KAREN ORREN
University of California, Los Angeles

Organized Labor and the Invention of Modern Liberalism in the United States

There is perhaps no political topic that has been given such relentlessly comparative treatment as the American labor movement. It is rare to read any comprehensive political or historical study of organized labor that is not cast, implicitly or explicitly, against the greater class consciousness of European counterparts. The explanations advanced for the uniqueness or the lack of vigor in the American strain—abundance of land, immigration, early suffrage, a revolutionary heritage of "republicanism"—constitute most of what exists in the way of theories about American labor politics.[1]

At the very least, comparisons such as these risk highlighting contrasts at the expense of common and arguably more fundamental tendencies. But there are other problems as well. In the first place, seen against the background of European labor parties, American trade unionism and its historical relationship to government appear in negative and sentimental tones: a compromised political destiny for the workers and a legacy of repression and broken promises to haunt the legitimacy of the liberal state.[2] The contemporary dis-

1. A representative selection of recent books on labor stressing these themes would include Mike Davis, *Prisoners of the American Dream* (London: New Left Books, 1986), and Gwendolyn Mink, *Old Labor and New Immigrants in American Political Development* (Ithaca: Cornell University Press, 1986), on immigration; Alan Dawley, *Class and Community, The Industrial Revolution in Lynn* (Cambridge, Mass.: Harvard University Press, 1976), on suffrage; and Sean Wilentz, *Chants Democratic* (New York: Oxford University Press, 1984), on republicanism. A useful review of explanations for American labor exceptionalism is in Eric Foner, "Why Is There No Socialism in the United States?" *History Workshop Journal*, Spring 1984, 57–80.

2. In addition to the books cited above, see Christopher L. Tomlins, *The State and the Unions* (Cambridge: Cambridge University Press, 1985), and David Montgomery, *Workers' Control in America* (Cambridge: Cambridge University Press, 1979). In the current period the specter of labor disorder has increasingly faded. However, it continues to figure in analyses of government stability. For example, on the accord between labor and the business

cipline of political science offers little to fill out the picture. Labor is not a good example of "interest group liberalism" and is at best a minor participant in studies of politics that take as their starting point the market functions performed by business corporations.[3] The result has been to leave the nation's largest organized group in analytic limbo, suspended between domestic models it does not fit and comparative themes that stress its most negligible aspects.

Second, whole conceptions of American political development and of American liberalism itself have been inspired by the relative weakness of radical politics among U.S. workers and of socialist ideologies advanced in their name. Again, these are not based on a study of trade unionism or working-class politics as such, but locate the peculiarities of the American case in other factors.[4] If prefigured images of failure are set aside, however, the labor movement's connections to the development of American liberalism can be specified, in the actual events. Proceeding from there, with liberalism understood as the product of conflict and change rather than as an all-consuming process, these broader conceptions of American political development—and also the comparative questions concerning who is an exception to what—might be usefully reexamined.

The following research note proposes this alternative formulation. Although it is only an outline, among the ideas it is intended to challenge are the following: that the historical project of organized labor in American political development has been the confrontation with industrial capitalism; that the significance of trade unionism—the strike, collective bargaining, and so on—is primarily as a strategy or weapon in that confrontation; and that the labor movement has played only a minor role in shaping American political

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corporation at the foundation of the contemporary liberal regime, see Samuel Bowles and Herbert Gintis, "The Crisis of Liberal Democratic Capitalism: The Case of the United States," *Politics and Society* 11, no. 1 (1982) : 51–93.

3. Theodore J. Lowi describes how the unions' "clientele agency," the Department of Labor, steadily lost jurisdiction over labor-related matters in *The End of Liberalism* (New York: W. W. Norton, 1967), 118–22. Charles E. Lindblom ascribes an unprivileged, "inferior" position to labor unions in polyarchies except in special circumstances approximating a general strike in *Politics and Markets* (New York: Basic Books, 1977), 175–76, 198–99. For an opposing view, see Karen Orren, "Union Politics and Postwar Liberalism in the United States, 1946–1979," *Studies in American Political Development* 1 (1986) : 215–52.

4. Louis Hartz, *The Liberal Tradition in America* (New York: Harcourt Brace, 1955); see also Seymour Martin Lipset, *The First New Nation* (New York: Basic Books, 1963). Samuel Huntington analyzes political change in terms of conflicts arising from the recurrent gap through history between the American creed consisting of political ideas and principles and political reality, and in that sense he departs from the consensus interpretation of Hartz. However, he *premises* his argument on the distinctive absence in the United States of working-class radicalism, explained in the usual terms: "This was a result of the prior achievement of universal white male suffrage, the general openness of political institutions, the continuing opportunities for vertical and horizontal mobility, the ethnic diversity and geographic dispersion of the working class, and the preexisting prevalence of the liberal-democratic norms of the American Creed" (*American Politics: The Promise of Disharmony* [Cambridge, Mass.: Harvard University Press, 1981], 19–20). Labor is given no further attention in Huntington's account.

culture and institutions. I argue that the emergence of the labor movement marked the final stage in the destruction of the ancient feudal ordering of personal relations; that besides being a method to improve working conditions, trade unionism was an expression of the new system being raised; and that organized labor played a critical role in defining the procedures of contemporary liberalism. The title word *invention* is (with due regard for its recent overuse) meant to emphasize the creative, formative dimension of American labor's history. I might have chosen *constitution,* in order to convey the new and stable configuration of political authority and representation that was brought into being as a consequence.

I.

To say that the historical project of organized labor has been different from the confrontation with industrial capitalism, and that trade unionism has been something other than a strategy, is not to deny the economic context of labor organizing or that strikes and boycotts have been, among other things, potent social weapons. But neither taking these elements at face value nor viewing them against their formal opposites (for example, precapitalist work life, electoral strategies) will elucidate their political meaning. Avoiding settled categories, the route I propose starts with the particular issues contested, then moves on to the broader structures at stake, and finally to organizational tactics and their significance.

The analysis may begin with the early decades of the twentieth century, one of the most vivid and intensively studied periods of industrial conflict. For scholars who emphasize the role of capitalist organization in labor developments, these years represent a turning point in the crisis that began in the 1870s. The dominant interpretation is that the forces of the state, through a national Supreme Court solicitous of the interests of capital, contrived to thwart working-class demands, demands made both directly on industrialists by union activity and through state legislation.[5] But upon close inspection, this position is not satisfying. From the standpoint of political development, it has nothing much to add. Although it no doubt captures important features of the status quo, the problem of exactly how, for example, the unions threatened or were compatible with the existing constitutional order cannot be understood with reference to either the violence of the struggle or the jurisprudential ingenuity of labor's opponents.

More important, the model of labor politics derived from capitalist-state resistance does not explain the data very well. It is silent on the important issues the Court decided in labor's favor. It ignores the fact that the laws in dispute at the federal level had been passed in numerous states dominated by

5. See, for example, Robert G. McCloskey, *The American Supreme Court* (Chicago: University of Chicago Press, 1960), chap. 5 and pp. 150–60; Arthur Selwyn Miller, *The Supreme Court and American Capitalism* (New York: Free Press, 1968), 55–62; Mink, *Old Labor,* 185–86, 237ff; Arnold M. Paul, *Conservative Crisis and the Rule of Law* (Gloucester, Mass.: Peter Smith, 1976), chaps. 6 and 7; Tomlins, *The State and the Unions,* chap. 3.

both major political parties. It overlooks the circumstance of accord, rather than of conflict, that usually prevailed between the decisions of the Supreme Court and those of state judges who, unlike their federal brethren, had to stand for reelection. Even if doubts on all these scores are suspended, however, a careful reading of the Court's opinions reveals the extent to which they fail to conform to what is usually thought to be the quintessential legal tenet—the central cultural metaphor—of the period. This, of course, is freedom of contract, what one leading scholar has called "the holy of holies for the knights errant of laissez faire."[6] Instead there appear intimations of a legal structure supporting quite a different way of ordering social relations, a structure antedating industrialization and as far removed from the precepts of Thomas Jefferson and Horace Greeley as of Stephen Field.

This deeper structure may be indicated by pointing to three of the Court's most important adverse decisions on the subject of labor organizing—*Adair* v. *United States* (1908), *Coppage* v. *Kansas* (1914), and *Hitchman Coal & Coke Co.* v. *Mitchell* (1918).[7] It will be recalled that in *Adair* and *Coppage,* the Supreme Court decided it was a deprivation of due process of law for the U.S. Congress and the state of Kansas, respectively, to make it a crime for employers to require of new or continuing employees that they agree not to be members of a labor union. *Hitchman* upheld a federal court injunction restraining officers of the striking United Mine Workers from attempting to organize a mine that had made nonmembership in the union a condition of employment. In each case, the decisions were based expressly on the liberty constitutionally guaranteed employers and employees to secure and provide services on terms freely chosen; in each case, the specific property right of the employee in his or her own labor, including the right to join a labor union, was affirmed. Hypocrisies or even absurdities in the Court's treatment of these matters need not detain us. What is striking, however, is the reliance, in reaching the results, on doctrines, uncontradicted in the dissenting opinions, that are in a different spirit from the pure vapors of contract theory.

According to the principles of contract theory, for example, parties *voluntarily* assume their legal obligations upon entering their agreement, and their intentions form the basis for any actions or disputes later on. But in each of these decisions the Court explicitly presumes, without evidence or serious inquiry into pertinent facts, that all the workmen in question were employed "at will." "At will" meant that either party could terminate the employment and the expectation of future employment for any reason and without prior notice. In the law of master and servant, employment at will was an alternative principle to employment for a specified term. The American courts had recently settled on the rule that employment would be considered at will unless otherwise provided by contract, rather than by a determination based on the payment period or customs of a given trade, as was the rule in England.[8] Both rules, however, were *prescriptive,* not voluntary.

6. McCloskey, *American Supreme Court,* 153.

7. 208 U.S. 161; 236 U.S. 1; 243 U.S. 229.

8. Sanford M. Jacoby, "The Duration of Indefinite Employment Contracts in the United States and England: An Historical Analysis," *Comparative Labor Law* 5, no. 1 (Winter 1982),

Another characteristic of contract theory is abstraction, without a priori references to concrete circumstances that might arise between the parties. But in these cases, the Court ascribes a *definite content,* a code of proper employee behavior (and one that is also not based on inquiry into the intentions of the parties). In *Hitchman,* for example, employees had not become members of the defendant union before the strike began, but had indicated by their signatures a willingness to join when and if the list being compiled reached a certain number of names. The Court thought it "highly significant" that this list was kept secret; the opinion noted the fact that the organizers addressed the men in a foreign tongue; and it said that every worker "acted a lie" upon signing, in violation of the goodwill the company should expect from its employees. Similarly, in *Coppage,* the Court disassociated itself from the view that the employer had no right "to dominate the life [or] interfere with the liberties of employees in matters that do not lessen or deteriorate the service," and averred how in "an ordinary contract of employment, the worker must serve his employer and him only, so long as the relations shall continue."[9]

A final discrepancy with nineteenth-century contract theory concerns the novel use at this time of the conspiracy doctrine. Although the use of the conspiracy doctrine has often been noted by scholars in the field, less attention has been paid to the underlying legal principle causing the association of worker-confederates to be unlawful. The opinion in *Hitchman* states it succinctly: "The right of action for persuading an employee to leave his employer is universally recognized." Justice Pitney insisted that this right "rests upon fundamental principles of general application, not upon the English statute of laborers." In fact, as will be explained below, the law of enticement had only recently been generalized, under the rubric of interference by third parties, to cover all types of contracts, but it still remained part of the law of master and servant. It would have been a new idea to businessmen, on the other hand, that they might not persuade customers away from their competitors. The Court conceded as much:

> Defendants' acts cannot be justified by any analogy to competition in trade. They are not competitors of plaintiff; and if they were, their conduct exceeds the bounds of fair trade. Certainly, if a competing trader should endeavor to draw customers from his rival, not by offering better or cheaper goods, employing more competent salesmen, or displaying more attractive advertisements, but by persuading the rival's clerks to desert him under circumstances rendering it difficult or embarrassing for him to fill their places, any court of equity would grant an injunction to restrain this as unfair competition.[10]

In other words, even among business competitors, relations with employees are afforded special legal protection. Although some American judges like Pitney were reluctant to say so, this protection, like the other discrepancies

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85–128. On the inconsistency between the at will rule and contract doctrine, see Jay M. Feinman, "The Development of the Employment at Will Rule," *American Journal of Legal History* 20 (1976) : 118–35.

9. 245 U.S. 225, 229, 239, 255; 236 U.S. 1, 19, 13.

10. 245 U.S. 229, 252, 259.

with contract theory noted above, had their basis in the sinews of Anglo-American law.

II.

The only full-length study to emphasize the question of feudalism in American political development denies that it existed. As if to confirm his own assertion that American political thought is absorbed in the idea of the middle class, Hartz pronounces the United States born liberal, free of Old World feudalism, apparently without considering that feudalism had extended its reach beyond the aristocracy and the bourgeoisie. Preoccupied by the absence of European-style radicalism, and succumbing to the Whiggish slogans he exposes, Hartz ignores the ancient forms enclosing the daily life of the working classes, the cracking of which would be the most urgent problem of nineteenth-century politics in the United States as well as in Europe.[11]

It is true that wages were not established by governments as they occasionally had been in colonial and revolutionary years, that what was left of indentured labor had been made unconstitutional by the Thirteenth Amendment, and that, by the late 1800s, an employer could not administer corporal punishment to his employees unless they were apprentices or seamen. But in their essentials, the relations between masters and servants had been fixed in law, both by statutes and common law, for several centuries. In the Supreme Court cases discussed above, for example, the legal prescription of employment duration dates from the Tudor period; laws against enticement are found in the Statutes of Labourers, beginning in the reign of Edward III, and their origin can be traced to the regulations of the medieval guilds.[12]

Here we might touch on some of the main features of this extensive but straightforward system of legally regulated subjugation as it existed toward the end—not the beginning—of the nineteenth century.[13] There were two

11. Hartz, *Liberal Tradition*. As already suggested in n. 4 above, the absence of feudal institutions is accepted without further analysis in studies that otherwise understand political change in U.S. history very differently from Hartz. For another recent example, see Samuel Bowles and Herbert Gintis, *Democracy and Capitalism* (New York: Basic Books, 1986), 30–31. The term *feudalism* as used in this note refers to the relation of lord and man, reproduced up and down the political hierarchy, which was the characteristic organizing principle of medieval society in England (and elsewhere in Western Europe). See Marc Bloch, *Feudal Society*, vol. 1 (Chicago: University of Chicago Press, 1961). The specific relation of master and servant appeared in English law in the fourteenth century. Prior to that, laborers were regulated by the highly uniform customs of manors, boroughs, and guilds.

12. Sources consulted on the English background of American law include William Holdsworth, *A History of English Law*, vols. 2–4 (London: Methuen, 1936), and Frederick Pollock and Frederic William Maitland, *The History of English Law*, 2 vols. (Cambridge: Cambridge University Press, 1968). On the legal status of employees in prerevolutionary America, see Richard B. Morris, *Government and Labor in Early America* (New York: Octagon Books, 1965), chap. 9.

13. Unless otherwise indicated, the legal account in this section is based on H. G. Wood, *A Treatise on the Law of Master and Servant* (Albany, N.Y.: John D. Parsons, 1877).

guiding principles: one, laborers were free in the sense that they could dispose of their labor of their own volition and have their contracts with their employers enforced in the public courts; and two, labor was transformed by acts of obedience into services, over which their employers acquired a proprietary right. Both of these may be seen at the point of entry into the contract. By definition, the laborer who is free and therefore permitted to enter in the relation must be sui juris, that is, not dependent upon the will or control of another. Any such disability would also interfere with the premise of obedience to his or her future employer; otherwise, the contract could not be enforced. This requirement excluded lunatics, idiots, married women, unemancipated infants, enlistees in the armed forces, and all persons with "any other engagement incompatible with that he was about to enter."[14] It is instructive that business corporations, in the 1870s allowed by the law to hire and discharge workers through their agents like any other individual, had until recently before then not been permitted to enter or terminate employment contracts except in writing and under the seal of the company. The previous rule reflected the *personal* nature of the relation intended, and also the corporation manager's deficiency in the autonomy required to enter into a labor agreement.

Regarding conditions of work, the weight of tradition was felt most heavily in the matter of working hours. Today, the hours issue in bread-and-butter unionism is often viewed as secondary to the wage question. But the portion of each day the employee must, according to law, obey his or her employer explains the recurrent political prominence of the ten-hour campaign; and it makes working people's arguments, that only the shorter day would allow them to become educated and active citizens, seem less rhetorical than they might appear. Here is one of the influential treatises of the period on the topic of the working day:

> By the statute of 5 Eliz., Chap. 4, it was provided that "if a servant works by the day or by the week, they must continue working from five in the morning till after seven at night, from the middle of March to the middle of September, and all the rest of the year from twilight to twilight, only from March to September as aforesaid. They are to be allowed two hours for breakfast, dinner and drinking, and from the middle of May to the middle of August an half hour more for sleeping, and all the rest of the year an hour and a half for breakfast and dinner, and for the absence of every hour, *the master may defalk . . . the wages,*" and in some respects, particularly so far as relates to the time of working and the length of time permitted for the taking of meals, the provisions of this statute have generally become part of the custom of laborers in this country.

As for whether an employee might recover wages if asked by an employer to work on a Sunday, precedents and authorities cited included, among others, practices prior to the year 500, Edward the Confessor, *The Mirror of Justices,* and Lord Coke: "Thus it will be seen that, except in those states where pro-

14. Ibid., 7, and chap. 1, passim.

hibited by statute, a contract made to labor upon the Sabbath in any lawful employment, or indeed any contract, is as valid as though made upon any other day."[15]

Enforcement of the labor contract was available to both parties as a matter of right, but this mechanism was made far more onerous for the employee. Employers had recourse to the self-executing remedy of discharge, whereas workers who quit or suffered some wrong under their contract had to rely on the legal process for any wages due them. Employees who were dismissed, for example, could recover wages for work already completed, but only upon a showing by unequivocal evidence that they had not been guilty of insubordination. Further, such proof was made difficult by the law's willingness to recognize any legitimate reason given by the employer for the discharge, even if this reason was different from that given at the time of discharge, or had not even then been known. If an employee hired for a specific term quit without legal cause, he or she normally could not recover wages already accrued.

Although the remedy of specific performance against a worker who unlawfully terminated a contract is sometimes cited as the hallmark of feudal labor relations, in America it appears not to have been available even in colonial times except when a specific job contracted for—such as constructing a building or digging a road—was left uncompleted.[16] A more common disposition was imprisonment, by which the employer claimed property rights over the employee's body until such time as other property could be produced to pay the remaining debt, determined in the form of damages by a court. Imprisonment for debt stemmed from a statute promulgated in 1285 during the reign of Edward I and had been incorporated into the laws of the American states. As the latter were gradually repealed, owing in large part to the efforts of the workingmen's parties of the 1830s, analogous actions were substituted to the same end. One resort, for example, was to the claim of the employee's criminal intent to defraud; and in many states mere nonperformance of labor services was prima facie evidence of fraudulent intent.

The proprietary interest of the employer in the employee's labor is shown no less unambiguously in the rights enforceable against third parties. Two actions of the common law protected the employer against the loss of workers' services. The first was *per quod servitium amisit* ("by which he lost his services"), allowing employers to recover against anyone who through a wrongful act caused injuries to any of their employees to the extent that the latter could not perform their duties. This writ predates the Statutes of Labourers by at least a century to the time of Bracton. The action could not be taken if the worker was actually killed, reflecting the fact that it was the labor that had been contracted for and owned by the employer, not the laborer himself or herself. The employer assumed legal responsibility for acts employees undertook in the course of performing their duties that caused injuries to an outside

15. Ibid., 174, 180.

16. This is consistent with the cases in Morris, *Government and Labor,* 221–23. On specific performance as a feudal institution, see, for example, Philip Selznick, *Law, Society and Industrial Justice* (New Brunswick, N.J.: Transaction Books, 1969), 127–28.

person, much as if those injuries had been caused by the employer's machine or animal. This was the case whether the acts in question had been authorized or were necessary to the job, and without regard for the intention, negligence, or malice of the employee. Second, as already suggested above, the employer was protected against the enticement of his or her worker, by any means, away from the employer's service. The writ of enticement applied to contracts at will, as well as for a specified term or piece of work, and to anticipated as well as existing labor contracts. As indicated, it also applied to the crime of conspiracy—a confederation to commit the unlawful act of enticement. Again, the servant's intentions were considered irrelevant. Whereas in ordinary torts, the "intervening will" rule broke any causal connection between the breach of a promise and a third party's interference, the laborer, once having entered the employment contract, was treated in law as lacking free will.

III.

Given the system described, it hardly needs explaining how profound a shock, psychologically, must have registered from a labor strike. A strike was a collective act over the partitions erected to keep the worker under the employer's personal sway. It was an act of defiance against the primary rule of obedience. Above all, the labor strike must have had the force of its own strategic fitness: objective and tactic linked in a single action, of a type blunted for us by the routines of Taft-Hartley, but known in the freedom rides and sit-ins of the civil rights movement. The employees' message was that they were unwilling to continue working under the conditions set down by the master; their tactic, to stop work.

The progress of organized labor may be understood, perhaps not too artificially, as a series of prolonged advances against a succession of peripheries encircling the employment relation and fortified by the courts. The inner periphery was the wall of the workplace itself, containing the master and the worker. Once over that, labor encountered a jagged boundary, separating those inside into irregular units according to industry and craft. Beyond lay the terrain occupied by employers against whom strikes were impractical, and their suppliers and customers. Occasionally the unions would attempt an attack from the rear through legislation. But with certain exceptions, such as the laws against imprisonment for debt, these were unsuccessful; the statutes in the 1840s shortening the workday, for example, could not be enforced. This perspective differs, then, both from one that would date modern trade union development from the period of intense industrialization during and after the Civil War rather than from the start of the nineteenth century, and from one that would see an important theoretical difference between trade unionism and "political" action rather than recognize them as alternate means to the same inevitably political end.[17]

17. The post–Civil War periodization is standard throughout a broad range of labor movement studies. See, for example, John R. Commons, David J. Saposs, Helen L. Sumner, E. B. Mittelman, H. E. Hoagland, John B. Andrews, and Selig Perlman, *History of Labour in*

For the most part, to secure their early objectives, unions relied on the strike, which was both the battering ram and the regimental flag of each advance. This double aspect of the strike was vital to the labor movement's achievement. Had the strike been simply a weapon, it could have been managed because it usually caused a response that provoked violence, justifying state intervention. A refusal to work under the old conditions, on the other hand, stymied the courts. At the employer's demand, judges could enjoin the violence, let the workers starve, imprison their leaders, assess exorbitant damages. But they could not lawfully order the men back under the old workplace regime, at least not without throwing over the Constitution. Thus, in the bitter strike against the Northern Pacific Railroad in 1893 that left passengers and equipment stranded, the circuit court reviewed a lower court injunction that, among other things, had ordered workers to return to their jobs. Retaining the sections of the writ that forbade destruction or taking possession of railroad property or otherwise interfering with operations, Justice Harlan struck out a clause restraining employees from "combining and conspiring to quit, . . . with or without notice, as to cripple the property or prevent or hinder the operation of said railroad." Harlan raised the question of whether an equity court could prevent such quitting:

> An affirmative answer to this question is not, we think, justified by any authority to which our attention has been called or of which we are aware. It would be an invasion of one's natural liberty to compel [an individual] to work for or to remain in the personal service of another. One who is placed under such constraint is in a condition of involuntary servitude—a condition which the supreme law of the land declares shall not exist within the United States, or in any place subject to their jurisdiction.[18]

The recognition of this principle, however, was not immediate. During the early phases of labor organizing, courts ruled strikes per se illegal. The first case for which there is a court record was a successful prosecution in Philadelphia in 1806 by forty-six master cordwainers against their employees for conspiring to strike in order to raise their wages. Since I suggest that the course of unionism should be viewed continuously, as the successive overcoming of ancient barriers, it is worth citing in some detail the judge's charge to

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the United States, vol. 2 (New York: Macmillan, 1936); Jeremy Brecher, *Strike!* (San Francisco: Straight Arrow Press, 1972); and David M. Gordon, Richard Edwards, and Michael Reich, *Segmented Work, Divided Workers* (Cambridge: Cambridge University Press, 1982). The American brand of "pure and simple" or business unionism, as opposed to European-style labor politics, was given its clearest exposition in Selig Perlman, *A Theory of the Labor Movement* (New York: Macmillan, 1928). In recent years, labor historians, influenced by the work of E. P. Thompson, Herbert G. Gutman, and others, have undertaken a more comprehensively social approach to working-class life. See David Brody, "The Old Labor History and the New," *Labor History* 20 (Winter 1979) : 111–26. However, the distinction between trade unionism and political action remains deeply embedded.

18. *Arthur* v. *Oakes,* 63 Fed. 310 (1894), 317–18.

the jury. Arguments were made then that would become familiar over the next century.

The first argument concerned the detrimental effects of collective, as opposed to individual, action. The position corresponds to the law of conspiracy by which an act ordinarily legal becomes illegal when undertaken by persons jointly. Here the judge discovered an operational reason for finding employees' organizations criminal:

> One man determines not to work under a certain price and it may be individually the opinion of all; in such a case it would be lawful for each to refuse to do so, for each stands alone, either may extract from his determination when he pleases. In the turn-out last fall, if each member of the body had stood alone, fettered by no promises to the rest, many of them might have changed their opinion as to the prices of wages and gone to work; but it had been given you in evidence, that they were bound down by their agreement, and pledged by mutual engagements, to persist in it, however contrary to their own judgment.[19]

Second, the justification offered for actually suppressing such combinations was indicative of what had been a recent practice of government setting wages to match the cost of commodities.[20] The judge denounced "artificial regulation . . . dependent on the will of a few who are interested":

> Is the rule of law bottomed on such principles, as to permit or protect such conduct? Consider it on the footing of the general commerce of the city. Is there any man who can calculate (if this be tolerated) at what price he may safely contract to deliver articles for which he may receive orders, if he is to be regulated by the journeymen in an arbitrary jump from one price to another? . . . It is impossible that any man can carry on commerce in this way.[21]

The mercantilist theme, which identified the worker's isolated and subordinate state with the welfare of the community, was prominent during this period. It had an ancestor in the fourteenth century, when the labor shortage and disarray following on the Black Death prompted regulations in the Statutes of Labourers. In *People* v. *Fisher* (1835), which was an important case because it was the first to apply an American statute, the New York champerty law, against strikers, the court held that collective quitting was "productive of derangement and confusion, which certainly must be considered injurious to trade."[22] After unions had moved beyond the first periphery, this idea was not successfully argued again until the next era of state regulation, under the Sherman Act.

Third, and finally, the judge in the Philadelphia cordwainers' case invoked

19. *Commonwealth* v. *Pullis* (1806); in John R. Commons, ed., *A Documentary History of American Industrial Society*, 10 vols. (Cleveland: Arthur H. Clark, 1910), 3 : 234.

20. Morris, *Government and Labor*, chaps. 1, 2.

21. Commons, *Documentary History*, 3 : 228–29.

22. 14 Wend. 10 (Sup. Ct., N.Y. 1835), 19–20.

the massive structure of past decisions, and presaged what would continue to be the most resistant legal defense against the unions' attack a century later. Pointing out that the by-laws of the cordwainers' association were not "the laws of Pennsylvania," he reminded the jury that even

> the acts of the legislature form but a small part of that code from which the citizen is to learn his duties, or the magistrate his power and rule of action. These temporary emanations of a body, the component members of which are subject to perpetual change, apply to the political exigencies of the day.
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> It is in the volumes of the common law we are to seek for information in the far greater number, as well as the most important causes that come before our tribunals. That invaluable code has ascertained and defined with a critical precision and a consistency that no fluctuations in the political body could or can attain not only the civil rights of property, but the nature of all crimes from treason to trespass. . . . Those who know, know that it regulates with a sound discretion most of our concerns in civil and social life.[23]

The labor movement may be said to have broken through the first wall with the decision of *Commonwealth* v. *Hunt* in 1842. In a case arising from a strike against shoe and boot shops employing nonunion members, Judge Lemuel Shaw found no criminal action per se in employees' combinations because people are "free to work for whom they please, or not to work, if they prefer" and thus "to collectively exercise their acknowledged rights in such a manner as to best serve their own interests."[24] Shaw was a leader of the Whig party of Massachusetts, which was at that time vigorously competing for labor votes. His decision also reflected the economic ideology of the era. He posed the example of a village baker, impoverished by his neighbors' opening a rival bakery after he had refused, although making a good profit, to lower the price of bread. Shaw saw the neighbors' object as "laudable":

> We think, therefore, that associations may be entered into, the object of which is to adopt measures that may have a tendency to impoverish another, that is, to diminish his gains and profits, and yet so far from being criminal or unlawful, the object may be highly meritorious and public spirited. The legality of such an association will therefore depend upon the means to be used for its accomplishment.[25]

Following *Commonwealth* v. *Hunt,* then, the main test of whether a strike was lawful was determined by whether the purpose of the action was lawful; and the courts proceeded over the next several decades to develop a rough common law on this subject. The purpose of the strike was usually considered lawful if it was to secure higher wages or shorter hours, provide more work for union members, prevent unequal distribution of labor during slack times, or other similar measures to improve working conditions. Strengthening a local union or trade unionism in general or deliberately injuring a plaintiff's

23. Commons, *Documentary History,* 3 : 231–32.
24. 4 Metcalf 111 (Mass. 1842), 130.
25. Ibid., 134.

business was considered unlawful by a majority of courts. If a strike had a lawful purpose, it still should not be accomplished by unlawful means, which included force, fraud, coercion, slander, or violence.[26] Such tests clearly left a great deal to judges' discretion, but they also enabled a degree of legal calculation and better strategic planning by labor organizers.

Another important development during the pre–Civil War period was the removal by the courts of any doubts as to whether the law of enticement still covered employees now working in factories, who were no longer housed and fed by the employer and, most important, whose employment contracts were usually at will. The question arose in the English tort case of *Lumley* v. *Gye* (1853), which concerned the luring away of an opera singer by a theater owner from a competitor who had previously engaged her services. There had been a contract for employment, but it did not fit into the hierarchical mold of master-servant relations. *Lumley* v. *Gye* discovered that the enticement action was based not only in the Statutes of Labourers, but also in such common law actions as trespass and assumpsit, which protect the interests of contracting parties.[27] This clarification, and the contractual frame in which it was accomplished, had the advantage of permitting judges to avoid unfashionable language about masters and servants while holding employees securely under the protections against enticement. It would find ready service against labor's next wave of actions in the 1870s and 1880s. But as we shall see, it also proved to be an instance of judicial overreaching, for it eventually both led to doctrinal disarray and handed the unions a new legal argument with strong ideological appeal.

After the legalization of unions and of the strike action itself for a range of industrial purposes, there remained what is called in the parlance of contract "all the world." This realm included employers against whom it was impractical for the unions to organize directly and those against whom strikes had been unsuccessful. The boycotts that had been tried—preventing employees and customers from entering the premises and blocking delivery of supplies—had caused violence and were enjoined on that ground by the courts. Accordingly, the unions now deployed a new kind of strike, the so-called peaceable labor boycott, whereby union members refused to work on any material purchased from or supplied to the company targeted for organizing. (Actually, this was one of two kinds of peaceable boycotts. The other was refusing to patronize retail customers of the company and circulating information that the company was "unfair to labor.") In the peaceable boycott, the injury to the targeted company was clear. But no workers had been enticed away; there was no violence or intimidation that would constitute illegal means under the laws against conspiracy; and the targeted company had no contractual relations with the striking employees. The legal problem presented was

26. Relevant cases on purposes may be found in Charles E. Carpenter, "Interference with Contract Relations," *Harvard Law Review* 41 (1927–28) : 728–63, espec. 760–61. On means, see John M. Wigmore, "The Boycott and Kindred Practices as Ground for Damages," *American Law Review* 21 (July-August 1887) : 509–32.

27. 2 El. & Bl. 216, 118 Eng. Rep. 749 (Q.B. 1853).

whether the company had been injured criminally, or even wrongfully, by the union.

In the sequence of legal problems and their solutions, which then caused a new round of problems, the old system was unraveling. Courts initially gave a variety of answers to the dilemma of the peaceable labor boycott, but the idea that took hold was that of borrowing the contractual terminology used for enticement in *Lumley* v. *Gye* and extending it to contractual relations in general. All contracts could then be protected from outside interference, including interference by labor unions. This step was taken in *Temperton* v. *Russell* (1893), where a union was sued for threatening a supplier with a strike, in order to get him to stop selling to another supplier who had defied a strike threat intended to cut off another employer, with whom the union sought to strengthen its bargaining position. The union was held liable for intentionally procuring the breach of property rights in the contracts.[28] But now the problem was how this breach of property rights through "enticing" away suppliers and customers was different from what people in business do everyday. The new solution was to recognize a privilege for third parties to interfere in contract relations based on the right of competition. The new problem: unions asked that they too be considered competitors, freely competing in trade.

This nettlesome issue was joined in the Massachusetts Supreme Court case of *Vegelahn* v. *Guntner* (1896), a suit against two upholsterer unions and their agents for maintaining a two-man patrol to keep customers, deliveries, and employees from entering the premises of a furniture company the unions were striking. The court agreed with the company that the patrol constituted illegal intimidation and rejected the unions' claim that their attempt to secure better wages was justified as competition. "A combination to do injurious acts expressly directed to another, by way of intimidation or constraint, of persons employed or seeking to be employed by him is outside of allowable competition and is unlawful."[29]

Massachusetts State Justice Holmes criticized this reasoning in dissent. He invoked *Commonwealth* v. *Hunt* and the doctrine there, according to his reading, "that competition is worth more to society than it costs."

> I have seen the suggestion that the conflict between employers and employed is not competition. But I venture to assume that none of my brethren would rely on that suggestion. If the policy on which our law is founded is too narrowly expressed in the term free competition, we may substitute free struggle for life. Certainly the policy is not limited to struggles between persons of the same class competing for the same end. It applies to all conflicts of temporal interest. . . .
>
> If it be true that workingmen may combine with a view, among other things, to getting as much as they can for their labor, just as capital may combine with a view to getting the greatest possible return, it must be true that when combined they have the same liberty that combined capital has to support

28. 1 Q.B. 715.
29. 167 Mass. 92, 99.

their interest by argument, persuasion, and the bestowal or refusal of those advantages which they otherwise lawfully control.[30]

Judges continued to enjoin peaceable labor boycotts according to a variety of theories; they almost never condoned them. But they no longer seemed to know exactly the reason. They said it was because the ultimate purpose of improving working conditions was remote, whereas the immediate purpose, the threat of economic injury, constituted unlawful coercion; or because with the peaceable boycott unions used unlawful means of moral intimidation; or because the boycott's restraint of trade was in violation of the Sherman Act; or that strikes and boycotts were illegal if based on "malicious intent."[31] This was a scramble, with no longer any clear line of doctrine to absolve the courts from the charge of applying the law in an arbitrary and biased way.

IV.

Some of the leaders of the early American labor movement seem to have understood their historical task similarly to what has been argued here, as the culminating phase in a social reconstruction extending over several centuries. Stephen Simpson, for instance, Jacksonian turned Whig and a founder of the Workingmen's party, wrote that it was time the "inconsistencies and discrepancies between theoretical constitutions and feudal laws and customs be discovered, exposed, and resisted."[32] But the intentions of such leaders were largely irrelevant, as were the intentions of the leaders of the religious reformation in the sixteenth century, which was, in this interpretation, one of the labor movement's important predecessors. Certainly religious reformers did not intend to change constitutional history by their arguments over communion tables and priestly collars. Labor leaders, as they pursued strategies of strikes and boycotts, were unconcerned that they were, in the process, enlarging the frame and inventing the forms of collective action fundamental to contemporary American liberalism. The achievement was theirs nonetheless.

A consideration of the idea of labor's centrality in American political development must include, along with an elaboration of the dismantling sketched above, two other large sections of analysis. One must be the legislative dimension of modern liberalism, the new patterns of collective pressure and representation successfully asserted by the labor movement and instituted as part of the broader political culture. The other must be the administrative dimension—the creation of private and state agencies and rules for the mobilization and stabilization of industrial forces, including but not restricted to labor. This was made necessary by labor's disruptions of the old order of social re-

30. Ibid., 106–07.

31. See "The Right of a Trade Union to Enforce a Boycott," *Michigan Law Review* 7 (1908–09) : 499–502; and "Tortious Interference with Contractual Relations in the Transformation of Property, Contract, and Tort," *Harvard Law Review* 93 (1980) : 1510–39, 1533 ff.

32. Stephen Simpson, "Political Economy and the Workers," in Joseph L. Blau, *Social Theories of Jacksonian Democracy* (Indianapolis: Bobbs-Merrill, 1954), 138 and passim.

lations and was undertaken by groups other than the labor movement itself. In the space remaining, I will briefly suggest some contents of the first section.

The claim that labor *enlarged the frame* of collective action derives from labor's extension of group pressures to the private economy. Group organization and petition to public agencies were well-established practices—according to such observers as de Tocqueville, definitive—of early nineteenth-century American politics. But an intricate system of law protected private business affairs from outside interference. If there is a single principle that characterizes the labor movement's gradual transformation of this system, it might be the principle of "contract breaking." John R. Commons wrote of the "liberty to violate contracts" in connection with his argument that the conceit of contract did not adequately describe the continually renewing relations between employer and employee.[33] As we have seen, however, the worker was bound by a contract, even if not by an idealized voluntary one; and the progress of trade unionism has been the forcible breaking of contracts in an ever-widening circle of associations. It is likewise a fair description of subsequent social movements that each has entailed the breaking of or interference in private contracts. No doubt there are exceptions, but the idea would encompass, at least in significant respects, prohibition, civil rights, the consumer movement, environmentalism, the women's movement, and, to pick an up-to-date example, corporate disengagement from South Africa.

The primary purpose, however, is not to locate origins or authorship in the labor movement. It is to clarify how trade union activity, directed toward immediate and nonpolitical industrial objectives, destroyed long established political boundaries and created new ways of behaving politically. Legally speaking, this meant the redefinition of elements in the law of torts. Torts concerns the inducing of wrongful acts or occasioning of harms: how the law draws the line between, for example, "inducing" and "intimidating" versus "advising" and "facilitating" a breach of contract; how it allocates property rights, privileges of competition, and the rights that society members not directly involved in a dispute have, for example, against coercion; what it considers as evidence of "malicious intent"; and so forth. All of these had hemmed in the field of lawful group pressure. Here the specific *forms* or tactics of trade unionism take on their immense political importance. For it was through the insistence on the legality of these forms—not on higher wages and shorter hours—that the labor movement accomplished this redefinition.

The steps by which unions performed this formative role against decades of opposition can be suggested in connection with picketing, an action that has had broader political applications than the labor strike. Today, picketing is such a common tactic of political activists that its legitimacy is taken for granted. Yet picketing was held by the courts to be per se illegal, as intimidation and interference with commerce, for a longer time than were both strikes and simple boycotts. "There is and can be no such thing as chaste vulgarity, or peaceful mobbing or lawful lynching. When men want to converse or per-

33. John R. Commons, *Legal Foundations of Capitalism* (Madison: University of Wisconsin Press, 1968), 302–03.

suade, they do not organize a picket line." Even after the passage of the National Labor Relations Act (NRLA) in 1935, as many courts took this position as there were courts that allowed picketing as a lawful activity.[34]

Picketing against private parties became an available method of group pressure only after labor unions successfully challenged its proscription, first, in connection with a lawful strike. This occurred in *Senn* v. *Tile Layers Protective Association* (1937), when the Supreme Court recognized picketing as a federal question, ruled that a Wisconsin law sanctioning picketing during a strike did not violate the employer's property rights under the Fourteenth Amendment, and stated in dicta that "the union might, without special statutory authorization by a State, make known the facts of a labor dispute, for freedom of speech is guaranteed by the Federal Constitution." *Thornhill* v. *Alabama* (1940) followed this lead and supported picketing on free speech grounds against an injunction based on a state loitering law.[35] After *Thornhill,* employers still had their rights to carry on business without illegal interference; now, however, interference by picketing, when connected with a strike, was no longer tortious but privileged, based on the competing right of free speech.

The second necessary step was the establishment of picketing as privileged interference when it was not connected with a strike. That was the decision in *American Federation of Labor* v. *Swing* (1941), stated in imagery similar to our own: "A state cannot exclude working men from peacefully exercising the right of free communication by drawing the circle of economic competition between employers and workers so small as to contain only an employer and those directly employed by him."[36] Although consumers, environmentalists, and others today are still subject to injunctions and other restraints related to the purposes and manner of their picketing, the burden of justification has been shifted to the other side. (Since 1938, civil rights picketing against racial discrimination has been under the protection of the Norris LaGuardia Act as a "labor dispute.")

An interesting contrast to picketing is the unavailability of the boycott to nonunion groups, partly as a result of the unions having secured the legality of this action by legislation, instead of through industrial confrontation and litigation. Boycotts are per se illegal under the Sherman Act, except for certain immunities established by statute or by the judiciary. The Sherman Act, which according to its legislative history did not intend to impose liabilities except on business groups, was interpreted broadly by the Supreme Court in the *Danbury Hatters* case (1908) to embrace nonbusiness groups and, in particular, labor unions.[37] Subsequently, labor succeeded in procuring its own protection by statute in the Clayton Act (1914), leaving boycotts by other groups out in the cold. Boycotts have been nevertheless widely used; by civil rights groups to protest discrimination; Jewish groups to retaliate against Mexico

34. "Picketing and Free Speech," *Harvard Law Review* 56 (1942) : 180–218. The quotation is from *Atchison, T. & S.F. Ry.* v. *Gee,* 139 F. 582 (S.D. Iowa 1905), 584.

35. 301 U.S. 468 (1937), 478; 310 U.S. 88.

36. 312 U.S. 321 (1941), 326.

37. *Lawlor* v. *Loewe,* 235 U.S. 522.

for an offensive United Nations vote; environmentalists against Japanese products for that nation's killing of whales; academic, professional, and feminist groups in favor of the Equal Rights Amendment; the religious right against television networks; Catholic bishops to prevent the selling of an English translation of the *Liturgia Horum*. But often such actions, as with the last three instances named, have had to answer suits for damages and injunctions.[38]

We might mention one more field opened up by the labor movement to the contest of private groups. This is the courts of equity, through the vehicle of a suit for injunctive relief. In *United Mine Workers* v. *Colorado Coal Co.* (1922) it was held that trade unions, although unincorporated, could be sued in the federal courts.[39] At first, the decision was regarded by union leaders as one of the greatest setbacks organized labor had ever received. Within a few months, however, the New York Cloakmakers came up with the argument that if unions could be sued they should also be allowed to sue, and succeeded in obtaining an injunction against their employers' trade association for breach of contract.[40] Up to that time, equity courts, as the legally designated protector of property rights, had offered recourse only to business interests and governments. When the cord between equity and property, which had been especially strong in the American courts, was severed, the way was prepared for the expansion of equitable protection of numerous other rights and interests that is so prominent a feature of the contemporary political landscape.

The law of collective action continues to evolve. For example, whereas certain labor boycotts have been curtailed by the 1947 and 1959 amendments to the NRLA, the Supreme Court more recently overturned an injunction against a boycott of white Mississippi merchants by civil rights groups seeking to desegregate local public facilities, and found a new free speech right for consumers to engage in refusals to patronize. This decision prompted legal scholars to speculate about possible reverberations back onto labor's own rights to boycott.[41] To the general reader such a development is not likely to seem of particular consequence. This impression would itself confirm the depth and permanence of what has been changed overall.

V.

Assuming the validity of the research outlined, is there anything in it that bears on the study political institutions more generally? Two points emerge.

38. See Ronald E. Kennedy, "Political Boycotts, the Sherman Act, and the First Amendment: An Accommodation of Competing Interests," *Southern California Law Review* 55 (1982) : 983–1030.

39. 259 U.S. 344.

40. See Alpheus T. Mason, "Organized Labor as Party Plaintiff in Injunction Cases," *Columbia Law Review* 30 (1930) : 466–87. The cloakmakers decision is *Schlesinger* v. *Quinto*, 192 N.Y. Supp. 564 (Sup. Ct. 1922).

41. See, for example, Michael C. Harper, "The Consumer's Emerging Right to Boycott: *NAACP v. Claiborne Hardware* and Its Implications for American Labor Law," *Yale Law Journal*, 93, no. 3 (January 1984) : 409–54. The case in question is *NAACP* v. *Claiborne Hardware*, 102 S. Ct. 3409 (1982).

First, the idea that contemporary liberal politics is an invention, so to speak, of the labor movement is a reminder that institutionalist, pluralist, and other approaches to studying politics are not approaches only, but may also refer to changing features in the empirical universe under study. Without underestimating the importance of public and private structures in, for example, contemporary labor politics, it is also correct to observe that employment relations were more hierarchically structured by formal institutions in the nineteenth century than in the twentieth; at least the earlier system of regulation did not contemplate the possibility of legitimate collective action upon which industrial policy is predicated today.

The tendency to lose sight of this changing reality through an engagement with analytic theories may be illustrated by an example drawn from Alan Dawley's influential study of the industrial revolution in Lynn, Massachusetts. Dawley's analytic foundation, as he calls it, is the concept of social class. As one of the new breed of social historians he believes that if "it is to be effective, class analysis must provide an accurate explanatory framework for subduing the chaos of individual experience and making it intelligible as the social experience of groups of people over time."[42] Speaking of early nineteenth-century community integration, he says:

> Given household organization, no group of townspeople could consolidate instruments of power to be used against other social groups. As long as the household was the basic unit of production, class ties among journeymen were indistinct. As long as propertied artisans sold commodities and performed manual labor in a day's work, the class position of the artisan was ill-defined. And as long as the scale of production and the size of the individual firm remained small, the power of capital in the hands of the shopkeeper was held in check.[43]

Dawley's account of the conscious experience of groups and individuals may be accurate. However, by overemphasizing the absence of concerted action on the part of community elites against laborers, he minimizes the importance of the legal institutions of the time. This imbalance causes a distorted view of the instruments and distribution of power in Lynn. Conversely, an analytic stress by political scientists that "institutions matter," without attention to the degree and character of social voluntarism complementing institutions at different periods of development, may obscure the deepest commitments of political regimes, and of their complexity.[44]

42. Dawley, *Class and Community*, 4.

43. Ibid., 24.

44. An important study of American state building, and a major contribution to the contemporary institutionalist literature on political development, is Stephen Skowronek, *Building a New American State* (Cambridge: Cambridge University Press, 1982). Skowronek's historical analysis—of how institutions such as parties and courts acted with other interests to obstruct the development of a vigorous and coherent system of national administration—is addressed to the "problem" (in an evaluative sense) of American state building, both historically and today. The view that the weakness and fragmentation of the American state ought

A second, related point concerns the value of more carefully distinguishing among the elements in often holistic ideas of state-society relations for given historical periods. In the labor literature, an excellent (if controversial) example is set by William M. Reddy in his study of the textile trade in nineteenth-century France. Reddy argues that the "idea of the market" permeated both the dominant culture and government institutions prior to the implementation of actual mechanisms of supply and demand in industry, particularly in the wage sector.[45] The labor case likewise suggests the problem of imposing overly unified models of state development—the United States was governed by a Madisonian-liberal state in the early nineteenth century, a "state of courts and parties" in the mid-nineteenth century, an interest–group liberal state in the mid-twentieth century—without regard to the discrete connections to society within them, and how these may separately change and coexist. For example, in the enforcement of the legal system that regulated labor relations in the early nineteenth century, there was full coordination, and arguably no important political distinction, between law courts and employers. In other important respects, however, state and property interests were differentiated, and the American state to that extent was a liberal state. There is, indeed, evidence this differential development worked to labor's advantage. During the Revolution, indentured servants were released from their bonds against their master's will upon being impressed into the militia; in 1840, labor unions secured the ten-hour day on federal works as a means of pressuring private industry to reduce hours.

These observations bring this note full circle. The account of American political development sketched above differs from Hartz's and others' in that theirs do not consider the persistence into the nineteenth century of the feudal institutions that have been described. From this perspective also, a fundamentally "radical" character may be attributed to the American labor movement. Finally, a more refined view of the transition to liberalism, in the United States and elsewhere—one that sees the dismantling of the old order in stages—should provide new avenues of inquiry into the comparative questions with which Hartz began. I suggest as a point of departure the query, why has pure and simple unionism been so weak among European workers?

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to be considered a problem is, at least in part, expressed from a vantage point outside the analysis itself. An interesting companion reading to Skowronek is Barry Karl, *The Uneasy State* (Chicago: University of Chicago Press, 1983). Karl sees a rough public ideology in favor of associationalism, and not institutional stalemate, behind the same historical resistance to government centralization and reform.

45. William M. Reddy, *The Rise of Market Culture* (Cambridge: Cambridge University Press, 1984).