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Publication Date

2020-03-03

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2020

Protection by Law, Repression by Law: Bringing Labor Back Into the Study of Law and Social Movements

Catherine L. Fisk

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PROTECTION BY LAW, REPRESSION BY LAW: BRINGING LABOR BACK INTO THE STUDY OF LAW AND SOCIAL MOVEMENTS

Catherine L. Fisk
Diana S. Reddy*

ABSTRACT

Within the rich, interdisciplinary literature on law and social movements, scholarly attention has often focused on how the civil rights movement, and other movements that share a resemblance to it, have mobilized law; less attention has been paid to the labor movement's experience of being regulated by law. In this Article, we ask how refocusing on the experiences of labor unions regulated by law complicates understandings of how movements shape law, and law shapes movements, in turn.

To explore the relationship between labor and law at a critical historical juncture, we delve into the largely unexplored legal history of the first major damages judgment against a labor union under the Taft-Hartley amendments to the National Labor Relations Act. Decided as the New Deal era gave way to the "rights revolution" of the 1950s and 1960s, this case dramatizes the costs of the labor movement's distinct regulatory framework. Law helped institutionalize unions—to give them autonomy, power, and legitimacy. At the same time, it subjected them to an increasingly restrictive regulatory scheme that made it harder for them to act—or to be seen—as a social movement.

* Fisk is the Barbara Nachtrieb Armstrong Professor of Law, University of California, Berkeley. Reddy is a Doctoral researcher in Jurisprudence and Social Policy, University of California, Berkeley; J.D., New York University School of Law. Our title is drawn from labor and civil liberties activist Elizabeth Gurley Flynn, who said: "There is less violence against labor today, but there are more legal restrictions There has been labor protection by law but there has also been labor repression by law[.]" Elizabeth Gurley Flynn, *Memories of the Industrial Workers of the World* (Nov. 8, 1962) (transcript available at http://www.sojust.net/speeches/elizabeth_flynn_memories.html).

We are grateful for comments from Kathryn Abrams, Catherine Albiston, Erwin Chemerinsky, Scott Cummings, Lauren Edelman, Gwendolyn Leachman, Nelson Lichtenstein, Michael McCann, Doug NeJaime, Dylan Penningroth, César Rosado Marzán, Christopher Tomlins, and Vasanthi Venkatesh. We also thank Catherine Powell, archivist of the Labor Archives and Research Center of the J. Paul Leonard Library at San Francisco State University, for her assistance with materials on the history of the ILWU; Ryan Reft, archivist at the Library of Congress, for his assistance with the Joseph Rauh Papers; Robin Walker, Librarian and Archivist for the ILWU, for her assistance accessing the ILWU legal archives; and the ILWU for granting us access. Responsibility for errors is ours.

Refocusing on labor re-centers the role of law in constructing the jurisprudential boundaries which channeled social movement activity throughout the twentieth century. As social movements today challenge these boundaries in order to assert more intersectional grievances, interrogating taken-for-granted notions about law and movements could not be more important.

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*Don't call it a comeback
I've been here for years*¹

INTRODUCTION

On November 22, 2019, a *New York Times* headline proclaimed: *Stunning \$93.6 Million Verdict Threatens to Bankrupt Major Union*.² The article recounted an ordinary dispute between the Portland local chapter of the International Longshore and Warehouse Union (ILWU) and the company that operated the city port; workers had protested the company's failure to hire union members for two jobs.³ What was extraordinary about the dispute was that it resulted in a \$93.6 million jury verdict against the union.⁴ The ILWU's total assets in November 2019—every cent contributed by its working-class members—were only \$8 million.⁵ Accordingly, the article noted that if the verdict were sustained, it could bankrupt the union, “embolden employers frustrated by labor disruptions,” and “chill[] the activities of unions that are just finding their footing after decades of setbacks.”⁶ In other words, the everyday application of law would destroy a social movement organization and, perhaps with it, quell a new wave of labor activism.

The year 2019 was not the first time that the ILWU (or other labor unions) faced a potentially catastrophic verdict as a result of protest activity arising from an everyday dispute. As we detail below, in 1949, the ILWU was hit with a verdict worth about \$8 million in 2020 dollars for picketing outside the Juneau Spruce lumber mill in Alaska.⁷ The United States Supreme Court upheld the

¹ L.L. Cool J, *Mama Said Knock You Out*, on MAMA SAID KNOCK YOU OUT (Def Jams Recordings 1990).

² Mike Baker, *Stunning \$93.6 Million Verdict Threatens to Bankrupt Major Union*, N.Y. TIMES, Nov. 22, 2019, at A18.

³ *Id.*

⁴ *Id.*

⁵ *Id.*

⁶ *Id.* After the initial jury verdict, the judge denied the defendants' motion for judgment as a matter of law, ordered remittitur to \$19 million, and, alternatively, a new trial on damages. *ICTSI Oregon, Inc. v. Int'l Longshore & Warehouse Union*, 442 F. Supp. 3d 1329, 1338–39 (D. Or. 2020); Maxine Bernstein, *Oregon Jury's \$93.6 Million in Damages Verdict Against Longshore Union Reduced to \$19 Million*, OREGONIAN (Mar. 5, 2020), <https://www.oregonlive.com/crime/2020/03/judge-reduces-jurys-936-million-in-damages-verdict-against-longshore-union-to-19-million.html>. After the plaintiff rejected the remittitur, the judge certified the case for interlocutory appeal. Bill Mongelluzzo, *ICTSI Portland Rejects \$19 Million Award Against ILWU*, JOC (Mar. 21, 2020, 5:34 AM), https://www.joc.com/port-news/longshoreman-labor/ictsi-portland-rejects-19-million-award-against-ilwu_20200321.html.

⁷ *Int'l Longshoremen's & Warehousemen's Union v. Juneau Spruce Corp.*, 342 U.S. 237, 240 (1952); *CPI Inflation Calculator*, BUREAU LAB. STAT., <https://data.bls.gov/cgi-bin/cpi/calc.pl?cost1=750%2C000.00&year1=194804&year2=202004> (last visited Sept. 5, 2020).

judgment in 1952.⁸ This was the first major damages judgment to reach the Court under the 1947 anti-labor Taft-Hartley Act, and the ensuing multi-year battle, in the courts and out, for the union's survival reveals how effectively business interests used law to squelch social movement activism. At that time, the ILWU was a multiracial, politically progressive, and activist union that was transforming labor and the politics of the Pacific West by organizing tens of thousands of farmworkers, food processors, and warehouse and dock workers into one big democratically governed union.⁹ Capitalizing on the opportunity presented by the verdict, company lawyers sought to use judgment collection devices against the ILWU as a way to roll back organizing victories throughout the West Coast and in Hawai'i.¹⁰ As the ILWU fought to stay afloat, it understood law and courts to be on the side of its opponents.¹¹ In the days after the Supreme Court's ruling, the ILWU's newspaper summed up this view with a political cartoon: In it, a bespectacled judge floats down from the heavens to hand the court's ruling, labeled "how to break strikes," to a businessman sporting top hat and cigar.¹²

The labor movement is a social movement, with a long history of shaping law and being shaped by it in turn.¹³ At times constrained by law and at times bolstered by it, the labor movement was one of the largest and most influential social movements before 1950.¹⁴ Labor activism was crucial to the enactment of the New Deal and to the period of relatively lower economic inequality in the

⁸ See *Int'l Longshoremen's & Warehousemen's Union*, 342 U.S. at 245; *infra* notes 295–96, and accompanying text.

⁹ See *infra* Part II.A.

¹⁰ See *infra* Part II.C.

¹¹ See *Supreme Court Upholds \$750,000 Against ILWU*, DISPATCHER, Jan. 18, 1952, at 1 (describing the Supreme Court's decision as proof that the Truman Administration was working with employers "to put unions out of business").

¹² Phil Drew, *The New Strikebreaking Gimmick*, DISPATCHER, Jan. 18, 1952, at 2.

¹³ See *infra* Part I.A (detailing our argument about how to conceptualize a "social movement" and why labor—in its various incarnations—must qualify). Importantly, labor organizing is explicitly recognized by law as protecting the public interest by "safeguard[ing] commerce from injury" and reducing the tendency of unrestrained capitalism to "aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners in industry." 29 U.S.C. § 151 (2018). And collective action by workers, including strikes, picketing, and boycotting, has been recognized by the Supreme Court for decades as foundational to the system in which workers and employers self-regulate. See, e.g., *NLRB v. Ins. Agents' Int'l Union*, 361 U.S. 477, 489, 493–95 (1960) (noting that the "presence of economic weapons in reserve, and their actual exercise on occasion by the parties, is part and parcel of the system that the Wagner and Taft-Hartley Acts have recognized"); *Thornhill v. Alabama*, 310 U.S. 88, 101–02, 104 (1940) (declaring unconstitutional a restriction on labor picketing even though it "may persuade some of those reached to refrain from entering into advantageous relations with the business establishment").

¹⁴ See Flynn, *supra* note *, *supra* notes 37–39 and accompanying text.

mid-twentieth century United States.¹⁵ Today, even following decades of deregulation of business and anti-labor decisions by courts and agencies, labor unions remain an institutional force for redistribution and economic security.¹⁶ Unions engage in protest, the quintessential social movement activity, to achieve their goals.¹⁷ Indeed, labor unions create an institutional channel for worker protest.¹⁸ As illustrated by the wave of labor organizing and protest activity during the COVID-19 crisis, unions can organize and mobilize those whose interests are overlooked in business and politics as usual.¹⁹ The goal of this mobilization, organizing, and protest is to challenge aspects of the status quo and to redistribute wealth and power from those who have more to those who have less.²⁰ And yet, organized labor—and the ways in which it has experienced law—has not been a primary case study within the law and social movements literature.²¹ Instead, as labor scholar Jane McAlevey wrote in 2016, there has been an “informal gestalt . . . that unions are not social movements at all.”²²

¹⁵ See Richard Kirsch, *The Future of Work in America: Policies to Empower American Workers and Ensure Prosperity for All*, ROOSEVELT INST. 2 (Mar. 25, 2014), <https://rooseveltinstitute.org/future-work-america-policies-empower-american-workers-and-secure-prosperity-all/>.

¹⁶ *Id.* at 3.

¹⁷ See Baker, *supra* note 2.

¹⁸ See Dan Clawson & Mary Ann Clawson, *What Has Happened to the U.S. Labor Movement? Union Decline and Renewal*, 25 ANN. REV. SOC. 95, 100 (1999) (“Unions are part of a legal regime that shapes and channels worker organization and activism through specification of legally permissible and impermissible modes of collective action and through the law’s very definition of workplace representation.”).

¹⁹ See, e.g., Alina Selyuhk & Shannon Bond, *More Essential Than Ever, Low-Wage Workers Demand More*, NPR (Apr. 28, 2020, 3:27 PM), <https://www.npr.org/2020/04/27/843849435/hometown-heroes-or-whatever-low-wage-workers-want-more-than-praise>.

²⁰ See, e.g., *Advocate for Social and Economic Justice*, AFL-CIO, <https://aflcio.org/what-unions-do/social-economic-justice> (last visited May 12, 2020) (describing how labor unions “re-writ[e] the rules of the economy, so they benefit the 99% instead of the wealthy few”).

²¹ As an empirical example of the field’s emphasis, we searched the Westlaw Journals and Law Reviews database in December 2019 for “social movement” or “social movements” in article titles. The search produced 146 articles. Of those articles produced, only seven articles—approximately 5% of the total—focus on the experience of the American labor movement. Among the twenty most-cited articles of those 146, i.e. those that presumably have had the greatest impact on the field, at best *one* can be said to substantially engage with the American labor movement. In contrast, six of those twenty (30%) emphasize the civil rights movement, and five (25%) emphasize some aspect of the women’s movement.

²² Her full quote is as follows:

There’s an informal gestalt in much of academia that unions are not social movements at all: that union equates to “undemocratic, top-down bureaucracy.” Yet not all so-called social movement organizations (SMOs) fit their own definition of social; many function from the top down as much as any bad union . . . Likewise, scholars assume that material gain is the primary concern of unions, missing that workplace fights are most importantly about one of the deepest of human emotional needs: dignity. The day in, day out degradation of peoples’ self-worth is what can drive workers to form the solidarity needed to face today’s union busters.

JANE F. MCALEVEY, NO SHORTCUTS: ORGANIZING FOR POWER IN THE NEW GILDED AGE 1 (2016) (emphasis omitted); see also JOSEPH E. LUDERS, THE CIVIL RIGHTS MOVEMENT AND THE LOGIC OF SOCIAL CHANGE 57 n.6

In this Article, we ask: How might the experiences of the labor movement, and, in particular, *labor unions as regulated by law*,²³ prove generative in theorizing the relationship between law and social movements? In asking this question, we seek to contribute to ongoing efforts to expand the boundaries of law and social movements scholarship.²⁴

Theory-building within the field of law and social movements has at times been shaped by its primary case studies, especially the civil rights movement, the women's movement, and the LGBTQ movement. Although a few classic and significant works have studied labor, the socio-historically specific ways in which the labor movement has experienced law have not fully permeated the literature.²⁵ Thinking of organized labor as a primary *case* of the relationship

(2010) ("Curiously, the labor movement is conventionally ignored by scholars of social movements.").

²³ We focus more on unions in this Article than on an important and growing portion of the labor movement: workers' centers and other "alt-labor" organizations. As we discuss in Part III.D, the ways in which unions and worker centers differ result, in part, from the ways in which law has regulated labor unions.

²⁴ Our discussion focuses on the law and social movements literature and not on the sociological literature on social movements or the political science literature on contentious politics (those fields have at times engaged in similar line-drawing, see *infra* note 51). Although generalizing about the content and defining the boundaries of the "law and social movements" literature is challenging, one useful synthesis of the field is provided by Michael McCann, *Law and Social Movements: Contemporary Perspectives*, 2 ANN. REV. L. & SOC. SCI. 17 (2006). Generally, we refer to a body of legal and socio-legal scholarship that attempts to generate theory about the relationship between law and social movements. See *infra* Part I.A and Part I.C.

Outside of the legal literature, sociologists have studied labor as a movement. See TAMARA KAY, NAFTA AND THE POLITICS OF LABOR TRANSNATIONALISM (2011); NEW LABOR IN NEW YORK: PRECARIOUS WORKERS AND THE FUTURE OF THE LABOR MOVEMENT (Ruth Milkman & Ed Ott eds., 2014); Kim Voss, *The Collapse of a Social Movement: The Interplay of Mobilizing Structures, Framing, and Political Opportunities in the Knights of Labor*, in COMPARATIVE PERSPECTIVES ON SOCIAL MOVEMENTS 227 (Doug McAdam, John D. McCarthy & Mayer N. Zald eds., 1996). And studies of particular union campaigns have emphasized the movement aspects of labor organizing. See, e.g., MARSHALL GANZ, WHY DAVID SOMETIMES WINS: LEADERSHIP, ORGANIZATION, AND STRATEGY IN THE CALIFORNIA FARM WORKER MOVEMENT (2009).

²⁵ As we detail in Part I.C, labor's relationship *with law* has been richly studied by a few law and social movements scholars, and by labor law scholars and legal historians, outside of the law and social movements canon. See, e.g., SCOTT L. CUMMINGS, BLUE AND GREEN: THE DRIVE FOR JUSTICE AT AMERICA'S PORT (2018) (studying law as a tool and a barrier to social movements in the context of movements responding to environmental degradation and low-wage work); MICHAEL W. MCCANN, RIGHTS AT WORK: PAY EQUITY REFORM AND THE POLITICS OF LEGAL MOBILIZATION (1994) (analyzing pay equity through a law and social movements lens). A work that has crossed over from the field of labor legal history to become part of the law and social movements canon considers the labor movement experience in depth. WILLIAM E. FORBATH, LAW AND THE SHAPING OF THE AMERICAN LABOR MOVEMENT 168–72 (1991). Among the many rich labor histories that are relevant for studying the intersection of labor and other social movements are DOROTHY SUE COBBLE, DISHING IT OUT: WAITRESSES AND THEIR UNIONS IN THE TWENTIETH CENTURY (1991) and ROBERT RODGERS KORSTAD, CIVIL RIGHTS UNIONISM: TOBACCO WORKERS AND THE STRUGGLE FOR DEMOCRACY IN THE MID-TWENTIETH-CENTURY SOUTH (2003). Works that shed light on the effect of law on labor as a movement include: KAREN ORREN, BELATED FEUDALISM: LABOR, THE LAW, AND LIBERAL DEVELOPMENT IN THE UNITED STATES (1991); Catherine Fisk, *Still "Learning Something of Legislation": The Judiciary in the History of Labor Law*, 19 LAW & SOC. INQUIRY 151 (1994) (surveying the literature on the effect of law on the American labor movement); Joel Rogers, *Divide and Conquer: Further "Reflections on the Distinctive Character of American*

between law and social movements accordingly has the potential to complicate some of the more taken-for-granted notions in the field, and with them the socio-legal imaginary of how social movements engage with law. The rights-focused movements of the latter half of the twentieth century have a familial resemblance in their relationship with law. They are envisioned, especially in the legal literature, as coalescing into lawyer-led advocacy organizations that wielded law to achieve broad cultural change through rights invocations, but that struggled to translate those wins into material gains on the ground.²⁶ The labor movement, particularly as it has been regulated by law since 1947, stands out as an alternative model for how movements and law intersect.

In addition, refocusing on labor creates space for a richer theorization of how law mediates the relationships *among* social movements. The *Juneau Spruce* case study shows that law seized upon the strengths of labor as a movement—its reliance on in-the-streets protest, its promotion of solidarity across entire economic sectors and geographic regions, and its institutional power drawn from member dues—and regulated them to deprive them of potency.²⁷ As other scholars have shown, the social movements that arose later, including the civil rights and women’s movements, sought alternate pathways to justice; they avoided the legal pitfalls that weakened labor, yet eventually bumped into jurisprudential constraints of their own.²⁸

Our discussion proceeds as follows. In Part I, we trace the pathways by which labor came to be de-emphasized in law and social movements studies and

Labor Laws”, 1990 WIS. L. REV. 1 (1990).

Partly in reaction to the limited focus of canonical law and social movements literature, a related field is beginning to flourish that focuses on law and organizing. This can be seen in both legal scholarship, *see, e.g.*, Kate Andrias & Benjamin I. Sachs, *Constructing Countervailing Power: Law and Organizing in an Era of Political Inequality*, 129 YALE L.J. (forthcoming 2020); Scott L. Cummings & Ingrid V. Eagly, *A Critical Reflection on Law and Organizing*, 48 UCLA L. REV. 443 (2001); Jennifer Gordon, *Law, Lawyers, and Labor: The United Farm Workers’ Legal Strategy in the 1960s and 1970s and the Role of Law in Union Organizing Today*, 8 U. PA. J. LAB. & EMP. L. 1, 10–13 (2005); James Gray Pope, *Labor-Community Coalitions and Boycotts: The Old Labor Law, the New Unionism, and the Living Constitution*, 69 TEX. L. REV. 889, 911–13 (1991); Benjamin I. Sachs, *Law, Organizing, and Status Quo Vulnerability*, 96 TEX. L. REV. 351, 376–77 (2017), and in law school-based law reform projects, *see, e.g.*, *Berkeley Law and Organizing Collective*, BERKELEY L., <https://www.law.berkeley.edu/experiential/pro-bono-program/slps/current-slps-projects/berkeley-law-and-organizing-collective/> (last visited Sept. 5, 2020); *Workers, Law, and Organizing Clinic*, UCLA L., <https://curriculum.law.ucla.edu/Guide/Course/6554> (last visited Sept. 5, 2020). Another important forthcoming article theorizes that legal scholars should “cogenerate law” by thinking in partnership with current Left social movements, including BLM and workers’ movements. Amna Akbar, Sameer Ashar & Jocelyn Simonson, *Movement Law*, 70 STAN. L. REV. (forthcoming 2020) (manuscript at 2).

²⁶ See *infra* Part I.C.

²⁷ See *infra* Part I.B.I.

²⁸ See *infra* notes 140–142 and accompanying text.

discuss how the emphasis on other movements can be understood to have shaped the field. We focus on five dimensions of the scholarship that do not fully reflect labor's experiences.

In Part II, we use our extensive archival work to reconstruct the ILWU's 1948 to 1955 struggle against the potentially ruinous *Juneau Spruce* damages judgment; we show how labor's unique regulatory regime was mobilized by opponents to constrain movement activity. The restriction on labor protest occurred just as a new cycle of protest began, the "rights revolution" of the 1950s (this phrase itself reflects the line-drawing we interrogate, since the understanding of certain claims as "rights" is a product of how movements have, and have not, engaged with law).²⁹

In Part III, we draw from this case study to suggest ways in which refocusing on labor's experience with law complicates understanding of the relationship between law and social movements, and specifically, how it enriches the five dimensions of the field identified in Part I. We also argue that reintegrating labor into the literature demonstrates the importance of studying the relationships *among* social movements, as mediated by law, over time and space. As one primary example, law helped construct the labor and civil rights movements as increasingly distinct from each other, by prohibiting labor unions (but not civil rights groups) from engaging in the forms of social movement activism—mass picketing and sector-wide boycotts—that came to be the model for protest after the 1950s. We conclude with thoughts on the future of labor as a social movement.

As movements today seek to assert more intersectional grievances, the legal boundaries that gave movements their shape throughout the twentieth century merit further scrutiny. Today, an increasing number of labor organizations challenge the multiple inequalities that impact their members' lives.³⁰ Similarly, the "new civil rights movement"—as the Black Lives Matter protests of 2020 have been called—center reforms that would build the welfare state and address economic inequality.³¹ But the ways in which legal constraints have channeled

²⁹ See CHARLES R. EPP, *THE RIGHTS REVOLUTION: LAWYERS, ACTIVISTS, AND SUPREME COURTS IN COMPARATIVE PERSPECTIVE* (1998) (employing the phrase "rights revolution" in an analysis that excludes labor unions from its understanding of social movement organizations, during the time period in which labor was arguably the most vibrant as a movement).

³⁰ See, e.g., SERV. EMPs. INT'L UNION, www.seiu.org (last visited June 27, 2020) (demanding protection for "ALL immigrants" because "unless we act together to protect ALL people we are ALL at risk" and announcing SEIU support for the Movement for Black Lives).

³¹ See BLM's #WhatMatters2020, BLACK LIVES MATTER, www.blacklivesmatter.com/what-matters-2020/ (last visited June 27, 2020) (announcing that BLM's #WhatMatters2020 campaign "will focus on issues

these movements, and the cultural adaptations that have followed, still have sway. Unpacking that history is, as always, essential to escaping it.

I. THE TIES THAT DIVIDE

We begin with the puzzle motivating our intervention: labor and other social movements have yet to receive widespread study *together* in the legal or socio-legal literature (or elsewhere, for that matter). Labor and its experiences with law have primarily been studied in one corner of the legal academy, while in another corner, the law and social movements literature has focused mainly on movements arising in the latter half of the twentieth century and their socio-historically specific approach to law. This stubborn line-drawing has shaped the trajectory of both fields. In section A, we discuss how and why labor and other social movements came to be studied separately. In section B, we discuss labor's experience with law. And in section C, we highlight five ongoing conversations in the law and social movements literature, which refocusing on labor has the potential to complicate.

A. *Enduring Divisions in the Study of Law and Movements*

Labor has often been studied separately from other social movements for a number of reasons—some purposeful, and some less so. Here, we trace the pathways by which these similar social phenomena came to be conceptualized distinctly.

1. *The Dominance of “Rights”*

The interdisciplinary literature on law and social movements is an essential resource for legal scholars and practitioners interested in the relationship between law and social change. Contained in law reviews, books by legal and socio-legal scholars, and interdisciplinary legal and social science journals, this literature has often focused on the experiences of the civil rights movement and on other movements which, since the 1950s, have made rights claims for historically marginalized groups.³² As Scott Cummings recently said, “[t]he

concerning racial injustice, police brutality, criminal justice reform, Black immigration, economic injustice, LGBTQIA+ and human rights, environmental injustice, access to healthcare, access to quality education, and voting rights and suppression”).

³² This emphasis can be seen with some of the earliest works in the field. See, e.g., JOEL F. HANDLER, *SOCIAL MOVEMENTS AND THE LEGAL SYSTEM: A THEORY OF LAW REFORM AND SOCIAL CHANGE* (1978). One important social movement that does not fit this mold and has received significant attention in the literature is the environmental movement (which we do not theorize in this Article). See, e.g., Alan Hunt, *Rights and Social Movements: Counter-Hegemonic Strategies*, 17 J.L. & SOC'Y 309, 318 (1990) (naming “three of the most

story of how and why social movements have come to matter within contemporary legal scholarship takes off at the moment of crisis within progressive legal thought caused by *Brown v. Board of Education*].”³³ Catherine Albiston and Gwendolyn Leachman likewise attribute to *Brown* and the civil rights movement the intense scholarly scrutiny of “whether and how law operates as an instrument of social change.”³⁴ And as law and society scholars Austin Sarat and Stuart Scheingold have written: “[t]he last half of the twentieth century in the United States was, in part, a story of law’s role in movements for social change[.]”³⁵ This subject-specific and time-limited emphasis has constrained the field’s theoretical horizons, leading to a focus on how and why social movements succeed or fail in generating social change via law.³⁶

In contrast, the literature has had less to say about organized labor.³⁷ The literature’s ambivalence about theorizing organized labor’s engagement with law, from a century before *Brown*³⁸ through today, is a missed opportunity to

important social movements” as the civil rights movement, the women’s movement, and the environmental movement); see also Thomas W. Merrill, *Foreword: Two Social Movements*, 21 *ECOLOGY L.Q.* 331, 331 (1994) (arguing that “[t]wo social movements in the last fifty years have had a profound impact on our understanding of law and the role of the courts in our system of government[.] . . . the civil rights movement . . . [and] the environmental movement”).

³³ Scott L. Cummings, *The Social Movement Turn in Law*, 43 *LAW & SOC. INQUIRY* 360, 365 (2018) [hereinafter *Turn*]; see Scott L. Cummings, *The Puzzle of Social Movements in American Legal Theory*, 64 *UCLA L. REV.* 1554, 1556, 1556 n.4 (2017) [hereinafter *Puzzle*] (identifying “the zenith of social movements in American politics” as being when Martin Luther King, Jr. led civil rights protesters across the bridge in Selma). It is important to note here that Scott Cummings has done some of the best recent work on labor activism, and thus, notwithstanding his accurate account of the periodization of the social movement literature, his own work does treat labor as an essential part of the contemporary social movement landscape. See CUMMINGS, *supra* note 25.

³⁴ Catherine R. Albiston & Gwendolyn M. Leachman, *Law as an Instrument of Social Change*, in 13 *INTERNATIONAL ENCYCLOPEDIA OF THE SOCIAL & BEHAVIORAL SCIENCES* 542, 542 (James D. Wright ed., 2d ed. 2015).

³⁵ Austin Sarat & Stuart Scheingold, *What Cause Lawyers Do For, and To, Social Movements: An Introduction*, in *CAUSE LAWYERS AND SOCIAL MOVEMENTS* 1, 1 (Austin Sarat & Stuart A. Scheingold eds., 2006) (emphasis added).

³⁶ See, e.g., Cummings, *Puzzle*, *supra* note 33, at 1556 (noting that social movements “have now achieved a privileged position in legal scholarship as engines of progressive transformation”); Edward L. Rubin, *Passing Through the Door: Social Movement Literature and Legal Scholarship*, 150 *U. PA. L. REV.* 1, 2 (2001) (arguing that legal scholarship on social movements, in contrast to the literature on social movements in other disciplines, focuses on “the movements’ specific effect on the decisions of courts, legislatures, and administrative agencies”).

³⁷ See *supra* note 21. As we noted above, there are significant exceptions. See *supra* notes 24–29.

³⁸ Labor’s movement activism and struggles with and against law go back to the early nineteenth century, if not before. See, e.g., MELVYN DUBOFSKY, *THE STATE AND LABOR IN MODERN AMERICA* 18–49 (1994); FORBATH, *supra* note 25, at 2–8; CHRISTOPHER L. TOMLINS, *THE STATE AND THE UNIONS: LABOR RELATIONS, LAW, AND THE ORGANIZED LABOR MOVEMENT IN AMERICA, 1880–1960*, at 36–44 (1985); SEAN WILENTZ, *CHANTS DEMOCRATIC: NEW YORK CITY AND THE RISE OF THE AMERICAN WORKING CLASS, 1788–1850*, at 33–

engage with one of the largest and most consequential social movements of the twentieth century.³⁹

2. Seeing Labor as a Social Movement

To some extent, the exclusion of labor is a purposeful one. While it is relatively easy to name the insurgent labor activism of the late nineteenth and early twentieth centuries a movement,⁴⁰ organized labor in the decades that followed did not always *seem* like one. Even those most sympathetic to the cause questioned whether organized labor was a social movement during the mid-to-late twentieth century, given its increasing institutionalization, relative political moderation, and ongoing failures to actively challenge racism and sexism within its ranks.⁴¹ In particular, the tendency of some unions during that time to see Black, Latinx, and Asian workers (and many recent immigrants) as a threat to union power and solidarity, rather than as allies in a common struggle, deeply undermined labor's credibility and efficacy as an agent of reform.⁴² As a result, Kim Voss and Rachel Sherman argued, "organized labor had become more like an institutionalized interest group than a social movement."⁴³

But the line between interest group and social movement is anything but bright, and it has often been tied to normative judgment as much as empirical assessment.⁴⁴ Much of organized labor may have become relatively

35 (20th anniversary ed. 1984).

³⁹ Union membership grew from 7.5% of employed workers in 1930 to 19.2% of employed workers in 1939 to 28.3% of employed workers in 1954. GERALD MAYER, CONG. RESEARCH SERV., RL32553, UNION MEMBERSHIP TRENDS IN THE UNITED STATES 23 (2004) (using Bureau of Labor Statistics data). Counting only nonagricultural workers, union membership grew from 28.6% in 1939 (the first year in which data was collected) to 35.4% in 1945. *Id.* Between 1930 and 1941, over 6.8 million people joined unions. *Id.*

⁴⁰ One of the relatively few canonical law and social movements works on labor focuses on this time period. See FORBATH, *supra* note 25.

⁴¹ Kim Voss & Rachel Sherman, *Breaking the Iron Law of Oligarchy: Union Revitalization in the American Labor Movement*, 106 AM. J. SOCIO. 303, 303–04 (2000).

⁴² Racism among union leaders and rank-and-file unions members, was a pervasive problem, particularly in certain industries. See generally THOMAS J. SUGRUE, SWEET LAND OF LIBERTY: THE FORGOTTEN STRUGGLE FOR CIVIL RIGHTS IN THE NORTH (2008) (describing racism and anti-Black violence by labor unions in the North); BRUCE NELSON, DIVIDED WE STAND: AMERICAN WORKERS AND THE STRUGGLE FOR BLACK EQUALITY (2001) (describing racism among longshore workers and steelworkers in selected cities nationwide).

⁴³ Voss & Sherman, *supra* note 41, at 304.

⁴⁴ Scholars have accordingly struggled to articulate a workable definition of a social movement. We do not wade into that debate here, other than to say that we think there is value in conceptualizing organized labor as one. We note that some scholars have also attempted to distinguish between "social movements" and "social movement organizations," and that as applied to labor, this has resulted in line drawing between "labor movements" and "labor unions." See John D. McCarthy & Mayer N. Zald, *Resource Mobilization and Social Movements: A Partial Theory*, 82 AM. J. SOCIO. 1212, 1217–18 (1977) (distinguishing between social movements and social movement organizations); Clawson & Clawson, *supra* note 18, at 109 (discussing the

conventional and bureaucratic in its methods, tepid in its demands, and moderate in its vision of an ideal society in the latter half of the twentieth century. Still, as Voss and Sherman caution, “[w]e have a fascination with the new and the dramatic in the social movement field and are often disdainful of older movements. Yet to limit our focus narrows our theoretical vision.”⁴⁵ Organized labor was not as new or dynamic in the 1950s as it was before, and as it may appear again now. But, to suggest it was not a social movement goes too far.

There is value in thinking of organized labor, even in its bureaucratic incarnation, as a social movement, even if not every union acts like one.⁴⁶ Labor unions engage in collective action—including protest—for the purpose of challenging existing economic and political power relationships. The definition of a social movement should be broad enough to encompass working-class people’s collective defiance of workplace authoritarianism to seek redistribution of both wealth and power. Moreover, to understand the relationship between law and social movements, it is essential to see that unions’ mid-century conservatism and institutionalization resulted, in part, from how they were regulated by law.⁴⁷ To exclude labor from consideration *because of its*

paradoxical nature of the institutional labor union as reliant on the labor movement more broadly for its existence). While that distinction is important in some contexts, we do not belabor it here. As Clawson and Clawson have argued, labor unions must both operate as bureaucratic organizations and *also* “constitute and reconstitute themselves as social movements” in order to achieve their goals. Clawson & Clawson, *supra* note 18, at 109. As such, we use the terms “labor movement,” “organized labor,” and “unions” relatively interchangeably throughout, except when greater precision is important for our analysis.

⁴⁵ Voss & Sherman, *supra* note 41, at 344.

⁴⁶ A number of scholars of labor, both in and outside of law schools, have studied the ways in which unions have failed to organize, mobilize, or advocate the interests of people of color, women, or even workers generally. *See generally, e.g.*, PAUL FRYMER, *BLACK AND BLUE: AFRICAN AMERICANS, THE LABOR MOVEMENT, AND THE DECLINE OF THE DEMOCRATIC PARTY* (2008) (discussing the experience of African Americans in the American labor movement); Marion Crain & Ken Matheny, *Labor’s Identity Crisis*, 89 CALIF. L. REV. 1767 (2001) (discussing the ways in which unionization fragments workers from their race, gender, and class identities).

⁴⁷ The argument that unions are interest groups rather than social movement actors is, as we have said, more normative than descriptive. *See supra* note 44 and accompanying text. But even where it is an accurate description, it oversimplifies and flattens the complex historical process by which labor organizations became less committed to mass organization and economic transformation. Exhibit A for the proposition that labor unions ceased being social movement actors in favor of being interest groups is the famous comment of AFL-CIO President George Meany in 1972, when he was asked about declining membership: “Frankly, I used to wonder about the . . . size of the membership. But quite a few years ago I just stopped worrying about it, because to me it doesn’t make any difference.” REUEL SCHILLER, *FORGING RIVALS: RACE, CLASS, LAW, AND THE COLLAPSE OF POSTWAR LIBERALISM* 230 (2015). As Schiller argues, “industrial pluralist labor law that developed in the immediate postwar period may have foreclosed a radical reconnection of the role that unions were to play in American society” and the increasingly conservative labor law of the 1970s made labor-organizing well-nigh impossible and reduced labor political power even more. *Id.* at 231.

relationship with law is to miss out on an opportunity to understand how law changes a movement.

The literature on “social movement unionism” (as opposed to “business unionism” or just plain unionism) is similarly premised on the argument that not all unions act like social movement organizations.⁴⁸ While we agree with the normative critique of unions which fail to prioritize solidarity with other marginalized groups, or worse, wield their collective power against such groups, we think it confuses the normative and the theoretical to treat organized labor’s status as a social movement as conditional. Instead, we see organized labor—whose power is rooted in protest and whose goal is redistribution—as a social movement, however limited and imperfect, in its own right. We find the term “social justice unionism” theoretically limiting for similar reasons. Distinguishing social justice unionism from unionism generally suggests that wages and benefits are not themselves “social justice” issues. Drawing from critical race theory, we prefer the term intersectional unionism for the kind of unions which seek to address the multiple inequalities in their members’ lives and communities.⁴⁹

3. *Ongoing Boundary Work*

The tendency to overlook labor—both in the law and social movements literature and in the disciplinary study of social movements⁵⁰—is not solely the product of purposeful exclusion, however; it also verges on hegemonic.⁵¹ It has often been taken for granted that labor is fundamentally distinct from other forms

⁴⁸ See, e.g., RICK FANTASIA & KIM VOSS, *HARD WORK: REMAKING THE AMERICAN LABOR MOVEMENT* 120 (2004) (describing the “practices and possibilities of a social movement unionism” as a distinct form of labor activism) (capitalization altered).

⁴⁹ See Hajer Al-Faham, Angelique M. Davis & Rose Ernst, *Intersectionality: From Theory to Practice*, 15 ANN. REV. L. & SOC. SCI. 247 (2019).

⁵⁰ Clawson & Clawson, *supra* note 18, at 96 (noting that “sociologists . . . have devoted surprisingly little attention to the labor movement,” and reflecting that “[a]s a discipline centrally concerned with processes of institutional functioning, social movement activism, and class differentiation and domination, this relative neglect is striking”); see also Gabriel Hetland & Jeff Goodwin, *The Strange Disappearance of Capitalism from Social Movement Studies*, in *MARXISM AND SOCIAL MOVEMENTS* 83, 84–86 (Colin Barker, Laurence Cox, John Krinsky & Alf Gunvald Nilsen eds., 2014) (noting that social movement studies have failed to pay adequate attention to organized labor and other economic movements in recent decades and have failed to adequately interrogate political economy when theorizing movement activity).

⁵¹ This ongoing line-drawing is evident within the leading academic organizations whose members study social movements. In the American Sociological Association, there are separate groups for social movement and labor movement research and scholarship, and in the Law and Society Association, there are separate research groups for law and social movements and labor rights. See *ASA Sections*, AM. SOCIO. ASS’N, <https://www.asanet.org/asa-communities/asa-sections> (last visited Sept. 5, 2020); *Collaborative Research Networks*, LAW & SOC’Y ASS’N, <https://www.lawandsociety.org/crn.html> (last visited Sept. 5, 2020).

of collective behavior.⁵² This is partly about path dependency; organized labor emerged well before the other movements prioritized by the field. But it is also because of the intractable problem within social movement theory (and arguably within all social theory) of how to reconcile the economic and the socio-political. We discuss each of these issues, in turn.

Temporally, labor gained both power and prominence in the early-to-mid twentieth century, before the modern conceptualization of a social movement fully emerged.⁵³ Owing to its success in gaining institutional power in the 1930s and 1940s, labor was no longer seen as a movement; it was an economic institution.⁵⁴ It accordingly was integrated into academia either on its own terms (as in “labor studies” or “labor law”) or as part of a broader study of economic issues (as in “industrial relations”).⁵⁵

The study of social movements, as a category distinct from labor, followed a distinct trajectory. Prior to the 1960s, academics tended to view “collective behavior” skeptically, largely because Nazism and fascism were the leading case studies.⁵⁶ Engaging in politics outside of the political system was generally presumed irrational⁵⁷ or deviant, because then-dominant pluralist political theory asserted that the political system was accessible to all.⁵⁸

With the increasing national prominence of the civil rights movement in the 1950s and 1960s, however, academics began to reconsider their normative and empirical approaches to social movements.⁵⁹ Movements could now be understood as a rational reaction to an unequally accessible political system—and this made them seem worthy of more systematic study.⁶⁰ Social scientists developed resource mobilization and political process theories to explain why,

⁵² See *supra* notes 24, 51, and accompanying text.

⁵³ Compare Voss & Sherman, *supra* note 41, at 310–11 (discussing the decline of labor as the twentieth century progressed), with *infra* notes 59–63 and accompanying text (highlighting the new conceptualizations of social movements that began to emerge at the turn of the twentieth century).

⁵⁴ Voss & Sherman, *supra* note 41.

⁵⁵ See *supra* note 51.

⁵⁶ See, e.g., SIDNEY G. TARROW, STRUGGLE, POLITICS, AND REFORM: COLLECTIVE ACTION, SOCIAL MOVEMENTS, AND CYCLES OF PROTEST 25 (1989).

⁵⁷ Later scholarship would reflect on the irrationality of collective action from a micro-economic rather than a political process perspective; and in that account, labor was a principal case study. MANCUR OLSON, THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS (1965).

⁵⁸ See, e.g., Louis Lindsay, *The Pluralist Persuasion in American Democratic Thought*, 22 SOC. & ECON. STUD. 479, 484–87 (1973).

⁵⁹ See SIDNEY TARROW, POWER IN MOVEMENT: COLLECTIVE ACTION, SOCIAL MOVEMENTS AND CONTENTIOUS POLITICS (2d. ed. 1998).

⁶⁰ *Id.*

how, and when social movements might rationally emerge.⁶¹ Both treat social movements as instrumental, strategic action, deploying the resources available to them or seizing upon political opportunities, in order to achieve goals.⁶² With the “cultural turn” of the 1980s, scholars began to reincorporate questions of meaning-making, culture, identity, and emotions into their analyses of social movements, but this time, with the added recognition that politics and law, too, involve signification struggles.⁶³

By the time the study of social movements claimed its own intellectual space, there were a number of barriers to incorporating labor as an appropriate object of study. Labor was already being studied in other departments and schools.⁶⁴ In addition, labor unions were in decline, both in power and perhaps more so in terms of legitimacy as a social movement.⁶⁵ As noted above, much of the New Left deemed the majority of labor unions to be bureaucratic interest groups rather than social movement organizations.⁶⁶ In part, this was because labor was no longer a “protest” movement seeking rights from the state.⁶⁷ Having gained such rights in the 1930s, labor now largely deployed its power in the “private” sphere, seeking redistribution directly from corporations.⁶⁸ Labor was different from other social movement actors: it was institutional, whereas social movements were thought to be noninstitutional; it used protest to influence business organizations, whereas they used protest to influence state policy.⁶⁹ Moreover, many labor unions were not meaningfully engaged in struggles against racial and gender oppression, or other progressive causes, at that time.⁷⁰

⁶¹ See *id.* at 24–25; see also Aldon D. Morris, *A Retrospective on the Civil Rights Movement: Political and Intellectual Landmarks*, 25 ANN. REV. SOCIO. 517, 527 (1999) (arguing that “the civil rights movement was the catalyst behind the wave of social movements that crystallized in the United States beginning in the middle of the 1960s and continuing to the present”).

⁶² See *supra* notes 59–61 and accompanying text.

⁶³ See James M. Jasper, *Cultural Approaches in the Sociology of Social Movements*, in HANDBOOK OF SOCIAL MOVEMENTS ACROSS DISCIPLINES 59 (Bert Klandermans & Conny Roggeband eds., 2010); see also Douglas NeJaime, *Constitutional Change, Courts, and Social Movements*, 111 MICH. L. REV. 877, 879 (2013) (outlining major theoretical advances within the disciplinary study of social movements and how they might improve understanding of law and social movements).

⁶⁴ See *supra* note 51.

⁶⁵ See Voss & Sherman, *supra* note 41, at 304, 310–11.

⁶⁶ *Id.* at 304.

⁶⁷ *Id.* at 310–11.

⁶⁸ *Id.* at 310.

⁶⁹ See *infra* Part I.C.2.

⁷⁰ See, e.g., DOROTHY SUE COBBLE, *THE OTHER WOMEN’S MOVEMENT: WORKPLACE JUSTICE AND SOCIAL RIGHTS IN MODERN AMERICA* (2004) (theorizing women’s involvement in the labor movement as separate from the broader feminist movement).

The disjuncture between labor movements and other social movements is about more than path dependence, though. It also represents the limitations of existing theories about the relationship between the economic and the cultural, the material and the ideational. Here, the long shadow of Marx and Marxist scholarship has often been read to occupy the field of studying class conflict, and therefore labor movements.⁷¹ And because Marxist scholars were thought to be interested only in the working class and not in other potential agents of social transformation, social movement scholars have often understood themselves to be building a new field of study which would focus on all movements *but* labor.⁷²

Within the sociological literature on social movements, one theoretical move which treats labor as fundamentally different from other movements is the distinction drawn between “old” and “new” social movements.⁷³ Here, old social movements—of which labor is the paradigmatic example—are understood as focusing on material inequalities.⁷⁴ In contrast, new social movements are post-material, concerned about identity and ideology.⁷⁵ While the old-versus-new taxonomy has been criticized for its simplicity, the intuition that *something* about social movements changed in the mid-twentieth century continues to shape the field. Nancy Fraser has attempted to rehabilitate the “class” versus “identity” debate by drawing a distinction between a “politics of redistribution” and a “politics of recognition.”⁷⁶ Yet, as others have noted, even this distinction fails to capture the complexity of the issue.⁷⁷ Labor always fought for dignity, not just money; for roses, and not just bread.⁷⁸ And recognition and inclusion have

⁷¹ See COLIN BARKER, LAURENCE COX, JOHN KRINSKY & ALF GUNVALD NILSEN, *Marxism and Social Movements: An Introduction*, in MARXISM AND SOCIAL MOVEMENTS 1, 1–3 (Colin Barker, Laurence Cox, John Krinsky & Alf Gunvald Nilsen eds., 2013).

⁷² Some more recent Marxist scholarship has sought to challenge this line-drawing and to use Marx as a starting point for understanding all movements. See, e.g., *id.*

⁷³ See, e.g., Alberto Melucci, *The New Social Movements: A Theoretical Approach*, 19 SOC. SCI. INFO. 199, 199–201 (1980).

⁷⁴ *Id.* at 199–200.

⁷⁵ *Id.* at 217–22.

⁷⁶ Nancy Fraser, *Social Justice in the Age of Identity Politics: Redistribution, Recognition, and Participation*, Tanner Lecture on Human Values (Apr. 30–May 2, 1996) (transcript available at the University of Utah’s Tanner Lecture Library).

⁷⁷ See Judith Butler, *Merely Cultural*, NEW LEFT REV. (Jan. 1998), <https://newleftreview.org/issues/I227/articles/judith-butler-merely-cultural>.

⁷⁸ Indeed, the “bread and roses” metaphor that rejects prioritization of economic over cultural transformation as a goal of movement activism comes from a poem adopted as an anthem by women textile workers on strike in Lawrence, Massachusetts in 1912:

Our lives shall not be sweated from birth until life closes—

Hearts starve as well as bodies: Give us bread, but give us roses.

James Oppenheimer, *Bread and Roses*, 73 AM. MAG. 214, 214 (1911).

material consequences, not merely psychological ones. In other words, there is much lost in these categorization schemes. This is not to say that there are *no* meaningful distinctions between these movements; this Article is about many of them. Rather, it is to say that those distinctions are not inevitable, but constructed; things to be explained rather than assumed. In Part III.C, we argue that law, coupled with socio-historic contingency, has played an undertheorized role in building these movements as separate and apart from each other.

Similar theoretical assumptions color legal scholarship's disparate treatment of labor and other movements. Scott Cummings explains how class and race have been relegated to entirely different jurisprudential areas: the class-based perspective of legal realists and critical legal scholars, on the one hand, and the race-based perspective of mid-twentieth century liberals, progressives, and critical race scholars, on the other.⁷⁹ He argues that the first category of theorists, consistent with a Marxian understanding of the limits of "political freedom" under law, tend to be skeptical of the judiciary's ability to effect progressive change and rely, instead, on the political branches.⁸⁰ In contrast, those who came of age with a reverence for the Warren Court tend to view the judiciary as a powerful check on the majoritarian political process, and as an essential defender of minority rights.⁸¹ Cummings argues that insights from labor have largely been incorporated into critical legal studies, whereas insights from other movements dominate the law and social movements literature.⁸²

In another variation on this theme, Edward Rubin conceptualizes the jurisprudential importance of social movements and argues that the "social" represents a separate category of human action, distinct from both the "economic" and the "political."⁸³ He posits that the study of law and social movements is about conceptualizing how the social can be generative of law in the same way that the economic and the political can be.⁸⁴ Under this scheme, it is unclear if labor, or other movements that are regarded as partially or fully economic in goals and orientation, should even qualify as *social* movements. Yet, from a law and political economy perspective, such an understanding of the economic as a separate sphere from the socio-political is itself a hallmark of the neoliberal era, which has done much to naturalize increasing economic inequality (and the weakening of labor unions) as an economic necessity rather

⁷⁹ Cummings, *Turn*, *supra* note 33, at 365–68.

⁸⁰ *Id.* at 366–67.

⁸¹ *Id.*

⁸² *Id.* at 367–68.

⁸³ Rubin, *supra* note 36, at 3–5.

⁸⁴ *Id.*

than a socio-political choice.⁸⁵ Consistent with this dichotomy between the economic and the socio-political, some of the law and social movements scholarship that does consider labor unions has tended to distinguish their “movement” aspects from their “bread and butter” work fighting for wages and benefits for low- and middle-income people. For example, most of Lani Guinier’s and Gerald Torres’ account of the United Farm Workers focuses on Teatro Campesino and almost none focuses on strikes, boycotts, or contracts.⁸⁶

At the same time, a growing body of scholarship challenges these constructed boundaries between the labor movement (or worker activism more generally) and other social movements. For example, Michael McCann, Scott Cummings, Kate Andrias, and Ben Sachs, among others, study labor as a movement.⁸⁷ McCann’s influential book, *Rights at Work*—now part of the law and social movements canon—focuses on campaigns for pay equity both through legislation and litigation, and through unions’ organizing in workplaces.⁸⁸ In this Article, we build upon their work to more directly interrogate the boundaries of the field, and to explore how refocusing on labor enriches the study of the relationship between law and social movements.

B. *Labor as a Social Movement*

Although labor has not been a primary case study within canonical law and social movements literature, labor movement activism *has* been extensively studied within legal academia, by labor law scholars and legal historians. In this section, we review the literature on labor and law.

1. *Law as the Problem*

The literature on organized labor’s encounters with law is vast and has varied over time. While some early labor scholars saw reason for optimism about what

⁸⁵ See KATHARINA PISTOR, *THE CODE OF CAPITAL: HOW THE LAW CREATES WEALTH AND INEQUALITY* 1–2 (2019); David Singh Grewal, *The Laws of Capitalism*, 128 HARV. L. REV. 626, 655–56 (2014) (reviewing THOMAS PIKETTY, *CAPITAL IN THE TWENTY-FIRST CENTURY* (2014)).

⁸⁶ See, e.g., Lani Guinier & Gerald Torres, *Changing the Wind: Notes Toward a Demosprudence of Law and Social Movements*, 123 YALE L.J. 2740, 2786–91 (2014).

⁸⁷ See MCCANN, *supra* note 25; MICHAEL W. MCCANN & GEORGE I. LOVELL, *UNION BY LAW: FILIPINO AMERICAN LABOR ACTIVISTS, RIGHTS RADICALISM, AND RACIAL CAPITALISM* (2020); SCOTT L. CUMMINGS, *AN EQUAL PLACE: LAWYERS IN THE STRUGGLE FOR LOS ANGELES* (2020); Andrias & Sachs, *supra* note 25; Michael M. Oswalt, *Alt-Bargaining*, 82 LAW & CONTEMP. PROBS. 89 (2019).

⁸⁸ See MCCANN, *supra* note 25. To be clear, *Rights at Work* does not claim to be a study of law and social movements; it is about legal mobilization by workers and how law shapes, as constraint and opportunity, struggles for change in the workplace. *Id.* at 9–11.

law might do for labor,⁸⁹ most have theorized law as a mechanism of control *imposed* on movement activism, rather than a tool proactively wielded by movements.

Prior to labor's precipitous decline after 1970, a decline seen as tied to an increasingly archaic and constraining legal regime, labor law scholars tended to be more sanguine about law.⁹⁰ Given massive state repression of labor in the late 1800s and early 1900s, many scholars initially saw the New Deal era laws that protected labor organizing as important victories for the labor movement.⁹¹ These laws—the Norris-LaGuardia Act of 1932,⁹² which prohibited injunctions in labor disputes, and the National Labor Relations Act of 1935 (NLRA or Wagner Act),⁹³ which protected the right to organize, collectively bargain, and strike—helped shield labor protest from state repression and legitimized workers' rights to engage in collective action.⁹⁴

⁸⁹ See generally, e.g., Archibald Cox, *Some Aspects of the Labor Management Relations Act, 1947* (pt. 1), 61 HARV. L. REV. 1 (1947) (exploring the possibilities offered to labor by the Wagner Act); Matthew W. Finkin, *Revisionism in Labor Law*, 43 MD. L. REV. 23 (1984) (critiquing two scholars positing the deradicalization of the labor movement by courts after the Wagner Act); Harry Schulman, *Reason, Contract, and Law in Labor Relations*, 68 HARV. L. REV. 999 (1955) (speaking positively about the law and reason underlying the collective labor agreement system). They came in for a great deal of criticism in the 1970s and 1980s for articulating a vision of labor law that failed to protect labor's right to build worker power. See, e.g., Staughton Lynd, *Government Without Rights: The Labor Law Vision of Archibald Cox*, 4 INDUS. REL. L.J. 483, 483 n.2 (1981); James Gray Pope, *The Thirteenth Amendment Versus the Commerce Clause: Labor and the Shaping of American Constitutional Law, 1921–1957*, 102 COLUM. L. REV. 1 (2002). Blame has also been placed on courts and the National Labor Relations Board (NLRB) for interpreting the statutes in a way that subverted the power they gave labor. See generally JAMES A. GROSS, *BROKEN PROMISE: THE SUBVERSION OF U.S. LABOR RELATIONS POLICY, 1947–1994* (1995) (discussing the NLRB's lack of consistency toward labor policy over the years and the Court's history of substituting its policy preferences for those of Congress); Karl Klare, *The Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness, 1937–1941*, 62 MINN. L. REV. 265, 269 (1978) (arguing that the Supreme Court's early decisions interpreting the Wagner Act narrowed the range of legitimate labor activity and thereby "did . . . much to guide the long-run development of the labor movement into domesticated channels and, indeed, to impede workers' interests"); Katherine Van Wezel Stone, *The Post-War Paradigm in American Labor Law*, 90 YALE L.J. 1509 (1981) (critiquing the industrial pluralist model and the relationship between courts and the NLRB that underlies it). Nevertheless, even the critics of labor law regard the fundamental principle of the National Labor Relations Act (NLRA)—the right of a subset of employees to engage in concerted activity for mutual aid and protection—as being a core aspect of legal protection for movement building. See Staughton Lynd, *Communal Rights*, 62 TEX. L. REV. 1417, 1423 (1984) (noting that, "[m]ore than any other institution in capitalist society, the labor movement is based on communal values," and that the Critical Legal Studies critique of rights rhetoric "misses the mark when it applies its critical analysis to the right to engage in concerted labor activities").

⁹⁰ See *supra* note 89.

⁹¹ See *supra* note 89.

⁹² 47 Stat. 70 (1932); 29 U.S.C. §§ 101–115.

⁹³ 49 Stat. 449 (1935); 29 U.S.C. §§ 151–166.

⁹⁴ In addition to some of the early work cited above, *supra* note 89, recognizing the potential of law to protect labor against repression, some recent work has credited vigorous enforcement of the Wagner Act with enabling labor movement success in social and economic transformation. See MOON-KIE JUNG, *REWORKING*

But labor (with the significant exceptions of agricultural and domestic workers and independent contractors) won these limited rights decades ago.⁹⁵ In the years since, labor has lost much more than it has won via the state. The most important of these losses was the Taft-Hartley Act of 1947.⁹⁶ Enacted by the first Republican-dominated Congress since the passage of the NLRA, it amended the statute to sharply restrict the rights of workers to act collectively through unions.⁹⁷ And as labor has increasingly struggled in recent decades under this amended regulatory regime, law has, in turn, increasingly been seen by scholars as a tool of social control, blunting whatever transformative potential the labor movement once had.⁹⁸

The mechanisms by which law has been understood to bridle labor are varied, but the basic theme is straightforward—in any number of ways, the state has suppressed concerted activity that threatened capitalism. Criminal law made unionization illegal in most places until as late as the 1930s.⁹⁹ Injunctions against strikes from the 1870s to 1932 (in federal courts), and even later (in state courts) deterred activism, by forcing workers back to work.¹⁰⁰ Lawyers for business in the three decades after the adoption of the Sherman Antitrust Act of 1890 created a framework for narrowing the permissible scope of worker collective action.¹⁰¹ Restrictions on picketing and boycotts deprived workers of the ability to form

RACE: THE MAKING OF HAWAII'S INTERRACIAL LABOR MOVEMENT 110–22 (2006) (recounting the history of labor organizing in Hawai'i and explaining its eventual success in the 1940s as being in part due to enforcement of Wagner Act).

⁹⁵ See Pope, *supra* note 89, at 15–17.

⁹⁶ 61 Stat. 136 (1947); 29 U.S.C. §§ 141–188.

⁹⁷ 29 U.S.C. §§ 141–188.

⁹⁸ As Jennifer Gordon summed it up, contemporary “discussions of the NLRA from the union perspective are tinged with desperation about what law does for and to organizing[.]” Gordon, *supra* note 25, at 2; see Klare, *supra* note 89, at 269–70.

⁹⁹ See VICTORIA C. HATTAM, *LABOR VISIONS AND STATE POWER: THE ORIGINS OF BUSINESS UNIONISM IN THE UNITED STATES* 30–75 (1993); Herbert Hovenkamp, *Labor Conspiracies in American Law, 1880–1930*, 66 TEX. L. REV. 919 (1988).

¹⁰⁰ FELIX FRANKFURTER & NATHAN GREENE, *THE LABOR INJUNCTION* (photo reprint. 1963) (1930); JOSIAH BARTLETT LAMBERT, “IF THE WORKERS TOOK A NOTION”: THE RIGHT TO STRIKE AND AMERICAN POLITICAL DEVELOPMENT 43–44, 64–65 (2005). Later examples include James B. Atleson, *The Legal Community and the Transformation of Disputes: The Settlement of Injunction Actions*, 23 LAW & SOC'Y REV. 41, 44–45 (1989), an empirical study of all cases between 1974 and 1979 in Buffalo, New York, in which employers attempted to enjoin picketing. *Id.* at 48–51. Atleson found that the cases were resolved mainly through negotiation. *Id.* Restrictions on picketing were imposed in a majority of cases and in the majority of those, counsel for the union consented to the restriction (often because it appeared likely that the court would issue an injunction). *Id.*

¹⁰¹ See DANIEL R. ERNST, *LAWYERS AGAINST LABOR: FROM INDIVIDUAL RIGHTS TO CORPORATE LIBERALISM* 5–9 (1995); Sanjukta Paul, *The Enduring Ambiguities of Antitrust Liability for Worker Collective Action*, 47 LOY. U. CHI. L.J. 969, 1001–16 (2016).

common cause with each other and with consumers and the public.¹⁰² Fines and damages judgments against unions and their members under tort, criminal, and antitrust law, and under the Taft-Hartley Act, were often devastating for workers and their unions.¹⁰³

Thus, the skeptical view is that even when law has ostensibly protected the right of workers to act collectively, it has still constrained movement activism. From this perspective, it was not just the Taft-Hartley Act's regressive amendments to the NLRA that were the problem for labor, it was the NLRA getting in the way to begin with.¹⁰⁴ Agency determinations of who could bargain with whom over what foreclosed the possibility that labor might play a real role in co-determining conditions of employment or in countering employers' market power.¹⁰⁵ The eagerness of the NLRB and courts in the 1940s to impose the rule of law on labor militance channeled labor activity into bargaining dominated by union leadership at the expense of the rank and file.¹⁰⁶ Labor's social movement activism was put on hold, both by law and by "voluntary" restraint of union leaders who feared being deemed unpatriotic during World War II,¹⁰⁷ and the labor movement never recovered.

For labor law scholars, the once-provocative thesis that even the NLRA as enacted was part of the problem has now become a consensus view.¹⁰⁸ The liberal legalism of the NLRA preserved rather than upended relations between

¹⁰² See, e.g., Dianne Avery, *Images of Violence in Labor Jurisprudence: The Regulation of Picketing and Boycotts, 1891–1921*, 37 BUFF. L. REV. 1, 32 (1989); Hiba Hafiz, *Picketing in the New Economy*, 39 CARDOZO L. REV. 1845, 1849–51 (2018).

¹⁰³ See, e.g., RICHARD A. BRISBIN, JR., A STRIKE LIKE NO OTHER STRIKE: LAW AND RESISTANCE DURING THE PITTSFORD COAL STRIKE OF 1989–1990, at 193–98 (2002); ERNST, *supra* note 101, at 149–55; AHMED WHITE, THE LAST GREAT STRIKE: LITTLE STEEL, THE CIO, AND THE STRUGGLE FOR LABOR RIGHTS IN NEW DEAL AMERICA 237 (2016).

¹⁰⁴ See *infra* note 107 and accompanying text.

¹⁰⁵ TOMLINS, *supra* note 38, at 132–40; Daniel R. Ernst, *Common Laborers? Industrial Pluralists, Legal Realists, and the Law of Industrial Disputes, 1915–1943*, 11 LAW & HIST. REV. 59, 79–84 (1993).

¹⁰⁶ See, e.g., Klare, *supra* note 89, at 290, 336; James Gray Pope, *How American Workers Lost the Right to Strike, and Other Tales*, 103 MICH. L. REV. 518, 533–34 (2004); David M. Rabban, *Has the NLRA Hurt Labor?*, 54 U. CHI. L. REV. 407, 422–27 (1987).

¹⁰⁷ See Klare, *supra* note 89, at 270 n.16; see also NELSON LICHTENSTEIN, LABOR'S WAR AT HOME: THE CIO IN WORLD WAR II (2003) (discussing the role of World War II in diminishing the CIO's movement activism by institutionalizing union leadership and delegitimizing the activities of the rank and file).

¹⁰⁸ See, e.g., Kate Andrias, *The New Labor Law*, 126 YALE L.J. 2, 5–6, 13–17 (2016); Cynthia L. Estlund, *Labor, Property, and Sovereignty After Lechmere*, 46 STAN. L. REV. 305, 307 (1994); Benjamin I. Sachs, *Labor Law Renewal*, 1 HARV. L. & POL'Y REV. 375, 375 (2007); Paul Weiler, *Promises to Keep: Securing Workers' Rights to Self-Organization Under the NLRA*, 96 HARV. L. REV. 1769, 1776–77 (1983).

labor and capital,¹⁰⁹ and the Taft-Hartley Act was just the nail in the coffin rather than the mortal blow.

And yet, it is worth asking whether this *should* be the end of the story. Below we argue that the elision of labor within law and social movements scholarship can be seen to have limited the theoretical horizons of that field. But for scholars who seek to understand the American labor movement, the failure to consider labor as one movement among many may have been limiting too. For labor law scholars, labor has often been seen as *sui generis*, as a movement which must be understood on its own terms. A strand of law and social movements scholarship, having failed to consider the struggles of organized labor, may be too optimistic about law's possibilities. On the other hand, a strand of labor law scholarship may have too bleak an assessment of law.¹¹⁰ One ongoing critique of the American labor movement is that it has been overly suspicious of state power and law, and too confident about what it could accomplish solely through private ordering.¹¹¹ If this critique is correct, labor's historical resistance to using public law as a resource may itself be constitutive of American exceptionalism.

2. *Lawyering for the Labor Movement*

The labor law literature has devoted less attention to the role of lawyers than

¹⁰⁹ SCHILLER, *supra* note 47, at 83–86; Stone, *supra* note 89, at 1516–17 (arguing that labor law “serves as a vehicle for the manipulation of employee discontent and for the legitimization of existing inequalities of power in the workplace”).

¹¹⁰ Many law and social movements scholars have been highly critical of law's possibilities. See, e.g., Sandra R. Levitsky, *To Lead with Law: Reassessing the Influence of Legal Advocacy Organizations in Social Movements*, in CAUSE LAWYERS AND SOCIAL MOVEMENTS, *supra* note 35, at 145, 158–59 (listing numerous arguments within the literature which question the value of law as a mechanism for achieving social change). Conversely, many labor scholars see potential value in the law. See Gordon, *supra* note 25, at 68, 68–71 (describing a cycle in which sometimes law presents opportunities and sometimes it is an “albatross” around the neck of labor); Michael H. Gottesman, *In Despair, Starting Over: Imagining a Labor Law for Unorganized Workers*, 69 CHI.-KENT L. REV. 59, 68–96 (1993) (proposing changes to labor law that would empower workers). Scholars other than labor lawyers likewise suggest a range of possibilities for the role of law in the labor movement. See RISA L. GOLUBOFF, *THE LOST PROMISE OF CIVIL RIGHTS* 16–17 (2007) (explaining that in the 1940s, courts were poised to afford collective labor rights a central importance in civil rights); Robin Stryker, *Half Empty, Half Full, or Neither: Law, Inequality, and Social Change in Capitalist Democracies*, 3 ANN. REV. L. & SOC. SCI. 69, 74 (2007) (noting that under the Wagner Act, increased labor militancy was associated with gains in membership for the first and only time, suggesting that law increased the power of labor movement activism in ways it had not experienced before, and has not experienced since, the Taft-Hartley amendments). Yet, on the whole, the law and social movements literature has tended to see more hope in law than the labor law literature.

¹¹¹ See, e.g., Mark Barenberg, *The Political Economy of the Wagner Act: Power, Symbol, and Workplace Cooperation*, 106 HARV. L. REV. 1379, 1394 (1993) (noting that a “deep-seated ideological unwillingness to embrace aggressive government intervention in labor relations debilitated organized labor as much as its diminishing size and its failure to achieve prominence in a partisan coalition”).

the literature on law and social movements. Because of the importance of lawyers to our case study, we briefly summarize what is known about labor lawyers here.

Labor lawyers were among the earliest cause lawyers, although they have rarely been recognized as such.¹¹² Labor lawyers were drawn to the labor movement because of their commitment to the cause, too.¹¹³ But consistent with labor's experience of law as a constraint imposed upon them, these lawyers largely did not litigate to establish new rights.¹¹⁴ To be sure, some of their work involved enforcing statutory or contractual protections, and occasionally protecting movement members from civil or criminal liability for activism.¹¹⁵ But a major part of their role was to help the organizations comply with onerous legal requirements and defend the organizations when their members' activism transgressed specified legal boundaries.¹¹⁶

Some of these lawyers were an important yet neglected part of the apparatus by which courts and the NLRB restrained labor activism. As Katherine Stone, Reuel Schiller, and others have explained, these attorneys imposed a pluralist vision that treated labor and management as interest groups whose bargains would be enforced; yet, the law denied many substantive rights to labor, all the while leaving corporate power untouched.¹¹⁷ When law required arbitration and limited strikes, picketing, and boycotts, the apparatus of industrial pluralism put even radical labor lawyers in the position of being cops in disciplining movement activism.¹¹⁸ Exactly how law and lawyers did this is best understood through archival analysis. We do so in Part II.¹¹⁹

¹¹² See, e.g., JEROLD S. AUERBACH, *UNEQUAL JUSTICE: LAWYERS AND SOCIAL CHANGE IN MODERN AMERICA* 217–20 (1976); Robert W. Gordon, *The American Legal Profession, 1870–2000*, in 3 *THE CAMBRIDGE HISTORY OF LAW IN AMERICA* 106–08 (Michael Grossberg & Christopher Tomlins eds., 2008) (identifying labor lawyers during the New Deal as “cause lawyers” with “commitments to social reform”); William E. Forbath, *Class Struggle, Group Rights, and Socialist Pluralism on the Lower East Side—Radical Lawyering and Constitutional Imagination in the Early Twentieth Century* 18–19 (Pub. L. & Legal Theory Rsch. Paper Series, No. 712, 2019), www.ssrn.com/ssrn-id=3485241.

¹¹³ Gordon, *supra* note 112, at 107.

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ SCHILLER, *supra* note 47, at 19–22; Stone, *supra* note 89, at 1513–14.

¹¹⁸ See Robert L. Nelson & Laura Beth Nielsen, *Cops, Counsel, and Entrepreneurs: Constructing the Role of Inside Counsel in Large Corporations*, 34 *LAW & SOC'Y REV.* 457 (2000) (asserting that lawyers inside corporations conceptualize their role in one or more of three ways, as cops policing the conduct of their clients, as counsel advising their clients, and as entrepreneurs aiding their clients achieve business goals).

¹¹⁹ One of the advantages of a *historical* approach to analyzing the role of lawyers in movement work is that it enables examination of attorney-client communications, something that is rarely possible for more contemporaneous movement activity. In the course of one of the many conversations between ILWU staff and

C. *Five Dimensions of Law and Social Movements Studies*

In this section, we turn to a brief survey of the law and social movements literature, emphasizing five dimensions in which refocusing on labor has the potential to be most productive. Our survey aims neither at comprehensiveness, nor at critique, but at identifying those conversations in which organized labor adds something to the story.

1. *Where Law and Movements Intersect*

Arguably the most defining feature of law and social movements scholarship is its emphasis on the ways in which movements *proactively* engage with the law. As the leading association of law and social movements scholars introduces the field: “Social movements use a wide variety of legal strategies—including litigation, lobbying, and administrative advocacy—in their programs for social change [M]ovements rely on rights to frame their grievances, to generate and circulate collective identity, and to recruit and mobilize activists.”¹²⁰ In other words, movements engage in what scholars call “legal mobilization.”¹²¹

Consistent with this vision, Lani Guinier and Gerald Torres frame the study of law and social movements as “demosprudence.”¹²² Demosprudence, they argue, describes “the ways that ongoing collective action by ordinary people can permanently alter the practice of democracy by changing the people who make the law and the landscape in which that law is made.”¹²³ Through mobilizing law, movements create social change.

The literature is not always sanguine about the consequences of movements invoking law. In fact, the literature is often quite critical of law’s potential as a

their attorneys during the mid-century dispute we detail below, ILWU staff remarked on the importance of attorney-client confidentiality: “You will bear in mind, I am sure, the possible use which an employer or a court could make of this letter if it fell into their hands.” Letter from Lincoln Fairley, Research Director, ILWU, to Allan Brotsky, Attorney, Gladstein, Andersen, Resner & Leonard (Feb. 5, 1951) (on file with the Labor and Archives and Research Center). Historical distance enables examination of these kinds of communications, and more granular study of how lawyering changes movements.

¹²⁰ See *Collaborative Research Networks*, *supra* note 51 (emphasis added).

¹²¹ “Legal mobilization” is a term that has been subject to “conceptual slippage” in its diverse uses. Emilio Lehoucq & Whitney K. Taylor, *Conceptualizing Legal Mobilization: How Should We Understand the Deployment of Legal Strategies?*, 45 LAW & SOC. INQUIRY 166, 168 (2020); see also Lisa Vanhala, *Legal Mobilization*, OXFORD BIBLIOGRAPHIES IN POLITICAL SCIENCE, <https://www.oxfordbibliographies.com/view/document/obo-9780199756223/obo-9780199756223-0031.xml#> (last updated Feb. 22, 2018). Here, we use the term in a broad sense, to refer to movements’ strategic use of law, broadly conceived, including formal legal claims, as well as “legal norms, discourse, [and] symbols.” Vanhala, *supra*.

¹²² Guinier & Torres, *supra* note 86, at 2749–56.

¹²³ *Id.* at 2750.

tool of social transformation. As the title of Rosenberg's famous inquiry, *The Hollow Hope*, suggests, much compelling research contends that legal change may not always result in the social change movements desire.¹²⁴ Similarly, socio-legal scholars have emphasized that there are a host of downsides for movements that use law as a tactic in order to achieve extra-legal goals.¹²⁵ Notably, the description of the field set forth above concludes with the caveat that "law and legal strategies can exert a conservative influence on social movements, channeling protest and more radical forms of action into conventional political institutions."¹²⁶ There is, accordingly, much in the literature that suggests movements should *not* focus so much on either law reform or litigation. Yet, descriptively, the literature still suggests they do.¹²⁷

Less emphasized, then, are the ways in which law is *imposed* on movements, or how and why movements eschew law. This theme has often been relegated to a separate body of scholarship—the study of law and authoritarian states.¹²⁸ But, as some of the classic exceptions to this taxonomy illustrate, law is used as a form of social control in democratic regimes as well. For example, in his now-classic work, Steven Barkan complicates the prevailing narrative of the role of law within the civil rights movement, arguing that "the legal system proved a mixed blessing,"¹²⁹ because at the same time that federal courts were providing some formal redress, the "entire legal machinery of the South" was also being deployed to repress movement activity.¹³⁰ Similarly, Luis Fernandez's account of social control of the anti-globalization movement in the United States found local regulation an effective means of quelling protests.¹³¹ Michael McCann and

¹²⁴ See generally GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* (1991) (discussing the limited success of courts in producing significant social reform in a variety of areas, including civil rights, abortion rights, and women's rights, among others).

¹²⁵ See, e.g., Gwendolyn M. Leachman, *Protest to Perty: How Litigation Shaped the LGBT Movement's Agenda*, 47 U.C. DAVIS L. REV. 1667 (2014).

¹²⁶ See *Collaborative Research Networks*, *supra* note 51.

¹²⁷ Making this assumption explicit, Ed Rubin states, "[w]hile there are probably social movements that ignore the political sphere—one example that comes to mind is Trekkies—the great majority . . . are deeply committed to law reform." See Rubin, *supra* note 36, at 51.

¹²⁸ For a review of this literature, see Lynette J. Chua, *Legal Mobilization and Authoritarianism*, 15 ANN. REV. L. & SOC. SCI. 355 (2019).

¹²⁹ Steven E. Barkan, *Legal Control of the Southern Civil Rights Movement*, 49 AM. SOCIO. REV. 552, 554 (1984).

¹³⁰ *Id.* at 554–59.

¹³¹ LUIS A. FERNANDEZ, *POLICING DISSENT: SOCIAL CONTROL AND THE ANTI-GLOBALIZATION MOVEMENT* 68–91 (2008). Elsewhere, we also note that Kim Voss's classic work on the decline of the Knights of Labor also shows how law is imposed on movements using the example of the systematic and effective efforts to use law to exterminate the radical Knights of Labor in the nineteenth century. Voss, *supra* note 24.

George Lovell also emphasize the repressive aspects of law that govern low-wage work and workers.¹³²

Yet, these pieces are still the exception. And few canonical pieces begin with where labor started and ultimately landed, thinking about law as a tool *imposed* on popular agitation, as something to be avoided. Nor is it common to consider whether or why certain movements have chosen not to prioritize legal change and have, in fact, sought to avoid engagement with law.¹³³

The literature's emphasis on movements that seek legal change (and particularly on those that do so in courts) has contributed to corollary assumptions which shape the field—that social movements tend to advance minoritarian causes rather than majoritarian ones, and that they turn to law as a corrective to failed political processes.¹³⁴ Again, to quote Guinier and Torres, “movements are one way that minorities in a majoritarian democracy protect their rights . . . [S]ocial movements enable those who are shut out of a majoritarian political process to nonetheless open up nodes in the decision-making practices of a democratic society.”¹³⁵

There is a neatness in understanding the scope of the law and social movements inquiry to be primarily about the relationship between courts and minority groups. Consistent with the *Carolene Products* answer to the counter-majoritarian difficulty, this paradigm imagines that social movements come before the court when the electoral process fails them.¹³⁶ Under these specific circumstances, it is legitimate for courts to make policy.¹³⁷ Yet, the relationship between law and social movements is often not so neat. Many movements claim

¹³² MCCANN & LOVELL, *supra* note 87; see George I. Lovell, Michael McCann & Kirstine Taylor, *Covering Legal Mobilization: A Bottom Up Analysis of Wards Cove v. Atonio*, 41 LAW & SOC. INQUIRY 61, 81–88 (2016).

¹³³ The literature on marriage equality considers at some length the debates among movement activists over whether to prioritize litigation or legislation to establish recognition of same sex marriages as opposed to other goals. See, e.g., Nan D. Hunter, *Varieties of Constitutional Experience: Democracy and the Marriage Equality Campaign*, 64 UCLA L. REV. 1662 (2017).

¹³⁴ Because these assumptions tend to be unstated, the definition of a “minoritarian” movement can itself be unspecified. Historically and theoretically, the meaning of a “minority” movement is contested and tends to be based to some extent on actual numbers and to some extent on political power.

¹³⁵ See Guinier & Torres, *supra* note 86, at 2756–57.

¹³⁶ In *United States v. Carolene Products Co.*, the Supreme Court set forth a new logic of judicial review, emphasizing that the judicial branch would largely defer to the political branches when it came to economic regulation, but would be more likely to intervene when majoritarian processes harmed minorities or infringed on fundamental rights. 304 U.S. 144, 152–53 n.4 (1938).

¹³⁷ See Cummings, *Turn*, *supra* note 33, at 362–63 (arguing that minoritarian social movements convince the broader public, thereby allowing courts to adopt new judicial interpretations of the law, which are consistent with majoritarianism).

to speak on behalf of, or at least for the benefit of, majorities; and many movements consider both political and judicial mobilization to be part of their tactical tool kits.

One further consequence of the legal change and minoritarian assumptions of the field is that there tends to be a disproportionate focus, especially by legal scholars, on constitutional claims-making. William Eskridge, for instance, writes about how “identity-based social movements” revolutionized constitutional law in the latter half of the twentieth century.¹³⁸ With fidelity to the *Carolene Products* framework, he argues that “courts were a natural forum for politically marginalized minorities to resist their subordination.”¹³⁹ He continues, “[f]or each [group], the social movement’s political arguments were translated into *constitutional arguments*.”¹⁴⁰ Similarly, Guinier and Torres contend that “social movements challenge, and, if successful, change governing norms, creating an *alternative narrative of constitutional meaning*.”¹⁴¹ All of that is true. As we discuss in Part III, however, this vision of social movements overlooks movements—like labor—that have long worried that constitutional claims offered more peril than promise.¹⁴²

2. *What a Movement Looks Like*

A second tendency in the literature has been to conceptualize movements as non-institutional. This is, to some extent, a threshold definitional issue, and one of the reasons why labor has long been excluded from the field.¹⁴³ For instance, Charles Tilly’s classic definition of a social movement is “[a] sustained series of

¹³⁸ See generally William N. Eskridge, Jr., *Some Effects of Identity-Based Social Movements on Constitutional Law in the Twentieth Century*, 100 MICH. L. REV. 2062, 2071 (2002) (positing that the expansion of constitutionally-protected individual rights was the result of identity-based social movements, including the civil rights movement, the women’s rights movement, and the gay rights movement).

¹³⁹ *Id.* at 2070.

¹⁴⁰ *Id.* at 2071 (emphasis added).

¹⁴¹ Guinier & Torres, *supra* note 86, at 2757 (emphasis added).

¹⁴² See Andrias, *supra* note 108, at 83–84, 84 n.400; Laura Weinrib, *The Right to Work and the Right to Strike*, 2017 U. CHI. LEGAL F. 513, 527 (observing that “[i]n many respects, the First Amendment strategy for advancing labor’s rights was a risky one”); *infra* Part III.

¹⁴³ There is a similar debate in broader social movement literature about the extent to which social movements can be organized and institutionalized. See, e.g., McCarthy & Zald, *supra* note 44, at 1236–38. While some scholars contend that social movements are at most “loosely organized,” others have a more capacious understanding of social movements, which includes social movement organizations. But see Doug McAdam, *Tactical Innovation and the Pace of Insurgency*, 48 AM. SOCIO. REV. 735, 736–37 n.4 (1983). Some scholars argue that social movements become more formal and institutionalized as they age. Suzanne Staggenborg, *The Consequences of Professionalization and Formalization in the Pro-Choice Movement*, 53 AM. SOC. REV. 585, 598, 604 (1988). While labor’s institutionalization is partly the product of the age of many unions, it is also a result of labor’s distinct relationship with state power.

interactions between power-holders and persons successfully claiming to speak on behalf of a constituency *lacking formal representation*.”¹⁴⁴ Similarly, Guinier and Torres define social movements as “those who *were not part of the ‘consent community’* and who challenge the legitimacy of those rules that flowed from the period of their exclusion or those rules that continue to exclude them.”¹⁴⁵ Social movements are groups insufficiently institutionalized to have a seat at the table.¹⁴⁶

This conceptualization frames social movements as having a specific relationship with power—challenging those who have it, not necessarily wielding it themselves. Movements make claims, whether legal, political, or cultural, against power-holders, but they do not become power-holders. As a result, the literature has focused less than it might on the trade-offs entailed in choosing among various organizational forms of, and paths to, institutional power. Moreover, it has devoted little attention to the private and public law mechanisms that regulate how institutionalized movements operate.¹⁴⁷

Again, there are exceptions to these generalizations. Some scholars have studied how different social movements take different forms, each with specific advantages and disadvantages. For instance, Luis Fernandez discusses the ways in which the non-institutionalized nature of the anti-globalization movement allowed it to evade some forms of state control, while making it uniquely susceptible to others.¹⁴⁸ At the other end of the spectrum, Catherine Albiston and Laura Beth Nielsen have shown how the funding of public interest law organizations—and by implication, an institutional structure reliant on such funding—shapes the substance and scope of their reform agendas.¹⁴⁹

¹⁴⁴ Charles Tilly, *Social Movements and National Politics*, in STATEMAKING AND SOCIAL MOVEMENTS 297, 306 (Charles Bright & Susan Harding eds., 1984) (emphasis added).

¹⁴⁵ Guinier & Torres, *supra* note 86, at 2751 (emphasis added).

¹⁴⁶ *Id.*

¹⁴⁷ Reva Siegel has argued that one characteristic of social movements is that they lack public accountability. See Reva Siegel, *The Jurisgenerative Role of Social Movements in United States Constitutional Law* 14 (2014) (available at https://law.yale.edu/sites/default/files/documents/pdf/Faculty/Siegel_Jurisgenerative_Role_of_Social_Movements.pdf). While such line-drawing helps distinguish social movements from political representatives, we think it overly simplifies the regulatory context in which labor unions and other social movements exist. There are a number of statutory, common law, and constitutional law doctrines which are designed to ensure “public accountability” by social movement organizations, and consistent with our argument about the role of law in channeling movement activity, we think those merit greater study as well.

¹⁴⁸ FERNANDEZ, *supra* note 131.

¹⁴⁹ Catherine R. Albiston & Laura Beth Nielsen, *Funding the Cause: How Public Interest Law Organizations Fund Their Activities and Why It Matters for Social Change*, 39 LAW & SOC. INQUIRY 62, 88–92 (2014); see also Megan Ming Francis, *The Price of Civil Rights: Black Lives, White Funding, and Movement Capture*, 53 LAW & SOC’Y REV. 275, 305–06 (2019) (discussing movement capture of the NAACP by the Garland Fund).

Importantly, both pieces find that organizational form matters a great deal for how social movements experience law.¹⁵⁰

And yet, even these pieces do not fully help theorize labor's experience. Labor has often been treated differently than other movements precisely because of its institutionalization—because rather than making claims against power-holders, it has often sought primarily to be left alone, to exercise power independently of the state. Bringing labor back into the conversation allows for greater theorization of the trade-offs social movements face in negotiating their relationships with power.

3. *The Role of Lawyers*

A third emphasis within the literature on social movements, cause lawyers, and social change has been on the ways in which lawyers come to dominate movements. Gwendolyn Leachman sums up this bent in the literature as follows: “Movement lawyers, the argument goes, dominate the attorney-client relationship in their pursuit of impact litigation, substituting their own legal priorities for the more radical goals of their activist clients.”¹⁵¹ Most scholars are critical of the domineering lawyer, or, at minimum, concerned about the ways in which lawyer leadership disempowers other movement actors.¹⁵² At the same time, scholars also recognize that lawyers can be effective in organizing campaigns, mobilizing people, and achieving real change on the ground.¹⁵³

¹⁵⁰ FERNANDEZ, *supra* note 131; Albiston & Nielsen, *supra* note 149.

¹⁵¹ Leachman, *supra* note 125, at 1669.

¹⁵² See Sarat & Scheingold, *supra* note 35, at 3–4, 6–7.

¹⁵³ In addition to Leachman's nuanced approach following the quote, *see* Leachman, *supra* note 125, at 1669, McCann has also recognized that lawyers can be empowering to movements. MCCANN, *supra* note 25, at 292 (noting the ways lawyers empowered the pay equity movement). As McCann and Silverstein powerfully summed up the criticism, before going on to challenge it, lawyers, animated by a belief in the power of rights and their own career goals, “tend to infuse movements with the misleading and mythical promise of legal justice,” which “can crowd out alternative substantive agendas, organizational approaches, and tactical actions.” Michael McCann & Helena Silverstein, *Rethinking Law's “Allurements”: A Relational Analysis of Social Movement Lawyers in the United States*, in CAUSE LAWYERING: POLITICAL COMMITMENTS AND PROFESSIONAL RESPONSIBILITIES 261, 263 (Austin Sarat & Stuart Scheingold eds., 1998). But it is important to note that McCann and others have shown that lawyers are diverse in their relationships and contributions to movements and have played significant roles in facilitating movement activism. *See, e.g., id.* at 286–87. Scott Cummings also has studied ways in which lawyers contributed powerfully to transformative struggles for equality without dominating movements. CUMMINGS, *supra* note 87. Cummings has theorized “movement liberalism”: whether or how lawyers can assist social movements to “mobilize dissent in order to shift politics and culture, thereby producing changes in law that reflect and codify social movement goals.” Cummings, *Puzzle*, *supra* note 33, at 1559; *see* Cummings, *Turn*, *supra* note 33, at 363–65, 382–91, 403–05.

The primary way in which lawyers have been shown to dominate movements is by reshaping movement strategy around legal goals. Lawyers theorize grievances as rights claims. Lawyers may also be on the defensive, since “mobilization from below begets counter-mobilization from above,”¹⁵⁴ and lawyers must defend past wins against efforts to roll back legal advances. But even the literature on backlash generally still portrays social movement lawyers as movement entrepreneurs, shaping movement strategy.¹⁵⁵ Even when studying how lawyers defend protesters against criminal charges or civil claims, scholars emphasize how skillful lawyering can mobilize activists and engender public support.¹⁵⁶

Collectively, these portrayals of lawyers suggest their skill and political commitments shape outcomes for clients. Given this, the legal obligations these lawyers owe to clients are theorized primarily as a matter of movement strategy,¹⁵⁷ of networks and efficacy,¹⁵⁸ or of professional responsibility.¹⁵⁹

The role that movement lawyers play in assisting social movements in avoiding the at-times drastic consequences of running afoul of the law has been far less studied. As we discuss in Part III below, labor unions became large institutions in the 1930s; collectively, they had millions of dues-paying members.¹⁶⁰ They had detailed and comprehensive contractual and statutory rights and responsibilities vis-à-vis the employees they represented, their

¹⁵⁴ Stryker, *supra* note 110, at 87.

¹⁵⁵ See Scott L. Cummings, *Rethinking Foundational Critiques of Lawyers in Social Movements*, 85 *FORDHAM L. REV.* 1987, 2005–14 (2017) (summarizing the literature on backlash, especially as it relates to lawyer dominance). An earlier and foundational work explaining why lawyers contribute to the resistance to progressive change is Marc Galanter, *Why the “Haves” Come Out Ahead: Speculation on the Limits of Legal Change*, 9 *LAW & SOC’Y REV.* 95, 149–51 (1974).

¹⁵⁶ See, e.g., Randall Kennedy, *Martin Luther King’s Constitution: A Legal History of the Montgomery Bus Boycott*, 98 *YALE L.J.* 999 (1989). Kennedy and other scholars of the bus boycott found litigation to be key to its success. See Robert Jerome Glennon, *The Role of Law in the Civil Rights Movement: The Montgomery Bus Boycott, 1955–1957*, 9 *LAW & HIST. REV.* 59 (1991).

¹⁵⁷ See, e.g., Betty Hung, *Essay—Law and Organizing from the Perspective of Organizers: Finding a Shared Theory of Social Change*, 1 *L.A. PUB. INT. L.J.* 4, 23–30 (2009) (articulating an approach to being an effective lawyer for a social justice organization).

¹⁵⁸ ANN SOUTHWORTH, *LAWYERS OF THE RIGHT: PROFESSIONALIZING THE CONSERVATIVE COALITION* 124–48 (2008).

¹⁵⁹ The classic in this vein is Derrick A. Bell, Jr., *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 *YALE L.J.* 470 (1976). More recent works exploring the issues of cause or movement lawyer accountability include Scott L. Cummings, *The Accountability Problem in Public Interest Practice: Old Paradigms and New Directions*, in *LAWYERS IN PRACTICE: ETHICAL DECISION MAKING IN CONTEXT* 340 (Leslie C. Levin & Lynn Mather eds., 2012); Kevin C. McMunigal, *Of Causes and Clients: Two Tales of Roe v. Wade*, 47 *HASTINGS L.J.* 779 (1996); Ann Southworth, *Collective Representation for the Disadvantaged: Variations in Problems of Accountability*, 67 *FORDHAM L. REV.* 2449 (1999).

¹⁶⁰ See *infra* Part III.A.2.

members, and employers.¹⁶¹ And, both by choice and by statutory command, they had more-or-less democratic mechanisms of internal governance.¹⁶² Lawyers did not lead the labor movement. But they did take on an increasingly important role in it because their clients had to navigate a complex legal regime, and the consequences of a legal misstep could be—as in the case of Juneau Spruce—massive. The ways in which labor law conscripted lawyers into these roles as a matter of professional obligation is a missed opportunity to understand how lawyers impact movements.¹⁶³

4. *The Mechanisms of Social Change*

A fourth dimension of the field emphasizes the “constitutive” effects of law. As socio-legal scholar Robin Stryker aptly sums up the literature, most scholars now believe “law’s constitutive power trumps its instrumental power.”¹⁶⁴

The constitutive effects of law can be broadly understood as its “cultural” effects—the ways in which legal claims-making alters legal consciousness, collective identity, and individuals’ and movements’ sense of efficacy.¹⁶⁵ Material or instrumental effects, by contrast, are the more immediate, empirically observable effects of law, such as legally-compelled redistributions of wealth or changes of behavior.¹⁶⁶ Michael McCann’s classic, *Rights at Work*, is commonly seen as reorienting the field around a constitutive view of how law creates social change.¹⁶⁷

¹⁶¹ See *infra* Part III.A.2.

¹⁶² Under the Labor Management Reporting and Disclosure Act, union members have the right to equal treatment, to free speech and assembly, to run for union office, to approve dues increases through direct votes or delegate conventions, to due process in hearings that might affect the member’s status as a union member, and to be free from retaliation for exercising rights under the statute. 29 U.S.C. §§ 411, 481, 529 (2018). Unions are required to hold leadership elections, by secret ballot, every three, four, or five years depending on the type of union, and they are permitted to impose only reasonable requirements on eligibility to run for union office. *Id.* at § 481. The statute prohibits use of union or employer funds to support candidates for union office and requires unions to mail candidates’ literature to union members at the candidates’ expense. *Id.*

¹⁶³ For example, in the labor movement, labor lawyers wrote entire handbooks aimed at other lawyers and union organizers to help them navigate the legal constraints on union organizing. See STEPHEN I. SCHLOSSBERG & JUDITH A. SCOTT, *ORGANIZING AND THE LAW* (3d ed. 1983).

¹⁶⁴ Stryker, *supra* note 110, at 75.

¹⁶⁵ See McCann, *supra* note 24, at 21–22 (distinguishing between instrumentalists/positivists who “tend to identify law primarily in instrumental, determinate, positivist terms . . . [and the extent] that official institutional actions cause direct, immediate, tangible effects on targeted behaviors” and the constitutive/interpretive perspective in which “attention is directed to how legal discourses and symbols intersect with and are expressive of broader ideological formations . . . [and] legal conventions are understood as a quite plastic and malleable medium, routinely employed to reconfigure relations, redefine entitlements, and formulate aspirations for collective living”).

¹⁶⁶ *Id.*

¹⁶⁷ MCCANN, *supra* note 25.

Published in 1994, McCann wrote largely in dialogue with Rosenberg's *The Hollow Hope*, the then-dominant book in the field.¹⁶⁸ Rosenberg's core argument was that the legal victories of the civil rights movement had *not* resulted in the social change movement activists sought; as a result, he believed that legal scholars should be less optimistic about courts as a vector of social change.¹⁶⁹ In response, McCann argued that Rosenberg's measure of social change was too narrow.¹⁷⁰ He pointed out, quite rightly, that social change can be seen not only in immediate legal change, but also in terms of building movements, in the ability of activists to compel formal policy concessions through negotiation, and through "a general moral discourse" and "ongoing challenges to status quo power relations."¹⁷¹ According to Scott Cummings, "[t]he immediate impact of McCann's intervention was to frame the new law and social movements field precisely around a constitutive view of law, in which lawyers and courts were de-centered—a view that affected the methodological focus and the kinds of campaigns that those who followed would study."¹⁷²

The focus on constitutive effects was much needed at the time. Law is undeniably a discursive and symbolic realm of contestation, in addition to a material one, and to focus only on the narrow, instrumental impact of law—what a court's judgment concretely yields—is to miss much of the story. Yet, there is a concern that the field may have swung too far in the other direction. For instance, Doug NeJaime correctly argues that litigation loss may be a victory from a constitutive perspective.¹⁷³ It can help movements solidify their sense of collective identity.¹⁷⁴ It can increase attention to an issue.¹⁷⁵ And it can increase financial support.¹⁷⁶ But, as Catherine Albiston has argued, this is far from a universal truth.¹⁷⁷ While new and insurgent movements may find legal mobilization useful, win, lose, or draw, established movements with limited resources may have reason to be quite concerned about the material impact of law.¹⁷⁸ The pre-Wagner Act history of strikes crushed and unions destroyed by

¹⁶⁸ *Id.* at 136 n.35.

¹⁶⁹ ROSENBERG, *supra* note 124, at 336–43.

¹⁷⁰ *See* MCCANN, *supra* note 25, at 290–93.

¹⁷¹ *Id.* at 279–81.

¹⁷² Cummings, *Turn*, *supra* note 33, at 380.

¹⁷³ Douglas NeJaime, *Winning Through Losing*, 96 IOWA L. REV. 941, 969 (2011).

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

¹⁷⁷ Catherine Albiston, *The Dark Side of Litigation as a Social Movement Strategy*, 96 IOWA L. REV. BULL. 61, 69–71 (2011).

¹⁷⁸ *Id.* at 74–77.

sweeping injunctions and staggering damages judgments reminds us that litigation loss can also shatter a movement.¹⁷⁹

Moreover, as Albiston also highlights, the literature often treats the constitutive effects of law as inherently positive, as a “catalyst” to movement mobilization.¹⁸⁰ But the cultural impact of law can harm movements as much as benefit them—a legal win can cause complacency; a legal loss can cause hopelessness. In making this argument, Albiston specifically emphasizes labor, and the ways in which the legacy of repression in the late 1800s and early 1900s caused the labor movement to be uniquely wary of public law.¹⁸¹ Citing Forbath, she concludes, “the movement’s interactions with the courts, including its own litigation strategies, constituted its identity and its understanding of itself in ways that deradicalized what it means to be a labor movement in America.”¹⁸² McCann and Lovell, too, have shown the ways in which repressive judicial rulings, along with discriminatory enforcement of criminal law, squelched a radical movement of Filipino migrant activists, who were challenging racial segregation and abusive working conditions in fish processing plants. As a result of their legal losses, many turned away from activism entirely.¹⁸³

Labor’s long history with law—over periods of gain and loss, material and constitutive—is a reminder that law operates in multiple arenas at the same time. This history counsels against over-emphasis on one pathway or one type of outcome. As Elizabeth Gurley Flynn suggested, there is *both* protection and repression by law, often simultaneously.¹⁸⁴

5. *The Rights Debate*

One final dimension of the literature concerns the conceptualization of rights. For decades, law and social movements scholars have sought to understand whether the *discourse* of rights can be empowering for social movements and marginalized communities.¹⁸⁵ This conversation focuses on the

¹⁷⁹ ERNST, *supra* note 101, at 149–55; Voss, *supra* note 24.

¹⁸⁰ Albiston, *supra* note 177, at 63, 65 (“Symbolic/strategic proponents are generally more positive about law and litigation . . . Constitutive changes of the negative, internal variety . . . are not addressed in the literature in the same detail . . . Most scholars seem to assume that changes to collective identity and oppositional consciousness are, by definition, positive.”).

¹⁸¹ *Id.* at 75.

¹⁸² *Id.*

¹⁸³ MCCANN & LOVELL, *supra* note 87.

¹⁸⁴ Flynn, *supra* note *.

¹⁸⁵ See, e.g., Amy Bartholomew & Alan Hunt, *What’s Wrong with Rights?*, 9 LAW & INEQ. 1 (1990).

symbolic value of “rights talk,” and the merits of framing movement goals as “rights.”¹⁸⁶

During the 1980s and early 1990s, critical legal scholars and critical race scholars helped to define the parameters of this conversation. From the canonical critical legal studies perspective, Mark Tushnet insisted that rights discourse was too indeterminate, unstable, and abstract to further people’s real, on-the-ground needs.¹⁸⁷ Given the anti-state, formalist origin of rights ideology, it could not be a progressive discourse, since for every rights-based argument advanced by liberals and progressives, conservatives would be able to advance a more resonant, historically-supported, counter-rights argument.¹⁸⁸

In powerful rejoinders, critical race scholars argued that rights rhetoric had been too meaningful to those historically *without* rights to be abandoned.¹⁸⁹ In the words of Patricia Williams, “[f]or the historically disempowered, the conferring of rights is symbolic of all the denied aspects of their humanity; rights imply a respect that places one in the referential range of self and others, that elevates one’s status from human body to social being.”¹⁹⁰ While acknowledging that the discursive invocation of rights may not itself create systematic change, she argued that it was still uniquely empowering to communities seeking change—and from a constitutive perspective, that itself was a form of social change.¹⁹¹

Both of these perspectives yield important insights into the *potential* advantages and disadvantages of rights rhetoric writ large. Yet on both sides, the claims have at times been relatively undifferentiated—either all rights talk is hollow or all rights talk is empowering, with some scholars suggesting that rights need not be tethered to doctrine or discourse at all.¹⁹² As a result, there has been

¹⁸⁶ As Gwendolyn Leachman explains in her work on legal framing, “[s]ocio-legal scholars conceptualize law broadly as both a cultural construct and a symbolic resource . . . and emphasize that informal articulations of the law may be only minimally constrained by official legal formulations.” Gwendolyn Leachman, *Legal Framing*, 61 *STUD. L., POL., & SOC’Y* 25, 27 (2013).

¹⁸⁷ Mark Tushnet, *An Essay on Rights*, 62 *TEX. L. REV.* 1363, 1363–64 (1984).

¹⁸⁸ *Id.* at 1364.

¹⁸⁹ See, e.g., Patricia J. Williams, *Alchemical Notes: Reconstructing Ideals from Deconstructed Rights*, 22 *HARV. C.R.-C.L. L. REV.* 401, 414–16 (1987). Defense of the historical importance of rights as a discursive framework is not limited to critical race scholars. In particular, historians have noted that rights are significant statements of aspirations. See Hendrik Hartog, *The Constitution of Aspiration and ‘the Rights That Belong to Us All’*, 74 *J. AM. HIST.* 1013 (1987).

¹⁹⁰ *Id.* at 416; see Kimberlé Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 *HARV. L. REV.* 1331 (1988); Mari J. Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparation*, 22 *HARV. C.R.-C.L. L. REV.* 323, 329–30 (1987).

¹⁹¹ Williams, *supra* note 189, at 431.

¹⁹² See Francesca Poletta, *The Structural Context of Novel Rights Claims: Southern Civil Rights*

comparatively less attention to *which* rights claims have been effective, for which groups, under which circumstances, and for which purposes.

To be sure, many scholars *have* drawn lines connecting legal doctrine to broader rights discourse to show that the efficacy of rights talk will depend on the right at issue, the extent to which it has been part of a recognized discourse of rights, and the extent to which it is grounded in foundational rights-granting documents.¹⁹³ As Bartholomew and Hunt have argued, “[r]ights discourses, whilst open-ended, do exhibit some structure in that their content is almost always located in proximity to the discourses of law, involving claims to entitlements that take a form capable of protection and advancement by and through legal action.”¹⁹⁴ And, in this vein, Tushnet conceded that his argument was more about the efficacy of positive rights (e.g., to food and shelter) than negative rights (e.g., to be free from government restraint): “the predominance of negative rights,” he argued, “creates an ideological barrier to the extension of positive rights in our culture.”¹⁹⁵ And yet, these nuances have not always been emphasized within the broader theoretical debates.

Organized labor has long struggled with the question of rights rhetoric, in part because the kinds of rights that would do the most work for labor—rights to association and mutual aid and solidarity in the workplace, to shared governance of workplaces and enterprises, and to some substantive standard of economic well-being, through wealth and power redistribution—are outside the doctrinal and discursive foundations for rights in the United States.¹⁹⁶ As such, to engage with the experiences of organized labor is to invite a more nuanced approach to the power of rights talk.

* * *

Collectively, these five dimensions of the literature describe the experiences of many social movements at many points in time. As we argue in Part III, they tend to reflect one model of a social movement interacting with law, a model largely rooted in the civil rights movement’s unprecedented legal victories mid-century and the impact of those victories on legal theory and popular legal consciousness. This model is important and eminently worthy of scholarly

Organizing, 1961–1966, 34 LAW & SOC’Y REV. 367, 368–69 (2000).

¹⁹³ See, e.g., EMILY ZACKIN, LOOKING FOR RIGHTS IN ALL THE WRONG PLACES: WHY STATE CONSTITUTIONS CONTAIN AMERICA’S POSITIVE RIGHTS 197 (2013) (noting the absence of positive rights in federal constitutional protections, but their relatively greater presence in state constitutions).

¹⁹⁴ Bartholomew & Hunt, *supra* note 185, at 7.

¹⁹⁵ Tushnet, *supra* note 187, at 1393.

¹⁹⁶ See Kate Andrias, *Building Labor’s Constitution*, 94 TEX. L. REV. 1591, 1592–95 (2016).

attention. But it is *not* the only model. Through our case study from a movement whose relationship with law has taken a distinct path, we seek to emphasize the socio-historic specificity of each.

Below, we tell the legal history of the first significant federal damages judgment against a labor union since Congress legalized the labor movement in the 1930s. It is also a story of how a union and its lawyers struggled to resist the movement restraining aspects of the Taft-Hartley Act. Taft-Hartley outlawed the tactics—picketing, strikes, boycotts, and political activity—that workers had used in the 1930s to organize unions and to exert collective power. In the story of Juneau Spruce, what seemed to local union leaders to be an ordinary labor dispute about an employer’s breach of a collective bargaining agreement wound up as an enormous damages judgment—one so large it could bankrupt the entire international union. Employer organizations sought to use the judgment to undo one of labor’s biggest organizing wins since the 1930s—the successful unionization of the entire agricultural workforce of Hawai’i.

The Taft-Hartley Act rendered movement activism dangerous by subjecting it to injunctions and the threat of ruinous liability. Through detailed archival analysis, we show that the effect of law on the movement was not merely a court order to stop protesting or to pay money. More subtly, but perhaps more powerfully, the new law put union lawyers in the position of policing their client’s activism in order to save the union, as an institution, from liability for the activism of the rank and file.

To understand how law shapes social movements, we argue, one must look closely at how the labor movement experienced law. And, for the reasons we detail below, the story of Juneau Spruce is an ideal place to look.

II. THE STORY OF JUNEAU SPRUCE

Emergent labor unions spent the late nineteenth century and the first three decades of the twentieth fighting for the right to operate free of state repression. In the economic collapse and labor upsurge of the early 1930s, labor ostensibly won that right. Under the Norris-LaGuardia Act of 1932 and the National Labor Relations Act of 1935, workers could organize unions, bargain collectively, and, when necessary, protest poor working conditions through strikes, picketing, and boycotts.¹⁹⁷ Having won rights to engage in the collective activism that is the

¹⁹⁷ See *supra* notes 92–93.

defining feature of a social movement, the labor movement grew exponentially.¹⁹⁸

Labor's legal victories proved short-lived. In January 1942, some of the new rights—especially to strike—were suspended for the duration of the war.¹⁹⁹ When the war ended, the no-strike rules and pledges lapsed.²⁰⁰ But the companies refused to meet the pent-up demand for wage increases, as they returned to a market economy, without wartime profits.²⁰¹ A huge strike wave ensued.²⁰² And in January 1947, when Republicans took control of Congress for the first time since 1932, they made attacking labor's power a key part of their agenda.²⁰³ The Taft-Hartley Act reflected the wish list of business interests.²⁰⁴

Taft-Hartley limited the collective rights labor had won in the 1930s. It protected anti-union employers and employees from the efforts of unions to organize or to protest unfair practices.²⁰⁵ It authorized the NLRB to seek injunctions against labor organizing tactics that violated the new restrictions.²⁰⁶ It also authorized any person “injured in his business or property” by union activities prohibited by the new law to file suit in federal court for damages.²⁰⁷

Employers lost no time in using the new statutory damages liability as a tactic for quelling union activism in the postwar strike wave. The first judgment to reach the Supreme Court revealed the full extent of the challenge that unions now faced when engaged in movement activism. An Alaskan lumber company known as Juneau Spruce sued the ILWU. The ILWU had waged a general strike in San Francisco in 1934, had won strikes and good contracts up and down the coast, and organized across racial lines.²⁰⁸ Just after the end of World War II, the ILWU helped Hawai'iian sugar and pineapple plantation workers unionize, forever transforming the Islands.²⁰⁹ The *Juneau Spruce* case sought to smash the union from Alaska to San Diego to Hawai'i.

¹⁹⁸ See *supra* note 39.

¹⁹⁹ ROBERT H. ZIEGER, *THE CIO: 1935–1955*, at 168–73 (1995).

²⁰⁰ See GROSS, *supra* note 89, at 5.

²⁰¹ See *id.*

²⁰² See *id.*

²⁰³ See *id.* at 5–6.

²⁰⁴ See *id.* at 1–14.

²⁰⁵ *Id.* at 4.

²⁰⁶ *Id.*

²⁰⁷ 29 U.S.C. § 187.

²⁰⁸ See, e.g., HARVEY SCHWARTZ, *SOLIDARITY STORIES: AN ORAL HISTORY OF THE ILWU 17–31* (2009).

²⁰⁹ *Id.* at 220–73; SANFORD ZALBURG, *A SPARK IS STRUCK! JACK HALL & THE ILWU IN HAWAII* (1979).

The lawyers who litigated the case for the union were, by any measure, cause lawyers, and the union organizing that the ILWU did in the Pacific was social movement activism. The lawyers preserved the records of the case.²¹⁰ It enables a close look at law, lawyers, and social movements. And it enables us to consider how the law after 1947 channeled labor movement activity, and how that effect rippled beyond labor unions to influence the movements that came after.

A. *Labor on the Docks in 1947*

Juneau, for centuries a favorite fishing ground of indigenous peoples, by the 1930s had a thriving lumber and commercial fishing industry and a population of about 5,000.²¹¹ In the mid-1930s, longshoremen unionized and secured a collective bargaining agreement with the Juneau Lumber Company to load lumber onto ships at its lumber mill.²¹² The company and ILWU Local 16 signed successive contracts each year until 1942, the year after the U.S. entered the war.²¹³ Because wages were fixed and strikes were prohibited during wartime, the mill and the ILWU simply continued the 1942 contract in effect for the war's duration.²¹⁴ The International Woodworkers Association, CIO, represented the mill workers, and the ILWU Local 16 supplied longshoremen whenever the mill had enough lumber to load directly from the mill's dock onto U.S. military-controlled vessels.²¹⁵

By early 1947, lucrative war production was ending.²¹⁶ A group of investors from Coos Bay, Oregon acquired the mill and changed its name to Juneau Spruce Company.²¹⁷ Little else changed at first. The new owners told the mill workers they could apply for employment with the new company.²¹⁸ The mill shut down

²¹⁰ All archival sources cited on the history of this dispute and the legal aftermath are, unless otherwise noted, either from the Labor Archives and Research Center (LARC) at the J. Paul Leonard Library, San Francisco State University or from the ILWU archives in San Francisco.

²¹¹ *Gastineau Channel Memories*, JUNEAU DOUGLAS CITY MUSEUM, <https://beta.juneau.org/library/museum/gastineau-channel-memories-browse/entry/17536> (last visited Sept. 5, 2020).

²¹² Letter from Germain Bulcke, Vice President, ILWU, to George R. Andersen, Attorney, Gladstein, Andersen, Resner & Sawyer (Apr. 15, 1949) (on file with the ILWU archives).

²¹³ *Id.*

²¹⁴ See ZIEGER, *supra* note 199; Letter from Germain Bulcke to George R. Andersen (Apr. 15, 1949), *supra* note 212.

²¹⁵ Letter from Germain Bulcke to George R. Andersen (Apr. 15, 1949), *supra* note 212. A different perspective on the story, but with the same basic facts, was later told by E.H. Card, the Personnel Manager of the Juneau Spruce Company in Coos Bay, Oregon, to a House Committee. *Labor-Management Relations: Hearing on H.R. 115 Before the H. Comm. on Educ. & Labor*, 83d Cong. 2 (1953) [hereinafter Card Statement] (statement of E.H. Card, Douglas Fir Industry).

²¹⁶ Card Statement, *supra* note 215.

²¹⁷ Letter from Germain Bulcke to George R. Andersen (Apr. 15, 1949), *supra* note 212.

²¹⁸ Card Statement, *supra* note 215, at 1.

on Wednesday, April 30 and then reopened on Friday, May 2, under the new name but with the same workers.²¹⁹ Juneau Spruce continued to recognize the IWA for its mill workers and continued to use Local 16 longshoremen.²²⁰ But after the Army terminated its contract with the company in September 1947, Juneau Spruce found civilian buyers and decided to ship the lumber on its own barges.²²¹ The company also decided that loading could be done more cheaply by workers paid on the wage scale of the IWA contract rather than the ILWU contract.²²²

The company had other reasons to terminate recognition of the ILWU. In the autumn of 1947, the Congress of Industrial Organizations (CIO) was in the midst of an epic internal struggle between centrists and leftists.²²³ It was the early days of the Cold War Red Scare, and ILWU President Bridges was rumored to be a Communist.²²⁴ The Taft-Hartley Act required all union leaders to swear in an affidavit that they were not members of the Communist Party, and it had forbidden any union whose leaders refused to sign the non-Communist oath to invoke the processes of the NLRB.²²⁵ Bridges, along with several CIO union leaders, refused to sign.²²⁶ CIO President Murray pushed Bridges out of his CIO leadership position in late 1947 and eventually purged eleven unions, including the ILWU, from the CIO.²²⁷ This turmoil opened the door to other CIO unions raiding the membership of the dissident unions, and companies were happy to exploit the dissension, for reasons of anti-Communism, to have less aggressive, activist unions with which to negotiate, and to use the dissension in the ranks to lower labor costs.²²⁸

What was happening to CIO unions nationwide happened in Alaska. Juneau Spruce took the chance to get rid of the ILWU. Verne Albright, who was the regional representative of the ILWU, on the International's payroll but based in Alaska, protested to the company that they were changing past practice.²²⁹ The company insisted that it had not assumed any of the labor or other contracts that

²¹⁹ *Id.*

²²⁰ *Id.* at 2.

²²¹ *Id.*

²²² Letter from George R. Andersen, Attorney, Gladstein, Andersen, Resner & Sawyer, to William Glazier, ILWU (May 16, 1949) (on file with the ILWU archives).

²²³ ZIEGER, *supra* note 199, at 253–93.

²²⁴ *Id.* at 259.

²²⁵ See PATRICIA CAYO SEXTON, *THE WAR ON LABOR AND THE LEFT: UNDERSTANDING AMERICA'S UNIQUE CONSERVATISM* 155–57 (1991).

²²⁶ ZIEGER, *supra* note 199, at 279.

²²⁷ *Id.* at 253, 277.

²²⁸ *Id.* at 291–93.

²²⁹ Letter from George R. Andersen to William Glazier (May 16, 1949), *supra* note 222.

had bound its predecessor, so it had no obligation to recognize or bargain with the ILWU or to use ILWU men on the docks.²³⁰

In October 1947, the company used IWA men to load a shipment. Albright protested, pointing out the longstanding practice and series of contracts obligating the company to use ILWU workers.²³¹ The company refused to discuss it, insisting it recognized only the IWA.²³² Albright, on behalf of the ILWU, appealed to the IWA.²³³ After all, they were both CIO-affiliated unions. IWA members in Juneau voted that the work was properly within ILWU's jurisdiction.²³⁴ But the company refused to accept the two unions' resolution of the matter.²³⁵ Over Albright's protest, IWA men loaded a second barge in January 1948.²³⁶ When the company tried to load a third barge in the first week of April, the members of Local 16 finally had exhausted their patience, and a few men established a peaceful "nominal picket line" at just one of the mill's many entrances with signs saying, "Locked out by Juneau Spruce."²³⁷

IWA workers refused to cross the picket line.²³⁸ Rather than negotiate with the ILWU, the company decided to shut the mill down temporarily.²³⁹ Although "5 or 6 young kids" were initially willing to cross the picket line, said an ILWU man later, that stopped when men in the mill refused to work with "scabs."²⁴⁰ The company appealed to the Chamber of Commerce, which set up a fact-finding commission on the dispute.²⁴¹ But a representative from the American Federation of Labor (AFL) and another from the CIO managed to get on the commission, so the hearing did not produce the company's desired result.²⁴² Afterward, said Albright, "public sentiment is more critical of management than usual in Juneau."²⁴³ On May 10, the company tried once again to get the men to return to work, but only three showed up.²⁴⁴ The day after that, the door to the

²³⁰ *Id.*

²³¹ Letter from Germain Bulcke to George R. Andersen (Apr. 15, 1949), *supra* note 212.

²³² *Id.*

²³³ Letter from George R. Andersen to William Glazier (May 16, 1949), *supra* note 222.

²³⁴ *Id.*

²³⁵ *Id.*

²³⁶ Letter from Germain Bulcke to George R. Andersen (Apr. 15, 1949), *supra* note 212.

²³⁷ *Id.*; Letter from George R. Andersen to William Glazier (May 16, 1949), *supra* note 222.

²³⁸ Letter from Germain Bulcke to George R. Andersen (Apr. 15, 1949), *supra* note 212.

²³⁹ *Id.*

²⁴⁰ Negotiations and Strikes Notes from the Alaska Organizing Card Files, ILWU, Local 16 (on file with the ILWU archives).

²⁴¹ *Id.*

²⁴² *Id.*

²⁴³ *Id.*

²⁴⁴ *Id.*

time clock office was found nailed shut.²⁴⁵ Juneau Spruce had clearly underestimated the resolve of the longshoremen.

Company managers tried another tack. They promised William Flint, an ambitious 21-year-old IWA millworker, an opportunity to rise in the company if he could get the IWA to break ranks with the ILWU.²⁴⁶ The company sent him to Oregon to meet with the leaders of the IWA.²⁴⁷ The strategy worked. On July 9, 1948, the mill reopened with IWA workers who crossed the picket line and loaded a barge.²⁴⁸ Flint, who was elected president of the IWA on the same day the IWA members voted to cross the ILWU picket line, accompanied the barge to Prince Rupert, British Columbia, to ensure the men at the port would unload it.²⁴⁹ Flint had no more success with ILWU men there than he had in Juneau; they refused to unload it because the ILWU had put Juneau Spruce on the union's unfair list.²⁵⁰ So the barge continued to Tacoma, Washington, where, finally, Flint found AFL men to unload it.²⁵¹ Tacoma was one of only three Pacific Coast ports where longshoremen belonged to the conservative AFL-affiliated International Longshoremen's Association rather than the progressive ILWU.²⁵²

The company closed the mill for good in October 1948, claiming the picketing prevented them from getting the lumber unloaded at ports of delivery for months at a time.²⁵³ In October 1949, the mill burned down.²⁵⁴ It was not rebuilt.²⁵⁵ The historical record does not reveal the cause of the fire, whether the property was insured, or whether an insurance claim was paid. Flint's loyalty was rewarded, however; he remained employed by Juneau Spruce after the mill was gone.²⁵⁶

²⁴⁵ *Id.*

²⁴⁶ Letter from George R. Andersen to William Glazier (May 16, 1949), *supra* note 222.

²⁴⁷ Letter from George R. Andersen, Attorney, Andersen, Gladstein, Resner & Sawyer, to Germain Bulcke, ILWU (May 19, 1949) (on file with the ILWU archives).

²⁴⁸ Letter from Germain Bulcke to George R. Andersen (Apr. 15, 1949), *supra* note 212.

²⁴⁹ Letter from George R. Andersen to William Glazier (May 16, 1949), *supra* note 222.

²⁵⁰ Letter from Germain Bulcke, Vice President, ILWU, to George R. Andersen, Attorney, Andersen, Gladstein, Resner & Sawyer (Oct. 27, 1948) (on file with the ILWU archives).

²⁵¹ *Id.*

²⁵² Clark Kerr, *Collective Bargaining on the Pacific Coast*, 64 MONTHLY LAB. REV. 650, 653 (1947).

²⁵³ Card Statement, *supra* note 215, at 4.

²⁵⁴ *Id.* at 5.

²⁵⁵ *Id.*

²⁵⁶ Letter from George R. Andersen, Attorney, Andersen, Gladstein, Resner & Sawyer, to Germain Bulcke, ILWU (May 19, 1949) (on file with the ILWU archives); Letter from George R. Andersen to William Glazier (May 16, 1949), *supra* note 222; Letter from George R. Andersen, Attorney, Andersen, Gladstein, Resner & Sawyer, to Louis Goldblatt, ILWU (Mar. 23, 1950) (on file with the ILWU archives).

The story might have ended there, but for the Taft-Hartley Act.

B. The Taft-Hartley Act Offers a New Tool

Taft-Hartley provided the tool that the Juneau Spruce company needed to combat Local 16's resistance. Section 8(b)(4) of the Act made it unlawful for a union to strike, or to encourage employees to strike, with certain prohibited objectives, including to change working conditions of an employer other than the employees' own (known as a secondary strike) or to force an employer to assign work to members of one union rather than another (known as a jurisdictional strike).²⁵⁷ Juneau Spruce hired a Portland law firm to file an unfair labor practice charge under section 8(b)(4) against Local 16 and the International.²⁵⁸ Taft-Hartley also added two powerful new remedies to protect employers—remedies unavailable to workers—and Juneau Spruce sought both. First, the company invoked a provision of the Act that *required* the NLRB to seek an immediate preliminary injunction against any violation of section 8(b)(4) and required the agency's lawyers to prioritize seeking such injunctions over all other cases.²⁵⁹ What this meant is that when Juneau Spruce filed its charge with the Board, the staff in the regional office were required by law to immediately investigate the charge and, if they found merit to it, to seek an injunction against it.²⁶⁰ The second provision of Taft-Hartley that Juneau Spruce invoked was section 303, which allowed any person "injured in his business or property by reason of" any violation of section 8(b)(4) to sue for damages in federal court.²⁶¹ This meant that even if the NLRB decided that picketing was legally permissible and declined to issue a complaint or seek an injunction, Juneau Spruce could still recover damages in federal court.

²⁵⁷ Section 8(b)(4) was amended in 1959 to prohibit additional conduct (what some called closing loopholes and others called prohibiting even more union protest activity). 29 U.S.C. § 158(b)(4). Those amendments reorganized section 8(b)(4), moving prohibitions from one subsection to another, so that the allocation of prohibitions in subsections (A) through (D) as described above are no longer current. *Id.* The same prohibitions were carried forward, and were expanded, in 1959. *Id.*

²⁵⁸ *Int'l Longshoremen's & Warehousemen's Union v. Juneau Spruce Corp.*, 189 F.2d 177, 177–78 (9th Cir. 1951).

²⁵⁹ *Juneau Spruce Corp. v. Int'l Longshoremen's & Warehousemen's Union*, 83 F. Supp. 224, 225–26 (D. Alaska 1949).

²⁶⁰ In overworked agencies, priorities are everything. As the General Counsel for the United Auto Workers complained in 1962, "[t]his is not even-handed justice." Resolution on the NLRB 8 (Apr. 7, 1962) (Joseph L. Rauh Papers) (on file with the Library of Congress). During the Eisenhower Administration, the NLRB sought significantly more injunctions against ongoing union unfair labor practices than against ongoing employer unfair labor practices. *See id.*

²⁶¹ *Juneau Spruce Corp.*, 83 F. Supp. at 225–26.

For its defense against the unfair labor practice proceedings before the NLRB and the damages suit in federal court, the ILWU turned to their regular counsel, a small San Francisco law firm known for representing unpopular clients, including labor activists.²⁶² Like other progressive labor lawyers of the era, some had come to labor law as a distinct field of practice when it emerged in the 1920s from tort and criminal cases dealing with interference with business during the World War I-era campaign for civil liberties. They were drawn to representation of labor unions because they were socialists or progressives who thought law could be an instrument of social change.²⁶³ The enactment of the New Deal labor legislation, as well as wage, hour, and workers' compensation laws, transformed labor law practice from the defense of outlaws to an affirmative project of representing workers demanding enforcement of minimum standards and the right to unionize and bargain collectively.²⁶⁴ By 1947, when the Juneau Spruce litigation arose, an ABA study of the legal profession found that "[f]ormerly, unions conducted their own everyday affairs, but today lawyers have become necessary not only for momentous issues but also for the daily problems of the union."²⁶⁵

The trial was handled by George Andersen, a Danish immigrant who had dropped out of school after the sixth grade to support his family by working as a boilermaker and graduated from the night law school program of the University of San Francisco.²⁶⁶ The appellate work was handled principally by

²⁶² COLIN WARK & JOHN F. GALLIHER, *PROGRESSIVE LAWYERS UNDER SIEGE: MORAL PANIC DURING THE MCCARTHY YEARS* 61, 67 (2015).

²⁶³ AUERBACH, *supra* note 112, at 217; LOUIS WALDMAN, *LABOR LAWYER* (1944); LOWELL S. HAWLEY & RALPH BUSHNELL POTTS, *COUNSEL FOR THE DAMNED: A BIOGRAPHY OF GEORGE FRANCIS VANDERVEER* (1953). The close connection between lawyers representing labor and lawyers drawn to protecting civil liberties is shown in LAURA WEINRIB, *THE TAMING OF FREE SPEECH* (2016). Biographies and memoirs of progressive lawyers who were drawn to representing the labor movement for these reasons include: GILBERT J. GALL, *PURSuing JUSTICE: LEE PRESSMAN, THE NEW DEAL, AND THE CIO* (1999); DAVID L. STEBENNE, ARTHUR J. GOLDBERG: *NEW DEAL LIBERAL* (1996); JOHN J. ABT & MICHAEL MYERSON, *ADVOCATE AND ACTIVIST: MEMOIRS OF AN AMERICAN COMMUNIST LAWYER* (1993); CHRISTOPHER H. JOHNSON, *MAURICE SUGAR: LAW, LABOR, AND THE LEFT IN DETROIT, 1912–1950* (2018).

²⁶⁴ A survey of the legal profession commissioned by the American Bar Association in 1947 estimated that 500 lawyers nationwide could be described as labor lawyers, but only two-thirds of that number devoted the major portion of their time to labor matters. Only 50, according to the survey, were house counsel for labor organizations. ALBERT P. BLAUSTEIN & CHARLES O. PORTER, *THE AMERICAN LAWYER: A SUMMARY OF THE SURVEY OF THE LEGAL PROFESSION* 52 (1954); Robert M. Segal, *Labor Union Lawyers: Professional Services of Lawyers to Organized Labor*, 5 INDUS. & LAB. REL. REV. 343, 343 (1952).

²⁶⁵ Segal, *supra* note 264, at 345. The survey also found that the union-side labor bar tended to be a bit younger and more highly educated than average for the bar: all had attended law school (at a time when only 75% of lawyers had) and nearly all had a college degree (at a time when only 45% of lawyers had graduated from college and only 80% had ever even attended college). *Id.* at 350.

²⁶⁶ WARK & GALLIHER, *supra* note 262, at 60. At the time, some law schools did not require a college degree, or even a high school diploma. ANN SOUTHWORTH & CATHERINE L. FISK, *THE LEGAL PROFESSION:*

Richard Gladstein, who had worked his way through his undergraduate and law school education at the University of California at Berkeley and who had been passed over for a job at the Alameda County District Attorney's office because of a Jewish quota.²⁶⁷ Gladstein later explained that he chose to represent union activists, including accused Communists in various sedition prosecutions, because their cases raised "the most important civil liberties issue in America today."²⁶⁸ The junior partner in the firm, Norman Leonard, was the son of Jewish immigrants and came to union labor representation fresh from Columbia Law School.²⁶⁹ The lawyers were involved in all sorts of progressive labor, civil rights, and civil liberties work, including litigation that declared closed shop agreements unenforceable if the union excluded Black people from membership; they also represented civil rights activists seeking to invalidate an injunction against picketing to protest race discrimination by a chain of Bay Area grocery stores.²⁷⁰ They faced tremendous hostility for their work. The FBI tapped their phones and conducted a long investigation into their alleged subversive activities.²⁷¹ In January 1948, a gunman entered the law office on a Saturday morning.²⁷² Finding George Andersen alone at work, the gunman shot Andersen and fled.²⁷³ Although the police and the press claimed the motive was robbery, the lawyers were fairly sure the motive was intimidation.²⁷⁴

When the Juneau Spruce dispute began, the Taft-Hartley Act was so new that its meaning was uncertain, but Andersen and his colleagues worried about its implications for the ILWU's picketing as soon as the law was enacted.²⁷⁵ On the lawyers' advice, the International wired the Local to warn them of the new penalties for labor picketing: "Is ILWU and IWA engaged in jurisdictional dispute re this sawmill[?] . . . Obligatory upon NLRB to seek injunction against such actions. Union subject to damage suits[.]"²⁷⁶

The lawyers' fears were justified. Although the first NLRB field agent rejected the company's unfair labor practice charge after investigation, and the

ETHICS IN CONTEMPORARY PRACTICE 933 (2d ed. 2019).

²⁶⁷ WARK & GALLIHER, *supra* note 262, at 78.

²⁶⁸ *Id.* at 85.

²⁶⁹ Other than three years in the Navy (1942–1945) where he served in the Pacific, he spent his career as a lawyer for the ILWU. NORMAN LEONARD: LIFE OF A LEFTIST LABOR LAWYER 39–40 (1986).

²⁷⁰ *James v. Marinship Corp.*, 155 P.2d 329, 342 (Cal. 1944); *Hughes v. Superior Court*, 339 U.S. 460, 468–69 (1950).

²⁷¹ WARK & GALLIHER, *supra* note 262, at 112–265.

²⁷² *Id.* at 61.

²⁷³ *Id.*

²⁷⁴ *Id.*

²⁷⁵ Letter to Louis Garrett, ILWU Local 41 (July 22, 1948) (on file with the ILWU archives).

²⁷⁶ *Id.*

NLRB in Washington rejected the company's appeal,²⁷⁷ the company persisted. After the ambitious young Flint got IWA members to cross the ILWU picket line, the company convinced the NLRB to issue a complaint on the charge that the picketing was an unlawful jurisdictional strike.²⁷⁸

The company was not content with waiting for the NLRB investigation and hearing to decide whether the picketing was lawful, and so in October 1948—a year before the agency would award the work to the IWA—the company also filed suit under section 303 against both Local 16 and the International.²⁷⁹ Although the International had no involvement in the dispute other than allowing its regional organizer, Vern Albright, to work as Local 16's sole paid staffer, it did have money.²⁸⁰ The theory of liability against the International was that Albright had acted on behalf of the International when he helped the Local.²⁸¹ The company argued to the jury (and, later, to the court of appeals) that Albright's involvement, along with the International's having placed Juneau Spruce on the union's unfair list (which prevented the barges from being unloaded in Prince Rupert), made it jointly and severally liable for the company's lost profits from April 1948, when the picketing began, until the trial commenced.²⁸²

Andersen and Gladstein attacked this theory on several fronts. First, from April to July, the IWA agreed with the ILWU that the loading should have been done by ILWU workers as had been the past practice.²⁸³ Second, they insisted the picketing was an entirely permissible protest of the company's unfair labor practice, at least until September 1949, when the NLRB determined that the work was legally the province of the mill workers, rather than the longshoremen.²⁸⁴ How, they argued, could it be wrong to protest a work assignment when the agency charged with deciding such disputes had not acted? Finally, from the point of view of the ILWU, the whole thing happened because the company refused to respect the decision of both the IWA and the ILWU that

²⁷⁷ Letter from Germain Bulcke to George R. Andersen (Oct. 27, 1948), *supra* note 250, at 1–2.

²⁷⁸ *Id.*; Melton Boyd, Hearing Officer, NLRB, to Juneau Spruce Corp. (Sept. 13, 1948) (on file with the ILWU archives).

²⁷⁹ Juneau Spruce Corp. v. Int'l Longshoremen's & Warehousemen's Union, 83 F. Supp. 224, 224–25 (D. Alaska 1949) (denying motion to dismiss).

²⁸⁰ Int'l Longshoremen's & Warehousemen's Union v. Juneau Spruce Corp., 189 F.2d 177, 186 (9th Cir. 1951).

²⁸¹ *Id.* at 181.

²⁸² *Id.* at 192.

²⁸³ Letter from George R. Andersen, Attorney, Gladstein, Andersen, Resner & Sawyer, to Louis Goldblatt, ILWU 1 (May 2, 1949) (on file with the ILWU archives).

²⁸⁴ *Id.* at 1–2.

the loading on the docks should be done by longshoremen, as it always had been.²⁸⁵ All of Juneau Spruce's damages could have been avoided, the ILWU argued at trial (and later to the Senate, urging an amendment to the Taft-Hartley Act to remove the legal prohibition of protests like the one in Juneau) if the company had honored the two unions' votes that the work was properly within the jurisdiction of the ILWU.²⁸⁶ But the Taft-Hartley Act empowered the company to ignore the unions' resolution and then to sue for the damages that the unions' vote was intended to prevent. Having refused to accept the amicable solution to the problem and therefore prompting a strike, according to the ILWU, the employer had caused its own problems.²⁸⁷

The jury accepted the company's view across the board and awarded \$750,000 for lost profits.²⁸⁸ While the case made its way through the appeals process, Gladstein and Andersen worked furiously to plan for the possibility that the judgment would be upheld.²⁸⁹ Among other things, they warned the union that the company could collect the judgment through a variety of intrusive methods: the company could get a court order allowing it to collect any money in any of the International's bank accounts; it could put a lien on any of the union's real or personal property; it could have the court appoint a receiver to take control of the union and to collect any dues paid by any local union to the International.²⁹⁰ As it turned out, the company did *all* of those things.

The case caused much consternation within the union because the enormous damages judgment (worth about \$8 million in 2020 dollars) would bankrupt the International and destroy the union.²⁹¹ And the *Juneau Spruce* judgment was not the only financial emergency facing the union. In the same month the *Juneau Spruce* jury returned its verdict, a federal grand jury indicted Harry Bridges for lying in his naturalization hearing by saying that he was not a Communist, and it also indicted two other ILWU leaders for aiding and abetting his alleged lies.²⁹² In addition, the ILWU was in the middle of a huge strike in Hawai'i in support of the newly organized sugar and pineapple workers, as well as a

²⁸⁵ *Id.*

²⁸⁶ *Id.* at 2.

²⁸⁷ *Id.*

²⁸⁸ *Int'l Longshoremen's & Warehousemen's Union v. Juneau Spruce Corp.*, 342 U.S. 237, 240 (1952).

²⁸⁹ Memorandum from George R. Andersen, Attorney, Andersen, Gladstein, Resner & Sawyer, on Juneau Spruce 1 (Feb. 1960) (on file with the ILWU archives) [hereinafter Andersen Memo].

²⁹⁰ *Id.*

²⁹¹ Executive Board Minutes, June 27–28, 1949, at 2 (July 14, 1949) (on file with the Labor Archives and Research Center, Norman Leonard Papers, Box 65, Folder 4) [hereinafter Executive Board Minutes].

²⁹² PETER AFRASIABI, *BURNING BRIDGES: AMERICA'S 20-YEAR CRUSADE TO DEPORT LABOR LEADER HARRY BRIDGES* 159 (2016).

warehouse strike on the mainland.²⁹³ ILWU leaders were convinced (not without reason) that the employers in all these far-flung matters were communicating with each other; the situation, they thought, “appears to be an all-out fight by the employers to wipe out our union.”²⁹⁴

Although the lawyers and the union’s leaders worried about the existential threat of Taft-Hartley injunctions and damages generally, and the *Juneau Spruce* judgment in particular, they made a strategic decision to approach the case in the courts as a narrow and technical matter of an overbroad statutory provision. The strategy produced a comparably narrow and technical Supreme Court loss in January 1952.²⁹⁵ In a brief, unanimous opinion by Justice Douglas, the Court rejected the union’s principal argument, which was that employers should not recover damages for picketing that had occurred before the NLRB ruled that the picketing union was not entitled to the work.²⁹⁶

C. “*The Old Business of Cops and Robbers, Chasing Debtors*”

The high stakes, post-judgment maneuvering to prevent the judgment from bankrupting the union became an epic battle of lawyer wits that began before the Court ruled and lasted for several years after. As employers in the Pacific Northwest combined efforts with employers and lawyers in San Francisco and Hawai’i to collect the judgment by seizing ILWU assets wherever they could be found, ILWU lawyers became increasingly sure that there was collusion among them in an effort to smash the union. Years later, Andersen wrote:

The Union recognized that not only was the judgment binding upon it, but that the efforts to procure the judgment as well as to satisfy it, were inspired not only by the terms and provisions of the Taft-Hartley Act, but there were political overtones and desirable political ends being sought by Juneau Spruce and unknown others believed to be in concert with them and to whom the harassment or liquidation of the Union would be of inestimable value as well as satisfaction.²⁹⁷

The ILWU prided itself on being thriftier than other big unions of the era. Bridges and other ILWU staff and officers famously took as pay no more than the highest earning member working on the docks,²⁹⁸ and the per capita payments that local unions gave to the International (a portion of each member’s

²⁹³ Executive Board Minutes, *supra* note 291, at 1.

²⁹⁴ *Id.* at 2.

²⁹⁵ *Int’l Longshoremen’s & Warehousemen’s Union v. Juneau Spruce Corp.*, 342 U.S. 237, 245 (1952).

²⁹⁶ *Id.* at 244.

²⁹⁷ Andersen Memo, *supra* note 289, at 1–2.

²⁹⁸ AFRASIABI, *supra* note 292, at 37.

dues) were relatively low.²⁹⁹ As a consequence, the lawyers for Juneau Spruce were going to have a difficult time collecting the judgment. But they went after it with zeal.

Juneau Spruce hired lawyers in San Francisco and Hawai'i to secure the appointment of a receiver to take over the financial affairs of the union and find the bank accounts, buildings, and any money belonging to the International. Having seen this coming, the International had made certain that it had no money in the bank.³⁰⁰ As ILWU Vice President Lou Goldblatt recalled, "When they tried to attach a bank account we had, all they picked up was an overdraft."³⁰¹ It was, he said, "the old business of cops and robbers, chasing debtors," as the lawyers for the company battled the lawyers for the union to see who could outsmart or outlast whom.³⁰² To reduce its assets, the union paid its staff and vendors six months in advance.³⁰³ Still, the company "levied upon every conceivable bank account in which it could be asserted that the ILWU had an interest."³⁰⁴ The company's lawyers tried to seize and sell the ILWU's San Francisco headquarters building, only to discover that the union's lawyers had already arranged for it to be sold to a nonprofit organization, with the sale financed by a large mortgage.³⁰⁵

As the lawyers for Juneau Spruce got ever more frustrated in their efforts to collect from the International, they decided to go after *other* ILWU locals— independent legal entities with no involvement in the dispute—on the theory that some of the money in their hands could be regarded as the International's assets (because of ILWU bylaws obligating locals to pay a portion of their dues to the International).³⁰⁶ Attacking the locals was also a way to get leverage to force the International to settle. The company's lawyers were right, ultimately, that this tactic would work, but it took longer than they thought.³⁰⁷ The ILWU and its lawyers had spent twenty years battling intransigent employers, violent police, the House Un-American Activities Committee (HUAC), the AFL, the CIO, the

²⁹⁹ Letter from Harry Bridges, President, ILWU, to ILWU Locals 1–2 (Jan. 7, 1952) (on file with the ILWU archives).

³⁰⁰ 1 LOU GOLDBLATT: WORKING CLASS LEADER IN THE ILWU, 1937–1977, ORAL HISTORY 410–12 (1979) [hereinafter GOLDBLATT ORAL HISTORY].

³⁰¹ *Id.* at 409.

³⁰² *Id.* at 415.

³⁰³ *Id.* at 410.

³⁰⁴ Andersen Memo, *supra* note 289, at 3–4.

³⁰⁵ GOLDBLATT ORAL HISTORY, *supra* note 300, at 410.

³⁰⁶ *Your Union Dues at Work*, ILWU LOCAL 142, <https://ilwulocal142.org/blog/members/guide-for-new-members-test/> (last visited Sept. 5, 2020).

³⁰⁷ STANLEY I. KUTLER, *THE AMERICAN INQUISITION: JUSTICE AND INJUSTICE IN THE COLD WAR* 144 (1982).

FBI, the DOJ, and many others over wages, working conditions, communism, and efforts to deport Harry Bridges.³⁰⁸ Richard Gladstein even spent six months in federal prison for contempt of court in connection with his representation of eleven leftist labor and civil rights activists tried for violating the Smith Act, which prohibited teaching about communism.³⁰⁹ They were used to bare-knuckle legal fights and this one was just the latest in a long series. Nevertheless, not every leader of every local was quite so experienced with legal struggles, and the International needed to help the leaders of the locals withstand the onslaught of legal proceedings. And the legal proceedings frequently froze locals' accounts whether or not the International had any assets there, which prevented local unions from paying their staff.

The company tried to weaken the resolve of ILWU members by using debt collection mechanisms to gather information on them and the activities and finances of all the local unions.³¹⁰ Company lawyers subpoenaed all sorts of information about the International's strategy and operations beyond its assets.³¹¹ A 1955 subpoena, for example, sought all Executive Board minutes and "all journals, ledgers, records, and books of account" from 1948 onward, and the names, locations, and membership information of every ILWU local.³¹² Membership information, the ILWU protested, was not public information. Still, union lawyers were not confident they could win litigation to protect this information, because in the early 1950s, at the height of the HUAC hearings, the FBI, HUAC, and their sympathizers in the business community were seeking union membership records all over the country. Union lawyers feared that compliance with one of these subpoenas would leave union members at risk of blacklisting.³¹³

The International fought back against the appointment of receivers by sending a memo to all locals explaining that freezing the assets of the International meant that there were no assets to pay the various committees and area arbitrators that resolved disputes in any Pacific port where ILWU members

³⁰⁸ *Id.* at 144–46.

³⁰⁹ *Id.* at 152, 157–58; MICHAEL R. BELKNAP, *COLD WAR POLITICAL JUSTICE: THE SMITH ACT, THE COMMUNIST PARTY, AND AMERICAN CIVIL LIBERTIES* 112 (1977).

³¹⁰ Letter from Joe Amyes, Former President, ILWU Local 91, and William Glazier, Wash. Representative, ILWU, to Louis Goldblatt, ILWU 1–2 (Jan. 3, 1955) (on file with the ILWU archives) (discussing Juneau Spruce Subpoena).

³¹¹ *Id.*

³¹² *Id.*

³¹³ See VICTOR RABINOWITZ, *UNREpentANT LEFTIST: A LAWYER'S MEMOIR* 103–04 (1996) (describing an incident in which he physically prevented congressional committee investigators armed with a subpoena from searching file cabinets in a Memphis union local's office in 1951).

worked.³¹⁴ This was a signal to employers that if the union's assets were frozen, the dispute resolution mechanisms on which employers relied to handle quickie strikes on the docks would also stop. The memo also reminded the locals of a provision in the ILWU contracts stating that in the event of outside interference in the union, the contract—and its no-strike clause—was void.³¹⁵ Just as the Juneau Spruce Company thought it could use the judgment to bust the International by breaking down the solidarity of the locals, the ILWU reminded all the other employers that they had something to lose in the Juneau Spruce company's effort to expand the scope of the dispute.³¹⁶

The union's situation became desperate when lawyers for Juneau Spruce filed a suit in federal court in Hawai'i, seeking authority to seize the assets of Local 142, a huge local that included tens of thousands of sugar and pineapple plantation workers who had only recently—after epic struggles and major strikes—joined the ILWU and won collective bargaining agreements.³¹⁷ To defuse this strategy, the ILWU had recently changed the union by-laws to make per capita contributions from locals entirely voluntary.³¹⁸ That way, the company could not argue that the assets of the locals were anything to which the International had a claim and, therefore, the assets of the locals should not be subject to freezing and seizure. But the Juneau Spruce lawyers had a response for that: the new “voluntary” per capita rule was a sham. The federal court agreed and issued an order freezing the assets of the Hawai'i local.³¹⁹

To protect its members' hard-earned dues money, Local 142 simply stopped depositing dues in the bank.³²⁰ The union that was famously scrupulous with its finances was suddenly forced to start acting like the long-derided East Coast and Gulf Coast International Longshore Association, running its operation out of bags of cash.³²¹ Yet the ILWU described their activities in these years the way Hollywood portrayed the French Resistance to the Nazis³²²—it was all in service of a noble cause. Not to mention, it was kind of fun to outwit their adversary. For example, Lou Goldblatt recalled that in 1955, when the International needed money, he asked lawyer George Andersen—who was going to Hawai'i to work

³¹⁴ Memorandum from H.J. Bodine & L.B. Thomas, Coast Lab. Rels. Comm., ILWU, to ILWU Locals (Dec. 28, 1954) (on file with the ILWU archives).

³¹⁵ *Id.*

³¹⁶ *Id.*

³¹⁷ GOLDBLATT ORAL HISTORY, *supra* note 300, at 386–87, 409–11.

³¹⁸ *Id.* at 414.

³¹⁹ ZALBURG, *supra* note 209, at 313.

³²⁰ *Id.*

³²¹ GOLDBLATT ORAL HISTORY, *supra* note 300, at 410.

³²² *See, e.g., CASABLANCA* (Warner Bros. Pictures 1942).

on the case—to bring back some cash. Andersen returned from the islands with \$60,000 in cash.³²³ Not wanting to keep it on hand, Andersen delivered the money to Goldblatt at his home on a Friday evening.³²⁴ Goldblatt responded, “What the devil do I want it for? I can’t go down to the bank and put it in the safety deposit box.”³²⁵ Andersen replied, “Well, you asked me to go bring it and I’m not going to keep it.”³²⁶ So, according to Goldblatt, “the money hung around all weekend and I figured the best thing to do was to put it in the most prominent place of all, so I just left the thing in a cigar box on the mantelpiece.”³²⁷ On Monday, with the help of a friendly bank teller willing to work after hours, Goldblatt converted it into cashier’s checks.³²⁸

I’d give him a list of bills I wanted paid – salaries, or other expenses; everything we could prepay, and give him the exact amounts. He would make out cashier’s checks. He’d call me just as the bank was closing and I’d go there and knock; he’d open up because he was expecting me and I’d give him the cash, pick up the cashier’s checks and have them all mailed within a half hour.³²⁹

When the Juneau Spruce lawyers figured this out, they informed Judge McLaughlin in Hawai’i and asked him to hold the ILWU’s Hawai’i lawyer, Myer Symonds, in contempt for violating the asset freezing order.³³⁰ Symonds insisted that any knowledge he had of the transaction was protected by attorney-client privilege, and Judge McLaughlin felt compelled to agree.³³¹ But he did refer Symonds to the Hawai’i Bar Association for discipline and also to the U.S. Attorney for prosecution.³³² The Bar ultimately determined that attorney-client privilege had prevented Symonds from disclosing what his client did and, therefore, he should not be disciplined, and evidently the U.S. Attorney agreed.³³³ The judge therefore declined to hold him in contempt.³³⁴

As in San Francisco, the company’s lawyers tried to seize Local 142’s headquarters building in Honolulu, only to discover they had been outfoxed and

³²³ GOLDBLATT ORAL HISTORY, *supra* note 300, at 410.

³²⁴ *Id.* at 409–10.

³²⁵ *Id.* at 410.

³²⁶ *Id.* at 410–11.

³²⁷ *Id.* at 411.

³²⁸ *Id.* at 410–11.

³²⁹ *Id.* at 411.

³³⁰ *Symonds Cleared of Contempt in Union Fund Case*, HONOLULU STAR BULL., Mar. 18, 1955.

³³¹ *Id.*

³³² *Id.*

³³³ *Id.*

³³⁴ *Id.*

the union had already sold it to a nonprofit.³³⁵ There was litigation over whether the sale was a sham, but ultimately, all the company got from the headquarters was the value of some furniture and four typewriters.³³⁶ Yet, with its assets frozen and no end to the litigation in sight, in January 1955, Local 142 in Honolulu (with 23,000 members) decided the only solution was to disaffiliate with the ILWU, effective immediately.³³⁷

Worried that the litigation would wipe out a decade of organizing, ILWU leaders decided some settlement had to be made. Suspecting that the Juneau Spruce company was tiring of paying its lawyers to recover nothing, Lou Goldblatt thought he saw an opening. The union would settle the case for \$68,000 in funds left over from the Harry Bridges legal defense fund.³³⁸ When the company refused to accept their lawyers' advice to take that deal, ILWU lawyers landed on another idea.

A few years before, as part of the Hawai'i organizing campaign, ILWU lawyers had filed a number of collective action suits on behalf of plantation workers for unpaid overtime under the Fair Labor Standards Act (FLSA).³³⁹ One was a test case on behalf of hundreds of cane processing workers.³⁴⁰ The workers had won at trial, although the amount of their recovery would have to be proved in individual proceedings.³⁴¹ Then, the Ninth Circuit overturned the judgment in its entirety, finding the workers exempt from the FLSA.³⁴² In the March 1955 Supreme Court argument, the tenor of the questions made it seem that the justices were divided.³⁴³ Rather than risk a potentially significant backpay award, lawyers for the Hawaiian Sugar Planters' Association (HSPA) offered to settle the case for \$250,000.³⁴⁴ Suddenly the ILWU's members were going to have a pile of money. The lawyers, together with ILWU regional director Jack Hall, local president Jack Kawano, and local leader Freddie Kamahoahoa, debated whether they should settle the *Juneau Spruce* case with the Waialua settlement.³⁴⁵ On the one hand, they would be depriving Hawai'ian workers of a significant sum of money to pay for picketing that they had had nothing to do

³³⁵ *ILWU Witness Grilled on Building Transfer*, HONOLULU ADVERTISER, Feb. 12, 1955.

³³⁶ *I.L.W.U. Will Pay Juneau for Items Almost Seized*, HONOLULU STAR BULL., Feb. 19, 1955.

³³⁷ *ILWU Here to Announce Disaffiliation Decision*, HONOLULU ADVERTISER, Jan. 30, 1955.

³³⁸ GOLDBLATT ORAL HISTORY, *supra* note 300, at 415.

³³⁹ *Id.* at 416–19.

³⁴⁰ *Maneja v. Waialua Agric. Co.*, 349 U.S. 254 (1955).

³⁴¹ *Id.* at 258.

³⁴² *Id.*

³⁴³ *Id.* at 272.

³⁴⁴ GOLDBLATT ORAL HISTORY, *supra* note 300, at 416.

³⁴⁵ *Id.* at 417.

with. But, on the other, the local leaders also thought that trying to divide up the recovery would be difficult and could undermine solidarity. As Jack Hall said to Lou Goldblatt, “Trying to undertake the distribution of \$250,000 to whatever number of guys we had in sugar at the time, 18,000 or 20,000 members, would be a hopeless job. Some people would get 10 bucks, some people would get nothing, and it would be more divisive than it’s worth.”³⁴⁶ Moreover, Local 142 had negotiated better protections in a collective agreement in the nine years since the suit was filed, so the backpay award seemed like ancient history. Thus, even if the workers won in the Supreme Court, it was not obvious that the legal win would be a victory from the standpoint of building worker power.

The union took the matter to the workers. Local leaders went from plantation to plantation and met with all of the roughly 10,000 plaintiffs to explain the situation. Fewer than half a dozen workers at the 26 affected plantations refused to approve the settlement and relinquish any claim to the money.³⁴⁷ The ILWU lawyers settled the sugar case and immediately turned around and settled the *Juneau Spruce* case for \$250,000.³⁴⁸ On May 23, 1955, just a couple of weeks after the settlements were negotiated, the Supreme Court handed down its decision in the *Waialua* case: the workers were unprotected by FLSA and lost everything.³⁴⁹ “The HSPA money [was] used to pay Juneau Spruce and it doesn’t cost the union a goddam nickel!” gloated Goldblatt.³⁵⁰ “Everybody in the Islands had a big laugh that the Big Five had been taken for a ride; settled for \$250,000 bucks when it wouldn’t have cost them a goddam dime.”³⁵¹

When the news reported the whole situation, the Honolulu press, which was a reliable voice for the interests of business, framed the settlement as union duplicity. Under the headline, *It’s the Hawaii Workers Who Pay*, the Honolulu Star Bulletin editorialized, “[t]he damage was done by the I.L.W.U. in Alaska but it’s the rank-and-file in Hawaii that gets soaked for it!”³⁵² But, the editorial concluded, “[a]ctually, when the chips are finally distributed, it turns out that the

³⁴⁶ *Id.*

³⁴⁷ ZALBURG, *supra* note 209, at 315.

³⁴⁸ *Juneau Spruce Settlement Made with H.S.P.A. Money*, HONOLULU STAR BULL., June 2, 1955; GOLDBLATT ORAL HISTORY, *supra* note 300, at 418–19.

³⁴⁹ *Maneja v. Waialua Agric. Co.*, 349 U.S. 254 (1955). As Gladstein explained to Hall in a letter describing the Court’s reasoning: “There can be no doubt about it: had we not made the settlement, we would have gotten nothing, or virtually nothing[.]” Letter from Richard Gladstein, Attorney, Gladstein, Andersen, Leonard & Sibbett, to Jack Hall, Hawai’i Regional Director, ILWU 1 (May 27, 1955).

³⁵⁰ GOLDBLATT ORAL HISTORY, *supra* note 300, at 418.

³⁵¹ *Id.* at 419.

³⁵² *It’s the Hawaii Workers Who Pay*, HONOLULU STAR BULL., June 4, 1955.

lawyers got a lot of the money anyway.”³⁵³ This was the one thing the union and the newspapers could agree on: nobody got any money out of the whole miserable episode except the company’s lawyers, whose fees consumed the \$250,000 settlement.³⁵⁴

Given how little the Juneau Spruce Company or the Hawai’ian Big Five got out of the litigation, it is important to bear in mind how much they might have gotten, and the significance of the Taft-Hartley Act in changing the Pacific Coast employers’ labor and legal strategy. In the mid-1940s, some shipping and longshoring companies (at least in San Francisco) seemed to have accepted unionization and even Harry Bridges, although they persisted in accusing him of being a Communist.³⁵⁵ All Pacific Coast employers (except in three cities, including Tacoma, Washington) were parties to the industry-wide collective agreement with the ILWU, although local unions handled minor disputes locally with each employer,³⁵⁶ as in the case of Local 16 in Juneau.³⁵⁷ Since 1936, many contract terms had been imposed, and all disputes had been resolved, through arbitration, which had occurred under the auspices of the Secretary of Labor and by the National War Labor Board between 1942 and 1945.³⁵⁸ By the spring of 1947, respected labor economist Clark Kerr reported that the major sources of disagreement between the Waterfront Employers’ Association of the Pacific Coast and the ILWU were the pace of work and stopping periodic local work stoppages.³⁵⁹ Another major disagreement, according to Kerr, concerned the hiring hall, which was supported by employers.³⁶⁰ The union thought it should use a rotation system to share work equitably among the whole labor force, but employers favored a gang system, which would allow employers to request the same gang of workers for job after job.³⁶¹ Importantly, Kerr said, the employers had largely resigned themselves to working with the ILWU.³⁶² Indeed, the President of the American-Hawaii Shipping Company said that by the mid-1940s he had come to the view that although he thought Bridges was a

³⁵³ *Id.*

³⁵⁴ *Id.*

³⁵⁵ Kerr, *supra* note 252, at 653; AFRASIABI, *supra* note 292, at 159.

³⁵⁶ Kerr, *supra* note 252, at 653.

³⁵⁷ *See infra* Part II.A.

³⁵⁸ Kerr, *supra* note 252, at 653–54; *see also* NAT’L ARCHIVES, NAT’L ARCHIVES PUB. NO. 55-10, PRELIMINARY INVENTORIES NO. 78: RECORDS OF THE NATIONAL WAR LABOR BOARD (WORLD WAR II) 5–9 (1955) (noting that the National War Labor Board existed from 1942 to 1945).

³⁵⁹ Kerr, *supra* note 252, at 653–54.

³⁶⁰ *Id.*

³⁶¹ *Id.*

³⁶² *Id.* at 653, 674.

Communist, he did not favor deporting him, and he believed the waterfront employers could and should work with him and with the ILWU.³⁶³

But the Taft-Hartley Act offered an opportunity to unsettle the status quo. As James Rogers, the lawyer for Juneau Spruce, gloated in a meeting of the Portland, Oregon, Chamber of Commerce, it provided a way to smash the ILWU, and he and the Big Five seized it.³⁶⁴

D. Union Lawyer Oversight of Worker Direct Action

Although many activist union leaders like those at the ILWU refused to concede that the Taft-Hartley Act would force them into quiescence, the aftermath of the *Juneau Spruce* verdict shows the ways in which the ILWU's erstwhile radical leaders and lawyers came to monitor and discourage rank-and-file activism, in order to ensure the union's continued survival.

As for the leaders, at the first ILWU Executive Board meeting after the *Juneau Spruce* verdict, one board member asked how on earth the International got tangled up in such a mess.³⁶⁵ The leadership's lengthy and defensive reply suggested that Local 16 tried to avoid a strike and that the International was careful about supporting local union protests.³⁶⁶ As ILWU Vice President Goldblatt recalled, the "five or six very intensive years" after the enactment of the Taft-Hartley Act were "an extremely difficult and arduous period in the life of the ILWU. Things piled up on us very quickly."³⁶⁷ Unlike many other radical unions, the ILWU retained most of its membership. But its successes in organizing new and smaller places in Chicago, New Orleans, and Minneapolis were reversed because "there was no way of hanging on to them during this era."³⁶⁸ Employers provoked strikes, knowing they had the remedies of the Taft-Hartley Act as a tool, and Juneau Spruce was one spectacularly hard-fought example. "For a period you couldn't help but feel every morning that the circle was getting tighter around you; an attack on every flank . . . We were literally

³⁶³ CORINNE L. GILB, ROGER LAPHAM: AN INTERVIEW ON SHIPPING, LABOR, SAN FRANCISCO CITY GOVERNMENT, AND AMERICAN FOREIGN AID 182 (1957) ("I'd rather put up with the devil that is, so to speak, than with an unknown one.").

³⁶⁴ GOLDBLATT ORAL HISTORY, *supra* note 300, at 419. Readily available archival records do not reveal the extent to which employers elsewhere on the Pacific coast shared this view. Uncovering the story of what they thought during this period would be a separate research project.

³⁶⁵ Executive Board Minutes, *supra* note 291.

³⁶⁶ *Id.*

³⁶⁷ GOLDBLATT ORAL HISTORY, *supra* note 300, at 456–57.

³⁶⁸ *Id.*

fighting for survival.”³⁶⁹ The union weathered it all, said Goldblatt, because of “the tradition of militancy, a deep loyalty on the part of the membership and a willingness to struggle instead of backing away from these beefs.”³⁷⁰

But it took its toll. Leaders at both the International and some locals apparently became cautious about resorting to picketing when companies refused to comply with ILWU collective agreements and also became more inclined to seek legal advice before acting. Two weeks after the Supreme Court handed down its decision in *Juneau Spruce*, the Company gave notice of its intent to terminate its contracts with the ILWU before they expired and to use ILWU men for fewer jobs than it had done before.³⁷¹ The leaders of Local 16 believed this new “BEEF,” as they called it, was copying “the pattern laid by” Juneau Spruce and was not authorized by the ILWU’s master agreement with Alaskan employers.³⁷² But rather than act, they promptly wrote to the International leadership asking for assistance, noting that “this matter may require Legal-Talent to keep us out of another [costly] Encounter” and the local needed to “be able to put ourselves on firm ground when and where we have to negotiate with this Company and its LAWYERS.”³⁷³

The effect on the lawyers is even clearer, and more multifaceted. First, the case prompted union lawyer review of the ILWU’s newspaper, *The Dispatcher*.³⁷⁴ The judgment against the International was based, in part, on *The Dispatcher*’s coverage of the picketing at the mill; the paper’s publication of the company being on the unfair list had prompted ILWU members to refuse to unload the barges in Prince Rupert, British Columbia.³⁷⁵ Unnerved by the prospect that company lawyers would read *The Dispatcher* as ratifying illegal local conduct, Goldblatt fired off a terse memo to the staff of *The Dispatcher* and the union’s publicity department instructing them that henceforward, “all articles or editorials on Juneau Spruce which are written for the Dispatcher, must

³⁶⁹ *Id.*

³⁷⁰ *Id.* at 457.

³⁷¹ See Letter from Richard Gladstein, Attorney, Attorney, Gladstein, Andersen & Leonard, to Elsie Fox, ILWU Local 6 (Feb. 13, 1948) (on file with the ILWU archives) (advising on desirable amendments to union constitution to safeguard union assets because of provisions of Taft-Hartley Act making unions liable for actions of “any person representing the Union in almost any capacity”).

³⁷² Letter from E. Pearson, Sec’y, ILWU Local 16, to Germain Bulcke, Vice President, ILWU (Feb. 13, 1952) (on file with the ILWU archives).

³⁷³ *Id.*; Letter from Germain Bulcke, Vice President, ILWU, to George R. Andersen, Attorney, Gladstein, Andersen & Leonard (Feb. 28, 1952) (on file with the ILWU archives).

³⁷⁴ Letter from Louis Goldblatt, ILWU, to *The Dispatcher* & ILWU Publicity Dep’t (Jan. 19, 1952) (on file with the ILWU archives).

³⁷⁵ See Letter from Germain Bulcke to George R. Andersen (Oct. 27, 1948), *supra* note 250, at 2.

be checked with Allan Brotsky, in Gladstein's office before publication."³⁷⁶ For Brotsky, who was devoted to the cause of civil liberties, censoring the newspaper to protect the union's legal position must have been a dreary task. To be sure, the paper remained a lively voice of criticism of the *Juneau Spruce* decision; the editor devoted half an issue to the Supreme Court's ruling with stories and cartoons condemning it as a "new strikebreaking gimmick"³⁷⁷ that would allow the national CIO, which "has been trying to destroy us for years," and "courts just as eager as [the] CIO," to "smash militant, autonomous unions."³⁷⁸ Still, it is impossible to know the path not taken here—how the birth of attorney review of union communications altered the course of what might have been said.

In addition to censoring *The Dispatcher*, the union's attorneys also took on a more prominent role in evaluating proposed picketing, strikes, and boycotts for possible damages liability. In January 1951, while *Juneau Spruce* was on appeal, Allan Brotsky wrote to an organizer for the International, cautioning him about getting involved in local disputes.³⁷⁹ Similarly, when Local 16 sought advice about a "new beef," Brotsky cautioned:

[E]ven though the Company may be breaching its agreement with Local 16 by diverting work now done by longshoremen . . . the Local has no right to picket the Company to prevent them from doing that . . . Fantastic as this may seem, this is precisely what the Taft-Hartley [Act] provides as that law has now been interpreted by the Supreme Court of the United States."³⁸⁰

And so, Brotsky concluded, picketing to enforce the contract "would subject the Local (and undoubtedly the International, . . .), to law suits for damages."³⁸¹ Brotsky took this stance even though the facts of the *Juneau Lumber* dispute were arguably distinguishable from the *Juneau Spruce* case; the loss had made him risk averse.

Allan Brotsky also instructed Lincoln Fairley, the ILWU Research Director, that the *Juneau Spruce* verdict had come about because "the International Representative in question" had not "understood the problems raised by the

³⁷⁶ Letter from Louis Goldblatt to *The Dispatcher* & ILWU Publicity Dep't (Jan. 19, 1952), *supra* note 374.

³⁷⁷ *Supreme Court Upholds \$750,000 Judgment Against ILWU*, *supra* note 11, at 2.

³⁷⁸ *Id.*

³⁷⁹ Letter from Allan Brotsky, Attorney, Gladstein, Andersen, Resner & Leonard, to Lincoln Fairley, Rsch. Dir., ILWU 2 (Jan. 12, 1951) (on file with the ILWU archives).

³⁸⁰ Letter from Allan Brotsky, Attorney, Gladstein, Andersen, Resner & Leonard, to Germain Bulcke, Vice President, ILWU 1–2 (Mar. 7, 1952) (on file with the ILWU archives).

³⁸¹ *Id.* at 2.

Taft[-]Hartley Act”³⁸² and had failed to clarify that he was acting only on behalf of the Local, not the International.³⁸³ Fairley then drafted a memo to all locals explaining that “the beefs which lead to damage suits are ordinarily beefs in which individual locals become involved The International has no authority to start the beef, to participate in it, to direct it, to encourage it or to assist it by financial means.”³⁸⁴ Fairley was forced to explain that “[t]he consequence of these provisions of [the Taft-Hartley] Act is that union officials and representatives need to watch their step so as not to involve the International in any situation which is likely to result in damages suits[.]”³⁸⁵ The courts and the NLRB would consider International staff as agents of locals for purposes of Taft-Hartley Act liability “unless they take affirmative steps to make it clear that they are not, in fact, acting in that capacity.”³⁸⁶ This was a delicate task. Even providing staff with the advice that the lawyer recommended was fraught, as Fairley warned: “You will bear in mind, I am sure, the possible use which an employer or court could make of the letter if it fell into their hands.”³⁸⁷

The threat was quite real, as lawyers for labor and management both saw the *Juneau Spruce* case as an effort to break the union that nearly succeeded. Only a couple of months before settling the litigation, James Rogers, one of Juneau Spruce’s lead attorneys, said in a speech to the Manufacturers Committee of the Chamber of Commerce that the judgment would empower the ILWU’s rival, the more conservative and quiescent Sailors Union of the Pacific, and it would be a “fight to the finish” for the ILWU.³⁸⁸ The ILWU, Rogers crowed, might have to disband.³⁸⁹

Even years later, the ILWU remained cautious about the prospect of liability for activism, even as it remained committed to supporting direct action by workers on a movement-wide basis. The ILWU and its California locals supported the efforts of California farmworkers to organize during the grape boycott of the 1960s. For a brief period, ILWU members honored a picket set up by farmworkers at the ports of San Francisco and Oakland to protest the

³⁸² Letter from Allan Brotsky to Lincoln Fairley (Jan. 12, 1951), *supra* note 379, at 1–2.

³⁸³ *Id.*

³⁸⁴ Letter from Lincoln Fairley, Rsch. Dir., ILWU, to Allan Brotsky, Attorney, Gladstein, Andersen, Resner & Leonard 3 (Feb. 5, 1951) (on file with the ILWU archives) (enclosing draft memorandum to Field Staff).

³⁸⁵ *Id.*

³⁸⁶ *Id.*

³⁸⁷ *Id.*

³⁸⁸ *Fight to Finish Seen for ILWU*, COOS BAY TIMES, Mar. 11, 1955.

³⁸⁹ *Id.*

shipment of struck grapes.³⁹⁰ But the ILWU and the United Farm Workers (UFW) both paid damages for this secondary boycott.³⁹¹ When the ILWU local president—James Herman—agreed to help the farmworkers, he warned that they would only be able to get away with picketing for a short time and that the UFW members should tell no one that Herman had helped.³⁹² Even fifty years after the Supreme Court’s *Juneau Spruce* ruling, members and staff attending a 2002 ILWU leadership conference were still being instructed about what the case held and the threats that Taft-Hartley restrictions pose for union activism.³⁹³

The risks remain very real. As we noted at the beginning, in November 2019, the ILWU was once again subject to a huge damages verdict under section 303 when members of its Portland, Oregon local engaged in a campaign of protest activity—including a slowdown, though not a strike—to protest the refusal to recognize that certain work was within the jurisdiction of the ILWU.³⁹⁴ The plaintiff, a subsidiary of a Philippine multinational corporation, claimed that it had suffered almost \$94 million in lost profits and other damages and had been forced to withdraw from its contract with the Port of Portland to operate a port terminal.³⁹⁵ ICTSI sued the union on an array of theories, including for alleged antitrust violations and for unlawful secondary boycotts.³⁹⁶ A jury apparently agreed and split the \$94 million in damages between the International and its local.³⁹⁷ The resemblance to *Juneau Spruce* is startling, including in the union’s delicate balance in how to react publicly to the threat that the judgment will smash the union.³⁹⁸ Although local and national news reports covered the case,³⁹⁹ the union said nothing. According to one journalist covering the matter, the union’s lawyers feared that allowing their client to speak to the press would anger the judge, a risk they could not afford to take while their motion to reduce or set aside the verdict was on his desk.⁴⁰⁰ Many social movement organizations faced with such a crushing blow would use “name, blame, shame” protests and

³⁹⁰ GANZ, *supra* note 24, at 140.

³⁹¹ *Id.* at 140–41

³⁹² *Id.*

³⁹³ See Conference Background Information, ILWU LEAD Institute, Unity & Autonomy: The Juneau Spruce Case (Sept. 15–19, 2002) (on file with authors).

³⁹⁴ *ICTSI Oregon, Inc. v. Int’l Longshore & Warehouse Union*, 442 F. Supp. 3d 1329 (D. Or. 2020). For additional history of the dispute, see also *Int’l Longshore & Warehouse Union*, 363 N.L.R.B. No. 12 (2015); *Int’l Bd. of Elec. Workers*, 358 N.L.R.B. No. 102 (2012).

³⁹⁵ *Id.*

³⁹⁶ See, e.g., *ICTSI v. Int’l Longshore & Warehouse Union*, 863 F.3d 1178 (9th Cir. 2017).

³⁹⁷ *ICTSI Oregon*, 442 F. Supp. 3d at 1337.

³⁹⁸ Compare *Int’l Longshoremen’s & Warehousemen’s Union v. Juneau Spruce Corp.*, 342 U.S. 237, 240 (1952), with *ICTSI Oregon*, 442 F. Supp. 3d 1329.

³⁹⁹ Baker, *supra* note 2.

⁴⁰⁰ This was said in a telephone interview, on background, with Catherine Fisk in November 2019.

mass mobilization to show they speak for the people, against the power of business and government. But the union, at its lawyers' behest, sits quietly in the hope that the judge will spare the union from disaster.⁴⁰¹

III. BRINGING LABOR BACK INTO LAW AND SOCIAL MOVEMENTS STUDIES

The *Juneau Spruce* saga was much discussed in the labor press at the time, and it remains part of the ILWU's historiography and collective identity.⁴⁰² Yet, in the law and social movements literature, what this case exemplifies about labor's experience with law and, in turn, the multifaceted relationship between law and social movements are largely unexplored.

In this Part, we begin with an analysis of how labor's experience with law complicates the dimensions of law and social movements scholarship identified in Part I.C. We then turn to broader theorizing about the relationship between law and social movements. We conclude with some thoughts on the future of labor as a social movement.

A. *Seeing Social Movements Through the Lens of Labor*

Seeing social movements through the lens of labor complicates all five of the dimensions of the law and social movements literature discussed in Part I.

1. *How Law Channels Movements*

Perhaps the most important benefit of bringing labor back into law and social movements studies is that it challenges how we understand the conjunctive metaphor that links law to social movements. Labor's experience shifts the emphasis away from "legal mobilization"—how movements strategically use law—and from demosprudence—how movements make and change law.⁴⁰³ These theories see social movements as the subject, and law as the object. The ILWU's experience of the law in the *Juneau Spruce* case is distinct, however. It

⁴⁰¹ The judge did not spare the union from disaster, but did allow ICTSI to choose remittitur, reducing the verdict to \$19 million, and alternatively ordering a new trial on damages. *ICTSI Oregon*, 442 F. Supp. 3d at 1366; see Bernstein, *supra* note 6. But \$19 million is still more than twice the total assets of the union. The employer refused to accept the remittitur, and the matter is now before the trial judge on the union's motion for interlocutory appeal. See *ICTSI Oregon, Inc. v. Int'l Longshore & Warehouse Union*, No. 3:12-cv-1058-SI, 2020 WL 2768683, at *1 (D. Or. May 28, 2020).

⁴⁰² See ZALBURG, *supra* note 209, at 382–88.

⁴⁰³ See *supra* Part I.C.1.

is not about how social movements act upon law, but rather about how law acts upon social movements.

Labor's experience with law in the *Juneau Spruce* matter is largely about law being used to regulate movement activity—a form of what other scholars have referred to as “channeling.”⁴⁰⁴ In their theorization of how law channels social movements, John McCarthy and his co-authors argue that even seemingly mundane forms of regulation, such as tax law and postal service rules, affect social movement behavior through “a tangle of incentives favoring certain standard forms of organization, tactical approaches, and collective goals.”⁴⁰⁵ These, they argue, promote “voluntary” compliance with state-desired ends.⁴⁰⁶ Labor's experience highlights that channeling can fundamentally reshape a movement, regardless of whether the movement proactively invokes legal tools.

Labor scholars have long shown how government regulation of unions creates a tangle of incentives toward less radical, less political, more self-interested behavior.⁴⁰⁷ The Norris-LaGuardia and Wagner Acts reduced outright repression of labor as a social movement, but they channeled union activism towards a state-preferred goal—collective bargaining—and away from more radical movement objectives, including broad-based organizing aimed at exerting working-class power.⁴⁰⁸ And, as Christopher Tomlins pointed out, the Wagner Act changed the structure under which unions organized by requiring them to adhere to the NLRB's determination of what constituted an appropriate

⁴⁰⁴ The term “channeling” has been used with different meanings by different scholars in the literature. Generally, it suggests the ways in which law can orient movement activity down a particular path, from which various institutional constraints make it difficult to deviate. Law channels social movements during litigation campaigns seeking to expand rights of minorities; once a movement proactively engages with law, that engagement alters the movement's trajectory, including even its protest activity, to focus on the rights seeking to be established in litigation. Leachman, *supra* note 125, at 1737–49. Similarly, Tomiko Brown-Nagin's study of movement mobilization in defense of affirmative action reveals that “social movements that define themselves through law risk undermining their insurgent role in the political process, and thus undermining their agenda-setting ability.” Tomiko Brown-Nagin, *Elites, Social Movements, and the Law*, 105 COLUM. L. REV. 1436, 1436 (2005).

⁴⁰⁵ John D. McCarthy, David W. Britt & Mark Wolfson, *The Institutional Channeling of Social Movements by the State in the United States*, 13 RSCH. SOC. MOVEMENTS, CONFLICTS & CHANGE 45 (1991).

⁴⁰⁶ *Id.* at 49.

⁴⁰⁷ See FORBATH, *supra* note 24; MCCANN, *supra* note 24; Rogers, *supra* note 25.

⁴⁰⁸ The focus on legal mobilization rather than on organizing is one of the chief criticisms of contemporary social movements, and it is made especially forcefully by labor scholars, and by few so forcefully as Jane McAlevey. See Eleni Schirmer, *Jane McAlevey's Vision for the Future of American Labor*, NEW YORKER (June 10, 2020), <https://www.newyorker.com/books/under-review/jane-mcaleveys-vision-for-the-future-of-american-labor>. McAlevey points out that law played an outsize role in directing union power away from broad-based organizing and direct action, toward weaker forms of action which left managerial power untouched. JANE MCALEVEY, A COLLECTIVE BARGAIN: UNIONS, ORGANIZING, AND THE FIGHT FOR DEMOCRACY 58–61 (2020).

bargaining unit, rather than what the union considered best for its organizational objectives and worker interests.⁴⁰⁹ Judicial interpretations of the NLRA, as well as the legislative changes wrought by Taft-Hartley, increased the costs of certain movement tactics—such as the sit-down strike that had been crucial to organizing Detroit in 1937,⁴¹⁰ slowdowns by workers who feared an all-out strike,⁴¹¹ wildcat strikes,⁴¹² or the picketing at Juneau Spruce. Courts, and to a lesser extent the NLRB, imported pre-NLRA notions from master-servant law into the new labor law in ways that constrained the rights of workers to act collectively.⁴¹³ Law accordingly channeled worker militance into periodic strikes in support of enterprise-based collective bargaining and rewarded unions that honored no-strike clauses.

The Juneau Spruce episode also reveals the *processes* by which channeling occurs, even as labor movement actors—including their lawyers—consciously attempt to resist it. The ILWU had long been a union which bucked bureaucratic conservatism in favor of more radical, direct action.⁴¹⁴ In 1952, that choice almost bankrupted the union. The ILWU’s attorneys were deeply committed to rank-and-file leadership; yet, they had to reckon with how important their legal knowledge, and legal prudence, could be to the institutions they served. Lawyers started reviewing the union newspaper for unnecessarily risky statements.⁴¹⁵ They warned leaders about involving the International in local disputes.⁴¹⁶ And when faced with the prospect of a new “beef” several years later, one that looked unsettlingly like the *Juneau Spruce* case, the lawyers favored a more conservative approach and cautioned against picketing.⁴¹⁷

The effect (intentional or not) of the employers’ use of the restrictive law regulating unions was not just to channel labor activity into weaker and less

⁴⁰⁹ Christopher L. Tomlins, *AFL Unions in the 1930s: Their Performance in Historical Perspective*, 65 J. AM. HIST. 1021, 1041 (1979).

⁴¹⁰ James Gray Pope, *Worker Lawmaking, Sit-Down Strikes, and the Shaping of American Industrial Relations, 1935-1948*, 24 LAW & HIST. REV. 45, 74–82 (2006).

⁴¹¹ James Atleson, *Elk Lumber, Slowdowns, and the Suppression of Worker Solidarity (1950)*, in AMERICAN LABOR STRUGGLES AND LAW HISTORIES (Kenneth M. Casebeer ed., 2d ed. 2017).

⁴¹² NLRB v. Fansteel Metallurgical Corp., 306 U.S. 240, 263 (1939) (overturning an NLRB order that peaceful sit-down strikers were entitled to reinstatement at conclusion of strike); James Gray Pope, *How American Workers Lost the Right to Strike, and Other Tales*, 103 MICH. L. REV. 518, 533–34 (2004).

⁴¹³ JAMES ATLESON, *VALUES AND ASSUMPTIONS IN AMERICAN LABOR LAW* (1983); STUART CHINN, *RECALIBRATING REFORM: THE LIMITS OF POLITICAL CHANGE* 109–51 (2014).

⁴¹⁴ See SCHWARTZ, *supra* note 208.

⁴¹⁵ See *supra* text accompanying note 376.

⁴¹⁶ See *supra* text accompanying note 380.

⁴¹⁷ See *supra* text accompanying note 381.

disruptive activities, but also, importantly, to conscript unwilling union lawyers in blunting union activism.

While labor is unique among social movements in the extent to which it has been subject to nationwide and movement-specific regulation, law plays a structuring role in all movements; it constitutes the terrain on which movements and counter-movements engage in strategic action. One example of how background legal rules were employed in an attempt to regulate civil rights movement organizations—and to leverage their specific institutional structure against them—is *NAACP v. Alabama ex rel. Patterson*, decided in 1958.⁴¹⁸ At that time, the NAACP drew much of its funding, as well as its legitimacy, from its membership base. Alabama tried to employ state corporation laws to drive the NAACP out of the state, and in the course of that litigation, subpoenaed the organization's membership list.⁴¹⁹ Given the extreme hostility in the state to the movement, and opponents' willingness to violently attack supporters, had the state been successful in asserting a right to membership lists, it could have fundamentally altered how the organization functioned. In that case, however, the Supreme Court concluded that freedom of association trumped the normal operation of civil discovery—and thereby helped preserve the civil rights movement as we know it.⁴²⁰

The trajectory of other movements has similarly been altered by the operation of law. As scholars have noted,⁴²¹ the decision of LGBTQ activists and lawyers to focus on marriage equality was a product of many factors, but among them were the legal repression of gay sociability in bars and bath houses.⁴²² The HIV/AIDS epidemic enabled cities to portray gay sexual liberation as a public health danger and to use local government power to shut down sexually oriented businesses. This legal change fundamentally altered the shape of the movement—not just the contexts in which people would gather, but what they were able to imagine.⁴²³

⁴¹⁸ 357 U.S. 449 (1958). The authors thank Nelson Lichtenstein for this insight.

⁴¹⁹ *Id.* at 458–59.

⁴²⁰ *Id.* at 467.

⁴²¹ Cf. MICHAEL J. KLARMAN, FROM THE CLOSET TO THE ALTAR: COURTS, BACKLASH, AND THE STRUGGLE FOR SAME-SEX MARRIAGE xx (2013) (noting that although the gay rights movement in the 1970s and 1980s made progress on other issues, marriage equality was “of little interest to most gay activists” until about 1990 when, “partly because of the AIDS epidemic, the issue of legal recognition of same-sex relationships became more salient to the public and more important to gay activists”).

⁴²² *Id.*

⁴²³ Indeed, one scholar has argued that after the gay rights movement had successfully challenged police harassment of gay bars with predominantly white, middle-class patrons, the movement largely lost interest in criminal justice, with devastating consequences for the growth of the carceral state and the fate of gay people of color. Timothy Stewart-Winter, *Queer Law and Order: Sex, Criminality, and Policing in the Late Twentieth-*

Law and social movements literature has understandably focused on how movements use law. But how law also represses, restricts, constrains, and channels *all* movements must equally be part of the story.

2. *When Movements Are Institutions with Something to Lose*

The literature on law and social movements, and on social movements generally, has struggled to make sense of the dividing line between social movements and institutions.⁴²⁴ Labor's experience contributes to theorization of the costs and benefits of varying levels of institutionalization, and how institutionalization mediates the relationship between social movements and law.

Unions became institutions because they saw it as a path to building worker power.⁴²⁵ For example, in the 1930s, the ILWU eliminated the day labor market at every port—the “shape-up,” with all the discrimination, blacklisting, bribery, daily humiliations, and arbitrariness of employers picking who would get work each day.⁴²⁶ In its place, the union created hiring halls to distribute work fairly to all longshoremen who abided by union rules.⁴²⁷ The ILWU, like every other union, hired staff to organize and to research employers and industries to improve their bargaining position.⁴²⁸ And unions created health and welfare and retirement funds, to improve their members' lives, and to grow the union.⁴²⁹ Unions created these and other institutions so that workers could exert control over their work lives and economic well-being, rather than submitting to whatever policies employers or the state might impose.

When employers recognized unions, they began to rely on the unions as institutions to perform an array of economic and social welfare functions.⁴³⁰

Century United States, 102 J. AM. HIST. 61, 62 (2015).

⁴²⁴ See *supra* Part I.

⁴²⁵ Cynthia Estlund has described labor unions' dual character—which we conceptualize here as an institutionalized social movement—in distinct, although not inconsistent, terms. She considers labor unions as a particular species of “private entities with public regulatory functions.” Cynthia Estlund, *Are Unions a Constitutional Anomaly?*, 114 U. MICH. L. REV. 169, 169 (2015).

⁴²⁶ See SCHWARTZ, *supra* note 208, at 8 (collecting oral histories of ILWU's founding in the Bay Area, including examples of corruption and favoritism that hiring hall eliminated).

⁴²⁷ See *id.*

⁴²⁸ See *id.* at 33.

⁴²⁹ See Nelson Lichtenstein, *From Corporatism to Collective Bargaining: Organized Labor and the Eclipse of Social Democracy in the Postwar Era*, in *THE RISE AND FALL OF THE NEW DEAL ORDER* (Steve Fraser & Gary Gerstle eds., 1989) (describing growth of union bargaining over benefit plans in the postwar period).

⁴³⁰ See generally JACOB HACKER, *THE DIVIDED WELFARE STATE: THE BATTLE OVER PUBLIC AND PRIVATE SOCIAL BENEFITS IN THE UNITED STATES* (2002) (describing the development of publicly subsidized and regulated, but privately provided, health and retirement benefits and other forms of social insurance).

They also relied on unions to be “responsible” by enforcing the collective bargaining agreements they negotiated.⁴³¹ This concept of “responsible unionism”—that unions should abide by no-strike clauses in collective bargaining agreements and, more generally, refrain from radical activism that disrupts the smooth and profitable functioning of business—had its origins in political debates over the propriety of damages judgments against unions for the epic strikes in mines, factories, and railroads in the Gilded Age.⁴³² When the Taft-Hartley Act made unions entities (like corporations) that could be sued apart from their members, and thus liable to suit in federal court for breach of collective bargaining agreements⁴³³ and violation of strike prohibitions, it achieved employers’ long-sought goal of law being a tool in requiring “responsible unionism.”

Juneau Spruce confirmed union leaders’ worst fears about the dangers of being liable for damages. What looked to the members of Local 16 as a perfectly ordinary picket line protesting the company’s unfair labor practice and breach of contract looked to a jury as the International’s illegal jurisdictional strike.⁴³⁴ And, in calculating damages, what union members thought was a laudable exercise of labor solidarity among ILWU and IWA members looked to the court like a concerted effort to ruin a business.⁴³⁵

In the fight to resist judgment collection, the union tried to transform the constraint of “responsible unionism” into a source of strength. In particular, it sought to portray the threat to its resources as leverage.⁴³⁶ By reminding the employer association that the system for arbitrating workplace disputes would come to a halt if the union could no longer pay for arbitrators, union leaders were also reminding them that, absent arbitration, grievances would prompt walk-outs, and walk-outs would slow down the handling of cargo, leave ships tied up at the docks, and ultimately, cost the shippers more than it would cost the striking workers.

⁴³¹ RUTH O’BRIEN, *WORKERS’ PARADOX: THE REPUBLICAN ORIGINS OF NEW DEAL LABOR POLICY, 1886–1935*, at 39–41, 51–56 (1998) (tracing the history of the concept of responsible unionism to debates over railroad strikes and whether unions are liable as entities for strikes and boycotts undertaken by their members).

⁴³² *Id.*

⁴³³ Section 301(b) of the Taft-Hartley Act provided that a labor organization “shall be bound by the acts of its agents” and “may sue or be sued as an entity.” 29 U.S.C. § 185(b). It protected against the worst abuses by saying that “[a]ny money judgment against a labor organization . . . shall be enforceable only against the organization as an entity and against its assets, and shall not be enforceable against any individual member or his assets.” *Id.*

⁴³⁴ *Int’l Longshoremen’s & Warehousemen’s Union v. Juneau Spruce Corp.*, 342 U.S. 237, 240 (1952).

⁴³⁵ *Id.*

⁴³⁶ *See supra* text accompanying notes 432–35.

Juneau Spruce illustrates that legal regulation of the labor movement has worked so well precisely because unions are institutions. A massive damages judgment is not as grave a threat to a group with no assets because the judgment cannot be collected. And if it cannot be collected, then many litigants will not go to the trouble of suing in the first place. The power of the ILWU depended not just on the solidarity of its members, but on the contracts that the union negotiated, and the staff and monetary resources the union could bring to bear in negotiating and enforcing labor contracts. Bankrupting the union would jeopardize that power.

There is a romantic quality to the vision of social movements as inchoate groups of mobilized people, rather than institutions; that vision suggests ideological purity and intrepidity. Yet, while institutionalization has at times been labor's Achilles' heel, it has also been a source of power. As Nelson Lichtenstein has theorized, the energy and commitment of non-institutionalized movements tends to fade away.⁴³⁷ Unions have endured because "[m]ember dues pay for a staff whose task it is to continually mobilize the membership, recruit new ones, and confront employer and state opponents."⁴³⁸

Juneau Spruce reveals that the strength of an institutionalized social movement becomes a vulnerability in a hostile legal climate. Bringing labor back into the law and social movements conversation complicates existing theories about how all movements navigate the trade-offs of institutionalization.

3. *Social Movement Lawyers in Service of Institutional Clients*

Law and social movements scholarship often portrays lawyers as advocates fighting for legal change.⁴³⁹ As a result, much of the literature focuses on movements led by lawyers.⁴⁴⁰ Labor aspired to be a movement led by workers, not lawyers. And yet, lawyers have also shaped the trajectory of labor, albeit for different reasons than most other social movements.⁴⁴¹ Lawyers are not only part

⁴³⁷ Nelson Lichtenstein, *Twenty-First Century "Populism: " Not for the Unions and a Good Thing Too*, 14 FORUM 235, 245 (2016).

⁴³⁸ *Id.*

⁴³⁹ See *supra* Part I.

⁴⁴⁰ There is a robust literature about what lawyers do to and for progressive social movements generally, and for the civil rights movement in particular. See, e.g., SUSAN D. CARLE, *DEFINING THE STRUGGLE: NATIONAL ORGANIZING FOR RACIAL JUSTICE, 1880–1915* (2013); TOMIKO BROWN-NAGIN, *COURAGE TO DISSENT: ATLANTA AND THE LONG HISTORY OF THE CIVIL RIGHTS MOVEMENT* (2011).

⁴⁴¹ WEINRIB, *supra* note 263; SCHILLER, *supra* note 47; SOPHIA Z. LEE, *THE WORKPLACE CONSTITUTION: FROM THE NEW DEAL TO THE NEW RIGHT* (2014); FRYMER, *supra* note 46.

of the mechanism by which mobilization or movements change law,⁴⁴² but also how law changes movements.

Labor lawyers played the same role as other social movement lawyers when they were advocates in litigation and legislative campaigns to establish new workplace rights. Many unions provided crucial financial support for Southern civil rights activism in the 1960s,⁴⁴³ fought hard for the enactment and enforcement of the Occupational Safety and Health Act of 1970,⁴⁴⁴ litigated and lobbied for legislation prohibiting employment discrimination,⁴⁴⁵ sought enactment of state agricultural and public sector labor relations acts, and fought for periodic increases to the minimum wage written into the FLSA⁴⁴⁶—and to win new rights in litigation (especially pay equity).

But alongside those affirmative campaigns for law, there was the constant threat of legal liability under the Taft-Hartley Act. The professional culture of union lawyers involves a great deal of work for movement activists on the defense, especially after the Taft-Hartley Act prohibited picketing and other tactics to promote solidarity, and created a federal claim for damages.⁴⁴⁷ The fact that labor unions were large institutions—with millions of members, thousands of contracts to negotiate and enforce, and a welter of contractual and statutory responsibilities to workers and employers—fundamentally shaped the role of the union lawyer. The institutional aspect of labor unions gave lawyers

⁴⁴² Compare MICHAEL J. KLARMAN, *FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY* (2004), and TAYLOR BRANCH, *PARTING THE WATERS* (1988) (documenting the role of civil rights lawyers in eliminating legally mandated segregation), with SOUTHWORTH, *supra* note 158; Ann Southworth, *Elements of the Support Structure for Campaign Finance Litigation in the Roberts Court*, 43 L. & SOC. INQUIRY 319 (2018) (documenting the role of a network of lawyers in achieving various legal changes sought by business, the Christian right, and various conservative groups).

⁴⁴³ The United Auto Workers (UAW) is well-known for its financial and political support of the civil rights movement. Less well-known is that its general counsel, Joseph Rauh, arranged for the loan of UAW money to bail out civil rights protesters in the early 1960s, and had the unenviable task of trying to collect the money from activists whose charges were dismissed so it could be returned to the union treasury. See MICHAEL E. PARRISH, *CITIZEN RAUH: AN AMERICAN LIBERAL'S LIFE IN LAW AND POLITICS* (2011); Papers of Joseph L. Rauh Papers (1999) (on file with the Library of Congress, Joseph L. Rauh Papers, Box 97).

⁴⁴⁴ Occupational Safety and Health Act, Pub. L. No. 91-596, 84 Stat. 1590.

⁴⁴⁵ The UAW was a major advocate for enactment of the Civil Rights Act of 1964. See, e.g., PARRISH, *supra* note 443, at 159–74 (describing the efforts of Joseph Rauh, lawyer for the UAW, in pushing for civil rights legislation in the early 1960s). The AFL-CIO filed party or amicus briefs in all the major employment discrimination cases since the 1970s, and its lawyers were involved in drafting the Pregnancy Discrimination Act (PDA). See *Discrimination on the Basis of Pregnancy*, *Hearings Before the Sen. Subcomm. on Labor of the Comm. on Human Res.*, 95th Cong. 199–205 (1977) (statement of Laurence Gold, Special Counsel, AFL-CIO); William N. Eskridge, Jr., *Title VII's Statutory History and the Sex Discrimination Argument for LGBT Workplace Protections*, 127 YALE L.J. 322, 362 n.151 (2017) (describing Marsha Berzon as “the PDA drafter”).

⁴⁴⁶ Fair Labor Standards Act of 1938, Pub. L. No. 75-718, 52 Stat. 1060.

⁴⁴⁷ 29 U.S.C. §§ 141–197.

an institutional role: advising a client about compliance with complex contractual responsibilities and, importantly, protecting the institutional coffers from legal attacks. The *Juneau Spruce* struggle drove home to labor lawyers how high the stakes were for lawyers advising union clients.

For labor unions, with the brief exception of the 1930s, law has been something to avoid as often as something to pursue. Moreover, as Part II shows, the Taft-Hartley Act consolidated the institutional nature of unions and leveraged it to restrict what business considered unbridled, destructive movement activism. Labor lawyers since 1947 have occupied a difficult position in navigating between law that allows little room for direct action and clients who believe that direct action is the only way to build worker power. Explaining the effect of law on the labor movement, Lee Pressman, the General Counsel of the CIO from 1936 to 1948, sarcastically described a “gimmick” of the Taft-Hartley Act that had received “little notice yet has had a terrific impact on unions.”⁴⁴⁸ This was a provision partially repealing the Norris-LaGuardia Act’s protection against holding unions liable for the acts of organizers. Noting that since 1947 there had “been many occasions in which unions have been held liable for the acts of individual members on the picket line,” Pressman said that allowing such suits was “one of the most deadly provisions of the Taft-Hartley Act.”⁴⁴⁹ The *Juneau Spruce* struggle shows why. In today’s terms, union lawyers after 1947 had an important and unwelcome compliance role that was more similar to that of corporate lawyers than movement lawyers today.

Labor lawyers feared the restrictions and the damages liabilities, but also worried that the law would make unions overly reliant on lawyers. Mathew Tobriner, a California labor lawyer who later became a respected California Supreme Court justice, predicted that “[t]he true beneficiaries [of the Taft-Hartley Act] will be the lawyers, who will reap a fine harvest from this paradise of litigation.”⁴⁵⁰ Not only would member dues have to be diverted to pay legal fees rather than to support organizing, but lawyers would become essential to the labor movement’s strategic thinking.

The questions for unions were no longer just about when and how to strike, boycott, or picket to build worker power, and how to avoid local police and state tort liability when engaging in movement activism. Rather, the questions became: Will a court find a strike illegal? What damages liability do we face if

⁴⁴⁸ THE REMINISCENCES OF LEE PRESSMAN: ORAL HISTORY 286–87 (1958).

⁴⁴⁹ *Id.*

⁴⁵⁰ *New Law Is Called Lawyer’s Paradise*, CONTRA COSTA CNTY. LAB. J. (1947) (internal quotations omitted).

a court decides it's illegal? The world that labor unions occupied became, suddenly, much more “law-thick,” which made it more important than before to get legal advice before acting.⁴⁵¹ And lawyers for unions had more reasons to advise against numerous tactics.

Having to say no—as when the International wired Local 16 raising doubts about the legality of the picketing to protest Juneau Spruce’s abrogation of the contract—ran against the grain for lawyers like Gladstein, Andersen, and Leonard, who became labor lawyers because they wanted to fight for working people.⁴⁵² Although their courtroom work in *Juneau Spruce* was relatively conventional, Gladstein’s courtroom work in a Smith Act case during the same years was so rebellious,⁴⁵³ so radical,⁴⁵⁴ that it landed him in prison for six months for contempt of court.⁴⁵⁵ These were not lawyers who believed that they must be independent of or dominate their clients, or who were captivated by the “myth of rights,” as critics of lawyer-led social movements sometimes lament. Nor were they the type of labor lawyer who transformed radical and visionary worker demands into prosaic and modest claims that fit within existing law.⁴⁵⁶ Rather, these were lawyers who were devoted to the cause, deeply connected to it, and committed to allowing the client’s priorities and values guide the representation, and who wanted to defer to client goals and strategic choices.⁴⁵⁷

⁴⁵¹ Gillian K. Hadfield & Jamie Heine, *Life in a Law-Thick World: The Legal Resource Landscape for Ordinary Americans*, in BEYOND ELITE LAW: ACCESS TO JUSTICE IN AMERICA 21 (Samuel Estreicher & Joy Radice eds., 2016).

⁴⁵² Cf. Bell, Jr., *supra* note 159, at 490.

⁴⁵³ See, e.g., GERALD P. LOPEZ, *REBELLIOUS LAWYERING: ONE CHICANO’S VISION OF PROGRESSIVE LAW PRACTICE* (1992).

⁴⁵⁴ See, e.g., Peter Gabel & Paul Harris, *Building Power and Breaking Images: Critical Legal Theory and the Practice of Law*, 11 N.Y.U. REV. L. & SOC. CHANGE 369 (1982); Victor Rabinowitz, *The Radical Tradition in the Law*, in THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE 310–18 (David Kairys ed., 1990).

⁴⁵⁵ BELKNAP, *supra* note 309, at 112.

⁴⁵⁶ James Gray Pope, *Labor’s Constitution of Freedom*, 106 YALE L.J. 941, 942–43, 1012–22 (1997) (recounting how, while workers asserted that the right to strike was protected by the Thirteenth Amendment, their lawyers undermined the movement’s “constitutional insurgency” by presenting the workers’ demands as a less radical First Amendment free speech right rather than the radical anti-slavery right the workers sought).

⁴⁵⁷ Compare Lucie E. White, *Subordination, Rhetorical Survival Skills, and Sunday Shoes: Notes on the Hearing of Mrs. G.*, 38 BUFF. L. REV. 1, 45 (1990) (describing lawyers who do not adhere to client priorities), with Anthony V. Alfieri, *Reconstructive Poverty Law Practice: Learning Lessons of Client Narrative*, 100 YALE L.J. 2107, 2111 (1991) (describing lawyers who recount client narratives), Ann Southworth, *Lawyer-Client Decisionmaking in Civil Rights and Poverty Practice: An Empirical Study of Lawyers’ Norms*, 9 GEO. J. LEGAL ETHICS 1101, 1120–22 (1996), and Ann Southworth, *Business Planning for the Destitute? Lawyers as Facilitators in Civil Rights and Poverty Practice*, 1996 WIS. L. REV. 1121, 1142 (1996). These lawyers were thus more like those that McCann and Silverstein described in their work on the pay equity campaign. See McCann & Silverstein, *supra* note 153.

The Juneau Spruce episode complicates existing notions of what it means to be a cause lawyer because it highlights the fact that repressive law, not just lawyers' legal training or lack of imagination, can make lawyers the conduit that channels activism. The lawyers' new and unwelcome role of having to be cops as well as counsel⁴⁵⁸ is also a function of the movement's institutional power and obligations.

4. *Losing Through Losing*

Scholars of law and social movements have theorized a number of counterintuitive ways in which winning in litigation can produce a social movement loss⁴⁵⁹ and losing can produce a social movement win.⁴⁶⁰ Among the most enduring arguments in support of the "winning through losing" thesis is that a litigation loss can help social movement mobilization "by inspiring outrage and signaling the need for continued activism in light of courts' failure to act" and by inducing movements "to appeal to the public by encouraging citizens to rein in an 'activist,' countermajoritarian judiciary."⁴⁶¹ Here, the constitutive effects of law are seen to outweigh its material effects; a formal legal outcome matters less than how it can be used to spur mobilization.

To some extent, the Juneau Spruce saga exemplifies labor's attempt to transform a legal loss into a movement win. Labor responded to the devastating judgment and the Supreme Court's cavalier opinion upholding it by using the case as a call to arms for the repeal of Taft-Hartley.⁴⁶² In Hawai'i, the ILWU portrayed the debt collection efforts as an assault on the union, which tens of thousands of Hawai'ian workers had struggled for decades to establish.⁴⁶³ Later, they celebrated their success in outwitting both Juneau Spruce and the Big Five by using money from the latter to pay off the former.⁴⁶⁴ The union's leaders emphasized that through solidarity, they could overcome any attack.

But the notion that litigation loss often produces positive movement effects is more compelling for social movement organizations that are on the offensive, seeking to establish new rights—as in NeJaime's examples of LGBTQ activists

⁴⁵⁸ See Nelson & Nielsen, *supra* note 118, at 462.

⁴⁵⁹ Catherine Albiston, *The Rule of Law and the Litigation Process: The Paradox of Losing by Winning*, 33 LAW & SOC. INQUIRY 869 (1999).

⁴⁶⁰ NeJaime, *supra* note 173, at 969.

⁴⁶¹ *Id.*

⁴⁶² See *supra* text accompanying notes 7–12, 286.

⁴⁶³ See *supra* Part II.C.

⁴⁶⁴ See *supra* text accompanying note 358.

and the Christian Right.⁴⁶⁵ By mid-century, however, the labor movement was not focused on winning through litigation, or even through legislation. After the Supreme Court upheld the Wagner Act in 1937⁴⁶⁶ and Congress legislated minimum labor standards in 1938 that set the floor for collective bargaining,⁴⁶⁷ labor had won all the victories from the state that it would get for decades. The Juneau Spruce mess was a reminder of what unions had discovered in fending off injunctions and damages suits since the nineteenth century—litigation was largely to be avoided, because courts were not a forum in which labor could expect to gain power, or even any rights that courts and employers would respect. And any losses they endured always had the potential to put at risk all that labor had won thus far.

A litigation loss as momentous as the damages judgment in *Juneau Spruce* had material consequences that could not be “spun” away. Had the union’s lawyers not proven so strategic, the loss could have been the end of the union. But even though the union survived to fight another day, the case required union leaders and lawyers to expend resources devising clever ways to evade paying the judgment. Those resources—once again, every penny of which was from member dues—could have been spent fighting for better working conditions or organizing more workers. In the long term, the precedent it set taught union leadership to be much more careful of how they allowed International staff to support activism by locals, what they allowed to be said in the union newspaper, whether they would picket to protest employer abrogation of contracts, and whether or when the union would engage in secondary boycott activity in support of other workers.

This is not to say that the ILWU became quiescent and never engaged in secondary boycotts or picketing; it still did, and it still does.⁴⁶⁸ And union lawyers with whom we have recently discussed this case insist that they do not tell the leadership or members not to be activists, but instead counsel them *how* to be activists in lawful ways. But none denies that the law has made it much harder for labor to engage in movement activism. It was the legacy of *Juneau Spruce* (if not the specific case) that prompted AFL-CIO President Lane

⁴⁶⁵ NeJaime, *supra* note 173.

⁴⁶⁶ *NLRB v. Jones & Laughlin Steel Corp.*, 331 U.S. 416 (1947).

⁴⁶⁷ Fair Labor Standards Act of 1938, Pub. L. No. 75-718, 52 Stat. 1060.

⁴⁶⁸ *ILWU Stands Down at West Coast Ports for Historic Juneteenth Action to Honor Black Lives*, ILWU (July 13, 2020 12:18 PM), <https://www.ilwu.org/ilwu-stands-down-at-west-coast-ports-for-historic-juneteenth-action-to-honor-black-lives/>.

Kirkland to lament in 1989 that labor would be better off if the entire NLRA, as amended, were repealed and labor went back to the “law of the jungle.”⁴⁶⁹

Because of advances in law and social movements theory over the past several decades, it is no longer possible to deny the law’s powerful constitutive effects. As scholars continue the project of bringing more movements under study, we will see when the constitutive effects outweigh the instrumental effects of law, and when they do not. Bringing labor back into the conversation suggests caution in de-emphasizing the materiality of law. Whether it is the ILWU’s struggles against Juneau Spruce, low-wage workers fired for organizing against the threat of COVID-19,⁴⁷⁰ or immigrants arrested by Immigration and Customs Enforcement for protesting their mistreatment,⁴⁷¹ there are limits to the ability of even the most robust belief in legal rights to resist the power of state-sanctioned repression backed by the force of law.

5. Differentiated Rights

Within law and social movements scholarship, debates about the value of rights talk have, at times, been divorced from both doctrine and legal discourse. The *Juneau Spruce* case—and the case of labor more generally—reemphasizes that not all social harms are equally cognizable as rights, whether in courts of law or public opinion.

Labor’s experience with law has often been one of courts prioritizing employer property rights. Like many cases, *Juneau Spruce* involved competing rights claims.⁴⁷² The Local sought to exercise rights to association and expression: to protest their employer’s abrogation of their labor contract and violation of its statutory obligations to bargain in good faith, and to encourage others to take action in concert with them.⁴⁷³ Juneau Spruce, on the other hand, sought to exercise a right to use its property to further its business interests without interference.⁴⁷⁴ In resolving these competing claims, the courts read the

⁴⁶⁹ Martin Tolchin, *A.F.L.-C.I.O. Chief Laments State of Labor Laws*, N.Y. TIMES (Aug. 30, 1989), <https://www.nytimes.com/1989/08/30/us/afl-cio-chief-laments-state-of-labor-laws.html>.

⁴⁷⁰ Jessica Silver-Greenberg & Rachel Abrams, *Fired in a Pandemic ‘Because We Tried to Start a Union,’ Workers Say*, N.Y. TIMES (Apr. 29, 2020), <https://www.nytimes.com/2020/04/28/business/coronavirus-unions-layoffs.html>.

⁴⁷¹ Marissa J. Lang, *Immigration Judge Revokes Green Card, Orders Deportation of Virginia Activist Alejandra Pablos*, WASH. POST (Dec. 12, 2018), https://www.washingtonpost.com/local/immigration/federal-judge-revokes-green-card-orders-deportation-of-virginia-activist-alejandra-pablos/2018/12/12/fac5f3ea-fe40-11e8-862a-b6a6f3ce8199_story.html.

⁴⁷² *Int’l Longshoremen’s & Warehousemen’s Union v. Juneau Spruce Corp.*, 342 U.S. 237 (1952).

⁴⁷³ *Id.* at 238.

⁴⁷⁴ *Id.* at 238–39.

Taft-Hartley Act to prioritize business rights to uninterrupted operation over labor associational and expression rights.⁴⁷⁵ The Court held the union liable for actions that, if done today by any group other than a labor union, would be protected by the First Amendment.⁴⁷⁶ For the act of walking with signs outside of a lumber mill—using nothing but their physical presence and the written and spoken word—the union was held liable for damages in an amount to force it out of existence.

This is not only about distinct types of rights, but also about whose claim to a certain type of right is more convincing. Over the multi-year legal battle to enforce the judgment, courts consistently prioritized Juneau Spruce's claims over competing claims from ILWU-affiliated unions. Across jurisdictions, a variety of courts were willing to reach into the bank accounts of entities that were legally independent from the defendants actually found liable in the case, in order to ensure that Juneau Spruce's judgment was satisfied.

Bringing labor back into law and social movements studies helps complicate existing theories about the limits or promise of rights, including rights talk, as an undifferentiated category. As we know, certain grievances are more easily translated into rights language than others. Claims to social and economic rights largely lack the resonance of other rights claims, including the equality claims which have been central to more recent rights-based movements. As Sandra Levitsky has shown, given the minimal U.S. welfare state, many people continue to understand rights as "limited only to certain kinds of civil and political rights."⁴⁷⁷ Without a "widely available discourse" of socio-economic rights, those who struggle without government support for their daily socio-economic needs often "fundamentally [do] not understand how to apply the concept of rights to their circumstances."⁴⁷⁸

Labor has often eschewed rights invocations because labor's goals do not fit neatly into existing discourse or constitutional doctrine.⁴⁷⁹ As Kate Andrias

⁴⁷⁵ *Id.* at 244–45.

⁴⁷⁶ See Catherine L. Fisk, *A Progressive Labor Vision of the First Amendment: Past as Prologue*, 118 COLUM. L. REV. 2057 (2018).

⁴⁷⁷ Sandra Levitsky, "What Rights?" *The Construction of Political Claims to American Health Care Entitlements*, 42 LAW & SOC'Y REV. 551, 576 (2008).

⁴⁷⁸ *Id.* at 566, 576.

⁴⁷⁹ Andrias sees labor's demands as being "more incompatible with court adjudication than the individual rights claims of recent identity-based movements, or even than revived efforts to win constitutional rights for the indigent." Andrias, *supra* note 196, at 1614. She attributes the incompatibility to the fact that the goal of labor law and the labor movement "is not only to guarantee individual rights or to secure freedom for workers from abuses of employer power, but also to enable workers to participate in the formation of conditions that structure their lives." *Id.*

points out, while “there is a developed line of constitutional law doctrine that tackles problems of discrimination, at least in the public sector,” a credible theory of constitutional support for “minimum entitlements and collective labor rights” remains weak.⁴⁸⁰ There are currently no constitutional rights to minimum labor standards, to co-determine conditions of work, or to use direct action, including strikes, to secure minimum standards. Indeed, says Andrias, “court-defined rights, as they exist in the modern American tradition, are in substantial tension with the commitments and goals of the labor movement.”⁴⁸¹

This disparity among movements in the work that rights do is evident in classic works on social movements. McCann’s pathbreaking defense of rights was based on his empirical finding that union litigation challenging the gendered pay gap in the 1980s and 1990s contributed to movement-building and consciousness-raising, even when the litigation failed.⁴⁸² Now, twenty-five years after the publication of the book, however, it is clear that this momentum translated into long-term gains solely on the issue of pay equity. In the early 1980s, women made approximately 62% of what men made; in 2018, they made 85% of what men made.⁴⁸³ But this consciousness-raising did not build the labor movement. In the early 1980s, 20% of the United States workforce were union members.⁴⁸⁴ Today, in sharp contrast to the progress achieved on pay equity, union density has been halved.⁴⁸⁵ As Nelson Lichtenstein has observed, “American unions have been unable to make the rights revolution work for them. . . . [F]or most of U.S. labor, especially that centered in the private sector, rights consciousness, which has revolutionized race and gender relations, has had little organizational payoff.”⁴⁸⁶

By arguing that certain rights claims have greater discursive legitimacy than others, we do not mean to disagree with scholars who have argued that the United States Constitution can be interpreted to have much more to say about material inequality and distributive justice than is commonly presumed.⁴⁸⁷ The past decade has seen a blossoming of scholarship that reconstructs paths not

⁴⁸⁰ *Id.* at 1597 n.34.

⁴⁸¹ *Id.* at 1598, 1612.

⁴⁸² MCCANN, *supra* note 25, at 278–84.

⁴⁸³ See, e.g., Nikki Graf, Anna Brown & Eileen Patten, *The Narrowing, But Persistent, Gender Gap in Pay*, PEW RSCH. CTR. (Mar. 22, 2019), <https://www.pewresearch.org/facttank/2019/03/22/gender-pay-gap-facts/>.

⁴⁸⁴ MAYER, *supra* note 39, at 22.

⁴⁸⁵ See News Release, U.S. Dep’t of Labor: Bureau of Labor Statistics, Union Members — 2019, at 1 (Jan. 22, 2020), <https://www.bls.gov/news.release/pdf/union2.pdf>.

⁴⁸⁶ NELSON LICHTENSTEIN, A CONTEST OF IDEAS: CAPITAL, POLITICS, AND LABOR 151 (2013).

⁴⁸⁷ See, e.g., Lynd, *supra* note 89, at 1440.

taken in defining the scope of U.S. constitutional concerns.⁴⁸⁸ Courts in the 1940s understood collective labor rights to association and protest to be a central First Amendment concern.⁴⁸⁹ Civil rights attorneys argued that the Thirteenth Amendment imposed affirmative duties on the government to address economic exploitation as well as racial discrimination.⁴⁹⁰ The story of how these distributive concerns were ultimately read out of constitutional canon following World War II is a long and complex one, but the point these scholars make is that other readings of the Constitution are possible.⁴⁹¹

Still, the foundational work of building a discourse of constitutionally protected social and economic rights is, at best, a work in progress. Whatever progressive legal scholars and labor unions may imagine for the future of the First Amendment, a majority of the Supreme Court—for now—contends that only public sector labor law—not the Bill of Rights—gives employees the right to collectively bargain, and that right is more vulnerable than ever. The work of building a constitutional theory that would, for instance, regulate “private” economic coercion or guarantee a living wage is, as yet, even more embryonic. Within this context, and consistent with the experience of the ILWU in *Juneau Spruce*, it is clear that rights are not an undifferentiated category.

B. Toward a Theory of the Changing Role of Law and Lawyers Through Cycles of Protest

As we noted at the outset, our goal in this Article is to ask the question—what do we get when we bring labor back into the fold of law and social movement scholarship? Refocusing on labor complicates existing conversations in the field. But we think it may do something more. By emphasizing the differences over time in how movements have experienced law—by suggesting that the relationship between law and movements is socio-historically specific—it invites greater attention to how and why movements’ relationship with law shifts over time.

⁴⁸⁸ See, e.g., Joseph R. Fishkin & William Forbath, *Reclaiming Constitutional Political Economy: An Introduction to the Symposium on the Constitution and Economic Inequality*, 94 TEX. L. REV. 1287, 1289 (2016); GOLUBOFF, *supra* note 110; LEE, *supra* note 441.

⁴⁸⁹ Fisk, *supra* note 476, at 2067.

⁴⁹⁰ See Jamal Greene, *Thirteenth Amendment Optimism*, 112 COLUM. L. REV. 1733 (2012).

⁴⁹¹ See generally Fishkin & Forbath, *supra* note 488 (describing the process by which affirmative rights to economic and political equality were read out of the constitution and proposing how they might be read back in). On how distributive concerns lost traction in the civil rights movement’s litigation agenda, see GOLUBOFF, *supra* note 110, at 141–73.

We turn in this section to a tentative theoretical outline of what a socio-historical approach to the study of law and social movements might look like.⁴⁹² And we conclude with thoughts about how this kind of approach might illuminate the relationship between the labor movement and the rights-based movements which succeeded it.

Much law and social movements scholarship has focused on only one movement at a time. Doing so is important; it enables a deep look that would not be possible with a comparative or broadly contextualized study. Yet, it is also important to consider the mutually constitutive relationships *between* law and movements. By examining the ways in which one movement's experience with law shapes other movements' experience with law over time we are better able to generalize about law and social movements, *plural*.

Two key principles would animate a socio-historical approach to the study of law and social movements. First, it would emphasize the relationship between movements in and over time. As political scientist Sidney Tarrow has argued, movements tend to arise within "cycles of protest."⁴⁹³ These are periods—the present moment appears to be one—of massive social upheaval. Because of a particular confluence of events, one movement rises up and succeeds. Its success signals "the vulnerability of the state to collective action," and ushers in conditions under which other movements rise up as well.⁴⁹⁴ Situating movements in these cycles reminds us that "[t]he most fundamental fact about collective action is its connectedness, both historically and spatially, both with other instances of collective action of a similar kind, and with the actions of different claim-makers such as authorities and countermovements."⁴⁹⁵

⁴⁹² This approach builds upon Charles Tilly's and Sidney Tarrow's work in theorizing "repertoires of contention" and "cycles of protest," respectively. Charles Tilly, *Repertoires of Contention in America and Britain, 1750–1830*, in *THE DYNAMICS OF SOCIAL MOVEMENTS* (Mayer N. Zald & John D. McCarthy eds., 1979); Tarrow, *supra* note 59. The concept of "repertoires" locates the tactics used by movements within a political, historical, and cultural context. A repertoire is "what [movements] *know how to do* and what society has come to expect them to choose to do from within a culturally sanctioned and empirically limited set of options." Sidney Tarrow, *Cycles of Collective Action: Between Moments of Madness and the Repertoire of Contention*, 17 *SOC. SCI. HIST.* 281, 283 (1993). And, as set forth below, the concept of "cycles of protest" emphasizes periodicity and the relationships among movements in accounting for how repertoires emerge, diffuse, and evolve.

⁴⁹³ Tarrow, *supra* note 59; see also McCann, *supra* note 24, at 26 (referring to "the common scholarly premise that movement formation and action are more likely in periods when dominant groups and state-authorized relationships are perceived as vulnerable to challenge").

⁴⁹⁴ Sidney Tarrow, *States and Opportunities: The Political Structuring of Social Movements*, in *COMPARATIVE PERSPECTIVES ON SOCIAL MOVEMENTS: POLITICAL OPPORTUNITIES, MOBILIZING STRUCTURES, AND CULTURAL FRAMINGS* (Doug McAdam, John D. McCarthy & Mayer N. Zald eds., 1996).

⁴⁹⁵ Ruud Koopmans, *Protest in Time and Space: The Evolution of Waves of Contention*, in *THE BLACKWELL COMPANION TO SOCIAL MOVEMENTS* 19 (David A. Snow, Sarah A. Soule & Hanspeter Kriesi eds.,

Because of this connectedness, one movement may empower others, but it may constrain or weaken them as well. How early movements within a protest cycle frame their grievances can become a “master frame,” an almost hegemonic way of representing movement claims.⁴⁹⁶ This frame serves as “a kind of master algorithm” which “colors and constrains the orientations and activities of other movements.”⁴⁹⁷ Similarly, the organizational forms and strategies of early movements in a cycle often become the models for later movements. Thus, the tactical repertoire of early movements also tends to “color and constrain” the toolkits of later movements.⁴⁹⁸

Second, a socio-historical approach to law and social movements would emphasize the dialectical relationship between social movements and law. The ways in which social movements engage with law are shaped by the legal possibilities available to them, and these legal possibilities are in turn shaped by social movement action. As Ellen Ann Andersen puts it in her examination of the role of “legal opportunity structures” in gay rights litigation in the United States, “socio-legal structures shape movement strategies and are shaped by those strategies in turn.”⁴⁹⁹ Like the common law, one movement’s legal outcome is reincorporated into the legal regime in which other movements navigate. As Serena Mayeri has shown, law particularly encourages analogical reasoning about unfair treatment, as each new group seizes upon legal precedent and seeks to apply that precedent to its own case.⁵⁰⁰ Either a success or a loss fundamentally reshapes the tactical choices available to all movements.

Taken together, these two principles mean that when movements engage with the legal system, they are, in part, engaging with the legacies of previous movement actors. The “rights” available to movements are, as Bartholomew and Hunt put it, “the crystallization of past struggles and the resulting balances of forces or power, which are thereby legitimated.”⁵⁰¹ Born of a particular socio-

2004).

⁴⁹⁶ Robert Benford & David Snow, *Framing Processes and Social Movements: An Overview and Assessment*, 26 ANN. REV. SOCIO. 611, 618 (2000).

⁴⁹⁷ *Id.*

⁴⁹⁸ See, e.g., Lauren B. Edelman, Gwendolyn Leachman & Doug McAdam, *On Law, Organizations, and Social Movements*, 6 ANN. REV. L. & SOC. SCI. 653 (2010).

⁴⁹⁹ ELLEN ANN ANDERSEN, *OUT OF THE CLOSETS AND INTO THE COURTS: LEGAL OPPORTUNITY STRUCTURE AND GAY RIGHTS LITIGATION* 8–9 (2006).

⁵⁰⁰ SERENA MAYERI, *REASONING FROM RACE: FEMINISM, LAW, AND THE CIVIL RIGHTS REVOLUTION* 33 (2011).

⁵⁰¹ See Bartholomew & Hunt, *supra* note 185, at 51 (emphasis added).

historical juncture and its particular compromises, such rights “play a role in constituting the terrain for subsequent social action and interaction.”⁵⁰²

C. *The Legal Reification of Movements*

The socio-historic approach to law and social movements that we have sketched above begins to bridge the conceptual gap between labor and the more recent rights-based social movements, to see how law has played a role, among other factors, in constructing them as separate and apart from each other. In so doing, this approach allows for a more systematic analysis of how law shaped social movement activity, and social movement activity shaped law, throughout the twentieth century.

With its remarkable victory in *Brown v. Board of Education*, the civil rights movement launched a new cycle of protest, which lasted well into the 1970s, and whose legacy continues to shape movements today.⁵⁰³ As the progenitor of the cycle, the civil rights movement empowered and constrained other movements. The women’s, disability, and LGBTQ rights movements—along with others—are commonly seen as drawing from the civil rights master frame and from its socio-legal tactical toolkit.⁵⁰⁴ They sought to accomplish social change through claims-making on behalf of minority groups.⁵⁰⁵ Their charge was at times led by legal advocacy organizations with lawyers at the helm. And they invoked rights language which accomplished significant constitutive change, even if material change was not always forthcoming.⁵⁰⁶ In other words, they were empowered and constrained by the same model of social movement

⁵⁰² *Id.*

⁵⁰³ See Morris, *supra* note 61, at 527 (arguing that “the civil rights movement was the catalyst behind the wave of social movements that crystallized United States beginning in the middle of the 1960s and continuing to the present”); see also Levitsky, *supra* note 110, at 1 (explaining that “[t]he NAACP’s early successes with test-case litigation created a model for using law as a social movement strategy that has since been replicated by advocates for such wide-ranging interest groups as consumers, environmentalists, gays and lesbians, economic libertarians, and the poor”); McCann, *supra* note 24, at 26 (noting the “contagion effect generated by rights litigation over the past 40 years in the United States”) (citations omitted).

⁵⁰⁴ See, e.g., Nancy Whittier, *The Consequences of Social Movements for Each Other*, in THE BLACKWELL COMPANION TO SOCIAL MOVEMENTS 531 (David A. Snow, Sarah A. Soule & Hanspeter Kriesi eds., 2004); see also GOLUBOFF, *supra* note 110.

⁵⁰⁵ See *supra* Part I.C.1.

⁵⁰⁶ Law and social movements scholars have spoken powerfully to the limitations of this model. As McCann has summarized this perspective, “the successful litigation represented by *Brown* clearly anchored the civil rights movement on a narrow desegregationist track, marginalizing [B]lack leaders with quite different visions of justice and transformation . . . and arguably containing or co-opting the possibilities of movement development.” McCann, *supra* note 24, at 28.

that has at times dominated the socio-legal imaginary and law and social movements scholarship.

The distinctive characteristics of the civil rights movement and its approach to law were not constructed in a vacuum, however. They evolved over more than a century of struggle on multiple fronts. When W.E.B. DuBois wrote his classic 1935 book on Reconstruction, in the midst of the great labor upheavals of the 1930s, he deliberately characterized the activism of enslaved people in bringing about the end of slavery as a “general strike” that targeted slavery as an economic institution.⁵⁰⁷ Similarly, later historians of Reconstruction have theorized Black people as *workers* engaged in struggle with *employers*.⁵⁰⁸ According to historian Paul Lawrie, the so-called “Labor” and “Negro” problems of the late 1800s and early 1900s were actually deeply interconnected, linked by the “sociocultural demands of contemporary labor economy.”⁵⁰⁹

DuBois and others have rightly emphasized the role of racism by white workers and their unions in the divergence of labor and civil rights after the Civil War.⁵¹⁰ Law, however, helped reify this divergence, increasingly channeling these interconnected issues into discrete regulatory regimes. One of the biggest limitations of the NLRA, as enacted, was its racialized and gendered exclusions.⁵¹¹ Through the purposeful exclusion of agricultural, domestic, and public sector workers, the demographics of the workers for whom unionization was legally accessible remained for decades, by law, whiter and more male than the entire working class.⁵¹² Moreover, through the legal requirement that unions be supported by a majority of workers in a bargaining unit, the law created further opportunities for employers to forestall unionization by appealing to

⁵⁰⁷ W.E.B. DuBois, *Black Reconstruction in America* (1935). We are grateful to Dylan Penningroth for this insight.

⁵⁰⁸ See, e.g., ERIC FONER, *Reconstruction: America's Unfinished Revolution, 1863–1877*, at 124–75 (1988) (describing the ambiguity of free labor during Reconstruction); TERA W. HUNTER, *To 'Joy My Freedom: Southern Black Women's Lives and Labors After the Civil War* (1997) (describing the washerwomen's strike).

⁵⁰⁹ PAUL R.D. LAWRIE, *Forging a Laboring Race: The African American Worker in the Progressive Imagination* (2016).

⁵¹⁰ DuBois, *supra* note 508. Cedric de Leon, for instance, has argued that discursive and institutional racial exclusion after the Civil War “conspired to fracture the initially biracial labor movement into a white labor movement and a [B]lack civil rights movement.” Cedric de Leon, *Black from White: How the Rights of White and Black Workers Became “Labor” and “Civil” Rights after the U.S. Civil War*, 42 *LAB. STUD. J.* 10, 12 (2017).

⁵¹¹ See Juan F. Perea, *The Echoes of Slavery: Recognizing the Racist Origins of the Agricultural and Domestic Worker Exclusion from the National Labor Relations Act*, 72 *OHIO ST. L.J.* 95 (2011).

⁵¹² *Id.* By the 1970s, however, black workers were more likely to be in unions than white workers were. JAKE ROSENFELD, *What Unions No Longer Do* (2014).

racial divisions, and for white workers to prevent Black workers from centering issues of discrimination in the workplace through labor unions.⁵¹³

The Taft-Hartley Act went one step further, limiting the scope of legitimate union activity, as opportunities for solidaristic struggle between labor unions and civil rights groups seemed increasingly possible. First, by the early 1950s, the Taft-Hartley Act's anti-Communist requirement had forced labor unions to purge their leadership of activists most committed to racial justice.⁵¹⁴ Second, Taft-Hartley and a number of restrictive court and agency decisions prohibited the kinds of direct action (especially sit-down strikes and secondary protests) which had created the New Deal.⁵¹⁵ *Juneau Spruce* drove home that running afoul of these prohibitions meant risking everything labor had already won. Third, after the Supreme Court ruled in 1950 that civil rights picketing urging a consumer boycott of a grocery store that refused to hire Black clerks could be enjoined because it, like labor picketing, was economic coercion not constitutionally protected political speech,⁵¹⁶ civil rights activists had good reason to frame their protests as seeking political and social transformation—voting, education, access to places of public accommodation—rather than as a strike over working conditions. If a labor union had been prominently involved, sector-wide picketing or boycotts would have been subject to injunctions and, as in *Juneau Spruce*, crushing damages liability. If a union was not at the forefront, social movement actors could and did successfully argue that their protest was “political” and protected by the First Amendment. For all these reasons, when the civil rights movement entered its direct action phase with the lunch counter sit-ins in 1960, their lawyers’ best hope for securing legal protection was to distance the movement’s activism from the labor picketing and sit-downs that came before, and to emphasize the political and social aspects of the protests, rather than the economic.⁵¹⁷

The extraordinary repression faced by majoritarian, multiracial, radical labor unions between 1947 and 1955 had long-term impact for both the labor and the civil rights movements.⁵¹⁸ By furthering the divide between labor and civil

⁵¹³ See SCHILLER, *supra* note 47, at 256.

⁵¹⁴ See *supra* text accompanying notes 225–29.

⁵¹⁵ See *supra* text accompanying notes 96–98.

⁵¹⁶ *Hughes v. Superior Court*, 339 U.S. 460, 464 (1950).

⁵¹⁷ See Catherine L. Fisk, “People Crushed by Law Have No Hopes but from Power”: Freedom of Speech and Worker Protest in the 1940s (n.d.) (unpublished manuscript) (on file with authors).

⁵¹⁸ See, e.g., RONALD L. FILIPPELLI & MARK D. MCCOLLOCH, *COLD WAR IN THE WORKING CLASS: THE RISE AND DECLINE OF THE UNITED ELECTRICAL WORKERS* 113–66 (1995) (describing legal and other attacks on the United Electrical Workers union). See generally *THE CIO’S LEFT-LED UNIONS* (Steve Rossworm ed., 1992) (describing eleven unions that were expelled by the CIO between 1949 and 1950).

rights, law weakened both. According to Robert Korstad and Nelson Lichtenstein, the repression of union workers' civil rights activism in the 1940s resulted in the civil rights struggle of the 1960s having a different social character and a different political agenda than it might otherwise have had.⁵¹⁹ The crushing of the incipient efforts of unions to organize—in the South, in agriculture, in nonwhite communities—left unions weaker.⁵²⁰ The repression of radical intersectional unionism empowered those factions in the labor movement who were not committed to racial equality and left the civil rights and women's movements cut off from the workplace as a way to build an inclusive structure of economic equity.

While bearing in mind labor's affirmative contribution to this divide,⁵²¹ it is worth considering what the labor and civil rights movements might have been like had the Taft-Hartley Act not derailed Operation Dixie, the CIO Southern organizing effort of 1946 to 1953.⁵²² Unions recognized from the moment they began unionizing industry in the North and Midwest that the gains workers made would hasten business efforts to find lower-wage and more exploitable labor in the South.⁵²³ Therefore, as soon as World War II ended, the CIO launched Operation Dixie, a massive effort to organize textile and other industries in the South on a racially inclusive, industrial basis.⁵²⁴ Communist unionists' staunch anti-racism and determination to organize the South provided even more reasons for business leaders to use the Taft-Hartley Act's anti-Communist oath provision to drive them out of the unions.⁵²⁵ Had more people of color succeeded in their quest to form and join labor unions at this time, the divide between "labor" and "civil rights" would not have been as large. That, in turn, might have reduced the ability of economic elites to perpetuate their centuries-long strategy of dividing the working class on the basis of race. It might have provided the institutional basis to create a federal labor agency that treated labor rights and employment discrimination rights together rather than separately, which scholars have shown weakened the NLRB, the Equal Employment Opportunity

⁵¹⁹ Robert Korstad & Nelson Lichtenstein, *Opportunities Found and Lost: Labor, Radicals, and the Early Civil Rights Movement*, 75 J. AM. HIST. 786, 811 (1988). Korstad echoed this point in his later book. KORSTAD, *supra* note 25, at 11–12.

⁵²⁰ See HERBERT HILL, *BLACK LABOR AND THE AMERICAN LEGAL SYSTEM: RACE, WORK, AND THE LAW* 185–259 (1985).

⁵²¹ See Bruce Nelson, *Organized Labor and the Struggle for Black Equality in Mobile During World War II*, 80 J. AM. HIST. 952, 955 (1993).

⁵²² See BARBARA S. GRIFFITH, *THE CRISIS OF AMERICAN LABOR: OPERATION DIXIE AND THE DEFEAT OF THE CIO* 162 (1988).

⁵²³ *Id.* at xii–xiv.

⁵²⁴ *Id.* at xiii.

⁵²⁵ See *supra* text accompanying notes 225–29.

Commission, and state fair employment practices agencies, and also weakened the worker protections that these agencies enforce.⁵²⁶ And it would have provided the civil rights movement with a strong institutional footing and a focus on workplace and economic equity.

The history of the women's movement between 1940 and 1980 similarly reveals that unions provided a fertile environment in which working-class women organized and developed a vision of feminism that focused on economic equity for working women, especially women of color and women who were the primary breadwinners for their family. This vision differed significantly from the middle class maternalistic or social issue-oriented liberationist visions of feminism which came to dominate the headlines.⁵²⁷ As Cobble shows, the labor movement of the 1940s "spurred feminism in much the same way as did the civil rights movement or the 1960s New Left organizations, *albeit for a different group of women.*"⁵²⁸ Again, the decline of the CIO unions that provided a base for Black, Latina, and working-class white women deprived the women's movement of the 1980s and later of a strong foundation in the experiences of working women of color.

Just as organized labor's experience with law affected the form and trajectory of the civil rights movement and the feminist movement, the civil rights movement's experience with law would alter the trajectory of labor too. When social movements inscribe their particularized, compromised, and socio-historically specific vision of justice in the law, those changes become part of the governing order. When the limitations of that new order ultimately become apparent, they are subject to challenge by new movements, who will, to some extent, dismantle the work of previous challengers in inscribing their own vision.

Organized labor, which arose in an earlier cycle of protest with distinct frames, organizational forms, tactics, and legal claims, did not fare as well in the cycle of protest initiated by the civil rights movement. As noted above, cycles of protest are not simply generative; they are destructive.⁵²⁹ The demise of movements "can also be explained in part by the emergence of frames that challenge or compete with the movement's master frame."⁵³⁰ Organized labor's defining frame has always been solidarity, and its primary tactic has been to

⁵²⁶ See, e.g., FRYMER, *supra* note 46, at 22–43; HILL, *supra* note 520, at 93–184.

⁵²⁷ COBBLE, *supra* note 70, at 12.

⁵²⁸ *Id.* at 15 (emphasis added).

⁵²⁹ See *supra* note 492.

⁵³⁰ See David Snow & Robert Benford, *Master Frames and Cycles of Protest*, in *FRONTIERS IN SOCIAL MOVEMENT THEORY* 150 (Aldon D. Morris & Carol McClurg Mueller eds., 1992).

build power through private, worker-run institutions. The rights-based movements of the latter half of the twentieth century directly called into question the concept of labor solidarity, highlighting the exclusions on which it had been built. And their emphasis on building public law as a mechanism of social justice similarly tended to delegitimize the privatized welfare state that had been labor's infrastructure.

The Supreme Court issued its *Juneau Spruce* decision in 1952, just two years before *Brown*.⁵³¹ Decided as one cycle of protest waxed and another waned, the case reflects both how the law came to channel labor activism into particularly narrow pathways, and to treat it differently than other social movements.

To the first point, *Juneau Spruce* is a concrete example of how the Taft-Hartley Act weakened labor as a broad, class-based movement. Taft-Hartley has long been understood by scholars as having been intended to drive apart groups within the dominant social movements of the mid-century.⁵³² The anti-Communist oath provision was to push Communists out of the labor movement, inserting a wedge between radicals and liberals.⁵³³ That, in turn, would weaken the connections between labor and civil rights activists, weaken labor's drive into the South, and slow the drive for racial equality that Communists and radicals were deeply committed to advancing.⁵³⁴ As applied in *Juneau Spruce*, the restrictions on direct action weakened industrial unionism and sectoral bargaining by allowing the employer to ignore the CIO's own resolution of the dispute between the ILWU and the IWA.⁵³⁵ This contributed to splintering labor as a movement into groups divided by skill, trade, race, gender, region, and occupation.

The ILWU was one of the few unions that succeeded in organizing, and in making its organizing gains stick (at least for a time), across the boundaries of race, occupation, and even sector—perhaps more even than the industrial unions in auto, steel, mining, and meatpacking, which were the bulwarks of the CIO.⁵³⁶ That the company's lawyers chose to attack Hawai'i Local 142 in its judgment collection efforts (more, as far as the historical record reveals, than any other local except Local 16, which had picketed) is not merely because it was huge

⁵³¹ *Brown v. Bd. of Educ.*, 347 U.S. 483, 495 (1954) (holding de jure racial segregation in public schools unconstitutional).

⁵³² See e.g., ZIEGER, *supra* note 199, at 250–52.

⁵³³ *Id.* at 247, 251, 279.

⁵³⁴ *Id.*

⁵³⁵ See *supra* Part II.B.

⁵³⁶ ZIEGER, *supra* note 199, at 2, 154.

and therefore had more dues-paying members to provide funds to pay the judgment.⁵³⁷ Its multiracial, sectoral, multi-occupational, and state-wide membership was a radical departure from the norm for unions of the era and was a threat to the political and economic power of the white elites in Hawai'i.⁵³⁸ When the litigation established the principles that solidarity across a union could be punished by damages, that the CIO's resolution of the jurisdictional dispute was not binding on anyone (including one of the unions that participated in the dispute resolution process), and that one union could be forced to pay damages for picketing done by another, the law created very strong incentives for unions to eschew the kind of cross-sectoral activism which was the goal of the ILWU in the 1940s.

The business elite's divide and conquer strategy was achieved by bans on picketing, especially for purposes of organization, recognition, or jurisdictional protest, and by bans on secondary appeals to workers and consumers.⁵³⁹ These legal prohibitions were precisely tailored to weaken labor as a force for solidarity across occupations, workplaces, and between consumers and workers.⁵⁴⁰ The introduction of courts into the enforcement of collective bargaining agreements, the provisions allowing unions to be sued in federal court, and the NLRB's authority over bargaining unit determinations and the provisions forbidding jurisdictional strikes were to force union leaders to be "responsible," to pursue narrower goals of narrower segments of workers through bargaining rather than through direct action.⁵⁴¹ Finally, the restrictions on union political expenditures—which were among the first campaign finance limitations in federal law, and preceded by decades any comparable restrictions on corporate expenditures—were intended to weaken unions as political actors and thereby blunt the effectiveness of national, class-based activism.⁵⁴²

To the second point, *Juneau Spruce* was possible only because of the Court's increasing reluctance to conceptualize labor as a social movement. When the Supreme Court rejected free speech challenges to Taft-Hartley Act's restrictions on protest in the same years as the *Juneau Spruce* litigation, it emphasized union protests as being animated by the economic self-interest of workers.⁵⁴³ The

⁵³⁷ See *supra* Part II.C.

⁵³⁸ See MOON-KIE JUNG, *supra* note 94 (exploring the ILWU's successful unionization of the majority of the Hawai'i labor force in the 1940s).

⁵³⁹ See Rogers, *supra* note 25, at 137–38.

⁵⁴⁰ *Id.* at 137.

⁵⁴¹ *Id.* at 121–23.

⁵⁴² Don M. Chang, *Labor Political Action and the Taft-Hartley Act*, 33 NEB. L. REV. 554, 571 (1954).

⁵⁴³ See NLRB v. Denver Bldg. & Constr. Trades Council, 341 U.S. 675, 690 (1951); Fisk, *supra* note 476, at 2068–69.

Court abandoned the view it had taken in *Thornhill v. Alabama* in 1940, when it accorded First Amendment protection to labor picketing because “[t]he health of the present generation and of those as yet unborn may depend on” the ability of workers to protest, and “[f]ree discussion concerning the conditions in industry and the causes of labor disputes appears to us indispensable to the effective and intelligent use of the processes of popular government to shape the destiny of modern industrial society.”⁵⁴⁴ Rather, in *Juneau Spruce* and in cases decided around the same time, the Court characterized labor issues as economic, not political, and labor’s interests as being narrowly limited to the wealth of the picketers rather than the welfare of society at large.⁵⁴⁵

But this happened just as the Montgomery Bus Boycott ignited the fuse of social movement activism that exploded during the direct-action phase of the civil rights movement.⁵⁴⁶ By the time the sit-in cases had reached the Court just a decade after *Juneau Spruce*, protests about equitable access to places of public accommodation and to jobs free from discrimination were characterized as political, and in pursuit of the public interest, rather than narrow self-interest.⁵⁴⁷ Thus, the Court said, in according First Amendment protection to the Freedom Summer-era boycott of white-owned businesses in Mississippi, civil rights boycotts, unlike labor boycotts, “sought no special advantage for themselves.”⁵⁴⁸

Juneau Spruce is thus one important and largely unknown chapter in the larger process by which workers, acting through unions, became ever more constrained in their ability to engage in the quintessential social movement activity of using protest to exert social and economic power. It was part of a series of cases in which the Supreme Court read federal law to broadly restrict union protests and rejected First Amendment claims for labor protest.⁵⁴⁹ And

⁵⁴⁴ *Thornhill v. Alabama ex rel. Patterson*, 310 U.S. 88, 103 (1940).

⁵⁴⁵ Fisk, *supra* note 476, at 2068–69.

⁵⁴⁶ See *supra* note 157 and accompanying text.

⁵⁴⁷ Fisk, *supra* note 476, at 2069–70.

⁵⁴⁸ *FTC v. Superior Court Trial Lawyers Ass’n*, 493 U.S. 411, 426 (1990) (citing *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982)) (rejecting First Amendment protection for a boycott protesting inadequate funding of indigent criminal defense because boycotters sought special advantage for themselves).

⁵⁴⁹ As one of us argues elsewhere, the Supreme Court’s cases denying labor constitutionally-protected protest rights can be seen as establishing a three-part test for a social movement, whose advocacy merits protection under the First Amendment: (1) the movement’s concerns must be understood as something other than “economic;” (2) the movement’s members must be understood, in sociological terms, as “conscience adherents” rather than “interest adherents,” that is, advocates for others rather than advocates for themselves; and (3) the discursive context at the time matters, including the extent to which broad public or political sentiment treats the advocacy as politically important. Diana S. Reddy, *Organized Labor and the Law of Apolitical Economy* (n.d.) (unpublished manuscript) (on file with authors). All three prongs of this test have worked to elide labor from the constitutional imagining of a social movement for more than half a century. *Id.*

that exclusion matters when the price of unprotected activism was as great as the ILWU found it in the 1950s, and as it is now.

D. The Future of Labor as a Social Movement

This Article has focused on the relationship between law and organized labor in one primary incarnation—labor unions regulated by law. By granting rights to this particular organizational form, unions *qua* collective bargaining agents became the dominant way through which workers could and would seek collective advancement for decades—even as the law changed to impose more costs and fewer benefits.

As union density continues its decades-long decline and labor law becomes ever more incompatible with economic realities, the future of that form of organized labor is uncertain. Consistent with the dynamic interplay between law and movements, new forms of organized labor emerge in its wake: workers' centers and other "alt-labor" organizations. We have focused less on these alternate models in this Article—partly because they are somewhat easier to conceive of as social movement actors, and have been named and analyzed as such in the legal literature.⁵⁵⁰

And yet, it is precisely the "tangle of incentives" created by labor law that forces this distinction, between "social movement organization" on the one hand, and "labor union" on the other. Workers centers insist that they are *not* labor unions largely because doing so frees them from the specter of *Juneau Spruce*-like liability; federal injunctions under section 8(b)(4) and damages judgments under section 303 are available only against "labor unions," not social justice organizations.⁵⁵¹ Not being a labor union regulated by law allows workers, particularly those excluded from the NLRA, or for whom its rigid structure is particularly inapt, to advance their collective interests more

⁵⁵⁰ See, e.g., Eli Naduris-Weissman, *The Worker Center Movement and Traditional Labor Law: A Contextual Analysis*, 30 BERKELEY J. EMP. & LAB. L. 232, 306–07 (2009) (noting that most worker centers appear to be social movement organizations protected by the First Amendment as opposed to labor organizations regulated by federal labor law); César F. Rosado Marzán, *Worker Centers and the Moral Economy: Disrupting Through Brokerage, Prestige, and Moral Framing*, 2017 U. CHI. LEGAL F. 409, 411 (arguing that "because worker centers function as social movement organizations, worker centers can frame issues in 'right' or 'wrong' ways, thereby attempting to garner wide popular support to their causes").

⁵⁵¹ See generally Monica Wilk, *Are Worker Centers Democratic?: Revisiting the "Labor Organization" Question*, ONLABOR.ORG (June 5, 2018), <https://www.onlabor.org/are-worker-centers-democratic-revisiting-the-labor-organization-question/> (discussing the debate over whether worker centers are labor organizations); Kati L. Griffith & Leslie C. Gates, *Worker Centers: Labor Policy as a Carrot, Not a Stick*, 14 HARV. L. & POL'Y REV. 231 (2019) (explaining why worker centers are not unions and should not be treated as such for purposes of federal restrictions).

effectively. As other scholars have written, these organizations have helped re-center economic equity and workplace exploitation as social justice issues—and class as an essential component of intersectionality. Their dynamic tactics, their focus on the most vulnerable workers, and their insurgency make their claim to social movement status stronger. But, for all their pathbreaking work, they also bump up against the limitations of their structure. Like their counterparts 100 years ago, they are limited in their capacity to effect change without an ongoing institutional role in the workplace. Again, law gives shape to social movements, whether movements seek out the law or not.

As we contemplate the future of the labor movement, the ways in which law has *both* protected and repressed workers through the regulation of labor unions merit careful consideration. For all the weaknesses of their increasingly narrow form, labor unions stand out, too, for their successes. As Jim Pope points out, workers' centers are often not funded and controlled by the workers they serve:

Alone among social movements, the labor movement has routinely managed to create durable, democratic mass organizations that can function both locally and nationally. The fact that unions have much to learn from other movements, like the civil rights and the women's movements, should not blind us to the fact that those movements have rarely produced such organizations—except in the form of labor unions. This is no small matter.⁵⁵²

Moreover, workers' centers do not do what unions do: organize broad coalitions to exert collective power *within* workplaces.⁵⁵³

Even as we have argued that the labor movement has more similarities to other social movements than has commonly been understood, it is important to remember the ways it is distinct. Labor as the basis of an oppositional movement represents a crucial liability of capitalism. Other movements coexist more easily within this country's governing economic logic, at least to some extent, whereas the labor movement challenges the primacy of capital.⁵⁵⁴ Against all odds, labor unions radically transformed the American political economy for decades. Their decimation has increased economic stratification and weakened the center-left

⁵⁵² Jim Pope, *Next Wave Organizing and the Shift to a New Paradigm of Labor Law*, 50 N.Y. L. SCH. L. REV. 515, 519–20 (2006).

⁵⁵³ MCALEVEY, *supra* note 408.

⁵⁵⁴ As Hetland and Goodwin point out, most movements can be seen as shaped by political economy and as shaping political economy in turn. See Hetland & Goodwin, *supra* note 50, at 91. As such, a movement's relationship to a capitalist economic system might better be conceptualized as a continuous variable, that is, something which matters for all movements, albeit to a greater or lesser extent, rather than as a dichotomous variable, which either matters or does not.

political coalition.⁵⁵⁵ Whatever form the future of the labor movement takes, a massive task awaits it.

CONCLUSION

Our goal in this Article has been to expand the boundaries of what constitutes the study of law and social movements—to include labor unions seeking economic equity within the workplace, and their socio-historically specific relationship with law.

To do so, we presented a case study of how the labor movement experienced the law during the mid-twentieth century, not as a goal, tactic, or frame—but as something imposed upon it, despite labor's best efforts to avoid it. The legal restraints of the Taft-Hartley Act, as interpreted by courts, seized upon much of what had been labor's strengths—its institutional power (and its coffers), its use of picketing to create solidarity, its legitimacy as a movement advancing the general good—and regulated these strengths to the point of depriving them of potency. Juneau Spruce exploited dissension within the ranks of the CIO, a dissension that had been fanned into flames by the Taft-Hartley Act's coercion of unions to oust suspected Communists from their ranks. The NLRB and courts aided that effort by ignoring the peaceful resolution of the dispute between the two contending unions at the Juneau Spruce mill. Having thus denied labor organizations the power to resolve the disputes, the courts then conceptualized the economic harm that ensued as being entirely the fault of the unions. These multifaceted legal constraints required union lawyers at every step of the process to counsel clients to moderate, to redirect, or to cease movement activity. At the same time, new social movements arose, which sought to avoid labor's fate, and in so doing, reconstituted the relationship between social movements and law.

The story of *Juneau Spruce* is important not just conceptually but temporally. The early 1950s was a transition point in cycles of protest—the point at which one vision of social movement replaced another, when one type of regulatory regime began to regress, just as another coalesced. Looking back at that moment in time, it is hard not to consider—and perhaps mourn—paths not taken, paths that might have better reconciled these two models of social movement. Today, we sit at what may be another historical turning point. The past ten years can be seen as their own cycle of protest—a populist challenge to the neoliberal turn of the decades prior.⁵⁵⁶ New visions of justice contend with

⁵⁵⁵ See ROSENFELD, *supra* note 512.

⁵⁵⁶ See Paris Aslanidis, *Populist Social Movements of the Great Recession*, 21 MOBILIZATION: INT'L Q.

older ones: international solidarity versus national supremacy; environment versus growth; inclusion versus exclusion. The *raison d'être* of governance—and of law with it—appears to be in question. And so too does the future of the labor movement.

On the heels of two years—2018 and 2019—that saw more workers on strike than in previous decades, the 2020 crisis of capitalism brought on by the global coronavirus pandemic has called long overdue attention to the dearth of worker protection and social insurance in the United States. Daily headlines question how it came to be that so many of the workers deemed “essential” are poorly paid, without health insurance and sick leave, and excluded from legal protections linked to employment, because they are undocumented or misclassified as independent contractors.⁵⁵⁷ We have shown that law played a significant role in bringing about a world in which essential workers have so few protections; it channeled labor from its mass movement origins in the 1930s, into a powerful institution from the 1940s through the 1960s, to its much weakened form today.

Envisioning there to be different models for how social movements are organized and for how they engage with law not only helps us think through the socio-historical specificity of the rights-oriented social movements, but also allows for theorizing how other movements have drawn or could yet build upon organized labor’s collective action, majoritarian, non-rights-based model. For example, other groups (e.g., tenant unions, debtor unions, cooperatives, credit unions, or even class actions) have created or could create institutional channels for the ongoing exercise of collective power. In turn, those institutional channels will both empower and repress, just as they did for labor. And, of course, our socio-historical approach also invites creativity in thinking through new organizational forms and new ways of interacting with law.

301, 316 (2016).

⁵⁵⁷ See, e.g., Kyla Mandel, *We Now Know Who Society’s Essential Workers Are. And They’re Among the Lowest Paid.*, HUFFPOST, https://www.huffpost.com/entry/essential-workers-lowest-paid_n_5e7bc7f7c5b6256a7a23e6f5 (last updated May 1, 2020); Madeline Leung Coleman, *Essential Workers Are Being Treated as Expendable: Farmworkers Risk Their Lives So Americans Can Eat, but They Receive Little Protection from the Virus*, ATLANTIC (Apr. 23, 2020), <https://www.theatlantic.com/ideas/archive/2020/04/farmworkers-are-being-treated-as-expendable/610288>.

In chaotic times like 2020, scholarship at the nexus of law and social movements is more important than ever. For that scholarship to be able to theorize these new challenges, it must be attentive to the jurisprudential boundaries which have channeled social movement activity throughout the twentieth century.