

The Search for Constitutional Protection of Labor Standards, 1924–1941: From Interstate Compacts to International Treaties

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I. INTRODUCTION

The history of American involvement with the International Labor Organization (ILO) and the international labor standards movement uncovers intriguing leadership and motivation, surprising triumph in the 1930s, and then relentless criticism. American involvement in the ILO began as an effort to overcome Supreme Court opposition to national labor standards. With domestic judicial opposition to standards gone after World War II, America's remarkable early leadership diminished when domestic attacks on the ILO undermined American defense of universal labor rights.

The American who led the United States into the ILO is as obscure today as the story of wavering American membership. John Winant, whom Franklin Roosevelt first sent to Geneva in 1935, previously served as Republican governor of New Hampshire. How and why did a governor of New Hampshire, from the opposition, come to this role? The answer originates in the decline after 1920 of the textile mills in Manchester, New Hampshire. That circumstance propelled Winant to the leadership of those, including Roosevelt, who saw national and then international labor standards as one solution to regional economic decline. Given the exceptionally cautious American embrace of uniform labor law, especially by the courts, FDR's collaboration with Winant, a Republican internationalist, made sense.

The ILO is the only survivor of the international organizations created at the Versailles Conference and the only one the U.S. joined

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in the isolationist, interwar period. Created to assure that the evolving global trading regime would be marked by fair treatment of workers, the annual ILO conference passes labor conventions and sends them to the member countries for ratification. For example, the first convention in 1919 limited the work day to eight hours and the work week to forty-eight. Winant and his allies turned to the ILO after their initial approach to national labor standards, through the interstate compact process, failed for want of state cooperation. They realized that if Congress ratified ILO conventions as treaties, they would be part of the country's fundamental law, voiding court rejection.

Just as Winant triumphed, the constitutional revolution of the late 1930s and the global confusion during World War II made his approach irrelevant. Then, in the immediate postwar years, the American right-wing joined with the Soviet Union to denounce the ILO. A depressed Winant committed suicide in Concord, New Hampshire. When the ILO passed conventions mandating universal health insurance and maternity leave, American business launched an effort to amend the Constitution to prevent treaties from changing U.S. domestic law. Although unsuccessful with the "Bricker Amendment," the attacks doomed American ratification of any substantive conventions for forty years.

Part II of this study will begin by reviewing the growing awareness before 1925 of the crisis in the New England textile industry and the emergence of John Winant as a concerned leader. Part III examines the early effort to confront the decline with new corporate and public policies. Part IV chronicles the pursuit of labor standards through interstate compacts and alternatives. Part V focuses upon joining the ILO and the questions that arose regarding the relationship of conventions to domestic law. Part VI describes the post-World War II attacks on the ILO which undermined, until the 1990s, the United States' willingness to protect global labor rights.

II. THE LABOR STANDARDS DEBATE BEFORE THE GREAT DEPRESSION

A. *The Case of the New England Textile Industry*

In 1906, T.M. Young, an English journalist, visited Manchester, New Hampshire, while writing a series on the American textile industry for *The Manchester Guardian*. He contrasted the town and its mills with his paper's hometown, for which the New Hampshire city had been named in the 1830s. He noted:

Unlike its great-grandmother, it has clean air, clear water, and sunny skies; every street is an avenue of noble trees . . . Perhaps the handsomest, certainly the most impressive, buildings in Manchester are the Amoskeag and Manchester Mills. . . Rising sheer out of a deep, clear, swift-flowing stream (the Merrimack), upon the other bank of which are grass and trees, they need little more than to be silent to masquerade successfully as ancient colleges.¹

Tommy Smith, a dye house worker hired at the Amoskeag Mills a year after Young's visit, later recalled the grandeur and ceremony of the factory. "Each of the mills had its own bell tower; and when the signal came over the electric wire, the bell ringers would jump onto the ropes. . . . When the bells rang it was time to go home."² When the workers departed for the day, they were not replaced by another shift. Amoskeag did not operate at night. Without romanticizing life for the mass of workers in Manchester, this was a humane community, and the mills were a more informal work place than other, later industrial operations. That is not because the community was homogeneous or the factory a small tight knit work place. Quite the contrary, Manchester's work force came from throughout the western world, from Scottish dye house employees such as Smith, to Poles, Italians, Greeks, and, especially, French Canadians. And the mills were not small. In fact, Amoskeag, by 1906, was the largest textile mill in the world, stretching for a mile along the Merrimack on the east and half a mile on the west. It supplied the upholstery for Henry Ford's Model T, and it sold massive quantities of cloth to buyers such as J.C. Penney and Marshall Field. It was unlike the later industrial world, where companies maximized production through round-the-clock and year-round operations. Amoskeag's production varied seasonally and workers came and went as the plant needed them. Amoskeag could function in this way because of its stability. It had been around for most of the century and had generational loyalty among its managers, who in turn knew their work force. The French Canadian workers returned to their ancestral Quebec towns and farms during slow seasons, yet supervisors knew how to find them when demand increased.

Of course, Amoskeag had not succeeded by maintaining static organizational structures. In 1910, the company began to introduce scientific management practices, created a separate personnel office for hiring, and introduced features of welfare capitalism, such as night

1. TAMARA HAREVEN, *FAMILY TIME AND INDUSTRIAL TIME* 35-36 (1982).

2. TAMARA HAREVEN & RANDOLPH LANGENBACH, *AMOSKEAG LIFE AND WORK IN AN AMERICAN FACTORY CITY* 223-24 (1978).

classes, playgrounds, and baseball teams for employees.³ These were the newest fads in the business world, and Amoskeag was a major American corporation that led the business community. Business continued to boom, especially during World War I. Scientific managers found new ways to maximize production and profits. However, in their fascination with efficiency, they could be tactless. They raised wages to reward productivity increases, but only 7.5%, while mills in Massachusetts increased theirs ten percent. The United Textile Workers of the AFL began organizing workers in 1918. Two strikes came that summer, but were settled quickly to maintain war production. But two forces had been introduced irreversibly into the formerly paternalistic or, as one worker called it, feudal world of Amoskeag: scientific management and organized labor.⁴

B. *Changing Dynamics in the Textile Industry*

The serious consequences of these factors and others beyond Manchester that would influence Amoskeag had not been felt in 1919. The war ended, the boys came home, and working conditions continued to improve. As a result of union demands, the company reduced the workweek from fifty-four to forty-eight hours per week. Since the piece work rates did not change, this reduction in hours cut worker incomes, but on June 2, 1919, Amoskeag increased rates fifteen percent. Piece rates went up in December and again in May 1920. But times had changed. The last boom for Amoskeag had passed. By the beginning of 1921, workweek reductions followed declining demand for Amoskeag products, and the company cut piece rates by 22.5%.⁵ Meanwhile, the scientific managers found ways to increase the number of looms workers ran, adversely affecting product quality as well as morale.

The corporation's grievance procedure revealed a looming crisis. One-third of the formal complaints were about declining quality, but management now worried more about profits than quality or workers.⁶ Then, in 1922, it had to worry about a massive ten month strike that shattered the balance at Amoskeag. Over 12,000 workers walked off the job, and the national guard came to town to protect the mills. The strike ended only after the exhausted union accepted the mediation of local clergy. The 1922 agreement satisfied neither the union nor the

3. See HAREVEN, *supra* note 1, at 38-68, 138-48.

4. HAREVEN & LANGENBACH, *supra* note 2, at 233 (on feudalism); HAREVEN, *supra* note 1, at 289 (on two features added at the time, a union and scientific management).

5. See DANIEL CREAMER & CHARLES W. COULTER, *LABOR AND THE SHUTDOWN OF THE AMOSKEAG TEXTILE MILLS* (1939).

6. See HAREVEN, *supra* note 1, at 302.

company.⁷ Not surprisingly, the problems in Manchester came to the attention of political leaders in the state, particularly the young war hero, John Winant. He responded most directly and profited most successfully from the Amoskeag problem, eventually seeing the link between the problems of Manchester and American constitutional traditions that constrained enactment of national labor standards.⁸

C. *John Winant and the Progressive Labor Movement*

Born in New York of well-to-do parents, Winant seemed an unlikely defender of the working class. He came to New Hampshire as a youth to attend the exclusive St. Paul's School in Concord. Then, he left for Princeton. While not interested in many academic fields, Winant immersed himself in Ruskin, Dickens, and the English Christian Socialists. He later accepted a standing offer from the rector at St. Paul's to join the faculty, coming back to Concord in time to participate in the Bull Moose campaign, led in New Hampshire by Governor Robert Bass. Bass, who went on to lead the Brookings Institution, became Winant's patron, first in the New Hampshire Legislature, and later as governor. In 1916 the voters in Concord began Winant's political career by sending him to the legislature. There he angered conservatives by introducing legislation to limit the hours of work for women and children.⁹

World War I interrupted Winant's political career. Distinguishing himself as a reconnaissance pilot, Winant returned to New Hampshire as a war hero and prime political material. He teamed up again with Bass, who had spent the wartime as a planner with the U.S. Shipping Board and later under Felix Frankfurter at the War Labor Policies Board. In these positions Bass met a number of individuals who pioneered efforts to reform American labor law.

By 1920 Bass and Winant had positioned themselves to resume their Progressive battles against the New Hampshire Republican leadership. Bass sympathized with a group led by Harold Ickes and other "Bull Moosers" that backed James Cox and FDR in 1920 against "the same reactionary bunch of politicians against whom they rebelled in

7. See Herbert A. Jump, *Six Months in a Strike City*, THE SURVEY 48 (August 1, 1922), at 555-57, 584.

8. See ELIZABETH MORISON & ELTING MORISON, *NEW HAMPSHIRE: A BICENTENNIAL HISTORY 184-87* (1976).

9. There are several good biographies of Winant, for example, BERNARD BELLUSH, *HE WALKED ALONE: A BIOGRAPHY OF JOHN GILBERT WINANT* (1968), and Alvin Knepper, *John Gilbert Winant and International Social Justice*, (1954) (unpublished Ph.D. dissertation, New York University). See also JAMES WRIGHT, *THE PROGRESSIVE YANKEES: REPUBLICAN REFORMERS IN NEW HAMPSHIRE, 1906-1916* (1987).

1912.”¹⁰ In 1921 Bass formed the New Hampshire Civic Association to give the “Bull Moosers” an organized home from which to attack the conservatives. Winant and Bass focused their state attack on the conservative opposition to labor legislation. Bass had developed an interest in the minimum wage as a way of stabilizing worker incomes and protecting companies from the pressure to lower standards. Winant focused on maximum hours legislation.

In 1924 Bass and other New Hampshire Progressives turned to Winant as their candidate for governor. He and Bass began to see that the problems of Manchester called for national legislation. This awareness grew out of concerns about state labor legislation voiced by some of Bass’ business friends. In December 1923, for example, O.P. Hussey of the Phillips Rubber Company in Massachusetts warned Bass that the Massachusetts eight hour law “works an unfair hardship unless all States unite in such a program.”¹¹ In defending the proposed federal child labor amendment during the campaign, Winant addressed both Hussey’s concerns and turned the defense into a sure way of gaining Yankee votes:

It is common knowledge that the object of this amendment is to raise the standards of the South to a parity with those of New England. There are still a sufficient number of states unmindful of the abuses of child-labor to keep our national standard lower than that of many other nations We do demand that the children of the South as well as the children of the North be afforded an unfettered start and a fair chance in the race of life. We recognize that the first door leading to equality of opportunity opens into the country’s school rooms and that equality of opportunity is the promise of American life.¹²

Of course, such a campaign brought both support and criticism. Hugh Moore of the Brown Company, the massive paper mill in northern New Hampshire, wrote to Bass, “Personally, I like John Winant,

10. Letter from Edwin M. Lee to Robert Bass (Oct. 14, 1920); *see also* Letter from Harold Ickes to Bass (Aug. 24, 1920) (in Robert Bass Papers, Baker Library, Dartmouth College) [hereinafter Bass Papers]. On the shift from Progressivism to the 1920s, *see* OTIS L. GRAHAM, JR., AN ENCORE FOR REFORM 94, 192 (1967).

11. Letter from O.P. Hussey to Bass (Dec. 15, 1923) in Bass Papers, *supra* note 10.

12. Winant campaign speech, in Bass Papers, *supra* note 10. The phrase “promise of American life,” doubtlessly was to send a message to the 1912 Progressives, because this was the title of the book by Herbert Croly, published in 1909, which became the blueprint for Roosevelt’s campaign; Croly had founded *The New Republic* and still edited it when Winant ran for governor. *See* CHARLES FORCEY, THE CROSSROADS OF LIBERALISM: CROLY, WEYL, LIPPMANN AND THE PROGRESSIVE ERA, 1900–1925 3-51 (1961) (finding Croly representative of “national liberalism,” a form willing to accept comprehensive national government action to address social and economic problems).

and believe he is sincere in every respect. I am not, however, impressed by his knowledge of Economics or his attitude on economic issues."¹³ But then, Winant did not have to win over every industrialist, just the majority of voters.

However, Winant did not succeed immediately with other state politicians. Three items in Winant's large agenda did not pass the legislature; all were labor law reforms, opposed partly because of the competitive pressures on the state. Consequently, by 1926 Winant had become deeply involved in national labor reform movements, serving on the boards of the National Child Welfare Conference, the National Consumers' League, and the American Association for Labor Legislation (AALL).¹⁴ There he began a special interest in interstate cooperation to address social problems through his work on the intergovernmental New England Council. While pursuing these interests, in 1927, Winant followed state tradition and retired after one term.¹⁵

III. ADDRESSING THE TEXTILE CRISIS

A. *The Decline of the New England Mills*

The problems at Amoskeag in 1922 began not only a crisis for the company and Manchester, but also an empirical test of federal diversity in social policy in the era of global manufacturing. What began as a state and regional crisis taught unforgettable lessons in modern economics.

One of the strengths of leaders such as John Winant was the ability to make policy decisions on the basis of observed evidence, rather than ideology or legal precedent. Winant did not begin his tenure as governor in 1925 seeking international labor laws. Yet, within a decade, he was observing the International Labor Organization (ILO) as a representative of the U.S., and a few years later he headed the organization, the first American to hold such an international position. These were not preplanned career steps, but neither were they chance promotions. Winant followed the evidence, and the evidence clearly

13. Letter from Hugh Moore to Bass (Jan. 10, 1924) in Bass Papers, *supra* note 10.

14. ARTHUR M. SCHLESINGER JR., *THE AGE OF ROOSEVELT: THE COMING OF THE NEW DEAL* 198 (1958). On the AALL, see John B. Andrews, *Annual Business Meeting*, 17 AM. LAB. LEGIS. REV. 99 (1927).

15. On his state administration in 1925-27, see H.C. Pearson, *THE WINANT ADMINISTRATION*, 58 GRANITE MONTHLY 409-13 (November 1926). See also Knepper, *supra* note 9, at 30-36; BELLUSH, *supra* note 9, at 60-85. Of special interest Bellush describes Winant's and Bass' leadership in efforts to support Coolidge's proposal to join the World Court in 1926.

went from the mills on the Merrimack through the American South and on to Geneva.

All New England leaders in the early 1920s saw that the region's textile industry was in crisis. First, there were short postwar declines in demand and profits. Then the companies cut wages and hours, and labor unrest followed. Lowell and Fall River had crises much like Amoskeag. Looking back a few years later, it was clear that these problems had begun a disturbing trend.¹⁶

Regionally, New England's relative share of cotton consumption peaked in the mid-19th century.¹⁷ The really disturbing regional trend came, however, after 1900, when absolute growth slowed and the region no longer processed even half of the nation's total. When national production rose in the late 1920s, finally recovering from the postwar depression, New England's production stagnated or fell. The differences between spindles available for production and those actively used makes clear the region's problems. When the South was utilizing virtually all the spindles it could put in operation, New England was disposing of some.¹⁸

B. Southern Mills Overtake New England's Cost Advantage

The textile industry in America generally was not in decline in the mid-1920s. Rather, the New England textile industry experienced rapid decay, while Southern industry expanded. The mid-1920s marked the arrival of the South as the center of American textile production. Data from North Carolina and Massachusetts made this change clear. In 1925, Massachusetts remained the leading textile state in the country, as it had for a century, with 96,182 workers producing textiles. North Carolina had risen to second place with 84,139. Only two years later, North Carolina had 95,786 textile workers to Massachusetts' 90,875. And the trend continued throughout the century. Regionally, while Southern employment grew 34,416 from 1925 to 1927, New England employment fell by 9,312.¹⁹

Twenty-five new mills opened in the South in the two-year period. Thirty closed in New England.²⁰ These were not short run

16. Spindles in use at Fall River peaked in the early 1920s and fell dramatically by 1928. Quite obviously, before the Great Depression, Fall River faced a depression. In New Bedford the decline, although less severe, followed a similar pattern. JACOB HERBERT BURGY, *THE NEW ENGLAND COTTON TEXTILE INDUSTRY: A STUDY IN INDUSTRIAL GEOGRAPHY* 30, 44 (1932).

17. See BURGY, *supra* note 16, at 60.

18. See BURGY, *supra* note 16, at 121.

19. See *id.*

20. BROADUS MITCHELL & GEORGE SINCLAIR MITCHELL, *THE INDUSTRIAL*

changes. They continued throughout the twentieth century. By 1977 North Carolina would have 219,100 textile workers; Massachusetts 21,400.²¹

Leaders such as Winant asked three related questions when observing their region's dramatic deindustrialization and the simultaneous industrial revolution in the South: What caused these changes to take place? Were the two changes related? And, how could New England best respond to the changes? It was the answers to these questions that led to interest in national and then international labor law.

While a number of factors explained the deindustrialization of New England and Southern industrial growth, generally the two trends seem directly related in the textile industry. Students of the shift of production out of New England identified five factors causing the changes: technological advances, tax differentials, changes in management techniques, union penetration rates, and labor standard variation.²²

Technological advances resulted from the introduction of electrical powered mill machinery, which undercut the great New England water power advantage. By 1925, 86.7% of New England mills were electrified, a sign of modernization to some, yet an example of a technology that freed industry from the rushing rivers of the region. Mills could move anywhere there was electricity, even the South. Worst, the old mills could not easily accommodate the new equipment, and faced the temptation to continue running less efficient, but still functioning, older machines. In fact, New England textile machinery manufacturers undermined their fellow New England textile businesses by offering cheap credit or even building southern mills, which then bought large numbers of their latest machines. Finally, the development of new consumer preferences, particularly for synthetic fibers, reduced demand for the natural fibers processed by the older factories. The exceptional advantages New England once had in technology and experienced personnel in the older factories no longer existed. Natural fibers and renewable energy were abandoned in a rush to the artificial and the nonrenewable.²³

REVOLUTION IN THE SOUTH 3 (1930).

21. PHILLIP J. WOOD, *SOUTHERN CAPITALISM: THE POLITICAL ECONOMY OF NORTH CAROLINA 1880-1980* 192 (1986).

22. HAREVEN & LANGENBACH, *supra* note 2, at 333. F.C. Dumaine, Amoskeag CEO, listed transportation advantages in the South, but those advantages always had been present.

23. See William H. Miernyk, *Unemployment in New England Textile Communities*, 78 MONTHLY LAB. REV. 645-48 (June 1955); HAREVEN & LANGENBACH, *supra* note 2, at 333.

At the same time the technological revolution was weakening regional strengths, New England state governments adopted progressive policies not easily sustained with a declining industrial base. As more government services came to New England communities, property tax rates rose. While southern states experienced some of the same growth in public services, the South always had fewer public agencies and fewer responsibilities assumed by the government. Taxes per spindle in Massachusetts nearly tripled during the Progressive Era. In 1919, the average New England tax per spindle stood at about fifty-five cents, compared to thirty-five in the South.²⁴ In 1929, the treasurer of Amoskeag Manufacturing Company appealed to a Manchester public meeting for reduced tax assessments. Taxes, investment in new technology, and interest on debt exceeded the company's operating profit. Fearing the consequences, the city cut the tax rate significantly. Of course, the treasurer failed to explain that the interest was owed to the parent Boston company, which in the mid-1920s had withdrawn cash from the corporation, established a holding company, and required the manufacturing entity to buy itself back from the owners. They, in turn, reinvested in the South.²⁵

The introduction of scientific management at companies such as Amoskeag minimized the differences between northern and southern mills. Yet, only so much efficiency could be milked out of the old New England factories and their comparatively humane labor traditions. Southern mills began in a later era and did not have to put down a tradition of paternalistic responsibility and familiarity with the work force. Southern mills could easily operate around the clock and year round. Also, they always had the threat hanging over the heads of their largely poor white work force of responding to worker complaints by bringing in the more desperate and despised local blacks.²⁶ Other traditions in Southern culture also helped the new management system. With lower rates of schooling and fewer rights for women, southern mills more easily utilized the cheap labor of women and children. Most importantly, the poorer economic prospects in the South, especially less alternative employment, made southern workers more desperate for mill jobs.²⁷

24. See BURG, *supra* note 16, at 172.

25. BURG, *supra* note 16, at 171-72; HAREVEN, *supra* note 1, at 30-31, 350-51.

26. MITCHELL, *supra* note 20, at 145.

27. See PHILLIP J. WOOD, *SOUTHERN CAPITALISM: THE POLITICAL ECONOMY OF NORTH CAROLINA, 1880-1980* 59-93 (1986); Clarence H. Danhoff, *Four Decades of Thought on the South's Economic Problems*, in *ESSAYS IN SOUTHERN ECONOMIC DEVELOPMENT* 7-68 (Melvin L. Greenhut & W. Tate Whitman eds., 1964); Harold Marley, *A Southern Textile Epoch*, 65 *THE SURVEY* (Oct. 1, 1930) 17-20, 55-58; Jacquelyn D. Hall et al. Robert Korstad, *Cotton Mill People: Work, Community, and Protest in the Textile South 1880-1940*, 91 *AM. HIST.*

Low rates of unionization also encouraged southern textile expansion—not that there were no unions and no strikes in the South, but the strikes were less frequent and public officials more helpful in strike suppression than in New England.²⁸ Meanwhile, the new technology that southern mills installed had ingenious production rate and quality measuring mechanisms that minimized the advantages New Englanders had in worker skill and commitment.²⁹

Lastly there were the differences in labor standards between the regions. The New England states, especially Massachusetts, had a number of protections not found, at least as strictly, in the South. For example, the three southern New England states limited the work week to six days for youth up to sixteen years of age. Massachusetts set the limit for adult women at nine hours per day and forty-eight hours per week. The comparable law in North Carolina was eleven hours per day and fifty-five hours per week. Georgia and South Carolina fully liberated their women by providing no such protection.³⁰ But the most important difference by region was in wage rate. Because there were no government mandated minimum wage laws in the U.S., except in California, wage rates differed markedly by region for a variety of reasons, including the rate of unionization, or the fear of it. In textiles this led to a significant difference in the cost of operation for mills in the two regions. To the credit of northern workers, New England productivity, or value added per worker, exceeded that in the South in the mid-1920s. Yet, the problem for New England was that wage rates exceeded southern rates much more than did the value added. Consequently, while the average North Carolina worker was only about 85 percent as productive as one in Massachusetts, the Massachusetts worker earned almost fifty percent more. Worst for New England firms, the differential between their wage rates and those of their southern competitors became greater from the pre-war years down to 1924. The differential only fell as the textile depression

REV. 245-86 (Apr. 1986). On night work, see IRVING BERNSTEIN, *THE LEAN YEARS: A HISTORY OF THE AMERICAN WORKER, 1920-1933* 4-5 (1960). See also Gregory Clark, *Why Isn't the Whole World Developed? Lessons from the Cotton Mills*, 47 J. ECON. HIST. 141-73 (Mar. 1987) (culture mattered in keeping New England developed earlier, but overlooks new methods of management).

28. See BURGY, *supra* note 16, at 169.

29. BERNSTEIN, *supra* note 27, at 11-12. On famous southern strikes, such as Gastonia, see *id.* at 20-21; Hall, *supra* note 27, at 270 (on pioneering methods of surveillance); RICHARD L. ROWAN & ROBERT E. BARR, *EMPLOYEE RELATIONS: TRENDS AND PRACTICES IN THE TEXTILE INDUSTRY* 113-16 (1987); BURGY, *supra* note 16, at 169-70.

30. See Alice S. Cheyney, *International Labor Standards and American Legislation (A Comparison)*, GENEVA SPECIAL STUDIES, Vol. 2, No. 8 (1931).

hit the region. Only toward the end of the 1930s did the differential shrink greatly, and by then it was too late for the North to recover.³¹

While there are different interpretations of which factors primarily caused the textile decline, the decline itself was such an obvious fact that it could not be ignored. Industrialists had to address the technological and management issues. Political leaders focused on the tax differential, organized labor, and labor standards. Of course, some factors could be more easily addressed than others by business and political leaders. For example, corporations controlled technology, providing they could secure financing; however, changes in management practices were more problematic. The culture of the New England mill towns assumed management might be paternalistic, but not inhumane. As evidenced by the Amoskeag grievances, worker pride placed limits on cost cutting at the price of quality. And, ultimately, management changes could lead to labor disputes that undermined any savings.

C. *The Local Response to New England's Textile Decline*

Political leaders faced similar limits on their options. Tax reductions meant reductions in public services, yet the public wanted the services that defined the quality of life in New England, such as exceptional educational facilities. There could be some adjustment of taxes, as Manchester had done for Amoskeag, but New England did not want to become the South, with poor public services and none provided for a pariah class, such as the segregated Afro-Americans. Consequently, responsive Yankee politicians turned to the one factor in production over which they had control—labor standards.

In the South politicians faced the issue by rejecting significant labor standard regulation, allowing the competitive market to drive standards to the lowest level. New England leaders did not have that option. Their states had enough interest groups supporting improving standards that some politicians could make careers by identifying with these interests. Unlike the South, New England had a slightly competitive political system. While Democrats seldom won office, they did have a power base, especially in the immigrant wards of urban centers. And they could win statewide office using labor standards as an issue. Winant's predecessor as governor, Democrat Fred Brown, had done just that in 1922 during the textile strike in Manchester. During the strike era in the four lower coastal New England states—

31. On the late 1930s, see WOOD, *supra* note 27, at 78; for other data, see A.F. Hinricks, *Historical Review of Wage Rates and Wage Differentials in the Cotton-Textile Industry*, 40 MONTHLY LAB. REV. 1170, 1173 (May 1935).

New Hampshire to Connecticut—the average Republican vote fell from 63.5 percent in 1920, to 49.6% in 1922 when they lost the Rhode Island governorship. This threat made them more willing to consider candidates who would undermine the Democratic threat, such as John Winant in New Hampshire in 1924.³² Despite this effort and with New England native son Calvin Coolidge winning a national landslide, in 1924, the Republicans only climbed back to 58.7%.³³

Republicans remained at the same point in 1926 and then fell in the Al Smith campaign of 1928. Their 1928 showing probably would have been worse had not New Hampshire Republicans run Charles Tobey, a Progressive ally of Bass and Winant. Tobey was the only one of the four gubernatorial candidates that year to get over fifty-three percent of the vote.³⁴

As the textile depression worsened with the onset of the national Depression, politicians responded in the only way they could: by looking for creative ways to address the labor standard problem. In New Hampshire, when Charles Tobey decided to take a break from government service, as Winant had in 1926, Winant came out of retirement and offered the voters a continuation of Progressive rule. He received fifty-eight percent of the vote. No other Republican gubernatorial candidate got over fifty-one percent that year. The Republicans held Rhode Island with only 50.5%. In 1932, the Democrats easily swept the other three states, while Winant handily won a third term. During the four years of his consecutive terms, Winant brought a little New Deal to New Hampshire, establishing state aid to mothers and children, financial guarantees to bankrupt local governments, and centralized poverty relief.

Winant attracted the most national attention when he took the lead in addressing the competitive labor standards problem. As one student of Winant said:

For a long time, Governor Winant sought to correct the wide variation in protective labor standards in the different states. In these states, contiguous in territory, with similar industrial developments, and with frequent interchange of workers across their borders, there were divergent labor laws affording various degrees of protection to labor and industry. Such a condition,

32. A classic defense of the value of party competition is E.E. SCHATTSCHEIDER, *THE SEMI-SOVEREIGN PEOPLE* 137 (1960); for a fuller discussion, see WALTER J. STONE, *REPUBLIC AT RISK: SELF INTEREST IN AMERICAN POLITICS* 90-118 (1990).

33. CONGRESSIONAL QUARTERLY, *CQ GUIDE TO US ELECTIONS* (3d ed. 1994).

34. *Id.*

Winant realized, hampered all fair programs and humane standards.³⁵

Supporters of interstate labor standards had long before formed a network through the American Association for Labor Legislation (AALL) and the American Bar Association to exchange thoughts on the concept. Now the Depression provided the crisis that would allow these ideas to be applied, if only an innovative politician would lead the way.

IV. THE PUSH FOR INTERSTATE AND INTERNATIONAL SOLUTIONS

A. *Interstate Compacts*

The struggle for interstate compacts moved forward with Winant's efforts to get minimum wage legislation through the New Hampshire General Court. He not only relied on New Hampshire partisans, but turned to an extensive network of scholars, activists, public administrators, and fellow politicians outside of New Hampshire. Among the scholars, he relied on those linked to the AALL and the Consumers' League. Thus, he tapped into a rich mine of information on interstate cooperation or uniformity in law.

As early as 1889, the American Bar Association had appointed a committee to study interstate legal uniformity, and the following year New York passed legislation to appoint commissioners to seek the same goal. Beginning in 1892, the annual Conference of Commissioners on Uniform State Laws met at the site of the ABA convention. In 1912, all the states sent representatives to that conference for the first time. Three years earlier the Bar Association had drafted a common child labor law as a way of launching the uniformity process in labor legislation. That same year, Ernest Freund, of the University of Chicago Law School and president of the Illinois AALL affiliate, published a study in *The Survey* alerting readers to the potential of the "interstate compact" wording in the Constitution.³⁶ Samuel Lindsay, who taught social legislation at Columbia University, explored the idea further in an article called "Reciprocal Legislation." He emphasized that the states could create common laws to solve social problems when the courts prevented Congress from passing a single federal law.³⁷

35. Knepper, *supra* note 9, at 72-73.

36. Ernest Freund, *Can the States Co-operate for Labor Legislation?* THE SURVEY (June 12, 1909) at 409-11.

37. Samuel McCune Lindsay, *Reciprocal Legislation*, 25 POL. SCI. Q., 435-57 (Sept. 1910).

From this interest, various intergovernmental organizations emerged that promoted the movement. For example, in 1926 interested officials founded the American Legislators' Association. Closer to the textile problems of New Hampshire, in 1925 Bass helped create the New England Council to address the common economic concerns of the region. Winant joined and described the Council as "an example of a useful type of regional organization. . . . Through it the six governors are called together frequently . . . to discuss problems that affect the people of their states." He warned, however:

We are too prone to imagine that a form of government set up more than a century ago will, without any effort on our part, automatically meet all the changes that have taken place in social and economic conditions. . . . If you want to hand to posterity more than debt, if you want to maintain the American ideal of government, it will be necessary to do something about this problem of efficiency and coordination and cooperation, this problem of the mechanics of government.³⁸

While Winant was not the original or leading thinker on interstate cooperation, he and Bass provided key leadership to the effort and were among the first to try to move from theory to practice, and from region to nation and beyond. They began with the New England Council, and then Winant sent staff to national groups, such as the Conference of Government Labor Officials.

While he prepared his next move, others also sponsored interstate meetings to address specifically the labor standards problems in America's industrial heartland. Franklin Roosevelt called an informal conference of governors to discuss unemployment, which Winant attended along with the governors of Ohio, Pennsylvania, New Jersey, and other New England states. University of Chicago economist Paul Douglas provided the expert leadership, while FDR served as host. It was at that meeting that FDR and Winant began a personal acquaintance, which soon blossomed. A few months later, Pennsylvania Governor Gifford Pinchot hosted the Eastern Interstate Conference on Labor Legislation, which adopted a number of very specific suggestions for common laws on worker's compensation, child labor, and occupational health. After a delay during the election campaigns of 1932, Governor Joseph Ely of Massachusetts hosted the next meeting in January 1933.³⁹

38. John G. Winant, *Perils and Possibilities of Our Government by the People*, 8 STATE GOV'T 81-82 (Apr. 1935).

39. See United States Bureau of Labor Statistics, *Interstate Conference on Labor Laws*, 36 MONTHLY LAB. REV. 537 (Mar. 1933); see also FRANCES PERKINS, THE ROOSEVELT I KNEW

The Boston meeting in 1933 marked a watershed in the movement in a number of ways. First, Winant took advantage of one of the darkest moments of the Depression to push through a draft interstate compact on minimum wages, the first specific outcome from the gatherings. Second, the meeting brought together as guest experts officials who were to play key American roles in the International Labor Organization. The opening speaker was Edwin Smith, holder of Carroll Wright's old position as Massachusetts Commissioner of Labor and Industry. Six months later Smith was to be one of the four unofficial American delegates to the 1933 annual ILO meeting in Geneva.

Smith explained that the purpose of the Interstate Conference was "to consider the possibility of united state action to bring about greater uniformity in the laws governing the hours of employment of women and minors. . . ." Using the AALL approach, he reminded the governors that the recommendations were "based on the study and experience of experts."⁴⁰ He was followed on the podium by Felix Frankfurter, then of Harvard Law School, and still a Consumers' League attorney and former supervisor of the international labor law study for the Inquiry, the academic advisory panel for the World War I peace process. Following Frankfurter, Amy Hewes of Mount Holyoke spoke. Also a member of the AALL, she had conducted labor law research for Frankfurter in preparation of the ILO constitution. Hewes was just completing an evaluation of the effectiveness of the voluntary Massachusetts minimum wage law. Then Frances Perkins spoke, still as New York Industrial Commissioner, but soon to be Secretary of Labor. Finally, there was Henry Dennison, a Massachusetts manufacturer, New England Power executive, and leader of the Chamber of Commerce of the United States. Dennison, who participated in a variety of labor standard activities, would be the U.S. employer delegate to the ILO from the late 1930s until 1944.⁴¹

With this preparation, Winant returned to New Hampshire and began to finalize the strategy to get his state to pass a minimum wage law that would spark a national standardization drive. New York's new governor, Herbert Lehman, pushed a similar bill through his legislature. Perkins dispatched future ILO delegate Mary Anderson from the Women's Bureau to provide Winant with needed information, and assigned another future ILO delegate, Grace Abbott, to launch a campaign to send word of the New Hampshire law to other

104-06 (1946).

40. MONTHLY LAB. REV., INTERSTATE CONFERENCE ON LABOR LAWS 537 (1933).

41. See SANFORD JACOBY, MODERN MANORS: WELFARE CAPITALISM SINCE THE NEW DEAL 15-28 (1997).

governors. To complete the ILO linkage to the event, Winant's minimum wage coordinator, Ethel Johnson, whom he recruited away from the Massachusetts minimum wage office, would go on to be his aide at the ILO and head of the ILO's Washington office during World War II. Of course, not all of these people were thinking of the ILO when they worked on the minimum wage project; however, it is not coincidental that only one of the identified speakers at the Boston interstate conference and only one of the people identified in the New Hampshire minimum wage law promotion in the spring did not play a role in either creating the ILO or representing the United States at the ILO.

In April 1933 the strategy to utilize the New York and New Hampshire minimum wage laws to build a national ratification effort was in place, and both legislatures cooperated. The New Hampshire Senate even passed the law unanimously. Winant signed it on April 26, 1933. Already the passage of a New York minimum wage law earlier in the month provided FDR with an excuse to send telegrams on April 11 to all of the other governors east of the Mississippi and north of the Potomac, plus the governors of Alabama and North Carolina, urging similar action. In early May, Abbott sent a new wave of letters announcing the New Hampshire act. Edwin Smith in Massachusetts, writing Perkins a few weeks before leaving for Geneva, said, "I feel that by next fall when the returns from the New York and New Hampshire experience begin to come in . . . that the chances for successfully putting through a [mandatory] minimum wage law here will be much better."⁴² Soon others agreed and, over the winter, most of the remaining northeastern states passed some minimum wage legislation. Then on May 29, 1934, commissioners from those states met in Concord and signed an interstate compact on the minimum wage.⁴³

Despite this triumph, Winant and other politicians engaged in the interstate compact fight could not remain oblivious to two important lessons from this approach to labor standards. First, it was very time-consuming to try to regulate working conditions using interstate compacts. More importantly, the compacts would be less than ideal if all states did not sign on to an agreement. The minimum wage compact of 1934, after several years of extensive preparatory work and the support of the national administration, only included states with relatively high wage rates. North Carolina and Alabama had been

42. Letter from Smith to Perkins (May 12, 1933) (General Records of Department of Labor, Office of the Secretary, General Subject File 1933-1941, Minimum Wage to National Emergency Council, Record Group 174, Box 82, National Archives, Washington, D.C.)

43. American Legislation Association, *Interstate Compact for Establishing Uniform Standards for Conditions of Employment* (1934).

included specifically in the promotion of the compact, yet neither low-wage state backed the compact.

Given these problems, Winant and Bass, working through the Brookings Institution, tried to improve the mechanism for interstate cooperation. They promoted the merger of intergovernmental interest groups, particularly the Interstate Reference Service and the American Legislators' Association, into the Council of State Governments. Winant became its first president in 1934. Meanwhile, Frances Perkins invited national labor standards interest groups to a Conference on Labor Standards in the fall of 1934. That conference turned to representatives of labor, the churches, and women's groups to facilitate follow-up conferences. One committee of the conference planned a strategy for ratification of the Child Labor Amendment. Another, including a representative of the AFL, National Catholic Welfare Conference, National Consumers' League, National League of Women Voters, and the National Federation of Business and Professional Women's Clubs, focused on state labor legislation.

Going to the heart of the opposition, they held the second conference in Asheville, North Carolina, in October 1935.⁴⁴ Yet, even with extensive preparation, eight states did not attend.⁴⁵ There seemed to be a need for another approach, and for a time this seemed to lie in corporatism and the National Recovery Act (NRA). Winant became intensely involved in making the NRA work to resolve labor issues in the textile industry. Even before the Supreme Court overturned the NRA, however, it clearly had not brought a labor standards solution. Winant and his associates looked for an alternative.

44. See Letter from John Winant President of the Consumers' League to Evans Clark of the Twentieth Century Fund (Jan. 3, 1936) (in John Winant Papers, National Consumers' League 1936, Franklin D. Roosevelt Library, Hyde Park, NY, Box 161) [hereinafter Winant Papers].

45. See U.S. Department of Labor, Division of Labor Standards, Agenda of Second Conference of National Organizations on Cooperation in the Improvement of Labor Standards. The membership in the Committee on State Labor Legislation demonstrated the faithful participation in the movement of four types of movements. Two of the five members were from women's movements: Marguerite Wells of the League of Women Voters, and Geline Bowman of the National Federation of Business and Professional Women's Clubs. Members also represented the Consumers' League, the AFL, and the National Catholic Welfare Conference; in General Records of Department of Labor, Record Group 174, Box 48. See also *Seven States in Compact on Labor Legislation*, LITERARY DIG., June 23, 1934, at 20; see also Winant's speech to the second conference, *Perils and Possibilities*, 8 STATE GOV'T 81-82 (Apr. 1935). On the work of the Massachusetts Consumers' League, see Letter to Rep. Christian Herter, Oct. 11, 1935, (in Consumers' League of Massachusetts Papers, Schlesinger Library, Radcliffe College, Box 9, File 127).

B. *From Interstate Compacts to International Treaties*

Given the difficulties with interstate compacts and the failure of the NRA, there really was only one more alternative to accepting state diversity in labor standards: accepting the ILO. While working on reciprocal state legislation in 1927, Joseph Chamberlain of Columbia University had suggested that American supporters of national labor legislation should learn about the ILO. He reviewed a number of Supreme Court decisions that recognized that treaties gave the national government powers otherwise outside its reach. He concluded:

If it is within the scope of the treaty power for the United States to enter into a Labor Convention such a convention will override the laws of any state to the contrary. Treaties have frequently had the effect of over-riding state legislation in fields which without the treaty Congress could not have entered.⁴⁶

He referred especially to *Missouri v. Holland*,⁴⁷ in which the Court in 1920 upheld the constitutionality of federal regulation of migratory birds. Such regulation had been declared unconstitutional earlier, but the courts upheld it following a 1916 treaty with Britain. If a treaty could change the status of waterfowl regulation, it could do the same for federal labor standards. To help clarify the latter connection, the academic network, which long had supported international labor standards, went to work explaining what had become obvious to Winant, Frances Perkins, and others seeking national standards.

In 1933 the American Academy of Political and Social Science invited Alice Cheyney, the ILO's Washington office manager, to edit an issue of *The Annals* on the International Labor Organization. Cheyney had Chamberlain do the piece on "Legislation in a Changing Economic World," which explicitly linked the need for interstate uniform standards of labor legislation with the work and purposes of the ILO. Cheyney herself had already written on the topic in 1930, producing under the auspices of the ILO a comprehensive comparison of American state labor laws and ILO conventions. Lest readers become bored with the specialized essays in *The Annals*, Cheyney got James Shotwell to write an essay on "The International Labor Organization as an Alternative to Violent Revolution."⁴⁸ Cheyney herself

46. J.P. Chamberlain, *The United States and the International Labor Organization*, 17 AM. LAB. LEGIS. REV. 171-75 (1927).

47. 252 U.S. 416 (1920).

48. See James T. Shotwell, *The International Labor Organization as an Alternative to Violent Revolution*, 166 ANNALS AM. ACAD. POL. & SOC. SCI. 18-25 (Mar. 1933).

wrote a shortened version of her 1930 "Comparison of [ILO] Convention Provisions with Labor Legislation in the United States."⁴⁹

One strategy for Cheyney would have been to emphasize that the ILO conventions primarily would force laggard states to improve their standards. She pointed out:

It is commonly assumed that the efforts of the International Labor Organization to effect improvement in working conditions are of only sympathetic interest to the United States. The general belief is that our working conditions are so far superior to those of other nations that any standards internationally applicable will necessarily be lower than our own.

Comparison of the standards set by our labor laws with those defined in international labor conventions does not confirm this assumption.⁵⁰

She then reviewed types of labor standards, from child labor restrictions through regulations of hours of work, days of rest, forced labor, immigrant labor, minimum wages, employment agencies, unemployment insurance, maternity insurance, and occupational health. She appealed to business, noting two benefits of the ILO. "By requiring the 'foreign' producer to meet certain conditions and assume certain financial burdens, it whittles away at whatever comparative advantage he may have By raising the standard of living . . . , it increases the potential market . . . for the American exporter."⁵¹

To test the last point, a year earlier the Rockefeller Foundation sent Carl J. Ratzlaff of Harvard to Europe to study the impact of ILO labor standards. In 1932 in *The American Economic Review*, he confirmed that ILO conventions did help raise standards in a number of countries. He therefore concluded that the U.S. should participate in the organization.⁵² As with *The Annals*, this evidence gave important academic legitimacy to the ILO among the American elite.

Other academics intensified their ILO advocacy. Samuel Lindsay, who had spent part of 1932 on the ILO staff, worked with the

49. See Alice S. Cheyney, *A Comparison of Convention Provisions with Labor Legislation in the United States*, 166 ANNALS AM. ACAD. POL. & SOC. SCI. 176-89 (March 1933) (revision of 1930 ILO piece).

50. *Id.* at 176.

51. *Id.* at 188-89.

52. C.J. Ratzlaff, *The International Labor Organization of the League of Nations: Its Significance to the United States*, 22 AM. ECON. REV. 447-61 (Sept. 1932). JOHN BRUCE TIPTON, PARTICIPATION OF THE UNITED STATES IN THE INTERNATIONAL LABOR ORGANIZATION (1959), overemphasized the certainty of Ratzlaff's findings; still it was important to get an ILO endorsement, even if supported by little evidence, in the *American Economic Review*. For Ratzlaff biographical information, see 3 WHO WAS WHO IN AMERICA, 712-13 (1963).

American Academy of Political and Social Science, of which he was an ex-President, to focus its March 1933 volume on the ILO. It was not coincidental that this was inauguration month in the U.S. A short time later, James Shotwell completed work on his more substantial two-volume history of *The Origins of the International Labor Organization*. Even before publication in 1934, Shotwell toured Washington offices dropping off copies of the proofs, overwhelming the recipients with ILO information. Samuel Lindsay, in his essay in the Shotwell book, had called the NRA "a milestone of the first importance in the history of American legislation."⁵³ With the NRA dead in 1935, Lindsay and others turned directly to the ILO to establish the labor protections they desired. They found support in an historic labor rights advocacy group.

C. *The Consumers' League*

In December 1933, the Consumers' League, bereft of leadership with the death of its long time director, Florence Kelley, and the retirement of its president, John R. Commons, invited Winant to deliver its annual luncheon speech. He praised Kelley for her "militant leadership," and then focused on the problems of interstate competition in labor standards, saying:

It has been my belief for a long time that jungle warfare has no place in modern industry. The exploitation of workers, with hours and wages as weapons in an attempt to capture markets, has been a deep underlying cause of our lack of social advance. . . .

The arguments against labor legislation within industrial states usually come from the manufacturers who argue that since 48 states comprise competing areas of free tariff and communication, it is unfair to set up in one state standards regarding wages, hours of labor and working conditions unless similar standards are set up in the other states. Hence all efforts should be turned toward uniform labor laws. . . .⁵⁴

Later in his address Winant referred to New Hampshire's problems with the textile industry and expressed hope that the NRA and interstate compacts would resolve these problems.

53. 1 THE ORIGINS OF THE INTERNATIONAL LABOR ORGANIZATION 358 (James T. Shotwell ed., 1934).

54. John Winant, Address to Consumers' League Luncheon (Dec. 13, 1933), in Winant Papers, *supra* note 44, Box 113, (on file with author).

Two days later, Rosilla Hornblower of the League wrote to Winant, saying:

It was a privilege to hear your inspiring speech at the Consumers' League luncheon last Wednesday. . . .

I am making a study, for the league, of various outstanding progressive political figures to see how they stood on social and labor legislation in the earlier years of their careers. . . . Our idea is to prove that it is no detriment to a youthful politician to champion such causes as the regulation of hours and wages in industry, old age security, the abolition of child labor, the stabilization of employment, etc.⁵⁵

Thus began the process of moving Winant from "outstanding progressive" to League president. And, given the concerns of Winant with interstate competition, it moved the League into the forefront of battles to win national labor standards. To help Winant, the League had already hired Lucy Mason, a Virginian, to take Florence Kelley's place and help confront job flight to the South.

By 1935 the NRA was unconstitutional and interstate compacts were victims of state intransigence. That year the Massachusetts League invited Robert Watt of the AFL, just back from Geneva and the ILO, to discuss the relevance of his experiences there. Watt linked the recent efforts to develop interstate agreements to protect labor standards to the ILO:

At the present time, the ILO, which I attended as A.F. of L. representative from the United States, is the Inter-State Compacts Commission of the World. It has some of the same merits, some of the faults. By and large, with 17 years experience behind it, the I.L.O. seems to function better than the Inter-State Compacts Commission meetings in which I have participated—but it has a much more difficult role to play.⁵⁶

The presentation by Watt and the agendas of Winant and Mason brought a special vitality to the Consumer's League in the mid-1930s. The program for the 1935 meeting demonstrated the new approach. Dorothy Kenyon, who had helped Felix Frankfurter prepare information on international labor standards at Versailles, spoke on the courts and labor. She helped members plan strategies to win

55. Letter from Rosilla Hornblower to Winant (Dec. 15, 1933) in Winant Papers, *supra* note 44, Box 113.

56. Robert M. Watt, address at a dinner given in his honor by the Consumers League and the Citizen Fact Finding Committee, chaired by E.A. Filene (transcript available in Ethel M. Johnson Papers, Box 1, Folder 17, Schlesinger Library, Radcliffe College, Cambridge, MA).

acceptance of the bills they sought to push through legislatures. The afternoon session focused on the use of interstate compacts to set minimum wages and regulate the hours of work. But, the ideas of Robert Watt had already won the day in the labor standards movement. Kenyon's relevance was not her legislative strategies, but her experience from Versailles.

V. JOINING THE ILO

A. *The Need for Subterfuge*

Even with the crisis of the Depression and the extensive lobbying by academics, social welfare leaders, and clergy, the American political system did not move quickly or directly to join the ILO. When the Administration decided to join in 1934, two years after President Hoover first sent unofficial delegates to Geneva, it used subterfuge to get congressional approval. FDR did not request an appropriation until months after the decision to join. The strategy included waiting until near the end of the 1934 session of Congress, in June, before requesting membership. To confirm the wisdom of the indirect approach, arch-isolationist Congressman George Tinkham of Boston objected:

[T]his is the hour and this is the time, as we near adjournment in confusion, when legislation is reported to this House which never would be reported if due deliberation could be given it. It is the spawning hour for the propagation of proposals fostered by corruption, by special interests, by foreign intrigue, and by conspirators against the public weal. . . .

[T]his resolution is not before the House in accordance with a fair interpretation of the rules. . . . There was no notification of members of the Committee on Foreign Affairs that the resolution was to be considered, a quorum was not present when the resolution was reported, and no witness appeared before the committee.

A letter signed by the Secretary of Labor . . . was sent to the committee. . . . It contains this wholly false statement: "The organization, " wrote Miss Perkins, referring to the International Labor Organization, "is not even now an integral part of the League of Nations."⁵⁷

While Congressman Tinkham may have been upset with the decision to join the ILO, Winant began to see it as the solution to the

57. 78 CONG. REC., H 12,238-39 (daily ed. June 16, 1934).

judicial barrier to labor standards. The interstate compact movement had failed because only similar states signed on to the minimum wage compact. Direct federal legislation to standardize labor standards repeatedly lost in the courts before 1937. He recognized that one possible solution was to skip beyond the federal government to international protection of labor standards through the ILO.

Two sources of information greatly contributed to Winant's fascination with the ILO in 1934. First, many social welfare reformers with whom he had worked effusively praised the ILO at the time of U.S. entry in 1934. For example, John Gavit, writing in *Survey Graphic* said,

This is what makes so momentous on the page of history the entrance of the United States at last into the International Labor Organization; more important and significant if possible than would be its entry into the League itself. For, be it remembered, the ILO was established in a time of crisis even more intense than that prevailing now. Its constitution . . . was written into the peace treaty, and opens with the pregnant statement *that permanent peace can be established and maintained only on the basis of social justice*. . . . No nation can effectively establish decent working and living conditions by itself or within its own borders. As the preamble of the constitution of the ILO puts it: "The failure of any nation to adopt humane conditions of labor is an obstacle in the way of other nations which desire to improve conditions in their own countries."⁵⁸

Whatever the accuracy of Gavit's assessment, it appeared in one of the major periodicals of social welfare. The American Association for Labor Legislation, on whose board Winant served, likewise rejoiced in U.S. membership.⁵⁹

Clearly the ILO convention ratification process provided one method around the constitutional problems of national welfare and labor legislation. It is important to appreciate how fearful Winant and other Progressives were in the mid-1930s that the Supreme Court would never validate such acts. What else could explain how so practical a leader as FDR would propose "court packing"? Winant's leadership position in this debate, for example, led to his selection by the American Academy of Political and Social Science to write the essay on the constitutionality of social security for an edition of *The Annals* devoted to "The Constitution in the 20th Century." There, Winant

58. John Palmer Gavit, *History Missing Its Cues*, 23 SURVEY GRAPHIC 438 (Sept. 1934).

59. John B. Andrews, *What Ho! This ILO?*, 27 AM. LAB. LEGIS. REV., 101-09 (September 1937), is a good example of the AALL position on ILO membership.

put forth his fears that the courts would misunderstand the relationship of the Constitution to changing economic realities, saying of the new law:

The lawyers will concern themselves with the issue of whether a specific act is in accord with the specific powers with which Congress has been endowed by a written document. But social security is more than a statute, it is a great national necessity; and the Constitution is more than an aggregate of legal commands engrossed on parchment; it is a living instrument of national government. The question is whether a great objective of national policy—the security of a people against the major hazards of modern industrial life—has, by the constitutional Fathers, been put beyond the reach of government. Such an issue belongs to public policy . . . upon it a public official, even though unlearned in the law, has a right to be heard.⁶⁰

If ratification of ILO conventions constituted a treaty under the Constitution, then Congress could pass enabling legislation, preventing child labor or providing a minimum social security system, so long as the Senate ratified the appropriate international agreement. Given this possible solution to the constitutional deadlock in the U.S., the administration and ILO supporters wanted Winant involved in the organization. Shortly after the U.S. joined, ILO Director Harold Butler visited Washington in October 1934, seeking FDR's support for appointment of an American to a leadership position in the ILO. Roosevelt, Frances Perkins, and James Shotwell naturally hit upon Winant, who accepted the appointment upon leaving office in Concord in January 1935.

B. Defining the Roles of Government Agencies

However, two fundamental legal issues arising from ILO membership needed to be addressed. First, the U.S. had to resolve the rather complex relationship between the State and Labor Departments on ILO issues. Second, the administration had not dared face the question of the relationship of ILO resolutions or conventions to the U.S. treaty process. Not wishing a fight on membership, the administration quietly pushed through the resolution to join the organization without full hearings or analysis of interdepartmental relations. As membership in the ILO began to produce substantive policy decisions, the two departments had to resolve these questions.

53. John G. Winant, *The Constitution and Social Security*, 185 ANNALS AM. ACAD. POL. & SOC. SCI. 22 (May 1936). Thomas Reed of the University of Michigan edited this volume, which appeared in 1936 during the election campaign.

The Labor Department began negotiations with the State Department about the relative departmental roles at the ILO in 1936.⁶¹ Frances Perkins initiated discussions with State as well about submitting proposed conventions for treaty ratification. Beginning in late April 1936, Isador Lubin, the Commissioner of Labor Statistics, led an unofficial discussion of treaty policy with several old Wilsonians: James Shotwell, who had directed creation of the ILO at Versailles; Joseph Chamberlain; other key Department of Labor officials; and Francis Sayre, Woodrow Wilson's son-in-law, of the State Department.

They developed three options for treating ILO conventions. First, they could be submitted to the Senate as treaties. Second, they could be sent to both houses of Congress as regular legislation. Finally, given contemporary Supreme Court attitudes towards federal labor law, they could be submitted to the governors of the states for state ratification. Lubin and his advisors recommended following the treaty option for two reasons:

- (1) We should establish the precedent of submitting conventions to the Senate so that in the event we wish to test out the treaty-making power as a vehicle for securing social legislation a definite precedent will have been established.
- (2) Under the Supreme Court rulings legislation relative to the shorter work week, the prohibition of employment of women in mines and other matters . . . do not come within the legislative competence of the Congress. To be sure, if the Senate should approve a convention and pass it as a treaty, legislation would have to be enacted . . . by both houses.⁶²

It is important to recall the context of this planning. Not only had the Supreme Court repeatedly held federal social and labor legislation to be unconstitutional, but efforts to amend the constitution to allow a child labor law had failed overwhelmingly in the previous decade. If the states would not even permit national regulation of child labor, the possibility of accepting other national standards, such as regulating hours and wages of adults, seemed remote. Yet, admittedly, many of the elite leaders of the labor standards campaign did

61. Letter from Perkins to Winant, (May 19, 1936) (U.S. Dept. of Labor, ILO Office Files, Record Group 174, Box 74); Letter from Hull to Perkins (Mar. 20, 1936) (National Archives, Washington, D.C.).

62. Memorandum from Isador Lubin to Frances Perkins on "Submission of ILO Conventions" (May 20, 1936) (U.S. Dept. of Labor, ILO Office Files, RG 174, Box 74).

not like the inexact and often crude world of popular politics and were glad to search for a solution in the esoteric world of international law.⁶³

C. Building Support Through the ILO Committee

Winant and the old elite leaders of the AALL joined together to form a new group to support the ILO. Working quietly with the League of Nations Association, they established a National ILO Committee, chaired by Samuel Lindsay of Columbia University. Other members included academics with long experience related to labor legislation, including James Shotwell, Joseph Chamberlain, Leo Wolman from Columbia, and Carl Ratzlaff of Harvard. There was also John Andrews from the AALL and Lucy Mason, the Virginian who had succeeded Florence Kelley at the Consumers' League.

In contrast to the AALL, a number of the members had specialized in international law and international relations, including Manley Hudson of Harvard and Carol Riegelman and Paul Taylor from the Carnegie Endowment for International Peace. Other experts came from the field of industrial relations, especially William Leiserson, Elmer Anderson, and Thomas Spates. Finally, the Committee included a southerner, Charles Pipkin of LSU, and a religious leader, James Myers of the Federal Council. The Carnegie Endowment headed by Shotwell provided office space at Columbia University.⁶⁴

The National ILO Committee provided powerful backing for the ILO at a time when isolationism threatened to overwhelm any American commitment abroad. To be successful in this atmosphere, Lindsay and Winant made several strategic decisions. The Committee was an elite group, but one that sought a national membership and even state and local chapters. The inclusion of Charles Pipkin was part of that strategy, although it was hard to hide the overwhelming linkage not merely to New York, but to the Upper West Side. Another strategy included separating the ILO Committee from the League of Nations Association.

The ILO Committee feared the League as an albatross around the neck of U.S. internationalism. When Winant addressed the Committee in 1935, the minutes reported:

The main point of [his] talk was that the I.L.O. and the League of Nations should be kept separate in the minds of the American people . . . He felt that there was no question but that Congress

63. On strategy, also see letter from Frances Perkins to William Phillips, Under Secretary of State (May 5, 1936) (U.S. Dept. of Labor, ILO Office Files, RG 174, Box 74).

64. On board, see Minutes of ILO Committee, Sept. 26, 1935, in Winant Papers, *supra* note 44, Box 169.

approved the resolution on the I.L.O. with the understanding that there would be no commitments with the League.⁶⁵

And of course, he was correct. American membership in the ILO was a remarkable achievement, given that the U.S. never even joined the World Court. Considering U.S. exceptionalism in social welfare policy, participation in the ILO was little short of miraculous.

Mindful of this, the Committee focused on a cautious public education strategy and not a mass public propaganda campaign. It avoided any publicity that might be designed to promote U.S. cooperation with the League. This caution was easy to criticize. John Andrews has been attacked for failing to lead the AALL to reach out to a wider public, allegedly because of his comfort in working with academic and social welfare experts.⁶⁶ Yet, his was a reasonable approach given exceptionalism.

Understanding popular xenophobia, the leaders of the ILO Committee copied Andrews' general approach. Winant called for reaching out to "State Labor Commissioners . . . and educating the proper people."⁶⁷ Andrews proposed ranking the goals of the Committee to "first, increase the number of influential citizens who know about [the ILO]."⁶⁸ Winant, Lindsay, and Andrews did want to reach out to the general public eventually, but their strategic priorities probably were correct. Any mass ILO support group in 1935, even if it would have been possible, would have been an ephemeral movement among the mass of American workers. Rather, good education extolling the value of labor internationalism could build the solid support for the ILO that would sustain American involvement.

In 1935 support for joining the ILO came primarily from those concerned with the problem of the judicial veto of national labor legislation. Thus, the ILO committee intensified efforts to understand and promote the use of the treaty power to bring standards. The committee sponsored two efforts to address this need. First, in 1935, Spencer Miller, who served both as one of the labor representatives on the committee as well as Episcopal Church liaison to the labor movement, chaired a week long conference on the ILO at the University of

65. Minutes of the I.L.O. Committee, Sept. 26, 1935, in Winant Papers, *supra* note 38, Box 169; see also Proposed Program of Work for the National I.L.O. Committee 1935-36, in Winant Papers, *supra* note 44, Box 169.

66. THEDA SKOCPOL, PROTECTING SOLDIERS AND MOTHERS: THE POLITICAL ORIGINS OF SOCIAL POLICY IN THE UNITED STATES 198-204 (1992), in discussion of national health insurance campaign of the AALL, points out that the leadership did not like appeals to popular support, preferring elite lobbying.

67. Minutes of the I.L.O. Committee, in Winant Papers, *supra* note 44, Box 169.

68. *Id.*

Virginia attended by 350 academics, employers, and labor leaders. Not only did the Committee sponsor the conference in the South to reach out beyond its base, it also published under Miller's editorship the key papers, entitled *What the International Labor Organization Means to America*.⁶⁹ In the introduction, Winant captured the essential goal of American membership, reminding readers:

One of the hardest tasks of the International Labor Conference is to build up standards in countries that we might describe as backward. A thing that is of particular interest to all countries of the world is relative standing. That is particularly true when we are dealing with world markets. We find right here in the United States that competition can be so severe that it is destructive of capital, of profit, and of human beings, and just as men here fight to maintain these standards, so it is necessary that we use our influence to maintain world standards. That is the major function of the International Labor Organization.⁷⁰

In addition to the Virginia conference and Miller's book, the Committee sponsored specialized studies. The executive secretary of the Committee, William Lonsdale Tayler, wrote specifically on the major American problem with ILO standards, in *Federal States and Labor Treaties—Relations of Federal States to the International Labor Organization*.⁷¹ As he said to Winant,

I have come to the conclusion that the treaty-making power of the Federal Government is broad enough to enable the United States to ratify the Labor Conventions thereby assuming an active role in the ILO. Once the Labor Conventions are ratified, it necessarily follows that the Government would have power to pass legislation effectuating the treaties.⁷²

While the Virginia conference was a strategic success, the Committee faced a problem in finding diversified support for ILO membership. Business interest was declining and more often only labor and the churches actively backed U.S. participation. Spencer Miller's role in linking the church and labor symbolized what was to become a distinctly American base of support for the movement. Business opposition was also soon to be peculiarly American.

69. WHAT THE INTERNATIONAL LABOR ORGANIZATION MEANS TO AMERICA (Spencer Miller, Jr., ed., 1936).

70. John G. Winant, "Forward," in WHAT THE INTERNATIONAL LABOR ORGANIZATION MEANS TO AMERICA, *supra* note 69, at xii.

71. WILLIAM LONSDALE TAYLER, FEDERAL STATES AND LABOR TREATIES (1935).

72. Letter from William Lonsdale Tayler to Winant (Jan. 15, 1936), in Winant Papers, *supra* note 44, Box 169.

The late 1930s proved a good time to address the legal issues relative to the ILO. As Daniel Patrick Moynihan observed, in that era American business did not have the nearly pathological fear of the ILO that surfaced after 1945.⁷³ Soon international crises and then World War II distracted American ILO policy. In 1944, at the Philadelphia Conference, the ILO's purpose to protect fundamental labor rights and to control the worst features of laissez faire were triumphantly reaffirmed. Labor was to be a sacred part of the human experience, freed of market forces, its dignity to be protected by all nations. Unfortunately, the Administration did not take full advantage of the ILO honeymoon.

VI. THE POSTWAR ANTI-ILO REACTION

Once World War II ended, opponents of labor's special status and of the ILO as its protector emerged both in the Communist bloc and, especially, in the United States. A large segment of the American business community, supported by sympathetic lawyers, economists, and other academics prepared to confront the use of the ILO to bring European-style social democracy across the ocean. That the U.S. refused to ratify any ILO conventions from the end of the war through the late 1980s demonstrates their success. Yet, perhaps this opposition also teaches an important lesson for the new century. Winant saw ILO standard setting as a way around the exceptional American opposition to meaningful legal protections for the dignity and rights of labor. The extreme and steadfast opposition to the ILO among many on the American right may provide the best proof that he was right.

The industrial opposition to the ILO after World War II was part of a more general business assault on labor rights and social welfare ideas. Domestically, it included public education and employee training in free market liberalism, opposition to extensions of the welfare state, especially national health insurance, and restrictions on labor rights, symbolized by the Taft-Hartley Act.⁷⁴ Opposition included aggressive use of the courts to restrict the rights of workers through interpretation.⁷⁵ Reinforcing these efforts was the general mobility of capital, slowly to the South in the early postwar years and later off shore. The strategy halted the expansion of the New Deal

73. Daniel Patrick Moynihan, *The United States and the International Labor Organization, 1889-1934* 335 (1960) (Ph.D. dissertation, Fletcher School of Law and Diplomacy).

74. ELIZABETH A. FONES-WOLF, *SELLING FREE ENTERPRISE: THE BUSINESS ASSAULT ON LABOR AND LIBERALISM: 1945-1960* (1994) (although I would maintain the assault was from a liberal free market perspective).

75. Robert M. Smith, *Using Knowledge Rather Than Goons: Modern Antiunion Agencies, 1956-1985*, 28 MICH. ACADEMICIAN 401-18 (1996).

welfare state and of organized labor, and began to turn back both. Politically, this process began with conservative victories in the 1946 elections. It moved forward, especially with regard to labor, as a result of McCarthy era charges of widespread Communist influence in unions. In the longer run, union vigor suffered from the economic complacency during the postwar economic boom and from divisions within the labor movement. Consequently, the era witnessed a remarkable return to popularity of classical liberalism.⁷⁶ This triumph brought an end to efforts to utilize the ILO to overcome American policy exceptionalism.

Postwar business leaders included an effective attack upon the ILO in the business press and among academics linked to business. The National Economic Council, a well-funded right wing business lobbying group, played a leading role in the education effort.⁷⁷ Especially under the leadership of Merwin Hart in the late 1940s, the Council focused on the ILO as a threat to free enterprise. Hart, who had been a leader of right wing causes in the 1930s and early 1940s, used the *Economic Council Letter* to attack the ILO. In October 1948, for example, he devoted the issue to the ILO and titled it "World Government—By the Back Door." He warned readers that "This Letter is one of the most important NEC has ever published. We therefore offer to send each subscriber up to five copies upon request . . ." ⁷⁸ The following month the letter specifically attacked the general leftward trend of the labor movement and the ILO "since 1919" and of the planned use of the ILO to override the Supreme Court. He warned, "[The] ILO has aptly been described as 'the 'UN' of all do-gooder activities pertaining to world totalitarianism.'" Focusing on David Morse, the American head of the ILO, Hart accused him of having presided over the American Military Government (AMG) in Germany at precisely the time "of the Stalinist influx into AMG." What especially disturbed Hart and his allies was the very issue that had made Winant and others first interested in the ILO, that ILO conventions, if ratified as treaties, would supersede constitutional barriers to federal social policy. Hart saw, "The cloak of legality for this conspiracy is a clause in the Constitution . . . which obviously was never intended to be used as the international leftists

76. See, e.g., RICHARD FRIED, NIGHTMARE IN RED: THE MCCARTHY ERA IN PERSPECTIVE 99-103 (1990).

77. See *High Lobby Costs Told to Congress*, N.Y. TIMES, June 6, 1954, at 55, which reported it among leading lobbying organizations in Washington, based upon amount spent on lobbying.

78. National Economic Council, Inc., *World Government—By the Back Door*, ECON. COUNCIL LETTER (Oct. 1, 1948).

are attempting to use it now."⁷⁹ The rightists then began an effort to amend the Constitution to limit the treaty power.

The primary reason for business opposition to the ILO was the specific ILO conventions, especially those related to women, forced labor, and health insurance, finalized in the period before 1954. At various times in the era, American business focused on those conventions dealing with women's equality, maternity and child allowances, guaranteed health insurance, and forced labor.⁸⁰ From its founding the ILO had as a fundamental principle equal pay for equal work, and it added maternity protections in one of its first conventions in 1919.

In the postwar era, however, the ILO went beyond general principles to define special protections for women and children. In 1946 three conventions dealt with the medical examination of youthful workers and restricted night work for minors. In 1948 came restrictions on night work for women. While the U.S. did not ratify these conventions, they did not cause much of a stir among business leaders compared to what was to come. In 1951 Convention 100 called for equal remuneration for equal jobs. The following year, Convention 103 guaranteed pregnant women twelve weeks of maternity leave and at least six weeks of postmaternity leave. While on leave, women were "entitled to receive cash and medical benefits," and the cash should be "sufficient for the full and healthy maintenance of herself and her child in accordance with a suitable standard of living."⁸¹ As with the other conventions of the era, the U.S. refrained from ratification, but now the business community was not just upset, it was frightened.

To make matters worse, there were Conventions 87 and 98, passed in 1948 and 1949, asserting the right of workers to free association and to organize. At the same time that American business was succeeding in getting the Taft-Hartley law at home, it seemed the ILO might be undermining regulation of labor unions. Charles McCormick, of the Baltimore Spice Company, led the new business approach at the ILO after he became employer delegate in the late 1940s. He said of Convention 98, "If this convention had been submitted to the Senate and ratified, the conflicting sections of the Taft-Hartley law would have been nullified automatically (as would many state statutes). The House of Representatives, in which support for

79. National Economic Council, Inc., *ILO Rides Again, for More World Government Over USA*, ECON. COUNCIL LETTER, 1-4 (Nov. 1, 1948).

80. See, e.g., *Socialistic Blueprint for Security to be Supported by U.S. at ILO*, NAT'L CHAMBER WASH. REP. (June 13, 1952) (George G. Higgins Papers, International Labor Organization Series, Catholic University of America Archives, Washington, D.C.).

81. International Labor Organization, Convention 103, June 28, 1952, Art. 3 and Art. 4.

the Taft-Hartley law is especially strong would have had no voice in the matter."⁸²

Finally, there was the Social Security Convention passed in 1952, which committed any signatory to minimum universal health benefits. The AMA and insurance industry joined with other business lobbyists to oppose this commitment. What upset McCormick about this convention was the process for approval in Geneva. "[T]he two most influential delegates in the conference, our government delegates, voted along with the U.S. worker delegate and the Socialist majority . . ."⁸³ This was the era before most Communist governments had joined the ILO. McCormick's Socialists were the delegates from Western Europe. During this era American business was not at war simply with communism; the distinction between communism and social welfare democracy was a matter of concern for labor and other western opponents of liberal materialism.

When McCormick discussed his opponents in the ILO it was as if he was referring to Communists. For example, he claimed, "[A]s the ILO has pushed further and further into controversial economic and social matters, the sessions have become more and more a battleground for a continuing struggle between the two powerful ideologies of the West—free enterprise, and Western European Socialism."⁸⁴ Writing in *The Nation's Business*, he complained that "the ILO has yet to show genuine admiration for the way of life which has given America's 150,000,000 citizens the highest standard of living the world has ever known."⁸⁵ This was no longer an era when American business and labor shared a common view of the world. Now, anyone not for the classic free market was the enemy, and in the spirit of the McCarthy era, implicitly a Communist ally.

McCormick raised in a more credible way than had other business leader the fear of getting social welfare reform through the treaty power. The awareness of this danger he traced

[to when] a joint committee of the U.S. Chamber of Commerce and National Association of Manufacturers—discovered that the ILO was no longer simply a standard-bearer for the smaller, underdeveloped nations. It had emerged as a gushing fountain of statist social and economic schemes, which aimed at higher

82. Charles P. McCormick, *ILO—A Body That Might Make America's Laws*, USA: THE MAGAZINE OF AM. AFFAIRS, Mar. 1952, at 88.

83. *Id.* at 87; see also Editorial: "Can't Public Members Represent the Public?" SATURDAY EVENING POST (July 12, 1952).

84. McCormick, *supra* note 82, at 86.

85. Charles P. McCormick, *We're Using the Socialist Soapbox*, 50 NATION'S BUS., Mar. 1952, at 43-45 and 78-79.

living standards through more and more government decree rather than by more and more production.⁸⁶

As this argument circulated repeatedly through business attacks on the socialistic ILO, it became linked to the efforts to ratify the proposed Bricker Amendment, which would have weakened the impact of treaties by making them effective only when in full accord with existing U.S. law.⁸⁷ McCormick wrote in 1952 in the *Nation's Business*, "[Employers feared] a vote-conscious prolabor Administration might seek to by-pass an unsympathetic Supreme Court with an ILO convention."⁸⁸ In addition to coverage in the popular business press, the issue received more thorough legal consideration in a research report sponsored by the American Enterprise Association (AEA). The report related the hearings for the Bricker Amendment to the ILO, concluding, in the words of future Secretary of State John Foster Dulles, that the amendment was necessary to protect "the rights given the people by their Constitutional Bill of Rights."⁸⁹

Only with the neoliberalism of the last decade, as global economic competition threatened to reward those who race fastest to the bottom in labor standards, locating production in nations with the weakest labor protections, have the arguments of Dulles, McCormick, and Hart been overcome. After years of refusing to ratify even the convention banning forced labor, the U.S. has ratified a few ILO standards.⁹⁰ Most importantly, in June 1998 the U.S. business delegate led support for global enforcement of core labor standards.⁹¹ A corrective for the failure of the World Trade Organization to effectively link trade and human rights policy, the ILO's Declaration of Principles may signal the realization of Winant's dream, if a half century late.⁹² That this movement has been led by a new cohort of international human rights lawyers is especially heartening and may also sig-

86. *Id.* at 44.

87. *Let's Look Before We Adopt 'Em*, 51 NATION'S BUS., June 1953, at 98 (editorialized especially against the maternity protections that might be imposed by the ILO).

88. McCormick, *supra* note 82, at 44.

89. LEONARD J. CALHOUN, THE INTERNATIONAL LABOR ORGANIZATION AND UNITED STATES DOMESTIC LAW 48 (American Enterprise Association, 1953) (the American Enterprise Association later became the American Enterprise Institute).

90. See Stephen I. Schlossberg, *United States Participation in the ILO: Redefining the Role*, 11 COMP. LAB. LAW J. 48-79 (1989).

91. See International Labor Organization, International Labour Conference, Report of the Committee on the Declaration of Principles. Discussion in Plenary, 86th Session, June 1998.

92. See Steve Charnovitz, *Trade, Employment and Labour Standards: The OECD Study and Recent Developments in the Trade and Labor Standards Debate*, 11 TEMP. INT'L & COMP. L.J. 154, 158 (1997).

nal a new emphasis in the legal profession in defining both the international and domestic meaning of the dignity of labor.⁹³

93. Consider the creation of human rights centers, such as the Schell Center at Yale Law School and the work of the American Bar Association's Section of International Law and Practice, which in 1996 passed a resolution urging "accelerated progress . . . toward ratification of . . . ILO conventions on human rights . . ." 30 INT'L LAW. 653 (1996).