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Senator Walsh
as Revealed through
Labor Legislation

by

W. G. Durrer

Presented in partial fulfillment
of the requirement for the degree of
Master of Arts

Montana State University

Approved:

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of Examiners.

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Preface

The purpose of this thesis is twofold. First, it is intended, as nearly as possible, to give an account of Thomas Walsh's activities in the Senate with regard to labor. In the second place, an attempt has been made to discover Walsh's primary motives for acting as he did, in view of the fact that some questions have been raised regarding this. For example, one source[↙] states that Walsh was always to be found on the progressive side of debates, while another cautions that it must always be remembered that he was a strict constitutionalist. It is desired, then, along with bringing out other attitudes, (i.e. those concerning labor directly,) to reveal how great a role those factors of constitutionalism and progressivism played in determining Walsh's decisions pertaining to labor legislation. For these reasons, mention has not been given to Walsh's labor activities in their entirety, but only to those instances which would more or less lend themselves to such interpretation.

The first chapter of this work is simply a general survey of Walsh's life. In view of the fact that little has been written on the life of Thomas Walsh, it was felt that the addition of such a chapter would lend to the work a more vital quality than it might otherwise have had.

I

Life of Thomas Walsh.

Early Life.

In order better to understand the progress, character, and achievements of Thomas Walsh it is necessary to look briefly at the progress, character, and achievements of his parents--for here, as in the life of every child, the subtle influence of environment played its part.¹

The father of Thomas Walsh, Felix Walsh, was born in 1821 in County Armagh of North Ireland. At the age of twenty-three, he emigrated to Canada where he made his home for a year. From Canada, he moved to Michigan, and from there he went to Two Rivers, Wisconsin, the little village which became his permanent home. Like her husband, Bridget Comer Walsh had, also, in her youth, emigrated from Ireland and settled in Canada. In 1852, two years after Felix had gone to Wisconsin, she, too, moved to that state. It was a year later that she and Felix met for the first time, the place of their meeting being Manitowoc Rapids, Wisconsin. Not long after that they were married.²

1. Joseph Schafer, "Thomas Walsh, A Wisconsin Gift to Montana," The Wisconsin Magazine of History, (June 1940), XLIII, p. 449.

2. Ibid., 449.

Felix has been described as " a gentleman of the old school"--a man whose character was such that young men, when in his presence, put on their "best manners." He was raised a Catholic among the Protestants of North Ireland, though this never affected his feeling for his own faith, to which he remained, all of his life, loyal and firm. Yet, because he did live in the midst of Protestants, devout Catholic that he was, he was anything but intolerant in his outlook. Felix grew to have an insight into the characters of men and women of different faiths, and from his insight was born, not intolerance, but a gentle understanding such as neither confirmed Catholics nor Protestants could gain in their religious isolation. Felix had come, while holding the offices of justice of the peace and city clerk, to be regarded as a sort of tribune of the people, "a sage and councilor whose services were freely at the disposal of his neighbors."³

Felix was not a member of the aristocracy. His was a family of skilled artisans, his father being a weaver, though to some degree, as Schafer writes, he

3. Schafer, op. cit. p. 449.

had mechanical ability.⁴ In 1870, Felix Walsh was described as a laborer. However his labor for hire was performed in the woods as a logger, and, when not so engaged, he worked in the streams as a raftsman. Apparently such skilled labor commanded good pay. Felix never worked in a factory or in a mill, nor did he allow his children to do so. And, in order that the good and healthy life close to the soil be not unknown to his family, he bought thirty acres of land near the edge of town. On this land he and his sons worked. In a word, the life of the Walsh family in Two Rivers "represented the kind of village life so typical to New England--a blend of town and country with a maximum of the advantages of both and a minimum of the evils of either."⁵

Thomas Walsh, the second son and third child of Felix and Bridget Comer Walsh, was born on June 12, 1859, at Two Rivers, Wisconsin. His early childhood was apparently uneventful, for little of it seems to be known except for the fact that he was especially fond of base-

⁴. Schafer, op. cit. p. 450. Felix knew the art of weaving. In his youth, he had served his apprenticeship in the home of a Methodist family. While in the home of these people he became well acquainted with the Bible. Schafer writes that he even learned many of the verses by heart.

⁵. Schafer, op. cit. p. 450.

ball, and that at the age of fifteen he undertook the job of city lamplighter for the sum of eighty dollars a year.⁶ Tom's father sent him to the Protestant school, and so diligent and scholarly was he that by the time he was sixteen he, himself, was ready to teach school.⁷

So intent was young Thomas to do well as a teacher that he spent long hours of individual and intensive study in order to master the work which would be necessary before he could get a higher certificate. Thus, despite the fact that he could not go on to school, it was not long before he had advanced to a first grade certificate. But still he was not satisfied; he wanted an unlimited certificate. So, after making what he considered adequate preparation, he went to Madison in the summer of 1881 to write for such a certificate.

It was, indeed, a red letter day in Walsh's life when he attained that for which he had worked so hard.

6. In 1876, Thomas Walsh organized the Centennial Baseball Team. Louise Pearson Blodget, Dictionary of American Biography, XIX, p. 393.

7. Besides being tolerant, local conditions might have had much to do with Felix Walsh's decision to send his nine children to the Protestant school. The parish being mostly German, the parish school was in the hands of a German priest and much of the instruction was in German, a circumstance not pleasing to the Irish families. Schafer, op. cit. p. 450.

Schafer writes that Walsh's sister, Mrs. Wattawa, told of the day when their mother, she, and Thomas were walking in the vicinity of the postoffice, and her brother left them to see if there was any mail. A few minutes later he rejoined them, waving the document in the air; he called out, "Mother, I have it!" Walsh, according to Schafer, was more proud of this achievement--gaining an unlimited certificate without so much as taking a single college course--than he was of almost any other aspect of his young life. He kept the diploma throughout his life, along with that which he received when he graduated from the law school at Wisconsin.⁸

Having his unlimited certificate, Thomas Walsh was now ready to teach as the principal of a state-aided high school, and that same year he received such a position at Glenbeulah, when he was made the sole teacher of forty-five pupils and earned a salary of \$495 a year. For one year he held this position before going on to a better one at Sturgeon Bay. Here, with the aid of a woman assistant, he taught and supervised the instruction of eighty children--all this for a salary of \$630 a year.⁹

8. Schafer, op. cit. p. 435.

9. Ibid., 455.

Thomas Walsh, now more or less independent and eager to take up the study of law, went to Madison in the fall of 1883 to enroll in the law class at the University.¹⁰ While Thomas was obtaining his training at Madison and gaining admission to the bar, his older brother, Henry, completed an apprenticeship in law in Manitowoc. Thus both of the brothers were now ready to set out on their own. It was the custom of the time for young men to seek their fortunes in the west. Thomas Walsh and his brother started for the west accordingly. They visited a number of towns in the Dakota Territory, and in each they looked over the prospects for young lawyers who might also wish to go into politics. At Fargo they interviewed several persons. But both Thomas and his brother were disappointed when they found out about the political conditions there. According to Schafer, Walsh and his brother, somewhat discouraged, bought a few items of food, carried them in a bag to the bridge over the Red River, and there sat down to have lunch. Suddenly Henry, after gazing rather intently at the stream a few moments, asked, "Tom, does this river flow north?" Tom looked at the river and with surprise

¹⁰. Schafer writes that this was at the time when the law school was taught by local practitioners, who lectured an hour each day and prepared men who had already done some reading in Blackstone and Kent, in a single year for beginning practice. op. cit. p. 454.

in his voice, replied, "I believe it does." "Well," said Henry, "Let's move on. I don't feel right about a place where the river flows north and the Irishmen vote the Republican ticket."¹¹

A short time after this incident, both of the men settled at Redfield, now in South Dakota, where Henry made his career as a lawyer while Thomas remained there for six years. W. F. Bruell, a leading lawyer in Redfield, wrote to the author that the court records show that the brothers quickly became popular. They had their share of business, indeed. Of all the important cases that came up, Thomas Walsh, it could be certain, would be found on either one side or the other.

Walsh's move to Helena, Montana, after six years in Redfield, did not come about in a search for legal employment. His work at Redfield had come to take up his time fully. Thomas Walsh, Schafer writes, went to Helena because he saw possibilities of greater things. In any event, the change was not unfortunate for either Walsh or Helena. Schafer explains that at this time mining was the principle industry of Montana. In those days, mining law was anything but a settled and easily

¹¹. Schafer, op. cit. p. 454.

interpreted system of jurisprudence. Litigation under it was notoriously abundant. Enormous values were involved and naturally the cases were contested with fierce earnestness. This, then, made just the right opportunity for a thorough student of law and a tenacious, relentless fighter like Thomas Walsh.

It is reported that one of the leading corporations devoted to mining sought to employ Walsh as its attorney at a very liberal salary. But, as Mr. Hard wrote in 1928, "You cannot make him wear any collar but his own," a statement which could have been said of Walsh at any time during his life.¹² That particular mining corporation did not get Walsh's services. He declined their offer, for he preferred to retain absolute freedom in accepting and declining cases. He sometimes acted for this company, and sometimes against it. In time, he came to be recognized as the champion of the small and struggling miner. "His office in Helena became the drafting room for labor legislation."¹³ The decision he made, not to become an attorney for the mining company, no doubt had a determining influence on his career, for in 1906 he was an unsuccessful candidate to the House of

12. William Hard, "Dry Tom Walsh," in Review of Reviews, April, 1928, LXXVII, p. 368.

13. Ibid., 369.

Representatives, while in 1910, he was defeated for the Senate. However, by making the cause of the common man his cause, he was elected to the Senate of the United States in 1912, in which body he served until his death in 1933.

Thus during his years as a lawyer in Montana Thomas Walsh was "neither the tool of money or mob,"¹⁴ and in the course of a quarter of a century this logical and persistent student made himself a lawyer who was probably second to none in sheer legal ability and legal learning. Schafer writes that Walsh's success as a lawyer was due to his studied and supreme simplicity of statement. Even the ordinary man was able to understand the principles of a case when Walsh presented them. He always emphasized right and justice as the very essence of law. His most simple sentence "had a clear ring of enlightened intention. His most brief fact was a blow and demolished, if possible, all that threatened the rights of humanity."¹⁵ "Defeat meant nothing to him in comparison to neglect of his duty. He feared the wrath of God a lot more than he did that of a lot of people--and it is no wonder that

14. Hard, op. cit. p. 369.

15. Schafer, op. cit. p. 457.

Thomas Walsh could be little scared in this world when his ultimate values were in another."¹⁶

16. Hard, op. cit., p. 369.

The Personality and Character
of Thomas Walsh.

"For many years," writes John W. Owens, "one had to guess at the appearance of Walsh."¹⁷ This was not far from wrong, for Walsh had a heavy forelock which he allowed to wander down over his forehead. He had an amazing set of aggressive eyebrows which jungled his eyes. And along with all this he wore a black mustache of incredibly voluminous droop. Thus the total effect was mystery. However, time tempered the weight of the forelock, while civilization mastered the mustache, so that eventually only the jungle of eyebrows kept one from knowing the man by the face of him.

Owens writes that the face of Thomas Walsh was the "most evenly proportioned and best balanced face, with the exception of Borah, in the United States Senate." In fact, Owens believed that Walsh's face loudly bespoke the intelligence of the man. "Every curve of the head and the face was a curve of power, and every curve matched and weighed evenly against the next curve." Going on with the description, this writer says that the full, large, handsomely-modelled skull was fronted with a forehead that required the same adjectives.

¹⁷. John W. Owens, "Walsh," in The New Republic, July 2, 1924, XXXIX, p. 152.

"There was a drop, then, to the capacious eyesockets which were filled with unusually large, bright, steely blue eyes, the eyes of a coldly intellectual Irishman. Then there was a drop to a wide, firm, rather thin-lipped mouth--and last, there was a final drop to a big, squarish, affirmative chin."¹⁸

That Thomas Walsh's personality has been described as cold and unemotional, that he has been regarded as more or less of a logic machine, is indeed no surprise. Certainly his appearance alone could have easily given that impression. Even Schafer admits this, but he did not believe that Walsh was through and through a machine, cold and unanimated.¹⁹ There is no doubt that Senator Walsh was, as William Hard describes him, "a solemn Irishman." Hard maintains that this trait of solemnity was the one outstanding trait of his Irish descent that Walsh conspicuously retained and displayed.²⁰ He writes that Walsh was the most solemn of all the statesmen in Washington who derived his descent from the British Isles. "No cynical jest, no paradox, no fling at any of the

18. Owens, op. cit., p. 153.

19. Schafer, op. cit., p. 472.

20. Hard, op. cit., p. 368.

religious contradictions of life ever passed his lips. He demonstrated all over again that a solemn Irishman is God's most solemn creation."²¹

Walsh might have been solemn, but he was not cold. Schafer writes of an incident that happened during the campaign of 1930, which in itself reveals that the soul of Walsh was somewhat warmer than many have been led to believe or think. One of Walsh's friends, a man who could not afford it, had donated fifty dollars toward the campaign fund. Not wishing to hurt his friend by returning the money, he recalled that this man had a son in college, and it was to the boy that Walsh sent a gift of fifty dollars along with a note telling him to enjoy himself with it.²²

In another place, we read that Walsh's voice was low, hesitating, and courteous. "No one has ever been^k known to interrupt Senator Wheeler successfully; but any witness, any fellow committeeman, is allowed to break in upon kindly Senator Walsh. He seems so diffident, so unwilling to hurt anyone's feelings that you feel sorry for him, a lamb in a butchers' convention."²³

21. Hard, op. cit., p. 368.

22. Schafer, op. cit., p. 472.

23. Bruce Bliven, "Wheeler's Way and Walsh's," in The New Republic, April 2, 1924, XXXVIII, p. 148.

At the time of the Teapot Dome investigation, William Hard wrote:

Senator Walsh did his duty. He looked across the table at his old friend, Doheny. He had brought him to a public confession of a public error. He did not turn his head. If he had turned it, he would have gazed with contempt at the mob of pleasure seekers who while evidence of the plundering of the public domain was being presented were not there, but who, when the blood of reputation was to flow, were present and exulting.²⁴

Perhaps as well as anyone, William Hard understood and truly evaluated the personality of Thomas Walsh. His words in this instance in no way conflict with those he wrote describing Walsh, the lawyer. Indeed, Senator Walsh did his duty, for with him it was "duty" not only first, but last and always. And there can be no doubt that statements such as the following, though true in part, can easily give an incorrect impression:

The implacability of Walsh stands him in relief among his fellows. Senators, as a rule, are amiable chaps, full-bodied, easy going, sparing of effort, tender of amenities, tolerant of their adversaries. Through this comfortable aggregation, Walsh stalks, grandly serious; always in earnest. There is something suggestive about him of the old familiars of the Inquisition; a consciousness of rectitude, unblemished with any concern with the feelings of those on the rack.²⁵

24. William Hard, "Oil Speaks," in The Nation, February 6, 1924, CXVIII, p. 133.

25. Charles Mickelson, "The Man from Montana," in The North American Review, February, 1928, CCXXV, pp. 149-156.

In 1912, Walsh entered the United States Senate, a seasoned lawyer; he needed no period of apprenticeship, and he took none. He was as much at home there as he had been in the court room. His style in the Senate was his style of the court room. Thus he indulged in no rhetorical speeches and flourishes. Of his style, John W. Owens writes:

It did and does resemble a palm tree, a stem with perfectly formed leaves branching in all directions. Each of Senator Walsh's sentences is like that, a beautiful mass of perfectly formed clauses spreading in a circle to cover possible questions from any point. These sentences are a triumph of literary and legal construction, as the palm tree is a triumph of nature.... But did you ever have any luck seeing the palm tree while trying to see and note each of its leaves?²⁶

William Hard also writes of Walsh's style:

Mr. Walsh is a man of slow, unrelenting speech. A sentence from him is like the laying down of brick after brick in a sort of verbal causeway in a deeply suspected swamp. He is not going to fall off in the swamp. Nor ... is he going to be severed from his destination.²⁷

In the Senate he was always wary, prompt, courteous, and well informed. Though his arguments were somewhat dry and appealed to the logical sense, they were, nevertheless, replete with appropriate facts having legal, social,

^{26.} Owens, op. cit., p. 152.

^{27.} Hard, "Oil Speaks," op. cit., p. 134.

and constitutional relation to the case. Here, too, he never failed to stress the ideals of right and justice.

Aside from the fact that his speeches were more often of the dry variety from the average point of view, another reason for his lack of gallery appeal was that, when talking, he seldom raised his voice. His main reason, perhaps, for not doing this was that sometimes when he did his voice, instead of coming out a great, robust roar, came forth only as a falsetto squeak. This would be reason enough to keep any man from roaring, no matter how strong his convictions on any point. Then too, we must remember that, even though Walsh might have had the voice of an orator, it is doubtful if he would have done much roaring, simply because his sense of order would not allow him to display passion or emotion. "Thus he spoke as he dressed ... so immaculately that it would have been an equal relief to have heard him split an infinitive as to have seen him without his neck tie."²⁸

28. Mickelson, op. cit., p. 154.

Walsh's Senate Career.

Characterizing in general Walsh's career in the Senate, Villard writes that it must be remembered that Walsh was a strict constitutionalist. And despite the fact that he did advocate the child labor amendment, which was something that few men of his legal training and type of mind did, Walsh was not, according to Villard, necessarily a great social reformer or even a great liberal. These moves on his part might show that his mind was not rigidly fixed, but nothing more.²⁹ However, Dictionary of American Biography states, "... he was always to be found on the progressive side of debates."³⁰ One might well wonder, in view of the above remarks, how strict a constitutionalist and how liberal a progressive Walsh was, after all. Though one might at times easily be progressive while at the same time remaining a strict constitutionalist, it does not follow that the two would always go together.

Thomas Walsh's career in the Senate was a long one, lasting from the time of his election in 1912, to the

29. O. G. Villard, "Presidential Possibilities," in The Nation, May 9, 1928, CXXVI, p. 535.

30. Louise Pearson Blodget, Dictionary of American Biography, XIX, p. 393.

time of his death in 1933. A glance at the index of the Congressional Record for any of the sessions during these years will prove beyond doubt that little went on in which Senator Walsh failed to play some role. The best that can be done here is to suggest or point out a few of the high-lights of his career as a Senator.

When the question of leasing the Alaska coal lands was before the Senate in 1914, Walsh, more than anyone else, was instrumental in forcing a reluctant majority to act on it. In fact, he made himself the champion of the bill. He followed point by point, Shafroth's, Borah's, and other vigorous and able speeches in opposition, interjecting frequent questions, some of which suggested penetrating arguments, and finally delivered a thorough speech in favor of the bill. It has been said many times that no subject, no matter how dull, no matter how complicated, was too dull or too complicated for Senator Walsh.³¹

Walsh was a devoted friend to Woodrow Wilson; he upheld the Treaty of Versailles, the League of Nations, the World Court, and the limitation of armaments.³² So

31. Schafer, op. cit., p. 155.

32. At the time of the campaign of 1916, Walsh was induced to take charge of the western headquarters at Chicago. So effective was the work he did in this capacity that Wilson later wrote him a note of praise. No doubt it was this reputation that he gained at this time, along with his affiliation with Wilson, that was responsible (contd. p. 19.)

worthwhile are Senator Walsh's words on these questions that they will bear repetition here. As late as 1928 the Senator said, with regard to the League and the World Court:

It is deeply to be regretted that it has been found well nigh, if not quite impossible to arrange a basis on which the United States may associate itself, while not a member thereof, with the League of Nations in some of its major activities for the peace of the world.... A disposition has been manifested in some quarters ... to criticize the Senate for qualifying the resolution of adherence to the protocol setting up the Permanent Court of International Justice, by Reservation five, giving to our Government the right to veto the submission to the Commission by the Council of the League of a request for an opinion on any question in which the United States has or claims an interest. That reservation represents simply an attempt to put this nation on a footing of substantial equality with every other nation having permanent representation on the Council, any one of which may at will veto such a request.... If Great Britain, France, or Italy finds that it will be in anywise embarrassed by any decision that may be made pursuant to a request from the Council, it may forestall an opinion by voting in that body against submission of the question. It would scarcely comport with the dignity of the United States to join in upholding the Court except upon a basis of equality with every other leading nation. It is, indeed, easy to conceive of questions which the United States would not care to have submitted to the Court for determination.... It is argued that the work of the League might be hampered by the exercise of the right of our country

for his being selected for the permanent chairmanship of the national convention of his party in 1920. See Schafer, op. cit., p. 461. Walsh was also made permanent chairman in 1924 and 1932. He was a delegate to every Democratic National Convention from 1908 to 1932.

arbitrarily to object to the submission of a question, but so it might be by an objection from any nation represented on the Council.³³

Walsh then goes on to say that the whole difficulty has been the product of a hopeless attempt to accommodate the machinery of the League, which was devised on the expectation that all the powers would become members, to the situation presented by the United States and Russia when they did not become members along with the rest in making the League effective. With the United States and Russia out of the League, any economic boycott would have no effect on the offending nation who could transfer its trade to the United States. Only when and if our Government consents, can an economic boycott against a nation the League wishes to punish be effective. Thus, "... the provision of the Covenant looking to the restraint of a war-mad nation by isolating it commercially is full of sound and fury, signifying nothing."³⁴

In 1929, we find Senator Walsh commenting on the election of Charles Evans Hughes to a seat on the Permanent Court of International Justice, filling the place left vacant by the resignation of John B. Moore. Mr.

33. Thomas J. Walsh, "America's Aloofness from European Politics Unmodified," in Current History, January 1928, XXVII, pp. 458-460.

34. Ibid., p. 459.

Walsh hoped that the placing of a Republican on the bench of this court would do much to allay the fear and suspicion of that party. He pointed out the fact that the Court had truly grown in the estimation of the world, that its decrees had been accepted with surprisingly little adverse criticism. "In seven years of its existence, the court has handed down thirteen judgments and sixteen advisory opinions, a record outrunning the number of cases passed upon by the Supreme Court of the United States during the first seven years of its labor."³⁵

On the matter of disarmament, too, Walsh had strong and most emphatic convictions. In 1921, he was saying, "... there is no reason why we should not at once enter into some agreement to reduce or at least limit naval construction."³⁶ He deplored the naval race in which the three great maritime nations, Great Britain, the United States, and Japan were engaged. To him it was an "awful waste," especially in view of the fact that

35. Thomas J. Walsh, "We Approach the World Court," Review of Reviews, May, 1929, LXXIX, pp. 43-46. As was typical of him, Walsh, to uphold his convictions, cited case after case that had come before the Court, besides listing other successes that body had enjoyed.

36. Thomas J. Walsh, "The Urge for Disarmament," in The Annals of the American Academy, July 1921, XCVI, pp. 45-48.

every dollar was needed to "repair the ravages of the war and to rehabilitate industry both at home and abroad."

Said the Senator:

No time should be lost in proposing to the governments of Great Britain and Japan the assembling of a conference with a view to an international agreement to bring it [the naval race] to an end. The initiative may, with entire propriety, come from us. We can open negotiations without giving occasion for the slightest suspicion that we are moved by financial distress, or for a revival of intimidations once given credence that we are too sordid to fight.... Congress should declare itself emphatically in favor of calling a conference for general disarmament.... The world's troubles would dissipate like the mist before the morning sun if we could only get rid of the armies and navies maintained for international war, the expense of which appreciates constantly and alarmingly with the development of science.... We ought not to delay a day. Every effort should be made to rouse public sentiment and to clothe it with such force that Congress cannot resist the appeal for a ringing declaration in favor of the immediate assembling of a world conference on disarmament.³⁷

For ten years, however, Thomas Walsh led a somewhat obscure and unknown existence in the United States Senate. Then came the scandal of the Teapot Dome, and Walsh overnight became a figure of national importance second to none.³⁸ The story of the Teapot Dome, it can be said,

³⁷. Walsh, "The Urge for Disarmament," op. cit., pp. 45-48.

³⁸. For an interesting account of the Teapot Dome, see Mark Sullivan, Our Times, the Twenties, chapter 15, pp. 272-349. A more detailed account is given by Werner in his book, Privileged Characters, passim.

really had its beginning when a citizen of Wyoming heard, about April of 1922, that certain oil land in his state was to be leased by the Secretary of the Interior to a certain private corporation. The citizen wrote to his senator and wanted to know why this was being done, and why, if it was, the leasing was being done in secret. After all, the government had had the lands for a good many years.³⁹ Why should it part with them now? Why were there no public biddings? Why should Albert B. Fall be doing the leasing? Didn't the oil lands that were set aside for the navy fall within the scope and control of the Navy Department?

Senator Kendrick of Wyoming finally wrote to Fall, asking him to explain the matter, but the Secretary of the Interior had little to say. No sooner had Senator Kendrick introduced a resolution in the Senate (April 15) to have both Fall and Denby, the Secretary of the Navy, come forth and clear the whole thing up, than news came out that a second lease had been made to a private corporation--the Elk Hills Reserve in California. Two days after the news of the second lease, Fall replied to

³⁹. For a history of these lands, see Sullivan, op. cit., pp. 285-286.

Kendricks.⁴⁰ In his reply, he hinted that great and important matters were involved; that that was the reason the leasing had been done in private, and that the Senate should not question an act of executive discretion. Almost everyone was willing to accept the Secretary of the Interior's explanation--that is, everyone with the exception of Robert M. La Follette. And to the older La Follette the mere fact that the explanation was plausible was not enough. Thus it was Senator La Follette who successfully pushed through the Senate a resolution ordering the Committee on Public Lands to look into the whole affair. The resolution also provided that the Navy and Interior Departments would send to the Senate all papers, documents, and other data they might have on and about the subject of the naval oil leases. Being too busy with other things to accept the leadership of the investigating committee, La Follette let it fall to none other than Thomas Walsh.

In due time, from the Navy and Interior Departments came a mountain of papers and documents to the Senate. "They made a pile of material so high that only Thomas Walsh had the mental laboriousness to scale it, and so full of winding ravines and chasms that no one but Walsh

⁴⁰. For an interesting sketch of Albert B. Fall, see Sullivan, op. cit., p. 288.

had the mental ingenuity to be able to map it and to be⁴¹ able to avoid getting lost in it." For eighteen months, Walsh lived and worked with this great mass of documents. Day after day, week after week, and month after month, he labored, accumulating his clues. Hearings and investigations were carried on unnoticed. "Not even the Department of Justice sent a representative ... reporters absented themselves, notables went to luncheon on the other side of town, and the White House was uninterested."⁴²

But all this mattered little to Walsh. He worked all the harder. Then one day, after eighteen months of hard, careful work,⁴³ the first witness was called to testify, and from the moment Walsh leaned over the table to ask his first question he became the acknowledged master of the situation. Sullivan writes:

We see tall, dignified, self righteous, a slight hurt look in his eyes, Fall on the stand. His sudden prosperity? That was made possible by Edward B. McLean. Even McLean said so. He had lent 100,000 dollars to Fall, taking his note and a mortgage on

41. William Hard, "The Man Who Blew the Lid Off," in Collier's, March 5, 1924, LXXIII, p. 7.

42. Hard, "Oil Speaks," op. cit., pp. 133-134.

43. Bruce Bliven, op. cit., pp. 148-150. "... Walsh has one priceless, incomparable qualification.... He knows all about his subject. There isn't a fact about oil or the law of oil or the history of the leases which is not instantly available in that cool, well-ordered mind."

the Fall ranches as security. It looked as though the whole bottom of the investigation had fallen out. It was so perfectly credible, just the thing McLean would have done in view of his membership in the Harding circle of which Fall was so conspicuous.⁴⁴

At this point of the investigation Walsh was advised to drop the whole thing and to leave the validity of the oil leases to the courts.⁴⁵ Instead, Walsh boarded a train and went to Florida to see McLean in person. Indeed, the bottom had not dropped out of the investigation, for that meeting of Walsh with McLean in Florida proved to be the beginning of the climax of the historic Teapot Dome Scandal.⁴⁶

From then on, after it was known that the playboy, McLean, had not been the donor of the 100,000 dollars to Fall, the proceedings of the investigation moved rapidly. In quick and natural sequence, there followed the testimony of Doheny, the millionaire oil man. "His was the tale of an old prospector's affection for his one time trail mate. It was an appealing picture with its mellowed

44. Sullivan, op. cit., p. 292, p. 303, and on.

45. Editorial, "Senator Walsh on the Oil Inquiry," in Outlook, May 21, 1924, CXXXVII, pp. 92-93.

46. Sullivan, op. cit., pp. 309-314.

reflections of the dim frontier, the soft side of a hard-boiled millionaire, of youthful companionship and poverty."⁴⁷
 The story was almost as plausible to everyone as the McLean story--that is, to everyone but Thomas Walsh. "Walsh had made his net too well and too strong. It could stand the jerks and pulls. And it did, until Fall and his associates were hauled upon the bank, sprawling and exposed."⁴⁸

In 1928, Walsh was considered by many as the ideal presidential candidate for the Democratic Party, even though he himself did not press his claims, and the honor eventually went to Alfred E. Smith. For several reasons, Walsh was considered the ideal candidate; he was a dry, his character was beyond assail, and he did have ability, as the Teapot Dome Investigation, several years before, had revealed beyond all doubt. In his article in The Forum, with regard to Walsh's candidacy, John Bruton wrote:

Walsh is preeminently fitted to bring order out of the legislative and judiciary chaos of our national life. A sane and faithful enforcement of present laws and a check on ill-considered legislation will follow his election. Walsh as a candidate will be representative of true democracy. All other candidates are considered because they advance or advocate some party policy or -ism. No one makes so broad appeal ... he has no political or sectional entangle-

47. Sullivan, op. cit., pp. 319-326.

48. Ibid., 326.

ments that would keep him from being just to all. Nothing in his many years calls for explanation or apology.... Walsh expresses the social ideals and political freedom of Jefferson. He has the crusading zeal and passion for justice and the welfare of the common people that made Jackson a national hero. He embodies the ideals and world statesmanship of Wilson. No other statesman in our national life exemplifies such a heritage of good as Walsh.... With Walsh in the White House, farm relief will be taken out of the category of jokes (legislative). He will give sympathetic aid to our basic industry. He knows that the tariff is now framed to make the farmer pay more for what he buys and receive less for what he sells.

While there was much to be said in favor of Walsh as a presidential candidate, there was the other side to be considered, too. For one thing, in 1928, Walsh was sixty-six years old, an age felt by many to be too advanced for a man aspiring to the presidency. Then, too, Walsh came from a rather unimportant state, politically speaking. Montana could lay claim to only four electoral votes. And on the whole the Democrats felt that if a Catholic were to be chosen, Governor Smith was the man for them-- Smith, who was better known than Walsh, and who also had a great record as an executive and administrator.

Perhaps the most significant objection to Walsh as a presidential candidate came as a result of the McNary-

49. John P. Bruton, "Thomas J. Walsh," in The Forum, July, 1928, LXXX, pp. 134-136.

Haugen Farm Relief Bill.⁵⁰ In The North American Review,

Mickelson wrote:

A Democrat who could have gone along with the farmers on the McNary-Haugen Bill would have been a tremendous pull in the middle west. Moreover, Walsh's own state is farm minded. It would be as radical as Wisconsin if Walsh permitted. But the equalization fee feature of the bill involved a delegation of the taxing power of Congress. Some scores of his colleagues voted for it on the theory that the Supreme Court would kill it if the President did not, and in the meanwhile, the election would have come and gone. Those farmer votes meant more to Walsh than to any other man in the Senate. And though he did have the urge to make things unhappy for Coolidge, it made no difference. There was the fine point of Constitutionality. Walsh could see nothing else and he voted "no".⁵¹

50. The McNary-Haugen Farm Relief Bill, also known as the Surplus Control Act, was passed by the Senate, April 12, 1928, by a vote of 53-33. The House passed it, May 3, 1928, by a vote of 204-121. The bill was then sent to conference and the conference report was passed by the House and Senate on May 14 and May 16, respectively. On May 23, the President vetoed the bill, and on May 26, the veto was sustained by the Senate. The purpose of the bill was to enable the farmer to market his products at an American price level, and to give him the benefit of a system similar to the protective laws that have been passed with regard to banking, immigration, or labor. A federal board was to have been created, one that was friendly to the producer. This board was to have had the power to arrange for the marketing of surpluses by co-operative associations. During any marketing period in which the board was assisting the co-operative associations to dispose or hold the surpluses, it was empowered to collect or withhold an equalization fee. This last was necessary in order that each producer might pay his ratable share of the cost of marketing the surplus, just as he would receive his proportionate share of the benefits derived from the marketing of the surplus. G. L. Haugen, "The McNary-Haugen Farm Relief Bill," in The Congressional Digest, June-July, 1928, VII, p. 192.

51. Mickelson, op. cit., pp. 149-156.

Thus it was that little came of Walsh's presidential aspirations. Had his opportunity come closer to the time when the whole nation was lauding him for his Teapot Dome investigation and before the McNary-Haugen Farm Relief Bill, perhaps the outcome would have been different.

Following the publicity that he received in 1928, at the time when he was considered for the Democratic presidential nomination, several years passed before Walsh again found himself in the public eye. This occurred in 1933, when Franklin Delano Roosevelt appointed him to serve in his cabinet as Attorney General of the United States. Roosevelt's appointment was highly praised by the press and public alike. Said one newspaper, "No one is likely to go to him in his new position looking for special favors. It would be like asking the statue of civic virtue for a chew of tobacco."⁵² And from The Nation:

The outstanding figure in the newly appointed cabinet, his nomination is the guaranty of the administration's integrity of purpose.... It is The Nation's view that the services of no senator now living, excepting only those of Norris,⁵³ have been as valuable as those of Tom Walsh.

Unfortunately, the new administration was forced to go on without the able Senator, for Thomas Walsh, while

52. Blodget, op. cit., p. 394.

53. Editorial, The Nation, March 15, 1933, CXXXVI, p. 273.

traveling from Florida with his bride⁵⁴ to attend the inauguration in Washington, died early on the morning of the second of March. Walsh's funeral was held in the Senate Chamber, and was conducted by the Most Reverend Michael J. Curley, D.D., the Archbishop of Baltimore. Walsh's was the third Catholic funeral ever to be held in the Senate. Said the Archbishop, "... he was not a Catholic in name only; he was, thank God, in the fullest sense of the word, a practical Catholic."⁵⁵

54. On April 25, 1933, Thomas Walsh had married in Habana, Señora Maria Nieves Perez Chaumont de Truffin, the widow of a Cuban banker.

55. Editorial, Catholic World, April, 1933, CXXXVII, p. 109.

II

Humanistic and Personal Attitude
of Walsh toward Labor.

In Walsh, labor truly had a champion. Always on the alert to protect and uphold the workingman's rights and privileges, he spent a great share of his public life ameliorating the plight of the wage earner. To Walsh the workingman was more than a mere cog in the wheels of industry; to him he was a human being entitled to certain rights and privileges that deserved consideration and were worthy of protection. Not only in that sense was the workingman a human being to Walsh, but he was a human being insofar as he too, like all mortals of this earth, had his share of weaknesses and frailties--weaknesses and frailties that were not always to be condemned, but more often to be overlooked and forgiven. Yet, as much as Walsh sympathized with the workingman, his sympathy always remained in the realm of practicality rather than theory.

Perhaps one of the best examples of Walsh's coming to the fore on behalf of labor, in an instance when a privilege inherently theirs as citizens of the United States was questioned, occurred when the Senate was debating a resolution which directed the Committee on Interstate Commerce to inquire into the truthfulness of the charge that

a number of the employees of the Federal Trade Commission were engaged in Socialistic propaganda.¹ From the outset of the introduction of this particular bill in the Senate, Walsh was firmly opposed to it. Perhaps his first reaction to this measure was one of surprise, mingled with a slight disgust. His words, "I am at a loss to understand how in this country, where freedom of speech is guaranteed by the Constitution of the United States ..." indicate very plainly his reaction to the idea of the Senate touching upon a Constitutional right in such a manner.²

Why the Senate of the United States "should take notice of the employment by the Federal Trade Commission of a man who professed the doctrines of Socialism" was without reason to Walsh.³ "If he is otherwise competent and able to discharge his duties, what is the difference what his political opinions are so far as socialism is concerned?"⁴ And further on, still questioning the

1. The resolution referred to here was Senate Resolution 217. For the history of the bill see Congressional Record, LIX, pt. 9, p. 9704, of the section, Senate Resolutions.

2. Congressional Record, LIX, pt. 1, p. 67.

3. Ibid., 67.

4. Ibid., 67.

Senate's power to tamper with a constitutional right, we find Walsh saying:

... the point I am making ... is that as far as I have been able to discover it is not a crime to be a socialist.... But I am at a loss to understand how in this ~~country, where free speech is guaranteed by~~ the Constitution of the United States, we can deny the right to a man to embrace or teach the doctrines of Socialism, nor can I understand how you can deny him an opportunity to seek employment in the public service because he is a socialisist.⁵

Aside from the moral nature of the measure, even from the practical aspect of it, this resolution had nothing about it to make it commendable to Walsh. That the measure might prove embarrassing to the Senate, if it did not lead them into a stone wall by reason of its impracticality, Walsh readily pointed out. "Suppose, Mr. President, we should discover as a result of this investigation, that there are indeed, a number of employees of the Federal Trade Commission who profess the theory of Socialism, what should we do about it?"⁶

During the course of the debate on the resolution, Senator Watson (Indiana) took the floor in opposition to Walsh. He stated that he had been advised that one wing of the Socialist Party of the United States had accepted

5. Congressional Record, LIX, pt. 1, p. 67.

6. Ibid., 67.

in all its implications "the most extreme Bolshevik doctrines"⁷ and was advocating the overthrow of the government of the United States by force. Then of Walsh Senator Watson asked, "Does the Senator think that it would be proper for the ~~government of the United States to~~ install voluntarily in positions of trust and responsibility men who are advocating the overthrow of the United States government by force and violence?"⁸ To this question there was but one answer, even for Walsh. For an instant, it seemed that maybe Walsh was on the wrong side of the question after all; that despite the fact that the resolution did question, and almost threaten, the freedom of speech, and even though for all practical purposes it was of little value, it did appear that the measure had reasons for its being that far outweighed those to the contrary. But Walsh was not to be snared, no matter how well constructed the loop. He conceded to Watson that there was no doubt that there were Socialists who advocated the overthrow of the government, but he also reminded the Senator that there were those who did not advocate such doctrines. Was Walsh hedging? Was he

7. Congressional Record, LIX, pt. 1, p. 66.

8. ibid., 67.

dodging in vain? No, indeed, for in a few lightning seconds, Watson's argument came tumbling about his head. Spoke Walsh, "If the resolution were an inquiry into the employment of men who, claiming to be socialists or anything else, preach the doctrines of the overthrow of the United States Government ... I should, of course, have no word of criticism of the resolution, but I call your attention to the fact that that is not the resolution."⁹

Unable to defeat the measure in its entirety, Walsh did what he could to improve it. With regard to the wording of the preamble he suggested that the words, "... it is charged that a number of employees ... have been and are now engaged in socialistic propaganda..." made the measure less acceptable than the wording of the original which read, "... there is reason to believe that ...". Also Walsh suggested that, in the second paragraph of the preamble, the word "Bolshevism" be left out, since "it is not recited in the first part of the preamble that there are Bolsheviks in the employment of the Federal Trade Commission, but only Socialists and those advocating Socialistic propaganda.

To illustrate further and prove the previous state-

⁹. Congressional Record, LIX, pt. 1, p. 67.

ments concerning Thomas Walsh and his humanistic attitude toward the working man, one should turn now to the time when the Senate was considering a compensation bill for the benefit of government employees suffering injuries in the performance of their work.¹⁰ One provision of this particular bill was that, when it was found that an injury to a worker resulted in whole or in part from the negligence of the employee, the amount of compensation due to the employee would be reduced in proportion to such negligence.¹¹ Senator Smith (Georgia) was especially enthusiastic regarding this particular provision. To him this bill was one of "the most comprehensive and philosophic and complete" measures that he had ever studied. "Our amendment contains a principle that I think ought to be in all the compensation bills, some small lessening of the compensation when the man's own negligence causes the accident."¹² That there was much to be said in favor of the bill could not be denied. Certainly it was progressive insofar as it was desired to make the measure a just

10. The bill referred to was House Resolution 15316. For the history of this bill, see Congressional Record, LIII, pt. 12, p. 317, of the section House Bills.

11. The bill provided that in any case, the total reduction in compensation would not be more than 25%.

12. Congressional Record, LIII, pt. 12, pp. 12166-12167.

one, for the quality of fairness--each man receiving compensation in the proportion that he deserved to receive it--was the very core of the bill. But progressive or not, Walsh was not to be found on the side of those favoring this legislation.

From two angles, Senator Walsh advanced his arguments against it. To begin with, Walsh pointed out that, though the bill might be progressive in theory, it would not be progressive in operation--that in the case of "exacting reparation upon the ground of the liability ... recovery is defeated almost invariably in the cases of alleged contributory negligence."¹³ So sure was Walsh of his convictions in this instance that he could not help but make the plea, "I venture to express the hope that the distinguished chairman [Smith of Georgia] will reflect further upon the provisions of the bill, and I feel entirely satisfied that the more that he give to it the more firm will become his conviction that it is unsound in principle."¹⁴ From this point on, Walsh's declarations and statements of opposition to the measure manifested immeasurably his complete understanding and sympathy with the workingman, not as a piece of machinery working

¹³. Congressional Record, LIII, pt. 12, pp. 12166-12167.

¹⁴. Ibid., 12166.

with the precision of machinery, but as a human being sometimes erring very much in precision and exactness. He felt sure that the Senator from Georgia had, in his experience, known many cases in which a man had been technically guilty of contributory negligence "when really it has been a misfortune, and that he should not be denied a recovery on that ground."¹⁵

Further illustrating his nearness to the working-man, Walsh went on to point out that there were so many things in the infinite division of labor that "go to distract his [the worker's] attention."¹⁶ A man might accidentally put his hand against a saw, or some other worker might distract him for a second or two, but long enough that an injury to the one could result. "Of course, he ought to have been attending to his duty but we are all frail, we ought not to forget it; we do not give the attention that we should."¹⁷

Not only did Walsh see and recognize the weakness of human nature, but he saw and recognized such weaknesses in varying degrees in different people, which made all the more significant the feeling, with regard to the

15. Congressional Record, LIII, pt. 12, p. 12167.

16. Ibid., p. 12167.

17. Ibid., p. 12167.

bill, that he expressed. "Some people have great power of concentration, and they are not easily diverted; others of the less strong mental make up, of the less vigorous mentality, are more easily diverted."¹⁸ And though the man was strong or weak, guilty or not guilty, of contributory negligence, it is quite evident that it was not in Thomas Walsh's heart to deny him recovery or even to limit that recovery, as the bill proposed.

Whenever the interests and welfare of labor were threatened, no matter how worthy and deserving the cause which endangered them, labor's interests came first with Walsh. Thus it was that Walsh was unable to condone the practice of some prisons which maintained their own factories and shops and consequently, along with their programs of rehabilitation of prisoners, turned out a considerable amount of cheaply-made prison goods each year. The economic effects of the convict-made goods, the cost of production of which was naturally low in competition with products manufactured by private capital, tended to

18. It is interesting to note here that at this point in his speech, Walsh was interrupted, the reason being that this bill was not to have been considered at that time. Walsh explained, "I do not intend to trespass upon the attention of the Senate today, but I was afraid I would not be here the next time the bill came up." Congressional Record, LIII, pt. 12, p. 12167.

lower prices and thus, indirectly, the effect on labor was harmful. Though there was much to be said in favor of convicts so spending their time while in prison, in Walsh's opinion the bad outweighed the good.

Toward the end of 1928, the Senate of the United States had before it a bill whose purpose was "To divest goods, wares and merchandise manufactured, produced, or mined by convicts or prisoners, of their interstate character in certain cases."¹⁹

In order to bring out more fully the stand that Senator Walsh took with regard to this bill, it will be necessary first to consider the arguments advanced by some of the other senators.²⁰ Senator Borah (Idaho) opened the debate on this particular question. In his opening remarks, he stated that he was not concerned with the economic or the humanitarian side of the measure, but that he was concerned with the question of Congress's right to pass such a law. In his talk, he pointed out the fact that should Idaho desire to ship prison-made goods to

¹⁹. The bill referred to was House Resolution 7729. For the history of it, see Congressional Record, LXX, pt. 6, p. 291 of the section, House Bills.

²⁰. For this particular part of the debate in which Walsh took part, see Congressional Record, LXX, pt. 1, pp. 864, 865, and 866.

Oregon, and Oregon did not desire to receive them, Idaho then "would be denied the privilege of the protection of the Interstate Commerce Clause of the Constitution."²¹

He called their attention to the fact that, were the goods in question of an unwholesome or injurious nature, Congress could provide for the operation of the police power within the state when such goods arrived, but that it was not contended that prison-made goods were of that nature. "If we break down that rule, then what rule can we establish and where is the line of demarcation?"²²

In opening his speech on the question of the constitutionality of the bill, Walsh stated, "I feel compelled to say a few words in justification of my vote in favor of this proposed legislation and of my conviction that it is entirely consistent with the Constitution."²³ He then went on to state that before the union was formed each of the thirteen colonies had a "perfect and absolute" right to exclude all goods produced in any other colony." However, these thirteen colonies entered into the compact of

²¹. Congressional Record, LXX, pt. 1, p. 864.

²². Ibid., p. 864.

²³. Ibid., p. 865.

the Union, and therefore the power that existed in the colonies before their union must either reside in the various States in which it had its inception to begin with, or that power must have been conferred, if not in its whole, in part, upon the government of the United States. "It is not possible that that ... power that existed in its plenitude in the colonies has gone out into thin air." In conclusion, Walsh stated that that power did not reside in the States; that everybody must know that it was not within the power of a State to exclude arbitrarily the goods of another State. "So the power must reside somewhere; and if it resides anywhere it must reside in Congress."⁸⁴

During the course of the debate, several questions were put to Walsh regarding the constitutionality of the measure. Senator Goff-(West Virginia) asked Walsh whether or not, according to Walsh's argument, he meant that Congress had the power to delegate to any State powers that were resident in itself. In view of the fact, as Walsh had explained, that the measure would simply provide that prison-made goods should not be allowed to pass into

⁸⁴. Congressional Record, LXX, pt. 1, p. 865.

any State that did not desire such goods on its markets, the question by Goff seemed a logical one. In reply, Senator Walsh stated, "That is a different thing. There is no delegation at all; the Congress of the United States says that in the exercise of its own powers it destroys the inhibition of the federal government against the passage of these goods in interstate commerce."²⁵ Walsh's reasoning in this instance is difficult to follow. However, on closer study, it is obvious that there would be in this case no delegation of power simply because no State could exclude prison-made goods of its own accord, but would first have to have the sanction of Congressional legislation. To the question of whether or not it might not be possible for a State then to instigate some very unreasonable legislation, (i.e. goods made in the night could not be sold in that State) Walsh again reverted to his argument of having faith and confidence that Congress was not likely to pass such legislation. When asked whether or not he thought that Congress had the power, should it so desire, to stop all interstate commerce among the States, Walsh replied, "Yes, I should say that under the Constitutional grant, the Congress of the United

25. Congressional Record, LXX, pt. 1, p. 836.

States could absolutely say that no goods of any kind shall pass from one State to another."²⁶ On hearing this, Senator Goff suggested that it might be well to amend the Constitution. But Walsh lightly dismissed the remark with words to the effect that that wouldn't be necessary; that the Congress could "practically ~~de-~~stroy our existence" should it abuse what powers it has.

Though Walsh was sympathetic and understanding as far as the working man was concerned, he was never so, to the extent that his emotions overruled his reason. It[↳] can be said that, when Thomas Walsh took an emotional stand for any cause, there was a basis of reason to uphold that stand. This practicality is brought out as clearly in the preceding instance as in his part in the debate on Section 18, one of the labor sections of the Clayton Anti-trust Act, which read: "No restraining order or injunction shall be granted by any court of the United States or the judges thereof ... unless necessary to prevent irreparable injury to property or to property rights of the party making the application."²⁷ The question would probably have never come up had not Senator

²⁶. Congressional Record, LXX, pt. 1, p. 866.

²⁷. Congressional Record, LI, pt. 14, p. 14532.

Pomerene of Ohio, in referring to this particular section, lamented the fact that, in this section, only property or property rights would be given protection by an injunction; that, if a person working in a plant or factory were suffering injury, that person, under Section 18 of the bill, could not be protected by an injunction. "In other words we are placing the sanctity of property rights above persons or personal rights." Pomerene continued in that same line of thought, "I cannot conceive that the Congress of the United States are [sic] going to pass a law which would protect an old barn by an injunction but would not protect men who might be employed in it."²⁸

When asked if he thought that the function of an injunction was to prohibit crime against a person, the Senator agreed that that was not ordinarily the case. Despite this admission on his part, Pomerene still persisted with his idea. We can imagine a slight undertone of exasperation in Walsh's question, "Did the Senator ever hear the expression 'irreparable injury' applied to a person?" No, he hadn't but.... Still Pomerene dawdled with the idea. Could the Senator "refer us to any case in which the expression, 'irreparable injury,' was ever held to apply to an injury to a person, and will he explain to us what

28. Congressional Record, LI, pt. 14, p. 14532.

kind of injury to a person would be denominated in the law as 'irreparable injury'?"²⁹ asked Walsh. This time there could be no doubt of his impatience with his fellow senator, for to Walsh this was purely an emotional appeal. Had Pomerene been able to cite case after case to back up his stand in this instance, had there been any logical reasoning at all, in Walsh's opinion, he would have considered the proposition. But there wasn't; it was like trying to cut down a forest with a pocket knife, so impractical did it seem to Walsh.³⁰

29. Congressional Record, LI, pt. 14, p. 14532.

30. Ibid., 14533. When the yeas and nays were taken on this amendment offered by Pomerene, there were only 13 senators in favor of it, while 43 opposed the measure.

III

Child Labor

Throughout his life Thomas Walsh was an ardent advocate of the idea that Congress should have the power to regulate and limit the labor of children under a certain age. The argument that to repose such power in the Congress of the United States would be to undermine eventually the Constitution, along with our whole democratic way of life, was a line of thought entirely foreign and incomprehensible to him. In 1924, when the Senate was debating the so-called "Child Labor Amendment," it was suggested that the amendment be amended itself, to the effect that Congress would not have the power to regulate the labor of children employed in agricultural or horticultural pursuits.¹

1. Congressional Record, LXV, pt. 10, p. 9598. The Child Labor Amendment, as considered at this time, read: Resolved by the Senate and the House of Representatives of the United States of America in Congress assembled, that the following article is proposed as an amendment to the Constitution of the United States, which, when ratified by the Legislatures of three-fourths of the several States, shall be valid to all intents and purposes as a part of the Constitution.

Section 1. The Congress shall have power to limit, regulate, and prohibit the labor of persons under eighteen years of age.

Section 2. The power of the several States is unimpaired by this article except that the operation of State laws shall be suspended to the extent necessary to give effect to the legislation enacted by Congress.

From the beginning, Walsh was thoroughly opposed to the proposed amendment to the original resolution. He commented, "We have listened to a very vigorous and eloquent argument about how legislation could be enacted which would make a criminal of a father who directed his boy of 14 years of age to go out and tend the flocks. I am not at all alarmed about that kind of argument."² From several points he then proceeded to launch his attack on the pending legislation. In the first place, it was inconceivable to Walsh that anyone would have no more faith and confidence in Congress than to think that, should it have such power over child labor, the day was not far off when a parent could be called into court for no more than, as Walsh pointed out, asking a son to tend the flock. In this connection he said, "I am going to assume that in the future, as in the past, the Congress of the United States which will be called to enact legislation will consist of men who will have some reasonable degree of common sense, and that they are not going to enact any such legislation as that."³

². Congressional Record, LVI, pt. 10, p. 10108.

³. Ibid., 10108.

Calling attention to the Senate that the State governments had always enjoyed the authority to enact child labor legislation and had never passed any law so ridiculous as that suggested it would be possible for Congress to do, should the child labor amendment pass, Walsh asked, "What is the reason for supposing that the Congress of the United States will exhibit less ordinary sense?"⁴ And again he argued to the effect that, since the State Governments had yet to prevent a man from asking his son to tend the flocks, "how can anyone conceive that the Congress consisting of representatives from all the States will so offend?"⁵

To illustrate his argument that Congress, had it such ^{← casual} power, would not abuse that power, Walsh remarked, "Why ... if we are going to hesitate to repose power in any body because that power may be abused, we shall have to stop legislation altogether. We can refer to a number of provisions of the Constitution of the United States under which, if the powers were exercised to their limit, most dangerous consequences would ensue."⁶ Walsh then

4. Congressional Record, LXVI, pt. 2, p. 1442.

5. Ibid., 1443.

6. Congressional Record, LXV, pt. 10, p. 10108.

called the attention of the Senate to several of the powers that Congress already possessed, which it could abuse if it so desired. For example, Congress, through the power of taxation, could take away all wealth. "We repose in Congress ... the power to tax without limit whatever, and, as John Marshall said, 'the power to tax is the power to destroy.'"⁷ "But," Walsh emphasized in making his point, "we do not hesitate to give it because we know perfectly well the Congress is not going to enact any such legislation." In like manner with regard to treaty-making power, the Senate and the Congress together were practically unlimited and unrestrained. Walsh asserted, "I undertake to say that the Senate and the President ... combined, could cede Montana to the British Empire and attach it to the Dominion of Canada, but are we going to deny to the President and the Senate ... the power to make treaties?"⁸ Of course not; it was illogical to think otherwise, for had not our history proved quite conclusively that fact?

However, for the sake of the die-hards who still would insist that no good and everything bad would come,

7. Congressional Record, LXV, pt. 10, p. 10108.

8. Ibid., 10108.

once Congress and the Child Labor Amendment got together, Walsh patiently pointed out that in the event that Congress should act as they predicted there was still the Fifth Amendment to be considered. "The Fifth Amendment would not be abrogated by the Twentieth." Congress would still be restrained from depriving by any law, any person of life, liberty, or property." He pointed out that the Fifth Amendment curbed Congress in much the same way that the Fourteenth Amendment did the States. "In other words, neither parents nor children will be in any more peril from inconsistent or oppressive legislation by the adoption of the Twentieth Amendment than they are now."⁹

Having then shown that the amendment to exclude farm children from the power of Congress was unnecessary by reason of the lack of logic or good common sense behind it, Walsh then advanced an argument from the practical aspect of the question. The legislation at hand was not the ordinary run of legislation. An amendment to the Constitution was under consideration--"an amendment ... which may stand for fifty years, for one hundred years, for three hundred years, or five hundred years, and who shall undertake to say that in the course of coming ages

⁹. Congressional Record, LXVI, pt. 2, p. 1442.

it may not be necessary for the Congress to legislate with regard to some aspects of farm labor?"¹⁰

In the course of his part of the debate on the Child Labor Amendment, Walsh took occasion to mention that it had been suggested that the amendment ought to be submitted to conventions called in the various States. He pointed out that in the one hundred and thirty years of the nation's existence not one amendment to the Constitution had been submitted to conventions, but that in every case the State legislatures had acted on the various amendments. Walsh wanted to know what there was about the Child Labor Amendment which "would require us to depart from the practice which has the sanction of one hundred and thirty years of experience." And further along he stated, "Nothing has transpired in our history ... to suggest that we ought to depart from the procedure that has guided us and which we have followed ever since we became a nation."¹¹ Could these remarks so literally drenched in conservatism have come from Thomas Walsh? The question might well be asked. Was the established custom so dear to him that he

10. The Yeas and Nays on the amendment to exclude farm children from the provisions of the Child Labor Amendment were: 38 Yeas, 42 Nays. Congressional Record, LXV, pt. 10, pp. 10128-10129.

11. Ibid., 10109.

would not have it changed? No, indeed, Walsh was not clinging to precedent for the sake of precedent; he was simply being practical. In the calling of conventions in the States to consider the amendment, Walsh saw simply another obstacle in the way of reform along with the unnecessary expense and confusion that would come to the various States in the matter of electing delegates and deciding when and where the convention should be held.

Despite opposition to it, the Child Labor Amendment passed with overwhelming majorities in both of the Houses of Congress during the First Session of the 68th Congress. The opponents of the Amendment, far from suffering defeat, betook themselves and their campaign to the States, and renewed and strengthened their lines of attack where they had left off when the Amendment had so successfully passed Congress.¹² Speaking in general of the opposition to the Amendment, Walsh stated, "Not a little of it consists of such palpable misrepresentation, such obvious appeals to passion.... The revoltingly sordid motives back of much of the effort to accomplish the defeat of the Amendment cannot be concealed."¹³ So well does Walsh's refutation ↙

¹² The vote in the House for the Child Labor Amendment was 297 to 89; in the Senate, 61 to 23.

¹³ Congressional Record, LXVI, pt. 2, p. 1438.

of the opposition illustrate his clear, methodical, and logical way of thinking, unbiased by prejudice or passion, backed by facts which in themselves were impenetrable to any argument, that it is worthwhile to devote time to it here. One of the stock arguments was that the whole move-^kment of government regulation of child labor was a Communistic plot; that the adherents to the Amendment were closely allied with the Russian Soviet. Walsh argued, "It cannot have escaped the notice of the most casual reader that latterly, every piece of legislation, every proposed change of policy, evoking the antagonism of big business is denounced as socialistic, communistic, bolshevistic, inspired if not directed from Moscow."¹⁴ Calling attention to the fact that the government of Russia did not come into power until 1917, Walsh stated that long before that time there had been agitation for legislation to restrict and regulate the labor of children. Having made that statement, Walsh then proceeded to prove it with as much data, as many facts, as it was possible for him to lay his hands on. For example, after citing any number of instances of child labor legislation passed by the States long before 1917, Walsh quoted from declarations of the American Federation of Labor, beginning

¹⁴. Congressional Record, LXVI, pt. 2, p. 1438.

as far back as 1881 and tracing that organization's sentiments with regard to child labor up to the present. Nor did he stop with a remark or two, or a few quoted lines here and there. He spared neither himself nor his listeners, for it seemed that no passage was too long to be quoted if it brought out a point for which he was striving.

Thus, having settled beyond all dispute that ideas of regulating child labor in the United States were far from their infancy when Soviet Russia came into being, one might naturally assume that he had done an admirable and complete piece of work. But Walsh's work in this instance was just begun. England had had quite an interesting history with regard to the regulation of child labor, and before he was through Walsh's fellow senators who were present that day were given quite a review of that legislation. Among other things, they learned that agitation to ameliorate the plight of the boy chimney sweeps had begun in England as early as 1773. From the life of the great Lord Shaftesbury, the man "who prodded England forward in that reform," Walsh read a long illustrative passage.¹⁵ And even that was not enough; he must read to the Senate selected passages from Dicken's Oliver Twist

15. Congressional Record, LXVI, pt. 2, p. 1440.

to prove that, almost a hundred years before Lenin became the God and savior of the Russian masses, there were people on this earth who agitated for the regulation of child labor. Concluding, Walsh said, "It is indisputable that the movement to prevent by law the exploitation of children in industry is world wide, long antedating in its origin the rise of communism in Russia, and in full flower and fruitage before the spread of its pernicious doctrines alarmed timid souls or afforded talking matter to hide-bound reactionaries in America."¹⁶

¹⁶. Congressional Record, LXVI, pt. 2, pp. 1442-1443. To the argument that should the Child Labor Amendment pass, Congress would have the power to limit the education of all people under 18, Walsh asked, "Would it not be perfectly absurd to imagine that the people intend to authorize Congress to prohibit the intellectual labor of such persons and thus prevent them from getting an education at all?" Though the argument was utterly without reason, Walsh went to the trouble to cite any number of instances in which the word "labor" in the legalistic sense was not given such scope as to include or embrace the field of education. See Appendix A.

IV

The Right of the Farmer
to Organize.

Exemption of Farm Organizations
from Antitrust Prosecution.

Several times during his long career in the Senate Thomas Walsh took the floor on behalf of the farmer. Though his efforts were not always understood or even appreciated, there can be no doubt as to Walsh's intentions. At the outset of his career, Walsh very clearly and succinctly stated his position with regard to farmer organizations—a position that he was to maintain throughout his life. His first speech in this connection came as a result of a Senate Amendment to a House appropriation bill, the amendment providing for the appropriation of 300,000 dollars for the purpose of enforcing the Sherman Antitrust Act. The question as to whether or not farmer or labor organizations should be included in the law designed to break corporations and trusts was debated at some length in the Senate. Very vigorously did Walsh oppose the expending of any of the appropriation for the purpose of prosecuting such organizations. Even the contention that to exclude them from the rest could be considered as class legislation, and therefore as unconstitutional, did not weaken Walsh's stand. Of course it was class legislation, Walsh agreed. There was no doubt about it. But it was

class legislation mainly in the sense that it singled out a particular class of crimes to punish, and not class legislation because it singled out a particular class of organizations to exempt from prosecution. And why should class legislation, even in this sense, be approved? Because everyone, as Walsh pointed out, recognized the fact that crimes against the anti-trust laws had not been prosecuted with the vigor their gravity required. It was also common knowledge that the perpetrators of such crimes were often men of wealth against whom the government officers had but a slight chance, were they forced to rely entirely upon the provisions made for the enforcement of criminal statutes in general. Then, too, there was usually a great expense involved in the prosecution of crimes of this particular nature. And last, as Walsh pointed out, the public suffered tremendously by the acts condemned by the anti-trust laws that had been violated. Those, then, in Walsh's opinion were the reasons that the particular legislation might be justly considered as class legislation.

But even though one might regard the legislation from the other side, and consider it class legislation in the sense that it exempted a certain class of people from prosecution by the appropriation, there was still plenty of reason and common sense behind the contention that such

organizations should be exempted. Said Walsh:

And why should they not be? Why should there be special appropriation for the prosecution of such offenders? Are they so numerous as to require some unusual and extraordinary measures for their suppression? Are the offenders so formidable as to require the employment of expensive council outside the regular aids of the Attorney General? Is there any great demand for relief from the evils coming from such organizations?¹

No indeed, the appropriation had but one purpose, and that was to arm the government in its struggle against the great industrial and financial monopolies. Surely it was obvious that:

If there were no evil to correct but those flowing from associations of laborers and farmers, we all know there would be no special appropriation in this bill directed at it. On the other hand, the appropriation would be amply warranted if the act did not reach to such organizations.²

Later, as to the question of whether or not it was justifiable to place farm organizations in a class apart from business organizations, Walsh referred to the dissenting opinion of Justice McKenna in the case, Connolly vs. Union Sewer Pipe Co., which had arisen as a result of an Illinois anti-trust statute exempting farm organizations. In his opinion, Justice McKenna maintained that

1. Congressional Record, L, pt. 2, p. 1190.

2. Ibid., 1190.

such organizations were in a class by themselves and that they did deserve different treatment under the law.³

³. Congressional Record, LXII, pt. 3, pp. 2169-2170. For the full text of the opinion as quoted by Walsh, see Appendix B.

Legalization of Farm Organizations.

At one time Walsh's efforts to come to the aid of the farmer, in connection with his right to form associations, were not only misunderstood and condemned by the farmer, himself, but were rejected by the Senate as well. This occurred when a bill to authorize associations of producers of farm products was being considered in the Senate.⁴ The main features of this bill, aside from the enabling section of the bill which permitted such associations in the first place, were, as explained by Kelley (Minnesota):

1. that such associations might have common selling agencies provided that such associations were operated for the mutual benefit of the membership thereof.

2. that no member should be allowed more than one vote despite the amount of the stock.

3. that the association might not pay dividends on the stock to an amount in excess of 8% a year.

4. that should the Secretary of Agriculture have reason to believe that such an association monopolized or restrained trade to such an extent that the price of any product was unduly enhanced, he might serve complaint upon such an association, and at the same time specify a time for a hearing.

5. that should he find that the association was guilty, he might issue an order directing it to cease and desist therefrom.

⁴. For the history of House Bill 2373, see Congressional Record, LXII, p. 13, and p. 360 of the section, House Bills.

6. that should the association neglect to do so for thirty days, the Secretary was authorized to bring suit in a United States Court against the offending association.⁵

In the main, there were two features about this particular bill which Walsh did not approve. One was that the bill authorized the formation of monopolies, and the other was that, by reason thereof, it was necessary to repose in the Secretary of Agriculture certain supervisory powers over the associations. Consequently Walsh, being the chairman of the sub-committee of the Judiciary which considered the bill as it came from the House, reported back to the Senate a bill which left out the two above-mentioned features of the House measure.⁶ The chief reason behind the legislation, as Walsh well understood, was to free such farm organizations completely from any hint of prosecution under the Sherman Anti-trust Law. Though such organizations had never been prosecuted under the anti-trust laws, there was, nevertheless, a certain uneasiness and apprehension among them in the fear that they would be. Certain unscrupulous middle-men, resentful because of the decline in their own businesses as a

5. Congressional Record, LXII, pt. 13, p. 360.

6. For the full text of this Senate Committee bill see Appendix C.

result of farmers' organizing and handling their own products, did all they could to keep the unrest and uneasiness alive by circulating rumors that such organizations were liable to prosecution under the anti-trust laws. Indeed, Walsh was sincerely back of the purpose of the legislation. His sentiments, as expressed in the midst of the debate in which he was opposing to the utmost the House Bill, prove this contention:

Of course, I understand perfectly well that I am "in bad." I am not at all in the counsels of the gentlemen who are supporting the bill. I am supposed to be antagonistic to the whole thing, and it is thought that I am merely standing up here pretending that my views are quite different from what I really entertain, and that I am conducting quite an adroit opposition to the plan of farm marketing. I had a letter from a very esteemed constituent, one of the professors of our State Agricultural College, who told me that the idea is being industriously circulated through my State. They are very fair people out there, and he wrote me for a statement of my views and my attitude with respect to the matter.

I would like to help prepare a bill, and I would like to point out to the gentlemen who are urging this measure, the perils which I think confront us, and I would like to try with them to frame⁷ a bill which would be helpful and operative.

But, despite his sincere desire to aid in the construction of such a bill, Walsh was unable to go along

⁷. Congressional Record, LXII, pt. 3, p. 2168.

with the rest on the matter of the House bill. Over and over again he tried to explain why it was unnecessary to authorize the formation of monopolies, thus making it imperative that there be some form of supervisory control over the organizations which, as has been stated, in the case of the House bill, was to be reposed in the Secretary of Agriculture. In brief, Walsh's plan was to exempt such organizations from section one of the Sherman Act which prohibited combinations or conspiracies in restraint of trade, but, on the other hand, not to exempt such associations from section two of that bill, which made it illegal for anyone to attempt to monopolize any part of the trade or commerce among the several States.⁸ Why there should be such great objection to inserting in the bill the provision banning absolutely the formation of a monopoly,

⁸. Section one of the Sherman Act reads: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is hereby declared to be illegal. Every person who shall make any such contract or engage in any such combination or conspiracy, shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by a fine not exceeding \$5000 or by imprisonment not exceeding one year, or by both said punishments in the discretion of the courts." Section two of the act reads: "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons to monopolize any part of trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by a fine not exceeding \$5000 or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the courts."

Walsh could not understand. As he explained again and again, during the course of the debate, such a ban would be of little or no consequence to the producer of the ordinary farm products, such as cereals, cotton, and livestock, since it was virtually impossible to form a monopoly in such products simply by virtue of the fact of the vastness of the United States and the differences in the growing seasons resulting therefrom. Walsh pointed out that, after all, all that the farmers wanted to do was to be allowed more complete association, without the fear of prosecution under the anti-trust laws; that they had no desire in the first place to form monopolies. The question might be asked, then, why Walsh wanted such a provision in the bill in the first place if, as he said, there was no desire on the part of the ordinary producer to form one.

Walsh's reason for wanting the monopoly-banning clause, even though the producer of the ordinary farm products had no desire to monopolize trade, and couldn't if he wanted to, was that without such a clause, it would be very easy for a few certain producers, although often producers of vital and necessary products, if they so desired, to form a monopoly. For example, this would be true of producers of such products that could only be raised in a restricted area, (i.e. the raisin growers

of California) or products that could not withstand the consequences of being transported for any great distance (i.e. the milk producers). In the case of such people, as Walsh pointed out, it would be easy to form a monopoly which, if it was desired, could raise the price of milk in a city to twenty or twenty-five cents a quart. Walsh called attention to the fact that the only people who came before the committee while the hearings were being held on the bill to object to the monopoly clause "... were representatives of the California Raisin Growers Association, a confessed monopoly, and the representatives of milk producers associations, who frankly stated their purpose to set up monopolies of the supply of milk to the great cities of the country."⁹

To the argument that something might be gained by the formation of a monopoly in the way of economies and service, Walsh was impervious.¹⁰ Several of the Senators

⁹. Congressional Record, LXII, pt. 3, p. 2157. For excerpts from the hearing on this bill which Walsh read at some length to illustrate his point, see Congressional Record, ibid., pp. 2158-2159.

¹⁰. It is interesting to note that in connection with his remarks concerning the arguments of the milk producers' advocating monopolies, Walsh stated sardonically, "The Standard Oil told us ... that instead of enhancing prices of its products, it had actually brought them down." Indeed, no good could come of a monopoly no matter in whose hands it happened to be, for, as Walsh put it, "selfishness is a trait of human nature which finds lodgment in the breasts of the rest of us. We are all of the same clay." ibid., 2159.

especially King (Utah), found themselves at a loss to understand Walsh's reasoning in this instance. In speaking on the matter, King stated:

It would mean that any of the organizations ... authorized under the law ... could conspire for the purpose of interfering with commerce, could conspire in restraint of trade, could conspire to stifle and destroy competition, and yet, unless that conspiracy ... failed to eventuate into a complete monopoly, there would be immunity.¹¹

The following well illustrates King's bewilderment in this instance:

I confess that I am not quite able to understand the position of the Senator from Montana or the morals, or the justice, or the ethics of a position which called for an abrogation of section 1. of the Sherman anti-trust act so far as it relates to agricultural associations. I have such profound respect for the judgement of the Senator from Montana that I cannot quite understand how he can justify a position of that kind in this matter.¹²

Though Walsh's reasoning might have had all the aspects of an intricate puzzle to King, Walsh himself found the whole thing quite clear and simple. He asked the Senator what would be the harm if a half a dozen cattle men in his State [King's] were to band together in an organization, chartering a train, appointing an agent to represent them, and so shipping their cattle to the East. Perhaps

11. Congressional Record, LXII, pt. 3, p. 2163.

12. Ibid., 2163.

in the other part of the State a similar group of men would be doing the same thing. "Where is the conspiracy? Does the Senator find anything wrong about that?" Walsh wanted to know. And in further explaining to the perturbed King, Walsh said, "They are going to associate themselves and set up a ... system in competition with another system." And to Fomerene (Ohio), who wanted to know what remedy would exist in the event that the associations did enter into a combination or trust that did unduly enhance prices, Walsh replied:

...it could not possibly be a monopoly because there is an express provision in the proposed act that it does not authorize the creation of a monopoly. If the absence of a monopoly is admitted, then there is competition, just as there is now; the matter is regulated by competition.¹³

Thus, as Walsh saw it, by simply not authorizing the formation of monopolies and allowing competition to work as the price leveler, the whole matter of authorizing farm associations became a simple, workable, and operative proposition. However, with the House bill, by not banning monopolies in the first place, the whole thing became quite involved and impractical in view of the fact that in some one or some group must be reposed supervisory power. Vigorously did Walsh attack this aspect of the

13. Congressional Record, LXII, pt. 3, p. 2161.

House bill.¹⁴ Aside from being unnecessary at all, Walsh found these provisions of the bill impractical in themselves.

In explaining his contentions, Walsh stated that when the Secretary of Agriculture, upon finding that a combination had unduly enhanced prices, issued his order to "cease and desist therefrom," the intention was to repose in the Secretary the power to fix prices. "But our friends who are urging this legislation say, 'That is not what it means, and if that is what it means, we do not want the bill; we do not want to give the Secretary of Agriculture any such power at all.'"¹⁵ In continuing, Walsh asked a question that he was to ask many times before the debate on the meaning of this particular section was over:

What power do they want to give him? You will search this record in vain for any explanation from any source as to what power they want to give the Secretary. The best you can get from any of them is that they want to give the Secretary the power to say that a price charged is an unreasonable price, but not to say what is a reasonable price.¹⁶

To illustrate the point that he was making, Walsh

¹⁴. For the full text of this particular part of the House bill, see Appendix D.

¹⁵. Congressional Record, LXII, pt. 3, p. 2163.

¹⁶. Ibid., 2163.

suggested the hypothetical situation of a milk producer's association unduly enhancing the price of milk in a city; if the Secretary, upon investigating and serving notice on the association, found that this was so, he would issue the order that the association should cease and desist therefrom. Walsh again asked what such an order would mean. As the debate continued, it came to light that no one knew exactly just what was meant by the order the Secretary would issue.¹⁷ If the order did mean to cease and desist from unduly enhancing the price, then the Secretary of Agriculture, despite the fact that the proponents of the bill said otherwise, had indirectly reposed in him the power to fix prices. And even if this were the right construction, as Walsh pointed out, from a practical standpoint it had no value, simply because the offending company, having received the notice, having attended the hearing, and having received the order from the Secretary of Agriculture, could simply lower their prices a half cent or less, thus making necessary innumerable repetitions of the whole procedure.

On the other hand, Walsh wanted to know what the order would mean in the last analysis if it was meant

¹⁷. Congressional Record, LXII, pt. 3, p. 2164.

that the offending association was to "cease and desist" from restraining trade or from monopolizing. If the organization were not a monopoly and were simply an organized group, then Walsh wanted to know of what value the order would be in this instance. Since the organization was not a monopoly, it would seem then that the whole thing would evolve itself back into the situation of giving the Secretary of Agriculture the power to control prices indirectly. Yet on the other hand, if the association were a monopoly unduly enhancing prices, and the Secretary, having issued his order for it to cease and desist from monopolizing, brought the organization into courts, Walsh pointed out that all the court could do would be to dissolve the monopoly; that certainly it could not fix the price.¹⁸ Having shown how very faulty the bill was in this respect, Walsh concluded with the following summary:

The conclusion I reach with respect to this matter is that the language of the bill is not expressive at all of any clear idea and that in operation, it will be perfectly nugatory. But ... if we eliminate the feature of monopoly, why should we in the future, any more than in the past, give to the Secretary of Agriculture the power to fix prices or to control the thing at all. Competition has taken care of this thing in the past. No one has been obliged to complain about these matters. No suit has ever been instituted

18. Congressional Record, LXII, pt. 3, p. 2168.

against any of these organizations upon the ground that they were inimical to the public welfare, and no one has insisted that their prices ought in anywise to be controlled. So if you simply eliminate the monopolistic feature, you do not need to repose in the Secretary of Agriculture or any other official or body any controlling or regulatory power at all. Let the ordinary rules and laws of trade govern and control the thing.¹⁹

So well had Walsh presented the case for his own bill, and torn to shreds the argument in favor of the House bill, that for a while it appeared that he would be successful in pushing his bill through, despite the condemning statement made by Aaron Sapiro, "one of the ablest authorities in the United States on co-operative marketing and legal counsel for more than fifty co-operative associations."²⁰ But such was not the case, for in his chain of reasoning Walsh had left one weak link, and because of that fatal omission, Senator Sterling (South Dakota) was able to advance the one argument that was to undermine the very foundation of Walsh's bill. Said Senator Sterling, "... after giving some further thought to this subject, my belief is that the substitute of the Senate Committee would cut the heart out of the

19. Congressional Record, LXII, pt. 3, p. 2168.

20. Congressional Record, LXII, pt. 2, p. 2058. This letter read: "The Walsh amendment ... will not give to the growers of the United States any important single thing which they do not have now in their rights, and will do definite harm to co-operation. The Walsh amendment would be a dangerous step backwards and the farmer organizations would rather see no legislation at all than such an act."

bill, would render nugatory the purpose intended to be attained by the original bill."²¹ He then went on to say that he felt that there was a close relation between monopoly or attempt to create a monopoly and combinations and conspiracies in restraint of trade; the evidence that would fit the one, would fit the other. Thus, in Sterling's opinion, farm organizations would be hindered by reason of the fact that to prosecute them one would need only to charge that they were monopolies, and the person doing so would need only to present the same evidence, had the charge been that the association was but an agreement in restraint of trade. To substantiate this contention, Sterling read from the opinion of Chief Justice White in the Standard Oil Case, in which it was pointed out that in the first section of the Sherman Act combinations in restraint of trade were forbidden because they were means of monopolizing trade, while the second section of the act made all the more complete its prohibitions by reason of the fact that it not only covered the scope of the first section of the act, but included all attempts to reach the end prohibited. The full passage, as quoted by Sterling, reads:

Undoubtedly, the words "to monopolize"

²¹. Congressional Record, LXII, pt. 2, p. 2219.

and "monopolize" as used in the section, reach every act bringing about the prohibited results. The ambiguity, if any, is involved in determining what is intended by monopolies. But this ambiguity is readily dispelled in the light of the previous history of the law of restraint of trade to which we have referred, and the indication which it gives of the practical evolution by which monopoly and the acts which produce the same result as monopoly--that is, an undue restraint of the course of trade, all came to be spoken of as, and to be, indeed, synonymous with restraint of trade. In other words, having in the first section forbidden all means of monopolizing trade--that is, unduly restraining it by means of every contract, combination, etc.--the second section seeks, if possible, to make the prohibitions of the act all the more complete and perfect by embracing all attempts to reach the end prohibited by the first section.²²

For once, Walsh had no comeback; he had made a fatal error and he knew it. Later, when Lenroot (Wisconsin) was explaining the same matter, Walsh admitted his mistake, "If the Senator will pardon me, I think the intent of the bill is perfectly plain. The combinations are forbidden by section 1. because they almost necessarily lead to monopolies."²³

^{22.} Congressional Record, LXII, pt. 3, p. 2219.

^{23.} Ibid., 2280.

V

Strikes and Injunctions.

Railroad Strikes and Lockouts.

During the second session of the 66th Congress, the Senate of the United States was considering a bill, the purpose of which was to "further regulate commerce among the States and with foreign nations."¹ During the course of the debate, in which Senator Walsh took part, there was considerable discussion on the passages of the bill which were concerned with the handling of strikes and lockouts.

Senator Stanley (Kentucky) had proposed an amendment to strike out entirely from the bill the sections dealing with strikes. The majority of the Senate was opposed to this, many feeling on the matter the same as McCormick (Illinois) that though the provisions were not all that could be asked for, still they were better than nothing. When the yeas and nays were taken on the Stanley Amendment, there were only 25 in favor of it, while 46, including Walsh, opposed the resolution. Later, Stanley proposed that only the sections dealing with the penalty to be imposed when workers failed to conform to the pro-

1. The bill referred to, was Senate Bill 3289; for the history of this bill, see Congressional Record, LIX, pt. 9, p. 9884, of the section, Senate Bills.

visions dealing with strikes, be stricken from the bill. This proposal, too, was rejected, the main argument against it being that to strike out the so-called penalty sections of the bill would leave the other sections valueless.²

Finally Senator McCormick (Illinois) offered an amendment which in effect provided that any employee or carrier subject to the bill, who should cease or quit work prior to, or within 60 days after the publication of a report submitted by the mediation board provided for in the bill, should be considered guilty of a misdemeanor, and fined. That this resolution contained elements of progressive legislation is obvious. It would seem reasonable that it would not be too much to expect a group of employees to stay on the job at least for a period of time no longer than two months while their case was in the hands of a mediation board. It was certainly progressive in view of the fact that by such an arrangement the inhabitants of a city, dependent for their daily existence on the regular operations of trains and other transportation, might be spared from facing food shortages or coal shortages.

Despite this, Senator Walsh was opposed to the amend-

². Congressional Record, LIX, pt. 1, pp. 809-814.

ment. He objected, "It is ... involuntary servitude to make it penal to foment, incite, ... or conduct a strike in violation of the final adjudication of an arbitral board." Not only was it involuntary servitude to do that, but, he continued, "it is no less involuntary servitude to make it penal in the same manner to do the same things prior to the adjudication."³ Thus it would seem that one reason for Walsh's opposition to the measure was that it denied the working man his right to quit work, whether alone or in combination with others at any time that he wished. To Walsh the so-called strike provisions of the original bill would have been far more preferable, for in those sections were to be found the words, "... nothing herein shall be taken to deny to any individual the right to quit his employment for any reason." Not only did the proposed amendment take this privilege from labor; Walsh added, "I do not believe that anyone who has given very serious consideration to the subject can doubt that it is wholly beyond the power of Congress." And in another instance, he continued, "The Senator from Illinois might possibly reframe his amendment to meet the objection, but I venture to say that as it stands,

3. Congressional Record, LIX, pt. 1, p. 818.

it cannot possibly be sustained as a constitutional enactment."⁴.

Thus for two reasons the resolution was objectionable to Senator Walsh. It took from labor the right to strike, and in so doing it was unconstitutional. Which of these objections was paramount in his mind? His reputation as a strict constitutionalist would indicate that he objected to the measure primarily on that basis. Yet, on the other hand, in view of the fact that the resolution itself was decidedly progressive, and the fact that Walsh had shown himself in several instances to be quite liberal in his interpretation of the Constitution, one might question whether the constitutionality of the measure was his chief reason for objection.

From another approach, Walsh attacked the resolution at hand. This time his criticism centered on and about the arbitral board which was provided for in the bill to settle the disputes of labor and capital as they arose. To Walsh the arbitral board represented a "fatal vice" in the plan offered by the Senator from Illinois. Walsh believed that the board called upon to settle the dispute at hand, knowing that after all was said and done a strike might still ensue, would be acting under the "greatest

⁴. Congressional Record, LIX, pt. 1, p. 814.

possible compunction to render a decision which inclines beyond what justice would require toward the demands of those who might thus have precipitated the strike."⁵ Walsh felt that under McCormick's plan the arbitral tribunal would be under exactly the same kind of compulsion that Congress had been under, at the time of the passage of the Adamson Act.⁶ Continuing, Walsh stated that, whenever the right of the laboring man to strike was taken away, a tribunal must be given him, before which he might go to be heard concerning his grievance. This being done, Walsh then agreed that the workingman ought to yield cheerful obedience to the judgment rendered. It would appear here, from the above, that Walsh was contradicting himself. However, his next statement removes any doubt or question of that sort. "But that tribunal ought to be fairly constituted. It ought to be so constituted as that there can be no doubt that justice will be done."⁷

5. Congressional Record, LIX, pt. 1, p. 818.

6. Ibid., 818. In connection with the Adamson Act, Walsh remarked that he thought the Congress of the United States was entirely justified in the legislation at that time. Said he, "It was enacted at that time not because the principle involved or the remedy it provided we deemed to be entirely just and right. There can be no doubt that many yielded their judgement, if they had any about the matter, simply to avert ... a catastrophe."

7. Ibid., 818.

The above remark the writer feels to be, in a way, the key to Walsh's entire position on the question of the McCormick Amendment. It is obvious now, though there might have been doubt before, that Walsh did approve of the theory behind McCormick's amendment. It is evident, too, that he did not oppose it purely on the ground that it was unconstitutional, though at first glance such a conclusion might be drawn. In theory, McCormick's plan was progressive, and so appealing to Walsh, but his words, "But ... it [the tribunal] ought to be so constituted as that there can be no doubt that justice will be done," prove conclusively that Walsh felt that in actual operation the plan would not have been progressive. In other words, had it been arranged to constitute the arbitral board of nothing short of heavenly beings, Walsh would, one feels, have been in favor of the amendment from the beginning to the end.

The Appointment of Judge Parker.

In 1930, Judge John T. Parker was nominated for the Supreme Court by President Hoover. This nomination stirred up a considerable amount of argument and debate in the United States Senate, in which Thomas Walsh took no small part.⁸ Senator Walsh greatly opposed the confirmation of Parker as a Supreme Court Justice, basing his opposition mainly upon two legal cases in which Parker's actions were criticized.

The first instance which shall be taken up here was the so-called Harness Case in which Parker had acted as a government counsel. This case arose as a result of the government's attempt to dispose of the excess harness on hand following the World War.⁹ In order to effect the

⁸. For complete references with regard to Judge Parker's nomination, see Congressional Record, LXXII, pt. 12, p. 312 of the section index.

⁹. In giving the facts of the Harness case, Walsh explained, "... this was a prosecution of one of what were known as the war fraud cases. It will be recalled that upon the incoming of the Harding administration, the then Attorney General, Mr. Daugherty, appeared before the Congress and represented that gigantic frauds had occurred during or immediately following the World War, and he asked for an appropriation for the purpose of investigating and prosecuting those guilty of such frauds. The Congress responded by making an appropriation of \$500,000, which amount was placed at the disposal of the Department of Justice for the purpose of carrying on the prosecution. It afterwards transpired that something like 105 lawyers were appointed for the purpose of conducting the work. (contd. p. 83.)

sale, it became necessary to make a survey and inspection. It was charged that those directing the survey had been corrupted by the defendants of the case in order that favorable action might be secured for them. On the basis of this case, Walsh proceeded to show, despite opposition, that Judge Parker, aside from being antagonistic to labor, erred much in his thoroughness and competency as a lawyer and judge.

Walsh in this instance based his argument on the instructions which Judge Groner, who presided in the Harness Case, had given the jury at the close of a trial which had consumed almost eleven days.¹⁰ The essence of this address by Groner was a review of the evidence presented and his opinion in which, finding the evidence for conviction quite lacking, he stated that "it was impossible for a man who is honest in his convictions to reach the conclusion that the defendants are guilty of the crime charged."¹¹ Regarding this address, Walsh commented, "If I were a prosecut-

Later it was disclosed that the Department of Justice, after some years of effort, something like six or seven years, and securing no conviction in any case, had abandoned the whole effort. This case belonged to that category. Congressional Record, LXXII, pt. 8, pp. 8021-8022.

10. For the complete text of this address, see Congressional Record, LXXII, pt. 8, pp. 8023-8026.

11. Ibid., 8106.

ing attorney and found myself subject to comment of this character from the judge on the bench, I should be so humiliated as to prompt me to abandon the practice of law."¹²

In discussing the case, Walsh brings out the fact that it was charged that the defendants had induced the government sales manager to refuse clearances and permits for the sale of harness. All the evidence that the government had to sustain that charge was the evidence of a witness named Bosson. In this connection, Walsh read the following from Groner's instructions to the jury:

Captain Bosson says that he was delayed in getting clearances. He doesn't put his finger on any particular bid, any particular property that he had ... wanted ... and say: "I went to this defendant Morse and asked him to allow me to clear this property for sale." And yet, the defendants in their behalf showed to my decided amazement that there were as a result of papers taken from the government files and in the possession of the government, at least four requests for clearances covering this harness made in the usual course from the property division to the sales division which contained Mr. Morse's visa after the receipt of these applications in his office.¹³

To such a skilled lawyer as Walsh, it was almost inconceivable that such a situation could have ever occurred. To him there was only one explanation for the fact that, in regard to this charge the government was attempting to

12. Congressional Record, LXXII, pt. 8, p. 8106.

13. Ibid., 8106.

sustain, evidence had been produced right from their own files to the contrary, and such an explanation revealed utter incompetence on the part of the government counsel. Walsh asserted:

There is no explanation. We are faced with just exactly that situation, and we are obliged to suspect simply that Judge Parker had not studied his case and did not know what the evidence in the matter was with respect to the very charge that had been made.... I regard this as a very serious imputation upon either the professional integrity or the professional industry of Judge Parker.¹⁴

In continuing his discussion of the Harness Case, Walsh read again to the Senate from Judge Groner's instructions to the jury:

... could any jury in this free land of ours undertake to stigmatize as traitors, four or five of their fellow citizens upon such evidence as that, and could any court, gentlemen of the jury, with courage--and when courts lose courage, the foundation stone of our government is in peril--allow a verdict based upon evidence of that kind to stand?¹⁵

In view of such remarks, it was disgusting and ironic to Walsh that a remark by Groner during the course of his address, to the effect that the counsel for the government had shown ability and fairness, should be used as an argument in favor of the confirmation of Judge Parker, as was a letter written to Senator Norse [Norris, sic]

14. Congressional Record, LXXII, pt. 8, p. 8107.

15. Ibid., 8106.

at the time these proceedings were going on in the Senate, which stated that Perker's conduct had in every way conformed to the "highest standards of the profession."¹⁶

Walsh emphasized:

It takes a good many pleasant compliments to overcome the significance of the comments of the trial court. I should like to ask any lawyer upon this floor how he would feel if, at the close of a case which he presented to a court--a case the trial of which consumed 11 days--the court had disposed of the case with a comment of that character? What kind of a tribute would it be to his industry in searching out the facts of the case, his sagacity and his learning in the law, his ability to analyze evidence, to have comments of that character upon the case which he submitted?¹⁷

Thus it was that, on the score of Parker's incompetency in the Harness Case, Walsh thoroughly revealed him as being anything but a desirable addition to the Supreme Court of the United States.

The second case in which Judge Parker's actions were seriously criticized by Walsh was that of the International Organization of United Mine Workers v. the Red Jacket

16. Groner's words in this instance were: "There was nothing in Judge Parker's conduct in that case which was properly the subject of adverse criticism, nor was there at any time during the trial. His part in the conduct of the case commended itself to me as conforming in all respects to the highest standards of the profession, and therefore [I] pronounce as wholly unjust and without warrant any and every implication to the contrary. (signed) D. L. Groner.

17. Congressional Record, LXXII, pt. 8, p. 8106.

Coal and Coke Company.¹⁸ In short, the case had arisen as a result of the issuance of an injunction by a district judge of West Virginia, upholding the sanctity of a yellow-dog contract. Thus a group of coal miners employed by the Red Jacket Coal Company were prevented from joining the United Mine Workers. The latter organization contested the action of the West Virginia district court, and the case eventually reached the United States Circuit Court of Appeals where Judge Parker upheld the decision of the lower court.

It was argued by the friends of Parker that because the Supreme Court had, in the Hitchman Case, upheld a similar contract, Parker was constrained to act in the manner that he did.¹⁹ Though there might have been something to the argument that Parker was constrained to follow, in his case, the ruling of the Supreme Court in the Hitchman Case, Walsh felt that he might have done other-

18. This case may be found in the government documents listed as 18 Fed. (2s.) 839.

19. In this particular case, the Circuit Court of Appeals had reversed the opinion of the lower court. Judge Pritchard had presided. On reaching the Supreme Court, the decision of Judge Pritchard had been reversed.

This case may be found in the government documents under 245 US 229. A good account of it may also be found in the article, "Collective Bargaining before the Supreme Court" by Thomas R. Powell. Political Science Quarterly, September, 1918, XXXIII, pp. 396-429.

wise, and with this attitude Walsh built his opposition and argument against the confirmation of Parker's appointment to the Supreme Court. Walsh believed that Parker had not studied the Hitchman Case as thoroughly as he could, before rendering his own decision in the Red Jacket Case; that, had Parker known the case thoroughly and had he been in sympathy with the miners, he could not have helped but advert to that sympathy in one form or another in his opinion, even though in the end, he had felt constrained to follow the ruling of the Supreme Court. In fact, Walsh asserted:

There is absolutely nothing ... whatever in the decision of Judge Parker or in what he said in the opinion that leads us to believe that he is not entirely in sympathy with the doctrine of the Hitchman Case and with the idea that the so-called "yellow-dog" contract is protected by the Constitution of the United States and is, so far as that is concerned, a perfectly justifiable arrangement.²⁰

To back up his statement here, Walsh quoted at considerable length, not only the opinion given by Judge Pritchard when he had reversed the decision of the lower court in the Hitchman Case, but also from the dissenting opinion given by Justice Brandeis when the case reached the Supreme

²⁰. Congressional Record, LXXII, pt. 8, p. 8108.

Court.²¹

It is worthwhile to note briefly, in order to establish Walsh's stand more clearly, the gist of the quotations from these opinions. Judge Pritchard pointed out that the growth and development of the common law had come about at a time when property rights had been placed above personal rights; that the domination of the working class by the landowner had been complete and absolute. He further pointed out that the industrial development of the world in the last half century had been such as to make it necessary for the courts to take a broader view with regard to questions pertaining to labor and capital. Judge Pritchard also expressed the idea that the laboring man should have as much protection from the courts in asserting his rights as the capitalists received in upholding his interests. In referring to the yellow-dog contract employed in the Hitchman Case, both of the justices concluded that that contract had not been broken. In respect to these remarks by Judge Pritchard and Justice Brandeis, Walsh stated:

...although the learned Judge Pritchard called attention to the fact that there was no violation of the contract in inducing the employees to quit the plaintiff's employment and join the union, and, although Mr. Justice Brandeis

²¹. The full text of these excerpts from the opinions of Judge Pritchard and Justice Brandeis may be found in Appendix E.

in his dissenting opinion called attention to that, the decision of Judge Parker without even adverting to the contract or even quoting it in the opinion anywhere, charged the defendants in that case with having induced the plaintiff's employees to violate their contract, and they were enjoined from continuing to do so. I am left with the impression that the learned Judge Parker was either entirely indifferent to these considerations thus advanced by ... Judge Pritchard, or he was entirely in sympathy with the yellow-dog contract.²²

Clearly then, from Walsh's stand on the confirmation of Judge Parker's appointment to the Supreme Court, it is quite evident that his primary motive was the cause of labor. One finds in this instance no traces of conservatism, no indication of clinging to precedent; the very fact that he pointed out that Parker might have taken a different point of view in the Harness Case than that which the Supreme Court had taken in the Hitchman Case proves this. The constitutional aspects of the sanctity of contracts did not alter Walsh's course in regard to Judge Parker's actions in any way. His closing remarks on the Parker case clearly indicate him to be truly progressive:

I believe, Mr. President, that we would not be discharging the duty with which we are charged to protect in its integrity this great court, the final arbiter of the lives and liberties of the American people under the Constitution of the United States, unless we

²². Congressional Record, LXXII, pt. 8, p. 8108.

made sure in so far as we can, that someone more in consonance with modern views concerning the relations of labor and capital than is Judge Parker, shall be selected for the Supreme Court.²³

²³. Congressional Record, LXXII, pt. 8, p. 8110.

When the yeas and nays were taken on the question of the confirmation of Judge Parker, the vote was very close, there being 39 yeas and only 41 nays.

Anti-Injunction
Legislation.

During the first session of the 72nd. Congress, the Senate of the United States considered a bill, the primary purpose of which was to bring about relief from certain abuses growing out of the issuance of injunctions.²⁴ Some of the abuses that the bill intended to correct were, as Senator Hebert (Rhode Island) pointed out:

1. The issuance of restraining orders without any notice whatever.
2. The issuance of temporary injunctions at least upon ex parte affidavits.
3. The use of general language in the restraining order so that the ordinary person to whom it was directed was unable to tell whether or not a certain act fell within the condemnation of the order or not.
4. The issuance of injunctions upon what is known as the yellow-dog contract.
5. The issuance of injunctions restraining the doing of acts clearly legal in themselves.²⁵

Thomas Walsh was strongly behind this particular bill and he took considerable part in the debate on it. Especially was he against the practice of issuing injunctions

^{24.} The bill referred to here was Senate Bill 935, to amend the judicial code and to define the limits of the jurisdiction of courts sitting in equity. For the history of this bill, see Congressional Record, LXXV, pt. 15, p. 686. See also, for the bill as it was considered by the Senate, Senate Report 163, in Senate Reports for the 72nd Congress, 1st Session, No. 9487.

^{25.} Congressional Record, LXXV, pt. 5, p. 4677.

upholding the so-called "yellow-dog" contracts.

Beginning his address on the subject of the courts and the yellow-dog contract, Walsh first discussed the three Supreme Court cases of Adair vs. The United States, Coppage vs. Kansas, and Hitchman Coal and Coke Co. vs. Mitchell, in which the validity of the yellow-dog contract was upheld.²⁶ The first two cases arose as a result of statutes making it a criminal offense to exact of employees such contracts, while in the case of Hitchman Coal and Coke Co. vs. Mitchell the question as to the authority of Congress or the States to legislate restricting the yellow-dog contract was not presented. The court, on the basis of such a contract, upheld an injunction. As quoted by Walsh, the majority opinion in the Adair Case was as follows:

It was the legal right of the defendant, Adair--however unwise such a course might have been--to discharge Coppage because of his being a member of a labor organization, as it was the legal right of Coppage, if he saw fit to do so--however unwise such a course on his part might have been--to quit the service in which he was engaged, because the defendant employed some persons who were not members of a labor organization. In all such particulars the employer and the employee have equality of right

26. These three cases are listed in the government documents under: Adair vs. United States, 208 U. S. 161; Coppage vs. Kansas, 236 U. S. 1; Hitchman Coal and Coke Co. vs. Mitchell, 245 U. S. 232. A good discussion of them may also be found in the article, "Collective Bargaining before the Supreme Court," by Thomas R. Powell. Political Science Quarterly, XXXIII, September, 1918, pp. 396-429.

and any legislation that disturbs that equality is an arbitrary interference with the liberty of contract which no government can legally justify.

And from the opinion in the Coppage Case, Walsh read:

To ask a man to agree in advance to refrain from affiliation with the union while retaining a certain position of employment is not to ask him to give up any part of his constitutional freedom. He is free to decline the employment on those terms, just as the employer may decline to offer employment on any other terms, for "it takes two to make a bargain."²⁷

"Both of these decisions proceed upon the assumption that both of the parties to the contract stand upon an entire equality of footing, whereas, as a matter of course, everybody in these days recognizes that they stand on no such footing," Walsh commented.

To Walsh the dissenting opinion in the Coppage Case, as was expressed by Justice Day, was much more in consonance with his own views and in keeping with the present-day situation of capital and labor. The words, "Liberty of making contracts is subject to conditions in the interest of the public welfare, and which shall prevail--principle or condition--cannot be defined by any precise and universal formula," expressed to the letter Walsh's own practical

27. Congressional Record, LXXV, pt. 5, p. 4677. See Appendix F.

outlook on the matter.²⁸ In further reference to this opinion, Walsh showed that by the very fact that an employee must provide for his family as well as himself, if they would live, the employee was definitely constrained to enter into such a contract no matter how much to his disliking such a situation might be. For that reason there was no such thing as a footing of equality between the employer and the employee; therefore, "contracts of that character are and should be by the courts declared to be contrary to public policy."²⁹

Having then dismissed as impractical and thoroughly unrealistic the majority opinions in the Adair and Copepage Cases, Walsh proceeded to prove that his contention that the courts ought to act differently with regard to yellow-dog contracts was not something in itself new and revolutionary. "The right to enter into a contract is not unrestricted. It is governed and controlled by many considerations, among them being the question as to whether the particular contract is or is not condemned by public policy."³⁰ For an example of this, Walsh cited the usu-

28. For the full text of this opinion as quoted by Walsh, see Congressional Record, LXXV, pt. 5, p. 4691. See Appendix F.

29. Ibid., 4691.

30. Ibid., 4691.

rious contract, a contract that has been defined as extorting a higher rate of interest than that allowed by law. Walsh explained that statutes making usurious contracts penal, proceeded upon the assumption that the borrower is constrained by necessity to enter into such an agreement. "It appears to me that there is perfect analogy between the cases of statutes condemning usurious contracts and statutes condemning contracts such as are under consideration," he commented.³¹ To prove further his point that the power of contract is limited, Walsh referred to Greenwood on Public Policy. He pointed out that in the index is a long list of contracts which the law will not permit.³² In involving the liberty of contract to which he called the attention of the Senate, he tried to emphasize "that a wide change has come over the judicial minds of the country as to the question of liberty of contract, the earlier decisions having been induced, as everybody must now realize, by reason of the judges entertaining antiquated and obsolete views concerning

31. Congressional Record, LXXV, pt. 5, p. 4692. In his typically thorough manner, in order that there be no doubt whether or not the yellow-dog contract was in the class of usurious contracts, condemned by public policy, Walsh had inserted in the record a list of statements by various commissions, societies, and individuals, condemning such an agreement. See Appendix G.

32. For examples, see Appendix H. Ibid., 4691.

economic questions."³³

Having made clear and justified his position and attitude toward the courts in this matter, Walsh, in so doing, had justified the position he was to take in the concluding paragraphs of his speech. At this time, he pointed out that despite the nature of the yellow-dog contract, or its condemnation in general, should the courts persist in upholding it, Congress was not entirely without a remedy. "We may limit as we see fit, the jurisdiction of the inferior courts."³⁴ He then pointed out that the Constitution itself prescribed that the judicial power of the United States shall extend to all cases in law and equity involving a federal question and to controversies involving citizens of different states, but that no jurisdiction could be exercised unless it was conferred by Congress. To prove his theory in this instance, Walsh quoted from the opinion in the case, *Kline vs. Burke Construction Company*, in which that view was clearly expressed:

Only the jurisdiction of the Supreme Court is derived directly from the Constitution. Every other court created by the general government derives its jurisdiction

^{33.} Congressional Record, LXXV, pt. 5, pp. 5017-5018. See Appendix I.

^{34.} Ibid., 4692.

wholly from the authority of Congress. That body may give, withhold, or restrict such jurisdiction at its discretion, provided it be not extended beyond the boundaries fixed by the Constitution.³⁵

Thus, though the Congress could not directly limit or fix the jurisdiction of the Supreme Court, Walsh, ever the opportunist, would simply limit the jurisdiction of the lower courts, so that the possibility of an injunction case ever reaching that court was remote.

Aside from delivering this rather long address, establishing his tenets on the matter of the courts and the yellow-dog contract, Walsh expressed himself in connection with the bill to limit the jurisdiction of the federal courts in several other instances. For example, a feature of the pending bill of which he was critical provided that one should not be liable for violence and acts of destruction in the course of a strike unless he actually authorized the acts, or ratified the commission of them. In the course of his remarks on the subject, Walsh pointed out that many courts held that strikes were conspiracies--conspiracies in restraint of trade. And that no matter how peaceful a strike might be carried on, it would to some extent interfere with trains and

³⁵. Congressional Record, LXXIV, pt. 5, p. 4692.

traffic, thus making it in the eyes of the courts a conspiracy in restraint of trade. Continuing, Walsh pointed out that there was a principle of law which said that every member of a conspiracy is liable for any act committed by any member of that conspiracy. He then pointed out that no matter how hard the leaders of a strike might try to make it a peaceful one, some acts of violence would usually occur. "Thus should the court find that the strike is a conspiracy, they [the leaders] are or become answerable for every act committed by everyone in the alleged conspiracy. That is entirely unjust."³⁶ Thus did Walsh point out that the pending bill, as it read in this respect, would only aggravate a condition that of itself was bad enough.

At another time in the course of the debate, the Senate was considering whether the local officers of the law should be notified in the event that a person seeking an injunction should base his plea on the grounds that the local authorities were unable to cope with the situation. In fairness to all, Walsh felt that such officers should be notified before the injunction sought should be issued. He added, in regard to this, "We do not want to allow their

³⁶. Congressional Record, LXXV, pt. 5, p. 4693.

integrity as officials to be impugned without giving them an opportunity to be heard on the matter."³⁷ To Senator Reed the idea expressed by Walsh was almost preposterous. He protested, "It proposes something totally new and fantastic in legal procedure.... Simply because it provides a species of freak procedure, I hope it will be stricken from the bill."³⁸

Perhaps one of the best examples of Walsh as a true progressive, unfettered by precedent or conservatism, is to be found in his reply to Reed. "... it seems to me because there is no precedent for this is no good reason why it should not be done. There had to be a beginning in the case of all procedure in the law. They came into being by reason of conditions which the courts were called upon to meet."³⁹ Nothing could be more pragmatic.

At another time, in the debate in which Walsh took part, Senator Hebert (Rhode Island) objected to the pending legislation and offered several amendments, one of which Walsh thought to be quite beside the point and valueless, while the other, he felt, would only lead to trouble.

³⁷. Congressional Record, LXXV, pt. 5, p. 4998.

³⁸. Ibid., 4999.

³⁹. Ibid., 4999.

In his first objection, Hebert pointed out that the preamble of the pending legislation which read, "Whereas under prevailing economic conditions, developed with the aid of government authority ..." implied that corporations and the like owed their existence to acts of Congress.... all senators know that this is not so, except in very rare instances."⁴⁰ The Senator from Rhode Island then went on to say that since business organizations were governed mainly by the laws of the States in which they were domiciled, the preamble of the pending bill was misleading. To Walsh, all this on the part of Hebert was an item of little or no consequence. Despite this, he mentioned by way of enlightening the Senator from Rhode Island that various business organizations such as the land grant railroads, the national banks, and the Western Union owed their existence to acts of Congress. But Walsh was little inclined to elucidate on the subject for the benefit of the Senator. He objected, "However that may be, it seems to me it is a matter of no consequence in the recital of policy here whether corporations are organized under the State law or laws of Congress."⁴¹ Indeed, Walsh was not to be sidetracked

⁴⁰. Congressional Record, LXXV, pt. 5, p. 4762.

⁴¹. Ibid,, 4763.

from the main issue. What did it matter? "...these are aggregations of capital which exist by virtue of statutes ... [any statutes] and we seek to put the body of workers on something like a footing of equality."

The second objection that Hebert offered was that the pending bill made no mention of the rights of the employer. The offending passage in this instance read:

It is necessary that he [the employee] have full freedom of association, self organization, and designation of representatives of their own choosing, to designate the terms of employment free from any interference, restraint, or coercion in their efforts toward mutual aid or protection.⁴²

It was Hebert's wish so to amend the passage that it would read, "It is necessary that both the employer and the employee shall have freedom...."⁴³ In Walsh's opinion, there were very substantial objections to the policy as announced by the Senator from Rhode Island. Walsh's first objection in this case of point was that a passage in the bill, to the effect that the employer was to have full freedom of association, would entrench upon the acts of Congress, curbing monopoly. He pointed out that the Sherman Act was passed for the express purpose of forbidding such

^{42.} Congressional Record, LXXV, pt. 5, p. 4762.

^{43.} The underscoring is mine.

full freedom of association.⁴⁴ Hebert, however, was not to be put off. He suggested that Walsh read the remainder of the language in the paragraph in question, i.e. the words, "to negotiate the terms of employment". But Walsh was not to be taken in by this. Immediately he showed Hebert that, of course, the paragraph could be read to mean, "shall have full freedom of association to negotiate the terms of employment." But that depended on how far back the clause "to negotiate the terms of employment" was a qualifying clause. He agreed that that might, indeed, be the proper construction, but that, ordinarily, one reading the passage would interpret it to mean that employers would have full freedom to designate representatives of their own choosing "to negotiate the terms of employment." Walsh was too learned a lawyer, too adroit at legal wording, for that.

But again, as in his criticism of Hebert's first amendment, Walsh reverted to the question of its practicality. Why should there be a declaration of policy concerning the rights of employers to associate? And again Walsh was to bring his fellow senator back to the point of the legislation at hand. "... there is no occasion for it

⁴⁴. It is interesting to note in this connection that Senator King, in speaking on this matter, said, "... but the language employed is susceptible to the interpretation placed upon it by the Senator from Montana, and in its present form, I would not be inclined to accept it. Congressional Record, LXXV, pt. 5, p. 4765.

at all. Injunctions have not been sought to prevent the association of employers for the purpose of promoting their mutual benefit."⁴⁵

Another example of Walsh's practicality, his ability to think logically, in a matter when it would have been easy to do otherwise, occurred when the Senate was debating the question of whether or not to make the threat to commit an unlawful act the basis for issuing an injunction. Senator Norris felt very definitely that such an amendment should not be put into the bill, his reason being that to do so would only give courts the opportunity to "go far afield" in issuing injunctions. Norris reasoned, "It will not be difficult for any of these large corporations to get hundreds to prove ... instances where somebody had made a threat."⁴⁶ Senator Long (Louisiana) in quite a stirring speech on the matter, asserted, "If the word 'threatened' is inserted in the bill, then the gate has been thrown open. That is all a federal judge needs for a ground upon which to issue an injunction. The threat

45. Congressional Record, LXXV, pt. 5, p. 4763.

When the yeas and nays were taken on the two amendments offered by Hebert, there were only 18 in favor of it, while 47 opposed the amendments. Ibid., 4765.

46. Ibid., 4774.

of one man is as good as the threat of a thousand."⁴⁷

As much as Walsh would have followed along in any cause that would aid or better the lot of labor, he was unable to go along in this instance. In Walsh's opinion, Long and Norris, in advocating this principle, were losing sight entirely of the purpose of the injunction in the first place. After all, as Walsh emphasized, "The only purpose of an injunction is to prevent threatened injury. He then pointed out that, as it was, the bill itself was very liberal in this regard; that it provided that an injunction would not be issued unless injury had been committed and would be continued unless restrained. "However," continued Walsh, "whether the threatening occurs before the injury is committed or after the injury is committed, it is necessary to have the threatening in order to obtain the injunction. That is all there is to that."⁴⁸ As far as the argument was concerned that it would be an easy matter for corporations to get any number of people to testify that a threat had been made, Walsh brought to the attention of the Senate that in either

^{47.} Congressional Record, LXXV, pt. 5, p. 4775. For an exceptionally interesting speech on this subject by H. Long, see Congressional Record, ibid., 4776-4777.

^{48.} Ibid., 4775.

case, whether it was a matter of proving that the threat had been made in the first place or of proving that further injury would follow by reason of the threats made, one was in the same peril from perjured testimony. And with that Walsh dropped the matter, concluding, as he had begun, that there was no purpose at all to an injunction except to prevent threatened injury.

Conclusion.

Perhaps the first conclusion that can be drawn, if the foregoing work on Walsh's labor activities can be considered in any way to be a cross section illustrating Walsh's constitutionalism, conservatism, and progressivism, is that such qualities in themselves did not find embodiment in Walsh to the extent that they alone determined his course of action. It cannot be denied, however, that in many instances the outward appearances of his actions might easily lead one to such a conclusion. In the following, an attempt will be made to point out examples of the above and at the same time, to give what the writer feels to be the true or underlying motives for the course of action which Walsh took in various instances despite seeming inconsistencies.

At the outset, it might definitely be asserted that Walsh was not always to be found on the progressive side of debate, despite the fact that such an assertion has been made in the Dictionary of American Biography, as given on page 17, Chapter I, of this work. For example, the McCormick Amendment, as discussed on page 77, contained in it the elements of progressive legislation in so far as promoting the welfare of the populace in generally limiting strikes. Progressive as it was, Walsh assailed

the measure on the ground that it denied the right of the workingman to quit his work whenever he so desired. He contended the right of Congress under the constitution to take such liberties. In view of this, it would be an easy matter to conclude that Walsh had opposed the measure on the ground that it was unconstitutional, and let it go at that. But one cannot feel that the mere factor of constitutionalism was the underlying reason for Walsh's decision in this instance. The fact that Walsh himself conceded that, if the board to settle the laboring-man's disputes were so constituted that there could be no doubt of justice, the laborer ought to give obedience to its adjudication. But Walsh could conceive of no such board, for as he saw it compulsion born of fear of consequent results would be conducive to making the decisions of that tribunal unfair, even though the decision might be much on the side of labor. Thus, though the amendment was progressive in theory, it was not so, as Walsh saw it, in operation. It was impractical. Another example of this is to be found when Walsh opposed a compensation measure which provided for a lessening of the compensation a man would receive in proportion to the man's negligence. Theoretically this too was a progressive measure, insofar as it proposed to give to each man what

he justly had coming to him. But Walsh opposed the legislation on the ground that in operation such a measure would too often result in a denial of recovery when in fact the worker might justly deserve compensation. Walsh was not to be lost in theory, no matter how progressive. The progressive elements of the bill failed to take account of one fact of human nature--that man at his best is weak and prone to error; for that reason, Walsh could not uphold the measure.

Nor can it justly be asserted, the writer feels, that Walsh was a strict constitutionalist in the sense that he was conservative or clung to precedent for that alone. The very fact that he criticized Judge Parker for issuing an injunction in the Red Jacket Case, despite the fact that the Supreme Court had upheld such a contract in the Hitchman Case, indicates this. His contention, that in view of the present relations of capital and labor it was fallacious assumption on the part of the Court in the Adair and Coppage Cases to assume that the employer and the employee stood on an equality of bargaining power also proves this. Walsh was practical; he would mould the legislation to fit present times. When the question was being considered of whether the police should be notified in the event that an injunction was requested, on the

ground that the local authorities were unable to protect the applicants' property, Walsh felt that in fairness to all such a practice was desirable. And he staunchly maintained that even though there were no precedent for such a procedure, that alone was no basis for condemning it. On the question of whether Congress had the power to prohibit prison-made goods produced in one State from passing into another, Walsh took the affirmative, though the constitutionality of the matter was seriously questioned by Borah. However, one might easily have reached the conclusion that Walsh was a strict conservative when he opposed the suggestion that the Child Labor Amendment be submitted to conventions called in the various States instead of submitting it to the State legislatures as had been the practice. But Walsh was not clinging to precedent for the sake of precedent in this instance. To him, the change in procedure would only result in confusion and added expense for the various states. It was simply impractical not to stay with old custom.

Thus, despite appearances to the contrary, practicality, common sense, and logical thinking were the underlying motives for all of Walsh's decisions. He had no fear that Congress would abuse the power which the Child Labor Amendment would give to it. Common sense told him that the day was not likely to come when a farmer would be

would be called into court for asking his son to tend the flocks. Congress had not abused to the point of absurdity other powers which it had been given; therefore it was illogical that this new power should be treated otherwise. Common sense and logical thinking made Walsh point out that the very purpose of an injunction was to prohibit threatened injury; that to issue an injunction only when and if injury to property had been committed was to nullify the entire meaning of the word, "injunction". In fact, as was noted in the bill to authorize farm organizations, so intent was Walsh on making his bill a simple and practical one by not authorizing monopoly and thus doing away with the necessity of some supervisory control of farm organizations, that for the moment he lost sight of the question as to whether it would be workable to separate section 1. and 2. of the Sherman Act. Thus, in final conclusion, it appears to be quite evident that Walsh followed consistently neither constitutional, conservative, nor progressive principles in themselves, when establishing a stand on a matter. To Walsh there was but one question to be considered, and that was, "Is it practical?"

APPENDIX

Appendix A.

Definition of
Word, "Labor"

In the ordinary significance of the term "labor" is understood to be physical toil.

It is safe to say that the word "laborer," when used in its ordinary and usual acceptance, carries with it the idea of actual physical and manual exertion or toil and is used to denote a member of that class of persons who literally earn their bread by the sweat of their brows and who perform with their own hands, at the cost of considerable physical labor, the contracts made with their employers. (Oliver vs. Macon Hardware Co., 98 Ga. 249; Farinholt vs. Luckard, 90 Va. 936.)

In the language of the business world a laborer is one who labors with his physical powers in the service and under the direction of another for fixed wages. (Rogers vs. Dexter R. Co., 85 Me. 372; 16 Ruling Case Law, 410.)

The word "labor" in legal parlance has a well-defined, understood, and accepted meaning. It implies continued exertion of the more onerous and inferior kind, usually and chiefly consisting in the protracted exertion of muscular force. "Labor may be business, but it is not necessarily so, and business is not always labor. In legal significance labor implies toil; exertion producing weariness; manual exertion of a toilsome nature." (Moore vs. American Industrial Co., 50 S. E. 682, 138 N. C. 304) Words and Phrases--Labor.

--Congressional Record, LXVI, pt. 2, p. 1443.

Appendix B.

McKenna's Opinion in
Connolly vs. Union Sewer Pipe Co.
as quoted by Walsh.

The equality of operation which the Constitution requires in State legislation can not be construed, as we have seen, as demanding an absolute universality of operation, having no regard to the different capabilities, conditions, and relations of men. Classification, therefore, is necessary but what are its limits? They are not easily defined, but the purview of the legislation should be regarded. A line must not be drawn which includes arbitrarily some persons who do and some persons who do not stand in the same relation to the purpose of the legislation, but a wide latitude of selection must be left to the legislature. It is only a palpable abuse of the power of selection which can be judicially reviewed, and the right of review is so delicate that even in its best exercises it may lead to challenge. At times, indeed, it must be exercised, but should always be exercised in view of the function and necessarily large powers of a legislature.

What was the purpose of the Illinois statute, and what were the relations of its classes to that purpose? The statute was the expression of the purpose of the State to suppress combinations to control the prices of commodities, not, however, in the hands of the producers, but in the hands of traders, persons, or corporations. Shall we say that such suppression must be universal or not at all? How can we? What knowledge have we of the condition in Illinois which invoked the legislation, or in what form and extent the evil of combinations to control prices appeared in that State? Indeed, whether such combinations are evils or blessings, or to what extent either, is not a judicial inquiry. If we can assume them to be evil because the statute does so, can we go beyond the statute and determine for ourselves the local conditions and condemn the legislation dependent thereon? But are there not, between the classes which the statute makes, distinctions which the legislature had a right to consider? Of whom are the classes composed? The excluded class is composed of farmers and stockraisers while holding the products or live stock produced or raised by them. The included class is composed of merchants, traders, manufacturers,

all engaged in commercial transactions. That is, one class is composed of persons who are scattered on farms; the other class is composed of persons congregated in cities and towns, not only of natural persons but of corporate organizations. In the difference of these situations and in other differences which will occur to any reflection, might not the legislature see difference in opportunities and powers between the classes in regard to the prohibited acts? That differences exist can not be denied. To take us from legal problems to economic ones, and this demonstrates to my mind how essentially any judgment or action, based upon those differences, is legislative and can not be reviewed by the judiciary.

--Congressional Record, LXVII, pt. 3, pp. 2167-2170.

Appendix C.

The Senate Committee
Amendment to the House Bill
to Authorize Farm Associations.

That persons engaged in the production of agricultural products as farmers, planters, ranchmen, dairymen, nut or fruit growers may act together in associations, corporate or otherwise, with or without capital stock, in collectively handling and marketing in interstate and foreign commerce such products of the persons so engaged and in processing or preparing such products for so marketing the same. Such associations may have marketing agencies in common; and such associations and their members may make the necessary contracts and agreements to effect such purposes: Provided, however, That such associations are operated for the mutual benefit of the members thereof, as such producers, and conform to one or both of the following requirements:

First. That no member of the association is allowed more than one vote because of the amount of stock or membership capital he may own therein: or

Second. That the association does not pay dividends on stock or membership capital in excess of 8 per cent per annum:

And provided further, That the association shall not deal in products of nonmembers to an amount greater in value than such as are handled by it for members.

Nothing herein contained shall be deemed to authorize the creation of or attempt to create a monopoly, or to exempt any association organized hereunder from any proceedings instituted under the act entitled "An act to create a Federal trade commission, to define its powers and duties, and for other purposes," approved September 26, 1914, on account of unfair methods of competition in commerce.

--Congressional Record, LXII, pt. 3, p. 2280.

Appendix D.

Section 2 of the Original
House Bill to Authorize
Agricultural Associations.

Section 2. That if the Secretary of Agriculture shall have reason to believe that any such association monopolizes or restrains trade to such an extent that the price of any agricultural product is unduly enhanced by reason thereof, he shall serve upon such associations a complaint stating his charge in that respect, to which complaint shall be attached, or contained therein, a notice of hearing specifying a day and place not less than 30 days after the service thereof, requiring the association to show cause why an order should not be made directing it to cease and desist therefrom. An association so complained of at the time and place fixed show cause why such order should not be entered. The evidence given on such a hearing shall be reduced to writing and made a part of the record therein. If upon such hearing the Secretary of Agriculture shall be of the opinion that such association monopolizes or restrains trade to such an extent that the price of any agricultural product is unduly enhanced thereby, he shall issue and cause to be served upon the association an order reciting the facts found by him, directing such association to cease and desist therefrom.

On the request of such association or if such association fails or neglects for 30 days to obey such order, the Secretary of Agriculture shall file in the district court in the judicial district in which such association has its principal place of business a certified copy of the order and of all the records in the proceeding, together with a petition asking that the order be enforced, and shall give notice to the Attorney General and to said association of such filing. Such district court shall thereupon have jurisdiction to enter a decree affirming, modifying, or setting aside said order, and may make rules as to pleadings and proceedings to be had in considering such order. The place of trial may, for cause or by consent of parties, be changed as in other causes.

--Congressional Record, LXII, pt. 3, p. 2160.

Appendix E.

Opinion of Judge Pritchard
in the Hitchman Case
as quoted by Walsh.

The growth and development of the common law occurred when property rights were recognized as paramount to personal rights. At that time there was little, if any, concert of action on the part of the laboring people, owing to their helpless condition, due in the main to their ignorance. Their domination by the landowner and capitalist was absolute in most respects, and as a result they were as helpless as those held in slavery before our great war. Under such circumstances, it is no wonder that we have many decisions in the past at common law, as well as the enactment of statutory laws, by virtue of which it was almost a physical impossibility for those who earned their living by honest toil to accomplish by organized effort those things necessary to elevate them to a plane where they could assert those rights so essential to their welfare.

The industrial development of the world within the last half century has been such as to render it necessary for the courts to take a broader and more comprehensive view than formerly of questions pertaining to the relation that capital sustains to labor.

... (p. 702)

The court below was also of the opinion that the rules of the organization undertake to "control, or rather abrogate and destroy, the right of the employer to contract with the men independent of the organization." If it is meant by this statement that under the rules it is possible by peaceable, persuasive, and other lawful methods to induce a majority, if not at all, of the miners of any particular locality to join the union and thereby place the mine owner in a position where it may be necessary for him to negotiate with union labor in order to operate his mines, then the conclusion reached by the court below is entirely correct. However, the fact that such a result would be possible under this rule could not in any way affect the legality of the organization, because it has been repeatedly held by the courts that a labor union may use all lawful methods for the purpose of inducing others to join its order, and until the contrary is shown it must

be assumed that only lawful methods are to be employed for the accomplishment of such purpose.

... (p. 703)

However, in this instance the plaintiff has adopted a policy by which only nonunion men may be employed. If the plaintiff may for the purpose of protecting its interests adopt a policy by which only nonunion men can secure employment at its mines, and such conduct be sanctioned by the law, by what process of reasoning can it be held that the defendants may not adopt the same methods in order to protect their interests? If the plaintiff is to be protected in the use of such methods, and the defendants are to be restrained from using lawful methods for the purpose of successfully meeting the issue thus raised by the plaintiff, then indeed it may be truthfully said that capital receives greater protection at the hands of the courts than those through whose efforts capital in the first instance was created. But such is not the law; and when we consider the testimony as respects the conduct of the defendants at and before the institution of the suit, we are of the opinion that the plaintiff has not a preponderance of the evidence shown that these defendants employed unlawful methods as alleged in the bill.

...

At one time this identical mine employed union labor, and in all probability could have continued to do so, had it not been for a controversy which arose as to certain adjustments and the parties failing to reach an agreement the plaintiff decided to employ only nonunion labor.

It further appears that the plaintiff is paying the nonunion men the same wages that are being paid union men. Therefore, under these circumstances, is it not as reasonable to infer that the plaintiff is endeavoring to place the laborers of that section in a position where he would be master of the situation as it is to infer that the defendants are seeking to destroy the business of the plaintiff? While it is true that the plaintiff has a perfect right to refuse to employ union labor, is it not equally true that union labor, as we have stated, may by the employment of legitimate means do that which is necessary to keep its forces together?

Surely we have not reached the point when capital with its strong arm may adopt a plan like this for protecting its interests, while on the other hand, the laboring classes are to be denied the protection of the law when they are attempting to assert rights that are just as important to their well-being as are the rights of those who have been more fortunate in accumulating wealth. He who "seeks equity must do equity." In other words he "must come into court with clean hands." If the courts of this country should by injunctive relief protect the mine owner in the enjoyment of his property rights and restrain the laboring people from organizing their forces by declaring such organization unlawful, would not the mine owner then be in a position to control the situation so that he who has to toil for his daily bread would be placed in a position where if he exists at all, he must do so at such wages, and upon such terms as organized capital may see fit to dictate?

...

The court below also reached the conclusion that the defendants have cause and are attempting to cause the non-union members employed by the plaintiff to break a contract which it has with the nonunion operators. The contract in question is in the following language:

I am employed by and work for the Hitchman Coal and Coke Co. with the express understanding that I am not a member of the United Mine Workers of America and will not become so while an employee of the Hitchman Coal and Coke Co.; that the Hitchman Coal and Coke Co. is run nonunion and agrees with me that it will run nonunion while I am in its employ. If at any time while I am employed by the Hitchman Coal and Coke Co. I want to become connected with the United Mine Workers of America or any affiliated organization, I agree to withdraw from the employment of said company, and agree that while I am in the employ of that company that I will not make any efforts amongst its employees to bring about the unionizing of that mine against the company's wish. I have either read the above or heard the same read.

...

It will be observed that by the terms of the contract that either of the parties thereto may at will terminate

the same, and while it is provided that so long as the employee continues to work for the plaintiff he shall not join this organization, nevertheless there is nothing in the contract which requires such employees to work for any fixed or definite period. If at any time after employment any of them should decide to join the defendant organization, the plaintiff could not under the contract recover damages for a breach of the same. In other words, the employees, under this contract, if they deem proper, may at any moment join a labor union, and the only penalty provided therefore is that they can not secure further employment from the plaintiff. Therefore, under this contract, if the nonunion men, or any of them, should see fit to join the United Mine Workers of America on account of lawful and persuasive methods on the part of the defendants, and as a result of such action on their part were to be discharged by the plaintiff, it could not maintain an action against them on account of such conduct on their part. Such being the case, it would be unreasonable to hold that the action of the defendants would render the United Mine Workers of America liable in damages to the plaintiff because they had employed lawful methods to induce the nonunion miners to become members of their organization.

Dissenting Opinion of Justice
Brandeis in the Hitchman Case
as quoted by Walsh.

Fifth. There was no attempt to induce employees to violate their contracts.

The contract created an employment at will and the employee was free to leave at any time. The contract did not bind the employee not to join the union, and he was free to join it at any time. The contract merely bound him to withdraw from plaintiff's employ if he joined the union. There is evidence of an attempt to induce plaintiff's employees to agree to join the union; but none whatever of any attempt to induce them to violate their contract. Until an employee actually joined the union he was not, under the contract, called upon to leave the plaintiff's employ. There consequently would be no breach of contract until the employee both joined the union and failed to withdraw from plaintiff's employ. There was no evidence that any employee was persuaded to do that or that such a course was contemplated. What perhaps was intended was to secure agreements or assurances from in-

dividual employees that ehwy would join the union when a large number of them should have consented to do so; with the purpose, when such time arrived, to have them join the union together and strike--unless plaintiff consented to unionize the mine. Such a course would have been clearly permissible under the contract.

--Congressional Record, LXXII, pt. 8, pp. 8108-8109.

Appendix F.

Majority Opinion in Adair Case
as quoted by Walsh.

It was the legal right of the defendant, Adair-- however unwise such a course might have been--to discharge Coppage because of his being a member of a labor organization, as it was the legal right of Coppage, if he saw fit to do so--however unwise such a course on his part might have been--to quit the service in which he was engaged, because the defendant employed some persons who were not members of a labor organization. In all such particulars the employer and the employee have equality of right, and any legislation that disturbs that equality is an arbitrary interference with the liberty of contract which no government can legally justify in a free land.

Majority Opinion in Coppage Case
as quoted by Walsh.

To ask a man to agree in advance to refrain from affiliation with the union while retaining a certain position of employment is not to ask him to give up any part of his constitutional freedom. He is free to decline the employment on these terms, just as the employer may decline to offer employment on any other, for "it takes two to make a bargain."

The Dissenting Opinion
of Justice Day in Coppage Case
as quoted by Walsh.

Liberty of making contracts is subject to conditions in the interest of the public welfare, and which shall prevail--principle or condition--can not be defined by any precise and universal formula. Each instance of asserted conflict must be determined by itself, and it has been said many times that each act of legislation has the support of the presumption that it is an exercise in the interest of the public. The burden is on him who attacks the legislation, and it is not sustained by declaring a liberty of contract. It can only be sustained by demonstrating that it conflicts with some constitutional restraint or that the public welfare is not subverted by the legislation. The legislature is, in the first instance, the judge of what is necessary for the public welfare, and a judicial review of its judgement is limited. The earnest conflict of serious opinion does not suffice to bring it within the range of judicial cognizance.

--Congressional Record, LXXV, pt. 5, pp. 4690-4691.

Appendix G.

Opinions on the Yellow-Dog
Contract as quoted by Walsh.

The United States Coal Commission reported in 1925:

Notwithstanding the decisions of the Supreme Court of the United States that the so-called "yellow-dog" contract is legal, the commission is of the opinion that it is a source of economic irritation, and is no more justifiable than any other form of contract which debar[s] the individual from employment solely because of membership or nonmembership in any organization.

The United States Coal Commission, reporting again in 1923:

We recommend that such destructive labor policies as the use of spies, the use of deputy sheriffs as paid company guards, house leases which prevent free access and exit, and individual contracts which are not free-will contracts be abolished.

Again the Coal Commission said:

The individual contract is closely tied up with the suppression of civil liberties. It has been used as a basis for securing injunctions against the attempts to organize the field by any means whatsoever. It has also been used as the basis for claiming damages from the United Mine Workers.

The Federal Council of Churches of Christ in America, in a press release under date of December, 1920, had the following to say:

When an applicant for work is compelled to sign a contract pledging himself against affiliation with a union, or when a union man is refused employment or discharged merely on the ground of union membership, the employer is using coercive methods and is violating the fundamental principle of an open shop.

From a pastoral letter of Catholic archbishops and bishops in the United States I read as follows:

Religion teaches the laboring man and the artisan to carry out honestly and fairly all equitable agreements freely arranged.... By treating the laborer first of all as a man the employer will make him a better working man; by respecting his own moral dignity as a man the laborer will compel the respect of his employer and of the community.

(... from an address by Elihu Root in 1916:)

Now, however, the power of organization has massed both capital and labor in such vast operations that in many directions, affecting great bodies of people, the right of contract can no longer be at once individual and free. In the great massed industries the free give and take of industrial demand and supply does not apply to the individual. Nor does the right of free contract protect the individual under those conditions of complicated interdependence which make so large a part of the community dependent for their food, their clothing, their health, and means of continuing life itself upon the service of a multitude of people with whom they have no direct relations whatever, contract or otherwise. Accordingly democracy turns again to government to furnish by law the protection which the individual can no longer secure through his freedom of contract and to compel the vast multitude on whose co-operation all of us are dependent to do their necessary part in the life of the community.

In the Daily Law Journal of May, 1909, appeared an article by Dean Roscoe Pound, from which I read as follows:

The attitude of many of our courts on the subject of liberty of contract is so certain to be misapprehended, is so out of the range of ordinary understanding, the decisions themselves are so academic and so artificial in their reasoning, that they can not fail to engender such feelings. Thus, those decisions do an injury beyond

the failure of a few acts. These acts can be replaced as legislatures learn how to comply with the letter of the decisions and to evade the spirit of them. But the lost respect will live after them in impaired authority of the courts long after the decisions themselves are forgotten.

Dr. Felix Frankfurter, of the Harvard Law School, had the following to say about it:

The rapidly increasing use of the so-called "yellow-dog" contracts has grown into a serious threat to the very existence of labor unions. In view of the inequitable conditions that surround the formation of such agreements and the unfair division of their obligation, to appeal to equity for their enforcement is to disregard the fundamentally ethical foundations of courts of chancery.

... That view is very clearly expressed in the case of *Kline vs. Burke Construction Co.*, in Two Hundred and sixtieth United States Reports. I read from page 234, as follows:

Only the jurisdiction of the Supreme Court is derived directly from the Constitution. Every other court created by the general Government derives its jurisdiction wholly from the authority of Congress. That body may give, withhold, or restrict such jurisdiction at its discretion, provided it be not extended beyond the boundaries fixed by the Constitution.

--Congressional Record, LXIV, pt. 5, pp. 4691-4692.

Appendix H

Examples of Contracts
not Permitted by Law.

Mr. Walsh: Mr. President, the power to contract is limited by many considerations. I have here the standard work, Greenwood on Public Policy, in the law of contracts. In the index we find a long list of contracts which the law will not permit to be made upon grounds of public policy. One chapter deals with "contracts promotive of private dishonesty." All such are void. Another chapter deals with "contracts destructive of competition." The Senator from Illinois (Mr. Lewis) referred this morning to the statutes of Congress declaring certain contracts void because their tendency was to abrogate or limit competition.

Other chapters deal with contracts tending toward oppression; contracts promotive of prostitution, crime, and infidelity; contracts promotive of gambling; contracts for insurance where the party insuring has no real substantial interest in the life of the party assured; contracts promotive of dereliction of duty, public and private; contracts the effect of which will be the corruption of private citizens with reference to public matters; contracts affecting the integrity of public elections; contracts restricting assignability, the latter prohibiting one from making a contract by which the person to whom he sells a piece of property is restrained from disposing of that property at will; contracts limiting the liability of common carriers, telegraph companies, employers, and tortfeasors; contracts excusing a man from negligence with or of himself or of his servants. So, Mr. President, there is a vast class, a great variety of contracts which the law will not permit to be made.

--Congressional Record, LXXV, pt. 5, p. 4691.

Appendix I

Cases Illustrating Changes
in Court Opinions with Regard
to Liberty of Contract.

Acts limiting the hours of labor on works conducted by municipal corporations were held, because they violated the liberty of contract, to be void in the case of *People v. Coler*, (166 N. Y. 1); in *State v. Varney Electrical Supply Co.* (160 Ind. 338), and in *Ex parte Kuback* (85 Calif. 274). But on the contrary they were held valid in *Milwaukee v. Raulf* (116 Wis. 172 (1916)), and in *Campbell v. City of New York* (216 N.Y.S. 141).

Acts fixing the time for the payment of wages, as for instance, on the 1st. and 15th. of each month, were held to be in violation of liberty of contract and therefore unconstitutional in *Frerer v. People* (141 Ill. 171), *Braceville Coal Co. v. People* (147 Ill. 66), *Johnson v. Goodyear Mining Co.* (127 Calif. 4), and *State v. Potomac Coal Co.*, (116 Md. 380). It was held otherwise in *Erie Railroad Co. v. Williams* (223 U. S. 685).

Acts fixing the method of paying employees as on the basis of the weight of unscreened coal were held unconstitutional in *Goodcharles v. Wegeman* (113 Pa. 431), *Ramsey v. People* (142 Ill. 380), in re House bill 203 (21 Colo. 27), and *Harding v. People* (160 Ill. 459); but it was held otherwise, namely, that such acts were constitutional in *McLean v. Arkansas* (211 U. S. 539), and in *Rail Coal Co. v. Ohio* (236 U. S. 338).

Acts limiting the hours of labor for women were held unconstitutional in *Ritchie v. People* (155 Ill. 98), but held otherwise in *Commonwealth v. Hamilton Manufacturing Co.* (120 Mass. 383), *Wenham v. State* (65 Nebr. 394), *State v. Buchanan* (29 Walsh. 602), *Muller v. Oregon* (208 U. S. 412), *Riley v. Commonwealth of Massachusetts* (232 U. S. 671), *Miller v. Wilson* (236 U. S. 385), and *Radice v. New York* (264 U. S. 292). That is to say, Mr. President, the Supreme Court of the State of Illinois in the case of *Ritchie v. People* (155 Ill. 98) held that if a woman desired to contract to work 16 hours a day or 20 hours a day, she had a perfect right to do so, and no law could be enacted prohibiting anybody from employing her for those unconscionable hours.

Acts limiting the number of hours of labor in which men could be employed were held unconstitutional, as an unlawful limitation of power to enter into contracts in *Low v. Rees Printing Co.* (41 Nebr. 127), in re *Morgan* (26 Colo. 415), *Lockner v. New York* (198 U. S. 45); but it was held otherwise in *Bunting v. Oregon* (243 U. S. 426), and *Holden v. Hardy* (169 U. S. 366).

Acts requiring employees to be paid in cash instead of scrip or store goods were held unconstitutional in *Millet v. People* (117 Ill. 294), *State v. Goodwill* (33 W. Va. 179), *State v. Loomis* (115 Mo. 307), *Leep v. Railway Co.* (58 Ark. 407), *State v. Haun* (61 Kans. 146), and *State v. Missouri Tie & Timber Co.* (131 Mo. 563), but the contrary view was taken by the Supreme Court of the United States in *Erie Railroad Co. v. Williams* (233 U. S. 685).

Acts prohibiting railroad employees from contracting away the right to recover for injuries were held to be violative of the liberty of contract in *Shaver v. Pennsylvania Co.* (71 Fed. 931), but the contrary view was taken by the Supreme Court of the United States in *Chicago, Burlington & Quincy Railway Co. v. McGuire* (219 U. S. 549).

Injunctions granted on the basis of "yellow-dog" contracts were authorized in *State v. Julow* (129 Mo. 163), *Adair v. United States* (208 U. S. 161), *Coppage v. Kansas* (236 U. S. 1), *Hitchman Coal & Coke Co. v. Mitchell* (245 U. S. 229), *Vail-Ballou Press v. Casey* (212 N. Y. S. 113), *People v. Marcus* (185 N. Y. 257), *Bittner v. West Virginia-Pittsburgh Coal Co.* (12 Fed. (2d) 652), *International Organization, etc., v. Red Jacket Consolidated Coal & Coke Co.* (18 Fed (2d) 839), *Flousheimer v. Schlesinger* (187 N. Y. S. 891), *McMichael v. Atlanta Envelope Co.* (151 Ga. 776), *Third Avenue Railway v. Shee* (179 N. Y. S. 43), *Cyrus Carrier & Sons v. International Molders Union* (93 N. J. Eq. 61), *Kinlock Telephone Co. v. Local Union* (275 Fed. 241), *Callan v. Exposition Cotton Mills* (149 Ga. 119), and *Montgomery v. Pacific Electric Railway* (293 Fed. 680).

But injunctions were denied upon that basis in *La France Co. v. Electric Workers* (108 Ohio St. 61), *Interborough Rapid Transit Co. v. Green* (227 N. Y. 258), and *Interborough Rapid Transit Co. v. Lavin* (247 N. Y. 65).

--Congressional Record, LXXV, pt. 5, pp. 5017-5018.

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