

UNEMPLOYMENT INSURANCE: AMERICAN SOCIAL WAGE, LABOR ORGANIZATION AND LEGAL IDEOLOGY†

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[Charland] tells us, in effect, I worked 30 years for defendant Norge. At the end I am thrown out of a job unless I move hundreds of miles to another city and start as a new employee behind hundreds of local residents and without either accumulated seniority or pension rights. In the alternative if I sign a complete release of all rights arising out of my job, I get \$1,500. This is fundamentally unfair. And it is a deprivation of my property rights in my job in violation of Article V of the Constitution

The claim presented by this appellant brings sharply into focus such problems as unemployment crises, the mobility of capital, technological change and the right of an industrial owner to go out of business This far federal law has sought to protect the human values to which appellant calls our attention by means of such legislation as unemployment compensation

Charland v. Norge Division, Borg-Warner Corp.¹

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* Professor of Law, University of Miami School of Law. The author expresses thanks to Martha Mahoney, Dan Ernst, Joel Rogers, Steve Diamond, Chris Tomlins, Rob Rosen and Frank Munger for discussion of earlier drafts, and to Joel Klaff and Amy Horton for research assistance. The author gratefully acknowledges the support of a grant for archival research from the Fund for Labor Relations Studies. A condensed version of the section on the Workers' Bill appears as a book chapter in the publication of the 1990 Schouler Lectures, *LABOR LAW IN AMERICA: HISTORICAL AND CRITICAL ESSAYS*, (C. Tomlins & A. King eds., 1992). This Article is written as a legal, and therefore discursive, practice. Specifically, it is written to allow the historical speakers to make their own substantive points in the course of writing this Article. Quotations are not used merely as gestures or as confirmation of the writer's opinion. Hence, there is frequent use of block quotations in text. In segments written about jurisprudence, the voice is openly advocative. This linguistic practice is intended to make clear the crosscutting and intertwined meanings of recovering lost voices and foregone alternatives, and at the same time, offering an immanent critique of legal practices. An immanent critique takes the currently held standards of practice as given and shows how they are only formally being met or not met at all. The critique of practice makes apparent the political economy of unemployment insurance law in its current functioning.

¹ Charland v. Norge Division, Borg-Warner Corp., 407 F.2d 1062, 1064-65 (6th Cir.), *cert. denied*, 395 U.S. 1927 (1969).

[An employee] surrenders his labor as a whole, and in return receives a compensation package that is substantially devoid of aspects resembling a security Looking at the economic realities, it seems clear that an employee is selling his labor primarily to obtain a livelihood, not making an investment.

Justice Lewis Powell²

One of the eternal conflicts out of which life is made up is that between the effort of every man to get the most he can for his services, and that of society, disguised under the name of capital, to get his services for the least possible return.

Justice Oliver W. Holmes³

This is an essay about power, the denial of power and the complicity of law. It is about the lies that orthodox history permits in legal discourse, and historical fabrications which the orthodox jurisprudence perpetuates as an official past. Orthodox history distorts when it omits the alternative voices of ordinary people, against whom the records of elite institutions were entered, sometimes in recognition, sometimes in opposition, sometimes in compromise forced by social contest. The distortions of jurisprudence stem from the limiting claims of its own internal standards of practice, standards which assume that the contests of legislation or the courtroom reach an eventual episodic end. Whether by methods labeled original intent, legislative history, stare decisis, canons of interpretation, or regular procedure, legal meaning finds its justification through the process of adjudication. The underlying social contest is therefore remembered as an artifact—the pre-history of the legal issues into which the social conflict is translated and thereby mediated.

Taken together, these versions of history and law belie the continuous social struggle over the terms and conditions of social organization.⁴ Under their thrall one forgets that the dominance of a particular view is only relative, and it only achieves that status through the exercise of power. We are led to believe, therefore, that legal discourse

² *International Bhd. of Teamsters v. Daniel*, 439 U.S. 551, 560 (1979) (vested pension rights do not qualify as security under regulation of Security and Exchange Commission).

³ *Vegelehn v. Guntner*, 44 N.E. 1077, 1081 (Mass. 1896) (Holmes, J., dissenting).

⁴ "[A]nalysis of social transformation starts with recognition of the nexus of antagonism binding together dominant and subordinate groups." ALAN DAWLEY, *Workers, Capital, and the State in the 20th Century*, in PERSPECTIVES ON AMERICAN LABOR HISTORY: THE PROBLEMS OF SYNTHESIS 152, 154 (J. Carroll Moody & Alice Kessler-Harris eds., 1989).

proceeds on natural or shared assumptions, rather than through the experience of contested power.⁵ Both our conventional, institutionally driven history and our judicial interpretations are artificial constructs. Legislative interpretation does not recognize the traces of the social struggles which culminate in the language of statutes. With the underlying conflict repressed, legislation and precedent take on the winners' interpretation. This Article uses the law and history of unemployment insurance to critique the Law's exclusion of alternate voices and to recall the alternatives through which the prevailing legal ideology in this area of law should be understood.

American legal, political, and intellectual culture generally associates social upheaval, from the American Revolution to the Civil War to the Great Depression, with radical changes in the consciousness of law and the structure of the state.⁶ Yet without minimizing the impact of extraordinary destabilization upon political division, cataclysms also magnify latent divisions and movements associated with those alienated from preexisting social conditions. Paradoxically, crises such as the depths of unemployment during the Depression are devalued as atypical—not the ordinary conditions of ongoing legal connection to society—as if social struggle only interrupts periods of consensus and calm. This assumption dims our legal understanding that law would not be functionally challenged during social crises if it were not functioning normally to mediate conflict by setting the terms within which society reproduces itself.⁷ It is less that law itself is continuously contested than that law is a means by which social conditions are known and constructed. Contests over those social conditions are inherently relevant to this synchronomy of power. History as it is written by the winners supports the legitimacy of law's neutrality, and the law which is defined by winners consolidates existing forms of social power.

In the American experience, the legal structure of labor markets assumes that conflicts over the terms of employment are resolved consensually in the bargaining process.⁸ As a matter of legal vision, free labor entails free capital. The return accorded to each creates constraints on self interest and, therefore, public reactions to the conse-

⁵ See Karl E. Klare, *The Public/Private Distinction in Labor Law*, 130 U. PA. L. REV. 1358, 1358 (1982).

⁶ See, e.g., Bruce Ackerman, *Constitutional Politics/Constitutional Law*, 99 YALE L.J. 453, 454 (1989).

⁷ E.P. THOMPSON, *WHIGS AND HUNTERS: THE ORIGINS OF THE BLACK ACTS* 258-69 (1975).

⁸ Kenneth M. Casebeer, *Teaching an Old Dog New Tricks: Coppage v. Kansas and At-Will Employment Revisited*, 6 CARDOZO L. REV. 765, 773 (1985).

quences of the private wage constitute compulsory or, at best, additive terms to the value and form of the private wage bargain. The extent of the social wage, therefore, gains its conceptual meaning in relation to prevailing market rates and not public determination of the minimum owed to workers for their social contribution.⁹ As a matter of legal construction, an employee has property in his or her labor time not in the job itself. That is what gives a worker the legal status of an employee. It is also what conceptually excludes unemployment from ordinary labor law and labor market organization. While this appears natural in legal discourse, in fact it represents a contingent and inescapably political choice. A conception of the employment relationship and the worker's relation to the state that is perceived as natural rather than chosen reflects untested ideology. This ideology of labor law functionally denies alternative arguments and legal constructions, and especially insulates legal analysis by reducing social conflict to a mere object of analysis.

An examination of the history of workers' political struggle for a social wage makes it clear that the wrenching wage insecurity of the Depression was not uniformly understood to be just a private matter. Nevertheless, judicial construction of the eligibility requirements for unemployment insurance creates the impression that no struggle over social security ever occurred. And even if there was social and political debate, it was of no significance to current judicial construction of the eligibility requirements.

To the contrary, the Unemployment Insurance enacted as part of the Social Security Act was contested, and it developed in part as a response to a radical proposal for a social wage. This Article, therefore, first tells the story of the workers' fight for social change. It then demonstrates how social security legislation developed in reaction to workers' politics. Finally, it chronicles a conservative judicial retrenchment of social policy, a retrenchment facilitated by ignoring the contest over its passage. The Article concludes that a more historically and socially faithful jurisprudence would recognize and incorporate the social struggle underlying the legal function. Each of these four sections is self-contained and makes its own point, but, taken together, they form a multi-faceted illustration of power as it is exercised through

⁹ See generally ROY LUBOVE, *THE STRUGGLE FOR SOCIAL SECURITY, 1900-1935*, at 144-74 (1968). For a general history of unemployment and its relation to public policy in earlier American history, see generally JOHN A. GARRATY, *UNEMPLOYMENT IN HISTORY* (1978); ALEXANDER KEYSER, *OUT OF WORK: THE FIRST CENTURY OF UNEMPLOYMENT IN MASSACHUSETTS* (1986).

a legal doctrine which is driven by a particular political economy. Section I rediscovers the struggle to enact the Workers' Bill for Unemployment Insurance and its connection to the organization of labor and to labor politics. It thus intervenes in labor history debates over American exceptionalism—the idea that the United States is exceptional among industrial nations for never developing a serious labor or socialist party, and only developed fragmented and decentralized organizations unions.¹⁰ It intervenes by suggesting that labor's relation to the state is less exceptional than particular. Section II illustrates the contemporaneous policy behind enactment of the Social Security Act which, when juxtaposed against its radical opposition, recharacterizes unemployment compensation as a conservative or privatized form of social wage. Section III examines the process of judicial retrenchment through narrowing interpretations of the doctrinal criteria for eligibility for and disqualification from receiving unemployment benefits. This judicial contraction of access to unemployment benefits was accomplished by recharacterizing the original social wage conception of unemployment insurance first, as a public welfare insurance program to combat destitution and, second, as a tool of fiscal stabilization. The resulting doctrinal argument integrates unemployment insurance policy with the ideological assumptions which underlie the law of employment relations generally. Safely masked, this legal discourse ignores the connection between unemployment insurance, labor reserve needs and labor force deskilling. It also creates a relationship of dependency between the worker and the state which allows the cost of labor market rationalization to be imposed on individual workers. Thus disappears a legal regime of unemployment insurance based on alternative visions of the social order which might have prevailed, and indeed in some sense was deployed effectively to force change in an accepted legal regime of privatized wage contracts. Section IV concludes with a call to incorporate the meaning of social contest in the practices constructing legal meaning. The rediscovery of the history of America's version of the social wage challenges both the legitimacy of accepted legal argument and the beneficiaries of the traditional model of legal practice. This history reveals the injustice of failing to incorporate a socially informed historical method in such practice.

¹⁰ See generally Leon Fink, *American Labor History*, in *THE NEW AMERICAN HISTORY* 233, 243-44 (Eric Foner ed., 1990) for a discussion of the decentralized nature of American labor unions.

I. STRUGGLE: THE WORKERS' UNEMPLOYMENT INSURANCE BILL

[O]ur economic condition as workers, and especially as Building Trades workers has steadily [sic] grown worse. We have had practically no work for five years, being unable to meet the interest of our mortgages, and of paying taxes, a great many have lost their homes and a lifetime savings

Having analized [sic] the different proposals for unemployment insurance recommended to become law, we find in many cases that recommendation for setup of such laws are based on principles which will not increase buying power nor give any relief to the unemployed for some time to come.

Only one plan or recommendation endorsed by our Labor Unions in the States is worthy of enactment to become law. I refer to HR 2827 known as [the Lundeen] Bill

Letter to Senator Robert Wagner, January 23, 1935¹¹

We indorsed the Frazier-Lundeen Bill not because we are Communist, which we are not, but on the merits of the Bill itself as we see a lot of good in the Bill providing we could get it enacted into law What difference does it make who indorses a Bill so long as it is in favor of the working people?

Letter to President William Green, American Federation of Labor, January 16, 1937¹²

Unemployment remains the defining experience of the Depression, searing the fear of loss of job and livelihood into the psychology of a people:

This experience is only too familiar to millions of men and women who work in mills, mines, factories and shops, depending on their daily wage for livelihood and for support of their families. The lives of these people are governed by the fear of losing their job. Eleven million others are no longer haunted by this constant fear—they have no work; and there is no assurance that there will be work for them soon. To survive they must depend on public relief or charity and they

¹¹ Letter from Robert Larson, Secretary and Business Agent, United Brotherhood of Carpenters and Joiners of America Local 66, Jamestown, NY to Senator Robert F. Wagner (Jan. 23, 1935) (on file with Wagner Papers, Lauinger Library, Georgetown University).

¹² Letter from James O. Cox, H.N. Cassell and E.H. Helterbraun, Yellowstone County Trades and Labor Assembly, Billings, Mont., to William Green, President, AFL (Jan. 16, 1935) (on file with Papers of the Office of the President, AFL, George Meany Memorial Archives, Silver Spring, Md.).

know that these cannot last long. For them fear has given way to hopeless despair.¹³

The Depression's meaning now, however, is often reconstructed differently. Changes in the law and the state which are associated with crises are more prominently remembered. Today, unemployment insurance is variously miscast as a cog in Keynesian governmental interventions to prop up consumer demand,¹⁴ a plank in a Democratic Party platform forging an urban liberal coalition,¹⁵ a minor character in Social Security enacted as a response to middle class reformers and bureaucratic building of the Welfare State,¹⁶ or a progressive business sop to buttress the structural dislocations of capitalist technology.¹⁷ Battles over the legislative details of unemployment insurance appear to have been waged solely by professional, academic and political elites in orderly conferences and hearing rooms. Absent are the voices and politics of those millions in fear and in pain. This account rediscovers rank and file struggle for an alternative legal approach, one which was foregone, but was nonetheless present, politically plausible, and contemporaneously of considerable consequence.¹⁸ In this section, the politics of a rank

¹³ *Economic Security for the Worker*, 42 AM. FEDERATIONIST 254, 254 (1935).

¹⁴ See MARGARET WEIR, *The Federal Government and Unemployment: The Frustration of Policy Innovation from the New Deal to the Great Society*, in *THE POLITICS OF SOCIAL POLICY IN THE UNITED STATES* 149, 150 (Margaret Weir et al. eds., 1988).

¹⁵ See generally J. JOSEPH HUTHMACHER, SENATOR ROBERT F. WAGNER AND THE RISE OF URBAN LIBERALISM 80-83 (1968) (discussing urban liberalism and unemployment insurance).

¹⁶ See generally PAUL H. DOUGLAS, *SOCIAL SECURITY IN THE UNITED STATES* (1936) (discussing unemployment insurance as component of social security).

¹⁷ See generally FRANCIS F. PIVEN & RICHARD A. CLOWARD, *REGULATING THE POOR: THE FUNCTION OF PUBLIC WELFARE* (1971).

¹⁸ The story is thus a small picture of how structure and culture meet in the process of the state as it both reflects and shapes the organization of work. The argument follows the labor history of David Montgomery, expanding worker's politics from shop floor control to the social consequences of economic, social and technological change. See generally DAVID MONTGOMERY, *THE FALL OF THE HOUSE OF LABOR* (1987) for a discussion of labor activism in the United States. The argument also follows the legal history of E.P. Thompson, emphasizing the contingency of legal and political content upon conscious, continuous and pervasive mass-based social activity and conflict. See generally THOMPSON, *supra* note 7, at 258-69; E.P. THOMPSON, *THE MAKING OF THE ENGLISH WORKING CLASS* (1963). The account expands on William Forbath's description of the legal form of American exceptionalism which existed before the 1930s. See William E. Forbath, *The Shaping of the American Labor Movement*, 102 HARV. L. REV. 1109 (1989); see also Joel Rogers, *Divide and Conquer: Further "Reflections on the Distinctive Character of American Labor Laws,"* 1990 WIS. L. REV. 1 (1990) (discussing postwar exceptionalism). Agreeing with Forbath that exceptionalism did not mean the absence of a distinct labor politics, the account shows how the content of organized labor's politics formed in response to rank and file and unorganized worker pressures, not merely in response to an antagonistic state. Agreeing with Rogers that the structure of labor law built through World War II created the conditions for a rational politics of organi-

and file workers' movement first will be placed in the historic context of the labor movement's political response to the issues of economic security: a view consistent with organized labor's voluntaristic stance toward government policy generally. The second part of this section demonstrates the salience of unemployment insurance as an issue which divided organized labor, pitting crafts against mass production industrial lines. The third part documents the political influence of the movement, and the fourth shows how the decision to forego the social wage alternative on unemployment insurance was consistent with parallel determinations in enacting the law of collective bargaining.¹⁹

The fight for the Workers' Unemployment and Social Insurance Bill thus becomes a component of the contingent political construction of a particular type of social wage consciousness—our own. Deceptively simple in its two guiding principles, the bill provided a minimum standard of benefits of indefinite duration for full or partial involuntary unemployment. These benefits were to be administered through European style workers' councils.

The Workers' Bill was not the only proposed alternative for unemployment insurance on the political agenda in the early 1930s, but it was structurally and ideologically both the most radical and the most different. Table 1 provides a comparison of key elements found in several of the alternatives. Ultimately, it was also the most influential of the foregone alternatives in shaping unemployment insurance as part of social security.²⁰

The fight for passage of the Workers' Bill encompasses many tangled narratives. It is the story of a rank and file movement which gained endorsement from union locals representing over a million members, and pushed conservative union leaders in the American Federation of Labor (the "AFL") to formulate an economic security

zation which ensured the weakness of labor organization as a political force, the account holds that this was not an inevitable outcome. First, this structure developed at least in part by virtue of a distinct politics internal to organized labor during the early New Deal. Second, worker politics during the Depression found voices other than unions and causes other than the organization and control of work.

¹⁹ See generally JAMES B. ATLESON, *VALUES AND ASSUMPTIONS IN AMERICAN LABOR LAW* 111—80 (1983) (discussing enactment of collective bargaining laws).

²⁰ The political history of the Social Security Act represents much more than that presented here. Other groups and interests contributed to the outcome. That history is for others to write. My interest is in the role of workers in contestation of power and the subtle repression of social democracy through discursive practices such as law and history. I trust urban liberals, middle class reformers, Keynesian economists, et al. to read the dialectics (plural) or history and defend themselves.

response. It is the story of the progress in Congress of the bill proposed by Farmer Labor Congressman Ernest Lundeen, which came closer to becoming law than any other predecessor to Social Security. It is the story of an incipient social movement which connected significant radical activists who otherwise were never linked personally or through their organizations. These included Lundeen himself, labor leaders Harry Bridges and Mother Bloor, social reformer Mary Van Kleeck, Communist Party organizer Herbert Benjamin and Urban League officer T. Arnold Hill.

The process of recovering the voice of the rank and file reconstructs the familiar description of American exceptionalism—the lack of a labor or social-democratic party. Indeed, organized labor's earlier antagonism to the state, and its later alliance with a pluralistic centrist party, frame what is particular about American worker politics.²¹ Facing individual hardships and horrors like those of the depression, workers often demanded the resources to protect family and home in social wage terms. In the instance of unemployment insurance, we should not assume that their voices were not heard, dialectically at least, merely because they could not ultimately succeed against organization, including their own unions.

A. AFL Voluntarism and the Rank and File

The story begins in the classic anti-state ideology of craft-based labor organization under AFL President Samuel Gompers. Because capital managers naturally obtain work through contract at the lowest possible wage, organization by crafts created the maximum possible holdout leverage for organized employees. Elite and skilled workers could control not only the terms of their work but also the return on their contribution. Any government interference with the gains derived from withholding labor either limited the economic weapon or sapped the workers' will to use it. Moreover, because skills defined scarcity, sufficient return could be extracted to protect pooling against risks such as the loss of one's job.

Until his death, Gompers believed that the state by inclination and inevitable effect would reduce workers' standards of living and therefore their very freedom. At Gompers' last convention in 1924, AFL Vice President William Green read for him a final presidential address and plea to honor his memory, "in a spirit of consecration to the cause of

²¹ See generally AMERICAN LABOR RADICALISM: TESTIMONIES AND INTERPRETATIONS (Staughton Lynd ed., 1973) for a discussion of American worker politics.

TABLE 1

WISCONSIN ACT (Plant Reserves)	OHIO PLAN (State Pool)	WAGNER-LEWIS BILL (1934) (Federal Tax Bill)	WORKERS BILL H.R. 7598 (Federal Funds)
Industrial workers only; Excludes all others and part-time workers; employers of less than 10 persons; workers earning over \$1500.	Excludes farm labor, domestic service and so on.	Similar to Wisconsin, except income limit is raised to \$3000. Sets up "approved" standards for State laws.	Includes all occupations: "industrial, agricultural, domestic and professional workers." Benefits cover all time lost.
Two preceding years residence or 40 weeks work in State, 2 weeks work for employer		Residence, etc. to be specified in state law.	No residence or previous employment required.
Worker disqualified for "misconduct," quitting "without cause," or not applying for work at "prevailing rates." Union standards not protected.		Allows 10 weeks "probationary period" without benefit rights, under each new employer.	Full protection. Trade union standards protected. Part-time workers covered.

BENEFICIARIES

**RESIDENCE AND
PREVIOUS
EMPLOYMENT
REQUIREMENTS**

**PROTECTION
AGAINST
DISCRIMINATION**

LENGTH OF BENEFIT PERIODS

AMOUNT OF BENEFITS

SOURCES AND SECURITY OF FUNDS

ADMINISTRATION

TABLE 1 (CONT.)

Not over 10 weeks in any year. Not over 1 week to every 4 weeks of employment in previous year.	Not over 16 weeks per year.	Ten weeks or in ratio to employment.	Throughout unemployment.
Not over \$10 a week or 50% of wages, minimum \$5. Less for part-time employment. All rates lowered when reserve runs low.	Not over \$15 or 50% of wages.	Twenty hours of pay or \$7 per week. Fund liability at all times limited to its resources.	Equal to average local wages. In no case less than \$10 a week, plus \$3 for each dependent. As prices rise, rates to be increased.
Individual plant reserves. Contributions by employer only; never over 2% of payroll. Lower contributions when reserve is not running low.	Statewide pooled fund. 2% tax on employers (after 3 years, tax may vary from 1 to 3 1/2%). 1% tax on workers.	Not specified; suggestive of reserve type. 5% tax on employers; payments under "approved" state unemployment insurance laws credited.	The Federal Government, by taxation of inheritance, gifts and incomes over \$5000.
State Industrial Commission. Worker must file claim which employer may dispute. Employer may set up and administer private plan if Commission approves.		Not specified except that employer may not insure its risk with any commercial insurance company. Private plans permitted.	Insurance commissions of workers and farmers under regulations prescribed by the Secretary of Labor. No private plans permitted.

From table prepared by IPA Committee on Unemployment Insurance in 1934 (on file with Lundeen Papers, *supra* note 76).

humanity . . . to urge devotion to the fundamentals of human liberty—the principle of voluntarism.”²² The eligibility requirements of unemployment insurance would make the means for sustaining life, and thus liberty, *dependent* on government supervision of the conditions of leaving employment, often in partnership with a coercive employer’s leverage over employment terms. “The whole of activity to organize, to assert and to live our own lives would be subject to every petty or high official . . . according to the government’s conception of what is and what is not voluntary unemployment.”²³ At the 1921 AFL convention, President Gompers had called unemployment insurance “not insurance against unemployment” but “compensation for lack of employment.”²⁴ Insurance against unemployment would be better achieved by translating increased productivity into the same pay for shorter hours. If necessary, workers would share hours if productivity could not support full employment of the relevant skilled labor force.

Shorter hours for the same pay would increase usable time for all and increase consumption by the greater number hired. For a worker, more leisure meant the “most valuable thing in life-time to read, time to cultivate the best that is in him, in his wife and in his children; to cultivate better tastes so that the luxuries become the necessities of life tomorrow.”²⁵ Writing to John O’Hanlon, then Chairman of the Legislative Committee, later President of the New York Federation of Labor, Gompers called a State Assembly Bill “a very clever device to reduce wages” which “should be opposed with all the vigor of the representatives of the New York State Federation of Labor and the entire labor movement of New York.”²⁶ With compulsory insurance, employers in a non-union shop could, under a threat of discharge, unilaterally reduce wages to pay for premiums. It was also a device, like company unions or relief societies, to inhibit autonomous organization.

During the 1920s, under conditions of increased productivity brought about through Taylorist work management, swollen profits accompanied lower levels of compensation and employment. Thus, even the most extensive union unemployment benefits, such as those

²² AMERICAN FED’N OF LABOR, REPORT OF PROCEEDINGS OF THE 44TH CONVENTION OF THE AFL 5 (1924).

²³ AMERICAN FED’N OF LABOR, REPORT OF PROCEEDINGS OF THE 41ST CONVENTION OF THE AFL 376–77 (1921).

²⁴ *Id.* at 377.

²⁵ *Id.*

²⁶ Letter from Samuel Gompers, President, AFL, to J. O’Hanlon (Mar. 7, 1924) (on file with Papers of the Office of the President, AFL, *supra* note 12).

of the Amalgamated Clothing Workers of America under Sidney Hillman, could not survive the combination of benefit demands and loss of dues consequent to the increasing unemployment of union members.²⁷ Yet, Gompers' successor, William Green, often made it appear as if Gompers' full theory of voluntarism continued.

In fact, during Green's administration, both the context and direction of anti-statism changed significantly, even as AFL policy changes could still be reconciled with a re-tooled voluntarism.²⁸ As of 1930 and 1931, the AFL and President Green were still clearly opposed to unemployment insurance, even as they supported some governmental efforts to ease joblessness through the formation of a national employment service, statistical studies of the problem, and increased public employment. In August of 1930, Green unflinchingly wrote, "The A.F. of L. has never prepared an unemployment insurance bill."²⁹ At the September quarterly meeting of the Executive Council, Green announced a public platform of voluntary agreements between employers and workers in seasonal industries for setting up insurance funds, the dividing of available work through shorter workdays and weeks, and stabilization of production to guarantee the worker a regular yearly wage. The Council actively opposed compulsory unemployment insurance. As late as February of 1931, Green still resembled Gompers in his insistence that the American worker would not willingly submit to the domination and control of the state as did British and Continental workers. "We do not want to destroy our economic movement through the substitution of force and state domination growing out of the enactment of hasty and ill-considered legislation."³⁰ Green even asserted that unemployment was unnecessary. "If industry had paid wages corresponding with the increasing power of individual and collective production, working people would have bought the things which industry produced and thus we would have employment . . ."³¹ Finally, Green retreated to bedrock: "The basis of all improvement in our

²⁷ See generally MATTHEW JOSEPHSON, *SIDNEY HILLMAN: STATESMAN OF AMERICAN LABOR* 252-55 (1952) (on Amalgamated Clothing Workers of America and unemployment insurance).

²⁸ For a critical analysis of AFL unions in the 1930s, see generally Christopher L. Tomlins, *AFL Unions in the 1930s: Their Performance in Historical Perspective*, 65 J. AM. HIST. 1021 (1979).

²⁹ Letter from William Green, President, AFL, to M. Reiss (Aug. 29, 1930) (on file with AFL Papers, Wisconsin State Historical Society, Madison, Wis.).

³⁰ Letter from William Green, President, AFL, to Charles W. Anderson, Secretary, City and County Employees Joint Council, Minneapolis, Minn. (Feb. 17, 1931) (on file with Papers of the Office of the President, AFL, *supra* note 12).

³¹ Letter from William Green, President, AFL, to John M. Gancz, Secretary, Lodge 7, International Ass'n of Machinists (Feb. 19, 1931) (on file with Papers of the Office of the President, AFL, *supra* note 12).

economic and social well being is found in the growth, strength and expansion of organized labor. Unemployment plans suggested by some well-meaning people would, if put into effect, effectively destroy the organized labor movement."³² But by July of 1932, Green was reporting to Senator Robert Wagner: "At the July meeting of the Executive Council I was instructed to draft a plan for unemployment reserves . . . relief had become so imperative an issue that we ought to consider legislative means for providing stable incomes for wage earners."³³

The 1931 Convention of the AFL was pivotal to a more subtly evolving voluntarism. The previous year, meeting in Boston, the Executive Council grudgingly had agreed to be instructed to study the problem of unemployment and various proposals for solutions, including insurance. But the Council had also vigorously reasserted its commitment to voluntarism, questioning "whether the American Federation of Labor shall continue to hew to the line in demanding a greater freedom for the working people of America, or whether liberty shall be sacrificed in a degree sufficient to enable the workers to obtain a small measure of unemployment relief under government supervision and control."³⁴ The Executive Council report to the 1931 Vancouver Convention ignored insurance. An emergency program demanded wage maintenance, shorter hours, the addition of workers by each employer, public building, employment agencies, preference for workers with dependents, and financial relief from public funds.³⁵ The long-term program called for employment stabilization through corporatist national planning, which would include organized labor as a partner and was aimed at balancing work time and wages with productivity increases so that "workers shall share in industrial progress by advances in real wages and greater leisure."³⁶ The program also called for the recognition of workers' equity in their jobs.³⁷ In short, the leadership wanted to preserve the voluntarist approach to the individual's unemployment or under-employment. This would maintain the twin goals of private control over benefits as a necessary tool of organization strategy and economic leverage over real wealth to improve living conditions. At the same time, a pro-state policy was necessary to

³² *Id.*

³³ Letter from William Green, President, AFL, to Senator Robert Wagner (July 28, 1932) (on file with Papers of the Office of the President, AFL, *supra* note 12).

³⁴ AMERICAN FED'N OF LABOR, REPORT OF THE PROCEEDINGS OF THE 51ST CONVENTION OF THE AFL 369 (1931).

³⁵ *Id.* at 17.

³⁶ *Id.*

³⁷ *Id.*

stabilize macro-economic conditions, and, as an adjunct to planning, state power to stand behind increased labor organization and rationalization.

However, Labor's proto-partnership with business and state for stabilized growth required that, as *quid pro quo* for cooperation, business supply job security and improve living standards. Instead, an ambivalent capitalist class retained increased profits while preempting the necessary countervailing labor organization by undermining organizing strategies. "Firms are establishing benefit features paid for by low wages and working conditions imposed on the workers. These methods are making it very difficult for our organizations to organize their employes [sic]." ³⁸

Pushed by political events, the AFL developed its proposals by concession. The Council continued its reactive stance in the August 1931 meeting. Green believed the call for relief was simply diverting attention from the Federation's approach of increasing jobs and sharing work, although Vice President Wharton concluded that divided work meant earnings so far reduced that they would not enable workers to make a living wage:

Failure of industrial management to provide and maintain work opportunities through the distribution of the amount of work available upon a nation-wide basis is resulting in the crystallization of public opinion in support of Unemployment Insurance legislation The American Federation of Labor wishes very sincerely that the enactment of such legislation could be avoided. It prefers work and the creation of work opportunities to the payment of relief to those who are idle but men, women and children must not suffer from hunger and want merely because willing workers are deprived of an opportunity to work. ³⁹

Minutes of AFL Executive Council meetings show that the Council gave little time, and then only grudgingly, to substantive discussion of proposals to deal with unemployment. ⁴⁰ As the AFL Labor Day message in 1932, which followed the Council's decision to endorse

³⁸ AFL Executive Council Minutes 82 (Sept. 1930) (on file with Papers of the Office of the President, AFL, *supra* note 12).

³⁹ William Green, Labor Day Address, AFL, Official Information and Publicity Service 5 (Sept. 5, 1932) (on file with Papers of the Office of the President, AFL, *supra* note 12).

⁴⁰ Milton Farber, *Changing Attitudes of the American Federation of Labor Toward Business and Government, 1929-33* (1959) (unpublished Ph.D. dissertation, Ohio State University) (dem-

insurance, shows, the leadership's heart and mind still lay elsewhere:

Hunger begets desperation and want transforms a rational, normal citizen into an irrational advocate of impracticable and unworkable remedies for all our social ills . . .

For this reason the workers everywhere are able to enter into the spirit of Labor Day fully conscious of the fact that the foundations upon which the structure of Organized Labor has been erected remain solid, sound and unimpaired; that the value of the Trade Union movement, as a defensive as well as an aggressive force, has been increasingly demonstrated and that the protecting force of our great economic movement is as necessary during the days of adversity as it is during the days of prosperity.⁴¹

In stark contrast, after 1931 the minutes record considerable attention by the Council to the Communist source of rank and file proposals for the Workers' Bill.

Here was a more general opening for labor movement members to voice their alternatives to conservative action by the leadership. A.J. Muste, the Chairman of the Conference for Progressive Labor Action, and also International Vice President of the American Federation of Teachers (the "AFT"), pushed an independent socialist proposal for an annual wage and government unemployment reserves in 1930. This approach was reintroduced in 1931 by AFT delegate Florence Hanson as Resolution 90, in lieu of which the Executive Council's proposal was passed. More directly active within the Federation, however, were rank and file elements whose proposals eventually coalesced under the banner of the Worker's Bill for Unemployment and Social Insurance.

On December 7, 1931, the National Hunger March, organized by the Unemployed Councils under Herbert Benjamin, climaxed with the presentation of the earliest version of the Workers' Bill to Congress. This "bill" was in the form of five demands: 1) a federal system of unemployment insurance to be immediately adopted guaranteeing full wages for full or partial involuntary unemployment; 2) the availability of benefits under this system to all categories of wage labor without discrimination by race, sex, age, origin or political opinion (no person

onstrates how little of Executive Council's deliberations concerned topics or substance of change from voluntarism to government partnership).

⁴¹ Green, *supra* note 39, at 2.

to be deprived of benefits for refusing to take the place of a striker or to work for less than union rates); 3) full funding from war preparation appropriations combined with sharply progressive taxation on all incomes over \$5000, with no levies on workers; 4) administration by elected worker committees and 5) social insurance for loss of wages through sickness, accident, old age or maternity.⁴²

On December 3, 1931, the National Civic Federation (the "NCF"), then under the leadership of one of the staunchest of the AFL's traditional voluntarists, Third Vice President Matthew Woll, warned the Washington police chief that the Hunger March was designed only to exploit the unemployed:

Their great 'propaganda slogan' is Unemployment Insurance which they, themselves, state in the resolutions of the Central Committee of the Communist Party "has the greatest revolutionary significance at the present time" . . . They are purposely made so extreme that they could not possibly be entertained by any sane body of Americans. . . . They do not expect to produce any revolution in the United States by this "March" at this time, although a little later, when the cold and hunger become more acute, they would have some hope of it.⁴³

The NCF's Acting President, Matthew Woll, noted on March 2, 1931, that "American labor's only spokesmen, the American Federation of Labor and the Railway Brotherhoods, have thus far declared themselves against [Unemployment Insurance]."⁴⁴

As Chair of the Resolutions Committee and thus of floor debates at the 1931 AFL Convention, Woll had attempted to shield the Executive Council's Report and program against the incursion of rank and file resolutions.⁴⁵ Nevertheless, the charged atmosphere of the debates

⁴² See Letter from A.W. Mills, Organizer, Unemployed Councils Committee for the National Hunger March, to Senator Robert Wagner (Dec. 3, 1931) (on file with Wagner Papers, *supra* note 11). For further discussion of the Unemployed Councils, see generally Daniel J. Leab, *"United We Eat": The Creation and Organization of the Unemployed Councils in 1930*, 8 LAB. HIST. 300 (1967); Roy Rosenzweig, *Organizing the Unemployed: The Early Years of the Great Depression: 1929-1933*, in WORKERS' STRUGGLES, PAST AND PRESENT 168, 170-77 (James Green ed., 1983).

⁴³ Letter from Ralph M. Easley, Chairman Executive Council, National Civic Federation, to Brigadier General Pelham D. Glassford, Superintendent and Chief of Police, Washington, D.C., at 2 (on file with Wagner Papers, *supra* note 11).

⁴⁴ Matthew Woll, Recent Important Activities and Plans for Future Work, National Civic Federation (Mar. 2, 1931) (draft address) (on file with author).

⁴⁵ See generally PHILIP TAFT, THE AFL FROM THE DEATH OF GOMPERS TO THE MERGER 33 (1959) (AFL Executive Council position on unemployment insurance at 1931 AFL convention).

inevitably connected industrial organizing and economic conditions. Delegate Duncan of the Seattle Central Labor Council challenged the efficacy of the leadership's organizing strategy, amending the Executive Council's report to force the AFL to commit itself to unemployment relief:

I want men to get the sustenance from somewhere so that they can stand up like real men and say, "No, I am getting enough to get by on, I don't have to undermine my fellows, I will stick to my unemployment insurance until I can go to work with my fellows and maintain my self respect."⁴⁶

The relationship between unemployment and the more fungible jobs of industrial workers made the ability of workers to remain outside the labor pool more important to organizing and later to protecting their strikes. This would become crucial to the unions which would later form the Committee on Industrial Organization (the "CIO"), such as the Textile Workers and the United Mine Workers (the "UMW"). The Typographers' Charles Howard, a CIO founder whose philosophy of unionism was an uneasy fit with the CIO, objected sympathetically that workers could predict that capital would use superior political power to force the tax burden onto employees. Moreover, he could not imagine disbursement being turned over to trade unions. Conservative Andrew Furuseth, President of the Seamen, lamented the impact of state interventions such as the infamous state and federal court use of injunctions on the strength of union self-protection through economic power, but sharply repudiated Duncan in an anti-industrial echo which equated industrial government with revolution: "I certainly do feel that the proposals, innocently but in fact, are transmitted in some way from those who are planning the destruction of existing governments and establishing an industrial government in its place."⁴⁷ But Delegate Hunter of the UMW responded by detailing both the number of miners unemployed and the impact on union power: "It means that the coal operators take advantage of that situation to break down the conditions of the men who are working in the mines. They know they can get plenty of men and they impose conditions upon the miners that are almost unbearable."⁴⁸ Hunter estimated that ninety percent of the miners favored unemployment insurance.

⁴⁶ AMERICAN FED'N OF LABOR, *supra* note 34, at 374.

⁴⁷ *Id.* at 378.

⁴⁸ *Id.* at 383.

Vice President Olander, who would succeed Woll on Resolutions, appealed that liberty not be sacrificed to some hunger. Seemingly forced to intervene, President Green acknowledged the need for government to aid the destitute, but pleaded with the Convention not to commit itself to insurance "which involves very fundamental principles, principles upon which our great union rests. [Insurance risked voluntarism, because] [y]ou must report, you must subject yourself in every way to the control of the law."⁴⁹

Workers who were frustrated by their leaders formed a natural constituency and a perfect political and economic opening for the Communists. At this point, however, affiliations blurred. On January 27, 1932, Carpenters Local 2717 called a conference of eighteen New York locals to establish the New York A.F. of L. Trade Union Committee for Unemployment Insurance and Relief. Louis Weinstock, a painter who became unemployed as a result of the Depression, was named its secretary.⁵⁰ While members of other groups of unemployed such as the Workers Alliance (Muste), Unemployed Councils (Benjamin), and the International Workers Order (benefit society)⁵¹ all worked together, Weinstock later recalled the new Committee's sense of the importance of establishing an independent group consisting only of union members within the AFL. In its first pamphlet, the New York Committee explained that its purpose was to initiate a rank and file referendum which would repudiate the 1931 AFL Vancouver Convention's rejection of unemployment insurance and its betrayal of twelve million unemployed workers: "The standard of living of the American workers must be maintained. Breadlines and starvation must be done away with. Unemployment Insurance is a life necessity for the American workers."⁵² The Committee itself claimed to have proposed the Workers' Unemployment Insurance Bill,⁵³ although it was in draft identical to the Hunger Marchers' wish list. Condemning voluntarist arguments

⁴⁹ *Id.* at 396, 397.

⁵⁰ Weinstock was later Secretary Treasurer of his Painters, Decorators and Paper Hangers local. He was one of the second group of fourteen indicted in New York under the Smith Act. According to Weinstock, the indictment read, "on or about April 1950, Louis Weinstock, a defendant herein, did teach at the Jefferson School of Social Science New York, N.Y. a course on labor history." Oral History of Louis Weinstock 24 (Deborah Bernhardt ed.) (on file with Tamiment Library, New York University).

⁵¹ For a discussion of the International Workers Order, see generally Roger Keeran, *The International Workers Order and the Origin of the CIO*, 30 LAB. HIST. 385 (1989).

⁵² NEW YORK A.F. OF L. TRADE UNION COMMITTEE FOR UNEMPLOYMENT INSURANCE AND RELIEF, WHY UNEMPLOYMENT INSURANCE? 3, 15 (1932).

⁵³ See *Unemployment Insurance: Hearings on H.R. 7598 Before the House Comm. on Labor*, 73d Cong., 2d Sess. 9 (1934) (statement of Herbert Benjamin).

as against workers' interests, the Committee attacked Green, Woll and company:

These fakers dare to speak about the pride of the workers, at a time when with the loyal assistance of the A.F. of L. officialdom, the bosses have reduced millions of American workers to bread lines and flop houses They have the effrontery to say that it is the workers who do not want Unemployment Insurance.⁵⁴

Pressure on the AFL leadership indeed mounted. In the February 1932 Executive Council meeting, President Green had worried:

The call from the mining sections of the country is terrific Now, what are we to do? How are these workers to express themselves except through the American Federation of Labor? They are calling for relief My position at the convention had nothing to do with the relief of the hungry; compulsory unemployment insurance was a union wrecking agency. I do not know what we can do when the people are hungry.⁵⁵

Yet as late as July 2, 1932, Green wrote in the AFL Weekly News Service, "Labor abhors unemployment insurance. Unemployment can be prevented by making the work week and the work day short enough so that all workers shall be employed in the future."⁵⁶ At the July meeting, Vice President Duffy of the Carpenters called attention to a communication from the Chicago District Council of Carpenters which called for the AFL to formulate an acceptable insurance plan. In response, President Green acknowledged local pressures. He pointed out that he had:

submitted to the Council the information in regard to the formation of the Communist movement in New York, known as the New York A.F. of L. Trade Union Committee for Unemployment Insurance and Relief. A number of our organizations, through a misunderstanding, became associated with it. They are in favor of a plan for unemployment insurance. We may have to face the situation some way and make a

⁵⁴ WHY UNEMPLOYMENT INSURANCE?, *supra* note 52, at 7.

⁵⁵ AFL Executive Council Minutes, 34-36 (1932) (AFL Papers, *supra* note 29).

⁵⁶ William Green, *AFL Weekly News Service* (on file with Papers of the Office of the President, AFL, *supra* note 12).

definite declaration because of the growing demand to do something.⁵⁷

On October 18, 1932, just before the Cincinnati Convention, the Council worried about the New York Committee's intention to enter the convention hall by force of numbers and "create whatever disorder they can while there. Their demand is for unemployment insurance."⁵⁸ The Council decided to warn all internationals about the dangers of locals supporting the "Communist conference."⁵⁹

On July 22, 1932, the AFL's Executive Council had a change of heart, and decided to support an unemployment reserves plan financed by wage deductions. Subsequently, the New York Committee issued a second pamphlet which called for a rank and file convention to be held in Cincinnati concurrent with the AFL convention. The pamphlet linked unemployed AFL members, who had been rebuffed by Green during the Hunger March, with unhappy locals as the genesis of the January 27th Carpenter's meeting.⁶⁰ Simultaneously with the AFL convention, 250 rank and file delegates from across the country met in Cincinnati's Carpenters Hall. A delegation of twenty-five people was sent to the AFL to seek floor access to press their demand for unemployment insurance. Upon discovering that the AFL was using a non-union hotel, the rank and file used 100 pickets around the hotel before attempting to present their delegation's credentials, which were refused. Picketers and delegates then entered the hall's public balcony. In order to present their demands for unemployment insurance, Weinstein climbed on a large chandelier and shouted out his message. The Cincinnati afternoon paper bore the headline "Rump Convention Disrupts A.F. of L. Convention." That evening's mass meeting at Carpenters Hall featured Walter Frank of the Minneapolis Building Trades Council, a close friend of Congressman Lundeen who would later introduce the Bill.⁶¹

At the AFL convention itself, unions organized on industry lines led the push for action on unemployment relief. Citing introduction of machine technology, the 57th Convention of the Amalgamated Association of Iron, Steel and Tin Workers called for AFL pressure on Congress. Decrying the hardship of increasing and permanent unem-

⁵⁷ AFL Executive Council Minutes, 71-72 (1932) (on file with AFL Papers, *supra* note 29).

⁵⁸ *Id.* at 7.

⁵⁹ *Id.* at 7-8.

⁶⁰ NEW YORK AFL TRADE UNION COMMITTEE FOR UNEMPLOYMENT INSURANCE AND RELIEF, UNEMPLOYMENT INSURANCE AND THE A.F. OF L. 5, 5 (1932).

⁶¹ Oral History of Louis Weinstein, *supra* note 50, at 20-26.

ployment, the 32nd Convention of the United Mine Workers did the same, and provided their own extensive study of insurance, under the names of John L. Lewis, Philip Murray, and Thomas Kennedy, with legal assistance from general counsel Henry Warrum. The UMW report began tellingly:

Independent occupation no longer furnishes a livelihood to the great industrial masses [I]f this economic structure determines the dependency of labor, it must also bear the obligation of providing employment for labor or caring for it while unemployed. . . . The unemployed labor reserves upon which industry thus relies, constitutes a just item of industrial cost.⁶²

The UMW leaders directly attacked the AFL leaders' fear that employers would have no incentive to stabilize production. They argued that full employment or its equivalent maintained living standards, while increased purchasing power accelerated the demand necessary to business growth. The report concluded pointedly:

It seems foolish to say that unemployment insurance will operate against the organized labor movement. The great purpose of union labor is to bring to all our workers the American standard of wages and working conditions The pressure of [the unemployed] for jobs, coupled with the fear of many of those employed that they may lose their jobs, constitute the real barrier to the organization of all industrial workers.⁶³

Thomas F. McMahon, President of the United Textile Workers, went so far as to introduce a resolution for insurance which would be financed by the state and employers and be administered in part by committees which would include labor representation. In response, old line delegates Andrew Furuseth, President of the Seamen, and John P. Frey, of the Metal Trades Department, could only lament the passing of Gompers style voluntarism:

We did not go to the unorganized who were suffering from industrial injustice and tell them, "if you join our union we will secure certain legislation for you." We believe that we

⁶² AMERICAN FED'N OF LABOR, REPORT OF THE PROCEEDINGS 52ND CONVENTION AFL 326-27 (1932).

⁶³ *Id.* at 334.

have to do something which would impress the non-unionists with the necessity for a vigorous, virile, militant organization in the economic field.⁶⁴

President Green finally closed the debate by invoking the escape clause of the Vancouver Convention—business neglect will force us to support insurance—insisting that any insurance protect the right and incentive to belong to a union.

Although the 1932 Convention voted to support a historic change in direction, incredibly, the minutes of the Executive Council for 1933 include no discussion of unemployment insurance. Meanwhile, the rank and file organization, dropping New York from its title, called for another convention to be held concurrently with the 1933 AFL meeting in Washington. At this Second Annual Rank and File Conference, Frank Mozer of Philadelphia Plumbers Union 690 was elected President, and Louis Weinstock was reelected Secretary-Treasurer. The agenda of the organization was broadened to encompass a range of rank and file issues including racketeering, exemption of unemployed dues, injunctions and the right to strike. Dues exemptions for the unemployed were of particular relevance:

The majority of the Internationals have a definite policy for expelling and suspending members. The incomes of the Internationals have declined considerably during the crisis, and by expelling members from the organization, the funds tied up in the sick and death benefits are put into organization funds, to be used for paying the high salaries.⁶⁵

The Committee issued a third pamphlet concerned with organized labor's complicity with Roosevelt's National Recovery Act (the "NRA"), seeing too little too late in the AFL convention decision to begin chartering federal unions:

Progressive elements in the A.F. of L. unions have long advocated industrial unions, and opposed the system of craft trade unions as a system that divides the forces of the workers in the shop, job or industry and makes it easier for the employers to defeat the workers.

The A.F. of L. leaders have been strong adherents of craft unionism. Now, however, after a wave of organization, and the

⁶⁴ *Id.* at 342.

⁶⁵ AFL TRADE UNION COMMITTEE FOR UNEMPLOYMENT INSURANCE AND RELIEF, PROGRAM—THIRD ANNUAL A.F. OF L. RANK AND FILE CONFERENCE 6 (Oct. 27–28, 1934).

fear of the employers that militant independent unions would come, the A.F. of L. is expected to organize the workers and keep them from struggling.⁶⁶

Once again, a delegation of twenty-five of the rank and filers presented credentials to the AFL Convention and was rebuffed. However, R. Suny, an AFL delegate representing the Cleaners, Dyers, Spotters and Pressers, who also attended the rank and file meeting, introduced the Workers' Unemployment Insurance Bill on behalf of his union as a resolution at the AFL Convention. In the brief convention floor debate on the Worker's Bill, Thomas Kennedy of the UMW asked if their non-concurrence meant that the Committee on Resolutions believed Senator Wagner's alternative unemployment insurance bill was unconstitutional. He was assured it was not. Kennedy would later write of his more generalized skepticism: "Of course, I am aware that some of our reactionary groups, as always is the case, have raised the question of unconstitutionality against a national system. No worthy cause or movement for human welfare has ever been free from such indirect and insincere attacks."⁶⁷

While unsuccessful in its attempt to enter the AFL Convention, the rank and file committee did get the attention of the Executive Council. At the January 1934 meeting, it agreed to receive a delegation. Frank Mozer began by claiming the support of 1200 locals and 12 State Federations. Mr. Coleman of Aeronautical Workers Union 18286, Buffalo, New York, challenged: "[I]f the American Federation of Labor expects to remain as a leader of the workers it must do something and do it now."⁶⁸ Louis Weinstock called for support of the Workers' Bill. Mr. Kuhlman of the Painters asked that suspensions for non-dues payment be ended, noting that the AFL had lost 400,000 members since 1932. Mr. Stein of the Quarry Workers 70, Bangor, Maine, pointed out that "the Federation is built on craft lines and that less than fifty thousand are in about eight different organizations and they should be in one."⁶⁹ Mr. Peter Paul, UMW, Girardsville, Pennsylvania, followed by warning that in one instance 25,000 miners marched from one town to another demanding unemployment relief, and subsequently the miners went out on strike.⁷⁰ The Executive Council offered no substan-

⁶⁶ AFL TRADE UNION COMMITTEE FOR UNEMPLOYMENT INSURANCE AND RELIEF, BEHIND THE SCENES OF THE 53RD CONVENTION OF THE AFL 3, 42-43 (1934).

⁶⁷ Thomas Kennedy, *Unemployment Insurance*, in 42 AM. FEDERATIONIST 1295, 1296 (1935).

⁶⁸ Minutes of AFL Executive Council 92 (1934) (on file with Meany Archives, *supra* note 12).

⁶⁹ *Id.* at 94.

⁷⁰ *Id.* at 95.

tive response to the specific proposal of the Workers' Bill and instead bristled at the accusation of widespread racketeering and rigged elections. President Green concluded the meeting by raising the Constitution as a barrier to any federal legislation.

In the September 1934 Executive Council, Vice President Duffy once again reported that many locals had "unknowingly" supported resolutions which favored the Workers' Bill. Regarding the San Francisco Convention, he asserted:

We will have to expose them because they will have the communists in here. They had them in the Washington convention and introduced resolutions but the convention voted them down. At some session they will probably want to storm the hall as they did in Cincinnati and other places demanding the right to be heard. They are not coming into the convention; they are not going to be heard.⁷¹

The Council considered a recommendation of the Committee on Resolutions which was designed to limit the danger of outside organizations introducing resolutions during the Convention and which required advance submission and screening. The Rank and File Committee, however, succeeded in electing fifteen delegates to the Convention and thus was already on the inside.⁷²

Resolutions in opposition to the Executive Council's nonspecific support for state unemployment reserves were introduced in the 1934 Convention in San Francisco. Industrial unions were particularly opposed. David Dubinsky and the International Ladies Garment Workers' Union (the "ILGWU") apparently missed President Green's lecture on constitutionality:

RESOLVED that the American Federation of Labor, in Fifty-fourth Convention assembled, in the City of San Francisco, continue unremittingly its drive for the passage of a compulsory Federal unemployment insurance law; and be it further RESOLVED, That the administration of the insurance funds created by this law be left to each and every industry and that the workers in each industry have a paramount voice in its administration.⁷³

⁷¹ *Id.* at 54.

⁷² AFL TRADE UNION COMMITTEE FOR UNEMPLOYMENT INSURANCE AND RELIEF, *supra* note 65, at 12.

⁷³ AMERICAN FED'N OF LABOR, REPORT OF THE PROCEEDINGS 54TH CONVENTION AFL 599 (1934).

Delegates Stubbe and Johnson of Automobile Workers Federal Labor Unions introduced resolutions which attacked the adequacy of the Wagner-Lewis Bill to establish unemployment reserves and supported the Workers' Bill as the only real unemployment insurance. Delegate Coleman Taylor, Federal Labor Union 19311, introduced a resolution calling for a general strike in support of the Workers' Bill. For all this, the Council's report was adopted without floor debate.

By its highpoint in early 1935, the AFL Trade Union Committee had collected endorsements from three thousand locals, five international unions, six state federations—Arkansas, Colorado, Iowa, Montana, Nebraska and Rhode Island—and thirty-three central labor unions in cities, including Pittsburgh, San Diego, Minneapolis, St. Louis, Albuquerque, Queens and Nassau Counties, Providence, Salt Lake City and Milwaukee.⁷⁴ The red-baiting from President Green's office, which had begun in 1932, intensified as the number of these endorsements grew. In 1933, Hutcheson's Carpenters dissolved New York Carpenter's Local 2717, the local which called the first meeting of the AFL Trade Union Committee on Unemployment Insurance and Relief, and transferred their members to other local carpenter's unions in the city. The same fate befell Local 1151 in Philadelphia, which had sent out a referendum on the Workers' Bill to all carpenters' locals.⁷⁵ Hutcheson's "despotic machine" exercised its power to quell Workers' Bill activities.⁷⁶ On August 4, 1934, when George Butler communicated the unanimous endorsement of the Workers' Bill by Local 252 of the Oil Field, Gas Well and Refinery Workers and excoriating the deficiencies of the Wagner Bill, Green replied, reiterating support for the Wagner-Lewis Bill:

I presume you are not aware of the motive behind the circulation of this [Workers'] bill among the Labor organizations of the country. The bill was prepared by Communists, who, as it is well known, are opposed to unemployment insurance.

⁷⁴ AFL COMMITTEE FOR UNEMPLOYMENT INSURANCE AND RELIEF, LABOR FIGHTS FOR SOCIAL SECURITY: WHY THE A.F. OF L. RANK AND FILE SUPPORTS THE WORKERS' BILL (H.R. 2827) 33-39 (1935).

⁷⁵ Cf. *Hearings on H.R. 7598*, *supra* note 53, at 2 (statement of Herbert Benjamin) (criticism of AFL's efforts to obstruct local support for Workers' Bill). Benjamin stated that, "the American Federation of Labor has not been utilized in the interests of labor." *Id.*

⁷⁶ *News From the Carpenters' Locals*, A.F. OF L. RANK AND FILE FEDERATIONIST, Feb. 1934, at 7 (on file with New York City Public Library).

They simply had introduced an impossible bill in order that the real bill would be defeated.⁷⁷

Butler countered:

[W]e of Local 252 dont [sic] understand your motive by branding this bill, as being prepared by communists, we read both bills before the body, H.R. 7598, bill is a thousand times better and suitable to [the] American laborer, than the half baked Wagner Lewis bill, which saddles the bill on the workers pay envelope

Was there any cry from the American worker of communism when high finance, big business, industry, railroads, banks, who received a governmental dole of not ten dollars a week but millions upon millions, ...

[T]ake that plug hat of reactionism and get into overalls

We are not going to beg your leadership to change your opinion of HR 7598, bill which is a just bill for the American Laborer but demand you to support this bill which is not impossible but just.⁷⁸

William Green sent letters to endorsing locals which labelled the Workers' Bill as a ploy of the Communists; he fortified the charge by remonstrating at the Bill's unconstitutionality. Rank and File President Frank Mozer responded: "Some of the locals sent the letters back to William Green, telling him that unemployment was also unconstitutional, and that Green was not doing very much to alleviate this condition."⁷⁹ W.W. Britton, President-Secretary-Treasurer of the Metal Polishers International, wrote Green asking for proof that the Workers' Bill was Communist. Britton wanted to provide such proof to members who were angry because they were being asked to pass a local rule prohibiting the reading of AFL Committee on Unemployment Insurance and Relief literature. Britton wrote: "I have issued an order to our local President not to permit the discussion of this matter on the floor of the meeting any more, and the threat of taking charge of that organi-

⁷⁷ Letter from William Green, President, AFL, to George W. Butler (Sept. 4, 1934) (on file with Ernest Lundeen Papers, Hoover Institute, Stanford University).

⁷⁸ Letter from George W. Butler to William Green, President, AFL (Sept. 1934) (on file with Lundeen Papers, *supra* note 77).

⁷⁹ Proceedings—3rd Annual AFL Rank and File Conference, 20 (Oct. 1934) (on file with Tamiment Library, *supra* note 50).

zation by the International and placing our own officers in the chair ⁸⁰ Green responded: "The Lundeen [Workers'] bill was prepared by the communists and is being urged by the 'Daily Worker,' the official organ of the Soviet Government in the United States."⁸¹ To one of the central labor unions which had endorsed the bill, Green wrote, "House Bill 2827 [the successor to 7598] is sent out by the communists. . . . No contributions should be made by any labor organization to this group"⁸² To the Yellowstone County Trades and Labor Assembly, he wrote:

Some twelve years ago the Third International at Moscow, Russia, called upon the Communists in this country to advocate unemployment insurance. It was to be used as a slogan in the campaign to organize Communists. At the same time it was made known that an impossible bill should be prepared as the Committern [sic] was opposed to unemployment insurance.⁸³

The President of the Montana State Federation, one of the State Federations to endorse the Workers' Bill later in 1936, wrote Green to tell him: "The boys were a little peeved at your letter as they took it that you were insinuating that they were mixed up with the communists"⁸⁴ In contrast, after formation of the CIO, but before expulsion, Green treated a UMW local's endorsement more gingerly. Louis Weinstock underlined the incredulity with which the official AFL position was received:

In 1934, when there are 15 million people unemployed, when the working conditions are miserable, and the living standards, are lowest in the history of the country, the workers in the A.F. of L. who are interested to improve their working conditions, cannot accept communications like this from the

⁸⁰ Letter from W.W. Britton to William Green, President, AFL (Jan. 16, 1935) (on file with Papers of the Office of the President, AFL, *supra* note 12).

⁸¹ Letter from William Green, President, AFL, to W.W. Britton, at 2 (Jan. 23, 1935) (on file with Papers of the Office of the President, AFL, *supra* note 12).

⁸² Letter from William Green, President, AFL, to George Heath, Secretary, Kalamazoo Fed'n of Labor (Dec. 30, 1935) (on file with Papers of the Office of the President, AFL, *supra* note 12).

⁸³ Letter from William Green, President, AFL, to E.H. Helterbraun, Yellowstone County Trades and Labor Assembly (Dec. 15, 1935) (on file with Papers of the Office of the President, AFL, *supra* note 12).

⁸⁴ Letter from James D. Graham, President, Montana State Fed'n of Labor, to William Green, President, AFL (Jan. 2, 1936) (on file with Papers of the Office of the President, AFL, *supra* note 12).

A.F. of L. officialdom The rank and file in the local unions cannot be scared by expulsions and suspensions.⁸⁵

"The American Federation of Labor convention which was held last October did not endorse any specific bill dealing with [unemployment] insurance."⁸⁶ In October 1935, the Executive Council, based on its "communist philosophy," did disapprove a resolution which supported the Workers' Bill which had been sent to the Council for action by the Committee on Resolutions of the 1934 Convention.

The Workers' Bill was introduced in resolutions again at the 1935 and 1936 Conventions but was not debated except for Vice President Woll's insistence on supporting the Social Security Act with appropriate amendments. By this time, in any case, issue-by-issue conflict between craft and industrial interests had given way to all-out conflict over the necessity that organized labor deal with the mass production industries.

B. *The CIO and the Workers' Bill*

Together with Sidney Hillman's Amalgamated Clothing Workers of America, which had its own internal unemployment insurance plan, four other international unions—the Miners; ILGWU; Textile Workers; and Mine, Mill and Smelter Workers—had actively opposed the AFL leadership program on unemployment insurance at AFL conventions between 1932 and 1934. The Textile Workers and the Mine, Mill and Smelter Workers specifically endorsed the Workers' Bill. James Robinson, Secretary of the latter, delivered the Mine, Mill and Smelter Workers' resolution: "We believe that the final solution of the unemployment problem is the seizure of power by the workers and the production for use instead of for profit"⁸⁷ By the time John Frey brought expulsion charges against the twelve unions of the Committee on Industrial Organization in July of 1936, a third backer of the Workers' Bill, the Iron Steel and Tin Workers, had joined the CIO. The connection between industrial unions and unemployment insurance was not entirely serendipity:

⁸⁵ Louis Weinstock, Opening Address—Third Annual Rank and File Conference, *supra* note 65, at 10.

⁸⁶ Letter from William Green, President, AFL, to Bert Graham, President, UMW Local 3506, Russellton, Pa. (Jan. 15, 1936) (on file with Papers of the Office of the President, AFL, *supra* note 12).

⁸⁷ Letter from James Robinson, Secretary-Treasurer, International Union of Mine, Mill and Smelter Workers to William Green, President, AFL (Aug. 27, 1935) (on file with Papers of the Office of the President, AFL, *supra* note 12).

Jett Lauck, Lewis's principal adviser on broad matters of political economy, shared this view about the relationships between industrial unionism and the restructuring of the political economy. . . . Lauck's advice to Lewis during the fateful years of the middle thirties emphasized the need for government intervention and regulation to expand production, redistribute income, and expand mass purchasing power and government credit. And in 1934 he broached the idea of the UMW leaving the AFL to start a new labor federation.⁸⁸

For Lewis and the CIO, dealing with the causes of unemployment meant also dealing with the causes of the decline of union power:

*In the great mass production industries and those in which the workers are composite mechanics, specialized and engaged upon classes of work which do not fully qualify them for craft union membership, industrial organization is the only solution. Continuous employment, economic security and the ability to protect the individual worker depend upon organization upon industrial lines.*⁸⁹

Moreover, the failure to change organization meant making conditions worse:

With great mass unemployment, people are driven to accept low wages. The pay of union men is forced down by the competition of those who must work for less to secure a job. The many changes taking place in methods and materials are undermining old ways of doing things, so that even the most skilled worker cannot be sure that his craft will not be swept away by new inventions.⁹⁰

The door swung both ways. As industrial unions recognized the problem of unemployment, so unemployed worker activists became important to the CIO: "Many leaders of the CIO came directly out of the unemployed movement, and it appears that many in the rank and file had similar training."⁹¹

⁸⁸ Steve Fraser, *The 'Labor Question,' in THE RISE AND FALL OF THE NEW DEAL ORDER, 1930-1980*, at 55, 70 (Steve Fraser & Gary Gerstle eds., 1989).

⁸⁹ CHARLES HOWARD ET AL., COMMITTEE FOR INDUS. ORG., *Minority Report of Resolutions Committee on Organization Policies, in 55th Convention AFL, 1935*, INDUSTRIAL UNIONISM 7 (1935).

⁹⁰ COMMITTEE FOR INDUS. ORG., *THE CASE FOR INDUSTRIAL ORGANIZATION*, PUB. NO. 4, at 5 (Mar. 1936).

⁹¹ Rosenzweig, *supra* note 42, at 182.

The connection between unemployment insurance and industrial organization was always prominent in the minds of the organizers of the Rank and File Committee. Louis Weinstock recalled:

[B]y 1934, we had a new country actually in the labor movement. We had the mobilizations of millions of unemployed people, who became organized in [the] unemployment movement, who were ready to become union people. This struggle for unemployment insurance coincided with the struggle for organization of the unorganized into industrial unionism. There was a struggle going on in this country way back since [the] 1920's to change the nature of the American trade union movement from craft unionism to industrial unionism.⁹²

This intent was prominent in *The Rank and File Federationist*, a monthly newspaper published from 1933 to 1935 by the AFL Trade Union Committee for Unemployment Insurance and Relief, and edited by Weinstock. The first issue outlined the committee's eight point program: 1) support for the Workers' Unemployment Insurance Bill; 2) exemption of dues for unemployed workers, who were to remain in good standing; 3) reduction of high salaries of union officials to the average wages in the industry; 4) a six-hour day, five-day week without reduction in pay; 5) trade union democracy in locals and against expulsions; 6) opposition to racketeers and gangsterism; 7) preservation of the right to strike and opposition to compulsory arbitration and 8) immediate conventions in all Internationals where regular conventions had been postponed.⁹³ Other articles attacked William Green for supporting state unemployment legislation in an effort to sidetrack a federal program and for supporting the NRA, which was accused of lowering wages under industrial codes without economic justification. An article by A. Baskoff in the sixth issue reported AFL "sabotage" of Mine strikes and the Toledo Autolite strike, as well as disruption of the longshore jurisdictional battle. It concluded that:

The issue of craft versus industrial unionism forms one of the most colorful chapters of American Labor History. Sincere farsighted progressive elements in the A.F. of L. have always fought for Industrial Unionism. . . . This A.F. of L. Committee

⁹² Oral History of Louis Weinstock, *supra* note 50, at 27-28.

⁹³ *The First Issue of the Rank and File Federationist*, A.F. of L. RANK AND FILE FEDERATIONIST, Jan. 1934, at 8 (on file with New York City Public Library).

is definitely in favor of Industrial Unionism and is ready to support the rank and file in the A.F. of L. in the fight for Industrial Unionism.⁹⁴

In the eighth issue, Weinstock berated Green for not supporting the West Coast strike. Joseph Ryan was quoted as saying: "Conservative union leaders sanctioned the general strike to force a show-down and terminate the activities of Harry Bridges, radical longshoreman's leader."⁹⁵ The tenth issue reported on the 1934 AFL Convention and its rank and file counterpart, which added industrial unionism and full participation for black workers to the Trade Union Committee program. The Committee convention elected Harry Bridges of the International Longshoremen's Association as President, and Louis Weinstock as Secretary of the organization. Although the role of Bridges has never been examined, the San Francisco AFL Rank and File Committee was quite active in the 1934 general strike:

The San Francisco Bay General Strike of July 16th to 20th, 1934 brings home to all of us major and vital lessons for Labor of "life and death" importance.

First, that to the extent we have real rank and file control, within the unions, or in the governmental set-up for that matter, to that extent only do we have real democracy and social and economic security in our lives. For the unions this is illustrated very well by the strength of rank and file control in the I.L.A. local of San Francisco. The I.L.A. local strike committee, together with the Joint Maritime Strike Committee of Fifty, was the spear-head of the fight against the Employers' Open-Shop, union-smashing program.⁹⁶

In volume two, issue five, following the 1935 AFL Convention, the editorial attitude toward John L. Lewis shifted drastically in his favor as a result of his celebrated punching of Carpenter's President Hutcheson during a dispute over industrial organizing:

This palace battle is caused by two main factors—first, the continuing impact of the six-year economic crisis upon the

⁹⁴ A. Baskoff, *Apostles on A.F. of L. Executive Board Still Opposed to Industrial Unionism*, A.F. OF L. RANK AND FILE FEDERATIONIST, June 1934, at 5 (on file with New York City Public Library).

⁹⁵ *Rank and File Waged Heroic Fight in Frisco*, A.F. OF L. RANK AND FILE FEDERATIONIST, Aug. 1934, at 5 (on file with New York City Public Library).

⁹⁶ THE LESSONS OF THE BAY DISTRICT 1934 GENERAL STRIKE I (A.F. OF L. RANK AND FILE COMMITTEE OF OAKLAND, CA., 1934).

A.F. of L. membership and the American working class as a whole, and second, resulting from this, the growing disbelief of the A.F. of L. membership—especially newly organized workers in basic industries—in the honesty and ability of the top leadership of the A.F. of L. and its principal affiliated unions.⁹⁷

The last issue of volume two, issue six, pushed for formation of a labor party.

In 1934, the AFL Trade Union Committee, in their convention, had already urged its membership to support the coalition known as the National Congress on Unemployment and Social Insurance. The Provisional Committee of the Congress included many direct and indirect connections to the Workers' Bill, as well as numerous representatives of independent leftist unions such as the Progressive Miners, and industrial unions such as the Auto Workers Union, the Marine Workers Industrial Union and the Trade Union Unity League.⁹⁸ The National Congress for Unemployment and Social Insurance met during January 5–7, 1935 and carried on an extensive campaign for the Lundeen Bill.⁹⁹ According to Weinstock, the union-only identity embodied in the *Rank and File Federationist* "was not necessary any more, [sic] because this was already the time when the AFL seriously considered the fight for unemployment insurance and industrial unionism, and John L. Lewis already appeared on the scene."¹⁰⁰

⁹⁷ *The Crisis in the A.F. of L. Official Family*, A.F. OF L. RANK AND FILE FEDERATIONIST, July 1935, at 3 (on file with New York City Public Library).

⁹⁸ See Call to a National Congress for Unemployment and Social Insurance (1934) (on file with Lundeen Papers, *supra* note 77). Committee members included: Draftsperson Mary Van Kleeck, Inter-Professional Ass'n for Social Ins.; Harry Bridges, International Longshoreman's Ass'n, President AFL Trade Union Committee for Unemployment Insurance Relief ("TUCUIR"); Elmer Brown, Vice President AFL TUCUIR, later President, International Typographical Union; Louis Weinstock, Secretary AFL TUCUIR; Endorser Max Bedacht, International Workers' Order; Herbert Benjamin, National Unemployment Council, Chair, National Congress; Supporter Paul Brissenden, Economics Professor, Columbia University; Supporter T. Arnold Hill, Executive Secretary, National Urban League; Endorser J. Stenglein, Rochester Bakers Union. See *id.*

⁹⁹ The times pushed past the Rank and File Committee. By late 1935, the need for the publication had been superseded by events. By the time a trademark infringement action which was instigated by the AFL Executive Council in the Federal Trade Commission was decided on November 24, 1936, the newspaper had ceased publication. See Federal Trade Commission Order (Nov. 24, 1936) (on file with Meany Archives, *supra* note 12). The FTC prohibited a New York organization from calling itself the "A.F. of L. Trade Union Committee for Unemployment Insurance and Relief," and prohibited the use of the name "A.F. of L. Rank and File Federationist." *Id.* The organization did not have permission from the AFL to use the initials "A.F. of L." *Id.* Although rank and file lobbying for the Lundeen Bill continued after passage of the Social Security Act, the Committee itself became part of a broader social insurance movement.

¹⁰⁰ Oral History of Louis Weinstock, *supra* note 50, at 30.

C. *Social Movements and the Workers' Bill in Congress*

Worker politics were not, of course, limited to political organizations internal to the labor movement. From 1934 to 1937, more than seventy municipal governments,¹⁰¹ including the city council of Minneapolis, endorsed the Workers' Bill during its congressional lifetime as the Lundeen Bill. Numerous local chapters of mutual benefit societies wrote Senator Robert Wagner to ask him to support the Lundeen Bill, not all ignorant that he was the sponsor of the competing reserves plan, the Wagner-Lewis Bill.¹⁰² The Fraternal Federation for Social Insurance claimed 25,000 members in endorsing the Workers' Bill. Also, locals of the Workmen's Sick and Death Benefit Fund, the International Workers' Order, and the Adolph Ullman Aid Society endorsed the Bill. Immigrant ethnic organizations, made up largely of unorganized mass production workers and their families, uniformly preferred the Workers' Bill. The Swedish Brotherhood, the Czech Society, International Glove Workers' Union of America, The Russian Workers' Club of Hamtramck, Michigan, the Polish Republic Society of Milwaukee, the Yugoslav Organization of Monessen, Pennsylvania, eighteen Lithuanian organizations, the Organization of Italian Descendants of Cleveland, Ohio, and the Union and League of Romanian Societies of America all wrote directly to Congressman Lundeen.¹⁰³ Not surprisingly, unemployed organizations did so as well because those who had already lost their jobs would not be eligible for benefits under Wagner-Lewis. The 10,000 member United Shoe and Leather Workers Unemployed Council wrote Wagner, as did many locals of the Workers' Unemployed Union, whose advisory board included Sidney Hillman, David Dubinsky, David Saposs and Walter Frank.¹⁰⁴

African American workers, most of whom were unorganized industrial workers, were hit hardest by the Depression. They received the least relief and that relief was administered on discriminatory terms:

The campaign of evictions of unemployed workers and their families which is one of the most vicious aspects of the employers' offensive, began in the Negro quarters of the large

¹⁰¹ *Call to a National Congress for Unemployment and Social Insurance*, UNEMPLOYMENT INSURANCE REVIEW 2 (National Congress for Unemployment and Social Insurance, 1935).

¹⁰² See various communications from benefit societies, ethnic organizations and unemployed councils to Robert Wagner (on file with Wagner Papers, *supra* note 11).

¹⁰³ See various communications from ethnic organizations to Ernest Lundeen (on file with Lundeen Papers, *supra* note 77).

¹⁰⁴ Letter from Orlie Pell, Chairman, Workers Unemployed Union of Greater NY, to Senator Robert Wagner (Apr. 25, 1934) (on file with Wagner Papers, *supra* note 11).

cities. Chicago papers last August reported that evictions were taking place at the rate of 2,000 per week and those were mostly on the South Side with its great preponderance of Negro workers from the packing-houses and steel plants.¹⁰⁵

The principles of the Workers' Bill therefore appealed to Blacks:

There must come before the Congress of the United States, legislation that will guarantee, for all workers regardless of age, occupation, color, sex, or political belief, full compensation for all loss of time occasioned by involuntary unemployment, industrial accident, and sickness. Minimum standards must be set below which this compensation must not fall. Costs must be placed not upon workers, but upon Government and capital; and workers must not be excluded from administering the benefits of such a plan.¹⁰⁶

Blacks had reason to suspect discrimination by the states:

Such an unemployment insurance scheme has special meaning for Negro workers. The establishment of uniform benefits regardless of race would be a step toward ending the whole system of segregation. Uniform benefits would put the Negro in a better position to bargain for higher wages and thus help eliminate the present differential between wages of white and Negro workers doing the same work.¹⁰⁷

T. Arnold Hill drove home the contrast to the Wagner-Lewis proposal by noting that farm and domestic labor, which employed more than half the black workers, were excluded from all social insurance plans except for the Workers' Bill.¹⁰⁸

Similarly, for the first time, women could look to benefits during maternity:

There are in the United States 2,425,000 married women of child-bearing age (18 to 45 years) gainfully employed in the United States. One in every five workers is a woman, and of these, one in every four is married . . . In New York City the

¹⁰⁵ NATIONAL HUNGER MARCH, POVERTY MIDST RICHES: WHY WE DEMAND UNEMPLOYMENT INSURANCE 25 (Dec. 7, 1931).

¹⁰⁶ T. Arnold Hill, *The Negro's Need for Unemployment Insurance*, 1935 UNEMPLOYMENT INS. REV. 9.

¹⁰⁷ *Id.*

¹⁰⁸ T. Arnold Hill, Address to National Congress on Social Insurance (Jan. 5-7, 1935) (on file with Lundeen Papers, *supra* note 77).

average total maternal death rate per 1,000 births is 4.4. In group A, which is the slum population, where there is extreme poverty and intense overcrowding, mainly a day-laborer class, the maternal death rate per 1,000 live births is 4.9. In group D, which is the favorably situated economical group, which has the highest grade of living standards, who are able to avail themselves of competent physicians and good hospitals, the maternal death rate per 1,000 live births is 3.9. The intermediary groups show a maternal death rate between these two extremes. Assuring an adequate family income would greatly lessen the maternal death rate in group A These figures, I think, point to a very close relation between economic security and the maternal mortality rate. The other causative factors, such as the quality and availability of medical care, do not alter this fact.¹⁰⁹

"Mother" Ella Bloor testified:

I think very few of us who are in the cities realize the poverty that the women are suffering, especially the young women in the farm districts, on account of not only the drought and the usual conditions there, but especially the fact of maternity in these isolated places We found in the women's section of the unemployed congress which took place in Washington recently, when I met with those women two or three times, that they were especially interested in this part of the bill, about maternity . . . not only the farm women, but working women everywhere. At this caucus of women in connection with the Congress, several single women spoke, and they said they felt that we must have a bill such as this, which makes no distinction between men and women in its benefits. In other clauses of the bill it just says "workers" and "farmers"; it never says "male workers."¹¹⁰

A poll of readers taken by the *New York Post* after printing the contents of the Wagner-Lewis, Lundeen and Townsend Bills, reported that out of 1391 votes cast, 1209 readers supported the Lundeen Bill, 157 the Townsend Bill, 14 the Wagner-Lewis Bill and 7 preferred no bill at all. Of the 1073 respondents who were employed, 957 supported

¹⁰⁹ *Social Insurance: Hearings on S. 3475 Before the Senate Comm. on Education and Labor*, 74th Cong., 2d Sess., 56-57 (1936) (statement of Dr. Emily N. Pierson).

¹¹⁰ *Unemployment, Old Age, and Social Insurance: Hearings on H.R. 2827 Before Subcomm. of the House Comm. on Labor*, 74th Cong., 1st Sess., 129-30 (1935) (statement of Ella Reeve Bloor).

the Lundeen Bill, 100 the Townsend Bill, 7 the Wagner-Lewis Bill and 5 preferred none:¹¹¹

The Post calls attention to the relatively high proportion of supporters of the Lundeen bill who are at present employed, a noteworthy fact, indicating the growing consciousness of the need for security among workers still able to support themselves.

The voters, employed and unemployed, came from every group and class

The Administration's Wagner-Lewis measure drew the votes of almost exactly one in a hundred.¹¹²

Neither organization nor any particular program of indoctrination can explain this support for the Workers' Bill. As the direct pleas written to Congressman Lundeen indicate, this was a mass movement:

The reason I am writing you is, that we Farmers [and] Industrial workers feel that you are the only Congressman and Representative that is working for our interest. We have analyzed the Wagner-Lewis Bill [and] also [the] Townsend Bill. But the Lundeen H.R. (2827) is the only bill that means anything for our class The people all over the country are [waking] up to the facts that the two old Political Parties are owned soul, mind [and] body by the Capitalist Class.¹¹³

When Congressman Ernest Lundeen, a member of the Farmer-Labor Party of Minnesota¹¹⁴ and a protege of Floyd B. Olsen, introduced the Workers' Unemployment and Social Insurance Act (H.R. 7598) on February 2, 1934, the only substantive difference between it and the AFL Trade Union Committee's version was the omission of the latter's guarantee of benefits regardless of citizenship. Both rank and file organizer Louis Weinstock and the Workers' Bill's eventual sponsor in Congress, Ernest Lundeen, credit Mary Van Kleeck, Director of Industrial Research for the Russell Sage Foundation,¹¹⁵ with actually

¹¹¹ *Final Returns in Social Insurance Poll*, N.Y. Post, Apr. 2, 1935.

¹¹² *Id.*

¹¹³ Letter from Jesse L. Keyser to Rep. Ernest Lundeen, United States House of Representatives (on file with Lundeen Papers, *supra* note 77).

¹¹⁴ See generally RICHARD M. VALELLY, *RADICALISM IN THE STATES* (1989) (discussion of role of Farmer-Labor Party in Minnesota politics).

¹¹⁵ On Mary Van Kleeck, see generally GUY ALCHON, *THE INVISIBLE HAND OF PLANNING* 13-15, 142-45 (1985).

drafting the Workers' Unemployment Insurance Bill. Van Kleeck remained the legislative draftsman through its various versions until 1936. Along the way, she formed her own organization to secure its passage, the Inter-professional Association for Social Insurance.¹¹⁶

Prior to the introduction of H.R. 7598, Lundeen kept an undated and unsigned draft which was similar in both principle and structure to the Van Kleeck version. The preamble of this draft began:

Congress recognizes the right of all useful members of society to enjoy the opportunity to secure and enjoy the essentials of life and accordingly undertakes to guarantee such opportunity to all workers who are deprived of their ordinary means of livelihood in consequence of mass unemployment, accident, sickness, old-age, maternity or any other cause that prevents workers from engaging in their normal wage-earning pursuits.¹¹⁷

The full text of H.R. 7598 reads as follows:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act shall be known by the title 'The Workers' Unemployment and Social Insurance Act.' . . .

SEC. 2. The Secretary of Labor is hereby authorized and directed to provide for the immediate establishment of a system of unemployment and social insurance for the purpose of providing insurance for all workers and farmers unemployed through no fault of their own in amounts equal to average local wages. Such insurance shall be administered by workers and farmers and controlled by them under rules and regulations prescribed by the Secretary of Labor in conformity with the purposes and provisions of this Act, through unemployment insurance commissions composed of the rank and file members of workers' and farmers' organizations.

¹¹⁶ Harvey Klehr credits the drafting of the Workers' Bill to the Communist Party, an assertion based on both an interview with Herbert Benjamin and various claims of sponsorship during the hearings on the Bill. The hearings, however, point to no draft language. Given the drafts in Congressman Lundeen's files, his correspondence with Mary Van Kleeck, and her subsequent control of all drafts after the initial version, it seems equally likely that while the Communists drafted general principles, Van Kleeck authored the actual Bill. See generally HARVEY KLEHR, *THE HEYDAY OF AMERICAN COMMUNISM* 284-89 (1984) (discussion of roles of communists and Mary Van Kleeck in lobbying for unemployment insurance).

¹¹⁷ Draft, Workers' Unemployment and Social Insurance Law (on file with Lundeen Papers, *supra* note 77).

Funds for such insurance shall hereafter be provided at the expense of the Government and of employers, and it is the sense of Congress that funds to be raised by the Government shall be secured by taxing inheritance and gifts, and by taxing individual and corporation incomes of \$5,000 per year and over. No tax or contribution in any form shall be levied on workers for the purposes of this Act. In no case shall the unemployment insurance be less than \$10 per week plus \$3 for each dependent.

SEC. 3. The Secretary of Labor is further authorized and directed to provide for the establishment of other forms of social insurance in like amounts and governed by the conditions set forth in section 1 of this Act for the purpose of paying workers and farmers insurance for loss of wages because of part-time work, sickness, accident, old age, or maternity.

SEC. 4. The benefits of this Act shall be extended to workers and farmers without discrimination because of age, sex, race, or color, religious or political opinion, or affiliation, whether they be industrial, agricultural, domestic, or professional workers, for all time lost. No worker shall be disqualified for the benefits of this Act because of refusal to work in place of strikers, at less than normal or trade-union rates, under unsafe or unsanitary conditions, or where hours are longer than the prevailing union standards at the particular trade and locality, or at any unreasonable distance from home.¹¹⁸

The second version of the Bill (H.R. 2827), introduced on January 3, 1935, included all the features of H.R. 7598. A draft in Lundeen's files included a few changes: eligibility was to begin at age eighteen; a more specific maternity provision provided disability benefits during the eight weeks prior to and eight weeks following birth; the bill's title was changed to "The Workers' Unemployment, Old Age, and Social Insurance Act;" it was to be administered by commissions whose members would be directly elected by members of workers' and farmers' organizations, not comprised only of the rank and file; and a provision was added to enable workers who wished to work full time but only were able to find part-time work to receive the difference between their earnings and the benefit standard.¹¹⁹

¹¹⁸H.R. 7598, 73d Cong., 2d Sess. (1934).

¹¹⁹Draft version of H.R. 2827 (on file with Lundeen Papers, *supra* note 77).

The mechanism for guaranteeing the social wage was more ingenious than insidious:

[W]here the benefits exceeded the prevailing wage, this differential would withdraw workers from the labor market and by making labor more scarce would raise the wage rate until it at least equaled [sic] the unemployment benefits. The benefits to the unemployed could thus be used as a lever to compel industry to pay a living wage to those who were employed. In a sense, therefore, this proposal meant that the benefits could be used to finance a tacit strike to make the scale of benefits the scale of wages.¹²⁰

Instead of collecting reserves to subsidize capital by underwriting labor pools of unemployed workers, a benefit minimum guaranteeing living standards subsidized labor by underwriting wage floors. To illicit skills a premium would be necessary and employers would have to contractually protect their access to those skills.

The Committee on Labor's Report which accompanied H.R. 2827 captured the distinctive feature of the Lundeen Bill's version of the social wage. First, the Bill covered all the unemployed for the duration of their joblessness. Second, it was funded by current taxation instead of reserves taken from payrolls which would raise prices, lower take-home wages, and create further imbalance between funds available for investment and money available for consumers' purchasing power. Finally, it linked democratic administration by workers to control by the insureds. Increased productivity whose value was not distributed to workers in the form of increased purchasing power, and was shared by fewer workers as the result of technological changes, meant a glut of undemanded goods which required rebalancing of supply and demand. Stabilizing the system of employment to allow growth in production justified management by the national state, "creating purchasing power for the masses who must spend the money for the necessities of life and who, in spending the money for these necessities, will thereby remove obstructions to the free flow of interstate commerce."¹²¹

Representative Lundeen firmly believed that the purpose of insurance was to provide a social wage or income security. This he contrasted to unemployment reserves as security of existing employment:

¹²⁰ DOUGLAS, *supra* note 16, at 80.

¹²¹ H.R. REP. NO. 418, 74th Cong., 1st Sess. 8 (1935).

In my opinion, the Wagner-Lewis bill is a piece of medieval barbarism. For the fifteen million people *now* unemployed it provides absolutely nothing. In no provision does it recognize the *responsibility* of the *federal government* to provide its citizens with social security. The supporters of the bill to date have not dared to bring it out of the committees.

In striking contrast to the lack of support for the Administration Wagner-Lewis bill is the situation existing with reference to the Lundeen Unemployment, Old Age, and Social Insurance Bill H.R. 2827. In addition to having by far the greatest popular support, this bill has made more progress in Congress than any other social security measure.¹²²

Senator Wagner was less certain. He preferred his own bill, but wrote in answer to a supporter of the Workers' Bill: "I am always ready to say that I have never seen an unemployment insurance bill that I did not prefer to no bill."¹²³

President Roosevelt pulled the rug from beneath the Wagner-Lewis Bill when he formed the Committee on Economic Security in 1935 in order to put old age, disability and dependent children insurance into an omnibus social security program. While clearly a response to the political movement being built around a social democratic demand for a social wage, the Social Security Act was simply a collection of four categorical assistance programs, each with a very different administrative structure and policy rationale. The Lundeen bill, however, was already comprehensive. Nonetheless, Van Kleeck redrafted the Workers' Bill to parallel the Administration's effort more closely. Completed on December 18, 1935, then Senator Lundeen introduced the Lundeen-Frazier Bill as H.R. 9680. The new version, styled the Workers' Social Insurance Act, provided both minimum and maximum benefit levels, with compensation otherwise set at the average wage for the occupation or district. Qualification and disqualification for voluntary quit standards were similar to those of the Social Security Act (the "SSA"). The Bill also provided for self-employment insurance (unlike in the SSA, farmers and domestics were included), and set specific standards for old age, disability and maternity (not available in the SSA) benefits. The Bill's administrative provisions were substantially

¹²² Letter from Rep. Ernest Lundeen to "Dear Friend," (Mar. 22, 1935) (on file with Lundeen Papers, *supra* note 77).

¹²³ Letter from Sen. Robert Wagner, United States Senate, to T.B. Hallock, Secretary, Workers' Unemployed Union, Local 4, New York City (May 16, 1934) (on file with Wagner Papers, *supra* note 11).

more detailed. Staff and advisors were not elected, but rather were chosen from panels submitted by workers' organizations, and a claims procedure system was established. Funding was to be established through a five-billion dollar insurance fund derived from general revenues. A lengthy Declaration of Policy established a federal need for the bill which exceeded the capacity of individual states to address. This was the basis for the assertion of the Bill's constitutionality:

This loss of work, involving mass unemployment, displacement of older workers and reduced opportunities for work by qualified young workers, and other factors, is primarily due to the operation of social and economic forces which are beyond the control of individuals, private bodies, or individual States. Further, this loss of work means the loss of purchasing power, with the subsequent impairment of health and well-being, and the lowering of the living standards of millions of workers and their families.¹²⁴

By operating through the states, the Roosevelt Administration's Social Security Act both avoided the federalism challenge under the Constitution *and* made it unnecessary to develop a social theory of the related causes of income insecurity. Such insecurity was therefore treated as individual misfortune. In contrast, the Workers' Bill not only tied the needs of the aged and disabled to their economic basis, but forced recognition of the social nature of the costs of the production system and of the reproduction of the labor force. This in turn demanded national action in order to maintain the economic system's health by guaranteeing the purchasing power of all the producers of the system's wealth—hence, the social wage: "The Worker's Bill puts forward a new concept of social insurance, namely that continuity of average income, with an established minimum equal to a living standard, must be assured through governmental action as a first change upon the economic system."¹²⁵ Van Kleeck outlined this premise, which was flatly opposed to the individualism of voluntarism, as follows:

By the very definition of the term, therefore, individual case treatment is excluded as a remedy, and it is recognized that the needs created by involuntary mass unemployment are also "mass needs" reflected in lowered standards of living

¹²⁴ H.R. 9680, 74th Cong., 2d Sess. (1936).

¹²⁵ Mary Van Kleeck, Speech Before National Congress for Unemployment and Social Insurance I (Jan. 5-7, 1935) (on file with Lundeen Papers, *supra* note 77).

both for the individual and the community. This suggests the necessity for *social* insurance as opposed to *individual* insurance, and it makes necessary the *integration* of insurance against "unemployment" . . . whether the cause of unemployment be located . . . in a general industrial depression; or whether it be due to the recognized general hazards to security, namely, industrial accidents, sickness, maternity, and old age *social insurance should not be split into categories.*¹²⁶

Politically, the Lundeen Bill could not be ignored.¹²⁷ In 1934, hearings were held on H.R. 7598 by a sub-committee of the House Committee on Labor, but no action was taken. The hearings did, however, seem genuinely open to change. One Congressman, Mr. Dunn, asked Unemployed Council head Herbert Benjamin: "[W]ould we attack the profit-making class if we cut down the hours of labor to 5 hours, and bring the minimum wage up to a living wage, and provide old-age pensions and workmen's insurance? Would not that attack the profit system?"¹²⁸ Mr. Benjamin replied, "If you would; but would you?"¹²⁹ To which Mr. Dunn responded, "We are making a big effort to do it."¹³⁰ During the 1935 hearings on the Bill, the AFL Trade Union Committee for Unemployment Insurance and Relief could claim the endorsement of labor organizations totaling more than one million members.¹³¹ Edmund Witte, the University of Wisconsin Professor who headed the Staff of the President's Committee on Economic Security, made extensive notes on the bill's legislative history. He concluded, in retrospect, that the Lundeen Bill would be used as a "scarecrow" to get action on its own bill.¹³² Witte also expected the Bill to have great influence in the future.¹³³

¹²⁶ Mary Van Kleeck, *An Outline of Principles*, UNEMPLOYMENT INS. REV. 4 (1935) (on file with Lundeen Papers, *supra* note 77).

¹²⁷ Jill S. Quadagno, *Welfare Capitalism and the Social Security Act of 1935*, 49 AM. SOC. REV. 632, 638-39 (1984). But see DANIEL NELSON, UNEMPLOYMENT INSURANCE: THE AMERICAN EXPERIENCE 1915-1935, at 203 (1969).

¹²⁸ *Hearings on H.R. 7598*, *supra* note 53, at 23 (question of Rep. Matthew A. Dunn).

¹²⁹ *Id.* (statement of Herbert Benjamin).

¹³⁰ *Id.* (response of Rep. Matthew A. Dunn).

¹³¹ Louis Weinstock, *Statement Made Before the Subcommittee of the House Committee on Labor*, in LABOR FIGHTS FOR SOCIAL SECURITY 3 (A.F. of L. Committee For Unemployment Insurance and Relief, 1935) [hereinafter *Statement Before Labor Subcommittee*].

¹³² Edmund Witte Papers (on file with Wisconsin State Historical Society, Madison, Wis.). Witte bowed to received wisdom, however, in later publication: "thanks to labor's clear denunciation, the 'thunder', for this measure never became more than a tinpan disharmony, which fooled scarcely anyone." Edmund E. Witte, *Organized Labor and Social Security*, in LABOR AND THE NEW DEAL 241, 255 (Milton Derber & Edwin Young eds., 1961).

¹³³ Witte Papers, *supra* note 132.

Reintroduced in 1935 as H.R. 2827, the Workers' Bill received a major boost when William Connery of Massachusetts, Chair of the House Committee on Labor, joined the ranks of those endorsing it.¹³⁴ Other congressmen had also sponsored the Workers' Bill in 1934, most notably Emanuel Celler of New York. The Subcommittee conducting the main hearings on H.R. 2827 in 1935 voted by a six to one margin in favor of the Workers' Bill. On March 8, 1935, the full labor committee voted seven to six to report the bill to the floor (Chair Connery, Subcommittee Chair Dunn, Lundeen, Lesinski, Gilder, Truax and Marcantonio cast favorable votes). The bill, however, seemed destined to languish in the House "graveyard"—the Rules Committee. Lundeen needed 212 votes to discharge it to the floor. An extensive campaign during March yielded a total of 166 signers; among the most active petition gatherers were William Connery and a young Illinois representative, Everett Dirksen.¹³⁵ In April, Lundeen tried to attach the Workers' Bill to the Social Security Act as an amendment from the floor. Paul Douglas treated the fifty-two votes in favor of the amendment as indicative of a lack of broad based support, but Lundeen remained upbeat:

We won a victory in bringing the Workers' Bill, H.R. 2827 before the House for a vote. On a standing vote we had fifty-two Congressmen for the bill. If we had been given an opportunity for full discussion on the bill, we would have had many more votes We have presented the first complete program for social insurance ever introduced.¹³⁶

During the hearings on H.R. 7598 in 1934 and on H.R. 2827 in 1935, the AFL Trade Union Committee witnesses repeatedly emphasized security against technical change in the production system. In 1934, Representative Wood of Missouri blamed the collapse of voluntarism on technological forces:

In this country, and just about every civilized country on the earth, up until 10 years ago there was a great spirit not only of opposition but of resentment against the attempt to regulate wage earners' conditions by legislation, to set their hours,

¹³⁴ Letter from William Connery to Benjamin E. Waite (Jan. 7, 1935) (on file with Lundeen Papers, *supra* note 77).

¹³⁵ Lundeen Papers, *supra* note 77. Until approximately two years previously, 167 signatures had sufficed for discharge.

¹³⁶ Letter from Ernest Lundeen to Walter Frank, Secretary, Minneapolis Sponsoring Committee for Unemployment and Social Insurance, at 1 (Apr. 27, 1935) (on file with Lundeen Papers, *supra* note 77).

set their wages, and thereby set their living standards, through the enactment of laws. In all civilized countries the labor movement had preferred to depend upon their economic organization to establish hours of labor and working conditions But with the development of machinery . . . it is necessary to enact legislation; . . . the only way we can meet the exigencies of the situation in bringing about recovery, permanent recovery, is to limit the hours of labor by the enactment of law, and also to regulate the minimum-wage standard by the enactment of law.¹³⁷

The AFL leaders sought to regulate hours in order to share work and they encouraged the growth of jobs to hold on to voluntarism as an organizational strategy to the fullest extent possible. "In the labor movement, too, the private wage became an ideology. Wherever the consumer's complaint was heard on the high cost of merchandise, or wherever a complaint from the workers seemed imminent against their low wages, which made it impossible to meet the high cost of living, or for shorter hours to counteract the monotony of increasing mechanization of industry, one answer served to quiet both. Increase productivity. Industrial efficiency with its elimination of waste is the only remedy and the only salvation against all social evils."¹³⁸

Herbert Benjamin and the rank and file, however, wanted to emphasize the guarantee of income as a response to the inevitable pace of technological change and technical management. They had a different view of AFL strategy and its futility. In 1935, Secretary Louis Weinstock began testifying by noting that 26% of the members of AFL labor unions were totally unemployed.¹³⁹ Wage standards were falling even faster than employment, with 1933 payrolls down 55% from 1929, while employment was down 34.3%.¹⁴⁰ The concomitant pressure toward lower valued and fewer jobs forced ruthless competition to hold on to what was left. "As a result of the excessive lay-offs, speed-up increased in the shops."¹⁴¹ With employment dropping at the same time that gross productivity increased, labor union membership, the very foundation of economic self-protection, dropped sharply. Gains of new members did nothing to protect the old members now unem-

¹³⁷ *Hearings on H.R. 7598, supra* note 53, at 17-18 (statement of Rep. Reuben T. Wood).

¹³⁸ Fannia M. Cohn, *Wages Should be Charged Against Industry—The Only Remedy Against Unemployment*, 42 AM. FEDERATIONIST 1236, 1237 (1935).

¹³⁹ *Statement Before Labor Subcommittee, supra* note 131, at 8.

¹⁴⁰ *Id.* at 9.

¹⁴¹ *Id.*

ployed. Not needed for the work, the surplus employee needed a living standard guarantee. Legislation "must protect the standards of the employed, it must offer security against illness and old age, and against a condition where millions of children are under nourished and starving, where families must live in overcrowded slum firetraps and are faced with evictions and lack of shelter. . . ."¹⁴²

Union endorsements of the bill followed the same pattern of drawing connections to industrial unionism. The Iron, Steel and Tin Workers endorsed the Lundeen Bill because of rising productivity and falling employment in the industry: "This proves to us that even with increased production, with a pick-up in steel, they will never be able to put the steel workers back to work," argued spokesman Roy Hallas, adding: "A large number of them are thinking of their own Labor Party."¹⁴³ F. Elmer Brown of the Typographers Union based his call for social insurance on the inability of the craft organizations to maintain their holdout power. Brown noted: "It is the only bill which places the responsibility for unemployment where it belongs—upon the federal government and the owners of the tools and natural resources of the country."¹⁴⁴ Confronted by scientific management and the re-division of labor, the power of the craftsman had declined to the same level as the production worker's. No longer able to command the surplus from productivity increases, union members had less ability to provide self-insurance:

For many years the printing trades unions have administered unemployment relief, sick benefits, and old age pensions to their members. Funds for these social features have been collected from the membership. However, technological development, in which the workers shared but little, with other maladjustments in our social system, have compelled the unions to either abandon these practices or curtail them to such a degree as to render them almost of no value.¹⁴⁵

D. *Unemployment Insurance and the Structure of Labor Law*

The social democratic moral vision of the radical rank and file was subordinated to the exigencies of organized labor's politics and the

¹⁴² *Id.* at 11.

¹⁴³ *Id.* at 20–21 (statement of Roy Hallas, President, Revival Lodge 169, Amalgamated Ass'n of Iron, Steel and Tin Workers, Clairton, Pa.).

¹⁴⁴ *Statement Before Labor Subcommittee*, *supra* note 131, at 23 (statement of F. Elmer Brown).

¹⁴⁵ *Id.* at 23–24.

content of legislation. A different version of workers' politics could have linked a social wage to the organization of mass production industry, which might have resulted in the formation of a viable labor party: "Even in the early years of the New Deal, when mass and general strikes and rank-and-file self-organization made independent labor politics and radical versions of industrial democracy seem less than utopian, counter-currents within and outside of the labor movement pressed toward a more conservative resolution."¹⁴⁶ Similarly, recognition of a mode of collective bargaining defined more forcefully by the full economic power of strikes, primary and secondary boycotts, and consumer actions, a development which was later vitiated by judicial retrenchment of the National Labor Relations Act and the Taft-Hartley Amendments, might have expanded bargainable "conditions of work" to include conditions of investment. This would have precluded the separation of investment and employment decisions. Instead, Senator Robert Wagner's collective bargaining vision succumbed to the same legal ideology as that of a conservative AFL leadership and a later CIO leadership: preference for unemployment reserves and industrial peace rather than social wage, worker democracy and worker control over production. In short, the nation settled for half a loaf.

In explaining the desirability of the Workers' Bill's social wage approach to insurance, the Labor Committee Report relied directly on the testimony of the Bill's draftsman Mary Van Kleeck:

Other proposals . . . [serve] merely to rearrange workers' income, decreasing current earnings in the interest of building up reserve funds against future unemployment. These funds enter into channels of investment, which really constitute increase [sic] in the debt burden of American industry and still further throw out of gear the purchasing power of the people in relation to productive capacity.¹⁴⁷

In the Workers' Bill:

Stability of the worker's dollar implies the possibility of purchasing always a suitable quantity of the necessities of life.

¹⁴⁶ Fraser, *supra* note 88, at 78. On militancy and labor law, see generally James Green, *Working Class Militancy in the Depression*, 6 RADICAL AM. 1 (1972); Michael Goldfield, *Worker Insurgency, Radical Organization, and New Deal Labor Legislation*, 83 AM. POL. SCI. REV. 1257 (1989).

¹⁴⁷ *Unemployment, Old Age, and Social Insurance, Hearing on H.R. 2827 Before the Subcomm. of the House Comm. on Labor*, 74th Cong., 1st Sess. 90 (1935) (statement of Mary Van Kleeck, Chairman, Interprofessional Association for Social Insurance).

And whether the dollar be measured in the value of metal or in terms of a commodity, both farmers and industrial workers must be able to count upon the stability of their income on one hand and, on the other hand, on the stability of the elements of the standards of living which this country makes possible.¹⁴⁸

Outside the hearings, Van Kleeck further elaborated on the possibility of establishing a new legal understanding of property as use value related to production. Such a formulation justified a guaranteed living standard:

[G]iven so great a productive capacity that goods must be destroyed, it is a reasonable demand that the unemployed be given the purchasing power which, as the surplus of resources shows, has not been paid in wages to the unemployed in sufficient quantity to buy the goods produced. From this point of view, unemployment insurance is a kind of deferred wage bill.¹⁴⁹

Just as this meant redistributive funding, it also meant workers' entitlement to exercise control: "As such, it is to be administered by workers for the same reason that they control their own wages after they are paid."¹⁵⁰

The opposed ideas animating the alternative insurance proposals—that workers should control a portion of credit or investment streams in the definition of the social wage versus the alternative of unemployment reserves which preserve management access to investment or credit streams at the expense of privately defined wages—throw into sharp relief the key structural provisions of American labor law. The social wage alternative undermines the idea that the terms of production are necessarily defined by bilateral wage agreements where costs and risks of production and reproduction of the labor force are voluntarily assumed. Rights are defined equally as an alternative to, or in supervision of, contract within the relations of the state and social organization. Worker controls over production are not limited to contract. Property in the job is established, and, concomitantly, investment is no longer reserved to capital as a matter of contract prerogative and property right. In contrast, a reserves plan such as the one adopted in

¹⁴⁸ *Id.* at 92.

¹⁴⁹ Mary Van Kleeck, *Security for Americans IV: The Workers' Bill for Unemployment and Social Insurance*, NEW REPUBLIC, Dec. 12, 1934, at 121, 123.

¹⁵⁰ *Id.*

the Social Security Act requires either direct wage reductions to pool for future loss or indirect funding by taxes which are passed on to worker-consumers through prices: "[A]s in the past program of the New Deal, restoration of business is the point of attack, rather than income, which appears to be the decisive factor in the maladjustment between production and consumption."¹⁵¹

Van Kleeck defended the constitutionality of a federal program in proto-Keynesian terms. Increasing purchasing power would free the flow of interstate commerce by removing gluts on the national goods markets, a problem which individual states could not solve given the "prisoner's dilemma" or competition problems. Thus, current unemployed workers must be protected as much as currently working but at-risk employees.

The drafters of the other Wagner Act also originally intended to increase and stabilize demand by making redistribution a tool of recovery. The framers of the National Labor Relations Act (the "NLRA") believed that increased organization would end recognition battles and therefore stop production loss, while increased labor power would redistribute wealth by forcing higher wages and asserting control over conditions of employment.¹⁵² Of course, redistribution was limited to employees whose organization was regulated. The NLRA left virtually the same groups unprotected as did Social Security unemployment insurance. The National Urban League's T. Arnold Hill protested the operation of NLRA forerunner section 7a of the National Industrial Recovery Act:

The large number of [Negro] employees who are worked longer hours and paid smaller wages than the regulations dictate constitute a much more serious violation of public trust and legal statute than do the dismissals of Negro workers by employers who are against paying them wages equal to those paid whites. And more serious is the failure of NRA to enforce compliance, thus tacitly condoning the violation.¹⁵³ [Hill feared] if the Wagner bill passes in its present form, the power and influence of the labor movement will be greatly

¹⁵¹ *Id.* at 121.

¹⁵² For development of the ideas behind the Wagner Act, see Kenneth M. Casebeer, *Holder of the Pen: An Interview with Leon Keyserling on Drafting the Wagner Act*, 42 U. MIAMI L. REV. 285 (1987); Kenneth M. Casebeer, *Drafting Wagner's Act: Leon Keyserling and the Precommittee Drafts of the Labor Disputes Act and the National Labor Relations Act*, 11 INDUS. REL. L.J. 73 (1989).

¹⁵³ 1 HERBERT HILL, *BLACK LABOR AND THE AMERICAN LEGAL SYSTEM* 99 (1977) (quoting T. Arnold Hill, *Old Settings in New Scenes*, OPPORTUNITY, Feb. 1934, at 58).

enhanced with the consequent danger of greater restrictions being practiced against Negro workers by organized labor.¹⁵⁴

Exclusions aside, among workers eligible for NLRA protection, the future Labor Board and the federal courts would instead emphasize the industrial peace made possible by government of the workplace under the collective bargain. This emphasis would reduce the economic power of union organization necessary to foster redistribution.¹⁵⁵ Similarly, the Social Security Act was never completely under Senator Wagner's control. Wagner and his aid, Leon Keyserling, both preferred a federal program, not only for the sake of uniformity but also to establish minimum standards of purchasing power. Wagner, however yielded to Roosevelt. Thus neither collective bargaining nor unemployment insurance resulted in complete expressions of this Keynesian animating vision.

Indeed, in explaining her opposition to the proposed NLRA, Mary Van Kleeck predicted judicial and administrative retrenchment of the Act's redistributive potential precisely because workers were denied control over investment: "Fundamentally I believe it is impossible to equalize the bargaining power of employers and employees, since necessarily the decision to produce at all and in what quantities and by what processes—such, for instance, as increase in mechanization—rests with the employer."¹⁵⁶ Van Kleeck believed that the Act forced unions to sacrifice power for a vision of industrial peace:

Strikes which have for their purpose gradual increase in the workers' power in a period when fundamental economic change in the ownership of industry can clearly be envisaged may only seem to check the rising power of the exponents of human rights, and indeed to protect private property rights in exchange for obligations which are likely to be merely the least common denominator of industrial practice. . . .

[I]t seems to me to be self-evident that a strike for any purpose listed in the bill as an "unfair labor practice," including a strike for the making of a trade-union agreement or against the discharge of a union member or on other points

¹⁵⁴ *Id.* at 105 (quoting T. Arnold Hill, *Labor Marches On*, OPPORTUNITY, Apr. 1934, at 120-21).

¹⁵⁵ See Karl E. Klare, *Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness: 1937-1941*, 62 MINN. L. REV. 265 (1978).

¹⁵⁶ Letter from Mary Van Kleeck to Sen. Robert F. Wagner 1-2 (Mar. 12, 1934) (on file with Leon Keyserling Papers, Lauinger Library, Georgetown University, Washington, D.C.).

involved in the forming and establishment of a strong union, would necessarily have to be discouraged on the ground that these are matters within the jurisdiction of a statutory federal body, the National Labor Board.¹⁵⁷

The original structure of the Social Security Act more directly limited its recovery potential. By using state benefits determinations and reserves funds, much of the purchasing power rationale for recovery would be diminished. In fact, the results might be perverse: "Unemployment reserves are incapable of mobilization when needed and any attempt to mobilize them will only result in further intensification of depressions."¹⁵⁸ Moreover, by limiting benefit periods, those persons permanently unemployed by technology or depression would be required to retrain for new jobs; benefits would not sustain them if their skills or labor were no longer necessary to management in full control over investment in technology or changes in the division of labor. The Administration programs were designed simply to ameliorate the normal contractual order, leaving workers "forced to maintain themselves in idleness, awaiting the time when the industrial system will need them for renewed production."¹⁵⁹

In a sense, such a reserves plan primarily supports business by subsidizing labor pools of skills defined by eligibility standards outside the control of workers. The existence of these skilled pools removes the need for employers to guard themselves against labor supply fluctuation by contracting for fixed durations or by modifying their investment control over the firm's division of labor. The at-will contract, another American particularism, thus is made more viable independent of its simultaneous protection by contract law.¹⁶⁰ Moreover, given employer leverage over at-will employees who can be fired for good reason, bad reason or no reason at all, organization becomes more difficult; and once employees are organized, their ability to bargain over the division of labor in the enterprise and its relation to the division of union and non-union jobs is decidedly limited. The Social Security approach to labor pool reserves, and to individualizing risk within

¹⁵⁷ *Id.*

¹⁵⁸ H.R. REP. NO. 418, 74th Cong., 1st Sess. 5 (Mar. 15, 1935) (quoting Elgin Groseclose, *The Chimera of Unemployment Reserves Under the American Money System*, N.Y. TIMES, Feb. 22, 1935).

¹⁵⁹ Mary Van Kleeck, Speech Before National Congress for Unemployment and Social Insurance 2 (Jan. 5-7, 1935) (on file with Lundeen Papers, *supra* note 77).

¹⁶⁰ For a discussion of the relationship between contemporary unemployment insurance and the at-will contract, see Casebeer, *supra* note 8, at 790-93.

insurance pools, fits precisely in the collective bargaining policy of private governance within industrial pluralism which eventuated in Taft-Hartley.

The Wagner-Lewis unemployment reserves bill increased the state's potential to undermine workers' economic power in other ways:

The insecurity of the working class is further emphasized by the drive of big business against trade-union organization. If employed workers strike to prevent further wage-cuts or to advance present rates, their lack of reserves undermines their power of endurance in a strike; and from the masses of unemployed are drawn willing strike breakers, while all the apparatus of the blacklist and discrimination against workers for trade-union activities is put into operation.¹⁶¹

For her part, Van Kleeck did not trust the NLRA's unfair labor practice machinery to prevent such control over workers. Only a more fundamental industrial change of approach to both control of investment *and* social insurance could provide the worker security that she favored:

[T]he programs which have been described all center in provisions for mere compensation for insecurity. Except as they stimulate and coordinate organized action by workers in all occupations, they do not touch the essential elements of a program for security. Basically this calls for the development of a planned economy founded upon the maximum utilization of America's productive capacity . . . assuming as a prerequisite the socialization of all industrial processes.¹⁶²

Senator Wagner well understood the relation between labor organization and job security:

Workers believe in collective bargaining They have an additional right to speak because millions of their brethren are still unemployed, still searching endlessly in a dismal quest for jobs. They believe further that they are entitled to be heard because their own jobs are constantly threatened by technological changes, or the displacement of men by machines. They feel that they should not be ignored upon the question of a living wage for their families. They are sold

¹⁶¹ Mary Van Kleeck, *United Action for Social Security*, NEW MASSES, Apr. 7, 1936, at 12.

¹⁶² *Id.* at 13.

upon the proposition that the worker's rights to some voice in the business from which he draws his bread is as fundamental as his right to some voice in the government from which he gets his laws. They do not want supremacy, but they do want equality. They do not want to dictate, but they are determined to be free.¹⁶³

According to its draftsman, Van Kleeck, it was the Workers' Bill and not the NLRA which provided the most powerful institutional form for the development of this very vision of workplace democracy:

It must be clearly recognized that the aims envisaged in the political democracy of the United States have not been fulfilled under the conditions of highly centralized economic development controlled by corporations which are representative of ownership and not of workers. This long struggle, as yet far from victory, to secure the right of collective bargaining for the trade unions of the United States, shows how far we are from democracy in economic life. The claim that workers should control the administration of social insurance is a reinforcement of this struggle for a voice for the workers in economic policies and industrial management.¹⁶⁴

II. STRUGGLE SANITIZED: UNEMPLOYMENT INSURANCE UNDER SOCIAL SECURITY

[T]he sense of desperation that unemployment can breed. Nobody had to explain this to me, for example, after watching the march of the unemployed across the Parker Dunn Memorial Bridge over the Hudson and seeing the struggle between them and State troopers, some of whom then proceeded to throw a couple of them into the river from there. You didn't have to explain to me how desperate unemployed people could be. Nor did you have to explain to any of the others in my generation. We knew it; and if we hadn't experienced it ourselves, we had come close enough.

Ralph Altman, Chief, Analysis Unit, Unemployment Insurance Division, Bureau of Employment Security¹⁶⁵

¹⁶³ Robert Wagner, Speech to Labor Institute (Feb. 29, 1936) (on file with Wagner Papers, *supra* note 11).

¹⁶⁴ Mary Van Kleeck, Speech Before National Congress for Unemployment and Social Insurance 3 (Jan. 5-7, 1935) (on file with Lundeen Papers, *supra* note 77).

¹⁶⁵ RALPH ALTMAN, U.S. DEP'T OF LABOR, BEGINNING THE UNEMPLOYMENT INSURANCE PRO-

Successful business men elect themselves by "natural selection" in the struggle for profits, through ability to "hire and fire" subordinates and thus command the confidence of investors. . . . But, modern capitalism fails in giving that security to jobs which it gives to investments.

Edmund Witte, Executive Director, Committee on Economic Security¹⁶⁶

This section examines how the conventional historical view of social security policy, which seemingly developed as an independently coherent view, actually formed in response to the alternative social wage model which Social Security displaced.

Edmund Witte and other architects of Social Security assumed that public policy should provide safeguards against the externalities of market forces and relations. They also assumed that the inherent insecurity of jobs and of investments were appropriately separate topics of policy, although they recognized that the insecurity of the former was directly linked to the latter because jobs were necessarily subordinated to investments. Private organization yielded greater social good; the public was coextensive with the private. This was an underlying assumption which did not change even as the New Deal created new labor law. In fact, it was recognized that employees must be kept from interfering with privatized social efficiency. Witte asks:

Why do wage-earners take to the idea that "labor," as a class, can manage industry better than business men? . . . Early economists and socialists, astonished by the industrial revolution, beginning at the close of the eighteenth century, emphasized capital and labor as productive, meaning by 'capital' stored-up labor and by 'labor' the producing power of workers. But these do not produce wealth. Wealth is produced by the credit system. . . . The credit system is simply that confidence in the future that springs from fulfillment of contracts and private property.¹⁶⁷

The idea that a social producer was entitled to a governmentally assured living standard was simply inconsistent with the private

GRAM—AN ORAL HISTORY 8 (Helen Manheimer & Evangeline Cooper eds., 1985) (Unemployment Insurance: Occasional Paper 85-5) [hereinafter BEGINNING THE UNEMPLOYMENT INSURANCE PROGRAM].

¹⁶⁶Edmund E. Witte, *Unemployment—Prevention and Insurance* 2 (undated) (on file with Witte Papers, *supra* note 132).

¹⁶⁷*Id.* at 1.

system of investments. This was true even if the entitlement did not extend to property in the job. Accordingly, investment decisions could not answer to worker management, even to the extent that the workers' management of unemployment funds or eligibility would have an impact upon either management discipline of workers or available capital.

Eventually the very stability of society would require some response to increasing job insecurity, a condition which was exacerbated because workers were at the mercy of employers' individual and aggregate investment decisions. Witte noted: "If the labor problem is a serious problem ahead, it is because it gets its bitterness from the inability of business to safeguard the security of employment."¹⁶⁸ Government, functioning as the agent of social capital, had no choice but to adopt a program to ameliorate the consequences of job insecurity. As Witte observed:

But we do hear that capital gets its profits out of the reserve army of the unemployed—and there is no effective reply. For the sake of capitalism and even of a civilization which, like capitalism, depends on confidence, capitalists should look ahead and assume legal responsibility for security of jobs parallel to their legal responsibility for security of investments.¹⁶⁹

To a limited extent, security of income was provided under Social Security. Those limits on Social Security were defined to cause minimum disruption of existing capital organization. Unemployment compensation, as described by a Social Security Board publication in 1937:

is a method of safe-guarding individuals against distress for a short period of time after they become unemployed. It is designed to compensate only employable persons who are able and willing to work and who are unemployed through no fault of their own . . . [u]nemployment compensation sets aside contributions during periods of employment and provides the individual with benefits as a legal right when he becomes unemployed.¹⁷⁰

Unemployment compensation was to be a limited benefit; it applied only to certain people, under prescribed circumstances, for a lim-

¹⁶⁸ *Id.* at 14–15.

¹⁶⁹ *Id.* at 15.

¹⁷⁰ SOCIAL SECURITY BOARD, PUB. NO. 14, UNEMPLOYMENT COMPENSATION WHAT AND WHY? 7 (1937).

ited period of time. Its beneficiaries were deserving because they had a history of employment, were willing to work, and were not to blame for their current joblessness. Unemployment insurance was to be distinguished from public relief or the dole; the benefits were earned entitlements because the money paid out during times of idleness had been specifically set aside for that purpose during times of employment. Finally, the right to the benefit, because it was earned, vested at a time a worker became unemployed. The government applied no means test and the worker made no showing of need.

Title IX of the Social Security Act had its genesis in early 1934 when Senator Wagner and Congressman Lewis offered a bill designed to encourage states to pass unemployment compensation laws. The bill was not reported out of committee. Soon after, however, the Committee on Economic Security, which was created by Roosevelt to make recommendations for a comprehensive economic security plan, reported unanimous agreement that federal legislation enabling states to pass unemployment compensation laws was desirable and necessary.

President Roosevelt presented the Committee's recommendations to Congress on January 17, 1935, urging prompt action. On the same day, bills incorporating the recommendations of the Committee and the President on unemployment compensation were introduced to Congress by Wagner, Lewis and Doughton. Hearings began almost immediately, and much of the extensive testimony was devoted to the unemployment compensation provisions. In both the House and the Senate, the bills passed by overwhelming majorities in both parties. The conference committee's report was adopted in both houses without even a roll call vote.

The final version of the Social Security Act does not set up a federal system, nor does it provide for federal regulation of unemployment insurance. Rather, Titles III and IX create incentives for states to establish their own unemployment compensation plans, but leave the questions of who contributes to the fund, the amount and duration of the benefits, and requirements for eligibility completely in the hands of the states. The bill levies a payroll tax of three percent on employers of eight or more (with certain exceptions, notably agricultural and domestic labor), against which a credit of up to ninety percent may be taken for amounts contributed to state unemployment compensation plans which meet federal approval.

Federal approval will be granted if the state plan meets certain requirements, but these requirements, rather than setting minimum standards for benefits, are "intended merely to define a genuine un-

employment compensation law as distinguished from relief and to safeguard the solvency of the fund and prohibit use of the funds to lower labor standards."¹⁷¹ Benefits must be paid through public employment offices. Contributions to the state fund must be transferred to a federal unemployment trust fund, and money withdrawn from the fund must be used only to pay benefits. These requirements ensure that the funds deposited for the purpose of paying unemployment benefits will not be dissipated for other purposes; they also serve to distance the fund, conceptually and practically, from public relief.

The Report from the Committee on Economic Security, President Roosevelt's speeches urging adoption of the legislation, testimony from the hearings and contemporary commentary all reveal the fundamental precept behind unemployment compensation: that the citizens of a country who have contributed to its progress and growth have a right to expect protection against the effects of bad times:

Unemployment insurance or reserves are . . . imperative as a matter of social justice. Economic society is as much the creation of the worker as of anyone else. He is entitled to share in its benefits, and he should not be made to bear more than his just portion of its burdens.¹⁷²

The advent of the Depression obviously had a profound effect on public attitudes toward unemployment insurance. . . . [A]s more and more people came face to face with unemployment they became increasingly preoccupied with the need for an income dependent on their willingness to work, not on the success or failure of the economy to provide steady employment.¹⁷³

Increasingly, unemployment was seen as "something practically outside the control of the individual wage earner."¹⁷⁴ Yet this awareness was not acted upon solely in the spirit of public generosity. Wilbur Cohen makes clear that the proponents of reform were acutely aware of the social struggle which arose to respond to the crises:

You have to go back and realize that with the Great Depression of 1929-33, and with 25 percent of the labor market

¹⁷¹ *Id.* at 33.

¹⁷² 78 Cong. Rec. S1898, S1901 (Feb. 5, 1934) (statement of Sen. Wagner).

¹⁷³ NELSON, *supra* note 127, at 129.

¹⁷⁴ *Unemployment Insurance: Hearings on H.R. 7659 Before the Subcomm. of the House Comm. on Ways and Means*, 73rd Cong., 2d Sess. 253-54 (1934) (statement of Hon. William Green, President, AFL).

unemployed, there were people who were concerned that America was on the verge of some kind of an internal revolution. And there were all kinds of nostrums — the Townsend Plan, and Huey Long's "every man a king", and so on. And so the people who came to work for social security and unemployment insurance had, underneath this all, a conception that they were grappling with a great rejuvenation of the social order, and that they were, in a sense, helping to maintain a fabric against social disintegration, socio-political disintegration. And this had a great unifying and emotional impact in a cohesive manner.¹⁷⁵

Although the Depression heightened the awareness of job insecurity, advocates of unemployment insurance stressed that unemployment was not a result of the Depression, and unemployment would not simply disappear upon the return of normal economic conditions: "[E]ven in prosperous years there is a large reservoir of unemployed . . . [T]heir number rarely falls below 1,000,000 and it often exceeds 2,000,000."¹⁷⁶ Moreover:

Economic and technical forces may change industry over night and wipe out the demand for skills that workers have acquired by decades of work . . . [F]or unemployment that occurs in normal years we have a definite obligation to provide reserves to meet the needs of those for whom work is not available.¹⁷⁷

This realization that unemployment was a permanent part of the economic future of the country put the needs of temporarily unemployed workers—and by extension the solution to their problem—in a different category from those whose needs were traditionally met through charity or public relief: "[I]n this depression we have come to recognize that people who are in need of public assistance because of unemployment should be treated differently from chronic paupers."¹⁷⁸

This response to the social protest over job insecurity caused a political split between concerned workers and those who were already

¹⁷⁵ Interview with Wilber Cohen, *BEGINNING THE UNEMPLOYMENT INSURANCE PROGRAM*, *supra* note 165, at 7.

¹⁷⁶ *Hearings on H.R. 7659*, *supra* note 174, at 255 (statement of William Green, President, AFL).

¹⁷⁷ *Id.* at 254 (statement of William Green, President, AFL).

¹⁷⁸ Edwin E. Witte, *The Government and Unemployment*, 25 *AM. LAW. LEGIS. REV.* 5, 5 (1935).

impoverished. Indeed, unemployment insurance was not designed to help those who were most in need at the time of the legislation—the unemployed: “Unemployment compensation insurance is a dignified, morale-preserving method of supporting the unemployed, far superior to relief, but not a solution of the unemployment problem.”¹⁷⁹ It was designed to supplement, not supplant public works. Unemployment insurance was repeatedly distinguished from relief and charity: “Unemployment compensation is not a substitute for the provision of relief.”¹⁸⁰

This careful distinction between relief, charity and unemployment compensation was evident in the characterization that recipients deserved benefits because they were blameless for their plight. The distinction was also evident in the limits placed on the benefit; it would be available only for a limited time period, and only to a certain class of workers who had previously been employed and were willing to work. The administrative structure of the legislation (proponents of the bill pointed out that “[u]nemployment compensation if it is not to be mere relief, must be based on the contributions that are received”)¹⁸¹ also illustrates the distinction to be made between unemployment compensation and charity.

Much attention was paid to the dignity of the recipient of the compensation:

Relief is a degrading thing for an individual. He has no right to it. He gets it after an investigation as to whether he is in need. You cannot ignore the moral factor in a workingman who knows that if he is thrown out of work for no fault of his own he is guaranteed a benefit.¹⁸²

Unemployment compensation was more dignified, more humane, more certain, and more economical than emergency relief: “[C]harity is a poor substitute for earned income. So long as we live under a system in which industrious men normally win their bread by working, industrious men suffer degradation when they must exist by begging.”¹⁸³

¹⁷⁹ *Id.* at 11.

¹⁸⁰ SOCIAL SECURITY BOARD, *supra* note 170, at 8.

¹⁸¹ Eveline Burns, *Common Sense and Unemployment Compensation*, 45 AM. FEDERATIONIST 252 (1938) (quoting testimony from Senate Hearing on the Economic Security Act).

¹⁸² *Hearings on H.R. 7659*, *supra* note 174, at 31 (statement of Hon. Harry Hopkins, Federal Emergency Relief Administration).

¹⁸³ *Id.* at 29 (statement of Hon. Robert F. Wagner, United States Senator from N.Y.).

Unemployment compensation, then, differed from relief not only because the worker was not to blame for his own unemployment, but because the benefit was also a right which had been earned through work, paid through direct or indirect contributions to the fund and to the economic health of the nation: "It is generally agreed that unemployment compensation should be viewed as an earned right."¹⁸⁴ Indeed:

Labor is an essential element in production. Production cannot be carried on without workers. These workers put their time, their abilities, their responsibility, their very lives, into the day's work. That investment gives them a claim on the industry to which they are attached which constitutes an investment in their job.¹⁸⁵

Payments have been made as a matter of right, and both the benefits and the cost are related to the payroll.

An unemployed worker did not have to demonstrate need to receive the benefit. "[T]he characteristic that separates unemployment compensation is the more favorable conditions under which the contractual benefits are given. No means test is applied, and, as a general rule, there is no pressure to take work at less, or substantially less, than prevailing wages for the duration of compensation rights."¹⁸⁶ Unemployment compensation is preferable to relief because it is a "contractual right not dependent on any means test."¹⁸⁷

This earned right, however, was a limited or partial entitlement, limited by the amount of the benefit, the length of payments, and worker eligibility:

Unemployment insurance cannot give complete and unlimited compensation to all who are unemployed. Any attempt to make it do so confuses unemployment insurance with relief, which it is designed to replace in large part. It can give compensation only for a limited period and for a percentage of the wage loss.¹⁸⁸

¹⁸⁴ Smith Simpson, *Should Unemployment Compensation Be Based on Earnings or Need?*, 28 AM. LAB. LEGIS. REV. 136, 137 (1938).

¹⁸⁵ *Hearings on H.R. 7659*, *supra* note 174, at 255 (statement of William Green, President, AFL).

¹⁸⁶ Eveline M. Burns, *The Relation of Unemployment Compensation to the Broader Problem of Relief*, 3 LAW & CONTEMP. PROBS. 150, 153 (1936).

¹⁸⁷ H.R. REP. NO. 615, 74th Cong., 1st Sess. 14 (1935).

¹⁸⁸ *Id.* at 7.

If only some unemployed would receive benefits, the market for labor would define criteria for selection: "The system protects only job seekers who are already and genuinely attached to the labor force and belong to covered occupations."¹⁸⁹ Furthermore, within this subclass the limit on amounts and duration should also be set by market or labor pool needs. "Unemployment compensation should permit such a worker, who becomes unemployed to draw a cash benefit for a limited period during which there is expectation that he will soon be reemployed."¹⁹⁰

The distinction between unemployment as an earned right and relief is also reflected in the structure of the Act, which vests administration of unemployment compensation in the states, but provides that the federal government will participate by encouraging states to enact laws, and by holding and investing all unemployment reserve funds. President Roosevelt, addressing the National Conference on Economic Security, urged this cooperative federal-state structure and "expressed his concern that unemployment insurance must not be allowed to become a dole through the mingling of insurance and relief: 'It is not charity. It must be financed by contributions, not taxes.'"¹⁹¹

Daniel Nelson sees the basic theme in the development of unemployment insurance as a "long-term effort by reformers . . . to reach a middle ground between the need for something besides relief and the popular willingness to allow businessmen to cope with complex industrial problems."¹⁹² The link between workers' needs and the need for economic stabilization is apparent in the dual-purpose promotion of the legislation by Roosevelt, Wagner and others. The bill was designed to correct "the social injustice of providing the least protection for the workers who need it most, and of shifting to their backs the heaviest and most immediate burdens of depression."¹⁹³ But another "important feature of this bill is its emphasis upon the stabilization incentive. An employer who has succeeded in reducing his State contribution because of success in regularizing employment will receive an additional rebate as a reward for his efforts."¹⁹⁴ Additionally, the bill was advocated as a means of "initiating a flow of purchasing power into the hands of

¹⁸⁹ Stefan A. Riesenfeld, *The Place of Unemployment Insurance within the Patterns and Policies of Protection against Wage-Loss*, 8 VAND. L. REV. 218, 232 (1955).

¹⁹⁰ H.R. REP. NO. 615, 74th Cong., 1st Sess. 14 (1935).

¹⁹¹ EDWIN E. WITTE, DEVELOPMENT OF THE SOCIAL SECURITY ACT 118-19 (1963).

¹⁹² NELSON, *supra* note 127, at 219.

¹⁹³ *Hearings on H.R. 7659*, *supra* note 174, at 29-30 (statement of Hon. Robert Wagner).

¹⁹⁴ *Id.* at 30 (statement of Hon. Robert Wagner).

consumers" which would help to "check an impending depression by releasing new stimulants to consumer demand." These, in turn, would benefit "every group by promoting industrial stability."¹⁹⁵

III. STRUGGLE FORGOTTEN: THE EMPLOYMENT IMAGE IN THE ADJUDICATED LAW OF UNEMPLOYMENT INSURANCE

Congress viewed unemployment insurance payments as a means of exerting an influence upon the stabilization of industry. "Their only distinguishing feature is that they will be specially earmarked for the use of the unemployed at the very times when it is best for business that they should be so used." Early payment of insurance benefits serves to prevent a decline in the purchasing power of the unemployed, which in turn serves to aid industries producing goods and services.

Chief Justice Warren Burger¹⁹⁶

This section demonstrates how the judicial task of interpreting legislative classification, when divorced from the contested origination of social policy, takes on a life of its own which is driven by the very need to classify. This judicial practice reflects a fixed vision of reality that is not necessarily grounded in any history of legislative politics. It is an opening to politics independently chosen by the judiciary.

The model of the employment relationship based on the mobility of both employers' and employees' capital, given its accompanying consumption-oriented division of labor, should rarely tolerate a public interest in job market stability. This should be particularly true where the public, by imposing a risk-pooling insurance term in most employment contracts, attempts to share some degree of labor force availability despite the disruptions in employees' lives created by employers' capital mobility:

There are, indeed, other causes of unemployment besides the credit cycle, but these are not as serious, and are even useful. The "labor turnover", up to an uncertain point, is useful. It is liberty to quit the employer and look for a better job, or liberty to dismiss the worker and look for a better one.¹⁹⁷

¹⁹⁵ *Id.* (statement of Hon. Robert Wagner).

¹⁹⁶ *California Dep't of Human Resource Dev. v. Java*, 402 U.S. 121, 132 (1971) (quoting *Statement of Federal Relief Administrator and Member of the Committee on Economic Security, Hearings on H.R. 4120 Before the House Committee on Ways and Means*, 74th Cong., 1st Sess. 214 (1935) (statement of Sen. Robert F. Wagner)).

¹⁹⁷ Witte, *supra* note 166, at 4.

As a matter of both policy and doctrine, only some workers' purchasing power needs to be publicly insured through enforced employer-employee risk pooling:

To sum up, unemployment compensation offers a number of advantages to employers, employees, and the government. From the employer's point of view, the existence of such a plan is a means of maintaining a reserve of workers, who cannot be continuously employed, in the various industries.¹⁹⁸

A worker's insurability against unemployment turns on key assumptions that define the distinction between involuntary and voluntary detachment from the labor force. The underlying requirement for unemployment compensation eligibility is that the claimant be available to work.¹⁹⁹ The threshold question for initial eligibility is: did the claimant involuntarily leave his or her past employment? If a worker was discharged for cause, she is held to have forfeited or waived her connection to that specific job and therefore to have voluntarily left her employment. Similarly, a voluntary quit without good cause, which in almost all jurisdictions also must be attributable to the employer, is a voluntary ending of employment. Good cause, in this context, is more than a good personal reason for refusing to work. The reason must indicate that the workers' unemployment is involuntary. Voluntary termination without good cause establishes ineligibility for compensation at the outset.²⁰⁰ Involuntary detachment occurs through the employer's unilateral action ("discharge without cause") or when the employee quits or refuses employment for publicly approved reasons. Voluntary detachment stems from the employee's action ("discharge for cause") or her purely personal reasons for terminating employment.

The criteria for continued eligibility exhibit the same underlying concern. All compensated individuals must demonstrate that they are currently and will continue to be part of the labor force. They must be ready and willing to accept suitable work. The requirement that claimants be available for work demands that they do more than simply register with an employment agency. They must actively seek work and demonstrate a mental attitude which indicates actual availability. Addi-

¹⁹⁸ SOCIAL SECURITY BOARD, *supra* note 170, at 11.

¹⁹⁹ For the leading work on early development of these statutory criteria, see RALPH A. ALTMAN, *AVAILABILITY FOR WORK: A STUDY IN UNEMPLOYMENT COMPENSATION* 74-85 (1950).

²⁰⁰ See, e.g., *Tannariello v. Federation of Pub. Employees*, 437 So.2d 799, 800 (Fla. Dist. Ct. App. 1983) (reasonable fear for personal safety may be good cause); *Gibson v. Rutledge*, 298 S.E.2d 137, 141 (W. Va. 1982) (cessation of work for health reasons held involuntary).

tionally, claimants may not refuse suitable work offers without good cause. A question arises whether good cause to refuse suitable work in a continuing eligibility situation is the same as good cause to quit in establishing initial eligibility. Variables weighed by the courts in determining whether good cause exists for refusing suitable work include transportation difficulties,²⁰¹ health risks,²⁰² past training and experience,²⁰³ comparability of earnings in the available job,²⁰⁴ prospects for securing other work,²⁰⁵ and the duration of the worker's unemployment.²⁰⁶

In judicial construction, these variables which define involuntary unemployment have been neither stable nor determinant. Jurisdictions differ between each other and internally over time. The most thorough study of cases at the midpoint of the program's operation observed:

Unfortunately the broad statutory formulae—such as “unemployed,” “able and available,” “refusal of suitable work,” “voluntary leaving without good cause”—do not entirely obviate the necessity of going back to first principles and major objectives and have not infrequently induced the courts either to read their own standards of compensability into the acts or to rest their decisions on incidental technicalities of statutory language. Moreover, the various tests sometimes seem to overlap or conflict in their application to specific situations and thereby create the danger of arbitrariness.²⁰⁷

Although individual cases may be decided differently, in the aggregate, certain assumptions consistently structure the manner in which the doctrinal variables are deployed.

B. *Skilled Labor Reserves*

The public will not insure workers against the consequences of unemployment unless those consequences affect the public interest. The primary public interest served is the preservation and availability

²⁰¹ Brenner v. Commissioner, Unemployment Compensation Bd. of Rev., 461 A.2d 921, 922 (Pa. Commw. Ct. 1983).

²⁰² Alexander v. Unemployment Ins. Appeals Bd., 163 Cal. Rptr. 411, 412 (Cal. Ct. App. 1980).

²⁰³ Perfin v. Cole, 327 S.E.2d 396, 402 (W. Va. 1985).

²⁰⁴ *In re* Unemployment Appeal of Fickbohm, 323 N.W.2d 133, 136 (S.D. 1982).

²⁰⁵ *In re* Behnke, 469 N.Y.S.2d 176, 178 (N.Y. App. Div. 1983).

²⁰⁶ Ellwood City Hosp. v. Commonwealth Unempl. Compensation Bd. of Rev., 457 A.2d 231, 233 (Pa. Commw. Ct. 1983).

²⁰⁷ Riesenfeld, *supra* note 189, at 236 (footnotes omitted).

of skills in the marketplace. If the employer is not required to acknowledge either the employee's personal reasons for leaving work or the employee's interest in the job (because no property right inheres in a job, especially under at-will employment) there is no public interest in providing benefits to an employee who voluntarily leaves her employment.²⁰⁸ The leading case of *Dubkowski v. Administrator, Unemployment Compensation Act* makes this explicit:

The development and preservation of worker skills and the advancement and utilization of employee training are of general public concern. The unemployment compensation law is designed to protect rather than depress the present social status and standard of living of a claimant

"Employment which may not be suitable while there is still a good present expectancy of obtaining other employment more nearly proportionate to the ability of the worker may become suitable if that expectancy is not realized within a reasonable time. Employment which may be unsuitable in a period of full employment may be suitable in a period of depression or of falling wages

To force a worker to accept a job at less than his highest

²⁰⁸ In California and Massachusetts, involuntary unemployment occurs for any good reason over which the employee has no control—whether caused by the employer, or a job offer or the employee's personal circumstances (e.g. transportation inadequacies)—or any good reason for which the individual should not be expected to be subjected to the market place (e.g. domestic obligations). See, e.g., *Sanchez v. Unemployment Ins. Appeals Bd.*, 569 P.2d 740, 750 (Cal. 1977); *Raytheon Co. v. Director Div. of Empl. Sec.*, 307 N.E.2d 330, 332 (Mass. 1974). Such reasons do not, however, allow a sharp public/private dichotomy. Just as in these same jurisdictions a sharp public/private dichotomy was not available to define the public policy exception to at-will discharges, it is not available to determine what constitutes involuntary detachment. A comparison between cases dealing with at-will discharge and those dealing with involuntary detachment is illustrative. Compare *Tameny v. Atlantic Richfield Co.*, 610 P.2d 1330, 1335 (Cal. 1980) (wrongful discharge suit sounds in tort because of employer's *ex delicto* duty to refrain from coercing employee's participation in criminal activity that contravenes public policy; issue whether such suit sounds in contract left open) and *Cleary v. American Airlines, Inc.*, 168 Cal. Rptr. 722, 728–29 (Cal. Ct. App. 1980) (employer's discharge of employee without legal cause may violate implied covenant of good faith, thus wrongful discharge suit may sound in contract as well as tort because of public interest in job security serving an interest in social stability) and *Fortune v. National Cash Register Co.*, 364 N.E.2d 1251, 1255–56 (Mass. 1977) (employer breached contract because it failed to exercise good faith when it discharged employee to avoid paying full commission, in spite of apparent authority to withhold payment under contract, but court declined to decide whether tort remedy was available for wrongful discharge) with *Sanchez*, 569 P.2d at 749–50 (because state statutes impose on parents responsibility to their children, unemployment insurance system must balance parental duties against burdens of work in determining "good cause" qualification to availability for work) and *Raytheon*, 307 N.E.2d at 333 (employee left involuntarily because she had no means of transportation to her job, thus was not disqualified from receiving unemployment compensation). Most jurisdictions, however, treat such personal

skill at the peril of losing his unemployment compensation might result in the loss of this skill and is economic waste which should be avoided as long as there is a reasonable probability of its not being necessary. . . . It seems reasonable, therefore, that work at a lesser skill and lower wages should not be deemed suitable unless a claimant has been given a reasonable period in which to compete in the labor market for available jobs at his higher skill or related skills"²⁰⁹

Even direct public intervention in the contractual organization of the labor market fosters rather than corrupts the private nature of the employment relationship. Unemployment insurance is a publicly imposed risk-pooling term of the wage contract that reinforces at-will employment contracting and thus fosters employers' and employees' capital mobility. Employers need not tie themselves to durational contracts to ensure the preservation and availability of a skilled workforce, and employees are assured to some extent of job searches that will result in the use of their skills. However, insurable mobility cannot include employees' personal restrictions on job continuance or acceptability without impinging upon management's prerogative to control investment by defining and offering positions in the labor market.²¹⁰ In theory, a reserve labor pool tailored to include only readily available workers enhances the power of labor, workers' capital, to move to its highest market-valued use at the same time that consumption demand is stabilized.²¹¹ This depends upon whether aggregate private invest-

reasons for refusing to work as voluntary reasons or incapacities and therefore do not recognize "good cause" for refusing suitable employment. See, e.g., *Aladdin Indus., Inc. v. Scott*, 407 S.W.2d 161, 163 (Tenn. 1966).

²⁰⁹ 188 A.2d at 658 (Conn. 1963) (quoting, respectively, *Pacific Mills v. Director of Div. of Empl. Sec.*, 77 N.E.2d 413, 416 (Mass. 1948); Louise F. Freeman, *Able to Work and Available for Work*, 55 YALE L.J. 123, 127 (1945); Arthur M. Menard, *Refusal of Suitable Work*, 55 YALE L.J. 134, 142 (1945)).

²¹⁰ The distinction between personal, and thus voluntary, absence from the labor market and publicly sanctioned, insurable reasons for absence makes refusal of suitable work because of child care responsibilities voluntary absence. Only in California are domestic obligations recognized as good cause for refusal of suitable work. See *Sanchez*, 569 P.2d at 750. More typical is Tennessee, where a woman who refused a transfer to a night shift for child care reasons was held to have voluntarily refused suitable work. *Scott*, 407 S.W.2d at 164.

To uphold the decision of the Board of Review would be placing in the hands of the employee the right to determine when and under what conditions she would work. Such a holding would unduly restrict the employer and could conceivably under certain circumstances, make it almost impossible to carry on a business during certain hours.

Id.

²¹¹ Chief Justice Burger, in *California Dep't of Human Resources Dev. v. Java*, described the program:

ment decisions, as well as the division of labor within enterprises, continue to determine a demand for those skills which need to be preserved and which elicit comparatively higher market values. The reserve pool is therefore a public resource which is either inadequately provided or provided at high cost by the market. Not surprisingly, the craft-oriented AFL leadership recognized this limit when it argued for the unemployment reserves approach. William Green testified, "I am confident that a full return for the investment made by industry will come through the maintenance of a trained force."²¹²

Unemployment compensation rationalizes the labor market as a public skill pool. First, workers who do casual labor or fungible labor, often domestic and agricultural workers, are excluded entirely. Second, only workers who have demonstrated attachment to the labor market by working in a single job for a qualifying period, usually thirteen weeks, become eligible. Finally, covered workers, by definition steady job-holders, must be currently attached to the labor market and "available for work."

Unemployment insurance primarily benefits the employer by reducing some of the costs of employing workers from the primary labor market. That is, unemployment insurance provides a reserve labor pool which enables an employer to lay off and later recall the insured worker without having to train a new employee:

But I know that employers that really wanted to avoid layoffs sometimes kept people on after it was economically sound to do it, and unemployment insurance met that need. And it also made it possible for employers to retain their work force. In a great many situations, they were laid off for a short period of time. They are carried on [Unemployment Insur-

It is true, as appellants argue, that the unemployment compensation insurance program was not based on need in the sense underlying the various welfare programs that had their genesis in the same period of economic stress a generation ago. A kind of 'need' is present in the statutory scheme for insurance, however, to the extent that any 'salary replacement' insurance fulfills a need caused by lost employment

Further, providing for 'security during the period following unemployment' was thought to be a means of assisting a worker to find substantially equivalent employment. The Federal Relief Administrator testified that the Act 'covers a great many thousands of people who are thrown out of work suddenly. It is essential that they be permitted to look for a job. They should not be doing anything else but looking for a job.'

402 U.S. 121, 130, 132 (1971) (footnote omitted).

²¹² *Hearings on H.R. 7659, supra* note 174, at 257 (statement of William Green, President, AFL).

ance], and they continue with that employer. A lot of employers think that's very important.²¹³

This labor reserve is in fact subsidized by the existing employees of the firm. The AFL knew this in 1936:

In the end, however, this tax could be shifted, in whole or in part, to the employees by reducing their wages or by not raising their wages when this was necessary. The same result would be accomplished if prices were raised, if fewer workers were used, if hours were lengthened, and if the speed-up and stretch-out systems were inaugurated by the employer.²¹⁴

To some extent the preservation of a reserve labor pool also benefits the covered employee by providing insurance against the need to retrain or relocate. However, workers in the employer's secondary labor market are also affected to the extent that many such employees do not meet the "base period worked" standard for eligibility, and there are frequent voluntary quits due to the nature of the employment:

Since the unemployment insurance program is commonly perceived as providing aid to families that have fallen upon hard times, it may be surprising that families with incomes over \$20,000 in 1970 received 10% of the program's benefits Program rules require, for example, that recipients have a firm attachment to the labor force, work in a covered industry, and, with a few exceptions, become unemployed through an employer initiated termination Specifically, relative to lower-income groups, the upper-income groups have a greater propensity to participate in the labor force . . . , a greater percent of labor force participants working in covered industries . . . , and larger weekly benefits per recipient.²¹⁵

The basic principle of labor market rationalization is skill subsidy. The Supreme Court of Vermont decided that a worker's refusal of

²¹³ Interview with Robert Goodwin, BEGINNING THE UNEMPLOYMENT INSURANCE PROGRAM, *supra* note 165, at 6.

²¹⁴ Walter L. Daykin, *The Incidence of Unemployment Compensation*, 45 AM. FEDERATIONIST 818, 819 (1938).

²¹⁵ Robert Hutchins, *Distributional Equity in the Unemployment Insurance System*, 34 INDUST. & LAB. REL. REV. 377, 383-85 (1980).

suitable work was justified where she was laid off from a stenciling job and refused to return to a prior position as a maid at a lower hourly wage:²¹⁶ "Maximum utilization of a worker's skills and experience is a recognized goal of the unemployment compensation system"²¹⁷ Therefore:

[I]t is not the purpose of the unemployment compensation law to force workers into jobs at the lowest levels of skill and compensation. To do so under these circumstances would contravene the general purposes of the law in the development and preservation of worker skills, and violate its express provision that a claimant is barred from unemployment compensation only if he refuses "suitable" work.²¹⁸

Yet the employee cannot choose his or her job skill. The more training a previous job required, the less the latest employment history seems to matter. If the majority of a claimant's work experience has been of a casual nature, the claimant will not be able to wait for a position similar to his or her best prior job or requiring the highest skill level if another past job requiring lesser skills becomes available.²¹⁹

In a different vein, while "mere dissatisfaction with wages" generally does not constitute good cause attributable to the employer, because the employer must be free to structure his labor costs in a manner which will keep the business viable, a "substantial" reduction in pay constitutes good cause to leave employment.²²⁰ At some point an employee who has become non-viable at a previous market wage serves job market stability by qualifying for unemployment insurance for the period of the search for similar employment. Such mobility of labor, however, should not be insured based on the judgment of the merely dissatisfied employee, but rather depends upon a unilateral decision of the employer to reduce wages.

In *Mohler v. Department of Labor*, the Supreme Court of Illinois held that although the claimants had not expressed any restrictions on their employability or detached themselves voluntarily from the labor market by moving to another locality, but were detached only because

²¹⁶ *In re Potvin*, 313 A.2d 25, 28 (Vt. 1973).

²¹⁷ *Id.* at 27.

²¹⁸ *Id.* at 28.

²¹⁹ See *Martinez v. Employment Div.*, 634 P.2d 268, 270-71 (Or. Ct. App. 1981).

²²⁰ *Boucher v. Maine Employment Sec. Comm'n*, 464 A.2d 171, 176 (Me. 1983).

there were no labor opportunities where they resided, nevertheless, because their normal past employment in canning work was seasonal they failed to demonstrate attachment to a current labor market.²²¹

The habit, born over a long period of years, of working only seasonally is indicative of a mental attitude of contentment to remain out of the labor market during the off season of the canning industry. Under such circumstances, it cannot be said that either appellee was currently attached to the labor market, and available for work within the requirement of our Unemployment Compensation Act.²²²

On the other hand, in *Denver Symphony Association v. Industrial Commission*, seasonally employed musicians were eligible claimants because taking other jobs which were available in the Denver area would not only require them to use different skills than they were trained for; it would lower their pay rates as well.²²³ In *Coman v. Administrator, Unemployment Compensation Act*, the President of a septic tank company had invested \$30,000 in the business and owned substantially all of its stock.²²⁴ In reaching its decision, the Connecticut Superior Court reasoned that:

[A]n employee is entitled to unemployment benefits in the event of temporary layoffs or shutdowns by an employer due to weather conditions which render it impossible or impractical to continue operations, as in the instant situation This policy has been followed in claims by students, school bus drivers whose employment is terminated at the end of the school year and who are rehired in the fall, and construction workers who are unable to work in winter because cold weather forces the cessation of outside construction.²²⁵

It would seem that the canning workers' interest in receiving benefits during the off-season is as great as the interests of the musicians and construction workers. The fundamental distinction between the cases, however, is that the musicians' employer needs a skilled labor pool while the canning workers' employer can hire virtually

²²¹ 97 N.E.2d 762, 765 (Ill. 1951).

²²² *Id.* at 765. *Accord* Kelley v. Department of Labor, 513 N.E.2d 988, 990 (Ill. App. Ct. 1987) (claimant seasonally employed as school crossing guard for 15 years found not available for work and thus not eligible for benefits).

²²³ See 526 P.2d 685, 688 (Colo. Ct. App. 1974).

²²⁴ 318 A.2d 649, 650 (Conn. Super. Ct. 1973).

²²⁵ *Id.* In most states, students are excluded.

anyone at the time of the canning harvest, particularly those who are captive to a rural community. Consider the early experience with seasonal industries in Florida:

We had, as you would expect in Florida, a resort-oriented kind of an economy with a winter season in the southern part of the State, and a complete closedown of the resort hotels, and a citrus industry with closedown of canning plants and packing plants during the summer season. So early on, we began trying to decide what to do about establishing seasonality determinations and limiting benefits during periods of time that were characteristically periods of unemployment. Quite soon we found that in the cigar industry they didn't want any limitation and seasonality provisions. They wanted to keep intact a labor force and they were not interested, as far as the industry was concerned, in any limitation during those periods.

However, the citrus industry took a different view to start off with. Now packing was not originally covered because it was considered to be non-covered employment because it was assembling of farm produce. We subsequently did take action in Florida to cover packing house workers earlier than Federal amendments covered them. Canning, however, was covered from the beginning, and their original belief was — the industry standpoint — that benefits should not be paid during a very predictable period of time when the plants were generally closed. But they did rely on local labor and subsequently changed their view that they should in fact pay benefits in order to stabilize the work force and have the workers there when they need them.²²⁶

C. Discipline and Control

Beyond needing job histories which qualify them for benefits, employees are also restrained in their conduct by the eligibility requirements which make the for cause discharge grounds for disqualification. Ironically, the AFL old guard's fears about unemployment insurance result from the specific form of insurance they ultimately helped pass: "In fear of jeopardizing their rights to Unemployment Compensation,

²²⁶ Interview with William Norwood, BEGINNING THE UNEMPLOYMENT INSURANCE PROGRAM, *supra* note 165, at 55. Norwood was Director of the Florida State Unemployment Insurance Service and later Director of the U.S. Employment Service. *Id.* at 65.

workers will tend to accept conditions which otherwise they would resist. The placing of undue emphasis on industrial peace by State Governments will check seriously the workers in their struggle for greater justice."²²⁷

The combination of complete employer control over the bulk of the labor force under at-will contracts, and control over job-creating investment decisions insulated from mandatory bargaining under union contract,²²⁸ reinforced the employers' ability to minimize the necessity for even the unemployment pool. When scientific management and the processes of the division of labor are themselves management tools, the craftsman has no more power to control his working conditions than the production worker or even the laborer. When labor is fungible, it is cheap and it need not be subsidized to remain available as a labor reserve.

The history of eligibility doctrine since 1937 has been one of steadily tightening standards. Relatively early in the program's history, the initial eligibility disqualification of voluntary quit without good cause was changed by legislatures to voluntary quit without good cause "attributable to the employer."²²⁹ "Only two states had that limitation in 1938, two more had adopted it by 1940, and now [1944] it is in the laws of eighteen states and in the regulations of one more."²³⁰ This change made clear the connection between good cause and the "public" interest in maximized investments. It must be the employer's choice that makes an otherwise eligible worker part of the subsidized reserve.

D. Deskilling

Over the history of the program, the labor force has been progressively deskilled. This has resulted in a diminished need for employers to maintain a reserve of skilled workers:

The new technology has also permitted a substantial amount of "deskilling." In the years following World War II, inside the factory and later the office, managers were introducing new machinery and radically reorganizing work tasks in ways that reduced their dependence on high-priced skilled labor. . . .

²²⁷ Harold B. November, *Workers' Discipline Under Unemployment Compensation*, 43 AM. FEDERATIONIST 139, 142 (1936).

²²⁸ Cf. *Fibreboard Paper Prods. Corp. v. NLRB*, 379 U.S. 203, 213 (1964) (distinguished capital investment decisions from decisions to contract out labor in holding that contracting out decisions were subject to collective bargaining).

²²⁹ *Id.* at 221.

²³⁰ Arthur J. Altmeyer, *Undermining Unemployment Insurance*, 33 SURVEY GRAPHIC 13, 13 (1944).

The creation of these new technologies, and the work reorganizations to implement them, made it easier for managers to take advantage of new sources of cheap and—at least, initially—tractable labor in peripheral locations, both within the country and beyond its borders.²³¹

After the initial qualification for benefits, the primary reason for disqualification is a workers' refusal to take a suitable job without good cause. Initially, a suitable job was considered to be the type of job last held, or at least a job which utilized the same craft. Over time, the definition of "suitable" expanded to encompass similar or more generic skills, and finally virtually any job with lesser or inclusive skills. The employee was especially obligated to return to a former employer who offered a different and less skilled job.²³² This development was an early concern of the CIO whose workers were vulnerable to pressures on wage gains:

Too often the job offered is actually quite unsuitable. Policies on this matter vary greatly, depending on how vigorously unions have defended workers' rights and succeeded in securing the right kind of unemployment insurance. This situation needs to be watched carefully, since bad policies by employment security agencies; which administer the employment service and unemployment insurance, may force workers to accept substandard jobs, thus breaking down hard-won wage levels.²³³

Some confirmation of a shift in the labor market's need for a reserve of skilled labor appears in the historical change in the court's adjudication of the suitability of preferred jobs based on skill differences. In 1944, the Supreme Court of Idaho, in *Hagadone v. Kirkpatrick*, could take it for granted that: "There is no evidence that claimant could not have returned to his former job, or when he could return, or that other jobs of bandsaw filing were not available The fact that claimant refused the two jobs [firing a boiler and common labor] . . . would not necessarily render him ineligible" ²³⁴ In 1948, a skilled weaver who had made \$45–50 per week did not need to accept

²³¹ BARRY BLUESTONE & BENNETT HARRISON, *THE DEINDUSTRIALIZATION OF AMERICA* 117 (1982). See also, HARRY S. BRAVERMAN, *LABOR AND MONOPOLY CAPITAL* (1974).

²³² Employers are taxed on their contributions to the fund based on an "experience rating" of past unemployment insurance claims charged to their employment record.

²³³ CIO Dep't of Educ. & Research, 10 *ECONOMIC OUTLOOK* 50, 52 (1949).

²³⁴ 154 P.2d 181, 182 (Idaho 1944). Compare *Hallahan v. Riley*, 45 A.2d 886, 888 (N.H. 1946) (skilled mender may not refuse shift to position of unskilled burler on grounds menders can

a winder's job at \$30 per week because she, "lived in a city where there are 'innumerable mills' and . . . 'she should be given a reasonable opportunity to realize employment in her regular occupation as a weaver particularly when she had been unemployed for three days only.'"²³⁵ Yet in 1950 a skilled auto hauler earning \$110 per week who, when laid off during model changes, expected to be recalled in three weeks, was held to lack good cause to refuse an unskilled job with his employer for 50% of his previous pay. Suitable work meant all work the employee was capable of performing: "The present claimant is being asked merely to avail himself of the opportunity to support himself while awaiting recall to an employment paying high wages."²³⁶ Clearly, there was no need to support a worker's reserve skills where the same employer merely sought to shift the costs of downtime to the employee. In *Wallace v. Sullivan*, a skilled machine operator who received \$4.30 per hour and was laid off in a force reduction had the option, by collective bargain, to accept a seniority rollback by bumping a grinder paid \$3.80 per hour or be laid off and maintain seniority for twelve months.²³⁷ He was ineligible for unemployment compensation.²³⁸

The record does not show that the work of the grinder would involve an unreasonable risk to the plaintiff's health, safety or morals. The plaintiff had worked as a grinder prior to his promotion to the position of machine operator and was certainly physically fit and properly trained to perform the work of the grinder

In cases wherein the claimant has been offered the next best available job which his employer has to offer, this Court and others have held that pay differentials of up to \$50.00 per week should be considered acceptable unless reasonable alternative employment could be found.²³⁹

burl, but burlers cannot mend, where worker had been unemployed for considerable time) *with Hagadone*, 154 P.2d at 182 (bandsaw filer must be allowed lengthy time to search for another bandsaw filing position for which his experience and training were suited).

²³⁵ *Pacific Mills*, 77 N.E.2d at 415.

²³⁶ *Glen Alden Coal Co. v. Unemployment Compensation Bd. of Rev.*, 82 A.2d 74, 76 (Pa. Super. Ct. 1951).

²³⁷ 561 S.W.2d 452, 453 (Tenn. 1978).

²³⁸ *Id.* at 455.

²³⁹ *Id.* at 454. See also *Unemployment Compensation Bd. of Rev. v. W.R. Grace Co.*, 351 A.2d 297, 299 (Pa. Commw. Ct. 1976) (laborer grade six must accept offer of job as laborer grade five during layoff even without period of unemployment between claimant's last job and offer of work).

And by 1983, in *Heltzel v. Commonwealth Unemployment Compensation Board of Review*, a secretary was required to accept any secretarial position because, "We can find nothing in the Law which would permit Claimant to refuse an offer of suitable work simply because the Employer did not offer the *best* job available."²⁴⁰ In *Aluminum Co. of America v. Walker*, five laid-off senior employees refused an available reassignment to laborer jobs on the grounds that their collective bargaining contract provided maintenance of seniority and benefits if they were recalled to an equivalent position, but were forfeited if they agreed to the offered position.²⁴¹ The court held that, in effect, the employer might determine the employees' insurability:

A payment of unemployment compensation to these men, notwithstanding their refusal to accept the next best available work, would have amounted to a financing of each of these men, within the time limitations of the statute, until there became available to him his old job or one paying equal wages

It may be that these men exercised good judgment in refusing the next best available job on the chance that there might be made available in the reasonably near future a job of their old classification in some department of their employer. Under the evidence and plight of this case, however, this was not a risk which must be charged to the official unemployment funds.²⁴²

Former United States Labor Secretary Raymond Donovan has reflected upon the changing contemporary administrative policy:

Our [unemployment insurance] laws therefore discourage workers from seeking jobs in new industries which may pay a lower initial wage but which may hold the possibility of rewarding new careers. This result simply does not make sense, either for the individual worker or the economy as a whole. With the growth of new industries and declining employment

²⁴⁰ 461 A.2d 1335, 1336 (Pa. Commw. Ct. 1983). Compare *Bethlehem Steel Corp. v. Commonwealth Unempl. Compensation Bd. of Rev.*, 310 A.2d 697, 698 (Pa. Commw. Ct. 1973) (skilled pattern maker entitled to compensation even after refusing offer of janitorial position which did not compare with prior training and experience) with *Heltzel*, 461 A.2d at 1336 (secretary must take any secretarial work because employer need not offer the best job available at her skill level).

²⁴¹ *Aluminum Co. of America v. Walker*, 340 S.W.2d 898, 900 (Tenn. 1960).

²⁴² *Id.* at 901, 902.

in old industries, workers must be challenged to adjust their lives and their careers to meet changing conditions.²⁴³

Of course, the changing conditions reflect management of the division of labor. The Chrysler Corporation, for example, was upheld in offering a trim cutter a choice between a position as a non-skilled press operator and one as a spot welder:

As plaintiff testified before the referee, his basic reason for refusing to accept the offered employment was that it would take him out of trim and prevent him from returning to trim. Acceptance of this personal reason as "good cause" is precluded by the policy of the employment security act ²⁴⁴

In fact, in some jurisdictions an employer can fire a skilled employee and avoid unemployment compensation by offering an unskilled job that is unlikely to offer advancement even when the old job is still available:

The fact that the laborer position was offered by the same employer who had recently discharged Johnson is not a factor . . . in determining "suitability" [of the offered employment] Proof that another position equivalent to an employee's prior employment is available in the labor market or with the prospective employer is not a factor which affects whether the job offered is suitable to the abilities of an employee. The prospective employee is entitled to suitable work, but he cannot without forfeiting unemployment benefits choose to remain unemployed because the prospective employer does not offer the highest available job for which the employee may be qualified.²⁴⁵

²⁴³Raymond J. Donovan, *To Protect and Promote the Interests of the American Worker*, 32 LAB. L.J. 195, 198 (1981).

²⁴⁴*Losada v. Chrysler Corp.*, 180 N.W.2d 844, 846 (Mich. Ct. App. 1970). *Losada* was distinguished in *Lyscas v. Chrysler Corp.*, 255 N.W.2d 767, 767 (Mich. Ct. App. 1977). In *Lyscas*, acceptance of the offered employment would have required the claimant to lose the benefits of his prior training and experience. *Id.* at 770. The court noted that "a temporary requirement that he do this should be weighed differently . . . if the period of unemployment had been lengthy and the prospects for recall were slight than it would if the period of unemployment had been brief and the prospects for recall were good." *Id.*

²⁴⁵*Johnson v. Virginia Empl. Comm'n*, 382 S.E.2d 476, 480-81 (Va. Ct. App. 1989) (citation omitted).

E. Dependency and Stabilization

Ultimately, as a response to doctrinal interpretations which narrowed eligibility based on the diminished need for a skilled reserve, the very purpose of the unemployment program was judicially and administratively recharacterized. Initially, unemployment benefits were earned entitlements of the wage worker, a governmentally imposed wage deferral in the form of partial insurance. During and after World War II, the program became one of public welfare in which the recipients were "beneficiaries" of public recognition of their status of deprivation. The sense that benefits were earned dropped out of the discourse. Unemployed workers were considered especially deserving, and temporarily deserving, poor. Their rights were statutory. Finally, in the 1970s, unemployment insurance became increasingly a matter of fiscal stabilization, in which recipients were more like public agents of aggregate demand supports. The progression obviously disempowers workers by reducing their benefits from something owned, to something needed, to something useful. Almost simultaneously craftsmen were recharacterized as production or semi-skilled workers, and then steady workers, only a step above casual laborers. As the unemployment program became more public in conception, it became less necessary to consider the uniqueness of the recipient in determining eligibility. As the need for a labor reserve with specific and varied skills continued to disappear, it became expedient to define eligibility around public criteria independent of labor relations. Today, it seems inconceivable that courts enforce access to unemployment compensation within any judicial consciousness of the social wage. In light of contemporary doctrine, who would imagine that the first bill to pass a Committee of Congress during the Depression provided for a wage floor for all workers to be administered by workers' councils?

One of the main policy reasons for unemployment insurance has always been to maintain or increase consumption during depressions, which are usually brought about by over-production or highly skewed wealth distribution. Both the proponents of the Workers' Bill and the Wagner-Lewis Bill, after all, argued that insurance was necessary not only to sustain consumer demand but to overcome the deprivations associated with lack of income. Lundeen and Van Kleeck scored points on this issue by emphasizing that the Administration's Bill would not reach those already unemployed. The issue was always who would be the recipients of consumption support and on what basis they deserved it. Supporters of the Workers' Bill believed that if one were willing to engage in socially productive work, to be either employed or unem-

ployed counted as being potentially available for work. Moreover, whether a job was available simply as a chance of the division of labor was a matter over which workers had all too little control. In passing the Social Security Act, supporters, including the AFL, took great pains to distinguish unemployment insurance from relief. They argued that benefits should be calculated and distributed not on the basis of need, but on the basis of desert. As the aggregate of employment became less secure during credit crises, or more characteristically, from technological change that increased productivity and wealth by reducing labor cost, the *worker* deserved to be protected as the innocent contributor to the social advance. The worker had earned the insurance.

Quite rapidly, during the 1940s, the justification benefits shifted from partial insurance against the consequences of unemployment to partial support for loss of income. Recipients became public beneficiaries whose need was not the result of either their desire or their fault. The program could therefore still be characterized as another category of charitable relief. Earl Simrell, Assistant General Counsel of the Federal Security Agency, noted in 1945 that courts were reluctant to add to the employer's experience-rated unemployment fund obligations when it was not their "fault" for discharging an unneeded or inefficient employee.²⁴⁶ Note that to the extent Simrell documented this judicial relegislation of the statute he confirmed the perceived equitable separation of employers' efforts to maximize return on capital from their private or public contractual employment responsibilities. Simrell, however, explained that: "Unemployment compensation is not a penalty imposed on the employer because of fault on his part, but rather is an involuntary contribution for the relief of unemployment attendant upon his operations."²⁴⁷ He characterized the purpose of eligibility in this way: "[T]he general-welfare approach is to interpret 'work' as meaning suitable work and test the claimant's availability by his attachment to the labor market and his readiness and willingness to work, rather than his readiness to continue in his last job."²⁴⁸ If the program were characterized to recognize that workers had been compelled to earn their benefits, it would be easier to define the suitable job as that last held or its equivalent as the court had done in *Hagadone*. Once the program is characterized as general welfare, it is the labor market rather than the employee who is being protected. In both cases, em-

²⁴⁶ See Earle V. Simrell, *Employer Fault vs General Welfare as the Basis of Unemployment Compensation*, 55 YALE L.J. 181, 181 (1945).

²⁴⁷ *Id.* at 187-88 (quoting Brief of Senate Advisory Committee at 26-27).

²⁴⁸ *Id.* at 198.

ployer fault is a red herring. Meanwhile, the equities and policies of interpretation have shifted, "neutrally," against the receipt of benefits by unemployed workers.

In 1944, Arthur J. Altmeyer observed the effect of the legislative change which added the "attributable to the employer" qualification to the good cause requirement for job separation:

A worker's wages have been credited to his record and enable him to satisfy the eligibility requirements for insurance payments. Cancellation wipes out in whole or in part the benefit rights he has earned. Yet now, under the laws of twenty-seven states, all or some of the wage credits of disqualified workers can be cancelled—in nineteen of these states for voluntary leaving; in twenty-one for refusal of suitable work.²⁴⁹

The "earned benefit" is therefore forfeited if a worker fails to continue producing, or renders public support unnecessary by moving his or her labor to what is perceived as an improved economic situation. In 1948, the New Jersey Supreme Court, in denying benefits to a woman who rejected an equivalent job from her former employer, ambiguously defined the purpose of unemployment insurance as a safeguard against economic hazard and an economic stabilizer:

The public policy upon which the unemployment statute is built, and which we are to use "as a guide to the interpretation and application" of the statute . . . is to achieve social security by affording "protection against this greatest hazard of our economic life," involuntary unemployment, "which now so often falls with crushing force upon the unemployed worker and his family" and constitutes "a serious menace to the health, morals, and welfare of the people" of the state; a security which "can be provided by encouraging employers to provide more stable employment and by the systematic accumulation of funds during periods of employment to provide benefits for periods of unemployment, thus maintaining purchasing power and limiting the serious social consequences of poor relief assistance."²⁵⁰

Compare this conception of unemployment insurance eligibility to the purpose expressed early in the program:

²⁴⁹ Altmeyer, *supra* note 230 at 14.

²⁵⁰ *W.T. Grant Co. v. Board of Rev. of Unempl. Comp. Comm'n*, 29 A.2d 858, 860 (N.J. 1943).

The class of employers who come under this Act provide or create the fund out of which the unemployed covered by the Act are paid a certain compensation for a prescribed time. To our minds such a plan should not be condemned as providing for or creating a gratuity. It is true that the employers alone directly create the unemployment fund, but it is created for the benefit of their employees. Therefore, the right of such employees to enjoy or participate in the fund in times of unemployment should be regarded as a part of their compensation or wages. All employees who labor or perform services for employers who are covered by this Act labor or serve in part for the right to enjoy the benefits of this unemployment fund. So regarded, the fund and the benefits to be derived therefrom by unemployed employees cannot be regarded as a gratuity within the meaning of Section 51 of Article III of our State Constitution. To the contrary, those who come under its provisions have labored or served for such privilege.²⁵¹

Not coincidentally, the statutory changes in eligibility requirements and experience-rated employer contributions, and changes in judicial interpretation of program policy occurred during the massive structural dislocations in the economy caused by conversion and reconversion during, and after, wartime. This dislocation made it necessary for substantial numbers of workers to retrain or to find new jobs. In the case of a 93¢ per hour tacker, laid off and offered 50¢ per hour as a laborer at a different company, Pennsylvania's Unemployment Compensation Board of Review reasoned:

During the period in question the United States Employment Service of the War Manpower Commission had no job opportunities [in and near Pittsburgh] for women at the rate of 93 cents an hour. The largest volume of positions paid wages at below 70 cents an hour. The board held: "We are convinced that in all cases a claimant should have a reasonable opportunity to obtain a position paying wages reasonable [sic] commensurate to those previously earned. Three weeks do not afford such opportunity."²⁵²

²⁵¹ *Friedman v. American Security Co.* of N.Y., 151 S.W.2d 570, 578 (Tex. 1941).

²⁵² *American Bridge Co. v. Unemployment Compensation Bd. of Rev.*, 46 A.2d 510, 511 (Pa. Super. Ct. 1946).

The Board concluded that one month would be the limit. The AFL's official policy reflected the need to maintain the purchasing power of dislocated workers. The policy emphasized support but pre-saged stabilization:

Loss of jobs to workers would bring loss of markets to industry. Industry cannot produce and expand if millions of workers are unemployed and if those who receive unemployment compensation are paid amounts which would be below the level of subsistence for their families. It would start a downward spiral of curtailed production to fit the limited market, firing of more workers as production is curtailed, a smaller market, still more unemployment, and a depression worse than that of the thirties

The greatest inducement to get them to stay on war jobs would be national legislative assurance that they are wanted enough and have earned the right to be taken care of during the reconversion and the mass migration to new jobs.²⁵³

President Truman's message to Congress asking for emergency legislation to raise unemployment benefits similarly argued:

Decent unemployment benefits would serve as a bulwark against post-war deflation. By assuring workers of a definite income for a definite period of time, Congress will help materially to prevent a sharp decline in consumer expenditures which might otherwise result in a downward spiral of consumption and production. Adequate unemployment insurance is an indispensable form of prosperity insurance.²⁵⁴

During the business cycle swings which characterized the 1950s and 1960s, unemployment insurance policy frequently recognized both income maintenance and economic stabilization as separate public goals.²⁵⁵ AFL-CIO policy reflected an increasing political emphasis on stabilization:

²⁵³ 90 Cong. Rec. S6756, S6768-69 (Aug. 8, 1944) (statement of AFL, printed in record at request of Sen. Davis).

²⁵⁴ Harry S. Truman, *Truman Message on Idle Pay*, N.Y. TIMES, May 29, 1945, at 10 (text of President Truman's address to Congress). For additional discussion of the need for unemployment insurance, see generally W.O. Hake, *Against Post-War Collapse*, 9 EMPLOYMENT SEC. REV. 25-27 (Nov. 1942).

²⁵⁵ Daniel N. Price, *Unemployment Insurance Then and Now, 1935-85*, 48 SOC. SEC. BULL. Oct. 1985, at 22, 24.

[Unemployment Compensation] could be a good "stabilizer" to even out the booms and slumps. It starts paying automatically—without Congressional debates—when the slump starts, and pays directly to the people bearing the major personal burden of recession. U.C. reserves soak up funds in good times (this is anti-inflationary), and pays them out when stimulation is needed.²⁵⁶

Resolution 165, submitted by the AFL-CIO Executive Committee to the Convention in 1961, recognized a problem with separating wage insurance from responses to structural economic changes:

While the wage insurance purposes of the program are being neglected, new problems in the form of long-term unemployment due to economic displacement have arisen and call for some adaptation of the unemployment insurance program to new needs on permanent basis.²⁵⁷

During the recessions of the 1970s, Congress established the National Commission on Unemployment Compensation. It was established largely as a result of the exhaustion of funds in those states hit hardest by unemployment. The need for reform forced a reexamination of the program's purpose. As its former Chairman, Wilbur Cohen, noted:

The Commission's recommended program for supplemental extensions is similar to the ad hoc emergency programs enacted by the Congress in the early- and mid-1970s. The supplementary extended benefit ("SEB") program recommended by the Commission would be a major addition to the protection of insured individuals in the labor force. It would also be a significant part of the federal government's countercyclical fiscal policy.²⁵⁸

In *California Department of Human Resources Development v. Java*, the Supreme Court emphasized stabilization arguments from the original hearings on the Social Security Act.²⁵⁹ The then-Secretary of Labor had explained why income replacement would also benefit

²⁵⁶ AFL-CIO, *How a Better U.C. Program Can Protect Us All*, 4 LABOR'S ECON. REV. 20 (1959).

²⁵⁷ AFL-CIO, REPORT OF THE PROCEEDINGS OF THE 81ST CONVENTION OF THE AFL-CIO 390 (1961).

²⁵⁸ Wilbur J. Cohen, *Reflections on the Work of the National Commission on Unemployment Compensation*, 59 U. DET. J. URB. LAW 485, 501 (1982).

²⁵⁹ *California Dep't of Human Resources Develop. v. Java*, 402 U.S. 121, 132 (1971).

the economy by maintaining demand, from which Justice Burger concluded: "Finally, Congress viewed unemployment insurance payments as a means of exerting an influence upon the stabilization of industry Early payment of insurance benefits serves to prevent a decline in the purchasing power of the unemployed, which in turn serves to aid industries producing goods and services."²⁶⁰ In fact, unemployment compensation has been cited as the second most important economic stabilizer.²⁶¹

The rhetoric of unemployment policy is by no means uniform. Neither is it restricted to distinct periods of history. Fiscal stabilization as a purpose of unemployment insurance was suggested during the hearings and debate over passage of the Social Security Act. What can be documented is an increasing emphasis on aggregate employment and a decreasing emphasis on public support against individual hardship. During the deep downturns of the 1970s and 1980s, only fifty to fifty-five percent of those unemployed were even eligible to receive benefits. What is absolutely clear is the disappearance of characterizations of unemployment insurance as either an earned benefit, or even a benefit owed to productive members of society whether they are currently laboring or are being held in reserve under the present division of labor. In fact, workers can no longer expect continuity of employment at all, and thus must be prepared to do for themselves what is necessary to respond to the privatized labor market. In reviewing the unemployment compensation program in 1989, Secretary of Labor Ann McLaughlin illustrated the changed economic assumptions of the present day:

Workers of the 1930s began their career expecting to stay in the same occupation throughout their working life. Today workers no longer have the expectation that they will continue in the same job throughout their working lives. They increasingly need to be ready to make career changes rather than wait for the return of their previous jobs.²⁶²

Case law in the state courts also does not represent a uniform and unbroken string of benefits being denied. Employees do win, but

²⁶⁰ *Id.*

²⁶¹ George M. von Furstenberg, *Stabilization Characteristics of Unemployment Insurance*, 29 INDUS. & LAB. REL. REV. 363, 364 (1976). For a discussion of supplementary unemployment benefit programs, see Price, *supra* note 252, at 31.

²⁶² U.S. DEP'T OF LABOR, UNEMPLOYMENT INSURANCE: REPORT OF THE SECRETARY OF LABOR 4 (1989).

courts give substantial weight to their skill level and experience.²⁶³ While there is an indeterminacy in the surface doctrines of unemployment insurance relations, it is clear that the discourse is structured by the assumed relation of the State and labor market within a consumption-driven division of labor. Differences are "different" only within a distinct political-economy.

It is clear that judicial, official and quasi-official accounts of unemployment insurance have entirely forgotten the contest over enactment of the program, and they have forgotten the degree to which present law was structured against a proposal for a true social wage. The social effects of this institutional translation contribute to the dependency of the wage worker on the state. Whatever entitlements or "wins" are secured in the legal arena are articulated within a discourse which has already been constructed to assume the worker should be covered, first, according to the public need for reserved skill as defined by eligibility requirements, and second, by virtue of the insulated aggregate division of labor which defines the demand for skilled eligible workers:

Eligibility and payment levels of existing U.S. social insurance programs are tied to an individual's work status and work history. Therefore, the completeness of coverage under Old-Age, Disability, and Unemployment Insurance depends on the consistency of one's career. The income disruptions being experienced by today's workers will further weaken their position when they need the benefits of these programs.

Unemployment Insurance offers the most striking example of this process. The standard program, which provides twenty-six weeks of coverage at about 40 percent of previous wages, was designed to meet the cyclical unemployment problems of industrial society. It appears less suited, however, to the long-term unemployment that is endemic to a postindustrial economy.²⁶⁴

The operation of the unemployment insurance system as a mechanism for the individual worker to ensure a rational, personal skill progression which has been earned by his or her past contributions

²⁶³ See, e.g., *MacDonald v. Florida Dep't of Labor and Empl. Sec.*, 568 So.2d 1319, 1320-21 (Fla. Dist. Ct. App. 1990) (experienced dining room manager need not accept position as assistant manager that involved food preparation and cleanup, skills for which he was not trained); *Scheuler v. RCA Corp.*, 536 So.2d 1055, 1056 (Fla. Dist. Ct. App. 1988) (engineer not suited for position as systems analyst).

²⁶⁴ JUNE AXINN & MARY J. STERN, *DEPENDENCY AND POVERTY* 24-25 (1988).

to society has been rendered unthinkable. William Norwood later regretted this choice:

One of the things that I began to realize is that the early concept of availability for work had somehow gotten distorted into instant availability. . . . In some instances, what we really ought to have been doing was encouraging people to be entering training, rather than to be immediately available for the first job that came along. To upgrade their skills, take advantage of the time between jobs to move up in the occupational hierarchy.²⁶⁵

Workers will still contest their loss of power, whether it be economic or legal. Their ability to make any gains, however, is contained by the terms in which that struggle is cast. A social wage administered by worker's councils would have empowered the wage worker not only because the terms of the programs would have been more favorable, but also because those terms would have recognized the dignity of the contribution of labor to social construction and reproduction.

IV. STRUGGLE RECALLED: CONTESTABLE LAW

This article recovers the political history of the rank and file workers who were opposed to elite labor leaders, and the social security politics of the Roosevelt Administration. It also demonstrates acknowledgement of those politics in, and their impact on, the unemployment insurance legislation which was ultimately passed. It documents the legal and historical amnesia which is apparent in judicial interpretations of eligibility requirements for such insurance. Through these interpretations, the judiciary implements a politically driven jurisprudence which is more accommodating to a general structure of labor law that reinforces capital control over the division of labor. As a result of this exercise of judicial power, which is encouraged by orthodox history and orthodox jurisprudence, workers lost what presence they had won in the 1930s.

There are obvious advantages of self-perpetuation to a legal methodology which creates social winners and losers while maintaining the discourse of neutrality. Such a methodology is also oppressive and antidemocratic. The oppression of "winner's" law occurs when the

²⁶⁵ Interview with William Norwood, BEGINNING THE UNEMPLOYMENT INSURANCE PROGRAM, *supra* note 165, at 32.

"loser's" voice is disowned in the legal construct of the decision, indeed when voice is denied to all sides of a social interaction, as if a more inclusive vision of the law never seriously existed. Precisely because social experience is known in part by the way it is framed in law, in order to be historically authentic, our own legal consciousness must reconnect our present legal constructions to the sense of hardship and conflict which was and is the social context we still live within:

The modern narrative must range across all the levels of society, from material conditions of daily life through the forms of social organization to the structures of state power. It must come to terms with the role of human agency—ordinary as well as extraordinary people—and with the irreconcilable antagonisms that drive society from one state of unstable equilibrium to the next. In short, what is needed is a narrative of contradiction.²⁶⁶

The exclusion from legal consciousness and method of a dialectical understanding of the contingency of power is deeply defended and multiply masked. Strip away these costumes. First, law is not episodic but on-going; past deployments of legal power exert a hold on future legal contests, however formally fair. Second, understanding legal consciousness requires that we do more than reveal the social meanings which are taken as "natural" in prevailing legal texts.²⁶⁷ As David Montgomery reminds us, power may be exercised linguistically, but it is not simply language:

Academic fashions of the 1950s are now enjoying a new lease on life The first is an enthusiasm for the analysis of discourse as the decisive mechanism in the shaping (as well as the understanding) of human relations. Although students of working-class culture have often devoted close attention to analysis of popular rhetoric for clues to understanding what E.P. Thompson called "the dialogue between social being and social consciousness," disciples of Derrida and Foucault would have us believe, contrary to Marx, that it is the social con-

²⁶⁶ ALAN DAWLEY, *STRUGGLES FOR JUSTICE* 12 (1991).

²⁶⁷ Especially if the production of ideas is no different in principle from the production of the material meaning-laden world, legal consciousness includes the dialectic of the relations—read, as required, struggle—of social action correlated to law. See Kenneth M. Casebeer, *Work on a Labor Theory of Meaning*, 10 CARDOZO L. REV. 1637, 1659 (1989).

sciousness of people that determines their social being. Historical research is thus reduced to the analysis of texts . . .²⁶⁸

The Workers' Unemployment Insurance Bill symbolizes a story of voice *and* action. Its history represents an idea and political way of life not chosen in any winner's sense. But the Bill was simultaneously a legislative event which did have impact. It was both voice *and* action, as is all struggle. What is typical and meaningful about understanding social meanings such as history and law in terms of the struggles which these discourses manifest, and which construct them, is that the struggles continue regardless of what symbolic meaning is imposed on them. Their actual meaning is experiential, not discursive. In these terms, the recovery of the Workers' Bill's history challenges both historians and legal practitioners.

To read the *history* of labor organization as exceptional in the United States necessitates reading it within the frame of history as it is constructed by dominant institutions, including those which prevail in law. This practice involves two intellectual mistakes. First, the history of American labor politics as exceptional depends upon an historical determinism which is incompatible with the actual experience of workers in the United States. Second, the history of labor law as exceptional depends upon a distorted view of law making and interpretation. Neither these mistakes nor what actually happened are accidental. Labor law and labor politics in the United States *are* particular, and especially so in their interrelationship. Organized labor, however divided, allied itself politically with progressive scientific management to elect industrial pluralism as a structure of collective organization and privatized economic planning. This structure was to be legally preserved in the separation of investment and employment. At the same time, organized labor acceded to individualized risk pooling for social injuries and simultaneously rationalized labor reserves. But these outcomes have more than one layer of historical meaning. They do represent the rejection of a different legal-political ideology, but a rejection in the context of an opposed and present alternative—that of social democracy and a social wage. Thus, to make the United States exceptional is to hide the political struggles imminent and visible in the very role of law; it pretends methodological virtue in legally forgetting what cannot indefinitely be ignored. The voices our history has

²⁶⁸ David Montgomery, *The Limits of Unions—Centered History: Responses to Howard Kiveldorf*, 31 LAB. HIST. 110, 115 (1991).

lost resonate in the social conditions of their figurative children's children, and in the misery the law and state perpetuate.

To read the *legal* discourse of labor law as devoid of contested terms, in turn, masks an orthodoxy of political economy. In American work law generally, a particular assumed image of *natural* employment relations and labor market organization determines what counts as a legally contestable issue. Structurally, as society's agents, employers need control over investment decisions and the maximum potential mobility for their capital. Such mobility would be sacrificed if public regulation of employment relations either directly or implicitly broke down the separation between organizational production decisions (investment) and inducement of workers to provide their own capital—labor—to production processes (employment). Instead, legal mechanisms maintain and enforce the separation of invested resource allocation and exchange relations eliciting labor time.

A contract for labor time gives labor the legal form of a commodity rather than an investment, but this artifice does not support an argument that labor must or should be so treated. Rather, it is a demonstration of how the phenomenology of law imagines labor in the simultaneous mirroring and constructing of reality. By contrast, when law is about labor markets or social structures rather than labor relations, two primary conceptual premises of reasoning change radically. Most importantly, the abstract conception of labor assumes employment and unemployment to be aspects of the same object. Labor becomes for society something like a natural resource, both potentially and actually in use and on inventory. Second, to the extent the labor image is utilized in arguments for instrumental policy purposes, law characterizes employers and employees as aggregates or classes of social actors, not as individuated interests, because such policies aim at a social labor pool.

Unemployment insurance during the 1930s was contested. The legislation enacted was passed in preference to an alternative social wage. Nevertheless, the program's articulated purpose would be recharacterized by various legal institutions, principally the judiciary, as if the contest never existed. Successive recharacterization from earned entitlement, to public welfare, to fiscal policy was not neutral. The ongoing hardships and conflict associated with the loss of a job are the same in kind as those which animated the original contest during the 1930s. Not to continuously and presently make the social conditions of parties to adjudication part of the interpretive framework simply denies a part of the ongoing constructive meaning of law within those conditions of hardship.

As the discourse shifted within this historical vacuum, of course, the doctrines interpreting the same provisions were significantly tightened in simultaneous reflection and construction of a changing labor market. Doctrinal development was hardly neutral as employers needed fewer reserve skills and constructed a division of labor utilizing cheaper labor which was less eligible for relief against the hardships of unemployment and was more fungibly reemployed if jobs became available.

An alternative was not only legally available, but the Workers' Bill was a necessary, if forgotten, part of the history of the enactment of unemployment insurance. The social relationship between worker and job inevitably frames not only the economic value of work, but the quality of the division of social obligations and possibilities. The Workers' Bill would have legally constructed a true social wage—a wage floor administered by workers. The Workers' Bill social wage would have drawn no distinction between the bottom wage of the employed and unemployed either as a matter of individualized desert or in fact.

The unemployment insurance program which was adopted, and the unemployment insurance system as it has been judicially constructed, also comprise a social wage. The formulation of this social wage, however, fragments social relations into separate classes: the employed, whose wages are elicited by the private market; the eligible, whose wages are provided by compensation; and the ineligible, whose wages are haphazard or depend on welfare. Under either conceptual system, however, employment and unemployment are the same phenomena with regard to their potential functioning in the reproduction of society.

Less exceptional than the fact that the labor movement in the United States did not establish a labor party is what did not happen to the country: that a workers' movement never appeared, or that workers engaged in no identifiable politics. One would never know this from existing historical and legal discourse. Indeed, the fact that the workers' organized labor politics reflected and constructed different institutions from elsewhere, and resulted in reduced political power or in narrow visions of wage or production conditions, does not diminish the workers' impact. In the 1930s, workers were vitally engaged in the politics of law. If they did not prevail, still they were heard, and the content of Social Security, then and now, can be fully understood only by including the workers' role in the process:

The organized sponsors of this vital measure [Workers' Bill] were compelled to risk imprisonment, injury and even violent death at the hands of police, by participating in street dem-

onstrations, Hunger Marches, and other militant actions by means of which attention was focused on the need and demand for genuine social insurance. Advocates of the Workers' Bill even had to face abuse and risk expulsion from their trade unions and other organizations because the influence of the privileged class reached into even workers' organizations with poisonous propaganda against the Workers' Bill.²⁶⁹

The recovery of the history of political struggle, however, is no substitute for the continuous renegotiation of the social conditions whose experience constructs social meaning in the interplay of alienation and authenticity. A contested history, however, can be made part of the current, inevitable contest over the legitimation of present conditions and relations. Law was part of past conflict as surely as it is part of present conflict. Law is not above us, or below us, or any more neutral than our own lives. Law is simply one of the forms by which we live those lives—blind or self-aware. Whose lives count in law which becomes history, or history imported into law shape each of us. If we ignore the excluded in our discourse, we ignore part of ourselves and limit our possibilities. Senator Robert Wagner described the prosperous Twenties and not the collapse of the Thirties in order to force recognition of the need for continuous collective responsibility for the others in our midst by which we learn what kind of people we are ourselves:

Twenty million families were living in the cold cellars of poverty dug beneath the streets of our prosperous cities. Countless children were being denied the simple joys of care-free childhood, their minds handicapped by improper schooling, their bodies racked by the relentless pressure of factory work. Misery and destitution were the sordid realities of every Main Street, not in a poverty stricken country, but in a land where the inequitable distribution of tremendous wealth was building palaces from which the favored few might survey the hardship of the multitudes.²⁷⁰

Then as now.

²⁶⁹ Herbert Benjamin, *Introduction to the Workers' Unemployment, Old Age and Social Insurance Bill, H.R. 2827*, National Joint Action Committee for Genuine Social Insurance (1935) (on file with Tamiment Library, New York University).

²⁷⁰ Robert Wagner, *Undelivered Speech, Madison Square Garden, May 1935* (on file with Wagner Papers, *supra* note 11).