

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

There Is Still So Much to Learn from Legislation

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Professors Hattam, Forbath, and Orren are important participants in a multifaceted debate about the role of the judiciary in the history of labor law and the impact of legal repression on the American labor movement and politics,¹ and I am honored by their attentive replies to my essay. In setting out to write a review essay on their books, I had three aspirations: (1) to explore their common ground while bringing their differences into sharper focus for those who are not actively following the debate; (2) to suggest that the books might be of interest to scholars of contemporary labor and employment law in ways that the authors themselves may not have imagined; and (3) to raise some questions about their shared views of the effect that labor law had on the labor movement.

Judging from their thoughtful responses, I have had some measure of success. In her reply, Hattam addresses more pointedly than she has before the respects in which her account of the origins of business unionism differs from Forbath's. Forbath elaborates his views on the nonvoluntarist figures in the American labor movement and on the comparison between the English and American labor movements. Orren clarifies her own position as to the limited influence that courts had on the American and British labor move-

1. Victoria Hattam, "Rethinking Questions of Culture and Institutional Power," 19 *Law & Soc. Inquiry* 195 (1994); William Forbath, "The Presence of the Past: Voluntarism, Producerism, and the Fate of Economic Democracy," 19 *Law & Soc. Inquiry* 201 (1994); Karen Orren, "Institutions, Antinomies, and Influence in Labor Governance," 19 *Law & Soc. Inquiry* 187 (1994). Page references to their works are preceded by "p"; references to their books are preceded by "at".

ments before the 20th century. To these aspects of their responses, I have nothing to add.

True to the genre, my essay also identified what struck me as vulnerabilities in their arguments, and the authors have graciously, cogently, and effectively responded. Perhaps I should leave well enough alone, but I cannot resist the temptation of the Editors' offer to have the last word. The only further contribution I might make at this juncture is to explain where differences of perspective remain.

Hattam's principal point is well taken: she notes that I focus less on her argument about the cultural forces shaping the strategies and fate of the labor movement than I do on her treatment of the institutional struggles between the AFL and the courts. She is quite right, but there is a reason for my choice. Hattam's opening volley, that "a strong judiciary created a politically weak labor movement in the United States" (at ix), is a strong claim, and I meant to explore exactly what she had in mind.

Hattam's view that the national AFL's uniformly antistatist response to judicial repression of concerted activity and invalidation of social legislation was attributable to the union leadership's deepest commitments concerning their identity as wage earners in the new corporate economy (p. 196) strikes me as unassailable. Indeed, I suggested as much when I commented that only some of the reasons for the AFL's commitment to collective action were attributable to the courts (p. 160). The aspect of Hattam's argument with which I continue to struggle, however, is the causal relationship between the AFL leadership's identity and the legal and political milieu in which it became an irrevocable commitment. I agree that labor's culture and ideology are an essential part of the explanation, and I did not intend to suggest that Hattam neglects alternative responses to judicial obstruction. My main point was that the claim that the judiciary *caused* a politically impotent labor movement in the 20th century is a difficult one to sustain. In other words, even to the extent that I am persuaded by her account of the role of the judiciary in voluntarism's origins, I wonder about the reasons for its persistence.

Hattam's skillful treatment of alternative strands in the 19th-century labor movement satisfied some but not all of my curiosity about events after the turn of the century. I see significant alternative paths still open after her story ends, and I wonder about how the events of the 19th century continued to shape labor's ideology and strategy for so long into this century. I do not mean to suggest that I wish she had written a different book; I emphatically do not. I meant only to suggest that while her argument as to the origins of business unionism is impressive, the persistence of business unionism remains enigmatic.

Forbath lands on a clue to that puzzle. Social legislation, he says in his response, "seemed utopian to so many trade unionists, because strong ad-

ministrative agencies and state-based reformers were simply nonexistent, and would-be state builders were adamantly opposed by courts and parties alike, in this period in the United States" (p. 206). This view is shared by Orren and Hattam as well: Labor's identity and strategy were a product of labor leaders' relationship to the various forms of government, of which the judiciary was the most important, but not the only, player. The story of that relationship is complicated, and the "nibbling" and "counternibbling" in this exchange is mostly about how boldly one can state the case.

Certainly, as Forbath contends, "'rights talk' and 'legal consciousness' sharply delimit the political imaginations of the downtrodden" (at 170), and judicial "bludgeoning of one major strike after another" contributed to the AFL's hostility to law (at 15). I pressed on the story of Sidney Hillman because I think the Hillman evidence posed a greater challenge to Forbath's theory than he allowed in his book. With respect to the Rochester strike, for example, Hillman's biographer concluded that the anti-union employer's legal strategy to destroy the Amalgamated proved "fruitless," and it was an economic downturn that proved devastating.² I do not think Forbath ignored Hillman, but I do think more could be said about him.

In response, Forbath expands on his earlier treatment of Hillman in a way that clarifies my point about collisions between labor and the various faces of government. In particular, as Forbath notes, the economics of the rag trade, the possibility of effective governmental intervention to stabilize prices, and Hillman's "relatively happy experience" with the War Labor Board during the First World War encouraged him in the belief that government was not inevitably the enemy of the working person (p. 204). Many AFL unions did not have the same "happy experience." Thus it was not just a bad relationship with courts but the absence of a good relationship with any other part of government that reinforced the AFL leaders' views. As the state expanded and courts became less dominant by comparison, why did not the AFL's views change? As government changed shape, labor's relationship to it must have changed in ways that may explain the persistence of voluntarism after the first decade of this century.

Orren's book is about exactly that—evolving relationships: how labor politics and American government changed in colliding with one another, a process she believes to be the driving force in American political development. In her response to my essay, Professor Orren probes the meaning and basis of my questions about her use of the labels "liberalism" and "feudalism" to describe that process. When I suggested that she tends to reify liberalism and feudalism, I meant neither that she treats these concepts as agents of political change nor that she submerges "antinomies." In fact, she does neither; as I said, her account is rich in perceptions of disjunctions, contra-

2. Steven Fraser, *Labor Will Rule: Sidney Hillman and the Rise of American Labor* 166 (New York: Free Press, 1991).

dictions, and ironies, and I agree with much of her argument as to the agents of political change. What I meant by reification, and how our differences are perhaps best characterized, can be elucidated by and attributed to differences in the perspectives of a political scientist and a lawyer looking at the law. I disagreed that the New Deal marked a transfer of authority over labor relations from the judiciary to the legislature and the triumph of voluntary social relations over traditional or prescriptive ones. I disagreed because I see a great deal of judicial control over labor relations still, within the law of collective bargaining but especially outside it, and because I see a great many traditional hierarchical assumptions in the law.

The language of the law did change in the late 19th century and the early 20th: Judges began to talk much more about contract and much less about tradition. But the voluntarist discourse ought not obscure the persistence of traditional assumptions of hierarchy and the substantial power judges retain in the interpretation of legislation and in the governance of the enormous number of employment issues that are not regulated by statute. By and large, the terms of the employment relationship are not voluntarily negotiated, or even negotiated at all: the terms of the "contract" are invented by employers and judges and are enforced by judges with, sometimes, formal reference to statutes but often with little real legislative control.

To return to the example I used in my essay, when judges say that ERISA protects the right of employers to eliminate health benefits for ailing or retired workers, they are not enforcing an agreement actually reached by the employer and employee. Rather, they are protecting managerial power from statutory constraint. Or, to use an example from the NLRA, it was the Supreme Court, not the Congress, that invented at the height of the New Deal the rule that employers can permanently replace striking employees.³ Now it is true that the law allows more freedom to negotiate around its constraints than in centuries past, and judges allow legislatures to change the law a great deal, if the legislature is clear about what it does. But the modern law leaves significant areas of judicial control. The law of wrongful termination, for example, is almost entirely nonstatutory. As Orren aptly remarks, the modern law "loosened the master's control formally while strengthening it informally" (p. 190). I simply see more significance in the interstitial judicial control than does she.

The question that remains, and the one as to which there is substantial disagreement still, is the one about which Orren says we agree and about which I am not so sure. She doubts that "courts had a significant independent effect on the character of the American labor movement before the New Deal, when the judiciary governed the workplace," and she remains "that much more convinced that courts have little impact beyond the inci-

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

dental today, when the legislative branch determines labor as well as other social policy” (p. 193). My view is to the contrary, and the tenor of my essay may have caused me to be misunderstood. That I have reservations about whether the 19th-century judiciary had the precise effects that these authors claim does not mean that they had little effect. I think that the courts continue to exert more than “incidental” control on labor policy, for better and for worse. The federal law governing the enforcement of collective bargaining agreements is entirely judge-made, and much of the law of employment discrimination and employee benefits is a product of judicial imagination with relatively little statutory guidance or legislative oversight. Judicial expansion and contraction of employee rights in the law of employment discrimination, employee benefits, and unionization make an enormous practical difference. While it is true that the legislature can overrule disagreeable interpretations of the law now more than before the New Deal, as the 1991 Civil Rights Act’s overturning of restrictive Supreme Court readings of antidiscrimination law illustrates, Congress does not always have the will or the interest in doing so.

The question is thus not whether the judiciary had an impact, or even an important impact; the question is what kind. And on that question I think these books make an enormous contribution, but there is much left to learn.

