Still "Learning Something of Legislation": The Judiciary in the History of Labor Law

Catherine Fisk

WILLIAM E. FORBATH, *Law and the Shaping of the American Labor Movement*. Cambridge, Mass.: Harvard University Press, 1991, Pp. xvi+211.

VICTORIA C. HATTAM, *Labor Visions and State Power: The Origins of Business Unionism in the United States*. Princeton, N.J.: Princeton University Press, 1993. Pp. xi+266.

KAREN ORREN, *Belated Feudalism: Labor, the Law and Liberal Development in the United States*. Cambridge: Cambridge University Press, 1991. Pp. 260. $49.50 cloth; $15.95 paper.

In the contemporary debate over the law's influence on the prospects of American labor, it seems to me that the naysayers have it. Labor lawyers will tell you that legal hostility to workers' collective action has for years sapped labor's strength,[1] and legal scholars agree;[2] federal labor law bans outright many forms of collective action and makes union organizing enormously difficult. The National Labor Relations Act (NLRA), an elaborate legal regime that was supposed to protect the working class from the vicissi-

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1. E.g., Thomas Geoghegan, *Which Side Are You On? Trying to Be for Labor When It's Flat on Its Back* (New York: Farrar, Straus & Giroux, 1991).

2. E.g., Joel Rogers, "Divide and Conquer: Further 'Reflections on the Distinctive Character of American Labor Laws,'" 1990 *Wis. L. Rev.* 1; Paul Weiler, "Striking a New Balance: Freedom of Contract and the Prospects for Union Representation," 98 *Harv. L. Rev.* 351 (1984); *id.*, "Promises to Keep: Securing Workers' Rights to Self-Organization under the NLRA," 96 *Harv. L. Rev.* 1769 (1983).

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tudes of wage labor, seems marginal (as the unionized percentage of the private sector workforce dwindles to 12%), ineffectual, or downright repressive.[3]

The heart of American labor law is collective bargaining—the notion, often called voluntarism, that the conditions of labor are best regulated not by state mandates but by private agreement between employers and unions. We are witnessing a transformation of American labor law in the decline of collective bargaining as the central focus of legal regulation of working conditions. The weakening of American unions and the partial eclipse of the law that governs them, like any historical and legal transformation, invites reflection on the causes and consequences of the rise and fall. The three books reviewed here concern themselves largely with the origins and political significance of voluntarism generally, and collective bargaining specifically, as the distinctively American approach to the problems of class and power in modern capitalism. Although these books focus on the causes and consequences of the rise of labor's voluntarism, their scholarly interest is motivated, at least in part, by distress about its decline and about the gap its absence leaves. So a fitting preface may be to begin with the end of the story, that is, with some reflections on the very contemporary consequences of the ideology of voluntarism that animated the legal regime of collective bargaining and that pervades much modern labor and employment law beyond the NLRA.

I want to make the rather improbable suggestion that these three studies of the ideology of labor voluntarism shed light in unlikely places: in particular, on the current policy debate over health care reform. The current employment-based system of health care finance is a more or less direct descendant of labor's enthusiastic embrace of voluntarism and rejection of governmental guarantees of social insurance. The modern law of employee benefits is infused with the ideology of voluntarism, and the voluntarist strain in the law undermines the law's protective purposes. It constrains the possibilities of political change. Thus, the inquiry into the origins of labor's voluntarism explains more than the rise and fall of collective bargaining. When the dominant forces in American labor embraced voluntarism at the turn of the century, they made a choice that profoundly influenced much American social welfare legislation. Through a series of hard choices, labor helped create a dominant ideology that has cramped the American legal imagination about the possibilities for law to soften the harsher faces of capitalism. The struggle over private pensions and health care reform is evidence that we are still working out the consequences of labor's choices.

3. 29 U.S.C. § 151 *et seq.* (1988). The literature criticizing the NLRA as irrelevant, ineffectual, and/or oppressive is too vast to cite it all here. See notes 65–66 infra for selected citations. Recent literature defending the NLRA against these charges is difficult to find.

After tracing the manifestations of the voluntarist ideology in modern cases to set the significance of the historical inquiry in modern context, I will suggest that these three disparate books share common concerns at two levels. First, all three look to labor history to understand the modern politics of social provision and the shape of the modern welfare state. Second, all three books place principal emphasis on the common law and explore the ways that judicial decisions shape social and political movements and carve the channels through which change flows. These thematic similarities encompass shared beliefs about and methods for the study of law and society.

I then examine in turn the arguments of each book, beginning with Victoria Hattam's study of the labor conspiracy cases, followed by William Forbath's study of the labor injunction cases, and closing with Karen Orren's reinterpretation of both categories of cases. Hattam and Forbath are foils for each other, in that both see the origins of labor voluntarism in common law as being determinative for American political development. Orren is the foil for both of them. She agrees that common law strictures shaped labor politics and strategy but offers an entirely different view of the historical significance of that fact. I conclude by suggesting, with reference once again to modern cases, the power and limits of these three authors' approach to the study of law's effect on society.

THE ROMANCE OF CONTRACT

The concept of private ordering that is the essence of the legal notion of contract is the ideological heart of much of American labor law. Terms of employment that are elsewhere matters of public right are here treated as matters of private contract. As is well known, various forms of social insurance that are in other countries guaranteed by the government are in this country provided, if at all, as a fringe benefit of employment. Private pensions, health insurance, child care, disability insurance, paid vacation and sick leaves, and job training are among the many forms of social provision that are provided in this country principally through employment. This reliance on private negotiations rather than legal mandates—known as voluntarism—remains the distinctive characteristic of American labor politics, and the labor laws reflect this emphasis on private contract at the expense of public rights.[4] The laws do not require that employers provide benefits but only regulate the negotiations for them (in the case of the NLRA) or regulate the administration and enforcement of private arrangements (in

4. See Derek Bok, "Reflections on the Distinctive Character of American Labor Laws," 84 *Harv. L. Rev.* 1394, 1417 (1971); Nelson Lichtenstein, "From Corporatism to Collective Bargaining: Organized Labor and the Eclipse of Social Democracy in the Postwar Era," *in* Steve Fraser & Gary Gerstle, eds., *The Rise and Fall of the New Deal Order, 1930–1980* at 122 (Princeton, N.J.: Princeton University Press, 1989) ("Fraser & Gerstle, *Rise and Fall*").

the case of employee benefits). In short, we attempt to treat the ills of capitalism with a dose of contract.

It would be hard to find a more graphic contemporary illustration of the problems inherent in such a legal regime than the regulation of employee benefits. The federal regulation of employee benefits, the Employee Retirement Income Security Act of 1974 (ERISA),[5] both by legislative design and by judicial interpretation, has followed a private contract paradigm. Because the provision of social insurance in the form of employee benefits remains voluntary, and the terms on which benefits are provided remain largely a matter of employer prerogative, the government has created a vast and intricate body of law that attempts simultaneously to achieve two somewhat inconsistent purposes. One purpose is to induce employers to offer such benefits and the second is to ensure that the terms on which such benefits are offered are fair to employees who lack the bargaining power to protect themselves. The articulated purpose of this law—to the extent we can say a law that is as much a legislative compromise as is ERISA *has* a purpose—was to protect employee expectations in receiving benefits. At least with respect to health care, one of the most important of employee benefits, ERISA has failed in its purpose. Innumerable recent news stories of employers eliminating health coverage for employees with AIDS and for retirees suggest that this federal regulation has been spectacularly unsuccessful in protecting employee expectations of continued health coverage.[6] In response to employee claims that the elimination of health benefits deprives them of bargained-for deferred wages which the statute was intended to protect, courts have developed an elaborate theory that ERISA was intended to protect managerial flexibility in setting the terms of benefit plans and the level of compensation, and that the employees can therefore have no *legitimate* expectations to receive anything beyond what management deems feasible or appropriate.

When courts say that employers are and should be free to amend the terms of employee health benefit plans, the judges treat the benefit plans as contracts and point out that the plans allow such amendments.[7] Employees

5. 29 U.S.C. §§ 1001 *et seq.* (1988).

6. See, e.g., Milt Freudenheim, "Medical Insurance Is Being Cut Back for Many Retirees," *N.Y. Times*, 28 June 1992, p. 1; Robert Pear, "U.S. Is to Argue Employers Can Cut Health Insurance," *N.Y. Times*, 16 Oct. 1992, p. A1; Jonathan Hicks, "Court Says USX Tried to Avoid Paying Benefits," *N.Y. Times*, 6 Nov. 1992, p. C2.

7. McGann v. H & H Music Co., 946 F.2d 401 (5th Cir.), *cert. denied*, 113 S.Ct. 482 (1992); Owens v. Storehouse, 984 F.2d 394 (11th Cir. 1993); Musto v. American General Corp., 861 F.2d 897 (6th Cir. 1988), *cert. denied*, 490 U.S. 1020 (1989); Moore v. Metropolitan Life Ins. Co., 856 F.2d. 488 (2d. Cir. 1988).

In one case, an employer drafted a benefit plan that provided benefits and the procedure for determining employee eligibility for them. But the plan also reserved to the employer the right, "in an individual case or more generally, to alter, reduce or eliminate any . . . benefit, in whole or in part, without notice." In other words, the plan provided that an employee would be entitled to benefits only when the employer deemed appropriate. When the employer

and retirees typically argue that the plan language was drafted by the employers' lawyers and does not accurately describe their expectations; on this basis they urge that ERISA was intended to protect employee expectations against just such sorts of legalistic maneuvers. Courts dismiss such arguments with bromides like "employees and their unions remain free to bargain for vesting requirements in the terms of their plans," even when it is perfectly clear that the employees had neither a union nor the opportunity to bargain over the terms of a benefit plan.[8]

The contemporary judicial vision of an employee and an employer haggling over the terms of an employee benefit plan bears as little relation to reality as did the *Lochner*-era judicial vision of an employer and an employee negotiating about whether the employee would work 8 hours a day or 12, for a few dollars a week or for a living wage.[9] Invoking the myth of negotiation and consent, judicial discourse in ERISA cases has attained a level of formalism reminiscent of laissez-faire era liberty of contract rhetoric. That the law still assumes, in the post-New Deal era, that these terms of employment are and should be negotiated between workers and employers with minimal state intervention requires some explanation. How is it that Congress and the courts lost sight of the core notion underlying the New Deal labor legislation that free contract was not always free?[10]

Reliance on privately negotiated arrangements does not necessarily entail a commitment to *unregulated* contract, as any state insurance regulator will tell you. The ideology of voluntarism at work in employee benefits cases is not only extremely persistent, it is also far more libertarian than other branches of law. Voluntarism and free contract are not necessarily the same thing, but in the employee benefit context the former has led to the latter.

The failure of the legal framework that was supposed to mitigate the inequalities of bargaining power and the enigmatic persistence of the contract framework for regulating labor relations are something of an obsession in recent left-leaning historical scholarship on labor. Several years ago, a number of historians rejected the then-prevailing historiographic consensus

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denied benefits to an eligible employee, the Third Circuit upheld the denial. The court justified its holding by saying that employees could of course "bargain further [with their employer] or seek other employment if they are dissatisfied with their benefits," and that the regime of free contract actually "furthers the interest of employees." This must have come as a surprise to the employee who discovered that the promised benefits were in fact not promised. Hamilton v. Air Jamaica, Ltd., 945 F.2d 74 (3d Cir. 1991), *cert. denied*, 112 S.Ct. 1479.

8. Hozier v. Midwest Fasteners, Inc., 908 F.2d 1155 (3d Cir. 1990).

9. Lochner v. New York, 198 U.S. 45 (1905), held unconstitutional as interfering with liberty of contract a state statute restricting the hours of work in bakeries.

10. Although the National Labor Relations Act was not a repudiation of the essential notion of free contract but in fact embraced the notion of free *collective* contracts, it nevertheless was premised on a congressional finding that there existed an "inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association." 29 U.S.C. § 151 (1988).

that the American labor movement had always been liberal rather than radical, pragmatic rather than political, voluntarist rather than socialist.[11] Workers in the United States at various points in the 19th century, these scholars argued, were as radical as workers anywhere in the industrial world. The evidence for this reinterpretation was strong. For example, just one hundred years ago, working class radicalism erupted in militance at the Pullman car company, prompting captains of industry and jurists alike to fear that the United States teetered on the brink of socialism. Judge William Howard Taft, who presided over the federal government's repression of the Pullman boycott, told the class of 1894 at the University of Michigan law school that labor organizations, in cahoots with some politicians, were engaged in an assault on property rights that was driving the nation toward socialism.[12] Only 20 years after the Pullman strike, the national leadership of the American Federation of Labor (AFL), the largest national labor organization, actually *opposed* the enactment of workers' compensation and health care legislation.[13] The new labor scholarship thus raised a perplexing issue: Why did that astonishing militance fail to translate into political change?

Because the failure to enact government-provided social insurance during the Progressive Era was due in part to labor's early opposition, the AFL's turn away from politics in the second decade of the 20th century turned out to be extremely significant in the development of the American welfare state. In the early part of this century, after the fledgling health insurance industry joined forces with the medical profession to defeat proposed state-guaranteed health insurance initiatives in California and New York, and

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11. See, e.g., David Brody, "The Old Labor History and the New: In Search of an American Working Class," 20 *Labor Hist.* 111 (1979); Sean Wilentz, *Chants Democratic: New York City and the Rise of the American Working Class, 1788–1850* (New York: Oxford University Press, 1984) ("Wilentz, *Chants Democratic*"); Ira Katznelson, *City Trenches: Urban Politics and the Patterning of Class in the United States* (Chicago: University of Chicago Press, 1981); Leon Fink, *Workingmen's Democracy: The Knights of Labor and American Politics* (Urbana: University of Illinois Press, 1983).

12. William E. Forbath, "Law and the Shaping of Labor Politics in the United States and England," *in* Christopher Tomlins & Andrew King, eds., *Labor Law in America* 201 (Baltimore: Johns Hopkins University Press, 1992) ("Forbath, 'Law and Labor Politics'"). A longer version of that essay is Forbath, "Courts, Constitutions, and Labor Politics in England and America: A Study of the Constitutive Power of Law," 16 *Law & Soc. Inquiry* 1 (1991). Forbath cites Diane Avery, "Images of Violence in Labor Jurisprudence: The Regulation of Picketing and Boycotts, 1891–1921," 37 *Buffalo L. Rev.* 1 (1989), and William Howard Taft, "The Right of Private Property," 3 *Mich. L. Rev.* 215, 218–19 (1894).

13. On the role of labor in the campaign for social welfare legislation, see Theda Skocpol, *Protecting Soldiers and Mothers: The Political Origins of Social Policy in the United States* (Cambridge, Mass.: Harvard University Press, Belknap Press, 1992) ("Skocpol, *Protecting Soldiers and Mothers*"); Roy Lubove, *The Struggle for Social Security, 1900–1935* (Pittsburgh, Pa.: University of Pittsburgh Press, 1986) ("Lubove, *Struggle for Social Security*"); Paul Starr, *The Social Transformation of American Medicine* (New York: Basic Books, 1982) ("Starr, *Social Transformation of American Medicine*"); David Abraham Moss, "The Political Economy of Insecurity: The American Association for Labor Legislation and the Crusade for Social Welfare Reform in the Progressive Era" (Ph.D. Diss., Yale University, 1992).

when progressive organizations gave up efforts to enact government-guaranteed health care, and many other forms of social insurance besides, unions turned to collective bargaining to force employers to provide what the government did not.[14] Consequently, what the United States lacks in the way of public social insurance, workers in unionized jobs and many white collar workers get as a fringe benefit of employment. Labor's strategy is part of the reason why, instead of welfare state socialism, we have employee benefits.[15]

Labor's commitment to voluntarism has persisted, as the structure and functioning of ERISA reflect. For instance, when ERISA was in the process of being enacted, union lobbyists favored a provision in the federal statute that would preempt state laws requiring employers to provide benefits to employees; labor preferred to leave the existence and scope of any benefits to negotiation. Labor's chief lobbyist on ERISA is reported to have recalled: "We understood we were giving up good state mandated benefits but we wanted the freedom to give up particular benefits in return for cash wages, and to trade one benefit for another."[16] ERISA preemption of state law has resulted in the invalidation of an enormous amount of protective labor and social welfare legislation. Although organized labor had long since become a loyal defender of government-funded social provision, the unfortunate legacy of voluntarism remained in 1974 and remains even now.

Having sketched out some of the consequences of the rise of labor voluntarism, let me return to the question of its causes. Why did the labor movement that was in the late 19th century so radical acquiesce in the creation of a social welfare system that relies so heavily on employer largesse? Why and how was 19th- and early 20th-century working-class radicalism shunted away from politics and into collective bargaining? And, most perplexing, why did the national leaders of the AFL conclude not only that collective bargaining was the best way to guarantee economic security of the working class, but that it was the *only* way?

In *Law and the Shaping of the American Labor Movement*, *Labor Visions and State Power*, and *Belated Feudalism*, three scholars of American labor politics claim that the common law and the judges who invented, interpreted, and administered it were the central force in shaping the labor movement's political strategies. These authors reject earlier views that the racial and ethnic heterogeneity of the labor force, party politics, the possibility of upward mobility, the frontier, or the individualist ethos of American culture were the principal determinants of labor's reformist and

14. See sources cited *supra* note 13.

15. There are limits to this point; as I will suggest below, one must be very cautious in suggesting that the paltry coverage of the American welfare state today was caused by the actions of the national leaders of the AFL 80 years ago.

16. Quoted in Daniel M. Fox & Daniel C. Schaffer, "Semi-Preemption in ERISA: Legislative Process and Health Policy," 7 *Am. J. Tax Pol'y* 47, 51 (1988).

voluntarist rather than socialist politics.[17] More generally, these books suggest that the evisceration of labor legislation through judicial interpretation did not stem merely from hostility to labor or favoritism for capital *simpliciter*. Rather, it was a complicated and subtle process involving the judiciary's view of its relationship to the legislature and its unease in its role as arbiter of the disputes between workers and business. These are enormously important insights for scholars of law, politics, and history, and these books are important contributions to the literature in all three fields. Not only do they make substantively provocative points about labor law history, they also contribute to the ongoing methodological debate about the significance of legal discourse and the "new institutionalism" in law and the social sciences.

The essence of Victoria Hattam's and William Forbath's argument is that courts' unremitting hostility to workers' collective action and to the social legislation that labor managed to push through legislatures ultimately forced workers and their unions to abandon the effort to improve working conditions through legislation, to forsake politics, and to rely on economic power and contract negotiations to improve their lot. Thus, the AFL elevated into a matter of principle the voluntarist strategy that, as Forbath says in *Law and the Shaping of the American Labor Movement*, the AFL initially had adopted as "a matter of necessity and grudging accommodation" (at 168). In short, as Hattam bluntly states in *Labor Visions and State Power*: "a strong judiciary created a politically weak labor movement in the United States" (at ix).[18]

Forbath and Hattam's view of the effect of law on labor politics is encapsulated in an episode drawn from the memoirs of Samuel Gompers, the first president of the AFL.[19] In a chapter called "Learning Something of Legislation," Gompers attributed the AFL's turn to voluntarism to his expe-

17. Hattam and Forbath both provide lengthy bibliographic footnotes on these alternative accounts of labor history. See Hattam at 21–33 nn.31–44, and Forbath at 10–13 nn.1–10.

18. That the judges were the principal actors in the state repression of working class insurgency is not as improbable a claim as it might seem to those accustomed to a late 20th-century vision of government, for in the much smaller pre-New Deal state, the judiciary occupied a proportionally larger share of the policymaking and administrative function than it does now. Until the New Deal, most of the law that regulated labor was the common law of master and servant and criminal conspiracy. Government labor policy, if one could dignify it with the name of policy, was that common law doctrine.

> Crucially, judges and lawyers could carry on more continuous and intellectually self-conscious conversations with one another than did legislative representatives, who tended to serve only for very brief terms, creating very high rates of turnover in Congress and the state legislatures. Arguably, therefore, the judicial sector of the American polity became the first to achieve the institutional memory that must underpin any sort of continuous policymaking.

Theda Skocpol, *Protecting Soldiers and Mothers* 70–71. See also Stephen Skowronek, *Building a New American State: The Expansion of National Administrative Capacities, 1877–1920* (New York: Cambridge University Press, 1982).

19. See Forbath at 40–42; Hattam at 159–61. See Samuel Gompers, *Seventy Years of Life and Labor: An Autobiography*, ed. Nick Salvatore (Ithaca, N.Y.: ILR Press, 1984) ("Gompers, *Seventy Years*").

rience as a leader of the New York local of the Cigarmakers International Union. The union struggled mightily to force through the New York State Legislature a bill restricting tenement manufacturing, only to see its legislative victory upset by the New York courts. The union went back to the legislature, but again its efforts went for naught. The New York high court thought it "plain that this law interferes with the profitable and free use of his property by the owner or lessee of a tenement house who is a cigar maker, and trammels him in the application of his industry and the disposition of his labor, and thus, . . . arbitrarily deprives him of his property and of some portion of his personal liberty."[20] Accordingly, the high court held the redrafted legislation unconstitutional.

"Securing the enactment of a law does not mean the solution of the problem," Gompers later wrote in disgust about this experience in the courts. "The power of the courts to pass upon the constitutionality of law so complicates reform by legislation as to seriously restrict the effectiveness of that method."[21] Bitterly disillusioned, Gompers and the union chose another tactic:

> After the Appeal Court declared against the principle of the law, we talked over the possibilities of further legislative action and decided to concentrate on organization work. Through our trade unions we harassed the manufacturers by strikes and agitation until they were convinced that . . . it would be less costly for them to abandon the tenement manufacturing system and carry on the industry in factories under decent conditions. Thus we accomplished through economic power what we had failed to achieve through legislation.[22]

Thus, it is said, was born in the AFL the tradition variously called "voluntarism," "business unionism," "job-conscious unionism," or "pure and simple unionism."[23] The new meaning Forbath and Hattam attribute to this old story is that the AFL's change of strategy not only changed the course of labor history, it was a watershed in American political development.[24]

In *Belated Feudalism*, Karen Orren puts a different spin on the evidence of the labor movement's prolonged battle with the courts. She agrees with Hattam and Forbath that labor's conflict with the judiciary was an impor-

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20. *In re* Jacobs, 98 N.Y. 98, 104 (Ct. App. 1885).

21. Gompers, *Seventy Years* 61.

22. *Id.* at 62. Both Hattam and Forbath recount this episode and quote Gompers's autobiography on it. See Hattam at 160 and Forbath at 42.

23. Most of these monikers seem to have been coined after the fact by historians. Gompers himself used the expression "trade unions pure and simple." Gompers, *Seventy Years* 115.

24. An earlier account of the role of the AFL's voluntarism, among other political forces, in defeating and narrowing social insurance legislation is James Weinstein, *The Corporate Ideal in the Liberal State, 1900–1918* (Boston: Beacon Press, 1968) ("Weinstein, *Corporate Ideal*").

tant influence on the ideologies and strategies that unions adopted (at 70). In particular, she concurs in their view that organized labor was attracted to a regulatory regime based on negotiation and consent rather than statutorily mandated terms of employment because labor distrusted initiatives that would have the government provide or mandate that employers provide social insurance such as health insurance and pensions. Orren, however, draws a different conclusion from these propositions. To her, the conflict between labor and the courts represented the triumph of laissez-faire liberalism, *not* over a socialism that might have been, but rather over the feudalism that had persisted long after the period that American political historians usually identify as the date of its demise (at 4). According to Orren, judicial control over labor relations up to the late 19th century marked the United States as an essentially feudal political economy (at 2–3). In embracing voluntarism, labor did not, in her view, defeat an incipient socialism but instead attained a "constitutional achievement" of considerable significance by throwing off the yoke of judicial control, and thus completing the transition from feudalism to liberalism (at 230). Labor's embrace of voluntarism, Orren posits, was the triumph of American liberalism, which she equates with a political system founded on the principle of voluntary exchange of labor (at 10, 230). And, I would add, as is often the case in liberal regimes, those who benefited from the scheme were those with market power. The unorganized and the unemployed were left without protection.

I suggest below the reservations I have about the authors' views of the preeminent role of the judicial repression of collective action as an historical cause of labor's embrace of voluntarism. To preview, that the judiciary squelched collective action by workers did not necessarily indicate that courts would invalidate all social welfare legislation that would benefit workers. Labor unions as institutions were key beneficiaries of the embrace of voluntarism, at least in the short term. Unions protected, and greatly enhanced, their institutional strength by emphasizing collective bargaining over statutory protection for individual workers. Thus it is not clear to me that the judiciary was the main culprit in the cooptation of American labor. But before elaborating on my reservations about the larger issues raised by these books, I will sketch out the books' arguments.

THE LABOR CONSPIRACY CASES

Victoria Hattam's *Labor Visions and State Power* is a nuanced and provocative analysis of the labor conspiracy cases, the prevailing form of judicial repression of labor activism between 1806 and 1880. In these cases, judges held that workers acted criminally when they agreed to strike or when they tried to persuade other workers to do so, whenever the judges deemed either the means or the ends of the workers' action to be unlawful

at common law.[25] Judges regarded "a combination of workmen to raise their wages," as the court observed in the first reported American labor conspiracy case, the *Philadelphia Cordwainers Case*, "from a two-fold point of view; one is to benefit themselves, the other is to injure those who do not join their society. The rule of law condemns both."[26] In that case, the court convicted a group of shoemakers on a criminal indictment that charged them with combining and conspiring to strike for higher wages.[27]

Hattam's central argument is that "[t]he primary mechanism through which American courts regulated working-class organization during the nineteenth century was the common law doctrine of criminal conspiracy" and that "[t]his particular form of government regulation, via the courts, created a unique set of incentives and constraints that shaped labor strategy in the United States" (at 30). Hattam analyzes the law of labor conspiracy at two levels: she first scrutinizes the evolving judicial rhetoric and doctrine; she then shows that the doctrinal changes both reflected and influenced social and ideological shifts in the labor movement. At the first level, Hattam argues that the rhetoric in labor conspiracy cases changed over the course of the 19th century from an initial concern with a perceived common good in economic development to later emphasis on individual property rights. In the early part of the century, the judges focused principally on the threat that workers' concerted action posed to an asserted public interest in economic growth and on the question whether, in light of the American Revolution, the judiciary could legitimately adopt common law precedents from England (at 50–54). In the antebellum era, "the economic interests of particular employers were rarely mentioned" (at 70). After the Civil War, however, there was a "dramatic change in the language and categories used to describe economic and social relations" (at 70). In the postwar cases, "judges and prosecution attorneys no longer stressed the public dimension of economic benefits and harms" (at 70). The private rights and

25. Other standard studies of the labor conspiracy cases include Edwin Witte, "Early American Labor Cases," 35 *Yale L.J.* 825 (1926); Herbert Hovenkamp, "Labor Conspiracies in American Law, 1880–1930," 66 *Texas L. Rev.* 919 (1988); Wythe Holt, "Labour Conspiracy Cases in the United States, 1805–1842: Bias and Legitimation in Common Law Adjudication," 22 *Osgoode Hall L.J.* 591 (1984).

26. Commonwealth v. Pullis (1806). A complete transcript of the case is found in John R. Commons, Elrick B. Philips, Eugene A. Gilmore, Helen L. Sumner, & John B. Andrews, eds., 3 *A Documentary History of American Industrial Society* 59–248 (Cleveland: Arthur H. Clark, 1910).

27. My colleague John Nockleby pointed out to me that the Cordwainers case is *sui generis* in that it was the only case in which combination itself was criminalized; as Hattam notes (at 57–58), in subsequent cases prosecutors charged, in addition to combination, the use of means such as coercion or the pursuit of ends such as monopoly or restraint of trade that were illegal at common law outside the realm of labor organizing. See John Nockleby, "Two Theories of Competition in Early Nineteenth Century Labor Cases," forthcoming in *Am. J. Legal Hist.* (1994).

injuries of employers came to be of paramount concern;[28] the public good would be advanced derivatively by protection of private rights.

The second level of Hattam's analysis places the evolving doctrine and judicial and prosecutorial rhetoric about the nature of the harm thought to be caused by labor conspiracies against the backdrop of the social history of labor in the 19th century. She shows how the doctrine reflected and directed ideological rifts and shifts in the labor movement. To sustain this argument, she distinguishes between "artisan republicanism" that predominated in the early part of the century and the "working-class consciousness" that prevailed in the latter half (at 93). In the artisan republican era of the 1820s and 1830s, "the principal social cleavage . . . was not yet between labor and capital, or workers and employers. Instead, skilled artisans considered themselves to be producers, allied with master craftsmen, small manufacturers, and farmers against the non-producing classes" (at 93).[29] This distinction proves critical to her thesis, as Hattam argues that it was the ideology of the working class, not the artisan republican ideology, that came into collision with the judiciary.

Hattam contends that the antebellum judicial concern with the *public* good of economic growth, the integrity of the common law, and the legitimacy of judicial review was not deeply offensive to union leaders of that era, who tended to be artisans and to regard themselves as having something at stake in the protection of the common good through economic growth (at 70). Only after 1860, when industrialization began to undermine workers' identity as producers, did the interests of wage earners and manufacturers become polarized and incompatible (*id.*).[30] As the nature of employment changed with industrialization, as machine tenders replaced skilled artisans,

28. An intriguing question, but one beyond the scope of this essay, is whether or to what extent this transformation in labor law reflected a general shift in the focus of American law. My intuitive sense is that it did. The rise of the subjective notion of contractual obligation, in which the courts were principally concerned not with what was a just or fair exchange but rather with what the contracting parties intended, shifted the focus of commercial law from the public concern with fair bargains to a concern with private arrangements and private rights. See Morton Horwitz, *The Transformation of American Law, 1780–1860* chap. 6 (Cambridge, Mass.: Harvard University Press, 1977); P. S. Atiyah, *The Rise and Fall of Freedom of Contract* (New York: Oxford University Press, 1979).

29. In this respect, Hattam contributes to an ongoing refinement of the notion of working-class consciousness. Although Hattam faults Sean Wilentz's study of working-class development in antebellum New York for focusing unduly on a degree of class consciousness that she believes had not emerged before the Civil War and, consequently, "misinterpret[ing] the nature and significance of artisan protest before the Civil War" (at 88), Wilentz himself critiqued the earlier generation of political and social historians, who, he thought, erred in using "a concept of class that now seems rudimentary," in that it constitutes "a series of flat, fixed social categories (proletarians, capitalists), lacking in historical specificity and explanatory power." Wilentz, *Chants Democratic* 7 (cited in note 11).

30. On this point, see Daniel T. Rodgers, *The Work Ethic in Industrial America, 1850–1920* (Chicago: University of Chicago Press, 1978).

so, too, the law changed.[31] By the late 19th century, Hattam finds in the conspiracy cases an explicit rhetorical emphasis on the wealth of one group—the manufacturers—rather than on the wealth of society as a whole. Under these economic conditions and legal ideology, workers could see themselves as being unfairly persecuted by the criminal law. The AFL and its members thought of themselves as working class, as wage earners pitted against the forces of capital. The AFL thus presented a threat to the capitalist order and to the judiciary that its predecessor, the Knights of Labor, did not, and the AFL found itself at war with the judiciary in a way that the Knights of Labor managed to avoid. This conflict between the AFL and the courts led AFL leaders to eschew the Knights' emphasis on politics and legal reform in favor of self-help economic action strategies to improve working conditions.

The AFL's collective action strategy, Hattam contends, was more inimical to the common law than were the antimonopoly views of the Knights of Labor. To the extent that labor organizations such as the AFL and the Workingmen's Assembly sought legal dispensation to act collectively, they "ran counter to one of the core values of Anglo-American law," inasmuch as "the common law had feared the consequences of concerted action and had subjected many forms of association to extensive judicial regulation" (at 170). But those worker groups like the Knights of Labor, who opposed all forms of concerted economic power and focused instead on initiatives intended to foster decentralized economic development, did not challenge "the individualistic cast of Anglo-American law" (at 170–71). It was thus not that the sum total of labor's encounters with the courts channeled labor to collective bargaining; Hattam makes a more nuanced claim as to precisely when and why the strategies of different labor organizations brought labor into conflict with the judiciary.

Among Hattam's more controversial claims is her assertion that common law conspiracy remained an important force shaping labor politics after the Civil War (at 39). The received wisdom is that labor conspiracy prosecutions died out after 1860 or so (see p. 38 n.24).[32] Hattam demonstrates this to be wrong, contending that the injunction did not fully supplant the conspiracy prosecution as the dominant mode of repression of labor militance until 1895 (at 139–61). She exhaustively traces the response of labor leaders in New York and Pennsylvania to the conspiracy prosecutions in the latter half of the 19th century, to demonstrate that conspiracy prose-

31. On the changes in work relations that occurred during industrialization, see Wilentz, *Chants Democratic*, and for a later period, David Montgomery, *The Fall of the House of Labor: The Workplace, the State, and American Labor Activism, 1865–1925* (New York: Cambridge University Press, 1987) ("Montgomery, *Fall of the House*").

32. See, e.g., Archibald Cox, Derek Bok, Robert Gorman, & Matthew Finkin, *Labor Law Cases and Materials* 8 (11th ed. Westbury, N.Y.: Foundation Press, 1991) ("Criminal prosecution fell into disuse by mid-century").

cutions and judicial nullification of anticonspiracy statutes affected labor's strategy (see chap. 4). She chronicles the use of conspiracy prosecutions to repress strikes in the three decades after the Civil War and the political efforts of the Workingmen's Assembly to enact anticonspiracy and other protective labor legislation in the 1880s (at 141–45). She then describes the evisceration of the legislation by judicial construction, as when a Pennsylvania court convicted striking workers on an indictment charging the use of a brass band to intimidate strikebreakers (at 150–51). If a court could construe a newly enacted anticonspiracy statute to allow prosecution for having a brass band at a strike, Hattam notes, the court "effectively rendered legislative protection of workers' collective action meaningless" (at 151). As a result, she contends, trade unionists grew disgusted with legislative reform.

I am not completely persuaded that conspiracy prosecutions account for labor's turn to voluntarism in the 1890s. In her impressively thorough chapter 4, Hattam scrutinizes the recorded proceedings of many New York and Pennsylvania trades unions in the 1870s and 1880s, noting the formation of the Workingmen's Assembly's anticonspiracy-prosecution political programs and the National Labor Union's aptly named Committee on Obnoxious Laws which initially sought the same goals (at 166). She identifies the frustration that labor leaders such as AFL Presidents Sam Gompers and John McBride expressed in the 1890s with judicial invalidation of all manner of protective labor legislation (at 158–59). Yet it is difficult to draw a completely convincing connection between these expressions of exasperation at the turn of the century and the conspiracy convictions that preceded them. The frustration and cynicism might equally have been a product of the labor injunctions of the 1880s and the continuing judicial invalidation of legislation. Indeed, given the astronomical increase in the number of labor injunctions issued after 1880 and the corresponding decline in the number of conspiracy prosecutions, it is difficult to say that the conspiracy doctrine remained of central importance in relation to other developments in labor law in the 1880s.

To the extent that Hattam confronts this problem, she does so by linking the development of class consciousness among workers and the judiciary to the conspiracy prosecutions. Judicial suppression of collective action drove workers to develop a class consciousness which in turn prompted them to see the invalidation of protective labor legislation in class terms (at 131–61). Yet the role of the conspiracy decisions as distinct from the invalidation of protective labor legislation remains somewhat unclear.

From my perspective, however, it does not matter whether it was the conspiracy prosecutions, the injunctions, or the invalidation of wage, hour, and child labor laws that drove labor to voluntarism. (I will return later to the question of how Hattam and Forbath sustain the claim that some com-

bination of these did in fact drive labor to voluntarism.) To Hattam it matters that it was the conspiracy prosecutions that were at the bottom of it, for she builds her theory of working class formation on this point, at least in part. Given the inescapably ambiguous nature of evidence of historical causation, this is a difficult claim to sustain, but Hattam does an admirable job of it.

At times, Hattam permits abstract arguments with her predecessors and fellow scholars to threaten to take precedence over her own narrative, and she runs the risk of turning her account into a dispute over the usefulness of certain analytic constructs. Her effort to build a general theory of working class formation on the foundations of her study of the labor conspiracy cases suffers particularly from this problem. For example, in theorizing that working class formation is the product of a collision between changing conceptions of class and political institutions, particularly the courts, Hattam tries to stake out a middle ground in the methodological debate over the study of class. She argues that "[c]lass interests cannot be unambiguously deduced from the reorganization of work and production" and that to understand the pattern of working-class formation, class "interests themselves must become the object of analysis" (at x). Apart from the difficulty of understanding what precisely she means by this, I found her compromise position somewhat unconvincing. She ultimately concludes:

> The actual experience of industrialization and working-class formation was inevitably mediated by language, ideology, and culture. Acknowledging the mutually constitutive role of ideas and interests does not require that questions of causation and explanation be set aside. All that is implied is that a non-foundational view of language, ideology, and interests be used. How these factors are configured at any particular historical moment is of great consequence, but how these particular linguistic categories and cultural traditions were established cannot be deduced from a priori principles. They were themselves the product of an ongoing political struggle that needs to be researched and explained. (At 207)

This statement is so general that it at once satisfies everyone and no one. One cannot disagree with her statement of the problem; the difficulty is that she leaves unresolved the genuinely troubling points of conflict.

But these are minor quibbles with an impressive, well-researched, and significant book. Hattam provides a survey and critique of much of the recent literature on labor history, working class development, and the welfare state. The footnotes are a valuable resource, and the discussion of labor historiography is wide ranging. She thus does a great deal more than provide a fresh analysis of the history of the use of common law criminal conspiracy doctrine to stifle the nascent labor movement in the 19th century. She

makes a very credible argument as to how that judicial repression shaped modern American politics.

THE LABOR INJUNCTION

William Forbath's *Law and the Shaping of the American Labor Movement* is an ideal book to read in tandem with Hattam's, because he does for labor injunction jurisprudence what Hattam does for labor conspiracy. He contends that "the paltriness of American labor law and social provision lies in the fact that American workers never formed a class-based political movement to press for more generous and inclusive protections" (at 1), and he locates labor's failure to do so in the fact that, through the labor injunction, "courts exacted from labor many key strategic and ideological accommodations, changing trade unionists' views of what was possible and desirable in politics and industry" (at 6–7). Thus, he holds a view of the origins of labor voluntarism that is strikingly similar to Hattam's, except he places the blame on the labor injunction while she puts it on the labor conspiracy doctrine.[33]

In reexamining the labor injunction, Forbath makes an important contribution to labor law historiography, since the last book-length history of the labor injunction was the classic, but dated, 1930 book by Felix Frankfurter and Nathan Greene, *The Labor Injunction*.[34] The Frankfurter-Greene book was something in the nature of a brief in favor of legislative reform that ultimately was enacted as the Norris-LaGuardia Act of 1932, which attempted to remove from the federal judiciary the power to enjoin labor disputes. Like the Frankfurter-Greene study, Forbath's project is motivated by progressive political sympathies. Whereas Frankfurter and Greene made their case for progressive labor legislation by showing how judicial intervention in labor disputes damaged the judiciary, Forbath is more interested in how judicial intervention damaged labor. This is less a matter of substantive disagreement—all would agree that the labor injunction took a toll on courts as well as on the labor movement—than it is a matter of emphasis. Frankfurter and Greene portrayed the legitimacy of the judiciary and the rule of law as the principal casualities of the war over the labor injunction; Forbath sees the radical labor movement as the main loser.

Forbath traces the origins of the labor injunction to the 1870s, when many railroads were in receivership, the early federal adaptation of the common law method for handling legal claims against business enterprises in

33. Forbath's book is a revision and expansion of an article that first appeared in the *Harvard Law Review*. William E. Forbath, "The Shaping of the American Labor Movement," 102 *Harv L. Rev.* 1109 (1989).

34. Felix Frankfurter & Nathan Greene, *The Labor Injunction* (Gloucester, Mass.: Peter Smith, repr. ed. 1963) ("Frankfurter & Greene, *The Labor Injunction*").

financial distress. Since, as part of the receivership process, the courts were already heavily involved in managing the railroads' financial affairs, Forbath notes, it was not a large step to intervene in their labor problems when railroad workers went on strike in 1877. The power of federal judicial oversight in receivership, combined with annoyance at some state and local officials' demonstrated sympathy for the cause of labor, led federal judges to resort to summary writs backed by the force of federal marshals or troops to subdue workers. From railroads in receivership, the injunction spread to railroads not already under judicial oversight and thence to other industries (at 66–73).

Forbath's central claim is that, in the struggle over labor injunctions, organized labor increasingly challenged not merely the employers' power and prerogative in the workplace but, more significant, the courts' "normative authority" by asserting the unions' role as a maker and enforcer of work rules (at 65). In support of this claim, Forbath cites, among other cases, the Supreme Court's denunciation in *In re Debs* of labor's effort to "'exercise powers belonging only to Government.'"[35] Thus, Forbath concludes, "[n]ot mere class bias but rather this special rage at unions as rival lawmakers" underlay the courts' enthusiasm for intervening in labor disputes by means of the labor injunction (at 66). Labor's autonomy posed a particular threat to the judiciary's vision of its role. According to Forbath, the struggle between labor and courts became so intense because it was a battle between institutions over their power, their legitimacy, and even their very survival.[36]

Forbath brings the techniques of the social historian to bear on several incidents of brutal repression of labor activism to illustrate the stress that the injunction placed on the courts' legitimacy and, more importantly, the effect of antistrike decrees on labor's strategy. For instance, Forbath contrasts the personal reflections of Judge William Howard Taft, Eugene Debs, and Justice David Brewer on the Pullman strike to assess the impact of the injunction on the labor movement. Judge Taft, who enjoined the Pullman strike, mused in letters to his wife during the strike on his awkward role in enforcing the injunction, complaining about "conducting a kind of police court" to process the steady stream of workers who were arrested by the 125 deputy marshals he had deployed to enforce his decree (at 74). After describing Eugene Debs's reservations regarding the Pullman boycott and Justice Brewer's opinion for the Supreme Court upholding the blanket in-

35. Forbath at 65, quoting 158 U.S. 564, 592 (1895).

36. Hattam, in contrast, places less weight on the threat to judicial authority after the Civil War; in her view, "[t]he problem of judicial authority largely had been solved in the antebellum trials" (at 72). Whereas Hattam focuses on labor's challenge to the individualist bent of common law doctrine, Forbath focuses on labor's threat to the courts' institutional authority.

junction, Forbath notes that Justice Brewer and Debs shared the view that the federal courts had played a decisive role in ending the boycott (at 76).

In a similar manner, Forbath makes effective use of social history in support of his claim that open defiance of the injunctions dwindled after two particularly notorious cases, *Loewe v. Lawlor*[37] and *Gompers v. Buck's Stove & Range Co.*[38] The effect of judicial decrees on local communities was devastating. As Forbath says one labor leader told it, a broad strike, in which "[c]olored and white workers . . ., teamsters, printers, hearse drivers and carriage drivers, musicians and carpenters and streetcar workers" supported the grievances of longshoremen, ended when "Judge Billings decided the strike was against the Interstate Commerce law" (at 95). The judge summoned the strikers to his courtroom to tell them "that the strike was outlaw and we would all go to jail and have the U.S. Army here again besides if we didn't call it off" (at 95). Reading this story, it is not difficult to imagine how, as Forbath claims, the enjoining of local officials and entire communities, and the status of being "outlaws," challenged labor leaders' image of themselves as upstanding, productive members of the community. For a relatively short book, Forbath paints quite an evocative narrative landscape and weaves a diversity of sources, both legal and nonlegal, into his account.

Forbath also looks to the judicial invalidation of anti-injunction and protective labor legislation to explain labor's dismay at political reforms and consequent resort to collective action (see chap. 2). He starts out by asserting that "[t]he labor movement of the 1880s and early 1890s embraced what was, by contemporary standards, a bold program for government regulation of the wage contract and working conditions" (at 37). Then, after briefly summarizing the judicial nullification of legislative reforms in Colorado and Illinois (at 45–49), and noting that the craft workers who dominated the AFL generally had the bargaining power to extract in the form of concessions by contract the very set of protections that judges would not accept by legislation, Forbath concludes that judicial hostility drove Gompers and his associates to condemn broad wages and hours and social insurance legislation (at 55–57).

Both Hattam and Forbath see the invalidation of protective legislation as an important part of judicial repression of labor. Neither, however, draws a clear analytic link between repression of labor's collective activity and invalidation of protective legislation. They both suggest that the connection lies in judicial hostility to class-based action or categories of any sort. I would have benefited from further consideration by them of the nature of the connection and further study of the similar discourses in the two categories of judicial decisions.

37. 235 U.S. 522 (1915).

38. 221 U.S. 418 (1911).

In the crucible of this armed and psychic conflict, Forbath contends, labor forged a new voluntarist and distinctly legal consciousness. Labor sought to come in from the cold of "semi-outlawry" by developing both a strategy and an ideology that would avoid conflict with the courts (at 98). Thus, Forbath, like Hattam, characterizes labor's transformation as the adoption of voluntarism and as being distinctively legalistic. The principal point of difference between Hattam and Forbath is whether the conspiracy or the labor injunction cases served as the catalyst.[39] Each of them makes a convincing case that the subject of his or her inquiry was important; neither needs to suggest that the other's focus is misplaced.

In a search for legitimacy, Forbath claims, labor leaders started talking like lawyers rather than like revolutionaries (at 7). Although Gompers and other labor leaders had little faith in the law, they learned to articulate their goals in a species of "common law, market place-rights rhetoric" to justify themselves to themselves and to others (at 132). Interestingly, this is a point that Frankfurter and Greene also made. Frankfurter and Greene use the example of Andrew Furuseth, the president of the International Seaman's Union, whose dedication "to the welfare of his fellow seamen" led him into a protracted legal struggle against the injunction:

> Of a studious nature, he delved into the history of chancery, and from his conclusion as to the bases of equity jurisdiction formulated a remedy which became the Shipstead Bill. With indomitable tenacity, Mr. Furuseth has persisted in his own conception of legal history and in the espousal of a reform deemed by him the correct legal tradition. There is much that is gallant in the picture of this self-taught seaman challenging with power and skill an entire learned profession.[40]

But whereas Frankfurter and Greene, with a certain genial arrogance, apparently considered the education of labor leaders in law a laudable, if faintly silly, inculcation of the working class in the values of legal process and the rule of law, Forbath regards the labor leaders' education in the law as a deliberate, shrewd, and but ultimately tragic choice (at 167). In the 60 years between the books, the views of the elite legal academy about whether it is a good thing for citizens to internalize legal consciousness have changed. What used to look like education now looks like cooptation.

Forbath's argument is well executed and intriguing. His prose is graceful and his analysis is subtle and nuanced. Although he sets out to explore some large metatheoretical debates (about law as epiphenomenon, about the role of legal discourse in shaping social consciousness), he reaches few

39. Hattam and Forbath discuss their differences only briefly in their work. See Forbath, "Courts, Constitutions and Labor Politics in England and America: A Study of the Constitutive Power of Law," 16 *Law & Soc. Inquiry* 1, 20 n.73 (1991); and Hattam at 165 n.132.

40. Frankfurter & Greene, *The Labor Injunction* 207.

conclusions. Forbath is, by and large, appropriately modest about the extent to which historical evidence can confirm or deny controversial theories. Although, as I explain below, I have a few reservations about whether Forbath is totally successful in sustaining his thesis about the origins of voluntarism, the book is nevertheless a meticulous and elegant history.

VOLUNTARISM AND LIBERALISM

In *Belated Feudalism*, Karen Orren offers yet another provocative perspective on the 19th-century collision between labor and the judiciary. Like Hattam and Forbath, she perceives the fact that, in the late 19th century, "tensions between workers and the state had mounted to a point where" judges were routinely enjoining workers from walking off the job, to be a manifestation of institutional resistance to a profound political and economic transformation (at ix). The tensions, in her view, emanated from a "disjunction between old and new, feudal and liberal," and the conflict "established labor's position not as merely one of several significant American social movements in the modern period but at the vortex of political change" (at 71).

Orren is interested in the conflict between labor and the judiciary for a different reason than Hattam and Forbath. Whereas they look to the law and politics to support their position in a hoary debate in labor historiography, Orren looks to labor to support her position in an even more hoary debate in American political and legal theory. Ultimately they all agree that labor law was at the core of the development of American liberalism, but they reach that conclusion from different starting points. Like Hattam and Forbath, Orren asserts that the common law regulation of labor shaped the development of the American political economy: "the law of master and servant was at the foundation of capitalist development and industrialism, and was not their result" (at 70). Thus, she shares with Hattam and Forbath the view that legal relations are partly constitutive of society, not merely products of other economic and social relations. She is less concerned than Hattam and Forbath with demonstrating the effect of law on society and is more willing to proceed from the assumption that the law is crucial.

Orren attributes far greater significance to the judiciary's control over labor relations than do Hattam and Forbath. In her view, the legal treatment of labor is the foundation of a political system. In labor's confrontation with the judiciary, Orren sees the transition from feudalism to liberalism; she thus argues that feudalism persisted in the United States until the New Deal. Orren is self-consciously radical about her claim. She argues "not that there was a resemblance between late-nineteenth-century employment law and feudal law, or that capitalist employment practices were analogous to feudal practices, but that there was, in actuality, an un-

broken line stretching from labor regulation in Tudor England . . . to labor regulation in Gilded Age America" (at 15).

Orren identifies two features of the 19th-century law of master and servant as defining it as a feudal structure: first, the judicial (as opposed to legislative) control over the regulation of employment (at 15), and second, "the *prescriptive* nature of the common law, the enforcement of rules existing a priori, in contrast to the voluntary principles associated with the modern idea of contract" (at 68). This is, in essence, her definition of feudalism: judges and the common law were the dominant governing institutions, and traditional or prescriptive rather than voluntary relations were the dominant social arrangements (at 15–17). More specifically, Orren argues that the law of master and servant was hierarchical; obligations were based on custom, status and deference, rather than on contract. Under the 16th-century English Statute of Artificers, workers were not free to quit to sell their labor to the highest bidder.[41] So too, claims Orren, in 19th-century labor conspiracy cases. Managerial prerogative was not a creation of contract but was thought to inhere in the status of a manager; workers owed deference to managers as a matter of status, not contract; workers could not freely quit, or those who did would forfeit wages; and, significantly, judges, not legislatures, workers, or employers, regulated the terms of employment.

The conflict between the judiciary, labor, and legislatures at the turn of the century was, in Orren's view, the final stage of the birth of liberalism. The American labor movement, Orren maintains, was the agent of the transition from what she defines as feudalism to what she defines as liberalism, that is, "from the regulation of employment by the law of master and servant to the regime of collective bargaining, and from the common law's embedded position in American government to the fully legislative polity" (at 19). The transfer of authority over labor relations from the judiciary to the legislature and the adoption of voluntarism—that is, the completely contractual ordering of employment relations—transformed the United States from a partially feudal to a thoroughly liberal polity. "Looked at comprehensively," Orren asserts, "the political development of liberalism will be seen to consist of the emerging relevance—the idea and the practice—of voluntary concepts, and of voluntary action itself, within society" (at 18). The Supreme Court delivered the coup de grace to the old order in 1937 when it sustained against constitutional challenge the National Labor Relations Act, which transferred authority to regulate labor from the judiciary to the legislature and adopted collective bargaining as the dominant relationship (at 30). In upholding the NLRA's legislative restrictions on managerial

41. Even into the early 19th century in the United States, laws restricted workers' ability to quit their jobs. See Robert J. Steinfeld, *The Invention of Free Labor: The Employment Relation in English and American Law and Culture, 1350–1870* (Chapel Hill: University of North Carolina Press, 1991) ("Steinfeld, *The Invention of Free Labor*").

prerogatives, the Court "confirmed in law the breakdown of the old categories already accomplished in practice," and "the remnant of feudalism that was labor relations gave way to liberal government" (at 209).

Orren argues that labor's collective action in the 19th century challenged the foundations of the ancien régime and that judicial efforts to enjoin or to prosecute that collective action as criminal conspiracies should be seen as counterrevolution. To sustain this claim, Orren parses the rhetoric of labor conspiracy and injunction decisions as well as other historical materials. For example, Orren sees in two well-known Massachusetts conspiracy cases, *Walker v. Cronin*[42] and *Carew v. Rutherford*,[43] that the judges

> exaggerated the dangers of trade unionism. On its side, the labor movement doggedly pursued contract breaking not as a goal in its own right but as a means to higher wages and better working conditions. However, as the judges put it, those purposes were "remote." The point at which the two positions locked horns was in the fundamental rule and raison d'etre of the existing structure: Workers must obediently work, and outsiders must not intrude. Adherence to that rule was what employers and courts insisted upon, and what workers refused. (At 128)

Like Hattam and Forbath, Orren sees the judicial hostility to social legislation as a profoundly significant "concerted institutional defense of the labor remnant of feudal government against legislative encroachment" (at 112). Because the subservient position of labor was the defining feature of the ancien régime, it was labor's presence in these disputes that was "the root cause of the judges' reaction" (at 114).

Given her premise about the persistence of feudalism, Orren sees labor's voluntarist tactic very differently than do Hattam and Forbath. She regards it neither as a grudging accommodation to the power of courts nor as a fall-back position, but as the final and determinative phase of the development of liberalism. Labor was not coopted by liberalism; labor created it. In her view, "the demotion of trade-union tactics to a status of second-best, either as compared with 'political' activity or as a strategic adaption to the power of courts, obscures the radical effects inherent in the unions' actions" (at 128).

Although, as I explain below, I do not agree with Orren's argument about feudalism, there is much to recommend her portrayal of labor's turn to voluntarism as being an accomplishment rather than a defeat. In her view, there is great irony in labor's historical reputation as having failed to unseat liberalism. Orren makes a persuasive case that labor did not fail for not having dislodged liberalism to make space for socialism, but instead succeeded in making an enormous contribution to the development of liber-

42. 107 Mass. 555 (1871).
43. 106 Mass. 1 (1870).

alism. Whereas Forbath thinks that the labor injunction effected a redefinition of work relations that was "a kind of refeudalization" (at 88) (a view not unique to him), Orren regards the labor injunction as the last stage of "defeudalization." Further, while Orren might agree with Hattam and Forbath that labor did not pursue "political," as in electoral, strategies of social change because of its experiences with the judiciary, she would attribute far deeper significance to this than do they. Even as labor lost battles with the courts, it won the war against the ancien régime. Labor adopted voluntarism not because it had no other choice; in adopting voluntarism, labor finally made a radical choice.

Orren makes a more detailed effort to link labor's voluntarist ideology to the experience of early 20th century governance than do Forbath and Hattam. To do so, Orren juxtaposes the 19th-century labor conspiracy cases against the first extensive nonjudicial regulation of labor represented by the Interstate Commerce Commission's regulation of the railroads at the close of the century. She thinks the ICC's notoriously difficult experiences with rate regulation reveal the institutional manifestations of the problematic transition to liberalism (at 190–204). She links the ICC's early difficulties to the turmoil in the legal regulation of employment relations at the time: Just as government inaugurated rate regulation, it lost the ability to control the crucial ingredient of rates—labor costs—for "management could no longer, with impunity, cut wages, stretch hours, delay payrolls, and augment duties of employees to lower costs" (at 196). This Orren sees as one of many ironies of the era: "at the time the railroads' commercial relations moved from a condition of free bargaining toward regulation, the railroads' labor relations moved from a condition of regulation toward free bargaining" (at 191).

Orren's book is a simultaneously satisfying and frustrating interpretation of the relationship between labor and courts. The satisfaction lies in Orren's skillful portrayal of the ways in which labor relations were at the heart of political and economic development in the United States. The frustration arises from the theoretical ambition of her project. The fundamental reorientation of the theory of American liberalism that Orren seeks to effect requires her to engage with an enormous literature; this imparts a distinctly mandarin character to the book. The first chapter, for example, is an explicit refutation of certain arguments of classic studies of American liberalism and a defense of her own method. The difficulty of beginning this way is that it tends to reify the concepts of liberalism and feudalism. This is a problem that plagues the rest of the book. Liberalism and feudalism are such slippery concepts that it is difficult to label a legal regime one or the other in any meaningful sense except a historical one. To speak of liberalism versus feudalism, or contract versus status, or social structures as being voluntary as opposed to traditional relationships, often leaves the real nature of

the antinomy fundamentally obscure. Of course, at a certain point there is no escape from the language of status and contract when talking about the change in employment relations brought about by modern capitalism. Yet, although Orren's efforts to characterize the essence of feudalism and liberalism are intriguing, ultimately I do not find them helpful. Her focus on the pervasiveness of judicial as opposed to legislative control over employment—whether or not it qualifies as "feudal"—is an interesting insight, but I am not entirely persuaded by her claim that the New Deal marked the end of the dominance of judicial control over labor relations. Through the power to interpret legislation and in the areas where common law retains a central role, the judiciary still occupies an extremely important place in the control of labor relations.

Thus, it seems to me that Orren's claim that the common law of master and servant defined the United States as essentially feudal into the 19th century has two interrelated flaws. First, it borders on the tautological, and second, I do not see the total revolution in labor relations that she sees as having occurred during the New Deal. As to the first, Orren's insistence on describing the transition she sees in legal regulation of work as being from feudalism to liberalism succeeds on her own terms because she gets to define for herself what feudalism and liberalism are. It is not my purpose here to evaluate the analytic power of her definitions or whether they capture the essence of feudalism or liberalism. My point is simply that her effort to define pre-New Deal labor law as essentially feudal is helpful only to the extent that she can show that the obvious differences in degree between the pre- and post-New Deal labor law amount to a difference in kind. And this she does not do, which brings me to my second criticism.

If feudalism is, as Orren says, defined by status rather than contractual relations, prescriptive rather than negotiated rules, and judicial rather than legislative control over labor relations, then the United States remains mired in feudalism. Although judges may call the employment relation contractual, they dictate the enforceable terms of the contract; the terms remain prescriptive and judge-made. For instance, judges invented and maintain the presumption of employment at will. The employment relation is thus both prescriptive and judge-made. Similarly, as the cases I discussed at the beginning illustrate, judges recognize no enforceable expectations of guaranteed health benefits. They call employee benefits plans contracts, but calling something a contract does not make the relation voluntary, consensual, negotiated, or any of the other characteristics of liberal relations. In the same vein, judges determine the limits on employee expectations of privacy, dignity, and freedom of expression on issues ranging from drug testing to surveillance. Outside of the 12% of the private sector workforce that is unionized, the National Labor Relations Board plays little role in defining the terms of employment. Except for sporadic administrative enforcement of

occupational safety and health, minimum wage, and antidiscrimination laws, judges remain the principal arbiters of the legal regulation of employment with precious little effective statutory guidance. In form, the law of labor relations changed dramatically with the enactment of protective labor and antidiscrimination legislation in this century. In practice, however, except for unionized workplaces, status as much as contract, and judges as much as administrative agencies, control the legal content of the employment relationship.[44]

This is not to belittle Orren's fundamental insight that the enactment of statutes and creation of administrative agencies to govern labor relations effected an important change. But the change has been more subtle and more limited than she portrays. The power to assign meaning to those statutes remains firmly in the hands of the judiciary, especially because the NLRB must rely on the federal courts of appeals to enforce its orders. The difficulty of amending the NLRA to overrule disagreeable Supreme Court interpretations—as evidenced by the long and so far fruitless effort to overturn the judicial rule allowing employers permanently to replace striking workers[45]—suggests that judicial power remains extremely important, and legislative and administrative power, though almost unlimited in theory, is sharply constrained in practice. So I might say that judicial and legislative control are, and have been since the early 20th century, in more of a dialectical relationship than Orren seems to allow. Nevertheless, irrespective of the success of Orren's theoretical claims, her book is a well-executed and insightful study of the effect on American political development of the evolving role of law in labor relations.

ASSESSING THE LIMITS OF JUDICIAL INFLUENCE

Among many other contributions these books make, they provide historical grist for the mill of legal scholars engaged in an ongoing debate about the effect judicial decisions have on social movements.[46] This literature fuels a lively academic debate that has the potential to generate profound consequences: What role can, does, and should the judiciary play in bring-

44. Notwithstanding the prefatory language in the NLRA about the equality of management and labor, judges have construed the statute to perpetuate 19th-century norms of managerial prerogative and worker obedience. See James B. Atleson, *Values and Assumptions in American Labor Law* (Amherst: University of Massachusetts Press, 1983) ("Atleson, *Values and Assumptions*").

45. NLRB v. Mackay Radio & Telegraph Co., 304 U.S. 333 (1938).

46. See, e.g., Gerald Rosenberg, *The Hollow Hope: Can Courts Bring About Social Change?* (Chicago: University of Chicago Press, 1991); Joel Handler, *Social Movements and the Legal System: A Theory of Law Reform and Social Change* (New York: Academic Press, 1978); Michael McCann, "Reform Litigation on Trial," 17 *Law & Soc. Inquiry* 715 (1993); Malcolm Feeley, "Hollow Hopes, Flypaper, and Metaphors," 17 *Law & Soc. Inquiry* 745 (1993); Gerald Rosenberg, "Hollow Hopes and Other Aspirations: A Reply to Feeley and McCann," 17 *Law & Soc. Inquiry* 761 (1993).

ing about social change? The message these authors deliver is intriguingly ambiguous: They suggest that the judiciary has the power significantly to alter society, and each author goes about demonstrating that influence in a different way. These books may thus be the harbingers of an approaching wave of legal and social science scholarship profoundly critical of the American judiciary generally and of judicial review in particular.

My principal reservation about these books is largely about the limits of the ideological and institutional power of the judiciary to reorient an entire political movement. To take just one example, I have three reasons to doubt that Gompers's frustration with the New York courts, or the AFL's experience in the courts generally, would have led the labor movement astray if it were not already tempted to stray for other reasons. First, as I explain below, other labor leaders did not respond to judicial wrath with nearly the enthusiasm for voluntarism that Gompers did. Additionally, unions had compelling institutional reasons for emphasizing collective bargaining at the expense of social legislation wholly apart from judicial hostility. Finally, it is not clear that judicial hostility to collective action would or did necessarily lead labor leaders to abandon the pursuit of other types of legislation that would benefit workers (e.g., health care and pensions) but that have no direct connection to labor's collective action.

Hattam and Forbath anticipate these reservations and confront them by offering a comparison between the fates of the American labor movement, which they say was thwarted by judicial review, and the English labor movement, which was thwarted to a much lesser degree.[47] Hattam and Forbath note the substantial similarities between the English and American working class, legal traditions, and systems of labor regulation in the 19th century. Unions in both countries had similar institutional incentives to favor collective bargaining over legislative action, yet only in the United States did labor fail to form a political party and fail to secure expansive social welfare legislation. Hattam and Forbath locate the principal difference between the experiences of the English and American labor movements in the fact that, between 1875 and 1906, the English judiciary gradually backed down in its confrontation with Parliament over the legitimacy of labor activism, whereas the American judiciary did not formally give up the fight until 1937. In particular, Forbath and Hattam argue, Parliament put a stop to labor conspiracy convictions by enacting the Conspiracy and Protection of Property Act in 1875.[48] As a consequence, the English labor movement began to see the rewards of political action which the American unions saw as futile.

47. Hattam's study of England is the fifth chapter of her book. Forbath's is found in a separate article and essay, "Courts, Constitutions, and Labor Politics in England and America: A Study of the Constitutive Power of law," 16 *Law & Soc. Inquiry* 1 (1991); and his "Law and Labor Politics" at 201–30 (cited in note 12).

48. Forbath, "Law and Labor Politics" at 215.

There are, as Hattam and Forbath note, many parallels between England and the United States in the 19th century. Perhaps there are more than they suggest. In particular, according to John Orth's recent book on English labor conspiracy cases, the contrast between the English judiciary's willingness to respect labor reform legislation passed by Parliament and the American judiciary's unwillingness to accord similar treatment to Congress and state legislatures may not be as great as Forbath and Hattam suggest.[49] For instance, Orth says, the English judiciary "speedily relegated to insignificance" 1859 labor conspiracy reform legislation, and judicial power in the late 19th century jeopardized labor's legislative gains of the 1870s (at 155). After Parliament enacted the Conspiracy and Protection of Property Act in 1875, employers found other legal theories on which they could attack unions, and they did so successfully.[50] Thus, in England in the late 1870s, the use of criminal conspiracy declined; in the United States the same thing happened at roughly the same time. In both England and the United States, employers thereafter resorted to tort theories in their war on labor. Labor's success in persuading Parliament to put a stop to criminal prosecution did not prove to be a success in ending the judiciary's attacks. Although the British judiciary did not have the option of invalidating protective labor legislation as unconstitutional, judges had and exercised the power to construe it narrowly. And, although tort largely (but not entirely) replaced criminal law as the British employers' weapon of choice after 1875, "civil liability proved far more punitive than imprisonment" (at 148).

In England, says Orth, the "lesson labour learned from its history was to see the common law as inherently hostile to its organizational aspirations" (at 155), and by 1906, "when labour's political might earned it carte blanche, it could think of asking for nothing more than" being ever more insulated from legal liability for its concerted activity (at 153). "Ever since then, being left alone has been one of labour's central demands" (at 153). As a result, Orth maintains, English labor applauded the late 19th-century move away from state-mandated terms of employment and favored adoption

49. John V. Orth, *Combination and Conspiracy: A Legal History of Trade Unionism, 1721–1906* (New York: Oxford University Press, 1991) ("Orth, *Combination and Conspiracy*"). On British labor law of this era, also see Michael Klarman, "The Judges versus the Unions: The Development of British Labor Law, 1867–1913," 75 *Va. L. Rev.* 1487 (1989).

50. For example, Orth, *Combination and Conspiracy* 148–49, observes:

> In 1901 in *Quinn* v. *Leathem* the House of Lords upheld a judgment against trade union officers for civil conspiracy. Defendants had threatened to strike against an employer's business customers in order to induce the employer to fire non-union workmen. . . . Key to [the employers'] success was the notion that an act lawful for one could be actionable if performed by many acting together. In addition to accepting that proposition, the House of Lords in *Quinn* also held that trade unionists' motives to raise wages did not privilege them to combine to injure an employer, even though it had held in an earlier case that a cartel of businessmen (a trade union of a different sort) could injure a competitor with impunity so long as they were motivated by a desire to improve their own economic position.

of a contract framework for employment relations (at 154). This, of course, is just what the American Federation of Labor concluded at the same time. In both countries, it thus appears, suspicion of the judiciary prompted labor to rely on its own economic strength and to seek to be let alone. While Hattam and Forbath are undoubtedly correct that judicial as opposed to parliamentary supremacy influenced labor's view of legislative strategies, I remain uncertain about the extent to which those differences explain the difference in labor politics and welfare state development in the two countries. Let me explain why.

There are a number of different ways that legislation can benefit workers, and judges in the two countries might not be hostile to all different types of pro-worker legislation to the same degree. For instance, legislation might benefit workers (1) by eliminating common law labor conspiracy prosecutions or labor injunctions; (2) by protecting collective bargaining; (3) by regulating working conditions (e.g., wage and hour and occupational safety and health laws); or (4) by providing social insurance such as medical insurance, pensions, and the like. It seems possible that the labor movements in the two countries might have regarded judicial invalidation or evisceration of anticonspiracy, anti-injunction, and working conditions statutes as raising different issues than judicial invalidation of protective legislation pertaining to social insurance and other matters not directly related to labor organizing and collective action. Workers' frustration with the judiciary might well lead them to abandon pursuit of the first and third sorts of legislation. Absent some class notion that social insurance amounted to a system of illegitimate taking of the property of the rich to give to the "undeserving" poor, the judiciary would not necessarily have invalidated social insurance laws. Indeed, the frustration with judicial review of some laws might have provided labor an increased impetus to seek socialism.

Similarly, although Hattam and Forbath claim that the struggles with the judiciary turned the AFL away from politics and the state, they both acknowledge that the AFL never entirely avoided the state.[51] All the AFL did was to abandon the quest for social welfare legislation for 30 years between roughly 1900 and the New Deal.[52] One aspect of the state that the AFL never gave up on was the quest for statutory protection for collective action. Gompers and the AFL fought hard to include protections for labor in the Clayton Act of 1912, and when the Supreme Court construed that

51. See Forbath, "Law and Labor Politics" at 213 n.58, and Hattam at 3.

52. These were crucial years, for they saw the passage of workers' compensation legislation and the first defeat of public health care legislation in New York and California. The AFL's decision may therefore have had significant consequences. See Lubove, *Struggle for Social Security* 66–90 (cited in note 13); Starr, *Social Transformation of American Medicine* 243–57 (cited in note 13); Skocpol, *Protecting Soldiers and Mothers* 205–47 (cited in note 13); and Irwin Yellowitz, *Labor and the Progressive Movement in New York State, 1897–1916* (Ithaca, N.Y.: Cornell University Press, 1965).

legislative protection away to nothingness, the AFL returned to Congress to support the Norris-LaGuardia Act of 1932. I am troubled by the argument that labor's collective action ideology led to conflict with courts that, in turn, led labor to abandon efforts to secure any legislation except protection for the right to act collectively. Voluntarism relies more on protection for collective action than does social legislation that protects workers as individuals. If labor's collective action posed the most severe threat to the state, and if labor was motivated to avoid conflict with the state, it is counterintuitive that the AFL's conflict with the courts drove it to *continue* the very behavior—collective action—that courts found most objectionable.

To be sure, the AFL had a variety of reasons to pursue the collective action strategy rather than to seek social welfare legislation, and some were only indirectly traceable to the courts. Obviously no labor union can exist without collective action. Groups form naturally in the workplace, and collective action to protest objectionable management decisions is an inevitable and valuable phenomenon. Additionally, unions recognize that their institutional survival depends on the need to maintain loyalty of members to the union by responding to workplace grievances. In this respect, the conventional view of why Samuel Gompers opposed compulsory public health insurance legislation continues to make sense. Unions were strong in proportion to their success in protecting their members. In difficult economic times, unions could count on worker loyalty in the face of declining wages and increasing unemployment only if workers saw the union as their only protection from destitution. Compulsory health insurance would reduce the unions' control over the protection of workers. Furthermore, labor leaders who were critical of health insurance initiatives that neared passage in California and New York in 1917 and 1918 had other reasons for concern. The experience with workers' compensation legislation in the early years was decidedly mixed for workers, who traded tort damages for low workers' compensation benefits and offensive employer-mandated industrial health examinations.[53]

Moreover, as I suggested at the outset, it is difficult to say with great certainty that the comparatively anemic condition of the American welfare state today, or in the last 40 years, stems from the AFL's strategic choice. Caution in this respect is counseled by two significant limits to claims that may be made as to the enduring significance of the AFL's turn to voluntarism. First, there were alternative strands in the labor movement. Second, the experience of labor during the Depression of the 1930s, the World War II years, and the postwar period was of enormous significance. Forbath ac-

53. Lubove, *Struggle for Social Security* 85 (cited in note 13); Weinstein, *Corporate Ideal* 43–44 (cited in note 24). On the job consciousness of unions, see David Brody, *Workers in Industrial America: Essays on the Twentieth Century Struggle* (2d ed. New York: Oxford University Press, 1993) ("Brody, *Workers in Industrial America*").

knowledges that there were other strands within the labor movement (at 119), and while it is well beyond the scope of either his book or Hattam's fully to account for them, their arguments would have been stronger had they given them more attention. It was Gompers and the dominant AFL unions whose encounters with the courts were so sour as to prompt them to ignore and even to oppose protective labor and social insurance legislation in the first decades of the 20th century. But certainly after 1930, and to some extent before, it is not accurate (as Forbath and Hattam readily acknowledge) to equate the AFL's views with labor's views, or even with working class consciousness.

Two examples come to mind. First, state affiliates of the AFL remained supportive of protective labor legislation; both the California and the New York federations supported the health insurance legislation that progressive middle class reformers proposed in 1917 and 1918.[54] A second example is found in the person of Sidney Hillman, one of the most prominent labor leaders of the 1930s. Hillman, founding leader of the Amalgamated Clothing Workers of America, and later one of the leaders of the Congress of Industrial Organizations, never abandoned hope in political transformation. The tradition of which Hillman was the most prominent exemplar, and the extent of Hillman's own influence, are important to bear in mind in any discussion of voluntarism, labor, and the state. While Hillman may have been an anomaly, he was not a marginal figure. The extent to which Hillman was an anomaly is crucial, particularly to Forbath's argument, because Forbath describes the era (1910–30) when Hillman's views on American politics were formed.[55]

Hillman's continuing faith in government cannot be attributed to the Amalgamated Clothing Workers Union having experienced fewer setbacks in the courts than AFL unions, because the Amalgamated had as dismal an experience as any union. Between 1880 and 1920, the needle trades were surpassed only by mining and the building trades in the number of strikes.[56] And, predictably, courts routinely enjoined the Amalgamated's strikes. Anecdotal evidence of one strike, however, suggests a possible reason why Hillman did not become disenchanted with the state in the same way that Gompers did. In a July 1919 strike against a large Rochester clothing firm, the court enjoined picketing and all efforts to persuade the firm's employees to strike, and the firm sued the union for the then-astronomical sum of

54. See sources cited in note 52.

55. Forbath notes that Hillman had a more optimistic view of government than did Gompers but does not make a sustained effort to account for their differences (at 119–20; 163–65). Of course, a more detailed examination of Hillman and the Amalgamated would be beyond the scope of their work, and they did not have the benefit of the definitive new work on Hillman, Steven Fraser's *Labor Will Rule: Sidney Hillman and the Rise of American Labor* (New York: Free Press, 1991) ("Fraser, *Labor Will Rule*").

56. Fraser, *Labor Will Rule* 41.

$100,000. Felix Frankfurter represented the union pro bono, using the case as a vehicle to advance Frankfurter's self-described interest "in the establishment of sound legal principles in the disposition of labor litigation primarily as a scientific student of the law and our legal institutions."[57] Frankfurter persuaded Hillman that the Amalgamated should mount a defense based on detailed sociological and economic data about the needle trades. His idea was to convince the court of the necessity of strikes to protect workers, as Brandeis had convinced the Supreme Court of the necessity of maximum hours legislation to protect women.[58] Although the strategy was not a success in that suit, Hillman and the Amalgamated did forge an enduring reliance on social science, and a faith in the union's need and ability to understand and to manage national economic cycles to improve the conditions of work.[59]

Incidents like this created a significant strategic alliance between influential legal academics and jurists such as Frankfurter and Brandeis, aspiring progressive political activists such as Frances Perkins and Harold Ickes, progressive business leaders like Filene, the left-leaning social scientists congregating at the Twentieth Century Fund and the Russell Sage Foundation, and progressive politicians such as Wagner, LaFollette, and Norris. All shared an interest in using their considerable political power to promote the nebulous goals of industrial democracy and economic stability.[60] Friendships and alliances between labor and the intelligentsia probably had an effect on the Amalgamated's strategy, as Forbath recognizes (at 165). Gompers's well-known determination that labor should not become unduly close to the intelligentsia may have had the opposite influence.[61]

The story of Hillman's life offers an interesting counterpoint to Forbath's and Hattam's theories, because it suggests how even a union that had many scrapes with the judiciary nevertheless did not turn antistatist. In part, Hillman's outlook may have been shaped by the economics of the garment trades, in which large firms often wished to ally themselves with the Amalgamated to prevent price wars with small firms that valued stability less than short-term profit. Leading clothing manufacturers supported collective bargaining with the Amalgamated as a way of increasing productivity, ensuring a steady supply of labor, and preventing ruinous competition.[62] Later, for the same reasons, they favored the price regulation of the

57. *Id.* at 163 (quoting a letter from Frankfurter to Hillman, 30 March 1920, Box 67, Felix Frankfurter papers, Library of Congress).

58. Muller v. Oregon, 208 U.S. 412 (1908).

59. Fraser, *Labor Will Rule* 164–65.

60. See Steve Fraser, "The Labor Question" *in* Fraser & Gerstle, eds., *Rise and Fall* (cited in note 4).

61. An excellent recent essay on the intellectual history of labor law of the era is Daniel R. Ernst, "Common Laborers? Industrial Pluralists, Legal Realists, and the Law of Industrial Disputes, 1915–1943," 11 *Law & Hist. Rev.* 59 (1993).

62. Fraser, *Labor Will Rule* 165.

National Industrial Recovery Act. And, of course, whatever temptation Hillman might otherwise have felt to follow the AFL's strategy was effectively stifled by the AFL's hatred of the Amalgamated for rebelling from the AFL's adherence to the principle of craft organization. Branded as a traitorous dual unionist by the AFL, Hillman had good reasons to reject the AFL's ideology and strategy.

All of this is not to suggest that courts were not formative in shaping the AFL's ideology; it does, however, suggest that judicial hostility may have been only one among several factors that made the AFL skeptical of reform through politics. Forbath, noting that Hillman and the Amalgamated "spearheaded labor's resort to the injunction" as a tactic to fight employers (at 119), takes this as an example of how the judicial domination of labor activity forced labor to talk the language of law. The alliance between Hillman and Frankfurter in the Rochester litigation, which Forbath describes (at 165), shows how the law shaped the Amalgamated's strategy and Hillman's thinking. But there remains the question, which neither Forbath nor Hattam confronts, of why Gompers reacted to judicial squelching of labor activity in one way and Hillman in another.[63]

Yet, when all is said and done, my reservations perhaps are little more than nibbling around the edges of three impressive works that make many significant contributions to the literature. First, their study of labor law and the courts strikes me as an exceedingly valuable contribution to an ongoing debate about law in labor historiography. The first generation of labor historians envisioned a venerable role for law in establishing a rational system of "industrial relations." Labor historians more recently have advanced the view that law—in particular, the legalism of collective bargaining and the National Labor Relations Act—coopted and undermined the labor movement.[64] Instead of regarding the federal law of collective bargaining as a great rationalizing and organizing force, they portrayed it as a repressive and conservative force that subverted labor radicalism, industrial democracy,

63. Nor was the AFL's voluntarism a consistent stand, and this, too, is important to Forbath's and Hattam's argument. The AFL's decision to support the First World War, when others in the labor movement opposed it, and its collaboration with the Wilson administration, when others in the labor movement were struggling to start a progressive third party, were inconsistent with its voluntarism. These decisions also led the AFL into persecution of socialists in the labor movement and to its "dismal conservatism" of the 1920s. Brody, *Workers in Industrial America* 42 (cited in note 53). A full account of the effect of law on labor politics would need to trace the effect of the injunction and criminal conspiracy cases through not only the adoption of business unionism but also into the other aspects of the AFL's political strategy.

64. Among the first generation of labor historians, one must count John R. Commons and his associates at the University of Wisconsin, who produced the massive four-volume *History of Labour in the United States* (New York: Macmillan Co., 1918–35), as well as Commons's student Selig Perlman, who wrote the classic *A Theory of the Labor Movement* (Philadelphia: Porcupine Press, 1928). Archibald Cox was an eminent defender of the law of collective bargaining; see his *Law and the National Labor Policy* (Los Angeles: UCLA Institute of Industrial Relations, 1960).

and egalitarianism.[65] Today's generation of left-leaning scholars of labor law history, including Orren, Forbath, and Hattam, is inspired by this skepticism about the law and disappointment at the meager results of the regulatory regime put in place during the New Deal and postwar era. Hattam, Forbath, and Orren contribute a sophisticated appreciation of the role of legal institutions in shaping society and political consciousness.[66]

A second important contribution these books make to the law and society literature is reflected in the graceful way that they straddle a disciplinary divide between history, law, and politics. It is noteworthy that they do not represent a debate simply among historians; Hattam and Orren are both professors of political science, and Forbath, though trained as a historian, is a professor at a law school. Why, one might ask, are political scientists studying the history of labor law? Why is a legal historian studying labor and why do labor historians study law? Why is anyone who is interested in the modern welfare state reading 19th-century common law? Inspired by the general trend in the social sciences to study the effect of institutions in historical and political development, political scientists and legal scholars seeking to understand the development of governmental institutions study their historical development. From my perspective as a legal scholar, this interdisciplinary interest in the historical development of legal doctrine and institutions is a welcome development, for, as I suggested at the outset, much contemporary labor and employment law doctrine is simply inexplicable on its own terms.[67] Forbath, Hattam, and Orren provide a historical context that makes some sense of modern legal doctrine. More significantly, their work suggests why interest in labor law history should not be limited to legal historians; they show that labor's encounters with the judiciary in the

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65. See, e.g., James Weinstein, *The Decline of Socialism in America, 1912–1925* (New York: Vintage Books, 1967); Staughton Lynd, "Government without Rights: The Labor Law Vision of Archibald Cox," 4 *Indus. Relations L.J.* 483 (1981); Karl Klare, "The Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness, 1937–1941," 62 *Minn. L. Rev.* 265 (1978); Katherine Van Wezel Stone, "The Post War Paradigm in American Labor Law," 90 *Yale L.J.* 1509 (1981); Brody, *Workers in Industrial America* (cited in note 48); David Montgomery, *Workers' Control in America: Studies in the History of Work, Technology, and Labor Struggles* (New York: Cambridge University Press, 1979); Montgomery, *Fall of the House* (cited in note 31).

A commendable historiographic essay on labor and voluntarism is Joseph Tripp, "Law and Social Control: Historians' Views of Progressive-Era Labor Legislation," 28 *Labor Hist.* 447 (1987).

66. Examples of the new approach include Christopher L. Tomlins's influential book, *The State and the Unions: Labor Relations, Law and the Organized Labor Movement in America, 1880–1960* (New York: Cambridge University Press, 1985), as well as his recent *Law, Labor, and Ideology in the Early American Republic* (New York: Cambridge University Press, 1993) ("Tomlins, *Law, Labor, and Ideology*"). In a different vein there is Rogers, 1990 *Wis. L. Rev.* 1 (cited in note 2).

67. James Atleson wrote the seminal study (*Values and Assumptions*; cited in note 44) of the persistence of 19th-century assumptions in 20th-century labor law; the three books in some sense account for the phenomenon that he described.

second half of the 19th century shaped labor's political aspirations for generations and retarded the development of the American welfare state.[68]

A third and related significant point about these books arises from their shared notion that legal institutions played a central role in directing the course of 19th- and 20th-century labor politics. That notion injects these writers of labor law history into the middle of a long-running methodological dispute about the relationship between law, economics, ideology, and culture in explaining political history. Forbath, Hattam, and Orren bridge that methodological divide by showing that legal discourse and legal ideology are a fruitful subject of historical and political analysis, by looking at ideology as data revealing the effect of economic and political change on institutions. Indeed, Hattam and Forbath explicitly defend the more controversial claim that legal discourse and ideology themselves shaped the course of history. These books thus contribute to a partial reconciliation among methodological camps in social science. Orren, Hattam and Forbath offer insights valuable both to those who take ideology, consciousness, and culture as a point of departure and to those who insist that institutions and economic conditions are the proper focus of scholarly inquiry. These works seem to be good examples of how different perspectives can offer complementary, rather than inconsistent, aids to historical understanding.

THE PERSISTENCE OF VOLUNTARISM

The final observtion I would make returns me to the point from which I began. These studies of the origins of business unionism demonstrate how fundamental the ideology and practice of voluntarism has been and remains in labor law and in the politics of social welfare. Labor's voluntarism was, as Orren puts it, "both the expression and the catalyst of modern liberal politics" (at 3). Labor may have transformed the legal regulation of work from a system based on legally prescribed status (which Orren controversially labels feudal) to the liberal one of contract, and from criminal law, to tort law, and ultimately to administrative law. But the rise of contractualist discourse in labor law did not, at least initially, liberate labor from state-enforced oppression. *Lochner*-era workers who "freely contracted" to work 12 or more hours

68. Other noteworthy books in this field published in the past two years besides those reviewed here include Tomlins, *Law, Labor, and Ideology* (cited in note 66); Orth, *Combination and Conspiracy* (cited in note 49); Steinfeld, *Invention of Free Labor* (cited in note 41); and Tomlins & King, *Labor Law in America* (cited in note 12). Another recent book that deserves note in this context is Steven Fraser's definitive biography of Sidney Hillman (*Labor Will Rule*; cited in note 55); in addition to being a fine biography, it is an impressive political history of labor in the New Deal.

Political scientists joining Hattam and Orren in working these fields include Theda Skocpol, *Protecting Soldiers and Mothers* (cited in note 13), and Ruth O'Brien, "'Business Unionism' versus 'Responsible Unionism': Common Law Confusion, the American State and the Formation of Pre-New Deal Labor Policy," 18 *Law & Soc. Inquiry* 255 (1993).

a day under terrible conditions, who risked forfeiture of unpaid earned wages for quitting, who would starve if they did not work, were in certain practical respects not noticeably better off than their 15th-century European forebears. Ultimately, of course, most workers gained improved working conditions, some through collective bargaining and many more through state and federal protective labor legislation. But the reliance on collective bargaining to secure decent working conditions has left many unorganized workers in a precarious position, and working conditions in some sectors of the economy remain appallingly bad. This is the darker side of American liberalism.

A tension between voluntarist and redistributive purposes remains at the heart of the federal common law of labor and underlies a set of assumptions about managerial prerogative. Even as courts began to frame the employment relation as a contract, they supplied implied contractual terms that protected management's "rights" to control the business, to close a plant, to hire permanent replacements for striking workers, and to set and change the terms of an employee benefit plan at will. The pre-NLRA origins of these assumptions is by now well known;[69] the three books reviewed here exhibit a sophisticated understanding of the institutional dynamics that led courts to adopt them as articles of faith.

The legacy of voluntarism was, moreover, destructive in ways that are only now becoming apparent. Liberal contractualism's hallmark institutionalization of "employee benefits" instead of social insurance seemed like an ideal antidote for the problems of income insecurity inherent in wage-based capitalism so long as there was an expanding economy where labor believed that its economic power could provide security for its members, and where those excluded from membership in organized labor were also excluded from politics and the popular consciousness. But the postwar detente between capital and labor fell apart. Plants closed and jobs disappeared. Companies eliminated health benefits and terminated pension plans. The stable structure on which contractual expectations were based crumbled in great seismic shudders. The framework of contract no longer honored or even described expectations, if it ever did.

At the same time, those who had been excluded from the munificence of the liberal regime represented by the employee benefit contract—the unorganized, the marginally employed, the chronically unemployed—began to penetrate the political consciousness, as the forms of economic organization on which the old order was based evolved into the new era of part-time and temporary work, global production, and the like. The employment contract began to appear to be unreliable and exclusionary. The ideology of voluntarism that sustained it now has started to look like the laissez-faire ideology of free contract that was discredited in the economic turmoil of the Depression.

69. See Atleson, *Values and Assumptions* (cited in note 44).

There is a connection between, and an unfortunate irony in, the decline of collective bargaining and the crisis of faith in voluntarism. As collective bargaining has failed to protect workers, legislatures have stepped in to provide individuals statutory employment rights, as Congress has in the in Occupational Safety and Health Act and the new Family and Medical Leave Act, and some courts have expanded common law protections against unjust dismissal. As individual employment rights have multiplied, unions have come to be seen as unnecessary and ineffectual, and union membership has dwindled. Yet many statutory workplace protections depend for their effectiveness on an informed, organized, and assertive workforce that only a union can create. For instance, as I suggested at the outset, inasmuch as the provision of health insurance is a matter of employer discretion, and given that the nature of health insurance and the disparities of bargaining power between an employer and an individual employee mean that there is no effective bargaining over the terms of health benefit plans outside the unionized sector, ERISA is an example of legislation that protects workers with substantial bargaining power much more effectively than other workers.[70] The apparent failure of the private employee benefits approach to health care finance has prompted a partial crisis of faith in voluntarism, the latest in a recurring series.

In suggesting that these three books shed light on contemporary politics of labor and social welfare, I want to join the authors in avoiding the temptation to overstate the case of continuity between then and now. Given the sea change in social welfare policy since the New Deal, one must be cautious in the claims one may make about the continuity between past and present. Yet continuity there certainly is, and Forbath, Hattam, and Orren all believe it. They use historical materials as a testing ground for their theories of contemporary society. This is not history for history's sake.

In the end, both the strengths and the weaknesses of these books may be attributable to the authors' unwillingness to limit themselves to history for history's sake and to the intractable nature of the large questions they seek to answer. Yet these can hardly be called faults. Though the answers may be elusive, the questions are essential if we care to understand why a country with the great wealth and democratic political tradition of the United States nevertheless consigns so many to live in such desperate poverty, where even hard work is no guarantee of freedom from want.

70. See Richard A. Ippolito, *Pensions, Economics and Public Policy* (Philadelphia: Pension Research Council, Wharton School, University of Pennsylvania, 1986).

The Occupational Safety and Health Act is another example of a regulatory regime more likely to be enforced effectively in workplaces with an empowered workforce than otherwise. See Michael O. Parsons, "Worker Participation in Occupational Health and Safety: Lessons from the Canadian Experience," 13 *Labor Stud. J.* No. 4 (Winter 1988); Les Boden & David Wegman, "Increasing OSHA's Clout: Sixty Million New Inspectors," 6 *Working Papers for a New Society* 43 (May/June 1978).