CAR WARS: STRIKES, ARBITRATION, AND CLASS STRUGGLE IN THE MAKING OF LABOR LAW

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The origin of labor law is deeply rooted in the Progressive era, a social epoch in which individualism, manifested in the law as laissez-faire constitutionalism, gradually gave way to liberal demands that the law be used to ameliorate the high social costs wrought by industrial development. While only one small part of this larger picture, labor law is of critical importance because of its key role in regulating the class conflict of the period. Modern labor law emerged out of the labor unrest of the Progressive era.[1]

In addition to its historic importance, labor law illustrates some of the most basic features of American law. It demonstrates the capacity of law to grow and change in response to new social needs and to restructure the social life of our society.[2] Labor law also shows the legal change effected by militant political action on the part of the formerly powerless — a basic validation of the democratic character of American law.

Many legal historians and labor law experts view Progressivism as a middle and upper class reform movement. Hence, they look to these reformers for the sources of the substantial legal change that swept American labor during the period.[3] This reform movement resulted in child labor legislation, laws regulating working conditions, wages and hours legislation, the beginnings of a labor arbitration system, and gave laborers the right to organize.[4] These reform efforts, however, can also be understood as a strategy on the part of one sector of monopoly capitalism, (often called "corporate liberals"), to reduce the level of class struggle, stabilize the labor force, and promote broader

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1. *See* S. FINE, LAISSEZ-FAIRE AND THE GENERAL WELFARE STATE; A STUDY OF CONFLICT IN AMERICAN THOUGHT 1865-1901 (1956); M. DERBER, THE AMERICAN IDEA OF INDUSTRIAL DEMOCRACY, 1865-1965 (1970). For general discussion of the evolution of modern labor law, see 3, 4 HISTORY OF LABOR IN THE UNITED STATES, 1896-1932 (J. Commons ed. 1935); E. WITTE, THE GOVERNMENT IN LABOR DISPUTES (1932).

2. According to Morton Horwitz and Willard Hurst, two of America's most eminent legal historians, the capacity of the law to serve as a means to achieve desired social ends is the great instrumental character of American law. *See* M. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW 1780-1860 1-30 (1977); W. HURST, LAW AND THE CONDITIONS OF FREEDOM IN THE NINETEENTH CENTURY UNITED STATES (1956).

3. *See, e.g.*, G. KOLKO, THE TRIUMPH OF CONSERVATISM; A REINTERPRETATION OF AMERICAN HISTORY, 1900-1916 (1963), which is the seminal statement of this thesis.

4. This view has been put forth both implicitly and explicitly in standard labor law texts and casebooks. *See, e.g.*, A. COX & D. BOK, CASES AND MATERIALS ON LABOR LAW (1969). For a brilliant French critique of the foundations of labor law, see Edelman, *The Legalisation of the Working Class*, 9 ECON. & SOC'Y 50 (1980).

social harmony that could permit rapid capital expansion with less violence and less human misery.[5]

Although this view has evidence to support it, it fails to recognize the role of working class thought and action in structuring early labor law. The workers of the period organized themselves for a wide range of ends, some of them contradictory. But on a broad front they had clear legal objectives that were encouraged by democratic values.

Analysis of the legal goals and strategies of the Amalgamated Association of Street Car Workers lends insight into workers' objectives during the Progressive era. This analysis will focus on the legal and illegal tactics of the union, including numerous and violent strikes to obtain arbitration contracts. Such a focus will clarify the union's basic objectives and strategy. Further, it will reveal the social origins of labor law as having been rooted in the working class trade unions.

I

THE STRIKE STRATEGY OF THE AMALGAMATED

Samuel Gompers, of the American Federation of Labor (AFL), organized the Amalgamated in 1893. Gompers recognized the historical working class militancy among the carmen and sensed the organizational potential of the street railroad industry.[6] Typical of other social democratic unions, the Amalgamated's ideology was not particularly radical. The "bread and butter" unionism of Samuel Gompers was as much a part of its platform as was the broader social reform unionism of Eugene Debs.[7] At the core of the Amalga-

5. For an excellent overview of the wide variety of historical positions on the meaning of the progressive era, see Rodgers, *In Search of Progressivism*, in THE PROMISE OF AMERICAN HISTORY: PROGRESS AND PROSPECTS (S. Kutler & S. Katz eds. 1982). The two major statements of the "corporate liberal" position are G. KOLKO, *supra* note 3; J. WEINSTEIN, THE CORPORATE IDEAL IN THE LIBERAL STATE: 1900-1918 (1968). In spite of the unsatisfactory nature of the corporate liberal position, analysis of the progressive era has not come far since the publication of the above works. To the extent that there is one, the opposing view is that there existed no single "progressive movement," but a set of interrelated "movements" with different purposes. *See, e.g.*, Filene, *An Obituary for The Progressive Movement'*, 22 AM. Q. 20 (1970). For a sharply different view than that of Kolko and Weinstein, which sees working class-based political action at the core of the progressive movement, see 5 P. FONER, HISTORY OF THE LABOR MOVEMENT IN THE UNITED STATES (1980). And for an important analysis that implicitly supports the positions of Weinstein and Kolko, including data showing a sharp decline in mass political participation during the period, see W. BURNHAM, CRITICAL ELECTIONS AND THE MAINSPRINGS OF AMERICAN POLITICS 71-134 (1970).

6. For a general history of the industry, see E. SCHMIDT, INDUSTRIAL RELATIONS IN URBAN TRANSPORTATION (1937). The history of the founding of the Amalgamated was published as part of a very detailed history of the union in *Motorman and Conductor* beginning with vol. 17 in March, 1909. *Motorman and Conductor* was the official organ of the Amalgamated and can therefore be expected to reflect the union's official viewpoints. *Motorman and Conductor* has been published continuously since 1895. Its name was changed to *Motorman, Conductor, and Motor Coach Operator* in 1927.

7. This characterization of American labor historiography does not credit the breadth and complexity of the field. The dichotomy between reform unionism and "bread and butter" unionism developed early in historical thought about the character of American trade unionism.

mated's organizing activity was its belief in the fundamental legality of workers' right to organize and hold a property right in their work.

Prevailing conditions in the industry led to many grievances among the workers. Wages were low and hours long.[8] Yet the early years of the Amalgamated were full of setbacks. Union rivalries prevented many locals from joining, the treasury was often empty, and staff worked without pay. Companies strongly resisted unionization and often fired employees thought to be interested in unions. This pressure forced organizers to work in secret and kept membership levels low.[9] Many of the early strikes, especially the Milwaukee strike in 1896, failed, discouraging further organizing activity.[10]

Scarcely twenty years later, the Amalgamated had 300 locals and was administering 200 collective bargaining agreements.[11] This rapid growth resulted from the immense organizing energy that the Amalgamated harnessed during these years. Its strategy called for both the ready (but always reluctant) use of the strike, as well as the arbitration of all disagreements. This strategy was unique because, of all the AFL unions, only the Amalgamated had arbitration as a central demand in both its Constitution and organizing strategy. It is not a paradox, however, that a union engaged in so much strike activity should have this type of strategy. Both were distinct, but interrelated, components of an aggressive plan — to win union recognition — that reflected a deep understanding of the legal and political complexities of union organizing in a period of intense class violence.

The strike was preeminent in this strategy because without the strike or the serious strike threat, the companies would not even talk to the union. Men were often dismissed on the merest suspicion of union activity. Even without that suspicion, employers hired spies to infiltrate their workers to talk to them about union activity, to take names, and dismiss union sympathizers. One spy, pretending to work for the Amalgamated, signed up 75 "members" in Birmingham who were consequently fired.[12] After this incident, the Amalgamated repeatedly urged workers not to talk to "union organizers" unless they had official Amalgamated documents. In this context, the strike became a basic organizing tool; striking encouraged the employer to regard the union as a serious bargaining force. However, the survival of the union depended on the success of strikes by the locals.

The strike, while potentially effective, was also a risky venture, and one that needed to be tightly disciplined and controlled. To counter manage-

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It emerged from 1, 2 HISTORY OF LABOR IN THE UNITED STATES, 1896-1932, *supra* note 1, and found its way into many labor histories. *See, e.g.*, G. GROB, WORKERS AND UTOPIA: A STUDY OF IDEOLOGICAL CONFLICT IN THE AMERICAN LABOR MOVEMENT 1865-1900 (1961); N. WARE, THE LABOR MOVEMENT IN THE UNITED STATES, 1860-1895 (1964).

8. E. SCHMIDT, *supra* note 6, at 102-17.

9. Mahon, *History of Organization Among the Street Railway Employees of America*, MOTORMAN AND CONDUCTOR, Dec. 1897, at 2.

10. E. SCHMIDT, *supra* note 6, at 138-40.

11. *Id.* at 157. This data was compiled by Schmidt from *Motorman and Conductor.*

12. MOTORMAN AND CONDUCTOR, July 1913, at 12.

ment's power and to prevent the possible weakening of the union due to an excessive number of strikes, national union approval and direction by the union's national leadership was required for each strike. The collection of a large strike fund by the national office, which would only be paid out to workers on approved strikes, enforced this practice. The union, therefore, had the luxury of choosing the arenas for its major struggles.[13]

These strikes were pivotal for the union. An immense investment of union resources was required to raise strike funds, to assign union officials to direct the strike, and to mobilize the support of organized labor and of the community in general. The careful mobilization of massive community support and resistance was critical in every strike and was probably the most salient feature of the streetcar strikes. Collectively, the more than 200 Amalgamated strikes are still known as the "car wars" because of their high level of violence. The strikes' death toll, which numbered nearly 100, was greater than that of any other industry with the exception of coal mining.[14] But while mining strikes were held in isolated small towns, the car wars occurred in the main streets of virtually every major city in America, including Chicago (1903 and 1915), St. Louis (1899 and 1903), San Francisco (1902), Philadelphia (1910), New Orleans (1902 and 1911), Buffalo (1913), Milwaukee (1896), Cleveland (1899), Indianapolis (1912), and Columbus (1910).[15] The Amalgamated's strike strategy took advantage of the social costs of massive urban violence, and used the public character of these strikes to generate support for settlement.

The public nature of the strikes determined their characteristics. A street railway strike, according to one reporter, "[was] always . . . swift and furious, carried on amid scenes of violence . . . [because] [a]ttempts to operate the cars of a struck service [brought] the hated scabs within close view of strikers and their sympathizers . . . ."[16] The close proximity of opposing sides, coupled with the mobile quality of the strikes, prompted cars, mobs, police, and hired

13. E. SCHMIDT, *supra* note 6, at 174-78, contains a detailed statement of the operation of this strike policy. Its functioning is detailed in the three major scholarly accounts of the Amalgamated Strikes. *See* Zeigler, *The Limits of Power: The Amalgamated Association of Street Railway Employees in Houston, Texas, 1897-1905*, 8 LABOR HISTORY 71 (1977); Cox, *The Wilkes-Barre Street Railway Strike of 1915*, 94 PA. MAG. OF HIST. & BIOGRAPHY 75 (1970); Molloy, *Rhode Island Communities and the 1902 Carmen's Strike*, RADICAL HIST. REV., Spring 1978, at 75. Molloy shows the limitations of the top-down strike control strategy by describing how the Amalgamated failed to provide, due to a lack of funds, the five dollars a week strike benefit in the Providence and Pawtucket strikes. He also suggests that the national organization was overeager to settle — a negative aspect of centralized control that has to be weighed against the gain of a nationally coordinated strike policy.

14. While the data is incomplete, it is clear that the "car wars" caused more deaths than any other type of strike except mining. *See* R. JEFFREYS-JONES, VIOLENCE AND REFORM IN AMERICAN HISTORY 199-201 (1978).

15. *See* Chicago Tribune, June 16, 1915, at 7, col. 2; R. JEFFREYS-JONES, *supra* note 14. E. SCHMIDT, *supra* note 6, at 147-49, reports two deaths in Albany/Troy and fourteen in St. Louis.

16. Rogers, *The Streetcar War at Indianapolis*, 14 INT'L. SOCIALIST REV. 340, 340-41 (1914).

guards to embark on wild chases through city streets. It was impossible for any urban observer to ignore such strikes. In this way the notoriety of the strikes and pressure to settle them grew.

Given the level of local disruption, it may seem surprising that the street railway strikes often lasted months. The long length of the strikes, however, illustrates an aspect of the strikes that added to their intensity: although day to day activity and disruption was local, the leadership on both sides was national. Beginning in the 1890s, large national syndicates bought up the local car companies.[17] This broad base allowed the national syndicates to close down one line while profitting on others. This ability reduced their economic incentive to settle a particular strike.[18] Because local disruption was of little concern to national companies, local businessmen tended to sympathize more with the strikers.

Similarly, the union was a nationwide organization which maintained a large strike fund that paid five dollars a week in strike benefits.[19] These payments permitted union locals to strike month after month. The union also kept a staff of at least a dozen professional strike organizers on the road.[20] The national organization of both sides, combined with the deep class antagonisms present in turn of the century cities, contributed to the violence of the car wars.

The strikes' high level of violence occurred because of a single issue — the property right of the streetcar companies to run their cars as they saw fit. Juridically, under American law, the streetcar companies clearly possessed that right.[21] But the Amalgamated believed that workers had an equally important right to their jobs and to bargain over work conditions. Although this conception of workers' rights was not consistent with dominant laissez-faire freedom of contract doctrine, that inconsistency was understood by the union in political terms: the law was too often controlled by corporate wealth.[22]

On the streets, this conflict resulted in struggle between two large, though

17. E. SCHMIDT, *supra* note 6.

18. The national car syndicates could also afford to keep professional strikebreakers on retainer and use them on a regular basis in strike after strike. *See* E. LEVINSON, I BREAK STRIKES! (1935), an account of strikebreakers in the streetcar industry during this period. The best current history of the strikebreaking business is R. JEFFREYS-JONES, *supra* note 15, at 78-114.

19. *See supra* note 13.

20. *Motorman and Conductor* regularly published reports of the travels of union officers, the amount of which was staggering. *See, e.g.*, MOTORMAN AND CONDUCTOR, Sept. 1913.

21. *See* S. FINE, *supra* note 1, at 129-68; B. TWISS, LAWYERS AND THE CONSTITUTION 63-92 (1942).

22. For a summary of the late nineteenth century conservative court, see A. KELLY, THE AMERICAN CONSTITUTION 492-512 (5th ed. 1976). Major works making a more detailed analysis are A. PAUL, CONSERVATIVE CRISIS AND THE RULE OF LAW: ATTITUDES OF BAR AND BENCH, 1887-1895(1960); W. SWINDLER, COURT AND CONSTITUTION IN THE TWENTIETH CENTURY: THE OLD LEGALITY, 1889-1932 (1969); Roche, *Entrepreneurial Liberty and the Commerce Power: Expansion, Contraction, and Casuistry in the Age of Enterprise*, 30 U. CHI. L. REV. 680 (1963).

unequal, forces. On one side stood the police and the private armies of strikebreakers employed by the car companies. On the other side were the motormen and conductors, backed by a substantial network of community supporters. The companies, to provoke the union and to show that they were conducting business as usual, generally ran the cars in groups through the center of town. Frequently aided by paid laborers who removed any track obstructions, the cars were heavily guarded by local police and private guards.[23] As strikes became more routine, the car companies were among the first industries to rely heavily on large, well-organized private detective agencies that specialized in all phases of anti-strike work. These men, numbering in the hundreds in a single strike, were quick to use violence and were protected against normal legal sanctions both by anonymity and by a company promise to put up bail and permit them to skip town if arrested.[24] The National Guard was also regularly used to keep the cars running.[25]

For the workers, these strikes consistently involved more substantial showings of working-class solidarity than any other type of strike. Crowds of workers and teamsters helped block the tracks. Women used their wash buckets to soap the tracks, thereby reducing traction. Boys taunted the scabs and threw rocks at car windows. The more agile climbed poles and cut wires.[26] And after 1908, the dynamiting of streetcars became a feature of some strikes.[27]

While the union's role in organizing this violence cannot be pinpointed, at a minimum it seems clear that the union counted on the strikes' violence as a part of its broader negotiating strategy. Union members themselves were regularly arrested in the strikes, but were only a small proportion of the total arrested. The statements of union officials, however, give some indication of the union's encouragement of violence. When the union took a strike vote in Buffalo in 1913, for example, a member moved to make the strike a peaceful one.[28] William Fitzgerald, a member of the union's executive board sent to Buffalo to direct the strike, replied that "he had been in strikes for a great many years and . . . had never seen one yet where they handed out lemon candy and used whiskbrooms . . . ."[29] He argued that "the men knew what they had to do to tie up the system and that they should do it."[30] During the

23. Accounts of virtually every streetcar strike were most often given detailed coverage in local newspapers. *See, e.g.*, Chicago Tribune, Nov. 13, 1903, at 1, col. 8; *Id.* June 14, 1915, at 1, col. 1.

24. For an account of one strike involving heavy use of professional strikebreaker forces, see The Ohio State Journal, April 5, 1910, at 1, col. 8; *Id.* May 1, 1910, at 1, col. 8; *Id.* May 3, 1910, at 1, col. 7; *Id.* July 11, 1910, at 1, col. 1.

25. On the general use of the militia in strikes, see Reinders, *Militia and Public Order in Nineteenth Century America*, 11 J. OF AM. STUD. 81 (1977).

26. *See, e.g.*, Cleveland Plain Dealer, May 20, 1908, at 1, col. 6.

27. *Id.*

28. Buffalo Express, April 7, 1913, at 1, col. 6.

29. *Id.*

30. *Id.*

June 1905 Pawtucket strike, the Amalgamated's Secretary-treasurer, Rezin Orr, declared that the mass violence was "only the people uprising in their wrath against a corporation which had apparently up to the present owned them."[31]

This careful and indirect advocation of violence made a great deal of sense in the political context of the day. Labor was not at all powerful and labor organizers worked in a hostile legal climate. Both the state and the car companies commanded large armed forces that were readily mobilized against the union. Yet the Amalgamated, as its actions indicated, recognized that only rigorous and virulent strike activity would get the union both the power and credibility it needed to force the car companies to even begin considering the question of union recognition. All the other goals of the motormen and conductors depended upon that recognition because only then could workers, together, negotiate for improved working conditions and wages.

II
ARBITRATION AND CLASS STRUGGLE

The ready and open willingness to strike was one pillar of the Amalgamated's political and economic strategy; the demand for "arbitration" was the second. The demand for arbitration was in the union's constitution and was repeatedly raised by the union before, during, and after its strikes.[32] Elaborate procedures in the union's constitution required that all means to resolve a dispute short of striking be attempted and that the union make an offer to arbitrate the dispute.[33] The constitution specifically forbade striking unless these procedures were followed.[34] Consequently, Amalgamated strikes were highly disciplined and methodical. Not only were there few wildcats strikes, but officials of the national union were generally able to arrive on the scene to participate in the last stages of negotiation and strike preparation.[35] This pre-strike organization resulted in better strike preparation. Furthermore, the union's brand of arbitration was aggressive and focused on the same goals sought by a strike.[36] Linking arbitration with vigorous strike activity was deliberate and effective: both were co-equal elements of a comprehensive strategy.

The concept of arbitration emerged out of the Progressive era as a reform tactic designed to reduce industrial unrest and to resolve strikes nonvi-

31. Molloy, *supra* note 13, at 90. In his 1896 Labor Day speech Amalgamated President William Mahon, at a time when many unions routinely denied the charge that strikes were inherently lawless, agreed with the proposition. He went on to ask his audience to look at the lawlessness of businessmen and to stop judging labor by a double standard. MOTORMAN AND CONDUCTOR, Nov. 1896, at 4.

32. E. SCHMIDT, *supra* note 6, at 199-207.

33. *Id.*

34. *Id.*

35. *Id.*

36. *Id.*

olently.[37] The first national arbitration law was the Erdman Act of 1898 (the Act),[38] which provided for voluntary arbitration of railroad labor disputes.[39] Until 1907, however, only one attempt was made to utilize the Act's voluntary arbitration provisions.[40] The Act had its roots in a number of state arbitration schemes — often "voluntary arbitration" schemes such as those used orginally in Pennsylvania, New York, and Massachusetts in the late 1870s and 1880s — which were based on the work of middle and upper class social reformers like Joseph Weeks and Carroll Wright.[41] Weeks, in turn, had borrowed heavily from British and French arbitration models that dated back to the early 19th century.[42] At the request of Governor Hanraft of Pennsylvania, who was concerned about industrial disorder in the iron and coal industries, Weeks traveled to Europe in 1878 and the results of his study were subsequently reported.[43] Soon thereafter, beginning in the early 1880s, a number of states established boards of arbitration and conciliation.[44] These entities were designed to promote voluntary arbitration of industrial disputes by making the services of experts available to both sides.[45] These services, however, were not widely used until well into the twentieth century.[46]

The Erdman Act's initial failure stemmed, in large part, from employers' resistance to it. Employers had two related reasons for opposing any kind of arbitration law. First, the idea of arbitration was philosophically inconsistent

37. Jensen, *Notes on the Beginnings of Collective Bargaining*, 9 INDUS. & LAB. REL. REV., 225 (1956) correctly locates the origins of labor's impulse to arbitrate, although I do not agree that the early unions conceptualized it as a "moderate, conservative process," as Jensen concludes. The most complete history of early arbitration in America is C. MOTE, INDUSTRIAL ARBITRATION (1916).

38. Erdman Act, ch. 370, 30 Stat. 424 (1898).

39. On the origins of federal "arbitration" in relation to railroad labor, see E. WITTE, THE GOVERNMENT IN LABOR DISPUTES (1932); Eggert, *A Missed Alternative: Federal Courts as Arbiters of Railway Labor Disputes, 1877-1895,* 6 LAB. HIST. 287 (1966); J. LEIBY, CARROLL WRIGHT AND LABOR REFORM (1960). It is important to note that there were widespread inconsistencies in the use of the term "arbitration" in the Progressive era. Initially, it was often used to refer to any "conciliation" scheme wherein the parties met and tried to resolve the dispute informally. It also referred to "mediation" formats where the parties tried to resolve differences with the assistance of a third party. In periods of intense class conflict, however, both of these approaches gave way to "umpire" formats, where a panel or person was empowered, by agreement of both parties, to decide the issues in dispute. This arbitration format is at the core of today's system of collective bargaining.

40. *See* MOTORMAN & CONDUCTOR, May 1912, at 6.

41. A brief legislative history of early arbitration statutes can be found in C. MOTE, *supra* note 37, at 196-204.

42. Carroll Wright published an early report, C. WRIGHT, INDUSTRIAL CONCILIATION AND ARBITRATION (1881), at the request of the Massachusetts State Legislature that was heavily based on Weeks' research. Wright's clearly reformist orientation, and his ignorance of major working class issues, is described in J. LEIBY, *supra* note 39, at 39-94.

43. *See* C. WRIGHT, *supra* note 42.

44. *See supra* note 41.

45. *Id.* at 199-203.

46. On the increasing use of industrial arbitration, see *Id.* at 242-47. On the various explanations for the failure of the state arbitration schemes in use at the beginning of the twentieth century, see *Id.* at 248-67.

with laissez-faire conceptions of freedom of contract from which employers implied an absolute right to conduct business activities as they saw fit. Secondly, arbitration was a product of the growing working class trade union movement and the social and political ideas the movement promoted did not appeal to capitalist employers.

Prior to 1900, the term arbitration meant any form of negotiated settlement achieved short of a strike.[47] Emphasis was on the process of face-to-face negotiation usually within a formal structure.[48] Almost *any* structure was considered adequate since the notion that labor and capital be treated as equals was itself a great victory. The Knights of Labor acquired the idea of arbitration from William Sylvan's National Labor Union and the Knights of St. Crispin, the shoemakers' union that is generally regarded as the first national union.[49] Both of these unions bridged the transition between the era of small craft industries and monopoly capitalism. During this period, arbitration became a fundamental right of workers that was solidly grounded upon natural law and equity as well as the equality of labor and capital.[50]

In the 1870s, the rise of monopoly capitalism and laissez-faire notions of private property reduced the status of American workers to that of hired hands without rights.[51] In addition, a series of bitter strikes occurred during the 1870s and 1880s that ended in defeat for the workers. Furthermore, the strike concept was perceived by many to be criminal and un-American.[52] Following these setbacks, the Knights of Labor began to put forth the idea of arbitration, but they did so from a weak and defensive position. The employers simply did not pay attention; employers had no ideological reason to support arbitration and organized labor lacked the power to compel even negotiation.

The Knights of Labor advocated the kind of arbitration that involved negotiation and conciliation but which was premised on preindustrial notions of equality of labor and capital. These preindustrial notions encompassed the idea that people of good faith should simply sit down and talk through their grievances. If the grievances could not be resolved informally, then they should be resolved formally using arbitration boards made up of representatives of both sides. In this context, even the distinction between compulsory and voluntary arbitration broke down. Since both sides were honor-bound to respect their agreements and as long as that faith was kept, there was no need

47. The term "arbitration" did not have a precise meaning in the nineteenth century. This is a recurring theme in N. WARE, *supra* note 7, at 123-24, 127, 200-01, 211, 262. *See also* Jensen, *supra* note 37.

48. C. MOTE, *supra* note 37, at 191-214.

49. N. WARE, *supra* note 7, at 200-04.

50. N. WARE, *supra* note 7.

51. For the best description of this process, see D. MONTGOMERY, BEYOND EQUALITY: LABOR AND THE RADICAL REPUBLICANS (1967).

52. *See* Morse, *The Molly McGuire Trials*, 11 AM. L. REV. 233 (1877); Selfridge, *American Law of Strikes and Boycotts as Crimes*, 22 AM. L. REV. 233 (1888).

for any coercive legal mechanisms.[53]

It is important to note that of all the early AFL unions only the Amalgamated directly included a strong "arbitration" requirement in its constitution and adhered to it rigidly. The Amalgamated was "required to encourage the settlement of all disputes between employees and employers by arbitration."[54] All local divisions were required to offer to engage in arbitration before going on strike.

The Amalgamated's arbitration requirement originated from several sources. First, it can be traced directly to the Knights of Labor. The Amalgamated took over whole Knights lodges as it aggressively organized the industry in the wake of the Knights' decline. The Knights had met with notable success in the streetcar industry and that success fed the fledgling Amalgamated. Second, the arbitration strategy had secured a contract in the Amalgamated's home local, run from union headquarters in Detroit, as early as 1891. This union accomplishment was due to reformist Mayor Hazen Pingree's ability to get the car company to negotiate, something that few mayors were willing to attempt. This early success also thrust the Detroit local into the leadership of the national union.[55]

While these factors figured prominently in putting arbitration into the language of the Amalgamated constitution, they do not explain why the Amalgamated *alone* put such an emphasis on arbitration when other AFL unions had similar exposure to the concept of arbitration. Arbitration was central to the Amalgamated's strategy because when combined with the strike policy, arbitration worked. It worked uniquely well in the strongly anti-union legal climate of the 1890s since it legitimated the union in spite of the union's militant strike policy. As long as arbitration was central to the union's policy, it transformed much of the strike issue into a moral one favoring the union. The political and legal strength of the car companies thus became liabilities: the car companies could never adequately explain why they could not arbitrate honest differences with their employees.

The Amalgamated also knew that strikes were necessary to achieve union demands. Without at least the threat of a strike, no company would agree to arbitrate. At the same time, despite prior criticism that strikes were antisocial or even criminal,[56] the union's offer to arbitrate made its use of the strike legitimate. Strikes, as defined in the Amalgamated's constitution, were measures of last resort, engaged in only against companies that would not arbitrate.

53. C. MOTE, *supra* note 37, at 195.

54. On the process of arbitration through Amalgamated contracts, see E. SCHMIDT, *supra* note 6, at 199-207.

55. E. SCHMIDT, *supra* note 6, at 193-94. Schmidt suggested that Hazen Pingree was responsible for the Amalgamated's arbitration policy. The most notable study of Pingree's Detroit administration does not confirm this conclusion, however, but states instead that Pingree pressed for arbitration. This position did not differ sharply from that of other mayors stuck between a powerful union and a politically well-connected streetcar company. M. HOLLI, REFORM IN DETROIT: HAZEN S. PINGREE AND URBAN POLITICS 4 (1969).

56. *Supra* note 52.

Even if a strike failed, arbitration served as a permanent fallback position and thereby demonstrated the Amalgamated's good faith.[57] Although the properly prepared strike remained a formidable tool, once a strike was initiated, the arbitration demand mollified antiunion sentiment and helped the union organize the necessary community support. And if the union chose to strike, the arbitration demand also gave it a moderate way out. The union did not need to win strikes since forcing the companies into arbitration was a significant victory. Thus, arbitration prevented the continual wearing down of union resources and helped sustain a vigorous strike policy. The strike became a well-planned implement in the arbitration process.

When strikes were won, the company and the union entered into labor contracts. Normally, the first feature of such contracts consisted of the company recognizing the union and guaranteeing the right of workers to belong to the union. Then, after wages, hours, and working conditions were included in the contract, the union insisted upon a clause binding both parties to agree to arbitration of all disputes arising under the contract. The method of arbitration was also always spelled out and almost always the same; each party was to choose one arbitrator and the two together were to select a third.[58] This moved the Amalgamated from one phase of arbitration, which focused on compromise between two intransigent positions, to a result-oriented arbitration underpinned by contract unionism. In essence, the Amalgamated and the companies were involved in a meaningful dialogue based upon joint administration of union contracts in the resolution of labor disputes.

In 1901, the union administered twenty-two collective bargaining agreements. This number rose to over 100 in 1907 and to over 200 in 1915, and virtually all of the agreements contained arbitration clauses.[59] Once this process was in place, there was, at least in theory, a mechanism to settle complex disputes over wages, hours, and working conditions without strikes. In practice, however, strike activity continued because either companies dishonored the contracts or the parties could not agree on a new contract after an old one

57. This arbitration policy is briefly summarized in SCHMIDT, *supra* note 6, at 193-207. This policy is also referred to in virtually every issue of *Motorman and Conductor.*

58. Following is the arbitration clause from one of the first Amalgamated arbitration agreements, the 1896 Detroit agreement. The full text of the agreement was published in MOTORMAN AND CONDUCTOR, July 1896, at 186, as an example for other locals to follow. Such agreements were often printed in the union's newspaper and were an important part of the legal culture of the Amalgamated:

> Sect. 6. Should any difference arise between the parties hereto that cannot be adjusted by the voluntary agreement of the parties hereto the matters in dispute shall be submitted, at the request of either party, to a board of arbitrators, of three persons, and the findings of a majority of such board shall be binding upon the respective parties hereto. The parties hereto shall each choose one member and the two thus selected shall choose a third. The three thus chosen shall constitute such board of arbitrators. Vacancies that may occur shall be filled in the same manner. When a case is submitted to arbitration each party shall name arbitrators within three (3) days. In case of the failure of either party to so name its arbitrators, it shall forfeit its case.

59. E. SCHMIDT, *supra* note 6, at 157. These dates were compiled by Schmidt from *Motorman and Conductor.*

expired. In the former situation, the persistent volatility of the car industry prompted large syndicates which ran non-union companies to purchase small car companies with union contracts and then refuse to honor the previously negotiated contract. Although these agreements were not always dishonored, when they were the union in effect had to reestablish itself by, among other methods, resorting to strike activity.

The union absolutely insisted that "arbitration" meant contractual arbitration imposed by joint agreement of the parties, rather than the kind of compulsory arbitration imposed by the government.[60] This position was a strong one, very much influenced by deep suspicion of the national government as unalterably antilabor, an experience rooted in the federal government's intervention in the Pullman strike of 1894.[61] However, this resistance to compulsory arbitration did not, in the end, extend to attempts by local courts to order specific performance of the contract to arbitrate. Indeed this tactic was emblematic of a strategy to force the companies to the bargaining table. It also, for the first time, put the Amalgamated in an alliance with city governments who were tired of the "car wars" and tired of wearing out their police departments on strikes that seemed endless.[62]

The Amalgamated's willingness to arbitrate may seem surprising but can be understood in the context of their repeated statement that the union could not "lose" an arbitration. *Motorman and Conductor*, the union journal, repeatedly published arbitration awards that *always* included pay gains and often included work concessions as well.[63] Sensitive to charges that the arbitration strategy cost members gains that might have been won through strikes, the union compared the gains it won from strikes, mediation, and bargaining. It conceded that it often won the highest increases from bargaining but recognized that arbitration awards were often compromises reached only after bargaining failed and could therefore be expected to be lower. It also conceded that it could not readily measure the gains won in strikes. For one thing, many strikes ended in arbitration so one could not pinpoint the source of the victory. Secondly, many strikes were lost, considerably reducing the average gain. How many strikes were won or lost is not easily determinable, since both sides often claimed victories. It does seem, however, that the union lost

60. MOTORMAN AND CONDUCTOR, Apr. 1895.

61. The origin of compulsory arbitration occurred in the area of the railroads, in the context of the national emergency of World War I. *See generally* Eggert, *supra* note 39. On the judiciary's response to the first compulsory arbitration laws, see Simpson, *Constitutional Limitations on Compulsory Industrial Arbitration Laws*," 38 HARV. L. REV. 753 (1925). In the general context of the Pullman strike, see N. SALVATORE, EUGENE V. DEBS: CITIZEN AND SOCIALIST(1982); MOTORMAN AND CONDUCTOR, April 1895.

62. The (Des Moines) Register and Leader, Oct. 2, 1912, at 1, col. 7; *id.* Oct. 4, 1912, at 1, col. 7; *id.* Oct. 5, 1912, at 1, col. 1; *id.* Oct. 7, 1912, at 1, col. 1; MOTORMAN AND CONDUCTOR, April 1912, at 36; *id.* Nov. 1911, at 30-31; E. SCHMIDT, *supra* note 6, at 194.

63. These awards were printed in virtually every issue of *Motorman and Conductor.* The 1912 Des Moines agreement, for example, was printed in MOTORMAN AND CONDUCTOR, Apr., 1912, at 36.

nearly eighty percent of its strikes between 1894 and 1900 and approximately twenty percent between 1900 and 1910.[64]

The idea that arbitration *always* produced a union victory must be seen as a manifestation of the process itself. The arbitration award was necessarily a compromise, but it was one that had to be reached in the quiet of an office by three people, one of whom represented the union and another who was amenable to the union representative. The goal of all three people was to at least minimize the potential for strike damages, and the company had already agreed to be bound by the result. Specifically, the company had already chosen not to fight the strike at all costs.

Besides the inherently compromising nature of the process, another part of the union victory stemmed from the employers' wealth, intransigence, and poor labor history. The union knew the nature of its opposition quite well. Working conditions were easily documented as not only inhumane, but dangerous to the public. Within the infrastructure of the companies, profit levels easily financed raises without seriously undermining net profits. Finally, the union knew that strikes were expensive to the company. An official of the Philadelphia line admitted, after a violent 1910 strike, that no company could any longer "win" a strike. That official, Daniel T. Pierce, said: "One of the lessons drawn from the Philadelphia labor battle is that no street railway company can . . . win a strike of its motormen and conductors . . . . [A] street railway can only win a strike at a cost greater than the value of the victory to be obtained."[65] A good deal of the impetus for the progressive movement can be found in such logic.

The union's fight to organize was an extended one. The move toward arbitration did not reduce the number of strikes or make the union less aggressive. The more contracts the union won, the harder it pushed to organize more companies. The success of organizing drives, especially in the years after 1907, were marked by an increased number of strikes — reaching fifteen strikes per year by 1911.[66] The year 1910 saw the union involved in fifteen strikes and lockouts and twenty-three arbitrations.[67] This level of activity is an immense increase for a union with perhaps 150 contracts in force.

Arbitration was often not an alternative to a strike, but the end product of one; both sides agreed to arbitrate their differences in order to end a conflict that was too costly to carry on. The Amalgamated, however, knew that it always won two things with an agreement. First, it won *de facto* union recognition because the company signed an agreement with the union to "arbitrate" differences between management and labor. Second, it knew that it would win wages and conditions-of-living concessions in the arbitration because those

64. MOTORMAN AND CONDUCTOR, Jan. 1911.
65. MOTORMAN AND CONDUCTOR, Feb. 1911, at 12.
66. MOTORMAN AND CONDUCTOR, Jan. 1911, at 19.
67. *Id.*

conditions were objectively inferior and because labor had substantial power on the arbitration panel.

Arbitration agreements, even if not followed by the employers, did not seriously set the union back. The union could always strike again. The pattern of repeated strikes in city after city resulted from employers repeatedly reneging on such agreements. Employers reneged for a number of reasons. Often, employers believed that arbitration awards would not be so extensive as they turned out to be and therefore were unwilling to meet the agreement's conditions. Other times, employers never really agreed to the conditions but just wanted to buy time or harass the union.[68]

The union's demand for arbitration, then, was simply one tactical weapon available in their struggle against the car companies. Arbitration, however, was not perceived by the union as a progressive reform. The union's use of arbitration had its roots in natural law notions of fairness and equity, adopted in modified form from the Knights of Labor and earlier American workers' movements.

III
THE COURTS ENFORCE ARBITRATION

The Amalgamated's arbitration policy rested on the establishment of private contracts, each containing an arbitration agreement, between the locals and the streetcar companies. The union preferred private contracts because it feared that government intervention would inevitably favor the employers. As a result, though it often utilized state arbitration boards, the Amalgamated initially did not seek to enforce contracts in the courts.[69] In time, however, the union began to turn more to the courts to enforce its contracts.

In the early years of the twentieth century, the Amalgamated was extensively involved in strike activity. The union orchestrated as many as ten to twenty strikes per year.[70] At the same time, the union won many contracts, almost all of which called for the arbitration of disputes. Obtaining contracts, however, did not end the union's struggle. Many employers entered into contracts only to terminate a strike and build strength in order to break the union in the future. Consequently, the union had to enforce its contracts by continually threatening to strike. Two exceptionally bloody strikes occurred in Columbus, Ohio, in 1910, despite the presence of an arbitration contract. The Columbus strikes illustrated the fundamental weakness of the union's arbitra-

68. *See, e.g.*, Heston, *The Street Car Strike at Columbus*, 11 INT'L SOCIALIST REV. 133 (1910), on the Columbus strike of 1910 which occurred in spite of an existing arbitration agreement.

69. MOTORMAN AND CONDUCTOR, April 1895, at 19.

70. E. SCHMIDT, *supra* note 6, at 174-78, discusses the high level of strike activity carried out by the Amalgamated. While there is no general census of their strikes, *Motorman and Conductor* appears to have reported virtually all of them. This is my own estimate based on all of the accounts in *Motorman and Conductor*.

tion policy and taught the Amalgamated the importance of using legal means to enforce its arbitration contracts rather than relying solely on the strike.

By the 1920s, the union started to find an ally in the courts. The laissez-faire freedom of contract doctrine that had been used heavily by employers to defeat both unions and social welfare legislation[71] increasingly came to be used to enforce the Amalgamated's contracts. Under that doctrine, because the companies had freely chosen to enter into labor contracts with the Amalgamated, the courts could order the companies to honor their contracts.

The freedom of contract doctrine was first used to enforce an Amalgamated contract during the August, 1911 Des Moines strike.[72] The conflict began when a union conductor was fired without the discharge hearing provided for by the union contract.[73] The Amalgamated reacted in its customary way, sending an Executive Board member to Des Moines to secure enforcement of the contract, but prepared to strike if necessary. The company's intransigence pushed the union into a strike and although no strike violence occurred, the city's corporation counsel immediately applied for an injunction against the strike. After arguing that the public required regular streetcar services, the city's petition pointed out that there was an arbitration agreement in effect between the two parties and that the company had "refused to submit the controversy to a board of arbitration as provided in said working agreement."[74] A city court immediately ordered that the striking conductor be reinstated, the carmen return to work, and the company run its cars in regular service.[75] The union quickly seized on that injunction as a major union victory — a vindication of the Amalgamated's twenty year arbitration policy.[76]

The Amalgamateds failure to even attempt to enforce its contracts in courts for nearly fifteen years evidences the level of the union's alienation, like other unions of the time, from a legal system that they could not trust. But once a court actually enforced an Amalgamated contract, the union quickly recognized that the Des Moines injunction was more than a symbolic victory. Most of the union's strike activity thenceforth was used to enforce existing contracts instead of increasing the number of unionized systems. If the courts would take up part of the burden of enforcing contracts, the union would be free of that obligation.

It was not only the Amalgamated that was interested in the "Des Moines plan," as it came to be called. The plan was widely circulated in Midwestern newspapers and was thereafter seized upon by local governments as a tool to end local "car wars." There was thus a double irony to the Amalgamated's use of injunctions after Des Moines: not only did the union begin to seek the very judicial decrees which had for so long been used to stymie its interests

71. *See infra* notes 81-116 and accompanying text.
72. MOTORMAN AND CONDUCTOR, Aug. 1911, at 6-8.
73. *Id.*
74. *Id.*
75. *Id.*
76. *Id.*

and actions, but the courts issued these decrees based on the same laissez-faire doctrine underpinning its pre-Des Moines orders. Far from becoming more enlightened, the courts were simply recognizing the power of the union embodied in its contracts with companies.[77] This irony may well explain why the Amalgamated and its lawyers did not originate the Des Moines plan or argue for it prior to its adoption in 1911.[78]

IV
CLASS LEGISLATION: THE AMALGAMATED'S LEGISLATIVE GOALS

It was not unreasonable for the Amalgamated to have expended some of its efforts and resources in order to achieve change through the legislature. Yet the Amalgamated did not trust the lawmaking process because it felt that the law was in the hands of labor's enemies. This perception resulted from the courts' reluctance to broadly interpret the police power of state legislatures.[79] Thus, legislation that served workers' interests — wage and hour legislation, industrial safety legislation, and municipal ownership legislation — was generally held unconstitutional.[80]

The Amalgamated, however, had a very active legislative program, and was not deterred by either its failure to get important measures through the legislatures or the practice of courts to hold new laws unconstitutional. The Amalgamated's legislative program was motivated by dual considerations: the desire to move ideas into the forefront of political discussion and the desire to expose the greed of the railroad companies who placed a higher value on ac-

77. The misuse of the injunction was a major grievance of the early labor movement against the legal system. The movement recognized the commonality of class interests between the employers and the local judiciary. For a detailed discussion of the context of the labor injunction, see E. WITTE, *supra* note 39, at 83-133; Ralston, *Use and Abuse of Injunctions in Trade Disputes*, 36 ANNALS 89 (1910). Injunctions were not often used in street railroad strikes because, given existing interpretations of public order laws, they were unnecessary. The employers did not need an injunction to obtain the assistance of the city police and other law enforcement forces since ordinary interpretations of existing criminal laws easily permitted such intervention. Hence, police arrests and court prosecution took the place of the injunction in street railroad strikes, even though the employers occasionally sought injunctions for both symbolic purposes and also to bolster the legitimacy of their positions.

78. MOTORMAN AND CONDUCTOR, Aug. 1911, at 6-8. It is important to place the Des Moines plan in context. It was unique in that a court had ordered compliance with a union contract. The Amalgamated had been concerned with various legal options to enforce its contracts because any legal option was preferable to relying on the strike for enforcement. Before the Des Moines strike, the best way to protect the contract was through state legislation. This issue was precisely at the heart of the Columbus strike where the union was powerless to enforce its contract. *Motorman and Conductor* had urged "formulating a law that [would] be more effective in protecting the interests of the public against public utility strikes," and argued that the people "have the right, through legislation, to control public utility corporations." MOTORMAN AND CONDUCTOR, Nov. 1910, at 11. This statement indicates that the Amalgamated had substantially more confidence in the legislative process than in the judicial process, perhaps because they had met with some success prior to 1910.

79. *See* B. TWISS, *supra* note 21, at 110-40.

80. *Id.*

cumulating profits than on human safety. The union's major legislative objectives were: (1) municipal ownership; (2) vestibule laws; (3) air brake laws; and (4) hours of work legislation.

The demand for municipal ownership was the most political of the union's legislative goals. It originated in the common struggle of rail unions against a railroad industry dominated by monopoly capitalists who made money on real estate and on cartels that profited from the transportation of basic commodities. Drawing heavily on the European experience of public ownership and on public resentment of the railroad industry that stemmed from the early populist movements of the 1870s, the demand for public ownership served a tactical function as well as a political one. As a proposed solution to the problem of street railroad strikes, it was a useful negotiating tool. It also eloquently bespoke the ultimate political goals of the union.

The Amalgamated's campaign for municipal ownership took a number of forms. On the highest level, it was part of the union's social democratic political agenda. Steps toward municipal ownership were published, along with news of municipal ownership in Europe.[81] Municipal ownership had a practical political quality to it because, unlike most legislation, which had to be passed by state legislatures, municipal ownership legislation could be enacted by city councils and was therefore a more attainable union goal at the turn of the century. Still, the union achieved little success with actual municipal ownership in the period before World War I. The Detroit local, among the strongest, succeeded in attaining municipal ownership. Cleveland achieved municipal ownership in 1908, but the action led to a violent strike as the new municipally owned company renounced its Amalgamated contract and refused to negotiate with the union.[82]

The Amalgamated knew that it generally fared better in legislatures than it did in courts. In a world where legal doctrine induced bitter debate over whether the state's police power permitted a law providing for a simple stool upon which a motorman could sit, the issue of municipal ownership was almost scandalous since it was based on the complete antithesis of the period's dominant laissez-faire constitutional ideology.[83] William Mahon, the president of the union and editor of *Motorman and Conductor*, laid out this sharply different analysis of the Constitution as follows:

> [T]hose who desire to rob their fellow men and prevent the advancement of civilization . . . tried to make our revolutionary fathers be-

81. Regular essays on socialism appeared in *Motorman and Conductor*. Eugene Debs was among the socialist writers who contributed essays to the magazine. Union president Mahon was also a contributor. Socialist literature and literature preaching Christian Socialism was also published. MOTORMAN AND CONDUCTOR, June 1907.

82. Similarly, the union's Canadian experience, where municipal ownership was much more widely achieved, was also negative. City-owned companies in Port Arthur and Calgary refused to negotiate union contracts. MOTORMAN AND CONDUCTOR, Sept. 1913, at 32; MOTORMAN AND CONDUCTOR, July 1904, at 8.

83. *See, e.g.*, Brown, *The Detroit Street Railway Decision*, 33 AM. L. REV. 853 (1899).

> lieve in the divine right of kings, and that it would be unconstitutional for them to establish a republic on this side of the Atlantic, and when we wanted to emancipate the slave, and extend the right of franchise to all mankind, they again raised the same old cry "unconstitutional." Now when the conditions have arisen that make it necessary to take another step along the road of civilization by the municipality assuming control of its street railways to protect the public and employees from robbery and plunder and extend the lines of civilization, the same old cry of "unconstitutional" is raised.[84]

On another occasion, Mahon again poked fun at the predominant legal theory of the day. Milwaukee's socialist city council had passed a city ordinance providing for free water for washerwomen, after they had been advised by the city attorney that the law was unconstitutional.[85] Mahon pointed to an obvious double standard: if the city council had given land to a street railroad, free water and taxes to a corporation, or a free franchise to a streetcar company, such actions would clearly be constitutional — indeed, they were standard practice. It was necessary, said Mahon, for legislative bodies to "break away from . . . old and foolish notions of constitutional rights when it comes to making laws that will actually relieve destitution and give proper assistance from the government to the people."[86]

The Amalgamated worked hard to obtain meaningful safety legislation, which was the most conservative and attainable of its goals. Of all the safety measures the union advocated, the most financially insignificant in its eyes, yet the most resisted by the companies, was the provision for a safe and comfortable place for the motorman to work — the exposed vestibule in the front of the car. The union achieved its first "vestibule law" in Ohio in 1893, the year of its founding.[87]

The success in Ohio belied the complexity of the controversy that followed. The employers fought bitterly because the mere existence of such laws violated their legal right to control private property.[88] Ultimately, the issue did not concern vestibules. The companies, for example, resisted a Kentucky

84. MOTORMAN AND CONDUCTOR, Sept. 1898, at 6.

85. Mahon, *Milwaukee's Unconstitutional Ordinance*, MOTORMAN AND CONDUCTOR, Jan. 1911, at 37.

86. *Id.*

87. 1893 Ohio Laws 220. The Ohio Vestibule Law required street car companies to install screens to protect motormen from foul weather. It is reprinted in Mahon, *History of Organization Among the Street Railway Employees of America*, MOTORMAN AND CONDUCTOR, Nov. 1904, at 11. A car company from Springfield refused to implement the law, seeking to test it in the state courts. The constitutionality of the law was upheld the next year in State v. Nelson, 52 Ohio St. 88, 39 N.E. 22 (1894).

88. Since the cost of a vestibule was estimated at fifteen dollars in testimony before the Connecticut legislature in 1897 (where the bill failed), the real issue was the control of capital. MOTORMAN AND CONDUCTOR, Mar. 1897, at 6.

law that provided only for a stool for the motorman.[89] Even in Ohio, when the union sought to extend the protection of the vestibule law to conductors the bill was vetoed by Governor Harmon because "the measure [was] class legislation."[90] The union tried again in 1911 only to meet the same fate.[91]

The Amalgamated put its full political clout behind vestibule legislation primarily because it was the most visible safety issue facing the company, although arguably the air brake issue was more important.[92] The energy put behind the vestibule bill reflected the merger of Amalgamated's concern for the simple health of its workers and the staggering human cost of the street railroad industry. In 1909, thirty-six Amalgamated members were killed on the job.[93] The cars were therefore responsible for seventeen percent of all the deaths of union members, more than any other cause except tuberculosis.[94]

That the car companies would not spend a mere fifteen dollars per car on safety (the cost of one vestibule) was a powerful argument against the "laissez-faire" position of the car companies. The union's success with the "vestibule" issue, however, was a mixed one. Minnesota, Maryland, Wisconsin, and Indiana followed Ohio's example during the middle 1890s.[95] But in other states the measure failed. In Illinois, for instance, the vestibule bill passed the lower house 108 to 4 and died in a Senate Committee.[96] And in Texas, the legislature passed the bill only to have it declared unconstitutional by the Texas Supreme Court.[97]

One of the ironies of the Amalgamated's hostility to the courts is that even in an era where labor legislation usually failed to pass constitutional mus-

89. Typical language can be seen in the Kentucky Court of Appeals' decision in Silva v. City of Newport, 150 Ky. 781, 785, 150 S.W. 1024, 1025-26 (1912). Although the issue here concerned only the provision for a stool, the case was similar to a vestibule case. Justice Settle wrote:

> [I]t is within the police power of the State to protect any class of its citizens, which stands in need of such protection. And it is not wide of the mark to say that the motormen who operate street cars are in need of such protection . . . the effect of enforcing the ordinance will [also] be to protect the traveling public.

Id. at 785, 150 S.W. at 1025-26.

90. MOTORMAN AND CONDUCTOR, Oct. 1911, at 39.

91. *Id.*

92. *Motorman and Conductor* argued that, "[a]ccidents would often be averted for the motorman would not be blinded by the storm and the car would not be allowed to rush into unseen danger." MOTORMAN AND CONDUCTOR, Mar. 1897, at 6. Besides the narrow issue of visibility a larger safety argument was related to fatigue and conditions of work; long hours of standing at careful attention produced a fatigue that increased the possibility of accidents.

93. MOTORMAN AND CONDUCTOR, Oct. 1911.

94. *Id.*

95. E. SCHMIDT, INDUSTRIAL RELATIONS IN URBAN TRANSPORTATION 128, 132, 134 (1937).

96. MOTORMAN AND CONDUCTOR, June 1911, at 39.

97. Beaumont Traction Co. v. State, 46 Tex Civ. App. 576 (1907); *see also* MOTORMAN AND CONDUCTOR, Oct. 1911, at 39. New York State's first vestibule law, a Yonkers city ordinance, was declared an unreasonable use of the police power — and thus a violation of the state constitution. The court held that a preponderence of the evidence showed that the vestibule was "more of a menace than a protection to health and safety." City of Yonkers v. Yonkers R.R. Co., 51 A.D. 271, 273 (1900).

ter as unlawful exercises of the "police power," the vestibule law fared better in the courts than in the legislatures. Perhaps the ultimate proof of the insignificance of the vestibule laws and the viciousness of corporate resistance to them, in view of the obvious public good at small cost, is that some courts had no problem upholding them.[98]

The struggle to obtain air brake legislation was much harder. In comparison to the fight for vestibule legislation, company resistance to air brake legislation was even stiffer because, despite the prospect of greater savings of human life, more money was at stake. Efficient braking action was obviously important given the crowded conditions under which the cars operated. Yet companies often relied on hand brakes. Given the weight and speed of the cars, the idea that hand brakes were adequate to stop the cars was ridiculous. The air brake, however, involved relatively simple technology, stopped the cars more quickly, and required less exertion on the part of the motorman. Michigan adopted an air brake law in 1903 forcing the Detroit system to equip its cars in 1904,[99] an action that was heralded by the Amalgamated.[100]

Detroit's city ordinance requiring car companies to install air or electric brakes was challenged by the railway company in *People v. Detroit United Railway*.[101] In an extensive evidentiary hearing, the company offered a host of arguments to show the unreasonable nature of the city's exercise of the police power. They argued that: the air brake was experimental and it was not clear that it actually performed better than the hand brake; the presence of two braking systems (air brake and back-up hand brake system) would confuse the motormen; and the $350,000 installation cost for the company's several hundred cars was prohibitive. The court's opinion revealed how far the police power doctrine had come in the ten years since *State v. Nelson*.[102] "It is past controversy," stated the court, "that the city may regulate the conduct of defendant's business to the extent of requiring reasonable safeguards against danger."[103] As legal ground for this statement, the court relied on the full range of streetcar safety cases that had resulted from the Amalgamated's policy initiatives.[104] A group of Brooklyn railroad companies subsequently challenged a similar statute, mainly on the grounds that the cost was excessive and deprived them of their property without due process of law. The companies

98. *See, e.g.*, Silva v. City of Newport, 150 Ky. 781, 785, 150 S.W. 1024, 1025-26 (1912).

99. The law provided as follows: "[o]n and after May 1, 1902, no street car or cars shall be operated or run on any street, avenue, or highway in the city of Detroit, unless the same be equipped with air or electric brakes." *See* People v. Detroit United Railway, 134 Mich. 682, 684-85, 97 N.W. 36, 38-39 (1903).

100. MOTORMAN AND CONDUCTOR, Sept. 1904.

101. 134 Mich. 682, 97 N.W. 36 (1903).

102. 52 Ohio St. 88, 39 N.E. 22 (1894).

103. *Detroit United Railway*, 134 Mich. at 686, 97 N.W. at 38.

104. *See, e.g.*, City of Detroit v. Detroit Citizens' Street Railway Co., 184 U.S. 368 (1902); Lake Shore and Michigan Southern Railway Co. v. Ohio, 173 U.S. 285 (1899); Chicago & Alton Railway Co. v. City of Carlinville, 200 Ill. 314, 65 N.E. 730 (1902); *Detroit United Railway*, 134 Mich. 682, 97 N.W. 36 (1903); City of Kalamazoo v. Traction Co., 126 Mich. 525, 85 N.W. 1067 (1901).

lost for substantially the same reasons that the Detroit company had lost ten years before.[105]

The union viewed legislation prescribing maximum hours of work as more crucial to worker safety than air brake legislation. According to *Motorman and Conductor*, "[m]ore accidents [could] be traced to long hours of service than any other cause."[106] While the companies were often quick to blame accidents on the employees, the union argued that the real cause was inhumanely long working hours.[107] In this area, the union enjoyed moderate success. Most labor victories in general involved maximum work hours legislation for women and children.[108] But between 1886 and 1906, eleven states passed laws making ten or twelve hours the maximum day's work for street carmen.[109]

Company resistance to maximum hours legislation was strong because of the unique nature of work-time requirements in the car industry. The major traffic times spanned at least twelve hours with rush hours at both ends of the work day. Since business sharply dropped immediately before and after rush hour, a two shift schedule was costly. In addition, the workers themselves were inconsistent on the issue, often needing the pay that their long hours provided. In 1911 and 1912, when the Massachusetts legislature was considering an Amalgamated- sponsored "nine in eleven hour bill," which allowed for no more than nine hours of work during an eleven hour period (a remedy for the time-consuming "split shifts"), members of some Amalgamated divisions sent protest petitions to the legislature, forcing Vice-President Reardon to come from Detroit to represent the union's position.[110] The measure was defeated in the legislature by one vote.[111] Union concern for work hours legislation did not extend to wages, however, because the Amalgamated strongly opposed minimum wage laws on the ground that they would invariably reduce wage levels. It feared that any minimum wage standard would become the prevailing wage.[112]

Aside from its fight for municipal ownership, vestibule laws, air brake

105. People v. Public Service Commission, 157 A.D. 698, 142 N.Y.S. 942 (1913).

106. MOTORMAN AND CONDUCTOR, Sept. 1904.

107. *Motorman and Conductor* blamed high injury rates on the companies' insistence that operators work eleven to fourteen hours a day and that they keep the cars moving quickly. MOTORMAN AND CONDUCTOR, Jan. 1900, at 10.

108. *See* Brandeis, *Labor Legislation*, 3 HISTORY OF LABOR IN THE UNITED STATES, 1896-1932, *supra* note 1, at 399-563. This is a classic survey of the scope of protective labor legislation which shows that society's concern for and protection of women and children preceded its protection of men, and, in fact, partially paved the way for the more general hours legislation that also encompassed men.

109. *Id.* at 548-50. The federal law on railroad workers generally is 34 Stat. 1415-17 (1907), upheld by the United States Supreme Court in Erie R. R. Co. v. New York, 233 U.S. 671 (1914).

110. MOTORMAN AND CONDUCTOR, Mar. 1911, at 24; Jan. 1912, at 12; Apr. 1912, at 27, 31; May 1912, at 33; Feb. 1912, at 12.

111. MOTORMAN AND CONDUCTOR, June 1911, at 23.

112. MOTORMAN AND CONDUCTOR, Mar. 1913, at 5-7.

laws, and maximum hours laws, the union was also active in other legislative areas. For example, to provoke federal intervention in strikes, many car companies painted the words "U.S. Mail" on all their cars. The disruption of mail service had been a factor in the government's decision to use federal troops in the 1894 Pullman strike.[113] Consequently, the Amalgamated was careful to let "mail cars" pass unmolested. However, if all the cars were so marked, it was impossible for the union to block any cars at all in a strike. The union repeatedly protested this company practice to their congressional representatives and to postal authorities. A postal regulation resulted which provided that removable signs be used and posted only while cars actually carried mail.[114]

For a union whose resources were taxed by strikes and which believed in "direct legislation" because federal and state legislative bodies, like the courts, were in the hands of monopoly capitalists, such lobbying initiatives were significant.[115] They indicated that, despite the apparent contradiction, the Amalgamated, like other social democratic political organizations and trade unions of the day, had great faith in democracy and in a social democratic future for America. In addition, they saw the legislative fights against the employers as a propaganda war which, like the demand for arbitration, was calculated to win over "neutral" segments of the communities.[116]

V
CONCLUSION

American labor law is most often viewed as a body of reform measures introduced by corporate liberals as an alternative to the large-scale class violence that occurred throughout the country from the 1880s to the 1930s. However, this analysis is class-biased and involves assumptions about the history of labor law that understate the importance of the workers. Organized in labor unions, the workers had goals that reflected their own class interests and their own experiences. The ultimate evolution of American labor law cannot be adequately understood without an appreciation of the contribution of organized labor.

As illustrated by the Amalgamated, labor organizing reached a sophisticated level by the turn of the century. Beginning in the early 1890s, the union correctly assessed the strengths and weaknesses of the car companies. It turned this understanding into a successful strategy that coupled virtually un-

113. *See* S. BUDER, PULLMAN: AN EXPERIMENT IN INDUSTRIAL ORDER AND COMMUNITY PLANNING 1880-1930 183 (1967).

114. MOTORMAN AND CONDUCTOR, May 1897, at 4.

115. The theoretical basis for the direct legislation movement was the domination of legislatures by corporations. Big business succeeded in blocking laws that benefited working people. The union's solution was to put particular laws to popular votes, a process termed "direct legislation." MOTORMAN AND CONDUCTOR, Aug. 1905, at 6.

116. Porter, *No Beans and Rice for Columbus*, 10 INT'L SOCIALIST REV. 1069, 1069-71 (1910); Heston, *supra* note 68.

precedented street violence with creative and innovative legal initiatives that led to the organization of strong unions within a strongly anti-union industry during an epoch of anti-labor political and legal activity.

The key to the Amalgamated's success was its shrewd comprehension of the relationship between legal and social action.[117] Critical to its strategy was its adoption and reformulation of the concept of arbitration from the defunct Knights of Labor. The Knights' arbitration policy had been weak and ineffective and led to its reluctance to strike. The employers interpreted this reluctance as a weakness which could be exploited. The Amalgamated, however, was willing to aggressively strike at a time when the strike was a politically difficult and marginally legal activity. Yet the Amalgamated legitimated this strike activity through its espousal of an arbitration policy that led to the favorable (and accurate) perception that the Amalgamated was flexible and willing to settle, while the companies were intransigent and guilty of escalating strike violence.

The employers were caught in a kind of trap. They could rely on violence, through the use of either private guards or local police, to protect their property rights. But violence had high social costs. In other industries, many employers were able to use violence and blame it on the unions. The Amalgamated's arbitration policy seriously weakened that option in the streetcar industry. At the same time, to agree to arbitration meant recognizing the union and automatically losing the major strike issue. Once the employer sat down to arbitrate with the union, it implicitly recognized that the workers were unionized and that the union represented them.

The call for arbitration to end industrial violence became widespread after the early years of the twentieth century. Many states created arbitration commissions before the federal government finally established a commission for railroads in 1925. These efforts are popularly seen as part of the middle class progressive reform movement's effort to build some kind of legal framework to contain unregulated class violence. However, for the Amalgamated, arbitration was not a middle-class reformers' idea but one part of a carefully thought out union strategy to fight for and achieve the goal of union recognition. This strategy, at least in the short run, worked. Yet, while the Amalgamated achieved the goal of union recognition, it lost control of its vision. For example, the union demand for municipal ownership, which was part of a social democratic vision of the American future, was achieved by socializing expensive and money-losing urban services. The Amalgamated's commitment to the law carried within it an optimistic notion of what working class political action could create if in control of the political process. With the failure to achieve that political goal, arbitration was reduced to an "official" form to resolve differences between employers and workers. At that point, generally

117. W. GAMSON, STRATEGIES OF SOCIAL PROTEST (1975), demonstrates this claim empirically, showing historically that social movements willing to use violence have a greater chance of achieving their goals.

well after the Progessive era, it was widely adopted across class lines. And one critical element of that legal form is collective bargaining — a common, legally enforced mechanism central to modern labor law.

The current importance of collective bargaining, however, raises a whole set of complex issues. By moving to a model of "contract unionism," unions now primarily serve a legal function. Their major responsibility has become the negotiation and management of labor contracts. Thus, unions have moved from working-class political action to the courts and negotiating rooms — the very places where the early unions felt disadvantaged and discriminated against by a legal system run by the wealthier classes. As any observer of the modern trade unions knows, the unions are not having much success. The early Amalgamated, with one foot in the streets and union halls, and the other very tentatively in the courts and negotiating rooms, may serve as some kind of reminder of a union strategy that can work in the United States.