

ESSAYS

“PUBLIC . . . SINCE TIME IMMEMORIAL”: THE LABOR HISTORY OF *HAGUE V. CIO*

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Personal Testament: Late in 1988 or early in 1989, during a Critical Legal Studies meeting, I was privileged to talk with a member of the Polish trade union Solidarność (Solidarity), who was on the team of union members then negotiating over a new constitution with the head of the Polish government, General Wojciech Witold Jaruzelski, during the Round Table talks. I do not recall the young man’s name, nor would I disclose it if I did, but what he relayed was eye-opening and important to the development of my work. He was on the team negotiating constitutional rights. Solidarity’s number one priority was not the protection of free speech, or even open political participation. Rather, the first priority was to secure an enforceable right to assemble on the streets and in public places—the other rights would follow inevitably. His and Solidarity’s remarkable prescience would be validated as massive assemblies toppled the governments of Eastern Europe, one by one, in 1989. They would once again be successful, at least in the short term, during the current and continuing “Arab Spring,” but also cruelly repressed earlier at Tiananmen Square. Mass arrests and police violence mar assembly in the United States too, as Occupy Wall Street and the Occupy Movement are continuously harassed, with observers swept up in police actions. It must be actually possible to assemble freely. The hope for mass democracy, in our time and in

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the future, depends upon it being a *fact* that “The People United Will Never Be Defeated.”¹

Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions. Such use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens.²

“*I Am the Law!*”³

INTRODUCTION

However important the philosophy and sentiment of Justice Roberts, free assembly was never actually assumed or assured in the United States up to the time of *Hague*. Indeed, neither the Roberts plurality nor the concurrence of Justice Stone depended on the First Amendment directly, but rather emerged either as a right to locomotion and communication as a privilege or immunity of national citizenship (Roberts, Black, and Hughes) or substantive due process under the Fourteenth Amendment (Stone and Reed).⁴ Yet free assembly has been the implied goal of struggle in *every* collective action undertaken by workers in our history.⁵ Parades and open-air meetings were the primary vehicles used in organizing early unions and airing their grievances as well as galvanizing their political support in the early republic.⁶

Whether public assemblies would be tolerated or repressed has usually depended on whose purposes people assembled to hear advanced. Assemblies of workers were always suspect because they met to challenge the powers that be. With rising urban immigrant

1. Chilean folk song popular during the government of Salvador Allende and later embraced by the United Farm Workers Union in their organizing drives. See LUIS CORVALÁN, *EL GOBIERNO DE SALVADOR ALLENDE* 111-12 (LOM EDICIONES 2003).

2. *Hague v. CIO*, 307 U.S. 496, 515 (1939) (Roberts, J., plurality opinion).

3. “*I Am the Law*,” *Mayor Hague Tells 1,000 in Speech on Jersey City Government*, N.Y. TIMES, Nov. 11, 1937, at 1.

4. See generally *Hague*, 307 U.S. 496. The language of Justice Stone would be first incorporated into a First Amendment free speech case during civil rights demonstrations in *Shuttlesworth v. Birmingham*, 394 U.S. 147, 151 (1969). As a result of the arrests surrounding the case, Martin Luther King, Jr. wrote “Letter From Birmingham Jail.” See Kathy Lohr, *50 Years Later, King’s Birmingham ‘Letter’ Still Resonates*, NPR.ORG (Apr. 15, 2013, 3:59 PM), <http://www.npr.org/2013/04/16/177355381/50-years-later-kings-birmingham-letter-still-resonates>.

5. See, e.g., KENNETH M. CASEBEER, *AMERICAN LABOR STRUGGLES AND LAW HISTORIES* (Kenneth M. Casebeer ed., 2011).

6. See SEAN WILENTZ, *CHANTS DEMOCRATIC: NEW YORK CITY AND THE RISE OF THE AMERICAN WORKING CLASS, 1788-1850*, 87-89 (1984).

populations necessary to industrial expansion post-reconstruction, organizing them, either in city neighborhoods or where such people transited, was crucial to the success of unions or parties in numbers reached and circulars distributed, in their native tongues and protected by anonymity of the crowd, and by the assumption that recipients were ordinarily presumed to be where they were. Indeed, both labor organizing and wage and hour legislation were set back a decade when a phalanx of uniformed Chicago police marched into a peaceful assembly of anarchists in 1886 in Haymarket Square and an unidentified person hurled a bomb into their midst.⁷ Court injunctions routinely suppressed public meetings during strikes.⁸ Vagrancy, and later, criminal syndicalism laws, were used to arrest Industrial Workers of the World (I.W.W.) organizers, and deter their attempts to hold street meetings among migrant workers, while at the same time veterans' groups and charities were allowed to congregate on the same streets.⁹ Street demonstrations were harassed or broken up by police along the Embarcadero during the Coastwise strike by stevedores on the Pacific Coast in 1934.¹⁰ And Martin Luther King, Jr. was assassinated in Memphis, days after police gassed and broke apart a march he was leading on behalf of attempts at organizing a union by impoverished Memphis sanitation workers.¹¹ Suppression by authorities of free public assembly was certainly not infrequent.

In the same tenor, many legal history articles have been written analyzing and debating the relation of the *Hague* opinions, soon in part to be read into First Amendment cases, eventually to be labeled the public forum doctrine, protecting communication access at least to willing listeners in limited places.¹² However, little has been written about the labor history of the case.¹³ The labor history of

7. See JAMES GREEN, *DEATH IN THE HAYMARKET: A STORY OF CHICAGO, THE FIRST LABOR MOVEMENT AND THE BOMBING THAT DIVIDED GILDED AGE AMERICA* 278, 318-20 (2006).

8. See *In re Debs*, 158 U.S. 564, 591-94 (1895) (upholding, in a famous and unanimous opinion, the federal government's issuance of an injunction ordering those workers involved in the 1894 Pullman railroad strike to return to work).

9. Ahmed A. White, *A Different Kind of Labor Law: Vagrancy Law and the Regulation of Harvest Labor, 1913-1924*, 75 U. COLO. L. REV. 667, 674-77 (2004).

10. KENNETH M. CASEBEER, *Distinctly American Radicalism and the Coastwide and General Strike in San Francisco of 1934*, in *AMERICAN LABOR STRUGGLES AND LAW HISTORIES*, *supra* note 5, at 179.

11. See MICHAEL K. HONEY, *GOING DOWN JERICHO ROAD: THE MEMPHIS STRIKE, MARTIN LUTHER KING'S LAST CAMPAIGN* 345, 432-33 (2007).

12. Richard T. Pfohl, Note, *Hague v. C.I.O. and the Roots of Public Forum Doctrine: Translating Limits of Powers into Individualized Rights*, 28 HARV. C.R.-C.L. L. REV. 533 (1993) (chronicling sparse early cases on assembly).

13. Little labor material is found in John J. Gibbons, *Hague v. CIO: A Retrospective*, 52 N.Y.U. L. REV. 731 (1977); Benjamin Kaplan, *The Great Civil Rights Case of Hague v. CIO: Notes of a Survivor*, 25 SUFFOLK U. L. REV. 913 (1991); Leo

Hague v. CIO was never about the content of speech or its restriction, or even about educating willing listeners, or the marketplace of ideas. No, this labor history was about effective organizing—about the ability of unions not to be prevented entry to or deported from any community, the ability to assemble in open-air meetings, to picket, to distribute literature and membership materials, and to placard opponents.¹⁴

The labor history of *Hague* was specifically about challenging a petty dictator bent on ensuring that *organizing* would not be tolerated in Jersey City.¹⁵ The labor organization in question was the Committee for Industrial Organization (CIO), a militant union organizing along industrial lines, in contrast to the tamer American Federation of Labor (AFL) craft unions already in Boss Hague's pocket locally.¹⁶ The CIO threatened the union-free promise Hague had made to lure unionized companies from New York City necessary to build his increasingly over-taxed economic base,¹⁷ heightening the to-the-death atmosphere as the hidden text of the case. But this specific struggle was also an important location of an internal struggle within the labor movement over industrial versus craft organization of unions,¹⁸ and the relation of organizing to class struggle. And even more generally, an instance of political struggle between bottom-up control of democratic movements versus the top-down old guard Democratic Party exemplified by Party Vice Chairman Frank Hague.¹⁹ Free assembly and social organizing were the ultimate stakes in Jersey City.²⁰ Upon that possibility not being illegal by fiat of the political and economic elite hinged the possibility of radical reform of the political-economic structure of society late in the Great Depression. That such radical reform never emerged, that distinctly American radicalism receded as the world engaged in war, does not diminish the real rights at stake, nor the importance of free public assembly as the "poor person's printing press."²¹

Yanoff, *Breaking the Hague Machine's Stranglehold on the Courts*, 162 N.J. L. J. 524 (2000). The most extensive account of the labor events of *Hague* will be found in a chapter of Mark Tushnet's forthcoming volume of *The Oliver Wendell Holmes Devise History of the Supreme Court of the United States* on the Hughes Court, an unpaginated copy of which is in the author's possession. Professor Tushnet describes the legal representation and briefs in the litigation to a much greater extent as well. Minor differences will be noted *infra*.

14. See Kaplan, *supra* note 13, at 913-14, 920.

15. See Yanoff, *supra* note 13, at 24-26.

16. See LEONARD F. VERNON, *THE LIFE & TIMES OF JERSEY CITY MAYOR FRANK HAGUE: "I AM THE LAW"* 97-98 (2011).

17. See Kaplan, *supra* note 13, at 913-14.

18. See Gibbons, *supra* note 13, at 731.

19. See *id.* at 731-32.

20. See *id.* at 733.

21. See *supra* note 12, at 538.

I. BOSS HAGUE—THE PREQUEL

Frank Hague, born in the poorest Jersey City neighborhood and expelled from school in the sixth grade, moved in and out of the juvenile justice system until he found a series of unofficial jobs with the ward heelers of the local Democratic Party.²² He slowly worked into administrative and then elective office until he overthrew the existing party boss.²³ Mayor of Jersey City for thirty years, he eventually gained appointment to the Democratic National Committee, becoming its Vice-Chairman.²⁴ Nothing in his background suggested a strongly held anti-union principle. Indeed, for a long period, he allied with the local AFL leaders, particularly Theodore Brandle, head of the Building Trades Council, until a political break over the Jersey City Medical Center in 1931.²⁵ Even then, as Mayor, Hague claimed friendship for unions, at times forcing favorable terms for workers in order to stem labor disputes. But most of all, Hague trumpeted labor peace in his town—no strikes allowed. Indeed, it was reported no successful strike took place between 1931 and 1937.²⁶ As long as the AFL did not insist on independence, their locals would not be attacked and outside unions would not be allowed to compete.²⁷

In the mid-thirties, the Depression upset this imposed stability. Labor was changing and so was New Jersey.²⁸ Many craft-based businesses went bankrupt. At the same time, North Jersey became the most densely industrial area of the country. All the same, some industries moved out to avoid tax burdens as more important than labor costs.²⁹ Hague's lavish patronage—his costs of municipal government ran substantially beyond comparable cities, as did municipal taxes—depended upon at least a stable tax base.³⁰ Hague's strategic response lured highly taxed and unionized New York City loft industries across the Hudson with the promise they would shed their former unions, and new locals—AFL or not—would not be

22. See VERNON, *supra* note 16, at 28-33.

23. See generally *id.* at 36-52 (describing Hague's gradual rise to power, eventually leading to his procurement of the Jersey City mayorship).

24. *Id.* at 85.

25. LEO TROY, ORGANIZED LABOR IN NEW JERSEY 182 (Richard M. Huber & Wheaton J. Lane, eds., 1965); RICHARD J. CONNORS, A CYCLE OF POWER: THE CAREER OF JERSEY CITY MAYOR FRANK HAGUE 98-99 (1971).

26. TROY, *supra* note 25, at 182.

27. Hague "fought the closed shop by establishing the closed city." Tushnet, *supra* note 13 (citing to ZECHARIAH CHAFFEE JR., FREE SPEECH IN THE UNITED STATES 410 (1941)).

28. See TROY, *supra* note 25, at 90.

29. Sidney Olson, *Hague, C.I.O.'s Foe, Ponders Senate Seat*, WASH. POST, Jan. 2, 1938, at 13.

30. See *id.*

allowed to organize their new workers.³¹ Strikes and picketing would not be allowed.³² As one scholar noted: “Hague ordered rigid enforcement of local ordinances regulating the distribution of circulars or the display of placards, and requiring permits to conduct public meetings.³³ State statutes against disorderly conduct, loitering, unlawful assembly, and disturbing the peace also played a role in deterring union activity.”³⁴

The AFL acquiesced in order to protect its existing locals, but the new, industrial CIO would not and began a long campaign to open up Frank Hague’s fiefdom.³⁵ Given Hague’s power and political career, no quarter would be offered. As Hague’s trial counsel argued in announcing appeal to the Supreme Court, “The alleged C.I.O. conspiracy . . . is ‘not for the benefit of the workers in industry but an incident in the nation-wide struggle for political-labor control between the C.I.O. and the A.F. of L.’”³⁶

Labor policies were simply part of a larger fiscal crisis for Boss Hague. His cronyism and patronage had extraordinarily high costs: Hague cut salaries of municipal employees as much as thirty-five percent; 12,000 homeowners lost their homes to tax sales caused by increased valuations.³⁷ Despite these measures, “the city’s gross debt rose above ninety-three million dollars.”³⁸ The 1936 city budget of over twenty-three million dollars was five times that of the larger

31. See Gibbons, *supra* note 13, at 733.

32. See *id.* at 733-34.

33. *Id.* at 733. An ordinance passed by the Jersey City Board of Commissioners on January 22, 1924, stated that: “No person shall distribute or cause to be distributed or strewn about any street or public place any newspapers, paper, periodical, book, magazine, circular, card or pamphlet . . .” Hague v. CIO, 101 F.2d 774, 782 (3d Cir. 1939).

An April 15, 1930 ordinance resolved that:

From and after the passage of this ordinance, no public parades or public assembly in or upon the public streets, highways, public parks or public buildings of Jersey City shall take place or be conducted until a permit shall be obtained from the Director of Public Safety.

. . .

[S]aid permit shall only be refused for the purpose of preventing riots, disturbances, or disorderly assemblage.

Id. at 797.

34. Gibbons, *supra* note 13, at 733.

35. See *id.* at 735 (noting that the CIO hired a lawyer known for his activity in civil-libertarian causes, who “began to organize political opposition in Congress”).

36. Russell B. Porter, *Hague Issue Slated for Supreme Court*, N.Y. TIMES, July 1, 1938, at 1.

37. Sidney Olson, *Jersey City Mayor May Take Way Out of ‘Hot Spot’ as Municipal Costs Mount to Thirteenth in Nation*, WASH. POST, Jan. 2, 1938, at 1.

38. James R. Macready, *Hague Does the Reactionary*, NEW MASSES, Jan. 11, 1938, at 3, 5.

New Orleans.³⁹

Hague would lose on law and in fact unrelated to his case. By the time the case reached trial, the CIO had 3,000 members in Jersey City and 10,000 members in Hudson County.⁴⁰ Just preceding this period, AFL membership in North Jersey plummeted from 38,700 in 1928 to 13,000 in 1934.⁴¹ Did winning *Hague v. CIO* help labor and organizing in Jersey City? Undoubtedly, but the context of power focused in the case reached both back and forward in time and, more broadly, in space.

II. CIO—INTERNATIONAL UNION POLITICS COME TO JERSEY CITY

The labor trouble in Jersey City began in San Francisco in 1934. Harry Bridges, in leading the Coastwise rank-and-file maritime strike and general strike in San Francisco, successfully circumvented the East Coast leadership of Joseph Ryan, President of the International Longshoremen's Association (ILA), effectively creating two unions, East and West.⁴² When the CIO split from the AFL, Bridges led his newly named International Longshoremen's and Warehousemen's Union (ILWU) into the CIO, becoming the CIO West Coast organizer.⁴³ One key to the maritime strike was inclusion of all the maritime unions in the strike.⁴⁴ The key tactic employed rank-and-file strike organization and communication, largely through *The Waterfront Worker*, a rank-and-file newspaper.⁴⁵

Bridges wanted to create a CIO-led East Coast Maritime Federation,⁴⁶ initially through the vehicle of the International Seamen's Union, eventuating in strikes in, among other places, Jersey City in 1936 through 1937.⁴⁷ The rank-and-file newspaper, *The ISU Pilot* ("Pilot"), published its first issue on February 27, 1935, overlapping with and featuring a format identical to *The Waterfront Worker* from San Francisco.⁴⁸ The first issue's objective was to

39. *Id.*

40. Sidney Olson, *Spies in Hague's Own City Hall Inform C.I.O. of His Moves*, WASH. POST, Jan. 5, 1938, at 1.

41. CONNORS, *supra* note 25, at 99.

42. CASEBEER, *supra* note 10, at 179.

43. HOWARD KIMELDORF, REDS OR RACKETS? THE MAKING OF RADICAL AND CONSERVATIVE UNIONS ON THE WATERFRONT 76, 168-169 (1988).

44. CASEBEER, *supra* note 10, at 179.

45. *Id.*

46. On the striking difference between the ILA on the East and West Coasts and the different experience of the rank-and-file, see KIMELDORF, *supra* note 43, at 122-23.

47. See Kaplan, *supra* note 13, at 914.

48. Irving Bernstein notes the centrality of the *Pilot* for beginning rank-and-file organizing but fails to see the parallels to *The Waterfront Worker*, simply attributing the organizing to the Communist Party following the collapse of the Marine Workers' Industrial Union (MWIU). IRVING BERNSTEIN, TURBULENT YEARS: A HISTORY OF THE AMERICAN WORKER, 1933-1941, 579 (1970).

establish a union-run hiring hall, which would include unemployed seamen within the hall in order to prevent the economic fact of unemployment during the depression from undermining aggressive union tactics and endorse the Lundeen Social Wage/Unemployment Insurance Bill.⁴⁹ Speed-ups and ship safety demands were included;⁵⁰ these issues were exactly parallel to the early rallying issues raised in *The Waterfront Worker*. ISU leaders immediately denounced the *Pilot* as communistic.⁵¹ Again following the West Coast, under the banner "An injury to one must come an injury to all," the *Pilot* called for ending Jim Crow Locals.⁵² Gulf Coast seamen planned a meeting of the maritime unions for January 6, 1936 in Houston.⁵³ The link back to Bridges appeared explicitly in January 19 "Boston I.L.A. Local 800 voted condemnation of the attack upon the Maritime Federation led by Finky Scharrenberg, Joseph Ryan and Edward McGrady, assistant secretary of Labor. A telegram was sent to Bridges, informing him of this support."⁵⁴ The East Coast union leadership struck back. The ISU expelled the 13,000 members of the Sailors of the Pacific for supporting the Maritime Federation of the Pacific and began trying to reorganize the East Coast ISU along craft lines.⁵⁵ The *Pilot* reported on February 7, 1936 that a renewal of the shipping agreement, in the process of being voted down by union members, would bring a strike at its end.⁵⁶ Demands included a twenty percent wage increase, seventy-five cents an hour overtime, "better working conditions and . . . all shipping through the union [hiring] hall."⁵⁷ Along rank-and-file lines, "ship crews should immediately elect strike preparations committees."⁵⁸

The strike, lead by Joseph Curran, lasted nine weeks.⁵⁹ On May 14, New York City police arrested 249 seamen in two mass picket lines that formed in front of the *S.S. Virginia*.⁶⁰ All were released before morning, but brutality accompanied arrest:

Crossing the street, I heard shouts. Over in front of the strike quarters a platoon of police on motorcycles and a number on foot

49. ISU PILOT, Feb. 27, 1935, at 1.

50. *Id.*

51. In fact, the *Pilot* purged its communist members in March 1936. Edward Levinson, *Waterfront East and West*, NEW REPUBLIC, Sept. 14, 1938, at 153.

52. ISU PILOT, Apr. 12, 1935, at 5.

53. *Gulf Coast Unions to Band in Federation*, ISU PILOT, Dec. 20, 1935, at 1.

54. *Boston Longshoremen Support Federation*, ISU PILOT, Jan. 24, 1936.

55. *13,000 Sailors Expelled From Union*, ISU PILOT, Jan. 31, 1936, at 1.

56. *Resolution Passed at Sailors' Union to Prepare for Strike Action to Win Better Agreement*, ISU PILOT, Feb. 7, 1936, at 1.

57. *Id.*

58. *Id.*

59. See BERNSTEIN, *supra* note 48, at 580.

60. *Police Attack Picket Lines—Mass Arrest*, ISU PILOT, May 15, 1936, at 1.

crashed into the pickets who had been standing quietly.

I saw police on motorcycles crash into the pickets and drive them up against the wall. I saw pedestrians and storekeepers on the block chased and slugged by police.⁶¹

Twenty were injured.⁶² Over eighty ships were struck with over 7,000 seamen registered for strike duty.⁶³ After Mayor LaGuardia agreed to investigate suppression of picketing,⁶⁴ the strike settled on May 29.⁶⁵ At a striker's meeting, 1,200 seamen voted to agree to the settlement despite its negotiation by ISU leaders.⁶⁶ Not much concrete progress was gained beside amnesty from blacklisting by the shippers or expulsion from the union.⁶⁷

Not all strikers in Jersey City fared as well. "[Frank] Hague, a personal friend of [ILA President Joseph] Ryan, declared the strike illegal. Persons wearing ISU [buttons] were stopped by police on sight and forced to board New York bound ferries"⁶⁸—the first use of deportation. "Declaring that he preferred 'force to arrest,' Police Chief Harry W. Walsh dispersed pickets and roughed up observers for the American Civil Liberties Union . . ."⁶⁹ A soup kitchen was closed as "a hang out for Communists."⁷⁰ A week after the strike ended, four strikers remained in jail, serving ninety-day sentences.⁷¹ Kelleher, Goldston, and DePico were convicted as disorderly persons, ostensibly for "trying to inform the crew of the Seatrain New Orleans that there was a seamen's strike."⁷² Ed Grand was held over for the grand jury for being "on foot for an unlawful purpose."⁷³ New Jersey "mad[e] it a felony for a person, especially strikers, to be on strike in the state of New Jersey when such person or persons are not residents of the state."⁷⁴ From this ISU strike onward, the legal barrier to labor organization was access to Jersey City in order to assemble and publicly communicate with workers.

61. *Id.*

62. *Strikers Win Mass Picket Rights*, ISU PILOT, May 22, 1936, at 1.

63. *Striking Seamen Offer Arbitration*, N.Y. TIMES, May 25, 1936, at 14.

64. *LaGuardia to Hear Striking Seamen*, N.Y. TIMES, May 19, 1936, at 46.

65. *Strike Ended in Partial Victory*, ISU PILOT, May 29, 1936, at 1; *Seamen End Strike, Fearing Cause Lost*, N.Y. TIMES, May 30, 1936, at 1.

66. *Strike Ended in Partial Victory*, *supra* note 65.

67. *See Seamen End Strike, Fearing Cause Lost*, *supra* note 65.

68. Peter Herbst, Frank Hague and the Challenge of the CIO 48 (Apr. 11, 1976) (unpublished B.A. Senior Paper, Georgetown University) (on file with the *Rutgers Law Review*).

69. *Id.*

70. *Id.* at 49.

71. *Let's Not Forget Our Brothers in the Jersey Brig*, ISU PILOT, June 5, 1936, at 4.

72. *Id.*

73. *Id.*

74. *Id.*

Another ISU strike began in November 1936 and struggled into 1937 with 30,000 men out on the East Coast.⁷⁵ In Baltimore, 3,000 seamen and longshoremen held a mass parade and listened to Harry Bridges and ILA dissenter Joe Curran.⁷⁶ Police in Boston broke up ISU meetings and picket lines.⁷⁷ In Jersey City, Bridges and the seafarers established the New Jersey Strike Committee for Striking Seamen.⁷⁸ When they attempted to picket Dollar Line ships there, police broke up the demonstration.⁷⁹ The strike failed against the combined pressures of the ship owners and ILA and ISU leadership.⁸⁰ Hague blasted the picketers, stating:

Their policy is to incite disorder and encourage violence, to assail government and the church, to inject themselves into labor disputes and to breed revolution. Revolution is their creed. We in Jersey City are God-loving, law-abiding, peace-desiring Americans, and there is no place in our community for Communists or the things they stand for.⁸¹

Now, the issue ceased to be labor peace or labor organizing, but rather radical political revolution. At the trial of the later case, Hague claimed Bridges “sent 500 ‘strong-arm men and killers’ into Jersey City during the . . . seamen’s strike.”⁸² In fact, in 1939, “Murder, Inc.” executed the Brooklyn CIO rank-and-file leader, Pete Panto.⁸³

Nevertheless, there was a subtext of a more prosaic politics as well. The connection between the CIO and the ACLU in Jersey City began with an injunctive suit by ACLU General Counsel Arthur Garfield Hays against police behavior during the seamen’s and ancillary strikes, which was heard before Judge William Clark in March 1937.⁸⁴ The suit alleged that the Jersey City Police “adopted a policy . . . of refusing to arrest people who they claim[ed were] acting unlawfully”—presumably so that the actions otherwise taken could not be challenged in court—“of assaulting people, of throwing them out of town, [and] of . . . determining who is desirable in Jersey City

75. See BERNSTEIN, *supra* note 46, at 583-84.

76. *Baltimore Greets Bridges*, ISU STRIKE BULLETIN, Dec. 19, 1936.

77. *Strikers Beaten Up and Told to Leave Town at Once! Citizen’s Committee Taking Action!*, WATERFRONT NEWS—PORT OF BOSTON, DAILY STRIKE BULLETIN, Nov. 25, 1936, at 3.

78. *See Strike Move Fails to Halt Truckmen*, N.Y. TIMES, Dec. 29, 1936, at 41.

79. *Picketing Seamen Routed by Police*, N.Y. TIMES, Dec. 31, 1936, at 2.

80. BERNSTEIN, *supra* note 46, at 584.

81. *Six Striking Seamen Held for Assault*, N.Y. TIMES, Jan. 6, 1937, at 15.

82. Russell B. Porter, *Hague Testifies Red Plots Forced Ban on C.I.O. Rallies; Denies Free Speech Is Issue*, N.Y. TIMES, June 11, 1938, at 1.

83. KIMELDORF, *supra* note 43, at 124-125 & n.76.

84. AM. CIVIL LIBERTIES UNION, CIVIL RIGHTS VS. MAYOR HAGUE 1, 3 (1938) [hereinafter ACLU, CIVIL RIGHTS VS. MAYOR HAGUE] (containing “extracts from a hearing before the Hon. William J. Clark”).

and who is undesirable.”⁸⁵ During a strike of two unions, the Boot and Shoe Makers Union and the Furniture Makers Union, on February 9 and 16, 1937, respectively, pickets from New York City “were assaulted by the police . . . taken into the Tube,” and forced to return to New York, even though they protested that the Tube at night was unsafe.⁸⁶ The pickets were asserted by Corporation Counsel James A. Hamill to be undesirables.⁸⁷ Hamill warned Hays not to “create disorder . . . [by] play[ing] the part of a Communist.”⁸⁸

MR. HAYS: You have no right to adopt Communist methods of government; after all, Jersey City is in the United States.

MR. HAMILL: Yes, and if it weren’t that Jersey City adhered to the Constitution, those who break the Constitution would be going into the river. It is because they exercise the forbearance of American citizenship against those who would tear down the flag that the latter are permitted to depart peacefully rather than to be driven out forcibly as they richly deserve.⁸⁹

When asked by the court how long it had “been the [police] policy to prevent picketing in Jersey City,” Police Chief Walsh responded, “As long as I have been a member of the police department where there were no strikes existent [sic].”⁹⁰ Arrests of pickets were justified because of alleged violence by men of the same union outside Jersey City, but most arrests for picketing occurred in the absence of a strike.⁹¹ As the court explained in exasperation:

The police then must arrest the men because there must be some judicial determination of the question whether there is a strike, whether it is done by an injunction or whether it is done by a writ of habeas corpus or a trial in the Common Pleas Court. The police cannot just say we have decided there is not a strike; therefore we are going to hustle the people out of Jersey City.⁹²

Corporation Counsel replied there was no strike because the workers wanted the status quo and had a right to be protected against disruption.⁹³ The Court responded there was no evidence of disruption.⁹⁴ It seemed to be Jersey City’s opinion that all picketing could be suppressed, because if any did start, the police chief would go to the site and force a settlement so that there were never any

85. *Id.*

86. *Id.*

87. *Id.* at 4-5.

88. *Id.* at 5.

89. *Id.* at 8.

90. *Id.* at 11.

91. *See id.* at 14-16.

92. *Id.* at 15-16.

93. *See id.* at 19.

94. *Id.* at 20.

legitimate strikes in Jersey City.⁹⁵ Union reps were busybodies with no legitimate reason to be where they were unwanted by definition.⁹⁶ The police admittedly had no right to expel, but they had a right to escort undesirables to the city's borders.⁹⁷ Ultimately, this complete police discretion was claimed under the "law of necessity."⁹⁸ The court responded that it "would like to be shown any case reported anywhere which gives a police officer the right to evict anybody from the city."⁹⁹ On appeal from Judge Clark's injunction, the end of the strikes mooted the case.¹⁰⁰ There was no doubt the city's representatives accurately portrayed Frank Hague's view, as Hague later proclaimed:

As long as I am Mayor of this city the great industries of the city are secure. We hear about constitutional rights, free speech and the free press. Every time I hear these words I say to myself "that man is a Red, that man is a Communist." You never heard a real American talk in that manner.¹⁰¹

Finally, the national struggle over union leadership would expand beyond the maritime.¹⁰² William Green, president of the AFL, sent a spokesman to the New Jersey Federation of Labor convention, from which CIO delegates had been denied credentials, to announce that "the initials CIO [stood] for Communist International Organization . . . who will do anything to drag down American standards."¹⁰³ Local politics and national unions joined Red baiting.¹⁰⁴ Early in 1937, John L. Lewis dispatched William Carney to be CIO regional director for New Jersey.¹⁰⁵ In the last preliminary, five men attempting to issue circulars urging workers of United States Testing in Hoboken to join the Textile Machine Operators and Helpers Union were arrested.¹⁰⁶

III. THE CIO INVASION OF JERSEY CITY

In 1937, former textile organizer, Samuel Macri, as instructed,

95. *See id.* at 23.

96. *See id.*

97. *Id.*

98. *Id.* at 25.

99. *Id.* at 27.

100. *See id.* at 31; *see also Press for Injunction Against Frank Hague*, SPOKANE DAILY CHRON., Dec. 14, 1938, at 10.

101. Frank Hague, Mayor, Address Before the Jersey City Chamber of Commerce (Jan. 12, 1938) in ACLU, CIVIL RIGHTS VS. MAYOR HAGUE, *supra* note 81.

102. *CIO Is Termed Red Organization*, JERSEY J., Sept. 14, 1937, at 1.

103. *Id.*

104. *See generally* ACLU, CIVIL RIGHTS VS. MAYOR HAGUE, *supra* note 81.

105. *See CIO Plans J.C. Invasion*, JERSEY J., Nov. 24, 1937, at 1.

106. *CIO Organizer Among Five Arrested Here*, JERSEY OBSERVER, Nov. 4, 1937, at 5.

opened a CIO office at 216 Academy Street in Jersey City.¹⁰⁷ Immediate organizing targets were small plants that fled from New York City, American Home Products and Standard Cap and Seal Company.¹⁰⁸ From the first, union organizers had been dismissed.¹⁰⁹ Macri was continuously shadowed by a Jersey City police lieutenant named Fitzgerald.¹¹⁰ A “flying squad” of Hague’s police” searched Macri’s car and he was not allowed to distribute CIO pamphlets at Consolidated Razor.¹¹¹

On November 23, 1937, CIO Regional Director William Carney threw down a gauntlet, which the media labeled an “[i]nvasion”: “According to the present plans, [on November 29] some 2,000 CIO organizers and workers will meet in Jersey City and will march to a number of the larger industrial plants for the purpose of distributing circulars.”¹¹² In the same announcement, a mass public meeting was announced for Friday, December 3, in the People’s Center, 160 Mercer Street.¹¹³ The speakers were to be Allan Haywood, regional director of the CIO, Michael Quill, president of the Transport Workers Union of America, Harry Wendrich, Printing Pressman’s Union, and Carney.¹¹⁴

From the Bill of Complaint in *Hague*, one circular read:

TO ALL WORKERS IN HUDSON COUNTY

Millions of workers all over the U.S. with the help of the CIO have ended their economic slavery and become free men or women again.

You can do it too!

Here at last is the great chance for every worker in Hudson County—the biggest opportunity in your life—the opportunity to organize for better wages, for security of your job and for life under the protection of a CIO contract.

Don’t forget! Your boss cannot prevent you from joining the CIO.¹¹⁵

During the early morning hours of November 29, a platoon of police surrounded new CIO headquarters at 76 Montgomery Street.¹¹⁶ Upon arriving, Samuel Macri was forced back into his

107. Herbst, *supra* note 68, at 51.

108. *Baldwin Accuses Hague of Tyranny*, N.Y. TIMES, Dec. 15, 1937, at 3.

109. Herbst, *supra* note 68, at 51.

110. *Id.*

111. *Id.*

112. *CIO Plans J.C. Invasion*, *supra* note 105.

113. *C.I.O. Girds for a Fight with Hague*, JERSEY OBSERVER, Nov. 24, 1937, at 1.

114. Herbst, *supra* note 68, at 55 (explaining that Quill and Wendrich were slated to speak); see also *Our History*, TWU, <http://www.twu.org/OurUnion/OurHistory.aspx> (last visited Feb. 25, 2014) (identifying Michael Quill as President of the Transport Workers Union).

115. Herbst, *supra* note 68, at 60 n.6.

116. See *Labor March on Jersey City Ends Without Disorder*, JERSEY OBSERVER,

automobile:

So when we got in the machine [worker name for automobiles], he (the police) says "All right, now drive." I said, "Am I under arrest?" "Never mind, keep on driving." So I kept on driving; then I said, "Where are we going, to the Police station?" He said, "Yes." , [sic] and we kept on driving. I was deported out.¹¹⁷

Workers and observers were met at tube and ferry stations by police, who sent them back by return transit.¹¹⁸ In all, about fifty people made it to Montgomery Street.¹¹⁹ They marched to Exchange Place on the waterfront to the Harborside Warehouse.¹²⁰ The workers were surrounded; the police struck circulars from their hands.¹²¹ More circulars arrived and, in turn, were seized by police.¹²² When some organizers returned to Montgomery Street, they were locked in the office, searched, and individually removed in cars to Kearney and Harrison, New Jersey.¹²³

Thirteen men were arrested: Jule Hydes and Neil Brant, field organizers for the United Electrical, Radio and Machine Workers of America (UE), and three other UE members were arrested for distributing literature outside Westinghouse Elevator; Samuel Macri and William McGinn of the CIO, Morris Milgrim, field secretary of the Workers Defense League, and Dominick Spina, a student, were arrested at the CIO office; and four others were arrested in various parts of the city for distributing circulars.¹²⁴ At Westinghouse, police crowded workers into doorways, told them that distributing circulars in the city was prohibited, confiscated the circulars, and told the workers they were littering, even though no circulars were found on the street.¹²⁵ Forty workers and organizers were deported.¹²⁶

Judge Anthony Botti tried seven of the arrested men immediately in a police court.¹²⁷ The judge "forced the CIO men to stand throughout the proceedings," refused defense counsel's requests to confer with their clients, denied all defense motions, "including a request for a recess," kept no stenographic record, confiscated notes made by an accused, and convicted the defendants

Nov. 29, 1937, at 1.

117. Herbst, *supra* note 68, at 53.

118. *See id.* at 53-54.

119. *Id.* at 53.

120. *Id.*

121. *See Labor March on Jersey City Ends Without Disorder, supra* note 116.

122. *Id.*

123. Herbst, *supra* note 68, at 54.

124. *Id.* at 59.

125. *Police of Jersey City Drive Out Forty CIO Organizers*, CHI. DAILY TRIB., Nov. 30, 1937, at 2.

126. *See id.*

127. *Id.*

on the spot, sentencing the men to thirty days' imprisonment.¹²⁸ The other six men were held for the grand jury on \$1,000 bond each, pending charges of unlawful assembly.¹²⁹ They received five days in jail for distributing circulars.¹³⁰ From the bench, Judge Botti warned:

I want to say to Mr. Carney [who was not arrested] and his associates that we don't want him here and we'll go the limit to keep him out. We don't want him and his CIO hoodlums coming here to make trouble and the people of Jersey City want nothing to do with him or them. It seems to be the idea of these people that they have a constitutional right to violate everyone else's rights but as soon as they are stopped from invading this peace-loving community with their plans for violence and disorder, they begin to cry that their own rights are being violated.¹³¹

On December 1, Judge Thomas Meaney, on appeal, found no legal impropriety in the summary trial, including the lack of transcript, yet curiously opined that there was ample evidence to support the convictions.¹³² The principal prosecution witness, Sergeant Edward Fletcher, testified "the prisoners assembled in front of the Harborside Terminal Warehouse, 26 Exchange place [sic] and by their actions and conduct, abused those who were approached with circulars."¹³³ Sergeant Fletcher further testified that "[t]heir general behavior was unlawful."¹³⁴ The constitutional challenges, mostly criminal due process objections to the proceedings rather than against the underlying laws previously upheld by the New Jersey Supreme Court, were immediately appealed to the New Jersey Supreme Court.¹³⁵

On December 3, the CIO postponed the Friday mass meeting at the People's Center when the building owners refused to allow use of the hall.¹³⁶ Alternative halls, though available, returned deposits or refused to book any CIO meeting throughout Hudson County, including "the White Eagle Hall, Columbia Hall, The Polish Hall, The Polish Community Hall, the Jewish Center, the People's Palace, and Grand View Auditorium."¹³⁷ In his trial testimony, Hague admitted "a hall owner would feel that he was not 'working within

128. Herbst, *supra* note 68, at 56.

129. *Police of Jersey City Drive Out Forty CIO Organizers*, *supra* note 125.

130. Herbst, *supra* note 68, at 56.

131. *Hague Lauded, Slammed on Clashes over CIO*, JERSEY J., Dec. 11, 1937, at 1.

132. *CIO Appeal Is Carried to Chief Justice*, JERSEY J., Dec. 2, 1937, at 1.

133. *Court Holds 6 Under Bail to the Jury*, JERSEY OBSERVER, Nov. 30, 1937, at 1.

134. *Id.*

135. *CIO Appeal is Carried to Chief Justice*, *supra* note 133.

136. *Mayor Hague's Testimony on His Second Day on Stand in Newark Court*, N.Y. TIMES, June 15, 1938, at 14.

137. Herbst, *supra* note 68, at 60 n.14 (citing Transcript of Record at 978, Hague v. CIO, 307 U.S. 496 (1939) (No. 651)).

the proper scope' if he rented his hall to the respondents; and, if he did not work within the 'proper scope,' he might be embarrassed in the 'little minor affairs' that concerned him at the City Hall."¹³⁸ On December 4, at the request of the CIO General Counsel Lee Pressman, Senator Robert La Follette promised an investigation by his sub-committee on civil liberties.¹³⁹

Finding no hall available, the union filed for a permit to hold an open-air meeting in Jersey City for late December.¹⁴⁰ Mayor Hague continued his public campaign approving the police arrests and deportations and, when responding to questions about their legality, Hague asserted who should decide whether labor organizing is an invasion¹⁴¹: "Me. Right here."¹⁴² At the same time, he dismissed Roger Baldwin, president of the ACLU, and quoted *The Red Network* by Elizabeth Dilling, stating that "the Civil Liberties' group was closely affiliated with the Communist movement in the United States 'and fully 90 per cent of its efforts are on behalf of Communists.'"¹⁴³

The bizarre tenor of city and labor relations played out during a perhaps "sit-down" strike labeled by media as the city's first sit-down.¹⁴⁴ CIO workers at Fargo Can and Seal Co. sat down for an hour inside the plant during the night shift.¹⁴⁵ The men insisted they were on strike because of refusal by the company to recognize the United Hood and Seal Workers Union, Local 682, CIO, as the sole bargaining representative of the plant (the union had signed fifty-one of sixty-four employees).¹⁴⁶ Fargo spokesman Ross claimed there was no strike; only that production had stopped during negotiations while the men waited for them to end. Samuel Macri claimed the company president gave permission for the men to remain overnight.¹⁴⁷ Nonetheless Commissioner Casey (public services) was telephoned.¹⁴⁸ Chief Edward Walsh entered the building with fifty policemen:

You are in Jersey City, New Jersey, not in Moscow, Russia . . .

138. Respondents' Brief at 8, *Hague v. CIO*, 307 U.S. 496 (1939) (No. 651), 1939 WL 48838, at *8.

139. See *Hague Inquiry Weighed: La Follette Advises C.I.O. Spokesmen to Present Jersey City Data*, N.Y. TIMES, Dec. 5, 1937, at 58.

140. See *Hague Acclaimed for CIO Barring*, SPARTANBURG HERALD, Jan. 7, 1938, at 1; see also Herbst, *supra* note 68, at 56.

141. *Mayor Hague Says He Will Keep Up Fight to Bar Red 'Elements' From Jersey City*, N.Y. TIMES, Dec. 10, 1936, at 16.

142. *Id.* Hague claimed he had been misquoted, but did not deny that the decision rested on his discretion alone. Porter, *supra* note 82.

143. *Mayor Hague Says He Will Keep Up Fight to Bar Red 'Elements' From Jersey City*, *supra* note 141.

144. *Sit-Downers Ousted From J.C. Factory*, JERSEY J., Dec. 7, 1937, at 1.

145. *Id.*

146. *Id.*

147. *Id.*

148. *Id.*

You are in possession of these people’s property. You can’t do that here. In Jersey City you must obey the law and observe the rights of other people You have a right to strike if you want to, but you can’t take possession of other peoples properties. If you feel that you want to strike, go ahead out and strike. We’ll not interfere with peaceful picketing. We will permit three of you to picket this place tomorrow without placards.¹⁴⁹

Amidst grumbling, the men left the lunch area and then the plant.¹⁵⁰

Early in the morning, twenty-six CIO workers began “mass picketing” outside the plant.¹⁵¹ They marched two abreast before the building two or three times.¹⁵² Eight present police “stopped them and explained at length” that mass picketing in Jersey City was against the law and that if they persisted in mass picket lines “there would be trouble.”¹⁵³ The men desisted and the police allowed two pickets to remain.¹⁵⁴ A week later, the CIO signed a one-year contract.¹⁵⁵

The same day, at the same building, the AFL Wine and Distilled Workers Union also struck the Continental Pure Foods Products Co. for better pay and hours.¹⁵⁶ The AFL used only two allowed pickets.¹⁵⁷ Management closed the plant, claiming “there was no work to be done”—yet strikers countered that this was “[the company’s] busiest season.”¹⁵⁸ While all thirty workers were out, company spokesman Paul said he closed because “he did not want to embarrass workers who did not want to go out.”¹⁵⁹ Whether there was two, one, or no strikes, the Mayor’s police seemed to be unable to lose control!

The national spotlight began to show. Apparently Jersey City’s separation from tyranny had yet to register; ACLU General Counsel Arthur Garfield Hays chided, “[P]eople all over the United States . . . are insisting that Jersey City again become part of America.”¹⁶⁰ Congressman Maury Maverick (D-Tex.) suggested a bill to cover the kidnapping and deportation of white men in the North to match the

149. *Id.*

150. *Id.*

151. *Id.*

152. *See id.*

153. *Id.*

154. *Id.*

155. *Id.*

156. *Id.*

157. *Id.*

158. *Id.*

159. *Id.*

160. *Hague Lauded, Slammed on Clashes Over CIO*, *supra* note 131.

“proposed anti-lynching law” in the South.¹⁶¹ Montana Congressman Jerry O’Connell, who was later denied the opportunity to speak at a meeting in Jersey City,¹⁶² and four other Congressmen called for hearings, writing in a letter to Hague: “[W]e note that you say labor is ‘under control’ in your city. Knowing something about your methods of operation we’re not surprised you think that it is.”¹⁶³ The *New York Times* editors wrote:

If you don’t want union organizers in your city, you tell them to keep out. If they come in, you have the police arrest them or kick them out. If they come on foot, you physically force them back into the tubes or on board the ferries. If they come by car, you have policemen meet them and ask them to drive back the way they came. You prohibit the distribution of leaflets. You don’t allow peaceful picketing when you don’t want it. You intimidate the owners of assembly halls so that they will not rent to the C.I.O. So far as can be learned, Mayor Hague does not believe that there are any rights that he is bound to respect.¹⁶⁴

The next day, the New Jersey Supreme Court denied the constitutional appeals of the UE men arrested and sentenced to five days’ imprisonment, holding “that the record of the proceedings in the lower court disclosed ‘no legal impropriety.’”¹⁶⁵

Mayor Hague, if listening, applauded the derision, assuming the hero’s mantle. When the permit for an open-air meeting was filed, Mayor Hague conducted a campaign to prevent it; first issuing a proclamation, asking that “the people of Jersey City aid [him] in [his] efforts to obstruct *this lawless element, whose only objective is to crush by terrorism.*”¹⁶⁶ “[T]hese strangers may as well understand that the Stars and Stripes will continue to fly over our city . . . the red flag never will be hoisted here while we Americans live in Jersey City.”¹⁶⁷ When ACLU attorney Morris Ernst compared Hague’s methods to “those of the worst dictator,”¹⁶⁸ Hague warned, “I am inclined to invite Ernst to Jersey City to repeat his speech. I will guarantee that if he does his friends will not see him for a long, long time.”¹⁶⁹ Resolutions of support for Hague came from all local newspapers, the Real Estate Board, the Ladies of the Grand Army of

161. *Congressmen Aid C.I.O. in Hague Fight*, N.Y. TIMES, Dec. 10, 1937, at 1.

162. Herbst, *supra* note 68, at 70-71.

163. *Id.* at 16.

164. “*I Am the Law*”, N.Y. TIMES, Dec. 17, 1937, at 24.

165. *CIO Appeal Is Carried to Chief Justice*, JERSEY J., Dec. 2, 1937, at 1; *see also C.I.O. Jailing Upheld*, N.Y. TIMES, Dec. 2, 1937, at 12.

166. Respondents’ Brief at 22, *Hague v. CIO*, 307 U.S. 496 (1939) (No. 651), 1939 WL 48838 (citation omitted).

167. *Hague Labor War Faces Test Today*, N.Y. TIMES, Dec. 21, 1937, at 1.

168. *C.I.O. Plans Test on Ban by Hague*, N.Y. TIMES, Dec. 19, 1937, at 29.

169. *Id.*

the Republic, Chamber of Commerce, Catholic War Veterans, Lions Club, Hudson County Building and Trades Councils, coupled with the largest Catholic church in the city.¹⁷⁰ Mayor Hague directed aides (city employees) to mail or deliver 3,000 postcards to residents and groups urging turnout to support the veterans groups.¹⁷¹ The campaign culminated in a meeting of 3,000 veterans at the 113th Regiment Armory, at which the "secretary to Governor-elect A. Harry Moore" (picked by Frank Hague) told the crowd, "[i]t [sic] about time we got excited and organized permanently, so that when things like this happened we can tell the authorities that we'll go to any limit to back them."¹⁷² After almost a month, the City denied the CIO permit application on the grounds that it would provoke violence by the veterans and others unsympathetic to the CIO message.¹⁷³

By the turn of the year, CIO leafleting occurred only sporadically "early in the morning" at plants, handing out a few circulars and dispersing before police could arrive.¹⁷⁴ But Boss Hague had a bigger plan. He stated:

[T]he Red army has already marched into hundreds of other American cities, trampling law and order under foot with the accompanying destruction of millions of dollars worth of property, the loss of millions in wages to working men, the deaths and serious injury of many workers and innocent citizens, and an utter defiance of governmental authority.¹⁷⁵

He drew 15,000 people to an Americanization Day meeting.¹⁷⁶ Hague repeated the warning that he would keep "un-American Reds and radicals out of [the] city,"¹⁷⁷ and "thanked the crowd [for] turning out to support his efforts 'to protect our city from invasion by the Communists and other Red groups behind the mask of a labor organization.'"¹⁷⁸

Congressman Edward T. Hart assured "the cheering crowd that the meeting was 'no demonstration against union labor', but a 'declaration that the labor of Jersey City stands unitedly behind Mayor Hague to maintain law and order and bar from our city

170. *Id.*

171. *Id.*

172. *3,000 Veterans Back Hague Fight on C.I.O.; Hail Plea 'to Go to Limit' to Support Him*, N.Y. TIMES, Dec. 29, 1937, at 14.

173. *See* Gibbons, *supra* note 13, at 734.

174. Herbst, *supra* note 68, at 62.

175. *Hague Welds CIO-Red Link Plans Set for Thursday Meet*, JERSEY J., Jan. 4, 1938, at 1.

176. Russell B. Porter, *15,000 Cheer Hague For Ban on C.I.O.; 'Reds' Are Defied*, N.Y. TIMES, Jan. 7, 1938, at 1.

177. *Id.*

178. *Id.*

fomenters of disorder and exponents of subversive communism.”¹⁷⁹ All the AFL locals and the Central Labor Union sent representatives.¹⁸⁰ Hague linked his local battle to the rise of the national CIO:

Pointing to his recent re-election as Mayor by an almost unanimous vote in a city whose population is 95 per cent labor, the Mayor said he had never permitted strikebreakers to enter his city, nor had he permitted mass picketing or mob attacks on factories and business places.

He charged that the present C.I.O. attack on him was due to his refusal to permit a C.I.O. “invasion of Jersey City more than a year ago when he said Harry Bridges, Pacific Coast C.I.O. seamen’s and longshoremen’s leader, came east and attempted to use Jersey City as the center of a drive on the Atlantic Coast.

From then on . . . Jersey City was a “marked city—it must be invaded and conquered.”¹⁸¹

Upon being asked by national leaders of the CIO for assistance against Hague’s tactics, AFL President William Green declared his organization neutral in the dispute.¹⁸²

Not all listeners bought into the message. One Charles Muldoon wrote the editor of the *Jersey Observer*:

There are lots of people who are breeders of Communism and, believe me, there were plenty of them on the platform last Thursday night. I could name you quite a number of them who are employers and pay starvation wages to their help. Its [sic] all right for these gentlemen to cry ‘Keep the Reds out!’ They have a full stomach and are well fixed financially.¹⁸³

The next day, the CIO filed suit in federal court asking for an injunction to prevent Mayor Hague and policemen from “restrict[ing] C.I.O. organizational activities in Jersey City.”¹⁸⁴ The suit was filed under the Civil Rights Acts of the nineteenth century protecting constitutional rights, as well as the Wagner Act.¹⁸⁵ Grievances included: prevention of free assembly, false accusations, and “unlawful interference with picketing . . . [and] leaflet distribution.”¹⁸⁶ The suit claimed that constitutional rights and privileges, under Article IV, section 2 and the Fourteenth

179. *Id.*

180. *See id.*

181. *Id.*

182. *See* TROY, *supra* note 25, at 117-18.

183. Charles Muldoon, Letter to the Editor, *Public Opinion Says Real Way to Fight Communism is to Remove the Cause*, JERSEY OBSERVER, Jan. 11, 1938, at 18.

184. *C.I.O. Starts Suit to Test Hague Bans*, N.Y. TIMES, Jan. 7, 1938, at 1.

185. *Id.*

186. *Id.*

Amendment, section 1, protected plaintiffs and those associated with them in renting meeting places, using the streets of the city in the same manner as others have been and are permitted to use them, and for purposes of holding public meetings to voice their grievances at the aforesaid actions of the defendants.¹⁸⁷ Thus, the complaint invoked both a right of free assembly under either constitutional provision on privileges and immunities of citizens, and a right of free assembly to petition the government under the First Amendment (here Mayor Hague and the police).¹⁸⁸

Mayor Hague began to be defensive in responding to outside criticism. Before the Chamber of Commerce he proclaimed not to be a dictator:

I have never tried to hamper the CIO in its peaceful organization in Jersey City. The CIO has had quarters in Jersey City since the organization was inaugurated. It has had public meetings, too, and they have never been molested or interrupted It is the racketeering leaders of the CIO I am fighting.

. . .

The Civil Liberties Union decided that it would lead into our city 500 strikers of the Seamen's Union. We had no labor trouble here.

You are familiar with the loss of property in San Francisco during this strike, with the bloodshed, too. There was no bloodshed in Jersey City. We knew Harry Bridges and his methods. They decided that Jersey City was too peaceful and had to be invaded and they gave notice of their intention. As Mayor it was my duty to take cognizance of their declaration and to interrupt the invasion. I notified the police authorities that this invasion was not to take place. It was consequently interrupted by the police, who met the strikers and escorted them to the city lines.¹⁸⁹

On the CIO's difficulty renting halls:

Look! I'll tell you about the halls. I've known those fellows who own those halls for thirty years. They're my friends. Most of them have bars and restaurants connected with the auditoriums I don't have to bring any pressure on them. They read the papers. They read I'm having a jam with the C.I.O. They're not going to go and hurt me for the ten or fifteen bucks they can get for renting the hall, are they?¹⁹⁰

In actuality, some hall owners did suffer unusual enforcement of city codes after bookings later withdrawn.¹⁹¹ When it was pointed out

187. *Id.*

188. *See id.*

189. *No Dictator, Mayor Tells The Chamber*, JERSEY OBSERVER, Jan. 13, 1938, at 1.

190. Paul Gallico, *Hague Sells Self to Gallico in Interview*, JERSEY OBSERVER, Jan. 14, 1938, at 1.

191. GERALD LEINWAND, MACKERELS IN THE MOONLIGHT: FOUR CORRUPT AMERICAN MAYORS 93-95 (McFarland & Co. 2004).

to Boss Hague at trial that a hall owner who happened to rent his place for a CIO meeting found himself charged with a building violation, he replied, "Any port in a storm, Counselor."¹⁹² When the *New York Post* ran an unflattering series on Hague, he ordered police to remove the paper from newsstands in the city.¹⁹³ After the *Griffin*¹⁹⁴ decision by the U.S. Supreme Court upheld the right of distributing circulars on the streets, Jersey City police still confiscated CIO leaflets, telling a curious couple, "We are enforcing a Jersey City ordinance—not the constitution."¹⁹⁵

On January 26, the CIO conducted the first successful strike since the deportations began.¹⁹⁶ The Amalgamated Association of Iron, Steel, and Tin Workers of North America struck the Crucible Steel Co., "when the incoming night shift was ordered out by a 'rank-and-file' committee of Lodge 1339," in a dispute to enforce contract rules on seniority after 150 men had been discharged.¹⁹⁷ Five hundred men were affected, and "picket lines were established" with only enough men left inside to operate the powerhouse and keep the furnaces from going cold.¹⁹⁸ Among those laid off were the President, Vice-President, and Treasurer of the union, plus others with over ten years' experience.¹⁹⁹ A week later, the Company settled a new contract recognizing the seniority rights.²⁰⁰ Yet police pressure continued elsewhere the same day as a series of workers attempted to pass out circulars at the American Home Products Corporation.²⁰¹ Each attempt was met by confiscation of the circulars and the directive to "scram."²⁰²

The last big confrontations over public meetings were political meetings protesting Mayor Hague's administration. Thus fear of anti-labor violence justifying suppression of organization elided into violent political suppression by both public and private groups. Socialist Norman Thomas "was dragged from his automobile, forcibly thrown into a patrol wagon," and returned to New York on his way to a May Day meeting in Jersey City.²⁰³ In adversely deciding Thomas' suit, the New Jersey Supreme Court stated unequivocally, "[Thomas]

192. Record at 1129, *Hague v. CIO*, 307 U.S. 496 (1939) (No. 651).

193. Tushnet, *supra* note 13.

194. *Lovell v. City of Griffin*, 303 U.S. 444 (1938).

195. *Jersey City Faces New Fight by C.I.O.*, N.Y. TIMES, Mar. 30, 1938, at 16.

196. *Crucible Steel's Plant Closed as CIO Calls Strike*, JERSEY OBSERVER, Jan. 27, 1938, at 1.

197. *Id.*

198. *Id.*

199. *Id.*

200. *Jersey City Police Again Rout C.I.O.*, N.Y. TIMES, Feb. 2, 1938, at 11.

201. *Id.*

202. *Id.*

203. *Hague Takes the Bait*, NEW REPUBLIC, May 11, 1938, at 1.

has no more right to speak in public places in [Jersey City], such as highways and parks, without permit than he has to invade a citizen's home without invitation."²⁰⁴ A few days later, Congressmen Jerry O'Connell and John Bernard were "prevented from speaking on behalf of the C.I.O." in Journal Square.²⁰⁵ One reporter, who was at the square at this time, reported that when the chief of police got word of the Congressmen not showing up, he responded, "It's just as well they didn't come . . . It would have been murder if they had."²⁰⁶ Shouting, "Kill the Jew bastard," groups in the crowd beat many Jews; some were rescued on tube platforms by horrified media members returning to New York.²⁰⁷ One writer recalled:

The door closed. I sat beside him—a medium-sized, disheveled man whose face I would never recognize if I saw it again in normal condition Bright, pure On his face, on his head, down his torn shirt. Hysterically, perhaps, I thought, "This is the thing Hague hates—*red* Like hell he does! He loves it—in nice warm, liquid form—smearing the workers' foreheads—trickling from the ears."²⁰⁸

The comparisons made to Hitler and Mussolini became tangible in these reports.²⁰⁹ During the day, journalists and photographers had been routinely beaten.²¹⁰ President Roosevelt, no doubt mindful of Hague's Democratic Party position, termed the violence a local affair, but then, later at Congressman O'Connell's insistence, turned the matter over to his Attorney General, Homer Cummings.²¹¹

The labor history of *Hague*—the national politics of the New Deal; the success of unionization; the schism nationally of the CIO and AFL; the spread of radical rank-and-file and industrial federations; the defended fiefdom of the New Jersey Democratic machine; the fiscal crisis of the state (Jersey City); a local dictator; free speech for radicals, the ACLU, and the Communist Party; the relation of federal power to local municipalities? All factors were here. How could they be untangled, and yet, how could they be unconnected? Additionally, the contest would push law to the fore as to an American's right to move freely into any city in the nation and

204. *Thomas v. Casey*, 1 A.2d 866, 870 (N.J. 1938) *aff'd*, 9 A.2d 294 (1939).

205. Porter, *supra* note 82; *see also* Donald B. Robinson, *I Was in Journal Square*, NEW REPUBLIC, May 25, 1938, at 66-67.

206. Robinson, *supra* note 205.

207. *Id.*

208. Paul Cox, *Saturday Night in Jersey City*, NEW MASSES, May 17, 1938, at 17; *see also* Robinson, *supra* note 205.

209. *See Mayor Hague's Testimony on His Third Day on Stand in Newark Court*, N.Y. TIMES, June 16, 1938, at 17.

210. Robinson, *supra* note 205.

211. *Mayor Hague's Testimony on His Third Day on Stand in Newark Court*, *supra* note 209.

the right to assemble in public—the keys to organization and democracy in modern society.

It would seem Frank Hague held no illusions about industrial organization and the potential transformation of democracy. Harry Bridges' fight to oust Joe Ryan for control of the docks and maritime in both the West and East made Jersey City a target, and Frank Hague knew that as well.²¹² The CIO/AFL schism involved both top down and bottom up struggles to bring the working class and Democratic/democratic political power to a juncture. The fate of the New Deal would be affected by the possibility of mobilized radicalism. Clinging to his fiefdoms, Frank Hague, no matter how thuggish his strategies, was not entirely dim.²¹³

IV. LABOR HISTORY IN THE COURTS DECIDING *HAGUE V. CIO*

In his testimony at trial of the injunction suit, Mayor Hague said about free assembly:

If they were high-class citizens and they met in peaceful, orderly manner, why, certainly, they have perfect rights; but if prior to that they were advocating the overthrow of the government, they were dissatisfied with everything that America offered to them, why, of course, I don't assume they have any rights.²¹⁴

The suspicion must arise that the former would always be pro-Hague and the latter anti-Hague. Anti-Hague sentiment inevitably equated to disruption of Jersey City citizens. Hague claimed that a permit to meet in public had never been denied before the “disruption” caused by Bridges' CIO in 1936: “Of course, when you find [a man like] Harry Bridges endeavoring to come in there and tear things apart, similar to what he does on the West Coast”²¹⁵

This perception carried over to the later “invasion”:

The C.I.O. proceeded immediately to start to make a request of Commissioner Casey for public meetings and advertised Roger Baldwin, Garfield Hays, and all [of] these undesirables to come in there and make these public addresses There was quite a lot of disorder, quite a lot of statements, quite a lot of threats of litigations and invasion—in free speech and free press.²¹⁶

Hague's trial counsel, however, acknowledged the deeper basis of

212. “There was only one major threat to the status quo during the Hague era: Harry Bridges' effort to take over control of the waterfront in 1936-37.” CONNORS, *supra* note 25, at 98.

213. Professor Mark Tushnet characterizes *Hague v. CIO* as an easy case because Hague was “a character out of a cartoon.” Tushnet, *supra* note 13. I think not.

214. Bruce Bliven Jr., *Will the Witness Step Down?*, NEW REPUBLIC, June 29, 1938, at 204, 205-06.

215. Porter, *supra* note 82.

216. *Mayor Hague's Testimony on His Second Day on Stand in Newark*, *supra* note 136.

Hague’s problem with Bridges and why any appearance by the CIO would not be tolerated.²¹⁷ CIO disruption meant communism: “The alleged CIO conspiracy . . . is ‘not for the benefit of the workers in industry but an incident in the nation-wide struggle for political-labor control between the C.I.O. and the A.F. of L.’”²¹⁸ Furthermore, in denial of the permits, Hague relied on “newspaper accounts of ‘class struggle’ views of Harry Bridges, C.I.O. maritime leader. He also laid stress on [the] charges of communism in the C.I.O. by William Green, president of the A.F. of L.”²¹⁹

Federal District Court Judge William Clark shocked the Hague camp in issuing a broad, multi-part injunction against Mayor Hague and the City on November 7, 1938.²²⁰ On public meetings, the Judge enjoined:

a) From placing any previous restraint upon or in any other manner whatsoever directly or indirectly interfering with the plaintiffs or any of them in respect to the holding of meetings or assemblies in the open air and in parks dedicated for the purposes of the general recreation of the public provided that an application for a permit to hold such meetings by or on behalf of said plaintiffs or any of them has been made three days in advance of such meetings and provided further that such permit may be refused these plaintiffs or any of them only for the reason that the particular time or place designated in the application is in reasonable conflict with the public recreational purposes of said parks.

. . . .

d) From refusing to the plaintiffs or any of them the rights set forth in the three preceding paragraphs of this decree for injunction in so far as such rights may be sought with respect to public meetings on any of the public streets, highways, thoroughfares or places of the City of Jersey City (other than public parks) and unless and until the defendants acted in their official capacities adopt and enforce the deliberate policy of forbidding meetings of any kind on any of the public streets, highways, thoroughfares or [sic] places of the City of Jersey City provided that the rights of the plaintiffs or any of them to hold meetings on the public streets, highways, thoroughfares or places of the City of Jersey City be held subject to a reasonable interpretation by the defendants of the acknowledged easement of public passage over any of the said public streets, highways, thoroughfares or places of the City of Jersey City.²²¹

217. *Id.*

218. Porter, *supra* note 36 (quoting Hague’s trial counsel).

219. *Id.*

220. *Comm. for Indus. Org. v. Hague (Hague I)*, 25 F. Supp. 127 (D.N.J. 1938), *decree modified*, 101 F.2d 774 (3d Cir. 1938) *decree modified*, 307 U.S. 496 (1939).

221. *Hague v. Comm. for Indus. Org. (Hague II)*, 101 F.2d 774, 795-96 (3d Cir.) *decree modified*, 307 U.S. 496 (1939).

Was the Clark injunction to prove a great victory, or a subjugation of assembly to blanket prohibitions on access to public streets, and time and manner restrictions so as to effectively stem minority viewpoints from effective dissemination? Compare relief to rhetoric. Judge Clark's opinion begins, "This case seeks the solution of a problem inevitable and inherent in a democratic form of government. Upon its sound solution the preservation of that form of government may well be said to depend."²²² Clark acknowledges, "So in nearly all modern legal systems we find a right (or liberty) of locomotion (movement) of free speech (and press) and of free assembly."²²³ Judge Clark thereafter focuses on the meaning and importance of free speech under the First Amendment, but mixes in a few references to assembly to petition the government.²²⁴ "The very idea of a government, republican in form, implies a right on the part of its citizens to meet peaceably for consultation in respect to public affairs and to petition for a redress of grievances."²²⁵ Assembly seems a right ancillary to speech; "[f]ree assembly is free speech in particular circumstances."²²⁶ The right to locomotion was discussed as a right protected by the privileges and immunities of citizenship deniable only with due process, which Judge Clark found recognized even in the *Bisbee I.W.W. Deportation* cases.²²⁷

The legal basis for protecting assembly in Judge Clark's rambling opinion remained unclear for many. The barrier to access to public places for assembly required overturning (or distinguishing) *Davis v. Massachusetts*, which held that the streets are held by municipalities as if private property and subject to complete control.²²⁸ Judge Clark found an implied limitation again under speech protection, noting that:

In the case of speech, one needs some place to speak in and some people to listen. The public meeting has been called the "platform of the poor." Lacking the money or perhaps in Jersey City the goodwill, sufficient to obtain some private place, the would-be orators are forced to resort to publicly owned places.²²⁹

Clark would not extend his "easement" on public places to the streets (preserving *Davis*) but only to public parks where assembly

222. *Hague I*, 25 F. Supp. at 129.

223. *Id.* at 130.

224. *Id.* at 130-37.

225. *Id.* at 135 (quoting *United States v. Cruikshank*, 92 U.S. 542, 552 (1875) (internal quotation marks omitted)).

226. *Id.* at 137.

227. ABA, *Community Has Right of Self-Protection*, 6 A.B.A. J. 99 (1920) (discussing the unreported decision *State of Arizona v. Wootton*, which was tried in 1920).

228. *Davis v. Massachusetts*, 167 U.S. 43, 47-48 (1896).

229. *Hague I*, 25 F. Supp. at 145.

would not restrict unduly competing uses.²³⁰ Such use would need to be secured by permit.²³¹ Even the “heckler’s veto” could still apply: “Before refusing the permits the municipal authorities must have proof (reviewable, of course, in the court) that the present applicants at least have spoken in the past in such fashion that audiences similar to those to be reasonably expected in Jersey City have indulged in breaches of the peace.”²³²

Thus, freedom of assembly does not find ringing or broad protection in the district court, although the opinion was thought daring and likely to be overturned on appeal. In each court the reasoning changed.

The majority opinion in the Court of Appeals by Judge Biggs unambiguously held that individuals coming into or going about a city on lawful concerns must be allowed free locomotion on streets and in public places, under the privileges and immunities of U.S. citizenship under section 1 of the Fourteenth Amendment.²³³ Biggs went further, finding a denial of due process when police summarily removed individuals from picket lines, or arrested and released individuals without charging or trying such persons or by deporting them, saying, “[s]uch a condition is abhorrent in a democratic community.”²³⁴ Prior restraint of circular distribution was struck down under the recently decided *Lovell v. City of Griffin*.²³⁵ On freedom of assembly, Judge Biggs found another prior restraint:

We are of the opinion that the ordinance is unconstitutional in view of the fact that it permits the imposition of previous restraint upon the right of the individual to speak before an assembly of his fellows in a public place. The ordinance therefore prohibits peaceable assembly except upon terms repugnant to free speech.²³⁶

These dual legal bases for assembly in the privileges and immunities of U.S. citizenship as well as in First Amendment free speech is potentially important because right of assembly, if not protected solely under the Free Speech Clause, does not seem limited to petition of government. However, Judge Biggs’ holding prohibiting interference of assembly as an aspect of prior restraint does not automatically grant a right of access to streets or parks, although such would seem implied.²³⁷ And, thirdly, police are to protect unpopular speakers—not stop them because of the threat of audience

230. Kaplan, *supra* note 13, at 920, n.21 (citation omitted).

231. *Id.*

232. *Hague I*, 25 F. Supp. at 146.

233. *Hague II*, 101 F.2d at 780-81.

234. *Id.* at 781.

235. 303 U.S. 444 (1938).

236. *Hague II*, 101 F.2d at 782.

237. *See id.* at 782-83.

unrest.²³⁸ Judge Biggs did believe the *Davis* case substantially overruled:

This view of the powers of city authorities in respect to a public park, viz. likening them to the powers of an individual over his own dwelling, does not seem consonant with the expressions of the Supreme Court upon germane subjects in a later period. On the contrary we think it cannot be doubted that a city owns and its officials administer its streets and parks, not as private proprietors, but as trustees for the people. While streets and parks are to be administered primarily for the use of the people for travel and recreation it is equally certain that, consistent with such uses, the public places of a city must be open for the use of the people in order that they may exercise their rights of free speech and assembly.²³⁹

Thus, going substantially beyond Judge Clark below, Judge Biggs finds a right of access to the streets that cannot be entirely prohibited even if consistently enforced against all views.²⁴⁰

Judge Davis dissented on the basis of upholding *Davis v. Massachusetts*, and the discretion of the police in refusing the permit.²⁴¹ How would Judge Biggs's broad holding on assembly and access to the streets be received in the Supreme Court?

Ultimately, with two Justices absent, five votes upheld the injunction on the basis of violation of constitutional rights.²⁴² Two Justices dissented on the basis of the *Davis* precedent.²⁴³ Only two votes agreed with Justice Roberts' plurality, with Chief Justice Hughes agreeing with the constitutional argument.²⁴⁴

Justice Roberts found protection of speech and assembly under the privileges and immunities of U.S. citizenship rather than the First Amendment.²⁴⁵ Asserting *Davis* distinguishable as resting on an outmoded understanding of property and the power of the state,²⁴⁶ Roberts held:

Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions. Such use of the streets and public places has, from

238. *Id.* at 784.

239. *Id.* at 785.

240. *Id.* at 785-86.

241. *Id.* at 799-808 (Davis, J., dissenting).

242. *Hague v. Comm. for Indus. Org. (Hague III)*, 307 U.S. 496, 500 (1939).

243. *Id.* at 500, 532-33.

244. *Id.* at 500.

245. *Id.* at 515-16.

246. *But see* Kaplan, *supra* note 13, at 930 (doubting that the cases are actually distinguishable for the reasons given by Justice Roberts).

ancient times, been a part of the privileges, immunities, rights, and liberties of citizens. The privilege of a citizen of the United States to use the streets and parks for communication of views on national questions may be regulated in the interest of all; it is not absolute, but relative, and must be exercised in subordination to the general comfort and convenience, and in consonance with peace and good order; but it must not, in the guise of regulation, be abridged or denied.²⁴⁷

As a matter of precedent in United States judicial opinions, Justice Roberts was completely wrong.²⁴⁸ As a substantive matter of any realist's democracy in republican form, Roberts could not have been more correct. Professor Mark Tushnet sees the opinion as a reflection of the changing realities and commitments to a pluralist society, shepherded by the emerging *United States v. Caroline Products*²⁴⁹ jurisprudence protecting access to fair political process.²⁵⁰ This jurisprudence is usually, but not universally, treated as solely prohibitive of arbitrariness of governmental treatment of individuals, and not the source of substantive guarantees.²⁵¹

The labor history of *Hague* suggests the holding stands for a more radical view of constitutional rights. Indeed, Justice Roberts states, "[i]t is clear that the right peaceably to assemble and to discuss these topics ['labor rights'], and to communicate respecting them, whether orally or in writing, is a privilege inherent in citizenship of the United States which the Amendment protects."²⁵² Such substance is reinforced by Roberts's invocation of the now disfavored, on other grounds, *Cruikshank*²⁵³ case and *Slaughter-House Cases*²⁵⁴ on locomotion and assembly, particularly to assert rights held severally.²⁵⁵ More than pluralism, the privilege and

247. *Hague III*, 307 U.S. at 515-16.

248. See David Kairys, *Freedom of Speech*, in *THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE* 190, 191-206 (David Kairys ed., 3d ed. 1998) ("Despite persistent but nonspecific references to 'our traditions' in legal and popular literature, no right of free speech as we know it existed, either in law or in practice, until a basic transformation of the law governing free speech during the period from about 1919 to 1940."). Mark Tushnet characterizes Judge Davis in his dissent below as destroying Justice Roberts on even recent precedents concerning *Davis*. Tushnet, *supra* note 13, at 7.

249. 304 U.S. 144 (1938).

250. Roberts' opinion provides no explicit support for this basis of the reasoning of the plurality, although it was available, and such would seem more consistent with a purely First Amendment speech theory. Perhaps Roberts really meant the privileges and immunities substance of the right at stake. See generally Tushnet, *supra* note 13.

251. But see Kenneth Casebeer, *The Empty State and Nobody's Market: The Political Economy of Non-Responsibility and the Judicial Disappearing of the Civil Rights Movement*, 54 UNIV. OF MIAMI L. REV. 247, 311 (2000).

252. *Hague III*, 307 U.S. at 512.

253. 92 U.S. 542, 552 (1875).

254. 83 U.S. 36 (1872).

255. *Hague III*, 307 U.S. at 513.

immunity of locomotion, travel to any locality, access to the streets, and assembly connected to local social and political organization is necessary to the political possibility of mass democracy. In addition, assembly to promote labor organization and the right to organize is pragmatically crucial to class organization and mobilization, a lesson not lost on New Deal Democrats even if not embraced by them, and most assuredly not lost on Harry Bridges and the CIO.²⁵⁶ A crucial part of establishing jurisdiction in the case to both the plurality and the concurrence was the violation of the civil rights promised literally in the Wagner Act.²⁵⁷ Assembly and access to the streets has indeed been the “platform of the poor” and the only path to mass resistance to arbitrary public power or private power sanctioned by government.²⁵⁸

Justice Stone’s concurrence rested on substantive due process protection against incursions on free speech, of which Jersey City was certainly guilty.²⁵⁹ However, resting on the negative liberty of no abridgements of free speech does not explicitly provide for the

256. Here it does not matter that a truly American Radicalism had died certainly by World War II. What matters is what was possible at the time.

257. *Hague III*, 307 U.S. at 523-24.

258. An affirmative guarantee of assembly and access to public places and streets under the privileges and immunities of national citizenship, which therefore cannot be abridged by the States, does not require an embrace of the search in the Constitution for the minimum positive ability to underwrite rights as so-called positive liberty. See generally David Abraham, *Liberty Without Equality: The Property-Rights Connection in a “Negative Citizenship” Regime*, 21 LAW & SOC. INQUIRY 1 (1996) (exploring the particular contribution of the property-liberty nexus to the purportedly stunted development of positive liberty and social citizenship in the United States). This affirmation of right to assemble is like that positive protection of the right to strike found by James Gray Pope under the Thirteenth Amendment. See James Gray Pope, *The Workers’ Freedom of Association Under the Thirteenth Amendment*, in THE PROMISES OF LIBERTY: THE HISTORY AND CONTEMPORARY RELEVANCE OF THE THIRTEENTH AMENDMENT 138, 138-59 (Alexander Tsesis ed., 2010). This idea of rights should be compared to the laudable efforts by many scholars to define minimum welfare rights in various parts of the Constitution. See William E. Forbath, *Constitutional Welfare Rights: A History, Critique, and Reconstruction*, 69 FORDHAM L. REV. 1821 (2001); William E. Forbath, *The Distributive Constitution and Workers’ Rights*, 72 OHIO ST. L.J. 1115 (2011); see also Frank I. Michelman, *Unenumerated Rights Under Popular Constitutionalism*, 9 U. PA. J. CONST. L. 121 (2006); Frank I. Michelman, *Democracy and Positive Liberty*, in CONSTITUTIONALISM AND DEMOCRACY 287 (Richard Bellamy ed., 2006).

259. *Hague III*, 307 U.S. at 518-33 (Stone, J., concurring). Justice Stone’s concurrence indeed fits Professor Tushnet’s pluralism/*Carolene Products* rationale better than the plurality. See Tushnet, *supra* note 13. Justice Stone would strike down the Jersey City ordinances under the Due Process Clause of the Fourteenth Amendment seemingly to protect all persons from arbitrary deprivation of speech activities. See *Hague III*, 307 U.S. at 518-33. Roberts’ privileges and immunities rationale would only extend to U.S. citizens, again suggesting a right not simply coextensive with the First Amendment. See *id.* at 500-18; see also Tushnet, *supra* note 13, at 10-11.

necessity of full assembly and affirmative access to streets and other public spaces if private property under public sanction is unavailable.

Nonetheless, Justice Roberts' ringing holding in *Hague III* has been frequently cited after 1940 by the Supreme Court in protecting an ever more limited "public forum" protection for First Amendment speech, rather than a robust right of assembly in the streets.²⁶⁰ However, Justice Roberts' language would next be made explicitly part of a Supreme Court holding during the Civil Rights marches of the 1960's, specifically in *Shuttlesworth v. City of Birmingham*.²⁶¹ When the Reverend Fred Shuttlesworth sent an aide to apply for a parade permit to Birmingham Sheriff Bull Connor, much like Boss Hague, Connor echoed, "No, you will not get a permit in Birmingham, Alabama to picket. I will picket you over to the City Jail."²⁶² The same need to federally protect assembly from local suppression followed from the fire hoses and the dogs. Justice Stewart just after citing the famous sentences from Justice Roberts' opinion in *Hague*, wrote:

Even when the use of its public streets and sidewalks is involved, therefore, a municipality may not empower its licensing officials to roam essentially at will, dispensing or withholding permission to speak, assemble, picket, or parade according to their own opinions regarding the potential effect of the activity in question on the "welfare," "decency," or "morals" of the community.²⁶³

While couched in terms of the First Amendment abridgement, nonetheless certainly ownership of the streets no longer closes them to assembly. Not quite Roberts in *Hague*, but close.

V. OCCUPY: THE CONCLUSION

Occupy Wall Street happened in a privately owned park administered in trust by the City of New York.²⁶⁴ Occupy San Francisco, Occupy Memphis, and Occupy gatherings in many other places occurred on city-owned public squares.²⁶⁵ Certainly it was politics only, as enlarged as more middle and professional class

260. See *Thornhill v. State of Ala.*, 310 U.S. 88, 102 (1940) ("In the circumstances of our times the dissemination of information concerning the facts of a labor dispute must be regarded as within that area of free discussion that is guaranteed by the Constitution."); see also *Niemotko v. State of Md.*, 340 U.S. 268, 279 (1951) ("The holding [in *Hague*] was that the licensing officials could not be given power arbitrarily to suppress free expression, no matter under what cover of law they purported to act.").

261. 394 U.S. 147, 152 (1969).

262. *Id.* at 157.

263. *Id.* at 153.

264. Meghan Barr & Monika Mathur, *Owner of NYC Protest Park Navigates a Dilemma*, ASSOCIATED PRESS, Oct. 20, 2011.

265. Shelton Stromquist, "Occupying" Public Space and the Fight for Historical Memory, in *WORKING-CLASS HIST. OF AMERICAS* 9 (2012).

persons were swept aside or arrested by police in New York, or elsewhere, that inhibited police ouster of these assemblies.

The Occupy Movement is nonetheless exemplary of public assembly in relation to the actuality of participatory or mass democracy. The importance of Occupy was less a predetermined message than a gathering of the disaffected (ninety-nine percent), where future planning and argument developed somewhat organically—one might even be tempted to say democratically. And in a republic, who should object to debate and discovery outside the control of the moneyed media of the one percent? That is, if we really want an authentic democracy.²⁶⁶

When, in 1970—by my count and not from police helicopters—as many as two million individuals and families went to the Ellipse in Washington, D.C. at some point during a day that, at midday, gathered a million people around the Washington Monument, with their hands linked, waving a peace sign, and singing John Lennon’s “Give Peace a Chance,” one block away, Richard Nixon claimed to hear nothing. Yeah, right!

266. *But see* Citizens United v. Fed. Election Comm’n, 588 U.S. 310 (2010).