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Voluntarism Triumphant: Forbath on Law and Labor

Carol Chomsky


In a scant 173 pages of text, William Forbath sets for himself a formidable task: demonstrating empirically that law is not merely reactive, reflecting the social, political, and economic forces and policies of its day, but that law itself influences the social, political, and economic interests that, in turn, affect the law. "Among historians and social and political scientists as with law professors, scholarship about law and society has emphasized the ways that the interests of social groups shape the law; it has slighted the ways that law shapes the very interests that play upon it" (at x). In his vision of "law-in-history," Forbath sides with the critics of traditional historical interpretation, challenging the idea that law and legal doctrine can be explained simply as adaptive responses to social needs.¹

Forbath, however, does not limit himself to trying to demonstrate that law has an independent historical effect. He also seeks to inquire how law influences social actors. One possible explanation, he suggests, is associated with social choice theory. It posits that law, like other social, political, and economic forces, may operate to constrain the pragmatic and strategic choices made by historical actors (at xi). While that is surely part of the picture, Forbath adopts a more radical theory: that the "ideological, discursive, and symbolic dimensions of the law" may have an independent

¹ Carol Chomsky is associate professor of law, University of Minnesota. The author wishes to thank Steven Befort, Laura Cooper, and Steven Liss for helpful comments on earlier drafts.

impact as well. Those affected by the law do not simply calculate material costs and benefits, thereby deciding how to react to legal developments. Rather, ideology and culture—including, in some times and some places, legal ideology and culture—help to determine how people respond to "material constraints and constellations of social power" (at xii). The language and structure of the law, Forbath suggests, may affect the way in which historical actors think about their problems and craft solutions to them. Law has a "constitutive" power, shaping as well as reflecting consciousness.²

Forbath's subject is the American labor movement of the late 19th and early 20th centuries and the impact that law—particularly judge-made law—had on the strategies and goals of labor and its leaders. He focuses on two forms of judicial activity with respect to labor: the invalidation of protective legislation, such as minimum wage and maximum hour statutes, as unconstitutional invasions of liberty of contract; and the use of injunctions to bar workers from engaging in collective activity. Consistent with his description of social choice theory, Forbath seeks to demonstrate that these "harsh constraints and significant incentives forged by the nation's courts" led American trade unionists to make "hard-nosed choices that importantly narrowed their political and industrial paths" (at xi). More radically, he suggests that the language of judge-made law "set... many of the key terms of public discourse and debate" on labor issues, affecting how trade unionists thought of labor's role and how they articulated their aspirations and organizational philosophy, both to the public and to themselves (at xii). The law not only made them act differently, it also made them think differently.³

Law and the Shaping of the American Labor Movement is most successful in its narrower goal: It effectively demonstrates that the decisions of the courts caused the labor movement to channel its activities away from strategies blocked by contemporary legal doctrine, thereby altering the organizational focus of the unions. This is, in itself, a substantial accomplishment, reconfiguring our understanding of this transformative period in labor history. Forbath may be correct in concluding that the language of the law also had an independent impact on labor ideology, that "labor's embrace" of the courts' discourse "displaced a more radical vocabulary of reform" (at 8), but he is much less successful in establishing that fact. It is


true that the labor movement's strategy and its discourse changed dramatically at this time, but the pragmatic impact of repressive court doctrine was itself so substantial that it is hard to identify separately the more subtle effects of language on ideology. Moreover, though Forbath does not claim that law was the only influence on labor's changing ideology, the presence of so many other political, economic, social, and cultural influences on the labor movement makes the impact of the "ideological, discursive, and symbolic dimensions of the law" seem insignificant at best.

The fact that this volume fails to succeed in all respects, however, does not detract from the author's considerable accomplishment. Forbath brilliantly demonstrates that judicial opinions in the decades surrounding the turn of the century not only governed the particular labor disputes before the courts and decided the fate of specific labor-oriented legislation, they also had a lasting impact on the future directions of the labor movement itself. Nor does he end there. Labor is not depicted as simply reacting to legal ideology but as using the language of the law—the "rights talk" of the courts—to create its own theory of the constitution, offering an alternative vision that ultimately prevailed both in the courts and in the legislatures (at 8–9). Forbath thereby demonstrates that, while legal discourse may sometimes serve to silence a subordinate social group by directing legal thinking away from the true needs of that constituency, "the language of law [may also supply] invaluable rhetorical resources for articulating those aspirations" (at xii). Law and the Shaping of the American Labor Movement thus ends by illustrating convincingly that our understanding of law is not complete if it focuses solely on the official legal texts and interpretations but must also include "legal history from below," incorporating the "distinctive norms and interpretations of law" proposed and adopted by those outside the halls of power.4

THE TRANSFORMATION OF THE LABOR MOVEMENT

According to the picture drawn by classical labor historians,5 the American labor movement has always been characterized by its "voluntarist" philosophy, focusing primarily on obtaining benefits for workers through collective bargaining in the private marketplace rather than through state regulation of industrial life. Unlike its European counterparts, the American labor movement lacked a politically radical, class-based organization and forswore any effort to use government to change


5. Forbath cites to John Commons, Selig Perlman, Seymour Lipset, Philip Taft, Gerald Grob, and Nathan Fine.
the balance of power in the marketplace or to redefine the positions of capital and labor. Forbath draws upon "the new labor historians" to demonstrate that, in fact, the American labor movement began as a radical political movement supporting active state involvement on behalf of workers. The Knights of Labor, for example, the "largest and most influential" of the early labor organizations, supported a radical program including workplace regulation, abolition of private banking, public funding for worker-owned industry, and the nationalization of monopolies (at 12–13).

By the end of the 19th century, however, the American Federation of Labor, with its more conservative and antistatist philosophy, had emerged as the leading voice of labor. While union leaders once talked of "final emancipation" from the "wages system," they ended by seeking only rights to bargain collectively within the context of the existing capitalist order (at 15). The AFL not only failed to support, it actively opposed, enactment of protective legislation to regulate hours, wages, and workplace conditions (at 16).

What explains this sea change in the attitudes of the leadership of the American labor movement during the last decades of the 19th century, the so-called Gilded Age? Forbath argues that the structure, attitude, and actions of the government were critical factors in leading trade unions to rethink and narrow their vision of the role for labor organizations. He touches briefly—and intriguingly—on ways in which the very form of American constitutional government helped to mold the nation's labor politics. But it is the actions of the courts that chiefly interest him here.

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8. Like the courts, the AFL and its state counterparts distinguished, and supported, protective legislation for women and children, judging those classes of individuals incapable of protecting their own interests in the marketplace. Forbath suggests that the courts first made this analytical distinction, and the attitude of the AFL unions changed to reflect the judicial idea of gender dependency (at 17, 52–53). It seems much more likely that, in this instance, both the unions and the courts were reflecting generally shared attitudes about women workers. See Alice Kessler-Harris, Out to Work: A History of Wage-Earning Women in the United States 142, 180–81, 186 (New York: Oxford University Press, 1982). The mere fact that at one time the unions favored broad hours and wages legislation and later promoted such statutes only for women and children does not prove a shift away from classwide solidarity.

9. Forbath suggests that the founders successfully structured the government to avoid domination by any—but particularly any propertyless, class-based—social or sectional faction. They elevated private rights of contract and property to constitutional status and divided power among separate state jurisdictions, thus making it harder to mount a legislative assault on power and privilege. The nature of political parties, with their cross-class ties of patronage, ethnicity, and neighborhood, compounded the difficulty of developing effective class-based labor politics. Finally, the elite status of those who were selected to be federal and state judges made them sympathetic to the "austere liberal social vision" that discouraged class-based activity, thus making them more likely to suppress the more radical organiz-
Forbath first addresses the impact of federal and state court review of protective legislation passed in response to labor's efforts to reform the workplace through affirmative government intervention. Among the legislative enactments considered by the courts were laws establishing minimum wages and maximum hours for workers, forbidding tenement labor, outlawing discrimination against union members, regulating weighing procedures at coal mines, mandating regular payment of wages, and regulating company stores and payment of workers in company scrip. The majority of these were struck down as unconstitutional infringements of liberty of contract. Often, if a court did not declare a regulatory statute unconstitutional, it would nevertheless limit the law's effectiveness by narrowly construing it.

Forbath argues that judicial nullification of labor legislation taught union leaders that their efforts likely would be futile if they focused on obtaining relief through the legislatures. Judges, not legislators, held the trump cards and were not reluctant to play them. Forbath points to the strategy debates within the AFL and the United Mine Workers in the 1890s to show that court decisions played a prominent role in convincing unions to abandon their broad political program of legislative reform and to concentrate instead on "simply seeking legislation to protect workers' organizations from public and private repression" (at 53–56). The "obdurate state of American courts" led some to take a more radical path, scorning the political process in favor of direct action and syndicalism under the auspices of the Industrial Workers of the World (at 48–49). The liberty of contract cases were central to the arguments of Gompers and others that labor should focus on protecting itself in the marketplace through collective bargaining and abandon the futile attempt to obtain reform through legislative proposals.

Gompers had particular reason to learn this lesson well. In his early organizing years with the Cigarmakers International Union, Gompers worked extensively, and successfully, for enactment of a statute prohibiting the manufacture of cigars in tenement buildings. The New York Court of Appeals struck down two successive versions of the law. In his autobiography, Gompers reports that the experience convinced him that the
"power of the courts to pass upon constitutionality of law" made that method of reform ineffective. It was through collective bargaining and economic pressure, not through legislation, that the union accomplished its ends (at 39–42). While we should be wary of Gompers' post hoc explanations of his motivations and understandings, the contemporaneous documentation appears to support the importance of judicial nullification as a significant shaping influence on the directions in which the leadership of the labor movement moved in the 1890s and thereafter.

It is, however, almost exclusively from the leadership that we hear in Forbath's telling. Although Forbath studied a wide array of sources in an effort to sample "the diverse ways in which trade unionists encountered judges' words and deeds" (at 6), he reports on only the statements of a few of the prominent union leaders. The minimalist politics of those leaders prevailed in the shaping of AFL programs, which suggests the acquiescence of ordinary union members, but we learn little of the attitudes and responses of the rank and file except that they voted to approve the leadership's voluntarist policies. At least one of those votes, however—the 1894 rejection of the socialist platform of England's Independent Labour Party—apparently occurred only through "parliamentary sleight-of-hand" by Gompers and other AFL leaders after a majority of the AFL's constituent unions had endorsed the platform (at 14). Forbath's own evidence thus suggests that the victory of voluntarist policies was attributable to more than the effect of judicial nullification. Because the leadership was instrumental and ultimately successful in shaping the policies of the unions, the impact of law on the movement nonetheless can be demonstrated through the words of Gompers, Charles Moyers (president of the Western Federation of Miners), Adolph Strasser (Gompers' mentor in the Cigar-makers International Union), and John Mitchell (president of the United Mine Workers) as they debated their opponents, but the extent of that impact cannot be evaluated fully without more voices being heard.

Forbath's thesis fits nicely with the traditional view of the courts of this era as bastions of laissez-faire constitutionalism, invalidating virtually every legislative effort to regulate business and industry; he adds much by showing that what the courts did helped to alter the course of the American labor movement. As Forbath notes, however, some commentators have recently challenged the view that the courts were as hostile to regulatory reform legislation during this period as generally believed. Melvin Urofsky, in particular, argues that many labor statutes were in fact upheld, including hours and wages regulation for women, minors, and workers

in hazardous occupations, and workers compensation systems.\textsuperscript{13} The Supreme Court, Urofsky concludes, “was as progressive as most reformers could desire.”\textsuperscript{14}

Although Forbath relegates his response to such scholarship to a footnote (at 51 n.79), his entire thesis undermines this reevaluation of the laissez-faire jurisprudence of the courts. Even if the vast majority of regulatory statutes were upheld in the years between 1880 and 1930, it is clear from Forbath’s review that labor reform statutes were particularly likely to be overturned. Many court approvals of legislation occurred near or after the turn of the century, after the labor movement had already altered its organizing focus in response to earlier court activity. Moreover, the courts were most likely to uphold narrowly drawn statutes, regulating conditions for special classes of workers, but were never especially receptive to legislation seeking to reform working conditions for all workers.

It also seems likely that both Congress and the state legislatures became more reluctant to enact labor reform in response to judicial nullification of labor statutes in the 1880s and early 1890s. Forbath suggests that in some states “timorous legislators” responded to pressures from party leaders and financial backers to scuttle meaningful labor reform (at 49), but we might also find legislators, no less than labor leaders, frustrated with the courts’ actions and therefore unwilling to promote seemingly futile gestures of lawmaking. Even if individual case outcomes were not always predictable, the courts’ dominant ideology undermined reform efforts. It is worth noting that the courts of three major industrial states, New York, Illinois, and Pennsylvania, as well as the United States Supreme Court, regularly issued opinions invalidating regulatory labor legislation. It is not surprising that the sweeping pronouncements of these influential courts affected reform efforts nationwide, even if some state courts sometimes upheld selected regulatory statutes.

As Forbath notes, the judicial nullification of legislative reform could, and did, lead to two widely different responses in the labor movement. One was the Gompers-AFL path: Concentrate on economic solutions through collective bargaining, while limiting legislative efforts to the promotion of statutes that would free unions to use their economic power without court restraint. The other was the “radical anti-statist” path chosen by the Industrial Workers of the World, working toward overthrow of the capitalist system and scorning the political process. Although these two arms of the movement had vastly different visions of the utopian


workplace, both chose to rely primarily on the exercise of economic power in the marketplace to achieve their ends.

But what about those who chose neither of these paths, who continued to press for legislative reform of the workplace throughout this time? Although Forbath acknowledges at the outset that the AFL's conservative antistatist philosophy "never enjoyed unchallenged dominion over the labor movement" (at 17), his failure to address more directly the competing reform vision of socialist labor leaders, industrial unionists, and progressives leaves his analysis incomplete. One cannot judge the impact of restrictive court doctrine on the labor movement without better understanding why some in the movement reacted by redoubling their efforts to enact a radical transformation through legislative intervention, while others responded largely by withdrawing from the political process and concentrating on direct action, whether through collective bargaining (the AFL) or planning general strikes (the IWW).

Forbath does not ignore this issue. He suggests that leaders whose organizing base lay among skilled workers were more receptive to voluntarism because their constituencies had enough economic power to use it effectively in collective bargaining. He notes, too, that some of the AFL leaders who promoted voluntarism came from an emigré-Marxist tradition within the labor movement that "championed economic action and the building of workers' own organizations and opposed what it saw as the dominant American labor tradition's 'middle class' faith in the efficacy of political reform" (at 55-56). But these explanations suggest that there were independent forces working toward the AFL's voluntarist perspective, undermining Forbath's claim that the law was a primary force in shaping labor ideology. Skilled workers might have been likely to concentrate on obtaining benefits for themselves through their economic power and to neglect action on behalf of less skilled workers who could not fend for themselves in the marketplace. If so—and the history of AFL organizing and the challenge from industrial unionists confirms the potential for just such a division—then the courts may have played a much less significant role in changing the focus of the movement. Similarly, if the leadership was steeped in an ideology that challenged the "efficacy of political reform" even before the courts acted, judicial nullification may have had little independent impact.

Forbath may be on stronger ground in pointing to the importance of court decisions in assisting the labor leaders who promoted voluntarism to win their battles for control against those who remained committed to legislative reform. "Even those not predisposed to voluntarism recognized the practical and symbolic barriers that the courts had erected to a broad politics" (at 57). The futility of obtaining relief from legislatures in the face of court invalidation appears to have persuaded many that the "surest
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path" for the labor movement, at least temporarily, was reliance on economic, not political, power. Yet the only example Forbath gives of a formal vote in which the AFL leadership sided with Gompers and his allies apparently was obtained by "parliamentary sleight-of-hand" (at 14). Forbath’s argument would be strengthened considerably if he offered more evidence of the way in which the AFL decided to adopt the voluntarist policies of some of its leaders.

JUDICIAL SUPPRESSION OF COLLECTIVE ACTION

Judicial nullification of labor statutes is only part of the picture Forbath draws. The most powerful part of his book is his extended description of the manner in which the courts, especially the federal courts, used the labor injunction to suppress many forms of collective action by trade unions and workers and the impact this form of judicial intervention had on the labor movement.

In discussing the history of labor injunctions in the courts, Forbath masterfully weaves together several approaches. He presents a traditional doctrinal analysis, outlining the manner in which the courts moved from a narrow conceptual basis, sufficient to warrant enjoining strikes by railroad workers, to a broad constitutional and common law analysis, supporting prohibitions against most forms of collective action in all industries. He offers a statistical analysis, determining the number and percentage of strikes in which the courts interfered on behalf of employers between 1880 and 1930. Finally, he considers the symbolic power of the law, suggesting both why the unions’ methodology and language may have elicited especially harsh responses from the courts and how the concepts and language employed by the courts affected lawmakers, the public, and labor itself in their attitudes toward collective action by workers.

The numbers alone are truly astonishing. By Forbath’s “conservative reckoning,” courts issued at least 4,300 injunctions between 1880 and 1930; by the 1920s, 25% of all strikes were the subject of some kind of restrictive injunction. Although this left many strikes unchallenged by injunction, court interference was especially likely with respect to secondary actions—sympathy strikes and boycotts. Courts enjoined at least 15% of recorded sympathy strikes in the 1890s, 25% in the 1900s, and 46% in the 1920s.

Injunctions figured in virtually every railroad strike; in most strikes in which industrial unionism, “amalgamation,” or “federation” was at issue; in most major organizing and recognition strikes, boycotts, closed shop or sympathy strikes or anti-union/open-shop lockouts of significant magnitude; and in a small but still significant and growing portion of ordinary mine-run strikes. (At 62)
Moreover, because injunctions were so prevalent, employers and state officials could use the threat of court intervention to break a strike without actually obtaining a court order.

In addition, the courts often issued blanket antistrike decrees, addressing thousands of workers and anyone who might assist them. Forbath's examples include a streetcar strike in Indianapolis, where the city's entire working class was enjoined from aiding the strikers, and mining strikes in West Virginia and Pennsylvania, where whole counties were the object of permanent injunctions (at 104). There was also the possibility that federal marshals or troops would be summoned to enforce an injunction; such intervention occurred in more than 500 disputes between 1877 and 1903 (at 118). The courts maintained a highly visible presence in many strikes, and the possibility of court interference was always considerable.

The doctrinal history begins during the 1877 railroad strikes, when federal equity courts holding bankrupt railroads in receivership found it appropriate and legitimate to intervene to protect the temporarily public property in the roads. In the middle to late 1880s, these rulings were extended to permit intervention in strikes against railroads not in receivership, based (after 1877) on the Interstate Commerce Act's ban on discrimination in interstate railroad traffic. Although it was not yet decided whether the ICA reached primary as well as secondary boycott activity, the question became moot when federal courts began finding primary strikes illegal under the Sherman Antitrust Act (at 66-73).

A second legal weapon emerged in response to the proliferation in the early 1880s of citywide secondary boycotts, which involved active union solicitation of customers throughout a community to cease doing business with employers viewed as "unfair" because of their treatment of workers. While earlier cases had found that employers had liberty interests in their businesses, protecting them from government regulation, courts now found that employers also had property rights in their business relations:

Where he had been merely free to run his shop, and use his machinery, as he willed, he now was found to have a property right to do so that was protected from interference created by a boycott or strike pressing for adherence to union work rules and standards. Where previously he had been merely free to hire whomever he liked, now he had a property interest in his employment relations and in the "natural flow" of labor to his shop or factory. (At 88)

This new concept of property rights logically would have led to the conclusion that all strikes were illegal because they interfered with a business's flow of labor and customers, but no court would go so far. Instead,
the courts found lawful only strikes seeking immediate benefit, defined narrowly as wages and working conditions. Other strikes—including all sympathy strikes and producer or consumer boycotts, as well as strikes for such purposes as union recognition, adherence to union work rules, and adoption of a closed shop—were unlawful (at 89).\textsuperscript{15}

Obviously, court intervention to stop or restrict a strike would change the balance of economic power and the likely outcome of that labor dispute. Forbath argues that, as with judicial nullification of legislative reforms, injunctions against strike activity also helped to change the direction of the labor movement itself. First, whatever energy the unions continued to expend on promoting legislative reform efforts was focused primarily on passing statutes to remove the power of the courts to block strikes through injunctions, not on enacting other kinds of labor reform. Thus, the shift toward voluntarism caused in part by court invalidation of substantive labor statutes was further encouraged by the need to prevent courts from enjoining strike activity.

Second, the courts were far more likely to enjoin sympathy strikes and secondary activity—the “only major weapon” of cross-class solidarity—than to restrain strikes in which workers acted directly in support of their own labor negotiations. The consequent inability of labor to use these tools, like the inability to obtain effective substantive reform through legislation, convinced many labor leaders “that broad, class-based strategies and industrial ambitions were too costly and self-defeating” (at 77, 78). “In the shadow of so many broken big strikes and bootless broad initiatives, many thought it wise to conserve and build upon what ‘worked’—minimalist politics, craft unionism, high dues, and restrained but well-calculated strike policies” (at 95–96). By the late 1880s, citywide boycotts had been virtually replaced by the tactic of simply publicizing “unfair” employers through labor publications. This, too, was an effective tool, but a majority of federal courts and then the Supreme Court outlawed it as a violation of the Sherman Antitrust Act.\textsuperscript{16} By the mid-1890s, Gompers and many other labor leaders chose to abandon illegal sympathy strikes as well (at 77–78).

Forbath also argues that, beyond their role in forcing labor leaders to make pragmatic decisions abandoning class-based economic weapons, court injunctions and rhetoric affected lawmakers’ and the public’s perceptions of the labor movement in ways that magnified the impact of individual court orders. By issuing blanket injunctions and arresting hundreds of

\textsuperscript{15} The courts were not uniform in condemning all but the narrowest rationales for strikes. Forbath cites a few state decisions upholding consumer boycotts and approving strikes to enforce union work standards or to force discharge of nonunion workers (at 89 n.119). But it appears that the great majority of cases found most such collective action to be unlawful, and the impact of those cases was sufficient to affect labor strategy.

\textsuperscript{16} See Loewe v. Lawlor, 208 U.S. 274 (1908).
striking workers as criminals for disobeying their orders, by deputizing company strikebreakers, and by providing the basis for sending state or federal troops to police a labor dispute, the courts created a vision of organized workers as outlaws. Indeed, that vision—striking workers as threatening and potentially violent—appears to persist today in decisions justifying bans on certain forms of picketing.\(^7\) Such imagery helped to reduce workers’ ability to persuade employers and the public of the justice of their cause.

Gompers himself talked of the manner in which law “disfigured” the discourse of judges, newspapers, and the public about the labor movement (at 125). “The courts had woven a powerful web of associations between strikers’ use of economic ‘coercion’ and their use of brute physical force, between popular images of criminal conspirators and the legal construction of virtually all secondary actions as conspiracies in restraint of trade, and between picketing in any fashion and threats of violence” (at 126). Federal court injunctions were used by employers to prod reluctant or sympathetic state officials into toughening their policies against strikers and helped to justify actions such as arming strikebreakers and jailing pickets (at 106–7). Even when no injunction was sought or issued in a labor dispute, company and state officials could and did use the language of the law to condemn labor’s actions and justify suppression of collective action (at 126).

THE TRANSFORMATION OF THE LAW

Forbath is overwhelmingly successful in demonstrating the extent to which the courts, particularly the federal courts, intervened in labor disputes in the 1880s and 1890s and how that intervention influenced both the tactics of the labor movement and the perceptions of the public about labor organizing. His narrative raises one further question about how law affected labor, however. When the courts closed the door to restructuring industrial relations through affirmative legislative regulation, labor leaders turned to collective bargaining as their strategy for reform. When the courts developed theories that barred sympathy strikes and secondary boycotts, labor refocused its collective action on primary strike activity. When the federal courts restricted even ordinary strikes, however, the same labor leaders did not shift once again to different strategies not yet foreclosed by court action. They chose, instead, to defy court orders and to argue repeatedly (and ultimately successfully) for changed concepts of freedom of contract that would support rather than undermine labor’s right to organize collectively.

Thus, Forbath describes how labor leaders took the oppositional rhetoric of the courts and, by drawing upon the Thirteenth Amendment as a source of rights for all working people and the First Amendment as a source of the right to protest, transformed the courts' own opinions into an alternative constitutional interpretation supporting the right of labor to strike (at 135–141). But why, as Forbath asks at the outset of his study (at xii), did labor defy or seek to alter some of these constraints placed upon them while altering its own behavior in response to other constraints? Why did invalidation of regulatory statutes and restrictions on secondary boycotts and sympathy strikes make labor change its approach to organizing, while injunctions against primary strike activity led to civil disobedience and efforts to manipulate legal doctrine?

One answer might be simply that when faced with a threat to its final organizing tool, the primary strike for better wages and working conditions, labor was forced to dig in its heels and fight back. Having been blocked in every other avenue first, labor could retreat no farther. But all these doctrines coexisted and threatened labor throughout the early years of the movement, when primary and sympathy strikes, secondary boycotts, and legislative reform were all part of labor's strategic arsenal. Why did the movement more easily abandon some strategies while retaining others, even in the face of hostile court action?

It seems likely that the answer lies in combining Forbath's explanation—the impact of court decisions and doctrine—with the more traditional explanations for the generally conservative perspective of the American labor movement: lack of class consciousness among American workers, organizational ideology of the AFL, turf battles among major labor leaders, ethnic divisions within the workforce. The law pointed labor away from virtually all forms of collective action; that its leaders came to accept some but not all of the restrictions suggests that other forces were at work besides the pressure of adverse court doctrine.

To understand fully what happened to the labor movement between 1880 and 1932, then, we need to know more about the rest of the picture than Forbath tells us. Indeed, one aspect missing from Forbath's study is any discussion of the political, economic, social, and cultural contexts in which the labor movement and the courts operated. It is clear, for instance, that the strength of the labor movement varied according to the state of the economy, with workers having more power and being better able to use the strike weapon during boom periods. Attitudes about labor organizing were affected by more than the discourse of the courts in this period. For example, state officials and the public were particularly
hostile to collective action during World War I, when that tactic was tied to questions about loyalty to the national war effort, and in the immediate postwar period, when labor unrest was seen as connected to the communist revolution in Russia. The political fortunes of labor varied according to the success or failure of sympathetic candidates and party organizations. Yet with the exception of a section about enactment of the Wagner Act and passage of anti-injunction statutes on the state and federal level, Forbath’s narrative excludes discussion of any of these or similar events.

Nor does Forbath include much about the labor movement’s continuing and renewed support for reform through legislation once the roadblocks were removed by the Supreme Court. Many of labor’s “core legislative goals” of the 1880s and 1890s—to establish minimum wages, maximum hours, and regular wage payment, and to bar discrimination against union members—were enacted, with labor’s support, in the 1930s. Labor has continued to promote, successfully, regulatory statutes respecting workplace health and safety, private pension plans, and job discrimination. It seems that labor may have abandoned its more radical goals of restructuring the economic system, but was only temporarily dissuaded from the strategy of obtaining relief through legislation. Perhaps it is precisely this deradicalization of the movement that Forbath sees as the primary effect of court obstructionism, but again, law seems to be only one—and a relatively weak one—of many factors explaining that shift.

Of course, Forbath does not claim to be telling the whole story of the labor movement from the 1880s to the 1930s. He is adding a new element to the explanations previously offered, and he has immeasurably enriched our understanding of the events of those years by doing so. He has fulfilled his purpose of demonstrating that courts and legal doctrine had an independent impact on the labor movement of the late 19th and early 20th centuries—that law affected as well as reflected the social forces at work. The next step will be to integrate Forbath’s vision with the surrounding social, political, economic, and cultural environment and to explore the interplay between law and those other forces.

THE LEGACY OF THE GILDED AGE

The doctrinal concepts that emerged in the labor law of the Gilded Age, and the choices labor leaders made as a result, still affect both the discourse of the courts on labor issues and the focus of union efforts. Forbath notes that many of the old common law restraints have been resurrected under the National Labor Relations Act. Virtually all forms of

secondary boycotts and strikes, for example, are illegal under the Act, despite claims to First Amendment protection for peaceful picketing (at 165–66).21 Primary strikes can be enjoined, despite the existence of the Norris-LaGuardia Act, if the governing contract contains a no-strike clause.22 Attempts to invoke labor solidarity by asking workers to refuse to handle struck goods are unlawful.23 Workers who refuse to cross another union's picket line may be replaced permanently by their employers.24

The restrictive Gilded Age view of the proper objects of union organizing persists in modern law as well. In the 1890s, the courts limited permissible strikes to those undertaken for immediate gain, defined as encompassing only wages and working conditions but not objects such as adoption of union work rules, union recognition, or maintenance of a closed shop (at 89). In modern labor law, we have the NLRA's distinction between mandatory and permissive subjects of bargaining. "Wages, hours, and other terms and conditions of employment" are mandatory subjects, so labor and management are required to bargain in good faith over them and can use economic weapons—strikes and lockouts—to achieve their demands. Subjects such as product prices and design, financing, benefits for retired workers, union label agreements, and decisions to sell or close a business are considered within management prerogatives and therefore are permissive subjects of bargaining. A union cannot insist that such issues be part of the collective bargaining process, nor can it strike to obtain terms with respect to them.25 Courts today may have a broader understanding of what constitutes "terms and conditions of employment" than they did in the Gilded Age—"union shops" are a mandatory subject of bargaining, for instance—but the notion of a limited sphere of legitimate labor concern persists.

21. The only lawful form of secondary boycott is leafletting to persuade customers to boycott a business that continues to do business with a struck employer. See DeBartolo Corp v. Florida Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568 (1988). Picketing a secondary business to induce consumers not to buy a struck product is considered primary, not secondary, activity and is therefore lawful. NLRB v. Fruit & Vegetable Packers, Local 760 (Tree Fruits), 377 U.S. 58 (1964). Even this form of boycotting is unlawful, however, if the struck product or employer forms a central part of the secondary employer's business. NLRB v. Retail Store Employees 1001 (Safeco), 447 U.S. 607 (1980).

22. See Boys Markets, Inc. v. Retail Clerks Local 770, 398 U.S. 235 (1970). In contrast, sympathy strikes—which have been held to be unlawful under the NLRA—may not be enjoined, because such strikes generally are found not forbidden by no-strike clauses, and therefore they do not implicate the "private dispute settlement mechanisms agreed upon by the parties" to a labor contract. Buffalo Forge Co. v. Steelworkers, 428 U.S. 397 (1976).

23. Local 1976, United Bhd. of Carpenters v. NLRB (Sand Door), 357 U.S. 93 (1958). Sand Door involved picketing at a secondary; it is not clear following the decision in Tree Fruits (cited in note 21) whether leafletting for that purpose would be lawful.


Moreover, the triumph of the voluntarist perspective means that labor and management are required only to bargain in good faith, not to agree to any particular terms. The Supreme Court has held that even when an employer acts in bad faith, the NLRB can order employers only to bargain properly, not to accept terms.26 One commentator has suggested that, as a result, management can provide the appearance of good faith while practicing intransigence at the bargaining table. Neither labor, with relatively weak economic power compared to management, nor the NLRB, with its limited mandate, can force management to bargain genuinely.27

The rule that dissenting employees in an agency shop may be forced to contribute only to expenditures “germane” to the union’s collective bargaining activity similarly reflects a Gilded Age vision of the role of labor unions. The United States Supreme Court has interpreted the Railway Labor Act and the NLRA to permit unions to compel employee contributions only for the “costs of negotiating and administering collective agreements, and the cost of the adjustment and settlement of disputes,” but not “to support candidates for public office” or to advance political programs.28 Organizing employees in other companies, lobbying for labor legislation, and participating in social, charitable, and political events were found to be unrelated to the unions’ role as bargaining unit representative. Similarly, the Court recently barred a state college faculty union from spending compelled dues to lobby the legislature to promote financial support for public education, to support another bargaining unit, to publish newsletter articles reporting on litigation of other bargaining units, and to engage in public relations efforts on behalf of the teaching profession. Such views are an outgrowth of the voluntarist perspective adopted by Gompers and the AFL in the 1900s and 1910s, reflecting a belief that unions exist to obtain more of the economic pie for their members through marketplace negotiation rather than to be part of a broad class-wide movement for political and economic reform.

Finally, the aftermath of the Gilded Age can be seen in the battle over the centerpiece of labor’s current legislative and political agenda, the enactment of a federal law prohibiting management from using permanent replacements for striking workers.29 The dispute over the use of perma-

29. Banning permanent replacement of striking workers has been a priority for labor for several years. Such legislation has passed the House of Representatives but not the Senate. On 30 March 1993, the Clinton administration announced its support for a permanent replacement ban, reversing the position taken by previous Republican administrations. See James Risen, “Clinton Seeks Ban on Striker Replacements,” L.A. Times, 31 March 1993, at A1. A Republican filibuster is nonetheless expected to block passage in the Senate.
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permanent replacements is a battle to define the contours of the marketplace within which labor and management meet. The issue is crucially important to labor, therefore, precisely because the movement chose to concentrate on gaining its objectives in the marketplace. The discussion of labor’s proposed legislation revolves around the question whether banning permanent replacements would “tilt the balance” of economic power toward the unions or restore a balance that once existed. As in the early 1900s, labor’s legislative agenda is directed principally toward freeing labor to use its economic power effectively in collective bargaining rather than on reforming the workplace directly through legislation—though, as noted previously, the latter goal has hardly been abandoned. The primacy of the marketplace is visible as well in the doctrine of federal preemption, which forbids the states to enact measures that alter the balance of economic power. Indeed, it was on this basis that courts have invalidated local laws regulating the use of replacement workers.30

Moreover, the fact that employers are able, when they wish, to find sufficient numbers of workers to cross picket lines and take permanent jobs from strikers is itself a mark of labor’s failure to establish intra- and cross-class solidarity among workers, a legacy of choices made in the early 20th century. The final irony is that, despite labor’s involvement with regulatory legislation assisting all workers, its historical focus on collective bargaining has resulted in public perception of labor as simply another special interest group in the political process rather than as a broad class-based force for progressive reform.

Forbath ends on a cautionary note. Labor should be hesitant to reject the current regulatory scheme, as constricting as it sometimes is, in favor of “deregulating” and thereby according labor new freedom for collective action. “No politics remains innocent of that which it contests,”31 and the labor movement is no exception. Unions chose the route to voluntarism under the influence of law-imposed restraints. Although the legal landscape has changed, the impact of law remains. Labor should beware of developing its new long-term organizing strategy in response to the labor discourse of the courts without at least attempting to break free of the bonds created by the language of the law.

