Positive Labor Rights in the United States

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"We can revolutionize conditions by amending the Constitution. We do not need a revolution."
George Blair to a meeting of New York labor leaders, 1901[1]

Introduction

The classic distinction between positive and negative rights is that negative rights require the government to restrain itself, thereby protecting citizens from the threats to liberty that state power poses. By contrast, positive rights (sometimes called social rights) require government intervention. They protect citizens not from government itself, but from other dangers, such as poverty, illness, or private violence.[2] Thus, negative rights are typically thought to promote liberty, while positive rights are often geared toward the promotion of equality. This dichotomy between positive and negative rights is often contested, yet many scholars of rights have long noted that, although we use the single term "rights" to describe a wide variety of protections, there are actually significant differences within the larger category.[3] For instance, while some constitutional rights primarily serve to cabin the scope of governmental involvement in the social and economic life of a polity, others were designed to require government to actively intervene in social and economic relationships. In using the terms positive and negative rights, therefore, I hope to capture the distinction between constitutional provisions that primarily mandate active governmental intervention and those geared toward protecting citizens from a tyrannical and intrusive state.

The conventional understanding has long been that America lacks a positive rights tradition. Even after the so-called "rights revolution" of the post-civil rights era, American constitutionalism is still largely understood as a negative-rights affair. Numerous scholars have characterized American rights as emphasizing individual privacy and civil liberties and opposing governmental responsibility and action. Judge Richard Posner has famously written that the Constitution is best understood as "a charter of negative rather than positive liberties," because "the men who wrote the Bill of Rights were not concerned that Government might do too little for the people, but that it might do too much to them," and constitutional law scholar Cass Sunstein has offered an explanation for why America lacks positive rights.[4] But is this

[1] Quote in "Organized Labor's Fight: First Steps to Secure Amendments to the Constitution" *New York Times*. June 13, 1901. P. 3

[2] Though most definitions of positive rights do include the necessity of government activity, Lippke R. L. Lippke, "The Elusive Distinction between Negative and Positive Rights," *Southern Journal of Philosophy* 33, no. 3 (1995). points out that not all distinctions between positive and negative rights rely on government action. Some definitions merely discuss the need for action on someone's part, not necessarily government's.

[3] For an example of an argument that there is no real difference between positive and negative rights see Stephen Holmes and Cass R. Sunstein, *The Cost of Rights : Why Liberty Depends on Taxes* (New York: W.W. Norton, 2000). However, many scholars have noted that there seem to be many different kinds of rights. For instance, T.H. Marshall distinguished between civil, political, and social rights. See T. H. Marshall, *Citizenship and Social Class, and Other Essays* (Cambridge [England]: University Press, 1950). In addition, scholars of human rights law often describe the difference between first and second generation rights. See, for instance, Joseph Wronka, *Human Rights and Social Policy in the 21st Century : A History of the Idea of Human Rights and Comparison of the United Nations Universal Declaration of Human Rights with United States Federal and State Constitutions* (Lanham: University Press of America, 1992). Finally, some rights scholars distinguish between civil rights and what they have termed social and economic rights. For one example see K. L. Scheppele, "A Realpolitik Defense of Social Rights," *Texas Law Review* 82, no. 7 (2004).

[4] Jackson v. City of Joliet, 715 F.2d 1200, 1203 (7th Cir.), cert. denied, 465 U.S. 1049 (1983). This particular excerpt is also cited in David P. Currie, "Positive and Negative Constitutional Rights," *The University of Chicago*

characterization correct? Have Americans used constitutional rights simply to restrain state power or have they also used constitutions to mandate that the state extend itself on behalf of its citizens?

The standard view about the American constitutional tradition was formulated largely in reference to the federal Constitution. However, if we expand our focus beyond the U.S. Constitution, we gain a new perspective on American constitutionalism in general and positive rights in particular.[5] In this paper, I examine the role of the labor movement in promoting positive rights at the state level, particularly in the development of state constitutions in the late 19th and early 20th century.[6] Through both case studies of individual states and a survey of state-level legislation and supreme court decisions, I demonstrate that labor organizations worked to enshrine positive mandates for government protection and regulation in constitutions.

Despite the increased pressure for labor regulation, by the middle of the nineteenth century, extensive controversies remained about which types of labor regulations were permissible and desirable. These controversies explain the appeal that constitutional change held for labor organizations. To many of those on the political left, the growing power of corporations (particularly in the mining and railroad industries) appeared to endanger laborers' lives and threaten democratic politics. Working conditions were often exceedingly dangerous and the typical workday was crushingly long. In addition, state legislatures (particularly in the Western United States) were often thought to be corrupted by the financial influence of national corporations.[7] However, under pressure from the populist and progressive movements, as well as early labor unions, state legislatures began to regulate labor relations and workplace safety. Such regulations were consistently challenged in state courts, some of which deemed these regulations

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Law Review 53, no. 3 (1986). Cass R. Sunstein, "Why Does the American Constitution Lack Social and Economic Guarantees?," (2003), http://ssrn.com/paper=375622

[5] A handful of political scientist have described the existence of positive rights in state constitutions. For example, see G. Alan Tarr, *Understanding State Constitutions* (Princeton, N.J.: Princeton University Press, 1998), 148-9. See also John J. Dinan, *The American State Constitutional Tradition* (Lawrence: University Press of Kansas, 2006). In addition, several legal academics have urged activists to litigate under the positive rights provisions in state constitutions order to expand social services. One example is H. Hershkoff, "Positive Rights and State Constitutions: The Limits of Federal Rationality Review," *Harvard Law Review* 112, no. 6 (1999). Another is Burt Neuborne, "State Constitutions and the Evolution of Positive Rights," *Rutgers Law Journal* 20 (1989).This paper goes beyond the observation that labor rights were included in state constitutions, and addresses the reasons that labor activists devoted resources to the drafting and ratification of constitutional rights. It asks why labor organization pursued positive constitutional rights instead of seeking only statutory regulations.

[6] One might also ask what factors account for the presence of labor protections in state constitutions. The answer to this question likely involves the relative strength of interest groups within the electorate, as well as the ease with which a state's constitution can be amended. Existing studies of state constitutions have addressed both of these factors. Donald Lutz demonstrates that some state constitutions are much more frequently amended than others and argues that "the variance in the amendment rate is largely explained by the interaction of two variables: the length of the constitution and the difficulty of the amendment process." Tarr explains that the content of these documents is also determined by "ordinary" or interest group politics. Given the importance of both interest group politics and structural constraints on constitutional change, one would expect to see positive labor rights added to constitutions that were easy to amend in the states where labor groups were relatively strong. This paper does not address that hypothesis. It asks a different question: why did labor advocates attempt to create constitutional protections?

[7] Thomas Goebel, ""A Case of Democratic Contagion": Direct Democracy in the American West, 1890-1920," *The Pacific Historical Review* 66, no. 2 (1997). See also Tarr, *Understanding State Constitutions*, 119-20. For more on the relationship between corporations and state development, see Richard Franklin Bensel, *The Political Economy of American Industrialization, 1877-1900* (Cambridge [England] ; New York: Cambridge University Press, 2000).and Gerald Berk, *Alternative Tracks : The Constitution of American Industrial Order, 1865-1917*, The Johns Hopkins Series in Constitutional Thought (Baltimore: Johns Hopkins University Press, 1994).

unconstitutional because they appeared to apply only to a single class of citizen, and to restrict the laborers' freedom of contract.[8]

From the perspective of today's labor law, which governs labor relations primarily through federal statutes, state law may seem largely unimportant. However, state law constituted the majority of American social and economic policy well into the twentieth century. The maintenance of social welfare and order was one of the primary roles of state governments.[9] While relatively little research has been conducted on the drafting and amendment of state constitutions, it is clear that state constitutions often reflect a wide array of political debates and anxieties. John Dinan has called them mirrors of American political thought and Amy Bridges has described the way constitution writers in Western states sought to address the particular problems posed by governing states on the nation's periphery.[10] The political advantages of constitutional politics over statutory change remain, however, relatively unexplored, particularly in the context of state politics.

This paper asks why labor organizations and laborers' advocates pursued constitutional change, rather than devoting all of their resources to legislative progress alone. Through a review of state-level labor publications and constitutional convention debates, I demonstrate that the advocates of protective legislation hoped that new constitutional rights would help them overcome many of the political obstacles they encountered. They believed that statewide displays of support for constitutional labor rights would prompt legislatures to pass protective statutes, and that explicit and detailed constitutional requirements might also prevent future legislatures from repealing protective laws. By placing protective provisions directly in constitutions, labor activists also planned to reverse existing court decisions that overturned protective legislation. They also hoped to prevent courts from issuing such unfavorable rulings in the future. Karen Orren has argued labor advocates were able to re-write American labor law through statute, but that they needed to shift these policy questions from the judiciary and into legislatures before they could achieve reform.[11] State-level labor organizations clearly employed constitutions in their quest to exclude courts and effect change.

The origins of constitutional labor therefore compel us to re-think the standard explanation for why people write constitutions or seek to change them. Scholars have often described the motive for constitution writing as the desire to involve courts in particular areas of policymaking, and in so doing, "entrenching" specific political goals in a document expected to be long-standing and difficult to amend. For instance, through his study of four national

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[8] Howard Gillman, *The Constitution Besieged : The Rise and Demise of Lochner Era Police Powers Jurisprudence* (Durham: Duke University Press, 1993).

[9] William J. Novak, *The People's Welfare : Law and Regulation in Nineteenth-Century America*, Studies in Legal History (Chapel Hill: University of North Carolina Press, 1996), 2. See also J. Novkov, "Historicizing the Figure of the Child in Legal Discourse: The Battle over the Regulation of Child Labor," *American Journal of Legal History* 44, no. 4 (2003).

[10] Dinan, *The American State Constitutional Tradition*. Amy Bridges, "Managing the Periphery in the Gilded Age: Writing Constitutions for the Western States," *Studies in American Political Development* 22, no. 1 (2008).

[11] Karen Orren, *Belated Feudalism : Labor, the Law, and Liberal Development in the United States* (Cambridge [England] ; New York: Cambridge University Press, 1991). Orren's larger point is that labor law in the United States was actually continuous with the British common law of master and servant that developed under a feudal, rather than democratic regime. In fact, Orren argues, this legal tradition was fundamentally anti-democratic and illiberal because it assigned the laborer a fixed (and inferior) status to his master. Thus, Orren's account demonstrates that courts did not clash with legislators merely because judges were, individually and personally, more conservative than legislators, but because courts were attempting to uphold a fundamentally feudal set of legal relationships, while legislatures were operating within a basically democratic framework.

constitutions, Ran Hirschl has argued that the creation of legal rights is motivated by elites' hopes that the judiciary will insulate their political gains in the event that they find themselves unable to maintain a winning electoral coalition.[12] In his study of the activities of 19th century American politicians, Howard Gillman has also described constitutional change as the product of legislative majorities who feel that they can trust the judiciary to entrench their policy agendas in the face of electoral threats.[13] Because constitutions may empower courts in the face of democratic oppositions, they have been dubbed a form of political insurance for the reigning legislative coalition.[14]

Labor organizations were not interested in using constitutions to usher courts into policymaking, as the existing literature would predict. On the contrary, they were primarily interested in prompting legislatures to pass protective regulations and in insulating that legislation from courts. Thus, this research contributes to two different literatures. First, it expands the literature on constitution writing by suggesting additional, and even opposing, motivations for influencing the shape of constitutions. In emphasizing labor organizations' efforts to create positive constitutional rights for labor, this paper also augments the standard picture of American constitutional rights as negative.

The first section of the paper describes the scholarship on the labor movement's relationship to rights, and demonstrates that most accounts of America's labor movement emphasize its negative rights rhetoric and assert that labor organizations largely abandoned their call for positive rights. The second section of the paper describes the positive labor protections included in state constitutions, and argues that these provisions (or at least many of them) are, in fact, positive rights. The rest of the paper describes labor organization's pursuit of these rights, demonstrating that labor sought constitutional changes in their efforts to overturn court decisions, preempt their rulings, prompt state legislatures to pass protective statutes, and perhaps even to mobilize their movements.

Labor Rights and American Liberalism:

The understanding of American constitutional rights as negative rights is particularly pronounced in studies on the American labor movement. Louis Hartz's influential account of American liberalism asserts that the labor movement was a co-participant with, not a rival of, the dominant economic and ideological regime. Because American labor participated unconsciously in the nation's liberal tradition, he argues, the movement never developed a salutary sense of class-consciousness, and consequently failed to demand the creation of a powerful and protective state, like those in Western Europe. Hartz declared that, "Far from inheriting the earth, all [the laborer] wanted to do was to smash trusts and begin running the Lockian race all over again."[15]

American political development (APD) scholars and labor historians have challenged Hartz from many directions, with some arguing that Liberalism was not so hegemonic as a

[12] Ran Hirschl, *Towards Juristocracy : The Origins and Consequences of the New Constitutionalism* (Cambridge, Mass. ; London: Harvard University Press, 2004).
[13]Howard Gillman, "How Political Parties Can Use the Courts to Advance Their Agendas: Federal Courts in the United States, 1875-1891," *The American Political Science Review* 96, no. 3 (2002).
[14] Tom Ginsburg, *Judicial Review in New Democracies : Constitutional Courts in Asian Cases* (Cambridge, UK: Cambridge University Press, 2003). See also Keith E. Whittington, *Political Foundations of Judicial Supremacy : The Presidency, the Supreme Court, and Constitutional Leadership in U.S. History*, Princeton Studies in American Politics (Princeton, N.J.: Princeton University Press, 2007).
[15] Louis Hartz, *The Liberal Tradition in America; an Interpretation of American Political Thought since the Revolution*, [1st ed. (New York,: Harcourt, 1955), 223.

matter of either ideology or law, and others claiming that the distinctive network of the nation's political institutions, and not ideology, was responsible for labor's failure to bring about a socialist democracy. However, in its relationship to constitutional law, the prevailing picture of the American labor movement still remains one of negative rights and anti-governmental voluntarism. For instance, William Forbath's preeminent treatment of the AFL's rights consciousness argues that the AFL was not duped by America's pervasive ideology, but consciously and strategically chose to reject governmental intervention in labor's affairs.[16] Because judicial rulings often criminalized the AFL's activities and undercut its legislative gains, the AFL abandoned its former arguments in favor of interventionist government and began to demand only that government leave it alone. Thus, the AFL's leadership embraced a classically liberal rhetoric, arguing that, like capital, labor was entitled to freedom from intrusive government. [17] According to Forbath, by the 1890s, the AFL had adopted "a rigid and anti-statist liberalism."[18]

Victoria Hattam has similarly argued that American labor was not ideologically stunted, but that it rejected governmental intervention in response to its institutional and political environment. In fact, she demonstrates that American labor was no less militant than European labor, and argues that what requires explanation is not why labor never tried to improve its lot, but why its militancy in the industrial realm was accompanied by a marked moderation in the political realm.[19] She explains this bifurcation as the result of the institutional structure in which American labor organizations found themselves and the conclusions they drew about that structure. Because the judiciary was able to undermine many of its legislative victories, the AFL ultimately shifted tactics away from law and towards private bargaining. She writes, "Having tried and failed to use political channels for their own ends, the AFL set about developing an alternative strategy . . . Voluntarism was a carefully crafted strategy that enabled the AFL to avoid the pitfalls of political reform largely by avoiding the state and negotiating and protesting directly with their employers."[20] Thus, Hattam argues that American labor was exceptional, not because it was less radical, but because it had fewer incentives to bring that radicalism to bear in the legal arena.

Current scholarship, like that of Forbath and Hattam, has largely undermined Hartz's account of American labor as simply blinded to the potential value of an active and protective state. However, these authors still emphasize labor's withdrawal from the political realm and its abandonment of positive rights claims. In light of this scholarship, the existence and origins of

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[16] William E. Forbath, *Law and the Shaping of the American Labor Movement* (Cambridge, Mass.: Harvard University Press, 1991).

[17] In making these liberal, anti-statist arguments, the AFL invoked the federal Constitution. James Pope demonstrates that the Thirteenth Amendment played a large role in labor's rhetoric. According to Pope, the core of Labor's argument was that the Thirteenth Amendment should be interpreted as a fundamental guarantee of labor rights. They argued that the Constitution's prohibition on enslavement made it illegitimate to outlaw labor strikes because, without the ability to strike, laborers could not consider themselves truly free. See James Gray Pope, "Labor's Constitution of Freedom," *Yale Law Journal* 106, no. 4 (1997). Forbath notes that labor's Thirteenth Amendment arguments were often entwined with First Amendment arguments, See Forbath, *Law and the Shaping of the American Labor Movement*, 139. When labor was not allowed to stage meetings, parades, peaceful protests, or strikes, the AFL also invoked the First Amendment, arguing that its activism was protected by the constitutional guarantees of freedom of speech and assembly.

[18] Forbath, *Law and the Shaping of the American Labor Movement*, 130.

[19] Victoria Charlotte Hattam, *Labor Visions and State Power : The Origins of Business Unionism in the United States*, Princeton Studies in American Politics (Princeton, N.J.: Princeton University Press, 1993), 9.

[20] Ibid., 206.

the protective labor rights in state constitutions is particularly illuminating. The existence of such constitutional provisions suggests that at least part of the American labor movement did not respond to its institutional context and liberal environment by entirely abandoning its quest to realize its demands for protection through law. In fact, the histories of these provisions demonstrate that labor organizations lobbied extensively for their creation, attempting to use constitutions to further their movements for active and protective government.

The hostile political climate in which labor organizations found themselves may explain not only their adoption of anit-statist tactics, but also their desire to influence state constitutions. Elizabeth Clemens has demonstrated that, those who are confined to the margins of the political game often perceive themselves as having an incentive to change the rules. In the United States, political outsiders have attempted to alter existing institutions by employing familiar political forms for new, subversive purposes. [21] Because they were relative outsiders to the political process, therefore, labor organizations had an incentive to alter the rules governing that process. Richard Bensel's survey of state party platforms demonstrates that while the nation was industrializing, labor issues were often effectively excluded from the agendas of the two major parties.[22]

Despite the national AFL's decision to forgo legislative lobbying in favor of voluntarism and private bargaining, state and local chapters of the AFL often chafed at the national leadership's approach, opting to press their demands on state governments through political channels.[23] As the actions of New York's labor organizations suggest, state- and local-level labor unions frequently involved themselves in the constitutional politics of their states. They used existing amendment procedures to add new rules to constitutions, and often lobbied for protective provisions when state constitutional conventions were already in the process of writing new constitutions. Constitutions were also familiar tools for controlling legislatures. Yet, instead of restricting state governments' authority to intervene in economic life, these new constitutional labor rights demanded that legislatures extend themselves to intervene on behalf of laborers.

Constitutional Rights for Labor

In order to develop an explanation for why these labor organizations sought to change state constitutions, I examined the legal and political context in which workers' advocates worked to influence constitutions. Using a series of digests of labor legislation, I compiled a list of labor laws passed by state legislatures during this period. I used the Westlaw keynumber system to compile a list of state supreme court cases addressing the constitutional validity of this legislation. I also examined the records from AFL conventions, state-level labor newspapers, state constitutional conventions, and opinions of state supreme courts as well as law reviews and political science journals of the period. In addition, I compiled a list of state constitutional amendments that require active government protection of laborers. I did this by reading the text of every state constitution, including all of their amendments. Since most states have ratified

[21] Elisabeth Stephanie Clemens, *The People's Lobby : Organizational Innovation and the Rise of Interest Group Politics in the United States, 1890-1925* (Chicago: University of Chicago Press, 1997), 92.

[22] The Republicans, for example, only offered the tariff (already a part of their political agenda) which they argued would protect American labor from foreign competition. Similarly, Democrats responded to labor predominantly by arguing that their free silver policy was a solution to unemployment. See Bensel, *The Political Economy of American Industrialization, 1877-1900*, 148.

[23] Julie Greene, *Pure and Simple Politics : The American Federation of Labor and Political Activism, 1881 - 1917* (Cambridge, UK ; New York, NY: Cambridge University Press, 1998).

multiple constitutions, it is often challenging to acquire the text of constitutions and their amendments now that those documents have been superceded. I obtained every constitution and amendment of 39 states from the NBER State Constitution Project.[24] Because the NBER project is still incomplete, I also referred to an earlier compilation of state constitutional texts.[25] I restricted my analysis to provisions that directly addressed labor or laborers and that mandated active government intervention in their workplaces and relations with employers.[26] Rather than determining an *a priori* time period for this study, I allowed the timing of the addition of these amendments to establish the historical period over which I examined labor organizations' constitutional activities.

The labor provisions I examined relate to laborer's liens, the number of hours in a legal workday, the safety of workplace conditions, the minimum amount of wages, the frequency with which those wages were paid, and the form of those wages. They also outlawed, or called for the legislature to outlaw, contracts that released employers of liability for workplace injuries, and established the constitutionality of workmen's compensation programs. Some called for the state to outlaw blacklists and provide protection from employers' private armies. These labor provisions were rarely universal—often relating only to women, people in particularly dangerous industries, and public employees. They were almost always written with only white workers in mind. However, these labor provisions did address many of the central concerns of labor organizations during the time of their passage. Table 1 summarizes the provisions by topic. Table 2 offers a chronology of their addition, by state. Both exclude broad declarations of labor rights that lack specific policy content.

[24] John Joseph Wallis, "Nber/University of Maryland State Constitution Project," (2007).

[25] Francis Newton Thorpe, *The Federal and State Constitutions : Colonial Charters, and Other Organic Laws of the States, Territories, and Colonies Now or Heretofore Forming the United States of America*, 7 vols. (Washington: Govt. Print. Off., 1909).

[26] Although many state constitutions required or enabled legislatures to regulate railroads, banks, and other corporations, I excluded these provisions if they did not specifically address employment. I also excluded child labor provisions, provisions that address the right to work or the right to unionize, as well as provisions that merely required the establishment of a labor commission or created a new office. While the creation of bureaus of labor and offices of inspectors were often the first steps to the passage of regulation, provisions that merely created these institutions but did not require or even empower them to regulate employment seemed significantly different from constitutionalizing protections themselves. Because the protections to work and unionize are often aimed at stopping government from interfering with labor relations, I have not included them in this list of protections that government must actively provide. I excluded child labor from this analysis because of the widespread and nearly successful campaign to add an anti-child labor amendment to the federal Constitution. It seems likely that because of this federal campaign, a different political dynamic was at work in the inclusion of these provisions in state constitutions.

Table 1: Constitutional Labor Provisions by Topic

Topic	Num.	States
Working conditions	15	AZ, AR, CA, CO, ID, IL, MI, NE, NM, NY, OH, OK, UT, WA, WY
Hours	14	AZ, CA, CO, ID, LA, MI, MT, NE, NM, NY, OH, OK, UT, WY
Employer liability	12	AZ, CO, MS, MT, NM, NY, OK, SC, TX, UT, VA, WY
Laborers' liens	11	AL, AR, CA, FL, GA, ID, LA, MN, NC, OH, TX
Workmen's compensation	9	AZ, AK, CA, NY, OH, PA, TX, VT, WY
Protection from private armies	8	AZ, ID, KY, MS, MT, SC, UT, WY
Wages	7	CA, KY, LA, NE, NY, OH, UT
Blacklisting	3	AZ, ND, UT

Table 2: Chronology of Constitutional Labor Provisions

Years	Number of States to add at least one labor protection	States
1864 – 1865	1	**LA**
1866 – 1870	6	**AL**, **AR**, **GA**, **NC**, **TX**, **IL**
1871 – 1875	1	**AR**
1876 – 1880	4	**CO**, **TX**, **CA**, **LA**
1881 – 1885	1	**FL**
1886 – 1890	7	MN, **MT**, **ND**, **WA**, **WY**, **ID**, **MS**
1891 – 1895	2	**KY**, **UT**
1896 – 1900	1	**SC**
1901 – 1905	6	CA, CO, ID, MT, NY, **VA**
1906 – 1910	2	**OK**, **MI**
1911 – 1915	8	CA, **NM**, **AZ**, NY, **OH**, VT, PA, WY
1916 - 1920	3	MI, CA, **NE**
1921 - 1925	1	OH
1926 - 1930	0	
1931 - 1935	1	UT
1936 - 1940	4	MT, TX, AR, **NY**

States that wrote labor provisions into new constitutions appear in bold.

The individual states that appear more than once in Table Two either added new provisions in succeeding years or expanded existing provisions after the original inclusion of a labor provision. In addition to the regulation of particularly dangerous workplaces, labor organizations also petitioned for the constitutionalization of other sorts of regulations, including maximum hours, minimum wages, and the creation of laborers' liens on the products of their labor (see Table 1). In general, provisions relating to laborers' liens, employer liability, and workplace safety (particularly for mines and railroads) dominate the early provisions. Provisions outlawing private armies and blacklisting were mostly constitutionalized in the 1890s (although both appear in Arizona's original constitution of 1912). Provisions relating to the hours and

wages of labor are scattered throughout the period, while states began adding workmen's compensation to their constitutions only in 1911.

In order to determine whether these provisions should be considered positive constitutional rights, it is first important to define the term positive rights. One very general definition of a right is "the basis for a justified demand."[27] The demand component of this definition captures the idea that rights describe things that are owed to people. In other words, rights do not merely enable their bearers to make requests, but to made demands, that is, to consider themselves completely entitled to whatever the right guarantees. This idea of entitlement is captured by Ronald Dworkin's famous conception of rights as trumps. All of these formulations all capture the idea that, by definition, rights claim to override the preferences or aims of everyone in a given polity .[28]

Constitutional scholars often discuss constitutional provisions as the legal reflections of moral rights. This paper examines only constitutional provisions and calls the provisions, themselves rights. Thus, when I talk about state constitutional labor rights, I mean legal, rather than moral, rights. In this context, the term "right" means the basis for a demand that is justified, not morally by some extra-institutional truth, but instead by some component of a particular legal system. Unlike moral rights, which may be said to exist regardless of the particular government or constitution under which one finds herself, legal rights are justified by and dependant on particular governments and their particular legal institutions.[29]

One way that constitutions established states' obligations to provide a particular labor protection was by including the protective regulation directly in the text of the constitution. For example, eleven constitutional provisions (in ten different states) contained a provision that resembled this direct declaration of state policy: "Eight hours shall constitute a lawful day's work." By establishing these protective policies through constitutions, constitutional provisions removed democratic and legislative discretion on this issue, thereby creating a right. In total, thirty-six labor protections were directly constitutionalized in this way. This group was primarily composed of provisions relating to laborers' liens, employer liability, maximum hours, private armies, and blacklists. Some of the earliest constitutional labor rights were phrased this way, and this phrasing was employed through the late nineteen-thirties.

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[27] This definition is taken from Henry Shue's book *Basic Rights*. I've omitted the word "rational" from his definition ("the rational basis for a justified demand") because I wanted to offer a definition that was as general as possible.

[28] Using this general framework, one can be said to possess a right against the state (such a right would provide the basis for a justified demand against one's state,) against a particular individual or corporation (providing the basis of a justified demand against that individual or organization), or against society in general (providing the basis for a justified demand against all of one's fellow national or global citizens).

[29] Some scholars reject the idea that rights can be justified in any objective or absolute way. They understand rights merely as a rhetorical practice, or a type of discourse, and are mostly interested in why people use rights discourse to make demands, and which sorts of things they demand with this discourse. These scholars are not concerned with whether a claim is actually justified because they recognize that justification itself is historically and culturally contingent. Instead, they are interested in the way that a sense of legitimate justification is created. For instance, in a chapter entitled "Rights talk as social practice," Richard Primus explains "Rather than regarding 'rights' as an *a priori* category with a formal essence, we can examine the relevant practice to see how rights discourse actually functions. If we can discover what people are doing when they say things like 'x has a right to y' we will understand what such utterances mean. . . the rules of use it [this definition of rights] will yield will be constantly open to revision. They are attendant on, not prior to, actual uses of language." Richard A. Primus, *The American Language of Rights*, Ideas in Context ; 54 (Cambridge, U.K. ; New York: Cambridge University Press, 1999)..
Primus urges scholars to study rights by watching for people's use of the term "rights" and then describing and explaining that use.

Another way that constitutions created recognizable positive rights was by mandating legislative action on a particular issue. For instance, the New Mexico Constitution of 1911 declared "The legislature shall enact laws requiring the proper ventilation of mines, the construction and maintenance of escapement shafts or slopes, and the adoption and use of appliances necessary to protect the health and secure the safety of employees therein." Some provisions also described a state policy first and then demand that the "legislature shall" write laws to enforce the provision. This type of mandatory language also meets our definition of a positive right. If the constitution says that the legislature "shall" or "must" do something, then that constitutional provision serves as the basis for a demand that the state do it, regardless of the preferences of the state's democratic majorities. Twenty-two labor provisions used this mandatory language. Provisions that employed this phrasing related primarily to workers' safety and laborers' liens and were added to constitutions between 1864 and 1912.

Twenty-five labor provisions simply authorized or empowered legislatures to implement labor legislation, but did not mandate that the state provide the protection. For example, the Texas constitution was amended in 1936 to read: "The legislature shall have the power to provide for workman's compensation insurance for … State employees." This permissive phrasing was particularly prevalent among workmen's compensation provisions. The New York Constitution was similarly amended in 1913 to read: "nothing in this constitution shall be construed to limit the power of the legislature to set up a system of workmen's compensation." Four provisions, including New York's were phrased only as guidance about what the constitution could not be said to prevent, and several additional provisions had a similar clause tacked on the end. Although the permissively phrased provisions in state constitutions were not written to be judicially enforceable, the political struggles surrounding their adoption reveal that they were drafted as directives to both legislatures and courts about the purposes and expectations of government. Constitutional labor provisions like these were phrased as grants of authority not because those amending the constitution hoped to give the legislature choices about whether or not to protect labor, but often because they were responding to court decisions that had explicitly denied permission to legislatures.[30][31] Thus, permissive provisions were often included in state constitutions with the understanding that they would allow, and in some cases prompt, legislatures to pass protective legislation. These permissions were thus aimed at overcoming the political obstacles that hindered the passage of protective labor laws. After all, the U.S. Constitution reserves to states all the powers that it does not explicitly deny them. Therefore, state legislatures would not have needed permission to enact labor legislation unless some obstacle stood in their way. These provisions were written with the understanding that legislatures would, in the absence of such obstacles, pass protective legislation.

If a right is the basis for a demand, not merely a request, then these provisions certainly seem less like rights than those phrased either as regulations or as legislative requirements. In addition, it would be difficult for a court to require a particular form of legislative activity using a provision that was phrased merely as a statement of permission. Is it reasonable, then, to

[30] A delegate to the Nebraska constitutional convention even explained his use of permissive language: "It seems to me that the decision of our court in Lowe v. Rees Printing Company makes this word 'may' particularly applicable. That was law which intended to fix the hours of labor and compensation. That is just what this proposal opens the way for. . . .The word 'may' thus becomes co-ordinate with those other constitutional inhibitions" Nebraska Constitutional Convention, *Journal of the Nebraska Constitutional Convention : Convened in Lincoln December 2, 1919*, 2 vols. (Lincoln: The Kline publishing co., 1921), John J. Dinan, "Framing a 'People's Government': State Constitution-Making in the Progressive Era," *Rutgers Law Journal* 30 (1999)..

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include the provisions worded this way in a study of rights? After all, many theories of rights do consider enforceability a critical component of a legal right. These theories equate the existence of a right with the likelihood that the relevant judges will recognize that right. On this understanding, a right does not even exist unless it is possible for an individual to have it enforced by a court.

There are other understandings of rights, however, that do not emphasize the mandatory, court-enforced nature of these constitutional provisions. For instance, Donald Lutz's work on early state constitutions demonstrates that the rights in these documents were not understood as legal tools for settling political disputes through courts. Instead, they were seen as statements of shared goals and broad principles that would direct legislatures in lawmaking and political figures in general. Consequently, early rights provisions were often phrased in terms of what legislatures ought to do, rather than instructions about what they must do. Even early understandings of the federal Consitution were not focused solely on judicial interpretation and enforcement. William Forbath explains that, "For most of United States history, when politicians, reformers—and scholars—debated the meaning of the Constitution, they far more often addressed the citizenry and the legislatures than the courts."[32] Certainly many labor activists during the Gilded Age and Progressive Era did not equate rights with courts. "To labor's constitutionalists. . .this linkage of rights and courts was entirely alien. In their experience, the judicial branch was the worst constitutional offender."

It makes sense to think about positive rights in particular as directives to the legislature, rather than as tools for judicial enforcement. In order to use a constitution to stop one branch of government from doing something, it seems especially important to enable another branch of government to check the first by enforcing that constitutional limitation. In the case of constitutional provisions intended to promote government activity, however, a firm, legalistic check on government might take on less importance. Though it is certainly possible to imagine a court enforcing a positive right, it also seems possible that legislatures might be more likely to act without the threat of judicial oversight than they would be to restrain themselves in the absence of such a threat. Thus, it may be more appropriate to phrase positive rights in terms of the general purpose of and responsibilities of government, thereby singling out particular policy areas on which the government should focus its energies, than it would be for negative rights. Although the permissively phrased provisions in state constitutions were not written to be judicially enforceable, the political struggles surrounding their adoption reveal that they were drafted as directives to both legislatures and courts about the purposes and expectations of government. Constitutional labor provisions were often phrased as grants of authority not because those amending the constitution hoped to give the legislature choices about whether or not to protect labor, but often because they were responding to court decisions that had explicitly denied permission to legislatures.[33] Permissive provisions were often included in state constitutions with the understanding that they would allow, and in some cases prompt, legislatures to pass protective legislation. These permissions were thus aimed at overcoming the political obstacles that hindered the passage of protective labor laws. After all, the U.S.

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[32] Pope, "Labor's Constitution of Freedom."

[33] A delegate to the Nebraska constitutional convention even explained his use of permissive language: "It seems to me that the decision of our court in Lowe v. Rees Printing Company makes this word 'may' particularly applicable. That was law which intended to fix the hours of labor and compensation. That is just what this proposal opens the way for. . . .The word 'may' thus becomes co-ordinate with those other constitutional inhibitions" Nebraska Constitutional Convention, *Journal of the Nebraska Constitutional Convention : Convened in Lincoln December 2, 1919*, Dinan, "Framing a 'People's Government': State Constitution-Making in the Progressive Era."

Constitution reserves to states all the powers that it does not explicitly deny them. Therefore, state legislatures would not have needed permission to enact labor legislation unless some obstacle stood in their way. These provisions were written with the understanding that legislatures would, in the absence of such obstacles, pass protective legislation. Because it is possible to understand constitutional texts as rights, even in the absence of judicial enforcement, and because these texts were part of the same political project that drove labor organizations to seek mandatory constitutional provisions and direct constitutional regulation, I have included permissively phrased provisions in this study of labor rights. Even if we only consider the mandatory provisions to be truly rights, the permissive provisions also emerged out of the movement to seek protection for labor using constitutions. Thus, these provisions can still help us to understand why organizations seek constitutional change and offer support for the assessment that labor pursued positive state protection through constitutions.

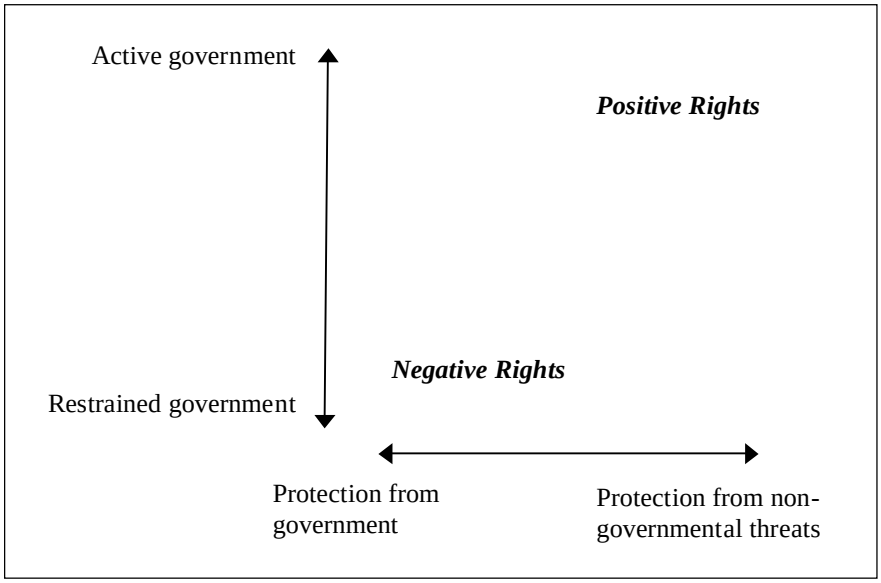
It is one thing to determine that these provisions are rights, and another to demonstrate that they are positive rights. In order to achieve the latter, it is necessary to develop an account of the difference between positive and negative rights. One way that people understand the division between positive and negative rights is in terms of the kind of protection that the right provides. For example, Frank Cross's test to distinguish a positive from a negative right involves imagining the total abolition of government. Under these conditions, negative rights would be secured because government could no longer pose a threat. Rights not automatically secured in such a scenario must be positive. Thus, Cross's distinction between positive and negative rights emphasizes the difference between threats posed by government itself and threats posed by other entities . A second way that people distinguish between positive and negative rights is according to the kind of demand for which that right serves as a basis. In other words does the right allow you to make a claim to government's aid or an assertion of your liberty? This distinction between claims and liberties is one way that modern scholars think about the difference positive vs. negative rights. In general terms "A positive right is a claim to something—a share of material goods, or some particular good like the attention of a lawyer or doctor, or perhaps the claim to a result like health or enlightenment—while a negative right is a right that something not be done to one, that some particular imposition be withheld."[34] A positive right against government imposes an obligation on government to do or provide something. A negative right, or liberty, deprives government of the legitimate authority to do something.

In describing rights against the state, these two distinguishing features of negative rights resolve into a single coherent concept: a negative right protects its bearer from governmental threats by serving as the basis for a demand that government restrain itself. A positive right protects its bearer from some non-governmental threat by serving as the basis for a demand that government intervene to protect and/or aid the threatened rights-bearer. Holmes and Sunstein explain the conventional wisdom this way "Negative rights ban and exclude government; positive ones invite and demand government. The former require the hobbling of public officials, while the latter require their affirmative intervention. Negative rights typically protect liberty; positive rights typically promote equality". Negative rights are thought to promote liberty because they require government to leave people alone. Positive rights are associated with the promotion of equality because they require government to provide a protection that disadvantaged members of society might not be able to provide for themselves. This definition is intended to capture the meaning of the terms in modern, scholarly use. I try to identify what modern scholars generally mean by positive rights and, using that definition, assess whether the

[34] Charles Fried, *Right and Wrong* (Cambridge, Mass.: Harvard University Press, 1978).

labor provisions in state constitutions can be considered positive rights. Thus, I do not simply attend to whatever people called rights in a given period; this is not a study of labor's rhetoric or discourse. Instead, I attempt to capture what the term "positive rights" means in the modern context and to determine whether the labor provisions in state constitutions fit that definition. The schematic below conveys this relationship between positive and negative rights[35]:

Fig. 1: Two dimensions of positive and negative rights



The critical legal studies (CLS) movement has offered the most complete critique of the distinction between positive and negative rights. Scholars in this tradition have argued that government restraint is always an illusion and that all of the economic and social threats that citizens face ultimately stem from government itself. Even when government appears to restrain itself, allowing the parties in a dispute to bargain freely, government structures are continually biasing the process and outcomes of those negotiations.[36] Even the area in which American government is said to be most restrained, that of private economic bargaining and contracting, government is always, through the rules and structures it necessarily established, active and influential.

[35] Some people have called certain criminal process rights quasi-affirmative, and have argued that they occupy a middle ground between positive and negative rights David A. Sklansky, "Quasi-Affirmative Rights in Constitutional Criminal Procedure," *Virginia Law Review* 88, no. 6 (2002)..The classic example of a U.S. constitutional ruling that appears to exemplify this intermediate position is *Gideon v. Wainright* (1963), in which the Court ruled that states must provide indigent criminal defendants with attorneys. This mandate that government actively provide aid places criminal process rights high on the dimension of government activity, and causes them to resemble positive rights. However, criminal process rights are intended to protect against a governmental threat. After all, government provision of a substantive good (for instance, a defense attorney) is triggered only after the government has actively and intentionally deprived someone of another good (for instance, personal liberty) and is intended to protect them from the ongoing threat that government poses to their freedom and livelihood (Sklansky 2002, 1234). Therefore, rather than thinking of criminal process protections as a middle ground between positive and negative rights, these rights would seem to fall in the top, left quadrant of this idea space. They are like positive rights on one dimension, and like negative rights in the other.

[36] Duncan Kennedy, *Sexy Dressing, Etc* (Cambridge, Mass.: Harvard University Press, 1993).

Because government restraint shapes political life as actively as more conventional forms of intervention, it is reasonable to argue that government is the ultimate source of all threats to individuals' wellbeing. However, at the proximate level, it is entirely possible to distinguish between government activity and inactivity and between threats that stem directly from government action and those that stem directly from private actors or social conditions. In fact, the labor advocates who fought for positive constitutional rights often made this distinction. The debates about mining safety at the Illinois Constitutional Convention exemplify this logic. In arguing for the inclusion of a mining safety provision, one delegate noted that miners did not ask the convention for more traditional property rights because he argued that that sort of protection was largely irrelevant to the laborer, who often had little in the way of property. Instead, a different sort of right was necessary to protect the laborer. He explained:

> The Constitution of this state, which throws around the property of the rich a protection which no Legislature or executive or judiciary can disregard, would be incomplete if it failed to afford to the operative miner protection in his life, in his limbs and as far as practicable in his health. . .Let the announcement be sent abroad that we have commenced our labors here by recognizing the rights of our operative miners to protection in their lives, in their limbs and in their health.[37]

Because miners desired rights to ensure the safety of their workplaces, the sort of rights that could protect the laborer would force the state legislature to require that mining companies add escapement shafts and proper ventilation to their mines. Miners did not request constitutional restraints on government to protect their property from government itself, but instead desired active legislation and regulation to protect them from the dangerous conditions under which they labored. While state policies may ultimately have been responsible for the condition in which miners found themselves, the threats to their lives did not stem directly from government action and could not be remedied by further government inaction, but resulted from the conditions of their workplaces and the practices of their employers, and required active government intervention to mitigate.

Although labor organizations did not use the term "positive rights" to describe the active protection they sought, they regularly contrasted property rights with rights to government protection, which (as in the Illinois example above) they often described as the right to live. For example, The *Toledo Union Leader* declared "The right to live is inherent. . . The right to live comes first. . .and he [the workingman] can't surrender that right by listening to the senseless drivel and sugar-coated preachments of smug respectables well clothed and housed, who talk of their 'inherent rights."[38] One delegate to the Virginia Constitutional convention of 1901 similarly argued "Surely, if it is necessary to put in the Constitution some provision to protect a man's property, if you find the whole tendency or doctrine of the courts is to allow a man's life to be taken without due compensation, it is necessary to have a Constitutional protection to stop that evil also."[39]These constitutional protections of laborers' lives took the form of rights to state intervention and regulation.

In addition to the regulation of particularly dangerous workplaces, labor organizations also petitioned for the constitutionalization of other sorts of regulations, including maximum

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[37] Illinois. Constitutional Convention, *Debates and Proceedings of the Constitutional Convention of the State of Illinois : Convened at the City of Springfield, Tuesday, December 13, 1869.* (Springfield: E.L. Merritt & Bro., printers to the Convention, 1870, 1870). Page 266.

[38] "The Right to Live," *Toledo Union Leader*, August 9, 1912

[39] As cited in: Dinan, *The American State Constitutional Tradition*. Pages 190-191.

hours, minimum wages, and the creation of laborers' liens on the products of their labor (see Table 1). These constitutional provisions mandated positive governmental activity in the form of regulation. They were thus intended to protect people from the practices of their employers, rather than the threat of interventionist government.[40] Consequently, on the dimension of active/restrained government, these provisions are best characterized as positive rights (see Figure 1).

While regulation is arguably not as active a role for the state as the provision of education or medical care, it is an instance of the state extending itself, rather than restraining itself from intervening. In fact, many conservatives of the period described this type of regulation not only as active state intervention in social and economic life, but as illegitimate intervention, the very sort of overreaching that substantive due process jurisprudence was developed to prevent. Rather than allowing market forces to govern employment relationships and workplace practices, these constitutional provisions demanded that the state intervene to offer laborers protection. In the case of provisions outlawing the use of private armies and blacklists, these regulations protected laborers from the union- and strike-breaking practices of their employers.

Workmen's compensation provisions are another clear example of the state extending itself through the creation of a statewide program and often a monetary fund for the protection of injured laborers. These provisions comprised the tail-end of a larger constitutional campaign to reform the governmental response to employer liability for workplace injuries. The employer liability provisions in state constitutions protected workers from the necessity of signing contracts which guaranteed that their employers could not be held liable for workplace injuries. To the degree that these provisions were self-executing, they performed the active regulation that makes these provisions a positive right. Several constitutions even abrogated the judicial doctrine known as the "fellow servant doctrine," which held that employers could not be held responsible for injuries resulting from the actions of another employee. These clauses spoke directly to the judiciary and, by eliminating the legal barriers to collecting compensation from employers, participated in the establishment of a state role in the relationship between injured workers and their employers.

Labor Activism and Constitutional Change

While popular participation in federal Constitutional change has most often occurred in periods of crisis, the demands of interest groups and social movements have consistently shaped state constitutions.[41] During the nineteenth century, the formal revision of state constitutions was both frequent and politically charged. As Alan Tarr explains in his study of state constitutional development "state constitutions increasingly became instruments of government rather than

[40] Eleven of the labor provisions that regulated hours, wages, and workplace safety related only to public employees. In that case, the from whom the constitution protected laborers was the state itself, rather than a private actor. However, these constitutional rights regulated the state in its capacity as employer, rather than its capacity as government. Such provisions were also intended as a wedge that would help to establish similar working conditions or wages throughout private industry. Despite the fact that these provisions technically protected people from government, therefore, these appear to behave like positive, rather than negative, rights, and are included in this study.

[41] For an argument about the sporadic involvement of the general public in federal constitutional change, see Bruce A. Ackerman, *We the People: Transformations*, vol. 2 (Cambridge, Mass.: Belknap Press of Harvard University Press, 1998).

merely frameworks for government."[42] This trait became particularly pronounced during Gilded Age and Progressive Era, when state constitutions became the focus of several of the national political movements. Labor was far from alone in seeking to influence state constitutions. In fact, labor organizations were not even the only forces striving to use these constitutions to force state governments into a positive, interventionist role. For instance, both prohibitionists and grangers sought to influence the text of state constitutions in order to ensure that states would engage in the active regulation of social and economic life.[43] By the end of the nineteenth century, state constitutions had come to embody many different substantive commitments and to reflect a wide variety of political controversies. Thus, labor's advocates joined a chorus of voices for state constitutional change.

Labor organizations' pursuit of state, rather than federal, constitutional change can be explained in part by the mechanics of the federal system. First, the federal Constitution is much harder to amend than its state counterparts. Second, the majority of labor regulation at the end of the nineteenth century was composed predominantly of state laws. To the degree that social and economic intervention was deemed legitimate, such regulation was understood to be the province of state governments. Consequently, state laws and institutions were a primary target of progressive social politics.[44] Because Congress was only constitutionally authorized to regulate interstate commerce, and few industries were understood to fall under that rubric, Congress was not always thought to possess the authority to regulate most industries. The Industrial Commission's Report on General Labor Legislation begins: "The subject covered by this report is particularly a matter of domestic law, and with one or two notable exceptions (such as railway labor, which may be regulated under the interstate commerce clause) the commission has to recommend improved legislation to the State Legislatures."[45] Because labor regulation was the province of state governments, state constitutions, which set the rules by which those governments operated, were relevant targets for those seeking changes in labor policy.

Different types of labor organizations, some far more formal and long-lasting than others, also engaged in the writing and re-writing of constitutions. The Knights of Labor, the Western Federation of Miners, the California Workingmen's Party, as well as many state chapters of the American Federation of Labor all lobbied for the addition of protective labor provisions to state constitution. Women's organizations, such as local chapters of the Women's Trade Union

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[42] Tarr, *Understanding State Constitutions*. State constitutional revision became commonplace in the nineteenth century. According to Tarr, "From 1861 to 1900, twenty states revised their constitutions, some several times, adopting 45 new constitutions in all. Even this figure underestimates the level of state constitution-making; for voters also rejected several proposed constitutions, including six from 1877 to 1887. Of those states that joined the Union from 1800 to 1850, only two had not revised their constitutions by century's end; altogether, ninety-four state constitutions were adopted during the nineteenth century"(94).

[43] For a detailed description of the temperance movement's attempts to change state constitutions see Ann-Marie E. Szymanski, *Pathways to Prohibition : Radicals, Moderates, and Social Movement Outcomes* (Durham, N.C.: Duke University Press, 2003). See also Solon J. Buck, *The Granger Movement; a Study of Agricultural Organization and Its Political, Economic and Social Manifestations, 1870-1880*, Harvard Historical Studies ... Vol. Xix (Cambridge,: Harvard University Press; [etc., 1913). Buck describes the Grangers' attempts to regulate railroads in Illinois through a constitutional convention on page 127.

[44] Clemens, *The People's Lobby : Organizational Innovation and the Rise of Interest Group Politics in the United States, 1890-1925*, 68.

[45] United States. Industrial Commission. et al., "Report of the Industrial Commission on Labor Legislation Including Recommendations as to General Legislation, and Digests of the Laws of the States and Territories Relating to Labor Generally, to Convict Labor, and to Mine Labor," G.P.O., http://galenet.galegroup.com/servlet/MOML?af=RN&ae=F104619531&srchtp=a&ste=14&locID=prin77918

League, and progressive social reformers also supported (and sometimes spearheaded) the inclusion of protective labor provisions.[46]

Labor organizations both lobbied to amend existing constitutions and to add provisions during the writing of new constitutions by constitutional convention. Before 1900, only Minnesota added a labor provision to an existing constitution. The other twenty states that included protective labor provisions in their state constitutions did so while drafting entirely new documents. In the twentieth century, there were twenty-five different instances in which labor provisions were added to a state constitution (though several were in the same states, although in different years), and in eight of these instances the provisions were included in new constitutions (see Table 2).

Constitutional conventions often created a sense of opportunity among labor leaders and organizations, prompting them to pursue a constitutional provision when they might not have otherwise. Alan Tarr has described the constitutional convention as "the key institution for the constitutionalization of state politics,"[47] and Amy Bridges' description of the delegates to constitutional conventions applies equally well to the reasoning of the labor leaders: "The opportunity to legislate group preferences might well not reappear in state assemblies, encouraging them to seize the time. . . When would there be another gathering of such hard working delegates, with so much public attention, and afterwards, so great a claim to popular mandate?"[48] For instance, in 1910, when it became clear that the Arizona territory would begin writing a state constitution, the many labor organizations of the state convened a large conference to discuss the provisions that they hoped would be included in the new constitution and to formulate plans for the pursuit of their inclusion. The *Arizona Daily Star* reported: "All organizations are urged to be present at the conference. The working class, if it only utilizes it, has the power to make the constitution to its own liking, and if it is properly drafted, our economic struggles of the future will be greatly simplified and our opportunities of bettering our conditions rendered much easier."[49]

The earliest instance I have identified of a protective labor provision added to a state constitution called on the legislature to establish a nine-hour workday and a minimum wage for laborers on public works in Louisiana, and seems to exemplify the role of opportunity in

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[46] The labor organizations and progressive reformers who were primarily concerned with the welfare of working women tended to support protective legislation and constitutional amendments. For instance, in her capacity as Illinois' chief factory inspector, Florence Kelley bemoaned the fact that the state supreme court had based its decision to nullify an eight-hour law in part on the federal constitution. Kelley explained in her third annual report that, if the court had only based its decision on the state constitution, that constitution could have been altered to allow for a reenactment of the law. See page 238 of Kathryn Kish Sklar, *Florence Kelley and the Nation's Work : The Rise of Women's Political Culture, 1830-1900* (New Haven: Yale University Press, 1995). Similarly, the Women's Trade Union League (WTUL) was an early advocate of protective legislation and broadly supportive of the state constitutional amendments. For instance, in the WTUL's official journal, *Life and Labor,* discussed a Wisconsin court's nullification of a workmen's compensation law predicting "there will also be a constitutional amendment which will guarantee the enforcement of these humanitarian laws as well as a curtailment of the prerogatives of the supreme court judges." See "Wisconsin Compensation Law," *Life and Labor* 4, no. 2 (1914). A Los Angeles branch of the WTUL also worked energetically to secure a constitutional amendment to California's constitution in the hopes that the amendment would protect existing minimum wage laws for women. See Sherry Katz, "Socialist Women and Progressive Reform," in *California Progressivism Revisited,* ed. William Francis Deverell and Tom Sitton (Berkeley: University of California Press, 1994).

[47] Tarr, *Understanding State Constitutions*.

[48] Bridges, "Managing the Periphery in the Gilded Age: Writing Constitutions for the Western States," 42.

[49] Anthony McGinnis, "The Influence of Organized Labor on the Making of the Arizona Constitution" (University of Arizona, 1930).

laborers' decisions to push for a constitutional right. In 1864, while the constitutional convention was composed largely of delegates who were themselves white laborers, thousands of the state's white laborers formed an informal lobby to ask that their policy preferences be written into the new fundamental law. They prefaced their petition to the Louisiana constitutional convention with the words "The undersigned, citizens of the state of Louisiana, beg leave to memorialize you honorable body in behalf of our claims, feeling that this being the only liberty-loving body, composed purely of the laboring class, that has ever convened in the State of Louisiana for the promotion of the interests of mankind in general, their appeal will not be in vain."[50] For more formally organized groups as well, constitutional conventions represented an opportunity to influence state law and extract a visible and public promise of governmental protection.

Labor leaders tried to ensure that sympathetic delegates were elected to constitutional conventions. For instance, the Twin Territories Federation of Labor refused to support the election of any delegates to the Oklahoma constitutional convention who would not pledge in writing to support the inclusion of a list of labor protections. The Federation of Labor then hired a paid lobby to attend the convention to ensure that these delegates served labor as they had promised.[51] Utah unionists decided to support only candidates to the state constitutional convention who promised to accede to their list of demands.[52] And, when George Meany was president of the New York Federation of Labor, he spent an intensive week lobbying the New York constitutional delegates when they threatened to reject the labor article proposed for the New York Constitution.[53]

In some cases, labor organizations even tried to elect constitutional convention delegates from among their own ranks. For example, the *Michigan Union Advocate* explained that members of the Michigan Federation of Labor were "determined to take matters into their own hands and 'pass up' the alleged reformers who turned down their most important resolution last week." Thus, "the labor unionists of this city and county decided to put up their own candidates for the constitutional convention."[54] Similarly, feeling that they had "not obtained any satisfactory 'recognition' at the hands of either political party", New York labor organizations discussed the need for "strenuous efforts to secure direct representation in the Constitutional convention [of 1893]."[55]

When labor organizations succeeded in inserting their provisions into the proposed constitutions, they then mobilized their members in an effort to ensure that voters ratified these documents. For instance, because it was satisfied with the labor rights embodied in the Ohio Constitution of 1912, the Ohio Federation of Labor called a statewide meeting of labor leaders to "devis[e] ways and means to stimulate interest in the new constitution and secure a full vote for its adoption at the special election by arousing workers to its importance."[56] The *Toledo Union*

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[50] Louisiana. Constitutional Convention, *Debates in the Convention for the Revision and Amendment of the Constitution of the State of Louisiana: Assembled at Liberty Hall, New Orleans, April 6, 1864* (New Orleans: W.R. Fish, Printer to the Convention, 1864), 418.

[51] Keith L. Bryant, Jr., "Labor in Politics: The Oklahoma State Federation of Labor During the Age of Reform," *Labor History* 11, no. 3 (1970).

[52] John P. Enyeart, ""The Exercise of the Intelligent Ballot": Rocky Mountain Workers, Urban Politics, and Shorter Hours, 1886-1911," *Labor: Studies in Working-class HIstory of the Americas* 1, no. 3 (2004).

[53] "Laws Committee Votes a Labor Bill," *New York Times*, July 12 1928.

[54] "Labor Unionists Have Put Candidates in the Field," *Michigan Union Advocate*, July 19 1907.

[55] "Workingmen and the Convention," *New York Times*, October 24 1893.

[56] "Constitution Makers Finish Labors " *Toledo Union Leader*, May 17 1912.

Leader then announced that "labor unions throughout the state, working under the direction of the Ohio Federation of Labor, and co-operating with various progressive organizations, will begin an active campaign for the adoption of the proposed constitutional amendments."[57]

Labor organizations also organized themselves and their members to amend existing constitutions through state legislatures (followed by a statewide vote) and through constitutional initiatives. In the absence of a constitutional convention, labor organizations may have required a more direct and immediate impetus to seek amendments to existing constitutions than was required to motivate their participation in constitutional conventions. The particular political circumstances (particularly the strength and organization of labor) in each state determined how challenging it was to add pro-labor amendments to the constitutions.[58] However, it is clear that labor organizations spearheaded campaigns for constitutional amendments. Labor organizations lobbied legislatures, just as they lobbied constitutional conventions, ran state-wide "get out the vote" efforts to attract both union members and non-union members to the cause, and labor leaders circulated letters about the need to garner support for their amendments and published numerous pro-amendment editorials in their journals.[59]

Whether they pursued constitutional changes during conventions or as amendments, it is clear that labor organizations did not seek constitutional rights alone, but as part of larger campaigns to change state policy. Thus, constitutional provisions were always understood to supplement, not substitute for, protective legislation. While a particular organization was attempting to influence the shape of its state's constitution, it often devoted significant resources to that endeavor, publishing newspaper articles, influencing constitutional conventions, lobbying state legislatures, and/or creating statewide support for their proposals. However, once they had succeeded (or even failed) to influence the constitution, labor organizations typically returned to their other political activities, which included lobbying for the passage of protective legislation and working to ensure that existing legislation was enforced. As the other sections of this paper demonstrate, constitutional reforms were motivated by a desire to facilitate the passage and continued existence of protective statutes, not to replace them.

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[57] "To Urge Constitution: Ohio Federation of Labor Plans Campaign for Adoption of Laws to Help Workers," *Toledo Union Leader*, July 28 1912.

[58] For instance, the eight-hour amendment to Colorado's constitution received the support of both the state's major political parties in 1902, and passed the statewide referendum on ratification by a nearly three-to-one margin. See page 235 of James Edward Wright, *The Politics of Populism : Dissent in Colorado*, Yale Western Americana Series ; 25 (New Haven: Yale University Press, 1974).

[59] For example, the Montana Federation of Labor promoted a 1936 constitutional amendment about hours regulation by contacting labor unions throughout the state, urging them to support the amendment, and publishing many editorials, which responded to the charges leveled against the amendment by its opponents. For the entire month of October, the Montana Labor News published the slogan "Vote for the Eight-Hour Amendment" on its front-page, above the paper's nameplate. The paper also recounted the efforts of the state federation of labor as well as the state Mining Council of Montana writing "The State Mining Council of Montana, which includes representatives of all mining and smelter organizations in the State of Montana, vigorously urged the necessity of the passage of the 8-Hour Amendment at its last meeting and notified the Central Labor Body of Butte of its action. The State Mining Council also praised the efforts of the Montana State Federation of Labor in arousing the people to the need of passing this proposed amendment. Nothing that has come up before the people in recent years, according to the report of the Council, is so vital to their interest as the passage of this 8-hour law."(Montana Labor News Oct. 8th, 1936, p. 1). After the amendment passed, the Montana Labor News ran a long column thanking those labor advocates and union leaders who "fought for the amendment and spent their time and money"(Montana Labor News, Nov. 12th, 1936, p.1).

As Table 2 demonstrates, protective labor provisions were steadily added to constitutions throughout the entire period from 1864 to 1940. (Although certain five-year periods saw more labor amendments added to constitutions than others, the appearance of discrete bursts of activism is largely due to the relatively small increments into which Table 2 divides this period.) However, in general, the earliest instances of constitutional change did differ from those in the middle and at the end of the period. The years following the Civil War saw the constitutionalization of labor provisions through the re-writing of many Southern constitutions. With the exception of Louisiana, which included a provision about the regulation of hours and wages, all of the protective labor provisions added to Southern constitutions in the 1860s established laborers' liens. The labor provisions written at end of the nineteenth and beginning of the twentieth century were largely included through the writing of new Western states' original constitutions. Many of these provisions addressed the concerns of miners. Finally, the Progressive Era witnessed the most organized and concerted attack on judicial interpretations of state constitutions and the most coordinated attempts to establish protective legislation related to hours, wages, and working conditions, and witnessed the first attempts to safeguard workmen's compensation programs through constitutions. In fact, many of the provisions written during this period were devoted to the establishment of legally controversial workmen's compensation policies.

I do not assess the efficacy of these constitutional provisions or compare their effects to those of statutes. Instead, I ask why labor organizations believed that constitutional rights were likely to advance their cause. Even if the existence of a constitutional convention prompted labor organizations to seek constitutional changes, those organizations still deemed it worthwhile to devote resources to the acquisition of constitutional protections. The remainder of the paper explains the reasons that labor delegates sought constitutional change by listing and characterizing the advantages that labor delegates believed constitutional change held over and above the potential benefits of statutes.

The Goals of Constitutional Labor Rights: Overturning Courts

One advantage that the creation of constitutional labor rights held over the passage of statutes was that constitutional protections could solve a problem that statutes could not: the hostile stance of state courts toward labor. Some scholars have questioned the degree to which state courts ultimately hampered the development of protective legislation.[60] Yet, regardless of how many protective statutes were actually overruled by state courts, labor legislation passed during the Gilded Age and Progressive Era was constantly challenged through litigation. Consequently, labor organizations of the period were convinced that judicial decisions posed a formidable obstacle to their legislative agenda. AFL founder Samuel Gompers concluded that: "The power of the courts to pass upon the constitutionality of a law so complicate[d] reform by legislation as to seriously restrict the effectiveness of that method."[61] This anxiety about the constitutionality of labor legislation transformed labor's desire for protections that could simply have been enacted as statutes into demands for constitutional rights.[62]

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[60] See, for example, Melvin Urofsky, "State Courts and Protective Legislation During the Progressive Era: A Reevaluation," *The Journal of American History* 72, no. 1 (1985).

[61] As cited in Forbath, *Law and the Shaping of the American Labor Movement*.

[62] As William Ross describes in a muted fury, judicial rulings on labor questions also created a more general fervor for curbing the power of the courts. See William G. Ross, *A Muted Fury : Populists, Progressives, and Labor Unions Confront the Courts, 1890-1937* (Princeton, N.J.: Princeton University Press, 1994). John Dinan identifies these protective labor provisions as part of the larger movement to use state constitutions in an effort to reign-in

One reason constitutional rights seemed superior to mere statutes is that they enabled labor to work around adverse court decisions by widening the scope of conflicts about the constitutionality of a particular law.[63] By increasing the number of people engaged in the conflict over the legitimacy of labor legislation, it was possible for labor to change the ratio of its allies to its opponents. This tactic was particularly important when state supreme courts struck down protective labor legislation. Because no appeal to a higher court was legally possible, when the state supreme court nullified a piece of labor legislation, the only way to authorize such legislation was to remove the conflict from the court and shift it to a different venue. Once constitutions clearly authorized legislatures to pass particular pieces of protective legislation, there could be little question about the constitutionality of that legislation (at least on state grounds). Thus, these amendments effectively returned questions about whether protective legislation should exist to state legislatures.

New York's Constitution was amended in 1905 for just this purpose. Since its founding in 1865, The New York Workingmen's Assembly's primary goal was to promote the passage of protective labor legislation in New York state. The eight-hour workday was one of its earliest legislative demands and by 1897, it had succeeded in convincing the legislature to pass a law limiting the workday on public works to eight hours and requiring that laborers must be paid at the prevailing rate.[64] In a series of state supreme court cases, this regulation was challenged and declared unconstitutional and completely void [65].

In order to re-establish the regulations, New York state labor leaders attempted to amend the state's constitution. In his 1906 article about New York's eight-hour movement, political scientist George Groat explained: "The only way out of the difficulty was to change the fundamental law of the state in such a way as to overcome the objections of the court against the law."[66] Groat was pointing out that, because the state supreme court had ruled the eight-hour law unconstitutional, the only way to address their problems with the courts and to re-establish the law was to change the constitution itself."[67] Groat then described the New York Federation of

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courts. See John J. Dinan, "Court-Constraining Amendments and the State Constitutional Tradition," (2007). Douglas Reed also notes this phenomenon in Douglas S. Reed, "Popular Constitutionalism: Toward a Theory of State Constitutional Meanings," *Rutgers Law Review* 30, no. 4 (1999).

[63] E. E. Schattschneider, *The Semisovereign People : A Realist's View of Democracy in America* (Hinsdale, Ill.: Dryden Press, 1975).

[64] George Groat, "The Eight Hour and Prevailing Rate Movement in New York State," *Political Science Quarterly* 21, no. 3 (1906).

[65] People ex rel. Rodgers v. Coler, 166 N. Y. 1, 59 N. E. 716, 52 L. R. A. 814, 82 Am. St. Rep. 605; People ex rel. Treat v. Coler, 166 N. Y. 144, 59 N. E. 776; People v. Orange County Road Construction Company, 175 N. Y. 84, 67 N. E. 129, 65 L. R. A. 33; People ex rel. Cossey v. Grout, 179 N. Y. 417, 72 N. E. 464.

[66] Groat, "The Eight Hour and Prevailing Rate Movement in New York State."

[67] It is instructive to compare this constitutional response to the invalidation of legislation to labor's responses to its other major complaint against courts in this period: their continued issuance of injunctions to end strikes and hamper labor organizing. Unlike state courts' constitutional rulings on constitutional grounds, which could only be overcome by amending the constitutional itself, labor injunctions were typically grounded in either common law or anti-trust legislation. Thus, it seemed possible to prevent the courts from issuing anti-labor injunctions through legislation alone, that is without a constitutional amendment. As Felix Frankfurter explained in a 1929 law review article: "Reform of abuses revealed by the use of labor injunctions therefore presents a variety of problems for legislative solution. Legislation might immunize activities of organized labor from all tort liability—pecuniary responsibility, as well as restraint of conduct—or merely define the conduct that is to be deemed wrong. Again, legislation might withdraw from the scope of injunctive relief activities normally prevalent in labor controversies, or merely fashion a procedure especially suitable to injunctions in such cases. Legislation has entered all these fields." See Felix Frankfurter, "Legislation Affecting Labor Injunctions," *Yale Law Journal* 38, no. 7 (1929). This is not to

Labor's response: "The machinery of the state organizations was accordingly at once set in operation to accomplish this result. The state federation became the champion of the cause."[68] Groat also discusses the reason that the labor advocates did not simply address themselves to changing composition of the state supreme court. With only changes in personnel, he explained, the constitutionality of the law would always remain in doubt and subject to changes on the bench. By contrast, a constitutional amendment would settle the issue permanently.

The New York chapter of the American Federation of Labor shepherded a resolution proposing a constitutional amendment through both houses of the state legislature, then publicized the amendment and called on all of its members to vote for its ratification. In October of 1905, the president of the state chapter sent a letter to every labor organization in the state. It explained "This [amendment] means if it is adopted that the Legislature of this state will have constitutional authority to pass laws in the interest of wage-earners, and the courts will not have the former excuse of nullifying our laws on the ground of unconstitutionality as has been the case, especially in the eight-hour and prevailing rate laws." It then urged each labor organization to "take immediate steps to notify each individual member and see to it that he is not permitted to forget his duty on election day."[69] The eight-hour amendment was adopted in 1905 and took effect on the 1st of January, 1906. That same year, the eight-hour law was reenacted, and, in 1908, was upheld by the state Supreme Court. In its opinion, the court explained that the constitutional amendment required the court to reverse itself and uphold the eight-hour law.[70] Thus, the eight-hour constitutional amendment shifted the ultimate authority to establish (or decline to establish) the eight-hour day from the state courts to the state legislature.

Karen Orren's seminal work argues that American labor had to fight to establish liberalism as a replacement for the older and less advantageous feudalism, which permeated American employment law.[71] She characterizes America's original system of labor law as feudal, rather than liberal, because it treated the laborer not as an equal of his employer's, but as a member of a rigid social hierarchy. Feudalism treats the laborer's status as an inalienable, personal characteristic, outside of the sphere of politics.[72] The judiciary, first through its common law jurisprudence and then through constitutional rulings that invalidated government regulations on behalf of workers, continually maintained this feudal understanding of the workplace. Consequently, Orren sees the shift from feudal relationships to liberal ones as both defined and accomplished by a shift in venue. The state became liberal precisely when legislatures began (and courts ceased) to direct the development of labor law. Orren has already

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say that labor organizations never tried to address their injunction problem through constitutions. The Arizona constitutional convention of 1910 considered the addition of an anti-injunction provision to its constitution, but ultimately rejected these proposals. See page 208 of Paul Mandel, "Labor Politics, Hayden Style," in *American Labor in the Southwest : The First One Hundred Years*, ed. James C. Foster (Tucson, Ariz.: University of Arizona Press, 1982). In addition, the New York constitution was amended in 1938 to include the statement that "Labor of human beings is not a commodity nor an article of commerce and shall never be so considered or construed." This declaration was taken directly from the Clayton Act of 1914, a piece of Congressional legislation designed to prevent courts from issuing labor injunctions on the basis of antitrust laws. However, the availability of legislative remedies for labor's injunction problem drove labor activists and their advocates to pursue legislative remedies at both the federal- and state-level.

[68] Groat, "The Eight Hour and Prevailing Rate Movement in New York State."

[69] Workingman's Federation of the State of New York, "Official Proceedings of the Workingman's Federation of the State of New York" (1906).

[70] People ex rel. Williams Engineering & Contracting Co. v. Metz, 85 N.E. 1070

[71] Orren, *Belated Feudalism : Labor, the Law, and Liberal Development in the United States*.

[72] Ibid., 74.

described labor's attempt to wrest control of labor relationships from the courts and locate that control in elected legislatures. The neglected element of this story is that labor employed constitutional protections in its efforts to achieve this switch from courts to legislatures.

I have identified six instances in which an amendment to a state's constitution was proposed in order to overturn a decision by that state's supreme court (Table 3). I identified these instances using my survey of state supreme court cases related to labor statues combined with my survey of constitutional labor protections. I looked for labor provisions that were added to state constitutions after a supreme court case in the same state declared a labor law on the same topic unconstitutional. I consulted primary and secondary sources to verify that the amendments I identified were actually passed in direct response to the state supreme court's ruling. Because my survey of state court cases only includes supreme courts, I could not identify amendments that were prompted by lower court decisions. Because Table three (below) does not include amendments passed in response to adverse rulings of lower courts, it is quite likely that other constitutional amendments were also created in an attempt to overturn a specific court ruling.

Table 3: Amendments in direct response to a supreme court case within the state

Year	State	Topic	Case Name
1902	California	hours on public works	Ex parte Kubach (1890)
1902	Colorado	hours in mines	In re Morgan (1899)
1905	New York	hours on public works	People v. Orange County Road Const. Co. (1903)
1913	New York	workmen's compensation	Ives v. South Buffalo Ry. Co. (1911)
1913	Ohio	hours on public works	City of Cleveland v. Clements Bros. Const. Co. (1902)
1920	Nebraska[73]	women's hours and wages	Lowe v. Rees Printing Company (1894)

Labor rights were not only created to overturn particular court decisions, but were also introduced in the original constitutions of newly admitted states. For instance, Colorado, Wyoming, North Dakota, Montana, Washington, Idaho, Utah, Oklahoma, New Mexico, and Arizona all included labor protections in their original constitutions. Though a state's first constitution could not have been a response to the state's own supreme court, it does seem quite likely that labor provisions were added to these state constitutions in response to the opinions of other states' courts. For instance, Florence Kelly, a prominent progressive activist, explained Utah's inclusion of labor rights in its first constitution with reference to an Illinois Supreme Court case that declared it unconstitutional for the state to regulate the hours of women's employment. "The people of Utah, instructed by the supreme court of Illinois in 1895, showed by their action in 1896 that they had learned their lesson. . .they incorporated in their own

[73] The Nebraska amendment about women's hours and wages followed a Nebraska state court decision that overturned a regulation for both men and women. In fact, while delegates passed this constitutional amendment in response to a state supreme court case overturning an eight-hour law for both men and women, a similar law for women alone was actually passed and even upheld by the state supreme court before the constitutional revision of 1920. Consequently, an examination of records from the constitutional convention was necessary to reveal that this constitutional amendment was proposed in response to this case. This suggests that even more amendments (than are evident from my survey alone) may have been proposed in response to supreme court cases within the same state.

constitution of 1896 an article dealing explicitly with the rights of labor"[74] In this article, written in 1898, Kelly then advised other states to follow Utah's example by including specific labor rights in their constitutions (both new and old.) In this way, Kelly explained, state legislatures could be made to pass such legislation and state courts could be prevented from overturning it. Thus, even in brand new states, constitutional labor protections appear to have stemmed in part from the national sense that such provisions would facilitate the passage of labor legislation and entrench this legislation against potentially hostile courts.

The Goals of Constitutional Labor Rights: Pre-empting Courts

As the New York case studies demonstrate, labor protections in state constitutions conferred power on labor's advocates by strengthening their position in existing political battles over protective legislation. Power can also operate in the absence of outright political conflict. In fact, power can be exercised precisely by preventing certain conflicts from ever occurring.[75] Thus, labor organizations not only hoped to win conflicts over the validity of the laws, but also to preempt (or at the very least alter the terms of) such conflicts. Constitutional labor provisions had the potential to preempt constitutional challenges to statutory labor protections because, if these protections were actually contained in a state's constitution, it seemed much less likely that they could be declared unconstitutional.

Labor organizations hoped that constitutional provisions would take certain questions off of the political agenda. For instance, in 1904, Montana added a provision to its constitution establishing an eight-hour workday for miners, smelters, and state employees. Two years later, the state Supreme Court upheld similar legislation. However, over the next three decades, the legislature passed many more eight-hour laws that were not protected by this constitutional amendment. These included eight-hour laws for laborers employed in strip mining, sugar refineries, cement and hydroelectric plants, and retail stores. Statutes also existed establishing an eight-hour day for bus drivers and women.[76] In 1935, a law regulating the hours of firemen was ruled unconstitutional by the state Supreme Court.[77] In addition, two lower courts ruled the law regulating store clerks' hours unconstitutional.[78] Even before these decisions were handed down, labor advocates desired a constitutional amendment that would establish a universal eight-hour day. Labor advocates made several attempts to have the legislature place the eight-hour amendment on the ballot for ratification by the electorate.[79] Once they accomplished this goal, the Montana State Federation of Labor campaigned aggressively for this amendment. Its newspaper, *The Montana Labor News*, ran a series of articles about the need to constitutionalize the right to an eight-hour day. One headline read: "All of these laws will be in danger if the eight hour amendment is defeated by the people November 3." The article explained:

> Let us try and understand this picture presented by the proposed 8-hour amendment. Only a few industries are governed in hours by the

[74] Florence Kelly, " The United States Supreme Court and Utah Eight-Hours' Law," *The American Journal of Sociology* 4, no. 1 (1898).
[75] John Gaventa, *Power and Powerlessness : Quiescence and Rebellion in an Appalachian Valley* (Urbana: University of Illinois Press, 1980).
[76] "All These Laws Will Be in Danger If the Eight Hour Amendment Is Defeated by the People November 3," *Montana Labor News*, October 29 1936.
[77] State ex rel. Kern v. Arnold. 100 Mont. 346, 49 P.2d 976, Mont. 1935.
[78] " History of the Shorter Working Day Constitutional Amendment in Legislature," *Montana Labor News*, October 22 1936.
[79] Ibid.

> Constitution of the state of Montana, namely underground workers and work performed by various units of the government. These people are protected. Other people who are enjoying 8 hours have gained this advantage by laws passed by the legislature and not through the Constitution. These people include clerks in stores and women in industry. Sugar beet workers, coal strip miners and others. All of these latter laws that have been passed by the Legislature are subject to challenge by the courts as to their constitutionality. All of these 8-hour laws may be destroyed by the corporations unless you pass this 8-hour amendment. Usually, the courts function in the interests of the corporations; so does the legislature."[80]

One primary purpose of the new eight-hour amendment was clearly to preempt an adverse court decision and protect these laws from courts. In 1938, the state's Supreme Court did uphold the eight-hour law for store employees.[81] As the quotation above suggests, this provision was also designed to entrench the shorter workday against any future legislative action. This intent was reflected in the text of the amendment itself. It read "the legislative assembly may by law reduce the number of hours constituting a day's work whenever in its opinion a reduction will better promote the general welfare, but it shall have no authority to increase the number of hours constituting a day's work beyond that herein provided."[82] This provision denied the legislature the authority to increase the legal workday, thereby allowing any future legislatures to continue shortening the workday while simultaneously entrenching the current eight-hour maximum.

Labor organizations were not the only bodies who employed constitutional provisions in order to preempt constitutional challenges to protective legislation. State legislatures also employed this strategy on occasion. For instance, in 1914, members of the California legislature attempted to entrench one of its policies through an addition to the California Constitution authorizing the legislature to establish a minimum wage for women and minors, regulate on behalf of the "comfort, health, safety, and general welfare of any and all employees," and to confer on "any commission now or hereafter created such power and authority as the legislature may deem requisite to carry out the provisions of this section." The addition of this provision was motivated primarily by the desire to establish preemptively the constitutionality of the Industrial Welfare Commission that the legislature had created the previous year and endowed with the power to regulate wages, hours, and working conditions.[83]

The Commission's power to establish minimum wages for women seemed particularly likely to provoke a constitutional challenge. In addition, it was quite controversial, even among California's labor organizations. The California State Federation of Labor had officially declared its opposition to minimum wages in 1912, and its official journals published editorials vehemently opposing the establishment of a state commission empowered to set wages. Labor opposition to minimum wages stiffened still further when Samuel Gompers weighed in on the question.[84] By the California Federation of Labor's annual convention of 1914, the state's labor

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[80] "All These Laws."
[81] State v. Safeway Stores, 76 P.2d 81
[82] Joseph R. Grodin, Calvin R. Massey, and Richard B. Cunningham, *The California State Constitution : A Reference Guide*, Reference Guides to the State Constitutions of the United States ; No. 11 (Westport, Conn.: Greenwood Press, 1993).
[83] Ibid.
[84] See page 274 of Norris Hundley, "Katherine Philips Edson and the Fight for the California Minimum Wage, 1912-1923," *The Pacific Historical Review* 29, no. 3 (1960).

leaders were sharply divided on the desirability of a minimum wage for women.[85] The strongest support for these laws came from progressive social reformers who were committed to protectionist policies for women. One such activist, Katherine Edson, a special agent for the Bureau of Labor Statistics for Southern California, advocated a preemptive amendment to the state constitution even before the legislature had passed the relevant law.[86] Several women's organizations, including the newly established Women's Trade Union League of Los Angeles organized a campaign to convince voters to support the minimum wage bill and to ratify the constitutional amendment.[87]

Two years earlier, members of the Vermont legislature (like its counterpart in California) had been so concerned about preempting a conflict over the constitutionality of a proposed workmen's compensation law that they sought a constitutional amendment on the subject before even passing the law. The state Republican Party included workmen's compensation legislation as a plank in its 1912 platform. Once elected, however, legislators became so concerned about the constitutionality of this legislation that, instead of passing a workmen's compensation law, they refused to act before securing explicit constitutional authority. The voters approved the amendment in 1914, authorizing the legislature to create a system of workmen's compensation. Only then, in 1915, did the legislature pass a workmen's compensation law.[88] As we have seen the desire to entrench protections against potential court decisions prompted both labor organizations and legislatures to pursue preemptive constitutional amendments.

What About *Lochner*?

Even taking into account the power of constitutional provisions to overturn state court decisions and perhaps to preempt adverse decisions, it would still have made little sense for labor organizations to amend their state constitutions if the U.S. Supreme Court had declared all labor legislation unconstitutional on federal grounds. Under such circumstances, labor provisions in state constitutions would have had little power to protect labor legislation. After all, the federal Supreme Court of this period is best remembered for its declaration in *Lochner v. New York* that a state law limiting the working hours of bakers violated the Due Process Clause of the federal, not state, Constitution.[89]

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[85] Ibid. While there were movements among both male and female labor leaders for the adoption of gender-neutral minimum wage laws, led by Gompers, the AFL was staunchly opposed to minimum wage laws for men and women, believing that labor would be better served by establishing a family wage for male breadwinners directly through their employers. The National Women's Trade Union League and middle-class female progressive reformers, like Florence Kelley, generally supported a minimum wage for both men and women, but settled for protective legislation for women, some out of the belief that protective legislation for women was better than no protective legislation at all, while some were motivated maternalist sentiments, believing that women needed special state protection because of their role as mothers coupled with their relative weakness when compared to male laborers. Vivien Hart, *Bound by Our Constitution : Women, Workers, and the Minimum Wage* (Princeton, N.J.: Princeton University Press, 1994). See especially pages 78-85.

[86] See page 277 of Hundley, "Katherine Philips Edson and the Fight for the California Minimum Wage, 1912-1923."

[87] For a more detailed account, see page 131 of Katz, "Socialist Women and Progressive Reform." See also page 415 in Theda Skocpol, *Protecting Soldiers and Mothers : The Political Origins of Social Policy in the United States* (Cambridge, Mass.: Belknap Press of Harvard University Press, 1992).

[88] Winston Allen Flint, *The Progressive Movement in Vermont* (Washington, DC: American Council on Public Afairs, 1941).

[89] *Lochner v. New York* 198 U.S. 45 (1905)

However, scholars of American political development have begun to challenge the conventional understanding of the Supreme Court's doctrine during this period. First, relatively recent scholarship has begun to dispel the myth that the Court struck down labor legislation simply to protect the "liberty of contract" it saw implied in the Fourteenth Amendment. Instead, as Howard Gillman has demonstrated, the Court was mainly concerned about whether it was constitutional to pass legislation that applied only to a single class of people, rather than applying equally to all members of the polity.[90] This mode of decision-making was significantly different from a jurisprudence that required the Court to strike down any statutes that limited contractual freedoms. It left room for the Court to uphold protective labor legislation. This re-interpretation of Lochner-era jurisprudence helps to explain the second type of revisionist scholarship, which argues that the Supreme Court was not a major impediment to the establishment of labor regulations.[91] More of the time than not, the Court ruled that statutes regulating the hours and conditions of work could be justified, despite the fact that they singled out one class of citizens, because these laws fell under the state's police power to regulate in the interests of the health and order of the community. Between 1897 and 1937, 43 Supreme Court rulings rejected substantive due process objections to employment regulations, while only declaring employment regulations unconstitutional in 12.[92] Consequently, many advocates of labor legislation argued that state supreme courts posed an even more serious threat to labor legislation than the federal courts. State courts posed this threat through their interpretations of the due process clauses of state constitutions.[93]

Many protective labor provisions were added to state constitutions before it was even clear that the U.S. Supreme Court would hinder the enactment of labor legislation. Initially, state courts were the only institutions overturning protective legislation. In 1898, when the Supreme Court finally did rule on these questions, its first ruling actually affirmed the constitutionality of the state labor law.[94] Even after the Court's famous *Lochner* decision in 1905, the Court did not strike down a significant number of labor regulations until the 1920s.[95] This period of active judicial review occurred in the final third of the period during which states added labor amendments to their constitutions (see Table 2).

The relative threat that state courts posed to protective labor legislation was not lost on contemporaneous observers. In a *Columbia Law Review* article published in 1911, the prominent Progressive and law professor Charles Warren argued that, with the notable exception of *Lochner* itself, the Supreme Court's attitude toward labor legislation was markedly sympathetic and that state courts posed the more serious threat.[96] The following year, a political scientist published a similar assessment and noted that the public was widely frustrated with the opposition of state courts to labor legislation. He went on to explain that: "While this [frustration] is the feeling towards many state courts, it is not to-day the feeling towards the

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[90] Gillman, *The Constitution Besieged : The Rise and Demise of Lochner Era Police Powers Jurisprudence*, Keith E. Whittington, "Congress before the Lochner Court," *Boston University Law Review* 85, no. 3 (2005).
[91] Robert G. McCloskey, *The American Supreme Court*, The Chicago History of American Civilization ([Chicago]: University of Chicago Press, 1960).
[92] Michael J. Phillips, *The Lochner Court, Myth and Reality : Substantive Due Process from the 1890s to the 1930s* (Westport, Conn.: Praeger, 2001), 57.
[93] State constitutions that did not contain the phrase due process of law, often contained provisions that were interpreted in equivalent ways by state courts.
[94] Holden v. Hardy 169 U.S. 366, 18 S.Ct. 383
[95] Phillips, *The Lochner Court, Myth and Reality : Substantive Due Process from the 1890s to the 1930s*.
[96] Charles Warren, "The Progressivenes of the United States Supreme Court," *Columbia Law Review* 13 (1913).

Supreme Court of the United States. There is, I am glad to say, a very general belief that that Court, as now constituted, is in reasonably close touch with the desire of the people for social and economic legislation."[97] These observers characterized the federal Supreme Court as progressive at the height of the period now known as the Lochner Era. Their analyses suggest that, although a federal case lent the period its name, state supreme courts may have played at least as large a role as their federal counterpart in distressing legislation's advocates.

Because the state courts did not always interpret the due process clause of state constitutions in the same way that the U.S. Supreme Court interpreted the identical clause in the Fourteenth Amendment, labor legislation had to overcome two distinct sets of restrictions on government power. One delegate to the Nebraska constitutional convention in 1919 explained: "I want to say that the Supreme Court of the United States has construed laws of this character more with reference to the public welfare clause of our national Constitution than to the inhibitory clause as to due process of law, and therefore the necessities under the federal Constitution are quite different from ours."[98] Similarly, in a discussion of workmen's compensation laws, one political scientist explained: "No state compensation act can be effective which violates the Fourteenth Amendment; But on the other hand, satisfying the Fourteenth Amendment will not insure the validity of the act. The state constitution must also be satisfied."[99]

Although most historical studies of the Lochner Era have focused almost exclusively on the Fourteenth Amendment, legal scholars and labor advocates of the period frequently discussed the need for labor legislation to conform to dual due process clauses—in both the state and federal constitutions. For instance, in its brief about the need to add more protective labor provisions to the New York Constitution, the American Association for Labor Legislation explained:

> There have been since 1868 two due process clauses to which New York legislation must conform—one authoritatively and finally interpreted by the United States Supreme Court, the other finally and authoritatively interpreted by the New York Court of Appeals. If these two tribunals always agreed as to what due process requires in connection with labor legislation. . . no harm would have resulted from this repetition. . . But it is notorious that the courts have not agreed.[100]

The significance of this system of dual due process clauses became clear to Colorado's labor leaders trying to enact legislation providing an eight-hour workday for miners and smelters. In 1895, the Colorado Supreme Court issued an advisory opinion stating that it would consider the eight-hour law unconstitutional on both state and federal grounds.[101] However, in 1898, the federal Supreme Court upheld a Utah law that was virtually identical, stating that such limitation

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[97] William Draper Lewis, "A New Method of Constitutional Amendment by Popular Vote," *Annals of the American Academy of Political and Social Science* 43 (1912).
[98] Nebraska Constitutional Convention, *Journal of the Nebraska Constitutional Convention : Convened in Lincoln December 2, 1919*.
[99] Thomas I. Parkinson, "The Future of the Workmen's Compensation Amendment," *Proceedings of the Academy of Political Science in the City of New York* 5, no. 2 (1915).
[100] American Association for Labor Legislation, "Constitutional Amendments Relating to Labor Legislation and Brief in Their Defense: Submitted to the Constitutional Convention of New York State by a Committee Organized by the American Association for Labor Legislation," (1915).
[101] In re Eight-Hour Law, 21 Colo. 29, 39 P. 328

did not violate the Fourteenth Amendment.[102] Encouraged by the federal Supreme Court's decision, the Colorado legislature then enacted the eight-hour law. In cases such as these, in which the U.S. Supreme Court upheld protective legislation from one state, opponents of such legislation would sometimes issue reminders that, regardless of what the Supreme Court had to say about the Fourteenth Amendment, their state's constitution still forbade such legislation. For instance, one lawyer who argued against the constitutionality of an eight-hour law in New York responded to a U.S. Supreme Court decision upholding an extremely similar law in Kansas, saying, "The Court of Appeals of this state held that the eight-hour law was not only a violation of the Constitution of the United States, but of the Constitution of the state of New York as well and that was a material difference."[103] In fact, when the Colorado Supreme Court reviewed the constitutionality of the eight-hour law, it employed this very logic, declaring the Supreme Court's ruling insufficient to render the law constitutional. The Colorado court explained that the U.S. Supreme Court's ruling could not validate Colorado's law:

> It goes without saying that if a federal question were involved in the case at bar, and had been passed upon by that tribunal [the federal Supreme Court], our duty in the premises would be clear. But the petitioner does not invoke the protection of any provision of the national Constitution. He maintains that his sacred rights of liberty, and freedom of contract embraced in his right of property, and his exemption from arbitrary and unjust discriminations, all of which are guarantied to him in the sections of our constitution. . ., are violated by this act.[104]

This ruling illustrates the importance of both state and federal due process clauses. Without an amendment to its state constitution, even the Supreme Court's interpretation of the federal Constitution could not protect Colorado's labor laws. Accordingly, in 1902, Colorado's labor unions responded by organizing a (successful) campaign to add such a provision to the Colorado Constitution.[105] As we have seen, the advocates of labor legislation addressed their concern about state courts by changing state constitutions.[106]

The Goals of Constitutional Labor Rights: Prodding Legislatures

Labor organizations employed constitutional labor provisions not only in their attempts to overturn and exclude courts, but also in their larger efforts to lobby legislatures for protective statutes. Because state legislatures were often perceived as corrupt or on the payroll of corporations, some labor amendments were passed with the express purpose of circumventing or

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[102] *Holden v. Hardy*, 169 U.S. 366 (1898)

[103] "Eight Hour Law Decision: Labor Men and Lawyers Anxious to See Text of Opinion," *New York Times*, December 3 1903.

[104] In re Morgan, 26 Colo. 415, 58 P. 1071, Colo. 1899

[105] David L. Lonsdale, "Chicanery in Colorado," *Red River Valley Historical Review* 4, no. 3 (1979), Enyeart, ""The Exercise of the Intelligent Ballot": Rocky Mountain Workers, Urban Politics, and Shorter Hours, 1886-1911."

[106] This phenomenon was also evident in California. In an explanation of the purpose of California's minimum wage amendment for women in 19414, a state assemblyman explained: "A similar law has been sustained by the Oregon courts and is now before the United States supreme court. . .It is expected that the United States supreme court will hold as it has with the eight hour law—'legislation that is not in conflict with the federal constitution, but is an extension of police power of the state.' To be sure that nothing in our state constitution will prevent this great act of justice and mercy being done to protect the women of this state, vote 'Yes' on Assembly Constitutional Amendment No. 90." See "Minimum Wage" in *Amendments to Constitution and Proposed Statutes with Arguments Respecting the Same*: *To be Submitted to the Electors of the State of California at the General Election on Tuesday November 3, 1914*, Certified by the Secretary of State and Printed at the State Printing Office, p. 29, 1914.

controlling legislatures.[107] Constitutional amendments often necessitated a state-wide vote for their inclusion. As a consequence of this procedural requirement, when constitutional amendments were ratified by large margins or enacted through the initiative and referendum process, labor organizations were able to point to these results to demonstrate their electoral strength and threaten any legislators who voted against protective legislation. While labor organizations in the Arizona territory were gearing up to influence the shape of the new state's constitution, an observer from Arizona noted "the coming campaign for the constitutional convention is expected to demonstrate that the political power of the working class is becoming one that will have to be considered in the affairs of the territory or state hereafter."[108] After the passage of a labor-friendly constitution, the Arizona State Federation of Labor had twenty different labor bills introduced in the new state's first legislative session. A contemporaneous commentator noted "Some of the demands may sound radical to lawyers of the old school, but Arizona is a twentieth century state. The men of labor had more to do with securing the 'new constitution' than any other class in the territory and now they do not propose to neglect their opportunities."[109]

The Ohio Federation of Labor (OFL) also used the amendment of its constitution to demonstrate the extent of labor's electoral power within the state. In 1913, the Ohio State Constitution was amended to include provisions that established an eight-hour day on public works, created liens for laborers on the products of their labor, authorized the legislature to pass a workmen's compensation law, and empowered the legislature to regulate the hours, wages, and working conditions of all employees. In the OFL convention that followed the adoption of these amendments, labor leaders explained that they planned to redouble their efforts to achieve protective labor legislation: "Now that the new constitution has been adopted, the work of this convention will be especially important, as it will have to adjust itself to new conditions, and the legislative demands of organized labor will not be made in the fear that some court will stand over the law and wipe it out of existence."[110] Labor leaders were particularly energized and optimistic about the prospect of passing labor legislation because of the extensive support that labor's amendments received when they were ratified. The *Toledo Union Leader* explained: "The fact that nearly every labor amendment received over 100,000 majority is best evidence that the people of Ohio are ready and willing to give labor such legislation as may be needed for its protection and welfare."[111] At the convention itself, speakers raised the explicit idea of using all of this voting strength to threaten legislators into acting on labor's demands. For example, one speaker stated: "Public sentiment can be so aroused as to force punishment of the party that fails or refuses to comply with its express contract."[112] In the legislative session that followed, Ohio's workmen's compensation law was extended and an eight-hour law for public works was established. The legislature passed further safety regulations for both mines and railroads. The state's existing lien laws were repealed and replaced and the legislature required that employers institute a semi-monthly payday. Mercantile establishments were required to report on the hours and wages of their female employees and the ten-hour day for women extended to mercantile

[107] Dinan, "Court-Constraining Amendments and the State Constitutional Tradition."
[108] "Political Notes from Arizona," *Miner's Magazine*, July 7 1910.
[109] George Jedson King, "Union Labor Is Active in Arizon Toledo Union Leader," *Toledo Union Leader*, May 3 1912.
[110] "For the O.F. Of L.," *Toledo Union Leader*, September 6 1912.
[111] "'on to Canton,' Urges O.F.Of L.," *Toledo Union Leader*, September 27 1912.
[112] Ohio State Federation of Labor, "Proceedings of the Twenthy-Ninth Annual Convention of Ohio State Federation of Labor " (Canton, Ohio, Oct. 14-19 1912).

establishments. In addition, the legislature created an industrial commission created to collect labor statistics and enforce the states' existing laws.[113]

As Ohio's experience demonstrates, constitutional amendments did not mark the end of labor organization's efforts to secure regulation. Instead, labor organizations viewed these amendments as a step on the road to establishing legislation. After constitutional provisions were incorporated into constitutions, labor organizations resumed their pursuit of legislative action. Labor organizations behaved this way in new states as well as existing ones. For instance, Arizona's labor organizations felt convinced that they had been ignored by the territorial legislature and intended to follow their successes at the constitutional convention with legislative action. One labor newspaper explained: "considering the fact that this is the first legislature and that labor in the 'territory' got short shrift at the hands of the politicians and federal judges. . . The men of labor had more to do with securing the 'new constitution' than any other class in the territory and now they do not propose to neglect their opportunities."[114] The years following the passage of the Arizona constitution did in fact mark a high point for labor influence in legislative politics and witnessed the passage of many protective labor laws.[115] Constitutional change was thus only a part, and only occasionally a primary part, of labor organization's overall strategy. When opportunities presented themselves to pursue constitutional change or court decisions made such changes seem necessary, they made it onto the agenda of labor organizations, they were always (at least in part) a means to some other end. While their primary end was the establishment of protective labor laws, constitutional rights may also have been useful to labor organizers as they attempted to strengthen their own organizations.

The Goals of Constitutional Labor Rights: Movement building

By giving labor a place in the visible institutions of government, constitutional labor rights may also have appealed to labor organizations because of their potential value for what Michael McCann has termed "movement building." In his study of the way that rights claims empower their bearers, McCann notes that rights may facilitate the process of "raising citizen expectations regarding political change, activating potential constituents, building group alliances, and organizing resources for tactical action."[116] The Arizona territory's proposed constitution, which included the popular recall of state judges, was so radical that Taft threatened to veto it, denying Arizona statehood. Yet, some believed that labor's constitutional victories would be such a powerful organizing tool that, even in the face of a presidential veto, workers would rally around the constitution. In fact, Miners' Magazine declared that a veto would actually strengthen labor's position: "Plutocracy may kill a constitution that demands liberty for the masses of the people, but assassinating the constitution . . . will only inspire men and women to stand more firmly on their feet to demand that the people must be heard on the organic law which governs the people of a state."[117]

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[113] American Association for Labor Legislation, "Topical Index by States," *American Labor Legislation Review* (1913).
[114] *Toledo Union Leader* "That Constitutional Convention" vol.5, no. 10, May 3, 1912: page 2.
[115] For a description of labor's influence in the Arizona legislature in the years after the constitutional amendment passed see page 52 of James W. Byrkit, *Forging the Copper Collar : Arizona's Labor Management War of 1901-1921* (Tucson, Ariz.: University of Arizona Press, 1982).
[116] Michael W. McCann, *Rights at Work : Pay Equity Reform and the Politics of Legal Mobilization*, Language and Legal Discourse (Chicago, IL: University of Chicago Press, 1994), 11.
[117] "That Constitution," *Miners Magazine*, January 5, 1911 1911.

A speaker at the Colorado Federation of Labor also touted the mobilizing potential of the eight-hour amendment to the Colorado Constitution. He explained "I believe that the adoption of the eight-hour amendment will do more toward thoroughly organizing Colorado in all lines than all the other agencies that could be introduced or all the eloquence possible to be let loose from organizers."[118] In fact, labor organizers did point to the constitution's Eight-hour amendment when justifying the labor strikes that followed its passage. The Miners' Magazine, which was published by the Western Federation of Miners, pointed to the existence of this eight-hour amendment and the lack of hours legislation immediately following the amendment to explain and to justify the miners' strikes in the state. It announced "Since the Fourteenth General assembly refuses to obey the political mandate of the people of Colorado discontent has grown and spread until thousands of men who are the victims of long hours are in rebellion"[119]

Labor advocates and publications described the role of state constitutions as that of broadcasting the demands of labor through a highly visible public institution. The Miners' Magazine descriptions of the state constitution as "the political mandate of the people" exemplifies this view. In fact, labor publications often described constitutions as the voice of the people, unmediated by legislatures and unmolested by courts. For example, one labor newspaper compared the delegates to the Oklahoma constitutional convention to the members of the Oklahoma legislature, calling the constitutional convention delegates the "real representatives of the people."[120] Similarly, when the New York Federation of labor presented its slate of demands for the new constitution, it explained: "[our slate of labor proposals] constitutes a Bill of Rights. We earnestly petition that it be made part of the new state constitution. . . it represents the hopes and aspirations of the wage-earners for better living and working conditions in the future."[121] While labor publications and organizers almost always described labor-friendly state constitutions as broadcasting the voice of the people, they also took pains to credit the particular unionists and politicians who facilitated the drafting of labor provisions and to list the parts of the state in which labor's agenda received strong support, thereby emphasizing the vitality of their movement and the efficacy of its leaders.

Conclusion

Constitutional law and the courts that interpreted it certainly hindered the enactment of state labor regulations. Many union leaders, especially at the federal level, did consequently determine that private bargaining would serve their interests better than public law. However, other labor organizations embraced constitutional law, viewing constitutions as vehicles through which they could continue to work for state regulation. Their activism demonstrates that, at least at the state level, American labor organizations abandoned neither the quest for government regulation nor the tactic of writing their demands into law. Their efforts resulted in constitutional rights to government intervention and protection. Consequently, the state constitutions written and amended throughout the Gilded Age and Progressive Era look very different from the U.S. Constitution. Rather than establishing explicit limitations on government action and intervention,

[118] Colorado State Federation of Labor, "Report of Proceedings of the Seventh Annual Convention" (Trinidad, CO, June 9-13 1902).
[119] "An Appeal for an Eight-Hour Fund," *Miners' Magazine*, August, 1903 1903.
[120] "Oklahoma Shows the Way: Government by Injunction Abolished – Michigan Should Follow Suit," *Michigan Union Advocate*, Nov. 1 1907.
[121] "Labor's Bill of Rights," *The Garment Worker*, September 17 1915.

these new rights mandated an active state role in protecting laborers. These positive rights demonstrate that the American rights tradition is not merely devoted to restricting government intervention, but also to mandating government protection of the vulnerable.

Attention to the origins of these constitutional labor rights and the goals of their advocates demonstrates that constitutional change is not always motivated by the desire to judicialize conflicts. In fact, for the proponents of protective labor provisions, one of the primary goals was actually to exclude the judiciary from this policymaking arena. Labor organizations worked to include positive rights in state constitutions because they hoped that constitutional changes would enable them to overcome hostile state court decisions and motivate reluctant legislatures to pass protective legislation. Labor advocates also attempted to entrench their preferred policies against both future legislatures and court challenges using state constitutions.

While this paper is primarily concerned with the political conditions that motivate popular pursuit of constitution writing and constitutional change, it would certainly be valuable to know whether these constitutional provisions achieved their desired effects. Unfortunately, it is very difficult to determine whether, taken as a whole, the state constitutional amendments about labor had a significant effect on labor policy.[122] It is clear that, in certain cases, these constitutional labor provisions achieved their desired ends. The effect of constitutional amendments was clearest when those amendments allowed state legislatures to reestablish regulations after a state court ruled the amendment unconstitutional. In California, both New York cases, and Ohio, the type of protective law that the court struck down was restored after the passage of the constitutional amendment (See Table 3). These amendments clearly allowed for the reestablishment of particular labor legislation.[123]

In Colorado, the state labor organizations had a more difficult time getting the state legislature to pass an eight-hour law after the passage of a constitutional amendment. Although the legislature passed a law regulating hours of work, this new statute lacked penalties for violating the law. The legislature's reluctance to pass a meaningful eight-hour law was widely attributed to the influence of mining companies and was often cited as one reason for the miners' strikes that rocked Colorado in the first decade of the twentieth century. The Colorado State Federation of Labor continued to agitate for a meaningful eight-hour law, which the legislature passed in 1911.[124]

In states in which supreme courts upheld protective regulations in the presence of constitutional labor provisions, it is not always possible to know whether the court would have decided the same way even in the absence of such a constitutional provision. However, there were cases in which state supreme courts actually cited a labor provision of the state's constitution in order to justify their rulings on state constitutional grounds. For instance, Kentucky's supreme court upheld the state's law that miners must be paid in lawful money

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[122] Tom Burke and Jeb Barnes describe the methodological difficulties of determining the empirical effects of rights politics in their article entitles "Is There an Empirical Literature on Rights," forthcoming in *Studies in Law, Politics, and Society*.

[123] Nebraska was a more complicated case since the constitutional amendment passed so long after the court case to which it was responding and did not pertain to an identical policy. While delegates passed this constitutional amendment in response to a state supreme court case overturning an eight-hour law for both men and women, a similar law for women alone was actually passed and even upheld by the state supreme court before the constitutional revision of 1920.

[124] David L. Lonsdale, "The Fight for an Eight-Hour Day," *The Colorado Magazine* 43, no. 4 (1966). See also Enyeart, ""The Exercise of the Intelligent Ballot": Rocky Mountain Workers, Urban Politics, and Shorter Hours, 1886-1911."

against the charge that this was special class legislation, and therefore unconstitutional, by citing the state's own constitution. The Kentucky court explained "The organic law makes the general classification in the first instance, and this fact cuts short all discussion of its constitutionality which might otherwise grow out of the special application to miners."[125]Similarly, the Utah court supreme court declined to void an eight-hour law for miners, stating that such a law could not violate the state's constitution because the state constitution explicitly directed the legislature to pass laws providing for the health and safety of employees in factories, smelters, and mines.[126] And the Wyoming Supreme Court upheld the state's workmen's compensation statute against the charge that it violated the state's constitutions. The opinion described the "active and strenuous campaign by and on behalf of the workmen of the state and their organizations" to see the constitutional amendment enacted, and then explained that the workmen's compensation law could not possibly be said to violate the constitution or deprive workmen of their constitutional rights: "The act in question. . .is in accord with the system of workmen's compensation acts that were in the minds of the people adopting the constitutional amendment. . .And any and all provisions of the [state] Constitution that might have been construed as preventing the Legislature for passing such an act are modified or repealed as far as they would effect such an act."[127] Opinions like these do suggest that the labor provisions in state constitutions did prevent state supreme courts from overturning protective legislation.

While this project does not focus on the effects of constitutional rights, the origins of constitutions are interesting and important in their own right. Constitutions establish and order all other political institutions. Consequently, they determine how the political game will be played. Whether or not the social movements that shaped state constitutions ultimately got what they wanted under the rules that they helped to write, they did succeed in shaping new rules for their governance. In the process, they contributed to the tradition of enshrining positive rights in America's state constitutions.

[125] Commonwealth v. Hillside Coal Co. 58 S.W. 441 (1900)

[126] The state supreme court explained that the state constitution "makes it the duty of the legislature to 'pass laws to provide for the health and safety of employés in factories, smelters and mines.' And we are not authorized to hold that the law in question is not calculated and adapted in any degree to promote the health and safety of persons working in mines and smelters. Were we to do so, and declare it void, we would usurp the powers intrusted by the constitution to the lawmaking power." *Holden v. Hardy*, 14 Utah 71 (1896)

[127] *Zancanelli v. Central Coal & Coke Co*., 173 Pac. Rep. 981 (1918)