
Michael J Goldberg

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Michael J. Goldberg*

I. Introduction

Since its founding in 1882, Labor Day has provided daily newspapers throughout the country, and particularly their editorial pages, with an annual opportunity to reflect upon not just the Labor Day holiday, but also upon workers, their unions, and the state of labor relations generally. The Labor Day editorials, op-ed pieces, political cartoons, and news features of the mainstream press therefore provide a unique window through which to view more than a century of American labor history.¹

This article takes a look through that window at the history of American labor and employment law from 1882 to 1935, as seen through the sometimes "jaundiced eyes" of the daily press.² The article examines representative Labor Day commentary on some of the most important features and developments in the law governing the emp-
ployment relationship during the period before its transformation by the Wagner Act in 1935.\(^3\) The legal and policy debates commented upon by the Labor Day press, and examined in this article, include those surrounding protective legislation for women and children, employer liability and workers compensation for job related injuries and deaths, legislation to shorten the working day, and the use of labor injunctions against union-led strikes, boycotts, and organizing efforts.

My goal in this article is to use the rich source material provided by these Labor Day commentaries to shed new light on important issues and developments in the history of American labor and employment law. In the process, a second goal is pursued: to test, against this substantial but never before systematically examined body of evidence, the theories and conclusions of leading media critics and historians regarding the media’s views of organized labor.

Prior studies have documented a generally anti-union bias on the part of the mainstream press,\(^4\) but they have tended to rely either on collections of anecdotal evidence, or on more comprehensive examinations of only a few papers’ treatments of a small number of incidents or issues.\(^5\) This article, on the other hand, is based on a survey of fifty years of Labor Day commentary in sixteen daily newspapers from major cities across the country.\(^6\)

While I make no claims that this study satisfies the demands of

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6. The material I refer to as Labor Day commentary was not necessarily published on Labor Day itself. Some of it may have been published on the Saturday or Sunday before Labor Day, or on the Tuesday or Wednesday following. Each of the following papers was canvassed for material published on those days over each Labor Day weekend for all or a substantial part of the period from 1882 through 1935: Atlanta Constitution, Baltimore Sun, Boston Globe, Chicago Tribune, Detroit Free Press, Los Angeles Times, New Orleans Times-Picayune, New York Times, New York Tribune (and Herald Tribune), New York World (and World-Telegram), Philadelphia Inquirer, Pittsburgh Post-Gazette, San Francisco Chronicle, Seattle Post-Intelligencer, St. Louis Post-Dispatch, Washington Post. We did not examine weekly or monthly publications, nor the labor movement’s own press, political party newspapers, or the ethnic, foreign language, or religious press.
social science sampling techniques or content analysis, the newspapers canvassed were selected with an eye toward geographic and political diversity. Certainly, the Labor Day focus of my survey skewed somewhat the topics addressed by the press commentaries I examined. As one would expect, important events in the history of American labor law that took place around Labor Day were undoubtedly the subject of more Labor Day commentary than events of equal or greater importance that took place at other times of the year. This would explain, for example, why I found so much commentary on the controversial passage in 1916 of legislation granting railroad workers the eight-hour day, and on the sweeping federal injunction against the railroad shopmen's strike of 1922, but only passing references to the federal government's most notorious use of the labor injunction in the Pullman Strike of 1894, or to the 1932 passage of the Norris-Laguardia Act, which curtailed the availability of labor injunctions in federal court. Nevertheless, to the extent my study reinforces or calls into question the findings of others that the press has over the years exhibited a bias against organized labor, it illustrates the point that "[i]n the social sciences, it is not exact duplication of 'experiments' that confirms a finding, but rather similarity of findings under different specifications."

The next section of this article provides some background on the media's treatment of organized labor and work related issues generally, and explores some of the reasons why that treatment has tended to exhibit an anti-union bias. The heart of the article then follows, analyzing the first fifty years of Labor Day commentary in the daily press on labor and employment law issues. The article's final section draws some conclusions about the press's commentary on these issues, and highlights some of the ways those conclusions are consistent with, and differ from, the observations of other critics of the media's coverage of labor issues generally. One interesting dynamic explored in that section is the somewhat circular, causal relationships among the nature of the evidence necessary for obtaining federal labor injunctions before Nor-

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10. See LINDSEY, supra note 5.
ris-LaGuardia, the reliance of the press upon the evidence presented in injunction cases as a basis for news stories and editorials on strikes and strike related violence, and the role of those press reports and editorials in shaping public opinion on those issues, which in turn helped create the political climate in which the courts continued to develop and apply the law pertaining to labor injunctions.

II. Press Coverage of Work, Workers, and Organized Labor

The media's treatment of organized labor is and long has been a critical factor in shaping American public opinion about unions. In part, this is because so small a percentage of the work force is unionized. Even at its peak during the 1950's, organized labor represented only about one third of private sector nonagricultural employees, and by 1994 that figure had dropped to only 10.8 percent (or 15.5 percent if public sector employees are included). As a result, "organized labor is a remote experience for the vast majority of Americans." For them, media portrayals of unions are the principal, if not the only, sources of information on the subject.

Unions have long been critical of their treatment by the press, particularly the commonly expressed editorial view that union goals and tactics are often contrary to the public interest. As one officer of the American Federation of Labor (AFL) explained in 1920:

When we read in the daily newspapers that 'the people will not approve'... of plans of the workers to help themselves; when it is said that 'the great American public will not permit this or that to be done'; when we are told that 'the community has rights which must be respected', we know that the class variously referred to as 'the people', 'the great American public' and 'the community' comprise those persons in whose interests the newspapers are published, by whom they are owned and under whose direction the views are given expression. They do not embrace the workers now any more than they have ever done since the beginning of history.

During most strikes, complained a union publication in 1922, "the big dailies... lash the strikers through the blatant columns of their unreliable news sheets for the inconvenience and suffering they have brought upon the public."

More recently, the AFL-CIO's director of public relations found it

14. PUETTE, supra note 2 at 4.
ironic that the mainstream press in this country, which shares with the labor movement "a common breeding ground—the first amendment to the Constitution—... regularly invokes its first amendment rights to oppose, or at best, to dampen the first amendment rights of union members. For example, no daily newspaper in America editorially supported the situs picketing bill and most opposed it, although the guts of that legislation was the construction workers' right to exercise free speech in the form of a picket sign." In 1979, the Machinists' union launched a major campaign to persuade the media, and especially television, to present the public with a fairer image of workers and their unions.

Unions, of course, have an obvious bias of their own when it comes to evaluating their treatment in the press, but most media critics and scholars who have commented on the subject agree that the union complaints are justified. In 1960, the New Yorker's long-term press critic A.J. Liebling wrote that "in practically every account of a strike I have ever read in a newspaper, [the strikers] were wrong, and dead to the public interest." In 1970, former Harvard president Derek Bok and former Secretary of Labor John Dunlop agreed that "to the public as a whole, the communications media tend to project an unfavorable image of organized labor." More recently, a Los Angeles Times survey of newspaper editors found that in business-labor disputes, 54 percent of them generally take business's side, 7 percent take labor's side, and 39 percent claim impartiality. Washington journalist James Fallows observed in 1996 that it "is very rare for a major paper to publish an article or even op-ed piece that is enthusiastic about labor unions."

Ironically, support for the labor movement's complaints about an


19. A.J. LIEBLING, THE PRESS 158 (2d rev. ed., 1975). A few years later Liebling observed that in strike stories, "the employer ... always 'offers,' and the union 'demands.' A publisher, for example, never 'demands' that the union men agree to work for a four-bit raise; the union never 'offers' to accept more. ('Demand'... is an arrogant word; 'offer,' a large, generous one.)" Id. at 539-40. See also Zack, supra note 17 at 4: "Every strike is calculated in lost wages, never in the lost self-esteem that would result if the workers caved in to management demands and tolerated unfettered management domination of their lives. Every strike is a strike against the public interest, or inflationary, or pigheaded, in the opinion of the press."


21. LEE & SOLOMON, supra note 5 at 188.

anti-union bias on the part of the press is implicit in conservative complaints that the media are too liberal:

For the most part, such [conservative] arguments rely on a definition of liberalism that is limited to politics affecting defense spending, federal funds for social programs, and advocacy of civil rights causes. The rights of labor to organize and bargain collectively have been removed from that liberal agenda so that not even its conservative critics can find traces of sympathy to the labor movement in the media they have so single-mindedly harangued otherwise.23

The history of American journalism is replete with examples of anti-union bias, as the following anecdote from Boston's journalistic past illustrates:

The [Boston Evening] Transcript, for all its tone of quality and its disdain for the "yellow" journalism of its fellows . . . was not above twisting the facts to favor its conservative point of view. When mill workers in Lawrence, Massachusetts, struck in 1912 for better working conditions and higher wages, Lucien Price, one of the great names in Boston journalism, was sent by the Transcript to cover the strike. He telegraphed stories daily but didn't see the paper because few managed to get into the strike-bound city. He returned to find that the essence of all his stories had been altered to present an antilabor point of view.24

Such incidents are limited neither to the distant past nor to papers now defunct. Another example occurred in December of 1969, as labor negotiations between hospital workers and management at Johns Hopkins University Hospital in Baltimore were getting under way.25 The first edition of the Baltimore Sun's "Perspective" section on Sunday, December 7, ran an article sympathetic to the workers under the headline, "For Sam Smith, Hospital Orderly: A Battle Whose Time Has Come."26 Mysteriously, the story disappeared from later editions of the Sun that day, replaced by an article on a different subject from the Associated Press. Coincidentally, one of the Sun's directors was also a director of both the Johns Hopkins Hospital and a Baltimore bank that


24. HERBERT A. KENNY, NEWSPAPER Row: JOURNALISM IN THE PRE-TелEVISION ERA 177–78 (1987). The reporter, Lucien Price, resigned from the Transcript over this incident and for the next fifty years wrote editorials under the pen name "Uncle Dudley" for the Boston Globe. Id. at 178.

25. For a history of the organizing campaign at Johns Hopkins Hospital, see Gregg L. Michel, Union Power, "Soul Power": Unionizing Johns Hopkins University Hospital, 1959–1974, 38 Lab. Hist. 28 (1997).

held a sixty-one percent interest in the newspaper company. As the Columbia Journalism Review later commented, "it seemed evident that if [that director] or an associate in the ownership echelon had not ordered the story killed, a top editor, afraid that it might displease the owners, had done so. Either way, journalistic morality suffered . . . ."

These stories illustrate A.J. Liebling's famous quip, "Freedom of the press belongs to the man who owns one." In 1970, Bok and Dunlop characterized as "naive" the explanation for press bias against labor that newspapers "are dominated by the views of anti-labor owners." In recent years, however, centralization of the ownership and control of the mass media in the hands of a few giant corporations, who are no friends of organized labor, has reached a point where it is probably the Bok and Dunlop position that is naïve. In the early 1980's, only 50 corporations controlled what Americans see, hear, and read. By 1990, the number of companies controlling all the major media, including newspapers, television, radio, and the movies, had dropped to 23, with only 14 companies controlling half of all the daily newspapers in the United States.

James Squires, a former editor of the Chicago Tribune, recently explained that his paper's editorial policy on important issues was often the result of prominent Chicagoans lobbying the paper's attorney, publisher, or chief financial officer in private conversations. Then one of them would set up a meeting with the editor of the editorial pages. "Sometimes, other Tribune executives, including advertising and financial people, would be among the delegation," Squires continued. "Even worse, these visitors were frequently not only lobbyists for a particular cause but also members of the Tribune Company board of directors. They would all sit around in what amounted to a joint editorial/corporate executive committee."

Newspapers, as businesses and employers, have experienced their share of labor strife over the years, often in lengthy strikes that cannot

29. Quoted in PARENTI, supra note 5 at 26.
30. BOK & DUNLOP, supra note 20 at 36.
31. See BAGDIKIAN, supra note 27 at xv. Many of those corporations "were interlocked in common financial interest with other massive corporations and with a few dominant international banks." Id. Illustrative of these interlocking directorates is the fact that the Ford Motor Company had directors on the corporate boards of three of the nation's most influential newspapers in 1979, the New York Times, the Washington Post, and the Los Angeles Times. Peter Dreier & Steve Weinberg, Interlocking Directorates, COLUM. JOURNALISM REV. 51, 52 (Nov.-Dec., 1979). See also NOAM CHOMSKY & EDWARD HERMAN, MANUFACTURING CONSENT: THE POLITICAL ECONOMY OF THE MASS MEDIA (1988); ROBERT W. MCCHESNEY, CORPORATE MEDIA AND THE THREAT TO DEMOCRACY (1997).
33. Id. at 112.
help but have affected the papers' editorial policies. The rabid anti-unionism of the Los Angeles Times in the early years of the twentieth century, for example, had its roots in a bitter 1890 printers strike that was a turning point not just for the Times but for the entire city. New York City, the nation's media capitol, has experienced several lengthy and vituperative newspaper strikes, including a 114 day strike against all the New York dailies in 1962–63, a 1978 strike that lasted three months against the New York Times and the Daily News, and nearly two months against the Post, and another, particularly viciously fought strike at the Daily News in 1990.

In the mid-1970's, Washington Post publisher Katherine Graham set out to put an end to what she characterized as her workers'archaic union practices," precipitating a strike and lockout that ultimately broke the paper's unions. "Her success," according to one observer in the industry, "had the same effect on newspaper management attitudes as President Reagan's devastation of the air traffic controllers' union had on the national climate six years later." The Post's victory over its unions still reverberates, undoubtedly providing some of the inspiration for the Gannett and Knight-Ridder chains' decisions to fight to the death the unions at the Detroit News and Detroit Free Press in 1995–97.

Anti-union bias in the press's coverage of labor relations is not solely the product of the corporate media's own interest in a weak and docile labor movement. Although not necessarily naive, such a view is overly simplistic. Another contributing factor is pressure from advertisers who disfavor unions. Although a wall of separation between the editorial and business sides of the news business is in theory revered

34. CAREY McWILLIAMS, SOUTHERN CALIFORNIA: AN ISLAND ON THE LAND 275 (1973).
37. For an account of the 1990 Daily News strike, see RICHARD VIGILANTE, STRIKE: THE DAILY NEWS WAR AND THE FUTURE OF AMERICAN LABOR (1994). At the time of the strike, the Daily News was owned by the Tribune Company, owner of the Chicago Tribune among other papers. Shortly after the Daily News strike, the Tribune Company hailed its CEO, who had also defeated the Tribune’s own unions in a 1985 strike, as a hero: "No single event was more important in [his] subsequent elevation from CEO to chairman." SQUIRES, supra note 32 at 178.
39. SQUIRES, supra note 32 at 204.
40. See Don Gonyea & Mike Hoyt, From a Brutal Strike, Bitter Lessons and Lasting Losses, 36 COLUM JOURNALISM REV. 36 (May/June, 1997).
like the separation of church and state, the *Chicago Tribune*’s James Squires has noted some major breaches in that wall:

Between the time I went to Orlando as editor [of the Tribune Company’s *Sentinel*] in December 1976, and the day I left the [Chicago] Tribune in December 1989, this separation—although still given lip service throughout the industry—had all but disappeared. Today, with few exceptions, the final responsibility for newspaper content rests with the business executive in charge of the company, not the editor. Editors such as myself who are willing to bridge the gap between editorial and business are now the standard in the nation’s newsrooms. Those reluctant to do so don’t last long.41

At the *Los Angeles Times*, bridging the gap between journalistic “church and state” has been official policy since a new CEO took over the paper’s parent Times Mirror Company.42 Even where an effort is made to maintain the separation, “In the normal hiring and firing of reporters, editors, writers, and producers, the owning corporations quietly eliminate those who do not conform to corporate wishes in the news and popular culture.”43

Other factors contributing to the press bias against organized labor stem not from an overt hostility toward unions but from the very nature of journalism and what is reported as news. It is true, for example, that strikes seem to dominate news reports about unions, even though less than two percent of contract negotiations in any given year result in

41. SQUIRES, supra note 32 at 78. During the recession of the early 1980’s, for example, the porous separation between the advertising and editorial sides of a newspaper chain in Michigan was underscored by a memo from the publisher to the papers’ editors. “From now on,” ordered the publisher, “plant closing, business failures and layoffs will not appear on the front page of any of our newspapers. It will be our policy to aggressively support, promote, and report business organizations within our circulation area and/or those business organizations who support us with their advertising.” Quoted in MICHAEL PARENTI, INVENTING REALITY: THE POLITICS OF THE MASS MEDIA 47 (1986). News-Herald Newspapers, Inc., was the chain involved. See also id. at 39, quoting a former journalist and director of a business journalism program at Columbia University: “I daresay anyone who has been in the business for more than a few months can cite plenty of examples of editorial compromises due to pressure, real or imagined, from publishers, owners, and advertisers.”

Pressure from a newspaper’s major advertisers may influence not only editorial decisions, but also the nature of other advertisements accepted by the paper. In 1970, for example, the *Chicago Tribune* and other Chicago papers refused to accept ads from the Amalgamated Clothing Workers union explaining its dispute with the Marshall Field department store—a major advertiser—over its sale of imported apparel. See SARA U. DOUGLAS, LABOR’S NEW VOICE: UNIONS AND THE MASS MEDIA 134–35 (1986). The Seventh Circuit rejected the union’s bid to compel the papers to accept the union’s ads. Chicago Joint Bd, Amalgamated Clothing Workers v. Chicago Tribune Co, 435 F.2d 470 (7th Cir. 1970).


43. BAGDIKIAN, supra note 27 at 223.
strikes. It is also true that labor news unrelated to strikes tends “to report on their links to organized crime, corrupt bosses, and the lack of internal democracy.” In these cases, however, labor’s complaints about the coverage it receives are no different from the complaints of other segments of society about their own treatment by the press. It is simply the nature of the beast. News inexorably “tends to be bad news,” and “human tastes being what they are, the most . . . arresting news stories about unions . . . involve strikes, corruption, and other unfavorable events.”

News is also shaped by its sources, and those sources are often linked to the public relations, lobbying, and propaganda activities of large corporations, organizations representing their interests, and foundations they support. Over the years it has been common for newspapers to print corporate press releases as news. Sometimes this results from pressure from advertisers, as happened during a 1913 coal strike, when newspapers faced economic retaliation from Rockefeller-owned businesses if they refused to print as news Rockefeller press releases on the strike. At other times, newspapers may simply find it easier to rely on press releases than to research everything they print themselves.

In recent years, a “distinct class of ’policy entrepreneurs’” has emerged with the goal of shaping public policy by shaping the media’s coverage of important issues. They work out of Washington’s think tanks and are forever presenting new “trends” to journalists at briefings and in research papers. The think tanks—Cato, Heritage, the American Enterprise Institute, the Progressive Policy Institute, and so on—present themselves as being quasi-academic. They are actually bridge groups that blend the functions of academics, journalists, and lobbyists. Their specialty is pack-

44. Puente supra note 2 at 70. Erickson and Mitchell point out that strikes occur more often (closer to 10 percent of the time) when major contracts are at issue, and large bargaining units generate more press coverage than small ones. Erickson & Mitchell, supra note 7 at 396 n.1. Even so, strikes still receive coverage out of proportion to their frequency. Cf. Kalaski, supra note 18 at 4: “Through the distorted eye of television, unions contribute little to society except strike turmoil. Labor’s ongoing campaigns for fair taxes, job safety and health, and decent social services go unnoticed.”

45. Parenti, supra note 5 at 85.

46. Schudson, supra note 9 at 9.

47. Bok & Dunlop, supra note 20 at 36. As one journalist succinctly put it, “No conflict, no news.” Fallows, supra note 22 at 163.

48. The labor movement, of course, has engaged in its own efforts to shape the media coverage it gets, although on a much smaller scale and against greater odds. See generally Douglas, supra note 33; Gerald Pomper, The Public Relations of Organized Labor, 23 Public Opinion Q 483 (Winter, 1959–60).


50. In one 1926 edition of the New York Times, 58 percent of the stories were based on press releases. On another day that year in the New York Sun, the figure was 46 percent. Michael Schudson, Discovering The News: A Social History Of American Newspapers 144 (1981).
aging research in a form that fits a columnist's or commentator's
need—and that uses a veneer of scholarship to dress up arguments
advancing their political agenda.51

True, some of these think tanks, like the Brookings Institution and the
Institute for Policy Studies, are liberal or further to the left, but over­
whelmingly the funding—and the ideological tilt—of most think tanks,
whether in Washington or elsewhere, comes from the opposite end of
the political spectrum.52

Biases in the news also stem from the demographics of those doing
the reporting and editing. Journalists with blue collar backgrounds
who might bring working class concerns to their work are for the most
part a thing of the past. “Today, many reporters and editors regard
unions and the working classes as beneath them. They want . . . to get
the glamour beats . . . not to muck around in decaying industrial towns
or crummy local union halls.”53 Another media critic explains, “Most
newspeople lack contact with working-class people, have a low opinion
of unions, and know very little about people outside their own social
class.”54

Most journalists reporting on the labor movement in the main­
stream media start out with little or no knowledge of workers and their
unions. Compounding the problem, they rarely have an opportunity to
develop that expertise on the job, due to the demise of the “labor beat”
on most newspapers. Often it is a police or crime reporter who covers
labor news; in other cases, it may be a business reporter.55 Even those

51. FALLOWS, supra note 22 at 155.
52. For example, the Institute for Policy Studies’ $1.5 million budget could run the
Heritage Foundation for only about thirteen working days. Michael H. Shuman, Why Do
53. William Serrin, Labor and the Mainstream Press: The Vanishing Labor Beat, in
PIZZIGATI & SOLOWEY, supra note 18 at 9, 16.
54. PARENTI, supra note 33 at 40, citing HERBERT GANS, DECIDING WHAT’S NEWS
208 (1979). See also FALLOWS, supra note 22 at 81–83.
55. See John A. Grimes, Are the Media Shortchanging Organized Labor?, 110
MONTHLY LAB. REV. 53–54 (Aug. 1987); Michael Hoyt, Downtime for Labor: Are Working
People Less Equal Than Others—Or Is Labor Just A Dead Beat?, 22 COLUM. JOURNALISM
REV. 37 (March- April 1984); PUETTE, supra note 2 at 63–64; Serrin, supra note 53;
For a Labor Day op-ed piece making this point, see Paul F. Clark, Labor Reporting Has
A study of the press coverage of a 1981 coal strike found that many of the reporters
on the scene “were not experienced enough to obtain any information except the official
press releases of the coal companies and superficial, guarded comments from the union
papers that maintain a labor beat, like The New York Times, often starve it for resources. 56

Of course, it would be wrong to say that press coverage of the labor movement is or ever was uniformly hostile or negative. "In the early days of the labor movement" in particular, writes one scholar, "it was the muckraking press characterization of the 'robber barons' and the 'captains of industry' that provided workers with much of the rhetoric of their moral imperative to organize." 57 The papers of press moguls Joseph Pulitzer, E.W. Scripps, and William Randolph Hearst (at least in his earlier years) often endorsed workers' rights to organize, and sometimes even supported their strikes. 58 In fact, "[p]eople at the bottom of the economic order were more likely to be served by publications keyed to their political aspirations in the 1890's than in the 1990's." 59

More recently, there was widespread press support for the textile workers' union's struggles with the J.P. Stevens company in the late 1970's. 60 But now, as in earlier times, those newspapers that do take a liberal, sympathetic view of low income workers and the harsh and dangerous conditions in which they often work commonly portray unions as part of the problem, not the solution:

[T]he so-called liberal left in America . . . is comfortable crusading for the downtrodden and aggrieved worker but is uncomfortable relating to the working-class union leader and the well-paid union worker. There may well be a deep-seated class antipathy at the bottom of this leadership." Puette, supra note 2 at 63–64, citing Curtis Seltzer, The Pits: Press Coverage of the Coal Strike, 20 Colum. Journalism Rev. 70 (July-Aug. 1981).

56. "I was hopelessly overcommitted," writes a former labor and workplace reporter for the Times. "I was supposed to cover all labor—New York labor, the national labor movement, the workplace. It couldn't be done by one person. . . . Other departments had far greater resources. The business section had forty or fifty reporters. Labor had me, plus a guy . . . [who was] supposed to cover the labor movement in Washington one-half of his time." Serrin, supra note 53 at 11.

57. Puette, supra note 2 at 59.


59. Thomas C. Leonard, News For All: America's Coming-Of-Age With The Press xiv (1995). This can be explained in part by the shift in newspapers' principal source of income from paid circulation to advertising revenues. By the 1920's, many journalists began to "conceptualize[] stories as 'written bait,' to make the public take in ads," id. at 164, and by the last third of the century, newspapers were purposely getting rid of readers who did not satisfy the demographic and income profiles advertisers most wanted to reach. This contributed to shifts in editorial policies away from the concerns of those in lower income brackets, and towards those of a more elite readership. Id. at 173–75; Bagdikian, supra note 27 at 129–32; Squires, supra note 32 at 89–90.

60. See Douglas, supra note 33 at 257.
long-standing intellectual disdain for unions that has colored the media portrayal of labor for over fifty years.\textsuperscript{61}

If this analysis is correct, one might expect to find liberal newspapers supporting legislation, opposed by more conservative papers, that is intended to curb workplace abuses like child labor or unsafe conditions, but to find many liberal papers joining their conservative counterparts in condemning the strikes it often takes for unions to remedy these problems through collective bargaining.\textsuperscript{62} The next section of this article will explore this and other questions as it examines the mainstream press's Labor Day commentary upon key labor and employment law issues and controversies that arose in the years between 1882 and 1935.

III. Labor Law, Employment Law, and the Labor Day Press

For the most part, American unions have utilized two approaches in seeking to improve the wages and working conditions of their members, and of other workers as well.\textsuperscript{63} On the one hand, unions have tried to extract these improvements directly from employers through collective bargaining—backed up, of course, with economic pressure in the form of actual or threatened strikes and boycotts. On the other hand, unions have also pursued a political strategy, seeking to achieve their goals through favorable legislation enacted at the state, local, or federal levels.\textsuperscript{64} By the turn of the century, the “pure and simple unionism” of
the AFL, with collective bargaining as its focus, was emerging as the primary approach, but during the 1880's and 1890's, legislative strategies were widely supported not only by the more overtly political Knights of Labor, but by the AFL as well. My examination of the mainstream press's commentary on labor law begins, therefore, with some of the significant legislative issues of that period.

A. Protective Legislation for Women

My survey of Labor Day editorial commentary yielded a number of pieces on "laws regulating women's work," with the first appearing on the San Francisco Chronicle's "women's page" in 1885. The subject of that article was a Pennsylvania statute prohibiting women and girls from working in the state's coal mines. The Chronicle voiced "no doubt that such employment is altogether unsuited to the physical powers of most women," but wondered whether the statute could be enforced "should the strong-armed lassies of the coal districts refuse to obey" it. There were always some, although probably not many, women who wished to enter the mines or actually found work there, but it was their potential employers, not the women, who controlled access to such work. Nevertheless, the Chronicle's concern about the statute's constitutionality was a legitimate one, because for many years the courts ordering of society as well. See generally Bert Cochran, Labor and Communism: The Conflict That Shaped American Unions (1977); John H.M. Laslett, Labor and the Left: A Study of Socialist and Radical Influences in the American Labor Movement, 1881-1924 (1970); Staughton Lynd, ed., "We Are All Leaders:" The Alternative Unionism of the Early 1930's (1996); Staughton Lynd, ed., American Labor Radicalism: Testimonies and Interpretations (1973).


66. "[T]he typical Gilded Age AFL activist shared the Knights' radical reform ambitions and their faith in lawmaking and the ballot as ways of ending the 'tyranny of capital.' " William E. Forbath, Law and the Shaping of the American Labor Movement 14 (1991).

67. For the Ladies, Laws Regulating Women's Work, San Francisco Chronicle, Sept. 5, 1885. During the 1880's, the "women's page" was becoming a fixture in major daily newspapers, Leonard, supra note 59 at 27, and Labor Day, not surprisingly, presents a good opportunity for those pages to discuss issues affecting working women. The publication date of this piece, however, was so early in the history of Labor Day, particularly in California, where for years Labor Day was celebrated in October to avoid conflict with another state holiday, that the timing was probably coincidental.

68. Laws of Pennsylvania, Act 165, s 1 and Act 169, s 16 (June 30, 1885).

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routinely declared unconstitutional most protective statutes enacted at both the state and federal levels.\(^70\) While the courts were somewhat more willing to uphold legislation for "dependent classes" like women and children,\(^71\) state legislation of even that type was not definitively upheld under the U.S. Constitution until the Supreme Court's 1908 decision in *Muller v. Oregon*,\(^72\) and federal statutes on those subjects were usually held unconstitutional until as late as 1935.\(^73\)

The *Chronicle* quoted at length an early feminist's contention that the law was enacted not for the benefit of women, but "in the interests of the men . . . who feared that their wages would be lowered by the competition of women."\(^74\) She argued, perhaps with tongue-in-cheek, that the new law could lead to absurd, and therefore unconstitutional, results:

If the State has the right to decide what is womanly work, and if it can deny women the right to do out-door work, it can decide what is manly work, and deny men the right to engage in in-door occupations. Women in that case would probably be the gainers. Every dry goods merchant would be subject to fine and imprisonment who would employ gentlemen clerks. Every newspaper office would be emptied of men, from editor down, except that the out-door reporter might be retained. . . . Judges, lawyers, clerks and office-boys would all be compelled to do manly work, instead of filling places nature never intended they should fill. Even male legislators might be removed to their proper sphere, where more muscle than brain is needed. . . . The absurdity of such a law is readily seen when viewed from all sides. The sacred right of individual freedom should be guaranteed to even


\(^71\) FORBATH, *supra* note 66 at 17.

\(^72\) 208 U.S. 412 (1908).

\(^73\) A.L.A. Schechter Poultry Corp. *v.* United States, 295 U.S. 495 (1935), for example, in which the Supreme Court declared unconstitutional the National Industrial Recovery Act, involved not only "sick chickens" but also wage and hour standards established by industry codes promulgated pursuant to the Act.

\(^74\) For the Ladies, *supra* note 67. The article quoted the views of Matilda Hindman, first presented in the *Pittsburgh Commercial Gazette*. More recently, a leading historian of women in the workplace offered this explanation for the AFL's position on protective legislation: "Fear of competition from women and reluctance to invest in organizing them led trade unionists to distinguish sharply between men and women when it came to legislation. To legislate for men, who were theoretically organizeable, would undermine their commitment to unionization. But for women, whose stay in the labor force was expected to be brief, legislation could provide an attractive alternative to the expense of organizing while it controlled the way in which women could enter the labor force and compete with men." ALICE KESSLER-HARRIS, *Out to Work: A History of Wage-Earning Women in the United States* 201–02 (1982). The AFL's support of protective legislation for women and children, but not for men, can also be explained in part by the fact that this was the only type of protective legislation likely to be validated by a conservative but activist judiciary. Why expend precious resources seeking legislation likely to be overturned by the courts even if enacted? See FORBATH, *supra* note 66.
the most humble. Therefore, the constitutionality of this act should
be tested for the sake of the principle involved. This position, the Chronicle was careful to point out, "is not the one
generally taken by the friends of women."

The debate over protective legislation for women has resonated for
more than a century. In 1913, for example, a Labor Day retrospective
in the St. Louis Post-Dispatch quoted Florence Kelley, general secretary
of the National Consumers' League, on the topic. Kelley was usually
a supporter of protective legislation to improve the sweatshop condi­
tions under which many women worked, but on this occasion, she was
critical of several recently enacted minimum wage laws directed at
women and children:

They are alarmingly undemocratic. They fail to afford to American
employees in underpaid industries those democratic safeguards which
characterize English and Australian legislation. In America the gov­
ernor appoints the commission, the commission selects the Wage
Board, the Wage Board determines the lowest wage and the women
and girls take what they get. Wage earners are not permitted to elect
representatives to the Wage Boards; they are, in fact, not represented
at all.

In 1930, The New York Times reported the views on protective leg­
islation of Alma Lutz, a leader of the National Women's Party (NWP).
Her opinions were variations on the theme expressed 45 years earlier
in the San Francisco Chronicle piece excerpted above. After acknowl­
edging that protective legislation enjoyed strong support from the Sec­
retary of Labor, the Women's Bureau, and the AFL, the Times reported
Lutz's assertion that protective legislation covering female but not male
workers "would be of actual hann to both groups." While conceding that
such legislation might have been justified "when women first entered
industry" and could not protect themselves because they "were not or­
ganized," the Lutz position was explained this way:

75. For the Ladies, supra note 67.
76. Id. Most women's reform groups in fact enthusiastically endorsed protective
legislation for women, ALICE KESSLER-HARRIS, supra note 74 at 205, and in Labor Day
proclamations and interviews union leaders repeatedly hailed such legislation as among
labor's greatest legislative achievements. See, e.g., Should Labor Organizations Enter the
Political Arena?, BOSTON GLOBE, Sept. 6, 1896; What Benefit Has the Trades Union Ren­
dered to Society?, BOSTON GLOBE, Sept. 4, 1904; Has Organized Labor Gained or Lost
During the Past Year?, BOSTON GLOBE, Sept. 1, 1912; Labor Looks Back, St. Louis Post­
Dispatch, Sept. 7, 1931.
77. The Year's Record of Labor in America, St. Louis Post-Dispatch, Sept. 2, 1913.
78. BARBARA MAYER WERTHEIMER, WE WERE THERE: THE STORY OF WORKING
WOMEN IN AMERICA 241 (1977). For an interesting example of Labor Day interpretative
journalism (see n.245, infra) that discusses Kelley's role in fighting sweatshop conditions
in the garment industry, see Clothing Strike Settlement Recalls Long Campaign for Labor
Reform Here, New York Herald Tribune, Sept. 3, 1933.
79. Quoted in The Year's Record of Labor in America, supra note 77. The new mini­
imum wage legislation discussed by Kelley had been enacted in Utah, California, Oregon,
and Wisconsin. Similar bills were pending in several other states. Id.
Men realize that an employer prefers workers without privileges, and they sometimes hope to curtail the employment of women through special labor laws supposed to protect them. When the supply of labor is plentiful, women can get work only by accepting wages lower than men's, and Miss Lutz thinks that this means an eventual reduction in men's wages for the same work. So she argues it is foolish for men to try to bring about a cut in women's wages through enforced privileges, as the net result will be a reduction in their own income.\(^80\)

To many supporters of protective legislation, the *Times* summed up, "shorter hours, no overtime, seats behind counters and other privileges are seen to be necessary for women workers but not for men." In contrast, "equalitarians" like the National Women's Party "believe that a good labor law should apply equally to both sexes."\(^81\)

The NWP was the moving force during the 1920's and 1930's behind the campaign to add an Equal Rights Amendment to the United States Constitution. This caused a major rift within the women's movement, because many reformers and activists—including Florence Kelley—feared that the amendment, if ratified, would require the invalidation of hard won protective legislation for women, which would result in the loss of improved working conditions it had taken decades of struggle to achieve.\(^82\)

During the 1970's, when ratification of an Equal Rights Amendment seemed finally to be imminent, this debate resurfaced,\(^83\) as it did

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80. *Regulating Women's Work*, NEW YORK TIMES, Sept. 1, 1930. The article continued, "The old talk of altruistic motives, protecting American womanhood . . . is out of place now that women are no longer a temporary addition to the working world. They cannot be run out of industry, and they should have a chance for competition with men on equal terms."

According to a more recent assessment, protective legislation for women reinforced women's role as "secondary wage earners." These laws "did not stop employers from hiring women. They did, however, help to stratify occupations according to sex and to maintain a separate female labor market." JAMES R. GREEN, *THE WORLD OF THE WORKER: LABOR IN TWENTIETH CENTURY AMERICA* 45 (1980).

A leading economic historian of women workers reaches a slightly different conclusion: "Protective legislation . . . had virtually no adverse impact on female employment around 1920, and states with more stringent hours laws [for women] had greater declines in hours for all workers than those with less stringent laws. Certain women, to be sure, were constrained by the laws. But from the perspective of a trade-union leader, a reformer, or a laborer who wanted lower hours, the benefits of maximum hours laws and other types of protective legislation were well worth the costs." CLAUDIA GOLDEN, *UNDERSTANDING THE GENDER GAP: AN ECONOMIC HISTORY OF AMERICAN WOMEN* 198 (1990).


over the question whether Title VII of the Civil Rights Act of 1964, even without an ERA, invalidated protective laws for women. And in a related context—the legality of employer imposed restrictions on women's employment involving work with substances potentially harmful to fetal development—similar debates emerged yet again. In United Auto Workers v. Johnson Controls, Inc., for example, the Supreme Court held that an employer's "sex-plus" rule barring women of childbearing age from jobs involving potential exposure to chemicals harmful to fetuses violated Title VII's ban on sex discrimination. Women's groups submitted amicus briefs on both sides of the case. A few years earlier, an opinion written by Robert Bork in a similar case when he was a judge on the U.S. Court of Appeals for the D.C. Circuit had been discussed in a Labor Day op-ed piece of my own, opposing Bork's then-pending nomination to the U.S. Supreme Court.

B. Child Labor Legislation

Protective legislation regulating the employment of children has always generated broader support than protective legislation for women. A 1906 Labor Day editorial in the Baltimore Sun, for example, praised Maryland's then-recently enacted child labor law, although the article also pointed out that the new law could create its own hardships:

The most persistent argument . . . against every effort to protect young children from factory work has been that many invalid and helpless parents are dependent for their living upon the wages of their young children. If these are deprived of this support, there will be destitution for the child itself as well as for the parent. There is much force in this plea, although most of the persons who have presented it are more concerned in making money by means of child labor than they are with the condition of the invalid parent.

85. The Equal Employment Opportunity Commission initially took the position that protective legislation was unaffected by Title VII, BALSER, supra note 82 at 102, but both the EEOC and the courts soon came to reject that view. See, e.g., Rosenfeld v. Southern Pacific, 444 F.2d 1219 (9th Cir. 1971).
90. Operation of the Child Labor Law, BALTIMORE SUN, Sept. 4, 1906. The Maryland statute prohibited the employment of children under 12 year of age, and limited work for children 12-16 years of age to those certified as physically able and literate in English. Id.
Despite "cases of individual hardship," the Sun concluded that such needy dependents would be better off in the long run because when their children could finally work under the new statute, their greater physical strength and/or education would enable them to obtain better paying jobs.\footnote{Id.} Moreover, "many able-bodied parents who are content to live in idleness upon the labor of their little children" would now have to seek work, noted the paper, implicitly reminding the reader that not all of the poor are "deserving."\footnote{Id.}

When it came to federal legislation as opposed to state laws, government regulation of child labor ran into greater opposition. In 1916, the San Francisco Chronicle criticized President Woodrow Wilson's support for federal child labor legislation, arguing that "children can be and are being protected without federal usurpation."\footnote{Child Labor Laws, SAN FRANCISCO CHRONICLE, Sept. 5, 1916.} Calling attention to election year political considerations, the Chronicle complained that a federal law was "wholly unnecessary, for the reason that virtually all states except the President's pet states of the South are [already] protecting children." Moreover, enforcement of such legislation, which was to prohibit the interstate transportation of goods produced with child labor, "would require an army of officials." Even worse would be the statute's "rank usurpation of police powers within the state, which are exclusively within the jurisdiction of the states and which the states are actually exercising." The editorial labeled the proposed legislation "a statutory lie. It would purport to 'regulate commerce,' which would not be the intent. It would really be a proposal to buy votes by usurpation of authority."\footnote{Id.}

The statute objected to by the Chronicle's Labor Day piece had been signed into law by President Wilson four days earlier.\footnote{The Keating-Owen Bill, 39 Stat. 675 (1916).} When it went
into effect, it encountered predictable resistance in the courts. In a test case brought by the Committee of Southern Cotton Manufacturers, a federal district court in North Carolina enjoined the statute's operation in that state, much to the chagrin of a Labor Day editorial in the *St. Louis Post-Dispatch*: "The decision will give great satisfaction to those in a few Southern states who transform childish opportunity into cotton mill dividends and whose sentiments are doubtless reflected in Judge Boyd's district. But it will give small satisfaction elsewhere." The editorial criticized the District Court opinion and predicted, with unjustified optimism, that it would prove to be out of step with the views of the Supreme Court:

[T]he Judge who issued the writ is now 72 years of age. His preparation for the bar was completed prior to 1868. We have had repeated reminders that views of the law representing the sound, learned judgment of a former generation on questions relating to what we call social justice, do not represent the law judgment of the present generation as made known authoritatively and finally by the Federal Supreme Court.

Nine months later, the Supreme Court affirmed, declaring the statute an unconstitutional exercise of the commerce power. Less than a year after that, a second federal child labor statute was enacted, based this time on Congress's power to tax, rather than to regulate interstate commerce. As the *St. Louis Post-Dispatch* had commented in relation to the first statute, "Congress [had] used its taxing powers to regulate and prohibit banks of issue within the states, and it has repeatedly used these and other powers in such a way that an important effect must be to regulate affairs within the states." The Supreme Court was not convinced, however, and the Court declared the second federal child labor statute unconstitutional in May of 1922.

The following year, *The New York Times* ran an early, Labor Day example of "interpretive reporting" that decried dramatic increases in

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96. TRATTNER, *supra* note 94 at 131, 134-36.
98. *Id.* For a discussion of the ideological tilt of classical education during the period of Judge Boyd's preparation for the bar, and the influence it had on the legal thinking of judges and lawyers of his generation, see DANIEL R. ERNST, *LAWYERS AGAINST LABOR: FROM INDIVIDUAL RIGHTS TO CORPORATE LIBERALISM* 25-37 (1995). See also *id.* at 47, quoting Oliver Wendell Holmes, *Path of the Law*, in OLIVER WENDELL HOLMES, *COLLECTED LEGAL PAPERS* 184 (Harold J. Laski, ed., 1920) (observing in 1897 that fear of radical change "has led people who no longer hope to control the legislatures to look to the courts as expounders of the Constitutions," leading to decisions in which "new principles have been discovered outside ... those instruments, which may be generalized into acceptance of the economic doctrines which prevailed about fifty years ago").
100. The Tax on Employment of Child Labor Act, 40 Stat. 1138 (1919); see TRATTNER, *supra* note 94 at 139-40.
child labor and the harm it inflicted on the children involved.\textsuperscript{103} The piece attributed the increases in part to an expanding economy, and in part to the demise of the second federal statute. The article quoted extensively Grace Abbott, head of the Children's Bureau in the U.S. Department of Labor, which had administered the first federal child labor law. She emphasized the inadequacy of the "crazy quilt" of state laws on the subject, arguing that even "[t]he best of them are often almost nullified by the exemptions permitted."\textsuperscript{104}

The "cure for the child labor evil in America," the Times piece continued, was "at least a minimum standard" of national protection for child workers. A proposed constitutional amendment permitting federal regulation of child labor had been reported favorably by both the House and Senate's judiciary committees in the previous session of Congress, and would be considered again in the next session, when it was approved by both Houses.\textsuperscript{105} The proposed amendment, explained the article, "is intended merely to assure a minimum of protection to the children of every State in the Union. It will not interfere with the passage of State laws nor with the operation of State laws that are stricter and are being enforced by State machinery."\textsuperscript{106}

The National Association of Manufacturers made defeat of the child labor amendment a principal focus of its activities in 1924. Its campaign was so successful by the end of 1925 that ratification appeared to be a lost cause.\textsuperscript{107} Prospects for ratification seemed to improve during the early years of the Depression, as another dramatic increase in child labor led to renewed pressure on state legislatures to ratify the amendment. This time, however, most newspapers came out against ratification, a major reversal from the previous decade, when most had supported both the child labor amendment and the federal legislation

\footnotesize{\textsuperscript{103} Child Workers Increasing; Millions Are Now Employed, NEW YORK TIMES, Sept. 2, 1923. On the emergence of "interpretive reporting" during the 1920's and '30's, see EMERY, \textit{supra} note 58 at 562–66; HILLIER KREIGHBAUM, FACTS IN PERSPECTIVE: THE EDITORIAL PAGE AND NEWS INTERPRETATION 57–67, 392–97 (1956); SCHUDSON, \textit{supra} note 50 at 144–48.}

\footnotesize{For a more recent Labor Day piece recounting the horrors of child labor, this time focusing on children of migrant farmworkers, who are not covered by federal child labor laws, see Cassandra Stockburger, Yes, Child Labor Is Still a Problem, NEW YORK TIMES, Sept. 4, 1972.}

\footnotesize{\textsuperscript{104} For example, although almost all states required children to be at least 14 for work in factories, 23 states "permit[ed] all sorts of exemptions under which children may work" before that age, with 10 states permitting a working day for children nine to eleven hours. In 37 states, a child could be employed before completing grade school, and 18 states failed to make a child's physical fitness a condition of employment. Child Workers Increasing, \textit{supra} note 103.}

\footnotesize{\textsuperscript{105} Id.; TRATTNER, \textit{supra} note 94 at 167; Jt. Res. 184, 68th Cong., 2d Sess., 43 Stat. 670 (1924).}

\footnotesize{\textsuperscript{106} Child Workers Increasing, \textit{supra} note 103.}

\footnotesize{\textsuperscript{107} See TRATTNER, \textit{supra} note 94 at 173, 179.}
it would authorize. As one historian wrote, "Even the Chicago Tribune, a consistent supporter of the amendment ever since one of its chief owners, Medill McCormack, had introduced it in the Senate in 1923, now opposed the measure." The Tribune's change of heart is more understandable when one remembers that Medill's brother, the arch-conservative Col. Robert McCormick, used his position as publisher of the Tribune and head of the Committee on Freedom of the Press of the American Newspaper Publishers Association (ANPA) to rail against President Roosevelt's New Deal. McCormack's real gripe, and that of the ANPA, was with National Recovery Administration (NRA) codes intended to curtail the extensive use of child labor in the newspaper industry. Newspapers used thousands of newsboys under age twelve, and even ten, to sell papers, working long hours and late into the night on often dangerous city streets. Because of ANPA pressure, the child labor provisions covering the press were among the most lax of the entire NRA. The mainstream press had for the most part been strong supporters of child labor legislation for other industries, but when government regulation started to reach its own operations, that support evaporated in an overheated editorial campaign against the child labor amendment:

Rarely, if ever, have opinions on a social issue been as full of false statements and bias dictated by self-interest as those published by newspapers intent on killing the amendment. So vicious was the newspaper campaign that William Allen White, owner-editor of the Emporia (Kansas) Gazette and one of America's most respected journalists, sounded a telling rebuke: 'The newspapers should stop their fight on the Child Labor Amendment. It is discrediting the newspaper profession and weakening our just position on other matters.'

The NRA was declared unconstitutional in 1935, but later federal restrictions on child labor under the Fair Labor Standards Act of 1938 were upheld by the Supreme Court in 1941, making a child labor amendment to the Constitution unnecessary. It was never ratified.

108. "Some seventy of the nation's leading newspapers, including the New York Sun, the New York Herald Tribune, and the St. Louis Post-Dispatch, which earlier had favored the amendment, suddenly turned against it. Id. at 198.
109. Id.
111. See TRATTNER, supra note 94 at 194, 195.
112. Id. at 198. A few years later, "[t]he Associated Press went all the way to the Supreme Court ... in an effort to get the news industry exempted from the National Labor Relations Act." Zack, supra note 17 at 7, referring to Associated Press v. NLRB, 301 U.S. 103 (1937).
115. United States v. Darby, 312 U.S. 100 (1941).
116. See TRATTNER, supra note 94 at 185–208.
C. Workers Compensation

As industrialization intensified during the second half of the nineteenth century, it brought with it increased risks of accidental injury or death on the job, particularly in dangerous but important industries like mining, steel, construction, and the railroads. "Along with profits and the products of machines," wrote one legal historian, "the industrial revolution... manufactured injury and sudden death."

To compound the problem, the controlling tort doctrines of the day assured that the "cost of industrial accidents was... shifted from entrepreneurs... to the workers themselves." As a lawyer for the AFL replied to a 1908 Labor Day query from the Boston Globe, it is "the fellow-servant rule, the assumption of risk, and contributory negligence which make murder in industry so safe and profitable in the United States." In less passionate terms, the nation faced "the paradox of ever-increasing industrial injuries and ever-decreasing judicial remedies for them."

Some of the legal doctrines responsible for this paradox were rooted in the same notions of freedom of contract that provided courts with the rationale for declaring unconstitutional all manner of labor and employment legislation, including most wage and hour laws and statutes outlawing the "yellow dog contracts" used to prevent employees from joining unions and as a basis for injunctions against union activity. This was particularly true of the defense of assumption of risk,

118. FRIEDMAN, supra note 117 at 473.
119. What Right Has Labor To Enter Politics?, BOSTON GLOBE, Sept. 6, 1908 (quoting John Weaver Sherman). These three employer defenses were labeled an "unholy trinity" in JACK B. HOOD, BENJAMIN A. HARDY, JR. & HAROLD S. LEWIS, JR., WORKERS' COMPENSATION AND EMPLOYEE PROTECTION LAWS 2-5 (2d ed., 1990).
120. Arthur Larson, The Nature and Origins of Workmen's Compensation, 37 CORNELL L.Q. 206, 223 (1952). According to government figures cited by the AFL in a 1916 Labor Day report, 30,000 workers were killed on the job annually, and 700,000 were out of work for a month or more due to injury. Union Labor Progress, WASHINGTON POST, Sept. 4, 1916 (reporting statement of AFL Secretary Frank Morrison). See also FRIEDMAN, supra note 117 at 482. Of those killed or injured, reported the New Orleans Times-Picayune in a 1911 Labor Day story, "on the average in the United States compensation is paid in any amount in less than 12 per cent of the cases." Workmen's Insurance, NEW ORLEANS TIMES-PICAYUNE, Sept. 4, 1911.
121. See e.g., Coppage v. Kansas, 236 U.S. 1 (1915); Adair v. United States, 208 U.S. 161 (1908); Lochner v. New York, 198 U.S. 45 (1905); Ives v. South Buffalo Ry, 201 N.Y. 271 (1911); Ritchie v. People, 155 Ill. 98, 40 N.E. 454 (1895); In re Jacobs, 98 N.Y. 98 (1885). See generally FORBATH, supra note 66; Pope, supra note 63 at 984; Urofsky, supra note 70. For a discussion of the continuing influence of Lochner-era liberty of contract doctrine in the employment context, see Kenneth M. Casebeer, Teaching an Old Dog Old Tricks: Coppage v. Kansas and At-Will Employment Revisited, 6 CARDOZO L. REV. 765 (1985). For an argument favoring the restoration of Gilded Age freedom of contract doctrines to their previously dominant position, see Richard Epstein, A Common Law for Labor Relations: A Critique of the New Deal Legislation, 92 YALE L.J. 1357 (1983).
as it was described by the *New Orleans Times-Picayune* in a 1911 Labor Day piece:

> It is a universal rule that a servant by his very act of entering the service, by his very contract of employment, assumes [the] ordinary risks of the service, and if he is injured solely because of them, he cannot recover. The reason why such risks are held to be assumed by the servant by his contract is that he must necessarily have had such risks in mind when he made his contract and that his compensation was fixed in reference thereto.\(^{122}\)

The flaw in this reasoning was that it assumed most employees were in a position to bargain over the terms and conditions of their employment. As employers and industrial corporations grew larger and more powerful, the reality was that most individual employees, without the aid of unions, had virtually no bargaining power.\(^{123}\) Equally bad, from the workers’ perspective, was the fact that when no negotiations took place, and no express terms of employment were agreed upon, the law implied contract terms that invariably favored employers over employees.\(^{124}\)

By the turn of the century, “the rage of the victims” of industrial accidents had become “a roaring force. Labor found a voice and agitated in every forum for protection.”\(^{125}\) Statutes reining in the common law defenses were passed in a number of states, and even without such statutes, some juries and even judges simply refused to apply employer defenses strictly.\(^{126}\)

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122. *Workmen’s Insurance*, supra note 120. Although the assumption of risk defense described by the *Times-Picayune* did not apply in cases of employer negligence, even then recoveries were often barred by the other two principal employer defenses, the contributory negligence rule, which precluded a recovery where the injured worker’s own negligence contributed to the accident, and the fellow-servant doctrine, which shielded the employer from liability when one employee was injured by the negligence of another. *See Hood, Hardy & Lewis*, supra note 119 at 2–5. The *Times-Picayune*’s explanation of the assumption of risk defense is also a reasonably accurate description of the court’s reasoning in *Farwell v. Boston & W.R.R.*, 45 Mass. 49 (1842), the landmark American case adopting the fellow servant rule.

123. When and where there were labor shortages, workers could sometimes “bargain” with their feet, by seeking or threatening to seek employment elsewhere. More often, however, members of the “reserve army of the unemployed” were literally at the plant gates looking for work. *See* Charles Stephenson, “There’s Plenty Waitin’ at the Gates”: Mobility, Opportunity, and the American Worker, in *Stephenson & Asher*, supra note 117 at 72–91.

124. *See* Karen Orren, Belated Feudalism: Labor, the Law, and Liberal Development in the United States 110, 127, 163 (1991), arguing that this freedom of contract rhetoric enabled judges to do “just what they said they were doing, to wit, protecting the employment contract from outside intrusion.” In the process, Orren continues, they protected a “belated feudalism’s” lingering hold over the terms and conditions of employment in late nineteenth century America.

125. *Friedman*, supra note 117 at 476.

126. *Id.* Labor’s struggles over workplace safety, and compensation for workplace injuries, extended beyond the courtroom and legislative chamber, of course, to the picket line and bargaining table as well. *See* Asher, supra note 117 at 116, 122–25.
Nevertheless, workers or their families still had to bring individual lawsuits, and still had to prove the employer’s negligence. And most workplace injuries, according to studies quoted in the *New Orleans Times-Picayune*’s 1911 report, were due to “the natural” or “the inevitable” risks of doing business that could not be attributed directly enough to employer negligence. At best, the article estimated (extrapolating from studies of the causes of industrial accidents in Germany), even if everyone eligible to recover under then-current tort standards did in fact successfully sue for damages, “the present common law action based upon the fault of the employer only presumes in theory to furnish compensation of any kind in less than 20 per cent of the cases.”

The Progressives took up the issue of industrial accidents and made it the labor problem they worked hardest to solve. In a 1910 Labor Day address, for example, former President Theodore Roosevelt—who in the same speech endorsed collective bargaining as the way “freedom of contract [is] made a real thing and not a mere legal fiction”—said this about the need for workers’ compensation statutes:

> No worker should be compelled as a condition of earning his daily bread to risk his life and limb or be deprive of his health or have to work under dangerous and bad surroundings. Society owes the worker this because it owes as much to itself. He should not be compelled to make this a matter of contract; he ought not to be left to fight alone for decent conditions in this respect. His protection in the place where he works should be guaranteed by the law of the land.

Workers compensation statutes, modeled in part on recently enacted laws in Germany and Great Britain, created a “no fault” mechanism for compensating workers or their families for work-related injuries or deaths without having to prove or disprove negligence on anyone’s part. The trade off was that the amount of the recovery was established by a predetermined formula. This protected employers from exposure to the large jury verdicts sometimes obtained through the efforts of the plaintiffs’ personal injury bar, lawyers then, as now, held in undeserved low esteem.

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127. *Workmen’s Insurance*, supra note 120.
131. *See Friedman, supra* note 117 at 482; JEROLD S. AUERBACH, UNEQUAL JUSTICE: LAWYERS AND SOCIAL CHANGE IN MODERN AMERICA 43–45 (1976). In his 1910 Labor Day speech, Roosevelt took this gratuitous swipe at plaintiffs’ lawyers in the course of praising workers’ compensation statutes: “The only sufferers will be lawyers of that undesirable class which exists chiefly by carrying on lawsuits of this nature.” *T.R. For Labor Unions*, supra note 91. One might wonder who is more deserving of disdain, the personal injury bar, who against great odds offered injured workers their *only* shot at a monetary recovery, or the defense bar, who crafted and exploited the legal defenses that prevented most injured workers from recovering anything.
Maryland passed the first, voluntary workers' insurance legislation in 1902,\textsuperscript{132} but a state court declared it unconstitutional,\textsuperscript{133} as also happened to a 1909 compulsory insurance law in Montana.\textsuperscript{134} The major breakthrough appeared to have come in New York in 1910, when that state's new employers' liability law went into effect on September 1.\textsuperscript{135} An editorial in the New York Tribune recognized that the statute "goes nowhere near as far as certain foreign governments have gone in providing for the automatic payment of damages to injured employees. That is not possible under the constitution, nor is it perhaps desirable, the subject being still in an experimental stage."\textsuperscript{136} Nevertheless, the paper warmly welcomed the new statute, which was a hybrid, mandating a compulsory no-fault workers' compensation scheme for certain occupations classified as dangerous, and for less dangerous fields, encouraging optional compensation systems and curtailing the employers' common law defenses in lawsuits for work-related injuries and deaths:

\begin{quote}
[T]he cost of injuries to workmen, like the cost of damage to machinery, should fall upon capital and should be shifted by capital upon society, in the form of higher charges, if need be, for the commodity produced. Society does not escape the burden now. It pays for injury to workmen in its support of paupers. To pay in the form of compensation for personal injuries is more humane and just. Besides, obligatory compensation... will tend to make employers use the most efficient safety devices to reduce losses through injuries. The new system may be open to abuses, but present conditions are so unfair that an experiment with qualified compulsory compensation is in order.\textsuperscript{137}
\end{quote}

The Tribune's observation that a stronger statute would be held unconstitutional was certainly well founded, since even the more moderate statute that was enacted, as so often happened during this period of a conservative but activist judiciary, was struck down by the New York Court of Appeals in Ives v. South Buffalo Ry.\textsuperscript{138} That case is a leading state level counterpart of Lochner v. New York\textsuperscript{139} and has been described as a "classic example of the impact of the prevailing jurisprudence at the turn of the century."\textsuperscript{140}

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\item[132] Md. Laws 1902, Ch. 139.
\item[134] Mont. Laws 1909, Ch. 67; Cunningham v. Northwestern Improvement Co., 44 Mont. 180, 119 P. 554 (1911).
\item[135] N.Y. Laws of 1910, Ch. 674.
\item[137] Id.
\item[138] 201 N.Y. 271, 94 N.E. 431 (1911). The first workers' compensation statute not to be struck down was enacted in Wisconsin in 1911, FRIEDMAN, supra note 117 at 682. Its fiftieth anniversary was commemorated by President Kennedy shortly before Labor Day of 1961. See Oldest Fringe Benefit, SAN FRANCISCO CHRONICLE, Sept. 4, 1961.
\item[139] 198 U.S. 45 (1905).
\item[140] BERNARD SCHWARTZ, MAIN CURRENTS IN AMERICAN LEGAL THOUGHT 412 (1993). "When our Constitution was adopted," wrote the court in Ives, "it was the law of the land that no man who was without fault or negligence could be held liable in damages
\end{notes}
The response in New York to this ruling was an amendment to the state constitution in 1913, allowing compulsory workers' compensation statutes, and a new statute, which was enacted soon thereafter.141 By Labor Day of that year, the St. Louis Post-Dispatch noted that “in the field of workmen's compensation legislation” there had been “a general awakening.”142 In 1917, the Supreme Court upheld the constitutionality of the New York statute, along with similar laws from Iowa and Washington state,143 and by 1920, workers' compensation statutes had been adopted in all but eight states.144

D. Legalizing Labor Day

After the first few Labor Day celebrations beginning in 1882, union leaders decided the event should be made permanent.145 When they pressed for legislation recognizing Labor Day as a legal holiday during the 1880's and 1890's,146 they were not only seeking an occasion on which they could demonstrate and celebrate the strength and solidarity of the labor movement with parades and picnics. By creating a Labor Day holiday, they were also furthering the ongoing struggle to capture more time “for what we will.”147

For more than a century, achieving a shorter working day, and fewer working days during the year, was an enduring and cherished

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141. N.Y. Laws of 1913, Ch. 816.
142. The Year's Record of Labor in America, supra note 77.
144. Larson, supra note 120 at 233.
146. Support for an officially recognized labor holiday became common among political candidates seeking labor's votes, David Montgomery, The Fall of the House of Labor 167 (1987), and a number of municipal ordinances to that effect were passed in 1885 and 1886. Oregon, in February 1887, was the first state to pass a law recognizing Labor Day as a legal holiday, followed later that year by Colorado, New Jersey, New York, and Massachusetts. Stewart, supra note 1, at 279–80. Most other states followed suit in the years to follow, and as one paper explained in 1891, "even where that has not been done it receives a popular observance." Labor Day, Seattle Post-Intelligencer, Sept. 7, 1891. Labor Day became a federal holiday in 1894 as the result of legislation enacted in the midst of the Pullman strike, perhaps as a bone thrown to the rest of the labor movement at a time the federal government was crushing the striking American Railway Union. See Thomas V. DiBacco, Strife a Century Ago Led to Labor Day, Baltimore Sun, Sept. 4, 1994.
147. The slogan, “Eight hours for work, eight hours for rest, and eight hours for what we will,” captured the spirit of the movement for a standard working day of eight hours. For a discussion of the Labor Day holiday's dual purpose, see Kazin & Ross, supra note 1 at 1307.
dream of the American labor movement. Establishing Labor Day as a legal holiday was a step toward that goal, for as a Labor Day column in the *Atlanta Constitution* once noted, when Labor Day was established as a holiday, most workers labored on Saturdays, so “having a Monday off along with a Sunday created the only two-day weekend in an entire year for a huge segment of the working population. . . . Vacations were things the boss took. Holidays were Christmas,” and perhaps Thanksgiving and July 4th. Period.  

Some papers welcomed the establishment of Labor Day as a legal holiday, but *The New York Times* was not one of them. In addition to condemning the class nature of the holiday, the *Times* saw “no evidence that the real workingmen demanded Labor Day:”

Most workmen can take a day off now and then at their own cost . . . when they want it, which they are not sure of doing if they take it on a fixed day. If they had any notion of getting Labor Day at the boss’s expense that notion will be effectually dispelled. They will lose a day’s work and forfeit a day’s wages as on any other public holiday. The only people who are benefited by Labor Day are the people who are paid by the week or the month—clerks, salesmen, bookkeepers, and so forth, and those do not count as “labor” at all in the estimation of the Knights [of Labor].

148. See generally DAVID R. ROEDIGER & PHILIP S. FONER, OUR OWN TIME: A HISTORY OF AMERICAN LABOR AND THE WORKING DAY (1989). In addition to seeking leisure time for its own sake, many advocates of the eight-hour day shared a “civic-republican political theory, which rejected the individual vs. the State dichotomy employed by the [Supreme] Court . . . embracing instead a view that the Constitution protected economic rights inhering not in the individual, but in the community. . . . [A] persistent theme among nineteenth and early twentieth century shorter hours advocates was that shorter hours yield enhanced leisure time with which working people could improve their minds and become better citizens.” Bewig, *supra* note 63 at 420, 443. See also FORBATH, *supra* note 66 at 13.


150. See, e.g., *Labor Day and Other Holidays*, BOSTON GLOBE, Sept. 6, 1887.

151. “The use of the day which is suggested by its title is to organize demonstrations of Labor, by Labor, and for Labor. . . . [It] will be used as a day on which one class of the community assembles to hear another class blackguarded, a suspension of labor being enjoined upon all classes for this purpose, and the whole performance going on under the express sanction of the State. To establish a holiday for this purpose is to give public authority to an un-American, undemocratic, and senseless procedure.” Labor Day and Idle Saturday, *New York Times*, Sept. 4, 1887. See also Labor Day, PHILADELPHIA INQUIRER, Sept. 4, 1911 (endorsing Labor Day as “one of the most welcome and enjoyable [holidays] of the year,” but criticizing the statute making it a legal holiday as “a rather . . . foolish attempt to flatter the wage earner and to recognize classes in a community where classes do not naturally and cannot rationally exist”).

152. Labor Day and Idle Saturday, *supra* note 151. The same editorial launched similar criticism at a recently enacted New York statute that called for reduction of the work week by a half day but did not prevent employers from reducing the contents of pay envelopes accordingly: “if a laborer can afford to lose half a day’s wages once a week, he could in almost all callings arrange to do so without losing his place. If he cannot afford that loss it is a great piece of cruelty . . . to enact a statute which, if it were effectual, would compel him to do so. In cities, during the heat of Summer a . . . sensible custom
Labor Day legislation enacted in the states beginning in 1887, and at the federal level in 1894, did not require private employers to give their employees a day off from work, much less, as the Times correctly pointed out, require them to pay their employees holiday pay for time not worked.\textsuperscript{153} Thus, to establish Labor Day "in fact as well as law," according to a leading history of the holiday, "workers had to engage employers . . . in direct confrontations." While some businessmen voluntarily gave their employees a day off, most did not, and "for nearly two decades, Labor Day was a virtual one-day general strike in many cities."\textsuperscript{154} As Samuel Gompers explained to a Labor Day crowd in San Francisco in 1911, "Labor day in America was not given to us any more than other things are given to us, on a silver platter. It was wrung from unwilling employers and legislatures. We just took it."\textsuperscript{155}

With or without pay, official recognition of Labor Day gave not only the holiday, but the labor movement itself, a degree of legitimacy it did not have before.\textsuperscript{156} But as late as 1922, workers who had won Labor Day as a paid holiday were still rare enough to be deemed newsworthy by the \textit{New York Times},\textsuperscript{157} and fourteen years after that, a Department of Labor history of Labor Day could still point out that "for the mass of workers," especially piece workers and hourly employees, "holidays re-

\textsuperscript{153} See e.g., Mass. Laws of 1887, Ch. 263; N.Y. Laws of 1887, Ch. 289; 28 Stat. 96 (1894).

\textsuperscript{154} Kazin & Ross, supra note 1 at 1303.

\textsuperscript{155} President of American Federation of Labor Talks on Wide Range of Subjects, \textit{San Francisco Chronicle}, Sept. 5, 1911.

\textsuperscript{156} See Kazin & Ross, supra note 1 at 1296.

duce earnings ... unless they are under collective bargaining agreements specifically providing for holidays with pay.”158 Even today, the following ditty from the St. Louis Post-Dispatch applies to many workers:

He had no joyous holiday,
And realized at length
The truth of what the sages say:
“In union there is strength.”
Having no union, sad to say,
He labored all of Labor Day.159

E. An Eight-Hour Day for the Railroads

Labor’s ultimate goal in its struggles for shorter and fewer working days was a five day, forty hour workweek with no reduction in pay. Not surprisingly, the topic came up frequently in the speeches and parades celebrating Labor Day,160 and in the Labor Day commentary of the daily press. For example, it provided the subject for this bit of Labor Day humor from the Los Angeles Times in 1915:

“Pat was drowned.”
“Couldn’t he swim?”
“Yes, but he was a union man. He swam eight hours and quit.”161

For striking New York garment workers on Labor Day of 1894, on the other hand, nothing was funny about their working hours. Even a ten-hour day would have been a big improvement:

We are not on strike for money ... but to be treated as Americans. At present we labor under conditions which do not prevail in the mines of Siberia.

We want a ten-hour work day. We leave our homes every day when our families are yet sound asleep, and we return at an hour when they have long since retired. We see them awake but once a week, when religious influence compels the observance of one day as a time of rest.

We are strangers to our own children, and our offspring often call others papa because they see them daily.162

By Labor Day of 1912, the ten-hour day had long been established as the norm in most industries,163 and an AFL vice president could boast to the Boston Globe that “[t]here are more workers employed on

158. Stewart, supra note 1 at 283.
159. After Labor Day, St. Louis Post-Dispatch, Sept. 8, 1903.
163. See Roediger & Foner, supra note 148 at 123.
the eight-hour day than ever before." Nevertheless, the eight-hour
day was for most workers still just a dream that would not be realized
for at least another 20 years, until the promulgation of industrial codes
pursuant to the New Deal's National Industrial Recovery Act,165 and
later passage of the Fair Labor Standards Act in 1938.166 An inhumane
twelve-hour, seven-day work week was still common in the steel indus-
try well into the 1920's, and at the end of that decade, more than half
of American wage earners still worked more than 48 hours per week.167

Just before Labor Day of 1916, however, workers in the crucially
important railroad industry achieved a major breakthrough in the
struggle for shorter hours. In the face of the first threatened nationwide
rail strike in twenty years, and in a presidential election year with
America's entry into World War I looming on the horizon, Congress,
urged on by President Wilson, passed the Adamson Act, making the
eight-hour day, with no cut in pay, a reality for railroad workers.168 As
the first federal legislation establishing that standard for workers in
the private sector,169 the Adamson Act would have generated great edi-
torial heat regardless of the circumstances of its passage. But with its
timing giving the appearance of economic blackmail by the railroad
Brotherhoods, most of the mainstream press expressed outrage in their
Labor Day editorials that year.

"For the first time in its history the Congress of the United States
has enacted a law under duress," fumed the Chicago Tribune.170 Al-
though President Wilson "will attempt to obscure it," the paper contin-
ued, it is "hypocrisy to pretend that the enactment of the eight hour
bill ... was anything but a surrender to the strike ultimatum of the
[union] leaders!" The Tribune also objected to the new law on its merits:
"Congress has with a haste unprecedented in such legislation embodied
in law a theory of wage estimate which if applied throughout the coun-
try ... would shake the economic foundation of the nation and produce
results which most certainly were not given due consideration ... ."171

In similar fashion, the St. Louis Globe-Democrat conceded "that by
this act a public calamity has been temporarily averted, but that does
not alter the fact that ... the great government of the United States

164. Has Organized Labor Gained or Lost During the Past Year?, BOSTON GLOBE,
Sept. 1, 1912 (quoting James Duncan, first vice president of the AFL).
166. 52 Stat. 1060 (codified at 29 U.S.C. ss. 201–219 (1994)).
167. See ROEDIGER & FONER, supra note 148 at 211, 243.
(1994)). See generally ALBRO MARTIN, ENTERPRISE DENIED: ORIGINS OF THE DECLINE OF
AMERICAN RAILROADS, 1897-1917 (1971); Laurence Scott Zakson, Railway Labor Legis-
lation 1888 to 1930: A Legal History of Congressional Railway Labor Policy, 20 RUTGERS
169. GREEN, supra note 80 at 83–84.
171. Id.
has raised the white flag without even a show of resistance." The election year implications did not go unnoticed by many papers, including the *Kansas City Star*: "Possibly wages should have been increased. The Star does not know. But neither does Congress. The Star does know that such legislation could not possibly have been obtained except in a campaign year. It is a humiliating spectacle." The *Los Angeles Times* ran an editorial cartoon showing a Sampson-like figure labeled "8 Hour Law" knocking down pillars holding up the railroads, and the *New York Tribune* called the new law a "disgraceful surrender to the railroad brotherhoods" and "a betrayal of the people." The real point, according to the *Tribune*, "was not the justice of the men's demands," or "even that the country was facing a general tie-up" of transportation. Rather, "[t]he point was that a comparatively small group, made powerful by coherence and the imminence of a Presidential election, should have the effrontery to threaten to inflict a 'tragical calamity,' as the President put it, on the whole country. Such action was the quintessence of selfishness." "What lynch law is to orderly judicial process," asserted *The New York Times*, "the method adopted by the brotherhoods, . . . with quite too much assistance from the President, is to the constitutional method of lawmaking. . . . [T]he people must and do denounce the means by which this legislation was forced upon Congress."

Other papers praised President Wilson's support for the law. At a minimum, papers like the *Chicago Examiner*, the *Philadelphia Press*, and the *Washington Star* expressed "universal relief" that the nation would be spared the "enormous injury . . . immeasurable suffering . . . [and] perhaps . . . physical violence" that would have resulted from a strike. A few papers, like the *New York American*, were enthusiastic about the eight-hour law on its merits as well:

President Wilson has shown great ability by the decisive part he took in the railroad crisis, and Congress is entitled to the thanks of the country, not only for preventing a strike that would have been a national calamity, but for passing a national eight-hour law for men in

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172. Quoted in *Strike Averted for Present; Trouble Ahead, Say Editors*, CHICAGO TRIBUNE, Sept. 4, 1916. According to the *Rocky Mountain News* in Denver, "what has been done by Congress under compulsion and without investigation appears a bad example and a poor piece of business. What has been done so hurriedly is another step toward state socialism." Quoted in *id*.


176. *Id*.


actual train service, for this law is right and just without regard to
the extraordinary circumstances of its enactment.¹⁷⁹

The critics of the Adamson Act were right that election year politics
taxtored into the eight-hour law’s passage. Democrat Woodrow Wilson
was running for a second term in a very tight race against the Repub­
lican nominee, Supreme Court Justice Charles Evans Hughes. Support
for Wilson was strong in the South and West, but he would have lost
the election without also winning Ohio, and as one historian put it,
“above all else, labor support helped swing the state to Wilson. His
administration’s pro-labor sympathies, particularly the eight-hour law,
gained him ardent union backing.”¹⁸⁰ For most working class voters,
“one note sounded above all the clamor: The president of the United
States had told Congress that ‘the eight-hour day now, undoubtedly,
has the sanction of the judgement of society in its favor.’ ”¹⁸¹

The pressure that ultimately produced the Adamson Act had begun
mounting in the fall of 1915 and winter of 1916, when the four major
railroad operating brotherhoods¹⁸² decided to demand the eight-hour
day and premium overtime pay for work past eight hours. Because of
the logistics of running a railroad, the shifts of workers who actually
operated the trains could not always easily be limited to eight hours.
This made the demand for premium pay for hours worked beyond the
proscribed eight a critical issue for both sides. The railroads criticized
the Brotherhoods’ eight-hour rhetoric as just cynical cover for what
they saw as nothing more than a demand for an exorbitant wage in­
crease.¹⁸³ In any event, a leading economic history of the industry
makes clear that a significant wage increase was overdue. Taking in­
fation into account, railroad workers did not receive any increase in
real wages during the entire Progressive era.¹⁸⁴

The railroad brotherhoods’ efforts were directed at their employers,
not Congress. Their goal was to win concessions at the bargaining table,
not to seek labor standards legislation. The economy was strong and

¹⁷⁹. Quoted in id.
¹⁸⁰. JOHN MILTON COOPER, JR., THE WARRIOR AND THE PRIEST: WOODROW WILSON
AND THEODORE ROOSEVELT 256 (1983) (emphasis added). By the same token, “Denunci­
ations of the eight-hour law as ‘class legislation’ became the Republican’s favorite battle
cry in 1916.” Id. Wilson’s last minute support for federal child labor legislation also con­
tributed to his labor vote in the election. See n.94, supra. See generally MELVYN DUBOF­
SKY, THE STATE AND LABOR IN MODERN AMERICA 58–60 (1994); ROEDIGER & FONER,
supra note 148 at 194.
¹⁸¹. MONTGOMERY, supra note 146 at 368–69.
¹⁸². The four Brotherhoods represented railroad engineers, firemen, trainmen, and
conductors. ROEDIGER & FONER, supra note 148 at 195.
¹⁸³. MARTIN, supra note 168 at 321. See also DUBOFSKY, supra note 180 at 59.
¹⁸⁴. “[R]eal wages of railroad men never rose above the 1890–99 average in the
years between 1896 and 1914 and, in fact, sank as low as 6 per cent below the average
in 1907. . . . The wage question hung over the railroads like a black cloud in these years,
pregnant with trouble.” MARTIN, supra note 168 at 125.
the war in Europe, having curtailed immigration, contributed to labor shortages in the United States that gave unions considerable leverage.\textsuperscript{185}

Because their experiences with interest arbitration in the past had not been good ones, the unions refused to submit their demands to the voluntary arbitration procedures established by earlier railway labor legislation.\textsuperscript{186} Instead, they set a national strike deadline for Labor Day, September 4, and when President Wilson's last minute mediation efforts failed, Wilson asked Congress to pass the Adamson Act to head off the strike.\textsuperscript{187} Implementation was delayed for several months pending a challenge to the law's constitutionality, and the unions set another strike deadline of March 17, 1917. On that day they agreed to a one day extension, and on the next day, the Supreme Court issued its decision in \textit{Wilson v. New,}\textsuperscript{188} upholding the power of Congress to regulate railway wages in the case of a dispute, pending further study and reconsideration by Congress in the future.\textsuperscript{189}

The Adamson Act was a major breakthrough for advocates of the eight-hour day, but beyond the workers covered by the Act, the effects of that breakthrough were more symbolic than real. President Wilson's declaration of support for the eight-hour day undoubtedly added legitimacy to union struggles toward that end, a fact apparently recognized by Frank Walsh, chairman of the Commission on Industrial Relations: "Wilson's Eight-Hour Day Plea Will Become the Demand of the Whole World's Workers."\textsuperscript{190} But the victory of the railroad Brotherhoods in 1916 was not to be easily duplicated in other industries. "The unions had won the eight-hour day at precisely the time when they were strong enough to demand more."\textsuperscript{191}

\textsuperscript{185} See Zakson, supra note 168 at 335, 336.
\textsuperscript{186} See Martin, supra note 168 at 126, 320.
\textsuperscript{187} Id. at 319, 326–31; Zakson, supra note 168 at 338.
\textsuperscript{188} 243 U.S. 332 (1917).
\textsuperscript{189} For an interesting account of the last minute maneuvering, including an ex parte communication between the Secretary of the Interior and the Chief Justice the day before the Supreme Court's decision in \textit{Wilson v. New} was announced, see Martin, supra note 168 at 332–34. \textit{Wilson v. New} was a rare exception to the general rule in Supreme Court cases reviewing employment and labor legislation prior to 1937, that such legislation was almost always declared unconstitutional. See, e.g., Bailey v. Drexel Furniture Co., 259 U.S. 20 (1922); Hammer v. Dagenhart, 247 U.S. 251 (1918); Coppage v. Kansas, 236 U.S. 1 (1915); Adair v. United States, 208 U.S. 161 (1908); Lochner v. New York, 198 U.S. 45 (1905). Regulation of the railroad industry was more readily tolerated by the Supreme Court because of the railroads' critical importance to the nation's economy and security, and because of their obvious interstate character. And in this case, the Justices knew that if they failed to uphold the Adamson Act, they could trigger a national railroad strike just when the nation was mobilizing for war. See Pope, supra note 63 at 960. The larger context in which the Supreme Court upheld the Adamson Act is revealed by the banner headline across the front page of the \textit{New York Times} the morning the Court's decision was announced: "Three American Ships Sunk, One Unwarned, 22 Men Missing; U-Boats Refuse Aid; Militia Demobilization is Stopped And Railroad Strike Abandoned." \textit{New York Times}, March 19, 1917.
\textsuperscript{190} Quoted in Roediger & Foner, supra note 148 at 199.
enough to take it. The victory did not automatically extend to other workers.”

F. Arbitration of Wages and Hours

Press critics of the Adamson Act were outraged that the railroad brotherhoods had refused to submit their eight-hour day demands to arbitration, and they were particularly worried about the precedent established by the actions of the President and Congress. The Chicago Tribune asked unionists “whether the setback suffered by the cause of arbitration is not too high a price to pay for what has been gained”:

It is no argument in favor of force that arbitration is defective and its results often disappointing. How often is the strike satisfactory in its results, and where will the doctrine of force finally lead any minority?

The interest of the wage earner is not to destroy arbitration like an impatient child, but to ... perfect the methods of arbitration, which, though it is, like all human institutions, fallible, it is in the long run less costly and more satisfactory than force can ever be.

Similarly, the Kansas City Star criticized President Wilson’s response to the strike threat as “the most serious setback the cause of arbitration has received in years.” His actions were “simply inviting other groups ... to discard arbitration and to bring sufficient pressure on a yielding president to get results.” The New York Tribune accused Wilson of paying only “lip-service” to the “humane and enlightened policy” of arbitration “when he decided that the brotherhoods’ demands were not arbitrable.”

The railroads favored arbitration of the Brotherhoods’ 1916 eight-hour demands not only because they wanted to avoid a strike “but also because arbitrators were generally favorable to the companies.” Contrary to the assumptions made on the editorial pages of the Chicago Tribune and the other papers quoted above, “the cause of arbitration”—if by that is meant binding, interest arbitration—had already been

191. Id. at 199.
193. Quoted in Strike Averted for Present; Trouble Ahead, Editors Say, supra note 172.
194. Too High a Price, supra note 175.
195. MARTIN, supra note 168 at 126. Having been burned by arbitration in the past—the firemen in 1913, for example, and the engineers in both 1912 and 1913—the unions were determined to rely on their own economic muscle to achieve their goals. Id. at 320.
196. In interest arbitration, “the arbitrator determines the wages, hours, or conditions of employment—in short, the arbitrator writes the agreement for the parties.” In grievance arbitration, on the other hand, “the arbitrator only interprets or applies the terms of an agreement already negotiated by the parties themselves.” Because collective bargaining agreements providing for grievance arbitration became commonplace only during and after World War II, “early arbitration was almost exclusively of the 'interest' variety.” LAURA J. COOPER & DENNIS R. NOLAN, LABOR ARBITRATION: A COURSEBOOK 5 (1994).

Today, interest arbitration is still quite rare in the private sector, but it is used ex-
lost before Congress passed the Adamson Act. Certainly, mandatory or compulsory arbitration of labor disputes was not an option endorsed by either labor or management, as a Labor Day editorial in the *San Francisco Chronicle* had observed in 1901:

Whenever an important labor strike occurs in this country the question of compulsory arbitration is sure to come up and we are apt to hear quite a general expansion of opinion that parties to labor disputes should be compelled to arbitrate and abide by the decision. Such expression, however, invariably comes from members of the general public, not directly concerned in the dispute which causes the strike or lockout, but suffering from its effects. Neither workmen nor employers in this country are generally in favor of compulsory arbitration . . . . [R]epresentatives both of capital and labor, before the [Industrial] Commission, and elsewhere, have been so emphatically against the proposition that it may be said that it has no standing in this country with those likely to be directly concerned in labor troubles.197

AFL President Samuel Gompers expressed his own opposition to compulsory arbitration in a 1916 Labor Day speech in Lewiston, Maine,198 and in a 1922 Labor Day article in the *St. Louis Post-Dispatch*:

There has been a persistent effort to bring about the establishment of Government tribunals for the compulsory settlement of industrial disputes and for the prevention of strikes . . . . It is the prime purpose of such tribunals to make strikes unlawful and to make it obligatory for workers to give service under conditions imposed by what amounts to judicial decision . . . . 199

As evidence of the "inevitable results" of compulsory arbitration, Gompers cited the records of the Kansas Court of Industrial Relations and the federal Railroad Labor Board: "Neither one of these outstanding examples of the industrial court idea has succeeded in preventing strikes. On the contrary, in both cases the utter futility of the whole idea has been completely demonstrated."200


200. *Id.* Three years later, the Supreme Court declared unconstitutional the Kansas statute that created the Kansas Industrial Relations Court, compelled interest arbitration, and denied workers the right to strike. *Chas. Wolff Packing Co. v. Court of Industrial
Defenders of the Adamson Act stressed that it required the president to appoint a three person commission to study the operation and impact of the eight-hour day for a six to nine month period, and then report back to Congress, at which time new railway labor legislation could be enacted if necessary. As the Washington Post explained, "It was better to do what was immediately necessary first and then proceed to the framing of legislation designed to prevent any recurrence of the situation." The St. Louis Post-Dispatch even argued that the approach taken by Congress and the President had more of the advantages of arbitration than arbitration itself:

The first duty of the Government is to ascertain the facts in the railroad controversy. That is what the Adamson act provides for. . . . All that the President, Congress and the public have had to guide them are two conflicting sets of assertions, one put out by the railroad press agents and one put out by the union press agents.

When the railroad presidents demanded arbitration. . . . they well knew that there could be no arbitration of an eight-hour day except after a practical experiment over a limited period, as the President suggested. All that an arbitration board could do in the absence of such a practical test would be to guess at the probable effect of an eight-hour schedule in the operation of freight trains. That is not arbitration. That is gambling.

. . . What is coming as a result of the Adamson bill is true arbitration based on definite information . . . . It is arbitration by Congress. Not merely by voluntary consent of labor and capital . . . .

The United States entered World War I in April of 1917, and in December of that year, as part of the mobilization, the federal government took temporary possession and control of the nation's railroads. Congressional reconsideration of the Adamson Act was therefore put off until passage of the Transportation Act of 1920, which created a Railroad Labor Board to resolve wage disputes in the industry. By that time, there had already been a massive post-war strike wave in many industries, and "the Adamson Act became the political hot potato of 1919, with Republicans seeking to link all of the post-war labor turbulence to its passage." As the New York Times four years earlier had predicted would happen, the circumstances surrounding passage of the Adamson Act contributed to the defeat of the unions' preferred alter-

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201. Quoted in Editorial Views of Newspapers on the 8-Hour Law, supra note 173.
native to the Transportation Act, long-term ownership and control of interstate railroads by the federal government pursuant to the Plumb Plan. 204

By 1922, some railroad workers had lost the eight-hour day, many suffered pay cuts, and another major railroad strike was around the corner. 205 The Republicans were back in the White House, however, and as the next subsection of this article demonstrates, their response to the crisis could not have been more different from that of the Wilson administration only six years earlier.

G. The Labor Injunction

On Labor Day of 1922, the Philadelphia Inquirer ran an editorial cartoon over the caption, “Drown It Out.” In the cartoon, raging fires labeled “Strike Outrage” were being drenched by dark torrents of rain, labeled “Strike Injunction.” 206

For more than fifty years, the labor injunction was the most powerful and controversial weapon employers and the state used to combat union led strikes, boycotts, and organizing efforts. It was “America's distinctive contribution in the application of law to industrial strife.” 207

According to one calculation, courts granted at least 4,300 labor injunctions between 1880 and 1930, and by the 1920s, injunctions were issued in twenty-five percent of all strikes. 208

Injunctions were sought by opponents of striking unions because, as the Philadelphia Inquirer cartoon described above suggested, they were so effective in dousing the flames of labor unrest.

The Inquirer's cartoon was prompted by a sweeping federal court injunction obtained just days earlier by President Warren G. Harding's Attorney General. 209 The injunction was directed at a nationwide strike of 400,000 railroad shopmen, 210 who were protesting cuts in their wages and a general offensive by the railroads to break the shopmen's unions

205. On the loss of premium pay for overtime, see Frederic J. Haskin, Union Labor Loses Ground, Los Angeles Times, Sept. 4, 1922.
208. Forbath, supra note 66 at 61.
209. The ex parte restraining order in United States v. Railway Employees' Dep't, Am. Fed. of Labor was issued by Judge James H. Wilkerson of the U.S. District Court for the Northern District of Illinois on September 1, 1922. The order was not officially reported, but was reproduced in substantial part in Frankfurter & Greene, supra note 207 at 253–59. The order was converted to a preliminary injunction on September 23, 1922, and a final injunction was granted on July 12, 1923. 283 F. 479 (N.D. Ill. 1922); 290 F. 978 (1923).
210. Railroad shopmen were the “machinists, boilermakers, blacksmiths, electricians, sheet- metal workers, and railway carmen . . . who repaired and refitted locomotives, freight cars, and passenger cars.” Davis, supra note 5 at 11.
after control of the railroads was returned to private hands following World War I. The shopmen's strike was the first truly national strike in the history of the nation's railroads, and some historians mark its loss—which was assured by the injunction—as a more decisive turning point for labor than such other noteworthy postwar union defeats as the steel strike of 1919.

The strike had begun on July 1, 1922, and within ten days The New York Times reported that the railroads had obtained from the federal courts in "virtually every State" restraining orders against picketing and other strike related activity. During the strike, nearly every railroad affected applied for federal injunctions. None of their applications was denied, and nearly 300 injunctions were granted in all.

It was the restraining order obtained by the Harding administration on September 1, however, that ultimately broke the back of the strike. Frankfurter and Greene's classic study of the labor injunction called that restraining order "a landmark in the history of American equity." The range of activities prohibited by the injunction was so broad that even the Chicago Tribune, a paper rarely sympathetic to striking workers, was troubled by its impact on freedom of speech:

... The President has shown moderation ... up to this time, and it is fair to assume that the attorney general's resort [to court for an injunction] is deemed necessary in the general interest.

The form and scope of the restraint sought is, however, quite another matter. . . . [T]he attorney general's draft is so general and inclusive as to involve very seriously, we think, the right of free speech. For example, prohibiting the issue "of any public statement" to members "to induce them to do or say anything to cause any railroad employee to leave his work or to cause any person to abstain from entering employment of a railroad." Under such a sweeping restraint a citizen might be held in contempt for almost any statement dealing with the facts or issues of the strike. . . . Another paragraph restrains all officers, etc., from "in any manner, by letters, circulars, telegrams, telephone messages, by word of mouth or interviews encouraging any person to leave the employ of a railroad or refrain from entering such employ," and still another includes in the restraints on picketing the resort to "entreaties!"

211. See id. at 51. Other issues in the strike included the contracting out of union work and the reintroduction of piecework. Id. at 61. Unlike strikes by the four major railroad Brotherhoods who actually operated the trains, "shopcraft strikes had little immediate impact. It could take months before rolling stock would break down, giving management time to starve the strikers and recruit strikebreakers." Id. at 26.

212. See, e.g., id. at 165, 171-72. Although the 1922 shopmen's strike was less effective in disrupting rail traffic than the great railroad strikes of 1877 and 1894, it affected more parts of the country.

213. NEW YORK TIMES, July 11, 1922, quoted in DAVIS, supra note 5 at 88.

214. FRANKFURTER & GREENE, supra note 207 at 52.

215. Id. at 103.
The use of injunctions in strikes in this country has been justified by our conditions. But the process, like any other, is susceptible of abuse and is abused if allowed to infringe the right of free speech by denying to men in industrial controversy the opportunity to make their claims public and to persuade others to aid them within the law.216

When the editor of a labor newspaper was later arrested for violating the restraining order by calling strikebreakers "snakes," "traitors," and "industrial scavengers," the New York World sarcastically explained that the editor "possibly was not thoroughly up-to-date on questions of fundamental rights in this country of the free. No doubt he is one of those old-fashioned souls who believe there is something real in those words the Constitution contains about Free Speech and Free Press."217

The New York Times also had reservations about the restraining order, although less about its terms than about whether the circumstances even warranted an injunction, concluding "it cannot be said that the Attorney General has yet furnished convincing evidence."218 Both the Times and the Chicago Tribune, however, found solace in the fact that only a temporary restraining order had been issued, and it would be in place only until more formal proceedings were scheduled, at which time labor would have its say and the judge might lift or modify the injunction:

A Federal Judge, on the application of the Attorney General . . . has granted a sweeping injunction. But it is only temporary. The court will be open, a week from today, to hear the counsel for the shopmen's unions. . . . [T]he injunction may not be made permanent; more probably it may be seriously modified. It is already intimated . . . the Attorney General himself will ask for alterations. . . . The Judge has the power and discretion to do this if the Attorney General does not propose it. In either event the labor unions are assured of their day in

216. Mr. Daugherty's Injunction, CHICAGO TRIBUNE, Sept. 3, 1922. The injunction also barred the strike leaders from issuing instructions, and from "using, causing, or consenting to the use of any [union] funds . . . in aid of or to promote or encourage" the strike." Quoted in FRANKFURTER & GREENE, supra note 207 at 259.

217. NEW YORK WORLD, Sept. 22, 1922, quoted in DAVIS, supra note 5 at 145. A similar incident involved William Allen White, the highly respected editor of the Emporia [Kansas] Gazette. White was threatened with arrest by state authorities for displaying signs supporting the striking shopmen in the window of his newspaper office. White replied sharply: " [T]he order is an infamous infraction of free press and free speech. Certainly it has not come to pass in this country where a man may not say what he thinks about an industrial controversy without disobeying the law." White's resistance to the Kansas Industrial Court was met with an arrest warrant, and on July 22 White removed the cards from his window." DAVIS, supra note 5 at 87–88, quoting William Allen White.

218. Labor's Day in Court, NEW YORK TIMES, Sept. 4, 1922. Other papers had no such reservations in their praise of the injunction. See, e.g., Government and Labor, ATLANTA CONSTITUTION, Sept. 3, 1922; Sam Gompers or America?, LOS ANGELES TIMES, Sept. 3, 1922; The Injunction, ST. LOUIS POST-DISPATCH, Sept. 3, 1922.
court. If they can show sound reasons why the injunction should be discontinued, or at least toned down, they may count upon full and impartial consideration of their case by the Judge.\textsuperscript{219}

Unfortunately, in the case of labor injunctions, justice delayed was usually justice denied. As Frankfurter and Greene wrote, "Temporary injunctive relief without notice, or . . . relying upon dubious affidavits, . . . stay[s] defendant’s conduct regardless of the ultimate justification of such restraint. The preliminary proceedings, in other words, make the issue of final relief a practical nullity." In ordinary injunction cases, they explained, the bond posted by plaintiffs can compensate the defendants for a temporary injunction mistakenly granted.

In labor cases, however, . . . the situation does not remain in equilibrium awaiting judgment upon full knowledge. The suspension of activities affects only the strikers; the employer resumes his efforts to defeat the strike . . . . Moreover, the suspension of strike activities, even temporarily, may defeat the strike for practical purposes and foredoom its resumption, even if the injunction is later lifted.\textsuperscript{220}

In addition to their often unreasonable scope, and the perfunctory \textit{ex parte} procedures and questionable evidence upon which they were typically based,\textsuperscript{221} the manner in which injunctions were enforced was also a major problem for unions. Particularly troubling was the absence of any right to a jury trial before fines or jail terms could be imposed. "In proceedings for contempt for an alleged violation of the injunction," one federal judge wrote sarcastically but accurately in an 1899 law review article, "the judge is the lawmaker, the injured party, the prosecutor, the judge and the jury. It is not surprising that uniting in himself all these characters he is commonly able to obtain a conviction."\textsuperscript{222}

Although state officials could and often did seek and obtain state court injunctions against union activity, the national administration in Washington sometimes concluded that state or local officials were too

\textsuperscript{219} Labor’s Day in Court, supra note 218. See also Mr. Daugherty’s Injunction, supra note 216: “[T]he issuance of the temporary order does not imply its approval by the court. When the motion to make the injunction permanent has been determined, it can hardly be doubted that the first form will be substantially modified.”

\textsuperscript{220} Frankfurter & Greene, supra note 207 at 200–03. In most cases, therefore, preliminary injunctions were neither appealed nor even taken to a trial on the merits, since they had either already brought about the end of the strike, or had so drained the unions’ treasuries (by prohibiting fundraising and expenditures on the strikes or by imposing burdensome costs for the defense of those arrested for violating the injunctions) that adequate funds were not available to pursue such proceedings. Id. at 79–80. That is precisely what happened in the 1922 shopmen’s strike. See Davis, supra note 5 at 135–36, 144–46.

\textsuperscript{221} According to Frankfurter and Greene, in 70 out of the 118 reported federal labor injunction cases they examined, \textit{ex parte} restraining orders were granted, and in 58 of those, the plaintiffs failed even to provide affidavits in support of their allegations. Frankfurter & Greene, supra note 207 at 64.

\textsuperscript{222} Henry Clay Caldwell, Trial by Judge and Jury, 33 American L. Rev. 321, 327 (1899).
slow to take effective steps against striking workers, perhaps out of sympathy with them or fear of workers' retaliation at the ballot box. The result could be the kind of sweeping federal injunctions issued in the Pullman strike of 1894 and the shopmen's strike of 1922, enforced by federal troops, and sometimes by deputized private armies as well, paid for directly by the companies whose employees were on strike.223

The most famous example of this was the federal role in breaking the Pullman strike, when, much to the satisfaction of the Chicago Tribune, federal troops were sent to Chicago to enforce a federal injunction obtained over the objections of both the mayor of Chicago and the governor of Illinois:

The strikers now have found out that when the police and militia fail to preserve order the United States forces can be called in; that the sympathies of a Mayor and a Governor with an organized attempt to arrest all trade do not assure success unless they also have on their side the President of the United States.... But it is not to be forgotten that if the President had been a man of the same stamp as the Governor of Illinois the result would have been different, and that the true cause for exultation is the ... courageous action of President Cleveland in maintaining the supremacy of the law throughout the length and breadth of the land... 224

The Tribune's point about the President's role finds validation in a comparison of the federal government's responses to the threatened rail strike of 1916 and the shopmen's strike in 1922. In the first case, President Wilson was sympathetic to the eight-hour day demands of the railroad brotherhoods and politically in need of the labor vote, so he used the powers of his office both to head off a strike and to mandate the eight-hour day through his support for the Adamson Act.225 In 1922, on the other hand, an Attorney General in an administration hostile to organized labor pursued a very different course of action:

No union or combination of unions can, under our law, dictate to the American Union. When the unions claim the right to dictate to the government and to dominate the American people and deprive the people of the necessaries of life, then the government will destroy the unions, for the government of the United States is supreme and must endure.

So long and to the extent that I can speak for the government of the United States I will use the power of the government within my

223. DAVIS, supra note 5 at 92; LINDSEY, supra note 5 at 166; cf. DAVIS, supra note 5 at 72–73 (deputization of railroad guards by local authorities).

224. Principles Involved in the Strike, CHICAGO TRIBUNE, Sept. 3, 1894. Another local paper, the Chicago Herald, not only condemned the strike and endorsed the injunction but also worked closely with federal prosecutors when they were gathering evidence in support of the government's petition for the injunction. See LINDSEY, supra note 5 at 285–86.

225. See TAN 168, 180, supra.
control to prevent the labor unions of the country from destroying the open shop.\textsuperscript{226}

Unfortunately for organized labor, Woodrow Wilson and, to a lesser extent, Theodore Roosevelt, were the only presidents between Abraham Lincoln and Franklin Roosevelt who displayed much sympathy for the cause of labor. At the other extreme was William Howard Taft, who as a state and then a federal judge helped pioneer the use of the labor injunction before becoming President in 1909, and later, Chief Justice of the United States. During the Pullman strike, he wrote his wife that the authorities “have killed only six of the mob as yet. This is hardly enough to make an impression.” In another letter, he wrote, “[U]ntil they have had much bloodletting, it will not be better.”\textsuperscript{227}

For decades, legislation curbing the powers of the federal courts to grant labor injunctions was at or near the top of the American Federation of Labor’s legislative wish list.\textsuperscript{228} In a Labor Day address in 1907, for example, AFL President Samuel Gompers asserted that “The injunction, as issued in trade disputes, tends to make outlaws of men when they are not even charged with doing things in violation of the law, state or national.” Labor seeks “no immunity from any conduct,” he continued:

But we do insist that when a workman is charged with a crime he shall be tried by the same process of law as every other citizen. And it may not be amiss to sound a word of warning and advice to those of the rampant, vindictive and greedy employers who seek to rob the working people of their rights by the unfair injunction process. The full power of labor has never yet been exercised in defense of its rights; it is not wise to compel its exercise.\textsuperscript{229}

“The full power of labor” was probably a reference to a national general strike, a response to sweeping federal injunctions Gompers and the AFL considered briefly but rejected during both the Pullman strike and the shopmen’s strike.\textsuperscript{230}

Critics of the labor injunction thought they had achieved their goal of curtailing its availability in federal court with the passage of the

\begin{footnotes}
\item\textsuperscript{226} Attorney General Harry Daugherty, quoted in \textit{Sam Gompers or America?}, supra note 218.
\item\textsuperscript{227} Quoted in \textit{FORBATH}, supra note 66 at 75. For an insightful discussion of Taft’s role in labor injunction cases both as a lower court judge and as Chief Justice, see Dianne Avery, \textit{Images of Violence in Labor Jurisprudence: The Regulation of Picketing and Boycotts, 1894–1921}, 37 \textit{BUFFALO L. REV.} 1 (1988–89). For a Labor Day speech expressing Theodore Roosevelt’s views on labor, see \textit{T.R. for Labor Unions}, supra note 91.
\item\textsuperscript{228} See \textit{FORBATH}, supra note 66 at 147–58. In the meantime, “principled disobedience to injunctions was official AFL policy.” \textit{Id.} at 143.
\item\textsuperscript{229} Quoted in \textit{Gompers Lands on Injunctions}, \textit{ATLANTA CONSTITUTION}, Sept. 3, 1907.
\end{footnotes}
Clayton Antitrust Act in 1914, hailed by Gompers as labor’s "Magna Carta."

The courts, however, relying upon language in the act permitting injunctions to prevent irreparable injury to property, held that employers had a property interest in their employees’ ongoing labor, and they continued to grant labor injunctions. Not until passage of the Norris-LaGuardia Act in 1932 were effective legislative curbs on the federal labor injunction finally put into place.

H. The New Deal

On Labor Day of 1933, editorial cartoons in both the *New York Times* and the *Baltimore Sun* gave full credit to the legislation at the center of President Franklin Roosevelt’s New Deal for bringing about "A Better Labor Day."

The *Baltimore Sun* cartoon showed a happy worker triumphantly boosted aloft by giant documents, marked “Codes,” and labeled with the words, “Abolition of Child Labor,” “Right to Organize,” and “Collective Bargaining.” The cartoon was referring to the industry codes promulgated under the supervision of the National Recovery Administration (NRA), an agency at the heart of the early New Deal. The NRA was created by the National Industrial Recovery Act (NIRA) during the remarkable first 100 days of FDR’s first term, earlier that year. The purpose of the Act was to stimulate the economy, which was three years into the Great Depression.

Both industry and labor could readily agree with some features of the NIRA, such as the public works program it established. But what business interests most wanted were blanket waivers of the antitrust laws. They argued that the economy would improve if industries were permitted to stabilize themselves by using otherwise illegal restrictions on competition like price fixing and agreements to curtail output.

In exchange for the antitrust exemptions desired by business, the NIRA required of employers agreements to abide by industry-wide “codes,” approved by the NRA, that would establish wage and hour


232. See e.g., Duplex Co. v. Deering, 254 U.S. 443 (1921); Hitchman Coal & Coke Co. v. Mitchell, 245 U.S. 229 (1917).


234. The cartoon in the *Times* showed Uncle Sam using paint in a bucket labeled "N.R.A." to add the words "A Better" to a banner proclaiming "Labor Day."


standards, limit child labor, and most important, promise workers "the right to organize and bargain collectively through representatives of their own choosing." The right to organize unions and bargain with employers was spelled out in the famous section 7(a) of the NIRA, which also promised workers freedom from employer "interference, restraint, or coercion" in exercising their rights. 238

As suggested by the Baltimore Sun's Labor Day cartoon, passage of the NIRA provided a tremendous boost to workers and their unions. John L. Lewis of the United Mine Workers (UMW) had helped to draft section 7(a), and not surprisingly, his union was the first to take advantage of the new law. Within two weeks of the NIRA's enactment, the UMW claimed 128,000 new members in Pennsylvania alone. The International Ladies Garment Workers and the Amalgamated Clothing Workers were quick to follow suit, and by the end of 1933, the AFL had gained about 500,000 members. By Labor Day of 1934, nearly 400,000 more workers had been organized. 239

The Baltimore Sun's cartoon is misleading, however, in specifically crediting industry codes under the NRA for labor's improved position. While a code for the textile industry was drafted within a month of the NIRA's passage, it took much longer to draft codes for other industries, and for still others, no effective codes were ever promulgated, due to the refusals of major companies to participate. Moreover, many of the codes that were adopted, reflecting a drafting process typically dominated by employers, contained wage and hour standards disappointing to labor and permitted employers to establish company unions rather than requiring them to bargain with unions of their employees' own choosing. 240

As AFL president William Green explained in a Labor Day weekend article in the New York Herald Tribune Magazine:

It is the associations of industry . . . represented by shrewd counsel, which frame and present the voluntary codes of industry being considered at Washington. . . . They have the money and organization to . . . present . . . the employers' conception of industrial justice.

The great mass of consumers are unorganized. Only by . . . organizations of labor can the public interests be safeguarded through the presentation, for official consideration, of the facts relating to working conditions, hours, actual pay, and purchasing power of those affected by proposed codes.

When a code was proposed recently, for instance, by the heads of the great steel companies, how could unorganized, practically desti-

240. See Irons, supra note 237 at 31–32, 204–05.
tute men who had worked in the rolling mills at Pittsburgh come to Washington to present in detail the needs of such labor . . . ?241

Even where industry codes satisfactory to labor were put into place, the NIRA provided no effective means of enforcement.242 A National Labor Board was appointed in August of 1933 by President Roosevelt, but neither it nor another labor board created the following June met with much success protecting the rights of workers or promoting collective bargaining before the NIRA itself was declared unconstitutional by the Supreme Court in May of 1935.243

Thus, what gave labor its boost was not the NIRA's actual implementation through the promulgation and enforcement of industry codes. Rather, it was the legitimizing effect of section 7(a)'s official endorsement of labor's efforts that helped produce the tremendous surge of union activity during the 1930's. As an important study of "poor people's movements" explains, the provisions of section 7(a) had "an unprecedented impact on the unorganized working people of the country, not so much for what they gave, as for what they promised." Those promises were not always kept, but the fact "that the federal government had made such promises at such a time gave a new spirit and righteousness, and a new direction, to the struggles of unorganized workers."244

On the Sunday before Labor Day of 1933, Louis Stark of The New York Times—the "dean of American labor reporters" and a pioneer in the "interpretive reporting" trend of the 1930's245—began an assessment of section 7(a) on an overly optimistic note: "Collective bargaining, long a theoretical right, . . . becomes a government guarantee, enforceable at law."246 He recognized, however, that many of the strikes that

242. Some scholars argue that the inclusion of section 7(a) in the NIRA was merely "to create the impression of balanced treatment of business and labor," and that the NRA never had any real interest in encouraging collective bargaining. E.g., JAMES B. ATLESON, VALUES AND ASSUMPTIONS IN AMERICAN LABOR LAW 37 (1983) (quoting BERNSTEIN, supra note 238 at 131); TOMLINS, supra note 15 at 108.
244. FRANCES FOX PIVEN & RICHARD A. CLOWARD, POOR PEOPLE'S MOVEMENTS: WHY THEY SUCCEED, HOW THEY FAIL 110 (1977). The United Mine Workers union was one of the best at exploiting the enhanced legitimacy the enactment of section 7(a) gave its efforts, using with great effectiveness the recruiting slogan, "The President wants you to join the union"—even if it was something of an overstatement. ZIEGER, supra note 239 at 29.
245. EMERY, supra note 58 at 563. Stark won a Pulitzer for his labor reporting in 1942. Id. at 483 n.15.
took place during the months following the NIRA's passage resulted from flaws in the statute's implementation:

Strike activity was due . . . also to delay in the formulation of codes of fair practice and to the tardiness of industry in carrying out the Recovery Act's objective of increasing minimum wages and reducing maximum hours . . . Even the submission of some codes resulted in strikes. When labor saw what meager pledges as to wages and hours some of the industries were willing to make it went on strike and demanded greater concessions.247

Similarly, a 1933 Labor Day article in the Boston Globe concluded that, with “the labor question thrusting its way into [the] operation of virtually every major code, and strikes reported over the Nation,” labor issues constituted the “greatest N.R.A. problem.”248

During 1934, labor unrest increased dramatically, and the Labor Day commentary of the daily press that year was quick to place the blame at the feet of Section 7(a). An editorial cartoon in the New York Herald Tribune, for example, under the heading “Coming Home to Roost,” showed two vultures, labeled “Strike” and “Strike Threat,” perched at the foot of a sickbed labeled “Section 7A” in which lay a patient identified as the “Administration.”249

Along similar lines, an editorial in the Baltimore Sun asserted, “It is plain that the New Deal has not been a solvent for labor troubles. On the contrary, there is some reason to believe that it has encouraged and fomented them.” As the editorial explained:

[T]he Administration has added fuel to the usual flames of controversy. It held out, for example, much greater hopes for collective bargaining under Section 7a of the Industrial Recovery Act than the . . . NRA was willing or able to make real. Labor is naturally disappointed at the failure of the supposedly universal guarantee on this subject.

Moreover, the . . . promises of shorter hours and higher wages under the new codes led labor to expect many practical benefits that have not materialized. . . .250

Despite the requirements of section 7(a), employers all too often refused to recognize or bargain with the unions chosen by their employees, and “at least as many company unions were organized as those

247. Id.
248. Labor Greatest N.R.A. Problem, BOSTON GLOBE, Sept. 4, 1933. One study of the period points out that “[a]long with FDR, a whole political generation matured during [the] ‘golden age’ of the ‘labor question’”—a time when “[e]veryone from Woodrow Wilson to Big Bill Haywood acknowledged that the ‘labor question’ was not merely the supreme economic question but the constitutive moral, political, and social dilemma of the new industrial order.” Steve Fraser, The ‘Labor Question,’ in STEVE FRASER & GARY GERSTLE, THE RISE AND FALL OF THE NEW DEAL ORDER, 1930–1980 at 55, 56 (1989).
249. Coming Home to Roost, NEW YORK HERALD TRIBUNE, Sept. 1, 1934 (cartoon).
not controlled by the employer." As a result, the nation experienced during the spring and summer of 1934 "an extraordinary spasm of labor unrest and violence." There were over 1800 strikes during 1934, involving almost 1.5 million workers. Three of the most dramatic confrontations grew out of the Electric Auto-Lite strike in Toledo, the west coast longshoremen's strike that led to a general strike in San Francisco, and the teamsters strike in Minneapolis leading to a general strike that shut down that city as well.

A fourth major strike, involving hundreds of thousands of textile workers from Maine to Alabama, began over Labor Day weekend of 1934 and for that reason was the subject of much Labor Day commentary, including a *Pittsburgh Post-Gazette* cartoon showing President Roosevelt at an ironing board trying to "iron out" the wrinkles in a shirt labeled "labor difficulties" taken from a basket of laundry labeled "textiles." Louis Stark of the *New York Times*, in another lengthy Labor Day analysis of the state of labor, blamed the strike on management for its failures to comply with the terms of the NRA code for the textile industry. Stark also cited the NRA's inadequate enforcement machinery:

Labor's state of mind concerning Section 7a and its almost sacred view of that provision is discernible in the developments in the dispute in the cotton textile industry.

Labor views its connection with the NRA as an organic one: it is willing to act as a police force for code enforcement. When . . . [employers fail] to abide by the code, court action would appear to be slow and cumbersome. Economic action by the unions in withdrawing employees from the recalcitrant employers is sometimes quicker and more efficacious. Several days ago the cotton garment manufacturers announced defiance of the President's executive order reducing hours. Promptly the unions affected announced their readiness to strike in support of the government's position.

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251. TAFT, supra note 243 at 420.
252. ZEIGER, supra note 239 at 33.
255. Louis Stark, *The Nation Ponders a Pivotal Labor Day*, NEW YORK TIMES, Sept. 2, 1934. The *Washington Post* also assigned a substantial portion of the blame for the textile strike on management:

[To some extent direct action has been forced on the United Textile Workers. Its right to speak for the employes of the industry is denied; its claim to be representative is flatly contradicted. The alternative in this situation are either admissions of the employers' thesis, or
In many respects, the *New York Herald Tribune* cartoon was correct to characterize the labor strife of 1934 as Section 7(a)'s chickens—or vultures—coming home to roost. The *Herald Tribune*'s view was that with the NIRA, the government had “plunged into a field for which it was utterly unsuited.” The results of the act were “to awake hopes among laboring men and ambitious labor organizers which the government had no means of satisfying; [and] to awake serious fears in the minds of industrial managers which it had not the courage to allay.”\(^{256}\) By Labor Day of 1934, even many liberals probably agreed with the conservative *Herald Tribune* that “[t]he labor policy of the Roosevelt administration [had] been one of its most obvious disasters.”\(^{257}\)

Thus, even before the entire NRA was declared unconstitutional in 1935,\(^{258}\) liberals and conservatives alike were seeking to overhaul the New Deal’s labor policy.\(^{259}\) Conservatives preferred the *Herald Tribune*'s proposed solution, that government “return to its normal hands-off policy and let American employers and American employees work out their own solutions.” Of course, state intervention in labor relations was nothing new, as targets of labor injunctions, to take one example, knew full well.\(^{260}\) What the *Herald Tribune* really wanted was a return to the government’s “normal” policy of siding with employers in most labor disputes.

Unions and their liberal allies in Congress, on the other hand, like Senator Robert Wagner of New York, wanted a new labor statute that could be meaningfully enforced. As one historian explained, “it was becoming increasingly clear that without a labor agency possessed of real powers to act, not only would there be no progress in extending

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action to prove that labor in the industry will follow the banner of trade unionism even on to an unfavorable field for battle.

In refusing eleventh hour mediation proposals the employers have virtually told the United Textile Workers to put up or shut up. The union would not be worthy of the industrial responsibility it seeks if it had failed to respond to such a challenge.

*A Test for Trade Unionism*, *Washington Post*, Sept. 2, 1934. In another editorial two days later, the *Post* added that “[p]robably three-fourths of the strikes of the past year” have resulted from “the failure on the part of certain industries to grant the right to organize along lines more independent than those of company unionism.” *The Day of Labor*, *Washington Post*, Sept. 4, 1934.

257. *Id.*
259. As one historian explained about the demise of the NRA, “[B]y 1935 [the NRA] was a woeful failure, even a political embarrassment; many liberals (including, it seems likely, Roosevelt himself) were quietly relieved to see it die.” ALAN BRINKLEY, THE END OF REFORM: NEW DEAL LIBERALISM IN RECESSION AND WAR 18 (1995).
bargaining, the unions would also risk losing all the gains which they had made in the previous . . . months."

A new and much more effective National Labor Relations Board (NLRB) was created by the National Labor Relations Act, enacted in 1935. In some respects, the new law was simply an expanded version of the old section 7(a), this time with teeth. But in two important respects it was very different. First, the Act completely outlawed company unions, which had flourished under the NIRA. Second, it resolved an important and controversial policy question that had arisen under the NIRA and had been the subject of an important decision by the NIRA's labor board, issued the Saturday before Labor Day of 1934. Should representation of workers for collective bargaining purposes be based on principles of majority rule, whereby the union selected by a majority of workers in the bargaining unit would be the exclusive representative of all the workers in that unit? Or in the alternative, should a proportional representation system be utilized, permitting more than one union to have representation on a bargaining committee in proportion to the number of supporters each union had in the workplace?

In the National Labor Relations Act, Congress adopted the same majority rule approach that had been endorsed by the NIRA's second labor board in its 1934 decision, *Houde Engineering Corp.* Particularly interesting, as noted in a *San Francisco Chronicle* editorial on the *Houde* case, was the fact that this view "revers[ed] the interpretation of President Roosevelt," who several months earlier had approved proportional representation as part of a labor settlement in the automobile industry.

The *Philadelphia Inquirer* was outraged at the *Houde* decision,
Lata, Labor, and the Mainstream Press

asserting that it accorded "[t]he closed shop, in effect . . . recognition by a Government agency." Moreover, the decision

nullifies the right of collective bargaining guaranteed by the NIRA to all employees. As the National Association of Manufacturers asserts, one of the purposes of Section 7(a) was to preserve "to every employee the right to bargain with management individually or collectively as he saw fit, and if collectively, then through such form of collective bargaining as he wished. Under this decision if an employee does not select the form selected by a majority of his fellow workers he is deprived of the right to bargain collectively guaranteed him by the act." 268

The Washington Post, on the other hand, described Houde Engineering as "a sensible and just decision." For collective bargaining to work well, the Post explained,

labor in the plant or . . . [bargaining] unit should have a single group of spokesmen, just as management has a single group. It is no more logical that the employees should have two or more distinct forms of representation than it would be for the stockholders. Management properly centralizes its responsibility in collective bargaining and it is in the public interest that labor should do the same. 269

Similarly, the San Francisco Chronicle described the effect of the decision "to make majority rule binding on labor as it is binding on employers' organizations under the [NRA] codes." 270 The New York World-Telegram also endorsed the Houde decision, noting that it "does not deny the right of minorities to present grievances; nor compel employees to join the majority organization; nor force a closed shop . . . ." 271

The language of the NIRA had been silent on the questions of majority rule and exclusive representation, but when the National Labor Relations Act was passed in 1935, Congress expressly adopted those principles—what one legal historian has called "the centerpiece of the emerging common law of collective bargaining" 272—as key elements of the labor relations framework established by the new law. 273

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269. Clarifying 7(a), WASHINGTON POST, Sept. 3, 1934.
270. Lines are Drawn on NIRA Labor Clause, supra note 267.
271. The Houde Labor Decision, NEW YORK WORLD-TELEGRAM, Sept. 1, 1934. No decision of the old labor boards "was more controversial or more opposed by employers" than was Houde Engineering, and the National Association of Manufacturers urged employers to ignore the decision until review by the courts. GROSS, supra note 3 at 89, 92. The old NLRB had no authority to seek enforcement of its own decisions; instead it had to refer "noncompliance" cases to the Justice Department. Houde was the only case, out of 33 so referred, that the Justice Department took to court, and it was still pending when the NIRA was declared unconstitutional in 1935. Id. at 125–26.
272. TOLMINS, supra note 15 at 113.
273. NLRA sec. 9, 29 U.S.C. s 159 (1982). Although it passed major amendments to the NLRA in 1947 and 1959, Congress has never seriously considered abandoning the concept of exclusive representation, although it has carved out special protections for workers in the skilled trades and for professional employees. The exclusive representa-
With the passage of the National Labor Relations Act, and the Supreme Court upholding its constitutionality two years later, American labor law entered a new era. That era is beyond the scope of this article, but it is one that can only be understood in light of the half century of labor law history that preceeded it.

IV. Conclusion: A Commentary on the Commentary

This article has examined the Labor Day commentary of the mainstream press on labor and employment law issues during the 50 years before the "modern" period of American labor relations began with the passage of the Wagner Act in 1935. While it did not explore every potential topic, this study sheds new light on some of the most important issues in the history of American labor and employment law. Some of these subjects, like the labor injunction, protective legislation for women, and exclusive representation, involve policy issues that remain highly relevant today.

This study also provides a vehicle for testing some of the hypotheses and conclusions of various media critics on the nature of the press's coverage of labor and employment related issues. For example, the mainstream press's general editorial support for the regulation of child labor before the New Deal, including endorsement of a constitutional amendment to overrule Supreme Court decisions hostile to such regulation, lends support to the common observation that the press is more...

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275. This point is equally true whether one believes the labor law regime ushered in by the passage of the NLRA constituted a radical break with the past, or merely provided new bottles into which the courts could pour old doctrinal values and assumptions. See, e.g., Atleson, supra note 242; Avery, supra note 227; Casebeer, supra note 121; Karl Klare, Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness, 1937–1941, 62 MINN L. REV. 265 (1978); Stauthon Lynd, Thesis and Antithesis: Section 7 of the NLRA, the First Amendment, and Workers' Rights, in Jules Lobel, A Less Than Perfect Union: Alternative Perspectives on the U.S. Constitution 151–73 (1988). See generally Wythe Holt, The New American Labor Law History, 30 LAB. HIST. 275 (1989).

276. This article did not, for example, discuss press commentary on legislation restricting immigration, a goal long sought by the AFL. See, e.g., Labor Day Sentiments, BOSTON GLOBE, Sept. 6, 1891; The Chinese Labor Question, NEW ORLEANS TIMES-PICAYUNE, Sept. 3, 1901; Mexican Labor in the United States, ST. LOUIS POST-DISPATCH, Sept. 1, 1929; Charles F. Burgman, A Few Labor Day Reminiscences, WASHINGTON POST, Sept. 1, 1929. Nor did it discuss the labor boycott, a potentially effective economic weapon largely prohibited by American labor law both before and after 1935. See, e.g., Bryan Guest of Labor, WASHINGTON POST, Sept. 8, 1908; Union's Rights Are Involved in Van Cleave Case, ST. LOUIS POST-DISPATCH, Sept. 8, 1908.
receptive to labor standards legislation than it is to union organized economic pressure as a means of improving wages and working conditions.277 Similarly, the press’s about-face on the regulation of child labor during the New Deal period, when publishers realized that such regulation could curtail their own extensive use of under-age newsboys, supports a conclusion that newspaper editorial policy is often influenced by the fact that newspapers are themselves employers and profit seeking business enterprises.278

On the other hand, after reviewing literally thousands of Labor Day editorial pages from the mainstream press for this study and a forthcoming anthology, I would have to conclude that press treatment of labor and employment issues is both more extensive and more balanced on Labor Day than it is at other times of the year. This is a tribute to the founders of Labor Day itself, who from the very beginning saw the holiday as an occasion when unionists “could command the attention, however brief, of millions of people . . . [and] could present their goals to the majority of Americans.”279 As two media critics put it recently, “It’s a good thing Labor Day was established. Otherwise, a whole year might pass at some news outlets with hardly any acknowledgement that workers exist.” For the mainstream media, “Labor Day is a reminder of the forgotten.”280

On Labor Days over the years, many of the newspapers I surveyed for this study, including some with editorial policies generally unfriendly to labor, were willing to open their pages to the views of organized labor, by reporting the substance of Labor Day speeches, publishing interviews with labor leaders or articles written by them,281 or simply by giving coverage to important labor issues that usually receive scant attention from the press. It is also true, however, that some papers saw Labor Day as an occasion for driving an editorial wedge be-

277. See supra TAN 61, 90.
278. See supra TAN 111.
279. Kazin & Ross, supra note 1 at 1296.
281. E.g., Green, supra note 241; Union's Side of Labor Problem is Told to Club, SAN FRANCISCO CHRONICLE, Sept. 3, 1916; President of American Federation of Labor Talks on Wide Range of Subjects, supra note 155; Jerome Jones Delivered Strong Labor Day Address, ATLANTA CONSTITUTION Sept. 6, 1904; A Women's Will Sways Thousands, PHILADELPHIA INQUIRER, Sept. 5, 1900; Celebrations in Baltimore and Other Large Cities, BALTIMORE SUN, Sept. 4, 1888. Regular features of the Boston Globe's Labor Day coverage around the turn of the century were articles reprinting the often thoughtful and insightful responses from a variety of labor leaders to a different question each year. E.g., Would the Formation of a Labor Party Aid the Workingman?, BOSTON GLOBE, Sept. 4, 1910; What Benefit Has the Trades Union Rendered to Society?, supra note 76; What Good Has Labor Day Done for Labor?, BOSTON GLOBE, Sept. 1, 1901; Should Labor Organizations Enter the Political Arena?, supra note 76; What is the Purpose of the Labor Day Parade?, BOSTON GLOBE, Sept. 1, 1895; Why Do Some Strikes Fail?, BOSTON GLOBE, Sept. 5, 1892; Labor Day Sentiments, BOSTON GLOBE, Sept. 6, 1891.
 tween workers and the unions—and union officials—who sought to represent them. The stereotyped “fat cat” labor bureaucrat has long been fodder for Labor Day commentary.

Bias in the press’s treatment of any issue, of course, can be present in straight news reporting as well as in editorial commentary. Indeed, bias in news stories is of greater concern than bias on the editorial and op-ed pages. Readers expect editorials to present a strong point of view, but they may fail to notice the more subtle bias in news stories. Being less obvious, that bias may have a greater influence on public opinion.

For example, the editorial pages of even the most anti-union newspapers occasionally paid lip service to the rights of workers to join unions, and even strike, so long as union activities were carried out in a peaceful manner. But news stories in those papers could easily promote a negative image of unions by highlighting or exaggerating allegations of union violence, coercion, or intimidation, and by blaming unions for strike violence that might have been initiated by an employer’s own plant guards, by the police, or by agent provocateurs.


283. Other manifestations of bias can include: sensationalist or slanted headlines that may not reflect article content; placement of a story (front or inside page, above or below the fold, placement next to crime news, etc.); and, of course, the decision to cover a story at all. See PARENTI, supra note 5 at 191–210; PUETTE, supra note 2 at 59–66.

284. See, e.g., The Open Shop, LOS ANGELES TIMES, Sept. 5, 1927: “[T]he open shop has no quarrel with the right to unionize, to bargain collectively . . . or to strike for the enforcement of just demands. . . . [A] workingman may or may not belong to a union, as he may personally choose.” But as the paper’s editors and publisher undoubtedly knew, both of these claims were false; they were part of the “fraudulent propaganda” supporters of the open shop relied upon in its defense. IRVING BERNSTEIN, THE LEAN YEARS: A HISTORY OF THE AMERICAN WORKER, 1920–1933 at 147–48 (1960). In 1914, an observer of the Los Angeles hearings of the United States Commission on Industrial Relations concluded that as a result of the militant anti-unionism of the city’s employers’ association, “the term ‘open shop’ is wholly a misnomer. It is as tight a closed shop as [union stronghold] San Francisco—with the lock on the opposite side of the door. Employers on the stand frankly stated that they would not employ union men.” DAVID F. SELVIN, SKY FULL OF STORM: A BRIEF HISTORY OF CALIFORNIA LABOR 31 (1966) (quoting John A. Finch). See also TAFT, supra note 243 at 364.

285. Recall, for example, the anti-union spin the Boston Evening Transcript placed on dispatches from the Lawrence textile workers’ strike of 1912. See supra TAN 24.

In addition to focusing on strike violence, press coverage of strikes tends to: portray unions, not management, as the greedy and intransigent instigators of labor strife; provide more favorable treatment of employer “offers” than union “demands;” emphasize high union pay scales and inflated salaries of union “bosses” (while offering little coverage of overly generous executive compensation packages); and provide poor coverage of the causes of strikes, but extensive treatment of their impact on the public. See PARENTI,
This is not to deny that unions and their members sometimes did resort to threats and violence to achieve their goals. The point, though, is that the press frequently exaggerated the extent of that violence, and placed most of the blame for it on organized labor. Those distortions in the press's coverage of strikes—the most "newsworthy" of labor related topics—helped distort the public's opinion of unions, which in turn made it easier for public officials to use their police powers and injunctions to quell labor unrest in a manner almost always more beneficial to the employer's side of a dispute.

Although this article did not focus on the straight news story, it provides the basis for a new explanation of press bias in the coverage of strikes and collective bargaining, and especially strike related violence. Earlier, this article explored a number of explanations for press bias against unions, including the often anti-labor views of papers' corporate owners, pressure from advertisers, and the labor strife many newspapers have experienced themselves. But there is another factor that enabled the often anti-union predilections of the mainstream press to run close to the surface of news coverage of strike related violence: the dominant role played by the labor injunction in American labor relations in the fifty years before passage of the Norris-LaGuardia Act.

By the 1920's, labor injunctions were obtained in twenty-five percent of all strikes, and certainly in a higher percentage of strikes when violence was present, threatened, or even merely alleged. Injunction proceedings were not only the subject of news coverage, they were critical sources of news about strikes as well. And in those typically ex parte proceedings, the employers' uncontested characterizations of the strikes, and their allegations of union violence—often unsupported even by affidavits—provided the "facts" upon which were based not only the labor injunctions issued by the courts, but also the news stories supra note 33 at 85.

Press treatment of strikes also tended to focus on union defeats, frequently not even reporting union victories. In response to a Labor Day inquiry from the Boston Globe, Samuel Gompers offered several reasons why the public believed unions lost more strikes than they did: First, "the general desire of the newspapers of the country to suppress the victories of labor; second, in most cases employers request that no publicity be given to their concession to the demands of labor; and third, that the wageworkers easily accommodate themselves to improved conditions and find nothing to be boisterously exultant about by reason of the change." Why Do Some Strikes Fail?, supra note 281 (quoting Samuel Gompers).

286. A recent study of the New York Times' coverage of labor issues reports that depending on the year, articles on strikes outnumbered articles on the much larger number of non-strike settlements in collective bargaining by a ratio of anywhere from 2 1/2-1 to 8-1. Erickson & Mitchell, supra note 7 at 401. Samuel Gompers had observed this phenomenon as early as Labor Day, 1892. See Why Do Some Strikes Fail?, supra note 281.

287. Cf. Erikson & Mitchell, supra note 7 at 406; Schmidt, supra note 7 at 160.

288. See supra TAN 29-56.
reported in the daily press about the underlying strikes. The impact on labor's public image was enormous:

On the basis of partial, untested allegations, labor disputes became linked with illegality in judicial and popular attitudes; and every restraining order, whether temporary or permanent, reinforced the image of organized workers threatening employers, nonunionized employees and the public with force, violence, or unjustified and severe economic harm.

This is a particularly powerful illustration of the notion that "[t]he ideological character of the news . . . is partly a reflection of the journalist's 'routine reliance on raw materials which are already ideological.' "

The impact one-sided injunction proceedings had on news coverage of strikes was further enhanced by the legitimacy that flowed from the judicial findings upon which the injunctions were based. Indeed, press reliance on court documents and rulings in its labor coverage could give news reports of strike violence an almost official character. And when it was the state, rather than private employers, that sought injunctions (as in the 1922 railroad shopmen's strike), these "official" accounts of the strikes carried even greater weight. After all, press coverage of labor relations tends to present an image of government "as a neutral arbiter in the struggle between capital and labor, acting on behalf of [a] 'national interest' . . . best served by getting the workers back into production as soon as possible, regardless of the terms of the settlement."

Compounding the problem was the all too common lack of expertise on the part of the journalists covering these stories. Not only did they frequently lack background in the complexities of labor relations, they could be even more at a loss when those complexities intersected the intricacies of the legal system. Thus, even when newspaper ed-

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289. See supra TAN 220–21.
290. Silverstein, supra note 233 at 102. See also Avery, supra note 227.
291. Parenti, supra note 33 at 50, quoting Mark Fishman, Manufacturing The News (1980).
292. See Schudson, supra note 23 at 11.
294. Parenti, supra note 33 at 85–86.
295. See supra TAN 53–55.
296. This "increasingly complex web of labor relations issues [was] considerably beyond the scope of the average local reporter and well beyond the ken of the general public's comfortable frame of reference." Even when business reporters with a greater expertise in labor issues covered strikes, "knowing the ins and outs of business writing [did] not always translate to well-informed labor reporting, which is often ensnarled in complicated legal issues." Puette, supra note 2 at 62, 126.

As Justice Rutledge asserted in an important freedom of the press case, "There is perhaps no area of news more inaccurately reported factually, on the whole . . . than legal news. Some part of this is due to carelessness, often induced by the haste with which news is gathered and published. . . . But a great deal of it must be attributed, in candor, to ignorance. . . . For newspapers are conducted by men who are laymen to the law . . .
itorials criticized overbroad labor injunctions and condemned judicial infringements of strikers' constitutional rights, as some editorials did during the shopmen's strike, the focus was on the scope and substance of the injunctions, not the questionable procedures and evidence used to obtain them.

The Labor Day commentaries of the mainstream press offer a fascinating glimpse at the role of the media in both reflecting, and shaping, public opinion regarding important issues in American labor history. As this article has shown, those commentaries also shed light on the development of American labor and employment law. Union strength may have ebbed and flowed over the last century, but the legal regulation of the relationship between employers and employees, whether in a unionized setting or not, continues to have an enormous impact on the economic, physical, and psychological well-being of this nation and its people. The public's perceptions and opinions about labor and employment law have helped to shape those bodies of law in both the judicial and legislative arenas, and those perceptions and opinions have in turn been shaped by the treatment those issues receive in the mainstream press. Labor Day celebrations since 1882, therefore, have not only marked the last flings of summer and the starts of new school years. They have also provided annual occasions for the public, and the press, to contemplate and comment upon important issues in the law of the workplace.

[and] their capacity for misunderstanding the significance of legal events and procedures, not to speak of opinions, is great." Pennekamp v. Florida, 328 U.S. 331, 371 (1946) (Rutledge, J., concurring).

297. See supra TAN 216.

298. For many years, even organized labor itself "evinced little understanding of how much turns on rules of procedure" when it campaigned for legislation to curb the use of labor injunctions. FRANKFURTER & GREENE, supra note 207 at 183.