BOOK REVIEWS

How the "Language of the Law" Limited the American Labor Movement

Law and the Shaping of the American Labor Movement. By William E. Forbath.* Cambridge, Mass.: Harvard University Press. 1991. Pp. 211. $10.95.

*Reviewed by Christopher D. Cameron***

INTRODUCTION

> The courts of justice [in the United States] are the visible organs by which the legal profession is enabled to control the democracy. . . . Scarcely any political question arises . . . that is not resolved . . . into a judicial question. Hence all parties are obliged to borrow, in their daily controversies, the ideas, and even the language, peculiar to judicial proceedings. . . . The language of the law thus becomes, in some measure, a vulgar tongue; the spirit of the law . . . penetrates . . . into the bosom of society . . . to the lowest classes . . . .[1]

It is almost quaint to search for causes explaining the steep decline in the fortunes of the American labor movement at the close of the twentieth century. In this era, "radical" social

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[1] 1 ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 278-80 (Phillips Bradley ed., 1945).

reforms for the workplace rarely make the political agenda at home.[2] And the socialist governments that once promised to establish a "worker's paradise"—the former Soviet Union, its one-time Warsaw Pact allies in Eastern Europe, Yugoslavia—are crumbling abroad.[3]

Yet such an inquiry cannot be avoided. Despite the well-documented free fall in the percentage of the American work force represented today by organized labor,[4] employees in this country are still demanding some forms of due process and fair treatment from their employers. For example, most employees in nonunion workplaces are surprised to learn that they may be fired at any time with or without good cause.[5] The number one workplace issue today is how best to reform our employment-based system of health care.[6] And workers are increasingly upset with invasions

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[2] *See, e.g.*, PAUL C. WEILER, GOVERNING THE WORKPLACE: THE FUTURE OF LABOR AND EMPLOYMENT LAW 2 (1990) [hereafter GOVERNING THE WORKPLACE] (finding little popular or political preoccupation with how workplace should be governed).

[3] *See, e.g.*, Elizabeth Shogren, *Slavic States Call Soviet Union Dead, Form a Commonwealth*, L.A. TIMES, Dec. 9, 1991, at A-1.

[4] Although estimates vary, it is generally agreed that the union density rate—the percentage of the American private sector work force represented by unions engaged in collective bargaining—bottomed at about 15% prior to the enactment of the Wagner Act in 1935, grew to a peak of nearly 40% in 1957, and dropped to just over 15% by the mid-1980s. *E.g.*, GOVERNING THE WORKPLACE, *supra* note 2, at 9-10; *see also* Leo Troy, *The Rise and Fall of American Trade Unions: The Labor Movement from FDR to RR*, *in* UNIONS IN TRANSITION 75, 82, table 3 (Seymour M. Lipset ed., 1986) [hereafter UNIONS IN TRANSITION] (from 1953 to 1983, union density fell from 35% to 18%). The union density rate continues to decline. According to one prominent union leader, absent a sea-change in union organizing successes, the union density rate will dip to just 5% within the next decade. *AFL-CIO Leaders Seek Ways to Boost Union Membership in U.S.*, 1991 DAILY LAB. REP. (BNA) No. 221, at 7 (Nov. 15, 1991) (remarks of Service Employees International Union President John Sweeney).

[5] *See, e.g.*, Joseph Grodin, *Toward a Wrongful Termination Statute for California*, 42 HASTINGS L.J. 135, 135-37 (1990) (arguing that common-law presumption of at-will employment "is on its way out" because it is inconsistent with most workers' expectations about how they should be treated in workplace).

[6] *E.g.*, *Sen. Sasser Says Health Care Reform Could Be Enacted Within Two Years*, 1991 DAILY LAB. REP. (BNA) No. 34, at A-1 (Feb. 20, 1992) (noting that debate on health care reform is " 'at top of the national agenda' " (quoting Senate Budget Committee Chairman Jim Sasser)). By one estimate, 34 million Americans lack basic health care protection. *President's Health Care Proposal Controversial*, 139 LAB. REL. REP. (BNA) 174, 175 (Feb. 12, 1992).

of their privacy by employers, both on and off the job.[7] Once, logic would have dictated that the body politic consult the leaders of the organized labor movement to address these grievances. But with the increasing marginalization of organized labor, to many such a course makes less sense.

The inconsistency between the need of workers for representation and the declining fortunes of organized labor demands a resolution of sorts. Thus, the past decade spawned a large body of scholarly work that tried to answer the questions whether and why it possibly can be true that Americans no longer want organized labor to represent them. Some of these scholars concluded that organized labor's goals, if not its methods, had become irrelevant or simply had turned off American workers.[8]

But others produced a strong body of literature, of which Professor Paul Weiler's writings[9] are the most prominent, suggesting that workers wanted unions and would support them if given a chance. It was not primarily workers' disaffection with unions,

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To address the problem, President Bush and dozens of members of Congress have offered health care reform legislation during the current session. As of February 1992, 43 separate bills had been introduced in the Senate alone, with " 'more still coming.' " *Passage of Comprehensive Health Reform Bill Unlikely in 1992, Congressional Aides Say*, 1992 DAILY LAB. REP. (BNA) No. 28, at A-9 (Feb. 11, 1992) (quoting Marina Weiss, the Senate Finance Committee's chief health care policy analyst).

[7] For example, one national magazine's poll showed that 67% of Americans oppose employer review of a job applicant's credit history. Richard Lacayo, *Nowhere to Hide*, TIME, Nov. 11, 1991, at 34, 36. The same poll shows that a significant minority—19%—oppose drug testing of employees at work. *Id.* In my experience as a practicing labor attorney, however, employee opposition to drug screening policies, especially the random variety, takes off as soon as the first employee is terminated under a new drug testing policy, if not when the policy is implemented.

[8] *See infra* notes 66-96 and accompanying text.

[9] Professor Weiler's recent book collects and refines his previously published thoughts on this subject and offers prescriptions for reform. *See* GOVERNING THE WORKPLACE, *supra* note 2; *see also* Paul C. Weiler, *Milestone or Tombstone: The Wagner Act at Fifty*, 23 HARV. J. LEGIS. 1 (1986); Paul C. Weiler, *Promises to Keep: Securing Workers' Rights to Self-Organization Under the NLRA*, 96 HARV. L. REV. 1769 (1983) [hereafter *Promises to Keep*]; Paul Weiler, *Striking a New Balance: Freedom of Contract and the Prospects for Union Representation*, 98 HARV. L. REV. 351 (1984) [hereafter *Striking a New Balance*]. For a discussion of the Canadian model of labor relations on which Professor Weiler draws for comparison with the American model, see generally PAUL WEILER, RECONCILABLE DIFFERENCES: NEW DIRECTIONS IN CANADIAN LABOUR LAW (1980) [hereafter RECONCILABLE DIFFERENCES].

but rather employers' illegal interference with workers' free choice, that killed union organizing efforts. Both the percentage of the organized work force in this country and the influence of organized labor—at the bargaining table and in the halls of government—were sent crashing along with those organizing efforts.[10]

To be sure, Professor Weiler and his colleagues who are sympathetic to collective bargaining have offered very different, even conflicting, reasons for the decline of organized labor. But there is a common theme. It is that laws and legal institutions, especially the slow and ineffectual enforcement mechanisms of the once-venerated National Labor Relations Act, have actually undermined the very rights that they were intended to preserve. Their work suggests that the content, structure, and perhaps even existence of labor law—by de Tocqueville's turn of phrase, "the language of the law"—has had as much to do with organized labor's failures as any perceived external factors.

In *Law and the Shaping of the American Labor Movement*,[11] Professor William Forbath offers a carefully supported historical perspective on the theme that law and legal institutions themselves have had their own separate and identifiable influence on the fortunes of the labor movement in the United States. His thesis is that during the 1890s and early 1900s, organized labor gave up its vision of enacting broad social reforms to protect working people. In place of this vision, organized labor adopted more modest goals because American courts, especially the federal courts, gave them no other choice. Part I of this Book Review elaborates Professor Forbath's thesis and the empirical data supporting it and concludes that they are both persuasive.[12] Part II shows how his contribution, though not itself sufficient, fits within the framework of other scholarship that has tried to explain the decline of organized labor in the United States.[13]

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[10] *E.g.*, Thomas A. Kochan & Kirsten R. Wever, *American Unions and the Future of Worker Representation*, *in* THE STATE OF THE UNIONS 363, 366-70 (George Strauss et al. eds., 1991).

[11] WILLIAM E. FORBATH, LAW AND THE SHAPING OF THE AMERICAN LABOR MOVEMENT (1991). The book is the product of Professor Forbath's refinement and elaboration of a previous law review article. *See* William E. Forbath, *The Shaping of the American Labor Movement*, 102 HARV. L. REV. 1109 (1989).

[12] *See infra* notes 15-65 and accompanying text.

[13] *See infra* notes 66-123 and accompanying text.

I. How Law Shaped the Labor Movement During the Gilded Age[14]

A. Gompers, the AFL, and "Business Unionism"

Since the first years of the twentieth century, the American Federation of Labor or its successor, the AFL-CIO, has been the dominant voice of organized labor in the United States.[15] For several generations now, the conventional wisdom has been that the AFL and Samuel Gompers, its founding father, staked out and promoted the philosophy of business unionism[16] that prevails in the organized labor movement to this day.[17] Professor Forbath points out that organized labor's adoption of business unionism was a dramatic departure in both tone and agenda.

The Knights of Labor were the AFL's most significant historical forbear. They "hewed to a working-class version of traditional republican ideas about laws and rights."[18] The Knights, who were born in 1869 and enjoyed their heyday in the 1880s,

> held that republican government rested on a virtuous and independent citizenry; and that citizens' political and economic independence were intertwined, both requiring a rough measure of economic equality. In keeping with traditional republicanism, they saw as law's chief aim not the security of private rights but the preservation of the social conditions necessary for such a self-governing citizenry. Workers read these traditional principles to mean that in an industrial society the very survival of republican government demanded the use of governmental

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[14] The Gilded Age includes the late nineteenth century, from about 1880 to about 1900. In previous work Professor Forbath describes the period as being profoundly influenced by legal developments that followed the Reconstruction Era. *See* William E. Forbath, *The Ambiguities of Free Labor: Labor and the Law in the Gilded Age*, 1985 Wis. L. Rev. 767, 768 [hereafter *Ambiguities*].

[15] Due to its dominance the AFL became known as " 'the House of Labor.' " David Montgomery, The Fall of the House of Labor: The Workplace, the State, and American Labor Activism, 1865-1925 5 (1987). In the minds of most trade unionists after 1900, the AFL was the arbiter of " 'bona fide' trade unionism." *Id.* at 5-6.

[16] *See, e.g.*, Archibald Cox et al., Cases and Materials on Labor Law 13-14 (1991). Neither Gompers nor Professor Forbath use the term "business unionism." I use it here as shorthand only. See *infra* notes 27-31 and accompanying text for a discussion of the goals and strategies of business unionism.

[17] Forbath, *supra* note 11, at 130.

[18] *Id.* at 13.

power to quell the "tyranny" of corporations and capital.[19]

The Knights' agenda for toppling this "tyranny" of capital and establishing the "social conditions necessary for . . . a self-governing citizenry"[20] included a host of legislative reforms. Among the Knights' goals were maximum-hours regulations, public funding for worker-owned enterprises, and the nationalization of certain industries.[21] It was common during the 1880s not only for the Knights but also for other Gilded Age labor activists to condemn the labor market of industrial capitalism as a system of " 'wage slavery.' "[22] Even Gompers, at the AFL's Detroit convention of 1890, spoke of the " 'final emancipation' " of workers from the wage system.[23]

But by the turn of the century the Knights of Labor had virtually disappeared as a national organization,[24] and neither Gompers nor the AFL's other spokesmen were any longer demanding legislation to quell the " 'tyranny of capital.' "[25]

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19 *Id.*; *see also Ambiguities*, *supra* note 14, at 806-17.

20 *See* FORBATH, *supra* note 11, at 13.

21 *See id.* at 13; *Ambiguities*, *supra* note 14, at 808 & n.142, 809. Sometimes omitted from the legislative agenda of labor reformers of the late nineteenth century was their goal of limiting immigration by successive waves of low-wage workers whom they viewed as a threat to the jobs of incumbent workers. *See, e.g.*, GRACE H. STIMSON, RISE OF THE LABOR MOVEMENT IN LOS ANGELES 60-67 (1955) (discussing anti-Chinese movement in Los Angeles). Although the Knights prided themselves on being egalitarian, many of them supported immigration quotas too.

22 FORBATH, *supra* note 11, at 129 & nn.3-4; *see, e.g.*, LEON FINK, WORKINGMEN'S DEMOCRACY: THE KNIGHTS OF LABOR AND AMERICAN POLITICS 4 (1983) (" 'We declare . . . an inevitable and irresistible conflict between the wage-system of labor and [the] republican system of government.' " (quoting Knights of Labor manifesto)).

23 SAMUEL GOMPERS, SEVENTY YEARS OF LIFE AND LABOR: AN AUTOBIOGRAPHY 115 (Nick Salvatore ed., 1984).

24 The Knights of Labor counted almost 1 million active members at its peak in the 1880s. With the demise of the Knights at the end of the century, the AFL's membership rose from about 375,000 in 1899 to about 1.7 million in 1904. FORBATH, *supra* note 11, at 12, 98.

25 FORBATH, *supra* note 11, at 130. In the early 1890s the AFL flirted with proposals for socialist platforms. At the AFL's 1893 convention in Chicago, plank 10 of the platform promoted by the Socialist Labor Party would have put the AFL on record as favoring "collective ownership by the people of all means of production and distribution." GOMPERS, *supra* note 23, at 116. This plank, like other efforts by the Socialists, was defeated with the vigorous opposition of Gompers. By the late 1890s, the Socialists in the AFL had abandoned these efforts. *Id.* at 114-17.

Gompers declared, "[Labor] does not depend on legislation. It asks . . . no favors from the State. It wants to be let alone and to be allowed to exercise its rights. . . ."[26]

Gompers and the AFL pursued mainstream goals and used mainstream rhetoric in adopting a pragmatic approach to labor relations. Thus business unionism embraced voluntarism, private ordering, and freedom of contract in the context of collective bargaining. In short, organized labor adopted a legalistic, business-like approach. This was more consistent with laissez-faire capitalism and more palatable to the American courts than the broad reform agenda of labor organizations like the Knights of Labor.

Business unionism adopts traditional economic liberalism, with some modifications. It embraces the legitimacy of both private wealth and control over it by the capitalist classes, but insists that the workers who help create this wealth are partners who are entitled to a fair share of it. A key element of business unionism is an antistatist politics.[27] Organized labor has the right, without government interference, to pursue its fair share of the wealth by building and using its economic weapons—the strike, the picket, the boycott—against employers who unreasonably refuse to share. Although labor would prefer to resolve its grievances peacefully and at the bargaining table, it reserves the right to wield its economic weapons in a "responsible" manner when appropriate.

Although business unionism supports modest reforms that encourage incremental improvement in the welfare of all working people, it is not anticapitalist. It does not work for dramatic structural changes in either the allocation of resources or the distribution of income across society. Generally the goals of business unionism are satisfied when it " 'deliver[s] the goods' " at the workplace level by providing higher wages and benefits to workers as well as a voice for them at the bargaining table and on the shop floor.[28] To Gompers these were the true goals of "trade unions pure and simple."[29] As Gompers envisioned them, the principles underpinning modern business unionism are the same legal principles that guarantee to labor's employer-antagonists

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[26] Samuel Gompers, *Judicial Vindication of Labor's Claims*, 7 AM. FEDERATIONIST 283, 284 (1900) (quoted in FORBATH, *supra* note 11, at 130).

[27] *See* FORBATH, *supra* note 11, at 130-31.

[28] RICHARD B. FREEMAN & JAMES L. MEDOFF, WHAT DO UNIONS DO? 5 (1984).

[29] GOMPERS, *supra* note 23, at 115.

entrepreneurial freedom and liberty of contract.[30] " 'The whole gospel' of the labor movement, Gompers proclaimed, 'is summed up in one phrase . . . freedom of contract—organized labor not only accepts, but insists upon, equality of rights and of freedom.' "[31]

Sixty years after Gompers' proclamation, the United States Supreme Court affirmed freedom of contract as national labor policy. *The Steelworkers' Trilogy*[32] held that the courts are generally forbidden to interfere with the private ordering of workplace relations as determined by labor and capital through collective bargaining, the desired outcome of which should be a legally enforceable labor contract.[33] Labor and capital are free to determine the "common law of the shop"[34] governing this contract, as well as to choose which mechanisms, such as arbitration, shall be used to apply this new "law" to the workplace. This pragmatic approach to industrial relations, right down to the borrowing of legalistic metaphors from the common law to describe workplace governance (such as "law of the shop"), contrasts sharply with the aggressive social reform agenda and rhetoric of American labor organizations, especially the Knights, before 1900.[35]

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30 FORBATH, *supra* note 11, at 130-31.

31 Samuel Gompers, *Justice Brewer on Strikes and Lawlessness*, 8 AM. FEDERATIONIST 121, 122 (1901) (emphasis deleted) (quoted in FORBATH, *supra* note 11, at 131).

32 United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960); United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960); United Steelworkers v. American Mfg. Co., 363 U.S. 564 (1960).

33 United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593, 596-99 (1960); *see also* Textile Workers v. Lincoln Mills, 353 U.S. 448, 456-57 (1957).

34 United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 579-80 (1960) (quoting Archibald Cox, *Reflections Upon Labor Arbitration*, 72 HARV. L. REV. 1482, 1498-99 (1959)).

35 Professor Forbath somewhat overstates the case when he says that organized labor abandoned its efforts at social reform through legislation. Though perhaps more modest in its overall goals than the Knights of Labor, the AFL never did give up its goal of enacting maximum hours legislation. Eventually, Congress and most states passed such legislation. *See, e.g.*, Fair Labor Standards Act of 1938, 29 U.S.C. §§ 201-219 (1988). In fact, in 1895 the AFL put two full-time lobbyists in Washington, D.C., to look after labor's interests in Congress. A few years later, Gompers himself moved the AFL's headquarters to the nation's capital. GOMPERS, *supra* note 23, at 171-72.

B. Toward a Minimalist Labor Politics

Why did organized labor abandon radical reforms to set up the "social conditions necessary for . . . a self-governing citizenry" in favor of the pragmatic, minimalist politics promoting labor's "private rights," which has been its hallmark for nearly a century? For years the classic answer of labor historians has been that American working people lacked " 'class consciousness.' "[36] According to the pioneering work of Selig Perlman and other scholars, a number of factors created a unique individualism among American workers. Among these factors were the diversity of peoples who came to the New World, the allure and opportunities of the Western frontier, the liberal immigration policies that prevailed until the late nineteenth century, and the system of free public schools.[37] American workers did not automatically inherit the class consciousness of their forbears in Britain and other Old World countries. By dint of hard work, individuals here could cut themselves larger slices of the economic pie without the help of their brothers and sisters in the working class. Thus Perlman, reviewing the ebb and flow of membership data over the years, concluded that organized labor's biggest problem in this country was simply staying organized.[38]

Professor Forbath directly attacks this classical view. He argues persuasively that organized labor's repeated and bitter defeats during the Gilded Age at the hands of the judiciary, despite hard-fought victories in state and local legislatures, caused a retrenchment in labor's goals. These courtroom lessons had as much to do with labor's adoption of a pragmatic agenda as did any set of supposed class-based historical factors.

1. Judicial Review of Labor Reform Legislation

During the Gilded Age, the burgeoning American labor movement vigorously sought legislative reforms that would benefit all

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[36] FORBATH, *supra* note 11, at 2, 134. As Professor Forbath notes, this view has come in for much criticism in recent years. *See id.* at 10-11 (discussing others' attacks on supposed American "exceptionalism").

[37] SELIG PERLMAN, A THEORY OF THE LABOR MOVEMENT 162-69 (1928). *See also* JOHN COMMONS ET AL., HISTORY OF LABOUR IN THE UNITED STATES, vols. I-IV (1918-29) (reprint ed., 1951). An effort to collect and identify the main theories explaining individualism in American life is found in Seymour M. Lipset, *Why No Socialism in the United States?*, *in* SOURCES OF CONTEMPORARY RADICALISM 31 (Seweryn Bialer & Sophia Sluzar eds., 1977).

[38] PERLMAN, *supra* note 37, at 162.

workers. Labor organizations affiliated with the Knights, the AFL, or both, made the passage of maximum-hours legislation the labor movement's major goal.[39] In support of this goal, "Eight Hour Leagues" and other groups began to appear.

As Professor Forbath reports, this activity resulted in the passage of scores of proworker statutes in states all over the country before 1900. Labor elected its friends to office, then lobbied them for favorable legislation. New laws not only restricted hours of work, but also regulated or prohibited discriminating against union members, weighing coal at mines, using tenement labor, issuing labor injunctions, and employing children and women.

But when these laws were challenged in the courts, state and federal judges "were far more likely than not to strike down the very laws that labor sought most avidly."[40] According to Professor Forbath, by the turn of the century, state and federal judges had struck down about sixty labor laws.[41] Of these judicial decisions, about twenty-nine represented reversals of labor's core legislative victories. For example, between 1885 and 1900, courts struck down six maximum-hours laws and upheld only three.[42] And despite the courts' somewhat more liberal attitude toward laws protecting workers after 1900, by 1920 judicial decrees had invalidated about 300 labor laws of all types.[43]

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39 FORBATH, *supra* note 11, at 42.

40 *Id.* at 38.

41 *Id.*

42 *Id.* at 38 & n.7. Between 1885 and 1900, one law proscribing tenement labor was struck down; none were upheld. Five laws prohibiting discrimination against union members were struck down; none were upheld. Five laws regulating the weighing of coal at mines were struck down; one was upheld. Four laws fixing the time of payment of wages were struck down; none were upheld. Four laws prohibiting or regulating company stores were struck down; none were upheld. Three laws outlawing payment in scrip were struck down; two were upheld. *Id.* at 38 & n.7, 177-87 (app. A).

43 *Id.* at 38 & n.7. Although Professor Forbath announces his statistics in text as though they are firm, this is not the case. The data on which he relies regarding legislation struck down by the courts are based mainly on reported appellate cases. These limited data may paint a skewed picture, either by overstating or understating the actual number of statutes thrown out by the Gilded Age courts. We do not know, and Professor Forbath does not discuss, whether there are unreported or unappealed cases in which courts also struck down, or perhaps upheld, labor's legislative victories. Yet nowhere does he offer a frank disclaimer pointing out these shortcomings.

The data on which Professor Forbath relies to tell the story of strike and

Professor Forbath describes in detail the fate of three such laws. New York's 1884 statute prohibiting the manufacture of cigars in tenement dwellings was invalidated in *In re Jacobs*.[44] An 1893 Illinois law restricting the work of women and children in factories, mines, and mills to eight hours per day was invalidated in *Ritchie v. People*.[45] Colorado's 1899 law restricting the hours of smelter workers and miners to eight hours per day was invalidated in *In re Morgan*.[46] In all three cases, the state's highest court ruled that the statute in question unconstitutionally impaired the liberty of contract "enjoyed" by workers and employers alike.[47]

2. Government by Injunction

In addition to striking down the legislative victories organized labor had won, courts severely limited the extent to which organized labor could use its economic weapons. During the Gilded Age, labor wielded those economic weapons, especially strikes and boycotts, in some of the most far-reaching, if not the bloodiest, strikes that had ever been taken. In the railroad industry alone were the massive strikes of 1877, the Great Burlington Strike of 1888, and the Pullman Strike of 1894.[48]

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boycott injunctions suffer from similar shortcomings. To his credit, he does acknowledge the problems with reported cases, Bureau of Labor Statistics, and other data: "An accurate tally of the total number of injunctions issued in labor disputes in the fifty years following 1880 is impossible." *Id.* at 193 (app. B). The problem, however, is that this disclaimer is buried in the appendix. It properly belongs in the text where it can be more readily confronted.

Despite this, Professor Forbath has made an important empirical contribution to the law, a discipline whose leading thinkers, including judges and law professors, are often long on speculation about the effects of legal rules but short on proof of actual conditions. As more legal scholars follow in the footsteps of the social sciences by conducting empirical research, they must be ever wary—and forthcoming—about the limitations of their research tools. *See, e.g.*, Lee E. Teitelbaum, *An Overview of Law and Social Research*, 35 J. LEGAL EDUC. 465, 476-77 (1985).

[44] 98 N.Y. 98 (1885).

[45] 40 N.E. 454 (Ill. 1895).

[46] 58 P. 1071 (Colo. 1899).

[47] According to the Colorado Supreme Court in *In re Morgan*: "[I]t is beyond the power of the legislature, under the guise of the police power, to prohibit an adult man who desires to work thereat from working more than eight hours a day, on the ground that working longer may, or probably will, injure his own health." *Id.* at 1076.

[48] FORBATH, *supra* note 11, at 66-79.

Professor Forbath describes the extensive use that judges made of the labor injunction to crush strikes and other concerted activities during this period. The courts generally enjoined concerted activities first and had labor leaders and their adherents arrested and jailed for contempt later. Federal judges, such as Judge (later Chief Justice) William Howard Taft of the United States Circuit Court for Ohio, commonly dressed down the union leaders who were brought before them for leading "criminal conspiracies."[49] Sometimes, federal judges, with the assistance of United States Marshals, acted even when local authorities would not.[50]

By Professor Forbath's estimate, between 1880 and 1930 federal and state judges issued at least 4300 injunctions against strikes, boycotts, and other concerted activities.[51] Although these covered only a small fraction of strikes for most of this period, by the 1920s 25 percent of all strikes were being enjoined. Injunctions against secondary boycotts were also proportionally high throughout the period. During the 1890s—the period of the most sympathy strikes in American history—Professor Forbath reports that courts enjoined at least 15 percent of recorded sympathy strikes. During the 1910s, this percentage rose to 25 percent, and during the 1920s, to 46 percent.[52] He explains this "exuberant growth" in the use of the labor injunction as the reaction of a hostile judiciary to perceived "rival lawmaking" by labor leaders whose defiance posed a threat to the established legal order supervised by judges.[53]

Certainly reports of overreaching by American courts during

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[49] *Id.* at 70. *See, e.g.*, Toledo, A.A. & N.M. Ry. v. Pennsylvania Co., 54 F. 730, 739 (C.C.N.D. Ohio 1893) (Taft, J.) (admonishing the "usually conservative" chief officer of the Brotherhood of Locomotive Engineers that the union's boycott rules "make the whole brotherhood a criminal conspiracy against the laws of their country").

[50] FORBATH, *supra* note 11, at 67. The federal judiciary's primary weapons were the railroad receivership laws, the Interstate Commerce Act of 1887, and the Sherman Antitrust Act of 1890. *Id.* at 66, 69, 71. The use of the Sherman Act was especially ironic, since Congress had enacted it to combat contracts, combinations, and conspiracies in restraint of trade by big business, not labor. *See, e.g.*, GOMPERS, *supra* note 23, at 133 (discussing Gompers' fears that the Act would be used to attack activity by labor in contrast with Senator Sherman's belief that it would prohibit only combinations by business).

[51] FORBATH, *supra* note 11, at 61, 193-98 (app. B).

[52] *Id.* at 61-62 & 193-98 (app. B).

[53] *Id.* at 63, 65-66.

the *Lochner* Era[54] are old news, especially to students of constitutional law. But what Professor Forbath contributes to them is new. First, he attempts to show by empirical evidence the pervasiveness of judicial hostility to even modest workplace reforms in the name of higher legal principles.[55] Second, he offers significant anecdotal evidence of the contemporaneous reactions of Gilded Age labor activists to these legalistic defeats and the effects that judicial lawmaking had on their behavior afterward.

Though nonempirical, the anecdotal evidence regarding labor's reaction to its defeats is also powerful. According to Professor Forbath, labor leaders and rank-and-filers alike were well aware of these judicial decisions and were quite upset by them. Their anger is still palpable a century later, even on the printed page. For example, after the Colorado Supreme Court invalidated the eight-hour law protecting miners and smelter workers in *In re Morgan*, a mine owner's spy reported that one member of the union's Cloud City, Colorado local said: " 'If the eight hour law don't suit the s—s of b——s it suits us and they will have to give us eight hours whether they want to or not.' " Another member was reported as saying: " '[I]f I could have my way . . . I would kill them all and see if that would be considered unconstitutional.' "[56]

Gompers himself learned early that progressive social legisla-

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[54] The liberty of contract analysis used to support both a searching judicial review of labor protective legislation and the issuance of labor injunctions is typified by the case of *Lochner v. New York*, 198 U.S. 45 (1905).

[55] The book contains three appendices that list labor's defeats in the courts in some detail. Appendix A lists, by topic for the period 1885 to 1930, the results of litigation challenging labor legislation in the courts for which there are published appellate decisions. FORBATH, *supra* note 11, at 177-92. Appendix B lists attempts to estimate, for roughly the same period, the number of labor injunctions issued against strikes, boycotts, and other concerted activities. *Id.* at 193-98. Although both sets of data have their shortcomings, *see supra* note 43, they are unique in the field and useful in assessing the viability of Professor Forbath's thesis. Finally, Appendix C lists the judicial fate of various statutes enacted to protect union organizing activities and collective action by reforming equity and common law doctrine. Although interesting, the data are somewhat less useful because the statutes are neither identified with a particular time period nor very extensive. *See* FORBATH, *supra* note 11, at 199-203. Still, these appendices, although incomplete, provide impressive proof of the magnitude of judicial hostility to labor's agenda.

[56] FORBATH, *supra* note 11, at 47 n.56 (quoting JAMES E. WRIGHT, THE POLITICS OF POPULISM: DISSENT IN COLORADO 234 (1974)).

tion was no match for a hostile, activist judiciary. As a vice president of the Cigarmakers International Union in the late 1870s and early 1880s, he had lobbied on behalf of the antitenement cigar manufacturing law that the New York Court of Appeals struck down in *In re Jacobs*. When the bill had passed and was signed into law "after ten long years of struggle," Gompers delighted in "a jubilee demonstration [at] Cooper Union which was a tremendous, inspiring success."[57] But in his autobiography, he recalled solemnly, "Securing the enactment of a law does not mean the solution of the problem as I learned in my legislative experience. The power of the courts to pass upon constitutionality of law so complicates reform by legislation as to seriously restrict the effectiveness of that method."[58]

Thus, Professor Forbath recounts how well labor leaders learned the lesson taught by the courts: broad social reform legislation was doomed. So Gompers and the AFL responded by adopting a voluntarist strategy. This strategy was the product of a practical, real-world problem, not any lack of class-consciousness. Instead of taking their grievances to legislators, labor leaders would organize craft and skilled workers. Then they would take their grievances to management and bargain, with collective leverage, for a better deal in the private workplace, one shop or one industry at a time.[59]

Adopting a voluntarist strategy meant not only focusing on the private ordering of individual workplaces, but also learning to speak a new language: the "language of the law." Led by Gompers, labor leaders declared their goals and explained their intentions in terms they thought their adversaries, both employers and judges, would understand and accept. They articulated laissez-faire legal arguments that hinged on analogies between unions' concerted activities against employers and competitive tactics used between business rivals.[60] Thus, when Gompers attacked labor injunctions, he did so by proclaiming labor's insistence upon " 'equality of rights and of freedom,' " including

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57 GOMPERS, *supra* note 23, at 61.

58 *Id.*

59 FORBATH, *supra* note 11, at 55. But even a voluntarist approach did not mean abandoning all legislative intervention. For example, the AFL continued to support and work for minimum-wage and maximum-hours legislation for " 'dependent' " women and children, not only out of a sense of " 'paternalism,' " but also to put a floor under wage competition. *Id.*

60 *Id.* at 135.

" 'freedom of contract' " without judicial interference.[61]

Like Gompers, AFL lobbyist and Seaman's Union president Andrew Furuseth spoke in terms of the law to persuade others that labor's goals were legitimate. When Furuseth testified in support of anti-injunction legislation in the 1910s, he did not favor fire and brimstone rhetoric about emancipating the working class. Rather, he dispassionately discussed the history of English equity jurisprudence to explain that by enjoining concerted action, American courts were exceeding their traditional authority. Furuseth noted that the jurisdiction of courts had historically been limited to "tangible" property. In granting labor injunctions, Furuseth said, the courts, without the authorization of a constitutional amendment, went beyond their jurisdiction over property to assert jurisdiction over labor.[62]

For Professor Forbath, then, it was "the inescapable power of the courts,"[63] rather than external social factors, that transformed organized labor during the Gilded Age. The pragmatism espoused by Gompers, the AFL, and other mainstream labor leaders after 1900 was "a constrained but canny response"[64] to this power. So viewed, labor's minimalist political agenda in the twentieth century expressed a prior era's deep disillusionment with reform and its frustrated possibilities.[65]

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61 *Id.* at 131 (quoting Gompers, *supra* note 31, at 122).

62 *Id.* at 154-56.

63 *Id.* at 135.

64 *Id.*

65 *Id.* As Professor Forbath concedes, not every American labor leader reacted by favoring pragmatism over radicalism. For example, the same events that drew Gompers to voluntarism pushed Eugene V. Debs toward socialism. *Id.* at 97 & n.149. But the mainstream clearly favored voluntarism. More typical of this approach in the early twentieth century was Andrew Furuseth, the Seamen's Union leader and the AFL's chief lobbyist and draftsman of anti-injunction legislation. *See generally* HYMAN WEINTRAUB, ANDREW FURUSETH: EMANCIPATOR OF THE SEAMEN (1959).

Even Sidney Hillman, the socialist president of the Amalgamated Clothing Workers, eventually became President Roosevelt's principal counselor on labor matters during the New Deal Era. It will be recalled that the centerpiece of the New Deal's labor program, the National Labor Relations Act, to this day favors private ordering by labor-management collective bargaining over government regulation of the workplace. *See generally* STEVEN FRASER, LABOR WILL RULE: SIDNEY HILLMAN AND THE RISE OF AMERICAN LABOR (1991).

II. Can Labor's Embrace of "Business Unionism" Explain the Decline of the Labor Movement in the Twentieth Century?

A. Five Contemporary Explanations

It may be that the forces which caused the American labor movement to adopt a minimalist political agenda also contributed to its decline in the last half of the twentieth century. The union density rate—the percentage of the American private sector work force represented by unions—has fallen from a peak of nearly 40 percent in the mid-1950s to less than 15 percent today.[66] This dramatic decline is now well-documented and has been the focus of much legal scholarship for the past decade or so.[67] As Professor Weiler has noted, market theory offers two general sets of reasons for this decline. First, certain factors may have depressed the *supply* of unionism; that is, union representation is generally less available even to workers who want it. Second, certain other factors may have depressed the *demand* for this product; that is, workers may not want union representation even if unions are ready, able, and willing to organize them. These two sets of factors are not mutually exclusive and indeed may work in tandem to affect the unionization rate of the work force.[68]

With a focus on factors affecting the supply side, the demand side, or a combination of the two, legal scholars have produced at least five general explanations for the decline of union density in the United States.[69] Although it is unlikely that there is any single explanation, some have more support than others. We may profitably ask whether and how Professor Forbath's thesis illuminates these explanations and where it fits in among them.

1. Changing Structure of Our Economy

The "first and simplest"[70] explanation for the decline in union-

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66 *See supra* note 4 (collecting data).

67 *See infra* note 69.

68 Governing the Workplace, *supra* note 2.

69 No list will be inclusive or exclusive enough for everyone, but a collection of explanations should begin with Chapter 15 of Richard Freeman and James Medoff's excellent book, *What Do Unions Do?*, which empirically explores the effects of unionism on the economy. *See* Freeman & Medoff, *supra* note 28, at 221-45. With some changes, I borrow liberally from that work here.

70 *Id.* at 224.

ism is that it is the result of broad changes in the structure of the economy. These changes have reduced the proportion of the work force that is traditionally organized and increased the proportion that is traditionally nonorganized. Collective bargaining was concentrated largely among less educated, male, blue-collar workers employed in the manufacturing sector. The growth of the labor force during the past generation, however, has been concentrated among more educated, female, white-collar workers employed in the service sector.[71]

The structural-change explanation blames demographics rather than anyone in particular for the decline of unionism. It takes as a given that some groups favor unions and some do not, without offering an empirically-supported explanation for this situation. Labor's decline may be due to a drop in the supply of union organizing activity, a drop in worker demand for it, or a little of both. In any case, the factors accounting for the depression in the supply of or demand for unionism are perceived to be part of the inevitable march of economic progress. Accordingly, they are viewed as beyond the control of individual workers, unions, or employers. Perhaps unionism has simply outlived its usefulness. Adherents to the structural-change explanation can simply say, "That's just the way it is."

The shift in the demography of the work force has been well-documented, and there is no need to elaborate on it here. As a purported explanation of the decline of unionism, however, the structural-change explanation falls short in several respects. First, these demographic changes have occurred in the economies of all major Western democracies.[72] If they were the chief cause of the decline of unionism, the proportion of the organized work force would be expected to fall everywhere else too. Instead, outside the United States, unionization has often increased, and

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[71] *See, e.g.*, DANIEL BELL, THE COMING OF POST-INDUSTRIAL SOCIETY: A VENTURE IN SOCIAL FORECASTING 129-42 (1973); William T. Dickens & Jonathan S. Leonard, *Accounting for the Decline in Union Membership, 1950-1980*, 38 INDUS. & LAB. REL. REV. 323, 323-34 (1985); Henry S. Farber, *The Extent of Unionization in the United States*, *in* CHALLENGES AND CHOICES FACING AMERICAN LABOR 15 (Thomas A. Kochan ed., 1985); Henry S. Farber, *The Recent Decline of Unionization in the United States*, 238 SCIENCE 915, 916-19 (1987); Seymour M. Lipset, *North American Labor Movements: A Comparative Perspective*, *in* UNIONS IN TRANSITION, *supra* note 4, at 421, 422-23 [hereafter *North American*]. As these scholars note, today's work force is also more ethnically and racially diverse.

[72] FREEMAN & MEDOFF, *supra* note 28, at 226-27.

often in large numbers.[73] For example, in Canada, where many United States-based unions and firms or their respective affiliates operate, the union density rate was going up at the same time it was going down here.[74]

Second, the structural-change explanation assumes that the proportion of workers of a given type who are organized does not change over time. But historically union growth has taken the form of sudden organization of traditionally nonunion groups. Examples of this phenomenon include the large-scale organization of unskilled industrial workers by CIO unions in the 1930s and the sudden organization of public sector workers in the 1960s and 1970s.[75]

Finally, despite these structural changes, a number of surveys have been taken asking workers whether they would vote for a union in an NLRB election if they had the chance. These surveys continually show female, white-collar workers—the very workers who are less likely to be organized—expressing more willingness to vote for a union than their male, blue-collar counterparts.[76] Thus the structural-change explanation turns out to be descriptive rather than explanatory. We must look elsewhere for the causes of the decline of unionism.

2. Worker Disaffection

America thinks of itself as the land of free choice. In matters of union representation, this choice is supposed to be protected by law. The National Labor Relations Act gives workers the right either to join or to refrain from joining labor unions without employer coercion.[77] If unions are in decline, then perhaps the reason is simply that workers don't want them.

The worker-disaffection explanation has several components: Organized labor has not adapted to the needs of the new breed of professional and skilled service workers who make up the fastest-

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[73] *Id.*

[74] *See, e.g.*, *Promises to Keep*, *supra* note 9, at 1816-19. Professor Weiler attributes the difference to labor laws in the Canadian provinces that reduce the opportunity for employers to interfere with workers' choices about union representation. *Id.*

[75] FREEMAN & MEDOFF, *supra* note 28, at 227; GOVERNING THE WORKPLACE, *supra* note 2, at 109.

[76] GOVERNING THE WORKPLACE, *supra* note 2, at 109.

[77] National Labor Relations Act § 7, 29 U.S.C. § 157 (1988).

growing sector of the work force;[78] the public perceives unions as being corrupt, or as wielding too much political power;[79] and unions are elitist, bureaucratic, or undemocratic.[80] What these components have in common is a focus on the demand-side: Organized labor is losing market share because it is not offering a product that Americans workers want to buy. According to Professor Seymour Lipset, this is reflected in public opinion data. He concludes that the decline in Americans' approval rating of unions is the primary explanation for the drop in the union membership rate.[81] In the 1980s, public opinion about labor was said to reflect a return to "individualism" and "a resurgence of traditional values."[82] These assertions all sound much like the lack-of-class-consciousness explanation given by Perlman and other labor historians[83] whom Professor Forbath challenges.

There is some validity to the worker-disaffection explanation. Some of the new breed want "a distinctive type of collective voice in the affairs of their workplace."[84] The five fastest-growing occupations between now and 2000 are white-collar and semiprofessional in character: paralegal, computer programmer, systems analyst, medical assistant, and data processing equipment repairer. To date, none of these groups has expressed a strong

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78 *See, e.g.*, STANLEY ARONOWITZ, WORKING CLASS HERO: A NEW STRATEGY FOR LABOR 125-70 (1983); Julius G. Getman, *Ruminations on Union Organizing in the Private Sector*, 53 U. CHI. L. REV. 45 (1986).

79 *See, e.g.*, Michael Maccoby, *The New Unionism*, UTNE READER, Mar.-Apr. 1992, at 85, *reprinted from* THE WORLD & I (Oct. 1991).

80 *See, e.g.*, Karl E. Klare, *The Labor-Management Cooperation Debate: A Workplace Democracy Perspective*, 23 HARV. C.R.-C.L. L. REV. 39 (1988); Karl E. Klare, *Workplace Democracy and Market Reconstruction: An Agenda for Legal Reform*, 38 CATH. U. L. REV. 1 (1988).

81 *North American*, *supra* note 71, at 438-42 (1986). The most frequently-cited statistic is the response to the Gallup Poll question, "Do you approve or disapprove of labor unions?" Whereas in 1957 76% of the American public answered approve and 14% answered disapprove (for a net approval rating of 62%), in 1987 only 55% said approve and 35% said disapprove (for an approval rating of just 20%). GOVERNING THE WORKPLACE, *supra* note 2, at 106 n.3. This and other polling data are complied in Seymour M. Lipset, *Labor Unions in the Public Mind*, *in* UNIONS IN TRANSITION, *supra* note 4, at 287.

82 *North American*, *supra* note 71, at 442-52.

83 See *supra* text accompanying notes 36-38 for a discussion of Perlman's classical explanation.

84 GOVERNING THE WORKPLACE, *supra* note 2, at 108 (relying on CHARLES C. HECKSCHER, THE NEW UNIONISM: EMPLOYEE INVOLVEMENT IN THE CHANGING CORPORATION 62-77 (1988)).

interest in traditional unionism.[85] Even the AFL-CIO has candidly attributed some of the labor movement's recent decline to the failure of its affiliated member unions to appeal to the new work force.[86]

But neither the desires of the new breed of worker nor the public opinion surveys tell the whole story. As for the new breed of worker, her absolute numbers in the work force are still relatively small. The occupations that are growing at the fastest rate in absolute numbers are traditional ones: cashier, registered nurse, janitor, truck driver, and food server.[87] Of these occupations, only nursing can be said to be professional in character. And unlike the other occupations, nursing is relatively organized and becoming more so. It may be that organized labor is not meeting the needs of today's workers, but if so it is probably not due to its failure to appeal to the still-marginal numbers of new-breed workers.

As for the public opinion data, they are more complicated than first blush would indicate. There has been significant ambivalence, if not improvement, in the public's perception of organized labor. Data available after Professor Seymour's important work in the mid-1980s showed unions' approval rating almost doubling between 1980 and 1988.[88] The same AFL-CIO report that concluded that labor could do better in appealing to workers also found that over 75 percent of union and nonunion workers alike agree that unions generally improve wages and working conditions.[89] Despite erosion of popular support for unions, Professor Weiler concludes, "[T]here remains a strong public commitment to the principle that workers have a right to union representation to improve their conditions at work."[90]

For these reasons, the worker-disaffection explanation does not

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85 *Id.* at 108 n.6 (relying on HECKSCHER, *supra* note 84, at 69).

86 AFL-CIO COMMITTEE ON THE EVOLUTION OF WORK, THE CHANGING SITUATION OF WORKERS AND THEIR UNIONS 13 (1985).

87 GOVERNING THE WORKPLACE, *supra* note 2, at 108 n.7 (relying on BENNETT HARRISON & BARRY BLUESTONE, THE GREAT U-TURN: CORPORATE RESTRUCTURING AND THE POLARIZING OF AMERICA 69-73 (1988)).

88 In 1988, the Gallup Poll found 61% saying approve and 25% saying disapprove (for a net approval rating of 36%, up from 20% the year before). *Id.* at 106 n.3; *see also id.* at 108 n.8 (discussing more complicated picture of workers' ambivalent attitudes toward unions).

89 AFL-CIO COMMITTEE ON THE EVOLUTION OF WORK, *supra* note 86, at 12.

90 GOVERNING THE WORKPLACE, *supra* note 2, at 109.

explain enough. As Professor Weiler has pointed out, large segments of workers, such as the clerk-typist in a large office or the counterperson in a fast-food restaurant, work in much the same type of impersonal, assembly-line environments in which unions enjoyed their greatest organizing successes from the 1930s to the 1950s.[91] Workers in jobs like these have been organized in other industrialized countries; some other explanation must be found to account for their remaining outside the circle of organized labor in the United States.

3. Decline of Organizing Efforts

Perhaps unionism is in decline because labor has fallen down on the job of organizing the unorganized.[92] During the 1950s, unions organized about 1.0 percent of the work force annually. By the early 1980s, this figure had dropped to just 0.14 percent, far below the rate needed merely to stabilize (rather than increase) the union density rate.[93] The union density rate plummeted at roughly the same time that annual expenditures on organizing by international unions fell by about 30 percent.[94] For this reason, one can reasonably conclude that unions have themselves to blame, at least in part, because they failed to increase the supply of unionism available to American workers who might have been interested in "buying" it.

The problem with the no-organizing explanation is that, like the worker-disaffection explanation, it does not account for all or even most of the decline in unionism. First, Freeman and Medoff

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91 *Id.* at 108.

92 Indeed, the failure to organize might be included as one of "a million blunders along the way" committed by a complacent labor movement. THOMAS GEOGHEGAN, WHICH SIDE ARE YOU ON?: TRYING TO BE FOR LABOR WHEN IT'S FLAT ON ITS BACK 246 (1991). Thomas Geoghegan's book is a thought-provoking account of his experiences and observations as a union lawyer in the 1970s and 1980s. Certainly other observers of the labor movement would concur in his view that labor erred, for example, by failing to buy stock in companies for which its members worked, by not seeking joint control with employers of investment-starved pension funds, and by avoiding the anti-plant-closing movement. *Id.* at 246-48.

93 FREEMAN & MEDOFF, *supra* note 28, at 229, 241-42. Since labor would have to organize 0.6% of the work force just to stabilize the union density rate at 20% of the work force, there is a ready explanation for the precipitous decline from the 1950s to the 1980s. *Id.*

94 Paula B. Voos, *Trends in Union Organizing Expenditures, 1953-1977*, 38 INDUS. & LAB. REL. REV. 52, 59-60 (1984).

admit that as much as a third of the decline in union successes through NLRB elections is attributable to reduced organizing efforts.[95] But even if this is true, it does not account for the remaining two-thirds of the decline. Second, at the same time that the number of NLRB certification elections was dropping, the union win rate in those elections was dropping too.[96] Even if there had been more elections, unions would still be losing more than they used to. Thus, factors other than less desire to organize must have caused unions to stay away from the NLRB election process.

4. Management Opposition

The antipathy of American management to labor unions, particularly in contrast to the relative acceptance of unions by European management, is by now quite well known.[97] From the perspective of employers, there is good reason: a union is a form of cartel that causes undesirable inefficiencies in the labor market.[98] Management prefers a union-free environment because unorganized firms need not pay premium union wages and benefits. A nonunion firm also maintains flexibility to implement work rules and other needed changes in the business.[99] Union avoidance is especially appealing in this era of international business competition and global product and service markets.[100] A lively

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95 FREEMAN & MEDOFF, *supra* note 28, at 229.

96 *See* MICHAEL GOLDFIELD, THE DECLINE OF ORGANIZED LABOR IN THE UNITED STATES 180-217 (1987) (union win rate in NLRB elections fell from over 80% in 1950s to under 50% in 1980s).

97 *See generally* Sanford M. Jacoby, *American Exceptionalism Revisited: The Importance of Management*, *in* MASTERS TO MANAGERS: HISTORICAL AND COMPARATIVE PERSPECTIVES ON AMERICAN EMPLOYERS 173 (Sanford M. Jacoby ed., 1991). The influential essay comparing American and European attitudes toward labor as reflected in the law is found in Derek C. Bok, *Reflections on the Distinctive Character of American Labor Laws*, 84 HARV. L. REV. 1394 (1971).

98 *See, e.g.*, MILTON FRIEDMAN & ROSE FRIEDMAN, FREE TO CHOOSE: A PERSONAL STATEMENT 228-43 (1980); Richard A. Epstein, *A Common Law for Labor Relations: A Critique of the New Deal Labor Legislation*, 92 YALE L.J. 1357, 1367-69 (1983).

99 *See, e.g.*, DAN C. HELDMAN ET AL., DEREGULATING LABOR RELATIONS 49-76, 141-54 (1981) (arguing that labor laws are too protective of unions and should be repealed).

100 Wilson McLeod, *Labor-Management Cooperation: Competing Visions and Labor's Challenge*, 12 INDUS. REL. L.J. 233, 245-50 (1990). For an attack on organized labor's recent experimentation with management-oriented

scholarly debate has sprung up over whether on the whole unions are good or bad for the economy.[101] The comprehensive work by Freeman and Medoff suggests that on balance unions improve productivity and efficiency (though not necessarily profits), reduce inequalities in the distribution of income, and provide an effective political voice for workers.[102] It is not necessary to decide who wins this debate, however, to determine whether management opposition to unionism can explain the decline of the latter. Right or wrong, the dominant perception among American managers is that their firms are better off without unions.

Accordingly, United States employers have undertaken a serious effort to reduce the demand for unionism, mainly by attempting to halt union organizing drives. Lawyers and consultants who specialize in teaching employers how to stay union-free help accomplish this goal. These advisors emphasize what employers should do and say to employees during the election-style campaign leading up to the NLRB certification vote.[103] Here Professor Weiler's work in analyzing empirical data on the effects of employer behavior during these campaigns is especially illuminating. His work is comprehensive and deserves close scrutiny, but can be summarized as follows:[104]

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cooperative programs in response to the perceived threats of increased global competition, see *id.* at 281-84.

101 GOVERNING THE WORKPLACE, *supra* note 2, at 182 nn. 100-01 (collecting studies).

102 FREEMAN & MEDOFF, *supra* note 28, at 162-80, 247. Other research, such as that recently collected by Lawrence Mishel and Paula Voos, finds no statistical support for the popular notion that unions make American business less competitive in international markets. *See, e.g.*, Thomas Karier, *Trade Deficits and Labor Unions: Myths and Realities*, *in* UNIONS AND ECONOMIC COMPETITIVENESS 115-17 (Lawrence Mishel & Paula B. Voos eds., 1992).

103 Examples abound. One national law firm's handbook on the subject is ROBERT LEWIS & WILLIAM A. KRUPMAN, WINNING NLRB ELECTIONS: MANAGEMENT'S STRATEGY AND PREVENTIVE PROGRAMS (1988) (firm of Jackson, Lewis, Schnitzler & Krupman).

104 The summary is gleaned from *Promises to Keep*, *supra* note 9, at 1776-93; *Striking a New Balance*, *supra* note 9, at 355-63; and GOVERNING THE WORKPLACE, *supra* note 2, at 40, 112. *See also* FREEMAN & MEDOFF, *supra* note 28, at 233-42 (collecting representation election studies).

Although the weight of the empirical evidence favors the views of Weiler, Freeman, and Medoff, there are dissenting views. *Compare, e.g.*, JULIUS G. GETMAN ET AL., UNION REPRESENTATION ELECTIONS: LAW AND REALITY (1976) (finding no significant relationship between illegal employer behavior and

- From the late 1950s through 1980, the number of unfair labor practices committed by employers against unions and their adherents increased astronomically.
- By 1980, there was a one in twenty chance that a union supporter would be illegally fired for exercising rights guaranteed by the NLRA. By 1985, the risk had increased to one in ten.
- The shift of only a few votes can mean the difference between victory and defeat for a union. A well-placed, illegal firing not only eliminates the union adherent (and her vote) from the workplace, but also sends a chilling message to other workers.
- It takes as long as three years to win a legally enforceable order of reinstatement for an illegally fired worker. By the time the NLRB has finally vindicated the worker's rights, the representation election is long over and the worker has long since moved on to other employment. If the worker does accept reinstatement, she will likely be forced out again for other reasons.
- Even when the union wins the election, the workers may never get the benefits of union representation. Due largely to unfair labor practices committed at the bargaining table, only half of all union victories produce a first contract.
- It is cheaper for the employer to break the law than to obey it. The only remedies are reinstatement, back pay with interest, the posting of a notice promising not to disobey the law, and, in the case of failure to bargain in good faith, an order to engage in such bargaining. There are no treble or punitive damages. The NLRB does not write collective bargaining agreements or force recalcitrant employers to sign them.

Given this hostile climate, it is small wonder that fewer and fewer workers are inclined to start down the path toward union representation. Professor Weiler himself does not see management opposition during the certification campaign (or afterward, during negotiations for a first contract) as a unicausal explanation for the decline of unionism. He does, however, give a "substan-

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representation election outcomes) *and* Stephen B. Goldberg et al., *The Relationship Between Free Choice and Labor Board Doctrine: Differing Empirical Approaches*, 79 NW. U. L. REV. 721 (1984) (defending 1976 work), *with, e.g.*, William T. Dickens, *The Effect of Company Campaigns on Certification Elections:* Law and Reality *Once Again*, 36 INDUS. & LAB. REL. REV. 560 (1983) (reexamining data of Getman et al., and attacking their conclusions).

More recently, two scholars have taken issue with what they call Professor Weiler's " 'rogue employer thesis.' " Robert J. LaLonde & Bernard D. Meltzer, *Hard Times for Unions: Another Look at the Significance of Employer Illegalities*, 58 U. CHI. L. REV. 953, 954 (1991). In response, Professor Weiler says he would not change "a single significant claim" made in his previous work. Paul C. Weiler, *Hard Times for Unions: Challenging Times for Scholars*, 58 U. CHI. L. REV. 1015, 1015 (1991).

tial share" of the credit "to the increasingly no-holds-barred resistance exhibited by American business toward unions, a level of employer opposition that tends to be facilitated rather than foiled by the present NLRA framework for the representation contest."[105] The evidence overwhelmingly supports his conclusion.

5. Changing Public Policy

Beyond management antipathy, there is the possibility that public policy—as expressed in the labor laws enacted by legislatures, enforced by the administrative apparatus of government, and interpreted by the courts—may explain the decline of unionism in the late twentieth century. Apart from Professor Forbath's work, little empirical evidence supports the largely intuitive notion that changes in public policy affect the supply of and demand for unionism. But the evidence that is available, including anecdotal evidence, is difficult to ignore.

First, the Canadian experience suggests that the legal atmosphere in which unions must operate has much to do with the union density rate. As noted above, many of the same firms and unions operate in both the United States and Canada. The principal difference lies in comparative labor law. The United States permits management to wage lengthy, well-funded election campaigns against unions. The laws of the Canadian provinces do not. In fact, in most Canadian provinces, unions are certified without a secret ballot election at all. The result has been a growing private sector unionization rate surpassing that of the United States.[106] Presumably, eliminating the campaign (if not the secret ballot) and ascertaining workers' choices about union representation by less obtrusive means would also eliminate illegal employer attacks that undermine those choices.

Second, in states where so-called "right to work" laws are on the books, the evidence suggests that unions face serious "free rider" problems. In "right to work" states, unions cannot collect the full amount of dues from workers who do not become members. Collecting less money from these workers, who are entitled to the benefits of union representation anyway, weakens unions financially and makes organizing more difficult. One study of

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105 GOVERNING THE WORKPLACE, *supra* note 2, at 114.

106 *Promises to Keep*, *supra* note 9, at 1806-22. *See generally* RECONCILABLE DIFFERENCES, *supra* note 9.

unionization across different states found that new organizing in a state falls by about three-fourths within the decade after a "right to work" law is enacted, and that in the long run, union membership declines by 5 to 10 percent.[107]

Finally, evidence from the public sector suggests that a change in the legal climate to favor organizing leads to increased union density. Public sector unionization grew tremendously in the 1960s and 1970s. This growth followed immediately upon the passage of laws directing state and local governments to bargain with public employee unions.[108]

B. "Business Unionism" and the Forbath Thesis

We now recall the Forbath thesis that the Gilded Age judiciary forced organized labor to adopt "business unionism" and to abandon its efforts to secure social reform legislation that would have benefitted all workers. We may now ask whether this thesis has anything to say about why unionism has declined in this century and why, for the moment, the labor movement shows few signs of regaining its strength.

The Forbath thesis has a great deal to say about the state of unionism today. It dovetails especially well with the no-organizing, management-opposition, and public-policy explanations. Neither structural changes in our economy nor less desire among employees can adequately explain the decline in unionism. Furthermore, unions are devoting fewer resources to organizing at the same time that the organizing efforts unions do undertake are thwarted by employers who are ever more willing to break the labor laws to remain union-free. Surely something not only makes this state of affairs possible, but also permits it to flourish in spite of employee wishes for union representation.

That "something" is public policy.[109] Since the passage of the Wagner Act in 1935, national labor policy has favored collective bargaining, not social reform legislation, as the principle means of securing workers' rights. Although organized labor has periodically undertaken social reform efforts, its priority has always

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107 David T. Ellwood & Glenn Fine, *The Impact of Right-to-Work Laws on Union Organizing*, 95 J. POL. ECON. 250, 266-67 (1987).

108 FREEMAN & MEDOFF, *supra* note 28, at 243.

109 The following discussion of the impact of public policy on the American labor movement is based on data presented in *Promises to Keep*, *supra* note 9.

been a better deal for its own members at the bargaining table. So it is hardly surprising that labor embraced both the New Deal and the Wagner Act and enjoyed great organizing successes for the next decade or so thereafter.

But by the 1950s, with the benefit of hindsight, we now can see that the system under which organized labor had begun to flourish was falling apart. Instead of discouraging employer resistance to unionism, the system seemed to encourage it. Instead of swiftly vindicating the rights it promised, the system delayed and thus effectively denied them. What happened?

What happened is that employers discovered that the inertia of the legal system was built into the NLRA, and they put it to work for themselves. First, they learned to exploit every step in the process of union certification: the demand for recognition, the petition for certification, the determination of the appropriate bargaining unit, the conduct of the anti-union campaign, the challenge of voter eligibility, the challenge to the results, the appeal from administrative law judge to the NLRB, the review by the federal circuit courts, and finally, the remand to the NLRB for back pay and other enforcement proceedings. Each of these proceedings became a battleground on which the employer could attack the union, delay the day of reckoning, and perhaps overturn the union victory.

These battlegrounds were located in the hearing rooms and courtrooms of the law, not at the bargaining table or at the barricades or in the streets. Labor had to master strange doctrines, follow special procedures, process appeals. Labor needed a champion who knew how to manipulate the legal machinery rather than organize people. Employers sent their lawyers to fight these battles. Unions responded by sending their lawyers to engage those of the adversary.

Second, Congress insisted that unions fight these battles through the legal process by taking away some of the key weapons that labor had used successfully to organize the work force during those early years under the Wagner Act. With the passage of the Taft-Hartley Act in 1947,[110] it became illegal for labor to use the secondary strike and the secondary boycott to demand recognition as workers' representatives and to enforce their demands at the bargaining table. Despite the passage of the Norris-LaGuar-

[110] Taft-Hartley Act, ch. 120, § 101, 61 Stat. 136, 141-42 (1947) (current version at 29 U.S.C. § 158(b)(4), (7) (1988)).

dia Act in 1932, injunctions halting such activity could once again be issued by the federal judiciary.[111] Deprived of the right to use secondary weapons, labor often lacked the leverage to deal effectively with management.

Finally, the federal courts—the same courts which had narrowed labor's agenda during the Gilded Age—institutionalized and confined labor's remaining power.[112] For example, in *NLRB v. Mackay Radio & Telegraph Co.*,[113] the Supreme Court held that workers could not be fired for going on strike. But the Court also held that management had the right to hire "permanent replacements" to displace the strikers indefinitely.[114] In *The Steelworkers' Trilogy*,[115] the Supreme Court held that courts could not interfere with the private ordering of workplace relations as determined by labor and management. But the Court also held that the price for this peace was giving up the right to strike as an alternative enforcement mechanism during the term of the contract.[116] And in *Boys Markets, Inc. v. Retail Clerks Local 770*,[117] the Court hailed the use of "administrative techniques for the peaceful resolution of industrial disputes" as a sign of "maturity" in the labor movement. But the Court held that the penalty for exercising less "mature" forms of dispute resolution, such as mid-contract strikes, would be a back-to-work injunction.[118]

All of these developments have contributed to the modern labor movement which, because it now has little choice in the matter, looks primarily to the processes of the law to achieve its aims. In all but a few areas, bringing collective pressure to bear on the employer is either illegal or, in the case of current striker replacement law, impractical.[119] In adopting a legal model to

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111 National Labor Relations Act § 10(l), 29 U.S.C. § 160(l) (1988).

112 *See, e.g.*, Karl E. Klare, *Critical Theory and Labor Relations Law*, *in* THE POLITICS OF LAW 70-71 (David Kairys ed., 1990); *see also* James G. Pope, *Labor and the Constitution: From Abolition to Deindustrialization*, 65 TEX. L. REV. 1071 (1987); Katherine V. Stone, *The Post-War Paradigm in American Labor Law*, 90 YALE L.J. 1509 (1981).

113 304 U.S. 333 (1938).

114 *Id.* at 345-46.

115 United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960); United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960); United Steelworkers v. American Mfg. Co., 363 U.S. 564 (1960).

116 363 U.S. at 596-99; 363 U.S. at 577-85; 363 U.S. at 567-69.

117 398 U.S. 235 (1970).

118 *Id.* at 253-55.

119 Just this Term, the Supreme Court ruled that an employer does not

enforce its "rights," labor ratified "a distinctly political judgment in favor of workplace hierarchy and against concerted activity."[120] After all, until an arbitrator or a judge says otherwise, management's status quo remains in place. Thus, the disgruntled worker must "work now, grieve later." The fired employee stays fired until an arbitrator orders her reinstated. The lost union representation election stays lost until the NLRB, with the concurrence of a federal circuit court of appeals, orders a rerun election. Management's authority, even though it ultimately may be found impermissible, prevails until the processes of the law are completed.

Thomas Geoghegan, who has written a thoughtful book on his experiences as a union lawyer, makes a direct connection between cases like *The Steelworkers' Trilogy* and the labor movement's embrace of what de Tocqueville called "the language of the law." According to Geoghegan, these cases have turned the labor movement into "a giant bar association of nonlicensed attorneys."[121] Today's union business agent no longer organizes new shops or run strikes and boycotts. Instead, she prepares grievances, testifies at arbitration hearings, and often takes the lawyer's role of putting on the cases herself. Sometimes she even goes to law school.[122] Lawyers, or their functional equivalents, fight the union's battles. Says Geoghegan, "This is post-strike America: the rank and file stay home and send out their lawyers."[123]

CONCLUSION

It is becoming fashionable to view the decline in American unionism today against the backdrop of the late 1920s and early 1930s.[124] Then, as now, union density was dropping precipitously, and many predicted the disappearance of organized

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have to allow nonemployee union organizers to distribute literature or conduct other organizing activities on its private property. Even the NLRB's modest test for balancing employee organizing rights against employer property interests was found to be too protective of union activity. Lechmere, Inc. v. NLRB, 112 S. Ct. 841 (1992).

120 Klare, *supra* note 112, at 75.

121 GEOGHEGAN, *supra* note 92, at 163.

122 *Id.* at 163-66.

123 *Id.* at 242.

124 *E.g.*, *id.* at 42-43. *See generally* IRVING BERNSTEIN, THE LEAN YEARS: A HISTORY OF THE AMERICAN WORKER 1920-1933 (1960) (recounting 1920s reports pronouncing the death of organized labor).

labor. Then, as now, a period of bust followed a decade of boom, at least on Wall Street. The assumption underlying this look back is that a Great Depression in the 1990s, or something like it, will be the impetus for labor organizing and for the resurgence of the labor movement.

Any prediction about the resurrection of the labor movement, much less whether we are on the brink of another Great Depression, is far beyond the scope of this Book Review. But if there is any single lesson to be learned from *Law and the Shaping of the American Labor Movement*, it is that organized labor will have to learn to speak more than one language if it is to reclaim the aspirations of working people. Spoken exclusively, "the language of the law" is too confining to get the job done.