BOOK REVIEW

LABOR LAW IN AMERICA: HISTORICAL AND CRITICAL ESSAYS

Edited By Christopher L. Tomlins and Andrew J. King.
Baltimore and London: Johns Hopkins University Press, 1992. Pp. 355.
$55.00.

PETER D. DECHIARA*

The last few years have brought to life the stuff of history: ethnic war in the Balkans, incurable tuberculosis in the United States, Nazi parades in Germany.[1] The past has also returned to haunt the American worker. In the United States today, the richest one percent of the population has captured thirty-seven percent of the economic pie, a maldistribution of wealth not seen in this country since before the New Deal.[2] Real wages have fallen below those of the early 1970s.[3] Along with low wages have come other signs of the past: child labor,[4] longer hours,[5] and fewer jobs which provide a pension.[6]

---

* Attorney, Cohen, Weiss and Simon, New York City. B.A., 1984, Brown University; J.D., 1988, Columbia University.

1. *See* John F. Burns, *New Virulent Strains of Hatred in the Balkans and Beyond*, N.Y. TIMES, May 3, 1992, at D3 (reporting that "Serbs and Croats and Muslim Slavs [are] killing one another with a ferocity not seen in Europe since 1945"); Lawrence K. Altman, *Deadly Strains of Tuberculosis Is Spreading Fast, U.S. Finds*, N.Y. TIMES, Jan. 24, 1992, at A1 (reporting outbreaks of drug-resistant strains in five states and noting "[a]t no time in recent history has tuberculosis been of such great concern as it is now"); *Neo-Nazis Seized in Dresden*, N.Y. TIMES, Apr. 24, 1992, at A8 ("The German police arrested dozens of neo-Nazis today after they marched through downtown Dresden flashing the Hitler salute to mark the 103d anniversary of the Nazi dictator's birth.").

2. Sylvia Nasar, *Fed Gives Evidence of 80's Gains by Richest*, N.Y. TIMES, Apr. 21, 1992, at A1 (reporting also that the top one percent of the population owns more than the bottom 90%). For a detailed discussion of the growth of the wealth gap in the 1980s, see KEVIN PHILLIPS, THE POLITICS OF RICH AND POOR: WEALTH AND THE AMERICAN ELECTORATE IN THE REAGAN AFTERMATH (1990).

3. *What it Takes*, WALL ST. J., Oct. 13, 1992, at A1 (noting that the average U.S. worker now has to work significantly longer to buy a house or car than 20 years ago); *see also* PHILLIPS, *supra* note 2, at 18-19 (finding that the median real wage of American men with no more than a high school education, in 1985 dollars, was $9.90 per hour in 1973 compared to $8.62 per hour in 1987).

4. *See* Gina Kolata, *More Children are Employed, Often Perilously*, N.Y. TIMES, June 21, 1992, at A1 ("After nearly disappearing from American life, child labor has re-emerged and proliferated in the last decade.").

5. *See* JULIET SCHOR, THE OVERWORKED AMERICAN: THE UNEXPECTED DECLINE OF LEISURE 1 (1991) (reporting that Americans now work longer hours than they did forty years ago).

6. *See* Sylvia Nasar, *Pensions Covering Lower Percentage of U.S. Workforce*, N.Y. TIMES, Apr. 13, 1992, at A1 (reporting that "[t]he share of America's work force covered by company pensions is shrinking, reversing a decades-old trend of steady growth").

Imaged with the Permission of N.Y.U. Review of Law and Social Change

Perhaps most significantly, fewer American workers now have the means to protect their interests collectively. The percentage of the private-sector workforce unionized today roughly equals the percentage unionized prior to the enactment of the National Labor Relations Act (NLRA) in 1935.[7] As unions have disappeared, employers — reviving a tactic popular seventy years ago — have replaced them with sham company-supported organizations meant to give workers the illusion of empowerment and workplace participation.[8] In the rare instances in recent years when workers have attempted to assert their clout through strikes,[9] employers have frequently resorted to the ultimate weapon — permanent replacement of the strikers — to crush the effort.[10]

As the hardships of the past have re-emerged, the study of labor history has taken on added significance. More than simply an academic exercise, the study of the past holds the promise of explaining how the current plight of American workers developed. Since labor law in particular helped cause that plight,[11] the study of labor law's past has become a central focus of labor history.

It is unsurprising then that the editors of this volume announce the study of labor law history to be a "burgeoning" field.[12] *Labor Law In America*,

---

7. PAUL C. WEILER, GOVERNING THE WORKPLACE: THE FUTURE OF LABOR AND EMPLOYMENT LAW 9-10 (1990). In 1989, private-sector unions represented just 12% of the workforce. *See infra* text accompanying note 74. Public and private-sector unions combined represented just 16.4% of the workforce. *See Anti-Union Group Charges Ban on Replacing Strikers Would Increase Strike Activity*, BNA DAILY LAB. REP., Dec. 10, 1990, at A7 [hereinafter *Anti-Union Group Charges Ban*].

8. Paul Weiler notes that for the last decade, ever-increasing numbers of employers have implemented "employee involvement plans," organizations which, he points out, "are not fundamentally different in nature or purpose from the initial employee representation plans developed in the era of 'welfare capitalism' in the early twentieth century." WEILER, *supra* note 7, at 191, 213. For a brief history of company unions in the pre-NLRA era of "welfare capitalism," see Thomas Kohler, *Models Of Worker Participation: The Uncertain Significance of Section 8(a)(2)*, 27 B.C. L. REV. 499, 518-34 (1986).

9. Labor's decline can be seen in the decline of strike activity: in 1974, 424 strikes involving over 1,000 workers took place in the United States, compared to just 51 such strikes in 1989. *Anti-Union Group Charges Ban, supra* note 7, at A7.

10. *See* Samuel Estreicher, *Strikers and Replacements: Introductory Comments, in* PROCEEDINGS OF NEW YORK UNIVERSITY 43D ANNUAL NATIONAL CONFERENCE ON LABOR 18 (Bruno Stein ed., 1990) (citing the air traffic controllers strike, and strikes at Hormel, TWA, AT&T, Boise Cascade, Continental, Pittston, and Greyhound as examples of recent strikes in which employers have permanently replaced strikers). According to Estreicher, "[u]ntil the 1980s . . . the use of replacements was a marginal feature of the industrial relations scene." *Id.* at 17. On June 16, 1992, a bill to ban the hiring of permanent replacements died in the Senate. *Senate Vote Kills Bill to Restrict Use of Permanent Striker Replacements*, BNA DAILY LAB. REP., June 17, 1992, at A9.

11. For a strong argument that law has played a pivotal role in labor history, see WILLIAM E. FORBATH, LAW AND THE SHAPING OF THE AMERICAN LABOR MOVEMENT (1991). Forbath's argument explicitly challenges what he sees as the view held by other labor historians, namely, that law is not an independent shaping force, but merely a superstructure reflective of deeper social currents. *Id.* at 3.

12. LABOR LAW IN AMERICA: HISTORICAL AND CRITICAL ESSAYS 1 (Christopher L. Tomlins & Andrew J. King eds., 1992) [hereinafter LABOR LAW IN AMERICA].

Imaged with the Permission of N.Y.U. Review of Law and Social Change

composed of eleven new essays by historians, legal scholars, and political scientists, purports to offer the state-of-the-art in the field. Together, the essays cover almost the whole of American labor history, from the colonies to the Bush presidency. They also cover a broad range of methodologies, from doctrinal analysis to the analysis of economic structures, from a case study of one lawsuit to a sweeping overview of the entire nineteenth century. Though uneven in quality, the essays as a whole offer a variety of ways to think about how law has shaped and limited the lives of workers, how labor's past led to labor's present, and by implication, how things might have been different.

Most strikingly, several of the essays examine past legal doctrines which, while perhaps now extinct in their original form, still resonate in current law.[13] While these essays do not explicitly draw parallels to the present, the parallels are hard to miss.

For example, in her essay on labor law in late nineteenth-century America,[14] Karen Orren explains how courts sought to shield the employment relationship between "master" and "servant" from interference from "outsiders" such as union organizers.[15] She shows how the courts repeatedly used the tort of enticement as the legal doctrine of choice to enjoin organizers' efforts.[16] By intruding upon the employment relationship, organizers interfered with what judges then perceived as "a kind of property right" which the employer had in the employee.[17]

Despite the intervening passage of the NLRA[18] and other reform legislation, the spirit of these nineteenth-century enticement actions remains and continues to frustrate efforts to improve the lot of workers. Just last year in *Lechmere, Inc. v. NLRB,*[19] the United States Supreme Court ruled that union organizers, seeking to organize the employees of a retail store, could not lawfully enter an employer-owned parking lot in front of the store to distribute pro-union handbills. The Court reached this decision despite the fact that the parking lot was open to the public and the distribution of the handbills caused no disturbances. As *Lechmere* demonstrates, despite workers' statutory right to organize[20] and the recognition that workers often depend on others to help them understand and exercise that right,[21] courts continue to believe that organizers are in essence nothing more than "outsiders," with no interest that

13. For the argument that basic concepts have remained the same in labor law despite superficial changes of doctrine, see JAMES ATLESON, VALUES AND ASSUMPTIONS IN AMERICAN LABOR LAW 10 (1983) (stating that certain assumptions, such as the inherent right of management to maintain production, "permeate modern decision making just as they did prior to the passage of the Wagner Act").

14. Karen Orren, *Metaphysics and Reality in Late Nineteenth-Century Labor Adjudication, in* LABOR LAW IN AMERICA, *supra* note 12, at 160.

15. *Id.* at 161, 166.

16. *Id.* at 161, 164-66.

17. *Id.* at 166.

18. 29 U.S.C. §§ 151-69 (1992) (hereinafter NLRA).

19. 112 S. Ct. 841 (1992).

20. *See* NLRA § 7, 29 U.S.C. § 157 (1992).

21. *See, e.g.*, NLRB v. Babcock & Wilcox Co., 351 U.S. 105, 113 (1956) ("[T]he right of

Imaged with the Permission of N.Y.U. Review of Law and Social Change

can trump employers' property rights.[22]

In another of the book's essays,[23] Christopher Tomlins recounts how by the early nineteenth century, American labor law had progressed to the point where wage-earners could no longer be held criminally liable for quitting before the end date of their employment contract. However, an employer could still lawfully deny the quitting employee his or her wages, including those already earned.[24] By ruling complete performance of the contract a condition precedent to the recovery of any wages, courts essentially made captives of workers who could not afford to abandon months of previously earned wages. The law thus enhanced an employer's authority over the worker during the term of the contract.

Fortunately, today legislation requires employers to pay wages on a regular basis.[25] Nonetheless, the fear of losing previously earned benefits — in particular, pensions — still looms over workers and has the dual effect of discouraging quitting and of boosting the employer's bargaining power over the employee who can not afford to quit. Arcane rules on vesting[26] and on matters such as breaks in service[27] continue to leave deserving workers empty-handed, echoing the injustices produced by nineteenth-century law.[28]

In her essay on nineteenth-century vagrancy law,[29] Amy Dru Stanley details how in the wake of the Civil War, when cities like New York were awash with beggars, Northern states enacted legislation criminalizing begging or even "wander[ing] about without visible means of support."[30] In 1877 alone, vagrancy arrests in New York City rose over a million, with the police arresting the poor not only for begging but sometimes simply for loitering on a

self-organization depends in some measure on the ability of employees to learn the advantages of self-organization from others.").

22. *See* Jay Gresham, *Still As Strangers: Nonemployee Union Organizers On Private Commercial Property*, 62 TEX. L. REV. 111 (1983).

23. Christopher L. Tomlins, *Law and Power in the Employment Relationship*, *in* LABOR LAW IN AMERICA, *supra* note 12, at 71.

24. *Id.* at 77, 85-86.

25. *See, e.g.*, N.Y. LAB. LAW § 191(1)(a)(i) (McKinney 1986) ("A manual worker shall be paid weekly . . . .").

26. Even under the protection of the Employee Retirement Income Security Act (ERISA), an employee can work up to seven years before obtaining a non-forfeitable right to all of the contributions an employer has made toward the employee's pension. 29 U.S.C. § 1053(a)(2)(B) (1992).

27. *See, e.g.*, Naugle v. O'Connell, 833 F.2d 1391 (10th Cir. 1987) (holding that an employee with a 30-year career was not entitled to pension, despite having otherwise put in the necessary years of service to qualify, due to a three month break-in-service and further, requiring him to return pension payments already received prior to the court's ruling, with interest).

28. In his account of the obstacles American workers face when trying to obtain a pension, Thomas Geoghegan, a labor lawyer, remarks: "[O]ver in Europe, they laugh at all this. They say, 'Why don't you just give them all a pension? What's all this about "vesting" and "years of service," etc?' " THOMAS GEOGHEGAN, WHICH SIDE ARE YOU ON?: TRYING TO BE FOR LABOR WHEN IT'S FLAT ON ITS BACK 151 (1991).

29. Amy Dru Stanley, *Beggars Can't Be Choosers: Compulsion and Contract in Postbellum America*, *in* LABOR LAW IN AMERICA, *supra* note 12, at 128.

30. *Id.* at 129.

Imaged with the Permission of N.Y.U. Review of Law and Social Change

stoop.[31] Summary convictions, without indictment or jury trial, led to prison terms and compulsory labor.[32] According to Stanley, the self-proclaimed social reformers who championed the vagrancy laws believed that charity was to be discouraged since it "taught the poor to view dependency as 'a right' rather than a stigmatized status."[33] Compulsory labor made sense since, according to one reform organization, the poor had to be "made to work in payment for what they have received."[34]

As a matter of constitutional law, nineteenth-century vagrancy statutes belong to history. The United States Supreme Court has held that statutes making criminal offenses of begging and vagrancy simply serve as "nets making easy the roundup of so-called undesirables,"[35] and that such statutes "are not compatible with our constitutional system."[36] Nonetheless, the spirit of nineteenth-century vagrancy laws remains alive, even flourishing. For example, the mayor of Atlanta recently proposed a local ordinance giving the police broad powers to arrest beggars.[37] The proposed law, like its nineteenth-century predecessors, called for fining or imprisoning the beggars arrested.[38] At the same time, New York City transit police were ejecting people for begging on the subway.[39]

Moreover, the notion that the poor should be forced to work retains its currency. One modern-day political scientist, addressing the problem of what he termed the "idle poor," recently commented in the *New York Times*: "[T]he nation needs a more authoritative social policy in which the needy are told how to live instead of merely being subsidized . . . . The best single cure would be to enforce the work requirement more fully."[40] Such views have led the federal government and many states to launch what has been described as "an increasingly strident attack on the very idea of welfare."[41] For instance, several states have recently begun to deny welfare to individuals they deem employable.[42]

One particularly revealing point in Stanley's essay is that several of the prominent Northerners who advocated vagrancy laws in their own states had earlier helped establish the labor system for African Americans in the Recon-

31. *Id.* at 140-41.
32. *Id.* at 129, 140.
33. *Id.* at 137.
34. *Id.* at 149.
35. Papachristou v. City of Jacksonville, 405 U.S. 156, 171 (1972).
36. *Id.* at 168.
37. James N. Baker, *Don't Sleep in the Subway: Beggars Beware: Cities Crack Down on Vagrants*, NEWSWEEK, June 24, 1991, at 26.
38. *The Homeless: Out of Sight, Out of Mind*, TIME, June 24, 1991, at 25.
39. Baker, *supra* note 37, at 26.
40. Lawrence M. Mead, *Jobs Programs and Other Bromides*, N.Y. TIMES, May 19, 1992, at A23.
41. Jason Deparle, *The Sorrows, and Surprises, After a Welfare Plan Ends*, N.Y. TIMES, Apr. 14, 1992, at A1.
42. *Id.* In Michigan, one woman cut from the welfare rolls died of a stroke, "apparently after trying to stretch out her blood pressure medicine." *Id.* at A18.

Imaged with the Permission of N.Y.U. Review of Law and Social Change

struction South.[43] Fearing that the former slaves would choose idleness to plantation work, federal agents issued edicts on vagrancy which required the former slaves to find jobs on pain of imprisonment or forced labor.[44] Upon returning home, the Northern reformers who had taken part in formulating the Reconstruction vagrancy laws applied what they had learned in the South to problems of poverty among the Northern working-class. As Stanley writes:

> The experience of war and emancipation . . . schooled Yankees in schemes for forcing beggars to work. The task of reconstructing the southern labor system and installing contract practices recast conceptions of dependency, obligation, and labor compulsion. Just as the ideal of free labor was transported south, so its coercive aspects — articulated in rules governing the freed people — were carried back north.[45]

The phenomenon of a legal regime formulated to govern one oppressed group which later spreads to oppress a more general population also plays a role in Lea VanderVelde's essay,[46] which focuses on nineteenth-century cases involving the right of actresses to quit their employment and work for other theaters.[47] As many lawyers may remember from first-year contracts class, the English Court of Chancery in *Lumley v. Wagner*[48] held that a female opera singer who breached her contract to sing could not be forced, through a positive injunction, to sing for her former employer. However, the Court ruled that the singer could be negatively enjoined from singing in any other opera house.

According to VanderVelde, American judges, sympathetic to the idea of free labor, initially rejected the *Lumley* rule, since the negative injunction, as opposed to simply contract damages, constituted "but a mitigated form of slavery."[49] In the 1870s, however, American courts began to accept *Lumley* in a series of lawsuits against actresses. By the turn-of-the-century, *Lumley* was firmly embedded in American law, severely limiting the job mobility of performers of both sexes.[50] VanderVelde argues, in essence, that the chink in the armor which allowed *Lumley* to wedge its way into American law was the Victorian-era backlash against the rights of women: "The free labor sentiment was in decline at the end of the nineteenth century, even in cases involving men. But actresses, by their precarious social position in a highly gendered

---

43. Stanley, *supra* note 29, at 146-47.

44. *Id.* at 144.

45. *Id.* at 147.

46. Lea S. VanderVelde, *Hidden Dimensions in Labor Law History: Gender Variations on the Theme of Free Labor, in* LABOR LAW IN AMERICA, *supra* note 12, at 99.

47. As VanderVelde writes: "Legal rules that subjugate one subpopulation can and do spread across legally and culturally constructed barriers to subjugate other groups as well." *Id.* at 100.

48. 42 Eng. Rep. 687 (1852).

49. VanderVelde, *supra* note 46, at 108 (emphasis omitted) (quoting Ford v. Jermon, 6 Phila. 6, 7 (1865)).

50. Vandervelde, *supra* note 46, at 105, 110-317.

Imaged with the Permission of N.Y.U. Review of Law and Social Change

society, served as a lightning rod for these forces [of conservatism] to touch down."[51]

The rule articulated in *Lumley* had little general impact on workers in the United States since it only applied to those relatively few employees privileged enough to have their services deemed unique.[52] The significance of American cases adopting *Lumley*, VandeVelde argues, is that the cases "serve as a barometer of how the free labor principle fared in different decades of the nineteenth century."[53] Tellingly, *Lumley* remains good law,[54] demonstrating just how little progress the "free labor principle" has made since the nineteenth century.

How did these repressive legal regimes from the past century manage to remain with us, at least in spirit, if not always in their original form? One answer is that the labor movement in this country (and its progressive allies) have lacked the political clout to eliminate them. That answer, however, just leads to the next question: why has the American labor movement been so weak? William Forbath, in an essay which attempts to discover the sources of this weakness,[55] zeroes in on what he believes to be the main culprit: the constitutional doctrine of judicial review.

Forbath makes his argument by comparing the history of the labor movement in the United States to that of Great Britain, a nation with a similar culture and legal tradition but where courts lacked the power to strike down legislation as unconstitutional. According to Forbath, the dominant view among American labor leaders following the Civil War, particularly among those affiliated with the short-lived Knights of Labor, was that unions should use reform politics as a positive tool to transform capitalist society.[56] However, whenever unions in the late nineteenth century managed to win even mild reform legislation, the courts almost always struck down the legislation as unconstitutional.[57]

Forbath argues that this experience eventually changed the outlook of the American labor movement. Faced with the apparent futility of reform

---

51. *Id.* at 118.
52. *Id.* at 119.
53. *Id.* at 101.
54. *See* EDWARD YORIO, CONTRACT ENFORCEMENT: SPECIFIC ENFORCEMENT AND INJUNCTIONS 360 (1989) ("Although specific performance will not be ordered against a breaching employee, a negative injunction may be granted in the proper circumstances to prohibit the employee from working for someone other than the aggrieved employer."); *see, e.g.*, Nassau Sports v. Peters, 352 F. Supp. 870 (E.D.N.Y. 1972) (enjoining hockey player from playing for competing league); MCA Records, Inc. v. Olivia Newton-John, 90 Cal. App. 3d 18 (1979) (affirming preliminary injunction prohibiting female singer from recording for any company other than plaintiff).
55. William Forbath, *Law and the Shaping of Labor Politics in the United States and England in*, LABOR LAW IN AMERICA, *supra* note 12, at 201. Forbath makes the same argument at greater length in LAW AND THE SHAPING OF THE AMERICAN LABOR MOVEMENT, *supra* note 11.
56. *Id.* at 210.
57. *Id.* at 211.

Imaged with the Permission of N.Y.U. Review of Law and Social Change

through politics, labor leaders such as Samuel Gompers, President of the American Federation of Labor (AFL), increasingly embraced the view — labeled "voluntarism" — that unions had to win their battles through strikes and collective bargaining rather than reform legislation.[58] But even conservative unionists like Gompers could not afford to ignore politics entirely since courts of that era often enjoined strikes, and only political action could produce legislation that might stem the flood of strike injunctions. Abandoning efforts to gain positive reform legislation, the AFL, through the 1920s, concentrated on establishing the right of workers to engage in strikes without being deemed outlaws by the courts. As Forbath writes, "as the number of antistrike decrees multiplied and the burdens of outlawry persisted, the AFL's political energies were riveted on gaining this indispensable — but negative, laissez-faireist — reform, and the AFL's voluntarist perspective hardened."[59]

In Britain, by contrast, judges, though just as hostile toward unions as their American counterparts, lacked the power to strike down positive reform legislation won by the labor movement.[60] In 1906, when pressed by British trade unions, Parliament enacted a statute which severely constrained the ability of courts to issue strike injunctions.[61] According to Forbath, such a political victory, which the courts could not take away, "lent enormous impetus and authority to the radicals and socialists who had led the battle for independent labor politics."[62] It also allowed labor to "focus upon other, positive reforms."[63] Soon thereafter, Forbath writes, British unions built the Labour Party, and while their American counterparts continued to fight simply for the right to strike, British unionists proceeded through political action to lay the foundations of the welfare state.[64]

While Forbath argues persuasively, his essay leaves certain questions unanswered: Given that judicial review of labor legislation in the United States created a tremendous obstacle to labor's goals, what made the union establishment react the way it did? Why, for example, under the same legal regime faced by AFL voluntarists, did New York City garment worker unions advocate socialism, or Western miners who joined the International Workers of the World, syndicalism? As Victoria Hattam writes in another essay in the volume, "[b]usiness unionism was by no means the only viable response to judicial recalcitrance. In fact, both socialists and the Wobblies advocated very different strategies for American labor. . . ."[65] One might also ask why after the 1930s, when courts ceased striking down labor legislation as unconstitu-

58. *Id.* at 212.
59. *Id.* at 213.
60. *Id.* at 214.
61. *Id.* at 220.
62. *Id.* at 221.
63. *Id.*
64. *Id.* at 222.
65. Victoria C. Hattam, *Courts and the Question of Class: Judicial Regulation of Labor under the Common Law Doctrine of Criminal Conspiracy, in* LABOR LAW IN AMERICA, *supra* note 12, at 44, 64.

Imaged with the Permission of N.Y.U. Review of Law and Social Change

tional,[66] did the American labor movement not abandon voluntarism and embrace plans to transform society through political action.

Joel Rogers' essay on the labor movement in post-World War II America[67] serves to address this latter question. Rogers contends that despite the gains of the 1930s and 1940s, organized labor, except in certain industries, never organized enough of the workforce to force employers to come to terms with unions rather than try to destroy them.[68] Unions also failed to mobilize American workers as a political force to achieve legislatively mandated benefits such as national health insurance and mandated vacation time.[69] In Rogers' view, these failures reinforced voluntarism: "[T]he failure to achieve classwide gains through the state sharpens concentration on achieving more particular gains in narrow arenas [and] increases the appeal of 'job control' versus 'political' unionism.... Once embarked on this trajectory, moreover, it is difficult to get off."[70]

Unions in sectors like manufacturing, transportation, and mining did achieve sufficient strength to reach an "accord" with management which produced stability for the employers and benefits for the unions' members.[71] Throughout the postwar period, however, structural changes in the economy caused these highly unionized sectors to dwindle in size.[72] Moreover, starting in the 1970s, the deterioration of the economy and increased international competition encouraged employers to launch an assault on unions, both in the highly unionized sector and elsewhere — an assault which continues to this day.[73] As a result of these factors, private-sector unionization in this country fell from thirty-eight percent in 1954, to twenty-four percent in 1978, to just twelve percent in 1989.[74]

Labor Law In America raises issues which may fuel debate among historians. For example, did nineteenth-century legal doctrines, such as that requiring a worker to work the whole contract term before receiving any wages, arise as innovations in response to the needs of American capitalism, or were

66. *See, e.g.*, West Coast Hotel Co. v. Parrish, 300 U.S. 379, 400 (1937) (upholding state minimum wage law as constitutional and overruling prior decisions which held to the contrary).

67. Joel Rogers, *In the Shadow of the Law: Institutional Aspects of Postwar U.S. Union Decline*, *in* LABOR LAW IN AMERICA, *supra* note 12, at 283.

68. *Id.* at 287.

69. *Id.* at 287-89.

70. *Id.* at 289.

71. *Id.* at 290-91.

72. *Id.* at 296-97.

73. *Id.* at 291-93, 296-97. According to Paul Weiler, employers in the 1980s engaged in "a widespread pattern of intimidation." On average, employers unlawfully fired one out of every twenty workers who supported a union during an organizing campaign. Paul Weiler, *Promises to Keep: Securing Workers' Rights to Self-Organization Under the NLRA*, 96 HARV. L. REV. 1769, 1781 (1983). Weiler reports that unfair labor practice charges filed against employers rose 750% from 1957 to 1980, and that a greater percentage of the charges filed in 1980 had merit. *Id.* at 1779-80, 1780 n.34.

Employers' increased willingness to hire permanent replacements for strikers constitutes another part of this assault on unions. *See supra* note 10 and accompanying text.

74. Rogers, *supra* note 67, at 288.

Imaged with the Permission of N.Y.U. Review of Law and Social Change

they merely manifestations of ancient legal regimes traceable back to medieval Europe?[75] The essays also suggest areas of future inquiry. One area which may be worth more study in the field of labor law history is the role of the labor lawyer. In his essay on the 1806 trial of Philadelphia cordwainers (shoemakers) for combining to form a union,[76] Robert Steinfeld notes that the lawyers who represented the cordwainers "held somewhat different views" on law and economic policy than did their clients.[77] Historians might explore further the past differences in views between (presumably) middle-class labor lawyers and their (presumably) working-class clients, and how such differences may have affected the rhetoric and strategies unions adopted.[78]

While one hopes that historians will mull over such issues, one also hopes that they will continue to keep the central problem in mind. Like the African elephant, the American union will soon face extinction if current trends continue.[79] And without unions, American workers will face further setbacks. We need to continue to ask how things got this way, so that we can start to figure out how labor can be saved.

---

75. Tomlins argues the former position, *see* Tomlins, *supra* note 23, at 86; Orren argues the latter, *see* Orren, *supra* note 14, at 169. Orren makes her argument at greater length in KAREN ORREN, BELATED FEUDALISM: LABOR, THE LAW, AND LIBERAL DEVELOPMENT IN THE UNITED STATES (1991).

76. Robert J. Steinfeld, *The Philadelphia Cordwainers' Case of 1806: The Struggle over Alternative Legal Constructions of a Free Market in Labor, in* LABOR LAW IN AMERICA, *supra* note 12, at 20.

77. *Id.* at 40.

78. Some such accounts do exist or are in progress. *See, e.g.*, STEVEN FRASER, LABOR WILL RULE: SIDNEY HILLMAN AND THE RISE OF AMERICAN LABOR 64-65, 163-64 (1991) (discussing the relationships of Hillman, president of the Amalgamated Clothing Workers Union, with Clarence Darrow and Felix Frankfurter); *see also* Gilbert J. Gall, *A Note On Lee Pressman And The FBI*, 32 LAB. HIST. 551 (1991) (discussing material for a forthcoming book on Lee Pressman, purported Communist and counsel to John L. Lewis, the CIO president who supported the Republican ticket in 1940).

79. *See* BNA DAILY LAB. REP., June 8, 1992, at A16 (according to Rutgers University economist Leo Troy, if current trends continue, only seven percent of private-sector workers will have union representation in 2000, the same percentage as had representation in 1900).

Imaged with the Permission of N.Y.U. Review of Law and Social Change