

***Compelled Consent: Wolff Packing and the Constitutionality of Compulsory Arbitration***

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**Abstract:** Nearly a century ago, the U.S. Supreme Court struck down a Kansas compulsory arbitration scheme that fixed wages and hours as to a single employer (but not its competitors), and barred strikes and other forms of concerted action by its workers. *Charles Wolff Packing Co. v. Kansas Court of Industrial Relations* recognized the right to strike as the constitutional bookend to the Fourteenth Amendment’s protections against deprivations of property and liberty of contract without due process of law. Though its holding has never been reversed, some modern-day proponents of private sector compulsory arbitration argue that the New Deal Court “completely repudiated” *Wolff* in 1937, when it administered its *coup de grâce* to “economic due process” in *West Coast Hotel Co. v. Parrish* and upheld the National Labor Relations Act (“NLRA”) against a Due Process Clause challenge in the *Labor Board* cases. In November 2017, the California Supreme Court endorsed this view in *Gerawan Farming, Inc. v. Agricultural Labor Relations Board*, when it rejected a challenge to a forced contracting scheme similar to the one invalidated in *Wolff*.

This epitaph cannot be reconciled with the history of the Kansas Act or *Wolff*’s significance in the evolution of the doctrinal shifts leading to the New Deal Court’s validation of the NLRA. The *Labor Board* cases reflected, rather than repudiated, one of *Wolff*’s central teachings – workers would not be able to deal on terms of equality with their employer without the right to engage in collective action. The proceedings before the Court of Industrial Relations, internal documents of the Taft Court, and the national debate precipitated by the Kansas Act over free speech, free labor, and free markets, explain why the unanimous decision in *Wolff* cannot be dismissed as a “*Lochner* era” relic – the Kansas Act’s compulsory arbitration scheme could not function unless associational rights *and* property and liberty due process protections were abridged. It also explains why modern-day experiments analogous to the “drastic and all-inclusive” joint compulsion imposed by the Kansas Act suffer from the same, fatal constitutional difficulties.

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## *Introduction*

The National Labor Relations Act of 1935 (“NLRA”) resulted from an extensive compromise over the reach and scope of collective bargaining and the obligations of employers to recognize their employees’ chosen bargaining representative. While requiring mutual, good faith bargaining, the Act does not “compel either party to agree to a proposal or require the making of a concession.”<sup>2</sup> The NLRA’s sponsor, New York Senator Robert Wagner, believed that the regulation of the bargaining process, rather than government control over the outcome of negotiations, would be the Act’s most enduring contribution to industrial peace. Others believe that this has been the NLRA’s most significant failure. From their perspective, compelling additional bargaining without the power to compel an initial contract merely invites more bad faith bargaining and the erosion of the union’s majority support.<sup>3</sup>

This debate predates the NLRA. Progressive reformers in the early twentieth-century viewed government-imposed, compulsory arbitration over the terms and conditions of employment as a means to avoid labor strife and to ensure a “living” wage and improved working conditions. More recently, proposed federal legislation would permit the National Labor Relations Board (“NLRB”) to impose collective bargaining agreements (“CBAs”) where the employer and union fail to reach an initial contract. Yet modern-day proponents of government intervention into private labor relationships, like their early twentieth-century Progressive Era counterparts, disagree over how to best to achieve the common goal of facilitating collective bargaining. The earliest and most significant experiment in the use of compulsory arbitration – the Kansas Court of Industrial Relations Act of 1920 – illustrated that tension.

The Kansas Court of Industrial Relations (“CIR” or “Industrial Court”) wasn’t a court. It was a state administrative agency with the power to ban strikes and to fix wages and hours in industries ranging from garment manufacturers to slaughterhouses. Proponents believed that the Industrial Court would create in the Sunflower State “a mecca of sane industrialism . . . in place of worn-out methods of settling industrial disputes.”<sup>4</sup> But other Progressives saw forced contracting as a “Middle Western ‘law and order’ movement” that threatened civil liberties.<sup>5</sup>

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<sup>2</sup> National Labor Relations Act of 1935, Pub. L. No. 74-198, § 8(d) (codified as amended at 19 U.S.C. § 158 (2016)).

<sup>3</sup> See, e.g., Catherine L. Fisk & Adam R. Pulver, [First Contract Arbitration and the Employee Free Choice Act](#), 70 LA. L. REV. 47 (2009).

<sup>4</sup> [Radicals Quit Kansas](#), COAL REVIEW 30 (Mar. 17, 1920).

<sup>5</sup> Editorial, *Exit the Kansas Court*, 35 THE NEW REPUBLIC 112, 112-13 (June 27, 1923). Felix Frankfurter, then a professor at Harvard Law School and one of the founders of *The New Republic*, authored

Both labor and management opposed the Kansas Act. The *Kansas City Post* saw it as “Socialism run riot – Socialism without any of the good points of Socialism and containing all the possibilities of Czarism.”<sup>6</sup> Samuel Gompers, the President of the American Federation of Labor, called the Kansas Act an “un-American slave law.”<sup>7</sup> He believed that the state should force the employer to bargain with unions selected to represent all workers while leaving them free to deploy whatever legitimate economic weapons to negotiate agreements, including strikes and lock-outs.

The Supreme Court had the last word. In 1923, the Court held that CIR wage orders imposed on the Wolff Packing Company, a Topeka meat packing plant, violated the Due Process Clause of the Fourteenth Amendment.<sup>8</sup> The Court addressed the Kansas statute one year later in *Dorchy v. Kansas*, this time in a case brought on behalf of labor.<sup>9</sup> A union official was prosecuted for calling for a strike against a coal mine in violation of the statute. In a unanimous opinion by Justice Brandeis, the Court reiterated its holding in *Wolff I* that “the system of compulsory arbitration as applied to packing plants violates the federal Constitution,” and that the same system was unconstitutional as applied to coal mines.<sup>10</sup>

The following year a second *Wolff* case came before the Court, this time addressing whether the CIR could regulate hours (as opposed to wages) as to only one employer.<sup>11</sup> The Court again unanimously struck down the CIR’s orders based on the compulsory nature of the proceedings and the manner by which terms were imposed.<sup>12</sup> As the Court observed, the statute “shows very plainly that its purpose is not to regulate wages or hours of labor either

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the editorial. *The Nation* labeled the Industrial Court as a “contagion” spreading from state to state that would “fasten fresh shackles on labor.” [Courts of Industrial Injustice](#), 110 THE NATION 416 (April 3, 1920).

<sup>6</sup> The *Kansas City Post* denounced it as “[s]tate control of all the necessities of life, the fixing of prices and wages, the making of rules for the conduct of any and every man’s business.” [The Kansas Strike Cure](#), THE LITERARY DIGEST 17 (Feb. 1920).

The GOP was divided on the issue. At the 1920 Republican Convention in Chicago, “[a] large majority of [delegates] favored its use in public employment, but the tally on its application to general private industry was almost evenly split. The industrial relations subcommittee made no recommendation on the party’s labor planks, commenting only that the issue found the rank and file of the party deeply divided.” ROBERT H. ZIEGER, [REPUBLICANS AND LABOR](#), 1919 – 1929 32 (1969).

<sup>7</sup> [DEBATE BETWEEN SAMUEL GOMPERS AND HENRY J. ALLEN AT CARNEGIE HALL, 28 MAY 1920](#) 41 (E. P. Dutton and Co. ed., 1920).

<sup>8</sup> *Chas. Wolff Packing Co. v. Court of Ind. Relations*, 262 U.S. 552 (1923) (“*Wolff I*”).

<sup>9</sup> *Dorchy v. Kansas*, 264 U.S. 286 (1924).

<sup>10</sup> *Id.* at 289.

<sup>11</sup> *Chas. Wolff Packing Co. v. Court of Ind. Relations*, 267 U.S. 552 (1925) (“*Wolff II*”).

<sup>12</sup> *Id.*

generally or in particular classes of businesses,”<sup>13</sup> but rather “is intended to compel ... the owner and employees to continue the business on terms which are not of their making.”<sup>14</sup>

Given the deep divisions within the Taft Court, the unanimity in the Kansas Act decisions is noteworthy. Chief Justice Taft, who authored *Wolff I*, viewed private sector compulsory arbitration as approximating a form of modern-day indentured servitude. Justice Van Devanter, who rarely saw eye-to-eye with his more liberal colleagues, wrote the second *Wolff* decision.<sup>15</sup> The Court’s most prominent civil libertarian, Louis Brandeis, saw the Kansas Act as an example of the “curse” of “bigness” in government.<sup>16</sup>

The *Wolff* decisions doomed what was seen by some as an instantiation of a Progressive view “that liberty was not an inalienable and God-given ‘possession[] of a sacrosanct individual,’ but rather something created by social institutions.”<sup>17</sup> By the time the CIR was dismantled in 1925, a version of the Kansas Act became an instrumentality to confiscate property and to suppress speech under Mussolini’s Syndicalist Labor Act.<sup>18</sup> “The Revolution,” as Karl Georg Büchner wrote in *Danton’s Death*, “is like Saturn – it eats its own children.”<sup>19</sup> Just as Georges Danton repudiated the revolution he sparked at the Bastille in 1789, many of the early enthusiasts of the Kansas Act became its fiercest critics.

But unlike Danton, government-ordered compulsory arbitration and state-imposed contracting has not died. The Employee Free Choice Act (“EFCA”), introduced in various iterations in Congress over the last decade, includes compulsory arbitration as a way to “fix” perceived “catastrophic underenforcement” of private sector employees’ statutory bargaining rights. Despite four attempts, the EFCA is not yet the law.<sup>20</sup>

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<sup>13</sup> *Id.* at 565.

<sup>14</sup> *Id.* at 569.

<sup>15</sup> Barry Cushman, [Inside the Taft Court: Lessons from the Docket Books](#), 2015 SUP. CT. REV. 345 (2016).

<sup>16</sup> See note 105 *infra*. See generally Louis D. Brandeis, [OTHER PEOPLE’S MONEY – AND HOW THE BANKERS USE IT](#) (1914).

<sup>17</sup> Victoria Nourse, *A Tale of Two Lochners: The Untold History of Substantive Due Process and the Idea of Fundamental Rights*, 97 CAL. L. REV. 751, 788 (2009) (quoting Ray A. Brown, *Due Process of Law, Police Power, and the Supreme Court*, 40 HARV. L. REV. 943, 944-45 (1927)).

<sup>18</sup> [Mussolini Prepared For War in Europe](#), THE FREDERICKSBURG FREE LANCE-STAR, at 1 (Oct. 15, 1935)..

<sup>19</sup> Georg Buchner, [DANTON’S DEATH](#) 18 (Howard Brenton ed., Methuen Drama 2010).

<sup>20</sup> Fisk & Pulver, *supra* note 3. See H.R. 5000, 114th Cong. (2016); H.R. 1409, 11th Cong. (2009); H.R. 800, 110th Cong. (2007); H.R. 1696, 109th Cong. (2005); H.R. 3619, 108th Cong. (2003); see also S. 560, 111th Cong. (2009); S. 1041, 110th Cong. (2007); S. 842, 109th Cong. (2005); S. 1925, 108th Cong. (2003). See also Kate Andrias, *The New Labor Law*, 126 YALE L. J. 5, 27 (2016) (“The failure to pass EFCA and its predecessor reform bills were significant losses for the labor movement.”).

Compulsory arbitration has fared better in California. In 2002, that state amended its Agricultural Labor Relations Act of 1975 (“ALRA”) by adopting a forced contracting procedure called “Mandatory Mediation and Conciliation,” or “MMC.”<sup>21</sup> The ostensible purpose of MMC was to “jump start” moribund bargaining relationships between agricultural growers and unions certified to represent farmworkers. Under MMC, the California Agricultural Labor Relations Board (“ALRB”) shall, at the request of a union, “refer” an employer into a compelled arbitration procedure where a state-empanelled “mediator” drafts the terms of an initial “collective bargaining agreement,” which is imposed by order of the ALRB, and enforced by the Superior Court.

In November 2017, the California Supreme Court resolved a split within the state intermediate appellate courts by upholding the MMC statute against a facial constitutional challenge. The court dismissed *Wolff* as a relic of the Supreme Court’s *Lochner*-era embrace of “liberty of contract.”<sup>22</sup> This misunderstands the history of the Kansas Act and the holding of *Wolff*, which recognized that property and liberty interests *and* freedom of association were inseparable, mutually reinforcing rights guaranteed under the Due Process Clause.

In fact, the *Wolff* decisions are most instructive as to the constitutional problems with MMC and the EFCA. Though some academics caricature *Wolff* as part of a “reign of terror for state and federal legislation” during the Taft Court<sup>23</sup>, this diminishes the extent to which the Court’s view of the Due Process Clause and individual liberties began to evolve well before the Court packing crisis of 1937. Three of its 1923 landmark decisions – *Wolff I*, *Adkins*, and *Meyer v. Nebraska* – illustrate that evolution. *Adkins*’ endorsement of *Lochner* barely held a majority vote. *Meyer*’s embrace of personal freedom, as the late David Currie wrote, “strikes a responsive chord today,” by signaling a willingness to extend due process protections to intimate privacy rights, and intellectual freedom.<sup>24</sup> *Meyer*, like *Wolff*, has “a

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<sup>21</sup> See 2002 Cal. Legis. Serv. Ch. 1146 (A.B. 2596) (2002 West). *Gerawan Farming, Inc. v. Agricultural Labor Relations Board*, 3 Cal. 5<sup>th</sup> 1118, 1139 (“*Gerawan Farming*”) (2017) (citing Fisk & Pulver, *supra* note 3, at 50) *petition for certiorari pending*, No. 17-1375 (Mar. 28, 2018).

<sup>22</sup> Fisk and Pulver, for example, argue that substantive due process challenges to compulsory arbitration “do not even pass the red face test” under “well-settled principles of constitutional law.” Fisk & Pulver, *supra* note 3, at 92. See also David P. Currie, *The Constitution in the Supreme Court: 1921-1930*, 1986 DUKE L.J. 65, 79 (1986) (discussing *Wolff*) (“Substantive due process had grown teeth such as it had never exhibited before.”).

<sup>23</sup> Currie, *supra* note 22 at 79. See also Paul L. Murphy, *Wolff Packing Company v. Court of Industrial Relations*, in THE OXFORD COMPANION TO THE SUPREME COURT OF THE UNITED STATES, ed. Kermit L. Hall, et al. at 936 (New York: Oxford University Press, 1992) (charging that “the ruling [in *Wolff I*] negated a half century of legal development since *Munn v. Illinois* (1876) by putting the majority of businesses outside the reach of state regulation.”).

<sup>24</sup> Currie, *supra* note 22, at 81.

very modern ring” by demanding more exacting scrutiny where quasi-legislative classifications implicate fundamental personal rights.<sup>25</sup>

According to Professor Currie, “[t]he doctrinal basis for *Meyer* is as shaky as that of *Lochner* itself, for it is the very same.”<sup>26</sup> But Holmes, who derided the “Dogma, liberty of contract,”<sup>27</sup> also believed that the Due Process Clause protected associational rights, as in *Wolff*, and the individual’s right to express dissent, as he maintained in *Gitlow v. New York*, a case argued one month before *Wolff I*.<sup>28</sup> Two years later in *Whitney v. California*, Justice Brandeis deemed it “settled” that “all fundamental rights comprised within the term liberty,” including the rights of free speech and assembly, while not absolute, are nonetheless protected by the Due Process Clause.<sup>29</sup> In the last of the Kansas Act cases, Justice Brandeis, writing for a unanimous Court, concluded that the right to strike, while not absolute, was still a fundamental right.<sup>30</sup> As the Court held in *Wolff I*, that fundamental right would yield only where an emergency justified the abridgment: “It is therefore always open to Americans to challenge a law abridging free speech and assembly by showing that there was no emergency justifying it.”<sup>31</sup>

Professor Currie views the Brandeis/Holmes attempt to accord economic and personal liberties equal dignity under the Due Process Clause as akin to “if you can’t lick ‘em, join ‘em; if your pet rights are protected by the shaky notion of substantive due process, so are mine.”<sup>32</sup> But this too seems dismissive. Notwithstanding their skepticism as

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<sup>25</sup> *Id.*

<sup>26</sup> *Id.* at 82.

<sup>27</sup> *Adkins v. Children’s Hospital*, 261 U.S. 525, 568 (1923) (Holmes, J., dissenting).

<sup>28</sup> *Gitlow v. New York*, 268 U.S. 652, 672 (1925) (Holmes, J., dissenting) (“The general principle of free speech, it seems to me, must be taken to be included in the Fourteenth Amendment, in view of the scope that has been given to the word “liberty” as there used, although perhaps it may be accepted with a somewhat larger latitude of interpretation than is allowed to Congress by the sweeping language that governs or ought to govern the laws of the United States.”). *Gitlow* was argued on April 12, 1923, and reargued on November 23, 1923. It was not decided until June 8, 1925.

<sup>29</sup> *Whitney v. California*, 274 U.S. 357, 373 (1927) (Brandeis, J., concurring).

<sup>30</sup> *Dorchy v. Kansas*, 272 U.S. 306 (1926).

<sup>31</sup> *Whitney*, 274 U.S. at 377 (Brandeis, J., concurring). *See also Wolff I*, 262 U.S. at 544 (“Certainly there is nothing to justify extending the drastic regulation sustained in that exceptional case to the one before us.”).

<sup>32</sup> Currie, *supra* note 22, at 82. If Holmes and Brandeis were engaging in a game of constitutional tit-for-tat, it would seem that they eventually won the game. *See West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 639 (1943) (“The test of legislation which collides with the Fourteenth Amendment, because it also collides with the principles of the First, is much more definite than the test when only the Fourteenth is involved.”).

to the use of judicial power to strike down economic and social legislation, both Holmes and Brandeis believed that the Due Process Clause protected fair criminal trials and free speech.<sup>33</sup> Holmes may have been “curious to see what the enthusiasts for liberty of contract will say with regard to liberty of speech under a State law punishing advocating the overthrow of government – by violence.”<sup>34</sup> But he also understood that every member of the Taft Court embraced *Wolff*’s holding.

Professor Currie was, however, correct that both Holmes and Brandeis saw freedom of speech and association as a means to an end.<sup>35</sup> Brandeis, insisting that “[t]hose who won our independence believed that the final end of the State was to make men free to develop their faculties,” maintained that “[t]hey valued liberty both as an end and as a means.”<sup>36</sup> The same may be said of the worker’s freedom of association in *Wolff I*. As Robert Post explains, the most plausible interpretation of Justice Brandeis’ concurrence in that decision was that it “express[ed] his view that the [Industrial Court] was an assault on individual liberties.”<sup>37</sup>

The *Wolff* trilogy also has a “modern ring,” when set against the startling similarities between the Kansas Act and California’s MMC statute. But it also anticipated the New Deal Court’s decisions upholding the NLRA by drawing the constitutional dividing line between the obligation of consensual bargaining and the compulsion of forced contracting.

Section I of this Article examines the rise and fall of the Kansas Act. Section II discusses the history of the *Wolff* cases. Section III discusses *Wolff*’s impact on labor legislation culminating in the NLRA, Section IV considers the continuing vitality of *Wolff*, and Section V looks at California’s attempt to resuscitate compulsory arbitration in the private sector. Whether or not these recent incarnations appear in sheep’s clothing, or

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<sup>33</sup> Brad Snyder, [THE HOUSE OF TRUTH: A WASHINGTON POLITICAL SALON AND THE FOUNDATIONS OF AMERICAN LIBERALISM](#) 352 (2017).

<sup>34</sup> He was referring to *Gitlow*, argued on April 12, 1923. 1 HOLMES-LASKI LETTERS: THE CORRESPONDENCE OF MR. JUSTICE HOLMES AND HAROLD J. LASKI, 1916–1935, 495 (Mark DeWolfe Howe ed., 1953).

<sup>35</sup> Currie, *supra* note 22, at 90, discussing *Abrams v. U.S.*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting), and *Whitney*, 274 U.S. at 375 (Brandeis, J., concurring).

<sup>36</sup> *Whitney*, 274 U.S. at 375 (Brandeis, J., concurring).

<sup>37</sup> Robert C. Post, [Defending the Lifeworld: Substantive Due Process in the Taft Court Era](#), 78 B.U. L. REV. 1489, 1522, n. 159 (1998). As Professor Post notes, “as early as 1913 Brandeis had made clear his opposition to compulsory arbitration because of its impairment of the ‘moral vigor’ necessary to maintain ‘the fighting quality, the stamina, and the courage to battle for what we want when we are convinced that we are entitled to it.’” *Id.* (quoting Louis Brandeis, *Brandeis on the Labor Problem: How Far Have We Come on the Road to Industrial Democracy?* 5 LA FOLLETTE’S WKLY MAG. 5-15 (May 24, 1913)).

whether the “wolf comes as a wolf,”<sup>38</sup> they are indistinguishable constitutionally from the joint compulsion scheme struck down by the Supreme Court nearly a century ago.

## **I. Free Speech and “Joint Compulsion”: A Brief Overview of the History of the Kansas Act.**

On Friday evening, May 28, 1920, a capacity crowd filled Carnegie Hall to witness a debate between Samuel Gompers and Henry J. Allen, Governor of Kansas. Fire regulations were stretched to allow standing room in the main auditorium.<sup>39</sup> The audience included Herbert Hoover, who would be nominated five months later by President Harding as his Secretary of Commerce.<sup>40</sup> The banker and early champion of the U.S. Federal Reserve Bank, Paul M. Warburg, was in the audience, as was Nicholas Murray Butler, the President of Columbia University.<sup>41</sup> Col. Theodore Roosevelt was listed as a member of Governor Allen’s “Honorary Committee,” but did not attend.

The event was described as “perhaps the most momentous clash since the historic meeting between Lincoln and Douglas.”<sup>42</sup> The topic was the Kansas Court of Industrial Relations, the most closely-watched and controversial Progressive Era experiment in government regulation of private labor relations. Allen had been elected on the promise that only dramatic state intervention could end labor strife and afford workers a “living wage” and better working conditions.

From Boston to Seattle, the year 1919 saw more labor unrest than any previous year in American history.<sup>43</sup> In September 1919, 24 unions led over 300,000 workers in nine

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<sup>38</sup> Cf. *Morrison v. Olson*, 487 U.S. 654, 699 (1988) (Scalia, J., dissenting).

<sup>39</sup> Dominico Gagliardo, [\*The Gompers-Allen Debate on the Kansas Industrial Court\*](#), 3 KANSAS HISTORICAL QUARTERLY (Nov. 1934).

<sup>40</sup> According to contemporary accounts, Hoover was not a proponent of the Kansas Act. He warned that to “enter upon summary action of court decision” may “both stifle the delicate adjustment of industrial processes and cause serious conflict over human rights.” *Courts of Industrial Injustice*, *supra* note 5.

<sup>41</sup> [\*County Officials Resign as Result Poor Farm Fuss\*](#), THE WICHITA DAILY EAGLE 1 (May 29, 1920).

<sup>42</sup> Gagliardo, *supra* note 39.

<sup>43</sup> The Kansas Supreme Court describes the extent of strike activity that year:

The strike record of the year 1919, however, proved to be the most disheartening one in our industrial history. The statistics are amazing, even to minds accustomed to war figures. Millions of men and women were involved. The following is a partial list of the more important strikes and lockouts shown by the government report for 1919: “A general strike in Tacoma and Seattle in February in sympathy with the metal-trades strikers, in which 60,000 persons were involved; 65,000 employees in the Chicago stockyards struck in August; 100,000 longshoremen along the Atlantic Coast struck in October; 100,000 employees in the shipyards of New

states to strike against U.S. Steel. The company recruited thousands of strikebreakers, an army of private guards, and ultimately persuaded President Wilson to send in the U.S. Army. The strike failed, in part due to a massive propaganda campaign which linked the strike with the Bolshevik revolution. By 1921, unemployment in the manufacturing and transportation sectors topped 20 percent.<sup>44</sup> Progressive leaders and state legislatures viewed government intervention as preferable to continued labor unrest, and looked to Kansas as its first test. Soon other state legislatures introduced similar legislation.<sup>45</sup>

Having led the state through a bitter coal strike in the winter of 1919, Allen was determined to rid Kansas of labor unrest.<sup>46</sup> Along with other leading Progressives, such as Thorstein Veblen and Walter Lippmann, Allen proselytized and published for dramatic state intervention.<sup>47</sup> He called an emergency session of the Kansas Legislature, which passed the Industrial Relations Act overwhelmingly in early January 1920.

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York City and vicinity struck in October; 115,000 members of the building trades were locked out in Chicago in July; 125,000 in the building trades in New York City struck in February; 250,000 railroad shop workers struck in August; 367,000 iron and steel workers struck in September; and 435,000 bituminous coal miners struck in November. The number of persons concerned in these nine strikes and lockouts was upward of 1,600,000, while the total number of persons involved in strikes and lockouts during 1919 was 4,112,507.” Monthly Labor Review, June, 1920, p. 200. The direct losses in money amounted to stupendous sums. William Z. Foster, who conducted the steel strike, says that struggle alone cost a billion dollars. The indirect losses were beyond computation. The moral effect was such that school children learned to strike; and the unspeakable crime was committed in Boston when the policemen struck. The plain citizen became so sated with news of strikes and threats of strikes that, unless his morning paper contained an account of some especially shocking strike incident, he yawned and turned to the doings of the Gumps.

*State v. Howat*, 109 Kan. 376, 198 P. 686, 697 (1921).

<sup>44</sup> Barry Cushman, *Doctrinal Synergies and Liberal Dilemmas: The Case of the Yellow-Dog Contract*, 1992 SUP. CT. REV. 235, 253 (1992).

<sup>45</sup> For example, the Texas Industrial Commission, created in 1920, heard disputes when the Governor believed a controversy between employers and employees is affected with a public interest. The Commission had the power to summon witnesses and to punish for contempt; to conduct an investigation; and to make a public report on the controversy, as a means of publicizing the facts of a labor dispute and to bring public opinion to encourage settlements. The Texas Industrial Commission had no power to compel settlement of disputes, or to prevent strikes during its investigations. Tex. Rev. Civ. Stat. (Vernon, 1925) art. 5186.

<sup>46</sup> See Post, *supra* note 37, at 1514, n. 128.

<sup>47</sup> See *id.*

Allen viewed the struggle in apocalyptic terms:<sup>48</sup> “It is of the utmost importance that we should waken to the fact that the battle is not alone between employer and employee. It is between government and those class-minded organizations which seek to supplant it.”<sup>49</sup> Within two years after the enactment of the Kansas Act, the CIR began imposing wage and hour scales on businesses without any evidence that a strike was imminent, or that the disruption of their operations would jeopardize public health or safety.<sup>50</sup>

The Act, which became effective January 24, 1920, was advertised by William Allen White, the publisher of the *Emporia Gazette*, as “the greatest piece of constructive legislation of the reconstruction period.”<sup>51</sup> Radical labor leaders saw compulsory arbitration as the wedge to destroy unions. William Z. Foster, the radical American labor organizer and later General Secretary of the Communist Party USA, described compulsory arbitration as “a cornerstone in the general structure of class collaboration. It is based upon the anti-working class principles of class peace and a harmony of interest between exploited and exploiters.”<sup>52</sup> The president of the Kansas Mine Workers, Alexander Howat, vowed that “whether or not my bones rot in a prison cell I am going to fight [the Act] with the force of 12,000 miner in Kansas.”<sup>53</sup>

Notwithstanding his willingness to suppress dissent or to threaten the seizure of private businesses, Governor Allen wasn’t a full-blown statist. A lifelong Republican, Bull Moose Progressive, and publisher of a string of papers, he championed woman’s suffrage, promoted better working conditions, and opposed the Ku Klux Klan – in large part because of that organization’s attempts to intimidate African-American coal miners willing to cross picket lines. He also had a taste for the avant-garde, given his choice of Frank Lloyd Wright to design his home in Wichita. Allen, like many Progressives, simply believed that

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<sup>48</sup> So did Charles Evans Hughes, who described the state of industrial relations as one of “trial by battle and trial by ordeal.” Gary Dean Best, *President Wilson’s second industrial conference, 1919–20*, *Labor History*, 16:4, 505-520, DOI: 10.1080/00236567508584359 (2008).

<sup>49</sup> Henry J. Allen, *How Kansas Broke a Strike and Would Solve the Labor Problem*, 68 *CURRENT OPINION* 472, 474-77 (Apr. 1920); *See also* Post, *supra* note 37, at 1509-10.

<sup>50</sup> *See* notes 77, 87 *infra*.

<sup>51</sup> William Allen White, *Industrial Justice-Not Peace*, *NATION’S BUS.* 14 (May 1922).

<sup>52</sup> “The latest act of treason of the bureaucrats in this respect was the passage of the Watson-Parker railroad law, brought about by them in open alliance with the great railroad magnates. This law, which practically saddles compulsory arbitration upon the railroad workers, is a menace to the progress of the entire American labor movement.” William Z. Foster, *Strike Strategy* (Chicago, The Trade Union Educational League ed., 1926).

<sup>53</sup> *The Kansas Strike Cure*, *supra* note 6.

government could address myriad social ills provided it was given the instrumentalities to do so, and the courts kept out of the way.<sup>54</sup>

His defense of the CIR was neatly summarized in *Wolff II*:

“Heretofore, the industrial relationship has been tacitly regarded as existing between two members – industrial manager and industrial worker. They have joined wholeheartedly in excluding others. The legislature proceeded on the theory there is a third member of those industrial relationships which have to do with production, preparation, and distribution of the necessities of life—the public. The legislature also proceeded on the theory the public is not a silent partner. When the dissensions of the other two become flagrant, the third member may see to it the business does not stop.”<sup>55</sup>

The Allen-Gompers debate at Carnegie Hall was described as a “free for all” or “catch-as-catch can” event by one observer.<sup>56</sup> Other than the venue, the committees representing the principals could not agree upon the question presented, or “the order in which the speakers were to discuss whatever it was they would happen to discuss.”<sup>57</sup> It was eventually agreed that Gompers would lead off. His opening framed the question narrowly: “Has the state a right to prohibit strikes?”<sup>58</sup> Gompers’ organizing theme was that liberty of contract and freedom of association were interdependent: workers have not only the right to withhold their labor power, but to act in concert to induce others to do the same, “[a]nd neither courts, injunctions nor other processes have any proper application to deny free men these lawful, constitutional, natural and inherent rights.”<sup>59</sup>

Governor Allen argued that avoiding industrial conflict was paramount. He asked: “When a dispute between capital and labor brings on a strike affecting the production or distribution of the necessities of life, thus threatening the public and impairing the public health, has the public any rights in such a controversy, or is it a private war between capital

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<sup>54</sup> See Post, *supra* note 37, at 1509-10. Allen’s efforts to outlaw the Ku Klux Klan was based on his concern that its visibility would intimidate African American coal miners who remained on the job during a coal workers’ strike in 1919.

<sup>55</sup> *Wolff II*, 267 U.S. at 564 (quoting *State v. Howat*, 109 Kan. 376, 417, 198 P. 686, 705 (1921)).

<sup>56</sup> Ralph M. Easley, [Is the Labor Problem Unsolvable?](#), THE NATIONAL CIVIC FEDERATION REVIEW, Vol. V, No 4, at 1 (July 10, 1920).

<sup>57</sup> *Id.*

<sup>58</sup> Henry J. Allen, [THE PARTY OF THE THIRD PART: THE STORY OF THE KANSAS INDUSTRIAL RELATIONS COURT](#) 93 (Harper & Brothers, 1921).

<sup>59</sup> DEBATE BETWEEN SAMUEL GOMPERS AND HENRY J. ALLEN AT CARNEGIE HALL, *supra* note 7.

and labor?”<sup>60</sup> Gompers would have had no difficulty answering “no” to the second part of the question. Given his experiences as a labor representative on the National War Labor Board during the First World War, he would have answered “yes” to the first part, had the question been framed in less tendentious terms.

Instead, Gompers equated strike injunctions with involuntary servitude. A worker may be free to quit his job, he argued, but “just imagine what a wonderful influence such an individual would have, say for instance in the U.S. Steel Corporation, (Laughter).”<sup>61</sup> For Gompers, collective action was essential to fulfillment of the workers’ inalienable right to life and liberty and the pursuit of happiness, “and for a long time they have been in pursuit of happiness, but haven’t caught up with it. (Laughter.)”<sup>62</sup>

Both sides declared victory. One of Allen’s committee members was heard to say that “the Governor wiped up the floor with Sam.”<sup>63</sup> Gompers’ seconds thought that “the old man put it all over the Governor tonight.”<sup>64</sup> The debate was front page news.<sup>65</sup> *The New York Times* headline read: “UNION CHIEF IS QUIZZED On the “Divine Right” to Quit Work and Human Control Thereof. . . . CALLS STRIKE ONLY WEAPON – Partisan Audience Cheers and Boos.”<sup>66</sup> Other papers viewed it as an entertaining evening where “the minds of the two contestants rarely crossed.”<sup>67</sup> (The following evening’s entertainment at Carnegie Hall was more decorous but less memorable – a recital by a European cantor with the unlikely name of Don Rinardi Fuchs.<sup>68</sup>) No one emerged as a clear winner, except perhaps E.P. Dutton & Company, which published a transcription of the debate. The book was a best seller, both in hard copy and paperback.

The President of the National Civic Federation offered a more realistic appraisal: the Carnegie Hall event “demonstrates there is no over-night nickel-in-the-slot machine solution of capital and labor problems.”<sup>69</sup> The Federation’s view was hardly uninformed. It had

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<sup>60</sup> [Value of Kansas Plan Questioned](#), THE NATIONAL LABOR DIGEST, Vol.2, at 33 (May, 1920).

<sup>61</sup> DEBATE BETWEEN SAMUEL GOMPERS AND HENRY J. ALLEN AT CARNEGIE HALL, *supra* note 7, at 15.

<sup>62</sup> *Id.* at 8.

<sup>63</sup> Easley, *supra* note 56.

<sup>64</sup> *Id.*

<sup>65</sup> Charles Delgadillo, “*The Balance Wheel*”: William Allen White, the Kansas Industrial Court, and the Progressive Approach to the Labor Question, 1914 – 1925, LABOR: STUDIES IN WORKING-CLASS HISTORY OF THE AMERICAS, Vol. 10, No. 1, 81, 91 (2013).

<sup>66</sup> *Id.*

<sup>67</sup> Gagliardo, *supra* note 39.

<sup>68</sup> *Don Rinardi Fuchs in Recital*, [THE MUSICAL COURIER](#) (June 10, 1920).

<sup>69</sup> Easley, *supra* note 56.

mediated labor disputes and brokered settlements, including that of a national coal industry strike in 1902. A proponent of collective bargaining, workmen's compensation reforms, and child labor laws, the Federation believed that the Kansas experiment would fail, as had prior efforts by government to compel industrial peace outside of wartime.<sup>70</sup>

The Federation was not alone in its skepticism. Ten days before the Carnegie Hall debate, Herbert Hoover, the vice-chairman of President Wilson's Second Industrial Conference, told the Senate Labor Committee: "The injunction, compulsory arbitration and other forms of legal repression in industrial disputes only lead to jail. They do not provide a solution of the industrial problem."<sup>71</sup> That same month, Hoover told the Boston Chamber of Commerce that "[t]he Kansas machinery goes one step further than any hitherto provided in the particular emphasis on fair profits, and it also provides for the right of the State to take over and conduct the industry in last resort."<sup>72</sup> According to press accounts, "Governor Allen's court of industrial relations in Kansas suffered a considerable loss of prestige at the hands of Mr. Hoover."<sup>73</sup>

Hoover anticipated the practical and constitutional difficulties exposed in *Wolff*. "The workings of such a law necessarily result in ultimate determination of a minimum wage for all crafts and industries,"<sup>74</sup> something not contemplated by the Act. "Every different industrial unit will claim a different minimum, based upon its local economic surroundings. Otherwise the competitive basis upon which industry is established will be undermined. No court has ever yet adequately solved these differentials and some dislocation of industry results."<sup>75</sup> Hoover picked up on the dilemma of fixing wages without the corresponding means to set rates across the affected industry: "the determination of wage disputes . . . must ultimately lead to a determination as to what a fair profit consists of, just as a minimum wage will need to be found for every craft and every establishment."<sup>76</sup> As we shall see, the CIR judges acknowledged the obvious: they had no control over setting industry-wide rates or wages.

These predictions were prophetic. The CIR settled only a small number of disputes; of the 166 cases opened, one in ten were initiated by employers, doubtless for the purpose of

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<sup>70</sup> *Id.*

<sup>71</sup> [\*Favors Works Councils\*](#), 66 THE IRON TRADE REVIEW 1487 (1920).

<sup>72</sup> *Value of Kansas Plan Questioned*, *supra* note 60, at 12-13.

<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

<sup>76</sup> *Id.*

triggering the Act's injunctive remedies against workers.<sup>77</sup> William Allen White soon conceded that barring strikes had been a mistake.<sup>78</sup> In 1922, he opposed Governor Allen's attempt to enjoin businesses which displayed placards in support of striking railroad workers. Four hundred thousand men walked off the job on July 1, 1922. Allen ordered the Kansas Attorney General to bring criminal charges against those who picketed in support of the strike. White believed that the right to strike was inalienable, and said so in a series of editorials. Allen warned White that his editorials were making him "dangerous at a time like this when given a double action typewriter . . . and I think you are more dangerous at that than you realize."<sup>79</sup>

Privately, White believed that Allen was motivated by an "obsession . . . to crush organized labor."<sup>80</sup> White threatened to put the sign in the window of his newspaper office, hoping to provoke a test case. Allen told him he would have no choice but to arrest White. "Come on and arrest me," White replied, "and we'll test this matter in the courts. I think your order restricts the liberty of utterance."<sup>81</sup> On July 19, 1922, he announced that he had put a pro-strike placard in the window of the *Emporia Gazette*, and renounced his support for the Act he championed.

After reading White's challenge, Allen commented, "[i]f White insists on being funny we will have to do something about it."<sup>82</sup> He ordered the arrest of White for violating the state's anti-picketing law and for conspiring with striking workers to stop the trains. Although White removed the placard three days later, the charge stood. Trial was set for December 8, 1922. Among others, Felix Frankfurter, a founding member of the ACLU, offered to defend him.<sup>83</sup>

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<sup>77</sup> Brian J. Moline, *Judicial Regulation in Kansas: The Rise and Fall of the Court of Visitation and the Industrial Court*, J. OF THE KANSAS BAR ASSOC. Vol. 63, No. 10, 35 (Dec. 1994) ("Twelve wage increases were granted by the court, three denied, five decreased and hours or working conditions modified in thirteen (13) cases. Permission to limit or suspend operations was granted in 114 cases.").

<sup>78</sup> "In part, White's blindness to [organized labor's opposition] was based on his absolute faith in the basic humanity of judges, which he claimed gave them a natural sympathy for those who had to toil for their daily bread. Furthermore, he argued that labor needed a powerful government organization designed to protect its right to organize against 'highly organized and ruthless capital,' which sought to crush unions through the open shop campaign." Delgadillo, *supra* note 65, at 91.

<sup>79</sup> Delgadillo, *supra* note 65, at 94.

<sup>80</sup> [\*To an Anxious Friend\*](#), THE EMPORIA GAZETTE (July 27, 1922).

<sup>81</sup> *Id.*

<sup>82</sup> [\*New Martial Adventures of Henry and Me\*](#), THE LITERARY DIGEST 17 (Aug. 5, 1922).

<sup>83</sup> "Frankfurter told White: 'Thank God we've got some people left with old fashioned guts!'" Delgadillo, *supra* note 65, at 95.

White's arrest was national news, as was his response to Governor Allen, a paean to free speech entitled "To An Anxious Friend," where he summed up the dispute with his fellow publisher, Governor Allen: "you say that freedom of utterance is not for time of stress, and I reply with the sad truth that only in time of stress is freedom of utterance in danger."<sup>84</sup> The editorial, widely reprinted, began a snowball of opposition to Governor Allen, and won White the 1923 Pulitzer Prize for editorial writing. His essay all but settled the fate of the Industrial Court in the eyes of his readers.

Realizing he overplayed his hand, Governor Allen ordered the Kansas Attorney General to drop the charges against White shortly before his scheduled trial on December 8, 1922. Allen was replaced in November 1922 by Jonathan M. Davis, a Democrat who opposed the Industrial Court. By the time the Kansas Legislature abolished the CIR in 1925, it had largely gone out of business after the U.S. Supreme Court declared that the core aspects of the Act were unconstitutional.

What doomed the Industrial Court? "White's arrest cost the Court [of Industrial Relations] prestige," according to his biographer, Walter Johnson, "but more fundamental causes brought its downfall."<sup>85</sup> These included "[p]olitical interference with the court's work, Governor Allen's impetuous nature, [and] the increasing anti-union bias of the court in preventing picketing but ignoring the employer violations of the law."<sup>86</sup> There was also the Industrial Court's record, including the extent of its reach over "essential" businesses in the state. According to Matthew Woll, the Vice President of the AFL, "about one-third to one-half of private industries in Kansas [fall under] the managerial control . . . of the industrial court."<sup>87</sup> He argued that the Kansas Act created a form of "absolute government" by combining executive, judicial, and legislative powers in a subordinate agency of the state, without any meaningful check on its authority. The result, he claimed, was a dramatic increase in strikes, and a lowering of wages and productivity.<sup>88</sup>

But other forces tempered public enthusiasm for this Progressive experiment. By 1925, much of the nation was experiencing unprecedented economic growth. The syndicalist labor movements, in particular the most violent of them, were under attack by the Justice Department. Some of their leaders were jailed. Others deported. Unions began to

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<sup>84</sup> [\*To an Anxious Friend\*](#), THE EMPORIA GAZETTE (July 27, 1922).

<sup>85</sup> Walter Johnson, [WILLIAM ALLEN WHITE'S AMERICA](#) 339-374 (Henry Holt and Company 1947).

<sup>86</sup> *Id.*

<sup>87</sup> Vincent H. Gaddis, [HERBERT HOOVER, UNEMPLOYMENT, AND THE PUBLIC SPHERE: A CONCEPTUAL HISTORY](#) 34 (2005).

<sup>88</sup> *Id.* Woll stated that "during the four years before the establishment of the Court of Industrial relations, there were 705 strikes; in the first year of its existence, there were 377 strikes, and 228 more in just the first six months of 1921." *Id.*

view collective bargaining and voluntary association as means to improve conditions within the existing framework of the new corporate economy.<sup>89</sup> By the time the Supreme Court reaffirmed in the last of the Kansas Act cases that workers had a qualified constitutional right to strike, the nationwide labor unrest which inspired the Kansas Act had abated.

At the same time, Americans began to see trade unions as a legitimate and powerful check on regulated industries. By 1930, the U.S. Supreme Court held that the right to select bargaining representatives was a protected property interest.<sup>90</sup> That same year, Judge John J. Parker's nomination to the U.S. Supreme Court was rejected by the Senate, in part because of his decision upholding the validity of yellow-dog contracts.<sup>91</sup> The rejection of the yellow-dog contracts, even by those who supported Judge Parker's nomination,<sup>92</sup> paralleled the public's recognition of collective bargaining rights, and the loss of interest in state intervention into the private ordering of labor relationships.

To some, the CIR failed due to a lack of political will and mutual short-sightedness on the part of labor and management. Governor Allen blamed the Supreme Court's antiquated view of "liberty of contract."<sup>93</sup> Two decades after *Wolff* decisions, Governor Allen continued to believe that the law he championed had written "a new chapter in the possibilities of just adjudication of labor disputes."<sup>94</sup> Allen had no difficulty with the fact that Mussolini adopted the Kansas Act's "provision against strikes and its accepted arguments."<sup>95</sup> He parted company with *Il Duce* because Mussolini "himself became the court, thus distorting it from a thing of impartial justice to an instrument of tyranny."<sup>96</sup> Allen

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<sup>89</sup> Cushman, *supra* note 44, at 257, n. 114.

<sup>90</sup> *Texas & N.O.R. Co. v. Bhd. of Ry. & S.S. Clerks*, 281 U.S. 548 (1930).

<sup>91</sup> *United Mine Workers v. Red Jacket Consol. Coal & Coke Co.*, 18 F2d 839 (4th Cir.), *cert denied*, 275 US 536 (1927); Irving Bernstein, *THE LEAN YEARS: A HISTORY OF THE AMERICAN WORKER 1920-1933*, 394, 406-9 (1960); Cochrane, *Public Opinion Flays Judicial Approval of Yellow Dog Contracts*, 20 AM LAB. LEGIS. REV. 181 (1930).

<sup>92</sup> See Peter Graham Fish, *Red Jacket Revisited: The Case That Unraveled John J. Parker's Supreme Court Appointment*, 5 LAW & HIST. REV. 51-104 (1987). By 1931, Wisconsin, Arizona, Colorado, Ohio, and Oregon passed laws voiding yellow dog contracts as against public policy. See generally Cushman, *supra* note 44, at 260.

<sup>93</sup> Governor Allen believed (incorrectly) that *Wolff* held that a state "should not have the power to establish a minimum wage under any circumstances, since such latitude would give the State power to interfere with contractual relations between capital and labor." Henry J. Allen, [\*Compulsory Arbitration of Labor Disputes?\*](#), THE ROTARIAN 13-14 (Mar. 1941).

<sup>94</sup> *Id.*

<sup>95</sup> *Id.*

<sup>96</sup> *Id.*

never acknowledged why the “pervading theory of the Act”<sup>97</sup> lent itself so easily to transfiguration by Mussolini.

Felix Frankfurter called the Industrial Court an act of “legislative exuberance.”<sup>98</sup> But he also felt that it was not the Supreme Court’s role to curb that enthusiasm. “Thus fails another social experiment,” he wrote in an unsigned editorial published in *The New Republic*, “not because it has been tried and found wanting, but because it has been tried and found unconstitutional. . . . It was for the legislature of Kansas, and not for the Supreme Court, to kill it.”<sup>99</sup> Yet, just as he had attacked the yellow-dog contract as a “plain denial of the right of association,”<sup>100</sup> Frankfurter understood that compulsory arbitration was no different and, in fact, more dangerous, given that the suppression of worker rights was at the hands of the state, rather than via private contract.

Whatever his misgivings, it is not likely that Frankfurter saw *Wolff* as little more than another example of *Lochner*-era jurisprudence, given that Taft, Sanford, and Holmes believed at the time [Wolff I](#) was decided that *Lochner* had been overruled *sub silentio* in

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<sup>97</sup> *Wolff II*, 267 U.S. at 564.

<sup>98</sup> Felix Frankfurter, *Mr. Justice Holmes and the Constitution*, 41 HARV. L. REV. 121, 128 (1927).

<sup>99</sup> Frankfurter wrote:

The Kansas Court of Industrial Relations is dead. That great achievement of the Middle Western “law and order” movement is killed by the Supreme Court of the land. . . Thus fails another social experiment, not because it has been tried and found wanting, but because it has been tried and found unconstitutional .... The New Republic is opposed to the idea which underlay the Kansas Industrial Court .... We...disbelieve in compulsory arbitration as a social policy; but we do not disbelieve in Kansas or any other state venturing a trial of the experiment .... We too rejoice with Messrs. Gompers and Emery over the death of the Kansas Industrial Court; but it was for the legislature of Kansas, and not for the Supreme Court, to kill it.

Unsigned Editorial, *Exit the Kansas Court*, 35 THE NEW REPUBLIC 112-13 (June 27, 1923).

Frankfurter’s comments may have been colored by the Court’s ruling in *Adkins*, decided one month before *Wolff I*. Frankfurter argued, and lost, *Adkins*. After the argument, he stated that he “[s]aw the Court today – and wish I had a cocktail before I spoke to them.” Snyder, *supra* note 33, at 350. It was the last time he would argue before the Supreme Court. His unsigned editorial was not the last time he would rale against the Supreme Court’s use of the Due Process Clause as “the vehicle for writing laissez faire into the Constitution,” and the application of “stereotype ephemeral facts into legal absolutes.” To Frankfurter, *Adkins* was a manifestation of an American social elite “dominated by fears, and these fears again registered as Supreme Court decisions.” William M. Weicsek, [THE HISTORY OF THE SUPREME COURT OF THE UNITED STATES VOLUME XII](#) 87-88 (Cambridge Univ. Press, 2006).

<sup>100</sup> Cushman, *supra* note 44, at 259.

*Bunting*, as their dissents in *Adkins* make clear.<sup>101</sup> While Brandeis did not participate in *Adkins*,<sup>102</sup> he likely would have sided with the three dissenters. It is also likely that Frankfurter knew of Justice Brandeis' reservations as to government-imposed private sector arbitration.<sup>103</sup>

Frankfurter also knew quite a bit about Chief Justice Taft's views on labor relations. Taft served as the co-chairman of the National War Labor Board ("NWLB") during World War I. As the head of the National War Labor Policies Committee, Frankfurter tried to expand the scope of the NWLB, which Taft evidently resented. Both men therefore knew, and cordially despised, one another.<sup>104</sup>

But Frankfurter also knew that Taft's first and most important action as co-chairman of the NWLB was to insist that management recognize and bargain exclusively with unions chosen by the workers, and to enjoin employers from discharging workers for membership in trade unions or for participating in legitimate trade union activities.<sup>105</sup> This was more to

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<sup>101</sup> Justice McKenna cast the deciding vote in *Adkins*. But he also wrote the majority opinion upholding the constitutionality of a similar minimum wage law six years earlier in *Bunting v. Oregon*, 243 U.S. 426 (1917), leading some scholars to suggest that his deteriorating mental capacity may have played a role in his decision in *Adkins*. See David J. Gallows, *Mental Decrepitude on the U.S. Supreme Court: The Historical Case for a 28<sup>th</sup> Amendment*, 67 U. CHI. L. REV. 995, 1014 (2000).

<sup>102</sup> Justice Brandeis recused himself because his daughter Elizabeth worked as *Adkins*' personal secretary at the D.C. Minimum Wage Board. Snyder, *supra* note 33, at 350. But Justice Brandeis certainly was sympathetic to Holmes' view. After reading Holmes' dissent in *Adkins*, Brandeis wrote: "To ought to make converts." *Id.* at 351.

<sup>103</sup> Justice Brandeis wrote on Taft's draft of *Wolff I*: "Yes. This will clarify thought and bury the ashes of a sometime presidential boom. In *Wilson v. New* there was 'clear and present' danger and the 'curse was in the bigness.'" Barry Cushman, [RETHINKING THE NEW DEAL COURT: THE STRUCTURE OF A CONSTITUTIONAL REVOLUTION](#) 254, n. 38 (Oxford Univ. Press 1998). Brandeis was not inalterably opposed to legislation that imposed industry-wide compulsory arbitration through administrative tribunals where "the uninterrupted pursuit of industry and the prevention of the arbitrary use of power appear to be deemed the paramount public needs." *Truax v. Corrigan*, 257 U.S. 312, 361 & n. 20 (1922) (Brandeis, J., dissenting) (citing the Kansas Act)). In *Wolff*, however, he evidently believed that the ad hoc targeting permitted by the Kansas Act went too far.

<sup>104</sup> Frankfurter pushed through a resolution by the National War Labor Policies Committee that would insert a basic eight-hour-day provision in all government contracts. Taft and his co-chair, Frank Walsh, resented Frankfurter's efforts to usurp the authority of the NWLB, and rejected Frankfurter's attempt to "amplify his jurisdiction and . . . to be able to say that this Board is under him." Snyder, *supra* note 33, at 222. Frankfurter, for his part, boasted privately that he "did a nifty job with Walsh today by getting the big fat Taft boy" in advancing the gradual implementation of the basic eight-hour day. *Id.* After much maneuvering, Frankfurter succeeded in persuading U.S. Steel to adopt his proposal. *Id.* at 221.

<sup>105</sup> "The Board ordered numerous reinstatements with back pay for employees discharged for engaging in legitimate union activities; prohibited employers from requiring employees to sign yellow-dog contracts; and forbade employers to require their employees to join company unions." Cushman, *supra* note 44, at 256.

Taft than a matter of expediency during national emergency; it had been his long-held belief that the bookend of an employer's "freedom of contract" was the workers' right to engage in collective action in the negotiation of the terms of their contracts.<sup>106</sup>

Taft's record in adjudicating labor cases, first on the Ohio Superior Court and later as a federal court of appeals judge, established his reputation as an authority on labor law.<sup>107</sup> Although he authored a number of important decisions enjoining strikes, he viewed "[g]overnment of the relations between capital and labor" as "a solecism [and] an absurdity. Injunctions in labor disputes are merely the emergency brakes for rare use and in case of sudden danger. Frequent application of them would shake to pieces the whole machine."<sup>108</sup>

Taft's opposition to compulsory arbitration was a matter of public record at the time he ran for President in 1908, as were his doubts as to the constitutionality of government-compelled contracting.<sup>109</sup> Other Justices shared his skepticism.<sup>110</sup> Taft's objections were

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<sup>106</sup> *Id.*

<sup>107</sup> As Chief Justice, Taft authored a number of significant labor cases, including *American Steel Foundries v. Tri-City Central Trades Council*, 257 U.S. 184 (1921), which "walked back" *Hitchman Coal & Coke Co. v. Mitchell*, 245 U. S. 229 (1917), which generally made picketing unlawful, and *Truax v. Corrigan*, 257 U. S. 312 (1921), which denied the use of injunctions in labor disputes unless irreparable damage was threatened. In addition to his dissent in *Adkins*, Taft carried all members of the Court (save Clarke), in a child labor law case, *Bailey v. Drexel Furniture Co.*, 259 U.S. 20 (1922), and the entire Court in *Coronado Coal Co. v. United Mine Workers*, 268 U.S. 295 (1925), which held that a labor union, although only an unincorporated association, was suable. "In this and the opinion in *Bedford Cut Stone Co. v. Journeymen Stone Cutters' Association* [274 U.S. 37 (1927)], to which he subscribed, the court held that although labor in coal and stone production was not interstate commerce, its acts might fall within the Sherman Act if they amounted to 'the suppressing and narrowing' of the interstate market. The distance down the road from this point to the *Jones & Laughlin* marker was not too great." Earl L. Shoup, [Review of The Life and Times of William Howard Taft](#), Henry F. Pringle, 26 WASH. U. L. Q. 142, 146 (1940).

<sup>108</sup> Alpheus T. Mason, [The Labor Decisions Of Chief Justice Taft](#), 78 U. PA. L. REV. 585, 622 (1930). "In fact the plank in the Republican platform of 1908 which advocated a modification of the federal court practice, under which injunctions were issued without notice, was adopted at Taft's request and suggestion. Several of these procedural changes were brought about by the enactment of the Clayton Act, but he had no hesitation in expressing the satisfaction he felt in the fact that this statute granted to labor no general immunity under the law and did not seriously impair the authority of the federal courts to issue injunctions in labor disputes." *Id.* at 623 (citing PHILADELPHIA PUBLIC LEDGER (Nov. 20, 1919)).

<sup>109</sup> See note 111 *infra*.

<sup>110</sup> Before Harding elevated ex-Senator George Sutherland to the Supreme Court, the Utah Republican told then-candidate Harding:

The government while bound within the legitimate scope of its powers to enforce a square deal as between labor and capital, owes a peculiar, if not a paramount duty to the general public-numerically strong, but strategically weak-to see that it is not made the victim of the conscious or unconscious selfishness of both classes. I am afraid that compulsory arbitration is not the remedy. There are inherent and serious difficulties in the way of supplying the coercive processes of the law to large groups

not based solely on the guarantee of employer “liberty of contract” or protecting associational rights of workers. He believed that they were intertwined, and interdependent.<sup>111</sup> In fact, his views were closer to Gompers<sup>112</sup> than Holmes. Taft believed that “a decree of a tribunal under a compulsory arbitration law, if enforced . . . would come very close to the violation of the thirteenth amendment, which forbids involuntary servitude.”<sup>113</sup>

Taft believed that the public interest received insufficient attention in resolving labor disputes; he doubted, however, that government intervention would be appropriate outside of public sector employment or in cases of a national emergency.<sup>114</sup> Other members of the *Wolff* Court, including Brandeis, Holmes and Sutherland, shared Taft’s view.<sup>115</sup> Taft’s willingness to protect the collective action rights of workers, while far from absolute, was informed by his tenure on the NLRB. His experiences in resolving hundreds of labor disputes were, according to his biographer, personally transformative.<sup>116</sup> His judicial decisions may have been tempered by institutional concerns of the Court,<sup>117</sup> but they leave

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of men whose offense may often consist of simply failing to recognize and discharge their economic duties to society.

Letter from George Sutherland to Warren G. Harding (June 26, 1920) (Sutherland Papers), reprinted in Post, *supra* note 37, at 1514, n. 128.

<sup>111</sup> William Howard Taft, [PRESENT DAY PROBLEMS: A COLLECTION OF ADDRESSES DELIVERED ON VARIOUS OCCASIONS](#) 254 (1908).

<sup>112</sup> *DEBATE BETWEEN SAMUEL GOMPERS AND HENRY J. ALLEN AT CARNEGIE HALL*, *supra* note 7.

<sup>113</sup> Taft, *supra* note 111, at 253-254 (citing Hughes’s decision in *Bailey v. Alabama*, 219 U.S. 219 (1911)).

<sup>114</sup> See Post, *supra* note 37, at 1514-15.

<sup>115</sup> See, e.g., *Block v. Hirsh*, 256 U.S. 135, 154, 155 (1921) (upholding temporary rent control measures enacted in response to housing shortage emergencies growing out of WWI). While the Court’s most liberal members supported wartime measures, as was the case in *Wilson v. New*, both Holmes and Brandeis had no difficulty distinguishing between national emergencies and state-directed grabs of private property where no exigency existed. See, e.g., *Chastleton Corp. v. Sinclair*, 264 U.S. 543, 548-49 (1924) (changed circumstances rendered unconstitutional any prior justifications for rent controls).

Brandeis wasn’t opposed to government intervention; to the contrary, he preferred administrative agencies as the vehicle for preventing monopolies from forming in the first place. Nor was he opposed to some experimentation via administrative oversight of regulated agencies, including through the use of compulsory arbitration of wage disputes. What he feared was supplanting monopolistic control with state collectivization. *Wolff’s* minutely detailed regulation of one business and its workers, even of a temporary nature, crossed that line. See also Post, *supra* note 37, at 1514, n. 128 (discussing Sutherland’s views).

<sup>116</sup> An extended trip to the munitions and textile mills of the South convinced Taft of the need for the establishment of minimum wages. This conviction was reflected in the orders of the NLRB, and subsequently in Taft’s dissent in *Adkins*. Cushman, *supra* note 44, at 256.

no doubt as to his view that union organizing and collective action were not only an essential aspect of labor relations, but were protected under the Constitution. Taft's views of industrial justice were also prescient, as they anticipated what would become a cornerstone of the Wagner Act.<sup>118</sup>

With this as our background, let us turn to the *Wolff Packing* decisions.

## II. The Kansas Court of Industrial Relations Act of 1920 and *Wolff Packing*.

The Act creating the CIR abolished the Kansas Public Utilities Commission and placed authority over the supervision and control over public utilities and common carriers under the CIR's jurisdiction. It also declared that the following industries "to be affected with a public interest" and therefore subject to the jurisdiction of the Court "for the purpose of preserving the public peace, protecting the public health, preventing industrial strife, disorder and waste, and securing regular and orderly conduct of the businesses directly affecting the living conditions of the people of this state": (1) The manufacture or preparation of food products; (2) the manufacture of clothing; (3) the mining or production

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<sup>117</sup> "Though the chief justice did not like to dissent, he was even more loath to depart from the Court's prior decisions. He also was also worried about the rising tide of criticism against him and the Court and the calls for judicial reform." Snyder, *supra* note 33, at 351. See also Kevin J. Burns, *Chief Justice as Chief Executive: Taft's Judicial Statesmanship*, 43 JOURNAL OF SUPREME COURT HISTORY 1, 47-68 (2018). Professor Burns explains how Taft's skills in forging compromise within a badly fractured Court played out in *American Steel Foundries v. Tri-City Trades Council*, which explicitly recognized the right to picket and attempted to define where collective action became unlawful intimidation:

The White Court had heard the case twice, but the Justices remained divided and heard the case again in 1921 after Taft took the center seat. Taft's opinion, relying in part on arguments set forth by the liberals on the Court, upheld an injunction against a violent labor strike but also held that the workers had a right to strike and picket. As a result, Holmes joined the majority and Brandeis chose to concur separately rather than dissent, merely noting that he "concurs in substance in the opinion and the judgment of the Court." When Justice Pitney hesitated to join the new, more liberal, opinion, Taft both incorporated several of Pitney's suggestions and convinced him to suppress his other objections, arguing that "it is so unusual to get as many of the Court together . . . that we better let it go as the opinion has been approved." Justice Clarke remained the lone holdout, but he did not write a dissent.

<sup>118</sup> Frankfurter ultimately revised his opinion of Taft. He viewed the Chief Justice as a vote in his favor in *Adkins*, and he was right. Snyder, *supra* note 33, at 350. According to Frankfurter, Justice Brandeis put it this way: "It's very difficult for me to understand why a man who is so good a Chief Justice . . . could have been so bad as President." Felix Frankfurter and Harlan Phillips, *FRANKFURTER REMINISCES: AN INTIMATE PORTRAIT AS RECORDED IN TALKS WITH DR. HARLAN B. PHILLIPS* 85 (New York: Reynald & Company 1960).

of fuel for domestic, manufacturing, or transportation purposes; (4) the transportation of all food products, apparel, or fuel; and (5) all public utilities.<sup>119</sup>

The Act empowered the CIR, whether on its own initiative or based on a petition filed by employers or workers, to summon all necessary parties, to investigate any controversy that “may endanger the continuity or efficiency of service . . . or produce industrial strife,” to make “temporary findings and orders,” to investigate labor conditions, and “to consider the wages paid to labor and the return accruing to capital, and the rights and welfare of the public,” and “to settle and adjust all such controversies by such findings and orders.”<sup>120</sup> The CIR was composed of three judges, appointed by the Governor, with the advice and consent of the Senate.<sup>121</sup>

#### **A. The Proceedings Before the Court of Industrial Relations.**

On March 21, 1921, the CIR issued a temporary order fixing wages and hours for the operation of the Wolff Packing Company, a slaughtering and meat packing house located in Topeka, Kansas. The request was made by local union of the Amalgamated Meat Cutters and Butchers Workmen of North America, following the company’s decision to reduce wages due to sustained operating losses. The workers voted to take their grievances to the Court rather than to walk off the job.

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<sup>119</sup> “(1) The manufacture or preparation of food products whereby, in any stage of the process, substances are being converted, either partially or wholly, from their natural state to a condition to be used as food for human beings; (2) the manufacture of clothing and all manner of wearing apparel in common use by the people of this state whereby, in any stage of the process, natural products are being converted, either partially or wholly, from their natural state to a condition to be used as such clothing and wearing apparel; (3) the mining or production of any substance or material in common use as fuel either for domestic, manufacturing, or transportation purposes; (4) the transportation of all food products and articles or substances entering into wearing apparel, or fuel, as aforesaid, from the place where produced to the place of manufacture or consumption; (5) all public utilities as defined by section 8329, and all common carriers as defined by section 8330 of the General Statutes of Kansas of 1915.” Laws of 1920, ch. 29, § 3 (codified at KAN. STAT. ANN. § 44-603 (2017)).

<sup>120</sup> “In case of a controversy arising between employers and workers, \* \* \* engaged in any of said industries, \* \* \* if it shall appear to said Court of Industrial Relations that said controversy may endanger the continuity or efficiency of service of any of said industries, \* \* \* authority and jurisdiction are hereby granted to said Court of Industrial Relations, upon its own initiative, \* \* \* to investigate said controversy, and to make such temporary findings and orders as may be necessary to preserve the public peace \* \* \* to settle and the public peace \* \* \* to settle and adjust all such controversies by such findings and orders as provided in this act. It is further made the duty of said Court of Industrial Relations, upon complaint of either party to such controversy, \* \* \* if it shall be made to appear to said court that the parties are unable to agree and that such controversy may endanger the continuity or efficiency of service of any of said industries, \* \* \* to proceed and investigate and determine said controversy in the same manner as though upon its own initiative.” Laws of 1920, ch. 29, § 7 (codified as amended at KAN. STAT. ANN. § 44-603 (2017)).

<sup>121</sup> Laws of 1920, ch. 29, § 1 (codified as amended at KAN. STAT. ANN. § 44-603 (2017)).

The petition alleged that a “controversy” between Wolff and its workers had “endangered and is continuing to endanger the continuous operation and efficiency of service of said packing plant, and does affect and will affect the manufacture and production of the commodities necessary for human food within the state of Kansas and within the vicinity where said packing plant is now operating, and will and does endanger the orderly operation of said packing plant.”<sup>122</sup> This was deemed sufficient to invoke the jurisdiction of the Industrial Court to investigate “said controversy” and “to make temporary findings and orders as necessary to preserve the public peace.”<sup>123</sup>

The CIR’s initial order of March 21 found that “although the plant and the surroundings are kept in the best possible order and condition,” “the work performed by a large number of employees of [Wolff Packing] is of a nature which is exhausting to the physical strength of the workers.”<sup>124</sup> It issued a temporary order imposing an eight hour day, with time and one-fourth for the ninth hour, and time and one-half thereafter as to employees “from the time the animals are driven into the shackling pen until the time that the product is placed in storage ready to be shipped.”<sup>125</sup> The CIR overruled Wolff Packing’s various defenses, including that it “was not given a fair opportunity to discuss with its workers the provisions of any new contract, but that the workers presented a typewritten contract and demanded signature without discussion.”<sup>126</sup> The company argued that it was able, ready, and willing to honor the terms of its former contract, which had expired on December 31, 1920, and that the business had operated at a loss in excess of \$100,000 in 1920 – roughly one-quarter of the wages paid that year.<sup>127</sup> It also offered to open its financial records to substantiate this fact.

Charles Wolff, Jr. testified that his father began the business nearly fifty years ago as “an ordinary butcher, buying his own live stock, butchering it himself by the aid of a few helpers, and supplying meat to the local trade.”<sup>128</sup> After the death of Charles Wolff, Sr., the stock of the company was sold to Allied Packers, a regional packer operating in several states as well as in Canada. Charles Wolff, Jr. remained in charge as Wolff Packing’s general manager.

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<sup>122</sup> *Court of Indus. Relations v. Charles Wolff Packing Co.*, 109 Kan. 629, 201 P. 418, 421 (1921), writ issued, 111 Kan. 501, 207 P. 806 (1922), rev’d sub nom. *Charles Wolff Packing Co. v. Court of Indus. Relations of State of Kansas*, 262 U.S. 522 (1923).

<sup>123</sup> Laws of 1920, ch. 29, § 7.

<sup>124</sup> Supreme Court Transcript of Record at 11, *Wolff I*, 262 U.S. 522 (Temporary Findings and Order).

<sup>125</sup> *Id.* at 12.

<sup>126</sup> *Id.* at 14.

<sup>127</sup> *Id.* at 63.

<sup>128</sup> *Id.* at 15.

The CIR issued its second order on May 2, 1921. In a unanimous opinion authored by its presiding judge, William L. Huggins,<sup>129</sup> the CIR recognized that its orders fixing wages must be “very carefully considered, in view of the fact that the respondent is doing business, and must continue to do business, upon an open and more or less competitive market, and in view of the fact that the plant cannot be expected to operate for any long period of time at a loss.”<sup>130</sup> Finding that the business losses of the previous year was caused by the “world-wide business conditions which are believed and at least are hoped to be temporary . . . it is hoped that the business will be more prosperous” in the coming year.<sup>131</sup> That said, the CIR concluded, “the laboring man is not in a position to take advantage of rising markets or prosperous conditions.”<sup>132</sup> The purpose of the Act was to ensure that laborers employed in “these essential industries” “receive a fair wage and that capital invested therein shall receive a fair return.”<sup>133</sup>

The order was comprehensive. It dictated wages pursuant to a detailed schedule as to each classification of work. The “basic working day of eight hours” was imposed, subject to certain, limited exceptions, as was time and one-half for additional hours.<sup>134</sup> While “[n]o guaranty of time per week is specifically ordered,” the CIR directed that the company to offer sufficient work to the regular employees.<sup>135</sup> Seniority rules were imposed, piece-work rates were set, the total working time for women was limited, and so forth.

Wolff Packing sought a writ of mandamus before the Kansas Supreme Court, which issued the alternative writ on July 11, 1921, and appointed a “receiver,” A.L. Noble, to take testimony and to make findings of facts and conclusions of law. Pending his report, the Kansas Supreme Court considered Wolff Packing’s facial challenge to the Act.<sup>136</sup>

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<sup>129</sup> Huggins was one of the Act’s principal authors and proponents. W. L. Huggins, [Speech delivered before the Kansas Legislature](#) (Jan. 9, 1920). He referred to the CIR as “The Court of the Penniless Man,” which was created to defend the interests of all hard-working men. W. L. Huggins, [Address to the Crawford County Bar Association: The Court of the Penniless Man](#) (Apr. 7, 1920).

<sup>130</sup> Supreme Court Transcript of Record at 18-19, *Wolff I*, 262 U.S. 522.

<sup>131</sup> *Id.* at 19.

<sup>132</sup> *Id.*

<sup>133</sup> *Id.*

<sup>134</sup> *Id.*

<sup>135</sup> *Id.* at 21.

<sup>136</sup> Wolff Packing’s attorney, John S. Dean, initially represented an organization called “Associated Industries,” comprised of Kansas businesses, as amicus in the matter. He later became Wolff Packing’s co-lead counsel. THE WICHITA BEACON 1 (June 2, 1921).

## B. The First Decision of the Kansas Supreme Court.

On October 8, 1921, the Kansas Supreme Court unanimously upheld the constitutionality of the Act. Terming the Act a “remedial statute,” the court concluded that it “should be liberally construed to promote its object.”<sup>137</sup> As a threshold matter, the court dismissed Wolff Packing’s contention that no order of the CIR could take effect before judicial review by the Kansas Supreme Court, including as to the reasonableness of the terms imposed. The court also held that the CIR’s jurisdiction to investigate and to impose orders was satisfied by the conclusory allegation that an emergency existed, without findings that such an emergency in fact existed.

The court rejected the argument that the Act constrained only the employer’s conduct without compelling employees to work for the wages fixed by the CIR.<sup>138</sup> The Act “takes from employ[ee] some of that which has been heretofore considered their legal right,” including the right of an “individual employ[ee] or other person to conspire with other persons to quit their employment or to induce other persons to quit their employment . . . . or for the purpose of deterring or preventing any other person or persons from accepting employment.”<sup>139</sup>

As to employers, the Act restricts them “from doing certain things with the intention of violating the law, or in other words is restricted from doing those things prohibited by the law. But the defendant is not, by the law, compelled to operate its plant at a loss, nor is it prohibited from changing its business, nor from quitting the business, if it desires to do either of these things in good faith, not intending thereby to violate any provision of the act.”<sup>140</sup> Analogizing the Act to laws governing public service corporations, the court held that while Wolff Packing is not a public service corporation, “the Legislature has declared that its business is affected with a public interest” . . . “can be compelled to operate but not at a loss.”<sup>141</sup>

This was a misdirection. While the Act put Wolff Packing to the choice of submitting to its jurisdiction or facing a state takeover of its operations, it also prohibited the company from closing its doors for the purpose of avoiding the Act or orders of the CIR. Aside from the *in terrorem* threat of a seizure of its business, the analogy between a meat packer and a public utility ignored the fundamental difference between a small, privately-

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<sup>137</sup> *Court of Indus. Relations v. Charles Wolff Packing Co.*, 109 Kan. 629, 201 P. 418, 420 (1921).

<sup>138</sup> *Id.* at 422.

<sup>139</sup> *Id.* at 422.

<sup>140</sup> *Id.* at 422.

<sup>141</sup> *Id.* at 423.

owned slaughterhouse and a state-regulated monopoly that provides vital public services subject to extensive regulatory oversight and a guaranteed, reasonable rate of return.

The wage increases imposed on Wolff Packing could not be offset by state-ordered price hikes, which the Kansas Supreme Court admitted was beyond the power of the CIR. Yet, the court reasoned, because wages are an integral part of “rates,” they could be regulated, and cited *Munn v. Illinois* for this proposition.<sup>142</sup> *Munn* concerned the fixing of prices as to *all* grain elevators in the state of Illinois, as opposed to imposing wage increases as to only one employer which exercises no monopolistic power. And while the court framed its analysis in terms of the public affectation doctrine, the issue was not whether the state of Kansas could exercise police powers to regulate wages or hours as to the meat packing industry in general, or whether such regulations could be justified on health or safety grounds. The question presented was whether the state could exercise that power as to only one employer and its employees without some basis to distinguish the circumstances at Wolff Packing from other slaughterhouses in Kansas.

Appreciating the extent to which the CIR’s jurisdiction depended on the existence of an emergency, the court cited *Wilson v. New*, which upheld the Adamson Act, a wartime measure passed by Congress to avert a nationwide railroad strike.<sup>143</sup> The Adamson Act fixed a day’s work at eight hours, and specified wages and overtime. The Kansas Supreme Court equated the Kansas law to wartime legislation authorizing the federal intervention in a nation-wide strike which threatened the entire railroad industry.<sup>144</sup> “If the Adamson law was compelled by an emergency, the Kansas Industrial court law was likewise compelled by an emergency.”<sup>145</sup>

Following remand, a court-appointed commissioner conducted hearings as to the as-applied challenges to the CIR order.

### **C. Commissioner Noble’s Findings and Conclusions of Law.**

Commissioner A.L Noble<sup>146</sup> heard testimony between July 27, 1921 and August 21, 1921, including testimony from Judge Huggins, the presiding judge of the CIR. Huggins

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<sup>142</sup> *Munn v. People of State of Illinois*, 94 U.S. 113 (1876).

<sup>143</sup> *Wilson v. New*, 243 U.S. 332 (1917).

<sup>144</sup> *Court of Indus. Relations v. Charles Wolff Packing Co.*, 201 P. at 425.

<sup>145</sup> *Id.* at 426.

<sup>146</sup> Noble practiced law in Medicine Lodge, Kansas, where Cary Nation, the temperance crusader, resided. Mr. Noble was among those who prosecuted her for wielding a brick bat in the town of Kiowa, where she attacked as many as six bars in June, 1900. It was not until December 27, 1900, when she smashed the bar in the Hotel Carey in Wichita, that she began to use her trademark hatchet. [AMERICAN SPIRITUALITIES: A READER](#) 327 (Catherine L. Albanese ed., 2001).

admitted that the CIR reviewed none of Wolff Packing's records relating to the company's financial condition. Huggins testified that his tribunal:

considered practically the reduction in wages that the company had made by its posted notice. We did raise some of the lower paid men and part of that because of a statement made in open court, made by the attorney for [Wolff] that [the company] was willing that women workers should be paid upon the same wage scale with men for the same class of work. Then we did raise, I am speaking now of raising above the scale fixed by the contract of 1920, we did raise some of the other lower paid workers, but we scaled down some of the higher paid workers and in the final wage scale that we made we believed that we had not in any very serious, to any very serious extent, increased the wage as fixed by the company in its posted notice. We did put some burden upon the company, however, in regard to working conditions and providing for more suitable surroundings down there, but on the wage scale we believed at the time we fixed that scale that we had not seriously impaired the company by increasing to any great extent. We realized that we possibly had increased some, but we felt not sufficiently to cripple the company in any serious way, over and above the wage fixed by the company in its posted notice, and we felt, especially in view of the trial of the court, that satisfied workers would be more efficient than dissatisfied ones.<sup>147</sup>

Judge Huggins' testimony shows just how far the CIR was prepared to depart from the relief sought to obtain a result that would serve its vision of the public interest. The workers asked that the expired 1920 contract be reinstated, with back pay to adjust for wage increases under that agreement, as well as for a basic eight hour day. The workers did not ask that women employees obtain equal pay for equal work. The downward adjustment of some wages, as well as the upward adjustment of wages (albeit below those promised under the expired contract), must have left some of the workers asking if they might have been better off negotiating with the company rather than submitting the controversy to the CIR.

Although there was no pending or threatened strike, the CIR concluded that "such an emergency existed as justified the Court of Industrial Relations in making an investigation."<sup>148</sup> There was no dispute that a shutdown would not result in massive labor dislocations; the plant was "a small one" which employed about 300 workmen.<sup>149</sup> There had been only one strike in the history of the company. It lasted only a short period, involved less than half of the workers, and had no meaningful impact on the company's

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<sup>147</sup> Supreme Court Transcript of Record at 48.

<sup>148</sup> *Court of Indus. Relations v. Charles Wolff Packing Co.*, 207 P. at 807.

<sup>149</sup> *Id.*

operations.<sup>150</sup> The plant workers, many of whom were “old residents and responsible citizens of the city of Topeka,” were “not under domination of agitators. The leaders were earnest, sensible, law-abiding men and women, who believed they were unjustly treated.”<sup>151</sup> In any event, the possibility that a strike might occur no longer existed when the Court issued its order of investigation.<sup>152</sup>

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<sup>150</sup> Supreme Court Transcript of Record at 93. (Testimony of Charles Wolff, Jr.).

<sup>151</sup> *Court of Indus. Relations v. Charles Wolff Packing Co.*, 207 P. at 812.

<sup>152</sup> *Id.* at 812. Charles Wolff, Jr. testified that in January, 1921, when the complaint was filed with the CIR, “there was no threat on the part of any of the employees, or group of employees, to strike. We have had no complaint from any employees at any time with reference to the matters of wages. I recall the circumstances of the employees, or some of them bringing me a contract that they wanted signed. I told them that [Wolff’s counsel] would be glad to see them and discuss the matter. They said they did not care to discuss it with the company’s counsel and left the paper. I do not recall any further meeting.” Supreme Court Transcript of Record at 56 (Transcript at 93).

Another member of the CIR, J.A. McDermott, was asked about the possibility of a threatened strike. He testified he was aware on March 21, 1921, the date of the CIR’s first order, that the Amalgamated Meat Cutters and Butchers Workmen, of which the Wolff Packing local union was part, had threatened a strike. When asked how he knew this, Judge McDermott testified:

By general information that every other citizen got; it had reached the point where the strike had been voted and called and the federal government, the President of the United States, had called the packers and the representatives of these unions to meet with the Secretary of Labor and Commerce on Wednesday; I think the strike had been voted to be called a day or two later than that. On Thursday of Friday a temporary adjustment was made through the efforts of the two secretaries [of Commerce and Labor] mentioned and while this national strike was impending, which would involve the Wolff Packing Company, we felt, knowing by general information the controversy that existed nationally, which was with reference to the overtime and the reduction of wages, that a temporary order made by this court would probably avert a strike at the Wolff Packing Company Plant.

Supreme Court Transcript of Record at 49.

In other words, Judge McDermott would have likely known that a strike was averted on March 21, due to the intervention of the Harding Administration. And, in fact, the only demand made by the national union was to have the packers agree to restore wartime arbitration agreements fixing wages and hours with the Big Five packers – Swift & Company, Armour & Company, Cudahy Packing Company, Wilson & Company, and Morris & Company – which were operating under an agreement negotiated by the Bureau of Conciliation of the United States Department of Labor. That agreement expired September 15, 1921, meaning any threat of a strike before then by the Amalgamated Meat Cutters would be in violation of that agreement. [\*Strike Favored by Meat Unions\*](#), SACRAMENTO UNION, at 12 (Mar. 18, 1921).

The Big Five had been under scrutiny by the federal government for over a decade. In 1921, Congress passed the Packers and Stockyards Act of 1921, as amended (“PSA”), 7 U.S.C. §§ 181-229, which was intended insure effective competition and integrity in livestock, meat, and poultry markets. It was enacted in response to concerns that the “Big Five” had engaged in anticompetitive practices that had a deleterious effect on producers and consumers. See 10 Neil E. Harl, *Agricultural Law* § 71.02 (1993) (providing an

Charles Wolff, Jr. testified that only a small percentage of its sales were made in the state of Kansas, and that the company had “plenty of competition” for those sales.<sup>153</sup> Nonetheless, the fact that it some portion of its products were sold and consumed within the state was sufficient to declare a threat to public welfare, even though the court did not suggest that the suspension of the plant’s operations would appreciably affect the supply of meat to residents of Kansas. The evidence showed that the supply of available labor “was abundant.”<sup>154</sup>

Commissioner Noble found that Wolff Packing was “a small, local plant, depending on an irregular local live-stock market, which it must maintain, or lose altogether.”<sup>155</sup> This meant that it would be impractical to impose an eight-hour work day, regardless of pay for extra hours, since the employer has no practical control over the hours of employment of the plant workers. As to the wage increases, the net change put into effect on January 17, 1921 (when Wolff Packing reduced its wage scale) was not particularly draconian. Beyond abolishing a five cent per hour bonus and extra pay for overtime, the effect of the CIR’s order was that “[s]ome wages were raised, more were unchanged, and the remainder were

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extensive discussion of the historical development of the PSA). Taft authored the Court’s opinion in *Stafford v. Wallace*, which upheld the PSA against a commerce clause challenge. 258 U.S. 495 (1922).

The Amalgamated Meat Cutters’ union eventually did call for a national strike, but not until the winter of 1921, well after the CIR’s temporary order would have expired. (It would have remained in effect, by statute, for only 60 days.)

In Chicago, where the union called for a walkout on December 5, 1921, over 90 percent of the Armour plant workers resisted the union’s call for a strike. The strike was short-lived, and had no appreciable effect on the supply of meat. In Kansas, news of the strike prompted the state attorney general to file an action in the CIR. The local unions and superintendents of the packing plants were summoned to appear on December 3, 1921. The packing plant officers appeared, but only one of the union officials responded. The following day, the Court told the mayor and chief of police “that unless crowds surrounding the packing plants were dispersed by tomorrow the industrial court would ask Governor Allen to declare martial law in Kansas City, Kansas, and order the militia to take charge.” [Martial Law Threatened Over Walkout of Packer employes](#), SACRAMENTO UNION 2 (Dec. 6, 1921).

Subpoenaed to appear before the CIR, “the union officials declared that they did not have any controversy which they desired to submit to the court, as did the employers.” See Second Annual Report of the CIR, at p. 11. Nonetheless, the CIR intervened, and credited itself with having broken what it termed the “so-called strike.” Left unclear is whether the Kansas workers would have struck and, if so, whether the workers would have disrupted operations. See Second Annual Report of the CIR, at 11. See also Sherman Rogers, [Strike News from Kansas and Chicago](#), 129 THE OUTLOOK 681 (1921); [Meat packing Workers Vote to Strike](#), HERALD DEMOCRAT 3 (Oct. 20, 1921).

<sup>153</sup> Supreme Court Transcript of Record at 57 (Testimony of Charles Wolff, Jr.).

<sup>154</sup> *Id.* at 156.

<sup>155</sup> *Id.* at 154.

lowered from 2 ½ percent to 14 percent, making an average reduction in the hourly wage throughout the plant of less than a half cent per hour.”<sup>156</sup>

Commissioner Noble concluded that it was within CIR’s jurisdiction to initiate the investigation and to consider their general knowledge as to local industrial conditions, as well as to consider ex parte information on “the subject of the particular strife and controversy.”<sup>157</sup> But he also concluded that the “tendency of the enforcement of the order would therefore be to deprive the [company] of that much property and to hasten the ultimate closing of the plant, which is inevitable unless business or operating conditions can be improved.”<sup>158</sup> His criticism of the CIR’s wage orders was direct and, implicitly, an attack on the Kansas Supreme Court’s conclusion that wage increases could be analogized to the fixing of rates:

The Industrial Court law was enacted for the general welfare which it was undoubtedly intended by the legislature to promote. Certain conditions are specified as conducive to the promotion of such welfare, and this amounts to an expression of a purpose of the law to bring about and maintain those conditions, which are, so far as the issues here are concerned, that workers engaged in the specified industries should receive a fair wage and capital invested therein a fair return on the investment. Normally both conditions must exist or the industry cannot survive, because workers cannot be induced nor compelled to labor for an unfair wage, and capital cannot be attracted nor held without a fair return. In the case of public utilities where the law can regulate both the wages paid and the price at which the product is sold, the purpose of the law, however difficult the adjustment may be, is, theoretically at least, fully attainable. With those industries, which though affected with public interest, must sell their products in the open market at prices which cannot be directly regulated by law, the realization of the purpose of the law, even theoretically, can only be more or less approximate. But the fact that the objects and purposes of the law may not be fully attained in every instance does not affect the validity of the law nor its general efficiency.<sup>159</sup>

Commissioner Noble then turned to the fundamental challenge raised by Wolff Packing: that the wage increases constitute a taking of the company’s property without any basis under the Act:

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<sup>156</sup> *Id.* at 121.

<sup>157</sup> *Id.* at 129.

<sup>158</sup> *Id.* at 176.

<sup>159</sup> *Id.* at 130-31.

There is nothing in the act justifying the taking of the property of the employer in one of the designated industries for the purpose of enabling the workmen [to] receive a fairer wage, any more than the taking of fair wages from the workmen to enable the employer to earn a fairer return on his invested capital. The object of the law is evidently to prevent an unfair and lop-sided condition, and beyond that there is no intention evident to change the operation of the law of supply and demand, either as to the price of labor or product, and in the regulation aimed at the interest of the public in having the industry continuously operated and its output produced and placed on the market is made paramount. If the [company] were making a substantial return on its investment in operating this plant, though not a fair one considering the going interest rates at the times, and were not paying fair wages to its workmen, the situation would be one for the Industrial Court to equalize in the interest of the general public, but where, as in this case, the [company] is getting no return whatever on its investment, and the workers are receiving wages, not as high as paid in the larger packing houses, but equal to those paid a year before when the cost of living was somewhat higher, an increase is not justified nor authorized by the Industrial court law and the execution of those paragraphs of the order would be unreasonable and should not be enforced. <sup>160</sup>

#### **D. The Second Decision of the Kansas Supreme Court.**

The case returned to the Kansas Supreme Court the following year, where the court considered questions relating to the evidence upon which the terms of the order were fixed, including whether an “emergency” justified the order.<sup>161</sup> A divided court rejected Noble’s key conclusions, and upheld the order by a 3-2 vote on June 10, 1922.

The court began by disposing of the argument that the existence of an emergency had not been sufficiently pled. The fact that a shutdown of Wolff Packing would “not greatly inconvenience the people of Kansas” was irrelevant.<sup>162</sup> Wolff Packing was under the authority of the CIR for no reason other than the fact that it supplied meat to residents of Kansas, “and if it should cease to operate, that source of supply would be cut off.”<sup>163</sup> This was pure bootstrapping. Nonetheless, the court deemed sufficient, for purposes of the CIR’s jurisdiction, that the workers had alleged the existence of a “controversy” that “had

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<sup>160</sup> *Id.* at 131.

<sup>161</sup> *Court of Indus. Relations v. Charles Wolff Packing Co.*, 207 P. 806 (1922).

<sup>162</sup> *Id.* at 807.

<sup>163</sup> *Id.*

endangered and is continuing to endanger the continuous operation and efficiency of service at said packing plant.”<sup>164</sup>

There was no dispute that Wolff Packing was operating at a loss. The Kansas Supreme Court found this irrelevant: “The operators of a packing plant cannot by law be compelled to sell the finished products of their plants at a price that will not allow them a fair return upon investment, but that does not say that those operating the packing plant cannot be compelled by law to pay a living wage to their employees, notwithstanding the fact that the plant is being operated at a loss.” In the court’s view, “[a]n industry of any kind that cannot be operated except at the sacrifice of its employees ought to quit business,” and “ought not be permitted to recoup its losses out of the wages of its employees, where those employees are in such a condition that they cannot prevent it.”<sup>165</sup>

Whether or not Wolff Packing’s financial problems were of its own making was also irrelevant, as were the unique burdens of wage increases imposed only on the company, but not on its competitors. “If the plant is badly located, . . . it ought to be moved . . . If the loss is caused by managerial faults, they ought to be corrected. Recoupment of losses caused by either of these matters ought not to be brought about by compelling the working man to labor for less than a living wage.”<sup>166</sup> This holding was curious, given that the Act was premised on protecting continuity of vital public services, rather than precipitating a shutdown of a plant as a result of unsustainable wage increases and maximum hours imposed by the CIR.

Justice Rousseau Angelus Burch, joined by Justice Silas Wright Porter, dissented.<sup>167</sup> The CIR, Justice Burch wrote, had decided that it “could regulate the conduct of [Wolff Packing’s] business” without first establishing a statutory emergency that could justify its intervention.<sup>168</sup> Wolff Packing, far from being vital to the supply of food in the state, was a small, and relatively insignificant, part of the immense packing industry in Kansas; most if its products were not sold in the state. If the plant were to close permanently, its business “would be absorbed by competitors so quickly [that] the people of the state who consume

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<sup>164</sup> *Id.*.

<sup>165</sup> *Id.* at 809.

<sup>166</sup> *Id.* at 810.

<sup>167</sup> Justice Burch joined the court in 1902. He is widely regarded as one of the most influential jurists in Kansas history. A member of the American Law Institute’s National Governing Council from 1923 until 1942, his most famous opinion, *Coleman v. MacLennan*, was cited with approval by the Supreme Court in *New York Times Company v. Sullivan*, 376 U.S. 254, 280 (1964).

<sup>168</sup> *Court of Indus. Relations v. Charles Wolff Packing Co.*, 207 P. at 810.

Wolff products would not be inconvenienced for a single meal.”<sup>169</sup> In any event, the possibility of a strike no longer existed when the CIR intervened.

Turning to the statutory purpose of ensuring continuity, Burch noted that the imposition of restrictions on the length of a day’s labor actually threatened to disrupt the operations of the plant. The fact that overtime was a necessary part of its operations was not antithetical to continuity and efficiency of its operations, but an essential part of how it ran its business: “and so a regulation nominally in the interest of continuity and efficiency of production puts an end to the defendant’s contribution to production.”<sup>170</sup>

Nor could the existing wage scale create an emergency, a fact underscored by the relatively insignificant overall change imposed by the CIR. The legislature, he concluded, “did not completely socialize the manufacture of food products,” and the fact that Wolff Packing was in operating in an essential industry “is not enough to subject it to state control.”<sup>171</sup>

Two days after the Kansas Supreme Court denied rehearing, Wolff Packing petitioned the U.S. Supreme Court for a writ of error on July 10, 1922. Oral argument was heard on April 27, 1923.

#### **E. The U.S. Supreme Court Decision.**

Although *Wolff I* was the first occasion for the U.S. Supreme Court to consider the constitutionality of the Kansas Industrial Relations Act, it was not the first time that a case involving the statute reached the court. In 1922, the Court dismissed writs of error in two cases involving Alexander Howat. The Court, concluding that the case failed to raise issues under the U.S. Constitution, held that a criminal contempt order must be obeyed until vacated, regardless of the constitutionality of the act under which the order was issued.<sup>172</sup> In *Wolff I*, the constitutionality of the Act was squarely presented.

As it did before the Kansas Supreme Court, the state sought to justify compulsory arbitration and the infringements on individual liberty based on *Munn* and *Wilson v. New*.<sup>173</sup> The company’s attorney focused first on the facts, to emphasize the most arbitrary aspects of

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<sup>169</sup> *Id.* at 811.

<sup>170</sup> *Id.* at 812.

<sup>171</sup> *Id.* at 810.

<sup>172</sup> *Howat v. Kansas*, 258 U.S. 181, 189–90 (1922) (all orders and judgments of courts must be obeyed “however erroneous the action of the court may be,” until the order “is reversed for error by orderly review, either by itself or by a higher court” and that “disobedience of them is contempt of [the court’s] lawful authority, to be punished”).

<sup>173</sup> *Munn v. People of State of Illinois*, 94 U.S. 113 (1876); *Wilson v. New*, 243 U.S. 332 (1917).

the orders. This proved effective: In his statement of facts, Chief Justice Taft focused on the operations of the plant, its operational losses, the effect of the CIR's order on the company's viability as a going concern, and the absence of findings of any threatened labor strife or imminent danger of disruption of food supplies, even assuming the potentiality of a work stoppage.

Though not discussed in any of the briefs, the Court noted that Wolff Packing and its parent company, Allied Packers, was in competition with the so-called Big Five Packers, the largest in the country.<sup>174</sup> Unlike Wolff Packing, the Big Five were facing a strike, which was settled by the President "us[ing] his good offices."<sup>175</sup> The Court's emphasis on the economic burdens caused by the order's limitation of hours and the rates of pay for overtime, as well as the CIR's concession that Wolff Packing could not operate on the schedule fixed by the order without a loss, telegraphed where the Court was heading.

Chief Justice Taft began by stating that the "necessary postulate" of the Industrial Court Act is that the state may compel companies to continue their business.<sup>176</sup> Short of finding that the terms fixed by the CIR would threaten bankruptcy, the employer was obligated to continue operations. But the Court was not merely stating that the Act mandated continuity of operations short of financial collapse; rather, that the right to

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<sup>174</sup> Not for long, however. By the end of 1928, Allied Packing was put into receivership. THE NEWS-HERALD FROM FRANKLIN, PENNSYLVANIA 8 (December 21, 1928).

<sup>175</sup> *Wolff I*, 262 U.S. at 525. Taft's acknowledgement was more than a tip of the hat by the former President; he was stating what every member of the Court (and the public) already knew – by the time the CIR imposed its orders on Wolff Packing, the threat of any industry-wide strike had been averted. Taft was not the only member of the Court with intimate familiarity of labor and anti-trust issues affecting the meat packing industry.

After losing his Senate seat in 1916, Justice Sutherland practiced law in Washington, D.C., where he represented a trade organization founded by the Big Five Packers. As he explained the following year to his friend (and former Utah Governor) Arthur Thomas, "[a]s soon as peace is declared, the flood of litigation will begin and Washington ought to be a place where a lawyer can earn bread and butter." Post, *supra* note 37, at 1491. Among those who buttered ex-Senator Sutherland's bread was the Institute of American Meat Packers, which retained Sutherland as its "advisory counsel." *Meat Packers' Institute Launched*, 61 THE NATIONAL PROVISIONER NO. 12, 129, 148 (Sept. 20, 1919). In February 1920, Sutherland was appointed by the federal district court to act in a "visitorial and inquisitorial capacity" as part of the "Packer Consent Decree," which prohibited various restraints on trade alleged against the Big Five. See *The Packer Consent Decree*, 42 YALE L. REV. NO. 1, 81-94 (1932). Sutherland later recused himself from the Court's review of the consent decree. *United States v. Swift & Co.*, 286 U.S. 106 (1932); *Swift & Co. v. United States*, 276 U.S. 311 (1928).

Before his appointment to the Court, Justice Pierce Butler was part of the team of Department of Justice attorneys which (unsuccessfully) prosecuted anti-trust charges against the so-called "Beef Trust" in 1911-1912. See Richard Cahan, *A COURT THAT SHAPED AMERICA: CHICAGO'S FEDERAL DISTRICT COURT FROM ABE LINCOLN TO ABBIE HOFFMAN* 59-63 (Northwestern Univ. Press 2002).

<sup>176</sup> *Id.* at 533.

discontinue was “generally illusory” because the Act gave the company no option but to be compelled into compulsory arbitration.<sup>177</sup>

The “temporary” nature of the CIR’s orders did not compel continuity of operation beyond the length of the order prescribed by that tribunal. Nonetheless, the purpose of the orders was to force the employer and its employees into a process that fixed the terms of their relationship, or face state seizure of the company’s operations. Once haled before the CIR, the employer could not cease operations unless it proved that its decision was not motivated by a desire to willfully avoid the orders of the Industrial Court. That hurdle would be challenging, given that the reason for going out of business also required a showing that the wages and hours requirements imposed by the CIR were the reasons for sustained financial losses.

Wolff Packing argued that the Act compels obedience on the employer, but not on its employees, who are free to quit at any time, including after the Industrial Court issues orders fixing wages and hours of employment. It argued that the relevance of the Act’s restrictions on the workers’ right to act in concert with other employees to quit, or to strike, was “not apparent.” Rather, it maintained that Wolff Packing was denied equal protection of the law by depriving it freedom of contract while leaving industrial employees their constitutional liberty of contract.

The Court did not agree. The essence of the Act, as the Chief Justice explained, is to curtail the right of the employer *and* employee to contract about his affairs, both protected individual liberties under the Due Process Clause.<sup>178</sup> This was not the first time Taft had considered the nexus between the workers’ freedom to contract and their freedom to associate in order to negotiate contracts. Echoing his decision in *American Steel Foundries*, Taft explains the nature of the compulsion imposed on workers: “The employer is bound by this act to pay the wages fixed, and, while the worker is not required to work at the wages fixed, he is forbidden, on penalty of fine or imprisonment, to strike against them, and thus is compelled to give up that means of putting himself on an equality with his employer which action in concert with his fellows gives him.”<sup>179</sup> Given that the Act abridged freedom of

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<sup>177</sup> *Id.* at 534.

<sup>178</sup> *Id.* (citing *Meyer v. Nebraska*, 262 U.S. 390 (1925)).

<sup>179</sup> *Id.* at 540. “Labor unions,” he stated in *American Steel Foundries*,

were organized out of the necessities of the situation. A single employee was helpless in dealing with an employer. He was dependent ordinarily on his daily wage for the maintenance of himself and family. If the employer refused to pay him the wages that he thought fair, he was nevertheless unable to leave the employ and to resist arbitrary and unfair treatment. Union was essential to give laborers opportunity to deal on equality with their employer. . . . They were withholding their labor of economic value to make him pay what they thought it was worth. The right to combine for such

individual liberty and property of both the employer and the employees, the Court turned to whether “exceptional circumstances” justified this legislative interference with these liberty and property rights.<sup>180</sup>

This required the Chief Justice to resolve whether Wolff Packing was a business clothed with a public purpose. Taft did not choose the public affectation doctrine as his framing analysis; it was thrust upon him by the Act itself, which identified categories of businesses “affected with a public interest,” and, therefore, subject to compulsory arbitration.<sup>181</sup>

He began by rejecting the notion that the continuous operation of any business in an “essential industry” could never be a matter of public interest and, therefore, not a proper object of government intrusion. Instead, he made clear that the answer is not determined by “the mere declaration” of the legislature that a particular business in a class of industries is clothed with a public purpose. That determination is, as the Court had long said, an appropriate subject of “judicial inquiry.”<sup>182</sup>

The degree of the deference in undertaking that “judicial inquiry” was, to be sure, a topic of considerable disagreement between the Justices. That dispute is on full display in Holmes’ dissent in *Adkins*, handed down two months before *Wolff I*.<sup>183</sup> Holmes contrasted

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a lawful purpose has in many years not been denied by any court. The strike became a lawful instrument in a lawful economic struggle or competition between employer and employees as to the share or division between them of the joint product of labor and capital.

257 U.S. 184, 209 (1921).

Charles Fried calls Taft’s decision in *American Steel Foundries* a “version of the arguments that Marxists rely on,” i.e., “that this system ‘corrects’ the market for labor by removing what is thought to be an inherent, ‘unfair,’ or structural imperfection in that market: the peculiar vulnerability of individual suppliers of labor, who do not enjoy unique capabilities and thus are unable to demand rent for those capabilities they do have.” Charles Fried, *Individual and Collective Rights in Work Relations: Reflections on the Current State of Labor Law and Its Prospects*, 51 U. CHI. L. REV. 1012 (1984).

<sup>180</sup> *Wolff I*, 262 U.S. at 534. Though Taft dissented in *Adkins*, his characterization of the due process “freedom of contract” in *Wolff I* cites *Adkins*. Compare *Adkins*, 261 U.S. at 545–46 (“freedom of contract is, nevertheless, the general rule and restraint the exception; and the exercise of legislative authority to abridge it can be justified only by the existence of exceptional circumstances”) and *Wolff I*, 262 U.S. at 534 (“Freedom is the general rule, and restraint the exception. The legislative authority to abridge can be justified only by exceptional circumstances.”). Taft was not suggesting that he had reversed his view that *Adkins* was wrongly decided. While Taft felt that the *Adkins* majority “went too far,” his decision in *Wolff I* largely avoided, rather than turned on, that holding. See note 194 *infra*.

<sup>181</sup> *Wolff I*, 262 U.S. at 536.

<sup>182</sup> *Id.* at 536.

<sup>183</sup> *Adkins*, 261 U.S. at 568.

the majority's opinion in *Adkins* with other decisions where the Court deferred to legislative choices where it suited its purposes.<sup>184</sup> Holmes then went beyond the pages of U.S. Reports, and used a hypothetical that anticipates *Wolff*: A legislature, he opined, could fix wages to settle industrial disputes. Similarly, it could delegate to a court "the power to fix a minimum for wages in the case of industrial disputes."<sup>185</sup> Under either scenario, Holmes concluded, "I should not feel myself able to contradict it."<sup>186</sup>

Holmes was not suggesting that such power could be used to fix wages as to only one employer. His example related to the fixing of wages as to an *entire industry*.<sup>187</sup> The fixing of wages in *Wolff* did not apply "to all businesses of a particular class."<sup>188</sup> The wage fixing in *Wolff* was "merely a feature of a system of compulsory arbitration [that] has no separate purpose" other than to compel one employer and its workers.<sup>189</sup>

It is unlikely that Holmes chose this example by happenstance. The Court had heard oral argument in *Wolff* less than three weeks after Holmes announced his dissent in *Adkins*. As he stated there, the Due Process Clause is not an impenetrable barrier to state laws that prohibit all contracts, or that force contracts upon companies.<sup>190</sup> But Holmes evidently felt that the Kansas Act could not survive even the most forgiving version of judicial deference. Whatever his internal thought process, he left behind a clue as to what he thought about the Court of Industrial Relations in his *Adkins* dissent.

Having explained the Court's obligation to do more than rubber stamp the validity of the Kansas Act based on the policy determinations of the legislature, Taft turned to the substantive question for conducting that inquiry. Taft offers his version of a unified theory for the public affectation doctrine. Three classes of business, he explained, have historically been subject to a degree of public regulation: First, public utilities, carried on under a grant

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<sup>184</sup> *Id.* at 568.

<sup>185</sup> *Id.* at 571.

<sup>186</sup> *Id.*

<sup>187</sup> This is made clear by his reference to an article published in the Harvard Law Review by Justice Henry B. Higgins of the Australia Supreme Court, who described how the South Australian Industrial Arbitration Court determined wages as to an entire industry. *Adkins*, 261 U.S. at 571 (Holmes, J., dissenting) (citing Higgins, *A New Province for Law and Order*, 29 Harv. L. Rev. 13 (1915)). See also *Adair v. United States*, 208 U.S. 161, 191-192 (1908) (Holmes, J., dissenting) ("It cannot be doubted that to prevent strikes, and, so far as possible, to foster its scheme of arbitration, it might be deemed by Congress an important point of policy, and think it impossible to say that Congress might not reasonably think that the provision in question would help a good deal to carry its policy along.").

<sup>188</sup> *Wolff II*, 267 U.S. at 569.

<sup>189</sup> *Id.*

<sup>190</sup> See *Adkins*, 261 U.S. at 569 (discussing *National Union Fire Ins. Co. v. Wanberg*, 260 U.S. 71 (1922)).

of a public right; second, exceptional occupations, such as innkeepers, grist mills, and so forth; and, third, some businesses, not public at their inception, but which become clothed in a public interest due to changed circumstances, including monopoly control over goods and services.

A meat packing plant did not fall under either of the first two classifications. Whether it satisfied the requirements of the third category required something more than the *ipsi dixit* that “the public welfare is affected by continuity or by the price at which a commodity is sold or a service rendered.”<sup>191</sup> Rather, as the Chief Justice explained, the public interest might arise from “the indispensable nature of the service and the exorbitant charges and arbitrary control to which the public might be subjected without regulation.”<sup>192</sup>

At this point of the opinion, as Alpheus Mason explains, “the Chief Justice changed the tenor of his argument. Why be concerned, he asked, with the question whether the meat packing business was affected with a public interest? The attempted regulation –that of compelling continuity –could not be sustained, even conceding the presence of a public interest. . . . Here the very purpose of the [Act] was to ensure continuity. Very special and extraordinary circumstances must exist to justify such a regulation.”<sup>193</sup>

The final, published version “merely cast strong doubt on this question and decided that, even if the enterprise were clothed with the public interest, owners and workers could not be ordered to continue in business ‘on terms fixed by an agency of the State.’”<sup>194</sup>

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<sup>191</sup> *Wolff I*, 262 U.S. at 537.

<sup>192</sup> *Id.* at 538. Taft was not writing on a blank slate when he offered this example. Nor was he oblivious to circumstances where meat packing businesses could, in combination, exercise the sort of “arbitrary control” over supply or prices that would subject them to regulation. In *Stafford v. Wallace*, the Chief Justice, writing for the majority, upheld the constitutionality of Section 316 of the Packers and Stockyards Act of 1921. That law, passed in response to concerns as to monopoly control by the “Big Five” Packers over pricing and supply of meat, authorized injunctive relief where possible collusion is threatened, but before it is consummated. 258 U.S. at 495, 520-21. Taft, in other words, was not opposed to enabling regulation to prevent imminent threats to public welfare, including by orders enjoining strikes before they disrupted commerce.

<sup>193</sup> Mason, *supra* note 108.

<sup>194</sup> Post, *supra* note 37, at 1516. Professor Post provides a fascinating and credible explanation as to how this change came about:

We do not have the original draft of Taft’s opinion, but on May 29, 1923, he wrote to Van Devanter asking him to review the manuscript and make “suggestions.” Letter from Taft to Van Devanter (May 29, 1923) (Taft Papers, Reel 254). Van Devanter responded with a long (undated) analysis, arguing that

As a whole, I fear the opinion will leave the impression that if only the Wolf [sic] Company’s business were affected with a public interest, the provisions of the statute as applied to it would be valid.

A decade later in *Nebbia*, the Court discarded (or, at minimum, substantially removed) the “public affectation” doctrine which Chief Justice Taft tried to wrestle to the ground.<sup>195</sup> But that doctrine was already showing signs of structural fatigue in *Wolff*. Taft’s

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To my mind this would not be so. Take for instance an elevator business and concede that it is so far affected with a public interest that the legislature may prescribe the rates to be charged to the public. Does this carry with it a power to make the owner continue the business, or a power to fix the wages which he must pay and his employees must accept, etc.? This hardly can be so. I cannot believe that all business affected with a public interest may be put on the same ground, nor that the power of regulation concededly extending to some features of such a business extends to every feature. The phrase “affected with a public interest” to me does not convey a definite conception of uniform application .... Even if Kansas could regulate the price at which the Wolf [sic] Company may sell its meat products, I do not think this carries with it what really is in question in the present case. I fear that the opinion lays too much stress upon the question of when a business is affected with a public interest and not enough on the other questions.

Taft Papers, Reel 254. Taft thanked Van Devanter for his “frank note,” and said that he could alter his opinion to put it “on the ground that regulation of businesses that develop by change of conditions ... into those affected with a public interest can not be regulated to secure their continuity and compel use of property and services by labor. I agree with you that the character of permissible regulation must vary with the kind of business but the cases are not such that it is easy to draw useful distinctions.” Letter from Taft to Van Devanter (undated) (Van Devanter Papers).

<sup>195</sup> *Nebbia v. New York*, 291 U.S. 502 (1934). A five-to-four decision, *Nebbia* upheld a New York law that prescribed a minimum price for the sale of milk. Justice Roberts, writing for the majority, viewed the law as a temporary measure intended to address an emergency caused by the oversupply of milk and the resultant unfair competition among retailers. Roberts’ opinion harkens back to the exigencies identified in *Wolff I* that might permit state intervention: “the paramount interests of the community” in curbing injurious commercial practices and assuring a safe and reasonable supply of milk to consumers. *Id.* at 525, 535-39.

Yet, Roberts did not go so far as to suggest the “abandonment” of distinction between private rights and public power. To be sure, Roberts commented “that there is no closed class or category of businesses affected with a public interest,” 291 U.S. at 536, and that the phrase “affected with a public interest” is an imprecise means of delineating the boundaries of permissible public regulation of private enterprise. *Id.* As Professor Samuel R. Olken explains:

Roberts’s expansive interpretation of the affectation doctrine seems less bold and indicates a juridical approach more minimalist than revolutionary. His emphasis upon the public interest in the retail milk business was hardly novel, given the extensive regulations that already governed the industry. Nor did the Court overrule *Wolff* or other cases from the 1920s that strictly construed the affectation doctrine. Rather than jettison the classical apparatus for differentiating between the public and private spheres, Roberts appears to have suggested a means for applying its categories broadly to make the distinction more viable under changing economic circumstances.

opinion was described at the time as “a heroic and labored attempt to reduce a vague concept to a specific rule of law.”<sup>196</sup> Even Taft agreed,<sup>197</sup> which explains why the holding did not rest entirely on whether Wolff Packing’s business was clothed in a public interest.<sup>198</sup> No amount of legislative discretion could justify a state “take over [of] its entire management and run it at the expense of the owner” proposed under the Kansas Act.<sup>199</sup> And no amount of judicial craftsmanship would have dislodged Holmes’ view that the public affectation doctrine was “little more than a fiction intended to beautify what is disagreeable to the sufferers.”<sup>200</sup>

Chief Justice Taft’s discussion of the public affectation doctrine, in other words, was a bit of a judicial head fake. He was not suggesting “that property affected with a public interest was entirely without constitutional significance.”<sup>201</sup> The question, as reframed by

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Samuel R. Olken, *The Decline of Legal Classicism and the Evolution of New Deal Constitutionalism*, 89 NOTRE DAME L. REV. 2051, 2079 (2014).

<sup>196</sup> Walton H. Hamilton, [Affection with Public Interest](#), 39 YALE L. J. 1089, 1100 (1930).

<sup>197</sup> *Wolff I*, 262 U.S. at 538-539 (“It is very difficult under the cases to lay down a working rule by which readily to determine when a business has become ‘clothed with a public interest.’ All business is subject to some kinds of public regulation, but when the public becomes so peculiarly dependent upon a particular business that one engaging therein subjects himself to a more intimate public regulation is only to be determined by the process of exclusion and inclusion, and to gradual establishment of a line of distinction.”).

<sup>198</sup> *Id.* at 539 (“We are relieved from considering and deciding definitely whether preparation of food should be put in the third class of quasi-public businesses noted above because, even so, the valid regulation to which it might be subjected as such could not include what this act attempts.”).

<sup>199</sup> *Id.*

<sup>200</sup> *Tyson & Brother v. Banton*, 273 U.S. 418, 446 (1927) (Holmes, J., dissenting). It is fair to assume that neither Justice Holmes nor Justice Brandeis would have lightly signed on to *Wolff I* decisions had it rested on the public affectation test. See also *New State Ice v. Liebmann*, 285 U.S. 262, 302 (Brandeis, J., dissenting) (disparaging the “notion of a distinct category of business ‘affected with a public interest,’” as resting “upon historical error”).

<sup>201</sup> Robert Post, [Federalism in the Taft Court Era: Can It Be Revived?](#), 51 DUKE L.J. 101 (2002). Taft anticipated the doctrinal framework of upholding the constitutionality of compulsory public employee interest arbitration as a quid pro quo where strikes were barred as a matter of public safety (i.e., police or firefighters), *Wolff I*, 262 U.S. at 541, or as to public utilities “where the obligation to the public of continuous service is direct, clear, and mandatory, and arises as a contractual condition express or implied of entering the business either as owner or worker.” *Wolff I*, 262 U.S. at 543 (citing *Wilson v. New*, 243 U.S. at 364).

These distinctions drew the constitutional line between private and public sector interest arbitration, and the trade-off where the public employees’ obligation of “continuous service” was a condition of employment, and not subject to a strike. *Wolff I* sets out the conditions for the imposition of compulsory public employee “interest” arbitration that every court has followed since. See, e.g., *United Steelworkers of Am. v. Warrior & Gulf Navigation Co.* 363 U.S. 574, 578, n. 4 (1960) (compulsory arbitration is deemed a necessary “quid pro quo” for the agreement not to strike)); *United Steelworkers of Am. v. U.S.*, 361 U.S. 39, 75 (1959) (Douglas, J., dissenting) (citing *Wolff I* as the reason why collective bargaining, not compulsory arbitration, is the norm); *Peick v. Pension Benefit Guar. Corp.*, 724 F.2d 1247, 1277 (7th Cir. 1983) (distinguishing between

Taft, was not whether Wolff Packing is clothed in a public purpose. Rather, the question is whether a public purpose can only be served by compelling continuity of operations by employers, and continuity of labor by its workers.

As the Chief Justice explained:

The power of a legislature to compel continuity in a business can only arise where the obligation of continued service by the owner and its employees is direct and is assumed when the business is entered upon. A common carrier, which accepts a railroad franchise, is not free to withdraw the use of that which it has granted to the public. . . . It may give up its franchise and enterprise, but short of this, it must continue. Not so the owner, when by mere changed conditions his business becomes clothed with a public interest. He may stop at will, whether the business be losing or profitable.

The minutely detailed government supervision, including that of their relations to their employees, to which the railroads of the country have been gradually subjected by Congress through its power over interstate commerce, furnishes no precedent for regulation of the business of the plaintiff in error. . . . It is not too much to say that the ruling in *Wilson v. New* went to the border line, although it concerned

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compulsory arbitration of public and private sector disputes); *United Farm Workers Nat'l. Union v. Babbitt*, 449 F.Supp. 449, 466 (D. Ariz. 1978), *vacated on other grounds*, 442 U.S. 936 (1979).

Non-consensual compulsory arbitration is rarely, if ever, imposed except in public or quasi-public employment situations where strikes are prohibited. This tradeoff is at the core of every case where the public has direct and vital interest in continuity of service, such as public utilities, police, firefighters, and other public employees, and hospitals receiving public funding. *See, e.g., Medford Firefighters Ass'n, Local No. 1431, IAFF v. City of Medford*, 40 Or. App. 519, 524 (1979) (“One of the differences [between collective bargaining in the public and private sectors], binding arbitration, is essentially a quid pro quo for the prohibition of strikes by firemen.”); *Town of Arlington v. Bd. of Conciliation & Arbitration*, 352 N.E.2d 914, 922 (Mass. 1976); *Brotherhood of Locomotive Firemen & Enginemen v. Chicago, B. & Q. R. Co.*, 225 F.Supp. 11, 21 (D.D.C.), *aff'd*, 331 F.2d 1020 (D.C. Cir. 1964) (“[I]t is elementary that railroads, as common carriers for hire, are engaged in a public employment affecting the public interest and, therefore, are subject to legislative control.”); *Fire Fighters Union v. City of Vallejo*, 12 Cal.3d 608, 622–23 (1974) (“[T]he arbitration and no-strike provisions were interdependent.”); *Fairview Hosp. Ass'n v. Pub. Bldg. Serv. & Hosp. & Institutional Emp. Union*, 64 N.W.2d 16, 28 (Minn. 1954) (characterizing hospitals as part of “a field of enterprise in which the public has a direct and vital interest, distinct from almost any other type of business”); *Mount St. Mary's Hosp. of Niagara Falls v. Catherwood*, 260 N.E.2d 508, 518 (N.Y. 1970) (same). Even in situations where public sector interest arbitration is used, the state has made the deliberate choice as to its own employment relationships with its own employees to offer binding interest arbitration as a fair exchange for depriving its employees “of such economic weapons as strikes and work stoppages which are available to employees in private employment.” *City of Biddeford by Bd. of Ed. v. Biddeford Teachers Ass'n*, 304 A.2d 387, 398 (Me. 1973).

an interstate common carrier in the presence of the nation-wide emergency and the possibility of great disaster.<sup>202</sup>

This avoided the analytical difficulties of defining the boundary as to which businesses are clothed in the public interest. But it also put the emphasis on the coercive aspects essential to the operation of the Act. The company's employees were "unable to leave the employ and to resist arbitrary and unfair treatment," because the Act criminalized collective activity, a right which Taft viewed as "essential to give laborers [the] opportunity to deal on equality with their employer."<sup>203</sup> The Act forced Wolff Packing to run its operations, even at a financial loss, and threatened it with government seizure if it refused to comply with the orders of the Industrial Court, or attempted to evade them by suspending its operations. In other words, both Wolff Packing and its workers were, for all practical purposes, compelled into continuous service without any rational basis or legislative justification.<sup>204</sup>

While the conditions imposed on Wolff Packing compelled, rather than threatened to suspend, continuity of operations, the arbitrary and unconstitutional violation of due process was no different. In fact, it was worse, because the orders in *Wolff* affected only one employer and its workers.<sup>205</sup> It could not be equated to the federal government's assumption

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<sup>202</sup> *Wolff I*, 262 U.S. at 543-44.

<sup>203</sup> *Am. Steel Foundries*, 257 U.S. at 209.

<sup>204</sup> Two years later the Court, relying on *Wolff I*, was even more emphatic in making this point. *Michigan Pub. Util. Comm'n v. Duke*, 266 U.S. 570, 577 (1925) (citing *Wolff I*, 262 U.S. at 535). In *Duke*, the Michigan Public Utilities Commission enjoined a transportation company, which delivered automobile bodies from Detroit to Toledo, from using Michigan roads without a permit. The Duke Cartage Company had no other business; it did not hold itself out as a carrier for the public; it did not use its property for any public use. Just as the Industrial Court compelled Wolff Packing to adjust its hours and raise its rates to serve the public's interest in avoiding labor strife, the Michigan Public Utilities Commission required Duke, "if he is to use the highways, to be prepared to furnish adequate service to the public." *Id.*

Because "these requirements have no relation to public safety," the Court held that "it is beyond the power of the State by legislative fiat to convert property used exclusively in the business of a private carrier into a public utility, or to make the owner a public carrier, for that would be taking private property for public use without just compensation." *Duke*, 266 U.S. at 577 (citing *Wolff I*, 262 U.S. at 535). *Duke* was a unanimous decision of the Court.

<sup>205</sup> This "picking and choosing" concerned Justice Brandeis, who was skeptical of regulations that did not appear to confer a benefit on the public generally, but instead upon a favored group or class. *See, e.g., Road Improvement Dist. No. 1 v. Missouri Pac. R.R. Co.*, 274 U.S. 188 (1927). Though later effectively overruled by *R.R. Comm'n of Tex. v. Rowan & Nichola Oil Co.*, 301 U.S. 573 (1940), his decision in *Thompson v. Consolidated Gas Utilities Corp.* summed up the danger of targeted and discriminatory legislation: "one person's property may not be taken for the benefit of another private person without a justifying public purpose." 300 U.S. 55, 80 (1937).

of control over the entire railroad industry during World War I, let alone as to one small packing house in Topeka, Kansas.<sup>206</sup>

In fact, Taft observed, Wolff Packing's business was not essential to the citizens of Kansas. There was no emergency threatened by the prospect of Wolff Packing shuttering its doors or, for that matter, any basis to believe that an emergency could eventuate were that to happen. The state's intrusion into one company's business was not based on a disruption of essential services, an on-going strike, or even the threat of one. It was predicated on the contention that "the danger that a strike in one establishment may spread to all the other similar establishments of the State and country and thence to all the national sources of food supply so as to produce a shortage."<sup>207</sup>

This theory was not tied to a legislative determination, but to the "findings and prophesy" of a "subordinate agency" of the state. The Court was not second-guessing policy judgments of elected representatives,<sup>208</sup> but hypotheticals spun by unelected agency officers sitting as "judges" on the Industrial Court. The CIR's construction of the operation and effect of its mandate was entitled to little judicial deference, particularly since the Kansas Supreme Court gave it no deference.<sup>209</sup> To the contrary, that court found that the cessation of Wolff Packing's business "would not greatly inconvenience the people of Kansas," let alone trigger a nation-wide general strike.<sup>210</sup>

This conclusion mirrors Commissioner Noble's observation that wage increases without any basis under the Act constitute a taking of the company's property. "There is

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<sup>206</sup> Compare *Wolff and Duke to Continental Baking v. Woodring*, 286 U.S. 352 (1932). Writing for a unanimous court, Chief Justice Hughes drew a distinction between a statute which converted one private business into a common carrier, as opposed to a regulation that merely imposes a tariff on all vehicles for the privilege of driving on a Kansas highway. The fee charged was used to maintain the highways. The Kansas law in *Woodring* "did not attempt to compel private carriers to become public carriers," or compel them to devote their property to public use. *Woodring*, 286 U.S. at 364.

<sup>207</sup> *Wolff I*, 262 U.S. at 542.

<sup>208</sup> Chief Justice Taft was not persuaded by the theory that a strike at a small packing plant in Topeka would spread unrest throughout the nation based on the say-so of the Industrial Court. He had heard similar parade of horrible arguments before, and they did not persuade him to second-guess legislative policy determinations, just as they did not disenable him from expressing skepticism in *Wolff I* as to the Industrial Court's "prophesy." See *Nat'l Union Fire Ins. Co. v. Wanberg*, 260 U.S. 71, 76 (1922) ("The statute here in question has been in force since 1913, and it does not seem to have driven companies out of the hail insurance business, an indication that they are able profitably and safely to adjust themselves and their methods to its requirements. Whether it is wise legislation is not for us to consider. All we have to decide, and that we do decide, is that it is not so arbitrary or unreasonable as to deprive those whom it affects of their property or liberty without due process of law.").

<sup>209</sup> *Wolff I*, 262 U.S. at 542-543.

<sup>210</sup> *Id.* at 541.

nothing in the act justifying the taking of the property of the employer in one of the designated industries for the purpose of enabling the workmen [to] receive a fairer wage, any more than the taking of fair wages from the workmen to enable the employer to earn a fairer return on his invested capital.”<sup>211</sup>

In sum, Taft found nothing in the record that could justify the existence of any emergency, let alone any constitutional basis to support Industrial Court’s “drastic and all-inclusive” deprivation of one employer’s freedom of contract or denying “workers of a most important element of their freedom of labor.”<sup>212</sup>

Having reframed the constitutional defect as joint compulsion without legislative finding or factual justification, Taft concludes his opinion where it began – by linking the employees’ liberty of contract to the protection of their associational rights. The Kansas scheme, he believed, constituted “a more drastic exercise of control . . . upon the employee than upon the employer. . . Without this joint compulsion, the whole theory and purpose of the act would fail.”<sup>213</sup>

#### **F. The Second U.S. Supreme Court *Wolff* Decision.**

After remand, the Kansas Supreme Court, believing that the U.S. Supreme Court’s decision went no further than to strike down the fixing of wages, took up that aspect of the order setting maximum hours. In two separate opinions, the Kansas Supreme Court held that the Industrial Court orders setting maximum hours were constitutional, in that the United States Supreme Court’s prior decision had only talked about wages.<sup>214</sup>

The United States Supreme Court again reversed.<sup>215</sup> Speaking for a unanimous Court, Justice Van Devanter wrote that the Industrial Court’s order required both employers and employees “to continue the business on the terms fixed in the order; violations and evasions being penalized.” The authority given to the agency to fix wages or hours of labor is not general, nor is it to be exerted independently of the system of compulsory settlement. On the contrary, it is but a feature of that system, and correspondingly limited in purpose and field of application.”<sup>216</sup>

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<sup>211</sup> Supreme Court Transcript of Record at 131.

<sup>212</sup> *Wolff I*, 262 U.S at 542.

<sup>213</sup> *Id.* at 541.

<sup>214</sup> *Wolff Packing Co. v. Court of Industrial Relations*, 114 Kan. 304, 219 Pac. 259 (1923) and 114 Kan. 487, 227 Pac. 249 (1923).

<sup>215</sup> *Wolff II*, 267 U.S. 552 (1925).

<sup>216</sup> *Id.* at 564.

Justice Van Devanter responded to the Kansas Supreme Court's view that the *Wolff I*'s characterization of the Act as establishing a system of "compulsory arbitration" was a misnomer.<sup>217</sup> Van Devanter was not inclined to engage in verbal fencing:

We recognize that in its usual acceptance, the term indicates a proceeding based entirely on the consent of the parties. And we recognize also that this Act dispenses with their consent. Under it, they have no voice in selecting the determining agency, or in defining what that agency is to investigate and determine. And yet the determination is to bind them, even to the point of preventing them from agreeing on any change in the terms fixed therein unless the agency approves. To speak of a proceeding with such attributes merely as an arbitration might be subject to criticism, but we think its nature is fairly reflected when it is spoken of as a compulsory arbitration.<sup>218</sup>

Van Devanter made short work of the Kansas court's attempt to distinguish between the regulation of wages and hours. In so doing, he made particular reference to why the Act was not general legislation intended to fix hours as to all packing houses, but only as to Wolff Packing:

The authority which the Act gives respecting the fixing of hours of labor is merely a feature of the system of compulsory arbitration, and has no separate purpose. It was exerted by the state agency as a part of that system, and the state court sustained its exertion as such. As a part of the system, it shares the invalidity of the whole. Whether it would be valid had it been conferred independently of the system and made either general or applicable to all businesses of a particular class we need not consider, for that was not done.<sup>219</sup>

Not waiting for the final answers from the United States Supreme Court, the Kansas court, in late 1923, decided *State v. Personett*.<sup>220</sup> There the court held that Section 17 of the Act, which prohibited picketing, was constitutional at least when the picketing was aimed at

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<sup>217</sup> *State v. Howat*, 116 Kan. 312, 415 (1923) ("Justice was to be done between employer and employee, but the protection of the public interest is not a subject of arbitration.").

<sup>218</sup> *Wolff II*, 267 U.S. at 566.

<sup>219</sup> *Id.* at 569. Justice Butler's notes in his Docket Book provide revealing insights into the Court's reaction to the second decision of the Kansas Supreme Court. "Taft lamented that 'our mandate' in the earlier decision was 'not obeyed.' 'The whole jud[gment] should go,' he argued. 'Also,' he added, 'that fixing of hours is bad *here*.' Butler records Holmes and Van Devanter as following with 'Yes,' while McReynolds agreed that the 'order is bad as to hours.'" Cushman, *supra* note 15, at 361.

<sup>220</sup> 114 Kan. 680, 220 Pac. 520 (1923).

a common carrier. This case was not appealed. In July of 1924, the Kansas court took up the question on remand from the United States Supreme Court in *Dorchy*, and held that section 19 of the Act, under which the *Dorchy* injunction issued, was separable and constitutional.<sup>221</sup>

In its second *Dorchy* decision,<sup>222</sup> the United States Supreme Court held that it was proper for the state to find the strike unlawful and issue an injunction when the union was attempting to enforce a stale claim. But the Court (per Justice Brandeis) also recognized that, while there was no absolute right to strike, that right nonetheless was entitled to qualified protection under the Constitution and the common law.<sup>223</sup>

### III. *Wolff* and the NLRA.

On April 14, 1923, two weeks before oral argument in *Wolff I*, Justice Holmes wrote to Harold Laski that his *Adkins* dissent “was intended *inter alia* to dethrone Liberty of Contract from its ascendancy in the Liberty business.”<sup>224</sup> Holmes viewed it as a challenge to “the liberty of contract crowd to pay the same attention to liberty of free speech.”<sup>225</sup> Notwithstanding his skepticism as to the use of judicial power to strike down economic and social legislation, Holmes believed that the Due Process Clause protected fair criminal trials and free speech.<sup>226</sup>

Whether the Court’s decision in *Wolff I* was a way of “paying attention” to Holmes’ plea, it is clear that the Chief Justice felt that the *Adkins* majority “went too far.”<sup>227</sup> Privately, Taft told Holmes that his *Adkins* dissent was “very strong,” though he intended to write his own dissent to respond to Sutherland’s “resuscitation of the *Lochner* case.”<sup>228</sup> In a May 3, 1923 letter to his recently retired colleague, Justice John H. Clarke, Taft commented that “there are expressions in Sutherland’s [*Adkins*] opinion that will merely return to plague us.”<sup>229</sup> Taft was worried about a rising tide of criticism against the Court, for good reason.

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<sup>221</sup> *State v. Howat*, 116 Kan. 412, 227 Pac. 752 (1924).

<sup>222</sup> 272 U.S. 306 (1926).

<sup>223</sup> Hopson, Jr., [Kansas Labor Law and District Court Injunctions](#).

<sup>224</sup> 1 HOLMES-LASKI LETTERS: THE CORRESPONDENCE OF MR. JUSTICE HOLMES AND HAROLD J. LASKI, 1916–1935, at 495 (Mark DeWolfe Howe ed., 1953), at 495.

<sup>225</sup> *Id.* See also Snyder, *supra* note 33, at 351 and n. 70.

<sup>226</sup> Snyder, *supra* note 33, at 352.

<sup>227</sup> Letter from William Howard Taft to John Hessin Clarke (May 3, 1923), cited in Post, *supra* note 201, at 176 n. 297.

<sup>228</sup> Letter from William Howard Taft to Oliver Wendell Holmes (Apr. 4, 1923), Holmes Papers, cited in Post, *supra* note 201, at 176 n. 297.

<sup>229</sup> *Id.*

By then, *Adkins* had “mobilized opponents of judicial review, some of whom would authorize Congress to reenact federal statutes invalidated by the Court, and some of whom would prohibit the Court from striking down congressional legislation without the concurrence of at least seven Justices.”<sup>230</sup>

The *Wolff I* decision was delivered on June 11, 1923. It did little to quell the growing public hostility over the Court’s perceived usurpation of legislative power. Yet *Wolff I* did acknowledge that free speech and liberty of contract rights were inextricably bound up in the relationship of employer and worker, and that the Kansas Act’s joint compulsion scheme could not function unless both liberties were abridged. Taft’s opinions in *Wolff* and *American Foundries* served as part of the doctrinal underpinnings for national legislative reforms targeting yellow dog contracts and other contractual bans on collective action.

The Norris-LaGuardia Act of 1932, for example, acknowledged the inability of a “single laborer, standing alone, confronted with such far-reaching, overwhelming concentration of employer power” to “negotiate or to exert any influence over the fixing of his wages or the hours and conditions of his labor.” The necessary corrective was to recognize “[t]he right of wage earners to organize and to act jointly in questions affecting wages [and the] conditions of labor,” and, as the solution, “specific legislative action” to preserve workers’ “freedom in association to influence the fixing of wages and working conditions.”<sup>231</sup> The legislative history of the NLRA explicitly acknowledged Chief Justice Taft’s admonition that because a “single employee was helpless in dealing with an employer,” collective action “was essential to give laborers [the] opportunity to deal on equality with their employer.”<sup>232</sup> And in its 1937 decision in *Jones & Laughlin*, the Supreme Court, citing Taft’s opinion in *American Foundries*, recognized labor’s “fundamental right” “to deal on an equality with their employer.”<sup>233</sup>

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<sup>230</sup> *Id.*

<sup>231</sup> Sen. Rep. No. 163, 72d Cong., 1st Sess., 9 (Feb. 4, 1932); *See generally Id.*, at 9–14.

<sup>232</sup> *Amer. Foundries*, 257 U.S. at 209 (quoted in H.R. Rep. No. 1147, 74th Cong., 1st Sess., at 10 (1935) and H.R. Rep. No. 669, 72d Cong., 1st Sess., at 7 (1935)).

<sup>233</sup> *Labor Board v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 33 (1937) (citing *American Foundries*). Professor James Gray Pope (cited with approval in *Gerawan Farming*, 3 Cal.5<sup>th</sup> at 1139) notes the linkage between *Jones & Laughlin* and *Wolff I*:

*Wolff Packing*’s treatment of the right to strike has never, however, been disapproved. It did not partake of the philosophy of *Adair* and *Coppage*, which invalidated legislative protections for union organizing partly on the ground that inequalities between employees and employers were not only “natural,” but “legitimate.” To the contrary, *Wolff Packing*’s concern with equality resonated with New Deal decisions like *NLRB v. Jones & Laughlin Steel Corporation*, which upheld protections for union organizing partly on the ground that

*Wolff* played an uncredited supporting role in defending the constitutionality of the NLRA. Before the Court, Jones & Laughlin Steel Company relied on lower court decisions which struck down the Act based on the conclusion that if the statutory obligation to bargain means more than merely “to talk,” then “good faith bargaining” is functionally indistinguishable from “compulsory unilateral arbitration.”<sup>234</sup> Contemporary commentators were quick to see the “clear distinction between compelling a party to arbitrate a difficulty and compelling him to entertain, and perhaps even to meet with reasonable counter-proposals, the proposals of another party looking toward a possible arbitration agreement. ‘To bargain’ does not mean ‘to reach an agreement.’”<sup>235</sup> Chief Justice Hughes saw this distinction as the constitutional dividing line between the compulsory arbitration scheme struck down in *Wolff* and the requirement of good faith negotiations upheld in *Jones & Laughlin*.

Addressing “Questions under the due process clause and other constitutional restrictions,”<sup>236</sup> the Court wrote: “The Act does not compel agreements between employers and employees. It does not compel any agreement whatever.”<sup>237</sup> The Court clearly rejected

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the right to organize was “a fundamental right” and that “union was essential to give laborers opportunity to deal on an equality with their employer.”

James Gray Pope, *The Right to Strike Under the United States Constitution: Theory, Practice, and Possible Implications for Canada*, University of Toronto Faculty of Law, Strike Symposium (Dec. 9, 2009), available at: <https://www.law.utoronto.ca/scholarship-publications/conferences/archives/strike-symposium/strike-symposium-program>.

While Professor Pope argues that the Supreme Court later “disapproved *Wolff Packing*’s holding concerning wage-fixing and renounced ‘the due process philosophy enunciated in the *Adair-Coppage* line of cases,” *id.* at n. 45 (quoting *Lincoln Federal Labor Union v. Northwestern Iron & Metal Co.*, 335 U.S. 525, 536 n.6 (1949)), he also recognizes that the “entire statutory scheme [of the Kansas Act] hinged on the ‘joint compulsion’ of both employer and employee to obey the industrial court.” *Id.* at n. 35. That “joint compulsion” was at the heart of the due process problem in *Wolff I*, which (unlike *Lincoln*), involved wage and hour regulations and strike injunctions affecting only one employer and its workers. This aspect of *Wolff* sets it apart from other “substantive due process” cases of the pre-New Deal Court.

<sup>234</sup> *Bendix Products Corp. v. Beman*, 14 F.Supp. 58 (D. Ill. 1936) (“If A is compelled to negotiate with B and must contract, but B is not only free from compulsion but is expressly informed that he is at liberty to reject any proposal of A, that which A does in pursuance of the compulsion cannot properly be called bargaining. A has lost his freedom of contract.”).

<sup>235</sup> Note, [Constitutionality of the National Labor Relations Act](#), 4 U. CHI. L. REV. 109 (1936).

<sup>236</sup> *Jones & Laughlin*, 301 U.S. at 43.

<sup>237</sup> *Id.* at 45. Internal memorandum from the files of the NLRB suggest that the Board’s attorneys believed that “the danger of an unfavorable ruling on this [due process] issue [was] not great.” James A. Gross, *Economics Politics and the Law the NLRB’s Division of Economic Research 1935-1940*, 55 CORNELL L. REV. 321 327 (1970). Neither, apparently, did Hughes, who devoted the bulk of his decision to the Commerce Clause challenge.

its earlier decisions permitting employers to refuse to bargain with a union.<sup>238</sup> *Jones & Laughlin* does not abandon the concept of “freedom of contract” as a liberty and property right; it embraces it to explain why consensual bargaining, unlike compulsory contracting, does not violate that right. That point was repeated in *Virginian Ry. Co. v. Sys. Fed’n No. 40*,<sup>239</sup> decided on the same day as *Jones & Laughlin*. *Virginian* considered the “Validity of section 2 of the Railway Labor Act under the Fifth Amendment.”<sup>240</sup> That section provided for voluntary arbitration as to what were deemed “minor disputes.” The Court noted: “The provisions of the Railway Labor Act applied in this case, as construed by the court below, and as we construe them, do not require petitioner to enter into any agreement with its employees, and they do not prohibit its entering into such contract of employment as it chooses, with its individual employees.”<sup>241</sup> It did not, as the Court held in *Jones & Laughlin*, “interfere with the normal exercise of the right of the employer to select its employees or to discharge them.”<sup>242</sup>

*Jones & Laughlin*’s references to “the sacredness and solemnity” of a voluntary agreement<sup>243</sup> is a sure clue that the absence of compelled concessions was an essential piece of the new constitutional bargain under the NLRA.<sup>244</sup> That conclusion is confirmed by *H.K. Porter v. NLRB*,<sup>245</sup> where the Court held that the right to resist concessions meant that the employer did not have to accept a dues check-off provision which it resisted the clause “solely on the ground that the company was ‘not going to aid and comfort the union.’”<sup>246</sup>

The basic constitutional logic behind the NLRA allows the parties to decide voluntarily to entrust their disputes to compulsory arbitration.<sup>247</sup> Over the 80 years since the

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<sup>238</sup> *Adair v. U.S.*, 208 U.S. 161 (1908) (dealing with federal legislation), and in *Coppage v. Kansas*, 236 U.S. 1 (1915) (state legislation).

<sup>239</sup> 300 U.S. 515 (1937).

<sup>240</sup> *Virginian Ry. Co. v. Sys. Fed’n No. 40*, 300 U.S. 515, 557 (1937).

<sup>241</sup> *Id.* at 557.

<sup>242</sup> *Jones & Laughlin*, 301 U.S. at 45.

<sup>243</sup> Remarks of Senator Walsh, 79 Cong. Rec. 7659; *See also* 79 Cong. Rec. 9682, 9711.

<sup>244</sup> The legislative history that shows emphatic rejection of compulsory arbitration: “The committee wishes to dispel any possible false impression that this bill is designed to compel the making of agreements or to permit governmental supervision of their terms. It must be stressed that the duty to bargain collectively does not carry with it the duty to reach an agreement, because the essence of collective bargaining is that either party shall be free to decide whether proposals made to it are satisfactory.” S. Rep. No. 573, 74th Cong., 1st Sess., 12 (1935).

<sup>245</sup> 397 U.S. 99 (1970).

<sup>246</sup> *H.K. Porter*, 397 U.S. at 101.

<sup>247</sup> The Court has never questioned, let alone overruled, the *Wolff* trilogy, as even modern advocates of compulsory interest arbitration acknowledge. *See Nebbia*, 291 U.S. at 537 n.39 (distinguishing *Wolff*);

adoption of the NLRA, no private employer or union has shown any willingness to resort to divest themselves of the right to control the terms of their own agreements. To the contrary, modern-day labor leaders, including Cesar Chavez and Jimmy Hoffa, rejected government control over the substance of labor-management arrangements, because they viewed government intervention as a threat to organized labor's most potent economic weapons: the right to picket and to strike.<sup>248</sup>

#### IV. The Myth of *Wolff's* Demise.

"Myths and legends" as Hunter S. Thompson wrote, "die hard in America."<sup>249</sup> No where is this more on display than in the characterization of *Wolff* as a casualty of the "constitutional revolution of 1937" precipitated by Roosevelt's court-packing plan. The traditional narrative posits that Roosevelt's scheme led to Justice Owen Roberts' "switch in time" in *West Coast Hotel Co. v. Parrish*, which upheld a Washington state minimum wage law and overturned *Adkins*. Roberts' decisive vote led court watchers to conclude that political pressure, rather than fidelity to constitutional principle or precedent, explained Roberts' reversal of his prior willingness to invalidate similar state legislation, as was the case in *Tipaldo*,<sup>250</sup> which relied on *Adkins* to strike down a New York minimum wage statute the prior term. Frankfurter called Roberts' "somersault" a "very, very sad business."<sup>251</sup> Justice Cardozo, though "elated by Roberts' switch, told his clerk that he "considered it quite an achievement to make the shift without even a mention of the burial of [*Tipaldo*]."<sup>252</sup>

These contemporaneous accounts, as G. Edward White explains, became the "orthodoxy in twentieth-century constitutional history."<sup>253</sup> *West Coast Hotel* was seen as a

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*Lincoln Fed. Labor Union v. Nw. Iron & Metal Co.*, 335 U.S. 525, 536 & n.6 (1949) (same); *United Steelworkers of Am. v. United States*, 361 U.S. 39, 75 (1959) (Douglas, J., dissenting) (citing *Wolff* as the reason why collective bargaining, not compulsory arbitration, is the norm). See also William B. Gould IV, *Some Reflections on Contemporary Issues in California Farm Labor*, 50 U.C. DAVIS L. REV. 1243, 1251 n.31 (2017) (former ALRB Chairman recognizing that MMC statute's constitutionality depends on *Wolff* trilogy); Jean R. Sternlight, *Rethinking the Constitutionality of the Supreme Court's Preference for Binding Arbitration*, 72 TUL. L. REV. 1, 83 (1997) ("[T]he Court has never expressly overruled *Wolff*").

<sup>248</sup> James R. Hoffa, *MESSAGES TO THE MEMBERSHIP* (Peake Delancey Pub. 2009), see note 340 *infra*.

<sup>249</sup> Hunter S. Thompson, *THE GREAT SHARK HUNT: STRANGE TALES FROM A STRANGE TIME* (Simon & Schuster 2003).

<sup>250</sup> *Morehead v. New York ex rel. Tipaldo*, 298 U.S. 587 (1936).

<sup>251</sup> Barry Cushman, *Lost Fidelities*, WILLIAM AND MARY L. REV. 45, 96 and n. 3 (1999).

<sup>252</sup> See Joseph L. Rauh, Jr., *An Unabashed Liberal Looks at a Half-Century of the Supreme Court*, 69 N.C. L. REV. 213, 217-18 (1990).

<sup>253</sup> G. Edward White, [West Coast Hotel's Place in American Constitutional History](#), 122 YALE L.J.F. 69, 84 (2012).

“seismic shift in judicial philosophy toward acceptance of the validity of social and economic legislation” which “defus[ed] Franklin D. Roosevelt’s court-packing proposal.”<sup>254</sup> That narrative began to fall apart twenty years ago, when scholars took a closer look at the Court’s decisions and internal Court papers.<sup>255</sup> This scholarship has gone unnoticed (or ignored) by some commentators and courts, who continue to view *Wolff* as nothing more than a *Lochner*-era relic.<sup>256</sup>

In *Gerawan Farming*, for example, the California Supreme Court dismisses *Wolff* as a “restrictive view of the police power [that] was completely repudiated” by *West Coast Hotel*.<sup>257</sup> *Gerawan Farming*, in turn, cites *Hess*, which upheld the MMC statute based on its conclusion that “[t]he trouble with [the *Wolff* decision] as precedent is that they were rendered during the bygone era of substantive due process.”<sup>258</sup> Both *Gerawan Farming* and *Hess* rely principally on *Birkenfeld*, a 1976 California Supreme Court decision which rejected a due process challenge to a Berkeley Charter amendment imposing residential rent controls. *Birkenfeld* held that such price-fixing legislation is a valid exercise of police

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<sup>254</sup> 4 ENCYCLOPEDIA OF THE AMERICAN CONSTITUTION 2045 (1986).

<sup>255</sup> Justice Roberts joined the four *Nebbia* dissenters in *Tipaldo*. “Had Roberts really intended to abandon the public-private dichotomy, or more precisely, had he understood his decision in that case as having that practical effect, perhaps he may have overcome his procedural concerns about overruling *Adkins* in the absence of a formal request to do so by counsel and become the fifth and pivotal vote for sustaining the New York law as a reasonable police powers measure to promote a paramount public interest. The substantive dissonance between Roberts’s positions in these cases suggests his reticence about disregarding completely the classical affectation doctrine.” Samuel Olken, *The Decline of Legal Classicism and the Evolution of New Deal Constitutionalism*, 89 NOTRE DAME L. REV. 2051, 2080 (2014).

<sup>256</sup> *Gerawan Farming*, 3 Cal. 5th at 1139 (quoting *Birkenfeld v. City of Berkeley*, 17 Cal.3d 129, 155 (1976)). See also *Hess Collection Winery v. California Agr. Labor Relations Bd.*, 140 Cal. App. 4th 1584, 1599 (2006) (discussing *Wolff*); William. B. Gould IV, [The Employee Free Choice Act of 2009, Labor Law Reform, and What Can Be Done About the Broken System of Labor-Management Relations Law in the United States](#), 43 U.S.F. L. REV. 291, 325, n. 124 (2008) (arguing that *Wolff* “has been repudiated since the 1930s”) (citing *Nebbia v. New York*, 291 U.S. 502 (1934)).

It is questionable whether *Nebbia* represents a clear doctrinal break from the Court’s decisions, let alone a “repudiation” of the *Wolff*. According to his biographer, Chief Justice Hughes did not believe that *Nebbia* announced a change in judicial philosophy. See Merlo J. Pusey, 2 CHARLES EVANS HUGHES 700 (1951). Neither did Judge Learned Hand. See Learned Hand, THE BILL OF RIGHTS 43 (1958) (“The decision of a bare majority in 1934 that a state may fix the price of milk was taken by some people as a *coup de grace* of the old doctrine, though it really should not have been so taken.”).

<sup>257</sup> *Gerawan Farming*, 3 Cal. 5th at 1139.

<sup>258</sup> *Hess Collection Winery*, 140 Cal. App. 4th at 1599.

power, whether or not a “so-called emergency” exists,<sup>259</sup> and regardless as to whether the regulated enterprise is “affected with a public interest.”<sup>260</sup>

*Birkenfeld*'s rent rollbacks and the compulsory arbitration scheme in *Wolff* have little in common. Notwithstanding its dictum that *Wolff* was “completely repudiated” by *West Coast Hotel*, *Birkenfeld* did not rely on *West Coast Hotel* as the basis for its holding. Rather, it held that price-fixing, upheld against constitutional challenge before and after *Nebbia*, substantially limited the “public affectation” doctrine as a basis for invalidating legislation. In *Nebbia*, the whole purpose of the scheme is to create super competitive profits for the industry by undoing the consequences of what was called “ruinous competition.” The exact opposite is at work in *Wolff*, where the risk of confiscation, without any meaningful ability to exit or to obtain *ex ante* some regulated adjustment to assure a reasonable return, was not possible. *Wolff*, of course, did not involve fixing prices.

*Hess*, unlike *Gerawan Farming*, acknowledged the joint compulsion at work in the Kansas Act. Neither decision took note of the risk of confiscation in both the Kansas Act and the MMC statute, or under the Berkeley Charter amendment.<sup>261</sup> But that identical risk of confiscation was present in *Birkenfeld*; the court held that the procedures created an intolerable risk of a taking without just compensation, precisely because it rendered all but illusory the landlords' ability to obtain any variances from the rent rollbacks, whether or not they would require the owner to operate at a loss.<sup>262</sup>

*Wolff*, unlike *Birkenfeld*, did not involve general legislation which fixes prices as to all businesses or industries in a particular sector of the economy. Unlike the general legislation at issue in *West Coast Hotel* and *Birkenfeld*, the Kansas Act and the MMC statute

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<sup>259</sup> *Birkenfeld*, 17 Cal. 3d at 129 (citing *Adkins v. Children's Hospital*, 261 U.S. 525 (1923)).

<sup>260</sup> *Id.* (citing *Nebbia v. New York*, 291 U.S. 502 (1934)).

<sup>261</sup> *Hess Collection Winery*, 140 Cal. App. 4th at 1584, 1600, n. 5 (“The act not only allowed the court of industrial relations to set wages and other terms of employment, it prohibited businesses from ceasing operations and, although individual employees could quit, it forbade employees from engaging in joint attempts to secure different wages or terms.”).

<sup>262</sup> Justice Brandeis would have had concerns as to the confiscation of private property under the guise of serving the public interest, or without any basis to justify such a taking, at least not without some safeguard against confiscation. In the sphere of rate regulation of common carriers or public utilities, Brandeis often (though not invariably) joined (or authored) opinions striking down rate setting schemes that deprived companies property without due process by not affording a company a reasonable rate of return on its investment. See, e.g., *N. Pac. Ry. v. Dep't of Pub. Works*, 268 U.S. 39 (1925) and *Groesbeck v. Duluth, S. S. & A. Ry. Co.*, 250 U.S. 607 (1919). Post-*Nebbia*, Brandeis maintained that a rate regulation order of the Secretary of Agriculture issued under the Packers and Stockyards Act of 1921 “may, of course, be set aside for violation of the due process clause by prescribing rates which, on the facts found, are confiscatory.” *St. Joseph Stock Yards Co. v. U. S.*, 298 U.S. 38, 74-75 (1936) (Brandeis, J., concurring).

legislates as to only one employer, one at a time.<sup>263</sup> *Wolff* imposed “drastic” burdens on only one company and its employees, and no others, which would deprive them “of a most important element of their freedom of labor.”<sup>264</sup> That burden is intentional, because the statute granted the respective agencies no power to extend the enactment of wages and hours to other employers within the affected class. Yet, without this joint (and targeted) compulsion, “the whole theory and purpose of the act would fail.”<sup>265</sup>

The reasons justifying the maximum hours legislation in *West Coast Hotel* mirrored the reasons cited by Taft in striking down the Kansas Act: to prevent “[t]he exploitation of a class of workers who are in an unequal position with respect to bargaining power.”<sup>266</sup> And, in fact, *West Coast Hotel* relied on the Holmes and Taft dissents in *Adkins*, and quoted them extensively.

But most curious is the *Hess* Court’s attempt to equate the legislative purpose of the NLRA and the MMC statute.<sup>267</sup> To be sure, the sponsors of the Wagner Act felt that collective bargaining itself was a means to allow workers to deal in a position of equality with their employers, provided that workers could engage in collective action, and that employers would recognize their exclusive bargaining representative and engage in good faith negotiations. As noted, the NLRA did not “equalize” the bargaining relationship by requiring concessions or forced contracts. *Jones & Laughlin* did not believe that “actual

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<sup>263</sup> *Hess Collection Winery*, 140 Cal. App. 4th at 1611 (Nicholson, J., dissenting).

<sup>264</sup> *Wolff I*, 262 U.S. at 542.

<sup>265</sup> *Wolff II* was more explicit in explaining why the CIR orders constituted special legislation: “The authority which the Act gives respecting the fixing of hours of labor is merely a feature of the system of compulsory arbitration, and has no separate purpose. . . . Whether it would be valid had it been conferred independently of the system and made either general or applicable to all businesses of a particular class we need not consider, for that was not done.” *Wolff II*, 267 U.S. at 569.

<sup>266</sup> *West Coast Hotel*, 300 U.S. at 399.

<sup>267</sup> *Hess Collection Winery*, 140 Cal. App. 4th at 1600 (“Congress was concerned that employees do not have the ‘actual liberty of contract’ and thus enacted the [NLRA] to, among other things, equalize the bargaining power of employees with that of employers through the collective bargaining process. (29 U.S.C. § 151.) For similar reasons our Legislature enacted the ALRA to apply to agricultural workers.”). Professor James Gray Pope notes that *Wolff I*:

did not partake of the philosophy of *Adair* and *Coppage*, which invalidated legislative protections for union organizing partly on the ground that inequalities between employees and employers were not only “natural,” but “legitimate.” To the contrary, *Wolff Packing*’s concern with equality resonated with New Deal decisions like *NLRB v. Jones & Laughlin Steel Corporation*, which upheld protections for union organizing partly on the ground that the right to organize was “a fundamental right” and that “union was essential to give laborers opportunity to deal on an equality with their employer.”

liberty of contract” required that an employer or its workers be divested of their liberty in negotiating contracts, including up to their refusal to be compelled into an agreement, or the worker’s right to strike.

Nor did post-New Deal cases repudiate the Court’s reluctance to validate government seizure of businesses in times of national emergency. The Taft-Hartley Act of 1947, for example, authorized negotiation, conciliation, and impartial inquiry, as well as a 60-day cooling-off period under injunction, followed by a secret ballot based on a final offer of settlement.<sup>268</sup> As Justice Burton explained in the *Steel Seizure Case*, “the most significant feature of that Act is its omission of authority to seize an affected industry. The debate preceding its passage demonstrated the significance of that omission. Collective bargaining, rather than governmental seizure, was to be relied upon. Seizure was not to be resorted to without specific congressional authority.”<sup>269</sup> Such language echoes Chief Justice Taft’s concerns that “findings and prophecy,” rather than a true emergency, would be the touchstone for depriving workers of “a most important element of their freedom of labor.”<sup>270</sup>

This was not only a matter of constitutional separation of powers or express congressional authorization based on specific findings as to a national emergency; there was also the “narcotic” effect of compulsory arbitration as an alternative to collective bargaining, and the extent to which it would undermine the core statutory and constitutional premise of federal labor law.<sup>271</sup> Justice Burton provided this illuminating quote from the legislative history of the Taft-Hartley Act:

The Chairman of the Senate Committee sponsoring the bill said in the Senate:

“We did not feel that we should put into the law, as a part of the collective-bargaining machinery, an ultimate resort to compulsory arbitration, or to seizure, or to any other action. We feel that it would interfere with the whole process of collective bargaining. *If such a remedy is available as a*

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<sup>268</sup> 61 Stat. 155-156, 29 U.S.C. (Supp. IV) §§ 176-180.

<sup>269</sup> *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 657 (1952) (Burton, J., concurring). *See also id.* at 679 (Vinson, C.J., Reed and Minton, J.J., dissenting) (“One is not here called upon even to consider the possibility of executive seizure of a farm, a corner grocery store or even a single industrial plant. Such considerations arise only when one ignores the central fact of this case — that the Nation’s entire basic steel production would have shut down completely if there had been no Government seizure.”).

<sup>270</sup> *Wolff I*, 262 U.S. at 542.

<sup>271</sup> Ellen Dannin & Gangaram Singh, *Creating a Law Reform Laboratory: Empirical Research and Labor Law Reform*, 51 WAYNE L. REV. 1, 44 (2005) (citing Harry Katz & Thomas Kochan, AN INTRODUCTION TO COLLECTIVE BARGAINING & INDUSTRIAL RELATIONS 346 (1992)) (arbitration has a “narcotic effect” on bargaining because it “creates dependency in the parties participating in it and weans them away from real collective bargaining.”).

*routine remedy, there will always be pressure to resort to it by whichever party thinks it will receive better treatment through such a process than it would receive in collective bargaining, and it will back out of collective bargaining. It will not make a bona-fide attempt to settle if it thinks it will receive a better deal under the final arbitration which may be provided.”*<sup>272</sup>

## **V. California Compulsory Contracting: “Mandatory Mediation and Conciliation.”**

In 1975, California enacted the ALRA, the purpose of which was to fill a “gap” under the NLRA, which exempts from its coverage “any individual employed as an agricultural laborer.”<sup>273</sup> The UFW was at its height of influence in 1975. Under the leadership of Cesar Chavez, the union engaged in high-profile boycotts, strikes, sit-ins, and protests. Though Chavez described himself as a student of Gandhi, the union’s activities were not always so pacific.<sup>274</sup> Nonetheless, the charismatic Chavez galvanized the nation, and brought attention to working conditions in California’s agricultural fields. At the time of the ALRA’s passage, it claimed over 50,000 dues paying members.

The ALRA was not Chavez’s brainchild. The driving force was Governor Jerry Brown, and his Secretary of Agriculture, Rose Bird, who later became the first woman to serve as Chief Justice of the California Supreme Court. Chavez was skeptical of the law. He believed that his most effective organizing tools were strikes and, in particular, boycotts. Both were used by the UFW, often with great effect, before and after the enactment of the ALRA, because they threatened growers with the destruction of perishable crops or the destruction of their reputations.<sup>275</sup>

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<sup>272</sup> *Youngstown Sheet & Tube*, 343 U.S. at 658, n.4 (Burton, J., concurring) (citing 93 Cong. Rec. 3835-3836) (emphasis added).

<sup>273</sup> 29 U.S.C. §152(3).

<sup>274</sup> See generally Miriam Pawel, *THE CRUSADES OF CESAR CHAVEZ* (Bloomsbury Press 2014).

<sup>275</sup> Governor Jerry Brown recounted his conversation with Mr. Chavez in which they discussed the merits of what became the ALRA:

Chavez pulled up to my Laurel Canyon house in an old car with a German shepherd dog named Huelga—Spanish for “strike.” We talked for several hours about whether the proposed state law or any labor law could actually help farmworkers. Chavez repeatedly said that his boycott was a much better organizing tool because the law would always be captured by the powerful economic interest that control politics. I argued with him and said that a law would be his best protection. He finally agreed, but remained skeptical.

McGregor, *REMEMBERING CESAR CHAVEZ* (2000) at 48.

In its first five years, the ALRB presided over hundreds of representation proceedings and an equal number of unfair labor practice adjudications. Twenty-five years after its passage, according to the California Supreme Court, “it became clear that the ALRA had not resulted in the widespread adoption of collective bargaining agreements between agricultural employers and employees.”<sup>276</sup> Proponents of the MMC viewed the problem largely in terms of employer recalcitrance.<sup>277</sup> Others believed that the reasons had more to do with the fact that the UFW largely abandoned organizing labor. That history figures into the Gerawan Farming dispute.

#### **A. The MCC Statute.**

The MMC statute applies when the employer and the union have failed to reach agreement over an initial collective bargaining agreement.<sup>278</sup> The process is initiated when a party (invariably, a union) files “a declaration that the parties have failed to reach a collective bargaining agreement and a request that the [ALRB] issue an order directing the parties to mandatory mediation and conciliation of their issues.”<sup>279</sup> Significantly, the prerequisite unfair labor practice need not relate to the breakdown in negotiations, or to collective bargaining at all. It may relate to events preceding the certification of the union. The MMC statute does not require that the union engage in any bargaining between its initial request and its invocation of MMC; the clock runs even if the union does nothing.<sup>280</sup>

If the ALRB concludes these conditions are satisfied, it “shall immediately issue an order directing the parties to mandatory mediation and conciliation.”<sup>281</sup> The state provides a list of approved mediators; if one party refuses to participate in the selection of a mediator, the other party will make that selection. Once empaneled, the mediator may order the parties to submit position statements as to “disputed” contract terms, issue subpoenas, conduct “off

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<sup>276</sup> *Gerawan Farming*, 3 Cal. 5<sup>th</sup> at 1132 (“Between 1975 and 2001 . . . , of the state’s approximately 25,000 farm employers, there existed fewer than 250 signed union agreements and there were another 250 farms where workers voted for union representation but had not yet obtained a contract.” (Broderdorf, *Overcoming the First Contract Hurdle: Finding a Role for Mandatory Interest Arbitration in the Private Sector*, 23 Lab. Law. 323, 338 (2008)).”).

<sup>277</sup> *Id.*

<sup>278</sup> *See* Cal. Labor Code §1164(a).

<sup>279</sup> *Id.* §1164(a)(1). The declaration must satisfy three conditions: “(a) the parties have failed to reach agreement for at least one year after the date on which the labor organization made its initial request to bargain, (b) the employer has committed an unfair labor practice, and (c) the parties have not previously had a binding contract between them.” *Id.*

<sup>280</sup> The conditions described in text apply to unions that were certified before January 1, 2003. A union certified after that date may request MMC anytime 90 days after making an initial bargaining request with the employer, without satisfying any other condition. *See* Cal. Labor Code §1164(a).

<sup>281</sup> Cal. Labor Code §1164(b).

the record” confidential mediation, conduct “on the record” trial-like proceedings, and sanction parties who refuse to “participate or cooperate” in the MMC process.<sup>282</sup> Absent agreement, the mediator dictates the terms of the collective bargaining agreement—a function beyond the role of “mediator” in the ordinary sense of that term.

The MMC statute “refer[s] to the end result as a ‘collective bargaining agreement,’ there is no agreement.”<sup>283</sup> The employer does not “agree to be bound by the terms of employment imposed” or “agree to submit to interest arbitration at all.”<sup>284</sup> The extent to which the MMC statute enables near plenary authority to fix terms and conditions is reflected in the California Supreme Court’s characterization of MMC as a “quasi-legislative” process.<sup>285</sup> MMC, unlike “grievance arbitration,” “focuses on what the terms of a new agreement should be.”<sup>286</sup> The CBA imposed creates “new rules for future application,” “is legislative or regulatory in character,” and is “subject to the same tests as to validity as an act of the Legislature.”<sup>287</sup> The “agreement” is in reality a state-imposed directive, its terms set by the state labor board. Workers are not allowed to vote on whether to accept the contract.

The mediator has broad discretion to set the terms in accordance with his own views of industrial policy, and may impose conditions on one employer that are not imposed on a

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<sup>282</sup> See Cal. Code. Regs, tit. 8, §20407.

<sup>283</sup> *Gerawan Farming*, 187 Cal. Rptr. 3d at 272 (quoting *Hess*, 140 Cal. App. 4<sup>th</sup> at 1597).

<sup>284</sup> *Id.*

<sup>285</sup> As explained by the California Supreme Court:

In crafting a determination, the mediator “may consider those factors commonly considered in similar proceedings, including: [¶] (1) The stipulations of the parties. [¶] (2) The financial condition of the employer and its ability to meet the costs of the contract in those instances where the employer claims an inability to meet the union’s wage and benefit demands. [¶] (3) The corresponding wages, benefits, and terms and conditions of employment in other collective bargaining agreements covering similar agricultural operations with similar labor requirements. [¶] (4) The corresponding wages, benefits, and terms and conditions of employment prevailing in comparable firms or industries in geographical areas with similar economic conditions, taking into account the size of the employer, the skills, experience, and training required of the employees, and the difficulty and nature of the work performed. [¶] (5) The average consumer prices for goods and services according to the California Consumer Price Index, and the overall cost of living, in the area where the work is performed.” (§ 1164, subd. (e).)”

*Gerawan Farming*, 3 Cal. 5<sup>th</sup> at 1133.

<sup>286</sup> *Id.* at 1133 (quoting *Local 58, Intern. Broth. of Elec. Workers, AFL-CIO v. Southeastern Michigan Chapter, Nat. Elec. Contractors Assn., Inc.* 43 F.3d 1026, 1030 (6th Cir. 1995)).

<sup>287</sup> *Gerawan Farming*, 3 Cal. 5<sup>th</sup> at 1141 (quoting *Knudsen Creamery Co. v. Brock*, 37 Cal.2d 485, 494 (1951)).

competitor.<sup>288</sup> In doing so, the mediator “may consider” certain statutory factors to guide his decision-making, such as “[t]he financial condition of the employer and its ability to meet the costs of the contract,” but there is no legal requirement that he in fact apply those criteria in reaching his decision.<sup>289</sup> Moreover, the statutory criteria are “nonexclusive” and thus do not preclude the mediator from considering factors not listed, nor does the statute provide guidance as to how he should weigh each listed factor should he decide to apply them.<sup>290</sup>

After the mediator decides the terms of the “collective bargaining agreement,” the employer and the union—but not the workers—have seven days to petition the ALRB for modification of that decision. ALRB review is discretionary, highly deferential, and limited to considering whether certain provisions are “unrelated to wages, hours, or other conditions of employment,” “based on clearly erroneous findings of material fact,” or “arbitrary or capricious.”<sup>291</sup> Unless the ALRB finds error, the mediator’s report becomes the final order of the ALRB.<sup>292</sup>

Within 30 days after the ALRB’s order becomes final, the employer and the union may seek review from the courts of appeal or from California Supreme Court.<sup>293</sup> The workers are not “parties” to MMC, and have no statutory standing to object to the order or to challenge it in court. Judicial review is limited to examining whether the ALRB “acted without, or in excess of, its powers or jurisdiction”; the ALRB failed to “proceed[] in the manner required by law”; or “[t]he order or decision of the [ALRB] was procured by fraud

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<sup>288</sup> The scope of the mediator’s latitude in fixing the terms of the “agreement” is illustrated in the Gerawan case. Among other provisions, the imposed contract required all Gerawan employees to pay union dues or agency fees to the UFW, amounting to 3% of their gross pay, imposed a “union security” provision, which requires Gerawan to terminate any employee who refuses to pay those dues or agency fees, imposed retroactive wage increases, though in an amount less than the 3% exacted in union dues, reworked all dispute-resolution procedures as to individual grievances at Gerawan, contrary to the real-time system long in place for resolution of workplace issues, imposed “length of service” provisions, thereby stripping employees of their seniority if they have any break in employment, as agricultural employees often do, and barred strikes, boycotts, and pickets.

<sup>289</sup> Cal. Labor Code §1164(e).

<sup>290</sup> Gerawan farmworkers asked for permission to observe the MMC sessions. The UFW opposed their request; Gerawan did not. The mediator barred their entry. The workers then asked the ALRB for leave to intervene. The ALRB denied their motion, holding that the sessions were “confidential and open only to parties,” and that the UFW “already adequately represented their interests.” *Gerawan Farming, Inc. v. Agricultural Labor Relations Board*, 202 Cal. Rptr. 3d 713, 716 (2016). The workers then asked for permission to silently observe the “on the record” portion of the MMC process, but the ALRB denied this request too, holding that the public interest was not served by their presence. *Id.* at 717.

<sup>291</sup> Cal. Labor Code § 1164(e).

<sup>292</sup> *Id.* §1164.3(d).

<sup>293</sup> *Id.* §1164.5(a).

or was an abuse of discretion.”<sup>294</sup> A court may also determine whether the order violates the U.S. Constitution or the California Constitution.<sup>295</sup> After judicial review, the MMC order is treated by law as if it were a consensual collective bargaining agreement, albeit one backed by the contempt power of the court.

### **B. The *Gerawan Farming* Case.**

Gerawan Farming is a family-owned agricultural employer that has harvested, packed, and shipped stone fruit and table grapes in California’s San Joaquin Valley for 80 years. The UFW won a runoff election at Gerawan in 1990.<sup>296</sup> Less than half the workers voted. The union was certified two years later. In July 21, 1992, the UFW requested negotiations. After Gerawan accepted that invitation, the UFW did not respond for more than two years. Following one brief, introductory meeting in February, 1995, the UFW made no attempt to initiate further negotiations until October 12, 2012, a decade after the 2002 MMC amendments became law.<sup>297</sup>

Gerawan responded by letter dated November 2, 2012, expressing its willingness to bargain in good faith, but also raising a number of questions and concerns based on UFW’s lengthy absence from the scene.<sup>298</sup> An explanation of UFW’s absence was requested, but UFW refused. Nonetheless, the parties proceeded with negotiations. Between January 17, 2013 and March 29, 2013, the parties held 10 or more bargaining sessions.<sup>299</sup> Three months after the renewed bargaining began, the union invoked MMC.<sup>300</sup>

On April 16, 2013, the Board, at the UFW’s request, ordered the parties to begin the MMC process.<sup>301</sup> The result was a mediator’s “report,” affirmed almost in its entirety by the Board, which fixed virtually every aspect of Gerawan’s relationship with its workers, and with the UFW. Among other provisions, the imposed contract requires all Gerawan employees to pay union dues or agency fees to the UFW, amounting to 3% of their gross pay, imposed a “union security” provision, which requires Gerawan to terminate any employee who refuses to pay those dues or agency fees. The MMC contract imposed retroactive wage increases, reworked all dispute-resolution procedures at Gerawan, imposed

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<sup>294</sup> *Id.* §1164.5(b).

<sup>295</sup> *Id.* §1164.5(b)(4).

<sup>296</sup> *Gerawan Farming*, 187 Cal. Rptr. 3d at 266.

<sup>297</sup> *Id.* at 267-268.

<sup>298</sup> *Id.* at 267.

<sup>299</sup> *Id.*

<sup>300</sup> *Id.*

<sup>301</sup> *Id.*

“length of service” provisions stripping employees of their seniority if they have any break in employment, and barred strikes, boycotts, and pickets.

### **1. The Court of Appeal Proceedings.**

Gerawan appealed to a California appeals court, contending, among other things, that the order was invalid because the MMC statute violates the Due Process and Equal Protection Clauses of the Fourteenth Amendment. The appellate court set aside the ALRB’s order, holding the MMC statute unconstitutional on equal protection grounds and reserving judgment on the Due Process claim. The court also concluded that the MMC statute resulted in an improper delegation of legislative authority under the California Constitution, and that the ALRB abused its discretion in failing to consider Gerawan’s defense to MMC based on the UFW’s alleged 17-year abandonment of its representational obligations.<sup>302</sup>

As the appellate court explained, the MMC statute is “the very antithesis of equal protection” and is unconstitutional even under rational basis review.<sup>303</sup> “[E]qual protection of the law means that all persons who are similarly situated with respect to a law should be treated alike under the law.”<sup>304</sup> In the MMC context, the court continued, “each imposed CBA will ... be its own set of rules applicable to one employer, but not to others, in the same legislative classification.”<sup>305</sup> Thus, “the necessary outworking of the MMC statute is that each individual employer (within the class of agricultural employers who have not entered a first contract) will have a distinct, unequal, individualized set of rules imposed on it.”<sup>306</sup> As the court observed, “the risk is simply too great that results will be based largely on the subjective leanings of each mediator or that arbitrary differences will otherwise be imposed on similar employers in the same classification—particularly as there is no objective standard toward which the mediator is required to aim.”<sup>307</sup>

### **2. The California Supreme Court Decision.**

The UFW and the ALRB sought review in the California Supreme Court, which reversed in an opinion by Justice Goodwin Liu. The court first held that the MMC statute does not unconstitutionally infringe any due process right.<sup>308</sup> To support its conclusion that

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<sup>302</sup> *Gerawan Farming*, 187 Cal. Rptr. 3d at 280.

<sup>303</sup> *Id.* at 293 (citation omitted).

<sup>304</sup> *Id.* at 291.

<sup>305</sup> *Id.* at 294.

<sup>306</sup> *Id.*

<sup>307</sup> *Id.* at 295.

<sup>308</sup> The appellate court did not reach the due process issue because its equal protection and state-law holdings fully resolved the case. The California Supreme Court addressed the due process claim *sua sponte*.

the *Wolff* cases had been “completely repudiated,” the court cited one of its own decisions (*Birkenfeld*) and a *Yale Law Review* article in support of this proposition.<sup>309</sup> It also cited *West Coast Hotel Co. v. Parrish*, which did not mention *Wolff* and did not involve compulsory interest arbitration.

The court also reversed the appellate court’s equal protection holding. The court first concluded that it was proper to “apply the same rational basis test to a final order by the [ALRB] ... as [it] would apply to a legislative act.”<sup>310</sup> Applying that standard of review, the court found that “the Legislature reasonably could have concluded that a mediation process followed by binding arbitration in the event of a bargaining impasse would ... facilitate the adoption of first contracts,” or alternatively that “facilitating first contracts furthers the goal of ‘ensuring stability’ in the agricultural industry.”<sup>311</sup>

Finally, the court dismissed the notion that the MMC statute violates equal protection because it treats differently “each individual agricultural employer *within* the covered class of employers”—*i.e.*, the subset of employers forced into compulsory interest arbitration.<sup>312</sup> The court agreed that differences in treatment under the MMC statute are “intentional,” but it concluded that treatment is not irrational, for the legislature has a “legitimate interest in ensuring that collective bargaining agreements are tailored to the unique circumstances of each employer.”<sup>313</sup> Although “[a]rbitrary treatment is of course possible under the MMC statute,” the court acknowledged,<sup>314</sup> an arbitrator’s “discretion” is “channeled” by the statutory factors, such as “[t]he financial condition of the employer and its ability to meet the costs of the contract.”<sup>315</sup> In all events, the court reasoned, “an initial collective bargaining agreement does not last forever,” and “[i]f the employees are dissatisfied with either the collective bargaining agreement or their union’s representation, then they can petition to decertify the union in the third year” of that contract.<sup>316</sup>

### C. *MMC: Kansas Redux.*

The MMC statute, while different in various respects from the Kansas Act, nonetheless seeks to achieve the same goals of “labor stability” and “industrial peace” via

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<sup>309</sup> The reliance on Professor Pope’s article in the *Yale Law Journal* is curious. See note 233 *supra* (distinguishing *Wolff* from *Coppage* and *Adair*).

<sup>310</sup> *Gerawan Farming*, 3 Cal. 5th at 1141.

<sup>311</sup> *Id.*

<sup>312</sup> *Id.* at 1142.

<sup>313</sup> *Id.* at 1144.

<sup>314</sup> *Id.* at 1145.

<sup>315</sup> *Id.* at 1144.

<sup>316</sup> *Id.* at 1159 (citing Cal. Labor Code §1156.7(c)).

forced contracting and administrative fiat. By design, it permits the targeting of one grower, and its employees, and imposes one set of rules on the employer and the union, with no exit, short of bankruptcy. As with *Wolff I*, the MMC statute “shows very plainly that its purpose is not to regulate wages or hours of labor either generally or in particular classes of businesses,”<sup>317</sup> but rather “is intended to compel ... the owner and employees to continue the business on terms which are not of their making.”<sup>318</sup> The terms imposed in *Gerawan* are applicable by design only to a single workplace, without any basis in generally applicable legislative policies; the order abrogates the workers’ right to petition to decertify a union that last stood for election in 1990.

This is an ironic twist on *Wolff*, which focused on the ability of the employee to put himself “on an equality with his employer which action in concert with his fellows gives him.”<sup>319</sup> In *Gerawan*, a “single employee was helpless” in dealing with its own bargaining representative; other than the option of seeking decertification of the union, the employees have no means to avoid the MMC’s joint compulsion. They cannot notify or opt-out of the contract imposed, and have no statutory means of judicial redress.

To be sure, a duly-elected union is given “powers comparable to those possessed by a legislative body both to create and restrict the rights of those whom it represents.”<sup>320</sup> Majority rule gives a union the authority to “forfeit the economic rights of the bargaining unit, including the right to strike as a trade-off for the employer’s acceptance of grievance and arbitration procedures.”<sup>321</sup> It may require employees to arbitrate certain statutory claims, including those involving the employees’ individual, non-economic rights.<sup>322</sup> It may limit, or abolish, the ability of workers to picket.<sup>323</sup> A court may not nullify such “contractual concessions.”<sup>324</sup> But the legitimacy of that power in labor relations derives from employees’ “full freedom” to designate representatives of their own choosing for the

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<sup>317</sup> *Wolff I*, 262 U.S. at 565.

<sup>318</sup> *Id.* at 569.

<sup>319</sup> *Id.* at 540; *see also American Steel Foundries*, 257 U.S. at 209.

<sup>320</sup> *Steele v. Louisville & N.R. Co.*, 323 U.S. 192, 202 (1944).

<sup>321</sup> *Textile Workers v. Lincoln Mills of Ala.*, 353 U.S. 448, 455 (1957).

<sup>322</sup> *14 Penn Plaza v. Pyett*, 556 U.S. 247, 256-57 (2009).

<sup>323</sup> *Emporium Capwell Co. v. W. Addison Cmty. Org.*, 420 U.S. 50, 69–70 (1975).

<sup>324</sup> *NLRB. v. Magnavox Co. of Tenn.*, 415 U.S. 322, 328 (1974) (conc. & dis. opn. of Stewart, J.).

purposes of collective bargaining.<sup>325</sup> That power “presuppose[s] that the selection of the bargaining representative ‘remains free.’”<sup>326</sup>

According to California Supreme Court, “[s]o long as the employees can petition for a new election if they wish to remove the union, the employer has no real cause for concern about whether it is bargaining with the true representative of its employees.”<sup>327</sup> But the court also acknowledged that the MMC order would bar workers from seeking to decertify the union.<sup>328</sup> Because the MMC statute affords the state-imposed MMC order the legal effect of a collective bargaining agreement,<sup>329</sup> an MMC order bars decertification petitions until the final year of its applicability.<sup>330</sup>

Unlike the Kansas Act, the MMC statute does not expressly authorize the ALRB or the mediator to bar strikes. The mediator barred strikes and pickets based on his belief that a no-strike clause was a “typical” trade-off for interest arbitration as to disputes concerning

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<sup>325</sup> Cal. Lab. Code §1140.2.

<sup>326</sup> *Magnavox Co.*, 415 U.S. at 325 (quoting *Mastro Plastics Corp. v. NLRB*, 350 U.S. 270, 280 (1956)). A union “may not surrender rights that impair the employees’ choice of their bargaining representative.” *Metro. Edison Co. v. NLRB*, 460 U.S. 693, 708 (1983) (quotations and citations omitted). Where the right of employees to that choice is at issue, “it is difficult to assume that the incumbent union has no self-interest of its own to serve by perpetuating itself as the bargaining representative.” *Magnavox Co.*, 415 U.S. at 325 (citation omitted).

<sup>327</sup> *Gerawan Farming*, 3 Cal. 5th at 1158.

<sup>328</sup> *Id.* at 1159.

<sup>329</sup> *Id.* (citing Cal. Labor Code §1156.7(c) (decertification petition “shall not be deemed timely unless it is filed during the year preceding the expiration of a collective-bargaining agreement”)).

<sup>330</sup> As the MMC process unfolded, Gerawan’s farmworkers began a five-month effort to obtain the right to hold a decertification election. On September 25, 2013, the ALRB’s Regional Director summarily dismissed their first decertification petition. ALRB Admin. Order No. 2013-37 (Sept. 26, 2013). In response, workers staged a one-day walkout. That walkout coincided with release of the mediator’s proposed MMC order. After seeing the contract, but unable to vote on it, a majority of the employees signed another decertification petition in October 2013. This time, overruling the objections of the Regional Director, the ALRB held that the petition raised a bona fide question as to the UFW’s representational status, and conducted a secret ballot election on November 5, 2013 to allow Gerawan farmworkers “to decide whether to decertify UFW as the[] bargaining representative.” *Gerawan Farming*, 187 Cal. Rptr. 3d at 268. Press reports stated that workers cast 2,600 ballots. Tim Sheehan, [Rising Expenses, Accusations of Bias Confront State Agency in Gerawan Farm-Labor Conflict](#), Fresno Bee (July 31, 2015). The ALRB did not count their votes. Instead, based on unfair labor practice charges lodged by the UFW relating to alleged misconduct occurring months before the election, the ALRB “impounded” the ballots. The ballots still have not been counted. Gerawan and the employees are currently challenging the ALRB’s refusal to count the ballots in California state court. See *Gerawan Farming, Inc. v. ALRB*, No. F073720 (Cal. Ct. App.); *Lopez v. ALRB*, No. F073730 (Cal. Ct. App.); *Gerawan Farming, Inc. v. ALRB*, No. F073769 (Cal. Ct. App.).

the terms of the contract.<sup>331</sup> That virtually untrammelled delegated power runs headlong into the concerns animating the Taft Court’s decisions in the *Wolff* trilogy.<sup>332</sup>

Nor did the statute require the imposition of mandatory agency fees, with the consequence of requiring the employer to fire any worker who refused to pay them.<sup>333</sup> This forces farmworkers to accept the union as their representative (without the right to decide whether to retain it as their representative), and to require them to subsidize its representational activities or to lose their jobs, whether they want the union’s representation, or not – a “compelled association” that amounts to a “compulsory subsid[y] for private speech.”<sup>334</sup>

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<sup>331</sup> The UFW proposed the anti-strike provision; Gerawan opposed it. The only strikes in recent memory were to protest the actions of the union and the ALRB in blocking a decertification election after the union reemerged, and requested MMC. See, e.g., ABC30 Action News, [Many Workers With Gerawan Farming Protest United Farm Workers Union](#) (Sept. 30, 2013).

<sup>332</sup> See, e.g., *American Foundries*, 257 U.S. at 209 (“The right to combine for such a lawful purpose has in many years not been denied by any court. The strike became a lawful instrument in a lawful economic struggle or competition between employer and employees as to the share or division between them of the joint product of labor and capital.”).

<sup>333</sup> As the “mediator acknowledged, imposition of the 3% payment on employees on pain of being fired was “decidedly the thorniest” issue, because “[t]he election which resulted in [the] certification [of the UFW] occurred so long ago that it is highly unlikely that any members of [Gerawan’s] current work force participated in it.” Despite these misgivings, he imposed the union security provision on the ground that without it the union would be “placed at a decided disadvantage.” Petition for certiorari in *Gerawan Farming*, at 11-12.

<sup>334</sup> *Knox v. Service Employees*, 567 U.S. 298, 309, 310 (2012). As the appellate court in *Gerawan* explained:

A fundamental purpose of the ALRA is to provide for and protect the right of agricultural employees “to full freedom of association, self-organization, and designation of representatives of their own choosing” for the purpose of collective bargaining. (§ 1140.2; see § 1152.) As stated by our Supreme Court, “the NLRA and ALRA purpose is not exclusively to promote collective bargaining, but to promote such bargaining by the employees’ *freely chosen* representatives.” (*J.R. Norton Co. [v. ALRB]*, 26 Cal.3d 1, 34 (1979); see *N.L.R.B. v. Mid-States Metal Products, Inc.* 403 F.2d 702, 704 (5th Cir. 1968) [NLRA is primarily a grant of rights to *employees* rather than a grant of power to unions].)

It is clear that the employees’ right to a representative of their own choosing would be seriously jeopardized in the situation of abandonment by a union where, as here, the absentee union suddenly reappeared on the scene to demand the MMC process. A union that has had little or no contact with the employees or the employer over many years (here, decades) would be unlikely to have an adequate working knowledge of the employees’ situation or their wishes. From the employees’ standpoint, that union would be reappearing on the scene as something of a stranger. Most importantly, during the union’s long absence, the employees’

Although the California Supreme Court held that the mediator’s power “to decide the precise contours of an individual collective bargaining agreement,” the MMC statute does not confer “unrestricted authority to make fundamental policy determinations’ that must be left to the Legislature.”<sup>335</sup> That conclusion notwithstanding, the mediator in *Gerawan Farming* did make fundamental policy determinations affecting the employer and its workers, including to bar strikes, to supplant judicial redress of contract disputes over the terms of the CBA with binding “interest” arbitration, and to impose a union security agreement.<sup>336</sup> These “fundamental policy determinations” were made based on “comparable” collective bargaining agreements, albeit CBAs, that were the product of consensual negotiations, rather than a compulsory arbitration procedure. While the MMC statute may have declared a “policy” (i.e., to “ensure a more effective collective bargaining process between agricultural employers and agricultural employees”), it does not tell the mediator what terms imposed would further that goal.<sup>337</sup>

The MMC statute is, by design, a means to legislate as to only one employer via quasi-legislative acts that have no applicability beyond one employment relationship, where “[t]he terms of the ‘agreement’ determined by the arbitrator [are] imposed upon [the employer] by force of law.”<sup>338</sup> The California Supreme Court dismissed the selectivity

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working conditions, wages and attitude toward the union (if they even knew they had a union) may have significantly changed over the years. Indeed, it may be the case that the employees do not want to be represented by that union or any other union, which *Gerawan* asserts was the situation here. Against that potential backdrop is the prospect that, in the MMC process, a CBA will be imposed whether the employees want it or not; and it will be imposed with the formerly absent union, whether the employees want its representation or not. For these reasons, as the present case illustrates, where a union has arguably abandoned the employees but later returns to invoke the MMC process, that situation may create a crisis of representation. Accordingly, it is appropriate to allow the employer to raise the abandonment issue at that stage, because only that result will preserve the ALRA’s purpose of protecting the employees’ right to choose.

*Gerawan Farming*, 187 Cal. Rptr. 3d at 286-287.

<sup>335</sup> *Gerawan Farming*, 3 Cal. 5th at 1148 (citing *Clean Air Constituency v. California State Air Resources Bd.*, 11 Cal.3d 801, 816 (1974)).

<sup>336</sup> It has been the policy of California, before and after the adoption of the ALRA that “union security” provisions “should result from ‘voluntary agreements between employer and employees.’” *Chavez v. Sargent*, 339 P.2d 801, 820 (1959) (quoting Cal. Labor Code § 923); *Pasillas v. ALRB*, 156 Cal. App. 3d 312, 346 (1984).

<sup>337</sup> *Wolff I* anticipated the problematic nature of this delegation. 262 U.S. at 542 (“Whether such danger exists has not been determined by the legislature, but is determined under the law by a subordinate agency, and on its findings and prophecy owners and employers are to be deprived of freedom of contract and workers of a most important element of their freedom of labor.”).

<sup>338</sup> *Hess, supra*, 140 Cal.App.4th at 1597.

problem: “laws regulating a small number of individuals, or even a class of one, are not necessarily suspect.”<sup>339</sup> The court framed the issue in terms of whether these one-off legislative acts were a “class of one,” rather than addressing whether such special legislation is rationally selected to any legislative purpose. The court never addressed the constitutionally suspect nature of such targeting, i.e., “the Framers’ concern that a legislature should not be able unilaterally to impose a substantial deprivation on one person.”<sup>340</sup> When the legislature “grants particular individuals relief or benefits,” “the danger of oppressive action that [the Constitution] was designed to avoid is not implicated.”<sup>341</sup> But in *Gerawan Farming*, as in *Wolff*, it is the selective deprivation of liberty and property that triggers due process concerns.<sup>342</sup>

### *Conclusion*

At the time of the ALRA’s passage in 1975, the ALRB was “inundated” with election petitions. In 2012, when the UFW resurfaced at Gerawan, it reported 3,391 active members.<sup>343</sup> According to William Gould, who served as the Chairman of the ALRB until 2017, “[u]nion organizational activity in California agriculture at this moment is completely moribund, notwithstanding the passage of [the MMC statute].”<sup>344</sup>

California’s MMC statute was championed by the UFW, yet its founder, Cesar Chavez, was skeptical that any labor law could actually help farmworkers. Chavez believed that “majority rule and collective bargaining are supposed to be more than academic theories or political rhetoric.”<sup>345</sup> They were essential to organizing workers.<sup>346</sup>

It is unlikely that Chavez would agree that the power of the UFW to picket, strike, or to boycott was illusory.<sup>347</sup> It is more likely he would have shared the views of the editors of

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<sup>339</sup> *Gerawan Farming*, 3 Cal. 5th at 1143.

<sup>340</sup> *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 242 (1995) (Breyer, J., concurring in the judgment).

<sup>341</sup> *Id.*

<sup>342</sup> *Wolff II*, 267 U.S. at 565 (the state did “not ... regulate wages or hours of labor either generally or in particular classes of business.”).

<sup>343</sup> U.S. Department of Labor, *2012 LM-2 Labor Organization Annual Report of the UFW*, at 15.

<sup>344</sup> William B. Gould IV, *Keynote Speech at Agricultural Personnel Management Association’s 36th Annual Forum* (Jan. 28, 2016).

<sup>345</sup> Cesar Chavez, [Address to The Commonwealth Club of California \(Nov. 9, 1984\)](#).

<sup>346</sup> *Id.*

<sup>347</sup> *Hess Collection Winery*, 140 Cal. App. 4th at 1600 (“However, with respect to agricultural employment the Legislature could reasonably conclude that the power to strike is illusory. The unskilled character of the work, the relatively low wages paid, and the seasonal rather than year-round nature of the work

*The Nation* (circa 1920): “Compulsory arbitration will not remove unrest or prevent strikes; that has been proved wherever it has been tried. . . . It will furnish, moreover, an irresistible argument for the belief that the status of labor cannot be radically and permanently improved except through control by the workers over the Government itself. . . . If the responsibility for the workers’ satisfaction is taken from unions and placed upon law, all injustice in the present order becomes guaranteed by the state, and every mass movement against such injustice becomes an open revolt against political authority.”<sup>348</sup>

It is also doubtful that Chavez would embrace the arguments advanced by those who believe that the “‘narcotic effect’ argument has no applicability to [MMC] since the statute provides only for first contract arbitration. After that, the parties must bargain to their own agreement.”<sup>349</sup> The difficulty with this argument is that, like any narcotic, compulsory arbitration may become habit-forming, particularly where the union and employer have self-interested reasons to collude, at the expense of the workers themselves.<sup>350</sup>

One of the motivating concerns behind the ALRA was to prohibit an employer from entering into a “sweetheart” arrangement with a union of its own choosing, rather than a labor organization selected by its employees in a secret ballot election.<sup>351</sup> Nor is it plausible to argue that “first contract” interest arbitration “will actually encourage parties to bargain because the outcome of arbitration is an unknown.”<sup>352</sup> This is belied by how the mediator in *Gerawan Farming* fixed the terms of the CBA, i.e., based on his conclusion that the proposals advanced by the union were “common” or not “atypical” from those found in *consensually-negotiated* CBAs.<sup>353</sup> Given the free-wheeling nature of how the MMC

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combine to make collective action by employees untenable. The Legislature could reasonably conclude that despite the ALRA, agricultural workers lack ‘actual liberty of contract.’”).

<sup>348</sup> *Courts of Industrial Injustice*, *supra* note 5, at 416.

<sup>349</sup> Fisk & Pulver, *supra* note 3, at 68.

<sup>350</sup> Justice Brandeis likely would have agreed. *See Post*, *supra* note 3, at 1522, n. 159.

<sup>351</sup> *See Highland Ranch v. Agricultural Labor Relations Bd.*, 29 Cal.3d 848, 859-860 (1981) (“In the legislative hearings on the bills that ultimately were enacted as the ALRA, the proponents of the legislation repeatedly stressed that the act would ‘only allow one way of recognition and that’s through a secret ballot election. . . . Recognition . . . cannot be obtained by sweetheart contracts. It can only be obtained by the workers going into the voting booth and selecting a union of their choice or rejecting any union, should they choose.’ (Hearing before Assem. Lab. Relations Com. on Assem. Bill No. 1533, at 2 (May 12, 1975) (remarks of Assemblyman Berman).)”).

<sup>352</sup> Fisk & Pulver, *supra* note 3, at 68.

<sup>353</sup> The mediator’s report based its conclusions on CBAs submitted by the parties, or the mediator’s views concerning current labor shortages, the possibility of a drought, or what he felt would be in Gerawan’s best interests—such as a wage increase. The mediator conceded that there was no evidence based on the CBAs submitted that would establish that other farm operations were “similar” in terms of any of the categories listed in the statute, or provide guidance as to any economic terms. He nonetheless accepted most of the non-economic terms proposed by the UFW because they were not “atypical” from, or “common” in, other

mediator chooses the terms of an agreement, it is difficult to see how the highly deferential and limited review of his recommendations can act as “a realistic safeguard against unfairness or favoritism.”<sup>354</sup>

Chavez believed that state intervention in the adjustment of labor relations would inevitably result in agency capture and domination by economic interests. The history of the MMC statute is a textbook example of what Chavez feared. It was foreseen, nearly a century ago, in *Wolff Packing*.

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agricultural labor agreements. This was the basis for adopting the union’s security provision, grievance and arbitration procedures, no strike/lock-out provisions, seniority requirements, disciplinary procedures, and just-cause termination requirements.

<sup>354</sup> *Gerawan Farming*, 187 Cal. Rptr. 3d at 298 (“In practical effect, this means the Board must give virtually a rubber-stamp approval to the mediator’s reported CBA as long as the terms thereof have at least a small kernel of plausible support. . . . Except in perhaps the most egregious instances of overreaching, the Board’s hands would be tied and the report would have to be approved. In light of the mediator’s considerable range of power to determine all aspects of a compelled CBA, which would include a broad array of important economic terms and relationships, such a highly deferential and narrow review mechanism would not be able to meaningfully protect the parties against favoritism or unfairness in regard to the determination of the CBA’s terms.”).