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Courts, Constitutions, and Labor Politics in England and America: A Study of the Constitutive Power of Law

William E. Forbath

For most of the 19th century, the labor movements of England and America seemed to be developing along similar lines. Then, in the decades around the turn of the century, both movements were embroiled in a common battle over the political soul of trade unionism. In England, the champions of broad, class-based social and industrial reforms prevailed. In the United States, they lost, and the winners were the voluntarists, who held that labor should steer clear of politics as much as possible. This article suggests that the key reasons for the divergence lie not in the sociology of the working class or labor movement, so much as in the character of the state and polity and the lessons trade unionists drew from experiences in those arenas. The difference between judicial supremacy in the United States and parliamentary supremacy in England combined with other differences in the two nations' forms of government to produce sharply contrasting lessons about the value of state-based reforms.

The framers of the American Constitution keenly understood the ways in which laws and forms of government shape people's characters,

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interests, and capacities for collective action. Our modern habits of mind tend to run in the opposite direction. We more readily appreciate the ways that the interests of groups in society shape the law; we overlook how law shapes the very interests that play upon it. In legal and political arenas social groups clash and compromise with one another; we resist the idea that the arenas mold the groups themselves. Our resistance reflects intellectual traditions. Beginning in the 19th century, leading schools of thought came to regard the realm of the social and economic as determining, and the realm of law and politics as derivative. Although much criticized,[1] this viewpoint continues to predominate.

This article is an exercise in comparative history that challenges this view of law. By comparing organized labor's experiences with the legal order in the United States and England during the half-century from the 1870s through the 1920s, the article reveals the irreducible significance of America's constitutional scheme in shaping the character of the nation's labor movement and with it, the low fortunes of class-based labor or socialist politics in America.[2]

In fact, the framers hoped that the Constitution would shape the political capacities and aspirations of the working people of the new republic. As the *Federalist Papers* illustrate, the framers were haunted by the possibility that enduring political "factions" might emerge based on citizens' economic condition—above all, they feared factions based on propertylessness. With the expansion of "manufacturing interests," Madison and many other Federalists foresaw that industrial workers might become a voting majority in many states. United as a political "faction," workingmen might then try to use the tools of government to "despoil" the propertied. Through the Constitution the framers hoped to project a future polity free of any enduring faction or party of the working classes.

The neo-Federalist judges who dominated the state and federal courts of the late 19th and early 20th centuries shared this anxious hope.

1. Among the classic social theorists, Max Weber's work offers a powerful critique of such reductionism, although one that often goes unheeded, even by Weber's followers. See David Beetham, *Max Weber and the Theory of Modern Politics* (London: Allen & Unwin, 1974). There is also a recent sociological and political science literature criticizing the "sociological determinism" or "functionalism" of much of our thinking about politics and political development. See, e.g., P. Evans, D. Rueschemeyer, & T. Skocopol, eds., *Bringing the State Back In* (Cambridge: Cambridge University Press, 1985) ("Evans *et al.*, *Bringing the State Back In*"). Among legal academics, Robert Gordon has written a number of superb essays whose central themes are a critique of "legal functionalism" and an argument for the "constitutive power" of law in society. See especially Robert Gordon, "Critical Legal Histories," 36 *Stan. L. Rev.* 57 (1984); "Historicism in Legal Scholarship," 90 *Yale L.J.* 1017 (1981).

2. Thus this comparative essay offers a new approach to some of the problems I address in William E. Forbath, "The Shaping of the American Labor Movement," 102 *Harv. L. Rev.* 1109 (1989). For a modestly expanded version of that work see William E. Forbath, *Law and the Shaping of the American Labor Movement* (forthcoming, Cambridge: Harvard University Press, 1991) ("Forbath, *Law*").

Among them was William Howard Taft, who in addition to being the nation's portliest president, was a high court judge. A state, then a federal judge and ultimately tenth chief justice of the U.S. Supreme Court, Taft was the leading architect of American judicial activism in labor strife.[3] In the spring of 1894, as the U.S. Circuit Judge for the Sixth Circuit, Taft presided over some of the crucial proceedings in the judicial repression of the great Pullman Boycott.[4] He interrupted his court business to deliver the commencement address at the University of Michigan Law School. His subject was "The Right of Private Property," and he warned that that right was "at stake" in "the social conflict now at hand."[5]

By the conflict at hand Judge Taft did not mean merely the Pullman Boycott. He pointed to a broader attack on property, and especially on "corporate capital," in the nation's politics as well as in its industries. The chief aggressors, according to the judge, were "labor organizations . . . blinded by the new sense of social and political power which combination and organization have given them." Congressmen, state legislators, and local "peace officers" all encouraged "the workingman to think that property has few rights which, in his organized union, he is bound to respect." With the connivance of such pandering politicians, labor organizations under leaders like Debs were pressing the nation toward socialism.[6]

The present seemed bleak, but Judge Taft remained optimistic about the future. The current drift toward "state socialism" would be reversed. The main "burden of this conflict" was bound to "fall upon the courts," he declared, and the courts would prevail. He contrasted America's situation with England's. There "the assaults of socialism on the existing order" would surely prove more enduring than here. England had bequeathed to her colonies the common law, with its high regard for "security of property and contract." But England lacked our Constitution. In England "parliament has always been omnipotent." In the United States, courts had been able to insulate the rights of contract and property "much further . . . from the gusty and unthinking passions of temporary majorities."[7] In the United States these rights were "buttressed" by a

3. The best discussions of Taft's role are found in Avery, "Images of Violence in Labor Jurisprudence: The Regulation of Picketing and Boycotts, 1891-1921," 37 *Buffalo L. Rev.* 1 (1989); Hurvitz, "American Labor Law and the Doctrine of Entrepreneurial Property Rights: Boycotts, Courts, and Juridicial Reorientation," 8 *Indus. Rel. L. J.* 307 (1986).

4. See Avery, 37 *Buffalo L. Rev.* at 18-35.

5. William Howard Taft, "The Right of Private Property," 3 *Mich. L. Rev.* 215, 218-19. The metaphor was familiar from Madison's famous use of it in the *Federalist Papers* and from such opinions of Chief Justice Marshall's as *Fletcher v. Peck*. Throughout his writings and opinions, Judge Taft linked the Federalist legacy with the present contest between majoritarian politics and collective action on one hand and the "rights of property" on the other.

6. *Id.* at 218.

7. *Id.* at 233.

"written Constitution" against "anarchy, socialism and communism."[8] The American judiciary, in other words, had constitutionalized many of the basic common law rules of the industrial game, and, by doing so, removed them from the political arena. In time, Judge Taft assured his audience, the American labor movement would come to its senses. "[L]onger experience" with our "complicated [constitutional] form of government" and with staunch judges like himself would enlighten the unions as to the futility of radical politics.[9]

To our ears the judge's confidence sounds misplaced. To be sure, what Taft regarded as "socialism"—what we would call social democracy—became the creed of the 20th-century labor movement in England but not in America. But could that have had much to do with "our written constitution"? Don't Judge Taft's ideas simply betray his lack of modern sociological imagination?

No, I think not. We tend to look to "deeper" sociological and cultural forces for our theories of causation. However, by comparing American and English labor's experiences with their countries' legal orders during the decades around the turn of the century, I aim to show that Judge Taft was largely right. More broadly, this comparative discussion will suggest how profoundly courts and judge-made law have molded our political culture and identities.

Comparative history is said to work best when it begins with similar contexts and concurrent events in the histories of two societies and proceeds from such sameness to the exploration of revealing differences.[10] A comparative approach seems promising here because of the profound similarities in the contexts—both institutional and cultural—of labor activity in the two countries. First, the two legal systems had much in common. The courts of both countries worked in the same common law tradition. Indeed, the judiciaries of both nations launched almost simultaneous waves of attacks on strikes and boycotts, and they elaborated a common body of rules and precepts to restrain workers' collective action.

Second, the two nations' labor movements also had structures and traditions in common. For example, the two most important labor leaders in turn-of-the-century America, Samuel Gompers and John Mitchell, were English immigrants, as were hundreds of lesser-known union leaders. They brought with them ideas and models from English trade unions. In England, conversely, the pioneers of industrial unionism and "independent labor politics" drew inspiration from their American counterparts.

8. *Id.* at 218.

9. *Id.* at 233.

10. See Marc Bloch, "Toward a Comparative History of European Societies" *in* Frederic C. Lane & J. Riemersma, eds., *Enterprise and Secular Change: Readings in Economic History* (London: Allen & Unwin, 1953); William H. Sewell, Jr., "Marc Bloch and the Logic of Comparative History," 6 *Hist. & Theory* 208 (1967).

Third, when confronted with persistent judicial attacks, the labor movements on both sides of the Atlantic responded alike. Each sought legislation that would repeal hostile judge-made law and legalize peaceful industrial protest. They strove for a regime of strict laissez-faire—"collective laissez-faire"—regarding workers' concerted activities. In both countries, moreover, labor met with legislative success. Here, however, the fruits of comparison begin to appear. In England, where, as Judge Taft reminded us, there was no institution of judicial review, the courts grudgingly acquiesced in their demotion. Parliament had the final word, and labor's political victories were preserved. In the United States, by contrast, the courts swept aside one court-curbing statute after another.

The importance of this relatively subtle constitutional difference, and of the different results it generated in this case, emerges in the subsequent divergences in political strategy and vision on the part of the two movements. During this period, the late 19th and early 20th centuries, each movement was embroiled in a battle over the political soul of trade unionism. On one side were those who championed a program of broad class-based social and industrial reforms; on the other side were those who held that labor should steer clear of politics as much as possible, other than to reform the ground rules of private ordering. In England those who championed broad reformism prevailed; in the United States they lost. The comparison I am drawing suggests that the two movements' different experiences with courts and legislatures did much to shape these divergent outcomes.

I. THE FLAWS OF THE "DEEPER" EXPLANATIONS

The traditional account of American "exceptionalism" is familiar. Both in its general form and in specific comparisons of English and American experience, the account has been roughly this.[11] The unique social context of the United States produced a working class that lacked "class consciousness" and was instead individualistic. From the dawn of industrialization, American workers have been wedded to individualistic strategies for bettering their lot and have largely resisted efforts to improve their condition as members of a class. Even American trade unionists have always been "pragmatists," not "class conscious" but "job conscious."[12] Accordingly, socialist and class-based reform politics have been the province of intellectuals and agitators on the margins of political life.

The picture of the American working class on which this traditional

11. The following brief examination of the American "exceptionalism" debate distills the more detailed discussion and argument in Forbath, *Law* (cited in note 2).

12. The phrases are from Selig Perlman's classic, *A Theory of the Labor Movement* (New York: Macmillan, 1923).

account rests was first drawn in scholarly fashion in the 1910s and 1920s by the founders of American labor history, John Commons and the "Wisconsin School," and particularly Commons's brilliant student Selig Perlman. Commons, Perlman, and scores of other scholars after them sought to explain the phenomenon widely known as American "exceptionalism"—American workers' apparent deviance from other countries' working-class history—their supposed un-class consciousness. Some emphasized the privileged economic condition of American workers in the 19th and 20th centuries, their affluence and mobility. Others singled out the unique ethnic and religious divisions within the American working class. Generally, accounts of American "exceptionalism" have underscored both these factors and also pointed to the unusual pervasiveness of liberalism and individualism in American life, to America's tenacious two-party system and to its distinctively "weak" and fragmented liberal state.

As a result of the work of the "new labor historians," however, the received accounts will no longer do. Launched in the 1960s and by now a venerable tradition itself, the new labor history's detailed reexamination of 19th-century working-class life and politics has undermined the classic picture of the American working class as distinctively conservative, cautious, and individualistic. The new labor historians have rediscovered that the history of the workplace in industrializing America is one of recurring militancy and of class-based, as well as shop- and craft-based, collective action. Measured by scale, frequency, and duration of strikes, workers' disposition toward collective action was greater in the United States than in most European nations, and considerably greater than in England, during the late 19th and early 20th centuries.[13]

The new labor history also shows that the mutualism that American workers displayed at work often carried over into their communities and their political and cultural lives. As Sean Wilentz and others have argued, the political ideas, cultural values, and forms of associational life that characterized the 19th-century workers' movements in the United States, in England, and on the Continent, were far more similar than the traditional story allows.[14] Broad and radical reform politics characterized the mainstream views of the Gilded Age labor movement.[15] The more cautious

13. See Paul K. Edwards, *Strikes in the United States, 1881–1974*. (Oxford: Blackwell, 1981); David Montgomery, "Strikes in the Nineteenth Century," 4 *Soc. Sci. Hist.* 81 (1980); Jeremy Brecher, *Strike!* (San Francisco: Straight Arrow Books, 1972).

14. See Sean Wilentz, "Against Exceptionalism: Class Consciousness and the American Labor Movement, 1790–1920," 26 *Int. Lab. & Working-Class Hist.* 1, 3–4 (citing authorities) (1984); Aristide Zolberg, "How Many Exceptionalisms?" ("Zolberg, 'How Many Exceptionalisms?' ") *in* I. Katznelson & A. Zolberg, eds., *Working-Class Formation: Nineteenth-Century Patterns in Western Europe and the United States* 397–436 (Princeton, N.J.: Princeton University Press, 1986) ("Katznelson & Zolberg, *Working-Class Formation*").

15. See Forbath, 102 *Harv. L. Rev.* at 1121–23 (cited in note 2) and works cited therein.

"pure and simple" union philosophy of Samuel Gompers was also active but as a minority perspective in this era of American labor history. Most Gilded Age observers agreed that American unions were *more*, not less, wedded to political radicalism than their English counterparts.[16]

Thus the key question that the work of the new labor historians poses, but has yet to answer, is this: If late 19th-century American workers and trade unionists were so radical, then why, by the early 20th century, did most of them end up supporting unions and political parties that were more conservative than those embraced by their counterparts abroad? If the American labor movement was not born with a comparatively narrow interest group outlook or an inveterate bias against broad, positive uses of law and state power, then how did that outlook and bias become dominant in the labor movement by the early 1900s?

Of course, the old sociological explanations still beckon as potential answers to this newer question. But, again, the work of the new labor historians suggests that many of these social factors can no longer bear any great explanatory weight. For example, the view that American workers enjoyed unparalleled opportunities to rise into the middle class figures prominently in most traditional explanations for American "exceptionalism." One can imagine the same view incorporated into an account of the demise of class-based reform politics. However, the mobility story's empirical foundations have proven shaky. Sophisticated recent quantitative histories of the American working class have shown that the bulk of America's working class was no more mobile (into the middle class) than England's. Nor did any significant portion of the 19th-century industrial working class actually ever "go West" from urban shops and factories into farming, as traditional accounts have assumed. Even mobility *within* the American working class (from unskilled to skilled work) was far more varied and uneven than was thought.[17] Moreover, it now seems clear that the typical forms of social mobility for 19th-century American workers, and, more important, their typical *aspirations* for it, were not incompatible with seeking material gains for themselves *as workers*—rather than as the individualistic incipient entrepreneurs that the mobility story always describes.[18] Thus the mobility story probably must relinquish its place as a

16. See Leon Fink, *Workingmen's Democracy: The Knights of Labor and American Politics* 229 (Urbana: University of Illinois Press, 1983) ("Fink, *Workingmen's Democracy*").

17. See Peter Knights, *The Plain People of Boston, 1830–1860*, 100–101 (1971); Peter R. Shergold, *Working-Class Life: The "American Standard" in Comparative Perspective* (Pittsburgh: University of Pittsburgh Press, 1982); James Holt, "Trade Unionism in the British and U.S. Steel Industries, 1880–1914: A Comparative Study," 18 *Lab. Hist.* 5 (1977).

18. See James Henretta, "The Study of Social Mobility: Ideological Assumptions and Conceptual Biases," 18 *Lab Hist.* 165 (1977); Howard P. Chudacoff, "Success and Security: The Meaning of Social Mobility in America" *in* Stanley L. Kutler et al., eds., *The Promise of American History: Progress and Prospects* (10 *Reviews in Am. Hist.*) (Baltimore: Johns Hopkins University Press, 1982); Margo Conk, "Social Mobility in Historical Perspective," 3 *Marxist Persp.* 52 (1978).

key factor accounting for the peculiarities of American labor politics.

Similarly, many scholars continue to assume that unionism was far less widespread among American than English or European workers around the turn of the century. On this assumption, some historians have argued that the chief reason that most of the labor movement abandoned broad reform ambitions lay in the fact that organized labor in the United States was a distinctly minority movement. The difficulty with this view lies, again, in its shaky empirical assumptions. Late 19th- and early 20th-century unions claimed a greater, not a lesser, portion of the industrial labor force in the United States than in some European countries well known for their radical labor politics.

France is a good example. In the first decade of the new century, unions claimed 15% of the manufacturing labor force in France, while they claimed almost 25% in the United States.[19] Apparently, its status as a "minority movement," its slightness in relation to the whole working class, did not deter the French workers' movement from adopting an ambitious political agenda.[20]

England was doubtless the nation with the highest proportion of unionized industrial workers during this era. Yet even England's unions, according to one comparative study, enjoyed "not such different organizational strength" from America's as is often assumed; rather "the percentages of the labor force unionized were comparable" during this period.[21] In the early years of the century when the American labor movement claimed 20–25% of industrial workers, the English movement claimed 30–35% of that country's manufacturing labor force. It too was a "minority movement." Moreover, American trade unionists formed most of their political goals and strategies, and learned many of their political lessons, in state and local arenas. It is significant, then, that levels of unionization in the major industrial states were substantially higher than levels in the nation as a whole. When one compares union density in Massachusetts or Illinois in the 1890–1910s with union density in England, the American

19. See Zolberg, "How Many Exceptionalisms?" at 398, 426.

20. See *id.* at 418–25. See also Bernard H. Moss, *The Origins of the French Labor Movement: The Socialism of Skilled Workers, 1830–1914* (Berkeley: University of California Press 1976); Joan Scott, "Social History and the History of Socialism," 111 *Le Mouvement Social* 145 (1979).

It is worth noting that like the United States, France retained a significant portion of agricultural and other nonindustrial workers throughout the 19th and early 20th centuries; it never became an industrial society in the same degree as England. The percentage of the French labor force employed in the secondary or industrial sector in 1910 was 33%, roughly the same as the American figure of 32%. Thus neither slightness as a proportion of the entire industrial working class nor slightness as a proportion of the overall population prompted the French labor movement to adopt a minimalist politics à la Gompers and the AFL.

21. Ann Orloff & Theda Skocpol, " 'Why Not Equal Protection?' Explaining the Politics of Public Social Spending in Britain, 1900–1911, and the United States, 1880s–1920," 49 *Am. Soc. Rev.* 726 (1984).

figures emerge as much more similar to the English ones.[22] For these reasons, union density, like workers' mobility, cannot bear any great explanatory burden in accounting for why most American trade unionists diverged from the political trail they had begun to blaze with their English and European counterparts.[23]

Ethnic division is the other principal factor in traditional accounts. In any revised account, ethnic and racial cleavages will surely remain central. However, as Wilentz observes in surveying the field, "the familiar arguments that American exceptionalism arose from some unique divisions within the American working class are no longer as compelling as they once were." Indeed, the new labor history demonstrates that in many contexts "ethnicity could be more of a reinforcement to class solidarity than a distraction from class antagonisms."[24]

Thus, most of the key reasons for the divergence between the political paths of the American and English labor movements must be located elsewhere, not in the character of the working class or labor movement, perhaps, so much as in the character of the state and polity; less, that is, in labor and more in the arenas in which labor made and remade its visions and strategies. Perhaps, then, we should return to Judge Taft's quaint emphasis on courts and constitutions.[25]

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22. See *id.* at 736.

23. If England was not dramatically different from the United States in regard to union density, it was unique along another, related dimension: the comparative vastness of its manual working classes as well as the relative slightness of its agricultural population. In 1910 industrial workers constituted 52% of England's and only 31% of America's population. See Zolberg, "How Many Exceptionalisms?" at 438 (cited in note 14). Moreover, the political lightness of the American working class, weighed against the rural vote or the whole voting population, was heightened by the nation's party and electoral systems.

24. See Wilentz, 26 *Int. Lab. & Working-Class Hist.* at 5 (cited in note 14); Eric Foner, "Class, Ethnicity and Radicalism in the Gilded Age," 2 *Marxist Perspectives* 6 (1978); Herbert Gutman, *Work, Culture and Society in Industrializing America* 234–60 (New York: Vintage Books, 1976); Victor Greene, *The Slavic Community on Strike: Immigrant Labour in Pennsylvania Anthracite* 207–15 (South Bend, Ind.: University of Notre Dame Press, 1968); Joshua Freeman, "Catholics, Communists and Republicans: Irish Workers and the Organization of Transport Workers Union," *in* Michael H. Frisch & Daniel J. Walkowitz, eds., *Working-Class America: Essays on Labor, Community and American Society* (Urbana: University of Illinois Press, 1983).

25. Recent works by two labor historians and a political scientist have made approaches much like mine to the origins of American labor voluntarism, emphasizing the role of law, state, and polity and drawing attention to the English experience. I have found all of them helpful. See Leon Fink, "Labor, Liberty, and the Law: Trade Unionism and the Problem of the American Constitutional Order," 74 *J. Am. Hist.* 904 (1987); Richard Oestreicher, "Urban Working-Class Political Behavior and Theories of American Electoral Politics, 1870–1940," 74 *J. Am. Hist.* 1257 (1988); Victoria Hattam, "Unions and Politics: The Courts and American Labor, 1806–1896" (Ph.D. diss., Massachusetts Institute of Technology, 1987) ("Hattam, 'Unions and Politics' "); *id.*, "Economic Visions and Political Strategies: American Labor and the State, 1865–1896," 4 *Stud. Am. Pol. Dev.* 82 (1990). In particular, Professor Hattam's work and mine have important themes in common. I discuss her work *infra* in notes 73, 74 and 80.

II. THE TWO FORMS OF GOVERNMENT

The powers it conferred on the courts were a critical—perhaps *the* critical—politics-shaping aspect of the American Constitution. The courts, however, did not operate in a vacuum. As Taft insisted, the American Constitution's safeguards against "socialism" consisted not only in the unique role of the courts but in the entire "complicated form of government."[26] Thus we cannot fully assess Taft's prophecy about the role of the American Constitution in 20th-century working-class history without considering England's and America's entire forms of government. In addition to the powers of the judiciary, three aspects of the 19th-century American state and polity seem central: federalism, the nature and role of political parties, and the absence of an administrative state elite. Along each of these three dimensions the English state and polity differed sharply, with important implications for the interplay of state and class formation. For now, I will simply sketch these three other significant differences. I will then turn to comparing labor's experiences with the courts in the two countries. There we will see these other differences in play, complementing and reinforcing the difference between judicial and parliamentary supremacy.

The framers hoped that the far-flung and federal nature of their new republic would help avoid the formation of a class-based political "faction" of have-nots in the national arena.[27] Their hope was realized.

By the 1830s the United States had become the world's first nation with a mass franchise: by that decade, virtually all white adult males enjoyed the vote. Thus throughout the era of industrialization propertyless male industrial workers were voters. Yet, as Ira Katznelson has recently reminded us, the "diffuse federal organizational structure of the United States took much of the charge out of the issue of franchise extension, for there was no unitary state to defend or transform."[28] American labor reformers had to contend with multiple and competing tiers of policymaking authority. This structural exigency raised the costs and reduced the efficacy of labor reforms.[29] So doing, it strengthened the case for voluntarism.

The English state, by contrast, was unitary. During the 19th century,

26. Taft, 3 *Mich. L. Rev.* at 218 (cited in note 3).

27. See *The Federalist* No. 10 (James Madison), in Clinton Rossiter, ed., *The Federalist Papers* (New York: New American Library, 1961).

28. See Ira Katznelson, "Working-Class Formation and the State," *in* Evans et al., *Bringing the State Back In* 273 (cited in note 1).

29. See John R. Commons & John B. Andrews, *Principles of Labor Legislation* 48–63 (New York: Harper & Bros., 1936); Florence Kelley, *Some Ethical Gains Through Legislation* (New York: Macmillan, 1921). For a compelling account of some *radical* potentialities of American federalism, see Richard M. Valelly, *Radicalism in the States: The Minnesota Farmer-Labor Party and the American Political Economy* (Chicago: University of Chicago Press, 1989).

as England became an industrial nation, the making of public policies towards industrial workers happened increasingly at the center of government, as did the administration of those policies.[30] The structure of government enabled the country's dispersed and localized unions and labor reform associations to meld their political claims.

Just at the United States was the first nation with a mass franchise, so the 19th-century American political party was the world's first mass-based party. Yet, the ties it forged with worker constituents were often intensely local and particularistic. As working people were incorporated into the polity, their party loyalties generally hinged on local patronage and neighborhood, ethnic, or religious bonds—not on the broader bonds of class.[31] Indeed, during the decades when this institutional matrix emerged and was consolidated, the industrial working class had barely been born. While not immutable, these non-class-based, particularistic and patronage ties to the two old parties had staying power.[32]

In 1894 the head of the Tailors' Union, John Lennon, argued this way against the prospects of independent labor politics: "We have in this country conditions that do not exist in Great Britain. We have the 'spoils' system which is something almost unknown in Great Britain and on account of it we cannot afford to try at this time to start a political party as an adjunct with their unions."[33]

"Spoils" or local patronage was not a currency available to England's political parties by the time that country's male workers were fully enfranchised. In the mid-1870s England undertook major civil service reforms. Therefore, the English parties could not adopt local patronage as a means of drawing in the new mass of working-class voters.[34] Accordingly,

30. The Public Health, Factory and Mine Acts passed from mid-century onward engendered a dramatic growth of England's central government. See Gillian Sutherland, *Studies in the Growth of Nineteenth-Century Government* (London: Routledge & Kegan Paul, 1972); Pat Thane, "The Working Class and State Welfare in Britain," 27 *Hist. J.* 877.

31. See Martin Shefter, "Trade Unions and Political Machines: The Organization and Disorganization of the American Working Class" ("Shefter, 'Trade Unions' ") *in* Katznelson & Zolberg, *Working-Class Formation* 197–276 (cited in note 14). For a contrasting account that underscores the salience of class-based issues in the development of the urban political machine, see Amy Bridges, *A City in the Republic: Antebellum New York and the Origins of Machine Politics* (New York: Cambridge University Press, 1984).

32. See Paul Kleppner, *The Third Electoral System*, 1853–1892 (Chapel Hill: University of North Carolina Press, 1979); Paul Kleppner, *The Cross of Culture: A Social Analysis of Midwestern Politics, 1850–1900* (New York: Free Press, 1970); Oestreicher, 74 *J. Am. Hist.*

33. *A Verbatum* [sic] *Report of the Discussion on the Political Programme at the Denver Convention of the American Federation of Labor, December 14, 15, 1894*, at 8 (New York: Freytag Press, 1895) ("*Verbatum Report*").

34. This argument, about the relative timing of mass suffrage on one hand and civil service reform on the other, draws on Martin Shefter, "Party Bureaucracy and Political Change in the United States," *in* Louis Maisel & Joseph Cooper, eds., *Political Parties, Development and Decay* (Beverly Hills, Cal.: Sage Publications, 1978); *id.*, "Party Patronage: Germany, England and Italy," 7 *Politics & Soc'y* 403 (1977). See also Orloff & Skocpol, 49 *Am. Soc. Rev.* at 726 (cited in note 21).

England's Liberal and Conservative parties relied on class-based programmatic appeals in competing for workers' votes in a way that the Democrats and Republicans in the United States did not.[35] Like the unity structure of the English state, this leaning toward programmatic reforms strengthened the hand of the English trade unionists who championed broad reformism.

Late 19th-century England's professional civil service did more than cut off the possibility of patronage-based "machine" politics as a way of mobilizing working-class voters. It also supplied the socialists and progressives in the English labor movement with valuable allies in the corridors of state power. The upper tiers of the professional civil service constituted a powerful *nonjudicial* state elite—a substantial group of high-placed policymakers with institutional autonomy, permanence of office, and interests as well as a tradition of their own. This alternative, and often reform-minded, state elite vied with the courts for primacy in governing industrial affairs and provided significant support for the English trade unionists who championed a more statist politics. Those who were drawn to public administration of industrial affairs were often reformist by inclination; they also had a material interest in promoting new welfare-state measures, since such measures would expand the very realms of government over which they presided. As we shall see, many of the reformers among the administrative elite worked hard to *persuade* often reluctant English unions to champion their reform proposals; in this respect they did not merely lend credibility to, but actually helped create, a more statist outlook among English trade unionists.[36]

In contrast, institutional space did not exist in the 19th- or early 20th-century American state for an organizationally autonomous administrative state elite. There was, of course, no lack of reform-minded, university-educated professionals in the United States who were ready and eager to do the same policymaking and state-building work undertaken by their English counterparts.[37] In a handful of states—and across a narrower

35. See Shefter, "Party Bureaucracy and Political Change"; Morton Keller, "Anglo-American Politics, 1900–1930, in Anglo-American Perspective: A Case Study in Comparative History," 22 *Comp. Stud. Soc. & Hist.* 458 (1980).

36. See Bentley B. Gilbert, *The Evolution of National Insurance in Great Britain: The Origins of the Welfare State* chs. 5–7 (London: Michael Joseph, 1966) ("Gilbert, *National Insurance*"); Hugh Heclo, *Modern Social Politics in Britain and Sweden* 84–90 (New Haven, Conn.: Yale University Press 1974) ("Heclo, *Modern Social Politics*"); Orloff & Skocpol, 49 *Am. Soc. Rev.* at 737.

37. Nineteenth- and early twentieth-century American reformers were keenly attentive to the work and examples of their English counterparts. See, e.g., Elizabeth Baker, *Protective Labor Legislation, with Special Reference to Women in the State of New York* 204, 334–50 (New York: Columbia University Studies in the Social Sciences, 1925) ("Baker, *Protective Labor Legislation*"); John B. Andrews, *Labor Laws in Action* 142–54 (New York: Harper & Bros., 1938). On the topic of English social reformers' influence on American colleagues, see Arthur Mann, "British Social Thought and American Reformers of the Progressive Era," 42 *Miss. Valley Hist. Rev.* 672 (1956); Kenneth O. Morgan, "The Future at Work: Anglo-Ameri-

range of industrial issues—they managed to do so. But administrative posts did not exist in the United States with power and influence comparable to England's high officialdom. The state and federal constitutions had been designed to frustrate those who would centralize and expand executive policymaking authority and administrative capacities, encouraging instead the emergence of what political scientist Steven Skowronek has called a "state of courts and parties."[38]

Late 19th- and early 20th-century America saw an unholy but highly successful alliance between the judicial elite and party bosses against civil service reformers and would-be welfare state builders. The party politicians saw the reformers' efforts to create a professionalized civil service and a centralized welfare state as threats to the localized, patronage forms of government on which their power rested. To the courts the reformers' vision of the modern administrative agency undermined the separation of powers as well as judicial prerogatives. The concluded that it lay outside the constitutional pale.[39]

The victories of this alliance in upholding the old scheme of government deprived the era's labor movement of the kinds of powerful state-based allies enjoyed by their English comrades. The lack of such allies, in turn, made broad reform politics less availing in the United States and rendered the voluntarist vision a more compelling one.

The reformers' defeats also deprived the labor movement of a corps of factory and mine inspectors and labor law administrators comparable to England's. Already in the 1860s England's factory inspectors had earned the admiration of no less a critic than Karl Marx.[40] By the 1890s, England had roughly 140 full-time factory and mine inspectors covering roughly 190,000 work places.[41] In sharp contrast to the United States, their jobs were insulated from changes in political administration; their occupation had become a reformist profession, with its own schools and traditions.[42]

At the turn of the century most labor laws in most American states

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can Progressivism, 1870–1917," *in* Harry C. Allen & Roger Thompson, eds., *Contrast and Connection: Bicentennial Essays in Anglo-American History* (Columbus: Ohio University Press, 1976).

38. See Stephen Skowronek, *Building a New American State: The Expansion of National Administrative Capacities* 47–55 (Cambridge: Cambridge University Press, 1982); Forbath, 102 *Harv. L. Rev.* at 1126–30 (cited in note 2).

39. See Skowronek, *Building a New American State* 150–54.

40. See Karl I. Marx, *Capital* 401, 609 (Ben Fowkes trans., New York: Vintage Books, 1977).

41. May Edith Abraham & A. Llewelyn Davies, *The Law Relating to Factories and Workshops, 1896,* 12, 5th ed. (London: Eyre & Spottiswoode, 1902) ("Abraham & Davies, *Law on Factories*"); *Report of the Chief Inspector of Factories and Workshops, 1896,* 323–28 (London: HMSO, 1896).

42. For a knowledgeable American observer's account of the differences between English and American factory inspectors, see George M. Price, "Administration of Labor Laws and Factory Inspection in Certain European Countries," 142 *Bull. U.S. Bureau of Labor Statistics* 24–25, 81–82 (Washington: Government Printing Office, 1914).

remained in what a classic study calls "the pre-enforcement stage"; they either were hortatory and had no penalty provisions or, at best, required enforcement by private civil actions rather than by state officials. More advanced states relied on the affected employee or his union to try to prevail on the ordinary state attorneys to prosecute their complaints.[43] Seventeen states were in the "enforcement stage" at the turn of the century; they had factory and mine inspectors. There were 114 inspectors in the nation, covering some 513,000 workplaces, and many of these inspectors were merely policemen on special assignment; many others were less than full-time inspectors.[44]

Small wonder, then, that in turn-of-the-century America, English immigrant miners and factory workers could be heard bemoaning the character of America's mine and factory inspectorates.[45] In England, as one transplanted miner explained to the federal Industrial Commission,

> the inspector's department is one of the institutions of the State. . . . The law is here [in the U.S.] but it don't amount to anything. What can [the American mine inspector] do? He comes once a year, and he has no power anyway. In England I know they could not be much better. So far as the sanitary and ventilation is concerned, they must attend to it, and that is all there is about it.[46]

"The trouble with the factory inspection departments of the different states is just this," a London-born leader of the Garment Workers told the Commission. "These departments are not in the hands of men who are interested in reform work. . . . In England these positions are held by men who have made a study of these conditions, but here they are appointed according to politics."[47]

Even in the most progressive states, factory and mine inspectors often were scarce in comparison to England and lacked many of their English

43. Elizabeth Brandeis, "Labor Legislation," in E. Brandeis et al., eds., 3 *History of Labor in the United States* 626–32 (New York: Macmillan, 1935) ("Brandeis, 'Labor Legislation' ").

44. See Susan Kingsbury, *Labor Laws and Their Enforcement* 233–35 (New York: Arno Press, 1971 (orig. ed. 1911)) ("Kingsbury, *Labor Laws*").

45. See, e.g, United States Industrial Commission (USIC), 12 *Report of the Industrial Commission on the Relations and Conditions of Capital and Labor Employed in the Mining Industry* 201–05 (Washington: Government Printing Office, 1901) (testimony of George Clark, miner-member of the Western Federation of Miners, Louisville, Colorado, July 17, 1899); see also *id.* at 56 (testimony of John Mitchell, President, United Mineworkers of America, Washington, D.C., 11 April 1899). For trade unionists in other trades comparing the factory laws and inspectorates of the U.S. with those of England see, e.g., USIC, 4 *Report of the Industrial Commission on the Relations and Conditions of Capital and Labor Employed in Manufactures and General Business* 198 (Washington: Government Printing Office, 1901) (testimony of Henry White); see also *id.* at 112–13 (testimony of George E. McNeill).

46. USIC, 12 *Report* 201–2.

47. USIC, 4 *Report* 198.

colleagues' enforcement and rulemaking powers; "the courts remained the fundamental agency for securing compliance."[48] Accordingly, U.S. courts held greater sway over the interpretation, administration, and enforcement of labor laws, and they tended to nullify by hostile construction many of the reforms that they didn't strike down.[49] This too helped make the "progressive" vision of state-based industrial reform seem unavailing to many American trade unionists.

These, then, were the contrasting state structures and traditions within which judicial supremacy operated upon labor's political choices in America and parliamentary supremacy swayed labor's politics in England. I turn now to those developments.[50]

III. THE AMERICAN STORY

The mainstream of the American labor movement in the late 19th century hewed to the idea that workers could use the ballot to transform the face of industry. Largest of Gilded Age (1880s–90s) labor organizations was the Knights of Labor; the Knights melded trade union and political endeavors, appealing to the "laboring classes" as both producers and citizens. The organization reached out from a base among coalminers and artisans to a constituency that embraced the burgeoning mass of unskilled factory workers. In addition to waging strikes and boycotts, the Knights created labor parties and ran and elected candidates to local and state government. Unifying all these activities was the project of preparing the "toiling classes" for self-rule. Workers read traditional republican principles to mean that in an industrial society the very survival of republican government demanded using governmental power to quell the "tyranny" of capital. Toppling "corporate tyranny" entailed a host of legislative reforms: hours and other workplace regulations, the abolition of private banking, public funding for worker-owned industrial cooperatives and the

48. See Brandeis, "Labor Legislation" at 633. On the size, powers, and responsibilities of state factory inspectorates see Baker, *Protective Labor Legislation* 281–84 (discussing New York's inspectorate); USIC, 14 *Report of the Industrial Commission on the Relations and Conditions of Capital and Labor Employed in Manufactures and General Business* 251 (Washington: Government Printing Office, 1901) (again, on New York's inspectorate); Pennsylvania Department of Factory Inspection, *Annual Reports* (Harrisburg, 1890–1900); James L. Barnard, *Factory Legislation in Pennsylvania: Its History and Administration* (Philadelphia: University of Pennsylvania, 1907); Illinois Department of Factory Inspection, *Reports* (Springfield, 1894–1900); Earl Beckner, *A History of Illinois Labor Legislation* (Chicago: University of Chicago Press, 1929); William R. Brock, *Investigation and Responsibility: Public Responsibility in the U.S., 1865–1900,* 148–84 (Cambridge: Cambridge University Press, 1984). On England's inspectorate see H.A. Mess, *Factory Legislation and Its Administration* (1926).

49. See Forbath, 102 *Harv. L. Rev.* at 1148 n.168 (cited in note 2).

50. The story that follows of American labor's experiences with the nation's legal order is one that I have told elsewhere in great detail. See Forbath, 102 *Harv. L. Rev.* at 1109–1256; see also Forbath, *Law* (cited in note 2).

nationalization of monopolies.[51]

The American Federation of Labor also emerged during the Gilded Age. Many of its founders were trade union leaders like Samuel Gompers who shunned the ranging reform ambitions of the Knights; they also diverged from the Knights by insisting that unions were best built on a craft basis rather than embracing all who toiled in a given industry. Gompers was the preeminent spokesman for this somewhat narrower trade union philosophy. During this era, however, the outlook associated with Gompers was less distinct than it later became from the competing vision embodied in the Knights. Indeed, a great many AFL unions and union activists in this period shared the Knights' vision of inclusive unionism, their broad reform ambitions, and their faith in lawmaking and the ballot.[52]

By the turn of the century, however, Gompers' outlook had become the predominant one. The Knights of Labor was defunct, and the AFL was the nation's leading labor organization. Government bludgeoning of one major strike after another had left the AFL leadership wary of broad-based sympathetic actions. Soon the AFL would also begin to assail many varieties of labor laws and social and industrial "reform by legislation"; the republican rights talk of the Gilded Age movement would give way to a liberal, laissez-faire language of protest and reform.

This new antistatist labor outlook did not preclude involvement in national as well as state politics; to the contrary, the early 20th-century AFL became increasingly involved in electioneering and lobbying. But its initiatives focused on *voluntarist* goals—above all, on halting hostile judicial interventions in labor disputes.[53] Increasingly, the organization's dominant unions set their faces against the broader, class-based reform politics and inclusive unionism that had marked the earlier era.

Judicial Review of Labor Reforms

What part did the courts play in these developments? In spite of the obstacles that we have canvassed—the federated form of American government, the patronage and particularistic cast of political parties, the absence of a strong administrative state apparatus and elite—the Gilded Age labor movement's successes in electing candidates and passing reforms meant that in some late 19th-century industrial states, the laws regulating

51. For more detailed accounts of the outlook and activities of the Knights see Fink, *Workingmen's Democracy* (cited in note 16); William Forbath, "The Ambiguities of Free Labor: Labor and the Law in the Gilded Age," 1985 *Wis. L. Rev.* 767; *id.*, 102 *Harv. L. Rev.* at 1120–22 and works cited therein.

52. See Forbath, 102 *Harv. L. Rev.* at 1123.

53. See *id.* at 1123–25.

hours and workplace conditions and enlarging workers' freedom of collective action compared favorably with England's.[54] These successes seemed to vindicate the view that politics and legislation were powerful engines of industrial reform.

Once legislative reforms were passed, however, it was the courts that determined how they would fare; and during the 1880s and 1890s the state and federal courts were more likely than not to strike down the very laws that labor sought most avidly.[55] By the turn of the century, judges had voided roughly 60 labor laws.[56] These constitutional cases figured prominently in the battles that raged through the 1890s between the champions of broad and narrow labor politics. One such debate occurred at the 1894 AFL convention,[57] concerning whether the AFL would embrace "independent labor politics" and adopt a "political programme," which had been proposed by some of the Federation's socialist unions.[58] The program included the goal of a legal eight-hour work day. Speaking to that point, Adolph Strasser of the Cigarmakers declared:

> There is one fact that can't be overlooked. You can't pass an eight hour day without changing the Constitution of the United States and the Constitution of every state in the Union. . . . I am opposed to wasting our time declaring for legislation being enacted for a time after we are all dead.[59]

Henry Lloyd, a widely known journalist, a key figure in the Labor-Populist alliance, and a champion of broad labor reform rose to respond:

> We are told it is unconstitutional. . . . I sometimes wish I had been born in any other country than in the United States. I am sick and tired of listening to lawyers and laboring men like Mr. Strasser declaring everything we ask unconstitutional.[60]

Lloyd went on to describe the depth of support for a legal eight-hour

54. Compare Abraham & Davies, *Law on Factories* (cited in note 41) (England) with Kingsbury, *Labor Laws* (cited in note 44) (Massachusetts); USIC, 5 *Report of the Industrial Commission on Labor Legislation* 356–421 (Washington: Government Printing Office, 1900) (New York, Pennsylvania).

55. See Forbath, 102 *Harv. L. Rev.* at 1133 n.78, 1237–45.

56. *Id.*

57. See *Verbatum Report* (cited in note 33).

58. In a plebiscite vote in 1894, a majority of the AFL's constituent unions endorsed the program. It met ultimate defeat at the 1894 convention, although most accounts agree that the defeat resulted from the "parliamentary sleight-of-hand" of Gompers and other Federation leaders. See Shefter, "Trade Unions" at 257 (cited in note 31); see also Joseph G. Rayback, *A History of American Labor* 198 (New York: Free Press, 1959); John R. Commons et al., 2 *History of Labour in the United States* 511–13 (New York: Macmillan, 1918).

59. *Verbatum Report* 19–20.

60. *Id.* at 21.

day at a recent labor conference that he had attended in England. Unimpressed, Strasser retorted, "Is it not a fact than in England there is no constitutional provision to stymie an eight-hour law?"[61] Then Strasser pointed proudly to the craft unions like his own Cigarmakers that had gained the eight-hour day "by themselves . . . pass[ing] and enforc[ing] [their own] law without the government."[62]

Invalidated labor laws were both powerful evidence and a potent symbol of the recalcitrance of the American state. The courts seemed so formidable partly because judicial review of labor laws was bound up with a broader judicial power. We have noted the extent to which courts controlled the interpretation, administration, and enforcement of reform legislation. Not only could judges strike down labor laws, they could also nullify them by hostile construction. And nullify they did. Often, they treated labor legislation as ill-considered tinkering with a governmental domain that belonged by right to the judiciary and the common law.[63]

The rise of judicial review of reform legislation occurred at a key moment of collective decision making in labor's political history. During this moment the courts helped turn minimalist politics from a minority outlook of cautious craft unionists like Strasser and Gompers into what seemed the surest path to most of the labor movement, a movement that would come increasingly to be dominated by craft unionists like themselves.

Injunctions

The thrust of a Gomper's or Strasser's voluntarist outlook was this. Labor should improve its lot through organization and collective bargaining. The less it relied on the state and the more it attained in the private realm of market relations, the better.

But the courts did not simply leave alone this private realm of market relations. First, of course, it was the common law that defined the metes and bounds of workers' marketplace conduct. In the early 19th century, the legal bounds on workers' "combinations" and strikes were more generous in the United States than elsewhere.[64] Nonetheless, the antebellum American courts set sharp limits on what counted as a legally tolerable strike or as allowable strike activities, and these limits changed remarkably

61. *Id.*
62. *Id.*
63. See Forbath, 102 *Harv. L. Rev.* at 1134–42, 1220–27; USIC, *Final Report* 38.
64. During the first three decades of the 19th century, the courts and the laws of England, France, and Germany all flatly condemned strikes or combinations to raise wages or contest working conditions as criminal combinations or conspiracies. See Bob Hepple, *The Making of Labour Law in Europe: A Comparative Study of Nine Countries up to 1945* (London: Mansell, 1986).

little over the course of the 19th century.[65] Moreover the application of these legal restraints grew dramatically harsher and more pervasive. Beginning in the 1880s, the courts vastly enlarged their role in regulating and policing industrial conflict. Also at this time, the characteristic form of legal intervention changed, and the labor injunction was born. By a conservative reckoning, at least 4,300 injunctions issued between 1880 and 1930. This figure represents only a small fraction of the total number of strikes in those decades, but injunctions issued against a sizable proportion of the larger strikes and a significant number of the sympathetic and secondary actions. During the 1890s, for example, courts enjoined at least 15% of recorded sympathy strikes. That percentage rose to 25% in the next decade, and by the 1920s 46% of all sympathy strikes were greeted by antistrike decrees.[66] As injunctions multiplied, the language of judge-made law became pervasive in industrial strife. Anti-union employers and state officials constantly spoke a court-minted language of rights and wrongs. Again and again trade unionists attributed the repression of strikes and protest to judge-made law—even when no injunction was in sight.[67]

As the legal repression of labor protest and collective action intensified, the mainstream of the labor movement relinquished positive regulation or reconstruction of industry as its central political project. The prime object of labor's energies became simply escaping the burdens of semi-outlawry. Thus the AFL strove to legalize all the peaceful forms of collective action that stood under judicial ban. It contested judge-made law everywhere: in the courts, of course, but equally in the legislatures and in the public sphere. In the course of this decades-long campaign, trade unionists began to speak and think more and more in the language of the law, abandoning a republican vocabulary of protest and reform for a liberal, law-inspired language of rights.[68] They no longer proposed to use legislation to quell the "tyranny" of capital. "Labor," they would declare, "asks no favors from the State. It wants to be let alone and to be allowed to exercise its rights."[69]

The protracted nature of this struggle to end legal repression returns us to the significance of the courts' power to hobble labor legislation.

65. See Forbath, 102 *Harv. L. Rev.* at 1448–76. By the early 20th century, both England and France had instituted broadly tolerant legal regimes, while the law of strikes and boycotts in the United States remained virtually unaltered.

66. *Id.* at 1448–80, 1249–53.

67. *Id.* at 1185–95, 1201–2.

68. *Id.* at 1202–14.

69. *Id.* at 1205 (quoting Gompers). From the 1890s onward until the New Deal, a remarkable number of trade unionists immersed themselves in equitable, common law and constitutional doctrine and created an eloquent labor version of liberal legal rights rhetoric and constitutional laissez-faire. They turned out thousands of editorials, speeches, and pamphlets assailing "government by injunction," and forging, in the process, an alternative reading of "liberty of contract" and the First and Thirteenth Amendments. See *id.* at 1208–14.

From the 1890s through the 1920s, labor prevailed on legislatures to pass many "anti-injunction statutes" loosening the judge-made restraints on collective action; the states and Congress passed roughly 40 court-curbing reforms during these decades—reversing substantive labor law doctrines, instituting procedural changes, and narrowing and, in some instances, flatly repealing equity jurisdiction over labor.[70] At least 25 of these statutes were voided on constitutional grounds, and most of those not struck down were vitiated by narrow construction.[71] Until the national emergency of the Great Depression and the constitutional revolution waged by FDR and the New Dealers,[72] courts had both the power and the will to trump these measures. So, during these four formative decades, as the number of antistrike decrees multiplied and the burdens of outlawry persisted, the AFL's political energies were riveted on gaining this indispensable—but negative, laissez-faireist—reform, and the AFL's voluntarist perspective hardened.[73]

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70. See Felix Frankfurter & Nathan Greene, *The Labor Injunction* 136–98 (New York: Macmillan, 1930); see also Forbath, 102 *Harv. L. Rev.* at 1220–22.

71. See *id.*

72. See the superb account in Bruce Ackerman, "Constitutional Politics, Constitutional Law," 99 *Yale L.J.* 453 (1990).

73. This is a point of disagreement between Professor Hattam's work and my own. See Hattam, "Unions and Politics" (cited in note 25). To my thinking, she mischaracterizes the political outlook and behavior of the early-20th century AFL. As a result, she misses some key aspects of the role of law in shaping that organization. Hattam's work includes fine case studies of two pre-AFL organizations and their legislatively successful but judicially nullified efforts to secure court-curbing legislation narrowing the grounds for conspiracy prosecutions of strikers and boycotters. As a consequence of such experiences, Hattam contends, when the AFL arrived on the scene, it abandoned politics, eschewing the electoral and legislative involvements of its predecessors in favor of "pure and simple trade unionism." *Id.* at 125–68.

Clearly the research projects that Hattam and I pursued have turned out to have important themes in common; that is only one reason I admire Hattam's work. Her account of labor and the law not only starts with an earlier period than mine; it also carries the story further forward. Not surprisingly, she paints with a bolder brush. Hers is largely an institutional narrative; mine is a more fine-grained approach looking at trade unionists' ground-level experiences with judges' words and deeds. The style and substance of our arguments are also somewhat different. She describes some of organized labor's frustrating early experiences with reform by legislation and invites the reader to infer that labor's natural reaction was to abandon that reform route. But a social and political actor like labor may react in different ways to frustrations. It may abandon its reform efforts, or it may redouble them. Understanding the road taken seems to me to require a couple more steps: uncovering the available evidence of actual debates and deliberations about the choice; and reconstructing the specific strategic considerations that were likely to have shaped trade unionists' thinking.

Thus, for example, Hattam is somewhat off the mark in suggesting at several points that the AFL simply abandoned the pursuit of reform by legislation. In fact, the AFL and its state federations electioneered and lobbied for immigration restriction, protective legislation for women and children, and, above all, court-curbing measures (Hattam's focus)—all with greater vigor and resources than the pre-AFL organizations she describes. These were the visible hand of AFL voluntarism. In particular, court-curbing legislation, repealing the harsh legal constraints on unions' concerted marketplace activities, was a reform goal that the AFL scarcely could afford to abandon. The strategic (and ideological) costs and benefits were otherwise for other, broader reform ambitions, and these receded, but the long cam-

To be sure, the debate between minimalists and radicals continued. The anticapitalist republicanism of the Gilded Age labor movement was carried into the 20th century by the Socialist party and others, and socialist and "progressive" labor leaders were prominent in many important AFL unions throughout the period. Moreover, the relative autonomy of the state federations of labor meant that broad reform politics remained dominant in some industrial states. Nevertheless, from 1900 onward most American trade unionists agreed with Gompers that it was folly to try to remake industry by legislation; labor ought to seek from government only what it could not gain elsewhere: above all, repeal of the judge-made restraints on collective action. Even those with a broader reform vision than Gomper's had to concede that this goal was labor's political *sine qua non*, and for the AFL leadership, it became the defining theme of an increasingly rigid, antistatist politics. Thus the recalcitrance of the American state of courts and parties got labor stuck in this stage of "negative" reform and minimalist politics—a stage that, as we shall now see, the English labor movement in this same era left behind.[74]

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paign against the courts continued, and ironically, labor's outlook fell more under the sway of law. See Forbath, 102 *Harv. L. Rev.* (cited in note 2).

74. Professor Hattam's recent article, again, offers a somewhat different, and quite interesting, account of the late 19th century's main labor organizations and the role of law in their formation. Hattam, 4 *Stud. Am. Pol. Dev.* 82 (cited in note 25). The AFL, in this tale, stood for "trade unionism," always hewing to Gomper's outlook and striving to carve out a place in the emerging industrial order for craft unions and collective bargaining. The Knights of Labor stood for "producerism" and largely rejected unionism and collective action. Spurning strikes and boycotts, they strove instead to restore the propertied independence of small producers through anti-monopoly legislation and public control of currency and credit. Of these two main currents of Gilded Age labor politics, it was only the "trade unionist" stream that ran up against the courts. Therefore, Hattam concludes, "the court's power to shape the American working class" was "contingent" (at 83). It hinged on the demise of the Knights and their vision, a demise attributable to factors other than the legal order.

Hattam suggests a contrast between her article and my work that is misleading (at 129 & n.123). My work has not "focus[ed] exclusively on the AFL," nor "reified the nature of judicial power" by looking solely to the "structure and capacity of the American legal system" while neglecting "the *interaction*" of "labor organizations and social movements" with the courts (*id.*). Indeed, I had thought my work examines those interactions as carefully as any. See Forbath, 1985 *Wis. L. Rev.* 767–817 (cited in note 51); *id.* 102 *Harv. L. Rev.* 1109–1256 (cited in note 2). The actual differences between us are, I think, more subtle but also more substantive. They do not spring from methodological or conceptual sins on either side, but do involve significant differences of interpretation.

First, although Hattam seems to claim otherwise, I think it was quite possible for a Gilded Age worker to be a "producerist" *and* a "trade unionist." Most Knights were both; their goal of a future "Co-operative Commonwealth" did not prevent them from being staunch trade unionists in the present. Thus, although Hattam suggests that the Knights were largely indifferent to workers' rights to strike and boycott, in fact, they made protection of these rights the chief aim of countless campaigns. Just as producerists could be trade unionists, so could many AFL unions champion a broad producerist politics. The AFL was never ideologically monolithic, as Hattam herself acknowledges, least of all in its first two decades, when the union philosophy associated with Gompers vied constantly with the more inclusive unionism and more ambitious vision of labor reform I have sketched.

I also question Hattam's insistence that the courts played no significant part in the

IV. THE ENGLISH STORY

The Common Law and the Common Beginning

American and English courts worked within the same common law tradition. They restricted workers' collective action through an almost identical body of rules and precepts. All the key common law doctrines of American labor law hailed from or developed simultaneously in England.[75] But despite this profound similarity in legal systems, English courts played a different role in regulating workers' collective action during the 19th and early 20th centuries. The English judiciary shared policymaking initiative and power with Parliament, and Parliament was the more powerful actor. There were, to be sure, persistent tensions, and as we will see, English courts were no less ill-disposed than American ones toward legislative measures that loosened the legal reins on workers. But Parliament held the trumps.

In the first decades of the 19th century English labor law was more hostile to unionism than American. It was also more statutory. In contrast to the United States, modern trade unionism and both craft and industrial workers' collective action emerged in England under a legal regime forged chiefly by the legislature. Inspired by events in France and their domestic reverberations, the Combination Acts of 1799 and 1800 criminalized unions along with many other associational activities of the lower classes. Other statutes also prohibited combinations in specific trades. In addition, they were (under broadly defined circumstances) criminal conspiracies "in restraint of trade."[76]

With the easing of upper-class anxieties, Parliament repealed the

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Knights' demise. In scores of industries and locales, court-sponsored suppression drove old-stock skilled workers away from the class-based solidarities they had formed in the Knights with the unskilled and the new immigrants, and into the more exclusive organizations and restricted spheres of action that characterized the AFL craft unions (see Forbath, *Law*). To say that the courts played this role is in no sense to deny that the "power of courts to shape the American working class" was "contingent." That power *was* contingent, not only as regards the Knights, but also in the arena that Hattam seems to exempt from contingency: the courts' sway over the AFL.

As we shall see, the contingency of the courts' power is illuminated by the English comparison: by the existence in England but not America of a long tradition of legislative regulation of industrial affairs; by the slightness of America's industrial working class compared to England's when each was weighed against the nation's whole voting population; by the fact that the Democrats and Republicans in the United States were, both structurally and culturally, far less constrained than England's two main parties to compete for industrial workers' votes through class-based appeals. Had factors such as these been otherwise, the political will necessary to rein in a uniquely powerful judiciary probably would have emerged much sooner.

75. See Otto Kahn-Freund, *Labor Relations and the Law. A Comparative Study* (Boston: Little, Brown, 1964) ("Kahn-Freund, *Labor Relations*").

76. Kenneth W. Wedderburn, *The Worker and the Law* 207–10 (London: MacGibbon & Kee, 1965) ("Wedderburn, *Worker*").

Combination Acts in 1824 and thereby ended the English state's efforts flatly to bar combinations among artisans and laborers.[77] For the next half century English trade unions existed in an often precarious position of semilegality, prone to the vagaries of judicial interpretation of the law of criminal conspiracy. Statutory reforms had increased employers' reliance on conspiracy law.[78] As unionism extended beyond traditional crafts, strikes became an increasingly common aspect of labor organization. The courts greeted these developments by enlarging conspiracy doctrine's bans to cover more and more kinds of strikes and strike activities.[79]

Ousting the Criminal Law

In the late 1860s, this burgeoning law of labor conspiracies inspired the newly formed Trades Union Congress to turn to politics. Founded in 1868 by the national leaders of such major unions as the engineers, the carpenters, and the bricklayers, the Trades Union Congress (TUC) became

77. The best account of the repeal of the Combination Acts remains Beatrice & Sidney Webb, *The History of Trade Unionism, 1666–1920* ch. 7 (New York: Longman, Green, 1920) ("Webb, *Trade Unionism*").

78. From the dawn of trade unionism in the 18th century until 1875 when unions were fully immunized from criminal prosecutions, criminal justice in England depended on a system of private prosecutions; hence, employers and not state attorneys brought conspiracy and other criminal prosecutions against unions. See Donald F. MacDonald, *The State and the Trade Unions* ch.2 (London: Macmillan, 1976).

79. See Wedderburn, *Worker* 207–10; Webb, *Trade Unionism* 248–49. The most richly detailed assessment of the development of 19th- and 20th-century English labor law and the vagaries of English courts' interpretations of Parliamentary reforms is to be found in a recent American law review article. See Michael J. Klarman, "The Judges versus the Unions: The Development of British Labor Law, 1867–1913," 75 *Va. L. Rev.* 1487 (1989). Klarman's essay appeared after this one was largely completed, so I could not use it as fully as I would have liked, but it confirms some key points. Klarman's account of English developments supports my view that English courts were markedly similar to the American judiciary in their use of strained constructions to vitiate pro-labor statutory reforms. Klarman also agrees that mistrust of the courts was the central reason that early 20th-century trade unionists in England, as in the United States, championed a laissez-faire regime, opposing any legal regulation, even benevolent regulation, of peaceful concerted activities or of union-employer relations.

Klarman underscores the tenacity of this laissez-faire outlook among English trade unionists. Having ousted the courts, English labor thereafter preferred continued judicial nonintervention over legally protected rights to organize and to employer recognition. So too did the AFL, decades later in the aftermath of Congress's passage of the Norris-LaGuardia Act in 1932; hence the AFL's initial opposition to, and swiftly renewed hostility toward, the National Labor Relations Act (Wagner Act) of 1934. See Forbath, 102 *Harv. L. Rev.* at 1231–33 (cited in note 2). But it would be wrong to read Klarman more broadly, as have some friendly critics of this essay. Klarman does not appear to claim, and certainly does not show, that as a result of its experiences with the courts, the English labor movement remained permanently hostile to government involvement in such other traditional trade union functions as hours and wages regulation and unemployment and sickness insurance. In fact, as we shall see, English trade unionists in general remained hostile to such welfare state measures roughly as long as they perceived the courts to be ruling the roosts of state policy and state power.

England's enduring labor federation.[80] At the time, however, most English trade unionists were wary of centralization. Other efforts at forming national union federations had failed.[81] If they wanted to overcome the skilled workers' ingrained particularism and jealous independence, the ambitious leaders who founded the TUC had to demonstrate the new federation's worth. They did so by successfully lobbying against repressive judge-made and statutory labor law.[82] Let by the TUC's new Parliamentary Committee, the unions in 1871 secured from Parliament the Trade Union and Criminal Law Amendment Acts. Then, in 1875 Disraeli's government, prompted by competition for the votes of the newly enfranchised upper layers of the working class, met the unions' demands for greater protection from the courts with the Conspiracy and Protection of Property Act. The 1875 Act contained what English labor lawyers ever since have called the "golden formula": acts by two or more persons, done in the context of a "trade dispute," were not liable to prosecution unless the acts were crimes if done by individuals.[83] The 1875 Act created a broad immunity indeed; it "marked the end of the significance of criminal law in labour relations" in England.[84]

Broad as these immunities were, the "golden formula," along with the 1871 acts' immunity for labor from restraint of trade prosecutions and legalization of picketing, were virtually identical to provisions of several statutes passed by American state legislatures in the 1880s and 1890s.[85] Courts struck down or sharply vitiated all of these late 19th-century Amer-

80. Victoria Hattam's dissertation offers a sustained and subtle interpretation of the pre-1880 English labor movement and its similiarities with organized labor in America during that era. See Hattam, "Unions and Politics" of 169–94 (cited in note 25). I merely note that the leading unions of the early TUC were powerful craft organizations like those that dominated the AFL. Indeed, they supplied Gompers, an English immigrant who had grown up in London's trade union world, with a model of the "business unionism" that he pioneered in the United States. See Samuel Gompers, 1 *Seventy Years of Life and Labor: An Autobiography* (New York: E.P. Dutton & Co., 1925). The English unions' key features from Gompers's perspective were the same as those that gained them the label "new model unions" in England: their greater measure of "businesslike" centralized control over matters of union finance and the calling of strikes, their high dues, and their building up sizable treasuries to underwrite both strikes and new insurance and benefits programs. On the TUC's founding and the development of "new model" unionism, see Webb, *Trade Unionism*; Alan Fox, *History and Heritage: The Social Origins of the British Industrial Relations System* 229–30 (London: Allen & Unwin, 1983) ("Fox, *History and Heritage*"); Hugh Clegg, Allen Fox & F. A. Thompson, 1 *A History of British Trade Unions* (Oxford: Clarendon Press, 1974) ("Clegg et al., *History*").

81. See G.D.H. Cole, *Attempts at General Union; A Study in British Trade Union History, 1818–1834* (London: Macmillan, 1953).

82. See Webb, *Trade Unionism* 78–103; Clegg et al., *History* 41–42.

83. Wedderburn, *Worker* 212–13 (cited in note 76). Thus the act eliminated such vague offenses as "molestation" and "intimidation" as these had been construed to include peaceful boycotting and other forms of secondary pressure and such demands as the closed shop; the act also expressly legalized peaceful picketing. *Id.*

84. Kahn-Freund, *Labor Relations* (cited in note 75).

85. See Forbath, 102 *Harv. L. Rev.* at 1220 (cited in note 2).

ican statutes, and the era saw the harshest (and most frequent) labor conspiracy convictions in the nation's history.[86] In contrast, in England criminal prosecutions against labor virtually ceased after the 1875 act.[87] This is what was remarkable from an American perspective: not the legislature's liberality—American legislatures had matched that; but the judiciary's acquiescence in the sharp revision of judge-made law.

The statutory change in 1875 and its judicial aftermath taught English labor that Parliament could rule the courts in the setting of state policy.[88] The 1875 act and its aftermath of judicial restraint would also figure as crucial precedent in the next chapter of Parliament versus the courts, involving civil injunctions and damage suits.

The "Collectivist" Alternative

The legislation of 1875 brought in its wake a full-blown alliance between the TUC leadership and the Liberals. Labor "formed," in Engels' acid phrase, "the tail of the 'Great Liberal Party.' "[89] By 1885 the TUC boasted ten "Lib-Lab" members of parliament. Their views on the uses of law and state power were laissez-faire and anti-interventionist, more adamantly so than those of many middle-class MPs in the Liberal party.[90] Born of the self-help ethos of strong craft unions and of the English working class's long exclusion from politics and its mistrust of government paternalism,[91] it was an outlook that closely resembled that of Gompers and his AFL craft union allies across the Atlantic.

Like Gompers, the TUC's Lib-Lab "Old Guard" held that gaining a regime of collective laissez-faire—freedom of collective action in the labor

86. See *id.* at 1241–43. The best and most detailed account is Hattam, "Unions and Politics" at 125–68. See also Hyman Kuritz, "Criminal Conspiracy Cases in Post-Bellum Pennsylvania," 18 *Pa. Hist.* 292. Criminal conspiracy prosecutions of unionists finally ceased in the United States in the 1900s, but not due to labor's legislative efforts. Instead, they were cast aside when both employers and state officials concluded that the injunction was a more efficacious weapon. See Forbath, 102 *Harv. L. Rev.* at 1152–55.

87. See Kahn-Freund, *Labour Law* 55. On the few occasions after 1875 in which they were called on to address the question, appellate courts consistently ordered the dismissal of conspiracy indictments and the reversal of conspiracy convictions against trade unionists. See Conner v. Kent, 2 *Q.B.* 549 (1891) (reversing magistrate's conviction of three local trade union leaders for threatening strike to enforce closed shop, demanding firing of three nonunion workers); Curran v. Treleaven, 2 *Q.B.* 560 (1891) (same); see also Gibbon v. Lawson, 2 *Q.B.* 557, 558 (1891) (upholding dismissal of indictment by magistrate). *Gibbon*, *Connor*, and *Curran* appear to be the last cases in which the question of the criminality of peaceful strikes and boycotts had to be addressed at the appellate level; they were preceded by a decade in which no such cases were reported).

88. Fox, *History and Heritage* 229–30; see also Henry Phelps Brown, *The Origins of Trade Union Power* 58–59 (Oxford: Clarendon Press, 1983).

89. Quoted in Clegg et al., *History* 50 (cited in note 80).

90. See Henry Pelling, "Trade Unions, Workers, and the Law," *in Popular Politics and Society in Late Victorian Britain* 153 (London: Macmillan, 1979).

91. *Id.*

market—was the *sine qua non* of labor politics; indeed they tended to hold that it was *all* that labor should seek from politics. The rights of workers to combine in the labor market and to defend their interests by striking and boycotting were essential to the very existence of trade unions; without those rights unions could not deliver the goods for which workers joined them. And freedom from legal repression or restraint of these rights was the one aim that only Parliament could provide. Other goals—an eight-hour day, or better wages or conditions of work—workers could and should attain through their unions without "calling upon the Legislature."[92]

In the United States, as we have noted, this laissez-faire creed remained something of a minority viewpoint in the 1880s. In contrast to their English brothers, American workingmen had long enjoyed the ballot, and, as David Montgomery has shown, the Radical Republicans of the Reconstruction Era had imparted to most American trade union leaders a strong belief in "reform by legislation." The Radicals, their ideology and their Reconstruction programs had taught labor's advocates the potentialities of an active democratic state for transforming oppressive social and labor relations.[93]

Thus at the beginning of our period, the more radical and more statist alternative enjoyed stronger support in the United States. But it found adherents in England, too. In both countries, it was the trade unionists who led the less skilled who tended to insist that mere laissez-faire was not enough, that positive state support and regulation were necessary. A broader view of the uses of law and state power generally went along with a broader, more inclusive unionism. In the United States this more radical vision belonged to the Knights of Labor and to the socialist and progressive wing of the AFL. In England it was associated with the "new unionism" of the less skilled and unskilled workers, which emerged in the 1880s, led by working-class socialists like Will Thorne of the Gasworkers and John Burns and Tom Mann, who led the great London dock strike of 1889 and founded the Dockworkers' union.[94] These new unions stood outside the pale of the "labor aristocracy" that dominated the TUC.

Just as unionists associated with the inclusive Knights created local labor parties and ran labor candidates for local elections, so Thorne and Mann were founders of the Independent Labour party, the small socialist

92. Henry Broadhurst [stonemanson, Liberal M.P., and Secretary of the TUC's governing body, the Parliamentary Committee, from 1875 to 1890], "Speech at the Trades Unions Conference of 1887" *in* E. J. Hobbsbawn, ed., *Labour's Turning Point* 96–97 (London, Allen & Unwin, 1948). See also "Speech of William Mosses at the TUC of 1889," in *id.* at 103–4.

93. See David Montgomery, *Beyond Equality: Labor and the Radical Republicans, 1862–1872* (New York: Vintage Books, 1974).

94. On the creation and character of the new unions see Webb, *Trade Unionism* 358–422 (cited in note 77); Clegg et al., *History* 55–96 (cited in note 80).

party of late 19th-century England. In retrospect it is ironic that their brightest inspiration lay in the success of the Knights in America.[95]

The Employers' Counteroffensive

In the mid-1890s, English labor leaders of all political stripes began to speak about a threatened "Americanization" of English industry.[96] The phrase rested on a fear that giant American-style trusts and combinations were emerging in England. The specter of "Americanization" also had a more specific set of referents—one suggested by English trade unionists' constant talk of "Homestead" and "Pullman." These American comparisons were used to characterize what English labor historians have called "The Employers' Counteroffensive" of the 1890s.[97] Prompted by the rise of the "new unionism"—particularly by the new unions' tumultuous strikes and radical politics, prompted too by mounting international competition, the employers' counteroffensive was marked by the renewal of judicial activism against striking unions. This, above all, made "Americanization" an apt description. The courts' renewed involvement in labor strife took a form that was already familiar by virtue of stories from America: stories of injunctions, heavy damage awards, and the use of judicially sanctioned violence against strikers.

As in the United States, a series of anti-union high court decisions encouraged the creation of employers' associations devoted to organized strike breaking,[98] and the new employers' associations, in turn, encouraged greater resort to the courts for antistrike decrees and damage judgments. *Temperton v. Russell*,[99] decided in 1893, was the first of these hostile decisions. It involved a refusal by plasterers and stoneworkers to work on materials bound for an anti-union construction firm. Operating in much the same fashion as building trades unions in America, three unions in Hull threatened to strike rather than work on sills ordered by the firm, which spurned union standards. By ruling for the building firm,

95. Henry Pelling, *The Origins of the Labour Party* 80 (Oxford: Clarendon Press, 1964); Henry Pelling, "Knights of Labor in Britain, 1880–1901," 9 *Econ. Hist. Rev.* (1956) (quoting Burns and Mann).

96. See Pelling, *Origins of the Labour Party* 196–97; John Saville, "Trade Unions and Free Labour: The Background to the Taff Vale Decision" *in* Asa Briggs & John Saville, eds., *Essays in Labour History* 345 (London: Macmillan, 1960); Hugh Clegg, *The System of Industrial Relations in Great Britain* 396 (Totowa, N.J.: Rowan & Littlefield, 1972).

97. On the "employers' counter-offensive" see Clegg et al., *History* 126–79; Saville, "Trade Unions and Free Labour" 317–50; Fox *History and Heritage* 174–221 (cited in note 80).

98. These associations' tactics were also viewed as American inventions and dubbed "the American method": the large-scale importation of "what the [employers'] Federations nicely called 'free labour'," and the use of heavily armed private police to guard the imported strikebreakers. See Saville, "Trade Unions and Free Labour" at 323.

99. [1893] 1 *Q.B.* 715.

Temperton announced the applicability of civil conspiracy doctrine in circumstances in which the 1875 act precluded a finding of criminal conspiracy.[100] In so doing, the case introduced a vast new uncertainty about the bounds of concerted action, since it signaled that the "golden formula" did not insulate traditional tactics from civil liability. Other civil cases followed, similarly holding actionable union conduct that was immune from criminal sanctions under the 1875 act. The employers' counteroffensive was marked by grim nationwide lock-outs against such long-established craft unions as the Engineers as well as against the newly organized Dockers. Accompanying these lock-outs was the employers' increasingly massive and systematic recruitment of strike breakers. The picket line was often the striker's only chance to speak to strike breakers—whether to exhort, cajole or shame, or to menace. Yet the lower courts had begun routinely to enjoin picketing.[101]

The most important case upholding the judicial repression of picketing was *Lyons v. Wilkins* (1896).[102] The opinions of both the trial and the various appellate judges suggest that their views on the allowable bounds of labor protest were roughly identical to those that characterized most American federal and state court judges at the time.[103] *Temperton*, *Lyons*, and the cases that followed inspired alarm over how far the borders of allowable protest and mutual aid would narrow. Americanization seemed to be approaching with a vengeance.

Taff Vale

Then came the 1901 House of Lords decision in *Taff Vale*, which upheld an injunction and damages award against Welsh railway workers and their union.[104] The Taff Vale strike was emblematic of the employers' counteroffensive, involving a struggle for recognition waged by the Amalgamated Society of Railway Servants (ASRS), which embraced both skilled and semiskilled workers. In resisting the strike, an obdurate railway management had turned to the services of a recently founded employers' association that operated a national network of "Free Labour Exchanges." When the "Free Labour" strike breakers first arrived at the Cardiff station, they were met by a large band of pickets. At the head of the pickets was Richard Bell, the Amalgamated Society's general secretary. Bell dis-

100. See Saville, "Trade Unions and Free Labour" at 344 n.3 (quoting Sir Frederick Pollock's supplementary note on *Temperton* appended to his 1892 *Memorandum on the Law of Trade Combinations: Royal Commission on Labour, Fifth and Final Report* 1894:157–63).

101. See *id.* at 344–45.

102. J. Lyons & Sons v. Wilkins, [1896] 1 *Ch.* 811.

103. Like the American judges, the English jurists believed that there was no such thing as "peaceful picketing." *Id.* at 825–26.

104. [1901] A.C. 426.

tributed to the imported workers a leaflet notifying them of the strike and offering them return fares.[105] At least a third of them were browbeaten into accepting the offer and returned to London and Glasgow.

The Law Lords held that Bell's and the pickets' "besetting" of the strikebreakers at the station was illegal under *Temperton*. The Lords also held that not only could strikers and their leaders be held liable for such conduct, but so too could union treasuries. Henceforth, unions might be liable for heavy damages for any of the kinds of boycotts, strikes, and strike activities that were falling under judicial bans.[106]

After *Taff Vale* even the most conservative of the Old Guard were persuaded of the need for vigorous action to repeal the new judge-made law.[107] But during the years immediately following the decision the Conservative government resisted all talk of restoring the "golden formula." Meanwhile, the Liberals seemed downright indifferent to labor's plight, as the party's leaders temporized, uncertain how far they wanted to go in enlarging the boundaries of allowable collective action. Within a few years, the Liberal party lost the allegiance of hundreds of local unions and trade councils, as these groups turned away from restrained Lib-Lab politics and toward supporting independent labor candidacies.

Taff Vale and the courts trebled the number of trade unions that affiliated with the Labour Representation Committee, predecessor of the Labour party.[108] This dramatic growth of the LRC was a triumph for the radicals and socialists, but it did not overnight transform the character of labor politics. Many old guard unions that had affiliated with the LRC were quite unsure where they stood on the question of collectivism. Still wary of broad reform ambitions, they were wedded only to the goal of creating a sufficiently strong bargaining position to force the next Liberal government to undo the effects of the *Taff Vale* decision.[109] The radicals' desire to forge a long-term alternative to Liberalism would have to await the outcome of the immediate struggle.

Both desires—the immediate one for repeal of *Taff Vale* and the long-term one for a collectivist alternative—were, however, educated by experiences that made them seem attainable. It was hardly reckless for trade unionists to believe that if pressed, Parliament could swiftly quell the courts. The 1875 act and the effective immunities from conspiracy and

105. Frank Bealey & Henry Pelling, *Labour and Politics 1900-1906: A History of the Labour Representation Committee* 74 (London: Macmillan & Co., 1958) ("Bealey & Pelling, *Labour*").

106. [1901] A.C. 426. In the particular event, the Amalgamated Society paid the Taff Vale Railroad Company £23,000 in settlement of the suit. See Bealey & Pelling, *Labour* 71.

107. See *id.* at 74.

108. See Webb, *Trade Unionism* 604 (cited in note 77); Bealey & Pelling, *Labour* 95.

109. James Hinton, "The Rise of a Mass Labour Movement: Growth and Limits" *in* Chris Rigley, ed., *A History of British Industrial Relations 1875–1914* at 32 (Brighton, Eng.: Harvester Press, 1982).

restraint of trade prosecutions that it created had not only taught labor a lesson in the efficacy of reform by legislation, they also meant that labor could cast "repealing *Taff Vale*" as restoring Parliament's own rule with respect to an issue Parliament had already once decided. Thus Labour MPs spoke constantly of the need for legislation "to restore to the trade unions an immunity which for thirty years they have enjoyed"[110] and "to prevent workmen being placed by judge-made law in a position inferior to that intended by Parliament in 1875."[111] In 1906 Liberal Prime Minister Campbell-Bannerman would champion the Trade Disputes Act precisely in the language of restoring the "old borders" and Parliament's authority over labor law.[112]

Even with respect to the long-term goal of a collectivist alternative to Liberalism, the more radical trade unionists had good reasons to believe that the state was relatively amenable to their new program. Here the role of the high civil service is central and the contrast with the United States becomes marked. As I have pointed out, by the 1890s England's high civil service in offices like the Board of Trade contained "new liberals" who keenly supported not only new protective legislation like minimum wages laws, but also the expansion of the state's responsibilities (and administrative capacity) to embrace ambitious "collectivist" welfare measures like old age, health, and unemployment insurance. Indeed, around the turn of the century high-placed progressive administrators were negotiating with labor leaders about the part unions might play in administering various forms of state-based social insurance.[113] The Board of Trade had begun "sending speakers to trade councils and other organizations and appointing trade unionists to the Labour Department."[114] In England, then, the idea of a national government won over to class-wide social "reform by legislation" had none of the utopian quality it bore in the United States.

Enlightened politicians and administrators also had no doubt that they, and not the courts, were the proper policymakers respecting strikes. Even during the grim 1890s and into the early 1900s, while Taff Vale remained good law, they stood for a policy of government support for trade unionism. From 1901 through 1905 the Board of Trade's high officials advocated reforming labor law "so as to minimize the scope for judicial involvement."[115]

110. "Summary of Parliamentary Debates on Trade Unions' Disputes Bill," in *Labour Leader*, 6 April 1906, at 670 (quoting William Hudson, Labour MP, Newcastle-on-Tyne).

111. TUC-sponsored motion in Parliament, 14 May 1902, quoted in Bealey & Pelling, *Labour* 93.

112. Quoted in Phelps-Brown, *Origins of Trade Union Power* 37–38 (cited in note 88).

113. Gilbert, *National Insurance* chs. 5–7 (cited in note 36); Heclo, *Modern Social Politics* 84–90 (cited in note 36); Pat Thane, "The Working Class and State Welfare in Britain," 27 *Hist. J.* 877, 899 (1984).

114. Thane, 27 *Hist. J.* at 899.

115. Fox, *History and Heritage* 252 (cited in note 80).

Thus in weighing whether to invest their political fortunes in independent labor politics, trade unionists knew that significant state actors had already made an investment of their own in the labor movement. The question was whether fielding independent labor candidates would force the Liberals' hand.

The answer turned out to be yes. Labour put 50 independent candidates in the field in the General Election of 1906, and in the face of this showing virtually all Liberal and a significant number of Conservative candidates committed themselves to the TUC's Trade Disputes Bill. The bill became law that year.[116] Section 1 restored the "golden formula," applying it to civil conspiracy law, so that henceforth any act done in concert, in contemplation or furtherance of a trade dispute, was not actionable unless illegal if done by an individual without concert.[117] Section 2 repealed the courts' bar on peaceful picketing, immunizing pickets from civil and criminal prosecution.[118] Section 4, the most controversial, specifically repealed *Taff Vale* by ruling out tort actions for damages or equitable relief against unions for wrongs committed by either officers or members; section 4 embodied, in Kahn-Freund's words, "the British solution of the problem of the labor injunction."[119] Thus the 1906 act gave English labor an extraordinary freedom from legal restraints.[120] According to Sidney and Beatrice Webb, "most lawyers, as well as all employers, regard[ed the extent of these immunities] as monstrous." Nevertheless, Parliament had spoken, and, apart from some minor skirmishes, the courts acquiesced in labor's new freedom of collective action.[121]

116. 6 Edward VII. c. 47.

117. *Id.* sec. 1.

118. *Id.* sec. 2.

119. *Id.* sec. 4; Kahn-Freund, *Labor Relations* 68 (cited in note 75).

120. The freedom would not be interrupted for 65 years. Industrial relations in England would be governed by the "collective laissez-faire" instituted by the '06 Act until 1971. In that year a Conservative government had a second try at "Americanizing" English collective bargaining and strike law. However, it ended in disarray and was soon repealed. See Michael C. Moran, *The Politics of Industrial Relations: Origins, Life and Death of the 1971 Industrial Relations Act* (London: Macmillan, 1977). Americanization arrived again in 1980 with the first of the Thatcher government's major pieces of trade union legislation. See *infra* note 128.

121. Although they bowed to the act's exiling them from the world of industrial relations, the courts did not go gently. They turned their ire on the new Labour party, whose potential strength the act had revealed. In 1908 the Court of Appeal ruled that unions could not impose "levies" on their memberships to pay the salaries of labor representatives in Parliament—M.P.'s received no salary from the government. With scant support in either statutory law or precedent, the Court held, and the House of Lords affirmed, that the unions' political levies were *ultra vires*. Osborne v. Amalgamated Soc'y of Ry. Servants, [1909] 1 Ch. 163 (C.A. 1908); 1910 A.C. 87 (1909). In 1913 Parliament again came to the unions' rescue, passing the 1913 Trade Union Act, which legalized such levies, with some protection for dissenters. This Act's principles still govern trade union spending. 1913, 2 & 3 Geo. 5, ch. 30, sec. 3. These judicial and Parliamentary developments are well chronicled in Klarman, 75 *Va. L. Rev.* at 1536–47 (cited in note 79).

CONCLUSION

"The Legislature cannot make evil good," declared the judge who had authored *Taff Vale* in a 1908 opinion construing the monstrous new act, "but it can make it not actionable."[122] Not all the high court judges were as outspoken. Some insisted on greater stoicism in the judicial administration of the disturbing new immunities.[123] However, several Law Lords besides the author of *Taff Vale* made plain how they would have treated the Act if, like their American counterparts, they had enjoyed the power of judicial review.[124]

By 1906 American judges had struck down four statutes containing provisions similar to those in the 1906 English act and left none standing.[125] The English judges lacked that power. Accordingly, labor gained another dramatic lesson in the efficacy of reform by legislation. The year 1906, the year that Labour's Trades Disputes Bill became law, marked the official founding of the Labour Party.[126] More important, it marked a turning point in the evolution of English labor politics.

Ending the legal repression of trade unionism lent enormous impetus and authority to the radicals and socialists who had led the battle for independent labor politics. Over the next several years, this impetus and authority would enable them to mobilize the ambivalent Old Guard unionists—and, thereby, the TUC—in support of the new party and its "collectivist" program of social reforms. Reading the labor press and the speeches of Labour candidates in the years following 1906, one finds the proponents of a broad reform program appealing again and again to La-

122. Conway v. Wade, [1908] A.C. 844, 856 (Farwell, L.J.).

123. See, e.g., Dallimore v. Williams and Jenson, 30 *Times L. Repts.* 432, 433 (1 May 1914) (Ct. of App.). In *Dallimore*, Lord Sumner reversed as barred by the Act a jury verdict against officials of a musicians' union. He reproached "the learned [trial] Judge" for his charge to the jury. The charge had "direct[ed] the jury quite correctly as to the effect of the Trade Disputes Act, and [told the jury] that, whatever their own views might be, they must follow and obey the Act." However, the trial judge had not stopped there; instead, he "added some remarks pointedly expressed," assailing the Act and told the jury "that a person who availed himself of the defence afforded by the Act was setting up a dishonest defense." *Id.* at 433. Lord Sumner condemned these remarks as "inopportune, detrimental to the defendants' case, and, perhaps worst of all, irrelevant." *Id.*

124. The Lord Chancellor, for example, declared during the House of Lords' legislative debates on the Bill that it "legalized tyranny" and was "contrary to the . . . Constitution." See also Conway v. Wade, [1908] A.C. 844, 857 (opinion of Kennedy, L.J.) ("It was possible for the Courts in former years to defend individual liberty . . . because the defense rested on the law which they administered; it is not possible for the Courts to do so when the Legislature alters the laws as to destroy liberty, for they can only administer the law"). See also Luby v. Warwhickshire Miners' Association, [1912] L. 203.

125. See Forbath, 102 *Harv. L. Rev.* at 1220–22 (cited in note 2). Over the next quarter-century, the states and Congress enacted at least 40 more court-curbing statutes, most of them more modest than the Trade Disputes Act. At least 25 of these 40 were struck down on constitutional grounds, and most of those not voided were vitiated by narrow construction. See *id.* at 1222, 1253–56.

126. See Fox, *History of Heritage* 276–79; Clegg et al., *History* 364–422.

bour's swift triumph over the courts. The stump speakers and publicists of the new party pointed to this victory and called on their uncertain comrades to look anew at Parliament as a vehicle of working-class aspirations. Now that labor had secured its freedom in the industrial arena—the *sine qua non* of labor politics, it was no longer treacherous but timely instead to focus on other, positive reforms. And the acquiescence of the Liberals and the administrative elite in adopting labor's own version of labor's rights supplied a balm for the old fears of government-sponsored reforms. Those fears were bred of a dependency on middle-class advocates and representatives; the party vowed to break that dependency and to press forward with the rest of its program—old age pensions, unemployment insurances, and the eight-hour day.[127]

The Old Guard might have responded to these progressive appeals as did their counterparts in early 20th-century America—resisting any fundamental break with their voluntarist, antistatist outlook. However, the victory over the courts meant that labor's industrial liberties were no longer in jeopardy; in sharp contrast to America, the political *sine qua non* had been gained in England, and the manifest support of the powerful progressive state elite in that battle—and the promise of its support in battles to come—all made it seem a wise wager to depart from the voluntarist heritage and embrace a broader and independent labor politics.

Embrace it they did. The party's membership doubled between 1906 and 1911. And during those years the Liberal Parliament passed an eight-

127. *The Case for the Labour Party* (London: 1909), for example, was a handbook that supplied stump speakers with arguments to win support for the new party. The handbook underscores the fledgling party's legislative achievements and promises; above all, it emphasizes the party's role in reforming "*The Legal Position of Trade Unions.*" "The [Liberal] government," it notes, "introduced a measure" aimed at halting the erosion of labor's industrial rights; but "its terms were so unsatisfactory that the Party persisted in pressing forward its own Bill, and succeeded in gaining legislation acceptable to the Trade Unions. *The political independence of the Party was thus justified in its very first attempt at industrial legislation.*" *Id.* at 106 (emphasis in original). After rehearsing the party's achievements, the stump speakers' handbook goes on to list "the Labour Party's work" that was yet to be done—"Old Age Pensions; Eight Hour Day for Miners; Unemployment and Sickness Insurance." *Id.* at 114. See also *id.* at 107, quoting Liberal M.P. T. P. O'Connor: "The Labour Party has profoundly influenced the present [1909] House of Commons, more than it realizes itself. It is in the sense that there is this power in the background— discontented, independent, hostile—that drove the Government to support the Trades Disputes Bill and compels it to keep legislation at the high speed to which it has risen."

For similar arguments in favor of "Independent Labour Politics" in trade union newspapers, see, e.g., "Well-Done!" *Labour Leader* (6 April 1906), at 668 ("Practically the whole of the Liberal members found themselves, much perhaps to the dismay of many of them, pledged by their election promises to support the Labour Party's [Trade Disputes] Bill Mr. Hudson [Labour M.P.] . . . presented the case for Trade Unionism . . . with the weight of the whole of the militant Labour vote of the country behind him"); "The Cotton Operative and Politics," *id.* (22 Jan. 1909) at 57 (the cotton operative, traditionally "narrow" and "backward" in his politics, inspired by the party's practical parliamentary triumphs over the courts to "begin to look at Parliament as the instrument of his social and industrial progress").

hour-day law for miners; a noncontributory old age pension scheme; provision for the first trade boards which would administer a minimum wage; and, finally, sickness and unemployment insurance schemes. Prodded by the unions and the Labour party, and guided by the progressive state builders in the permanent civil service, the Liberals had laid the foundations of the welfare state.

Cole wrote that "*Taff Vale* gave birth to the Labour Party." From a comparative perspective we might want to amend Cole's conclusion: *Taff Vale* plus legislative supremacy gave birth to the Labour party. And the midwife was a nonjudicial state elite.

In the United States achieving a secure legal status for trade unionism consumed several decades. A constitutional revolution had to occur before that political threshold could be crossed. During the Gilded Age the movement's mainstream had been disposed toward broad regulatory and redistributive politics. But its experiences with what Judge Taft called our "complicated" constitutional form of government—a continent-sized, fragmented, federalist state dominated by obdurate constitutional courts and tenacious, multiclass parties—drove it toward a narrower, antistatist outlook. It spurned "socialism," as the judge prophesied it would, and embraced instead a labor variant of the courts' own laissez-faire Constitution.[128]

128. Ironically, a laissez-faire state policy toward peaceful collective action turned out to be exactly what American labor never got. (Or, rather, such a national policy existed only during the brief interregnum between the passage of Norris-LaGuardia in 1932 and the Wagner Act of 1934, which, of course, created a national administrative agency with substantial regulatory powers over collective bargaining and labor conflict.) See Christopher L. Tomlins, *The State and the Unions: Labor Relations, Law, and the Organized Labor Movement in America, 1880–1960* (Cambridge: Cambridge University Press, 1985).

English labor, by contrast, got such a laissez-faire state policy toward strikes and concerted activity in 1906; and neither the English labor movement nor the Labour Party ever relinquished its commitment to that policy. It endured, with little interruption or exception, until 1979, when Margaret Thatcher came to the premiership committed to fundamental change in the nation's labor law. The changes wrought by Thatcher's government were Americanization once again and with a vengeance: detailed state regulation of union affairs and sharp limits on strikes and collective action. As Michael Klarman observes, "the Thatcher Government's recent trade union legislation constitutes an unmitigated rejection of collective laissez-faire. . . . [And] it seems increasingly likely that the . . . [old] British system of industrial relations . . . now has" vanished for good. See Klarman, 75 *Va. L. Rev.* at 1596–1601 (cited in note 79).