

THE WORKERS' CONSTITUTION

Luke Norris*

This Article argues that the National Labor Relations Act of 1935, Social Security Act of 1935, and Fair Labor Standards Act of 1938 should be understood as a “workers’ constitution.” The Article tells the history of how a connected wave of social movements responded to the insecurity that wage earners faced after the Industrial Revolution and Great Depression by working with government officials to bring about federal collective bargaining rights, wage and hour legislation, and social security legislation. It argues that the statutes are tied together as a set of “small c” constitutional commitments in both their histories and theory. Each statute sought to redefine economic freedom for workers around security and sought to position worker security as essential to the constitutional accommodation of corporate capitalism. The Article also explores the interpretive implications of conceiving of a “workers’ constitution” in the current context.

INTRODUCTION.....	1460
I. NEW DEAL CONSTITUTIONALISM	1464
A. <i>The Transformation of the Economy</i>	1465
B. <i>A Wave of Mobilization</i>	1467
II. THE NATIONAL LABOR RELATIONS ACT OF 1935.....	1469
A. <i>Movement Development</i>	1469
B. <i>Passing the Statute</i>	1471
1. <i>The Black Bill</i>	1471
2. <i>The Path to the NLRA</i>	1474
a. <i>Trying the Path of Persuasion</i>	1474
b. <i>Strikes: Act I</i>	1474
c. <i>NLRA: Attempt I</i>	1476

* Assistant Professor of Law, University of Richmond School of Law. For generous feedback and input, I thank Bruce Ackerman, R. Michael Fischl, Joseph Fishkin, Owen Fiss, William Forbath, Heather Gerken, Marie-Amélie George, James Gibson, Jamal Greene, Claudia Haupt, Corinna Lain, Justin Lo, Anna Lvovsky, Jon Michaels, Henry Monaghan, Douglas NeJaime, David Pozen, Reva Siegel, Allison Tait, Ryan Williams, John Fabian Witt, Maggie Wittlin, and participants in workshops at Law & Society (New Orleans) and Columbia Law School. I am also grateful to Jonathan D’Errico, Matthew DeLuca, and the editors of the *Fordham Law Review* for their excellent editorial assistance, and to Gregory Nelson for his excellent research assistance.

<i>d. Strikes: Act II</i>	1477
3. Debate and Passage	1478
III. THE SOCIAL SECURITY ACT OF 1935	1481
<i>A. Movement Development</i>	1482
1. The Wisconsinites and the AALL	1482
2. The Townsendites	1484
<i>B. Passing the Statute</i>	1485
1. The Push for Old-Age Security	1486
2. The Wisconsinites in Government	1486
3. Townsendite Pressure	1487
4. Debate and Passage	1488
<i>C. FDR and the Supreme Court Weigh In</i>	1490
IV. THE FAIR LABOR STANDARDS ACT OF 1938	1491
<i>A. Movement Development</i>	1492
<i>B. Passing the Statute</i>	1493
1. New Deal Networks	1494
2. The Path to the FLSA	1494
<i>a. Courting Labor</i>	1495
<i>b. Getting Child Labor into the Act</i>	1496
<i>c. Getting the Act out of Committee</i>	1496
<i>d. Courting Labor, Again</i>	1498
3. Debate and Passage	1499
V. INTERPRETATION AND IMPLICATIONS	1500
<i>A. Constitutional Purposes of the Statutes</i>	1501
<i>B. The Statutes as Super-Statutes</i>	1503
1. The NLRA	1505
2. The SSA	1507
3. The FLSA	1508
<i>C. Interpreting the Statutes</i>	1509
CONCLUSION	1513

INTRODUCTION

Across the legal landscape today, the federal laws that once protected workers' rights are unraveling in important ways. Workers face mounting hurdles to bargaining collectively, and unionization levels have dipped to an

all-time low,¹ with effects on income inequality and insecurity.² Workers have less job security, and increasingly their relationships with firms are being defined so as to unbundle the protections afforded by law.³ The future and strength of social security are in peril, and social security fails to offer the old-age and unemployment security it once delivered.⁴ The federal minimum wage has been stagnant for some time, and workers in the gig economy are increasingly categorized so as to fall outside of its protections.⁵ And courts are increasingly using the First Amendment to fashion “neo-Lochnerian” doctrines that further weaken worker protections in the name of corporate or individual opt-out rights.⁶ At the same time, new rights movements have formed to strengthen social insurance,⁷ raise the minimum wage,⁸ and to find novel ways to provide workers with representation and protection in the global economy.⁹

1. See, e.g., Rebecca E. Zietlow, *A Positive Right to Free Labor*, 39 SEATTLE U. L. REV. 859, 892–93 (2016) (“Union density in the United States has declined to an all-time low.”). See generally SOPHIA Z. LEE, *THE WORKPLACE CONSTITUTION FROM THE NEW DEAL TO THE NEW RIGHT* (2014).

2. See, e.g., Nicholas Kristof, *The Cost of a Decline in Unions*, N.Y. TIMES (Feb. 19, 2015), <https://www.nytimes.com/2015/02/19/opinion/nicholas-kristof-the-cost-of-a-decline-in-unions.html> [https://perma.cc/Q4Y5-BTEU].

3. See generally, e.g., KATHERINE V. W. STONE, *FROM WIDGETS TO DIGITS: EMPLOYMENT REGULATION FOR THE CHANGING WORKPLACE* (2004); DAVID WEIL, *THE FISSURED WORKPLACE: WHY WORK BECAME SO BAD FOR SO MANY AND WHAT CAN BE DONE TO IMPROVE IT* (2014).

4. See, e.g., ANNE L. ALSTOTT, *A NEW DEAL FOR OLD AGE: TOWARD A PROGRESSIVE RETIREMENT* (2016); Steve Benen, *Social Security Faces Threat from ‘Ideological War,’* MSNBC (Feb. 12, 2015, 12:36 PM), <http://www.msnbc.com/rachel-maddow-show/social-security-faces-threat-ideological-war> [https://perma.cc/35DH-SW2B].

5. See, e.g., Steven Greenhouse, *How the \$15 Minimum Wage Went from Laughable to Viable*, N.Y. TIMES (Apr. 1, 2016), <http://www.nytimes.com/2016/04/03/sunday-review/how-the-15-minimum-wage-went-from-laughable-to-viable.html> [http://perma.cc/H2YM-KHAL].

6. See, e.g., Samuel R. Bagenstos, *The Unrelenting Libertarian Challenge to Public Accommodation Law*, 66 STAN. L. REV. 1205, 1233 (2014); Jeremy K. Kessler, *The Early Years of First Amendment Lochnerism*, 116 COLUM. L. REV. 1915, 1917–18 (2016); Elizabeth Sepper, *Free Exercise Lochnerism*, 115 COLUM. L. REV. 1453, 1453 (2015); Tim Wu, *The Right to Evade Regulation*, NEW REPUBLIC (June 3, 2013), <https://newrepublic.com/article/113294/how-corporations-hijacked-first-amendment-evade-regulation> [https://perma.cc/3T35-4ULU]. For an account of the U.S. Supreme Court’s neoliberal approach, see David Singh Grewal, *The Laws of Capitalism*, 128 HARV. L. REV. 626 (2014), and see also David Singh Grewal & Jedidiah Purdy, *Introduction: Law and Neoliberalism*, 77 LAW & CONTEMP. PROBS. 1 (2014).

7. See, e.g., Mark Miller, *Calls for Social Security Expansion Grow Louder in Washington*, N.Y. TIMES (July 15, 2016), <https://www.nytimes.com/2016/07/16/your-money/calls-for-social-security-expansion-grow-louder-in-washington.html> [https://perma.cc/B2T5-42JT].

8. See, e.g., Lydia DePillis, *It’s Not Just Fast Food: The Fight for \$15 Is for Everyone Now*, WASH. POST (Dec. 4, 2014), <https://www.washingtonpost.com/news/storyline/wp/2014/12/04/its-not-just-fast-food-the-fight-for-15-is-for-everyone-now/> [https://perma.cc/79YK-T3ZD].

9. See, e.g., WILLIAM B. GOULD IV, *AGENDA FOR REFORM: THE FUTURE OF EMPLOYMENT RELATIONSHIPS AND THE LAW* 166 (1993). See generally Kate Andrias, *Building Labor’s Constitution*, 94 TEX. L. REV. 1591 (2016); Benjamin I. Sachs, *The Unbundled Union: Politics Without Collective Bargaining*, 123 YALE L.J. 148 (2013).

All of the challenged legal regimes described above—which provide workers with collective bargaining rights, unemployment insurance, and the minimum wage—were established during the New Deal. Indeed, New Deal worker legislation has an important constitutional lineage. The legislation was seen by many citizens and government officials as creating new rights and was won during a constitutional battle over Congress’s regulatory authority.¹⁰ Today, the unraveling of those commitments and the related arrival of what some call a “Second Gilded Age” of vast economic inequality and insecurity has drawn many scholars back toward thinking about the relationship between constitutional law and economic ordering—and, as a result, inevitably back toward the New Deal.¹¹

The New Deal is a foundational moment that established the architecture of federal economic regulation. In this Article, I argue that we should understand a core part of it differently. I recreate a significant part of the New Deal constitutional transformation from the bottom up, exploring how an interconnected set of movements engaged with political leaders in the process of enacting the National Labor Relations Act of 1935 (NLRA),¹² which provided workers with collective bargaining rights; the Social Security Act of 1935 (SSA),¹³ which provided workers with unemployment and old-age insurance; and the Fair Labor Standards Act of 1938 (FLSA),¹⁴ which established federal minimum wage and hour guarantees. I argue that the statutes were connected in their histories and in their conjoined effort to provide workers with economic security rights and have become part of the constitutive “web of practices, institutions, norms, and traditions that structure American society,”¹⁵ sometimes called “small c” constitutional commitments. While legal scholars have explored separately the histories of the NLRA and SSA, and have paid comparatively less attention to the FLSA, this Article both tells different stories of the statutes’ enactment¹⁶ and is the first to capture the fuller history of the three statutes’ connection and significance.¹⁷

While acknowledging the ossification and withering of these statutes today, most of the Article is dedicated to telling the histories of their

10. See *infra* Parts I.A, II–IV.

11. See *infra* notes 19, 440. This literature is sometimes called a “constitutional political economy” literature. See, e.g., Joseph Fishkin & William Forbath, *Reclaiming Constitutional Political Economy: An Introduction to the Symposium on the Constitution and Economic Inequality*, 94 TEX. L. REV. 1287, 1290 (2016) (“[A]rguments about constitutional political economy begin from the premises that economics and politics are inextricable and that our constitutional order rests on and presupposes a political-economic order.”).

12. Pub. L. No. 74-198, 49 Stat. 449 (codified as amended at 29 U.S.C. §§ 151–169 (2012)).

13. Pub. L. No. 74-271, 49 Stat. 620 (codified as amended in scattered sections of 42 U.S.C.).

14. Pub. L. No. 75-718, 52 Stat. 1060 (codified as amended at 29 U.S.C. §§ 201–219 (2012)).

15. Andrias, *supra* note 9, at 1596; see also Richard Primus, *Unbundling Constitutionality*, 80 U. CHI. L. REV. 1079, 1082 (2013); *infra* Part V.B.

16. See *infra* note 42 (NLRA); *infra* notes 162–64 (SSA); *infra* note 21 (FLSA).

17. See *infra* note 21.

enactment in order to breathe new life into how legal scholars understand their foundations and purpose. Along the way, I make several arguments. First, I argue that the statutes are historically connected in part by the overlapping social movements that were involved in their enactment. Drawing on social movement theory, I argue that the statutes were produced by a “wave of mobilization” characterized by overlapping and linked movements struggling for worker security. Second, I argue that the statutes are historically connected as responses to conditions of economic insecurity for wage earners that the forces behind their enactment believed were constitutionally impermissible. Third, I argue that the statutes are connected at the level of theory because each seeks to redefine economic freedom for workers around security and to tie security to citizenship. Fourth, I argue that each statute has settled into the constitutional fabric and has become a “small c” constitutional commitment.¹⁸ Finally, I argue that the statutes are best understood as a set of connected “small c” constitutional commitments: together, a “workers’ constitution.”

This Article proceeds in five Parts. In Part I, I lay the foundations for the history that follows, foregrounding the economic context from which the statutes arose and the wave of connected movements that pushed for their enactment. In Parts II, III, and IV, I explore the rise and constitutional status of, respectively, the NLRA, SSA, and FLSA. In Part V, I turn to considering some implications of this historical recasting. In the Conclusion, I briefly situate this Article in debates about today’s rising levels of economic inequality produced in part by the withering and ossification of the workers’ constitution.¹⁹

18. See WILLIAM N. ESKRIDGE, JR. & JOHN FERREJOHN, *A REPUBLIC OF STATUTES: THE NEW AMERICAN CONSTITUTION* 29–74, 171–208 (2010) (assessing how “super-statutes,” including the Social Security Act of 1935, have established “small-c” constitutional rights). Jack Balkin refers to statutes that fulfil constitutional purposes as “constitutional constructions.” See JACK M. BALKIN, *LIVING ORIGINALISM* 113–14, 300–10 (2011). Bruce Ackerman, in his account of “constitutional moments,” also references “landmark statutes.” See, e.g., Bruce Ackerman, *The Living Constitution*, 120 HARV. L. REV. 1737, 1742 (2007). I argue that the statutes are “super-statutes” in Part V.B below, but they would also qualify as constitutional constructions or landmark statutes.

19. See, e.g., GANESH SITARAMAN, *THE CRISIS OF THE MIDDLE-CLASS CONSTITUTION: WHY ECONOMIC INEQUALITY THREATENS OUR REPUBLIC* (2017); K. Sabeel Rahman, *Domination, Democracy, and Constitutional Political Economy in the New Gilded Age: Towards a Fourth Wave of Legal Realism?*, 94 TEX. L. REV. 1329 (2016); Ganesh Sitaraman, *The Puzzling Absence of Economic Power in Constitutional Theory*, 101 CORNELL L. REV. 1445 (2016); see also Fishkin & Forbath, *supra* note 11, at 1290.

I. NEW DEAL CONSTITUTIONALISM

Rather than taking on the incredibly generative New Deal writ large,²⁰ or analyzing its statutes one-by-one,²¹ in this Part I explore how a connected set of movements and legislators sought to win new rights of economic security

20. Among legal scholars, Bruce Ackerman perhaps best epitomizes this approach. Ackerman argues that through a multistep process—signaling, proposing, triggering, ratifying, and consolidating—FDR gained the authority to speak on behalf of “We, the People” in creating a federal government that would intervene in the economy. See 1 BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* ch. 5 (1991); 2 BRUCE ACKERMAN, *WE THE PEOPLE: TRANSFORMATIONS* pt. III (1998). He references the NLRA and SSA as signature achievements of the era, but he does not recount their histories. See 2 ACKERMAN, *supra*, at 391; Ackerman, *supra* note 18, at 1761. In some ways, this height becomes a disadvantage to a bird’s-eye level approach and limits from view the richer histories of the New Deal. Ackerman, for example, must explain policies as ranging as the Securities and Exchange Acts of 1933, the NLRA, the Public Utility Holdings Act, the repudiation of the gold standard, and so on. See, e.g., 2 ACKERMAN, *supra*, at 256–71.

21. Scholars have produced rich accounts of the history of the NLRA. See, e.g., Mark Barenberg, *Political Economy of the Wagner Act: Power, Symbol, and Workplace Cooperation*, 106 HARV. L. REV. 1379, 1392–1410 (1993); William E. Forbath, *The New Deal Constitution in Exile*, 51 DUKE L.J. 165, 175 (2001); James Gray Pope, *The Thirteenth Amendment Versus the Commerce Clause: Labor and the Shaping of American Constitutional Law, 1921–1959*, 102 COLUM. L. REV. 1, 59 (2002); see also WILLIAM E. FORBATH, *LAW AND THE SHAPING OF THE AMERICAN LABOR MOVEMENT* ch. 1 (1991) (providing an earlier history). They have also produced rich accounts of the history of the SSA. See, e.g., ESKRIDGE & FEREJOHN, *supra* note 18, at 171–208. There is comparatively less focus on the FLSA in legal scholarship. In a prominent recent exception, Kate Andrias explores the statute’s industry committees and approach to social democracy. Kate Andrias, *An American Approach to Social Democracy: The Forgotten Promise of the Fair Labor Standards Act*, 128 YALE L.J. 616 (2019). Other articles engaging with the statute include, for example, Samuel R. Bagenstos, *Employment Law and Social Equality*, 112 MICH. L. REV. 225, 263 (2013); Judith Resnik, *Vital State Interests: From Representative Actions for Fair Labor Standards to Pooled Trusts, Class Actions, and MDLs in the Federal Courts*, 165 U. PA. L. REV. 1765, 1780–87 (2017); and Benjamin I. Sachs, *Employment Law as Labor Law*, 29 CARDOZO L. REV. 2685, 2687–91 (2008); as well as Marc Linder, *Farm Workers and the Fair Labor Standards Act: Racial Discrimination in the New Deal*, 65 TEX. L. REV. 1335 (1987); and Deborah C. Malamud, *Engineering the Middle Classes: Class Line-Drawing in New Deal Hours Legislation*, 96 MICH. L. REV. 2212 (1998).

for workers. This Article's approach entails both a focus on the diverse actors behind the statutes²² and the interconnections among them.²³

A. *The Transformation of the Economy*

The forces behind the rise of the workers' constitution responded in large part to the transformation of the economy. The relatively agrarian economy of the American founding had become with the Industrial Revolution an economy where citizens were largely wage earners, often in large corporate enterprises. This transformation was thought by many social movements and political leaders to destabilize the constitutional system by creating vast economic insecurity that would bleed into the political system.

For the founding generation, structuring the economy around agrarian independence created the economic conditions for sustaining self-government.²⁴ Granting wide access to property was thought to create a system of citizen-entrepreneurs—then, white males—whose economic self-sufficiency would make them the kinds of independent persons that could govern themselves.²⁵ This notion was not only linked to property enabling citizens to become entrepreneurs or farmers from their own land, but also, and equally importantly, to combating the docility and domination in webs of landlord-tenant governance that would bleed into politics and make constitutional self-government impracticable.²⁶

But as the nation moved from an agrarian system to an industrial system based on wage-earning in enterprises, the Industrial Revolution created the very webs of dependence that property was meant to untangle. As the nation

22. In this way, it differs from approaches focusing largely on presidential leadership. See 1 ACKERMAN, *supra* note 20, ch. 5; 2 ACKERMAN, *supra* note 20, pt. III. See generally CASS R. SUNSTEIN, *THE SECOND BILL OF RIGHTS: FDR'S UNFINISHED REVOLUTION—AND WHY WE NEED IT MORE THAN EVER* (2006). Indeed, the focus on presidential leadership requires scholars like Ackerman to focus on presidential elections as evidence of “mandates” reflecting popular assent—a move that is criticized. See, e.g., BARRY CUSHMAN, *RETHINKING THE NEW DEAL COURT: THE STRUCTURE OF A CONSTITUTIONAL REVOLUTION* 27 (1998) (noting that “it is difficult to see how the Court could have construed the 1936 election as a constitutional referendum” in light of the fact that “Roosevelt assiduously avoided raising either the Constitution or the Court as an issue in his campaign”); Michael J. Klarman, *Constitutional Fact/Constitutional Fiction: A Critique of Bruce Ackerman's Theory of Constitutional Moments*, 44 STAN. L. REV. 759, 771 (1992) (book review) (“Ackerman asserts that the 1936 election represented a popular mandate against the Court's constriction of the New Deal. Perhaps the most problematic aspect of this thesis is that Roosevelt scarcely mentioned the Court during the 1936 campaign.”).

23. Scholars who focus singularly on the NLRA or SSA do not account for the ways in which certain New Deal achievements together responded to the problems industrialism posed for workers. Scholars pluck the statutes out of their historical context and proceed with a “view from nowhere” rather than a contextualized understanding of how statutes connect. Cf. THOMAS NAGEL, *THE VIEW FROM NOWHERE* (1986) (contrasting an objective perspective, detached from experience and reasoning about experiences from the outside—a “view from nowhere”—with a subjective perspective based on personal experience and feeling).

24. E.g., Joseph Fishkin & William E. Forbath, *The Anti-Oligarchy Constitution*, 94 B.U. L. REV. 669, 680 (2014).

25. ERIC FONER, *THE STORY OF AMERICAN FREEDOM* 9 (1999).

26. E.g., GORDON WOOD, *THE RADICALISM OF THE AMERICAN REVOLUTION* 106 (Vintage Books ed. 1993) (1991).

became a country of workers in often large enterprises, the notion of economic freedom being embodied by atomistic and self-sufficient citizen-entrepreneurs no longer fit economic conditions.²⁷ In the Progressive Era and through the Great Depression, economic life was coming to be seen by many workers, movements, and political leaders as a sphere of vast insecurity, where citizens were powerless in bargaining with employers over their wages, hours, and working conditions,²⁸ where child labor existed,²⁹ where job loss or old age meant material insecurity,³⁰ and where efforts of workers to associate to challenge these conditions were thwarted by employers and courts.³¹ Citizens needed to work to survive, and they had very little control over their work lives and working conditions.³²

For many citizens and political leaders, the consequences of this new form of economic ordering had constitutional implications. Economic insecurity, as movements and legislators argue again and again in the histories that unfold below, made people unfit for citizenship in our constitutional republic.³³ Thus, with the rise of the Industrial Revolution came a new wave

27. *See, e.g.*, CHRISTOPHER L. TOMLINS, *THE STATE AND THE UNIONS: LABOR RELATIONS, LAW, AND THE ORGANIZED LABOR MOVEMENT IN AMERICA, 1880–1960*, at 33–36, 59–95 (1985). As Robert Dahl put it, “The older vision of a citizen body of free farmers among whom an equality of resources seemed altogether possible, perhaps even inevitable, no longer fitted that reality of the new economic order in which economic enterprises automatically generated inequalities among citizens.” ROBERT A. DAHL, *A PREFACE TO ECONOMIC DEMOCRACY* 3 (1986).

28. *See, e.g.*, GEORGE E. PAULSEN, *A LIVING WAGE FOR THE FORGOTTEN MAN: THE QUEST FOR FAIR LABOR STANDARDS 1933–1941*, at 16–34 (1996) (exploring workers’ difficulties in controlling wages and hours and in receiving legislative aid in doing so); LANDON R. Y. STORRS, *CIVILIZING CAPITALISM: THE NATIONAL CONSUMERS’ LEAGUE, WOMEN’S ACTIVISM, AND LABOR STANDARDS IN THE NEW DEAL ERA* ch. 1 (2000) (exploring the fight for minimum wage and hour laws).

29. *See, e.g.*, FLORENCE KELLEY, *SOME ETHICAL GAINS THROUGH LEGISLATION* ch. 1 (1910) (exploring the phenomenon of child labor in the United States).

30. *See infra* notes 165–68 and accompanying text.

31. *See generally, e.g.*, FELIX FRANKFURTER & NATHAN GREENE, *THE LABOR INJUNCTION* (1930).

32. *See, e.g.*, IRVING BERNSTEIN, *THE LEAN YEARS: A HISTORY OF THE AMERICAN WORKER, 1920–1933* chs. 1–2 (1960) (surveying the conditions in mill villages where workers had very little power, were sometimes hired as families, worked incredibly long hours without adequate pay, and lived on company grounds and often company credit). As William Forbath explains, this situation had been produced by “increasing concentration of ownership of resources and capital” during a time that would push “millions of working-class women and children into the factories.” William E. Forbath, *Caste, Class, and Equal Citizenship*, 98 *MICH. L. REV.* 1, 28–29 (1999). The proprietors of these factories “demand[ed] longer and longer hours of ‘mindless toil,’ that deprived working[people] of the time to educate themselves and participate in public affairs.” *Id.* at 29. The system produced “more ‘dependence,’ more ‘ignorance,’ and more ‘grinding poverty.’” *Id.*

33. The constitutional political economy argument tied economic freedom to citizenship and therefore political freedom. *See generally* Fishkin & Forbath, *supra* note 11. Economic freedom in this understanding helps to create the conditions for political freedom—that is, for citizens to participate in self-government. *See* DAHL, *supra* note 27, at 1 (noting the American consensus “that a well-ordered society would require . . . political liberty . . . and economic liberty”); FONER, *supra* note 25, at 9 (noting that, since the American Revolution, it has been axiomatic in American constitutional thought that political freedom and a decent measure of economic freedom are both required).

of movements that sought to win workers guarantees of security and to redefine economic freedom for workers around security and tie economic security to citizenship.³⁴

B. *A Wave of Mobilization*

FDR's election would be a turning point for workers' movements. The fall of 1932 commenced what social movement theorists call a "wave of mobilization."³⁵ Waves occur when movements facing similar problems see political openings and rise up together to capture political opportunities by engaging with legislators and executive branch officials on multiple yet related lawmaking fronts.³⁶

In the fall of 1932, disparate movements connected and increased their ambitions for a national program of economic security legislation. The moment had the elements that social movement theorists associate with a wave. First, the movements were responding to the political opening of FDR's election with new ambitions, and second, they were crossing lines to come together to plan this ambitious agenda of connected worker-security measures; in the statutory histories below, indeed, they continue to intersect.³⁷

The movements that gathered that fall would become among the leading organizations behind the rise of the "workers' constitution" in the years to follow. In November of 1932, the American Federation of Labor (AFL) held a blockbuster convention bringing disparate movements together to call for

34. This is not to deny the earlier lineage of workers' movements. The labor movement, for example, has rich history in American life preceding the Industrial Revolution. *See generally, e.g.,* TOMLINS, *supra* note 27, ch. 2.

35. By focusing on social movement theory and how movements guide constitutional law, my approach is nested in "democratic constitutionalism" scholarship. *See, e.g.,* Reva Siegel & Robert Post, *Roe Rage: Democratic Constitutionalism and Backlash*, 42 HARV. C.R.-C.L.L. REV. 373, 374 (2007) (defining the term). Scholars of democratic constitutionalism focus on how social movements and citizens "make claims about the Constitution's meaning" and engage with political figures to guide constitutional change. *Id.* Drawing on social movement theory, democratic constitutionalists assess how movements frame constitutional struggles, mobilize resources, and succeed or fail in influencing courts and other constitutional interpreters based on structural political factors. *See, e.g.,* Douglas NeJaime, *Constitutional Change, Courts, and Social Movements*, 111 MICH. L. REV. 877, 877-79 (2013) (reviewing JACK M. BALKIN, *CONSTITUTIONAL REDEMPTION: POLITICAL FAITH IN AN UNJUST WORLD* (2011)).

36. *E.g.,* J. Craig Jenkins & Charles Perrow, *Farmworkers' Movements in Changing Political Contexts*, in THE SOCIAL MOVEMENTS READER: CASES AND CONCEPTS 287, 297 (Jeff Goodwin & James M. Jasper eds., 3d ed. 2015); J. Craig Jenkins & Charles Perrow, *Insurgency of the Powerless: Farm Worker Movements (1946-1972)*, 42 AM. SOC. REV. 249 (1977) [hereinafter Jenkins & Perrow, *Insurgency*]. The idea of waves of mobilization has Deweyan undertones: just as Dewey theorized that "publics" would form by bringing the problems of everyday life to the state for collective resolution, social movement scholars show how movements may overlap and converge in accessing the state. *See generally* JOHN DEWEY, *THE PUBLIC AND ITS PROBLEMS: AN ESSAY IN POLITICAL INQUIRY* (1927).

37. For useful explanations of how political opportunities and movement interconnections structure waves of mobilization, see generally Jeff Goodin & James M. Jasper, *Introduction to THE SOCIAL MOVEMENTS READER: CASES AND CONCEPTS*, *supra* note 36, at 3; and Jenkins & Perrow, *Insurgency*, *supra* note 36.

and draft sweeping federal labor legislation.³⁸ The stirrings at the conference would become the first sparks in the New Deal battle for the NLRA.

Similarly, that December, the American Association for Labor Legislation (AALL) met in Cincinnati, bringing together labor-movement leaders, leaders of several prominent worker movements, star lawyers like Felix Frankfurter, and reformers like Frances Perkins.³⁹ Fueled by “widespread interest in social justice legislation” and stirred by FDR’s call for a “new deal,” the AALL and the various movement representatives seized the moment to plan for a program of social insurance legislation—a plan that would lay the foundations for the SSA.⁴⁰

The National Consumers’ League (the “League”) held a similarly well-attended conference that December, bringing together various movements and intellectual leaders and calling for a dramatic federal program of workers’ legislation: wage and hour laws, which were the League’s bread and butter, but also unemployment and old-age insurance, collective bargaining rights, and child labor prohibitions.⁴¹

These movements had long histories and pedigrees—the AFL had been around since 1886, focusing on worker collective action; the AALL since 1905, fighting for social insurance programs of various kinds; and the League since 1891, leading the fight for wage and hour laws and child labor prohibitions. They had been working, both independently and together, toward achieving victories for workers for sustained periods, making piecemeal progress mostly at the state level, but this was a particularly energetic moment both in terms of the movements’ ambitions at the federal level and their interconnection.

In the following three Parts, I recreate the history of the New Deal wave of mobilization that helped to produce the economic security statutes. I focus in each Part on the development of a movement in response to the problems posed by industrialism, sketching its formation and view of legislative rights making, and then turn to the histories of the enactment of the statutes. Although the movements in each history interact and overlap, the history of the NLRA focuses principally on the AFL; the SSA, on the relationship between an elderly movement, the Townsendites, and a group of mostly Wisconsin-based academics, which I sometimes refer to as the “Wisconsinites,” although they were a subset—indeed, the most powerful part—of the AALL; and the FLSA, on the League and various parts of the labor movement.

38. See BERNSTEIN, *supra* note 32, at 476, 481–82.

39. John B. Andrews, *Annual Business Meeting*, 23 AM. LAB. LEGIS. REV. 60, 60–61 (1933).

40. John B. Andrews, *Social Justice*, 22 AM. LAB. LEGIS. REV. 115, 115 (1932).

41. LUCY RANDOLPH MASON, *TO WIN THESE RIGHTS: A PERSONAL STORY OF THE CIO IN THE SOUTH* 12 (1952); STORRS, *supra* note 28, at 94.

II. THE NATIONAL LABOR RELATIONS ACT OF 1935

The NLRA, which would protect the right of workers to bargain collectively, was born of a significant engagement between movements and congressional leaders. This Part first explores the labor movement's efforts to define economic freedom around worker association and collective security.⁴² It then explores how the AFL played a key role in teeing up collective bargaining guarantees by getting them into a corporatist bill that would be a precursor to the NLRA—the National Industrial Recovery Act (the “Recovery Act”). The Part then turns to the battle for the NLRA. While strands within the AFL remained unconvinced of or opposed to governmental intervention along the lines of the NLRA, much of the AFL had come to “firmly support[.]”⁴³ the bill by the time it was introduced. AFL leaders influenced core components of the final shape of the legislation, and labor-movement pressure helped pave the way for its enactment. Finally, this Part also explores how congressional leaders, along with the labor movement, came to define economic freedom around worker self-representation in unions.

A. Movement Development

This Part focuses in large part on the AFL, which began to rise to ascendance in the 1890s.⁴⁴ While the labor movement had previously made constitutional arguments against a system of “wage slavery” based on the Thirteenth Amendment and other constitutional provisions,⁴⁵ the AFL at the time began to narrow the labor movement's goals.⁴⁶ The movement's ascendancy “reflected a shift toward the judgment that workers must frankly accept their status as wage earners and seek higher wages and better working conditions” through collective bargaining.⁴⁷

As the AFL rose to prominence, concepts like “industrial freedom” and “industrial democracy” became central parts of both progressive and labor movement discourse.⁴⁸ Indeed, Samuel Gompers, the AFL's president from

42. The role of the labor movement in the lead-up to the enactment of the NLRA has been explored by James Gray Pope. See Pope, *supra* note 21, at 59. This Part builds on his account by exploring in detail labor's influence in producing the Act and in generally establishing collective bargaining as a federally protected norm as early as 1932. I diverge from Pope's account insofar as I do not think that Congress was as untrue to labor's constitutional vision as he does and agree with William Forbath's account in this regard. See Forbath, *supra* note 21, at 175. I also diverge from scholars who focus on Wagner and Congress and not as much on the labor movement in the NLRA's construction. See generally Barenberg, *supra* note 21.

43. IRVING BERNSTEIN, *THE NEW DEAL COLLECTIVE BARGAINING POLICY* 89 (1950).

44. See TOMLINS, *supra* note 27, ch. 2.

45. See Forbath, *supra* note 32, at 18–23, 34–43; see also FONER, *supra* note 25, at 60; WILLIAM E. FORBATH, *LAW AND THE SHAPING OF THE AMERICAN LABOR MOVEMENT* ch. 1 (1991).

46. See Forbath, *supra* note 32, at 59. The AFL's rise coincided with the decline of the Knights of Labor, which had organized workers across “skill, race, and ethnicity.” *Id.* at 58; see also *id.* at 58–59 (discussing the AFL's racial issues and shortcomings).

47. FONER, *supra* note 25, at 135.

48. *Id.* at 141.

its inception through 1924, said that industrial freedom was founded upon “a new concept of the rights of man”⁴⁹ and the “right . . . to have a voice in the industrial world.”⁵⁰

AFL leaders contrasted worker economic freedom through association with the ills of workplace domination and connected both to citizenship. As Gompers declared, it was “ridiculous to imagine that wage-workers can be slaves in employment yet achieve control at the polls.”⁵¹ AFL President William Green, who would lead the movement from 1924 to 1952, similarly argued that worker association contributed to self-independence and citizenship.⁵² Labor leaders thus argued that political freedom was “not sufficient unless the wage-earner possesses an industrial equality that places him on a par with his employer[; until then,] there can never exist that freedom and liberty of action which is necessary to the maintenance of a republican form of government.”⁵³ As future U.S. Supreme Court Justice Louis Brandeis summarized labor’s argument, citizens could not be “self-respecting members of a democracy” without “freedom in things industrial.”⁵⁴ The possibility of “political liberty” was undermined by “industrial slavery.”⁵⁵ As a member of the Brotherhood of Railway Clerks wrote in the AFL’s journal, “Mere political independence was a dead letter unless it was accompanied by industrial independence.”⁵⁶

Despite some promising advances in the Progressive Era—including the passage of the Clayton Act of 1914, which declared that the “labor of a human being is not a commodity,”⁵⁷ and spurts of organizing soon after, including the Era’s largest labor uprising in 1919–1920 with steel strikes

49. Samuel Gompers, President, AFL, Address to the AFL Convention at Horticulture Hall in Philadelphia, Pennsylvania (Nov. 9, 1914), in REPORT OF PROCEEDINGS OF THE THIRTY-FOURTH ANNUAL CONVENTION OF THE AMERICAN FEDERATION OF LABOR 3 (1914).

50. *See id.* Much of this would come through direct confrontation with the courts that were attempting to stand in the way of labor’s right to protest and strike. *See generally, e.g.,* FRANKFURTER & GREENE, *supra* note 31; TOMLINS, *supra* note 27, ch. 3; Forbath, *supra* note 32; Luke P. Norris, *Labor and the Origins of Civil Procedure*, 92 N.Y.U. L. REV. 462 (2017).

51. SAMUEL GOMPERS, LABOR AND THE COMMON WELFARE 125 (Arno Press, Inc. reprinted ed. 1969) (1919).

52. *Praise Carnegie at Founder’s Day Exercises*, PITTSBURGH GAZETTE TIMES, Apr. 30, 1926, at 1. Green also argued that labor association would help workers reduce their hours so that they could have the ability to participate in community activities. *Id.* A worker who has time away from work, he continued, “becomes a social factor and his interest in civic and political affairs is quickened and intensified.” *Id.* “He is a force in the community, a better citizen and a more efficient workman,” one who has the energy to participate in constitutional self-government. *Id.*

53. Editorial, 40 IRON MOLDERS’ J. 750, 750 (1904), *quoted in* Forbath, *supra* note 32, at 59.

54. FONER, *supra* note 25, at 142.

55. *Id.*

56. Henry F. Kirkham, *Union Achievements*, 38 AM. FEDERATIONIST 947, 948 (1931), *quoted in* Forbath, *supra* note 32, at 59.

57. Clayton Act of 1914, Pub. L. No. 63-212, § 6, 38 Stat. 730, 731 (codified at 15 U.S.C. § 17 (2012)).

which, at their height, included some 365,000 workers⁵⁸—the labor movement bled one million members during the 1920s and made few advances.⁵⁹ During that period, workers increasingly found their efforts to protest and strike rebuffed by federal judges issuing injunctions that often interpreted their activities as conspiratorial or violent.⁶⁰ The Norris-La Guardia Act of 1932, which cabined this judicial discretion and declared in name a right of workers to associate,⁶¹ was a signature achievement removing some impediments from the way of worker association. But the legislation was opposed by President Hoover, who ultimately signed it but sought to undermine it swiftly;⁶² a full collective bargaining right was not yet entrenched by the beginning of the New Deal.

B. *Passing the Statute*

FDR had campaigned on a promise of leadership on the economy. However, a national labor policy was not being developed by the incoming president or Congress. Instead, the labor movement had assumed leadership of the process. The AFL turned to Congress with a bill to limit the hours of workers in interstate commerce. The bill was not a collective bargaining bill, but the story of the deliberations around it and its ultimate failure are critical to understanding how the NLRA would come to be. The compromise around abandoning the bill would place a collective bargaining right at the center of the national legislative agenda.

1. The Black Bill

At its November 1932 convention in Cincinnati, the AFL decided that the Great Depression required a change in course from its position of opposing wage and hour laws out of fear that they would provide wage floors and ceilings. Its executive committee drafted a bill and convinced Senator Hugo Black to introduce it in late December.⁶³ The bill would limit hours and days for those whose work was involved in interstate commerce. The United Mine Workers (UMW) also proposed setting a minimum wage, although the wage provisions never made it into the draft.⁶⁴ During this period, the AFL and UMW consulted with and worked with Senator Black and other legislators.

58. See FONER, *supra* note 25, at 176. For an overview of strikes during those years, see also ARTHUR M. SCHLESINGER, JR., *THE AGE OF ROOSEVELT: THE CRISIS OF THE OLD ORDER, 1919–1933*, at 41 (1957).

59. See FONER, *supra* note 25, at 179.

60. See, e.g., BERNSTEIN, *supra* note 32, at 391–93; FRANKFURTER & GREENE, *supra* note 31; Norris, *supra* note 50.

61. Norris-La Guardia Act of 1932, Pub. L. No. 72-65, 47 Stat. 70 (codified at 29 U.S.C. §§ 101–115 (2012)).

62. See BERNSTEIN, *supra* note 32, at 414.

63. See IRVING BERNSTEIN, *THE TURBULENT YEARS: A HISTORY OF THE AMERICAN WORKER, 1933–1941*, at 24 (2010).

64. See *id.*; see also *Thirty-Hour Week Bill: Hearings Before the H. Comm. on Labor*, 73d Cong. 814 (1933).

The House and Senate held hearings, and the AFL was the major supporter of the bill, working behind the scenes to gain support from members of Congress.⁶⁵ The bill gained increasing popularity as it became clear that the AFL was going to be a leading force in developing a recovery program for workers. As one commentator wrote that February with regard to the labor movement, “Any politician can testify . . . that this is not an influence to be ignored safely.”⁶⁶ The Black bill was thus becoming “the trigger of the recovery program.”⁶⁷ Another commentator asserted that the bill and the activity surrounding it were a “revolution boiling up from the bottom.”⁶⁸

On March 30, it was clear that the bill would pass at least the Senate and potentially the House, although there were concerns among political leaders about its constitutionality in light of the fact that it included limitations on workers’ hours.⁶⁹ The issue for FDR was that his administration was about to “find itself with a recovery program without having taken a hand in its formulation.”⁷⁰ Indeed, it was a recovery program mostly created by the AFL in coordination with other parts of the labor movement and congressional leaders. FDR “had not yet seriously considered the problem and did not know how he wanted to proceed.”⁷¹ He was “stung to action” when the bill passed the Senate.⁷² FDR worried about a constitutional showdown.⁷³ And a showdown this would have been: the Black bill was a direct challenge to the Supreme Court’s rulings about the unconstitutionality of state wage and hour laws, and the Court had struck down many such regulations as interfering with the Fourteenth Amendment’s protection of liberty—here, the liberty of contract between employers and employees.⁷⁴ The federal law implicated not only substantive due process concerns but also the scope of Congress’s federal interstate Commerce Clause power.

Instead of creating fixed standards on wages and hours, the administration proposed an alternative route suggested by Secretary of Labor Frances Perkins: it sought to create a scale of wages and hours keyed to certain industries.⁷⁵ The AFL indicated that it would support the bill if the bill would also guarantee workers the right to bargain collectively.⁷⁶ Many industry leaders were deeply opposed to collective bargaining guarantees, but the

65. See BERNSTEIN, *supra* note 63, at 25–26.

66. *Id.* at 25 (quoting journalist Paul Anderson).

67. *Id.*

68. The commentator, Ernest K. Lindley, is quoted in ARTHUR M. SCHLESINGER, JR., *THE AGE OF ROOSEVELT: THE COMING OF THE NEW DEAL* 95 (1958).

69. See BERNSTEIN, *supra* note 63, at 25.

70. *Id.* Perkins recounts, “When I talked with the President in April 1933 about the Black bill, his mind was as innocent as a child’s of any such program as [the] NRA.” FRANCES PERKINS, *THE ROOSEVELT I KNEW* 189 (1946).

71. BERNSTEIN, *supra* note 63, at 25.

72. WILLIAM E. LEUCHTENBURG, *FRANKLIN D. ROOSEVELT AND THE NEW DEAL* 56 (1963).

73. See BERNSTEIN, *supra* note 63, at 25; SCHLESINGER, *supra* note 68, at 95.

74. See generally *Lochner v. New York*, 198 U.S. 45 (1905).

75. See BERNSTEIN, *supra* note 63, at 25–26. For a history of support of voluntary codes, see SCHLESINGER, *supra* note 68, at 87–91.

76. See BERNSTEIN, *supra* note 63, at 26.

AFL would not back down.⁷⁷ Despite industry's protest, the AFL was able to negotiate with government leaders, and the House Labor Committee came out in unanimous support of the bill, which included a collective bargaining guarantee, "bowing fully to organized labor with respect to collective bargaining."⁷⁸

Although the Black bill ultimately failed when the administration proposed the Recovery Act instead, seeking to commit industries to voluntary codes rather than national standards, the AFL had demonstrated its power and put a collective bargaining guarantee on the table. To ensure the passage of the Recovery Act in the Senate, FDR had asked Senator Robert Wagner to form a committee to work on proposals.⁷⁹ His committee and a drafting committee worked to produce a flexible bill that involved self-regulation of business under codes, which would be formed sector by sector and regulate workplace issues from hours to wages to child labor.⁸⁰ After Felix Frankfurter recommended it, the committees also drafted the collective bargaining guarantee that had been promised during the Black bill deliberations in light of the "political strength of the AFL, as demonstrated by the Black bill."⁸¹

In May 1933, FDR sent the Recovery Act to Congress.⁸² The debate in Congress was focused on the collective bargaining right in section 7(a). The AFL offered proposals to strengthen this provision by putting strong language in favor not only of protecting collective bargaining as a "right" but also of barring employer interference; the proposal was opposed by industry leaders.⁸³ Ultimately, the AFL prevailed: section 7(a) of the Act included a strong collective bargaining guarantee.⁸⁴ It gave workers "the right to organize and bargain collectively" and prohibited employer interference with that right.⁸⁵ As labor historian Irving Bernstein puts it, "The American Federation of Labor achieved in the Recovery Act, in one form or another, its leading legislative demands. In addition to [section] 7(a), it won the prospect of shorter hours through codes and collective bargaining, as well as a public works program."⁸⁶ The *New York Times* reported that organized labor "has suddenly jumped into . . . sudden power."⁸⁷ As Bernstein notes, AFL President Green heralded section 7(a) as a "Magna Charta" for labor, and John Lewis of the UMW "compared it with the Emancipation Proclamation."⁸⁸

77. *See id.* at 26–27.

78. *Id.* at 27.

79. *Id.* at 27–30; *see also* LEUCHTENBURG, *supra* note 72, at 56–57.

80. *See* BERNSTEIN, *supra* note 63, at 27–30. For an overview of the drafting process, *see* SCHLESINGER, *supra* note 68, at 96–98.

81. BERNSTEIN, *supra* note 63, at 28–29.

82. *See id.* at 30–31.

83. *See id.* at 31–34.

84. *See id.*

85. *Id.* at 34.

86. *Id.*

87. *Id.*

88. *Id.* (quoting William Green and John Lewis).

2. The Path to the NLRA

a. Trying the Path of Persuasion

The Recovery Act, and its assertion of workers' right to bargain collectively, created great energy among workers, who began joining unions and organizing for labor rights.⁸⁹ At the same time, the labor movement helped push to get industries under codes through the Blue Eagle Campaign. As historian Arthur M. Schlesinger, Jr., describes it, "Throughout the land merchants put the Blue Eagle in their windows and stamped it on their products" to show their support for the evolving labor regime and its sector-by-sector codes of conduct.⁹⁰ The public engagement surrounding the campaign was strong.⁹¹

Parades celebrated it. Speeches praised it. . . . Over two million employers signed up. Consumers signed a pledge of their own

The climax came with the Blue Eagle parade in New York City In the greatest march in the city's history, a quarter of a million men and women streamed down Fifth Avenue, while a million and a half more lined the streets, watching and cheering.⁹²

At the same time, the League—which had historically fought for wage and hour laws and is at the center of the FLSA story in Part IV—connected with the labor movement. League leaders were shocked by how little public participation Hugh Johnson, the NRA administrator, brought to bear on drafting codes. The League used public and intragovernmental channels to pressure him and industries and, in so doing, is credited with influencing the adoption of many labor codes.⁹³ The "national surge around the Blue Eagle" that the League and the labor movement had sparked "helped break the log jam in Washington," and "[d]raft codes began to pour in to NRA."⁹⁴

b. Strikes: Act I

There was a significant problem with the Recovery Act, however. The collective bargaining guarantee in section 7(a) was being ignored. The words of section 7(a) "expressed an intent," "[b]ut they did not precisely define a policy."⁹⁵ Put another way: "The meaning of 7a, in short, would be determined in large part not by the words of the [Recovery Act] but by the

89. *See id.* at 35–37; SCHLESINGER, *supra* note 68, at 139. Unions gained incredible spikes in membership, which contributed to the labor movement's common appeal. *See, e.g.*, LEUCHTENBURG, *supra* note 72, at 106–07.

90. SCHLESINGER, *supra* note 68, at 115.

91. *See id.*

92. *Id.*; *see id.* at 111–15; *see also* LEUCHTENBURG, *supra* note 72, at 66.

93. *See* SUSAN WARE, *BEYOND SUFFRAGE: WOMEN IN THE NEW DEAL* 91 (1981); *see also* STORRS, *supra* note 28, at 96, 110–12.

94. SCHLESINGER, *supra* note 68, at 116.

95. *Id.* at 137; *see also* IRVING BERNSTEIN, *THE NEW DEAL COLLECTIVE BARGAINING POLICY* 29–39 (1950).

pressures management and labor could bring to bear on the process of interpretation.”⁹⁶ And so, as Schlesinger puts it:

[E]mployers were losing no time in mounting a counteroffensive. If the Recovery Act promised workers the right to organize, the law still remained vague about the form organization should take. Many businessmen decided that the best way to meet the terms of the Act without unduly strengthening labor was to set up company unions.⁹⁷

Company unions were formed within a single plant or company.⁹⁸ Workers in them could not join with a broader independent union. And union leaders had the tricky position of working within the plant: “Men whose future was dependent on the employer across the table obviously could not put the labor case with the freedom of an outsider or with the technical skill of a professional.”⁹⁹ Because of this, the company union became “an ideal instrument for any who sought to fulfill the letter and frustrate the spirit of the Recovery Act.”¹⁰⁰ This was a disappointment for the labor movement.¹⁰¹

The response to the problem was remarkable. Workers from across the labor movement began to agitate and strike, and the “overriding issue in these disputes was the fundamental right to bargain collectively. Workers formed unions and demanded recognition.”¹⁰² From steelworkers to newspaper workers, these strikes made national headlines and put wind in the sails of the movement.¹⁰³ As Bernstein recounts it, “Man-days lost due to strikes, which had not exceeded 603,000 in any month in the first half of 1933, spurted to 1,375,000 in July and to 2,378,000 in August.”¹⁰⁴

The government, though, reacted with gradual measures, such as establishing the National Labor Board (NLB) to deal with these disputes, but it was then an ad hoc body without legal powers.¹⁰⁵ It employed a common-law approach to interpreting section 7(a), and its “authority and prestige were sapped in the latter part of 1933 by the fatal lack of a legal underpinning.”¹⁰⁶ Workers began refusing to appear before it, and similarly ad hoc revisions and changes were not sufficient.¹⁰⁷ Strikes, sit-ins, and divisions within the automotive industry across the country raised the stakes of the issue as workers pushed for stronger guarantees of what they now considered in great numbers to be a fundamental right.¹⁰⁸ A wave of protest was peaking.

96. SCHLESINGER, *supra* note 68, at 137.

97. *Id.* at 144.

98. *Id.* See generally 1 JAMES A. GROSS, THE MAKING OF THE NATIONAL LABOR RELATIONS BOARD: A STUDY IN ECONOMICS, POLITICS, AND THE LAW (1974).

99. SCHLESINGER, *supra* note 68, at 144.

100. *Id.* at 145; see also TOMLINS, *supra* note 27, at 108–09.

101. SCHLESINGER, *supra* note 68, at 145; see also TOMLINS, *supra* note 27, at 108–09.

102. BERNSTEIN, *supra* note 63, at 173; see also SCHLESINGER, *supra* note 68, at 144–45.

103. BERNSTEIN, *supra* note 63, at 173.

104. *Id.* at 172–73.

105. *Id.* at 173–77.

106. *Id.* at 177.

107. *Id.* at 177–216; see also SCHLESINGER, *supra* note 68, at 148–49.

108. BERNSTEIN, *supra* note 63, at 177–216; SCHLESINGER, *supra* note 68, at 385.

c. NLRA: Attempt I

With the labor movement's power at a seeming height, Senator Wagner, his advisors and team of lawyers, and various movements worked together to push for a stronger bill—one that would both guarantee workers the right to bargain collectively and better respond to and prevent employer interference.

As deliberations began, congressional leaders maintained that the NLRA would enact new legislative rights of freedom. When introducing the bill, Senator Wagner remarked, "Simple common sense tells us that a man does not possess this freedom when he bargains with those who control his source of livelihood."¹⁰⁹ He went on to argue that economic freedom could only be ensured through the security of collective bargaining.¹¹⁰ Worker self-government, the Senate report that came out of the committee hearings declared, simply attempted to be true to "rights that were inherent in citizenship," including the right "to be free to form or join organizations, to designate representatives, and to engage in concerted activities."¹¹¹

One marker of the power of the labor movement in the legislative deliberations during 1934 was the extent to which members of Congress recognized the pressure of the movement and felt compelled to respond. The preamble to the 1934 bill itself reflected this reality. In one part it declared, "Inadequate recognition of the right of employees to bargain collectively through representatives of their own choosing has been one of the causes of strikes, lockouts, and similar manifestations of economic strife."¹¹² In a speech by Wagner to promote the bill, he continued this theme by citing the 900,000 workers whose disputes came before the National Labor Board.¹¹³ An article by Senator Wagner printed in the *New York Times* in March 1934 and included in the Congressional Record continued this theme:

Men versed in the tenets of freedom become restive when not allowed to be free. The sharp outbreaks . . . in various parts of the country at the present time have been caused more by the failure of employers to observe the spirit of section 7(a) of the Recovery Act than by any other single factor.¹¹⁴

The AFL President, William Green, continued this siren call in his testimony, where he recounted the efforts that workers had made in good faith to organize, only to be thwarted by management.¹¹⁵ Just before the Senate Committee on Labor issued its report, an automotive strike involving 100,000 workers was averted, but the Committee did not forget: its report stated that during their deliberations, the strike had been narrowly averted

109. 78 CONG. REC. 4230 (1934) (statement of Sen. Wagner).

110. *Id.*

111. S. REP. NO. 73-1184, at 4 (1934).

112. S. 2926, 73d Cong. § 2 (1934).

113. 78 CONG. REC. 3678-79 (1934) (statement of Sen. Wagner).

114. 78 CONG. REC. 4230 (1934) (statement of Sen. Wagner).

115. S. REP. NO. 73-1184, at 69 (1934) (statement of William Green, President of the American Federation of Labor).

and that witnesses testified that “a majority” of the strikes were “caused by interference with the right of individuals to organize.”¹¹⁶

On June 3, 1934, the chairman of the Senate Committee on Labor echoed the power of the movement.¹¹⁷ But debate did not go on long in the Senate before FDR proposed a substitute measure to keep the Recovery Act alive by strengthening the NLB’s enforcement power through enabling it to hold union elections.¹¹⁸ When Wagner took the floor, he agreed to support the president’s measure, arguing that it “may be a good thing to allow these reforms to encounter an additional period of trial and error, so that the processes of education and understanding may catch up with the social program that has been inaugurated.”¹¹⁹ Senator La Follette took a stronger tone. He spoke of the “ominous signs of great unrest” in the country and reminded his fellow senators that strikes “are in progress in practically every section of the United States.”¹²⁰ He urged that the bill be passed and the president’s measure defeated. With these words in the air, the session closed and the president’s measure was passed.

d. Strikes: Act II

A flood of strikes proceeded—together they were “the great wave of strikes”¹²¹ of the “volcanic” summer of 1934.¹²² And the “right to organize was itself becoming the crucial issue” throughout these strikes.¹²³ As Bernstein says, “In 1934 labor erupted.”¹²⁴ “There were 1856 work stoppages involving 1,470,000 workers, by far the highest count in both categories in many years.”¹²⁵ They included the “auto parts workers at the Electric Auto-Lite Company in Toledo, . . . truck drivers in Minneapolis, . . . longshoremen and then virtually the whole labor movement on the shores of San Francisco Bay, and . . . cotton-textile workers in New England and the South.”¹²⁶ In order to push for the right of collective bargaining, there was the “growing conviction of many workers that they must now take matters into their own hands and demonstrate their collective power.”¹²⁷

The strikes have been credited with having impact. As James Gray Pope states, the “great strike wave of 1934 provided the impetus for the Wagner Act and stiffened the Democrats’ determination to regulate the national

116. *Id.* at 11.

117. 78 CONG. REC. 10,351–53 (1934) (statement of Sen. Walsh).

118. SCHLESINGER, *supra* note 68, at 150–51.

119. 78 CONG. REC. 12,018 (1934) (statement of Sen. Wagner); *see also id.* at 12,016–22, 12,024–34.

120. *Id.* at 12,027–28 (statement of Sen. La Follette).

121. BERNSTEIN, *supra* note 63, at 185.

122. *Id.* at 216.

123. SCHLESINGER, *supra* note 68, at 385.

124. BERNSTEIN, *supra* note 63, at 217.

125. *Id.*

126. *Id.*

127. *Id.* at 218.

economy.”¹²⁸ The strikes of the summer of 1934 died down by the time that the NLRA was going to be reconsidered in the spring of 1935, but the labor movement was sure to remind Congress and FDR of their nearness. Pope describes the scene in detail, from John Lewis of the UMW ordering a national strike of 400,000 coal miners on the night that the Recovery Act expired, to the Philadelphia delegations from 400 unions preparing for a wave of strikes to defend section 7(a), to even the New York Central Trades and Labor Council raising “the spectre of a nationwide general strike.”¹²⁹ The various parts of the movement, in short, were interconnected and mobilized.

3. Debate and Passage

As the Senate again considered the NLRA, the labor movement took center stage in legislative deliberations. As Bernstein explains:

[T]he bill was presented at the most favorable possible moment politically, for 1935 was the apogee of the New Deal as a domestic reform movement. The influence of labor was at its height and Senators who had little enthusiasm for [the Act] feared to face the AFL at the polls with a negative vote on their records.¹³⁰

It is worth noting the movement convergence during these hearings as well. Various parts of “the labor movement, industrial relations experts, [and] religious leaders” testified in support of the bill.¹³¹ The Wisconsinites and AALL—who are central to the social insurance battle discussed in Part III—also strongly backed the bill, and Senator Wagner brought in Edwin Witte and William Leiserson, two students of John Commons, a University of Wisconsin professor who cofounded the AALL and created the Wisconsin school approach to social insurance, to help his staff continue drafting the bill.¹³²

Labor’s argument about economic freedom was present in the hearings and debates as well. In committee hearings, where the “great debate over the Wagner Act took place,”¹³³ Wagner spoke of bestowing upon the worker “a new freedom to grapple with the great economic challenges of our times.”¹³⁴ He also spoke of collective bargaining rights providing “emancipation from economic slavery and of an opportunity to walk the streets free men in fact as well as in name.”¹³⁵ He continued this theme in his speech on the Senate floor, calling the NLRA “the next step in the logical unfolding of man’s eternal quest for freedom.”¹³⁶ Aligning the NLRA with the American

128. James Gray Pope, *Labor’s Constitution of Freedom*, 106 YALE L.J. 941, 942 (1997).

129. Pope, *supra* note 21, at 58.

130. BERNSTEIN, *supra* note 63, at 341.

131. *Id.* at 330.

132. See DELL P. CHAMPLIN & JANET T. KNOEDLER, *THE INSTITUTIONALIST TRADITION IN LABOR ECONOMICS* 56–57 (2004).

133. BERNSTEIN, *supra* note 63, at 330.

134. 79 CONG. REC. 2371 (1935) (statement of Sen. Wagner).

135. 79 CONG. REC. 6184 (1935) (statement of Sen. Wagner).

136. 79 CONG. REC. 7565 (1935) (statement of Sen. Wagner).

Revolution, where political “despotism” was “cast off,” Wagner continued that “today, with economic problems occupying the center of the stage, we strive to liberate the common man from destitution, from insecurity, and from human exploitation.”¹³⁷ The “isolated worker” was “[c]aught in the labyrinth of modern industrialism and dwarfed by the size of corporate enterprise,” and he could “attain freedom and dignity only by cooperation with others of his group.”¹³⁸ The logic of the NLRA, as Wagner would put it in another instance, was therefore not only to ensure worker economic freedom but to protect our system of “democratic self-government” itself, for in an industrial nation of workers, worker freedom of association made the “difference between despotism and democracy.”¹³⁹

Congressman Truax, a leader in the House, continued this theme and used political concepts to anchor economic freedom. He said, to wide applause, “Thomas Jefferson said: ‘If the Constitution is not right let us amend it.’ I say that again that day has arrived.”¹⁴⁰ He then called the NLRA a “new bill of rights, a new declaration of independence, if you please.”¹⁴¹ He continued, “[This] is an emancipation for American labor. As Lincoln freed the blacks in the South, so the Wagner-Connery bill frees the industrial slaves of this country from the further tyranny and oppression of their overlords of wealth.”¹⁴²

Senator Wagner also testified to the power of the labor movement. Wagner referred to the recent strikes, and he also outlined how nearly three-quarters of them were based on workers arguing in principle for the right to bargain collectively.¹⁴³ Wagner concluded that bolstering the right to bargain collectively needed to be Congress’s path.¹⁴⁴

The Senate Committee on Labor reported unanimously in the bill’s favor on May 2, 1935, with the Senate report noting the labor movement’s activism and power.¹⁴⁵ Indeed, a few days before, the AFL had put together a conference with over 400 representatives in attendance to support the bill, at which Senator David Walsh, chairman of the Senate Committee on Education and Labor, spoke.¹⁴⁶ At the same time, the AFL remained in contact with members of Congress and continued to negotiate on key items. AFL President William Green testified in favor of the enactment of the NLRA, and Wagner’s team of lawyers “constantly consulted [the AFL] and

137. *Id.*

138. *Id.*

139. Senator Robert F. Wagner, Address Before the National Democratic Club Forum (May 8, 1937), *quoted in* Leon H. Keyserling, *Why the Wagner Act?*, in *THE WAGNER ACT: AFTER TEN YEARS* 5, 13 (Louis G. Silverberg ed. 1945); *see also* Forbath, *supra* note 32, at 60–61.

140. 79 CONG. REC. 9714 (1935) (statement of Sen. Truax).

141. *Id.*

142. *Id.*

143. S. REP. NO. 73-2926, at 8 (1934).

144. *Id.*

145. S. REP. NO. 74-573, at 2 (1935).

146. BERNSTEIN, *supra* note 63, at 339.

received many suggestions through its counsel, Charlton Ogburn.”¹⁴⁷ The AFL also pushed Frances Biddle, the chairman of the NLRB, to include a provision in the bill stating employers’ duty to bargain “explicitly in view of the pressing problem of union recognition under 7(a).”¹⁴⁸

On May 15, 1935, Wagner took the bill to the floor. After short debate, the bill passed the Senate the next day by a vote of 63-12. Only four Democrats and eight Republicans voted against it. At the same time, FDR consulted with labor leaders, including Green from the AFL, Hillman from the Amalgamated Clothing Workers of America (ACWA), Lewis from the UMW, as well as Secretary of Labor Frances Perkins, and decided to support the bill.¹⁴⁹

Momentum was building for the passage of the bill when, on May 27, the Supreme Court decided *A.L.A. Schechter Poultry Corp. v. United States*,¹⁵⁰ which struck down title I of the Recovery Act.¹⁵¹ Wagner and his colleagues were planning to replace the Recovery Act with the NLRA, but the ruling increased doubts about the NLRA’s constitutionality. The Court found that the portion of the Recovery Act at issue was unconstitutional because the business activity in question only had an “indirect effect” on interstate commerce.¹⁵² In moving forward, Wagner would distinguish the NLRA from the Recovery Act. Wagner argued that the NLRA related to “employment conditions related to goods that are intended for subsequent interstate shipment or that are in the flow of commerce” and thus directly affected interstate commerce.¹⁵³ FDR threw his support more wholeheartedly behind the measure, calling the Court’s decision a “horse and buggy” view of interstate commerce and comparing the decision to *Dred Scott*.¹⁵⁴

The House proceeded with its deliberations, and the House report reiterated the strength of the labor movement.¹⁵⁵ Deliberation, too, continued with unions. Senator Wagner addressed the Executive Council of the Teamsters and assured them that the bill would not harm craft unions.¹⁵⁶ Unresolved issues remained, and they demonstrate the movement interlinkage and the movement interlinkage and conflict that can sometimes occur. The AFL sided with Secretary Frances Perkins on housing the new National Labor Relations Board (NLRB) within the Department of Labor.¹⁵⁷ The League worked strenuously to get the Act passed, but it thought that the NLRB should be an independent agency and engaged in deliberations with

147. *Id.* at 323; *see also* Pope, *supra* note 21, at 51–53.

148. BERNSTEIN, *supra* note 63, at 336.

149. *Id.* at 342–43.

150. 295 U.S. 495 (1935).

151. *See generally id.*

152. *Id.* at 548–49.

153. BERNSTEIN, *supra* note 63, at 344.

154. *See* 4 THE PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT 221 (1938).

155. 79 CONG. REC. 7518 (1935) (statement of Rep. Connery).

156. BERNSTEIN, *supra* note 63, at 346.

157. *Id.* at 335.

House leaders on this issue.¹⁵⁸ The House ultimately adopted the League's position, and the Senate agreed.¹⁵⁹ The Act passed the Senate easily on June 19, 1935, without a roll call, and passed the House on June 27 also without a roll call.

The NLRA, among other things, provided workers the right to bargain collectively and to engage in collective action for mutual aid and protection, and indeed encouraged these features. It also set in place an administrative structure—the NLRB—to enforce that right. Even those representatives who worried about the constitutionality of the bill preferred to “gain labor’s political support” and leave the outcome in the hands of the Supreme Court—a fact that testifies to the power of the movement.¹⁶⁰ FDR signed the Act into law on July 5, 1935, giving pens to Senator Wagner and AFL President Green.¹⁶¹

III. THE SOCIAL SECURITY ACT OF 1935

This Part focuses on the role of a movement of mostly elderly citizens, the Townsendites, and a group of academics, the Wisconsinites, who formed a core part of the AALL,¹⁶² in pressuring for and drafting the Social Security Act of 1935, which provided for federal unemployment insurance, old-age insurance, and benefits for the blind, disabled, and dependent children. This Part explores how they tied economic freedom to collective security through social insurance, and then looks at their role in passing the legislation.

A caveat: Many groups were behind the push for social security during the wave of mobilization, and many of them were integral to producing the Social Security Act of 1935.¹⁶³ Some accounts focus mostly on other groups, and I reference them here.¹⁶⁴ The Townsendites and the Wisconsinites, however, had direct and cognizable roles in shaping the law that was produced. The Townsend movement, although it favored old-age pensions rather than social security, exerted enough external pressure to get old-age guarantees onto the agenda and into a proposed congressional bill. At the same time, because the administration and Congress were unsure of the final form of a social security bill, they integrated members of the AALL, with the Wisconsinites leading it, into an ad hoc committee that would propose

158. See STORRS, *supra* note 28, at 312 n.99.

159. BERNSTEIN, *supra* note 63, at 348.

160. *Id.* at 341.

161. *See id.*

162. I focus on the Wisconsin members because of their outsize influence in forming the AALL and pushing for social insurance as core members of the president's Committee on Economic Security. *See infra* Parts III.A.1, III.B.2, III.B.4; *see also* THEDA SKOCPOL, SOCIAL POLICY IN THE UNITED STATES: SOCIAL POSSIBILITIES IN HISTORICAL PERSPECTIVE 153 (1995) (“The Social Security Act was basically a substantive and organizational victory for the Wisconsin reformers . . .”).

163. These include Abraham Epstein's movement, John Andrews and his activism, the work of the American Association for Old Age Security, and the Fraternal Order of the Eagles. *See, e.g.*, SKOCPOL, *supra* note 162, at 153. These movements were also critical of the initial Act, as much as they propelled the energy for it. *Id.* at 174–77.

164. ESKRIDGE & FEREJOHN, *supra* note 18, at 171–208 (focusing in large part on Epstein).

architecture for the bill and draft major portions of it. The combination of Townsendite pressure and Wisconsinite expertise would be key ingredients in the making of the Social Security Act of 1935.

A. Movement Development

At the level of policy, the Townsendites and Wisconsinites would differ. But each movement considered it to be a right for older Americans to have security in their old age. This point became especially salient after the Great Depression. The notion of an agricultural life, surrounded by family to take care of one upon retirement, was fading.¹⁶⁵ Just before the Great Depression, Dr. Abraham Epstein estimated in 1928 that “30 per cent of the aged sixty-five years and over were dependent on others for support.”¹⁶⁶ With the Great Depression, things worsened.¹⁶⁷ In 1930, the dependent old-aged rose to 40 percent of those sixty-five and older and, by 1935, to 50 percent.¹⁶⁸

1. The Wisconsinites and the AALL

John R. Commons, a founder of the AALL and the leader of its Wisconsin school, was a student of Richard T. Ely at Johns Hopkins University and had been influenced by him to study social insurance programs that would protect injured and disabled workers, the unemployed, and the aged who could no longer work.¹⁶⁹ Commons began to advocate for these programs. He worked with veterans, attempting to procure them pensions, and began to discuss the need for pensions and other forms of social insurance with scholars and workers’ movements.¹⁷⁰

At Wisconsin, Commons began regular Friday evening conversations—affectionately called “Friday Niters”—where he, students, and other professors would discuss issues surrounding social security.¹⁷¹ Commons, with his peers, turned to fighting in Wisconsin for compensation for workplace injuries and deaths.¹⁷² He struck up a friendship with the more conservative Yale professor Henry W. Farnam, and they united on issues surrounding worker security.¹⁷³ Commons, along with Farnam and Ely, started the AALL—focusing on the right to unionize, on minimum wages, and on worker security and insurance—with only twenty-three members,

165. See ABRAHAM HOLTZMAN, *THE TOWNSEND MOVEMENT* 20 (1963).

166. See *id.* at 22.

167. See *id.*

168. See *id.*; see also ROY LUBOVE, *THE STRUGGLE FOR SOCIAL SECURITY, 1900–1935*, at 115–19 (1986).

169. See LUBOVE, *supra* note 168, at 115–19. See generally JOHN R. COMMONS, *MYSELF* (1934).

170. See NANCY J. ALTMAN, *THE BATTLE FOR SOCIAL SECURITY: FROM FDR’S VISION TO BUSH’S GAMBLE* 12 (2005).

171. See *id.* at 13.

172. See *id.* at 14.

173. See *id.* at 15; COMMONS, *supra* note 169, at 139.

most of whom were friends of Commons.¹⁷⁴ In a few years, it grew to over 3000 members, with leading lights such as Louis Brandeis and Jane Addams on its roster.¹⁷⁵

The Wisconsinites, through the AALL, campaigned for state legislation for workers. It was auspicious that Commons would come to the University of Wisconsin when progressive Robert La Follette became governor and controlled both houses of the legislature.¹⁷⁶ Commons and his colleagues drafted and worked with legislators to put into law the nation's first workers' compensation law in 1911 in Wisconsin.¹⁷⁷ It was upheld in the courts and drew the attention of a young man, Arthur Altmeyer, then working in a small law firm.¹⁷⁸ Altmeyer enrolled in the University of Wisconsin and within little time was integrated into the Friday Nites.¹⁷⁹ He was joined by a young Edwin Witte.¹⁸⁰ Together with Commons and Farnam, they helped craft and pass workers' compensation statutes in thirty states by 1915.¹⁸¹ For years after, they focused on state-provided health insurance, but to no avail.¹⁸² By 1920, Witte and Altmeyer were in Wisconsin state government, and the AALL refocused its attention on unemployment and old-age security, with little success.¹⁸³

Together, in living rooms and in conferences, the Wisconsinites and the AALL formed a vision of freedom based on collective security. As early as 1909, the proceedings of the AALL's annual meeting show a merging of its proposed legislation with fundamental constitutional commitments. A transcription in the publication of its 1908 proceedings speaks of the insecurity born of the losses incurred by both the workers—who lose their lives or ability to work—and their families, who suffer as well.¹⁸⁴ The publication tied social insurance to liberty, saying that social insurance and workers' legislation would be in keeping with the “view of the founders of the Republic,” who designed the Constitution to “secure the blessings of liberty.”¹⁸⁵

By the next year, the AALL's journal spoke of the legislature as being “bound to the observance of certain fundamental principles of individual

174. Its first formal gathering is summarized in the *Proceedings of the First Annual Meeting of the American Association for Labor Legislation, Madison, Wis., Dec. 30–31, 1907*, 1 AM. ASS'N FOR LAB. LEGIS. (1908).

175. ALTMAN, *supra* note 170, at 15.

176. Richard T. Ely, *Economy Theory and Labor Legislation*, 1 AM. ASS'N FOR LAB. LEGIS. 10, 13 (1908).

177. See ALTMAN, *supra* note 170, at 15–16.

178. See Larry DeWitt, *Never a Finished Thing: A Brief Biography of Arthur Joseph Altmeyer—the Man FDR Called “Mr. Social Security,”* SOC. SECURITY ADMIN. (1997), <https://www.ssa.gov/history/bioaja.html> [<https://perma.cc/HQ4T-N7T4>].

179. See ALTMAN, *supra* note 170, at 16.

180. See *id.*

181. See *id.* at 17.

182. See *id.* at 17–18.

183. See *id.* at 19.

184. H. W. Farnam, *Some Fundamental Distinctions in Labor Legislation*, 2 AM. ASS'N FOR LAB. LEGIS. 29, 42 (1908).

185. *Id.*

right” to critique those courts which stand in the way of workers’ legislation.¹⁸⁶ Later in the same volume, social legislation—including collective bargaining guarantees, old-age insurance, workers’ compensation insurance, and onward—was situated in its constitutional context: “Social legislation” laid down a “new rule [that] must become a part of our constitution.”¹⁸⁷ The essay continued that the forms of social insurance and protection sought were not only constitutional, but a “constitutional necessity” to secure the purposes of the Constitution and make self-government function.¹⁸⁸ These forms were “positively constitutional,” which means that “[t]hey both modernize and vitalize these honored phrases and the constitution is given a new and larger life.”¹⁸⁹ The essay concluded by bringing the Wisconsinite vision full circle: “So a new meaning is given to the constitution. The way is open for it to do for twentieth century civilization what it has done for nineteenth century civilization.”¹⁹⁰

2. The Townsendites

Years later, after the advent of the Great Depression, Dr. Frances E. Townsend of Long Beach, California, was sixty-six years old when he was forced into retirement without savings.¹⁹¹ He began to formulate an idea, which appeared in its first form in the *Long Beach Press-Telegram* on September 30, 1933, for the federal government to offer every person age sixty or older a pension of \$200 per month.¹⁹² This was a “princely sum in the 1930’s.”¹⁹³ Ever creative, Townsend also required that each recipient spend the entire amount within thirty days.¹⁹⁴

Within a few weeks of Townsend writing the letter, a full page of the *Telegram* was dedicated to debate over the plan, and Townsend’s personal residence was being stormed by neighbors wanting to discuss it.¹⁹⁵ They formed clubs in Long Beach and soon across the nation.¹⁹⁶ The clubs had regional and national conventions, which were a mixture of deliberation and mass protest.¹⁹⁷

From the beginning, the Townsend movement stressed the need for a national system of old-age policy.¹⁹⁸ The initial local petitions in California called upon Congress to act, and the petitions thereafter frequently had their

186. See Ernst Freund, *Constitutional Limitations and Labor Legislation*, 3 AM. ASS’N FOR LAB. LEGIS. 51, 58 (1909).

187. George G. Groat, *Precedent Versus Conditions in Court Interpretation of Labor Legislation*, 3 AM. ASS’N FOR LAB. LEGIS. 88, 104–05 (1909).

188. *Id.* at 107.

189. *Id.*

190. *Id.*

191. ALTMAN, *supra* note 170, at 27.

192. *Id.* at 27–28.

193. *Id.* at 28.

194. *Id.*

195. See HOLTZMAN, *supra* note 165, at 36.

196. *Id.* at 50.

197. *Id.* at 70.

198. See *id.* at 86–87.

eyes set on the national stage.¹⁹⁹ Equally important, the club's membership was largely composed of persons who had worked all of their lives and viewed their right to a pension as emanating from that fact. These were workers who could no longer work and who felt that their years of toil entitled them to basic security.²⁰⁰

Within two years after the initial Townsend Club was chartered, there were 7000 clubs with approximately one and a half million participants.²⁰¹ Already, in some congressional districts, not supporting the Townsend plan meant defeat.²⁰² When a Townsend bill was introduced in the House in 1934, nearly two hundred congressmen absented from the vote.²⁰³

The right to old-age security was for Townsendites something fundamental, something any "aging citizen should be entitled to."²⁰⁴ And this is why they brought their message about old-age security as a "right."²⁰⁵ The Townsendites felt that the stakes could not be higher. Indeed, the movement believed that the persistence of democratic government itself was at stake: "We truly believe that if such a vigorous fight is not prosecuted with all seriousness and resistance, we may expect to see our democratic form of government pass; not only from this country but from the face of the earth during this generation."²⁰⁶ Economic security was, for them, imperative for a thriving democracy.

B. *Passing the Statute*

During the New Deal, both movements knew that influence would have to run through the national lawmaking process, and the lawmaking process was not exactly trending in either movement's direction as much as they had hoped with FDR's election. FDR supported old-age insurance and had agreed before his inauguration to explore methods for establishing it, often gesturing toward state or federal-state programs.²⁰⁷ And he had intended to support such programs even earlier.²⁰⁸ But little was forthcoming. The Wagner-Lewis bill of 1934, which FDR encouraged, dealt only with

199. *See id.*

200. *See* FRANCES FOX PIVEN & RICHARD CLOWARD, *REGULATING THE POOR: THE FUNCTIONS OF PUBLIC WELFARE* 101 (1971).

201. *See* HOLTZMAN, *supra* note 165, at 47.

202. *See* ALTMAN, *supra* note 170, at 28.

203. *See* PIVEN & CLOWARD, *supra* note 200, at 101.

204. *Id.* at 148–54.

205. EDWIN AMENTA, *WHEN MOVEMENTS MATTER: THE TOWNSEND PLAN AND THE RISE OF SOCIAL SECURITY* 11 (2006).

206. *Id.* at 166–77.

207. *See, e.g.,* Anna Shola Orloff, *The Political Origins of America's Belated Welfare State*, in *THE POLITICS OF SOCIAL POLICY IN THE UNITED STATES* 37, 65–66 (Margaret Weir, Anna Shola Orloff & Theda Skocpol eds., 1988); *see also* ARTHUR J. ALTMAYER, *THE FORMATIVE YEARS OF SOCIAL SECURITY* 4–5 (1966) (providing an overview of FDR's evolution on social insurance programs).

208. *See* Orloff, *supra* note 207, at 65.

unemployment insurance. As one historian puts it, “Apparently the President had not contemplated asking for old-age insurance at that time.”²⁰⁹

1. The Push for Old-Age Security

But 1934 was an election year for Congress, and the Townsend movement was employing pressure.²¹⁰ Signatures on petitions for old-age security “mounted by the hundreds of thousands.”²¹¹ The press reported the movement’s membership to be as few as 300,000 people and as many as 4,000,000.²¹² The Townsend clubs bombarded newspapers, senators, and the White House with “carloads of letters.”²¹³

As a result, Frances Perkins remarked that adding old-age insurance to the Wagner-Lewis bill became “politically almost essential.”²¹⁴ Perkins continued, years later in her memoir, “One hardly realizes nowadays how strong was the sentiment in favor of the Townsend Plan The pressure from its advocates was intense.”²¹⁵ She added that, as a result, FDR “began telling people he was in favor of adding old-age insurance clauses to the bill and putting it through as one program.”²¹⁶

2. The Wisconsinites in Government

FDR composed the Committee on Economic Security (CES) in 1934 to look into drafting a better bill in large part to respond to the Townsend movement’s pressure.²¹⁷ FDR also did so to be responsive to the wave of mobilization around the issue of social insurance more generally, including Senator Huey Long’s “share the wealth” movement and other social insurance organizations such as the American Association for Social Security.²¹⁸ FDR wanted a proposal for a bill from the CES by January, five months after he signed the executive order creating it, and a draft plan for it by December 1. And here is where the story of the two movements converges: the Townsendites levied the pressure that helped to create the CES, and the Wisconsinites were integrated into the CES as a result of their expertise and in the CES would play a leading role in the deliberations to devise the architecture of social security. In this way, the Townsendites received formal recognition as voices for the old-aged, while the AALL and Wisconsinites were recognized for their expertise in designing social insurance systems.

209. HOLTZMAN, *supra* note 165, at 87.

210. *See id.*

211. *See id.* at 88.

212. *See id.*

213. *Id.* at 91.

214. PERKINS, *supra* note 70, at 278–79.

215. *Id.* at 278.

216. *Id.* at 279.

217. *See* JILL QUADAGNO, THE TRANSFORMATION OF OLD AGE SECURITY 108 (1988); *see also* ALTMAN, *supra* note 170, at 28–29; HOLTZMAN, *supra* note 165, at 87.

218. *See* ALTMAYER, *supra* note 207, at 10, 41–44 (Long movement); LUBOVE, *supra* note 168, at 139 (American Association for Social Security).

Labor Secretary Perkins brought in members of the AALL, and the Wisconsinites took center stage. First, she brought in Altmeyer to implement the executive order, and Altmeyer brought in Witte to serve as executive director.²¹⁹ As a research assistant, Witte brought in Wilbur Cohen, a student of Witte's and another regular Friday Niter.²²⁰ They also brought in Barbara Armstrong, the first female law professor in the United States, who had written a comparative global treatise on social security and insurance programs.²²¹ She had also been involved with various social security movements and had developed social insurance policies in California and other areas of the United States.²²² The advisory council, apart from the staff members, included members of the labor movement, various worker security movements, as well as participants from industry.²²³

3. Townsendite Pressure

The wave of connected movements knocking at the door of the CES continued to swell. The president had provided for an additional advisory council of five, but there were over 150 experts that the White House thought ought to be included in deliberations.²²⁴ As a result, they convened a national conference and invited well over a hundred of these experts and activists. The keynote speakers were an antipoverty activist doctor, Isaac Rubinow, and Abraham Epstein, who led the American Association for Social Security.²²⁵ Witte and Armstrong were asked by Perkins to write an initial report outlining "the problem" for the CES in advance of the conference.²²⁶ Witte was sensitive to FDR's hesitancy about old-age insurance and thus focused more on unemployment insurance.²²⁷ To test the waters at the conference, and in response to concerns over the constitutionality of old-age insurance, FDR decided not to make it a centerpiece of the conference.²²⁸

Next, the Townsend movement came back into play in an important way. As the conference was starting at the Mayflower Hotel in Washington, D.C., FDR retreated on old-age insurance. Mentions of it were gone in the list of discussion topics in the program and an address from FDR at the White House that day yielded this message: "On some points it is possible to be definite. Unemployment insurance will be in the program . . . I do not know whether this is the time for any Federal legislation on old-age security."²²⁹

219. See ALTMAN, *supra* note 170, at 35.

220. See *id.* at 38–39.

221. See *id.* at 41–42.

222. See *id.*; see also PERKINS, *supra* note 70, at 285.

223. ALTMAYER, *supra* note 207, at 8 (noting that it "consisted of 23 persons, five of whom were labor leaders, five employers, and the rest persons interested in social welfare").

224. See ALTMAN, *supra* note 170, at 52–53.

225. See *supra* note 162 and accompanying text.

226. ALTMAN, *supra* note 170, at 43.

227. *Id.* at 44.

228. See *id.*

229. Franklin D. Roosevelt, President of the United States, Address to the Advisory Council of the Committee on Economic Security on the Problems of Economic and Social

Once again, the Townsend movement rose to action. “[They] reacted immediately and vociferously. Letters, phone calls, and telegrams poured into the White House.”²³⁰ Before long Perkins was on the phone with FDR, who had left to vacation in Warm Springs, to explain the pressure being levied by the Townsendites. FDR bent and asked Perkins to issue a press release affirming the president’s strong support for old-age insurance.²³¹

To further assuage the Townsendites, FDR gave a written address days later to the National Conference of Mayors in which he strongly asserted that old-age insurance would be included in his recommendations to Congress.²³² Thus, as FDR moved back, the Townsend movement pushed him, and ultimately old-age insurance, forward. The “urgency of the issue, reflected in the election of Townsend congressmen and the mounting public demand which the Townsend Plan spearheaded, could not be ignored.”²³³ In addressing the CES after the conference, FDR thus said this of old-age insurance:

We have to have it The Congress can’t stand the pressure of the Townsend Plan unless we have a real old-age insurance system, nor can I face the country without having devised at this time . . . a solid plan which will give some assurance to old people of systematic assistance upon retirement.²³⁴

4. Debate and Passage

The ball was back in the CES’s court. With a clear consensus around making old-age and unemployment insurance part of the bill, it was a question of how to do it and how to pass it.²³⁵ This was what the Wisconsinites in the CES toiled over. Numerous proposals were floated for programs, and numerous interpretations about the costs and benefits were swirling around.²³⁶ Information overload set in and it was not long before the president’s December 1 deadline passed and the CES had not come to make its recommendation.²³⁷ Perkins ordered the CES to stay over Christmas week to hammer out a proposal.²³⁸

A federal plan to provide a tax-offset scheme to states for unemployment was led by Witte, with support from Perkins and Roosevelt.²³⁹ Witte also pushed for a contributory plan for old-age insurance, a more federally led

Security (Nov. 14, 1934), <http://www.ssa.gov/history/fdrstmts.html#advise> [<http://perma.cc/QZ3K-EE8F>].

230. ALTMAN, *supra* note 170, at 54.

231. *See id.*; EDWIN E. WITTE, THE DEVELOPMENT OF THE SOCIAL SECURITY ACT 46–47 (1962).

232. *See* WITTE, *supra* note 231, at 47.

233. HOLTZMAN, *supra* note 165, at 88.

234. PERKINS, *supra* note 70, at 294.

235. *See* ALTMAN, *supra* note 170, at 56.

236. *See* ALTMAYER, *supra* note 207, ch. 1.

237. *See* ALTMAN, *supra* note 170, at 57.

238. *See id.*

239. *See* Orloff, *supra* note 207, at 71–76; *see also* ALTMAYER, *supra* note 207, ch. 1.

program than unemployment insurance.²⁴⁰ The Wisconsinites also supported programs for the elderly in need, dependent children, and the blind.²⁴¹ And Grace Abbott, a former League and AALL member who now ran the Children's Bureau, had an outsize role in designing programs for dependent children, and according to Witte, later played a critical role in convincing the Ways and Means Committee to push forward with the bill when its members were wavering.²⁴² In these ways, the League and AALL were in constant negotiation with lawmakers. Even the AFL "did everything it could" to help pass the SSA.²⁴³

The CES turned these recommendations over to Congress, with no knowledge of their fate. Concessions were made, including the removal of agricultural and domestic workers from old-age and unemployment insurance systems, a compromise made for senators from the South and to the detriment of many working blacks and women.²⁴⁴ This would be a limitation of the bill for some time.²⁴⁵ Apart from this limit, the bill was "in its general design, consistent with the work that had emerged from the Committee on Economic Security."²⁴⁶ The Act both provided federal grants to states that gave relief to the unemployed, needy, and to children, and mandated payroll taxes for employers and employees to provide insurance for unemployment and old age.

In the short legislative deliberations in 1935, Congress picked up on the argument made by the movements, touting social insurance as both a right and as fostering economic freedom through providing security. Sounding in the Wisconsinites' register, Senator Wagner, one of the sponsors in the Senate, called social security a matter of right and heralded in a "new era of well being in which the social inequalities of the past will be driven forever from the scene."²⁴⁷ Senator Alben Barkley also conceived of social security as a fundamental right, and sounding in the Townsendites' register, argued that it stemmed from government's "duty . . . to its aged and to its unemployed and to its indigent."²⁴⁸

240. See Orloff, *supra* note 207, at 73.

241. See *id.*

242. Witte stated that Abbott "above everyone else, was responsible for the child welfare provisions which occur in the Social Security Act." Letter from Edwin E. Witte to Edith Abbott (Oct. 18, 1939) (on file with the University of Chicago library), *quoted in* Lela B. Costin, *Grace Abbott of Nebraska*, 56 NEB. HIST. 164, 187 (1975). Witte also recounts how the Ways and Means Committee was "very near . . . to ditching the entire bill" and how Abbott took the lead in organizing a committee to pressure Congress, and in light of this gave Abbott "much of the credit for getting this measure through Congress when it appeared to be lost." *Id.*

243. See ALTMAYER, *supra* note 207, at 32–33.

244. For a general summary of the racial and gender exclusions of New Deal programs, see IRA KATZNELSON, *FEAR ITSELF: THE NEW DEAL AND THE ORIGINS OF OUR TIME* (2013).

245. See *infra* Part V.B for an overview of how the Act's coverage was expanded over time.

246. ALTMAN, *supra* note 170, at 79.

247. 79 CONG. REC. 9283 (1935) (statement of Sen. Wagner).

248. 79 CONG. REC. 9627 (1935) (statement of Sen. Barkley).

Senator Nathan Bachman spoke of social security in promoting the “economic independence” of citizens, which in turn allows the citizen to be an “agent for his Government.”²⁴⁹ He continued that “American democracy can be preserved only” by ensuring this kind of economic security.²⁵⁰ Similarly, Congressman Robert Doughton stated that Congress was “fashioning the foundation stones upon which will rest the happiness and welfare of future generations” by enacting “social reforms that are necessary to preserve our economic and political institutions.”²⁵¹ And Congressman J. William Ditter spoke of the constitutional responsibility to protect the “economic security” of citizens and stated that he was “persuaded that the recognition of this responsibility by the civic and industrial leaders will help to protect our traditional American institutions of freedom and personal liberty by the correlation of the needed economic security.”²⁵² Congressman William Sirovich further argued that only after economic security is achieved can one turn to being a citizen.²⁵³

The House passed the bill on April 19, 1935, by a vote of 372-33. The Senate passed the bill by a vote of 77-9 on June 19, and conference proceeded through July, with voice votes on August 8 in the House and August 9 in the Senate. FDR signed the bill on August 14 and provided a pen to a leader of the Fraternal Order of the Eagles, a gesture to the fact that even conservative organizations and movements supported the Act.

C. FDR and the Supreme Court Weigh In

As FDR campaigned for reelection in 1936, which he would win in a landslide, he focused on economic security. FDR’s acceptance speech for the Democratic Party’s nomination took place in Philadelphia. Over 100,000 people gathered to hear a speech that Senator Wagner had helped to draft. In the speech, FDR argued that “political freedom” must also extend to prohibit “economic slavery,” that the “right to work” was no less central to citizenship than “the right to vote,” and that the very liberty of democracy is not safe otherwise.²⁵⁴

FDR continued, “For too many of us the political equality we once had won was meaningless in the face of economic inequality. . . . For too many of us life was no longer free; liberty no longer real; men could no longer follow the pursuit of happiness.”²⁵⁵ He proclaimed, “Today we stand

249. 79 CONG. REC. 8224 (1935) (statement of Sen. Bachman).

250. *Id.*

251. 79 CONG. REC. 5476-77 (1935) (statement of Rep. Doughton).

252. 79 CONG. REC. 6092 (1935) (statement of Rep. Ditter). Although Ditter worried about the constitutionality of the old-age security provisions of the Act, he ultimately voted for it. *See id.* at 6091-92.

253. 79 CONG. REC. 5787 (1935) (statement of Rep. Sirovich) (“It is only after these necessities are satisfied that an individual can turn his thoughts to problems of politics, society, education, science, art, philosophy, or even religion.”).

254. Franklin D. Roosevelt, Acceptance of the Renomination for the Presidency (June 27, 1936), in 5 THE PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT 230-31, 233-34 (1936).

255. *Id.* at 233.

committed to the proposition that freedom is no half-and-half affair. If the average citizen is guaranteed equal opportunity in the polling place, he must have equal opportunity in the market place.”²⁵⁶ As he put the argument in an address on Labor Day, “The Fourth of July commemorates our political freedom—a freedom which without economic freedom is meaningless indeed. Labor Day symbolizes our determination to achieve an economic freedom for the average man which will give his political freedom reality.”²⁵⁷

After the election, in 1937, the Supreme Court would have the opportunity to weigh the constitutionality of the statutes. In each case, the Court described workers and their insecurity as the national government’s focus, which reflected the shift in emphasis from employer-employee freedom of contract that had animated its substantive due process cases. In upholding the NLRA on interstate commerce grounds in *NLRB v. Jones & Laughlin Steel Corp.*,²⁵⁸ the Court referred to workers’ “fundamental right” to “self-organization.”²⁵⁹ The Court focused on the conditions faced by workers that made this right necessary, noting that workers were often “helpless in dealing with . . . employer[s]” and that employees relied on wages to maintain their lives and their families—all of which made it “essential to give laborers opportunity to deal on an equality with their employer.”²⁶⁰ In another sign of movement convergence, the Wisconsinites played a role in the case. After the NLRA was passed, Wagner called in David Saposs, another former Commons student and Wisconsinite AALL member, to develop evidence on how labor issues and strikes affected interstate commerce.²⁶¹ Finally, in upholding the taxation and old-age insurance provisions of the SSA in *Charles C. Steward Machine Co. v. Davis*²⁶² and *Helvering v. Davis*²⁶³ on, respectively, interstate commerce grounds and general welfare grounds,²⁶⁴ the Court spoke of the insecurity born of the problems of unemployment and poverty, the inability of states to provide adequate relief, and Congress’s judgment of the necessity of acting in favor of the general welfare to address a national problem.²⁶⁵

IV. THE FAIR LABOR STANDARDS ACT OF 1938

This Part explores the enactment of the FLSA, which, for workers in interstate commerce, provided for a federal minimum wage, instituted overtime pay requirements, and prohibited child labor, among other things.

256. *Id.* at 234.

257. Franklin D. Roosevelt, *Fireside Chat 8: On Farmers and Laborers* (Sept. 6, 1936), <http://millercenter.org/the-presidency/presidential-speeches/september-6-1936-fireside-chat-8-farmers-and-laborers> [<https://perma.cc/PWR3-W9WX>].

258. 301 U.S. 1 (1937).

259. *Id.* at 33.

260. *Id.*

261. See CHAMPLIN & KNOEDLER, *supra* note 132, at 57.

262. 301 U.S. 548 (1937).

263. 301 U.S. 619 (1937).

264. U.S. CONST. art. I, § 8 (“The Congress shall have Power To . . . provide for the common Defence and general Welfare of the United States . . .”).

265. See *Helvering*, 301 U.S. at 640–45; *Steward*, 301 U.S. at 585–90.

The Part focuses first on the League. It explores the League's arguments about economic freedom and shows how it was integral to the generation of a national conversation on wages and hours. It then explores the campaign of pressure that the League launched to get the Act out of the House Rules Committee, which had been holding it hostage for months. Throughout these efforts, the League worked with and linked to other movements. The League also integrated members into government, where they played important roles. This Part focuses, finally, on the labor movement and traces its influence on the evolution and passage of the FLSA.

A. Movement Development

Before becoming Secretary of Labor, Frances Perkins had long been committed to workers' rights and safety. As an employee of the League in the early days of the twentieth century, Perkins demanded legislative action after a fire at the Triangle Shirtwaist Factory in New York City in 1911, where 150 young girls died, "suffocating . . . behind locked doors, or leaping, screaming, to the streets below."²⁶⁶ When the New York State Legislature set up an investigatory committee and put her on it, she took political leaders to see young girls "up at dawn . . . snipping beans and shelling peas" at other factories and alerted the leaders to the length of their hours, the paucity of their wages, and the dangerousness of their conditions.²⁶⁷ Perkins and the League believed that collective bargaining was not enough alone to prevent these problems.²⁶⁸ As Schlesinger notes, "It was from these middle-class groups . . . that the first demand came for the abolition of child labor, for maximum-hour and minimum-wage laws, and for social insurance."²⁶⁹ They brought to their representatives, said Senator Wagner, "the insistent problems of modern-day life."²⁷⁰

Though the League formed in New York City in 1891 as the Consumers' League, it became the National Consumers' League in 1899.²⁷¹ From then through 1932, it was led by Florence Kelley. In discussing the work of the League, Kelley liked to tell others what her father had told her: "My generation has created industry, your generation must humanize it."²⁷² The League's motto was: "Investigation, education and legislation."²⁷³ By 1916, the League claimed to have 15,000 members in forty-three states.²⁷⁴ It included on its rosters figures from Louis Brandeis to Eleanor Roosevelt.²⁷⁵ As the League's General Secretary until Lucy Mason took over upon her

266. SCHLESINGER, *supra* note 58, at 96.

267. *Id.*

268. *See id.* at 25.

269. *Id.*

270. *Id.*

271. *See* STORRS, *supra* note 28, at 23.

272. *Id.* at 12.

273. *Id.*

274. *Id.* at 23.

275. *See* Clement E. Vose, *The National Consumers' League and the Brandeis Brief*, 1 MIDWEST J. POL. SCI. 267, 267-69 (1957).

death, “Kelley masterminded the movement that by 1917 produced maximum hours laws for women in most states and minimum wage laws for women in a dozen states.”²⁷⁶

Like all of the movements explored here, the League believed that it was fighting for fundamental rights for workers. They spoke, when opposing child labor, of “the right to childhood.”²⁷⁷ Florence Kelley wrote that the “right follows from the existence of the Republic”²⁷⁸ because children who enjoy childhood rather than the doldrums of work become “enlightened self-governing citizens.”²⁷⁹ In arguing for shorter working hours and sufficient wages, Kelley said that without leisure, limits on hours, and living wages, “manhood becomes ignoble and unworthy of citizenship in the Republic.”²⁸⁰ The right to leisure, then, “is required to undo the damage wrought in the working-hours, if the worker is to remain fit for citizenship in the Republic.”²⁸¹ Thus, the League came to believe that “equal rights in citizenship” in the political sphere were “meaningless” without “social and economic freedom.”²⁸² Wage and hour laws and those banning child labor were rights in “process of recognition” through the legislative process.²⁸³

B. *Passing the Statute*

The League’s membership declined during the 1920s, when policymakers and presidents fostered an increasingly hostile environment to wage and hour laws,²⁸⁴ but would resurge in the 1930s when it pushed harder for wage and hour laws and put together large conferences of experts to discuss their formulation.²⁸⁵ Quite a few members—including Frances Perkins, Eleanor Roosevelt, and Grace Abbott—were integrated into inner echelons of state and national politics by the 1930s.²⁸⁶ Among the movements considered here, the League had the highest degree of inclusion within government structures. And agitation by the League had helped to produce some of the institutional configurations within federal government that would be essential to the future success of workers’ rights: the Children’s Bureau in

276. STORRS, *supra* note 28, at 24.

277. KELLEY, *supra* note 29, at 3.

278. *Id.*

279. *Id.*

280. *See id.* at 108.

281. *Id.* at 109.

282. VIVIEN HART, *BOUND BY OUR CONSTITUTION: WOMEN, WORKERS, AND THE MINIMUM WAGE* 114 (1994).

283. KELLEY, *supra* note 29, at 168.

284. *See* STORRS, *supra* note 28, at 17–18.

285. *See id.* at 22–23. *See generally* Lizabeth Cohen, *The New Deal State and the Making of Citizen Consumers*, in *GETTING AND SPENDING: EUROPEAN AND AMERICAN CONSUMER SOCIETIES IN THE TWENTIETH CENTURY* 111 (Susan Strasser, Charles McGovern & Matthias Judt eds., 1998).

286. STORRS, *supra* note 28, at 34–35.

1912, the Women's Bureau in 1920, and the Division of Labor Standards in 1934.²⁸⁷

1. New Deal Networks

By 1932, Florence Kelley had passed away, and Lucy Mason took the helm of the League.²⁸⁸ The League began lobbying the Senate for hearings on a potential bill and authorized Molly Dewson, who was close to FDR and Eleanor Roosevelt, to explore with them routes to national legislation on wages and hours.²⁸⁹ In these early processes of deliberation and consultation, the League and its allies harnessed the citizens involved from their state struggles to fight for a national policy. Indeed, while the Recovery Act was still in its “gestational stage, Secretary of Labor Perkins proposed a national wage-hour law based directly on the [League]’s model state bill.”²⁹⁰

At the same time, the League strengthened its networks, which would become important to its success in the years ahead. It “drew on local women’s groups, female-employing unions, settlement houses, church groups, and labor departments” and was “behind the passage of six minimum wage laws for women in 1933.”²⁹¹ During this time, the League would also shape labor leaders who would later be important to generating the FLSA. John Lewis, who would later lead the Congress of Industrial Organizations (CIO), which split away from the AFL at the end of 1935, and Sidney Hillman, who would lead the ACWA, were influenced by the League to take positions in favor of national wage and hour laws when the labor movement was still largely skeptical of such government policies.²⁹² Hillman had been mentored by Frances Perkins and promoted by her when he worked in New York State government, and Lewis had been influenced by League member Josephine Roche, who owned a coal-mining company that had treated Lewis’s union well.²⁹³ These leaders’ experiences with the League have been credited with shaping their evolution toward supporting national wage and hour legislation.²⁹⁴

2. The Path to the FLSA

A national policy would be difficult to enact. Court rulings striking down wage and hour laws on freedom-of-contract grounds continued, although

287. *See id.* at 39. *See generally* ROBYN MUNCY, CREATING A FEMALE DOMINION IN AMERICAN REFORM, 1890–1935 (1991); Josephine Goldmark, *Fifty Years—the National Consumers’ League*, 85 SURVEY 674 (1949).

288. MASON, *supra* note 41, at 11–12.

289. *See id.* at 13–16.

290. STORRS, *supra* note 28, at 94.

291. *Id.* Connecticut, New York, Ohio, New Jersey, Illinois, New Hampshire, and Utah were the first states to pass wage laws based on the League’s model bill. *See, e.g.*, Alice S. Cheyney, *The Course of Minimum Wage Legislation in the United States*, 38 INT’L LAB. REV. 26, 31 n.1 (1938).

292. *See* STORRS, *supra* note 28, at 100–01.

293. *See id.*

294. *See id.*; WARE, *supra* note 93, at 89.

they were increasingly unpopular. By 1936, when the Court overturned yet another minimum wage law on freedom-of-contract grounds in *Morehead v. New York ex rel. Tipaldo*,²⁹⁵ “it alienated nearly everybody.”²⁹⁶ As Schlesinger notes, “It was even too much for Herbert Hoover.”²⁹⁷

The Court would change direction not long after. The institution of these standards was vindicated in the 1937 case *West Coast Hotel Co. v. Parrish*,²⁹⁸ which upheld a 1913 Washington State minimum wage law for women.²⁹⁹ Chief Justice Charles Hughes, writing for the majority, defended the minimum wage as protecting the liberty guaranteed by the Constitution, a “liberty in a social organization which requires the protection of law against the evils which menace the health, safety, morals and welfare of the people.”³⁰⁰ The Court’s ruling in *Parrish*, as well as its upholding of the Wagner Act and Social Security Act, also gave the movement hope in national policy. After *Parrish*, at FDR’s prodding, Frances Perkins asked administration lawyer Ben Cohen to turn his attention to the wage and hour bill that she had “locked away in a desk drawer.”³⁰¹ The bill he worked on was based on a bill he had drafted before with the League, and he put his energy into reworking it.³⁰²

As the bill was introduced in Congress on May 24, 1937, President Roosevelt sent a letter imploring members of Congress to think of the relationship between democracy and economic security—the one he had laid out clearly as he campaigned for reelection in 1936. FDR stated that a third of the nation was “ill-nourished, ill-clad and ill-housed” and that a “self-supporting and self-respecting democracy can plead no justification for the existence of child labor, no economic reason for chiseling workers’ wages or stretching workers’ hours.”³⁰³

a. Courting Labor

In the meantime, in mid-May 1937, FDR turned his attention to deliberating and negotiating with labor leaders. The AFL had been a leading force at the outset of the New Deal in producing the Black thirty-hour bill. Many forces within the labor movement had by then come around to national regulation on hours. However, the AFL still worried that minimum wages would become maximum wages, and while its leadership still supported some type of wage program, it was not predisposed to put too much power

295. 298 U.S. 587 (1936).

296. ARTHUR M. SCHLESINGER, JR., *THE POLITICS OF UPHEAVAL* 489 (1960).

297. *Id.*

298. 300 U.S. 379 (1937).

299. *See generally id.*

300. *Id.* at 391.

301. STORRS, *supra* note 28, at 183.

302. *See id.*

303. Franklin D. Roosevelt, *The President Recommends Legislation Establishing Minimum Wages and Maximum Hours* (May 24, 1937), in 6 *THE PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT* 209, 210–11 (1938).

in a federal administrative structure.³⁰⁴ AFL leaders wanted to ensure that the form of the law did not undermine its purposes and even sought to exempt unionized workplaces from legislation.³⁰⁵

Others were less concerned. John Lewis of the CIO was much more supportive of the measures that were forthcoming.³⁰⁶ Hillman, president of the ACWA, was also supportive of the measures and had worked with Perkins in drafting similar legislation at the state level. Given labor's splintering, FDR called in the president of the AFL, William Green, separately from Hillman and Lewis.³⁰⁷ With each, he discussed his hopes for the labor standards bill. They were all supportive of a program to some degree, but the details of that program were yet to be hammered out.³⁰⁸

b. Getting Child Labor into the Act

Cohen and other lawyers worked hard on the bill. An early draft was produced without child labor prohibitions. Before the bill was sent to Congress, it was a League member and former chief of the Children's Bureau (which, as noted above, was put in place in large part due to the League's efforts³⁰⁹) who consulted with government officials and also ensured that the child labor provisions were put into the Act. As Frances Perkins recounted the episode:

One last minute change was the insertion of a clause prohibiting the labor of youngsters under sixteen in industries engaged in interstate commerce or affecting interstate commerce, and providing for not more than eight hours of work a day for children over sixteen. As Grace Abbott, [former] Chief of the Children's Bureau, so eloquently pleaded, "You are hoping that you have found a way around the Supreme Court. If you have, why not give children the benefit by attaching a child labor clause to this bill?" The President readily agreed and was delighted that we might make this bill cover child labor as well as low wages and long hours.³¹⁰

Abbott had been integrated into government as a result of her work with the League, and although she had retired from government in 1934, she was instrumental in making sure that one of the League's central commitments made it into the bill.

c. Getting the Act out of Committee

When the now-polished bill based on the League's model made it to Congress, the League, now led by Mary Dublin, mobilized people across the country and lobbied broadly in D.C. The labor movement, though, would

304. See PERKINS, *supra* note 70, at 258.

305. See *id.*

306. See Howard D. Samuel, *Troubled Passage: The Labor Movement and the Fair Labor Standards Act*, MONTHLY LAB. REV., Dec. 2000, at 32, 33–34.

307. See *id.*

308. See *id.* at 34–35.

309. See *supra* note 287 and accompanying text.

310. PERKINS, *supra* note 70, at 257.

initially not be so enthusiastic. When the bill first came before Congress, the testimonies of Lewis, Hillman, and Green were mixed.³¹¹ They continued to support the bill in principle but all testified in favor of amendments that, to their minds, would best realize the aims of the bill by ensuring that minimum wages did not become both floors and ceilings, among other things.³¹²

The bill left committee, and after some back-and-forth and a few months of recess, a version of the bill was able to pass the Senate, only to linger in the House. Southern conservatives on the House Rules Committee held up the bill, refusing to release it to the floor.³¹³ While the bill floundered there, the AFL amped up its criticism and the House Labor Committee proposed another bill.³¹⁴ By the spring of 1938, the House Rules Committee was still stonewalling the bill.³¹⁵

To put pressure on the Rules Committee, the League mobilized middle-class Americans in the South, both within the League and from its collaborative allies, where conservative congressmen faced strong employer resistance to the bill.³¹⁶ The League used “southern voters to apply pressure from home on anti-FLSA politicians.”³¹⁷ Other unions lobbying for the bill were not able to find this pressure point, but the League’s leader, then Mary Dublin, knew to target Southern Democrats on the House Rules Committee. Dublin “sent dozens of wires like this cryptic one” to Lucy Mason in Atlanta: “Rules Committee deadlocked 7-7—extremely urgent you wire Rep. Cox [D-GA] now opposing sending wage-hour bill to floor vital persuade others influence do likewise.”³¹⁸ The League’s network of Southern women “signed resolutions to be read into the congressional record” and wrote editorials in Southern papers supporting the bill.³¹⁹ They also went into local chapters of the League of Women Voters and other women’s groups to garner support for the bill.³²⁰

Through exerting pressure like this, the League has been credited with generating enough pressure in the South to help move conservative members of Congress and get the bill out of committee.³²¹ Indeed, largely as a result of the League’s efforts, in the spring of 1938, “southerners demonstrated sufficient enthusiasm for the FLSA in surveys and at the polls to trigger a shift in congressional attitudes.”³²² The League had also helped the cause of those few Southerners supporting the measure. Claude Pepper of Florida and

311. *Id.* at 257–58.

312. *Id.*

313. *See id.* at 260.

314. *See id.*

315. STORRS, *supra* note 28, at 193–95.

316. *See id.* at 188–89.

317. *Id.*

318. *Id.* at 189.

319. *See id.*

320. *See id.* at 194.

321. *Id.* at 154; *see also* DEBORAH M. FIGART, ELLEN MUTARI & MARILYN POWER, LIVING WAGES, EQUAL WAGES: GENDER AND LABOR MARKET POLICIES IN THE UNITED STATES 104–05 (2005).

322. STORRS, *supra* note 28, at 189, 335–36.

Lister Hill of Alabama were criticized even for their lukewarm support of the bill, only to surprisingly win their renominations for the upcoming election with “spectacular majorities” mobilized by the League and its sister movements; this effort contributed to the tide change in favor of the bill.³²³

Thereafter, the League’s National Labor Standards Committee “obtained thousands of signed resolutions supporting the [FLSA] from individuals around the country.”³²⁴ League members mobilized: speaking on the radio, writing in newspapers, calling labor committees in states across the country, and helping to mobilize “the middle-class, intellectuals, churches, [and] women’s organizations.”³²⁵ Convinced that “it is not labor alone which speaks for itself” but rather the “leaders of the community in every walk of life,” the League sought and achieved great support from many movements.³²⁶ The League convinced the Young Women’s Christian Association (YWCA), the National Council of Jewish Women, and the League of Women Shoppers to endorse the bill. They joined with the ACWA, International Ladies’ Garment Workers’ Union (ILGWU), and CIO in “flood[ing]” legislators with telegrams and producing opinion pieces signed by “hundreds of ‘leading citizens.’”³²⁷

d. Courting Labor, Again

With public momentum building, the White House then focused on labor. In January of 1938, Perkins had called in a young lawyer, Rufus Poole, who went out and explored the different objections labor leaders had to the bill and worked to negotiate with them.³²⁸ In coordination with Poole and others, the AFL began to come around.³²⁹ As Perkins recounted, negotiations made it clear that the White House would need to better understand, and move toward, the AFL’s position in terms of simplifying the bill. “Congressman Griswold of Indiana drafted a bill which was said to have originated in the [AFL] Council. This simply established a forty-hour work-week and a forty-cent minimum wage in all industries.”³³⁰ The AFL bill also got rid of the complex administrative structure and gave courts the ability to hold responsible those who deviated from the bill.³³¹

Given the time that the Rules Committee had freed up, a subcommittee in the House Labor Committee was formulated to make the bill a possibility from the AFL’s perspective.³³² Through its deliberations, the committee mostly kept to the AFL’s plan, though it added in its draft the establishment of wage boards that would fix wages and hours gradually so as to reach the

323. PERKINS, *supra* note 70, at 263–64; STORRS, *supra* note 28, at 194–96.

324. *See* STORRS, *supra* note 28, at 193.

325. *Id.*

326. *Id.*

327. *See id.* at 195.

328. *See* PERKINS, *supra* note 70, at 261–62.

329. *See id.*

330. *See id.*

331. *See id.*

332. *See id.*

forty-hour week.³³³ This bill, named the Ramspeck bill, was then opposed by the AFL because it did not favor the wage board; conversely, it was supported by the CIO, which further exacerbated the still-existing problem of conservative Southern Democrats, who were deeply opposed to the CIO.³³⁴

Mary Norton, chairwoman of the House Committee on Labor, then decided to “present a bill along the lines of the one offered by the [AFL].”³³⁵ The bill came out of the House Labor Committee favorably, on a vote of 14-4, on April 21, 1938, but, as explored above, the Rules Committee was not yet budging, and by a vote of 8-6, did not release the bill to the floor.³³⁶ When the Rules Committee did ultimately let the bill out of committee, both the conservative Southerners and the AFL were on board. On May 23, the bill was sent to the floor.

3. Debate and Passage

On May 23, debate began on the House floor. Congressman Edward Curley of the House Labor Committee argued that the legislation would provide Americans the “security which the Constitution of the United States of America provides for,” linking constitutional commitment and economic security.³³⁷ Echoing Florence Kelley’s comments on how the lack of economic security from high wages saps citizens of their self-governing qualities, Congressman Maury Maverick picked up the republican argument and said that low wages had drained workers of their “spirit of independence” and had made them “docile.”³³⁸ He urged for the passage of the bill, arguing on behalf of “upstanding, courageous Americans demanding all their rights.”³³⁹

Congressman William Fitzgerald spoke of the bill as protecting fundamental rights. He argued, “The wage and hour bill is an honest and sincere effort to meet and not to avoid the just demands of the workingman that his fundamental rights be observed.”³⁴⁰ To applause, Congressman Sirovich spoke of the economic order that the bill was a part of and echoed the League’s vision of a civilized capitalism based on firm economic rights of citizenship.³⁴¹ Channeling Kelley, he said that the bill aimed to “humanize our economic order.”³⁴² He continued that a worker with economic security is “sober-minded” and “patriotic.”³⁴³ Again connecting political and economic themes, he said that the bill would deliver on the “promissory note”

333. *Id.*

334. *Id.*

335. *Id.* at 263.

336. *Id.*

337. 83 CONG. REC. 7283 (1938) (statement of Rep. Curley).

338. 83 CONG. REC. 7291–92 (1938) (statement of Rep. Maverick).

339. *Id.*

340. 83 CONG. REC. 7310 (1938) (statement of Rep. Fitzgerald).

341. 83 CONG. REC. 7311 (1938) (statement of Rep. Sirovich).

342. *Id.*

343. *Id.* at 7312.

of the Declaration of Independence, which set up “a system of minimal equality, extending into political, economic, and social realms.”³⁴⁴ The bill passed the House by a vote of 313 to 97.³⁴⁵

The Senate and House bills now had to be reconciled. When the Senate and House conferees discussed the bill, there was large divergence between them. In short, the Senate bill did not contain the same extent of national standards on wages and hours.³⁴⁶ Ultimately, the Southerners “yielded, and the conference agreed upon national standards.”³⁴⁷ A single administrator advised by the industries committees was chosen to set the basic standards of wages and hours to placate the AFL, and the Wage and Hour Division was created.³⁴⁸ A final compromise was to move the hour regulation from forty to forty-four hours.³⁴⁹ Like the Social Security Act, however, the formation of the FLSA suffered from built-in exclusions, such as the exclusion for agricultural workers, which “meant the omission of more than 50 percent of southern black employees, men and women, from coverage.”³⁵⁰

The FLSA was adopted by the House and Senate on June 14, 1938.³⁵¹ The Act applied to workers in interstate commerce and prohibited employing minors, established a national minimum wage, and ensured the payment of overtime for hours worked over forty-four hours per week. Reflecting on the FLSA, Perkins predicted that the Act would “be a permanent part of the legal structure and economic pattern of the United States.”³⁵² But it had to clear a final hurdle: the Supreme Court. The Court upheld the FLSA on interstate commerce grounds in *United States v. Darby Lumber Co.*,³⁵³ in which the Court repeatedly referred to “substandard labor conditions” that were “injurious” to commerce and to workers.³⁵⁴ The Court stated that Congress “is free to exclude from the commerce articles whose use in the states for which they are destined it may conceive to be injurious to the public health, morals or welfare.”³⁵⁵

V. INTERPRETATION AND IMPLICATIONS

Thus far, this Article has presented the related histories of the NLRA, SSA, and FLSA. The previous three Parts focused on an overlapping set of social

344. *Id.*

345. See PERKINS, *supra* note 70, at 252–53.

346. *See id.*

347. *Id.* at 252.

348. *See id.* at 253. As Kate Andrias explains, the committees were “comprised of representatives from labor, business, and the public to set wages.” Andrias, *supra* note 21, at 667. Andrias holds out these committees as an early model of American social democracy. *See generally id.*

349. See PERKINS, *supra* note 70, at 253.

350. Suzanne B. Mettler, *Federalism, Gender, & the Fair Labor Standards Act of 1938*, 26 POLITY 635, 646 (1994); *see also* Linder, *supra* note 21, at 1336.

351. *See* Mettler, *supra* note 350, at 651.

352. PERKINS, *supra* note 70, at 266.

353. 312 U.S. 100 (1941).

354. *Id.* at 114–15.

355. *Id.* at 114.

movements behind the push for each statute, their engagements with legislators and officials, and their arguments about the purposes of the statutes. In this Part, I draw out the constitutional purposes of the statutes *as a set* at a more general level and explore how they together responded to the problems industrialism posed to the Republic by redefining economic freedom around worker security. I also argue that they qualify as “small c” constitutional commitments, or “super-statutes.” I briefly explore some implications of this argument for how courts generally interpret the statutes.

Before proceeding, it is worth noting that this Part does not focus on the history of how political, social, and economic developments and judicial review have interacted with, and in some cases weakened, these commitments in the past few decades. This history has been well chronicled elsewhere and still remains to be fully chronicled,³⁵⁶ but this Article’s most useful contribution is reframing the foundations and constitutional significance of the statutes and offering some thoughts about how that reframing can shape present debates.

A. Constitutional Purposes of the Statutes

This Article began in Part I with a description of the rise of an industrial order that movements and political leaders believed subjected citizens to degrees of economic insecurity that were incompatible with our constitutional system. In this section, I explore how the statutes together articulated a novel definition of economic freedom in the sphere of work—freedom as worker security—to remedy this problem.

In each statutory history, the movements and lawmakers made arguments about how providing economic freedom as security³⁵⁷ through these statutes would produce citizens capable of participating in constitutional self-government.³⁵⁸ In each statutory history, movements and legislative leaders elaborated this theme and argued that workers would gain the security of better working conditions from collective action, that social insurance would diminish insecurity resulting from temporary or permanent work stoppages, and that wage and hour laws would prevent workers from falling into the insecurity of poverty.³⁵⁹ And in each history, these figures connected security both to freedom and citizenship.³⁶⁰ New Deal leaders thus sought, as FDR put it, an “economic freedom” that made “political freedom [a]

356. See *supra* notes 1–8 and accompanying text; see also LEE, *supra* note 1, at 233–37. See generally JACOB S. HACKER & PAUL PIERSON, WINNER-TAKE-ALL POLITICS: HOW WASHINGTON MADE THE RICH RICHER—AND TURNED ITS BACK ON THE MIDDLE CLASS (2010).

357. Eskridge and Ferejohn also see “liberty as security” as a central component of the Social Security Act’s constitutional architecture. See ESKRIDGE & FEREJOHN, *supra* note 18, at 90–95.

358. As I have mentioned throughout, those guarantees suffered from gender and racial exclusions that have been partially remedied over time. See *supra* notes 244, 350 and accompanying text.

359. For examples, see *supra* notes 60–63, 109–10, 133–35 (NLRA); *supra* notes 184, 247 (SSA); *supra* notes 337, 340 (FLSA).

360. For examples, see *supra* notes 51–56, 111, 134–41 (NLRA); *supra* notes 184–87, 204–06, 248–53 (SSA); *supra* notes 277–83, 337–44 (FLSA).

reality.”³⁶¹ Without economic freedom *as* security, workers would be enmeshed in webs of dependence and suffer wage, workplace, and unemployment conditions that would result in systemic insecurity, which would sap them of the self-governing qualities the constitutional republic requires. This is why, in the words of the Wisconsinites, “social legislation” for workers needed to become “part of our constitution.”³⁶²

The passage of these statutes transformed the American idea of economic freedom and its relationship to political freedom. While the founding conception linked economic freedom as entrepreneurial “independence” to political freedom,³⁶³ to speak of independence in an era of worker interdependence and corporate managerial governance would have been inapt. Citizens had become enmeshed in forms of workplace governance rather than agrarian isolation as the wage earner replaced the citizen-entrepreneur. As Part I explored, the constitutional concern of the movements and lawmakers was that industrialism had impaired or destroyed the balance between economic and political freedom as workers became increasingly unable to effectively bargain with their employers, secure wage and hour limitations that provided them with independence from the workplace, and endure insecurity as work stopped temporarily or permanently.

Restoring conditions of economic freedom by providing workers with security was essential to making industrialism compatible with our constitutional republic. As historian Eric Foner explains:

Like the Civil War, the New Deal recast the idea of freedom by linking it to the expanding power of the national state. But now, economic security, not the civil and political rights of the former slaves and their descendants, dominated discussions of freedom. “Our democracy,” wrote John A. Ryan, “finds itself . . . in a new age where not political freedom but social and industrial freedom is the most insistent cry.”³⁶⁴

However, exploring the arguments of the movements and lawmakers pushing for these statutes and placing them in their historical light shows that the redefinition of economic freedom around security is best understood in terms of its relationship to political freedom in the constitutional order: economic security in a country of workers produced citizens who could participate in constitutional self-government—that is, who could exercise political liberty.³⁶⁵ Economic and political freedom remained intimately

361. See *supra* note 257 and accompanying text.

362. See *supra* note 231 and accompanying text.

363. See WOOD, *supra* note 26, at 106.

364. FONER, *supra* note 25, at 196 (quoting FRANCIS L. BRODERICK, RIGHT REVEREND NEW DEALER: JOHN A. RYAN 195 (1963)).

365. This New Deal conception of freedom offers a useful contrast to the individualistic, neoliberal conception of freedom that increasingly plays a large role in the American legal order today. See Grewal & Purdy, *supra* note 6, at 9, 13–15; see also Jon D. Michaels, *To Promote the General Welfare: The Republican Imperative to Enhance Citizenship Welfare Rights*, 111 YALE L.J. 1457, 1459 (2002) (arguing that “basic socioeconomic resources” are both “necessary for effective political engagement” and for “republican citizenship”).

connected, but the former took on a new gloss. To read these statutes as a set, then, is to speak of how they were focused on redefining economic freedom around security in order to fill the hole that the Industrial Revolution tore in the constitutional order. The freedom and security of workers as a group took center stage in the American constitutional system.

B. *The Statutes as Super-Statutes*

The statutes are not only a set connected by their purposes; they are also a set of “small c” constitutional commitments. William Eskridge and John Ferejohn’s *A Republic of Statutes* describes a deliberative process through which statutes become “super-statutes” that exist as part of our constitutional framework and provides wide-ranging examples of how super-statutes have been constructed and entrenched.³⁶⁶ A super-statute “emerges after a lengthy period of public discussion and official deliberation” and becomes entrenched after an even longer post-enactment period of interpretation, amendment, and consensus-building.³⁶⁷

Eskridge and Ferejohn argue at length that the Social Security Act has become embedded in the “small c” constitution and, in previous work, identified the NLRA as a super-statute in passing, but their account is silent on the connection between the statutes.³⁶⁸ However, Eskridge and Ferejohn generally theorize that statutes may be related in their histories and purposes. For example, they argue that there is a “national security constitution” and a “green constitution,” each composed of a *set* of statutes.³⁶⁹ There is similarly a “workers’ constitution” composed of the NLRA, SSA, and FLSA.

While my argument in this section focuses on post-enactment entrenchment, it is worth pausing briefly to emphasize the ways in which social movements played important roles in the initial legislative processes. Eskridge and Ferejohn principally focus on social movements’ role in setting the legislative agenda,³⁷⁰ after which the main actors in their account tend to

366. ESKRIDGE & FEREJOHN, *supra* note 18, at 26.

367. William N. Eskridge, Jr. & John Ferejohn, *Super-Statutes*, 50 DUKE L.J. 1215, 1231, 1273 (2001).

368. See ESKRIDGE & FEREJOHN, *supra* note 18, at 26, 171–208 (SSA); Eskridge & Ferejohn, *supra* note 367, at 1227 (NLRA). Balkin also references the New Deal in discussing how statutes become constitutional constructions. BALKIN, *supra* note 18, at 5, 297. He is more general, referring to “Congress’s passage of New Deal legislation” as creating “important constitutional constructions,” but he does not specify the full range of statutes he would include, although he references the SSA as well. *Id.* at 298. Cass Sunstein also refers to the SSA as a “constitutive commitment.” SUNSTEIN, *supra* note 22, at 179. And Ackerman views the SSA as a “landmark” statute. 2 ACKERMAN, *supra* note 20, at 271.

369. See generally ESKRIDGE & FEREJOHN, *supra* note 18, chs. 6, 9.

370. In their account, social movements “demand . . . state action,” after which the demands are “translat[ed] . . . into a proposal by the legislative or executive branch of government.” See *id.* at 105; see also BALKIN, *supra* note 18, at 17, 364 n.3 (focusing on how congressional and executive actors “translate” movement claims). In their study of the SSA, Eskridge and Ferejohn thus follow one influential movement, but only through the agenda-setting process. See ESKRIDGE & FEREJOHN, *supra* note 18, at 171–208.

be legislators, executive branch officials, and courts,³⁷¹ whose deliberation and consensus-building entrench the statute in the constitutional fabric.³⁷² Social movement theorists focus on how movements can be involved not only in agenda-setting but in later parts of the legislative process, including content-specifying, drafting, and aiding passage.³⁷³ In the histories of the New Deal statutes above, this was precisely what happened. The statutes studied here were the product of a decades-long struggle to accommodate the American constitutional order with corporate and industrial capitalism, and the focus above on the exchanges and deliberations between movements and lawmakers throughout the legislative process deepens the deliberative pool from which to draw in establishing the statutes' entrenchment.³⁷⁴

The central roles citizens played in the enactment of the statutes may even be constitutionally significant. American constitutional politics since its inception has been conceptualized as a process whereby the people "take power into their own hands" and mobilize to participate in making new fundamental commitments.³⁷⁵ The fact that social movements were central actors in the legislative processes of the New Deal contributes to those statutes attaining "small c" constitutional status because it involves the people themselves in the deliberative process.³⁷⁶ This Article's bottom-up account of New Deal legislative constitutionalism better reveals the various forms of deliberation and engagement which build the consensus that entrenches the statutes. Indeed, while the post-enactment histories of the

371. Eskridge and Ferejohn specify how, post-enactment, the statute is "debated, honed, and strengthened through an ongoing give-and-take among the legislative, executive, and judicial branches." Eskridge & Ferejohn, *supra* note 367, at 1237.

372. *Id.*

373. See, e.g., Edwin Amenta, Drew Halfmann & Michael P. Young, *The Strategies and Contexts of Social Protest: Political Mediation and the Impact of the Townsend Movement in California*, 4 MOBILIZATION 1, 1 (1999).

374. See Edward L. Rubin, *Passing Through the Door: Social Movement Literature and Legal Scholarship*, 150 U. PENN. L. REV. 1, 68–69 (2001) (noting that the role of social movements in the enactment of New Deal legislation "might suggest a different approach to their interpretation and administration"). This orientation also responds to a critique of the super-statute account. Critics have argued that scholars of legislative constitutionalism locate the deliberation that entrenches statutes in the day-to-day horse-trading and machinations of legislative politics in the years after the statutes are passed. See, e.g., Mathew D. McCubbins & Daniel B. Rodriguez, *Superstatutory Entrenchment: A Positive and Normative Interrogatory*, 120 YALE L.J. ONLINE 387 (2011). My approach deepens the well of preenactment deliberation.

375. As Edward Rubin has argued, the Constitution is thus "part of a larger social process, the product of a mobilized citizenry whose members were either attempting to achieve particular goals or to define their own identity." Rubin, *supra* note 374, at 65.

376. *Id.* at 68–69 (noting how popular input "supports the argument" that New Deal statutes gain constitutional authority). A legislative-constitutionalism account more focused on the role of citizens throughout the various stages of the preenactment legislative process can thus show "a more direct linkage between the members of [the] political order and the decisions made in their name." Sanford Levinson, *Popular Sovereignty and the United States Constitution: Tensions in the Ackermanian Program*, 123 YALE L.J. 2644, 2647 (2014). Indeed, constitutional theorists have been critiqued for providing accounts of constitutional change that are interested in "political leaders . . . who make decisions in the name of the People rather than in such decisionmaking by the People themselves." *Id.* at 2653.

statutes are illuminating and central to qualifying them as super-statutes under Eskridge and Ferejohn's framework, arguably the most sustained and serious forms of deliberation took place in the years and decades leading up to their enactment because the statutes transformed the American idea of economic freedom and the federal government's role in securing it.

1. The NLRA

While the history leading up to the enactment of the NLRA provides a remarkable example of the labor movement's vision of economic freedom and of a years-long battle over the right of workers to bargain collectively as an expression of that freedom, post-enactment entrenchment is central to a statute becoming a super-statute.³⁷⁷

The NLRA qualifies under all of the criteria that Eskridge and Ferejohn focus on: deliberation through legislative and administrative expansion of the statute, bipartisan support for the statute, and the interweaving of the statute into the constitutional fabric.³⁷⁸ First, the NLRA received further legislative deliberation. While it survived conservative amendments in 1939,³⁷⁹ the Taft-Hartley amendments of 1947 aimed to protect employer free speech, encouraged "free choice" in collective bargaining, and prohibited unions from discriminating against employees who did not wish to bargain.³⁸⁰ While the Taft-Hartley amendments shifted some of the power back to employers and have been subject to intense criticism,³⁸¹ they did not vitiate the core right of workers to bargain collectively and, from a deliberative standpoint, arguably made that right more palatable to conservatives. In addition, and perhaps more importantly, in the decade before the Taft-Hartley amendments, unionization rates quadrupled from about 3.6 million workers to 14.3 million workers,³⁸² and in the decade after its passage, the union density levels remained at about 35 percent of the working population and remained there through the 1970s.³⁸³

Second, the NLRA's administrative structure grew and evolved. The NLRB withstood conservative challenge in 1940 and its structure changed through legislative deliberation and administrative experimentation. As regional directors were given more authority, the NLRB took on complex economic functions, and the Office of the General Counsel was created to

377. Sam Simon also makes the case that the NLRA is a super-statute. *See generally* Sam Simon, *How Statutes Create Rights: The Case of the National Labor Relations Act*, 15 J. CONST. L. 1503 (2013).

378. Eskridge & Ferejohn, *supra* note 367, at 1231, 1273. *See generally* ESKRIDGE & FEREJOHN, *supra* note 18.

379. *See* STORRS, *supra* note 28, at 211–12.

380. Labor-Management Relations (Taft-Hartley) Act, Pub. L. No. 80-101, 61 Stat. 136 (1947) (codified as amended in 29 U.S.C. §§ 147–197 (2012)); *see also* Cynthia L. Estlund, *The Ossification of American Labor Law*, 102 COLUM. L. REV. 1527, 1534 (2002).

381. *See, e.g.*, Estlund, *supra* note 380, at 1534.

382. *See generally* ARCHIBALD COX, LAW AND THE NATIONAL LABOR POLICY (1960).

383. *See generally* GERALD MAYER, CONG. RESEARCH SERV., RL32553, UNION MEMBERSHIP TRENDS IN THE UNITED STATES (2004).

cordon off judicial and prosecutorial operations.³⁸⁴ In addition, the Landrum-Griffin Act of 1959 specified union election and reporting mechanisms, building out the administrative information-gathering functions of the NLRB.³⁸⁵

Third, the Act was supported by presidents of both major parties over time. Truman supported collective bargaining rights to the extent of vetoing the Taft-Hartley amendments, which were passed over his veto, and Eisenhower, as the first Republican president after FDR, supported the collective bargaining rights of employees as well.³⁸⁶ That support continued over succeeding decades.³⁸⁷

And, finally, while the past thirty years have seen a decline in labor organizing for a variety of reasons, including employer efforts to limit the scope of collective bargaining, globalization, and the transition to a service economy,³⁸⁸ the notion of a “right” of workers to bargain collectively is stuck in constitutional culture, and indeed it has been heralded by the Supreme Court as a “fundamental right.”³⁸⁹ The recent attack on public sector unions has further weakened organized labor as a force,³⁹⁰ but public sector unions were not part of the NLRA, none of the attacks go to the rights of workers to organize and bargain, but instead chip around them, and even these efforts are opposed by large supermajorities of citizens.³⁹¹ While these are serious threats to labor organizing, no national politician could at this time succeed on a platform of taking away from workers the right to bargain collectively. Indeed, the SSA survives as a super-statute under Eskridge and Ferejohn’s account even though a president sought to privatize the system, although his administration’s ultimate failure to do so contributes to the notion that the “small c” right is difficult to dis-entrench.³⁹² Recent major national

384. BERNSTEIN, *supra* note 63, at 663–71.

385. See Labor-Management Reporting and Disclosure (Landrum-Griffin) Act of 1959, Pub. L. No. 86-257, 73 Stat. 519 (codified as amended in scattered sections of 29 U.S.C.).

386. The Republican Party’s platform of 1956 stated, “The protection of the right of workers to organize into unions and to bargain collectively is the firm and permanent policy of the Eisenhower Administration.” *Republican Party Platform of 1956*, AM. PRESIDENCY PROJECT, <https://www.presidency.ucsb.edu/documents/republican-party-platform-1956> [<https://perma.cc/Z2M5-FGXL>] (last visited Feb. 12, 2019).

387. See, e.g., *Republican Party Platform of 1980*, AM. PRESIDENCY PROJECT, <https://www.presidency.ucsb.edu/documents/republican-party-platform-1980> [<https://perma.cc/E8BG-XKUE>] (last visited Feb. 12, 2019) (“We reaffirm our commitment to the fundamental principle of fairness in labor relations, including the legal right of unions to organize workers and to represent them through collective bargaining . . .”).

388. For an overview of the forces leading to organized labor’s decline, see Estlund, *supra* note 380, at 1536; and see also STONE, *supra* note 3, chs. 4, 5.

389. See *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 33 (1937).

390. See generally Richard Michael Fischl, “Running the Government Like a Business”: *Wisconsin and the Assault on Workplace Democracy*, 121 YALE L.J. ONLINE 39 (2011).

391. See, e.g., Michael Cooper & Megan Thee-Brenan, *Majority in Poll Back Employees in Public Sector Unions*, N.Y. TIMES (Feb. 28, 2011), <https://www.nytimes.com/2011/03/01/us/01poll.html> [<https://perma.cc/7TZR-YH6P>] (“Americans oppose weakening the bargaining rights of public employee unions by a margin of nearly two to one: 60 percent to 33 percent.”).

392. See ESKRIDGE & FEREJOHN, *supra* note 18, at 205–08.

legislative proposals seek to make it easier for employees to exercise their right to bargain.³⁹³

At the same time, there is no doubt that the statute as a mechanism for encouraging or facilitating worker organization has weaknesses.³⁹⁴ And while the ossification or weakening of super-statutes over time is a problem for any account of legislative constitutionalism—one I turn to in the Conclusion—it speaks to the question of how to keep the statute functioning well over time once it is entrenched and not whether it has become entrenched through deliberation and consensus. That is, the question of whether a legal norm is entrenched so it has achieved constitutional or quasi-constitutional status is separate from the question of whether the institutional mechanisms operationalizing that commitment need to be revitalized at a later point in time—here, some eighty years later. Undoubtedly, they do at this point. And the ways in which citizens struggle to easily exercise that right, and the ways in which movements are trying to attack that problem by reshaping the structure of unions, are deeply important. But for present purposes, the more important point is, as Cass Sunstein puts it, that “the right to join a labor union is so deeply ingrained that its elimination would require a large-scale change in public judgments.”³⁹⁵

2. The SSA

Eskridge and Ferejohn have argued at length that the SSA is a super-statute, but it is worth summarizing their claim here. While their account of the process of passing the statute focuses more on different movements, as I referenced above, and deviates from mine in this regard, their account of post-enactment entrenchment is generally accurate.

Eskridge and Ferejohn argue that the SSA has “become a successfully entrenched super statute” in part because “its norm of federally guaranteed old-age insurance has stuck in our political culture more firmly than many Constitutional norms.”³⁹⁶ And although the “Social Security Act was not immediately internalized in the political culture,” it became so over time “through an arduous process of successful administration, statutory amendment, and bipartisan commissions.”³⁹⁷ Eskridge and Ferejohn therefore provide an overview of the path of deliberation leading to the limited Act of 1935; the 1939 amendments expanding its coverage and congressional deliberation surrounding them; how the SSA then went through administrative deliberation and survived Republican attack as President Truman supported the program; how Congress then reaffirmed it and expanded coverage into the 1950s; and how it was supported through

393. See generally Benjamin I. Sachs, *Enabling Employee Choice: A Structural Approach to the Rules of Union Organizing*, 123 HARV. L. REV. 655 (2010) (providing an overview of the Employee Free Choice Act).

394. See *id.* See generally Estlund, *supra* note 380.

395. SUNSTEIN, *supra* note 22, at 62.

396. ESKRIDGE & FEREJOHN, *supra* note 18, at 166.

397. *Id.*

GOP control of the presidency with Eisenhower, and continued expanding and flourishing through that decade and those to come.³⁹⁸ Each of these forms of contestation, debate, and deliberation led to the SSA becoming further entrenched in the national consciousness until it became a super-statute.

3. The FLSA

The FLSA has also become entrenched as a super-statute through deliberation and elaboration. The Act was extended and modified over the twenty years after its passage in a spate of legislative deliberation. Congress passed the 1947 Portal-to-Portal Act to clarify what constituted compensable work time.³⁹⁹ In 1949, Congress passed an amendment, which, among other things, increased minimum wages and strengthened the child labor prohibitions.⁴⁰⁰ The Act was similarly amended in 1955 and 1961 to raise the minimum wage.⁴⁰¹ The Equal Pay Act of 1963 extended the FLSA's provisions to make it illegal to pay workers less on the basis of their sex.⁴⁰² A 1966 amendment raised the minimum wage and included farm workers in the Act's provisions.⁴⁰³ The Act has been amended several times since.⁴⁰⁴

In addition, the Act's administrator—the Wage and Hour Division—has grown to cover more administrative functions: for example, the Division acquired the ability to sue on behalf of employees for back wages and to regulate wages and hours with regard to other laws, including the Family and Medical Leave Act of 1993.⁴⁰⁵ Finally, the Act was also supported by Truman⁴⁰⁶ and Eisenhower,⁴⁰⁷ who were both in favor of raising the minimum wage. While some amendments to the Act in recent years have limited it by, for example, reclassifying “exempt” employees,⁴⁰⁸ the concepts of prohibition on child labor, minimum wages, and overtime pay are central

398. *See id.* at 186–98.

399. 29 U.S.C. § 254(a) (2012).

400. Fair Labor Standards Amendments of 1949, Pub. L. No. 81-393, §§ 6, 16, 63 Stat. 910, 912, 920 (increasing the FLSA minimum wage amount to 75 cents); *see also* William S. Tyson, *The Fair Labor Standards Amendments of 1949—Wage and Hour Coverage*, 28 N.C. L. REV. 161, 162 n.3 (1950) (discussing the changes in the minimum wage amount).

401. *See* 29 U.S.C. §§ 201–219 (2012) (listing amendments to the FLSA in 1949, 1955, 1956, 1961, 1963, 1966, 1974, 1977, 1985, and 1989).

402. *See id.*

403. *See id.*

404. *See id.*

405. *See id.* § 209.

406. President Harry S. Truman, Statement by the President on the New 75-Cent Minimum Wage Rate (Jan. 24, 1950), <https://www.trumanlibrary.org/publicpapers/index.php?pid=593> [<https://perma.cc/DU5G-HZBH>].

407. President Dwight D. Eisenhower, Annual Message to the Congress on the State of the Union (Jan. 6, 1955), https://www.eisenhower.archives.gov/all_about_ike/speeches/1955_state_of_the_union.pdf [<https://perma.cc/5P4F-DNJH>].

408. 29 U.S.C. § 213(a)(1).

to the American political culture and indeed are the roots of increased activism and democratic activity.⁴⁰⁹

C. *Interpreting the Statutes*

The NLRA, SSA, and FLSA are connected by the wave of movements that fought for them, by their redefinition of economic freedom around worker security, and by their settlement into the constitutional fabric as super-statutes. The account of these statutes I have offered thus far deviates from the conventional account of the New Deal transformation. That account is focused on the federal government—with FDR at the helm—seeking to pass economic legislation, including labor and employment legislation, that would expand the federal government's regulatory power over the economy. This commenced a battle that, after a long struggle, was resolved when the judiciary acquiesced or evolved on its own with regard to the constitutionality of federal economic legislation.

The focus on constitutional permissibility not only obscures from view the affirmative constitutional purposes and status of the statutes. It also potentially affects how courts interpret the statutes. Eskridge and Ferejohn, for example, argue that courts should interpret super-statutes “broadly and evolutively” to implement “statutory purpose and principle as well as compromises suggested by statutory texts.”⁴¹⁰ That means that the underlying constitutional purposes of the statutes matter, as does fulfilling those purposes under inevitably changing conditions. I share with other scholars some concerns about what it means to interpret a statute “broadly” or “evolutively.”⁴¹¹ I am less concerned with “purposive” interpretation because the form is well-established in judicial practice and normatively defensible. But since I have argued that the statutes qualify as super-statutes, and indeed as a set of super-statutes, it is worth considering what work both more purposive or “evolutive and broad” interpretation of the statutes could do.

Consider the NLRA. Courts have understood its underlying purposes differently over the years.⁴¹² Brishen Rogers has identified three concepts of

409. See generally, e.g., Sachs, *supra* note 21 (explaining how the FLSA has become the channel through which the demand for worker collective action has moved).

410. See Eskridge & Ferejohn, *supra* note 367, at 1247; see also Kathryn E. Kovacs, *Superstatute Theory and Administrative Common Law*, 90 IND. L.J. 1207, 1222–23 (2015).

411. See Gillian E. Metzger, *Administrative Constitutionalism*, 91 TEX. L. REV. 1897, 1933–34 (2013) (expressing concerns in the context of administrative constitutionalism); Abbe Gluck, *Obamacare as Superstatute*, BALKINIZATION (July 29, 2017), <https://balkin.blogspot.com/2017/07/obamacare-as-superstatute.html> [http://perma.cc/2RVK-RGLH] (expressing “dissatisfaction with the doctrinal implications” of the interpretive approach).

412. See, e.g., JAMES B. ATLESON, VALUES AND ASSUMPTIONS IN AMERICAN LABOR LAW 19, 45 (1983); LEE, *supra* note 1, at 233–37; see also Kate Andrias, *The New Labor Law*, 126 YALE L.J. 2, 17, 22–23 (2016); Cynthia L. Estlund, *Labor, Property, and Sovereignty After Lechmere*, 46 STAN. L. REV. 305, 306–08 (1994).

union freedom of association that courts have employed in interpreting it.⁴¹³ One is a “social democratic” concept that focuses on worker freedom of association and links economic freedom to political freedom.⁴¹⁴ The social democratic concept is faithful to the purposes of the NLRA that this Article has elaborated. The NLRA is embedded in a set of statutes designed to redefine economic freedom around security for workers and tie worker security to citizenship. That is, the history of the “workers’ constitution” both reveals the constitutional purposes of worker freedom of association and embeds worker freedom of association in a larger constitutional transformation connecting economic and political freedom.

Rogers explores, however, how the Supreme Court has moved from employing the social democratic concept in interpreting the NLRA and toward both civil libertarian⁴¹⁵ and neoliberal⁴¹⁶ interpretations of the statute. Each is increasingly individualistic and removed from the statute’s underlying purposes. Rogers argues that what is at stake in the distinction in many cases is the vitality and strength of unions and, indeed, of the NLRA itself. For example, he argues that the neoliberal concept would allow free riders to opt out of paying union dues while receiving the benefits of union representation, an issue the Supreme Court recently confronted with regard to public sector unions.⁴¹⁷ This approach could potentially cripple

413. See generally Brishen Rogers, *Three Concepts of Workplace Freedom of Association*, 37 BERKELEY J. EMP. & LAB. L. 177 (2016).

414. *Id.* at 181–82, 208–10.

415. “The civil libertarian concept . . . holds that the state may almost never compel association in the political or expressive sphere, but may do so without limit in the economic or commercial sphere,” and therefore generally upholds the rights of unions to, for example, demand dues from their members. *Id.* at 195.

416. The neoliberal concept, recently ascendant, is the most individualistic, and it understands worker freedom of association “as an exercise of workers’ individual wills akin to a consumer transaction, strongly emphasizing negative [freedom of association] and enabling positive [freedom of association] only as desired by individual workers.” *Id.* at 181.

417. *Id.* at 202–06. The Court had for several decades allowed workers to opt out of paying the portion of fees related to unions’ political speech on First Amendment grounds, but it had required those workers, who are still represented by unions, to pay a remaining “agency fee” for the cost of collective bargaining. See, e.g., *Comm’n Workers of Am. v. Beck*, 487 U.S. 735 (1988); *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977); *Int’l Ass’n of Machinists v. Street*, 367 U.S. 740 (1961). But these cases have been successfully challenged with regard to public sector unions. See, e.g., *Janus v. Am. Fed’n of State, Cty., & Mun. Emps., Council 31*, 138 S. Ct. 2448 (2018) (holding that requiring public-sector employees to pay agency fees violates the First Amendment); *Harris v. Quinn*, 134 S. Ct. 2618 (2014) (finding a First Amendment right for “partial” public sector union employees to opt out of paying agency fees). Cynthia Estlund has argued that extending *Harris* to public sector and private sector unions would undermine core tenets of the New Deal constitutional settlement. See generally Cynthia Estlund, *Are Unions a Constitutional Anomaly?*, 114 MICH. L. REV. 169 (2015). Estlund argues that, as part of the New Deal settlement, unions took on legal responsibilities for their members that are unique among voluntary associations—including agreeing to serve as representatives for all workers within the bargaining unit and to bargain in good faith in their interest—and that these responsibilities are the *quid* that justify the *quo* of requiring workers to pay agency fees for the cost of collective bargaining. *Id.* at 171–78. And Rogers has critiqued the decision and its potential extension as resting on a neoliberal conception of the NLRA focused on individual opt-out rights and a novel interpretation of the First Amendment, which deviates from the Court’s longstanding jurisprudence. See Rogers, *supra*

unions that would have to represent free riders without collecting necessary dues from them for the union to function and be effective. Rogers defends the social democratic vision from the vantage of liberal political theory. But this Article engages with both the constitutional struggle leading to the statute's enactment and frames its larger constitutional purposes. It offers historical reasons to call into question the extent to which judges are reading civil libertarian and neoliberal economic theories—which deviate from the purposes of the NLRA—atop the statute.⁴¹⁸

The Article's framing of the purposes and context of the NLRA may also be useful in other circumstances. For example, a broader purposive reading of the NLRA would support the notion that unions have a collective action right under section 7 of the statute to join together to litigate or arbitrate for mutual aid and protection.⁴¹⁹ Also, scholars have argued that the Supreme Court's expansive body of precedent allowing employers to permanently replace striking employees has made the right to strike enshrined in the NLRA inoperable, and an evolutive approach to interpreting the statute might push against these decisions for undermining the statute's purposes.⁴²⁰ Finally, a deeper understanding of the NLRA's purposes could support reading the statute to allow for minority unions, which are formed without a majority of a workforce agreeing to be represented by a union⁴²¹—a reading that could help to revitalize labor law in an era where fashioning majority unions is increasingly difficult because of employer advantages and tactics, many of which are sanctioned by courts.⁴²²

Consider one other important example. The weakening of the NLRA has been produced in part by judicial decisions making it difficult for workers to bargain with companies that are increasingly organized in layers of subunits

note 413, at 182–83, 202–06. The claim advanced here both strengthens the social democratic view of the NLRA advanced by Rogers and clarifies the constitutional settlement explored by Estlund. In this way, it can be employed against extending *Harris* and *Janus*.

418. Karl Klare has similarly argued that the Court in interpreting the NLRA has limited it to narrow goals, such as promoting industrial peace to make workplace relations more stable; ignored the deeper purposive goals of the NLRA; and taken a narrow interpretive perspective that benefits employers over workers by recognizing broad employer property and speech rights and weak worker rights. See generally Karl E. Klare, *Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness, 1937–1941*, 62 MINN. L. REV. 265 (1978).

419. The Supreme Court recently held that the NLRA's collective action provisions were not violated by employer-employee contracts requiring workers to arbitrate individually. See generally *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612 (2018). Before the decision issued, Katherine Stone argued correctly that the case was going to come down in significant part to how broadly or narrowly the NLRA is understood. Katherine V. W. Stone, *Procedure, Substance, and Power: Collective Litigation and Arbitration Under the Labor Law*, 61 UCLA L. REV. DISCOURSE 164, 173–77 (2013).

420. See generally Matthew W. Finkin, *Labor Policy and the Elevation of the Economic Strike*, 1990 U. ILL. L. REV. 547.

421. See generally CHARLES J. MORRIS, *THE BLUE EAGLE AT WORK: RECLAIMING DEMOCRATIC RIGHTS IN THE AMERICAN WORKPLACE* (2005).

422. See, e.g., Andrias, *supra* note 412, at 21–32 (explaining employer tactics and the judicially imposed obstacles to forming a majority union). See generally James J. Brudney, *Reflections on Group Action and the Law of the Workplace*, 74 TEX. L. REV. 1563 (1996).

and subcontracts. Corporations have adopted “fissured” corporate structures to make unionization difficult⁴²³ and to “diminish the potency of the NLRA and employment law.”⁴²⁴ This approach is useful in thwarting organizing insofar as the NLRA is interpreted as requiring workers to garner support to bargain with one single employer.⁴²⁵ As employers have “disintegrated” into webs of contracts and subunits, bargaining has also “disintegrated into single-division or single-facility units.”⁴²⁶

This diffusion makes it difficult for workers to bargain in myriad ways.⁴²⁷ To take one example that Kate Andrias draws out, the fast food workers behind the “Fight for \$15” have recognized the “futility of holding [unionization] elections at McDonald’s franchise stores on a one-off basis” and “ha[ve] sought to define McDonald’s as the joint employer of all McDonald’s employees.”⁴²⁸ They have therefore attempted “to move responsibility for bargaining and liability up the supply chain.”⁴²⁹

These efforts turn on how joint employers who can be responsible for bargaining with employers are understood under the NLRA. While the Third Circuit and the NLRB initially interpreted “joint employers” somewhat broadly, which made it easier for workers in fissured workplaces to bargain with the company atop the fissured firm, in the past few decades the NLRB changed positions and required an entity to “exercise direct, immediate, and actual control over the terms and conditions of employment before the entity would be considered a joint employer.”⁴³⁰ This interpretation of the NLRA made it “exceedingly difficult for workers to hold liable an entity that retaliated against them for organizing, unless that entity was their immediate employer.”⁴³¹

The Board reversed that position during the Obama administration and returned to the more flexible previous position adopted by the Third Circuit, but now is considering going back to its previous, more rigid view of what constitutes a joint employer through rulemaking.⁴³² Viewing the NLRA as in light of its constitutional purposes and as a super-statute helps to justify

423. See STONE, *supra* note 3, at 290; WEIL, *supra* note 3, at 10.

424. Andrias, *supra* note 412, at 6.

425. *Id.* at 30; Mark Barenberg, *Widening the Scope of Worker Organizing: Legal Reforms to Facilitate Multi-Employer Organizing, Bargaining, and Striking*, ROOSEVELT INST. 1, 3 (Oct. 7, 2015), <http://rooseveltinstitute.org/wp-content/uploads/2015/10/Widening-the-Scope-of-Worker-Organizing.pdf> [<http://perma.cc/JWN2-DS57>].

426. Barenberg, *supra* note 425, at 3.

427. *Id.*

428. Andrias, *supra* note 412, at 58.

429. Andrias, *supra* note 9, at 1618.

430. Andrias, *supra* note 412, at 31 (describing the change in position); see TLI, Inc., 271 N.L.R.B. 798 (1984), *overruled by* Browning-Ferris Indus. of Cal., Inc., 362 N.L.R.B. No. 186 (Aug. 27, 2015); Laerco Transp. & Warehouse, 269 N.L.R.B. 324 (1984), *overruled by* Browning-Ferris Indus. of Cal., Inc., 362 N.L.R.B. No. 186 (Aug. 27, 2015).

431. Andrias, *supra* note 412, at 31.

432. Hy-Brand Indus. Contractors, Ltd., 365 N.L.R.B. No. 156 (Dec. 14, 2017); Lydia Wheeler, *NLRB Proposes Rule to Establish Joint-Employer Standard*, HILL (Sept. 13, 2018), <https://thehill.com/regulation/court-battles/406589-nlrb-proposes-rule-to-establish-joint-employer-standard> [<https://perma.cc/A7CF-VDJQ>].

the Board's earlier approach, which turns on a purposive and evolutive reading of the NLRA.⁴³³ The narrowing of the joint employment standard, the Obama Board found, was untrue to the purposes of the NLRA and failed to make it functional under evolving conditions; it failed to "effectuate the purposes of the Act . . . in the current economic landscape" in which firms have fissured.⁴³⁴ Construing the NLRA otherwise would be "increasingly out of step with changing economic circumstances, particularly the recent dramatic growth in contingent employment relationships" and "potentially undermines the core protections of the Act for the employees impacted by these economic changes."⁴³⁵

The Obama Board also recognized, as the Supreme Court had in the past, the need to take an evolutive approach that would "adapt the Act to the changing patterns of industrial life."⁴³⁶ It thus held that "two or more statutory employers are joint employers of the same statutory employees if they 'share or codetermine those matters governing the essential terms and conditions of employment.'"⁴³⁷ This holding was consistent with the NLRA's definition of "employer" and the common-law standards that aid in interpreting it.⁴³⁸

The fight to reinstate the previous joint employment standards reflects the labor movement's "aspiration to negotiate employment standards on industrial, sectoral, and regional levels, rather than at the level of the individual employer or even the individual supply chain."⁴³⁹ The labor movement aims to make the collective bargaining promised by the NLRA more feasible in a changing economic world. Their fight shows how a narrow reading of the NLRA can have damaging effects for workers in the modern economy and contribute to the decline of unionism.

CONCLUSION

This Article has explored the rise of the New Deal worker security provisions both in their original context and in terms of their modern constitutional significance. I have argued that a wave of mobilization was behind the passage of the NLRA, SSA, and FLSA, and that the statutes are best understood as a set of "small c" constitutional commitments designed to redefine economic freedom around worker security.

This history bears on how we conceive of the promise and limitations of the statutes in a new era of economic constitutionalism. Americans now inhabit a "Second Gilded Age."⁴⁴⁰ It is one characterized by increasing levels of economic inequality and insecurity, as well as the ossification of

433. *Browning-Ferris*, 362 N.L.R.B. No. 186.

434. *Id.* at 1.

435. *Id.*

436. *Id.* at 11 (quoting *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251, 266 (1975)).

437. *Id.* at 2.

438. *Id.* at 15–18.

439. Andrias, *supra* note 412, at 62.

440. See Rahman, *supra* note 19, at 1330; see also LARRY M. BARTELS, *UNEQUAL DEMOCRACY: THE POLITICAL ECONOMY OF THE NEW GILDED AGE* 1–28 (2008).

many of the laws of economic security.⁴⁴¹ In response, movements are making new claims for redefined rights to collective action, wage protections, and new forms of social insurance and economic protection.⁴⁴² Scholars have rightly characterized their efforts as a form of “small c” constitutionalism since they seek to make the revitalized economic security provisions “part of the deep normative commitments that define Americans as a political community.”⁴⁴³

Part of this Article’s contribution is to reset the baseline by arguing that the economic security provisions for workers have been interconnected parts of the nation’s deep normative commitments. Indeed, scholars note that one goal of movements today is to “breathe new life into ossified super-statutes of the past” by reforming labor rights, social insurance, and raising wages.⁴⁴⁴ Part of this Article’s work has been to show that these federal laws both are super-statutes and should be understood as a complementary set.

At the same time, even with the statutes formally in place, a new era of worker insecurity has arisen in part because legislators, courts, and administrators have fallen short on making the statutes workable under changing conditions. Today’s ossification suggests that it would also be unwise to think that the formal entrenchment of a super-statute marks a sort of end, that super-statutes retain their “small c” constitutional status in enduring, perhaps even permanent, ways that are significant to citizens. The reality is that citizens, legislators, courts, and administrators must play an ongoing role in the continued interpretation and vitalization of these regimes. To tell the worker who faces countless obstacles in exercising collective action that the NLRA is a super-statute offers cold comfort.

Yet, like the individual workers who come together to exercise mutual aid and protection, the power of the New Deal super-statutes is augmented by their connection. Together, they offer a foundational model of Americans reinterpreting their constitutional principles in light of changing social and economic structure. They ground the idea of economic freedom as security as an important foundation of our modern constitutional history. This idea runs through and connects the statutes, reveals itself as a constitutive norm that both binds the statutes and is shared over time by the broad wave of citizens, legislators, and executive branch officials who made and entrenched them.

In one sense, then, this Article offers a tale of lost opportunity, a failure of courts, legislators, and executive officials in recent history to appreciate the constitutional edifice, to elaborate and honor it. But, in another sense, revealing the “workers’ constitution” fused in our constitutional architecture raises the burden for those who seek to dismantle it and raises the floor for those who seek to revitalize it.

441. *See supra* notes 1–5, 440.

442. Andrias, *supra* note 9, at 1591–94 (exploring “right-based claims . . . for higher wages, better conditions, and unions”).

443. *Id.* at 1596, 1617.

444. *Id.* at 1618.