and fought bitterly to defeat Parker's confirmation. For a fuller history of these confirmation battles, see Bernstein, *The Lean Years; a History of the American Worker, 1920-1933* 403-10. See also Greene, *Pure and Simple Politics: The American Federation of Labor and Political Activism, 1881-1917*, Ross, *A Muted Fury: Populists, Progressives, and Labor Unions Confront the Courts, 1890-1937*.

[97] *Injunctions in Labor Disputes*, 3rd Session, February 17, 1931 1937. Injunctions In Labor Disputes, Senate Document No. 327, 71st Congress, 3rd session. February 17, 1931.

(Sec. 8).[98] It was in its following discussion, however, that the proposed bill outlined in sophisticated prose the product of decades of determined constitutional thinking on the part of Gompers, Furuseth, and many others. Martin presented a proposition of fact, which recounts in detail the practical need for collectivization of freedom of contract:

> We disregard the facts of life if we say that the workers in these highly specialized industries, controlled by huge financial interests, have any genuine freedom of expression or any real influence in fixing the terms of their employment. In this situation only united action … can give even a semblance of equality … Under such conditions, it is clear that the worker is in a position of absolute helplessness, completely at the mercy of the employer.[99]

This proposition of fact was followed by a proposition of law that the above conditions constitute involuntary servitude and therefore must be remedied, and explicitly reference the amendatory force of the Thirteenth Amendment on the Fifth Amendment to bolster the point that man's labor can no longer be property and to treat it as such is to create involuntary servitude.[100]

Martin assured Congress that involuntary servitude is a category broader than slavery or even debt peonage. He proudly cited *Bailey v. Alabama*, an old favorite of the AFL, for having "definitely exploded" the notion that involuntary servitude could be so limited.[101] The interrelationship of modern industry requires this reevaluation, he claimed, offering a complex metaphor comparing modern industry to a stockade. Modern industry is a huge stockade with all the features of servitude within it, the only difference being that the door is left open. However, outside the door economic conditions are such that workers will starve unless they remain within the stockade. And

---

[98] Ibid., 11-2.
[99] Ibid., 12-3.
[100] Ibid., 13-4.
[101] Ibid., 16. AFL cooption of *Bailey* and other peonage decisions will be discussed at greater length in Chapter Four.

then even this "vestige of an alternative," the stockade's door open to impoverishment and starvation, is slammed shut by the labor injunction.[102]

The Thirteenth Amendment was presented as the ideal harbor for the fleet of rights and protections necessary to empower workers to take the "initiative" to fight for their own destinies by coming together with their peers and solving their own problems through collective bargaining unmolested by the state. Unfortunately for Furuseth, Martin's proposed bill went absolutely nowhere. The AFL, which had not been totally pleased with Furuseth's actions, was skittish about offending progressives like Norris, so they suggested a grafting of the Thirteenth Amendment rationale of Martin's bill to the substitute bill.[103]

Progressives reacted negatively to these Thirteenth Amendment claims. Frankfurter would argue in pointed response to Furuseth and Winter that, "[T]he talk about the Thirteenth Amendment is too silly for any practical lawyer's use and would only nullify the aim that lay behind the formation of the 'public policy'."[104] His fellow progressive lawyer and expert drafter of the substitute bill, Francis Sayre, had already observed in a *Yale Law Review* article in 1930 that the Shipstead Bill and its progeny had been misguided and naïve in its attack on the injunction. "Such a notion every lawyer at once would disclaim; but few trade unionists are lawyers," he quipped.[105] Labor's problems required wide-ranging legislative solutions. Edwin Witte, yet another of the progressive experts that drafted the substitute bill, wrote in 1932 of the foolishness of labor for adhering to abstract conceptions of rights. Labor problems required social

---

[102] Ibid., 17.
[103] AFL, Report of Proceedings of the Fifty-First Annual Convention of the American Federation of Labor 463 (1929).
[104] Letter from Felix Frankfurter to Roger N. Baldwin, Dec. 9, 1931. Quoted in Ruth O'Brien, *Workers' Paradox : The Republican Origins of New Deal Labor Policy, 1886-1935* (Chapel Hill: University of North Carolina Press, 1998) 153.
[105] Francis B. Sayre, "Labor and the Courts," *Yale Law Journal* 39 (1930): 684.

scientific solutions. Witte suggested, in typical progressive fashion, that "what is needed is an examination of the facts and a study of how the law is actually working out, rather than a priori reasoning, nice deductions, and reversion to old doctrines and phrases."[106] The rejection by progressives, who held the ear of policymakers, of a corporatist constitutional vision that kept a foot in traditional, rights-based constitutionalism was clear.

What originated as the substitute to the Shipstead Bill finally made it through Congress as the Norris-LaGuardia Act in 1932, incorporating a number of jurisdictional hedges against equity courts, but no major assertion of the constitutional rights of labor and no concessions to the AFL, who had surrendered their objections and their recommended amendments to the substitute bill, in order to maintain a vital coalition with progressive elite.

The Norris-LaGuardia Act opened the door to the state-mediated corporatist constitutionalism that progressives desired. Ruth O'Brien argues that the Act, using its approach of procedural rather than substantive limitations on judicial equity power, decoupled union activities from union identity, inexorably leading to the need for a bureaucratic apparatus necessary to determine who were the responsible parties in labor-management relations. Organized labor had lost its autonomy by sacrificing its privacy in favor of protection and the march toward the regulatory statism embodied in the power and purview of the National Labor Relations Board (NLRB) was underway.[107]

Ken Kersch reads the significance of the Norris-LaGuardia Act's progressive triumph somewhat differently. He contends that the Act set constitutional development

---

[106] Witte was an economist and has been called the father of social security for his work as the executive director of the President's Committee on Economic Security in 1934. Edwin Emil Witte, *The Government in Labor Disputes*, 1st ed. (New York, London,: McGraw-Hill Book Company, inc., 1932) 59-60.
[107] O'Brien, *Workers' Paradox : The Republican Origins of New Deal Labor Policy, 1886-1935* 148-72.

on the course toward corporatism, because it embraced a class-based conception of labor disputes, such as had been articulated in Louis Brandeis' dissent in *Duplex.* The Act defined a labor dispute to include any unions with an interest in a particular industry. There need not be a proximate relationship between employer and employee in order to create protections from injunction. Class-based legislation on behalf of labor had been embraced.[108] Regardless of which reading of the Norris-LaGuardia Act, O'Brien's reading or Kersch's reading, is accepted, it appears clear that this legislation marked both the capitulation of the AFL to their progressive friends and the first major step toward the constitutional reconstruction of the economic order that would be built on a group sensibility.

With Gompers and Furuseth now part of the AFL's past and the coalition with progressives on the progressives' terms solidified, AFL president William Green felt comfortable acceding to Senator Robert Wagner's effort to rescue the weakened National Industrial Recovery Administration, and the struggling Norris-LaGuardia Act, from oblivion with his Commerce Clause gambit that would entrench a statist version of corporatism in the Constitution.[109] Signing off on the Wagner Act meant no looking back for the AFL to traditional rights-based claims to support labor interests.

The Wagner Act, which was also known as the National Labor Relations Act (NLRA), would secure the rights of workers in private industry to unionize and to engage in collective bargaining, including the right to use tactics such as strikes and pickets. The Commerce Clause was implicated both by the disruption of strikes and the burden on the

---

[108] Kersch, *Constructing Civil Liberties: Discontinuities in the Development of American Constitutional Law* 171-2.

[109] Senator Wagner would flirt with the Republican Guaranty Clause (argued for by William Green of the AFL), the Thirteenth Amendment, Fourteenth Amendment due process, and the General Welfare Clause as possible grounds for congressional authority for his bill, before settling on the Commerce Clause as the Wagner Act's authority. See Pope, "The Thirteenth Amendment Versus the Commerce Clause: Labor and the Shaping of American Constitutional Law, 1921-1957," 17.

economy resulting from employers' refusal to bargain collectively, and by the need to raise wages and more evenly distribute purchasing power throughout the economy to stabilize commerce, which would happen through collective bargaining.[110] If the Wagner Act could survive judicial review then the days of the labor injunction and government by judicial conscience were about to be over. The NLRB would be established as part of the Wagner Act to oversee the newly state guaranteed rights of collective bargaining. Progressives had gotten their bureaucrats. Industrial rights would now flow from the state rather than from natural rights. No matter the disappointment to supporters of collective laissez-faire, organized labor had made the strategic adjustment to both the dire economic times and the preferences of their progressive allies, and headed in a new direction that would bind workers and the realization of industrial freedom to the state. Labor would prove proud defenders of state-sponsored collective bargaining rights in this newest phase of the AFL's ongoing battle with the courts.

The Wagner Act was signed into law on July 5, 1935, and was quickly challenged by employers across the country. The remnants of the *Lochner* Court were still in place and still a thorn in the side of progressive legislation, much to the chagrin of Franklin D. Roosevelt as he attempted to get the New Deal off the ground. The constitutionality of the Wagner Act would be challenged in *Jones & Laughlin*, and here the tale of an activist Supreme Court as told by organized labor meets back up with the narrative of *Lochner* scholars as this constitutional era reached its final days.

This extended dance, performed principally in the halls of Congress, between the AFL and progressive elite gets little notice in constitutional scholarship. Evidence of this interplay cannot be found in judicial decisions, for the Thirteenth Amendment theory of

---

[110] See Senator Wagner's statements to Congress. S. 2926, 73d Congress S2 (1934) and 78 Cong Rec. 3443 (1934).

collective freedom of contract never found full legislative success. Even Ken Kersch, who sets out to explode "Whiggish" disciplinary narratives, conflates the constitutionalism of the AFL and the labor movement and the constitutionalism of progressives in setting up a dichotomy between progressive constitutionalism and the individualistic constitutionalism of the civil rights movement.[111] In an effort to peel back constitutional history to reveal the tensions between black activists and the progressive/labor coalition, the reality of the resource competition between labor and progressives and the powerful constitutional tensions between them is not fully acknowledged. Kersch comes closer to acknowledging these competitive tensions between labor and progressives in the constitutional construction of the welfare state than most constitutional scholars, but much remains obscured by his attention to the court cases challenging the NLRB apparatus as a means to explore competitive constitutionalism between past constitutional insurgents. I will explore Kersch's dichotomy between the civil rights movement and the labor movement in much greater detail in Chapter Four.

WHICH SWITCH IN TIME? THE END OF THE *LOCHNER/DUPLEX* ERA

In 1937, the Supreme Court finally gave its blessing to the New Deal. The case famously remembered for the Supreme Court's switch away from strict scrutiny of state and federal economic legislation is *West Coast Hotel*. In *West Coast Hotel* the Supreme Court announced support for a state minimum wage law that protected women, overruling the earlier granting of liberty of contract to women in *Adkins v. Childrens'*

[111] Kersch, *Constructing Civil Liberties: Discontinuities in the Development of American Constitutional Law* Ch.3.

Hospital.[112] Substantive due process, which had its high moment in *Lochner*, was finished. The traditional explanation for this about-face in *West Coast Hotel* was that the justices had made a prudential decision to protect the integrity of their institution in the face of significant public approval of the New Deal and the threat by President Roosevelt to pack the court with sympathetic justices introduced in January 1937.[113]

Cass Sunstein and Howard Gillman analyze the cause of this shift in constitutional interpretation differently, moving away from unflattering political explanations for the justices' actions. Sunstein points to the revision in the Court's understanding of what neutrality by the state entailed under modern economic conditions. The Court was still concerned about granting a subsidy to one group over others, but now their entire understanding of who was receiving the subsidy from the government had changed. Employers were now the beneficiaries of an unfair subsidy, as their abuses of employees came at a significant cost to society. The *West Coast Hotel* majority referred to the need for minimum wage regulation due to the exploitation "of a class of workers at wages so low as to be insufficient to meet the bare cost of living," casting "a direct burden for their support on the community."[114] The Court declared that a "community may direct its law-making power to correct the abuse which springs from [employers'] selfish disregard of the public interest."[115] The baseline of state neutrality was no longer going to be the common law and the market mechanisms inherent in it, but instead would

---

[112] 261 U.S. 525 (1923).

[113] But see Ariens, "A Thrice-Told Tale, or Felix the Cat.", Barry Cushman, *Rethinking the New Deal Court: The Structure of a Constitutional Revolution* (New York: Oxford University Press, 1998), Richard D. Friedman, "Switching Time and Other Thought Experiments: The Hughes Court and Constitutional Transformation," *University of Pennsylvania Law Review* 142, no. 6 (1994). Revisionists of the switch in time suggest that the threat of court packing did not significantly influence Justice Roberts before *West Coast Hotel*. Barry Cushman also suggests that the "switch" of the Court in support of the New Deal had happened much earlier in *Nebbia v. New York*, 291 U.S. 502 (1934).

[114] 300 U.S. 379, 399.

[115] 300 U.S. 379, 399-400.

be an assumption about what was necessary for all workers to have a living wage.[116] Sunstein's explanation of the change inherent in *West Coast Hotel* asserts a principled reason for the change in constitutional approach by the Court.

Howard Gillman also suggests that the Court had more than its own institutional survival on its mind in *West Coast Hotel.* After having for so long viewed class legislation as an unfair grant of an advantage for one group over another, the Court had found itself unable to respond to the harsh realities of capitalism and the modern economy. State neutrality had traditionally been viewed as the best servant of the public purpose, but the Court could no longer rely on this conception of neutrality to serve the public purpose with the costs of state neutrality to society so great with the tremendous disparity between employer and worker.[117] The Court was embracing a changed perspective due to changed conditions, not attempting to simply protect itself from institutional attack.

But was *West Coast Hotel* the most significant switch in time executed by this Court? Organized labor would likely answer no. It may have come first by a few weeks, but *West Coast Hotel* was only a warm-up in their eyes to the Court's momentous decision in *Jones & Lauglin.* With the *Jones & Laughlin* decision, we can also bring our tale of the *Lochner* Court to a close on a note of judicial principle rather than with reason to pillory the Court for grounding new constitutional doctrine on political expediency. Just as with *West Coast Hotel* and the court packing plan, there was a significant external pressure on the Court to change its constitutional interpretation in *Jones & Laughlin.* This pressure resulted from the widespread sit-down strikes of 1937. Large employers had been systematically resisting the Wagner Act since its passage in 1935, and so unions

---

[116] Sunstein, "Lochner's Legacy," 880-81.
[117] Gillman, *The Constitution Besieged : The Rise and Demise of Lochner Era Police Powers Jurisprudence* 190-93.

throughout the country began to strike to ensure their collective bargaining rights. Because these were sit-down strikes, they took place within the factories and employers could not bring in strikebreakers to keep their businesses going. The sit-down strikes were successful in winning concessions from large corporations such as General Motors. The sit-down strikes were so widespread, more than 400 strikes involving more than 400,000 workers across the country,[118] and so damaging to the economy that they merited mention at oral argument of the NLRA cases before the Supreme Court.[119] The federal government wasted no opportunity to draw the Supreme Court's attention to the economic impact of labor unrest at every opportunity. In the *Jones & Laughlin* brief, the government suggested that, "relationship to interstate commerce of industrial strife may be said to be a matter of common knowledge."[120]

The Wagner Act had been passed on Commerce Clause authority despite the damaging decision in *Schecter Poultry Corp. v. United States* in 1935 that had invalidated the NIRA.[121] The prospects for success would get no better, in fact they would get worse, in 1936 with the Supreme Court's decision in *Carter v. Carter Coal Co.*.[122] In a 5 to 4 decision, the Court continued with its traditionally limited understanding of interstate commerce, ruling that commerce is distinct from production, and matters such as wages and working hours are production and therefore unreachable by federal regulation. This decision would seem to spell certain doom for the Wagner

---

[118] Melvyn Dubofsky and Warren R. Van Tine, *John L. Lewis: A Biography* (New York: Quadrangle/New York Times Book Co., 1977) 271.

[119] For a detailed discussion of the effect of the sit-down strikes on the "switch in time," see Drew D. Hansen, "The Sit-Down Strikes and the Switch in Time," *The Wayne Law Review* 46 (2000). *Jones & Laughlin* was only one of many NLRB cases that were in front of the court. See Richard C. Cortner, *The Wagner Act Cases* (Knoxville: University of Tennessee Press, 1964).

[120] 33 Landmark Briefs 286 at 83. See United States. Supreme Court., Philip B. Kurland, and Gerhard Casper, "Landmark Briefs and Arguments of the Supreme Court of the United States: Constitutional Law," ([Washington]: University Publications of America, 1975).

[121] 295 U.S. 495 (1935).

[122] 298 U.S. 238 (1936).

Act, and the public's attention, including the attention of those workers then sitting in protest in their factories, was on the Supreme Court as they mulled the *Jones & Laughlin* case. "The people stand before the oracles still waiting for a decision on the Wagner Act cases," wrote *The Nation*.[123] While *Time* noted that on the day that *West Coast Hotel* was issued the courthouse was packed with many luminaries eagerly awaiting the Wagner Act decisions. The magazine pointed out that it was time well spent, despite the disappointment, because they had witnessed a "red-letter decision day."[124] While *West Coast Hotel* was a welcome decision, it had not been as eagerly anticipated by the public or the government as the decision that followed two weeks later.

The *Jones & Laughlin* decision was handed down on April 12, 1937, and it was filled with references to lived experience. The sit-down strikers had made their point. The Court wrote of the old standard for the commerce clause:

> We are asked to shut our eyes to the plainest facts of our industrial life and to deal with the question of direct and indirect effects in an intellectual vacuum. … When industries organize themselves on a national scale, making their relation to interstate commerce the dominant factor in their activities, how can it be maintained that their industrial labor relations constitute a forbidden field into which Congress may not enter when it is necessary to protect interstate commerce from the paralyzing consequences of industrial war? We have often said that interstate commerce itself is not a practical conception. It is equally true that interferences with that commerce must be appraised by a judgment that does not ignore actual experience. … Experience has abundantly demonstrated that the recognition of the right of employees to self-organization and to have representatives of their own choosing for the purpose of collective bargaining is often an essential condition of industrial peace. Refusal to confer and negotiate has been one of the most prolific causes of strife. This is such an outstanding fact in the history of labor disturbances that it is a proper subject of judicial notice and requires no citation of instances.[125]

---

123 "The Shape of Things," *Nation* 1937.
124 "Judiciary: Chambermaid's Day," *Time*, April 5, 1937 1937.
125 301 U.S. 1, 41-2.

The Court had embraced a new perspective that was consonant with changing times. The nature of society was now such that old baselines for state neutrality could no longer hold, and neither could prior understandings of the proper locus of government responsibility and public policy. "Actual experience" must be acknowledged and appreciated in constitutional interpretation. The crass suggestion that the Court had simply changed its view to quell public and presidential furor in the face of both the sit-down strikes and the court packing plan has its appeal, but the Court was also revising the proper parameters of their constitutional analysis in the face of new social and economic realities that required a new baseline and a new openness to what evidence could be noted in judicial decision-making.

CONCLUSION

After *West Coast Hotel* and *Jones & Laughlin*, the courts would no longer be a major obstruction to the New Deal and to the transformation of the American constitutional order. *West Coast Hotel* revitalized state police powers, and *Jones & Laughlin* broadened the Commerce Clause to permit a far wider ambit of federal economic regulation. To cap the story of the victory over the obstructionist Supreme Court of the Progressive Era with only *West Coast Hotel* would miss the transformative effect of the new commerce clause jurisprudence that would ultimately permit the federal government to assume its own *de facto* police power.[126] It would also leave a false

[126] See *Heart of Atlanta Motel v. United States,* 379 U.S. 241 (1964), and *Katzenbach v. McClung,* 379 U.S. 294 (1964), upholding desegregation provisions of Title VII of the Civil Rights Act of 1964 under Commerce Clause authority. Perhaps scholarly fascination with the doctrinal development from *Lochner* to *West Coast Hotel* is driven by the challenge presented by the rebirth of substantive due process in the privacy cases. Now that the Supreme Court has revisited the Commerce Clause to slightly rein in federal power, will scholars grow more interested in examining the roots of the Commerce Clause revolution that

impression of history. *West Coast Hotel* was important to reformers when it was issued, but for ordinary Americans fighting for change at the time, *Jones & Laughlin* was much more significant and much more eagerly anticipated. Organized labor had far more to lose had the court struck down the Wagner Act, and scuttled federal guarantees of collective bargaining, than if the Court had continued to block police power regulations on due process grounds, for organized labor had long ago abandoned the benefits of state-mandated terms of employment.

Not much is lost by supplementing the story of the *Lochner* Court with the story of the *Duplex* Court. Certainly the same debate over the justices' allegiance to constitutional principles of equality and neutrality versus judicial preferences for laissez-faire economics can be carried out looking to the line of cases that directly challenged organized labor in the twentieth century. It is still possible to rehabilitate to some degree this Court, and the legal model of decision-making, from the cruelest accusations of ideological opportunism and unprincipled behavior by following the misadventures of the AFL in the first decades of the twentieth century.

What is gained by analyzing this history through the lens of organized labor is not only closer scholarly attention to the revolutionary enhancement of federal power grounded in the Commerce Clause, but also acknowledgment of a wider set of constitutional claims and potential directions for constitutional development. The AFL led organized labor through a long and often devastating series of skirmishes with the courts, constantly innovating with new strategies and new or rediscovered constitutional narratives as they met each new judicial thrust and parry. The Constitution was primed for its New Deal transformation with each adaptation of organized labor to hostile

---

took place in *Jones & Laughlin*? See *United States v. Lopez*, 514 U.S. 549 (1995), and *United States v. Morrison,* 529 U.S. 598 (2000).

precedent, which required both constitutional creativity on the part of the AFL and a willingness to eventually make compromises with their progressive allies.

Had the AFL had sole control over their own destiny, the turn to collective bargaining to replace the safety net of the police power lost to freedom of contract may never have occurred, but once it did, the first choice of the AFL was not mediation by the state of bargaining between employers and employees. But the AFL was not alone in its quest to capture the Constitution back from the *Lochner*/*Duplex* Court, and the AFL eventually made the expedient decision to surrender its Thirteenth Amendment claim and its collective freedom of contract narrative to progressive faith in bureaucracy. As discussed in Chapter Two, doctrine does not change without extended conflict and negotiation between judges and those representing forces fighting for change. But there also exists a horizontal dimension to this negotiation and conflict, not always played out in briefs, oral arguments, or judicial decisions. Peer social movements will negotiate their claims in an attempt to best husband their resources and realize their policy goals, and this happened between labor and progressives. The lesson of studying the AFL's long journey from *Jacobs* to *Jones & Laughlin* is that by examining that conflict from the perspective of those claiming the Constitution as their own, a much wider field of conflict and complex negotiation for constitutional change can be appreciated, and a fuller arsenal of constitutional arguments and provisions can be recognized for their radical potential, such as the Thirteenth Amendment, rather than dismissed as too silly or too dusty for current use.

Chapter Four: The Black Worker as Individualist? The Effects of Resource Competition on the Strategies of the Civil Rights Movement

The *Lochner* Court has long been a favorite villain of constitutional scholars for its stubborn activism and its unjustified grafting of laissez-faire economic principles onto the Constitution that thwarted progressive economic regulation by the state. Many constitutional scholars do not stop there, however, in recounting the villainy of this particular group of justices. For some critics, the *Lochner* Court was also a menace to the welfare of African-Americans, thanks to an implicit racism and hostility to civil rights present in laissez-faire constitutionalism. For these critics, that menace was most clearly illustrated by *Plessy v. Ferguson*,[1] which was decided by substantially the same Court that would later decide *Lochner*, and was motivated, so they contend, by the same intellectual commitment to laissez-faire principles on the part of these justices.[2] Given judicial commitment during this period to barring state intervention against "natural" economic or social forces, segregated blacks were just as much the victims of Lochnerian

---

[1] 163 U.S. 537 (1896). *Plessy*, which upheld a state law requiring private railroads to enforce segregation, constitutionally entrenched segregation with its "separate but equal" interpretation of the Equal Protection Clause of the Fourteenth Amendment.

[2] For a full discussion of the relationship between *Plessy* and *Lochner*, see generally David E. Bernstein, "Plessy Versus Lochner: The Berea College Case," *Journal of Supreme Court History* 25 (2000). Bruce Ackerman points to the *Plessy* Court's insistence that societal commingling can only result from natural affinities and must be the product of societal change not legislation as evidence that laissez-faire beliefs are motivating the justices just as they had in *Lochner*. Ackerman, *We the People: Foundations* 147. Owen Fiss reads both *Plessy* and *Lochner* as codifications of existing social practices driven by sociological beliefs (*Plessy*) and by the market (*Lochner*). Owen M. Fiss and United States. Permanent Committee for the Oliver Wendell Holmes Devise., *Troubled Beginnings of the Modern State, 1888-1910*, *History of the Supreme Court of the United States ; V. 8* (New York: Macmillan Pub. Co., 1993) 362. Cass Sunstein also argues that laissez-faire commitments motivated the justices to treat existing social distributions as neutral baselines for constitutional analysis in each case. Cass R. Sunstein, *The Partial Constitution* (Cambridge, Mass.: Harvard University Press, 1993) 48. Derrick Bell likewise accuses the Court of protecting existing social and economic arrangements in *Plessy* and *Lochner* respectively. Derrick Bell, "Does Discrimination Make Economic Sense? For Some It Did - and Still Does," *Human Rights* 15 (1988): 41.

jurisprudence as exploited white workers. Laissez-faire constitutionalism not only served as an illegitimate constitutional barrier to economic reform, but also served as a convenient constitutional excuse for perpetuating racist public policies and for neutering the force of the Reconstruction Amendments.

As discussed in earlier chapters, revisionist scholars have attempted to rehabilitate the *Lochner* Court, not only by tackling accusations that the justices were unduly activist, but also by demonstrating that liberty of contract beliefs were well-established at that time, and that state neutrality had been a long-standing constitutional commitment governing judicial decision-making. Now some scholars are turning their attention to this ancillary indictment of the *Lochner* justices, and their laissez-faire ideology, as opponents of civil rights for African-Americans during this era. The challenge to this indictment has focused not only on the characterization of *Plessy* as a product of laissez-faire constitutionalism and a forerunner of Lochnerian jurisprudence, but also on the attitudes of African-Americans of the period towards both laissez-faire constitutionalism and the courts themselves.[3] According to these latest *Lochner* revisionists, African-Americans, in contrast to progressives and the white working class, tended to support both laissez-faire constitutionalism and judicial activism. While much of the country during the

[3] The challenge to the laissez-faire underpinnings of *Plessy* comes from a diverse range of scholars. Michael Klarman attributes the decision to the pervasive racism of the period not any particular tendency of laissez-faire constitutionalism. Michael J. Klarman, "Constitutional Fact/Constitutional Fiction: A Critique of Bruce Ackerman's Theory of Constitutional Moments," *Stanford Law Review* 44 (1992): 787, Michael J. Klarman, "Race and the Court in the Progressive Era," *Vanderbilt Law Review* 51 (1998): 887-8. Mark Tushnet and Richard Epstein each focus on the statist, expansionist view of the police power present in *Plessy* that was repudiated in *Lochner*. Richard A. Epstein, "Lest We Forget: Buchanan V. Warley and Constitutional Jurisprudence of the 'Progressive Era'," *Vanderbilt Law Review* 51 (1998): 790, Mark Tushnet, "Plessy V. Ferguson in Libertarian Perspective," *Law and Philosophy* 16 (1997). David Bernstein, in addition to highlighting the statist nature of *Plessy*, also draws attention to the judicial reliance on social science ideas and public opinion within the opinion that is rejected in *Lochner*. David E. Bernstein, "Philip Sober Controlling Philip Drunk: Buchanan V. Warley in Historical Perspective," *Vanderbilt Law Review* 51 (1998). My subsequent focus in this chapter will be on the latter set of revisionist claims that highlight African-American adoption and promotion of laissez-faire constitutional ideals rather than this dispute over the intellectual pedigree of *Plessy*.

Progressive and Inter-War Eras viewed the courts as an enemy of democracy and a servant of the capitalist elite, African-Americans viewed them as modest allies. Unless it can be demonstrated that African-Americans had misjudged and miscalculated their own political interests at the time, it is difficult to paint the *Lochner* Court as their enemy.

The reasons for African-American support for an individualistic, rights-based constitutional order partnered with aggressive courts to enforce that constitutional order are not surprising when considering the political context of the Progressive and Inter-War Eras. First, free labor ideology had been a critical aspect of the abolitionist fight for emancipation, so it is unsurprising that African-Americans would adopt and hold tightly to the ideology and rhetoric that had contextualized the fight for their freedom.[4] As late as 1930, African-Americans were still proving to be "the most individualistic of workers."[5]

Second, courts proved to be the least hostile institutions of government to the interests of African-Americans during this period. With the rise of Jim Crow and the influence of Social Darwinism on American culture, African-Americans faced deteriorating social and political conditions entering the twentieth century.[6] This racist hostility frequently translated into discriminatory public policy segregating African-

---

[4] For a review of the development and importance of free labor ideology, see Foner, *Free Soil, Free Labor, Free Men: The Ideology of the Republican Party before the Civil War*. See also Kersch, *Constructing Civil Liberties: Discontinuities in the Development of American Constitutional Law* 188-95.

[5] This was the finding of a study of the black worker and unions by the NUL. See National Urban League. Dept. of Research and Community Projects., *Negro Membership in American Labor Unions* (New York,: Negro Universities Press, 1969) 165.

[6] For a general depiction of the formation and extent of Jim Crow laws, see Rayford Whittingham Logan, *The Negro in American Life and Thought: The Nadir, 1877-1901* (New York,: Dial Press, 1954), C. Vann Woodward, *The Strange Career of Jim Crow* (New York,: Oxford University Press, 1955). For a discussion of the curtailment of the political rights of African-Americans during this period, see J. Morgan Kousser, *The Shaping of Southern Politics : Suffrage Restriction and the Establishment of the One-Party South, 1880-1910*, *Yale Historical Publications. Miscellany. 102* (New Haven: Yale University Press, 1974). For a discussion of the impact of Social Darwinism on American social and political culture during this period, see Carl N. Degler, *In Search of Human Nature : The Decline and Revival of Darwinism in American Social Thought* (New York: Oxford University Press, 1991).

Americans, curtailing their political rights, and limiting their economic mobility.[7] At the national level, Woodrow Wilson would match this legislative assault by being the first executive to segregate the federal workforce since the Civil War.[8] But the Supreme Court would actually make a series of rulings favorable to civil rights, which limited some legislative abuses of African-Americans during this period. The *Lochner* Court invalidated grandfather clauses under the Fifteenth Amendment,[9] struck down peonage laws under the Thirteenth Amendment,[10] policed state adherence to equality in the provision of separate railroad accommodations under the Fourteenth Amendment,[11] and invalidated residential segregation ordinances under the Fourteenth Amendment.[12] The Supreme Court was certainly not an unqualified ally during this era. They did after all decide *Plessy*. And as Michael Klarman points out, these pro civil rights decisions were neither motivated by any forward-thinking beliefs in racial equality by the justices, nor did they have the bite necessary to make a tremendous difference in the daily lives of African-Americans.[13] Yet however modest and inconsistent their assistance, the *Lochner*

---

[7] See generally Bernstein, *Only One Place of Redress: African Americans, Labor Regulations, and the Courts from Reconstruction to the New Deal*, Klarman, *From Jim Crow to Civil Rights: The Supreme Court and the Struggle for Racial Equality*, Klarman, "Race and the Court in the Progressive Era."

[8] See Nancy J. Weiss, "The Negro and the New Freedom: Fighting Wilsonian Segregation," *Political Science Quarterly* 84 (1969). Wilson's decision to segregate the bureaucracy reflected the uniform commitment to segregation by national political leaders during this period. See generally Desmond S. King, *Separate and Unequal : Black Americans and the Us Federal Government* (New York: Clarendon Press ; Oxford University Press, 1995).

[9] *Guinn v. United States*, 238 U.S. 347 (1915). *Myers v. Anderson*, 238 U.S. 368 (1915).

[10] *Bailey v. Alabama*, 219 U.S. 219 (1911). *United States v. Reynolds*, 235 U.S. 133 (1914).

[11] *McCabe v. Atchison*, 235 U.S. 151 (1914).

[12] *Buchanan v. Warley*, 245 U.S. 60 (1917).

[13] Klarman argues that these decisions were concerned with form rather than substance and therefore easy for whites to circumvent. As to judicial motivation, he suggests that these decisions were the product of a minimalist commitment to constitutionalism, since these practices that the Court invalidated were so plainly unconstitutional that the Court had no choice but to strike them down. Klarman, "Race and the Court in the Progressive Era," 886,96-7. See also Klarman, *From Jim Crow to Civil Rights: The Supreme Court and the Struggle for Racial Equality.*

Court was nevertheless the only institution of government that offered blacks any measure of political, social or economic protection during this period.

Third, demonstrating the old adage that the enemy of my enemy is my friend, African-Americans recognized that the courts kept one of the greatest threats to the economic survival of African-Americans in check – white workers. As historian Rayford W. Logan points out, it was not publicly sponsored Jim Crow laws, largely judicially upheld, that worked the first and greatest exclusion of blacks from private organizations or establishments, rather the "first large-scale exclusions of Negroes by private organizations in the post-bellum period was the handiwork of organized labor."[14] David Bernstein highlights the *Lochner* Court's application of its ideology to strike down a number of facially neutral economic regulations during this period, which protected the economic interests of African-Americans, as evidence that blacks were knowing beneficiaries of Lochnerian judicial activism.[15] Every judicial blow against the collective bargaining strength of organized labor, which as will be discussed subsequently in this chapter firmly closed its doors to black membership, provided a competitive advantage to black workers who had to negotiate individually with their employers to set the terms of their employment.

Constitutional scholars have largely resisted, however, viewing black and white workers of this period as competitors with fundamentally conflicting constitutional interests, and African-Americans as beneficiaries of Lochnerian activism. David

---

[14] Logan, *The Negro in American Life and Thought: The Nadir, 1877-1901* 142.

[15] See Bernstein, *Only One Place of Redress: African Americans, Labor Regulations, and the Courts from Reconstruction to the New Deal*. Bernstein studies judicial curtailment of emigrant agent laws that prevented the recruitment of black workers out of the South and into competition with Northern white workers (Chapter 1), of occupational licensing laws which reduced African-American competition with white unions (Chapter 2), of monopolization of railroad labor by white unions (Chapter 3), of federal minimum wages that priced blacks out of the market (Chapter 4), and of New Deal protections for unions that allowed whites-only unions to pressure employers to fire black workers (Chapter 5).

Bernstein argues that this blind spot is the product of a scholarly preoccupation with understanding this period of politics and history as a product of economic class conflict, inspired by both the influence of Marxist interest group theory and the focus of Progressives of this time on the myth of the "interests" versus the "people." Because the *Lochner* Court stood in the way of economic reform and made constitutional decisions that benefited capital, the Court is best understood as an enemy of all oppressed workers. This perspective, however, according to Bernstein, overlooks the economic reality that not all workers share the same interests or the same position in the economic order.[16]

Ken Kersch agrees, but points to a different intellectual phenomenon. He contends that this scholarly blind spot stems from a disciplinary commitment to the Whiggish historiography of the progressive statebuilding project which paints a linear development of group-based civil rights, with blacks following labor into the protected bosom of the state on an orderly and inevitable trajectory. Generations of confident constitutional scholarship regarding the welcomed and necessary advent of the welfare state have made it extremely difficult for scholars to see and to acknowledge the serious conflicts between the interests of the "oppressed" and to see the role of the progressive state, and not the laissez-faire traditionalists in the judiciary, as an oppressor rather than as merely a tardy liberator of African-Americans.[17] In an affirming review of Bernstein's work, Kersch writes:

> In our grand narratives of constitutional development and the emergence of the American welfare state, central casting has arrayed the oppressed (blacks and labor) acting in solidarity against the (capitalist) oppressor. American blacks' resentment of the heroes of Steinbeck novels and Woody Guthrie songs and their alliance with employers are acknowledged in footnotes and discussed only in

---

[16] Ibid. 4-5. Paul Moreno echoes Bernstein's analysis. See Moreno, *Black Americans and Organized Labor : A New History* 1-3.

[17] Kersch, *Constructing Civil Liberties: Discontinuities in the Development of American Constitutional Law*.

> specialized historical studies. For as Plato declared in his Republic, it is one of the chief tasks of the ruling Guardians to 'take good care that battles between gods and giants and all other various tales of gods and heroes coming to blows with their relatives and friends don't occur in the stories the people hear and the pictures they see.'[18]

In this chapter, I examine the actions and constitutional claims of African-Americans themselves to test this revisionist account of their affinity for laizzez-faire constitutionalism and for the courts. To do so, I track the activities of the leading SMOs of the early civil rights movement, the NAACP and the NUL, which negotiated their own internal movement coalition, on behalf of the black worker. What I find generally confirms the revisionist rehabilitation of the relationship between the *Lochner* Court and African-Americans presented by Bernstein and Kersch. Civil rights leadership in this period was protective of the courts and of the laissez-faire constitutional order that empowered capitalists at the expense of organized labor. However I discover, by probing the effects of resource competition on the strategies of these movement organizations, that the continued commitment throughout this period of the civil rights movement to laissez-faire constitutionalism, individual rights, and judicial activism was grounded in expedient necessity rather than a sincere constitutional preference for the continued success of free contract jurisprudence and the maintenance of an individualistic constitutional order. Bernstein overlooks this nuance in his account of the divergent constitutional commitments of African-Americans and organized labor, while Kersch credits A. Philip Randolph with crafting a corporatist constitutional vision of civil rights that would be compatible with the New Deal state, overlooking the earlier contributions of the NUL and the NAACP.

---

[18] Kenneth I. Kersch, "Blacks and Labor - the Untold Story," *The Public Interest*, no. Summer (2002): 144-5.

My charting of the decades long courtship of the AFL by the NAACP and the NUL belies any claim that the leadership of the civil rights movement was adverse to surrendering their laissez-faire, anti-union beliefs to second the constitutional vision of the AFL. This courtship would fail, however, and the NAACP and the NUL would take practically motivated measures to contest the AFL's constitutional vision and continue to promote the institutional interests of courts, who had proven to be stalwart enemies of organized labor. Evidence of this negative resource competition between the civil rights movement and the labor movement, and the expedient nature of the constitutional arguments of the NAACP and the NUL, are found in the hearings on the Shipstead Bill, which I highlighted in Chapter Three. My return to the legislative misadventures of the Shipstead Bill not only clarifies the constitutional motivations of the civil rights movement, but also reveals the ironic position the movement finds itself in as the NAACP goes to Congress to contest a legislative measure grounded in an expansionary interpretation of the Thirteenth Amendment.

COPING WITH THE NADIR OF RACE RELATIONS: NEGOTIATING THE VOICE OF THE BLACK WORKER

The Progressive and Inter-War Eras represented a bleak period for African-Americans, as the promising developments of Reconstruction were swiftly swept away following the exit of the federal government from the South. Rayford W. Logan famously referred to this period straddling the birth of the twentieth century as the "nadir" of American race relations.[19] Out of this period would develop a new race consciousness and organization of protest that would challenge the dominance of the

[19] Logan, *The Negro in American Life and Thought: The Nadir, 1877-1901.*

conciliatory, self-help approach to racial advancement of Booker T. Washington and his Tuskegee Movement. As discussed earlier, social movements are not monolithic entities. They typically consist of a diverse array of groups and individuals who frequently hold widely divergent preferences for social and political change and often develop conflicting strategies for realizing those preferences. Within every SMI there will be competition over resources, as groups maneuver themselves, and their preferred visions for social or political change, for success. The civil rights movement in its early years would be no different. The outcome of this internal peer resource competition would significantly impact the direction and success of later efforts to promote the interests of the black worker, including the strategic decision to pursue a coalition with the AFL, and the execution of that strategy.

Booker T. Washington was the leading voice for black interests entering the twentieth century. At the core of his philosophy was a belief that blacks must achieve economic success before they could hope to realize civil or political rights or equal treatment under the law. His self-help approach no doubt resonated with those African-Americans disillusioned by their increasing exclusion from the political process. In his famous Atlanta Exposition Speech in 1895, Washington urged African-Americans to start from the bottom up, to "cast your bucket down where you are," promising that, "no race that has anything to contribute to the markets of the world is long in any degree ostracized. … It is important and right that all privileges of the law be ours, but it is vastly more important that we be prepared for the exercise of these privileges."[20] His philosophy conformed to the dominant doctrine of laissez-faire capitalism, and he preached a doctrine of conciliation, individualism, paternalism, and anti-unionism that

[20] Booker T. Washington, Louis R. Harlan, and Raymond Smock, *The Booker T. Washington Papers*, 14 v. vols., vol. 3 (Urbana,: University of Illinois Press, 1972) 583-7.

won him tremendous support among elite whites, including capitalist philanthropists and national politicians, like Andrew Carnegie and Theodore Roosevelt.[21] In fact, it was the white capitalist that Washington appealed to for assistance in improving the social conditions of blacks. In his Atlanta speech, he implored these elite to "cast down your bucket among these people who have, without strikes and labor wars, tilled your fields, cleared your forests, builded your railroads and cities, and brought forth treasures from the bowels of the earth. … We shall stand by you with a devotion that no foreigner can approach."[22] It would be difficult to find a cozier depiction of traditional free contract beliefs than this paean to the paternalistic employer's embrace of the loyal and productive employee.

Washington's conservative approach left many African-Americans dissatisfied. His emphasis on predominantly rural black interests in the South ignored increasing black migration to the North and the urban experience. Likewise, his staunch support for industrial education and humble social and intellectual ambitions did not appeal to many educated blacks, nor did it allow for the future development of a black leadership class.[23] More importantly, many African-Americans were unwilling to turn their back on organized protest and to rely on white benefaction to achieve racial advancement. T. Thomas Fortune founded the Afro-American League (later the Afro-American Council) in 1890 with a declaration that it was "time to face the enemy and fight inch by inch for every right he denies us."[24]

---

[21] See generally August Meier, *Negro Thought in America, 1880-1915; Racial Ideologies in the Age of Booker T. Washington* (Ann Arbor,: University of Michigan Press, 1963).
[22] Washington, Harlan, and Smock, *The Booker T. Washington Papers* 583-7.
[23] Jesse Thomas Moore, *A Search for Equality : The National Urban League, 1910-1961* (University Park: Pennsylvania State University Press, 1981) 19-20.
[24] Remarks printed in the *New York Age* on Jan. 25, 1890. Reprinted in Nancy J. Weiss, *The National Urban League, 1910-1940* (New York,: Oxford University Press, 1974) 8.

W.E.B. Du Bois would also challenge Booker T. Washington and his approach to racial advancement directly, making a name for himself in 1903 with the publication of *The Souls of Black Folk*, where he challenged Washington's hostility to higher education for blacks, his abandonment of civil rights, and his surrender of political power and protest as tools for forcing change.[25] Capitalizing on his growing reputation, Du Bois would call a meeting of well-known anti-Bookerite black leaders, such as John Hope and William Monroe Trotter, in 1905. This meeting would spawn the Niagara Movement, named for the location of the meeting, Niagara Falls, which explicitly rejected the accommodationist approach of Washington. The group would aggressively call for equality for African-Americans and the immediate enjoyment of the same civil rights as all other Americans, particularly manhood suffrage and the protest rights to free speech, association and press.[26] James Weldon Johnson, who would later serve as general secretary of the NAACP, recalled that the Niagara Movement would divide the race into "two well-defined parties," and sow a "bitterness" that would continue for years.[27]

Entering the twentieth century, white interest in racial advancement also intensified as many progressives turned their attention to the plight of African-Americans. Given the widespread racism of the Progressive Era, which witnessed the growing popularity of eugenics and Social Darwinism, such a claim may seem paradoxical. However, according to Nancy J. Weiss, there were several reasons for why a significant portion of white progressives, particularly from the north, during this period

---

[25] See the chapter entitled "Of Mr. Booker T. Washington and Others." W. E. B. Du Bois, *The Souls of Black Folk*, 1st Vintage Books/Library of America ed. (New York: Vintage Books/Library of America, 1990).

[26] For a comprehensive history of the Niagara Movement, see Elliott M. Rudwick, "The Niagara Movement," *The Journal of Negro History* 42, no. 3 (1957).

[27] James Weldon Johnson, *Along This Way; the Autobiography of James Weldon Johnson* (New York,: The Viking press, 1933) 313.

reached out to assist African-Americans, including abolitionist family tradition,[28] religious conviction,[29] commitment to social justice and democracy,[30] and the development of the field of sociology and the proliferation of trained social workers who confronted the increasing number of urban blacks in their daily work.[31] Whether these white progressives were genuinely committed to racial equality or simply devoted to the eradication of poverty and committed to social uplift and democracy is unclear, nevertheless a significant number of northern progressives, particularly concentrated in New York, embraced the black cause and helped to bring focus to the early civil rights movement.[32]

The biracial NAACP and the biracial NUL, which would both quickly become the leading SMOs of the civil rights movement, developed from this unrest among black

---

[28] Many of the white founders of the NAACP and the NUL were the descendants of prominent abolitionists and frequently cited a responsibility to family tradition as reason for their involvement in racial causes. See Weiss, *The National Urban League, 1910-1940* 50-2. Oswald Garrison Villard, a founder of the NAACP and the grandson of William Lloyd Garrison, took this responsibility to honor his heritage of racial activism particularly seriously, musing that "if in this cause of human rights I do not win at least a portion of the epithets hurled at my grandfather in his battle, I shall feel that I am not doing effective work." Quoted in James M. McPherson, "The Anti-Slavery Legacy: From Reconstruction to the Naacp," in *Towards a New Past; Dissenting Essays in American History*, ed. Barton J. Bernstein (New York,: Pantheon Books, 1968), 151.

[29] Weiss points out that better than half of the members of the NUL were Protestant and had been influenced by liberal denominations present in northern churches that had a rich abolitionist tradition and had more recently been influenced by the social gospel, which preached the ills of industrial society. The remaining members of the NUL were primarily Jews, Quakers and Unitarians, which shared liberal beliefs. See Weiss, *The National Urban League, 1910-1940* 51-4.

[30] Several members of the NUL and particularly the NAACP were socialists, such as Mary White Ovington, William English Walling, John Haynes Holmes and Charles Edward Russell, and were among the most egalitarian of the white racial reformers. Ibid. 54.

[31] Weiss points to the quintessentially progressive belief in man's ability to control his social environment that had accompanied the rapid development of fields of study such as economics and sociology as a motivating factor in white participation in the civil rights movement. She points out that white racial reformers were more highly educated than the average progressive, including the new ranks of college-educated progressive women, such as Jane Addams and Florence Kelley, who were involved in the settlement movement and other social work and were members of the NAACP. Ibid. See also Moore, *A Search for Equality : The National Urban League, 1910-1961* 33, John Louis Recchiuti, *Civic Engagement : Social Science and Progressive-Era Reform in New York City* (Philadelphia, Pa.: University of Pennsylvania Press, 2007) 177-208.

[32] Moore, *A Search for Equality : The National Urban League, 1910-1961* 32.

intellectuals and this growing progressive concern for African-Americans among the white biological, intellectual and spiritual heirs of abolition. The NAACP would fulfill the radical promise of the Niagara Movement and would continue to challenge the influence of Washington's conservatism over the civil rights movement. While the NUL, more conservative like Washington in its temperament, would fight for the interests of urban blacks, whose concerns had been previously marginalized by Washington's tight focus on southern blacks and the rural experience.

The NAACP began as a reaction to the race riots in Springfield, Illinois in August of 1908. This racial violence in the home of Lincoln had a profound effect on Oswald Garrison Villard, grandson of William Lloyd Garrison, William English Walling, a prominent socialist intellectual, and Mary White Ovington, a socialist and a social worker that had spent some years living and working in a black tenement and who had recently become, at Du Bois' invitation, the first white member of the Niagara Movement. The three met to discuss the possibility of forming a biracial organization to address racial injustice and this meeting led to a "Call" for a conference on the Negro problem. The 1909 conference was well attended by blacks and whites alike, and the NAACP was formed, though it did not immediately carry that name.[33]

Du Bois would be brought on board to edit the group's journal, *Crisis*. Du Bois' Niagara Movement was faltering at this time due to poor organization, poor funding, and challenges from Washington and his followers.[34] The NAACP represented a new venue for the underlying ideals of the Niagara Movement, and its early black membership was dominated by "Du Bois Men," who were anti-Washington in their approach to civil

[33] For a comprehensive history of the founding and early activities of the NAACP, see Charles Flint Kellogg, *Naacp, a History of the National Association for the Advancement of Colored People* (Baltimore,: Johns Hopkins Press, 1967).
[34] Rudwick, "The Niagara Movement."

rights.[35] The NAACP would adopt aggressive tactics and a thematic commitment to civil rights, which echoed the Niagara Movement. Villard pointed out in his autobiography that from the beginning his conception of the organization was that it should be an aggressive watchdog of Negro liberties and should allow no racial wrong to occur without protest and the maximum pressure that the organization could bring to bear.[36] As for civil rights, disfranchisement was the theme selected by Villard for the original "Call" to arms that led to the formation of the NAACP, and Du Bois similarly made disfranchisement the theme of the second conference of the NAACP.[37]

At the same time that the NAACP was finding its footing, the NUL was coalescing out of a variety of social betterment organizations that had been formed in New York in the first years of the century to assist urban blacks. The first of these organizations was the National League for the Protection of Colored Women (NLPCW). The NLPCW was founded by Frances Kellor in 1906. Kellor received her training in both law and social work and made the plight of immigrants and blacks her life's work. The first goal of the NLPCW, as stated in its constitution, was to "prevent friendless, penniless, and inefficient Negro women from being sent north by irresponsible agencies which often misrepresented to them conditions in the northern city."[38] This mission was reminiscent of Washington's belief that blacks should remain in the south and concentrate on self-help and self-improvement. The group's second order of business was likewise Washingtonian, as the NLPCW concerned itself with improving the

---

[35] Kellogg, *Naacp, a History of the National Association for the Advancement of Colored People* 22.
[36] Oswald Garrison Villard, *Fighting Years; Memoirs of a Liberal Editor* (New York,: Harcourt, 1939) 194.
[37] Kellogg, *Naacp, a History of the National Association for the Advancement of Colored People* 14-21.
[38] NLPCW Constitution reprinted in Guichard Parris and Lester Brooks, *Blacks in the City; a History of the National Urban League*, [1st ed. (Boston,: Little, 1971) 7.

traveling experiences and living conditions of those women that did come north, as well as provide them with necessary industrial training.

1906 also witnessed the organization of the Committee for Improving the Industrial Condition of Negroes in New York. (CIICNNY), which was a biracial organization founded by William L. Bulkley, the first black principal in New York's school system, and interestingly counting part of the future core of the NAACP Du Bois, Ovington and Villard, among its other founding members. Industrial education and economic opportunity were the goals of the CIICNNY, and in this way the group prefigured the NUL both in its mission and its biracial makeup. It also prefigured the NUL in its close relationship to and support from white business leaders.[39] Although Washington was suspicious of the CIICNNY, given its connection to Du Bois, the organization reflected the pragmatism of Washington's approach with its strict emphasis on industrial education. Similarly, the group engaged in direct appeals to blacks in the south encouraging them to remain there since they were not equipped for urban life and scarcely available industrial work.[40]

In 1910, the Committee on Urban Conditions Among Negroes (CUCAN) was formed with the express goals of studying the conditions and impact of black urbanization and of training black social workers to deal with this growing population.[41] George Haynes, like Du Bois a black sociologist, spearheaded this effort with the assistance of Ruth Standish Baldwin, the widow of a railroad magnate and a great admirer of Washington as well as a contributor to the efforts of the NLPCW. The focus of CUCAN reflected the distinctly progressive commitment to sociology and the burgeoning social work profession.

---

[39] Ibid. 10-20.
[40] Weiss, *The National Urban League, 1910-1940* 23-5.
[41] Parris and Brooks, *Blacks in the City; a History of the National Urban League* 29-30.

Consolidation of these three organizations quickly followed on the heels of the formation of CUCAN, which had eyed consolidation and a national reach from its inception. The NUL was officially formed in October of 1911 as the National League on Urban Conditions (NLUCAN). The name would be subsequently shortened to the National Urban League in 1917, but I will refer to the organization as the NUL from here on out. The NUL's mission would reflect the goals of its original constituent organizations, and would focus on industrial opportunity and the training of black social workers and the administration of social services to urban blacks. It would take a pragmatic approach to racial advancement that was reminiscent of Washington's self-help philosophy. Self-improvement and economic success and social stability were the keys to winning and maintaining rights and liberties. "The fundamental proposition," according to George Haynes, "was the issue of wages and working conditions. You give him [the Negro worker] wages and proper working conditions, and he is bound to come up in all other things."[42] According to one NUL *Bulletin*, civil and political rights were not useful if blacks lived in poverty and idleness. Effort must be aimed at "the most fundamental element of race status: economic standing, physical and mental well-being," in order to bring about "internal group improvement."[43]

As the NAACP and the NUL began to take shape, the question of whether it was wise to dilute precious resources by spreading them across two organizations with overlapping personnel and missions arose. But this developing peer competition within the civil rights SMI was dealt with quickly and a coalition was formed to responsibly allocate resources and to divide responsibilities for advocacy. When George Haynes formed the CUCAN in 1910 with an eye toward consolidating with the CIICNNY and the

---

[42] From NUL Minutes (October 16, 1919). Reprinted in Weiss, *The National Urban League, 1910-1940* 63.
[43] *Urban League Bulletin* (March 1922). Reprinted in Ibid.

NLPCW to form a national organization committed to the fields of employment and philanthropy, he contacted Du Bois to discuss his intentions and to avoid any overlapping of responsibilities between the NAACP and the organization he envisioned. Du Bois wrote Haynes to tell him that he intended "to co-operate with and forward" the work of the CUCAN and "to avoid all unnecessary duplication." Du Bois recognized that although the economic and philanthropic matters that Haynes intended his fledgling organization to handle "would have been a natural matter of study" for the NAACP, the field had now been preempted and resources should not be wasted in duplicating efforts.[44]

This understanding between Haynes and Du Bois regarding the divided responsibilities of the NUL and the NAACP would be formalized in 1911 when representatives of each organization met to hammer out a working relationship. According to organizational minutes, it was established that the NAACP would "occupy itself principally with the political, civil and social rights of the colored people," while the NUL would deal "primarily with questions of philanthropy and social economy." The organizations would "interchange monthly reports on their activities and plans," in order to ensure an efficient division of their resources and responsibilities.[45]

The NAACP had originally included industrial opportunity for African-Americans as one of its programmatic goals, so stepping aside from such a large area of concern could not have been taken lightly. "Some of us gasped at having so large a field of 'advancement' taken out of our program," NAACP founder Mary White Ovington later recollected, "but nothing could have been more fortunate." The NAACP "could not have raised money for 'philanthropy' as successfully as an organization with a less

[44] Letter from Du Bois to Haynes (November 22, 1910). Quoted in Ibid. 65.
[45] See CUCAN Minutes (February 6, 1911 and March 31, 1911). Reprinted in Ibid.

militant program." Ovington also recognized that securing employment for black workers would be "a business in itself," therefore dividing the field of racial advancement made great sense.[46] Ovington's reflections highlight the practical considerations that any SMO must confront when establishing and prioritizing its movement commitments, and provide insight into the differing predisposition and tenor of each of the developing organizations as they organized their coalition.

As for predisposition, the NAACP, though it was concerned with the plight of black workers, had already placed a premium on the pursuit of civil rights, particularly battling disfranchisement. For Du Bois and others in the NAACP, particularly Walling who had already had unsuccessful dealings with the AFL on behalf of black workers, the ballot was key to redressing black marginalization in industry. Black workers could not effectively compete for jobs if employers recognized that white workers had political control over the state and its taxing, regulating and law enforcement functions through the ballot.[47] Winning civil rights would lead to economic empowerment. On the other hand, the NUL had made the daily life issues of the social and economic survival of urban blacks its primary mission from the start. Given the tremendous commitment of resources that would be required to fight for both civil rights and economic opportunity such a division of the field made great sense, seeing as how each undertaking would really be "a business in itself."

But beyond predisposition, Ovington's reflections touched on the differing tenor or temperament of the NAACP and the NUL. It would be difficult for a "militant"

---

[46] Mary White Ovington, *The Walls Came Tumbling Down*, [1st ed. (New York,: Harcourt, 1947) 111-2.
[47] Kellogg, *Naacp, a History of the National Association for the Advancement of Colored People* 12-9. See also August Meier and Elliott M. Rudwick, "Attitudes of Negro Leaders toward the American Labor Movement from the Civil War to World War I," in *The Negro and the American Labor Movement*, ed. Julius Jacobson (Garden City, N.Y.,: Anchor Books, 1968), 44-5, Moreno, *Black Americans and Organized Labor : A New History* 91.

organization to open white pocketbooks to fund social work, or to convince conservative businessmen to open white factory doors to African-Americans. The NUL was a more conservative organization, operating consistently with many of the pragmatic tenets of Booker T. Washington's approach that had proven popular with many of the patrician whites of the north. In fact, the NAACP was buffeted in its early years by challenges from Washington, and faced hesitance from white donors who respected the Tuskeegan.[48] Thus a coalition with the NUL, which Washington supported,[49] and the division of programmatic responsibility allowed the two SMOs to maximize available resources.

This difference in temperament between the two organizations was also the product of the type of members that were drawn to each organization. Nancy J. Weiss reports that over half the members of the NUL were black educators and service workers, and educators at this time tended to favor the accommodationist approach of Washington as well, naturally, as his emphasis on vocational education. Black educators also tended to be more conservative at this time due to their reliance on white philanthropy. The NAACP, on the other hand, had a large membership of both black lawyers and northern black ministers who were more radical in their outlook and prioritized civil rights over economic improvement. As for the elite white membership of the two groups, there was considerable range in ideology on both boards, but the NAACP elite was filled with many socialist sympathizers and other radicals, such as Du Bois, Ovington, Walling,

---

[48] For a comprehensive history of the power struggle between Washington and the NAACP see Kellogg, *Naacp, a History of the National Association for the Advancement of Colored People* 67-88, Elliott M. Rudwick, "Booker T. Washington's Relations with the Naacp," *The Journal of Negro Education* 29, no. 2 (1960). Villard would recall the difficulty of getting white donors, who often echoed Washington's concerns about the NAACP and Du Bois, to pledge money to the organization. See Rudwick, "Booker T. Washington's Relations with the Naacp," 139.

[49] Washington was not directly involved with the founding of the NUL or any of its constituent organizations, but he did express support for the group, particularly as a balance to the NAACP, and eventually became a board member in 1915, shortly before his death. See Parris and Brooks, *Blacks in the City; a History of the National Urban League*, Weiss, *The National Urban League, 1910-1940* 62-4.

Russell and Jane Addams, while the white NUL elite was dominated by successful philanthropist businessmen and their wives.[50]

Despite marked differences in outlook and approach to racial advancement, the coalition between the NAACP and the NUL would hold, as the reformers recognized the usefulness of dividing movement responsibilities. Joel Spingarn, chairman of the NAACP, would write NUL chairman Hollingsworth Wood regarding a 1917 League conference that "I am glad, very glad that you are doing just this sort of thing, in your own way, and not in mine, for no one realizes more than I that there is a place for both ways."[51] Similarly, NAACP secretary John R. Shillady would tell a NUL conference in 1918, that "you are dealing from one angle, and we are dealing from another … but we are all on the same job."[52] Roger N. Baldwin, a member of the NUL who also founded the American Civil Liberties Union (ACLU), perhaps captured the practicality of the ideological compromise of the NAACP and NUL best when he recalled that, "method and timing divide all reformers, and however deplorable their quarrels seem, they sift out the practical. Or, from a detached view, one holds the goal line while the others carry the ball." Accordingly, he explained that he had "long supported both the 'radical' NAACP and the 'conservative' National Urban League, not always on friendly terms, but with closer association with the Urban League in my more accustomed old role as a social worker."[53]

As Nancy J. Weiss reports, the NUL liked at this time to term itself the "State Department" of the civil rights movement, while referring to the NAACP as the "War

---

[50] Weiss, *The National Urban League, 1910-1940* 56-60.
[51] Letter from Spingarn to Wood (January 27, 1917). Quoted in Ibid. 67.
[52] NUL Annual Conference Minutes (November 26, 1918). Quoted in Ibid.
[53] Roger N. Baldwin, *Reminiscences*, vol. I, *New York Times Oral History Program* (New York: New York Times, 1972) 315.

Department."[54] Such a metaphor aptly captures the differences in missions and methods between the two organizations that have been discussed above. Such a metaphor also provides insight into the manner in which the pursuit of black economic rights would occur. The NAACP and the NUL had negotiated the voice of the black worker and assigned it to the NUL, which would speak in the words and tones of statesmen and not crusaders.[55] The interests of the black worker were now the primary responsibility of an organization that favored negotiation, persuasion and education over protest and agitation, an organization that favored the pursuit of pragmatic social and economic gains over the vindication of constitutional rights.[56] As will be discussed below, this

---

[54] Weiss, *The National Urban League, 1910-1940* 67. See also Parris and Brooks, *Blacks in the City; a History of the National Urban League*, Recchiuti, *Civic Engagement : Social Science and Progressive-Era Reform in New York City* 206.

[55] With Washington's death in 1915, the path was cleared for the NAACP and the NUL to assume leadership of the civil rights movement. Within a few years of Washington's death, the black press, which had previously been dominated by Washington's influence, began to acknowledge and even embrace the leadership of the NAACP and the NUL. See Kellogg, *Naacp, a History of the National Association for the Advancement of Colored People* 87-8. This new prominence does not mean that the NUL and the NAACP spoke for the entire civil rights movement. I focus on their activities because they were the most influential and consistently active and well-resourced organizations at work on behalf of black interests during this period. However, there would remain a significant conservative element of the movement represented in the black press and in black intellectuals and ministers, particularly from the South. A more radical wing of the movement would also develop. The overarching goal of both the NAACP and the NUL was to successfully realize black integration with whites and full membership in society. This was in opposition to the Black nationalism of Marcus Garvey, who loathed the NAACP and the NUL, and referred to Du Bois' "talented tenth" of black leaders as "weak-kneed and cringing … sycophants to the white man." Garvey's separatist movement was extremely popular among the black masses, but not surprisingly scared the black elite that populated the NAACP and the NUL as well as whites in business and government. See Moore, *A Search for Equality : The National Urban League, 1910-1961* 69-70. Because Garvey's movement was short-circuited by his deportation and because he was not interested in engaging the standard channels of the government and Constitution, I do not cover the activities of his SMO, the Universal Negro Improvement Association (UNIA), in this chapter. Interestingly, his views on the black worker drew inspiration from Washington. Garvey believed that blacks should steer clear of white labor and form their own unions and undercut the wages of white workers until such time as black workers became self-sufficient. This position was essentially compatible with the free contract constitutionalism of the *Lochner* era, but was no longer tenable after the New Deal and the incorporation of collective bargaining into the constitutional order. See Sterling Denhard Spero and Abram Lincoln Harris, *The Black Worker; the Negro and the Labor Movement*, *Studies in American Negro Life ; Nl7* (New York,: Atheneum, 1968) 135-7.

[56] As will be discussed below, the NAACP did not abandon the interests of the black worker altogether, in fact members of the NAACP continued to weigh in on the needs of the black worker, but they did not develop a comprehensive strategy to tackle economic rights as that was now the purview of the NUL.

preference for pragmatic and instrumental tactics would be demonstrated again and again in the measures taken by the civil rights movement, under the leadership of the NAACP and the NUL, to find a place for the black worker in the constitutional order of the early twentieth century.

TRUE-BLUE BELIEVERS IN LAISSEZ-FAIRE CONSTITUTIONALISM? THE FRUSTRATED COURTSHIP OF THE AFL BY THE NUL AND THE NAACP

The advent of the Progressive Era witnessed significant deterioration in the economic conditions of African-Americans that matched the social and civil blows that Jim Crow had delivered. Black land ownership plummeted by one-third between 1910 and 1930, and income growth for blacks also took a significant hit after 1900. Black employment in skilled trades also fell off considerably after promising growth during the Gilded Age.[57] While the Knights of Labor had been relatively open to black membership in unions, the AFL, which had supplanted the influence of the Knights in the 1890's, would effectively close union doors to African-Americans as racial attitudes hardened and the AFL turned its attention to other problems facing the American labor movement.[58] While the AFL had no formal policy of racial exclusion, its leadership did very little to force its affiliated unions to admit African-Americans. In fact, the AFL's 1897 convention passed a resolution condemning reports that Negro workers were being prevented from joining AFL unions. It reiterated its welcome to all workers, "without

[57] Moreno, *Black Americans and Organized Labor : A New History* 82-5.
[58] Ibid. See also Philip Sheldon Foner, *Organized Labor and the Black Worker, 1619-1973* (New York,: Praeger, 1974) 47-81, Meier and Rudwick, "Attitudes of Negro Leaders toward the American Labor Movement from the Civil War to World War I."

regard to creed, color, sex, race or nationality."[59] By 1900, however, Gompers, who reflected the spirit of the times, suggested that separate unions for African-Americans could be established, and in 1902 the AFL constitution was amended to charter these separate unions, entrenching second-class status for those very few black workers that managed to unionize.

Du Bois' study of the Negro artisan in 1902 confirmed this unfortunate deterioration in the union prospects of the black worker, reporting that there were at that time forty-three national unions operating in the country without a single black member. Twenty-seven other national unions had very few black members, and in many AFL affiliated unions the number of African-American members had actually declined between 1890 and 1900.[60] Union exclusion hardened black attitudes toward organized labor. "This is the age of combination, both of capital and of labor, wrote the prominent black sociologist Kelly Miller, who would later serve as a vice-chairman of the NUL, in 1903. "What the trusts are to capital, trades unions are to labor … Combination among whites always proves inimical to the interests of the Negro."[61] The *Colored American* was much harsher in its language, denouncing "labor barons" as "autocratic and overbearing … narrow, dictatorial and full of prejudice …. The trade and labor unions are the greatest enemies of the Negro in America and are doing more to foster and encourage race hatred and the caste spirit than any other agency we know of."[62]

---

[59] AFL Convention Proceedings of 1897. Reprinted in Charles Harris Wesley, *Negro Labor in the United States, 1850-1925; a Study in American Economic History* (New York,: Vanguard press, 1927) 271.
[60] W. E. B. Du Bois, *The Negro Artisan. Report of a Social Study Made under the Direction of Atlanta University; Together with the Proceedings of the Seventh Conference for the Study of the Negro Problems, Held at Atlanta University on May 27th, 1902*, *Atlanta University Publications, No. 7* (Atlanta, Ga.,: Atlanta university press, 1902) 151-88. See also Foner, *Organized Labor and the Black Worker, 1619-1973* 74.
[61] Kelly Miller, "The City Negro: Industrial Status," *Southern Workman* 30 (1903): 340-45.
[62] Editorial from the *Colored American* (May 25, 1901). Quoted in Moreno, *Black Americans and Organized Labor : A New History* 97.

But the white capitalist embrace of cheaper black labor that Booker T. Washington and other anti-union conservatives in the civil rights movement had envisioned was weak at best.[63] The classical liberal perspective of Washington was waning in its influence.[64] By 1909, Du Bois and his Niagara Movement had taken to handing out equal blame for the desperate straits of black workers to both white labor and white businessmen. According to the 1909 Niagara Movement Declaration of Principles:

> We hold up for public execration the conduct of two opposite classes of men: The practice among employers of importing ignorant Negro-American laborers in emergencies and then affording them neither protection nor permanent employment; and the practice of labor unions in proscribing and boycotting and oppressing thousands of their fellow-toilers, simply because they are black. These methods have accentuated and will accentuate the war of labor and capital, and they are disgraceful to both sides.[65]

While black workers could readily count on discrimination from organized labor, they could not rely on consistent support from white capitalists. This presented the leaders of the civil rights movement with a tremendous dilemma. Laissez-faire constitutionalism was hitting its apex with *Lochner* in 1905 and organized labor was and would continue in deep crisis from judicial persecution, but white capitalists were proving to be fair weather friends to the black worker, and there was increasing skepticism that tying the long-term interests of black workers to the interests of their employers was wise or desirable in any event. Even if the white capitalist proved more reliably willing to hire, and to retain, black workers (at a discount of course), should the judicial tide turn in favor of collective bargaining then the black worker would find himself both out of work and alienated from his own class interests having failed to previously tear down the union color line. As the NAACP and the NUL came into

---

[63] Spero and Harris, *The Black Worker; the Negro and the Labor Movement* 128.
[64] Moreno, *Black Americans and Organized Labor : A New History* 86-8.
[65] Niagara Movement, "Declaration of Principles," *The Horizon*, December 1909. Quoted in Moreno, *Black Americans and Organized Labor : A New History* 90.

existence and assumed the mantle of racial leadership entering the second decade of the century, they were confronted with this difficult choice of whose fortunes, whose constitutional vision, to tie the fate of the black worker to.

The NAACP, which was populated by many with socialist leanings, was predisposed to fight for entrance into organized labor freeing black workers to be recognized as workers first and to make common cause with their class.[66] Du Bois reached out as early as 1902 to unions on behalf of black workers, suggesting that solidarity within their class was to everyone's benefit. Blacks would make "as staunch union men as any," if educated on the importance of unions.[67] "It is only a question of time when white working men and black working men will see their common cause against the aggressions of exploiting capitalists," he wrote hopefully.[68] While Du Bois' optimism on black progress with unions would turn to bitterness in the following years given the harshness of AFL exclusion, he did not waver from promoting the cause of collective bargaining in the NAACP's *Crisis*.[69]

But the NUL, as discussed above, took the lead in directing movement efforts on behalf of industrial blacks. The NUL had been influenced by Washington's pragmatism, friendliness toward white elites, and bread before ballots approach. Did this mean that the NUL shared Washington's same liberal commitment to an individualistic

---

[66] Founding members Walling, Du Bois, Ovington and Russell all shared, to varying degrees, socialist leanings. See Kellogg, *Naacp, a History of the National Association for the Advancement of Colored People* 9-19, Moreno, *Black Americans and Organized Labor : A New History* 90.

[67] Du Bois, *The Negro Artisan. Report of a Social Study Made under the Direction of Atlanta University; Together with the Proceedings of the Seventh Conference for the Study of the Negro Problems, Held at Atlanta University on May 27th, 1902* 7-8.

[68] Foner, *Organized Labor and the Black Worker, 1619-1973* 80-1.

[69] In 1912, Du Bois would argue that the mission of organized labor was "divine," but that so long as organized labor fought for only a "clique" of Americans, "they deserve the starvation which they plan for their darker and poorer fellows." In that same editorial he would also write wistfully of the proud display of the union label on the *Crisis*, despite the knowledge of every black reader that no black hand had participated in its printing due to the printers union's exclusionary practices. W. E. B. Du Bois, "Organized Labor," *Crisis*, July 1912, 131.

constitutional order and anti-union posture? It is undeniable that the NUL dedicated itself to courting white employers, regardless of their union practices, as one of its chief strategies for aiding the black worker.[70] But in studying the engagement of the AFL by the NUL, it becomes apparent that any constitutional commitment to individualism or free contract liberty was instrumental in nature and not ideologically driven. As discussed earlier, the leaders of the NUL were not ideologues. They were not the same type of determined constitutional thinkers that populated the NAACP. Their tactics reflected their pragmatic outlook. And just as pragmatism counseled outreach to white capitalists as a civil rights strategy, pragmatism also counseled outreach to organized labor. The NUL, despite its conservatism, would in partnership with the NAACP embark on a long courtship of the AFL in an attempt to form a coalition on behalf of all labor regardless of race. The long and tortured history of this courtship, this resource competition between the labor movement and the civil rights movement, would illustrate the constitutional opportunism of the black activists that populated the NUL and the NAACP.

Kelly Miller aptly captured the nature of the dilemma discussed above faced by the black worker, recognizing that logic aligned the black worker with the cause of organized labor, but that good sense aligned him with capital given the racism (and fear of competition) of white workers. He wrote:

> At present the capitalist class possess the culture and conscience which hold even the malignancy of race passion in restraint. There is nothing in the white working class to which the Negro can appeal. They are the ones who lynch and burn and torture him. He must look to the upper element for law and order.

---

[70] See Moore, *A Search for Equality : The National Urban League, 1910-1961*, Parris and Brooks, *Blacks in the City; a History of the National Urban League*, Spero and Harris, *The Black Worker; the Negro and the Labor Movement*, Weiss, *The National Urban League, 1910-1940*.

> But the laborers outnumber the capitalists ten to one and under democracy they must in the long run gain the essential aims for which they strive. … How will it fare for the Negro in that day, if he now aligns himself with capital and refuses to help win the common battle?
>
> Sufficient unto the day is the industrial wisdom thereof! The Negro would rather think of the ills he has than fly to those he knows not of. He has a quick instinct for expediency. Now he must exercise the courage of decision. Whatever good or evil the future may hold in store for him, today's wisdom heedless of logical consistency demands that he stand shoulder to shoulder with the captains of industry.[71]

Miller was among the most conservative black members of the NUL, and his advice to black workers to side with white business rather than white labor reflects that, but even his conservative advice to the black worker "to stand shoulder to shoulder with the captains of industry" falls far short of any spirited or sincere endorsement of the individualistic constitutional order that neutered collective bargaining and empowered white capitalists (who Miller noted were not racial egalitarians but at least practiced their racism with "restraint") to hold white labor at bay and pass those jobs along to black labor instead. Miller admits that black workers naturally belong in the constitutional camp of organized labor, that "logical consistency" counsels such a place, that by rights they should join the "common battle," if not because the collective bargaining that empowers the working class is constitutionally right, but because it is democratically and therefore constitutionally inevitable, as "the laborers outnumber the capitalists ten to one." But Miller points out that black workers have "a quick instinct for expediency,"

---

[71] Kelly Miller, "The Negro as a Workingman," *American Mercury*, November 1925, 313. Quoted in Spero and Harris, *The Black Worker; the Negro and the Labor Movement* 134. Miller was speaking out against the labor efforts of A. Philip Randolph against the Pullman Company. I will discuss Randolph's contribution to black trade unionism below. Although Miller was affiliated with the NUL, his anti-union attitude was not in keeping with the highest NUL leadership. As will be discussed below, T. Arnold Hill, the industrial secretary of the NUL, would aggressively court organized labor and lend NUL support to Randolph. Miller's contrary viewpoint illustrates the spectrum of policy preferences that can exist not only within a SMI, but also within a single SMO. Regardless of recommendation, Miller's observation provides insight into the instrumentalist nature of the dilemma that confronted all racial reformers interested in black economic progress.

and "today's wisdom," the desperate needs of the here and now, should guide them regardless of the ills the black worker "knows not of" now but will likely someday face for aiding the capitalists in, at least for now, breaking the backs of organized labor.

This "quick instinct for expediency" applied as much to black activists as it did to black workers, and the NUL would not focus on securing the short-term survival of black workers to the exclusion of pursuing long-term benefits for them. From its earliest days the NUL would court organized labor and profess a commitment to collective bargaining. Such support may not have been cast in constitutional terms or shouted from the rooftops where every white capitalist with a job to fill could hear, but it was nonetheless clearly offered.

In 1913, George Haynes, reacting to the escalating crisis of black strikebreaking in New York, took the initiative and called the local office of the AFL to open a dialogue between the AFL and the NUL. Haynes was invited to appear at the summer meetings of the AFL's executive council. He consulted with the NUL board and a request to the AFL was drafted for delivery at the meetings. The NUL requested AFL cooperation along four avenues:

> 1. To correct the impression wide-spread among Negroes that labor unions and organized labor of white men in general are not friendly toward Negroes as members on full terms of membership.
>
> 2. *To educate the Negro working men in correct ideas of the underlying principles of organized labor, and to show them that the interests of Negro labor are ultimately one with those of white labor.*
>
> 3. To change the indifferent or prejudiced attitude of white union working men in their relation to Negro labor.
>
> 4. To assist in organizing associations in unskilled and semi-skilled occupations, bringing Negroes into local unions with whites where they can, but organizing

> them into separate locals where they must, with full privileges and rights of representation in the central councils and in the National conventions.[72]

This appeal to the AFL marked a clear embrace by the NUL of collective bargaining as an important tool of industrial advancement (no matter what the Supreme Court might have to say about it), and served as a clear indication that the NUL saw the future of black workers as best served by absorption into organized labor.

Samuel Gompers offered a mixed reaction to Haynes' proposal that their organizations become allies and that blacks be aggressively welcomed into the AFL. He was supportive of the spirit of the proposal, but resisted taking any concrete action. Gompers, with shameless sincerity, claimed that the AFL had already attempted to unionize African-Americans, like they had all classes of working men, but had met with resistance by blacks themselves. He based this analysis on the poor returns from the work of three black organizers that had worked for the AFL since 1910.[73] Haynes considered asking the AFL to make a public statement in the press of "their broad principle and sympathy with the Negro," but hesitated in doing so given the reticence of Gompers, explaining to the NUL that "they seemed somewhat disinclined to take any definite action on this our first appearance before them. I, therefore, decided not to ask them to do any definite thing, not even to make a public announcement."[74] The caution of a statesman rather than an agitator had been demonstrated. Much to Haynes' delight, however, the AFL did issue of its own accord a publicized resolution welcoming the NUL's overture and agreeing to cooperate in black organizing. Unfortunately, little would come of this initial dialogue, as the AFL created no machinery for actually

---

[72] NLUCAN Report of the Director for June, July, August to September 22, 1913. Quoted in Parris and Brooks, *Blacks in the City; a History of the National Urban League* 50. Emphasis added.
[73] Ibid. 50-1, Weiss, *The National Urban League, 1910-1940* 204-6.
[74] NLUCAN Report of the Director for June, July, August to September 22, 1913. Quoted in Parris and Brooks, *Blacks in the City; a History of the National Urban League* 51.

organizing black workers.[75] The NUL would continue to pursue a relationship with the AFL, but it would be five years before they would become more aggressive in their pursuit of a coalition.

RENEWED URGENCY FOR ALLIANCE WITH THE AFL – THE GREAT MIGRATION AND BEYOND

The effects of World War I and the great migration of 1915 to 1918 would intensify the courtship of the AFL by the NUL, and draw the NAACP in to deeper involvement. The demands of the war in Europe stimulated an economic boom in the United States, but the war also led to a steep decline in immigration to the United States. Northern industries had lost much of their base workforce, and so African-Americans streamed northward to claim jobs. Some 322,000 Southern blacks had moved North between 1910 and 1920.[76] By the end of World War I, there was at last a significant black industrial class. With more blacks in industry due to these significant demographic shifts and with the post-war economy cooling, civil rights activists could no longer afford to wait for organized labor to lessen its hostility to black workers.

Also fueling the new urgency for a settlement with the AFL was the violence of the devastating race riots touched off by the great migration. Among the worse race riots was the riot of July 2, 1917 in East St. Louis. The local trade union issued an appeal for action against the growing Negro "menace," and rumors that blacks were being brought in as strikebreakers swirled. The tensions erupted into violence and thirty-nine African-

[75] Ibid.
[76] Foner, *Organized Labor and the Black Worker, 1619-1973* 131.

Americans were killed as most local authorities turned a blind eye to the violence.[77] Du Bois, who was sent to the scene by the NAACP, believed Gompers and the trade unions were behind the tragedy. He became increasingly bitter at the prospect of justice for the black worker being achieved through acceptance in unions. Of the East St. Louis riot, Du Bois remarked in the *Crisis* that it "brought the most unwilling of us to acknowledge that in the present Union movement, as represented by the AFL, there is absolutely no hope of justice for an American of Negro descent."[78]

Despite this pessimism, African-American activists had no real option other than attempted alliance with the AFL. The AFL ruled organized labor.[79] Thus the NUL and the NAACP had little choice but to continue to pursue a coalition with them, to continue to try and capture the resources of the labor movement's fight to improve the social and economic place of the worker in the constitutional order. Neither SMO appeared content at this point to rely entirely on the white capitalist, and his judicially enabled grip on the workplace, as a long-term solution to black economic empowerment.

In January 1918, the NUL held a three day conference on "Negro Labor in America." The keynote address aptly captured the pragmatic approach of the NUL to appealing to both labor and employers on behalf of the black worker, of playing both

---

[77] Meier and Rudwick, "Attitudes of Negro Leaders toward the American Labor Movement from the Civil War to World War I," 47, Spero and Harris, *The Black Worker; the Negro and the Labor Movement* 112.
[78] W. E. B. Du Bois, *Crisis*, March 1918, 216.
[79] While shut out or marginalized by AFL unions, African-Americans were warmly welcomed into the Industrial Workers of the World (IWW), which was popularly known as the Wobblies. A socialist union, the IWW actively courted blacks, and had issued union cards to some 100,000 African-American laborers at one time or another. Parris and Brooks, *Blacks in the City; a History of the National Urban League* 183. Despite the socialist leanings of some in the NUL and many in the NAACP, a strong push to place blacks in the IWW never occurred. In fact, the NAACP would work hard to disassociate itself from the IWW during and after World War I to avoid accusations of radicalism in the NAACP. Kellogg, *Naacp, a History of the National Association for the Advancement of Colored People* 288. Ultimately, the Wobblies never provided a strong counterpoint to the control of the AFL over organized labor, and could not function as a surrogate coalition partner with a robust constitutional vision open to the black worker to match the AFL. For a history of the IWW, see Melvyn Dubofsky, *We Shall Be All : A History of the Industrial Workers of the World*, 2nd ed. (Urbana: University of Illinois Press, 1988).

ends against the middle whenever possible. "If the labor unions," explained Chicago League member Horace J. Bridges, "refuse [entrance] to the colored laborer, then the labor unions themselves are putting into the hands of the masters a weapon to use against them. Because the men must live."[80]

The meeting attendees passed a resolution directed to the AFL asking for a "square deal" for Negro workingmen and efforts that would include deeds by organized labor and not just words. In exchange for such deeds, the NUL resolved "to urge Negro workingmen to seek advantages of sympathetic cooperation and understanding between men who work." The resolution also reflected the social work orientation of the NUL and the legacy of Washington's self-help approach as the NUL reminded black workers "to be persevering in their efforts to improve in regularity; punctuality and efficiency; and to be quick to grasp all opportunities for training both themselves and their children. Success lies in these directions." The black press extensively publicized this overture to the AFL. The New York *Age* gave the conference and resolution a banner three-column headline on its page one: "National Urban League Advises Negro Workmen to Affiliate with the Federation of Labor."[81]

A joint committee of NUL members, NAACP members, and representatives from the philanthropic Phelps-Stokes Fund was formed at this conference and would travel to Washington in February of 1918 to meet with the AFL to ask for a response to the NUL's resolution. A meeting with Gompers and other AFL leadership took place in April. Gompers announced that black workers were welcome in the AFL and always had been, and although getting the cooperation of local unions could be "difficult," and there had

---

[80] NUL Conference: "Negro Labor In America" (January 29-31, 1918). Proceedings reported in the New York *Age* (February 9, 1918). Quoted in Parris and Brooks, *Blacks in the City; a History of the National Urban League* 135.
[81] Quoted in Ibid. 136-7.

been "unpleasant incidents" in past efforts to admit blacks to trade unions, he was sure that if greater efforts were undertaken in the black community to ease suspicions about unions, progress could be made.[82]

The NUL followed up on this meeting in June with a letter to Gompers that recommended an agenda for action on the understanding reached in April. In the letter, the NUL asked the AFL to release a statement trumpeting the "advantages of collective bargaining" to black workers, and to outline to black workers the benefits of "affiliation with the American Federation of Labor." The NUL further reminded the AFL that the "interests of workingmen white and black are common. Together we must fight unfair wages, unfair hours, and bad conditions of labor."[83] The NUL, and its partners at the NAACP, clearly were not zealots when it came to constitutional individualism.

Gompers referred the letter to AFL leadership and a statement was released:

> It is with pleasure we learn that leaders of the colored race realize the necessity of organizing the workers of that race into unions affiliated with the American Federation of Labor, and your committee recommends that the President of the American Federation of Labor and its Executive Council give special attention to organizing the colored wage workers in the future. We wish it understood, however, that in doing so no fault is or can be found with the work done in the past, but we believe that with the cooperation of the leaders of that race much better results can be accomplished.[84]

Nothing of consequence came of the NUL/NAACP meeting with Gompers, and the above report of the AFL served in the words of two historians of the NUL to be a great "benchmark from which to judge future hypocrisy."[85] The AFL was not interested in coalition with the civil rights movement and resisted sharing its resources with black

---

[82] Ibid. 139.
[83] Reprinted in Spero and Harris, *The Black Worker; the Negro and the Labor Movement* 108-9.
[84] Quoted in Parris and Brooks, *Blacks in the City; a History of the National Urban League* 140-1.
[85] Ibid. 141.

labor. Whatever benefits the solidarity and loyalty of the black workforce could bring to the cause of organized labor clearly did not impress the AFL sufficiently or outweigh the disadvantages they saw at this time in bringing black workers fully into the labor movement.

Frustration with the AFL in the NUL and the NAACP deepened. But the NUL would not give up on the virtues of collective bargaining and its benefits to black workers. In 1919, the NUL, at its annual conference, issued a resolution that unmistakably embraced collective bargaining, but did so pragmatically rather than dogmatically as strikebreaking was countenanced as a fair fallback strategy for the black worker. The League resolved:

> We believe in the principal of collective bargaining and in the theory of cooperation between capital and labor in the settlement of industrial disputes and in the management of industry. … We advise [Negroes] to take jobs as strike breakers, only where the union affected, has excluded colored men from membership. We believe they should keep out of jobs offered in a struggle to deny labor a voice in the regulation of conditions under which it works.[86]

Hardly the language of staunch individualists wedded to the freedom of contract and the outlawry of collective bargaining practices.

In that same year, Eugene Kinckle Jones, field secretary of the NUL, would echo this commitment to collective bargaining as the future for black workers. Blacks had become too significant a portion of the labor force to be ignored. He explained to an audience at Howard University:

> It is inevitable that an adjustment of some kind must be made. Whether it will be through the affiliation of Negroes directly with white labor organizations or through the formation of Negro labor organizations that will eventually affiliate with labor but in the meanwhile will bargain with labor and capital alike, is the question which the local situation in any industry must determine. The fact

[86] Quoted in Ibid. 143.

> remains, that Negroes must organize in industry for self-protection and self-preservation.[87]

In these remarks, Jones continues to promote an independent relationship for the black worker with white capitalists, where necessary, but he points out that such an independent relationship must be collective in nature rather than individual in nature. Although Jones is not speaking in expressly constitutional terms, his urgent support for collective bargaining fits far more comfortably within the constitutional vision of the AFL, the collective freedom to contract discussed in the last chapter, than it does with the judicially entrenched constitutional order illustrated by *Lochner* and the soon to be decided *Duplex Printing Co. v. Deering*.[88]

The tone of the NAACP's efforts to merge the interests of white and black labor during this period was not surprisingly, given its more radical leanings, blunter, both as to the propriety of collective bargaining as the future for the black worker and as to the impropriety of strikebreaking and individual dealings with employers in the short term. In 1924, the 15th Annual Conference of the NAACP addressed the AFL in a resolution:

> For many years the American Negro has been demanding admittance to the ranks of union labor.
>
> For many years your organizations have made public profession of your interest in Negro labor, of your desire to have it unionized, and your hatred of the black 'scab.'
>
> Notwithstanding this apparent surface agreement, Negro labor in the main is outside the ranks of organized labor, and the reason is, first that white union labor does not want black labor, and secondly, black labor has ceased to beg admission to union ranks because of its increasing value and efficiency outside the unions.

---

[87] Remarks appeared in NUL news release: "Negro Workers Urged to Organize" (November 15, 1919). Quoted in Ibid.

[88] *Duplex* would be decided two years later in 1921 and would gut the Clayton Act's anti-trust protections of organized labor.

> We face a crisis in inter-racial labor conditions; the continued and determined race prejudice of white labor, together with the limitation of immigration is giving black labor tremendous advantage. The Negro is entering the ranks of semiskilled and skilled labor and he is entering mainly as a 'scab.' He broke the great steel strike. He will soon be in a position to break any strike when he can gain economic advantage for himself.
>
> On the other hand, intelligent Negroes know full well that a blow at organized labor is a blow at all labor; that black labor today profits by the blood and sweat of labor leaders in the past who have fought oppression and monopoly by organization. If there is built up in America a great black bloc of non-union laborers who have a right to hate unions, all laborers, black and white eventually must suffer.
>
> Is it not time, then, that black and white labor get together? Is it not time for white unions to stop bluffing and for black laborers to stop cutting off their noses to spite their faces?[89]

This overture to the AFL would be ignored as surely as all earlier overtures by the NAACP and the NUL, causing Du Bois to lash out angrily in a *Crisis* editorial, pointing out that besides "perfunctory acknowledgment of receipt, no action has ever been taken on this resolution by the American Federation of Labor."[90]

CREDITING THE PRAGMATISTS AS CONSTITUTIONAL CORPORATISTS

The 1920's also witnessed the rise of the New Negro Movement led by A. Philip Randolph.[91] Randolph was a socialist and therefore a strong believer in trade unionism. Randolph also believed that African-Americans could no longer accept second-class status and must reach out and take equal rights for themselves. The New Negro was

---

[89] Reprinted in Spero and Harris, *The Black Worker; the Negro and the Labor Movement* 144-5.
[90] W.E.B. DuBois, Crisis July 1929.
[91] Other key leaders included Chandler Owen, Cyril Briggs and Hubert Harrison. See Beth Tompkins Bates, *Pullman Porters and the Rise of Protest Politics in Black America, 1925-1945*, *The John Hope Franklin Series in African American History and Culture* (Chapel Hill, N.C.: University of North Carolina Press, 2001) 6.

aggressive and proud while the Old Negro relied on white patronage and benefaction in order to achieve progress.[92] Randolph would be recruited to become the president of the Brotherhood of Sleeping Car Porters (BSCP), which formed in 1925 and would embark on a decade-long struggle with the Pullman Company that would divide the black community. Randolph incorporated the sensibilities of the New Negro into the fight for black labor rights by the BSCP. For Randolph, it was imperative to break the individualist orientation of black workers, and their Old Negro leaders, who relied on the patronage and paternalism of wealthy whites to ensure social and economic survival. A black collectivist conscience was a must, according to Randolph, thus Uncle Tom was rhetorically revived and portrayed as an individualist by the BSCP.[93]

Where the NUL and the NAACP assumed a pragmatic and statesmen-like posture in negotiating the precarious position of the black worker in both the present and the possible future constitutional order, Randolph engaged in an aggressively ideological reconstruction of the constitutional vision of the black worker that was corporatist in nature. This corporatism was rhetorically illustrated by a dialogue between old sleeping car porters and new sleeping car porters depicted in Randolph's journal the *Messenger*. According to the new porter:

> White folks are no different from any other kinds of folks, pop. It all depends on how much *power* you got, and you can't get power unless you are *organized*. You know the old joke about the farmer not bothering *one hornet* because of fear of the *rest* of the *hornets standing behind him*. Well, that's all we porters got to do. That's all the Negro race has got to do – *stick together; be all for each and each for all*.[94]

Ken Kersch highlights this aggressive reimagination of the constitutional place of African-Americans by Randolph in the 1920's as marking the turn away from traditional

---

[92] Ibid. 32.
[93] Ibid. 96-8.
[94] A. Philip Randolph, "Dialogue of the Old and New," *Messenger*, March 1927, 94. Emphasis in original.

individualistic constitutionalism within the civil rights movement and toward incorporation with the corporatist constitutionalism of progressive and labor state-builders.[95] But Kersch's credit to Randolph, for having "assimilated labor movement ideology into civil rights thinking," overlooks the earlier instrumentalist embrace of corporatism on behalf of the black worker by the NAACP and the NUL that I have outlined.[96] Furthermore, Randolph and the BSCP would receive assistance from the NAACP and the NUL in undertaking their protest campaign. Despite expressing frustration at times with both the NAACP and the NUL for being too moderate and too accommodating of their white partners in the civil rights movement,[97] Randolph would also credit the NAACP and the NUL for having been virtually alone among those in the civil rights establishment to seriously turn "to the question of improving the lot of Negro workers."[98] In fact, the NUL, under the fairly aggressive pro-labor leadership of both Kinckle Jones and its industrial secretary T. Arnold Hill, would not only controversially endorse the cause of the BSCP but also provide the black union with office space during the 1920's.[99]

IF YOU CAN'T JOIN THEM, BEAT THEM – THE SHIPSTEAD BILL

While Randolph began injecting economic and constitutional radicalism into the civil rights movement as well as radicalizing the movement's protest practices, the

---

[95] Kersch, *Constructing Civil Liberties: Discontinuities in the Development of American Constitutional Law* 195-201. In this discussion of Randolph's constitutionalism, Kersch repeats his conflation of the corporatism of progressives with the proto-corporatism of the AFL, which I critiqued in Chapter Three.
[96] Ibid. 201.
[97] Bates, *Pullman Porters and the Rise of Protest Politics in Black America, 1925-1945* 6-7.
[98] A. Philip Randolph, "The Negro and Economic Radicalism," *Opportunity*, February 1926, 126. See also Parris and Brooks, *Blacks in the City; a History of the National Urban League* 184.
[99] Parris and Brooks, *Blacks in the City; a History of the National Urban League* 183-6.

NAACP and the NUL continued to keep an opportunistic foot firmly planted in the laissez-faire constitutional order that favored white capitalists and had been carefully protected by the courts. This instrumentalist strategy would be well demonstrated by the NAACP's response to the legislative misadventures of the Shipstead Bill discussed in Chapter Three.

By the late 1920's, the AFL had grown desperate over the effects of the judicial assault on collective bargaining practices. As discussed in Chapter Three, the courts had thwarted organized labor at nearly every turn through the aggressive use of injunctions and antitrust measures to break strikes and boycotts. Where Congress or state legislatures had provided relief to organized labor by exempting them from antitrust enforcement, the Supreme Court responded by striking that relief down on grounds that class legislation was prohibited by the Fourteenth Amendment. The AFL responded in 1927 with the submission of the Shipstead Bill to the Senate, which radically proposed to eliminate all equity jurisdiction, i.e. injunctive power, from courts over intangible property. If passed, the Shipstead Bill could liberate organized labor from judicial outlawry, allowing them to press their collective bargaining practices to the fullest to win concessions from employers (concessions that would almost certainly include eliminating the competition of all non-union labor).

The prospect of the passage of the Shipstead Bill brought the dilemma that faced supporters of the black worker into stark relief. Black workers were still not welcome into the ranks of organized labor due to the intransigence of the AFL and therefore could not risk their empowerment, but supporting the empowerment of employers instead to dictate the terms of employment meant permanently embracing lesser standards for working conditions and wages. A bad job, however, was preferable to no job at all. If coalition with the AFL had failed as a means to amass practical, political and

constitutional resources on behalf of the black worker, then contestation of any strengthening of their position was the only sensible strategic choice. Thus it was not surprising that two members of the Cleveland branch of the NAACP arrived in Washington to protest the Shipstead Bill during its hearings. Their testimony plainly illustrated the constitutional opportunism of the NAACP when it came to support of the equity power of the courts and their continued control over the workplace.

Harry E. Davis and Charles W. Chestnutt, both Cleveland attorneys, believed that the removal of court equity control over the actions of organized labor would be a disaster for black workers. "My sole interest in being here is to prevent what I believe is a gross injustice to a submerged group of people, the colored people, 12,000,000 in numbers, 95 percent of whom are of the working classes," explained Davis.[100] Davis contended that for African-Americans, "their biggest asset is their right to a job … the right to earn a living."[101] Such language was steeped in the free contract language of the individualistic constitutional order. And this right was being thwarted by organized labor as it sought to drive the black worker out of the workplace. Both Davis and Chestnutt pointed to the hostility of organized labor against black workers that had left African-Americans little choice but to opportunistically rely on their individual freedom to contract with employers when and where courts had restrained organized labor. "I make the charge baldly that the labor unions of the United States, broadly speaking, are unfriendly to colored labor," accused Chestnutt.[102] Labor unions "will go to any extreme to discourage colored workmen, and to monopolize the various trades for white workmen," he continued.[103]

---

[100] *Limiting Scope of Injunctions in Labor Disputes*, 609.
[101] Ibid.
[102] Ibid., 604.
[103] Ibid., 607.

If African-Americans were going to be denied admittance into the collective that would exercise collective bargaining, they were going to stand and fight the transformation of the freedom of contract ideal away from the individual and more importantly out of the protected haven of the courts. The courts may not have been much of a friend to African-Americans over the last several decades, but they had proved themselves kinder than state and federal legislatures. Chestnutt was acutely aware of this fact. He explained:

> The colored people of the country have exercised and still exercise their citizenship under very great handicaps. Their rights ... have been infringed by legislation and by the common consent of white people to such an extent as in many respects to nullify them; to such an extent, indeed, that it is only to the courts that they can look for relief. ... The Federal courts, in those parts of the country where the rights of negroes are most limited, have been almost their only bulwark against oppression ... and the power of injunction has been one of the strongest weapons which those courts have employed.[104]

Davis agreed, as he pointed to the importance of the courts to protect against tyranny of the majority, as courts had always been "primarily intended for the protection of minorities."[105] At this time, for much of the country, courts were the enemy, but for African-Americans they were their "one place of redress."[106]

Davis and Chestnutt accurately represented the view of the NAACP's national leadership in their Capitol Hill testimony. The Clevelanders were in active contact with James Weldon Johnson, the organization's national secretary, and other officials at the national office about their efforts against the Shipstead Bill. The national leadership referred the bill to their attorneys for their advice, which came back resoundingly in favor of protesting the Shipstead Bill just as Davis and Chestnutt had begun to do. The association's legal advisors considered the effects on labor to potentially be "immense,"

---

[104] Ibid., 605.
[105] Ibid., 614.
[106] Ibid., 610.

and they pointed to the "serious wrongs" to black workers that might result from passage of the bill.[107] No official NAACP position was ever taken, however, as the bill went through several drafts, and as was discussed in Chapter Three, was frequently stalled.

Davis and Chestnutt's testimony would also accurately represent the instrumentalism of the NAACP's position. Happy to invoke the language of Lochnerian jurisprudence and to defend the honor and importance of courts and their activist ways they were, but they made no secret of the fact that if union racism was not an issue they would feel quite differently about the fate of the Shipstead Bill and the collective power of workers. Davis unabashedly admitted that, "(i)f I were a craftsman or artisan, I would join a union."[108] Joining a union made good economic sense. "Colored workers want just as good wages and just as good working conditions as anybody else," explained Davis. "They are just as much interested in getting the best out of life as anybody else and are striving toward that end daily and they want that right protected and they are willing to join unions to secure that protection," but the problem for Davis was that, in most instances, this was not currently an option for members of his race.[109] Chestnutt was likewise candid in his testimony. "It is quite possible," he argued, "it would be only human nature, if colored working men were granted, as union members, equal rights ... and entitled to benefit equally by whatever union labor might achieve in the way of power or influence or reward, that they might not oppose this bill."[110] After all, Chestnutt

---

[107] See letters of William T. Andrews, dated January 4, 1929, and Louis Marshall, dated May 10, 1928. From Papers of the NAACP. Part 10, Peonage labor and the New Deal, 1913-1939; reel 4; frame 375; 361. See also Bernstein, *Only One Place of Redress: African Americans, Labor Regulations, and the Courts from Reconstruction to the New Deal*.

[108] *Limiting Scope of Injunctions in Labor Disputes*, 610.

[109] Ibid., 614.

[110] Ibid., 608.

admitted, "labor owes a great deal to the unions. Their efforts have done much to promote the dignity of labor and to secure a living wage for working men."[111]

To lend constitutional gravitas to their pragmatic opposition to the bill, Chestnutt pointed to the Fourteenth Amendment and the requirement of equal protection. "This bill is class legislation pure and simple," argued Chestnutt.[112] On this point he favorably quoted Chief Justice Taft's well-known 1914 speech to the American Bar Association that outlined the constitutional justification for undercutting any special protection of unions or collective bargaining. This logic had found its way into many of the decisions of the Taft Court. Chestnutt quoted Taft as follows:

> The great political power that labor combinations are believed to exercise has enabled them successfully to press upon legislature the idea that they are politically a privileged class, that the interest of the community lies in making them so, and that their cause is so important that the ordinary means of enforcing the law against their violations of it should be weakened rather than strengthened.[113]

Such elevated status for one class of people was in violation of the Fourteenth Amendment.

Labor could not be permitted the status of a protected class, because such protection would work against black workers who did not belong to that class (though they wished most urgently to join and then partake in all the special protection the legislatures might wish to provide). With this turn to the Fourteenth Amendment and an equal protection narrative to thwart the ambitions of the AFL, the NAACP found itself in an ironic position. As discussed in Chapter Three, the Shipstead Bill marked the climax of the AFL's Thirteenth Amendment narrative of labor rights. According to the AFL, the Thirteenth Amendment, among other things, provided an important exception to the

---

[111] Ibid., 604.
[112] Ibid., 607.
[113] Ibid., 607-8.

general prohibition against class legislation that had been memorialized in the Fourteenth Amendment. The Thirteenth Amendment guaranteed a special place for labor in the constitutional order, therefore antitrust exemptions were constitutional despite the Fourteenth Amendment. With the Shipstead Bill, a crossroads had been reached where the constitutional narrative employed to promote racial equality and secure civil rights, equal protection, was being deployed to protect black economic advancement, at the cost of contravening the leading constitutional narrative of benefit to the class and occupational identity of most African-Americans at that time. The irony was made all the richer given that perhaps the most-celebrated and significant constitutional provision for blacks, the Thirteenth Amendment abolition of slavery and involuntary servitude, was the provision these civil rights activists sought to trump with their Fourteenth Amendment claims of equality.[114] Because of the AFL's continued exclusion of black workers, the civil rights movement was not free to lend its voice, at least not in full throat, to labor's constitutional narrative that was attractively built on the legacy of the permanent emancipation of the slaves. Instead retreat to the racial narrative of equality was necessitated when organized labor appeared at all close to achieving its liberation from the courts, and the NAACP forwarded that Fourteenth Amendment narrative necessarily at the expense of their class interests.

Fortunately for the black worker, the AFL did not prevail with the Shipstead Bill, leaving more time for the civil rights movement to find a way to convince or cajole the AFL into opening union doors to black workers. But this time would run short with the economic collapse of the Great Depression and the recovery measures put into place by

[114] The height of this irony might have been reached if the Furuseth/Martin Thirteenth Amendment substitute bill to the Shipstead Bill, which was more explicitly rooted in the AFL's Thirteenth Amendment narrative, had ever been publicly vetted. Would Chestnutt and Davis have returned to Washington, D.C. on behalf of the NAACP to protest?

the New Deal. As discussed in Chapter Three, the AFL would align themselves with progressive statebuilders interested in reconstructing the constitutional order to embrace (white) collective bargaining. Now more than ever, the NAACP and the NUL needed to break the union color line.

CONFRONTING THE CONSTITUTIONAL LEGITIMATION OF COLLECTIVE BARGAINING

Entering the 1930's, disgust with the AFL, and its calculated footdragging against admission of black workers, among members of the civil rights movement was palpable. T. Arnold Hill of the NUL complained that the AFL had never "campaigned among its members for its idea of fair play reiterated in frequent resolutions."[115] As usual, Du Bois was more colorful in his complaint. "The A.F.L. has from the beginning of its organization stood up and lied brazenly about its attitude toward Negro Labor," he charged. "They have affirmed and still affirm that they wish to organize Negro labor when this is a flat and proven falsehood."[116] But the federal government had begun to sponsor collective bargaining and incorporate it into the constitutional order with passage of the National Industrial Recovery Act (NIRA) in 1933. Section 7(a) of the NIRA provided:

> 1) that employees shall have the right to organize and bargain collectively through representatives of their own choosing, and shall be free from the interference, restraint or coercion of employers of labor, or their agents, in the designation of such representatives …

---

[115] T. Arnold Hill, "Letter to William Green," *Opportunity*, February 1930, 56.
[116] W. E. B. Du Bois, "The A.F. Of L.," *Crisis*, December 1933, 292.

> 2) that no employee and no one seeking employment shall be required as a condition of employment to join any company union or to refrain from joining, organizing, or assisting a labor organization of his own choosing …[117]

The NAACP and the NUL now had little choice but to continue to pound on the doors of the AFL for entrance into their unions.

For a time the civil rights movement took solace in the fact that the NIRA had failed to adequately safeguard labor's ability to organize and to collectively bargain given the weak machinery of the NIRA to enforce its collective bargaining positions and the hostility of the Supreme Court.[118] A pragmatic approach to continue courting both the AFL and white employers looking for cheaper labor remained viable as business worked around the NIRA. James Weldon Johnson, one-time general secretary of the NAACP, counseled just such an opportunistic position in his advice to African-Americans published in 1934:

> Organized labor holds the main gate of our industrial and economic corral; and on the day that it throws open that gate in realization of the truth that the cause of the white worker and the black worker are one, there will be a crack in the wall of racial discrimination that will be heard round the world. We have not yet found an effective means of convincing organized labor that this is what we ought to do. … The only pressure we control for backing them up is the more or less veiled threat of "scabbing."[119]

Such an ability to play both sides of the constitutional street, and to take such solace over the ineffectiveness of the NIRA did not last with the proposal of the Wagner Act and its intended fortification of the provisions of section 7(a) of the NIRA. The bill would not only give the NLRB tremendous enforcement power in order to police

---

[117] Reprinted in Raymond Wolters, "Closed Shop and White Shop: The Negro Response to Collective Bargaining, 1933-1935," in *Black Labor in America*, ed. Milton Cantor (Westport, Conn.,: Negro Universities Press, 1969), 137-8.

[118] Ibid., 147. See also Horace R. Cayton and George Sinclair Mitchell, *Black Workers and the New Unions* (Chapel Hill,: The University of North Carolina Press, 1939), Spero and Harris, *The Black Worker; the Negro and the Labor Movement*. The Supreme Court delivered a serious blow to the NIRA in *Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935).

[119] James Weldon Johnson, *Negro Americans, What Now?* (New York,: The Viking Press, 1934) 66-7.

employers to allow collective bargaining effectively, but also made union membership mandatory (with the union being chosen by the majority of employees). Now there was virtually no hope for black workers to form their own competing unions or to somehow coexist in an industry with white unions. As Roy Wilkins of the NAACP explained in an organizational memorandum, the Wagner Bill "rigidly enforces and legalizes the closed shop," meaning "the act plainly empowers organized labor to exclude from employment in any industry those who do not belong to a union." He thought it was "needless to point out the fact that thousands of Negro workers are barred from membership in American labor unions and, therefore, that if a closed shop is legalized by this act Negro workers will be absolutely shut out of employment."[120] The Wagner Act would give government sanction to discrimination against black workers, explained T. Arnold Hill, by elevating "labor to the dominant position of an active, operating co-partner with the employer and the public, each having equal rights and authority."[121]

But now that collective bargaining was going to be sponsored by the state, the state could have something to say about whom the AFL permitted to partake in that bargaining. This meant a shift in tactics was necessary, and the New Deal had a profound affect on the work of the NUL in particular. For the first time, the NUL would move away from negotiation with private parties like business leaders and labor unions in order to win racial advancement, and focus instead on protest, lobbying and the legislative process by encouraging petitions, mass letter-writing campaigns, and meetings with members of Congress.[122] Hushed tones and pragmatic entreaties were no longer the order of the day, as the NUL began to speak in a louder, more aggressive, more ideological,

---

[120] NAACP Memorandum from Roy Wilkins to Office Staff (March 23, 1934). Reprinted in Wolters, "Closed Shop and White Shop: The Negro Response to Collective Bargaining, 1933-1935," 149.
[121] T. Arnold Hill, "Labor: Labor Marches On," *Opportunity*, April 1934, 120-1.
[122] Weiss, *The National Urban League, 1910-1940* 272-3.

much more public voice. And this voice did not rail against the coming of a new constitutional order that recognized the group above the individual. Instead this voice spoke up for the right of blacks to be one of those groups that would be constitutionally recognized by the state.

The NUL and the NAACP turned their attention to winning inclusion of an anti-discrimination clause in the Wagner Act. Both the NUL and the NAACP prepared informational statements for the hearings on the Wagner Act, and an amendment to the bill was proposed that would deny the benefits of the legislation to any union that discriminated on the basis of race. The amendment stated that:

> It shall be an unfair labor practice for a labor organization to bar from membership any worker or group of workers for reason of race or creed either by constitutional provision or by ritualistic practice.[123]

Walter White, who now headed the NAACP, kept in close touch with Senator Wagner, and his aide Leon Keyserling, to monitor the prospects of the NAACP/NUL amendment. From Keyserling, White learned that the AFL had already killed the equivalent of the amendment in earlier drafts of the legislation. Keyserling reassured White that Senator Wagner was sympathetic to their position, and had originally drafted the legislation to provide "that the closed shop be legal only when there were no restrictions upon members in the labor union to which the majority of workers belonged." But according to Keyserling, the AFL "fought bitterly to eliminate this clause and much against his will Senator Wagner had to consent to the elimination in order to prevent scuttling of the entire bill."[124] The AFL would be likewise victorious over inclusion of the NUL/NAACP amendment, despite numerous entreaties by the NUL and the NAACP to Senator

---

[123] Reprinted in Ibid. 274. See also Wolters, "Closed Shop and White Shop: The Negro Response to Collective Bargaining, 1933-1935," 150.

[124] Quoted in Wolters, "Closed Shop and White Shop: The Negro Response to Collective Bargaining, 1933-1935," 150.

Wagner, President Roosevelt, and members of Roosevelt's administration.[125] This victory served as the final crushing rebuff to the overtures for coalition that the civil rights movement had been offering the AFL for years.

The NUL and the NAACP received sympathetic responses from the progressive statebuilders they lobbied, but they were also candid with these civil rights leaders about the relative power imbalance between the AFL and black workers, who were not organized and therefore not able to force any special consideration.[126] The Wagner Act passed in 1935 without any protections for the black worker and it would only be a matter of very short time before the Supreme Court would make its "switch in time" that would reject Lochnerian jurisprudence, constitutionally entrench collective bargaining, and put an end to the individualistic constitutional order.[127] The Labor/Progressive coalition had won and blacks had not been included. Attempting to pragmatically straddle two different constitutional visions, and appeal to the separate partisans, white labor and capitalist whites, of those distinct visions, was no longer a viable movement strategy and the NUL and the NAACP would embark on a long struggle to bring black workers as a group into the new corporatist constitutional order with a new phase of social and constitutional activism conditioned by this New Deal alteration of the constitutional order.[128]

---

[125] Ibid., 151.

[126] See Minutes of the Second Meeting of the Interdepartmental Group Concerned with the Special Problems of Negroes (March 2, 1934). Quoted in Ibid., 152.

[127] In 1937, *West Coast Hotel v. Parrish* would reject *Lochner*, while *NLRB v. Jones & Laughlin* would quickly follow on its heels to embrace the Wagner Act and state sponsored collective bargaining.

[128] For a study of this new phase of the civil rights struggle and the tactics and constitutional vision employed by the NUL and the NAACP to find a place in the New Deal state, see Dona C. Hamilton and Charles V. Hamilton, *The Dual Agenda : Race and Social Welfare Policies of Civil Rights Organizations*, *Power, Conflict, and Democracy* (New York: Columbia University Press, 1997).

CONCLUSION

Looking back on the constitutional commitments of the NUL and the NAACP in the years between the rise of Jim Crow and the constitutional acceptance of the New Deal, it becomes clear that these SMOs made opportunism rather than ideology their guide in selecting their constitutional tactics and narratives. There existed a wide gulf between the constitutional interests and beliefs of white workers and black workers during this period that complicates any constitutional history that would paint the *Lochner* Court as an unrelenting victimizer of the common man. The *Lochner* Court, with its free contract views and its hostility toward collective bargaining, was the handmaiden of the white capitalist, and it was the white capitalist who often stood between the black worker and starvation during this period. The NUL and the NAACP recognized this reality and were protective of the courts and their embrace of laissez-faire constitutionalism and courted the white capitalist as a result.

But they also attempted with equal, if not greater, vigor to close the gap between the white worker and the black worker. For the NAACP and the NUL the future of the black worker belonged with the future of all workers, but a complete constitutional commitment to the cause of organized labor was not possible until entrance into AFL unions had been won. This left the NAACP and the NUL with a tricky navigation between coalition with white capitalists and coalition with white workers. They could not afford to reject the resources provided by employers and their preferred constitutional order, until the resources of the labor movement were secured for the benefit of the black worker. Such a practical bind limited any full-throated endorsement of either the constitutional individualism that advantaged industrialists or the proto-corporatist constitutionalism that was envisioned by the leaders of the AFL.

This pragmatic approach of the NAACP and the NUL to advancing the rights of the black worker had its roots not only in the practical barrier of the union color line, but also in the nature of the organizations themselves and the effect of the coalition they formed on behalf of the black worker. Assigning primary responsibility for the interests of the black worker to the NUL in a bid to save the limited resources of the civil rights movement meant that an aconstitutional approach to advancing black economic interests was more likely given the occupational makeup and more conservative disposition of the NUL. We can only speculate as to the possibility of a more openly ideological, rights-oriented alternative vision of the Constitution that might have been developed on behalf of the black worker, in contrast to both the individualism of Lochnerian jurisprudence and the collective free contract approach of the AFL, had the NAACP assumed control of the fate of the black worker. Nevertheless, it seems clear that the internal movement coalition between the NAACP and the NUL impacted the tenor and tactics of black economic activism during this period.

My study shows that practical and political reality partnered with organizational predispositions played into the pragmatic and decidedly aconstitutional tactics of the civil rights movement on behalf of the black worker during the Progressive and Inter-War Eras, as they courted the partisans of two constitutional visions at once. This long, painstaking history of pragmatic negotiation and persuasion of private groups is easy to overlook when looking back on the sweep of constitutional history with the typical tools of the constitutional scholar to find competing narratives of the Constitution. An accurate accounting of the civil rights movement's constitutional commitments on behalf of workers during this time cannot be fully found in the court cases, or even in the legislative histories, that normally preoccupy scholars. Nor can it be perfectly deduced from economic principles or a careful understanding of the complex politics of the

working class of this period, as David Bernstein attempts to do. It is necessary to start with the actions of the organizations themselves in order to understand the nature of their constitutional beliefs and how they would express them. Such a study reveals a movement whose constitutional commitments were in flux between individualism and corporatism, but whose leanings toward corporatism could not yet be fully expressed due to instrumental considerations. First the resources of the labor movement had to be captured. Unfortunately for the civil rights movement this capture of resources would not occur, leaving African-American workers painfully sidelined in the revised constitutional order of the New Deal.

Chapter Five: Working Women or Women Workers? The WTUL, Organized Labor, and the Gendered Constitution

The Supreme Court's landmark decision in *West Coast Hotel v. Parrish*[1] in 1937 repudiated *Lochner v. New York*[2] and the judicial commitment to free contract liberty that case memorialized, which had radically limited state regulations of working conditions for decades. *West Coast Hotel* is typically viewed, by constitutional scholars, as a watershed case for American constitutional development marking a sharp break with traditional constitutional jurisprudence and heralding a new constitutional regime that embraced the contours and ambitions of the New Deal state.[3] Rarely, as Julie Novkov points out, do these reflections on *West Coast Hotel* acknowledge that the decision not only represents a new direction in constitutional development with the repudiation of free contract jurisprudence, but also reflects a culmination of an established doctrinal framework for protective labor legislation built on gender classifications. In fact, the role of women workers as the vehicle through which *Lochner* is undone and through which protective labor legislation is constitutionally vindicated for all is routinely overlooked in

---

[1] 300 U.S. 379 (1937).

[2] 198 U.S. 45 (1905).

[3] For a review of scholarship that points to the importance of *West Coast Hotel* as a new direction in constitutional development, see Gary D. Rowe, "Lochner Revisionism Revisited," *Law and Social Inquiry* 24 (1999). *West Coast Hotel* has been characterized in recent years by William Leuchenberg as marking a political/institutional settlement; by Bruce Ackerman as heralding a "constitutional moment" embracing activist government; by Cass Sunstein as establishing a new baseline for constitutional interpretation; and by Robert Post as emphasizing a new commitment to harmonizing constitutional meaning with social and economic realities. See Ackerman, *We the People: Foundations*, Ackerman, *We the People: Transformations*, William Edward Leuchtenburg, *The Supreme Court Reborn : The Constitutional Revolution in the Age of Roosevelt* (New York: Oxford University Press, 1995), Robert C. Post, "Defending the Lifeworld: Substantive Due Process in the Taft Court Era," *Boston University Law Review* 78 (1998), Sunstein, "Lochner's Legacy."

constitutional scholarship that contemplates the transition between these radically different constitutional eras.[4]

Novkov's study of the role of gender in the doctrinal roots of the modern welfare state not only draws attention to the gendered exception to *Lochner's* stringent limits on state labor regulation, which was established in 1908 in *Muller v. Oregon*,[5] but also highlights the women's movement's own agency in creating this exception and subsequently exploiting it on behalf of working women. This separation of the constitutional identity of male and female workers was not the product of patriarchal coercion. In fact, the Supreme Court's reasoning in *Muller*, which emphasized women's greater physical needs for protection and the special public interest in their role as society's reproducers, was drawn from the maternalist arguments presented by the NCL, which was one of the leading SMOs of the women's movement at that time.[6] Such a deliberate embrace of constitutional difference may seem strange to modern constitutional sensibilities, but the NCL and other organizations active on behalf of working women at this time did not balk at establishing a separate constitutional place for their sex, though they did hope to see protective labor legislation eventually extended to all workers.

---

[4] Novkov, *Constituting Workers, Protecting Women: Gender, Law, and Labor in the Progressive Era and New Deal Years* 4-14.

[5] 208 U.S. 416 (1908).

[6] I will use the term "maternalist," as opposed to the also popular designation "social feminist," in this chapter to describe the rhetoric and policy preferences of the NCL, WTUL and other organizations within the women's movement that focused on the extension of domestic ideals into public life and the integration of women's special identity and special needs associated with their roles as wives and mothers into social provision and civic identity. See Seth Koven and Sonya Michel, *Mothers of a New World : Maternalist Politics and the Origins of Welfare States* (New York: Routledge, 1993), Theda Skocpol, *Protecting Soldiers and Mothers : The Political Origins of Social Policy in the United States* (Cambridge, Mass.: Belknap Press of Harvard University Press, 1992). But see Lipschultz's work for the argument that "social feminism" better captures the approach taken by the NCL and other women's groups on labor standards. Sybil Lipschultz, "Hours and Wages: The Gendering of Labor Standards in America," *Journal of Women's History* 8, no. 1 (1996). For a general discussion of the limits of feminist terminology, see Nancy F. Cott, "What's in a Name? The Limits of 'Social Feminism;' or Expanding the Vocabulary of Women's History," *The Journal of American History* 76, no. 3 (1989).

Securing and defending protective labor legislation for women became the dominant strategy of progressive reformers for aiding women who worked during this period in light of the constitutional success of *Muller*. Constitutional sanction of a preferred policy is a welcome resource for any social movement, but perhaps even more so for a movement that was limited in its political resources by the disabilities of the second-class citizenship of its members. But the passage and enforcement of state regulation of the workplace was by no means the only approach employed by women activists to improve the lot of women in industry. Women's movement organizations also experimented with ethical consumerism, trade union organizing and the empowerment of women within the labor movement itself, and adding a working-class voice to the suffrage campaign in order to improve the political agency of working women so that they might help themselves, particularly in the expansion of state labor regulation in their favor.

In this chapter, I focus on one such alternative to gendered labor legislation by examining the activities of the WTUL, which formed in 1903 with the express purpose of organizing working women into unions so that they could engage in collective bargaining in their own interests. To accomplish this goal, the WTUL began as an inter-class organization comprised of both middle-class women reformers and working-class women. The WTUL, then, was unique as a SMO that had a place in both the labor movement and the women's movement given both its ambitions and its composition. However, it would not succeed in its original mission. The failure of the trade union approach to empowering women workers and integrating them into the labor movement could be attributed both to failed efforts at coalition and cooperation with the AFL, which ruled organized labor, and to the increasing attractiveness of legislative work, given *Muller*, and its fit with league strengths. SMOs must be strategic in the use of their

resources, and the WTUL made little headway with the AFL, which did not provide much tangible support or guidance to the league, and in turn working women, as the resources the league did possess absent AFL assistance were not well-suited to direct organization work, but given the special status of working women under the Constitution, the organization's limited resources could more readily be translated into results when working on legislative reform. Thus turning away from the unionization approach toward the legislative approach was a resource conscious choice by the WTUL. In this chapter, I will analyze the practical, political and constitutional reasons for and the ramifications of this choice to dedicate the bulk of the SMO's resources and efforts to the exploitation of the gendered Constitution in lieu of greater emphasis on integrating women into the labor movement and promoting the labor Constitution of collective free contract that Gompers and the AFL were carefully crafting at this time.

In shifting its focus, the WTUL became a significant partner of the NCL in the campaign for protective labor legislation for women that would stretch through to the New Deal period. Beyond legislative campaigning, the WTUL would also be principally responsible for the establishment of the Women's Bureau of the U.S. Department of Labor, which would be supportive of protective legislation for women. With this transformation in strategic goals and full plate of legislative and bureaucratic activities, the WTUL's tenuous foothold within the labor movement weakened further

With woman suffrage secured through ratification of the Nineteenth Amendment in 1920, the women's movement faced a challenge of redefinition for those who had focused their activism on the ballot. For members of the NWP, the new challenge would be securing equality for women. This goal put them at odds with other organizations within their movement that had built social services and regulatory protections for women on maternalist foundations now entrenched in the Constitution and providing a

means to circumvent *Lochner*. The NWP's fight for an equal rights amendment (ERA) would spark heated competition between their members and the NCL, WTUL and their allies. This conflict was punctuated by the devastating setback to protective labor legislation for women suffered with the Supreme Court's veto of a minimum wage for women in 1923 in *Adkins v. Children's Hospital*.[7]

But the WTUL would not only have to protect the gendered Constitution from attack by a faction of women within the women's movement, but also by a faction of women within the labor movement. The Women's League for Equal Opportunity (WLEO) and the Equal Rights League (ERL), which were comprised of women printers and other women workers who had been adversely affected by protective labor legislation, went on the attack in the years following World War I, and engaged the WTUL in a heated battle over the gendered Constitution. While this battle between the WTUL and the WLEO and ERL was fierce, the WLEO and ERL represented the views of only a small faction of skilled women workers. Unskilled women workers generally favored protective labor legislation for women. Nevertheless, this struggle with these women workers aptly illustrated the strategic tradeoffs the WTUL had made earlier in its history when it turned its primary focus away from organizing women.

The challenge of the ERA would fail, and the setback of *Adkins* would only be temporary as the New Deal approached. With the triumph of protective labor legislation in *West Coast Hotel*, the WTUL would be vindicated for its turn to legislative work on behalf of women in industry. What's more, the WTUL and the NCL would also heroically, and at long last, serve as the thin edge of the wedge that opened the Constitution to state labor regulation that benefited men and women alike. The gendered Constitution was no longer needed to meet women workers' needs. However, all would

[7] 261 U.S. 525 (1923).

not go smoothly for working women with the apparent re-integration of gender and labor in the Constitution as New Deal labor reform moved forward. I will conclude this chapter with a reflection on this legacy of *West Coast Hotel*, and a reconsideration of the resource-conscious choice earlier made by the WTUL to limit their commitment to unionizing women workers and to establishing their influence over collective bargaining, which was now newly legitimized by the Constitution and sponsored by the state as part of the New Deal revolution.

THE FORMATION OF THE WTUL – CREATING A WOMEN'S BRANCH OF THE LABOR MOVEMENT

The American WTUL had its origins in the settlement house tradition, which brought together middle-class social reformers and women workers. Through living together, these reformers got a first-hand look at the miserable working conditions that industrial women toiled under. But many of them would grow frustrated with the limits of the settlement house approach to aiding the working-class and seek other methods of assistance. Gertrude Barnum, a middle-class settlement worker who helped establish the Chicago branch of the WTUL and would later be active in the national organization, expressed this frustration in 1905:

> I myself have graduated from the Settlement into the trade union. As I became more familiar with the conditions around me, I began to feel that while the Settlement was undoubtedly doing a great deal to make the lives of working people less grim and hard, the work was not fundamental. It introduced into their lives books and flowers and music, and it gave them a place to meet and see their friends or leave their babies when they went out to work, but it did not raise their wages or shorten their hours.[8]

[8] Remarks originally appeared in *Weekly Bulletin of the Clothing Trades* (March 24, 1905). Quoted in Nancy Schrom Dye, *As Equals and as Sisters : Feminism, the Labor Movement, and the Women's Trade*

Another such reformer and settlement worker that wanted to do more for women workers was William English Walling, a socialist and economist, and millionaire, who would later play an integral role in the founding of the NAACP. Walling lived and worked in multiple settlement homes, and he had become particularly interested in trade unionism while at Hull House in Chicago. In 1902, Walling took up residence at University Settlement in New York. There he learned of the organizing work of the British WTUL, which had formed in 1874.[9] That same year, 1902, Walling also observed an ongoing boycott and series of demonstrations against Jewish butchers that was carried out by the working-class women of New York's East Side. Walling was impressed with the militant and articulate activism of the women involved, and he became convinced that unionization of working-class women might be feasible. With the blessing of fellow settlement workers, such as Florence Kelley and Lillian Wald, Walling left for England in 1903 to learn more about the activities of the British WTUL. He would be particularly impressed by the league's mixed class effort to organize women

---

Union League of New York (Columbia: University of Missouri Press, 1980) 41-2. This frustration would also stimulate other activists from the settlement tradition, such as Florence Kelley, to pursue other methods of assistance to the working poor beyond unionizing. In Kelley's case, as will be discussed below, she would pursue both ethical consumerism and protective legislation while heading the NCL. For a general discussion of this phenomenon and the manifold approaches middle-class women took to aid the poor, see Skocpol, *Protecting Soldiers and Mothers : The Political Origins of Social Policy in the United States*.

[9] Interestingly, the British WTUL was formed by a British suffragist, Emma Ann Paterson, who was influenced by the efforts of American union women that she encountered during a visit to this country in 1873. In 1919, a member of the British WTUL speaking at the American WTUL convention would joke that it was unclear whether the British league was the American league's "grandmother or granddaughter." Gladys Boone, *The Women's Trade Union Leagues in Great Britain and the United States of America* (New York: Columbia university press, 1942) 20. See also Allen F. Davis, "The Women's Trade Union League: Origins and Organization," *Labor History* 5, no. 1 (1964), Philip Sheldon Foner, *Women and the American Labor Movement*, 2 vols., vol. 1 (New York: Free Press, 1979). For a history of the British WTUL, see Robin Miller Jacoby, *The British and American Women's Trade Union Leagues, 1890-1925*, *Scholarship in Women's History; V. 7* (Brooklyn, N.Y.: Carlson Pub., 1994).

workers into unions and returned to the United States with a plan to form an organization on that model.[10]

Walling arrived in Boston in November of 1903 to attend the annual AFL convention. He approached fellow settlement resident Mary Kenney O'Sullivan, who was a bookbinder and working-class labor leader,[11] with his plans to establish an organization aimed at unionizing women and she enthusiastically agreed to assist him in getting the group off the ground. Fittingly, the WTUL began with a cross-class partnership that would become its hallmark. A series of meetings were held at the convention that included several AFL delegates along with a group of Boston settlement workers. Not surprisingly, all of the labor delegates save one that would attend these meetings were men, while the Boston settlement workers in attendance were predominantly women. At the close of the convention, the new organization had a name, a constitution, and a set of officers. As for the name, the WTUL began as the Women's National Trade Union League, but the name would be changed to the National Women's Trade Union League in 1907.

The constitution of the new league set out very clearly that its mission "shall be to assist in the organization of women workers into trade unions." Soon after that statement was supplemented with the rationale for collective bargaining for women, the constitution

---

[10] The historical recounting that follows of the initial founding and early work of the WTUL is drawn principally from Foner, *Women and the American Labor Movement* 290-302. For other extensive historical accounts of the founding and early years of the WTUL, see Boone, *The Women's Trade Union Leagues in Great Britain and the United States of America*, Davis, "The Women's Trade Union League: Origins and Organization.", Dye, *As Equals and as Sisters : Feminism, the Labor Movement, and the Women's Trade Union League of New York*, Alice Henry, *The Trade Union Woman* (New York and London: D. Appleton and company, 1915), Alice Henry, *Women and the Labor Movement* (New York,: George H. Doran company, 1923), Jacoby, *The British and American Women's Trade Union Leagues, 1890-1925*, James J. Kenneally, *Women and American Trade Unions*, 2nd ed., *Monographs in Women's Studies* (Montréal ; St. Albans, Vt.: Eden Press Women's Publications, 1981).

[11] Kenney had served as a part-time organizer for the AFL in 1892, but her appointment lasted only five months, as the AFL council decided that there was no need for a woman organizer after all. Kenney's experience would prove prophetic of the AFL's inconsistent attitude toward organizing women in the coming decades.

now reading "and thereby to help secure conditions necessary for healthful and efficient work and to obtain a just return for such work."[12] The WTUL would come quickly to wear many hats, committing to several different approaches to helping women workers, but at its initial formation it was single-minded in its commitment to organizing women and to being a labor organization.

What made the WTUL unique as a SMO at this time was its ambition to bring middle-class feminist reformers into an ostensibly working-class, labor organization in order to assist in the task of unionizing women. These middle-class and upper-class members of the group were called "allies," and their role was anticipated in the league constitution. The constitution mandated that anyone was eligible to become a member, and hold office, so long as they declared themselves "willing to assist those trade unions already existing, which have women members, and to aid in the formation of new unions of women wage workers."[13] But Walling and his fellow founders were adamant that the WTUL not be dominated by the allies. Walling described the ally in a letter to Leonora O'Reilly, a New York garment worker and original board member of the WTUL, as someone who had "patience, lofty faith and unalterable humility. It is the girls who must ever be the movement, but the ally can help immensely." He warned that the league not become a vehicle for imposing middle-class values on women workers. He envisioned the WTUL as part of the labor movement first and foremost and its goals at the direction of women workers.[14] To that end, the constitution stipulated that the Executive Board was to be divided as follows: "The majority … shall be women who are, or have been, trade unionists in good standing, the minority of those well known to be earnest

---

[12] *Constitution of the National Women's Trade Union League of America*, Adopted in Boston, MA, November 17-19, 1903. Quoted in Foner, *Women and the American Labor Movement* 299-300.
[13] *Constitution of the National Women's Trade Union League of America*, Adopted in Boston, MA, November 17-19, 1903. Quoted in Ibid. 300.
[14] Letter from Walling to O'Reilly (November 25, 1903). Quoted in Ibid.

sympathizers and workers for the cause of trade unionism."[15] The initial leadership of the WTUL would reflect this mixture. Mary Morton Kehew, a wealthy reformist and former president of the General Federation of Women's Clubs (GFWC), was selected as the league's first president, and Jane Addams of Hull House was tapped to be vice-president. Kenney, the one-time AFL organizer, was named secretary. The initial board would be true to the working-class character required by the constitution with at least nine members who had some union organizing experience. Reflecting on the formation of the WTUL and its labor-first character, member, and early editor of the league periodical *Life and Labor*, Alice Henry, would refer to the WTUL as "a federation of trade unions with women members," that happened to also provide a "niche" and an "honorable and useful function for the wives of workingmen, for ex-trade-union women, and for others who endorse trade unionism and gladly give their support to constructive work, aiming at strengthening the weakest wing of labor, the unorganized, down-driven, underpaid working-girls."[16]

What emerged from Boston was the first labor organization geared toward working women's needs and interests of a national scale, which could organize women through local branches, the three largest were established in Chicago (by settlement workers at Hull House), New York (by settlement workers at University Settlement) and Boston (by settlement workers at Denison House) in 1904, while simultaneously linking them together through the national organization to allow for communication, cooperation and the exchange of ideas.[17] But if it was truly to be a successful labor organization embedded within the labor movement and dedicated to integrating women into the

---

[15] *Constitution of the National Women's Trade Union League of America*, Adopted in Boston, MA, November 17-19, 1903. Quoted in Ibid.
[16] Henry, *The Trade Union Woman* 87.
[17] Ibid. 59-61.

established centers of labor power, if it was truly to be an organization dedicated first to the economic advancement of women as workers rather than their social and political advancement as women, then it needed a solid relationship with organized labor.[18] For all practical purposes this meant a solid relationship with the AFL, which as discussed in earlier chapters dominated the labor movement during this period. From the start, Walling and other league founders were eager to ensure good relations with the AFL. After all, they had come to the AFL's annual convention to start their organization. The WTUL did not ask for an immediate endorsement from the AFL in 1903, waiting instead to make some tangible accomplishments first and hesitant due to the lack of female representation among the AFL delegates present to press for AFL action, but a desire for ties with the AFL was clear from the decision that an annual meeting of the WTUL be held jointly with the AFL convention.[19]

Even in these earliest moments of the WTUL, the relationship with the AFL was erratic, marked by both moments of embrace and dismissal. In his autobiography, Samuel Gompers recalled warmly welcoming the formation of the league and promoting its program of work. "When they submitted to me a proposal," he wrote of Walling and Kenney's presentation of the league at the 1903 convention, "I gave it most hearty approval and participated in the necessary conferences. It was a step toward the realization of the economic organization of women. I defended the movement against the dubious and tried to contribute counsel for its guidance."[20] But Gompers did not make any approving remarks following Kenney's announcement of the formation of the WTUL

---

[18] Dye, *As Equals and as Sisters : Feminism, the Labor Movement, and the Women's Trade Union League of New York* 45.

[19] Philip Foner reports that out of the 496 members of the AFL present at the 1903 convention, only 5 were women. Foner, *Women and the American Labor Movement* 301.

[20] Gompers and Salvatore, *Seventy Years of Life and Labor: An Autobiography* 128.

at the podium of the AFL convention, nor did he announce its formation in the *American Federationist* in the reporting on the news from the convention.[21]

As the fledgling WTUL departed Boston and began its operations, its members were optimistic, but they faced a difficult task in unionizing women. While some women did belong to unions prior to the twentieth century, they comprised only a small percentage of total union members, and where they did participate in unions that participation was typically limited to local unions and did not extend to the national level.[22] Due to rapid industrialization, by 1900 one in five women in America were part of the workforce, and women had representation in a broad array of occupations, but the vast majority remained unorganized.[23]

Women had a different occupational pattern than men that did not lend itself to existing practices of unionization. The typical women worker in industry at this time was young and single, normally beginning work in her mid-teens, often an immigrant that did not speak English, and likely to remain in the labor force for only an average of six to seven years. Marriage was a natural interruption to employment, although many women returned to industry later out of necessity.[24] This transient nature of women's employment not only contributed to the "working only for pin money" myth of women's employment that was widely accepted at this time, but also made it difficult for both men

---

[21] Foner, *Women and the American Labor Movement* 300-1.

[22] Alice Kessler-Harris estimates that in 1900 a mere 3.3% of industrial women workers were organized into unions. Alice Kessler-Harris, *Out to Work : A History of Wage-Earning Women in the United States* (New York: Oxford University Press, 1982) 152. For a comprehensive history of women in the American labor movement before the formation of the WTUL, upon which the following section is drawn, see Foner, *Women and the American Labor Movement*, Henry, *The Trade Union Woman*, Alice Kessler-Harris, *Gendering Labor History*, *The Working Class in American History* (Urbana: University of Illinois Press, 2006), Kessler-Harris, *Out to Work : A History of Wage-Earning Women in the United States*. See also Boone, *The Women's Trade Union Leagues in Great Britain and the United States of America* 43-63.

[23] Foner, *Women and the American Labor Movement* 257.

[24] Ibid. 258. According to Alice Kessler-Harris, 87 percent of women workers at the turn of the century were unmarried and almost half were under 25. Kessler-Harris, *Out to Work : A History of Wage-Earning Women in the United States* 153.

to see the value in organizing women and women to see the value in making the effort and taking up the expense (dues) to join a union. These differences in employment patterns were largely due to societal belief that women belonged in the home not the workplace. The ideological commitment to the cult of true womanhood was pervasive during this era, and as will be discussed below, created an immense barrier to the integration of women into the labor movement.

UNIONIZING WOMEN FALTERS – THE WTUL'S DIFFICULT COURTSHIP OF THE AFL AND WOMEN WORKERS

Even against these structural and cultural barriers to organizing women, the WTUL held fast during its early years to its original commitment to trade unionism as the critical means to empowering women workers.[25] But the drift to legislative work as a focal point would occur quickly, as the organization faced resistance to unionization of women from both organized labor and working women. Capturing the resources of the AFL, through coalition and cooperation, was necessary to achieve success in organizing women, particularly in light of the structural and cultural difficulties that made women reticent to unionize. But the WTUL would not succeed in winning much cooperation from the AFL. This failure to gain AFL support was attributable to many factors, including ideological hostility to women as wage-workers by male trade unionists and fear of female competition, the craft bias of the AFL and its federated structure, cultural differences between men and women workers, inflexibility by the AFL in accepting women's unions or adapting to their needs and a failure of the AFL to provide tangible

[25] The WTUL, by one of its members own admission, did not accomplish much in its early years, as it focused on preparatory work, including information gathering on trade union practices, recruiting women organizers from the working-class, and marketing themselves and their mission to the male trade unionists whose cooperation they would require. See Henry, *The Trade Union Woman* 63.

support to unionization efforts, and particular suspicions that the AFL had about the WTUL itself, particularly based on its cross-class character.

The AFL's official stance on the organization of women from the beginning of its existence was that women's unions should be represented upon an equal footing with those of men within the AFL, and that there should be equal pay for equal work. In much the same way that the AFL had always officially welcomed black workers, such platitudes were routinely offered at the annual conventions, but little actual effort was put forth to unionize women or to give those women that were unionized a voice in the AFL. Only two national affiliates of the AFL, the Cigar Makers' Union and the Typographical Union, during these early years accepted women members and many other affiliates had prohibited female members or discouraged their active participation in union affairs at the local level. In fact, only one female delegate appeared at an AFL convention prior to 1891, and as discussed earlier, the AFL council put limited effort toward a national approach to organizing women, having only employed one woman organizer in its history prior to 1908, Mary Kenney in 1892, for a mere five months. The WTUL would force little change of this disconnect between AFL policy and AFL practice.

The WTUL felt compelled to court the AFL given its dominance of organized labor, but the AFL represented the interests of craft unions first and foremost and most women laborers were unskilled.[26] This made the AFL a less than ideal coalition partner from the outset, as they were already predisposed against industrial unionism. This same problem had stymied the efforts to unionize African-American and immigrant men. Frustration over AFL hostility to unskilled workers was frequently vented within the

[26] Foner, *Women and the American Labor Movement* 319. See also Kessler-Harris, *Out to Work : A History of Wage-Earning Women in the United States* 153. Kessler-Harris points out that this lack of skill also meant that women workers were particularly susceptible to exploitation by employers and efforts by those employers to thwart their unionization.

WTUL, but it did not change the necessity of winning its cooperation.[27] To that end, the WTUL insisted on craft organization of women, but the policy proved ineffective. Unskilled women inside craft unions were isolated and powerless and their interests were routinely ignored by their skilled male counterparts. This was a particular problem in the garment industry, where tremendous gains were made in the raw number of women organized with WTUL help, but in the failure of those women to earn many concessions or assume any power within their unions.[28]

Compounding the problem of the craft union bias, was the AFL's commitment to trade union autonomy and noninterference. Even if Gompers and the national leadership had been so inclined to strenuously press the incorporation of women, skilled and unskilled, into the trade union movement, they could do little concrete to press the matter locally. It was up to the WTUL to win cooperation not only of the national AFL leadership, but also the individual unions.

The greatest obstacle to unionizing women, however, was the prevalent attitude throughout society and among trade union men themselves that women did not belong in the labor force but rather in the home. Despite the surface commitment of the AFL to unionizing women, hostile attitudes to women working as against the natural order and contributing to societal decay, and serving as a blow to proper masculinity, were readily apparent among its members at the turn of the century and onward.[29] One member wrote in the pages of the *American Federationist*:

---

[27] Infighting occurred within the WTUL over the craft union issue, with some of the organizers, like Melinda Scott, favoring a strategy of targeting skilled American women for organization though they were fewer, because it would appease the AFL and succeed more readily within the AFL model, and other organizers, like Rose Schneiderman, favoring attention to the larger numbers of unskilled, often immigrant women who suffered the greater exploitation by employers but were more difficult to unionize suceesfully. See Dye, *As Equals and as Sisters : Feminism, the Labor Movement, and the Women's Trade Union League of New York* 115-7.

[28] Ibid. 79-80.

[29] Kessler-Harris, *Out to Work : A History of Wage-Earning Women in the United States* 155.

> … that it is wrong to permit any of the female sex of our country to be forced to work, as we believe that the man should be provided with a fair wage in order to keep his female relatives from going to work. The man is the provider and should receive enough for his labor to give his family a respectable living.[30]

Another member complained that:

> Respect for women is apt to decrease when they are compelled to work in the factory or the store. … More respect for women brings less degeneration and more marriages … if women labor in factories they bring forth weak children who are not educated to become strong and good citizens.[31]

And an 1897 submission used perhaps the most colorful language of all to express the unnatural and insidious effects of wage work for women.

> The demand for female labor is an insidious assault upon the home … it is the knife of the assassin aimed at the family circle. … The wholesale employment of women in the various handicrafts must gradually unsex them as it most assuredly is demoralizing them, or stripping them of that modest demeanor that lends charm to their kind, while it numerically strengthens the multitudinous army of loafers, paupers, tramps and policemen.[32]

Buttressing this ideology of proper womanhood and belief in the confinement of women to the domestic sphere was fear among working men that unskilled women workers were undercutting their wages and taking their jobs.[33] Gompers himself wondered whether women belonged in the workforce given their negative effects on the male breadwinner's wages. "It is the so-called competition of the unorganized, defenseless woman worker, the girl and the wife, that often tends to reduce the wages of the father and husband," he wrote.[34] Of course, removing women from the workforce altogether was not feasible, so the AFL increasingly gave begrudging lip service to

---

[30] William Gilthorpe, "Advancement," *American Federationist*, October 1910, 847.
[31] John Safford, "The Good That Trade Unions Do," *American Federationist*, August 1902, 423.
[32] Edward O'Donnell, "Women as Breadwinners: The Error of the Age," *American Federationist*, October 1897, 186.
[33] Kessler-Harris, *Out to Work : A History of Wage-Earning Women in the United States* 154-7.
[34] Samuel Gompers, "Should the Wife Help Support the Family?," *American Federationist*, January 1906, 36.

unionizing women, but emphasized that it was for men's protection as much as for women. Gompers, in the same article quoted above where he lamented women working at all, concluded that AFL policy would be best served if they were, "to throw open wide the doors of our organization and invite the working girls and working women to membership for their and our common protection."[35] Thus the WTUL confronted an ambivalent coalition partner, filled with latent hostility to the mission of the WTUL and only pragmatic and begrudging motivations to counteract that hostility and to cooperate with the unionization of women.

Trade union men were not alone in having absorbed the ideology of proper womanhood. Many women workers likewise believed that they did not belong in the workforce on a full-time basis, and they were apathetic about unionizing because they expected to return to the home when they married. This self-identification as being a part-time worker or supplementary worker also contributed to disinterest in unionizing and a failure to see the importance of solidarity with the collective bargaining efforts of their fellow male workers, which was as the AFL feared. The WTUL frequently used women workers' own identification as wives and mothers first and industrial help-mates second as a marketing tool to women for unionizing. Women needed to unionize, if not for themselves, then as part of their responsibility to their family as good wives and mothers. President Margaret Dreier Robins explained to the 1909 WTUL convention that, "if the young woman acts as an underbidder before marriage, then her husband must bring home a lesser wage after marriage … and she must suffer a lower standard of living all the remaining years of her life." Furthermore, Robins explained that if husbands

[35] Ibid.

earned lower wages, they would have to work longer hours, causing wives to lose the "fellowship of a husband," and their children to lose the "companionship of a father."[36]

But there were even more practical and mundane obstacles than ideology and competitive fears to unionization of women due to social and cultural differences between the sexes, and their relative positions in the labor force. Union dues were a greater hardship on lower paid women than on men. More so in AFL unions, which typically insisted on higher dues than unaffiliated unions. WTUL policy to incorporate women into AFL unions led to a greater financial hardship on women through higher dues. This was a hardship that the AFL was unwilling to work around and which the WTUL lacked the funds to defray.[37] As to social and cultural problems, union meetings often took place in saloons and other locales where women were socially prohibited, and meetings very often took place at night when many young working girls, particularly immigrant girls, were expected by their families to be home.[38] Furthermore, male organizers were limited in where they could go themselves to recruit women. For instance, decorum required that they could not call on women who lived alone in their own lodgings.[39] Alice Henry would also point out that the relative youth of women workers made them resistant to the commitment necessary to participate in union meetings, as they were at the "play age" and likely to view union activities as "tiresome and boring past endurance."[40] Added to all of these barriers to unionization, was the reality that women workers had domestic responsibilities that absorbed their time outside the workplace.

---

[36] WTUL Proceedings of the 1909 Convention, September 27, 1909. Quoted in Jacoby, *The British and American Women's Trade Union Leagues, 1890-1925* 25.
[37] Dye, *As Equals and as Sisters : Feminism, the Labor Movement, and the Women's Trade Union League of New York* 82-3.
[38] Boone, *The Women's Trade Union Leagues in Great Britain and the United States of America* 60.
[39] Henry, *The Trade Union Woman* 150.
[40] Ibid. 147.

Helen Marot, a WTUL organizer and ardent trade unionist, aptly summarized the above challenges to unionizing women, when she wrote of "the woman's problem" in labor. Marot wrote:

> The question of why more women are not members of unions is only partially answered with the reasons for lack of organization among the unskilled. There is another phase of the problem … It is the woman's problem … Men's domestic duties coincide with the performance of a day's work. … Wage-earning women give their time and strength to industry as men give theirs, but women, unlike men, are not relieved from home duties in consequence. … They perform their day's work in the factory in addition to their obligation at home. They go into industry, in short, not as competent wage-earners, with the common needs of individual human beings, but as helpers-out at home. They have little conception of their place in industry and their relation to other wage-earners … With this attitude toward their work they readily accept a wage which is an auxiliary wage, that is, a wage which supplements the wages of others … This is not only a woman's attitude toward her wage. It is the general attitude. The woman who is thrown entirely on her own resources … is subject to the same depressing influence of the prevailing attitude toward women as is her sister who pools her earnings with members of her family. No one expects a woman to take her wage-earning seriously, or to consider it as a future occupation. She is invited to indulge in the glittering generality that marriage will relieve her of all financial burdens. … This attitude toward women wage earners is more serious in its effects on wages and her interest in the problem of her fellow workers than is the actual bearing of children. The eternal emphasis on a woman's response to the demands of her family make it difficult for her to realize the effect of her underbidding her fellow workers in search of jobs, or her responsibility to them. The appeal to her to help build up an organization for permanent protection is not met with the ready response it might if she were master of her own time and if the future was as clear for her as for her brothers. Even as she answers the appeal to organize, she finds it difficult to attend union meetings in addition to her household duties … Many labor men are men first and unionists second. Such men are too often annoyed at the thought of women out of the home to face the danger which threatens organization by leaving her free to shift for herself and to meet the organization of labor as she meets capital, as best she can and in her own way. [41]

In order to address some of these immense cultural obstacles to female unionization, the WTUL believed that the AFL needed to do more to adapt to the special

---

[41] Helen Marot, *American Labor Unions* (New York,: H. Holt and company, 1914) 71-3.

needs of women in their recruiting of female labor. The vehicle for this, in the league's view, was women organizers who could meet the special needs of women workers and appeal to their special problems in organizing.[42] The training of women organizers became a central focus of the league very early on, as the concrete effort involved in actual unionization drives often were too much for the members of the WTUL themselves, particularly the allies.[43] The New York branch, which had been the most aggressive organizer in early years, reported in 1908 that it recognized "that the strength of the league lies in its capacity to train wage-earning women for the work of organization."[44] To this end, the WTUL in 1913 would establish a school for the training of women organizers, which involved both fieldwork and coursework for selected working-class women in topics such as parliamentary procedure and the writing of business letters that were skills needed to operate within existing unions.[45] The WTUL lobbied hard for the AFL to hire woman organizers, but the AFL employed only thirty-eight woman organizers between 1908 and 1923, and most for short tenures of only a few months.[46] This meant that the organization of women that was taking place was occurring in unaffiliated unions that held less power and stability and less of a chance of eventual affiliation. This also meant that the AFL was unwilling to take concrete steps

---

[42] See Henry, *The Trade Union Woman* 142-60.

[43] The most comprehensive work on the day-to-day, on the ground difficulties in organizing women that faced the WTUL is the case study of the New York league by Nancy Dye. Dye reports the broad array of practical problems the league faced in unionizing urban, industrial women. See Dye, *As Equals and as Sisters : Feminism, the Labor Movement, and the Women's Trade Union League of New York*.

[44] Report on New York Conference, in *Union Labor Advocate*, Volume 9, October 1908. Quoted in Jacoby, *The British and American Women's Trade Union Leagues, 1890-1925* 50.

[45] This school, which operated intermittently, was open until 1926. For a full history of the school see Ibid. 55-67. Jacoby reports that the school offered increasingly bureaucratic and administrative training for the trainees which reflected the skill-set needed for the legislative program the WTUL had turned its attention to.

[46] There had been no woman organizers employed between 1892 and 1908. Henry, *Women and the Labor Movement* 95.

toward indicating favoritism for women in the workforce and even more to the point for women to be integrated into the labor movement.[47]

Class was also a significant barrier to AFL cooperation. The mixed-class character of the WTUL made Gompers and others in organized labor uneasy, as Walling and other founders had worried. This uneasiness manifested itself in several ways. The AFL refused to seat delegates from the WTUL at conventions, limiting them only to ceremonial and informational participation in AFL business. Gompers wrote to Gertrude Barnum of the WTUL to explain that union members were not comfortable that the ladies of the league would be, in their participation, "voicing the sentiments and reaching the conclusions desired by the membership."[48] Gompers' own hostility to the WTUL also manifested itself in the 1908 selection of the woman organizer that the WTUL had agitated so strongly for. Gompers selected Annie Fitzgerald of the rival Union Label League to serve rather than a WTUL candidate. Fitzgerald was hostile to the WTUL and league members took this snub by Gompers personally. But even this tainted victory was short-lived as Fitzgerald's commission was revoked quickly.[49] Gompers also viewed the WTUL as filled with dilettantes and prone to socialist beliefs.[50] Trade unionist men also distrusted the WTUL's sincerity as a labor organization, suspecting it of being a political organization and a suffragist group in disguise.[51] The league was always aware of this distrust built on class suspicions and fear of the interloping of the women's movement and its agenda. Thus the WTUL felt it particularly important to work hard to secure the "confidence of the official movement," because, as Helen Marot explained, "the league

---

[47] Foner, *Women and the American Labor Movement* 318.
[48] Ibid.
[49] Ibid. 318-9. See also Kenneally, *Women and American Trade Unions*.
[50] Dye, *As Equals and as Sisters : Feminism, the Labor Movement, and the Women's Trade Union League of New York* 102.
[51] Ibid.

was composed of two groups of people, unionists and sympathizers [it] is in danger of creating a feeling that the latter look for strength to forces other than labor."[52]

Despite these frustrations with the AFL, the WTUL continued to devote resources to organizing women, but the experiences with the AFL's response to the revolution in the garment trades between 1909 and 1913 would disillusion the WTUL and refocus their approach to helping women workers.[53] Ostensibly, the series of strikes that took place in the garment trade from New York City, to Philadelphia, to Chicago, to Kalamazoo to Lawrence were successes for women in unions and for the WTUL who had supported the major strikes. The WTUL earned great praise in the press and even from the AFL for their participation in strike support, including the unprecedented participation of allies on the front lines, particularly in the New York strike of shirtwaist workers that lasted for several months.[54] Rose Schneiderman, a WTUL organizer and later president, nicknamed the society ladies who faithfully picketed the "Mink Brigade."[55] However, the gains made for women in unions fell far short of what was possible given the hostility of the United Garment Workers (UGW) to women within their unions. Time and again the WTUL witnessed the UGW marginalize the concessions to be given to women workers within their ranks despite the overwhelming number of women workers that participated in the strikes. The AFL did nothing to pressure the affiliated UGW to change its ways, and when the WTUL experimented during these strikes with supporting unaffiliated unions that were more receptive to unionizing and supporting the needs of

---

[52] Secretary's Report of the WTUL of New York, April 22, 1911. Quoted in Ibid. 84-5.

[53] Kessler-Harris, *Gendering Labor History*, Kessler-Harris, *Out to Work : A History of Wage-Earning Women in the United States*.

[54] For an extensive history of these strikes and WTUL participation, upon which the following section is principally drawn, see Foner, *Women and the American Labor Movement* 324-73. See also Dye, *As Equals and as Sisters : Feminism, the Labor Movement, and the Women's Trade Union League of New York* 88-109.

[55] Rose Schneiderman and Lucy Goldthwaite, *All for One* (New York,: P. S. Eriksson, 1967) 8.

the largely immigrant and unskilled women in the garment trades they made little headway with employers and only sparked the ire of the AFL.

Tensions between the AFL and the WTUL would come to a head with the strike of textile workers in Lawrence, Massachusetts in 1912. The socialist enemy of the AFL, the IWW, dominated the strike, and the AFL union that represented the striking skilled workers, the United Textile Workers (UTW), advised the WTUL to avoid involvement. But members of the Boston branch of the league decided to assist the women strikers once the size and importance of the strike became apparent. The UTW begrudgingly permitted the league to assist the women strikers, but the UTW quickly negotiated a settlement with the mills that benefited only the skilled male workers in their union and ordered the WTUL to cease assistance in light of the settlement, despite having left the mass of unskilled women workers unprotected. The WTUL, given its commitment to AFL principles, complied, but the incident inflamed the league.

WTUL frustration with the AFL's intransigence on organizing women boiled over. Mary Kenney O'Sullivan, co-founder of the WTUL, ignored AFL (and WTUL) directives and stayed on to assist the strikers and subsequently quit the league in disgust.[56] The opinion of Sue Ainslie Clark, president of the Boston league, on the futility of alliance with the AFL was representative of the views of many within the WTUL. She wrote:

> To me, many of those in power in the American labor movement today seem to be selfish, reactionary, and remote from the struggle for bread and liberty of the unskilled workers. Are we, the Women's Trade Union League, to ally ourselves with the 'stand-patters' of the Labor Movement or are we to hold ourselves ready to aid the insurgents – those who are freely fighting the fight of the exploited, the oppressed and the weak among the workers?[57]

---

[56] Kessler-Harris, *Out to Work : A History of Wage-Earning Women in the United States* 166.
[57] Letter from Sue Ainslie Clark to Margaret Dreier Robins, April 1912. Quoted in Dye, *As Equals and as Sisters : Feminism, the Labor Movement, and the Women's Trade Union League of New York* 105-6.

Melinda Scott called the AFL "a bag of wind."[58] WTUL president, Margaret Dreier Robins, confessed to her sister that she was growing immune to the insensitivity of the AFL. "It is just as well that I have no illusions regarding the men," she wrote.[59] Rose Schneiderman left the WTUL for a time to join the suffrage fight following the crushing disappointments of the general garment strikes, blaming the AFL for the failures the WTUL had encountered in organizing women. "We have come to the American Federation of Labor," she complained, "and said to them, 'Come and help us organize the American working girl' … but nothing was done."[60]

Despite this disillusionment, the WTUL saw little choice to adhering to AFL principles and policies when unionizing and continuing to attempt to draw upon the established resources of the AFL. The WTUL could offer little in the way of assistance to women workers if they organized them into unions that had no influence with employers or staying power within the labor movement. Thus the WTUL held firm to coalition with the recalcitrant AFL when unionizing women. As Raymond Robins, husband of the WTUL president, explained to the restless New York branch, "The AFL with all of its shortcomings – and few people know these better than ourselves – is none the less the true representative body of organized labor in this country … As a matter of expediency you must cooperate with the policy of the American Federation of Labor."[61] Not surprisingly, given the futility of this expectation of AFL cooperation, the WTUL increasingly looked to channel its resources into other methods for aiding women workers. Propitious then was the constitutional victory of *Muller* in 1908, which

---

[58] Letter from Melinda Scott to Leonora O'Reilly, April 30 1909. Quoted in Ibid. 103.
[59] Letter from Margaret Dreier Robins to Mary Dreier, 1913. Quoted in Ibid.
[60] Remarks published in *New York Call*, June 15, 1915. Quoted in Foner, *Women and the American Labor Movement* 487.
[61] Letter from Raymond Robins to Mary Dreier, November 12, 1913. Quoted in Dye, *As Equals and as Sisters : Feminism, the Labor Movement, and the Women's Trade Union League of New York* 108.

invigorated the prospects of securing protective labor legislation for women in the workplace.

MULLER MEETS DISILLUSIONMENT – THE WTUL REINVENTS ITSELF

At the 1913 convention of the WTUL, the national secretary summarized the first ten years of the league's existence. She announced that:

> During the ten years which have elapsed since its founding, the effort of the National Women's Trade Union League has been twofold, to organize women directly and to awaken public opinion to the recognition of the value of trade organization. A great deal of preparatory work has been done with meager equipment and unbounding enthusiasm and faith in the future distinctive of pioneer undertakings, and the next ten years may be trusted to show very definite results.[62]

The next ten years proved distinctive in the undertakings of the WTUL and did show definite results, as the league turned its attention to a legislative program. But even in reflection on the first ten years, it was clear that the league had shown more skill and had greater success in awakening public opinion to trade unionism than it had in actually organizing women.

In fact, it was apparent almost immediately that the WTUL's natural strengths lay in providing education and public relations to support the cause of unionization of women. The organization did not possess a reservoir of membership with field experience in unionizing women or with inside connections to labor unions. Thus at the first executive board meeting, the national league agreed that it would best suited to aid the cause of organizing women through providing general education and investigating factory conditions. William English Walling and Jane Addams dedicated themselves to

---

[62] Proceedings of WTUL Convention, 1913, Secretary's Report. Quoted in Boone, *The Women's Trade Union Leagues in Great Britain and the United States of America* 110.

publishing pro-union propaganda, and a Wellesley College professor among their ranks was put to work on a bibliography on labor topics that could educate both the league and the public on the importance of unionization for women.[63] At the first annual meeting of the league in 1904, the WTUL added ambitions for creating a bureau of information for members on labor statistics and factory investigations and commitment to appearances before women's clubs in order to promote the league as fruitful techniques to achieve their goals of unionization of women.[64]

These natural strengths and strategic predispositions of the league could be attributed in part to the presence of the allies in the WTUL.[65] These women were articulate and predominantly college educated, thus they were naturals at publishing and propaganda. The WTUL published frequently in labor periodicals, such as the *Union Labor Advocate*, and started a periodical of their own, *Life and Labor*. Also, their position within the network of the women's movement was a tremendous resource to be exploited, such as with informational appearances before women's clubs. After all, the first president of the WTUL had first helmed the GFWC. Time and money were also resources that the allies possessed in greater abundance than the working-class membership and thus skewed the methods employed by the league. Experience of members within the women's movement created a comfort level that also pushed the WTUL toward engagement with the state as a technique of activism.[66]

---

[63] Minutes of First Executive Board Meeting of the WTUL, March 24, 1904. Reported in Foner, *Women and the American Labor Movement* 303.

[64] Ibid. 310-2.

[65] Nancy Dye's study of the New York league provides in-depth coverage of the class dynamic of the WTUL and the importance of "sisterhood" as a league ideal. See Dye, *As Equals and as Sisters : Feminism, the Labor Movement, and the Women's Trade Union League of New York.* See also Jacoby, *The British and American Women's Trade Union Leagues, 1890-1925.*

[66] See generally Skocpol, *Protecting Soldiers and Mothers : The Political Origins of Social Policy in the United States.*

Buttressing the dominance of these strategic predispositions and resources for education, public relations and political work was the WTUL's financial problems. The league did not even hold an annual convention in 1906 due to money woes. The AFL never provided any financial assistance to the WTUL, thus the league relied on the generosity of its allies, particularly the wealth of its long-time president Margaret Dreier Robins, who kept the league periodical afloat with her own money.[67] Due to these financial exigencies, the WTUL could only afford to underwrite a limited number of approaches to organizing women, and thus when squeezed the league often defaulted to the methods that the allies excelled at and felt at home with, methods and interests which would quickly prove particularly conducive to legislative and suffrage work.

Thus the WTUL in its early years not only experienced frustration with organizing efforts and rejection by the AFL, but also discovered that its organizational and membership strengths predisposed it to the kind of publicity and bureaucratic work that was best aimed at lobbying the state rather than at transforming the attitudes of working-class union men and recruiting working-class women to unions. Contributing to this confluence of factors pointing to a new direction for the WTUL would be the birth of the gendered Constitution in *Muller* and the prospect of an attractive partnership with the NCL and other organizations within the women's movement.

From its inception, the WTUL maintained a legislative agenda. In 1903, the organization noted that one of its objectives would be "to secure new legislation to protect women workers and to obtain better enforcement of existing laws."[68] In 1904, the WTUL board got somewhat more specific, as it recommended that the league work for the "adoption of progressive industrial legislation and uniformity in factory laws

---

[67] Foner, *Women and the American Labor Movement* 304.
[68] Jacoby, *The British and American Women's Trade Union Leagues, 1890-1925* 119.

throughout the United States."[69] This progressive industrial legislation the league dedicated itself to included not only laws geared toward workplace safety and sanitation, but also the limitation of hours to be worked by women to eight hours per day and fifty hours per week, along with a prohibition against night work.[70] At the WTUL's first national convention in 1907, the league adopted a platform that included, in addition to calls for the organization of women into trade unions, equal pay for equal work, the promotion of the economic principles of the AFL, and full citizenship for women, the eight-hour day.[71]

At this point in time, these legislative goals were fairly unremarkable. While the AFL was moving away from supporting a legislative program for shorter hours in the workplace to supporting an economic program for shorter hours in this first decade of the twentieth century due to judicial hostility, they had not yet turned fully hostile to state labor reform.[72] Likewise, there were a growing number of legislative campaigns for hours restrictions for working women that had spread to assorted states. At this point, the success of a legislative approach to limiting the hours women worked had been erratic, as state and federal courts struggled with balancing state police powers with a developing commitment to free contract liberty, which would not fully triumph until 1905 with *Lochner*. Thus in these early years of the WTUL there was no special advantage to working on legislative reform. The uncertain constitutionality of protective labor legislation for women made the state an uncertain resource for the advancement of the

---

[69] Minutes of Executive Board Meeting of the WTUL, October 7, 1904. Reported in Foner, *Women and the American Labor Movement* 304.

[70] Barbara Drake, *Women in Trade Unions* (London: The Labour Research Dept, 1920) 18. See also Jacoby, *The British and American Women's Trade Union Leagues, 1890-1925* 121.

[71] Foner, *Women and the American Labor Movement* 304.

[72] The AFL fought for an eight-hour day for all workers from the late nineteenth century into the early twentieth century, but by 1914 it supported such restrictions only for women and children. As discussed in Chapter Three, they had become true believers in voluntarism by this point. Greene, *Pure and Simple Politics: The American Federation of Labor and Political Activism, 1881-1917* 73-88.

interests of women workers. Given this uncertainty and more importantly the still fresh, and perhaps naïve, enthusiasm for the trade union approach, the WTUL treated legislative work as a supplementary approach to aiding women workers. This would begin to change after 1908.

The Progressive Era battle over protective labor legislation for women began in Illinois in the 1890's. There had been sporadic attempts to limit the hours women could work in Massachusetts and a few other states beginning in the 1870's, but these laws were weakly drafted and largely unenforceable.[73] For the most part these laws survived judicial review, but the courts did not engage in any extensive analysis of the relationship between women, the police power, and the parameters of individual liberty.[74] In Illinois, Florence Kelley worked with her fellow settlement residents at Hull House to draft and to lobby for an aggressive law governing factory practices and inspections, which included limitations on the hours women could work. The law, which had far more bite than earlier forays into protective labor legislation in Massachusetts and elsewhere, passed in 1893 and Florence Kelley was appointed as the state factory inspector, a job she took quite seriously.[75] However, this protection for women workers in Illinois was short-lived, when the Illinois Supreme Court struck down the hours provision in 1895 in *Ritchie v. People*.[76]

In *Ritchie*, gender did not play a significant role in the decision of the Illinois Court. The justices upheld a general right to freedom of contract that trumped the police

---

[73] Skocpol, *Protecting Soldiers and Mothers : The Political Origins of Social Policy in the United States* 375. See also Judith A. Baer, *The Chains of Protection : The Judicial Response to Women's Labor Legislation* (Westport, Conn.: Greenwood Press, 1978).

[74] Novkov, *Constituting Workers, Protecting Women: Gender, Law, and Labor in the Progressive Era and New Deal Years* 60-1.

[75] For an extensive history of this period of Kelley's life and the passage and enforcement of the Illinois law, see Kathryn Kish Sklar, *Florence Kelley and the Nation's Work* (New Haven: Yale University Press, 1995).

[76] 155 Ill. 98 (1895).

power of the state, glossing over any discussion of sex.[77] *Ritchie* was part of a larger period of constitutional adjustment, as courts around the country worked out the proper parameters of the police power in light of developing commitment to ideals of economic due process liberty that had first found voice in Field's dissent in *The Slaughter-House Cases*, had gained acceptance in state cases such as *in re Jacobs*, and would culminate in the victory of freedom of contract in *Lochner*.[78] In the years that followed *Ritchie* and preceded *Lochner*, a few other states would instead uphold maximum hours laws for women in the face of this constitutional uncertainty, but the disappointment of *Ritchie* dealt a setback, though not a deathblow, to the movement for protective labor legislation for women.[79] Florence Kelley did not give up on protective labor legislation for women, despite the experience in Illinois, and she would go on to spearhead campaigns for hours laws, and later minimum wage laws, to protect women workers at the helm of the NCL.

The NCL began as a movement of individual consumer leagues that developed in several states in the 1890's, and then consolidated in 1899 as the NCL. Florence Kelley was brought on board that year as the NCL's general secretary. The NCL agitated for better working conditions for women that worked in shops and factories. To win these better working conditions for women, the NCL relied on ethical consumerism (regulation through consumption). To that end, the NCL publicized "white lists" of shops that treated employees well, provided "white labels" for merchandise manufactured under safe and sanitary conditions, and undertook a variety of consumer campaigns to bring about changes in the workplace that were not covered by state regulation or collective

---

[77] Novkov, *Constituting Workers, Protecting Women: Gender, Law, and Labor in the Progressive Era and New Deal Years* 61.

[78] Julie Novkov refers to this period of largely sex-blind negotiation and adjustment of the parameters of the police power under the Constitution as one of "generalized balancing." See Ibid. 37-76.

[79] Hours regulations for women were upheld in Washington (*State v. Buchanan*, 29 Wash. 603 (1902)); Nebraska (*Wenham v. State*, 65 Neb. 394 (1903)); and Oregon (*State v. Muller*, 48 Ore. 252 (1906)).

bargaining, such as the "shop early" campaign which encouraged women to do their Christmas shopping early so as to avoid unhealthy hours for shop girls at the holidays. The NCL worked closely with the GFWC on these projects, using the clubs to raise consumer awareness and serve as an information distribution network for their lists and labels.[80]

The NCL was the quintessential embodiment of "social housekeeping," which was the prevailing ideology of the period.[81] The organization embraced and utilized the domestic role of the woman, as homemaker and therefore purchaser of household goods, as a force for positive social change that benefited the community at large. Their reform program, which exported the duties and responsibilities of the maternal role in the private sphere to the public sphere, was an exemplar of what Paula Baker calls the "domestication" of American politics during this era.[82]

With Florence Kelley at the helm, the NCL quickly added the pursuit of protective legislation for women and children to its slate of consumer campaigns.[83]

---

[80] For a history of these consumer campaigns see Kathryn Kish Sklar, "The Consumers' White Label Campaign of the National Consumers' League, 1898-1918," in *Getting and Spending : European and American Consumer Societies in the Twentieth Century*, ed. Susan Strasser, Charles McGovern, and Matthias Judt (Cambridge, England ; New York: Cambridge University Press, 1998). See also Eileen Boris, *Home to Work : Motherhood and the Politics of Industrial Homework in the United States* (Cambridge [England] ; New York, N.Y.: Cambridge University Press, 1994) 81-122, Allis Rosenberg Wolfe, "Women, Consumerism, and the National Consumers' League in the Progressive Era," *Labor History* 16, no. 3 (1975).

[81] Rheta Childe Dorr, who belonged to both the NCL and the WTUL, captured the ideal of social housekeeping well in 1910: "Woman's place is in the Home. Her task is homemaking. But Home is not contained within the four walls of an individual home. Home is the community. The city full of people is the Family. The public school is the real Nursery. And badly do the Home and the Family and the Nursery need their Mother." Rheta Childe Dorr, Carrie Chapman Catt, and National American Woman Suffrage Association Collection (Library of Congress), *What Eight Million Women Want* (Boston,: Small, 1910) 327. See also Skocpol, *Protecting Soldiers and Mothers : The Political Origins of Social Policy in the United States* 20-1.

[82] Paula Baker, "The Domestication of Politics: Women and American Political Society, 1780-1920," *The American Historical Review* 89, no. 3 (1984).

[83] Gradually the legislative work would overtake the consumer techniques. Much like the story of the WTUL, this alteration in focus and redirection of organizational resources would be driven not only by the enticing success of *Muller*, but also by the hostility of organized labor to some of the consumption techniques employed by the NCL, particularly the "white label." For further discussion of the hostility of

Buoyed by the success of a Utah maximum hours law for miners before the Supreme Court in 1898, which took some of the sting out of *Ritchie*, the NCL sponsored legislative campaigns in several states.[84] Between 1900 and 1908, branch consumers' leagues participated in campaigns to secure new or improve existing hours laws for women workers in Massachusetts, Rhode Island, Oregon, Connecticut, Michigan, and Tennessee.[85] They also worked, during these pre-*Muller* years, on campaigns for laws against women's night work, and secured such legislation in four states, including New York.[86]

In 1905, the Supreme Court struck down a maximum hours law for bakers in *Lochner*, and freedom of contract was solidified as a constitutional principle. Protective labor legislation was now imperiled everywhere. But *Lochner* also contained hints that a gendered exception to free contract liberty might be possible. The majority opinion, echoing language found in the plaintiffs' brief, spoke of the "intelligence and capacity" of bakers, like other men, to "care for themselves," without state interference in their "independence of judgment and action." Bakers, as a class, were in "no sense wards of the state."[87] Women did not possess such robust independence, judgment and capacity for self-protection according to the conventional wisdom and legal conventions of the period. But it would not be male state officials or judges' themselves that would bring such an insight to the fore when a maximum hours law for women only subsequently

---

unions, particularly the Woman's Union Label League, toward the NCL, see Boris, *Home to Work : Motherhood and the Politics of Industrial Homework in the United States*, Sklar, "The Consumers' White Label Campaign of the National Consumers' League, 1898-1918."

[84] *Holden v. Hardy*, 169 U.S. 366 (1898).

[85] Skocpol, *Protecting Soldiers and Mothers : The Political Origins of Social Policy in the United States* 387.

[86] O'Connor, *Women's Organizations' Use of the Courts* 67.

[87] 198 U.S. 45, 57. For a discussion of the plaintiffs' brief in *Lochner* see Lipschultz, "Hours and Wages: The Gendering of Labor Standards in America," 115-6.

made its way to the Supreme Court. Women themselves, through the NCL, would be responsible for bringing such arguments to the constitutional table.

The NCL became involved in the litigation of the hours laws they helped pass when Florence Kelley and Josephine Goldmark, the NCL member who was the chief researcher and co-author responsible for the famous Brandeis Brief used in *Muller*, attended the judicial proceedings on New York's night work law, which was challenged in 1905 in the wake of *Lochner*, to show women's support for the measure. They were horrified to discover that the state attorney had assigned no one to argue the case and had merely submitted a brief, which Florence Kelley described as "a disgraceful display of ignorance."[88] Kelley became convinced that the NCL needed a concerted litigation strategy to protect NCL-sponsored legislation.

In 1907, the Portland branch of the NCL reported that their state's maximum hours law for women had survived judicial review in Oregon following a challenge by a laundry owner, but was now headed to the Supreme Court. The NCL recruited Goldmark's brother-in-law, Louis Brandeis, to the cause. Incidentally, Margaret Dreier Robins, president of the WTUL, and her husband participated in Brandeis' recruitment.[89] This kind of interconnection between reform organizations was typical during this period, and demonstrates the comfortable degree to which the WTUL was wired into the power centers of the women's movement, in sharp contradistinction to the league's tenuous

---

[88] Josephine Clara Goldmark, *Impatient Crusader : Florence Kelley's Life Story* (Urbana: University of Illinois Press, 1953) 148. See also O'Connor, *Women's Organizations' Use of the Courts* 67-9. Not surprisingly, given the meager efforts of the state attorneys of New York, the night work law was struck down, and when it later reached the state's high court, *Lochner* was cited as the court argued that women were "adult" citizens capable of freely making contracts. See *People v. Williams*, 189 N.Y. 131, 134 (1907). Julie Novkov points out that this New York case was an outlier in the emerging pre-*Muller* consensus at the state level that the police power could be more readily invoked to protect women. Novkov, *Constituting Workers, Protecting Women: Gender, Law, and Labor in the Progressive Era and New Deal Years* 101.

[89] Mary E. Dreier, *Margaret Dreier Robins, Her Life, Letters and Work* (New York,: Island Press Cooperative, 1950) 46.

connection to the power centers of the labor movement. Thus, cooperation with the NCL in legislative work was a ready resource for the WTUL even before the enticing success of *Muller* would draw a greater proportion of its attention to legislation.

Brandeis and Goldmark set to work on crafting the amicus brief for the Oregon case. The brief was a landmark in American constitutional history for its voluminous use of statistics and its embrace of sociological jurisprudence, but it also laid the groundwork for a maternalist exception to the established constitutional principle of economic due process liberty.[90] Brandeis and Goldmark chose not to attack *Lochner* directly, but instead opted to push for an exception for women, perhaps influenced by the masculinist rhetoric of the *Lochner* opinion itself. The Supreme Court adopted virtually wholesale the arguments put forth by Brandeis and Goldmark, accepting the general point that women's overwork harmed the general welfare because women were responsible for reproduction.[91] Justice Brewer, writing for a unanimous Supreme Court, embraced the medical, social and statistical evidence provided by the NCL to support their maternalist rationale:

> That woman's physical structure and the performance of maternal functions place her at a disadvantage in the struggle for subsistence is obvious. This is especially true when the burdens of motherhood are upon her. Even when they are not, by abundant testimony of the medical fraternity continuance for a long time on her feet at work, repeating this from day to day, tends to injurious effects upon the body, and, as healthy mothers are essential to vigorous offspring, the physical well-being of woman becomes an object of public interest and care in order to preserve the strength and vigor of the race.[92]

---

[90] For a brief history of *Muller* and the involvement of Brandeis and the NCL, see Nancy Woloch, *Muller V. Oregon : A Brief History with Documents*, *Bedford Series in History and Culture* (Boston: Bedford Books of St. Martin's Press, 1996).

[91] For a review of the maternalist arguments of the Brandeis Brief, see Novkov, *Constituting Workers, Protecting Women: Gender, Law, and Labor in the Progressive Era and New Deal Years* 117-22.

[92] *Muller v. Oregon*, 208 U.S. 412, 421 (1908).

Male labor was the constitutional norm, and governed by the principles in *Lochner* that celebrated individualism, but women were distinguished not only by their relative weakness, but also by their significance to the community, which counseled against treating them merely as individuals. Brewer explained (with greater flourish on the point of female dependence than was to be found in the Brandeis Brief):

> Differentiated by these matters from the other sex, she is properly placed in a class by herself, and legislation designed for her protection may be sustained, even when like legislation is not necessary for men, and could not be sustained. It is impossible to close one's eyes to the fact that she still looks to her brother and depends upon him. Even though all restrictions on political, personal, and contractual rights were taken away, and she stood, so far as statutes are concerned, upon an absolutely equal plane with him, it would still be true that she is so constituted that she will rest upon and look to him for protection; that her physical structure and a proper discharge of her maternal functions-having in view not merely her own health, but the well-being of the race-justify legislation to protect her from the greed as well as the passion of man.[93]

A gendered Constitution was born, and the NCL had served as midwife.[94]

---

[93] 208 U.S. 412, 422.

[94] The NCL may have pressed hard for this maternalist basis for protective legislation for women, but this strategy was largely instrumental in nature, as the NCL considered protective legislation crucial for men as well and worked toward and defended universal laws where possible. The NCL viewed women as the "entering wedge" of universal labor reform. For example, Goldmark and Brandeis articulated a new universal constitutional basis for labor laws in 1912, and the NCL submitted a Brandeis Brief in favor of a universal maximum hours law in *Bunting v. Oregon* (243 U.S. 426 (1917)). See Josephine Clara Goldmark and Louis Dembitz Brandeis, *Fatigue and Efficiency* (New York,: Charities publication committee, 1912). Vivien Hart refers to the reformers in the NCL, and the WTUL as well, as "reluctant and conflicted maternalists." Vivien Hart, *Bound by Our Constitution : Women, Workers, and the Minimum Wage*, *Princeton Studies in American Politics* (Princeton, N.J.: Princeton University Press, 1994) 88. Kathryn Kish Sklar argues that for Kelley, and her allies, gender was a surrogate for class. Maternalist arguments permitted these reformers to make policy inroads on behalf of the working class that could be incrementally exploited. Frances Perkins even dubbed Kelley the "half loaf girl." See Kathryn Kish Sklar, "The Historical Foundations of Women's Power in the Creation of the American Welfare State, 1830-1930," in *Mothers of a New World : Maternalist Politics and the Origins of Welfare States*, ed. Seth Koven and Sonya Michel (New York: Routledge, 1993), Kathryn Kish Sklar, "Two Political Cultures in the Progressive Era: The National Consumers' League and the American Association for Labor Legislation," in *U.S. History as Women's History : New Feminist Essays*, ed. Linda K. Kerber, Alice Kessler-Harris, and Kathryn Kish Sklar (Chapel Hill: University of North Carolina Press, 1995), 41. Theda Skocpol has critiqued this thesis for undervaluing the ideological investment of these reformers, if not for the unique Kelley herself then certainly for her allies, in maternalism and the cult of true womanhood that buttressed their concerns over the universal ills of industrial exploitation. Skocpol, *Protecting Soldiers and Mothers : The Political Origins of Social Policy in the United States* 35. Although it is beyond the scope of this

With unanimous Supreme Court backing of a separate constitutional category for women's labor that favored state protection, and near universal public acclaim for the decision, the NCL, enjoying its now greatly enhanced status as a major leader for social reform, made the promotion and defense of protective labor laws for women its paramount mission and viewed it as the best method for aiding women workers.[95] They would achieve great success. Between 1908 and 1917 nineteen states and Washington, DC would enact hours laws for women, and twenty states with existing laws would improve them. All these new maximum hours laws survived judicial challenge.[96] Most gratifying to Florence Kelley was the reversal of the 1895 *Ritchie* decision by the Illinois Supreme Court in 1910.[97] The NCL was not alone, however, in recognizing the valuable resource of the gendered Constitution and the new promise of the state as a site for reform after so many years of judicial obstruction.

Muller made an immediate impression on the WTUL. At an early 1909 executive board meeting a rift developed in leadership, with one faction favoring league dedication to educational and legislative missions, and the other faction favoring a sustained central focus on organizing women and strengthening women's unions.[98] This strategic disagreement on the most effective role of the organization would keep the WTUL's attentions divided between legislative work and union organizing through a period of adjustment from 1909 to roughly 1914 that coincided with the increasing disillusionment

---

chapter to explore in detail, I have found similar tensions in the maternalist reasoning and rhetoric of the WTUL, as members appeared to simultaneously hold genuine maternalist beliefs along with universal class convictions that made their approach to and defense of gendering the Constitution instrumental.

[95] Given this stunning Constitutional success, Kelley favored the legislative approach now over both ethical consumerism and trade unionism. Woloch, *Muller V. Oregon : A Brief History with Documents* 38-41. See also Foner, *Women and the American Labor Movement* 304.

[96] Woloch, *Muller V. Oregon : A Brief History with Documents* 41.

[97] *Ritchie & Co. v. Wayman*, 244 Ill. 509 (1910).

[98] Minutes of WTUL Executive Board Meeting, March 18, 1909. Reported in James J. Kenneally, "Women and Trade Unions 1870-1920: The Quandary of the Reformer," *Labor History* 14, no. 1 (1973): 46.

with organized labor discussed above that plagued the league in these years. From that point forward, however, the WTUL would be first and foremost a state-focused pressure group. At the 1909 national convention, the WTUL broadened its legislative program, putting the pursuit of the eight-hour day and the elimination of night work for women at the top of its eleven-point platform.[99] However, the WTUL, perhaps given executive dissension over strategy, did not become active at the national level in lobbying for legislation until 1913, instead encouraging local leagues to come to their own decision regarding how much time to devote to legislative lobbying.[100] Many local leagues went immediately to work, forming coalitions with local consumers' leagues and other reform allies, to press the fight for maximum hours laws. In 1909, WTUL branches campaigned for legislative reform in Illinois and Missouri, followed by local campaigns in Massachusetts in 1911 and Vermont in 1912.[101] The Chicago WTUL was particularly aggressive as a legislative pressure group. They assisted in the passage of the ten-hour law in 1909, but they believed an eight-hour day was preferable and vowed to continue to fight for the more stringent restriction. Agnes Nestor, the local WTUL president from

---

[99] The legislative program called for: 1. The eight-hour day. 2. Elimination of night work. 3. Protected machinery. 4. Sanitary workshops. 5. Separate toilet rooms. 6. Seats for women and permission for their use when work allows. 7. Prohibition of the employment of women two months before and after child-birth. 8. Pensions for mothers during the lying-in period. 9. An increased number of women factory inspectors, based on the percentage of women workers in the State. 10. The appointment of women physicians as health inspectors, whose duty it shall be to visit all workshops where women and children are employed to examine into the physical condition of the workers. 11. A legal minimum wage in the sweated trades. See Alice Henry, "Convention of the National Women's Trade Union League," *Union Labor Advocate* 1909, 22. In this chapter, I do not explore the extensive legislative work that the WTUL engaged in on workplace safety, sanitation and benefits issues, as these laws did not routinely raise the same constitutional concerns regarding freedom of contract. It should be noted that during this period of redirection for the WTUL, the Triangle Shirtwaist Company factory fire in New York City in 1911, that killed 146 women garment workers, led to a significant increase in legislative activity by the league aimed at industrial safety and factory inspection. For a history of this tragic event and its fallout see Foner, *Women and the American Labor Movement* 358-61. See also Dye, *As Equals and as Sisters : Feminism, the Labor Movement, and the Women's Trade Union League of New York* 144, Jacoby, *The British and American Women's Trade Union Leagues, 1890-1925* 124-6.

[100] Jacoby, *The British and American Women's Trade Union Leagues, 1890-1925* 121-2.

[101] Skocpol, *Protecting Soldiers and Mothers : The Political Origins of Social Policy in the United States* 387-8.

1913 to 1948, appeared before every session of the state legislature from 1909 until the bill finally passed in 1937.[102]

Although the national league did not fully dedicate itself to legislative campaigning in 1909, it did publicize its platform as a representation of the policy needs and preferences of organized women workers to other SMOs, such as the NCL and the American Association of Labor Legislation (AALL), and encourage them to incorporate the legislative goals into their own efforts.[103] What made the league's 1909 legislative program particularly distinctive was its call for a minimum wage (the final point of the eleven-point platform). The NCL had not yet made such a bold call. This put the WTUL at the forefront of upping the ante of the success of *Muller* to regulate an aspect of the employment contract that was not so obviously linked to the health and reproductive capacity of women workers.

The Boston branch of the WTUL went quickly to work on a minimum wage campaign in Massachusetts, and by 1911 they had assembled a coalition that included unionists, social workers and local outlets of the NCL and the AALL, and in 1912 they succeeded with passage of a state wage bill. This success would quickly spread, with eight more states following with minimum wage laws for women in 1913.[104] At this point, the NCL would take the lead in the national legislative campaign. The NCL would now spearhead the coalition of reformers, not only because they were better resourced for and more tightly focused on a legislative approach to aiding women workers, but also because the WTUL was still adjusting the scope and focus of its activism and tensions

---

[102] Jacoby, *The British and American Women's Trade Union Leagues, 1890-1925* 123-4.

[103] For a study of the relationship/coalition between the female-dominated NCL and the male-dominated AALL, see Sklar, "Two Political Cultures in the Progressive Era: The National Consumers' League and the American Association for Labor Legislation."

[104] For an extensive study of the minimum wage campaign for women workers during this era and its relationship to the gendered constitution, see Hart, *Bound by Our Constitution : Women, Workers, and the Minimum Wage*.

over that adjustment were high. Kelley explained in 1912 that the minimum wage campaign "was first actively taken up by the Women's Trade Union League. It seems likely to be carried to success in the near future chiefly by the efforts of a public commission and the Consumers' League constituency, the Women's Trade Union League being shaken to its foundations by inner dissension."[105]

Muller had significantly impacted the league's strategy and focus and not everyone was happy. Many of the working-class members of the league, and even some of the more radically-inclined allies, were alarmed at the de-emphasis on organizing work that was implicit in the redirection of resources to legislative campaigns. The AFL was also displeased with the WTUL endorsement of a legislated minimum wage, exacerbating the tensions between the organizations. Gompers was adamant that there be no minimum wage for men, as a minimum wage might serve as a ceiling on wages that could be negotiated and such a wage for women might prove to be a slippery slope. "The establishment of such a policy or practice … would infringe upon the liberty of women, and would directly or indirectly affect that of men," declared Gompers.[106] He conceded that as a resource-conscious strategy it was tempting "to resort to legislative devices that palliate the ills," but that legislative solutions were inferior to trade unionism since a minimum wage would not help women develop the valuable qualities of "self-discipline, the development of individual responsibility, and initiative."[107] Many of the women within the WTUL agreed and resisted the new direction.

By 1915, when the WTUL reiterated its commitment to minimum wage legislation at its annual convention, the AFL issued a warning that the WTUL was endangering its identification with the labor movement and becoming far too comfortable

---

[105] Letter from Florence Kelley to Dr. Jessica B. Peixotto, April 15, 1912. Quoted in Ibid. 72.
[106] Samuel Gompers, "The American Labor Movement," *American Federationist*, July 1914, 44.
[107] Samuel Gompers, "Woman's Work, Rights and Progress," *American Federationist*, August 1913, 626-7.

a creature of the women's movement.[108] Gompers reminded the WTUL that "industrial freedom must be fought out on the industrial field … Protection and regulation may offer immediate relief – but they are not freedom." He praised the WTUL for having "tremendous opportunity and promise," as an organization, but warned that those resources made it attractive to those with other agenda. Being "confronted by dangers and pitfalls," the league "must protect itself against attempts to dominate it and use it for other purposes." Shamelessly glossing over the AFL's own failures to organize women and to aid the WTUL in that mission, Gompers contended that "the fight of women for industrial freedom is made doubly difficult … by patronizing social workers and those who would protect woman in order to keep her from exercising her own will power and becoming a member of society upon equality with all."[109]

The WTUL stood at a strategic and constitutional crossroads. Gompers had reminded the WTUL of the virtues of the labor Constitution, which as discussed in Chapter Three, emphasized the civic value of trade unionism, which created independent citizens, and its ability to enhance the liberty of the individual, who could rely on collective self-help rather than the state for his survival. This constitutional vision was deeply at odds with the regulatory embrace of the gendered Constitution.

But with the WTUL more disenchanted with the AFL than ever following the disappointments of unionizing efforts in the garment trades in the years following 1909, and with the AFL more disappointed with the WTUL than ever due to their legislative efforts on the minimum wage and earlier dalliances with the IWW and other unaffiliated unions,[110] and with the rapid success of legislative campaigns following *Muller* that

---

[108] Jacoby, *The British and American Women's Trade Union Leagues, 1890-1925* 126-8.
[109] Samuel Gompers, "Coming into Her Own," *American Federationist*, July 1915, 518.
[110] A 1914 spat between the AFL and the WTUL over the Clayton Act also raised tensions between the organizations, when Margaret Dreier Robins suggested that Gompers' "magna carta" of organized labor

showed tangible returns on the resources invested, the pro-legislative faction of the WTUL won out by the middle of the decade. The labor Constitution had been traded in for the gendered Constitution. Trade unionism was not abandoned, but President Margaret Dreier Robins captured the resource and opportunity driven reinvention of the WTUL well in a 1914 essay:

> It is ten years since the National Women's Trade Union League was organized, and out of our ever widening experience, we are seeking to establish such measures for constructive work as will enable us to meet with greater knowledge, courage, and capacity, the ever growing problem of women in modern industry. We must ever use the living issues of each hour. If the fight for the shorter work day presents itself, we throw ourselves into winning that fight. If the contention for better wages becomes a legislative measure, we throw whatever we have of time and strength into that fight.[111]

Those who disagreed with the strategic change believed that legislative solutions to the problems of working women, though perhaps more easily or more quickly secured, were inferior to the benefits to women workers of trade unionism.[112] The league had always emphasized unionization as a source of fellowship, education and empowerment for women,[113] but many of its members also echoed the voluntarist rhetoric of Gompers

---

was effectively useless given its drafting. She was right of course. See Kenneally, *Women and American Trade Unions* 80.

[111] Margaret Dreier Robins, "Trade Unionism for Women," in *Woman and the Larger Citizenship*, ed. Shailer Mathews (Chicago: The Civics Society, 1914), 2914. Robins was a staunch believer in the values of fellowship, independence and self-government that trade unionism provided. Elizabeth Anne Payne, Robins' biographer, argues that the WTUL remained focused on trade unionism under her leadership (which extended until 1922) and then became a legislative pressure group. Elizabeth Anne Payne, *Reform, Labor, and Feminism : Margaret Dreier Robins and the Women's Trade Union League*, *Women in American History* (Urbana: University of Illinois Press, 1988) 100. This account of the timing of the change in strategic orientation of the league conflicts with the arguments of Boone, Dye, Jacoby, Kessler-Harris and myself.

[112] Hostility was also expressed by some working-class members to the WTUL's endorsement of woman suffrage and the routing of resources into that battle during these years. Suffrage was of course a strategic partner to the legislative reform since the vote would secure political influence over legislators. One working-class member complained to Leonora O'Reilly that, "[w]oman suffrage is beginning at the other end. What the women is economic emancipation, and, Sister, dear, how they need it! And they can't get it without organization." Letter from "Little Sister" to Leonora O'Reilly, April 27, 1908. Quoted in Foner, *Women and the American Labor Movement* 481.

[113] This was the "flower realm" of unions that the WTUL liked to promote. See Jacoby, *The British and American Women's Trade Union Leagues, 1890-1925* 25-7.

in suggesting that women could obtain better concessions through collective bargaining. Helen Marot took a swipe at meddlesome philanthropists and bureaucrats in her 1914 book. "Benevolently imposed measures are weak substitutes for those which are self-imposed and administered," she wrote.[114] She also enthusiastically cited Gompers' editorial on the material and spiritual benefits of trade unionism for women over any regulatory solution.[115] Pauline Newman, a working-class organizer and one of the more ardent trade unionists in the WTUL, favored women workers' control of reform. She wrote, "to shorten the workday and raise wages is, or SHOULD BE, the business of the working woman herself. No one can or will do it better than she herself. … it will have to be done … on the basis of collective bargaining. … And so why not concentrate all efforts to the organizing of the working woman?" She went on to explain that unions could better enforce workplace standards than the state.[116] Mary Dreier, president of the New York league and Margaret's sister, emphasized as against the supplementary work of legislation, "the more important work of organization, for we know that the greatest power to enforce labor laws is trade unions, and a strong trade union can demand better conditions and shorter hours than the law will allow, and then, too, we get education and power through organization, which we do not get through law."[117]

Some like Marot would leave the WTUL as a result of the new direction, but others like Newman and Dreier stayed on and begrudgingly accepted that a legislative agenda was both useful and realizable, especially in light of the recalcitrance of the AFL, even if not the best solution. Newman admitted at the 1915 convention that where

---

[114] Marot, *American Labor Unions* 9.
[115] Ibid. 76-7. Citing Gompers, "Woman's Work, Rights and Progress."
[116] Pauline Newman, "The Workers of the World," *Progressive Woman*, May 1912, 7. (emphasis in original) Quoted in Novkov, *Constituting Workers, Protecting Women: Gender, Law, and Labor in the Progressive Era and New Deal Years* 165.
[117] From *New York Times*, December 3, 1909. Quoted in Dye, *As Equals and as Sisters : Feminism, the Labor Movement, and the Women's Trade Union League of New York* 143.

organization fell short (and for many women workers it did), legislative protections were important. "[I]f the state, which is supposed to serve its people, can help these people get 2 or 3 dollars a week more," she argued, "not one of us has a right to say to the girls: 'Don't accept it. Starve rather than accept money from the state.'"[118] Mary Dreier agreed that organization was regrettably often unobtainable, therefore the WTUL needed to assist in obtaining legislative relief. Dreier wrote to Melinda Scott in 1914 that:

> It seemed to me that in arousing public sentiment, first among the workers themselves, and second among the general public, for the minimum wage the League could proclaim to those women who know nothing about organization, who are so hard-pressed that there seems little chance of organizing them, that the Women's Trade Union League is a friend to them in their extremity.[119]

As Alice Henry, who came to be a great league defender in later years despite her skepticism of converting the WTUL to a legislative pressure group, summed it up: "What we win for ourselves we ever value more highly and hold more securely. But it would be inhuman to postpone the day of improvement until trade unionism among women becomes so general that they can act through the power of numbers."[120]

At this point, a legislative strategy had proven to be a faster and more reliable route to results on behalf of working women, not to mention in keeping with the natural resource strengths of the league women and their connections to the reform network of the women's movement. In 1923, Alice Henry would explain that where "organization is too slow a method to relieve oppression, it is on legislation that the League bends its efforts."[121] The gendered Constitution, which provided an exception to Lochnerian jurisprudence, had proven to reliably provide such a faster route to results and protective

---

[118] Proceedings of the 1915 WTUL Convention, p. 253. Quoted in Jacoby, *The British and American Women's Trade Union Leagues, 1890-1925* 130.
[119] Letter from Mary Dreier to Melinda Scott, August 14, 1914. Quoted in Ibid. 129.
[120] Henry, *Women and the Labor Movement* 136.
[121] Ibid.

legislation had absorbed the bulk of the league's attention. By this year, however, the gendered Constitution would no longer hold such promise as a resource for women's labor activism, given a change of attitude on the Supreme Court. The WTUL would find itself challenged in the 1920's not only by this judicial setback, but also by an internecine battle within the women's movement itself. And it was in the women's movement that the WTUL now made its true home, having drifted far from its original moorings within the labor movement to embrace the strategic methods, policy preferences, and support network of women reform organizations such as the NCL.

FIGHTING THE ERA – THE WTUL OUT OF STEP WITH WOMEN WORKERS

As the 1920's approached, the WTUL dedicated itself to a series of political and bureaucratic initiatives consistent with the new focus of the league. One of the most significant of these initiatives was the creation of the Women's Bureau in the Department of Labor. The WTUL first campaigned for its creation in 1909 and intensified their lobbying efforts during World War I, winning the establishment of a woman's division of the War Labor Administration. WTUL members were hired to run this division, and were integrally involved in the drafting of regulations on women's war-time employment. In 1920, this agency was converted to the Women's Bureau, an autonomous unit of the Department of Labor.[122] Mary Anderson, a one-time WTUL organizer and member of the working-class, was appointed director. Other significant political activities by the WTUL included creating the International Congress of Working Women in 1919 to deal with post-war reconstruction issues. Consistent with the league's new emphasis, the

[122] For history of the formation of the Woman's Bureau and its war-time roots see Philip Sheldon Foner, *Women and the American Labor Movement*, 2 vols., vol. 2 (New York: Free Press, 1980) 50-8.

program recommended by the Congress was geared entirely toward legislative solutions for the problems of working women.[123] The WTUL would also join as a charter member the Women's Joint Congressional Committee (WJCC) in 1920, meant to flex the new-found political muscle of women that accompanied the granting of suffrage.

The granting of suffrage marked a tremendous victory for the women's movement, but left many of the organizations within it wondering what, if any, policies on behalf of women they should now pursue. One such organization was the NWP, the most militant of the suffrage groups, which struggled with establishing a new identity and mission for itself following the ratification of the Nineteenth Amendment. The group's executive board met regularly in 1920 to hash out its new priorities, and convened a convention of members in early 1921 to settle on a new strategic direction. The new mission that emerged was the pursuit of equality, which in NWP leader Alice Paul's view meant the removal of all legal disabilities of women.[124] This new mission created a conflict with the WTUL, NCL and other organizations in the women's movement that had secured protective labor legislation for women on the grounds of women's difference that had been entrenched in the Constitution at their own request. This conflict was only magnified when the NWP decided to pursue their new mission through an amendment to the Constitution – the ERA.[125] Almost everyone agreed, except the NWP of course, that

---

[123] Ibid. 129-35.

[124] For a history of the NWP's reinvention, see Susan D. Becker, *The Origins of the Equal Rights Amendment : American Feminism between the Wars*, *Contributions in Women's Studies ; No. 23* (Westport, Conn.: Greenwood Press, 1981), Nancy F. Cott, "Feminist Politics in the 1920's: The National Woman's Party," *The Journal of American History* 71, no. 1 (1984), Christine A. Lunardini, *From Equal Suffrage to Equal Rights : Alice Paul and the National Woman's Party, 1910-1928*, *The American Social Experience Series ; 5* (New York: New York University Press, 1986).

[125] An early version of the ERA stated: No political, civil or legal disabilities or inequalities on account of sex nor on account of marriage, unless applying equally to both sexes, shall exist within the United States or any territory thereof. The version submitted to Congress in 1923 read: Equality of Rights under the law shall not be denied or abridged by the United States or any state on account of sex.

the gendered exception to *Lochner* could not survive a sex-based equality requirement in the Constitution.

The NWP floated several versions of the ERA to other members of the women's movement, in an effort to reduce the threat to protective labor legislation for women and calm tensions within the movement.[126] But the WTUL, and others, was in no mood to deal. WTUL legislative secretary, Ethel Smith, rejected the olive branch offered to her by her counterpart at the NWP. Smith wrote to Maude Younger, to inform her that, "I have found no one yet … who believes it is possible to draft a blanket Federal constitutional amendment which would not jeopardize our social legislation."[127] The WTUL, like the NCL and others, including Mary Anderson at the head of the Woman's Bureau, were too deeply invested in the legislative results they had won since 1908 on a maternalist foundation to jeopardize them for abstractions of sex equality. Both sides dug in their heels on the equality issue and a fierce battle ensued in the press, in the courts, and in legislative hearings.

The WTUL pulled out all the stops in its fight against the ERA, which included recruiting and publicizing union disapproval of the ERA, and asserting its own exclusive right to speak for wage-earning women in one voice against the measure. The WTUL took it upon itself to voice the working-class preference for protective labor legislation for women. But this voice was not so singular as the WTUL portrayed. A small but vocal group of skilled and semi-skilled women workers had doggedly challenged

---

[126] The NWP was not opposed to protective labor legislation for all workers. The organization overall was not devoted to free contract ideals. While they would occasionally find themselves allied with pro-laissez faire business interests in their fight for the ERA and would play a role in the last celebration of *Lochner* in the *Adkins* case, it was the gendered Constitution that they objected to not the welfare reform Constitution. See Cott, "Feminist Politics in the 1920's: The National Woman's Party.", Hart, *Bound by Our Constitution : Women, Workers, and the Minimum Wage*.

[127] Letter from Ethel Smith to Maude Younger, October 11, 1921. Quoted in Kessler-Harris, *Out to Work : A History of Wage-Earning Women in the United States* 207-8.

protective labor legislation for women for years, and their pitched battle with the WTUL highlighted the distance that had opened up between the WTUL and women workers as the WTUL had increasingly identified itself with the women's movement.

Skilled women workers in the printing trade levied early challenges against protective labor laws for women. After New York's prohibition of night work by women in 1914, many women workers in publishing, such as bookbinders, lost their jobs. These women put the WTUL on the defensive for its support of the night-work provision, and the WTUL responded that individual hardship to a small subset of women workers was counterbalanced by the tremendous value of the law to most working women. As one member of the New York league reported telling these workers, "in the case of all good things, the few suffer for the good of the many."[128] This was the same response that the WTUL gave to New York waitresses who had been banned by the state legislature from night work (after 10pm) and had protested vociferously to the WTUL. "The mere fact that in some instances individual hardship is experienced under the statutes is no way controlling as to its constitutionality," the league explained in support of the state court decision to uphold the law in 1918.[129] Dissatisfied with the suggestion that sacrifice was a part of progress, the women printers formed the WLEO in 1915 to battle all protective legislation for women. The smaller ERL would be founded in 1917.

The ranks of these two organizations would swell after the war with women workers, largely from the transit industry, that had been displaced by new regulations that prohibited them from working in their traditionally male industry. Incidentally, the

---

[128] NYWTUL, Organizer's Report to League Meeting, January 4, 1914. Quoted in Susan Lehrer, *Origins of Protective Labor Legislation for Women, 1905-1925*, *Suny Series on Women and Work* (Albany: State University of New York Press, 1987) 129.

[129] From *Life and Labor*, Volume 8 p.275 (December 1918). Quoted in Ibid. As will be discussed below, this case would subsequently be appealed to the U.S. Supreme Court and the law upheld in *Radice v. New York* (264 U.S. 292 (1924)).

WTUL with its newfound legislative and bureaucratic influence in the labor department was instrumental in securing many of these war-time and reconstruction laws and regulations.[130]

Members of the WLEO and the ERL attended every legislative session in New York in the years following the war to combat protective legislation, later frequently sitting side by side with members of the NWP who also attended to protest such legislation, and they fanned out to battle protective laws in Rhode Island, New Jersey and other states as well.[131] They argued that protective laws ensured that women would remain segregated in low-paying occupations. As one leader explained, "[i]t will drain women out of all the highly paid and highly organized trades, because the law will prevent them from doing the same work as men do."[132] Frustrated with the WTUL, the WLEO accused it of being out of touch with the needs of working women and too much a creature of the middle-class women's movement. "So-called 'welfare' legislation is not asked for or wanted by real working women," it argued. "These welfare bills are drafted by self-styled social uplifters who assert that working women do not know enough to protect themselves, aided by a few women who once worked but are now living off the labor movement."[133]

The WTUL reacted bitterly to the challenge from these women in the WLEO and the ERL. Their public attacks in the press and lobbying of legislators against protective

---

[130] The WTUL often favored broad classifications in the legislation and regulations it promoted to ensure that they would be robust. Some within the WTUL, such as Mary Van Kleeck who ran the war-time forerunner of the Women's Bureau, attempted to be more sensitive to the needs of those women harmed by the wide reach of protective measures, but this was not representative of the overall approach of the WTUL. See Foner, *Women and the American Labor Movement* 52-4.

[131] Elizabeth Faulkner Baker, "Protective Labor Legislation, with Special Reference to Women in the State of New York" (Thesis (Ph. D.), Columbia University, 1925., 1925) 229.

[132] Quoted in Ibid. 190.

[133] From *New York Times*, January 18, 1920. Quoted in Dye, *As Equals and as Sisters : Feminism, the Labor Movement, and the Women's Trade Union League of New York* 156.

legislation undermined the WTUL's contention that it spoke for all working women. The WTUL used its influence where possible to silence the WLEO, such as encouraging former member Mary Anderson, head of the Women's Bureau, to exclude the group from government deliberations on women and industry because they were not a national organization and did not represent the true views of working women. The WLEO responded in outrage:

> BUT WE ARE WAGE-EARNING WOMEN, ALL OF US; we have been fighting this type of legislation for years and proving that it is a handicap instead of a protection; we are citizens about to be exploited by the recommendations of organizations whose members know nothing of economic conditions, the law of supply and demand etc.[134]

The WTUL also reassured legislators that the groups were a fringe element and that the WTUL was the legitimate voice of women workers. A member told one New York legislator that the WLEO consisted of a few hundred women, whereas:

> The WTUL whom they spend a good deal of time reviling, is an organization which has been in the field since 1903. It has an affiliated membership of 60,000 trade union women … which [at a conference in January 1918] went on record as favoring our entire legislative program. It would seem to me that the answer in that is enough. … the very best opinions and minds of the entire civilized world are against them, and organized labor itself.[135]

The WTUL also accused (without evidence) the WLEO and the ERL of being secretly financed by manufacturing groups looking to topple protective legislation, in order to deny their legitimacy in representing the views of women workers.[136] The WTUL even attempted to have some of the most vocal women printers in the groups thrown out of their own union.[137]

---

[134] Appeared in *Industrial Equality*, January 8, 1923. Quoted in Lehrer, *Origins of Protective Labor Legislation for Women, 1905-1925* 163.
[135] Letter from NYWTUL to C. Solomon, February 15, 1919. Quoted in Ibid. 130-1.
[136] Dye, *As Equals and as Sisters : Feminism, the Labor Movement, and the Women's Trade Union League of New York* 158.
[137] Lehrer, *Origins of Protective Labor Legislation for Women, 1905-1925* 129-30.

The WTUL was right that the members of the WLEO and the ERL were atypical women workers. They were skilled women working in occupations that required them to compete directly with men for work. Protective labor legislation put them at a distinct disadvantage. These women could be better served economically by joining craft unions and engaging in collective bargaining, which most did. They had the means to gain admittance to and enjoy the benefits of the labor Constitution. But legislation interfered. Most women workers, however, were unskilled and sex-segregated by occupation. They needed to worry more about exploitation by men than competition with men. They were harder to unionize than skilled women, and therefore legislative solutions to their problems made better sense from a resource-conscious perspective. This struggle with the WLEO and ERL made for quite an irony, however, as the WTUL's now preferred legislative methods of serving women workers artificially blocked the functions and benefits of trade unionism for this small percentage of women that could successfully unionize and partake in collective bargaining.[138] The WTUL was now far afield from the labor solutions to women's problems they had once championed.

Despite this estrangement with skilled women workers, the larger mass of unskilled women workers generally supported protective labor legislation for women.[139] But their attitudes toward legislative solutions echoed the same frustrations that had been aired within the WTUL years earlier. Collective bargaining was preferable to legislative intervention, but state protection was useful for those women who could not yet be unionized. Fannia Cohn, one of the most influential labor leaders in the garment trades, and a one-time trainee in the WTUL's school for women organizers, gave voice to this

---

[138] For further discussion see Elizabeth Faulkner Baker, "At the Crossroads in the Legal Protection of Women in Industry," *Annals of the American Academy of Political and Social Science* 143 (1929).
[139] Lehrer, *Origins of Protective Labor Legislation for Women, 1905-1925* 168-83. See also Kessler-Harris, *Gendering Labor History* 49.

reluctant endorsement of middle-class reform: "I did not think the problem of working women could be solved in any other way than the problem of working men, and that is through trade union organization, but considering that very few women are as yet organized into trade unions, it would be folly to agitate against protective legislation."[140] The WTUL spoke for the great bulk of women workers when they challenged the ERA as a threat to protective labor legislation, but mounting such a defense drew even more of the league's resources away from the solution most women workers truly craved – a chance to bargain on their own behalf.

The ERA never stood much of a chance of success in the 1920's. The resources arrayed against the NWP were far greater than what it could muster for a pitched political fight on behalf of the ERA. The majority of women's groups were against the ERA. So was organized labor, with the AFL now helpfully coming to the WTUL's aid in defending protective legislation that kept women workers out of competition with male workers. And little political will to fight for another women's issue was to be found on Capitol Hill. But the weak political prospects of the ERA did not stop the Supreme Court from dealing a severe blow to protective labor legislation for women in 1923 in its spirit.

The maternalist exception to the free contract rule of *Lochner* was based on protecting the health of women so that they could serve as mothers, but such a justification was more tenuous in the case of the minimum wage, which did not directly implicate the conditions under which women worked. The minimum wage for women had survived the Supreme Court's 4-4 non-decision in *Stettler v. O'Hara* in 1917, but judicial attitudes had shifted, as had the civic status of women, by 1923.[141] The Supreme Court struck down Washington, DC's minimum wage law in *Adkins*. The Court was

[140] Letter from Fannia Cohn to Dr. Marion Phillips, September 13, 1927. Quoted in Foner, *Women and the American Labor Movement* 142.
[141] 243 U.S. 629 (1917). Brandeis, now a member of the Supreme Court, recused himself.

skeptical of the police power justification for the minimum wage. What's more, wages were "the heart of the contract" for employment, therefore government had far less latitude in restricting the free contract right on this issue, free contract being "the general rule and restraint the exception."[142] But the Justices went beyond merely pointing out that women possessed some measure of free contract liberty that could not be trespassed on police power grounds. They also suggested that women's free contract rights were becoming virtually as robust as the free contract rights of men, given social trends and the recent elevation of women's civic status. Justice Sutherland explained that:

> the ancient inequality of the sexes, otherwise than physical, as suggested in the *Muller* case … has continued "with diminishing intensity." In view of the great -- not to say revolutionary -- changes which have taken place since that utterance, in the contractual, political and civil status of women, culminating in the Nineteenth Amendment, it is not unreasonable to say that these differences have now come almost, if not quite, to the vanishing point.[143]

The "Alice Paul theory of constitutional law" had been adopted and no ERA had been necessary.[144] Protective labor legislation for women had been dealt a serious blow. The minimum wage, which had boldly tested the parameters of regulatory labor reform, was near death and there was foreboding about even maximum hours laws and other occupational restrictions.[145]

---

[142] 261 U.S. 525, 554, 546.

[143] 261 U.S. 525, 553.

[144] Felix Frankfurter to Jesse Adkins, April 16, 1923. Quoted in Hart, *Bound by Our Constitution : Women, Workers, and the Minimum Wage* 130. For a cogent discussion of the effect of legal/constitutional discourse on the shape of the battle between Paul and equality feminists and Florence Kelley and social feminists, that is highlighted in *Adkins*, see Zimmerman, "The Jurisprudence of Equality - the Womens Minimum-Wage, the 1st Equal-Rights-Amendment, and Adkins V Childrens Hospital, 1905-1923." See also Hart, *Bound by Our Constitution : Women, Workers, and the Minimum Wage* 130-50.

[145] Since *Adkins* addressed federal authority, state wage laws were not immediately invalidated. That shoe apparently finally dropped in *Morehead v. New York ex rel Tipaldo* (298 U.S. 587 (1936)), which cited *Adkins* but left room to revisit the issue. Of course, it was only one year later when the Supreme Court did revisit the issue and execute its New Deal about-face on the minimum wage for women in *West Coast Hotel*. In the intervening years between *Adkins* and *Morehead*, minimum wage laws held in some states and were even passed in others, but the campaign had been critically curtailed.

But *Muller* did survive intact, and proof of that came the following year when the Supreme Court upheld the New York night-work ban for waitresses in the interest of women's health and the public welfare, in *Radice v. New York*, which the WTUL had celebrated years earlier, when it survived the state court, despite the great outcry of the women workers affected.[146] In discussing the *Adkins* and *Radice* decisions, Judith Baer points to the irony in the Court's choice to protect the free contract rights of unskilled, low-paid hotel workers, and to deny the free contract rights of independent waitresses that could earn their largest tips at night. She writes that freedom of contract had been "sustained in a situation where it did not exist and curtailed in a situation where it did exist."[147] The WTUL did little better than the courts in grappling with the contours and impact of the gendered Constitution, and with the legislative solutions it enabled, which did not always reflect workplace realities. It is difficult to claim that trade unionism was a more artful and productive approach than the regulatory approach to protecting and empowering women workers given the manifold difficulties in unionizing women, which turned the WTUL to the regulatory approach in the first place when *Muller* presented itself. But de-emphasizing trade unionism and the integration of women into the labor movement as a strategic priority, did have some negative consequences for the WTUL and women workers. Some of these negative consequences, however, would not become apparent until after the New Deal embrace of protective labor legislation.

CONCLUSION

[146] 264 U.S. 292 (1924).
[147] Baer, *The Chains of Protection : The Judicial Response to Women's Labor Legislation* 97.

The Great Depression hit the WTUL's finances hard, and it lacked the resources to continue to play a significant role in pursuit of protective labor legislation, much less to sustain public relations and organizing efforts on behalf of women's trade unionism. The league periodical was suspended after 1929 and no convention was held between 1929 and 1936. What little resources the league did have were directed toward the fight against the ERA that had continued to boil throughout the 1920's and into the 1930's. The WTUL did receive a boost in influence from the support of Eleanor Roosevelt, a devoted member, but the organization's influence had clearly waned from its earlier years. The league would finally disband in 1950.[148] Despite its fading star, vindication for the WTUL's investment in protective labor legislation for women arrived in 1937 with the constitutional revolution of the New Deal that would be augured by *West Coast Hotel*.

In 1936, Washington's high court upheld its minimum wage law and Elsie Parrish, a hotel chambermaid, sued for back wages. Her case arrived as the U.S. Supreme Court was ready to embrace a new constitutional direction. The justices overruled the *Adkins* decision, declaring the minimum wage for women workers constitutional. They embraced the gendered arguments of *Muller* and the importance of women's health to the public interest in doing so, observing a link between wages and women's well-being. But they went beyond gender to question the validity of free contract liberty itself. "What is this freedom?" the Court asked. It answered itself with a mortal blow to *Lochner*:

> The Constitution does not speak of freedom of contract. It speaks of liberty and prohibits the deprivation of liberty without due process of law. In prohibiting that deprivation, the Constitution does not recognize an absolute and uncontrollable liberty. Liberty in each of its phases has its history and connotation. But the liberty safeguarded is liberty in a social organization which requires the protection

[148] Foner, *Women and the American Labor Movement* 275-6.

> of law against the evils which menace the health, safety, morals, and welfare of the people. Liberty under the Constitution is thus necessarily subject to the restraints of due process, and regulation which is reasonable in relation to its subject and is adopted in the interests of the community is due process.[149]

A signal had been sent that freedom of contract would no longer stand in the way of the state police power, and that labor reform was now open to men as well as women. This was confirmed a few short years later in *United States v. Darby*, when the Court upheld a minimum wage for men.[150] Women had not only helped themselves, but also served as the "entering wedge" for the constitutionality of universal labor reform, as the NCL, WTUL and other progressive reform groups had long hoped. State labor regulation was now constitutionally secure, and the gendered Constitution was no longer strictly necessary to regulate for the benefit of women workers since sex-neutral labor regulation was now possible. Thus *Darby*, taking up the invitation of *West Coast Hotel* to bring men under protection, appeared to constitutionally re-integrate gender and labor with *Lochner* now fully in the past. But this re-integration of gender and labor was only apparent and not actual, both as a constitutional matter and as a political matter.

Constitutionally, *Lochner* may have been dismissed, but *Muller* remained and had been reaffirmed in *West Coast Hotel*. Women remained of special constitutional interest to the public interest, to all the good and the ill that might lead. This differential constitutional place allowed for the continuation of sex-specific labor regulations rooted in the police power, some of which were designed to prevent female job competition. This was the case with *Goesaert v. Cleary*, which upheld a Michigan law that prevented a woman from experiencing the social and moral dangers of working as a barmaid (unless

---

[149] 300 U.S. 379, 391.

[150] 312 U.S. 100 (1941). This case validated the FLSA and dealt with federal authority rather than the state police power. However, it was understood to endorse state power as well.

she was an "alewife, sprightly and ribald" and secure in her husband's protection) in order to keep jobs open to returning World War II veterans.[151]

Politically, the will did not exist at the state level in the post-New Deal years to engage in extensive labor regulation of men. However, extensive regulatory regimes already existed to govern female labor courtesy of the NCL, WTUL and others. Many of the women reformers invested in existing protective laws for women, such as night work bans, hoped that these laws would be extended to men as well under the new universal reach of the police power, making the workplace healthier and more humane for all, but states showed little inclination to do so. Women remained subject to these laws, however, and therefore remained at a competitive disadvantage in industries where they competed with men.[152]

Compounding the problem of the limited extension of state labor regulations to male workers, was the Fair Labor Standards Act (FLSA), passed in 1938. The federal government took responsibility, under commerce clause authority, to mandate a minimum wage and set limits on the maximum hours to be worked by men and women alike.[153] Although an incredible victory for labor reform, the FLSA not only enervated state level initiative for male labor regulation, perpetuating a sex-based regulatory gap below, but also created a constitutionally submerged gender (and race) stratification at the federal level by exempting from its scope, for both political and structural reasons, the

---

[151] 335 U.S. 464, 465 (1948). The opinion was authored by progressive and one-time NCL brief-writer Felix Frankfurter. Clearly not all of Florence Kelley's past allies accepted maternalism only instrumentally.

[152] See Hart, *Bound by Our Constitution : Women, Workers, and the Minimum Wage*, Suzanne Mettler, *Dividing Citizens : Gender and Federalism in New Deal Public Policy* (Ithaca, N.Y.: Cornell University Press, 1998), Landon R. Y. Storrs, *Civilizing Capitalism : The National Consumers' League, Women's Activism, and Labor Standards in the New Deal Era* (Chapel Hill: University of North Carolina Press, 2000).

[153] The Supreme Court accepted the commerce clause argument of the federal government to legislate labor standards and validated the act in *Darby*.

industries where female labor was well-represented or dominated, such as in retail, in agriculture and in personal and domestic service.[154] It would take decades for the FLSA to cover even half the workers in the United States, and this limitation in coverage hit women harder than men.[155]

The gendered Constitution of *Muller*, and its promise of reform results for women workers, had rerouted the WTUL's mission from promoting trade unionism to securing state regulation, but now the gendered Constitution, and the protective regime it supported, had left a constitutional and political residue of gender difference and stratification of the workforce beyond its original utility in the pre-New Deal years. This then was one of the enduring legacies of the constitutional journey of women from *Lochner*, to *Muller*, to *West Coast Hotel*.

But, as discussed in Chapter Three, *West Coast Hotel*, and the clearing of the decks for government regulation of labor, represented only one of the tectonic constitutional shifts of the New Deal. The New Deal constitutional revolution also netted the constitutional coronation of collective bargaining in *NLRB v. Jones & Laughlin*.[156] Unions now had sanction from the state to negotiate the best contracts possible. And for

---

[154] For a full study of the gendered (and federalism) implications of the FLSA see Mettler, *Dividing Citizens : Gender and Federalism in New Deal Public Policy*. According to Mettler: Structurally, the FLSA was grounded in the commerce clause and bureaucrats and legislators were cautious to exempt any seemingly intrastate commercial activity in order to avoid testing the boundaries of the revolution in the Supreme Court's constitutional interpretation. Politically, women still had not exerted themselves as a voting bloc and SMOs working on their behalf were preoccupied with maintaining state level regulations. For a study of the NCL's engagement with the FLSA, see Storrs, *Civilizing Capitalism : The National Consumers' League, Women's Activism, and Labor Standards in the New Deal Era*. For a somewhat different take on the "feminization" of civic membership through the construction of the labor rights of women in the post-New Deal years, see Ritter, *The Constitution as Social Design: Gender and Civic Membership in the American Constitutional Order*.

[155] A further gender cruelty of the FLSA was that it required overtime pay for hours worked in excess of the statutory limits. However, state hours laws that covered women only prohibited them from accepting excess hours at all. Employers proved to prefer paying a wage premium to increasing their workforce or extending the time for production, thus preventing women from benefiting. See Mettler, *Dividing Citizens : Gender and Federalism in New Deal Public Policy*.

[156] 301 U.S. 1 (1937).

the AFL this meant the power to exact compensation in excess of any floor the government might offer in the FLSA.[157] The labor solution was superior to the legislative solution. Just as women workers had always told the WTUL.

Yet women workers were still not significantly integrated into the labor movement. Much work was still to be done to unionize women workers, and furthermore to unionize them effectively so that they held sufficient power within unions to protect their own interests at the bargaining table. But the WTUL had given up this fight to organize women, and its place within the labor movement, to pursue more readily obtainable legislative reform. This continued alienation of women from organized labor, and from membership in the progressive labor Constitution of *Jones & Laughlin*, then, was in part also a legacy of the constitutional journey of women from *Lochner*, to *Muller*, to *West Coast Hotel*.

Of course, the WTUL did not reorient itself to the exploitation of the gendered Constitution simply because of the promise of *Muller*. It also changed its strategic approach to activism on behalf of women workers because it had substantial difficulty organizing women effectively due to the intransigence of the AFL. The WTUL could not convince the AFL to join them in a useful partnership to organize women and admit them to the labor Constitution. The league instead unsuccessfully spent their limited resources battling the AFL's dual bias against unionizing women, which consisted of sexism and the organization's craft bias, which militated against unionization of most women workers who were unskilled, as well as the AFL's suspicion of the cross-class, cross-movement WTUL itself, until a more resource-friendly option presented itself after 1908.

---

[157] This was one of the additional ironies of the initial FLSA, that it protected principally manufacturing workers, who by and large (at least those in craft unions) could do better on their own with the collective bargaining power they had contemporaneously been given.

But even if the WTUL had redoubled rather than effectively abandoned its efforts to organize women, it is highly doubtful they could have made the headway necessary in the unionization of women to avert the negative political and constitutional fallout of the remnants of the gendered Constitution. For that matter, the WTUL had little control over the creation of the gendered Constitution itself, and it was not the most significant player in the proliferation of sex-based labor laws across the states. That honor belonged to the NCL.[158] Nevertheless, in examining and better understanding the political dynamics of cooperation, conflict and competition between the parties that sought constitutional change during this era, we can better appreciate and understand the underlying ironies, strategic tradeoffs, and unintended consequences of this often overlooked gender legacy of *West Coast Hotel* and the New Deal constitutional revolution.

[158] I do not mean, in pointing out the negative fallout of the gendered Constitution, to imply that it was a dishonor. These progressive labor reforms enabled by *Muller* greatly reduced the misery of exploited women workers at that time.

Chapter Six: Conclusion

This project mapped, through the study of the strategic interrelationships of organizations within the labor movement, the civil rights movement and the women's movement, an important and often overlooked branch of the political genealogy of the constitutional contestation and development of the *Lochner* Era. By isolating and examining the resource competition that took place between these peer social movements active at this time, I exposed a series of constitutional undercurrents, tradeoffs, ironies and oversights that have been obscured by the juricentric focus of modern constitutional scholarship and the preoccupation with the judicial activism of the *Lochner* Court.

I began this project with a series of theoretical observations on constitutional resource competition, which counseled an expansion of the scope of constitutional inquiry to include a horizontal dimension of study. Through attention to this horizontal dimension, I captured the impact of the actions and choices of constitutional competitors, as opposed to constitutional arbiters, on the claims made by social movements seeking constitutional change during this era.

Winning constitutional rights and powers requires substantial resources. Where a resource is valuable and difficult to obtain, competition can be expected. Therefore, any actor that seeks constitutional change in its favor must be both strategic and opportunistic in engaging, cultivating and maintaining the Constitution as a positive resource for the advancement of its interests and adapt its behavior to the competitive environment. This competition for constitutional resources can come from many sources. It can come from the current constitutional power holders in society, who are eager to maintain their advantage. It can come from those who seek opposing and incompatible constitutional

change. And it can also come from those who travel the same constitutional byways in pursuit of their own constitutional advancement that may or may not be compatible with another actor's own constitutional goals, values and strategies.

It is on this last class of constitutional competitors that I focused my study, and I found that the peer social movements studied did indeed share competitive constitutional relationships that manifested themselves in both cooperation and competition, and which led to strategic adjustments of the constitutional claims groups within these movements forwarded. Thus the constitutional claims that organizations within the labor movement, the civil rights movement, and the women's movement advanced during this period, when Lochnerian jurisprudence dominated, were the product of a rich terrain of strategic political contestation, which included their competitive engagement with each other. The scope and depth of this terrain I uncovered is not always readily apparent to scholars that utilize court decisions as a point of departure for studying constitutional development, rather than beginning with the ambitions of those seeking to force constitutional change and tracing their claims to find where they succeed, where they fail, and where they are negotiated and adjusted, or where they are abandoned altogether. Guided by this resource competition approach, my study provides fresh insights into the roots of the New Deal constitutional revolution.

Entering the twentieth century, workers faced difficult labor conditions due to the effects of rapid industrialization. Any attempts to change these conditions were governed by strict constitutional limits, being enforced by the courts, on the state as an agent of reform of the workplace. However workers did not confront these conditions as a unified group. Within the labor movement, the AFL, the movement's dominant organization, principally represented the interests of white, male workers. Although their constitutional claims were universal in nature, they limited the reach of any constitutional

change they might win by effectively blocking membership to women workers and African-American workers. This created a need within the women's movement and the civil rights movement to address the needs and interests of workers within those groups. This need would be addressed by the WTUL and the NCL, and the NAACP and the NUL respectively. Here I found that the differences of race and gender and class played just as critical a role in the initial construction of constitutional claims as they did in the arbitration of those claims by those who possessed the interpretive authority of the state. This peer social movement competition over the constitutional fate of workers carried out across race, class and gender lines sets the backdrop of my study.

In confronting the constitutional conditions of this period and judicial hostility to state labor reform, I found that the AFL responded by creating an alternative constitutional vision of the workplace. The AFL lacked the political and institutional resources necessary to counteract or circumvent this constitutional barrier to state labor reform, thus they accepted and incorporated the Lochnerian understanding of the workplace as a private sphere, where employer and employee held individual rights to bargain for labor that the state could not violate, into their own constitutional vision that was consistent with precedent. On to this existing constitutional foundation, the AFL grafted a collectivist vision of free contract liberty that was supported by the Thirteenth Amendment.

Given the existing power imbalance within the workforce between white male workers and female workers and African-American workers, the AFL was able to rebuff coalition attempts from organizations within other movements on their behalf. These workers lacked the resources in numbers, skill, employer desirability, and wider social and political power to provide a sufficient competitive inducement to the AFL to negotiate their constitutional vision and admit these workers to their ranks. Thus I found

that peer resource competition was not highly relevant to the crafting of the collective free contract vision of the AFL, at least not as to competition from these peer movements.

However, as the AFL vision floundered for acceptance in the face of continued judicial hostility, now along antitrust lines rather than as to the character of the workplace, it faced competition from an elite social movement built on progressive ideology. These progressives sought to expand the powers of the state (to regulate in the interest of social betterment and socioeconomic efficiency) by converting the workplace into a public sphere. The social and political resources these progressive politicians, bureaucrats and professionals had at their disposal to challenge the recalcitrant courts and remake the Constitution to fit their ambitions far outweighed the social and political resources of the working-class AFL. Outmatched and outmaneuvered in Congress, the AFL surrendered its constitutional vision, that remained tethered in key ways to *Lochner's* principles, and aligned itself with the progressives' corporatist vision of the state and federal sanction of collective bargaining, which would win out following the surrender of the Supreme Court to the New Deal.

By focusing on the AFL's constitutional vision from its formulation (in response to the vertical channeling of Supreme Court precedent) through its abandonment due to horizontal resource competition with progressives, I uncovered both a lost undercurrent of constitutional development and a common oversight of modern constitutional scholarship that is preoccupied with the rise and fall of *Lochner*. By mapping constitutional development from the perspective of constitutional claimants rather than from the starting point of constitutional outcomes, I was able to flesh out the contours of a rich constitutional vision constructed by the AFL that engaged the boundaries of the Thirteenth Amendment in ways unfamiliar to modern constitutional jurisprudence, and which also envisioned a middle way, through collective freedom of contract, between the

individualism of the old constitutional order and the needs of modern, industrial society to regulate as to groups. If one relies only on the seminal cases of constitutional law to mark and to retrace the course of constitutional development, this vision is lost, as it never was judicially vetted because it was surrendered to the better prospects of the progressive vision that eventually found its way into the courts and triumphed in *Jones & Laughlin*. Furthermore, preoccupation with *Lochner* as the key case of constitutional obstruction of the New Deal order and of helpful state intervention on behalf of workers is somewhat misplaced once it is understood that organized labor (at least on behalf of white males) had incorporated *Lochner* into its own preferred solution to workplace exploitation and moved on in its attention to other judicial barriers (to collective bargaining) to improving working conditions.

Regarding the constitutional interests of black workers during the Progressive and Inter-War eras, the study of resource competition between social movements allows me to provide much needed nuance to the common constitutional depiction of African-Americans as victims and detractors, like their poor and working-class brethren, of Lochnerian jurisprudence. It also allows me to highlight a modest but cruel constitutional irony of the estrangement between white and black workers as African-American activists took aim in Congress at the AFL's constitutional vision built on expanding the boundaries of the Thirteenth Amendment.

Black workers, as they increasingly joined the industrial class in the twentieth century, were not welcomed into organized labor. This created a tension in constitutional strategy for the NAACP and NUL, which were quickly gaining influence over the voice and strategic direction of the civil rights movement. Perpetuation of Lochnerian free contract principles limited the power of white collective bargaining and provided black workers continued opportunities to work as strikebreakers and underbidders of white

labor. Free labor principles were also well-ingrained in the psyche of African-American workers due to the legacy of abolitionism. But the NAACP and the NUL were not satisfied to hew to a constitutional vision that afforded meager short-term benefits and was subject to consistent and aggressive challenge from not only white labor, but also non-judicial government institutions.

Foreseeing the need to assure future constitutional resources, they pursued a coalition strategy with the AFL, despite its racist resistance, in an attempt to re-integrate the racial and class interests of the black worker. But this courtship was marked by pragmatism. This pragmatism particularly reflected the resource-conscious decision made within the civil rights movement to assign principle advocacy of the interests of black workers to the NUL, which was predisposed to favor more conservative and pragmatic solutions to constitutional rhetoric or claims-making. Here the resource competition approach aids in uncovering the intra-movement politics of constitutional competition that can further enrich constitutional understanding by isolating strategic tradeoffs that are often silent in case law.

By studying this resource competition between the AFL and the NUL/NAACP coalition, the divided constitutional loyalties of the civil rights movement to two constitutional visions, the one that they husbanded for short-term gains and the one they pursued for long-term benefits, is revealed. This nuance of the careful parsing of two constitutional orders, collective free contract with limitations on judicial power and individual free contract with emphasis on judicial hegemony, by the civil rights movement, with full cognizance of the strategic tradeoffs inherent in each vision, is obscured for scholars that do not move beyond blanket assumptions about the effects of constitutional doctrine on group interests to explore these groups' own strategic calculations and modulated and negotiated responses to constitutional authority.

Incidental to this exploration of the resource competition between the labor movement and the civil rights movement is the discovery of a lost constitutional irony involving the Thirteenth Amendment, as NAACP activists sought to squelch, for admittedly instrumental and not ideological reasons, the radical expansion pursued by the AFL of the amendment that had granted emancipation. This interesting episode of constitutional conflict is hidden from the view of constitutional scholars who remain wedded to a juricentric examination of constitutional development, as the AFL abandoned the Thirteenth Amendment narrative in its concurrent resource competition with progressives before it reached the channels of judicial review.

In applying the resource competition approach to the study of the constitutional advocacy on behalf of women workers during the *Lochner* Era, I uncovered the most complex and interesting interplay of the politics of both internal and external social movement competition. Women workers had greater constitutional flexibility due to prevailing gender ideology than either black or white male workers, and the study of movement exploitation of this constitutional flexibility reveals a significant constitutional tradeoff that would resonate for women long past the New Deal constitutional revolution.

Like black workers, women workers were not welcomed into the ranks of organized labor by the AFL. This continued rejection made it a calculated risk for women workers to support constitutional sanction of collective bargaining power that would push women further to the margins of the workforce if they were not integrated into unions. However, the constitutional status quo of Lochnerian free contract principles, which permitted unorganized women workers to survive as underbidders of male labor, was not the only other constitutional option for women workers.

Established gender ideology enabled the judicial granting of an exception to *Lochner's* barrier to state labor reform on behalf of women. Thus the women's

movement, through the aggressive constitutional advocacy of the NCL, constitutionally fused women with the public interest in a way that specially enabled the regulatory powers of the state. Female labor became part of the public domain, while male labor remained private and unreachable by the state. To the degree that this exception to *Lochner* blunted the competitiveness of women workers with men and remained strictly cabined in its application to women, the AFL accepted this alternative constitutional vision of labor as only a limited danger to the resources for its own constitutional ambitions to win sanction for collective free contract liberty.

But the NCL was not the only movement voice speaking out in favor of women workers. The WTUL preferred the constitutional vision of trade unionism promoted by the AFL and the integration of women into the labor movement as a means to assisting them. But continued efforts to court the AFL failed, causing them to redirect their own resources into the gendered Constitution once it received constitutional sanction. This was a resource-conscious decision that reduced the constitutional options of women workers, as no organization continued to actively pursue integration of women workers into the labor movement.

When middle-class women in the NWP challenged the gendered Constitution for the disabilities to women it created in the wake of its assistance to women workers, the costs of the resource-conscious constitutional tradeoff made by the WTUL in abandoning the labor Constitution for the gendered Constitution came to light, as those women workers, whom the WTUL claimed to specially represent, and who had already integrated into the labor movement joined the ERA challenge to the gendered Constitution. The gendered Constitution proved incompatible with the labor Constitution for women workers, who could not apparently enjoy the benefits of both.

This early working-class challenge of the abandonment of the labor Constitution for women workers prefigured the longer-term costs of the gendered Constitution strategy that developed when women's labor interests and men's labor interests failed to fully re-integrate in the Constitution after the New Deal constitutional revolution mooted the need for an exception to *Lochner* in order to win salutary state regulation of the workplace. While the gendered Constitution itself is readily apparent to constitutional scholars that focus on judicial constructions of the Constitution to mark and to explain constitutional development, the role of the WTUL, which operated in the interstices between the women's movement and the labor movement, as both a particularly instructive emblem and harbinger of the strategic constitutional tradeoffs inherent in this maternalist constitutional gambit is not so readily appreciated.

By orienting my study to begin from the perspective of constitutional claimants themselves rather than from the perspective of constitutional outcomes, and by using theoretical insights on resource competition to guide the direction of my inquiry, I have uncovered several interesting and previously obscured or underappreciated aspects of the constitutional development of these pre-New Deal years that are not captured in the standard disciplinary narratives of the *Lochner* Era.

Reflecting more broadly on the constitutional development of this period, that was in part a product of the political byplay of resource competition that I have highlighted, the role of labor as a key engine of the constitutional reconstruction that occurred during the New Deal is apparent. For Karen Orren, the labor movement, with its commitment to voluntarism, was not a victim of an omni-present American liberal tradition and a Hartzian spoiler of socialism, but rather was both the catalyst and the constructor of modern American liberalism itself, with liberalism being understood as interest-group centered pluralism in the vein of Ted Lowi. I agree with Orren that *Jones & Laughlin*,

rather than *Lochner*, is the key gateway to the modern constitutional order with its public legitimation and mediation of private collective bargaining, but her account overlooks the varying influences on and compromises inherent in the brand of voluntarism ultimately grafted onto the Constitution with the Wagner Act and the brand of interest-group liberalism it supports, which I have highlighted in tracking the resource-conscious interactions between labor and other social movements as well as ambitious progressive reformers with a statist agenda. Labor may be the key locus of constitutional development during this era, but the labor movement is hardly independent in its role as constitutional constructor.

Labor is the key focal point of New Deal constitutional change, not only because this new recognition of the group as a constitutional actor rather than the individual enabled a liberal economic pluralism, but also because this recognition enabled and channeled later constitutional attention to the needs and demands of African-Americans and women, who were largely excluded from the initial benefits of the constitutional reconstruction of the New Deal due to their alienation from the labor movement and in turn collective bargaining. This attention came in the form of legislatively constructed anti-discrimination principles applicable to employment practices.[1] The rich legacy of political and constitutional contestation between these movements that was ongoing during the Progressive Era suggests that these subsequent civil rights developments cannot be simply categorized and understood as separate, supplemental iterations of the new pluralist constitutional order, which was birthed from labor strife, designed to expand its reach and make it more inclusive.

[1] The triumph of a legislative constitution over the feudal, judicial constitution is also important to Orren's labor account. The inter-movement politics and constitutional negotiations I highlight also frequently played out against a legislative backdrop.

These Progressive Era efforts by women and African-Americans to engage with the labor movement and modulate or challenge voluntarism to fit their interests illustrates the important ways that these movements viewed work as a key avenue to securing not only subsistence, but also to securing their other constitutional aspirations of civic inclusion and protection against public and private discrimination. Labor questions were significantly integrated in the larger strategic calculus of these movements and their division of labor between organizations. Movement actors devoted significant attention to the project of influencing (admittedly often with limited success) the constitutional parameters of an economic pluralism long before *Jones & Laughlin*. The civil rights potential of collective bargaining was not a new revelation or fresh strategy for these groups, or the clever and independent invention of bureaucrats seeking ways to exploit the potential of the new state, but instead was already deeply rooted in their constitutional narratives and strategies. The roots then of the modern constitutional order, both in the manner of economic management and in the provision of civil rights, in the Progressive Era are deeper and more extensively intertwined than even previously realized.

The value of this resource competition approach to the study of the constitutional insurgency of social movements is not limited, to this study or to these conclusions. It is possible to study all time periods of constitutional development and all social movement actors under the guidance of this approach. Furthermore, the resource competition insight, which counsels investigation of the horizontal channeling of constitutional claims, even by parties whose constitutional interests and preferences do not obviously conflict, across all possible venues for constitutional competition, also has broader applicability beyond social movements. All constitutional claimants are, after all, in direct competition with other non-authoritative constitutional actors to capture the resources of the Constitution. With this study I sought not only to bring greater richness

to constitutional scholarship that explores the roots of the New Deal constitutional revolution, but also to broaden the horizons of constitutional inquiry with an approach that can assist in providing nuance to and filling in other gaps in our understanding of constitutional development that have opened due to the prevailing (though presently moderating) juricentric focus of constitutional research.

Appendix A: Abbreviations Used

AABA	American Anti-Boycott Association
AALL	American Association of Labor Legislation
ACLU	American Civil Liberties Union
AERA	American Equal Rights Association
AFL	American Federation of Labor
BSCP	Brotherhood of Sleeping Car Porters
CIICNNY	Committee for Improving the Industrial Condition of Negroes New York
CORE	Congress of Racial Equality
CUCAN	Committee on Urban Conditions Among Negroes
EEOC	Equal Employment Opportunity Commission
ERL	Equal Rights League
FLSA	Fair Labor Standards Act
GFWC	General Federation of Women's Clubs
KOL	Knights of Labor
NAACP	National Association for the Advancement of Colored People
NAWSA	National American Woman Suffrage Association
NCL	National Consumers' League
NIRA	National Industrial Recovery Act
NLPCW	National League for the Protection of Colored Women
NLRA	National Labor Relations Act
NLRB	National Labor Relations Board
NLUCAN	National League on Urban Conditions
NOW	National Organization for Women
NUL	National Urban League
NWP	National Women's Party
NWSA	National Woman Suffrage Association
PCSW	President's Commission on the Status of Women
RM	Resource Mobilization
SCLC	Southern Christian Leadership Conference
SM	Social Movement
SMI	Social Movement Industry
SMO	Social Movement Organization
SNCC	Student Non-Violent Coordinating Committee
UGW	United Garment Workers
UTW	United Textile Workers
WJCC	Women's Joint Congressional Committee
WLEO	Women's League for Equal Opportunity
WTUL	Women's Trade Union League

Appendix B: Cases Cited

U.S. Supreme Court Cases

Adair v. United States, 208 U.S. 161 (1908)
Adkins v. Childrens' Hospital, 261 U.S. 525 (1923)
American Steel Foundries v. Tri-City Central Trades Council, 257 U.S. 184 (1921)
Bailey v. Alabama, 219 U.S. 219 (1911)
Barbier v. Connolly, 113 U.S. 27 (1884)
Bedford Cut Stone Co. v. Journeymen Stone Cutters, 274 U.S. 37 (1927)
Bradwell v. Illinois, 83 U.S. 130 (1873)
Brown v. Board of Education, 347 U.S. 483 (1954)
Buchanan v. Warley, 245 U.S. 60 (1917)
Bunting v. Oregon 243 U.S. 426 (1917)
Carter v. Carter Coal Co., 298 U.S. 238 (1936)
Connolly v. Union Sewer Pipe Company, 184 U.S. 540 (1902)
Coppage v. Kansas, 236 U.S. 1, 27 (1915)
Duplex Printing Company v. Deering, 254 U.S. 443 (1921)
Goesaert v. Cleary, 335 U.S. 464 (1948)
Gompers v. Buck's Stove and Range Co., 221 U.S. 418 (1911)
Griswold v. Connecticut, 381 U.S. 479 (1965)
Guinn v. United States, 238 U.S. 347 (1915)
Hayes v. Missouri, 120 U.S. 68 (1887)
Heart of Atlanta Motel v. United States, 379 U.S. 241 (1964)
Hitchman Coal & Coke Co. v. Mitchell, 245 U.S. 229 (1917)
Holden v. Hardy, 169 U.S. 366 (1898)
Katzenbach v. McClung, 379 U.S. 294 (1964)
Lawrence v. Texas, 539 U.S. 558 (2003)
Lochner v. New York, 198 U.S. 45 (1905)
Loewe v. Lawlor, 208 U.S. 274 (1908)
McCabe v. Atchison, 235 U.S. 151 (1914)
Minor v. Happersett, 88 U.S. 162 (1874)
Morehead v. New York ex rel Tipaldo 298 U.S. 587 (1936)
Muller v. Oregon, 208 U.S. 416 (1908)
Myers v. Anderson, 238 U.S. 368 (1915)
Nebbia v. New York, 291 U.S. 502 (1934)
NLRB v. Jones & Laughlin Steel Company, 301 U.S. 1 (1937)
Plessy v. Ferguson, 163 U.S. 537 (1896)

Radice v. New York, 264 U.S. 292 (1924)
Schecter Poultry Corp. v. United States, 295 U.S. 495 (1935)
Shelley v. Kraemer, 334 U.S. 1 (1948)
Slaughter-House Cases, 83 U.S. 36 (1873)
Stettler v. O'Hara, 243 U.S. 629 (1917)
Truax v. Corrigan, 257 U.S. 312 (1921)
United States v. Darby, 312 U.S. 100 (1941)
United States v. Lopez, 514 U.S. 549 (1995)
United States v. Morrison, 529 U.S. 598 (2000)
United States v. Reynolds, 235 U.S. 133 (1914)
West Coast Hotel v. Parrish, 300 U.S. 379 (1937)
Yick Wo v. Hopkins, 118 U.S. 356 (1886)

Federal Cases

Bronson v. Swensen, 394 F.Supp 2d. 1329 (2005)

State Cases

In re Jacobs, 98 N.Y. 98 (1885)
Millet v. People, 177 Ill. 295 (1886)
People v. Williams, 189 N.Y. 131 (1907)
Ritchie & Co. v. Wayman, 244 Ill. 509 (1910)
Ritchie v. People, 155 Ill. 98 (1895)
State v. Buchanan, 29 Wash. 603 (1902)
State v. Goodwill, 33 W.Va. 179 (1889)
State v. Muller, 48 Ore. 252 (1906)
Wenham v. State, 65 Neb. 394 (1903)

Bibliography

(AP), The Associated Press. "Excerpt from Santorum Interview." *USA Today*, April 23 2003.

Ackerman, Bruce A. *We the People: Foundations*. Cambridge, Mass.: Belknap Press of Harvard University Press, 1991.

———. *We the People: Transformations*. Cambridge, MA: Belknap Press of Harvard University Press, 2000.

Adams, John, Abigail Adams, and Charles Francis Adams. *Familiar Letters of John Adams and His Wife, Abigail Adams, During the Revolution*. New York, Cambridge,: Hurd & Houghton; The Riverside Press,, 1876. xxxii, 424 p.

Alger, George W. "The Courts and Legislative Freedom." *Atlantic Monthly*, March 1913, 345.

Ariens, Michael. "A Thrice-Told Tale, or Felix the Cat." *Harvard Law Review* 107 (1994): 620-76.

Aynes, Richard L. "Constricting the Law of Freedom: Justice Miller, the Fourteenth Amendment and the Slaughter-House Cases." *Chicago-Kent Law Review* 70 (1994): 627.

———. "On Misreading Bingham,John and the 14th Amendment." *Yale Law Journal* 103, no. 1 (1993): 57-104.

Baer, Judith A. *The Chains of Protection : The Judicial Response to Women's Labor Legislation*. Westport, Conn.: Greenwood Press, 1978.

Baker, Elizabeth Faulkner. "At the Crossroads in the Legal Protection of Women in Industry." *Annals of the American Academy of Political and Social Science* 143 (1929): 265-79.

———. "Protective Labor Legislation, with Special Reference to Women in the State of New York." Thesis (Ph. D.), Columbia University, 1925., 1925.

Baker, Paula. "The Domestication of Politics: Women and American Political Society, 1780-1920." *The American Historical Review* 89, no. 3 (1984): 620-47.

Baldwin, Roger N. *Reminiscences.* Vol. I, *New York Times Oral History Program.* New York: New York Times, 1972.

Balkin, Jack M. "How Social Movements Change (or Fail to Change) the Constitution: The Case of the New Departure." *Suffolk University Law Review* 39 (2005): 27-65.

Balkin, Jack M., and Sanford Levinson. "Understanding the Constitutional Revolution." *Virginia Law Review* 87 (2001): 1045-104.

Balkin, Jack M., and Reva B. Siegel. "Principles, Practices, Social Movements." *University of Pennsylvania Law Review* 154 (2006): 927-50.

Barkow, Rachel E. "More Supreme Than Court? The Fall of the Political Question Doctrine and the Rise of Judicial Supremacy." *Columbia Law Review* 102 (2002): 237-336.

Bates, Beth Tompkins. *Pullman Porters and the Rise of Protest Politics in Black America, 1925-1945*, *The John Hope Franklin Series in African American History and Culture*. Chapel Hill, N.C.: University of North Carolina Press, 2001.

Becker, Susan D. *The Origins of the Equal Rights Amendment : American Feminism between the Wars*, *Contributions in Women's Studies ; No. 23*. Westport, Conn.: Greenwood Press, 1981.

Bell, Derrick. "Does Discrimination Make Economic Sense? For Some It Did - and Still Does." *Human Rights* 15 (1988): 38.

Benedict, Michael Les. "Laissez-Faire and Liberty: A Re-Evaluation of the Meanings and Origins of Laissez-Faire Constitutionalism." *Law and History Review* 3 (1985): 293-331.

Bernstein, David E. *Only One Place of Redress: African Americans, Labor Regulations, and the Courts from Reconstruction to the New Deal*, *Constitutional Conflicts*. Durham [N.C.]: Duke University Press, 2001.

———. "Philip Sober Controlling Philip Drunk: Buchanan V. Warley in Historical Perspective." *Vanderbilt Law Review* 51 (1998): 797-879.

———. "Plessy Versus Lochner: The Berea College Case." *Journal of Supreme Court History* 25 (2000): 93-111.

Bernstein, Irving. *The Lean Years; a History of the American Worker, 1920-1933*. Boston,: Houghton Mifflin, 1960.

Berry, Jeffrey M. *Lobbying for the People : The Political Behavior of Public Interest Groups*. Princeton, N.J.: Princeton University Press, 1977.

Boone, Gladys. *The Women's Trade Union Leagues in Great Britain and the United States of America*. New York: Columbia university press, 1942.

Boris, Eileen. *Home to Work : Motherhood and the Politics of Industrial Homework in the United States*. Cambridge [England] ; New York, N.Y.: Cambridge University Press, 1994.

Brody, David. *Workers in Industrial America: Essays on the Twentieth Century Struggle*. New York: Oxford University Press, 1980.

Brown-Nagin, Tomiko. "Elites, Social Movements, and the Law: The Case of Affirmative Action." *Columbia Law Review* 105 (2005): 1436-528.

Burstein, Paul. "Social Movements and Public Policy." In *How Social Movements Matter*, edited by Marco Giugni, Doug McAdam and Charles Tilly, xxxiii, 324 p. Minneapolis, Minn: University of Minnesota Press, 1999.

Caldeira, Gregory A., and John R. Wright. "Amici Curiae before the Supreme Court: Who Participates, When, and How Much?" *Journal of Politics* 52 (1990): 782-806.

Carpenter, Dale. "Judicial Supremacy and Its Discontents." *Constitutional Commentary* 20 (2003): 405-36.

Carroll, Mollie Ray. *Labor and Politics*. Boston and New York,: Houghton Mifflin company, 1923.

Cayton, Horace R., and George Sinclair Mitchell. *Black Workers and the New Unions*. Chapel Hill,: The University of North Carolina Press, 1939.

Coates, Ken, and Tony Topham. *Trade Unions in Britain*. Nottingham: Spokesman, 1980.

Commons, John Rogers, David Joseph Saposs, Helen Laura Woodbury, Edward Becker Mittelman, Henry Elmer Hoagland, John B. Andrews, Selig Perlman, Don D. Lescohier, Elizabeth Brandeis, and Philip Taft. *History of Labour in the United States*. New York,: The Macmillan Company, 1918.

"Coretta Scott King Speaks at the Palmer Hilton." *Chicago Defender*, Apr. 1 1998, 1.

Cortner, Richard C. *The Wagner Act Cases*. Knoxville: University of Tennessee Press, 1964.

Costain, Anne N. *Inviting Women's Rebellion: A Political Process Interpretation of the Women's Movement*. Baltimore: Johns Hopkins University Press, 1992.

Cott, Nancy F. "Feminist Politics in the 1920's: The National Woman's Party." *The Journal of American History* 71, no. 1 (1984): 43-68.

———. "What's in a Name? The Limits of 'Social Feminism;' or Expanding the Vocabulary of Women's History." *The Journal of American History* 76, no. 3 (1989): 809-29.

Cover, Robert M., Martha Minow, Michael Ryan, and Austin Sarat. *Narrative, Violence, and the Law: The Essays of Robert Cover*, *Law, Meaning, and Violence*. Ann Arbor: University of Michigan Press, 1992.

Cushman, Barry. *Rethinking the New Deal Court: The Structure of a Constitutional Revolution*. New York: Oxford University Press, 1998.

Cushman, Robert E. "Social and Economic Interpretation of the Fourteenth Amendment." *Michigan Law Review* 20, no. 7 (1922): 737-64.

Dahl, Robert A. "Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker." *Jourrnal of Public Law* 6 (1957): 279-95.

Davis, Allen F. "The Women's Trade Union League: Origins and Organization." *Labor History* 5, no. 1 (1964): 3-17.

Degler, Carl N. *In Search of Human Nature : The Decline and Revival of Darwinism in American Social Thought*. New York: Oxford University Press, 1991.

Devins, Neal, and Louis Fisher. *The Democratic Constitution*. Oxford ; New York: Oxford University Press, 2004.

Dorr, Rheta Childe, Carrie Chapman Catt, and National American Woman Suffrage Association Collection (Library of Congress). *What Eight Million Women Want*. Boston,: Small, 1910.

Drake, Barbara. *Women in Trade Unions*. London: The Labour Research Dept, 1920.

Dreier, Mary E. *Margaret Dreier Robins, Her Life, Letters and Work*. New York,: Island Press Cooperative, 1950.

Du Bois, W. E. B. *Crisis*, March 1918, 114.

———. "Organized Labor." *Crisis*, July 1912, 131.

———. "The A.F. Of L." *Crisis*, December 1933, 292.

———. *The Negro Artisan. Report of a Social Study Made under the Direction of Atlanta University; Together with the Proceedings of the Seventh Conference for the Study of the Negro Problems, Held at Atlanta University on May 27th, 1902*, *Atlanta University Publications, No. 7*. Atlanta, Ga.,: Atlanta university press, 1902.

———. *The Souls of Black Folk*. 1st Vintage Books/Library of America ed. New York: Vintage Books/Library of America, 1990.

Dubofsky, Melvyn. *We Shall Be All : A History of the Industrial Workers of the World*. 2nd ed. Urbana: University of Illinois Press, 1988.

Dubofsky, Melvyn, and Warren R. Van Tine. *John L. Lewis: A Biography*. New York: Quadrangle/New York Times Book Co., 1977.

Dudziak, Mary L. *Cold War Civil Rights : Race and the Image of American Democracy*, *Politics and Society in Twentieth-Century America*. Princeton, N.J.: Princeton University Press, 2000.

Duncan, James F. "To Purify Our Courts." *American Federationist*, March 1895, 14.

Dye, Nancy Schrom. *As Equals and as Sisters : Feminism, the Labor Movement, and the Women's Trade Union League of New York*. Columbia: University of Missouri Press, 1980.

Epp, Charles R. "External Pressure and the Supreme Court's Agenda." In *Supreme Court Decision-Making: New Institutionalist Approaches*, edited by Cornell W. Clayton and Howard Gillman, xiv, 344 p. Chicago: University of Chicago Press, 1999.

Epstein, Richard A. "Lest We Forget: Buchanan V. Warley and Constitutional Jurisprudence of the 'Progressive Era'." *Vanderbilt Law Review* 51 (1998): 787.

Ernst, Daniel R. *Lawyers against Labor: From Individual Rights to Corporate Liberalism*, *The Working Class in American History*. Urbana: University of Illinois Press, 1995.

Eskridge, William N., Jr. "Channeling: Identity-Based Social Movements and Public Law." *University of Pennsylvania Law Review* 150, no. 1 (2001): 419-525.

———. "Some Effects of Identity-Based Social Movements on Constitutional Law in the Twentieth Century." *Michigan Law Review* 100, no. 8 (2002): 2062-407.

Filippelli, Ronald L. *Labor in the USA : A History*. New York: A.A. Knopf, 1984.

Fink, Leon. "Labor, Liberty and the Law: Trade Unionism and the Problem of the American Constitutional Order." *The Journal of American History* 74, no. 3 (1987): 904-25.

Fisher, Louis. "Constitutional Interpretation by Members of Congress." *North Carolina Law Review* 63 (1985): 707-47.

Fiss, Owen M., and United States. Permanent Committee for the Oliver Wendell Holmes Devise. *Troubled Beginnings of the Modern State, 1888-1910*, *History of the Supreme Court of the United States ; V. 8*. New York: Macmillan Pub. Co., 1993.

Foner, Eric. *Free Soil, Free Labor, Free Men: The Ideology of the Republican Party before the Civil War*. New York,: Oxford University Press, 1970.

———. *Politics and Ideology in the Age of the Civil War*. New York: Oxford University Press, 1980.

Foner, Philip Sheldon. *History of the Labor Movement in the United States*. 2d ed. New York: International Publishers, 1975.

———. *Organized Labor and the Black Worker, 1619-1973*. New York,: Praeger, 1974.

———. *Women and the American Labor Movement*. 2 vols. Vol. 1. New York: Free Press, 1979.

———. *Women and the American Labor Movement*. 2 vols. Vol. 2. New York: Free Press, 1980.

Forbath, William E. "Caste, Class, and Equal Citizenship." *Michigan Law Review* 98, no. 1 (1999): 1-91.

———. *Law and the Shaping of the American Labor Movement*. Cambridge, Mass.: Harvard University Press, 1991.

———. "The Ambiguities of Free Labor - Labor and the Law in the Gilded Age." *Wisconsin Law Review*, no. 4 (1985): 767-817.

Foust, Michael. *Atlanta: Black Pastors Rally to Oppose Same-Sex 'Marriage'* Baptist Press, Jan. 28 2004 Available from http://www.bpnews.net/bpnews.asp?ID=17941.

Frankfurter, Felix, and Nathan Greene. *The Labor Injunction*. New York: Macmillan, 1930.

Frankfurter, Felix, and Philip B. Kurland. *Felix Frankfurter on the Supreme Court; Extrajudicial Essays on the Court and the Constitution*. Cambridge, Mass.,: Belknap Press of Harvard University Press, 1970.

Freeman, Jo. "A Model for Analyzing the Strategic Options of Social Movement Organizations." In *Waves of Protest : Social Movements since the Sixties*, edited by Jo Freeman and Victoria L. Johnson, xi, 381 p. Lanham, MD: Rowman & Littlefield Publishers, 1999.

———. *The Politics of Women's Liberation: A Case Study of an Emerging Social Movement and Its Relation to the Policy Process*, 1973. microform :.

Freeman, Jo, and Victoria L. Johnson. *Waves of Protest : Social Movements since the Sixties*, *People, Passions, and Power*. Lanham, MD: Rowman & Littlefield Publishers, 1999.

Frey, John P. *The Labor Injunction : An Exposition of Government by Judicial Conscience and Its Menace* Thomson Gale, 1923 [cited 25 August 2006]. Available from http://galenet.galegroup.com.content.lib.utexas.edu:2048/servlet/MOML?af=RN&ae=F153308006&srchtp=a&ste=14.

Friedman, Richard D. "Switching Time and Other Thought Experiments: The Hughes Court and Constitutional Transformation." *University of Pennsylvania Law Review* 142, no. 6 (1994): 1891-984.

Galanter, Marc. "The Radiating Effects of Courts." In *Empirical Theories About Courts*, edited by Keith O. Boyum and Lynn M. Mather, xi, 284 p. New York: Longman, 1983.

Gamson, William A. "Introduction." In *Social Movements in an Organizational Society: Collected Essays*, edited by Mayer N. Zald and John D. McCarthy, x, 435 p. New Brunswick, U.S.A.: Transaction Books, 1987.

———. *The Strategy of Social Protest*. Homewood, Ill.: Dorsey Press, 1975.

———. *The Strategy of Social Protest*. 2nd ed. Belmont, Calif.: Wadsworth Pub., 1990.

Gewirtzman, Doni. "Glory Days: Popular Constitutionalism, Nostalgia and the True Nature of Constitutional Culture." *Georgetown Law Journal* 93 (2005): 897-938.

Gillman, Howard. *The Constitution Besieged : The Rise and Demise of Lochner Era Police Powers Jurisprudence*. Durham: Duke University Press, 1993.

Gilthorpe, William. "Advancement." *American Federationist*, October 1910, 847.

Giugni, Marco. "How Social Movements Matter:Past Research, Present Problems, Future Developments." In *How Social Movements Matter*, edited by Marco Giugni, Doug McAdam and Charles Tilly, xxxiii, 324 p. Minneapolis, Minn: University of Minnesota Press, 1999.

Gold, David M. "Redfield, Railroads and the Roots of 'Laissez-Faire Constitutionalism'." *American Journal of Legal History* 27 (1983): 254-68.

———. *The Shaping of Nineteenth-Century Law: John Appleton and Responsible Individualism*, *Contributions in Legal Studies, No. 57*. New York: Greenwood Press, 1990.

Goldmark, Josephine Clara. *Impatient Crusader : Florence Kelley's Life Story*. Urbana: University of Illinois Press, 1953.

Goldmark, Josephine Clara, and Louis Dembitz Brandeis. *Fatigue and Efficiency*. New York,: Charities publication committee, 1912.

Goluboff, Risa L. "The Thirteenth Amendment and the Lost Origins of Civil Rights." *Duke Law Journal* 50, no. 6 (2001): 1609-85.

Gompers, Samuel. "Coming into Her Own." *American Federationist*, July 1915, 626-7.

———. *Debate between Samuel Gompers, President, American Federation of Labor, and Henry J. Allen, Governor of Kansas, at Carnegie Hall, New York, May 28, 1920* Thomson Gale, 1920 [cited 25 August 2006]. Available from http://galenet.galegroup.com.content.lib.utexas.edu:2048/servlet/MOML?af=RN&ae=F152700198&srchtp=a&ste=14.

———. "Should the Wife Help Support the Family?" *American Federationist*, January 1906, 36.

———. "The American Labor Movement." *American Federationist*, July 1914, 544.

———. "The Charter of Industrial Freedom - Labor Provisions of the Clayton Antitrust Law." *American Federationist* 1914, 957-74.

———. "Woman's Work, Rights and Progress." *American Federationist*, August 1913, 627.

Gompers, Samuel, and Hayes Robbins. *Labor and the Common Welfare*, *American Labor: From Conspiracy to Collective Bargaining*. New York,: Arno Press, 1969.

Gompers, Samuel, and Nick Salvatore. *Seventy Years of Life and Labor: An Autobiography*. Ithaca, NY: ILR Press, New York State School of Industrial and Labor Relations, Cornell University, 1984.

Greeley, Louis M. "The Changing Attitude of the Courts toward Social Legislation." *Illinois Law Review* 5 (1910): 222-32.

Greene, Julie. *Pure and Simple Politics: The American Federation of Labor and Political Activism, 1881-1917*. Cambridge, UK ; New York, NY: Cambridge University Press, 1998.

Grillo, Trina, and Stephanie M. Wildman. "Obscuring the Importance of Race: The Implication of Making Comparisons between Racism and Sexism (or Other - Isms)." *Duke Law Journal* 1991, no. 2 (1991): 397-412.

Grob, Gerald N. *Workers and Utopia; a Study of Ideological Conflict in the American Labor Movement, 1865-1900*. [Evanston, Ill.]: Northwestern University Press, 1961.

Halley, Janet E. "Gay Rights and Identity Imitation: Issues in the Ethics of Representation." In *The Politics of Law : A Progressive Critique*, edited by David Kairys, ix, 738 p. New York, NY: Basic Books, 1998.

Hamilton, Charles V. "Social-Policy and the Welfare of Black-Americans - from Rights to Resources." *Political Science Quarterly* 101, no. 2 (1986): 239-55.

Hamilton, Dona C., and Charles V. Hamilton. *The Dual Agenda : Race and Social Welfare Policies of Civil Rights Organizations*, *Power, Conflict, and Democracy*. New York: Columbia University Press, 1997.

Hansen, Drew D. "The Sit-Down Strikes and the Switch in Time." *The Wayne Law Review* 46 (2000): 49-133.

Hart, Vivien. *Bound by Our Constitution : Women, Workers, and the Minimum Wage*, *Princeton Studies in American Politics*. Princeton, N.J.: Princeton University Press, 1994.

Hartog, Hendrik. "The Constitution of Aspiration and the Rights That Belong to Us All." *Journal of American History* 74, no. 3 (1987): 1013-34.

Hartz, Louis. *The Liberal Tradition in America; an Interpretation of American Political Thought since the Revolution*. [1st ed. New York,: Harcourt, 1955.

Hattam, Victoria Charlotte. *Labor Visions and State Power: The Origins of Business Unionism in the United States*, *Princeton Studies in American Politics*. Princeton, N.J.: Princeton University Press, 1993.

Henry, Alice. "Convention of the National Women's Trade Union League." *Union Labor Advocate* 1909, 22.

———. *The Trade Union Woman*. New York and London: D. Appleton and company, 1915.

———. *Women and the Labor Movement*. New York,: George H. Doran company, 1923.

Hill, T. Arnold. "Labor: Labor Marches On." *Opportunity*, April 1934, 120-1.

———. "Letter to William Green." *Opportunity*, February 1930, 56.

Horwitz, Morton J. *The Transformation of American Law, 1780-1860*. New York: Oxford University Press, 1992.

Hough, Charles M. "Due Process of Law Today." *Harvard Law Review* 32 (1919): 218-33.

Jacoby, Robin Miller. *The British and American Women's Trade Union Leagues, 1890-1925*, *Scholarship in Women's History; V. 7*. Brooklyn, N.Y.: Carlson Pub., 1994.

Jenkins, J. Craig. *The Politics of Insurgency : The Farm Worker Movement in the 1960s*. New York: Columbia University Press, 1985.

Johnson, James Weldon. *Along This Way; the Autobiography of James Weldon Johnson*. New York,: The Viking press, 1933.

———. *Negro Americans, What Now?* New York,: The Viking Press, 1934.

"Judiciary: Chambermaid's Day." *Time*, April 5, 1937 1937, 13.

Kellogg, Charles Flint. *Naacp, a History of the National Association for the Advancement of Colored People*. Baltimore,: Johns Hopkins Press, 1967.

Kelly, Alfred Hinsey, and Winfred Audif Harbison. *The American Constitution, Its Origins and Development*. New York,: W. W. Norton, 1948.

Kenneally, James J. *Women and American Trade Unions*. 2nd ed, *Monographs in Women's Studies*. Montréal ; St. Albans, Vt.: Eden Press Women's Publications, 1981.

———. "Women and Trade Unions 1870-1920: The Quandary of the Reformer." *Labor History* 14, no. 1 (1973): 42-55.

Kens, Paul. *Judicial Power and Reform Politics: The Anatomy of Lochner V. New York*. Lawrence, Kan.: University Press of Kansas, 1990.

Kersch, Kenneth I. "Blacks and Labor - the Untold Story." *The Public Interest*, no. Summer (2002): 141-52.

———. *Constructing Civil Liberties: Discontinuities in the Development of American Constitutional Law*. Cambridge, UK ; New York, NY, USA: Cambridge University Press, 2004.

Kessler-Harris, Alice. *Gendering Labor History*, *The Working Class in American History*. Urbana: University of Illinois Press, 2006.

———. *Out to Work : A History of Wage-Earning Women in the United States*. New York: Oxford University Press, 1982.

King, Desmond S. *Separate and Unequal : Black Americans and the Us Federal Government*. New York: Clarendon Press ; Oxford University Press, 1995.

Klarman, Michael J. "Constitutional Fact/Constitutional Fiction: A Critique of Bruce Ackerman's Theory of Constitutional Moments." *Stanford Law Review* 44 (1992): 759.

———. *From Jim Crow to Civil Rights: The Supreme Court and the Struggle for Racial Equality*. Oxford ; New York: Oxford University Press, 2004.

———. "Race and the Court in the Progressive Era." *Vanderbilt Law Review* 51 (1998): 881-952.

Kornhauser, William. *The Politics of Mass Society*. Glencoe, Ill.,: Free Press, 1959.

Kousser, J. Morgan. *The Shaping of Southern Politics : Suffrage Restriction and the Establishment of the One-Party South, 1880-1910*, *Yale Historical Publications. Miscellany. 102*. New Haven: Yale University Press, 1974.

Koven, Seth, and Sonya Michel. *Mothers of a New World : Maternalist Politics and the Origins of Welfare States*. New York: Routledge, 1993.

Kramer, Larry D. *The People Themselves : Popular Constitutionalism and Judicial Review*. New York: Oxford University Press, 2004.

———. "The Supreme Court, 2000 - Term Foreword: We the Court." *Harvard Law Review* 115 (2001): 5-169.

Labor, American Federation of. *History, Encyclopedia Reference Book*. Washington, D.C.: American Federation of Labor, 1924.

———. "Involuntary Servitude in Colorado." Washington, D.C.: American Federation of Labor, 1917.

Lehrer, Susan. *Origins of Protective Labor Legislation for Women, 1905-1925*, *Suny Series on Women and Work*. Albany: State University of New York Press, 1987.

Leuchtenburg, William Edward. *The Supreme Court Reborn : The Constitutional Revolution in the Age of Roosevelt*. New York: Oxford University Press, 1995.

Levinson, Sanford. *Constitutional Faith*. Princeton, N.J.: Princeton University Press, 1988.

———. "Constitutional Protestantism in Theory and Practice: Two Questions for Michael Stokes Paulsen and One for His Critics." *Georgetown Law Journal* 83 (1994): 373-84.

———. *Responding to Imperfection : The Theory and Practice of Constitutional Amendment*. Princeton, N.J.: Princeton University Press, 1995.

Judiciary Committee. *Limiting Scope of Injunctions in Labor Disputes*, 1928.

Lippmann, Walter. *Drift and Mastery*. New York,: M. Kennerley, 1914.

Lipschultz, Sybil. "Hours and Wages: The Gendering of Labor Standards in America." *Journal of Women's History* 8, no. 1 (1996): 114-36.

Logan, Rayford Whittingham. *The Negro in American Life and Thought: The Nadir, 1877-1901*. New York,: Dial Press, 1954.

Lunardini, Christine A. *From Equal Suffrage to Equal Rights : Alice Paul and the National Woman's Party, 1910-1928*, *The American Social Experience Series ; 5*. New York: New York University Press, 1986.

MacKinnon, Catherine A. "Reflections on Sex Equality under Law." *Yale Law Journal* 100 (1991): 1281-328.

Marot, Helen. *American Labor Unions*. New York,: H. Holt and company, 1914.

Injunctions in Labor Disputes, 3rd Session, February 17, 1931 1937.

Mayeri, Serena. ""A Common Fate of Discrimination": Race-Gender Analogies in Legal and Historical Perspective." *Yale Law Journal* 110, no. 6 (2001): 1045-87.

McAdam, Doug. *Political Process and the Development of Black Insurgency, 1930-1970*. Chicago: University of Chicago Press, 1982.

McAdam, Doug, Sidney G. Tarrow, and Charles Tilly. *Dynamics of Contention*, *Cambridge Studies in Contentious Politics*. Cambridge ; New York: Cambridge University Press, 2001.

McCann, Michael W. "Law and Social Movements: Contemporary Perspectives." *Annual Review of Law and Social Science* 2 (2006): 17-38.

———. "Mobilization of Law." In *Social Movements and American Political Institutions*, edited by Anne N. Costain and Andrew S. McFarland, viii, 335. Lanham, Md.: Rowman & Littlefield, 1998.

McCloskey, Robert G. *The American Supreme Court*, *The Chicago History of American Civilization*. [Chicago]: University of Chicago Press, 1960.

McCurdy, Charles W. "The Roots of Liberty of Contract Reconsidered: Major Premises in the Law of Employment, 1867-1937." *Supreme Court Historical Society* 1984 (1984): 20-33.

McPherson, James M. "The Anti-Slavery Legacy: From Reconstruction to the Naacp." In *Towards a New Past; Dissenting Essays in American History*, edited by Barton J. Bernstein, vi, 364 p. New York,: Pantheon Books, 1968.

Meier, August. *Negro Thought in America, 1880-1915; Racial Ideologies in the Age of Booker T. Washington*. Ann Arbor,: University of Michigan Press, 1963.

Meier, August, and Elliott M. Rudwick. "Attitudes of Negro Leaders toward the American Labor Movement from the Civil War to World War I." In *The Negro and the American Labor Movement*, edited by Julius Jacobson, vi, 430 p. Garden City, N.Y.,: Anchor Books, 1968.

Mettler, Suzanne. *Dividing Citizens : Gender and Federalism in New Deal Public Policy*. Ithaca, N.Y.: Cornell University Press, 1998.

Miller, Kelly. "The City Negro: Industrial Status." *Southern Workman* 30 (1903): 340-45.

———. "The Negro as a Workingman." *American Mercury*, November 1925.

Montgomery, David. *The Fall of the House of Labor : The Workplace, the State, and American Labor Activism, 1865-1925*. Cambridge: Cambridge University Press, 1987.

Moore, Jesse Thomas. *A Search for Equality : The National Urban League, 1910-1961*. University Park: Pennsylvania State University Press, 1981.

Moreno, Paul D. *Black Americans and Organized Labor : A New History*. Baton Rouge: Louisiana State University Press, 2006.

Movement, Niagara. "Declaration of Principles." *The Horizon*, December 1909.

National Urban League. Dept. of Research and Community Projects. *Negro Membership in American Labor Unions*. New York,: Negro Universities Press, 1969.

Nelson, William E. *The Fourteenth Amendment: From Political Principle to Judicial Doctrine*. Cambridge, Mass.: Harvard University Press, 1988.

———. "The Impact of the Antislavery Movement Upon Styles of Judicial Reasoning in Nineteenth-Century America." *Harvard Law Review* 87 (1974): 513.

Newman, Pauline. "The Workers of the World." *Progressive Woman*, May 1912, 7.

Novkov, Julie. *Constituting Workers, Protecting Women: Gender, Law, and Labor in the Progressive Era and New Deal Years*. Ann Arbor: University of Michigan Press, 2001.

O'Brien, Ruth. *Workers' Paradox : The Republican Origins of New Deal Labor Policy, 1886-1935*. Chapel Hill: University of North Carolina Press, 1998.

O'Connor, Karen. *Women's Organizations' Use of the Courts*. Lexington, Mass.: Lexington Books, 1980.

O'Donnell, Edward. "Women as Breadwinners: The Error of the Age." *American Federationist*, October 1897, 186.

Orren, Karen. *Belated Feudalism: Labor, the Law, and Liberal Development in the United States*. Cambridge [England] ; New York: Cambridge University Press, 1991.

Ovington, Mary White. *The Walls Came Tumbling Down*. [1st ed. New York,: Harcourt, 1947.

Parris, Guichard, and Lester Brooks. *Blacks in the City; a History of the National Urban League*. [1st ed. Boston,: Little, 1971.

Payne, Elizabeth Anne. *Reform, Labor, and Feminism : Margaret Dreier Robins and the Women's Trade Union League*, *Women in American History*. Urbana: University of Illinois Press, 1988.

Peabody, Bruce G. "Congressional Constitutional Interpretation and the Courts: A Preliminary Inquiry into Legislative Attitudes." *Law and Social Inquiry* 29 (2004): 127-71.

Perlman, Selig. *A Theory of the Labor Movement*. New York,: The Macmillan Company, 1928.

Piven, Frances Fox, and Richard A. Cloward. *Poor People's Movements : Why They Succeed, How They Fail*. New York: Vintage books, 1979.

Pope, James Gray. "Labor's Constitution of Freedom." *Yale Law Journal* 106 (1997): 941-1031.

———. "The Thirteenth Amendment Versus the Commerce Clause: Labor and the Shaping of American Constitutional Law, 1921-1957." *Columbia Law Review* 102 (2002): 1-122.

Post, Robert C. "Defending the Lifeworld: Substantive Due Process in the Taft Court Era." *Boston University Law Review* 78 (1998): 1489-548.

Post, Robert C., and Reva B. Siegel. "Protecting the Constitution from the People: Juricentric Restrictions on Section Five Power." *Indiana Law Journal* 78 (2003): 1-45.

Pound, Roscoe. "Liberty of Contract." *Yale Law Journal* 18 (1909): 454-87.

Pringle, Henry F. *The Life and Times of William Howard Taft: A Biography*. New York ; Toronto: Farrar & Rinehart, 1939.

Randolph, A. Philip. "Dialogue of the Old and New." *Messenger*, March 1927, 94.

———. "The Negro and Economic Radicalism." *Opportunity*, February 1926, 126.

Recchiuti, John Louis. *Civic Engagement : Social Science and Progressive-Era Reform in New York City*. Philadelphia, Pa.: University of Pennsylvania Press, 2007.

Ritter, Gretchen. *The Constitution as Social Design: Gender and Civic Membership in the American Constitutional Order*. Stanford, Ca.: Stanford University Press, 2006.

Rivers, Eugene F., and Kenneth D. Johnson. *Same-Sex Marriage: Hijacking the Civil Rights Legacy* NewsCorp, Jun. 1 2006 [cited. Available from http://www.weeklystandard.com/Content/Public/Articles/000/000/012/285fhdqe.asp.

Robins, Margaret Dreier. "Trade Unionism for Women." In *Woman and the Larger Citizenship*, edited by Shailer Mathews. Chicago: The Civics Society, 1914.

Rogin, Michael. "Voluntarism: The Political Function of an Antipolitical Doctrine." *Industrial and Labor Relations Review* 15, no. 4 (1962): 521-35.

Rosenberg, Gerald N. *The Hollow Hope : Can Courts Bring About Social Change?* Chicago: University of Chicago, 1991.

Rosenthal, Naomi, Meryl Fingrutd, Michelle Ethier, Roberta Karant, and David McDonald. "Social Movements and Network Analysis: A Case Study of Nineteenth-Century Women's Reform in New York State." *The American Journal of Sociology* 90, no. 5 (1985): 1022-54.

Ross, William G. *A Muted Fury: Populists, Progressives, and Labor Unions Confront the Courts, 1890-1937*. Princeton, N.J.: Princeton University Press, 1994.

Rowe, Gary D. "Lochner Revisionism Revisited." *Law and Social Inquiry* 24 (1999): 221-52.

Rubin, Edward L. "Passing through the Door: Social Movement Literature and Legal Scholarship." *University of Pennsylvania Law Review* 150 (2001): 1-83.

Rudwick, Elliott M. "Booker T. Washington's Relations with the Naacp." *The Journal of Negro Education* 29, no. 2 (1960): 134-44.

———. "The Niagara Movement." *The Journal of Negro History* 42, no. 3 (1957): 177-200.

Safford, John. "The Good That Trade Unions Do." *American Federationist*, August 1902, 423.

Sayre, Francis B. "Labor and the Courts." *Yale Law Journal* 39 (1930): 682-705.

Schneiderman, Rose, and Lucy Goldthwaite. *All for One*. New York,: P. S. Eriksson, 1967.

Segal, Jeffrey Allan, and Harold J. Spaeth. *The Supreme Court and the Attitudinal Model Revisited*. Cambridge, UK ; New York: Cambridge University Press, 2002.

Siegel, Reva B. "Constitutional Culture, Social Movement Conflict and Constitutional Change: The Case of the De Facto Era." *California Law Review* 94 (2006): 1323-419.

———. "She the People: The Nineteenth Amendment, Sex Equality, Federalism, and the Family." *Harvard Law Review* 115, no. 4 (2002): 947-1046.

———. "Text in Contest: Gender and the Constitution from a Social Movement Perspective." *University of Pennsylvania Law Review* 150, no. 1 (2001): 297-351.

Sklar, Kathryn Kish. *Florence Kelley and the Nation's Work*. New Haven: Yale University Press, 1995.

———. "The Consumers' White Label Campaign of the National Consumers' League, 1898-1918." In *Getting and Spending : European and American Consumer Societies in the Twentieth Century*, edited by Susan Strasser, Charles McGovern and Matthias Judt, xiv, 477 p. Cambridge, England ; New York: Cambridge University Press, 1998.

———. "The Historical Foundations of Women's Power in the Creation of the American Welfare State, 1830-1930." In *Mothers of a New World : Maternalist Politics and the Origins of Welfare States*, edited by Seth Koven and Sonya Michel, xi, 447 p. New York: Routledge, 1993.

———. "Two Political Cultures in the Progressive Era: The National Consumers' League and the American Association for Labor Legislation." In *U.S. History as Women's History : New Feminist Essays*, edited by Linda K. Kerber, Alice Kessler-Harris and Kathryn Kish Sklar, viii, 477 p. Chapel Hill: University of North Carolina Press, 1995.

Skocpol, Theda. *Protecting Soldiers and Mothers : The Political Origins of Social Policy in the United States*. Cambridge, Mass.: Belknap Press of Harvard University Press, 1992.

Smelser, Neil J. *Theory of Collective Behavior*. New York,: Free Press of Glencoe, 1963.

Soukup, Elise. "Polygamists, Unite!" *Newsweek*, Mar. 20 2006, 52.

Spero, Sterling Denhard, and Abram Lincoln Harris. *The Black Worker; the Negro and the Labor Movement*, *Studies in American Negro Life ; Nl7*. New York,: Atheneum, 1968.

Spriggs, James F. II, and Paul J. Wahlbeck. "Amicus Curiae and the Role of Information at the Supreme Court." *Political Research Quarterly* 50, no. 2 (1997): 365-86.

Stanton, Elizabeth Cady, Susan B. Anthony, Matilda Joslyn Gage, and Ida Husted Harper. *History of Woman Suffrage*. Rochester, N.Y.: C. Mann, 1887.

Stern, Charlotta. "The Evolution of Social-Movement Organizations: Niche Competition in Social Space." *European Sociological Review* 15, no. 1 (1999): 91-105.

Storrs, Landon R. Y. *Civilizing Capitalism : The National Consumers' League, Women's Activism, and Labor Standards in the New Deal Era*. Chapel Hill: University of North Carolina Press, 2000.

Sunstein, Cass R. "Lochner's Legacy." *Columbia Law Review* 87 (1987): 873-919.

———. "On Analogical Reasoning." *Harvard Law Review* 106, no. 3 (1993): 741-91.

———. *The Partial Constitution*. Cambridge, Mass.: Harvard University Press, 1993.

Swisher, Carl Brent, and Edward McChesney Sait. *American Constitutional Development*. Boston, New York [etc.]: Houghton Mifflin company, 1943.

Tarrow, Sidney G. *Power in Movement: Social Movements and Contentious Politics*. 2nd ed, *Cambridge Studies in Comparative Politics*. Cambridge [England] ; New York: Cambridge University Press, 1998.

"The Shape of Things." *Nation* 1937, 253.

Thompson, E. P., and Great Britain. *Whigs and Hunters : The Origin of the Black Act*. London: Allen Lane, 1975.

Tilly, Charles. "From Interactions to Outcomes in Social Movements." In *How Social Movements Matter*, edited by Marco Giugni, Doug McAdam and Charles Tilly, xxxiii, 324 p. Minneapolis, Minn: University of Minnesota Press, 1999.

———. "Social Movements and National Politics." In *Statemaking and Social Movements : Essays in History and Theory*, edited by Charles Bright and Susan Friend Harding, 404 p. Ann Arbor: University of Michigan Press, 1984.

Turner, Ralph H., and Lewis M. Killian. *Collective Behavior*. Englewood Cliffs, N.J.,: Prentice-Hall, 1957.

Tushnet, Mark. "Plessy V. Ferguson in Libertarian Perspective." *Law and Philosophy* 16 (1997): 245.

Tushnet, Mark V. *Taking the Constitution Away from the Courts*. Princeton, N.J.: Princeton University Press, 1999.

United States. Supreme Court., Philip B. Kurland, and Gerhard Casper. "Landmark Briefs and Arguments of the Supreme Court of the United States: Constitutional Law." v. [Washington]: University Publications of America, 1975.

Villard, Oswald Garrison. *Fighting Years; Memoirs of a Liberal Editor*. New York,: Harcourt, 1939.

Waldron, Jeremy. *Law and Disagreement*. Oxford: Oxford University Press, 1999.

Warren, Charles. "A Bulwark to the State Police Power - the United States Supreme Court." *Columbia Law Review* 13 (1913): 667.

———. "The Progressiveness of the United States Supreme Court." *Columbia Law Review* 13 (1913): 294.

Washington, Booker T., Louis R. Harlan, and Raymond Smock. *The Booker T. Washington Papers*. 14 v. vols. Vol. 3. Urbana,: University of Illinois Press, 1972.

Weiss, Nancy J. *The National Urban League, 1910-1940*. New York,: Oxford University Press, 1974.

———. "The Negro and the New Freedom: Fighting Wilsonian Segregation." *Political Science Quarterly* 84 (1969): 61.

Wesley, Charles Harris. *Negro Labor in the United States, 1850-1925; a Study in American Economic History*. New York,: Vanguard press, 1927.

West, Robin. *Progressive Constitutionalism : Reconstructing the Fourteenth Amendment*, *Constitutional Conflicts*. Durham: Duke University Press, 1994.

———. *Re-Imagining Justice : Progressive Interpretations of Formal Equality, Rights, and the Rule of Law*, *Applied Legal Philosophy*. Aldershot, Hants, England ; Burlington, VT: Ashgate, 2003.

White, Morton Gabriel. *Social Thought in America; the Revolt against Formalism*. Boston,: Beacon Press, 1957.

Whittington, Keith E. *Constitutional Construction : Divided Powers and Constitutional Meaning*. Cambridge, Mass.: Harvard University Press, 1999.

———. "Presidential Challenges to Judicial Supremacy and the Politics of Constitutional Meaning." *Polity* 33 (2001): 365.

Wiebe, Robert H. *The Search for Order, 1877-1920*. [1st ed. New York,: Hill and Wang, 1967.

Wiecek, William M. *Liberty under Law: The Supreme Court in American Life*, *The American Moment*. Baltimore: Johns Hopkins University Press, 1988.

Wilentz, Sean. *Chants Democratic: New York City & the Rise of the American Working Class, 1788-1850*. New York: Oxford University Press, 1984.

Witte, Edwin Emil. *The Government in Labor Disputes*. 1st ed. New York, London,: McGraw-Hill Book Company, inc., 1932.

Wolfe, Allis Rosenberg. "Women, Consumerism, and the National Consumers' League in the Progressive Era." *Labor History* 16, no. 3 (1975): 378-92.

Woloch, Nancy. *Muller V. Oregon : A Brief History with Documents*, *Bedford Series in History and Culture*. Boston: Bedford Books of St. Martin's Press, 1996.

Wolters, Raymond. "Closed Shop and White Shop: The Negro Response to Collective Bargaining, 1933-1935." In *Black Labor in America*, edited by Milton Cantor, xii, 170 p. Westport, Conn.,: Negro Universities Press, 1969.

Woodward, C. Vann. *The Strange Career of Jim Crow*. New York,: Oxford University Press, 1955.

Zald, Mayer N., and John D. McCarthy. "Resource Mobilization and Social Movements: A Partial Theory." In *Social Movements in an Organizational Society: Collected Essays*, edited by Mayer N. Zald and John D. McCarthy, x, 435 p. New Brunswick, U.S.A.: Transaction Books, 1987.

———. "Social Movement Industries: Competition and Conflict among Smos." In *Social Movements in an Organizational Society: Collected Essays*, edited by Mayer N. Zald and John D. McCarthy, x, 435 p. New Brunswick, U.S.A.: Transaction Books, 1987.

Zemans, Frances K. "Legal Mobilization - the Neglected Role of the Law in the Political-System." *American Political Science Review* 77, no. 3 (1983): 690-703.

Zimmerman, Joan G. "The Jurisprudence of Equality - the Womens Minimum-Wage, the 1st Equal-Rights-Amendment, and Adkins V Childrens Hospital, 1905-1923." *Journal of American History* 78, no. 1 (1991): 188-225.

Vita

Allison Marie Martens was born in Boston, Massachusetts on April 16, 1971, the daughter of Ann Marie Martens and Robert Edmund Martens. After completing her work at Lamar High School, Arlington, Texas, in 1989, she entered Smith College in Northampton, Massachusetts. She received the degree of Bachelor of Arts from Smith College in May 1993. She next entered The University of Texas School of Law in Austin, Texas. She received the degree of Doctor of Jurisprudence from The University of Texas School of Law in May 1996. During the following years she was employed as a corporate trainer for a contractor with The United States Department of Justice in Washington, D.C. In September 2000, she entered The Graduate School at The University of Texas at Austin to study in the Department of Government. She received the degree of Master of Arts in May 2005.

Permanent address: 1915 Wrocklage Avenue #303, Louisville, Kentucky 40205

This dissertation was typed by the author.