REVIEW

Has the NLRA Hurt Labor?

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The State and the Unions: Labor Relations, Law and the Organized Labor Movement in America, 1880-1960. Christopher L. Tomlins. Cambridge University Press, New York, 1985. Pp. xvi, 348. Cloth $39.50. Paper $12.95.

The past decade has seen a flowering of highly creative scholarship in labor history and labor law. Although scholars in these two disciplines occasionally refer to each other, their work has proceeded largely along independent lines. Yet these lines have been parallel, if unconnected. Much scholarship in both disciplines has been informed by revitalized traditions of radical analysis that have influenced a new generation educated in the late 1960s and early 1970s.

Born in 1951, Christopher L. Tomlins is part of this new generation. In *The State and the Unions*, he combines an excellent synthesis of recent work in labor history and labor law with a stimulating account of the debate in the 1930s over state intervention in labor relations. His analysis of the New Deal, based on original archival research, reveals key developments within the American Federation of Labor (AFL) and the National Labor Relations Board (NLRB). Readers interested in these subjects will be fascinated by his important and well-written book.

I. An Overview

The State and the Unions is much more than a presentation of original research and a useful synthesis of history and law. Iden-

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I appreciate the thoughtful comments on an earlier draft of this review by William Forbath, Patrick Gudridge, Laura Kalman, Stanley Katz, Karl Klare, and David Silberman.

tifying with the new radical critique of the liberal state, Tomlins attacks the "self-congratulatory complacency" of the theory of "industrial pluralism" that has dominated American labor scholarship since World War II (p. xii).[1] Industrial pluralists view the American system of labor law, especially the National Labor Relations Act[2] (NLRA) that stands as its centerpiece, as a brilliantly effective way of solving the conflicts between labor and management in an atmosphere that promotes industrial peace, stability, and democracy.

Tomlins, in contrast, argues that the American state, largely through its legal institutions, has conditioned the legitimacy of labor activity and collective bargaining on their effectiveness as "means to higher productivity and efficient capital accumulation" (p. xiii). Like the radical theorists on whom he relies,[3] Tomlins rejects a conspiratorial or instrumental model of the impact of business elites on the law. He does not believe that corporate capitalists consciously attempted to co-opt the American working class by engineering the passage of the NLRA. Nor, however, does Tomlins view the law as a formal and autonomous system uninfluenced by business interests. Rather, he accepts the increasingly prevalent radical concept of the "relative autonomy" of the state and its law from corporate capitalism. According to Tomlins, law—the language of the state—mirrors and helps reproduce the dominant political and economic system. The law is sufficiently autonomous to permit results inconsistent with the immediate interests of capitalists, but it is this very autonomy that enables law to be especially effective in preserving the capitalist system. Tomlins views the relationship and tensions between the state and the unions as a concrete example of the relative autonomy of law (pp. xii-xiv), although he does not elaborate explicitly either the theory or the operation of this concept after he introduces it in his preface.

Tomlins argues that the NLRA, while more favorable to workers and unions than prior law, continued the "contingent legiti-

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[1] All parenthetical page references are to Christopher L. Tomlins, The State and the Unions: Labor Relations, Law, and the Organized Labor Movement in America, 1880-1960 (1985).

[2] 29 U.S.C. §§ 151-66 (1982) (adopted in 1935).

[3] Tomlins cites Nicos Poulantzas and Fred Block as writers who have influenced his theoretical views (p. xiii). See, e.g., Nicos Poulantzas, Political Power and Social Classes (1973); Fred Block, The Ruling Class Does Not Rule, 33 Socialist Revolution 6 (1977); Fred Block, Beyond Relative Autonomy: State Managers as Historical Subjects, in Ralph Miliband and John Saville, eds., Social Register 227 (1980). Tomlins also incorporates perspectives from Isaac Balbus, Commodity Form and Legal Form: An Essay on the 'Relative Autonomy' of the Law, 11 Law & Society Rev. 571 (1977).

macy of collective labor action [that] has been a constant theme of the development, over the last hundred years, of a corporate capitalist polity in the United States" (p. xiii). He sadly concludes that labor's reliance on the state, and particularly on the NLRA and its subsequent interpretation by the NLRB and the courts, has produced a "counterfeit liberty" for workers and unions that may be "ultimately no more than the opportunity to participate in the construction of their own subordination" (pp. 326-28).

Oddly, Tomlins's conclusion is echoed in recent statements by Lane Kirkland, the President of the AFL-CIO. Criticizing decisions in which an NLRB dominated by appointees of President Reagan overturned precedents more favorable to labor interests, Kirkland has angrily and defiantly asserted that the American labor movement would be better off operating outside the legal framework established by the NLRA.[4] *The State and the Unions* makes clear that Kirkland's comments, though shocking to many of his contemporaries shaped by the ideology of industrial pluralism, invoke a venerable tradition of labor voluntarism. This tradition, which rejected any role for the state in labor relations and stressed the importance of collective activity by workers, existed throughout American history before being submerged by labor's reliance on the NLRA. Indeed, AFL leaders in the 1930s worried that the NLRA would threaten the principle of voluntarism and produce precisely the debilitating effects that Kirkland and Tomlins now lament. These AFL leaders resisted provisions of the proposed legislation, as well as many subsequent NLRB interpretations of the Act, that they believed were at odds with traditional union voluntarism.[5]

Tomlins is particularly effective in examining the debate over voluntarism in the context of the NLRB's definition of an appropriate bargaining unit for union representation. Through his creative integration of original research with theoretical analysis, he has infused new excitement into what had previously been a rather technical subject. Tomlins argues that by giving the NLRB, a state agency, the discretion to determine the appropriate bargaining unit, the NLRA destroyed the previous power of unions to decide

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[4] Cathy Trost and Leonard Apcar, AFL-CIO Chief Calls Labor Laws A "Dead Letter," Wall St. J. 8 (Aug. 16, 1984).

[5] The AFL nevertheless supported the NLRA enthusiastically (p. 141). Yet similar suspicions about government intervention in labor relations led some groups on the left, such as the Communist Party of the United States and the American Civil Liberties Union, to oppose the NLRA. See Cletus E. Daniel, The ACLU and the Wagner Act (1980).

for themselves where and how to organize. Most prior radical critiques of modern American labor law have asserted that the NLRA has been undermined by unnecessarily and sometimes unjustifiably restrictive decisions of the NLRB and the courts.[6] Tomlins suggests, in contrast, that by encouraging reliance on the law and the state as a substitute for the tradition of labor voluntarism, the passage of the statute itself doomed the American worker. Rather than speculating about how a different interpretation of the NLRA might have produced more progressive results, Tomlins contends that the position of workers deteriorated when they allowed law to replace voluntarism as the means of achieving their aspirations.

By contrasting labor voluntarism with reliance on the state, Tomlins suggests his own answer to the familiar and fundamental debate about why a more radical labor tradition did not emerge in the United States. He clearly believes that workers' reliance on the state essentially precluded more radical possibilities. Regrettably, however, Tomlins does not reflect on whether it would have been possible to preserve a successful version of labor voluntarism during and after the New Deal. His almost exclusive focus on the *law* in the period beginning with the New Deal prevents him from making a convincing argument that reliance on the state has been the major factor inhibiting the realization of a more radical vision of labor relations.

Many factors other than the law help explain the current position of unions and workers in American society. But Tomlins barely refers to them; he fails to examine sufficiently the relationships between law and society or the ways in which law is both relative and autonomous. The creative synthesis of legal and historical materials that Tomlins applies so effectively to his analysis of the nineteenth century is strangely missing from his account of labor relations beginning with the New Deal, the primary subject of his book and the focus of his original research. His discussion of purely legal doctrine, moreover, is marred by his failure to acknowledge any significant respect in which contemporary interpretation of the NLRA has or could have helped workers and unions.

An effective demonstration of the relative autonomy of law in the context of contemporary American labor relations would have required a different book than the one Tomlins wrote. The book he did write cannot sustain the ambitious theoretical conclusions that

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[6] See James B. Atleson, Values and Assumptions in American Labor Law (1983); Karl E. Klare, Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness, 1937-1941, 62 Minn. L. Rev. 265 (1978).

he summarily presents in his preface and final chapter. Yet this book does demonstrate the value of integrating recent radical scholarship in labor law and labor history and illustrates, through its highly original and effective analysis of the debate over the appropriate bargaining unit, the dangers of reliance on the state and the weaknesses of industrial pluralism.

II. A Fusion of Historical and Legal Analysis

Tomlins begins his book by relating several familiar developments. He describes the growth of the corporation and of its control over workers; the changing legal status of the corporation from a creature of the state, regulated in the public interest, to an autonomous entity with the rights and privileges of a natural person; the extent of labor unrest in the late nineteenth and early twentieth centuries; and the hostility of the law to union goals and activities—from application of the theory of criminal conspiracy to the development and widespread use of the labor injunction. Drawing on recent scholarship by labor historians,[7] Tomlins also contrasts the increasingly incompatible interpretations, offered by employers and journeymen workers, of the republican heritage of the American Revolution. Whereas employers appealed to notions of liberty and independence to justify entrepreneurial freedom from restraints, journeymen argued that the virtuous society for which the Revolution had been fought required enough substantive equality to guarantee economic and social independence for all citizens. Influenced by the associational traditions of their trades, the journeymen reinterpreted revolutionary ideology in largely collective terms (pp. 34-36).

Brilliantly integrating the conclusions of these historians with his analysis of the developing law, Tomlins observes that the individualism of entrepreneurial republicanism fed into the emerging legal doctrine of criminal conspiracy. Collective efforts by journeymen to regulate labor and wages sufficiently to preserve meaningful independence became, according to this legal doctrine, an attack against the individual rights of employers and other

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[7] See especially Sean Wilentz, Chants Democratic: New York City & the Rise of the American Working Class, 1788-1850 at 14-15, 94-96, 141-42, 220, 242-48, 296 (1984); Sean Wilentz, Artisan Republican Festivals and the Rise of Class Conflict in New York City, 1788-1837, in Michael H. Frisch and Daniel J. Walkowitz, eds., Working-Class America 37, 37-38, 49-53, 60-61, 64-65 (1983); Eric Foner, Politics and Ideology in the Age of the Civil War 58-59 (1980). William E. Forbath, The Ambiguities of Free Labor: Labor and the Law in the Gilded Age, 1985 Wis. L. Rev. 767, traces the growing divergence of these interpretations of republicanism from the Reconstruction era until the 1890s.

journeymen to contract freely with each other. In an extremely original and provocative interpretation of the famous labor law case, *Commonwealth v. Hunt*,[8] Tomlins convincingly observes that Judge Shaw's influential decision, which is best known for redefining the law of criminal conspiracy in ways that expanded the permissible scope of union activities, was actually consistent with the traditional individualistic emphasis of the common law.[9]

A. The Transformation of the AFL and the Law in the Early Twentieth Century

The journeymen's collective interpretation of republicanism, Tomlins maintains, continued to influence the emerging American labor movement throughout the nineteenth century. It even influenced Samuel Gompers, the first president of the AFL, whose name eventually became synonymous with the narrow economic goals often labelled "bread and butter" or "business" unionism.[10] According to Tomlins, Gompers and the AFL fused this version of republicanism with a newer social democratic collectivism imported from Europe. In responding to judicial attacks on the "coercive" activities of labor unions, Gompers and the AFL frequently echoed the arguments of their predecessors and defended the associational traditions of the labor movement as essential to the economic freedom on which republican institutions depend. Gompers frequently treated attacks on unions as if they were directed

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[8] 45 Mass. 111 (1842).

[9] Tomlins accepts the conventional interpretation that, in contrast to earlier decisions holding combinations of journeymen and strikes unlawful under any conditions, Shaw declared them to be criminal conspiracies only when done for an unlawful purpose. And Shaw found no unlawful purpose in either the combination or the strike in *Hunt*. Yet Tomlins perceptively adds to this legal analysis by drawing on the scholarship of recent labor historians who have analyzed the transition of labor societies from prerevolutionary corporatist organizations, requiring membership by all members of a trade, to postrevolutionary voluntarist ones. The journeymen in *Hunt*, Tomlins points out, combined and struck only to regulate the activities of those who had freely joined their association, rather than to coerce other journeymen in their trade who had not become members. This distinction between voluntary and coercive societies, Tomlins persuasively asserts, allowed Shaw to find a lawful purpose in *Hunt* without deviating from the individualism of the common law (pp. 40-44). When unions tried to enforce their associational traditions by regulating work rules and jurisdictional issues for an entire craft, by contrast, courts routinely found that they had engaged in illegal "coercion" or "oppression" (pp. 44-51).

[10] Other recent labor historians reinforce Tomlins's somewhat revisionist view of Gompers. See John H. M. Laslett, Samuel Gompers and the Rise of American Business Unionism, in Melvin Dubofsky and Warren Van Tine, eds., Labor Leaders in America 62 (1987); Nick Salvatore, Introduction to Samuel Gompers, Seventy Years of Life and Labor xi (1984). In his autobiography, id. at 133-34, Gompers himself hints at this transformation in his thinking.

against republicanism itself (pp. 32-33, 52, 58-64, 74-75). Yet these views remained inconsistent with the individualistic common law, leaving American unions "in a legal twilight zone" (p. 33).

During the decades between 1900 and 1920, unions affiliated with the AFL largely abandoned the broad social goals of their associational traditions for a redefined voluntarism that accepted the reality of corporate capitalism (pp. 61, 74-75, 77). Tomlins, somewhat narrowly, attributes this dramatic change to the decline of craft unionism and the extension of national controls over local unions (pp. 68-74). Beginning in these years, unions conceded substantial power to management and sought only to achieve economic goals through formal collective bargaining agreements with employers (pp. 81-82).

Corresponding to this important change within the AFL, the courts, particularly after World War I, altered their legal treatment of unions. For many years, courts had reasoned that unions, as voluntary associations, lacked legal personality and could not enforce trade agreements. But by the 1920s, courts in many jurisdictions had come to consider unions, like corporations, to be separate legal entities distinct from their members, with their own legal rights and obligations (pp. 83-91). The Norris-LaGuardia Act of 1932[11] incorporated this developing common law into a federal statute by allowing unions as organizations to pursue a wide range of economic activity largely unchecked by legal constraints (pp. 102, 117).

This new recognition of unions as autonomous legal entities, Tomlins claims, lasted only until the NLRA transformed American labor law by giving a central role to the state. After World War I, especially after the widespread labor unrest of 1919-20, employers increasingly accepted the necessity of formal labor relations with their employees. Employers continued, however, to resist relationships with independent unions. Instead, they established and dominated shop committees, employee representation plans, and company unions. These developments presented a terrible dilemma for the AFL. The employers' generally successful avoidance of independent unions prompted these unions to look to the state for assistance in compelling employers to deal with them. Yet unions feared the power of the state, which threatened their independence and had often been exercised against unions and workers in the past (pp. 91-95).

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[11] 29 U.S.C. §§ 101-15 (1982).

B. The Principle of Majority Rule and the Determination of the Appropriate Bargaining Unit

Tomlins considers the development of the principle of majority rule by the National Labor Board (NLB), an important predecessor of the NLRB, as the decisive step in the evolution of labor law and collective bargaining policy during the New Deal. Section 7(a) of the National Industrial Recovery Act (NIRA),[12] a cornerstone of New Deal legislation, guaranteed employees the right to organize and to bargain collectively. Yet neither employers nor the administrators responsible for enforcing this law accepted the AFL's interpretation of these guarantees as requiring employers to bargain with independent unions. The resulting strikes and other industrial unrest led to the creation of the NLB in August 1933 to settle disputes under section 7(a). Initially, the NLB limited itself to mediation, allowing employees themselves to decide how they would choose their representatives. Extraordinary employer intransigence, however, soon prompted the NLB, over the opposition of its employer members, to establish the principle of majority rule. This principle required the employer to bargain only with the representative chosen by the majority of employees in a particular electorate. Employers could no longer bargain with unions representing minority groups (pp. 103-15).

The AFL happily endorsed majority rule as an effective weapon against widespread employer refusals to deal with its affiliates. For Tomlins, however, majority rule reintroduced the concept of a union as a mere agent of the employees it was elected to represent, a model similar to the one used by the common law in the nineteenth century to declare various union activities coercive and oppressive (pp. 115-16, 183-84, 187). Moreover, unions traditionally had been able to determine for themselves the basis for seeking (and occasionally obtaining) recognition from an employer. Customs within a particular trade and mutually accepted jurisdictional divisions often provided the basis for recognition. Sometimes employers recognized unions even when the unions did not have the majority support of the employees (pp. 118, 237-38).

Majority rule introduced tension between this jurisdictional or "property" right of unions and the emerging individual or "civil" right of employees, guaranteed by the state, to determine their own union representatives. This tension, dormant during the exis-

[12] 15 U.S.C. §§ 701-12 (enacted in 1933). See generally Bernard Bellush, The Failure of the NRA (1975).

tence of the weaker NLB, exploded into conflict after Congress passed the NLRA and created a new NLRB designed to have power that its predecessors lacked. When the NLRB began to enforce majority rule, Tomlins concludes, the union movement lost substantial control over its own destiny and ceded even the definition of its legitimacy to the state (pp. 135, 149).

In theory, majority rule does not foreclose a union from choosing the electorate in which it organizes and attempts to win a majority. But the NLRA gave the new labor board the authority to determine an appropriate bargaining unit in which to hold the representation election. Tomlins frequently implies, moreover, that the NLRB's power to select the electorate and the political model of representation inherent in the principle of majority rule are closely related. Under this view, the individual right of employees to choose a representative by majority vote is rendered meaningless whenever the voting occurs in an artificial electorate (pp. 102, 135).

Tomlins indicates that the NLRB's power to select an appropriate bargaining unit, more than the principle of majority rule, undermined traditional union claims to representation based on custom and jurisdiction. A bureaucratic arm of the state, not the union movement itself, now had control over labor organization in the United States. The AFL and other observers of labor relations recognized the importance of this change even before the NLRA became law. Commenting on the the initial version of the NLRA, Wallace Donham of the Harvard Business School told the Senate Committee on Education and Labor that selection of an appropriate bargaining unit by the NLRB "means State control over trade union organizations, jurisdictions, elections; indeed, the death of trade unionism as we know it" (p. 123).

Union leaders raised analogous concerns. In testimony before the Senate Committee, they emphasized that government intervention in labor disputes should be limited to ensuring that employers dealt with independent unions. Specific issues, including determination of an appropriate bargaining unit, should be worked out in negotiations between labor and management, not by a government agency (p. 123). The general counsel of the AFL proposed various amendments to the bill that would have preserved traditional union autonomy to determine the structure of the bargaining unit and even to make closed shop agreements with employers without a prior demonstration of majority support (pp. 138-39). Despite their criticisms of the bill, however, unions enthusiastically supported its passage even when their proposed amendments failed.

The prospect of collective bargaining enforced by the government, particularly in industries dominated by recalcitrant employers and their company unions, overcame union reservations about ceding power to the state (p. 141).

C. The Impact of the NLRA and the NLRB on the American Labor Movement

Members and staff of the first NLRB, established by President Roosevelt in 1934 and superseded by a new Board with the enactment of the NLRA in 1935, vigorously opposed these suggested restrictions on government authority. Chastened by the weaknesses of the NLB and by their own limited power, they maintained that a strong and independent administrative agency was essential to enforce the substantive rights of employees contained in the proposed legislation. The victory of this position in Congress, Tomlins asserts, meant that the new NLRB would be able to determine the structure of labor representation in light of its own interpretation of the proper public policy for labor relations (pp. 136-40).

According to Tomlins, the new NLRB took full advantage of this freedom. The majority of its members, he observes, believed that the main purpose of the NLRA was to remove industrial conflict from American life. By substituting rights enforceable at law for economic struggles between employers and employees, the agency could achieve industrial peace. The Board's commitment to "a professional legal discourse," Tomlins insists, "enabled law and order to penetrate and transform a hitherto closed realm of social and economic life" (pp. 158-59). Any limitations on NLRB power, such as deference to traditional union practices for determining the unit for organization and bargaining, would jeopardize the Board's responsibility to promote industrial peace.

This interpretation of the NLRA "reconstituted collective bargaining" into a public rather than a private function (p. 147). It also transformed labor unions from autonomous entities that had finally obtained legal status to "quasi-public instrumentalities whose function was to bargain within the parameters of a model of labor relations defined by a state agency" (p. 147). The customs that had governed unions' relations with employers, employees, and each other had become potential impediments to the realization of the federal goal of industrial peace (p. 147).

The AFL almost immediately challenged the NLRB's emerging understanding of its role, particularly in the context of determining appropriate bargaining units. "Better to fight the antago-

nisms of the employers against organizations of labor," one AFL leader argued, than to let the NLRB destroy "the power and the machinery and the right of labor to settle its own disputes within itself" (p. 144). The emerging rivalry between the AFL and the insurgents who eventually broke away and formed the Committee for Industrial Organization (CIO) provoked the AFL's most significant opposition to NLRB policy regarding the appropriate bargaining unit (pp. 143, 150). Initially, the NLRB stayed out of jurisdictional disputes between unions affiliated with the AFL, and did not disrupt existing patterns of organization. Yet by 1937, as the AFL and the CIO both expanded their organizing activities, the NLRB felt compelled to intervene in contested cases. Limiting itself at first to disputes between unions affiliated with the competing federations, the NLRB soon expanded its review to include disputes between affiliates of the same federation, and it generally gave no weight to private jurisdictional agreements between unions (pp. 162-64).[13] This NLRB position, Tomlins maintains, underlines the transformation of unions from autonomous entities with rights of their own to mere agents of employees selected by an agency of the administrative state (pp. 149, 187).

Tomlins concludes that by 1938 the AFL's attack on the NLRB began to transcend the specific context of its rivalry with the CIO and to focus on the ideological issues raised by the Board's threat to its traditions of voluntarism (pp. 150, 160). These broader concerns surfaced during congressional consideration of proposed amendments to the NLRA, prepared by the AFL, which would have restricted the NLRB's discretion to determine bargaining units and to invalidate existing collective bargaining agreements on grounds of public policy (pp. 182-83). During congressional hearings on this proposal, the AFL's general counsel claimed that when the AFL in 1935 supported legislation intended to force recalcitrant employers to bargain with independent unions, it had

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[13] Tomlins perceptively observes that the NLRB's famous decision in Globe Machinery, 3 NLRB 294 (1937), which held that the appropriate bargaining unit was the craft unit favored by the AFL rather than the industrial unit supported by the CIO, was not the broad victory for the AFL that many assumed. Although upholding the AFL's position in this particular case, the NLRB made clear that it retained the power to determine an appropriate unit without regard to traditions of union organization, and that it might in other circumstances determine an industrial rather than a craft unit to be more appropriate. The next year the NLRB did just that, despite AFL claims that the majority of employees in a craft unit within the industrial unit supported the AFL. In his discussion of *Globe Machinery*, as in his earlier treatment of *Commonwealth v. Hunt*, Tomlins persuasively argues that a legal decision perceived to protect the autonomous traditions and activities of unions actually reinforced legal doctrines hostile to them (pp. 165-68).

not expected application of the statute to require the labor movement to surrender "its philosophy of 'voluntarism,' its right to regulate and conduct its own internal affairs, and to maintain or change its form and structure as it deems wise and proper without government intrusion" (p. 184). The AFL Executive Committee claimed that the NLRB was establishing "a principle which organized labor has opposed for over fifty years, namely dictating by governmental decree the form of organization a group of workers shall select" (p. 184).

The vigorous opposition of the NLRB to the AFL's proposal, Tomlins points out, highlights the Board's conception of the meaning of the NLRA and of its own function in interpreting it. In its report to the House Committee on Labor, the Board maintained that "the interest of labor organizations in the outcome of a representation proceeding . . . should yield to the superior interest of the public in the prevention of industrial strife" (p. 187). The NLRB emphasized the role of the union as an agent of employees rather than as a possessor of rights, adding that even the rights of employees to associate freely and select a union as their agent must be subject to the Board's determination of the general public interest (p. 187).

The AFL's proposed amendments to the NLRA hardly received support from within the union movement. The CIO, which grew out of opposition to the AFL's traditions of organizing and which benefited from the NLRB's intervention in jurisdictional disputes, actively opposed the amendments (p. 187). Even the AFL's own affiliates attacked them. Not simply concerned that any changes in the NLRA might lead to more dangerous ones, the AFL affiliates had begun to accept what the CIO unions had always recognized—the public ordering enforced by the NLRB had provided substantial legal support in their disputes with employers. The metaphysics of voluntarism, however attractive in the abstract, could not compare with this tangible benefit (pp. 187-95).

Under these circumstances, it is not surprising that the AFL's proposed amendments failed. The leadership of the AFL found itself isolated within its own ranks. Its attempt to preserve autonomy for the labor movement beyond the tentacles of the administrative state created by the New Deal was, in Tomlins's words, "the final flourish of a decaying voluntarist ideology" (p. 195).

The unsuccessful attempt by the leadership of the AFL to amend the NLRA, however, did bring about some organizational benefits. President Roosevelt hoped to diffuse pressure to amend the NLRA by appointing William Leiserson, a leading industrial

pluralist, to the NLRB in 1939. Under Leiserson's influence, the Board began to develop policies more favorable to the institutional interests of unions at the expense of the individual rights of employees. The inability of unions to control the activities of their members, Tomlins asserts, provided the impetus for this change of policy. The Board increasingly viewed unions as potential allies in achieving the goal of industrial peace. Stronger unions, the Board reasoned, could police and restrain rank-and-file unrest (pp. 198-99).

Tomlins claims that the NLRB, pursuing its new policy of enlisting unions in the service of industrial peace, began to accept the AFL's view that union traditions should determine the structure of an appropriate bargaining unit (pp. 221-27). The Board's development of the "contract bar," which prevented employees from challenging the majority status of a union even during the extension of an existing collective bargaining agreement, further supported incumbent unions while restricting the rights of individual employees to choose their own representatives (p. 233). By limiting the closed shop contract, the NLRB preserved some protection for the rights of individual employees. But Tomlins concludes that the thrust of Board decisions after Leiserson's appointment subordinated employee rights to union interests in order to secure the contractual stability that contributed to industrial peace (p. 237).

Board and court decisions confining the scope of employee concerted activity protected by the NLRA, Tomlins maintains, complemented this subordination of individual rights to contractual stability. Allowing employers to punish spontaneous worker activity—such as sitdowns, slowdowns, and wildcat strikes—helped channel workers into more conventional union behavior that would be more likely to promote industrial peace (pp. 238-43). According to Tomlins, these developments undermined the basic protections for individuals guaranteed by the NLRA (p. 243). The organized labor movement, he emphasizes, did not resist this "thermidor in employee rights" (p. 241). Even the CIO, despite its early reliance on militant tactics that the Board and the courts were now declaring unprotected, "had quickly learned to prefer the security which accompanied institutionalization and bureaucratic routine to the heady uncertainty of spontaneous rank-and-file action" (p. 242).

Tomlins views the transformation of NLRB policy that dates from Leiserson's appointment as an accommodation in legal theory between the innovations of the NLRA and the principles of the common law that prevailed prior to the Act's passage. Strengthening the power of unions returned to them some legal rights as enti-

ties that they had enjoyed under the common law; the Board no longer treated them simply as agents of employees (p. 237). Tomlins concedes that the AFL never fully regained its traditions of voluntarism (pp. 241-42). But he maintains that the Board's increasing emphasis on the role of unions in promoting industrial peace through the negotiation of enforceable collective bargaining agreements again placed the unions in the position of principals, while reducing the employees to relatively passive and impotent beneficiaries (p. 237).

For Tomlins, the New Deal was the climax of the history of labor relations in the United States, and subsequent developments have been merely the predictable *dénouement*. He interprets the Taft-Hartley Amendments to the NLRA,[14] passed by a Republican Congress in 1947 over President Truman's veto, as an extension of the collective bargaining policy of the New Deal—not as the reactionary break with the past that many have perceived them to be (pp. 250-51, 280-81, 299).[15] Although conservative members of Congress and business groups tried to repeal the NLRA (pp. 247-50), Tomlins insists that the Taft-Hartley Amendments did not accomplish what these conservatives wanted. In large part, the amendments simply transposed prior NLRB decisions into legislation. To the extent that the amendments seemed to alter the NLRA, the Board was generally able to neutralize them through subsequent weakening interpretations (p. 285). Tomlins concedes that several amendments, including those outlawing jurisdictional strikes and secondary boycotts, confined unions more strictly within existing collective bargaining structures and prevented them from penetrating additional aspects of the employment relationship. But in his view, these admittedly severe restrictions enabled the Taft-Hartley Amendments to entrench rather than to disrupt the pluralist model of stable collective bargaining as the road to industrial peace (pp. 299-300, 303-04). Subsequent NLRB and court decisions, Tomlins concludes, only furthered this process (pp. 304-26).

III. A Critique

Tomlins's provocative account of the relations between the

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[14] Labor Management Relations Act of 1947, 29 U.S.C. §§ 141-88 (1982).

[15] As Tomlins acknowledges, other scholars have recognized this continuity. See, e.g., Arthur McClure, The Truman Administration and the Problems of Postwar Labor, 1945-48 at 242 (1969); Philip Ross, The Government as a Source of Union Power 148 (1965); Clyde W. Summers, Politics, Policy Making and the NLRB, 6 Syracuse L. Rev. 93, 99-100 (1954).

state and the unions itself raises several basic questions about his conclusions. Tomlins focuses on the collective bargaining policy of the New Deal, and particularly on the role of the NLRA in conditioning the legitimacy of labor activity. But his description of the transformation of organized labor between 1900 and 1920 from an ambitious social movement to a narrow economic one seems much more significant. Imbued with the broad collective values amalgamated from its republican traditions and European social democratic thought, the AFL as late as the turn of the twentieth century saw itself as the means by which labor would transform society. By the 1920s, however, it had accepted corporate capitalism and had limited itself to a redefined voluntarism that sought, through collective bargaining agreements with employers, to obtain greater economic benefits for employees. The dramatic constriction of labor's own purposes in the early twentieth century, probably influenced by a hostile judiciary and the use of police and military power against the collective activities of workers,[16] overshadows whatever role the state may have had later in limiting the efforts of unions and workers to achieve their goals. Thus, Tomlins's own evidence indicates that subsequent legal developments during the New Deal were significantly less important than he maintains, and that the current position of labor must be traced to its own internal development as well as to the intervention of the state.

Even with respect to the New Deal period on which he concentrates, Tomlins makes somewhat inconsistent arguments. In discussing NLRB decisions in the years immediately following the passage of the NLRA, Tomlins bemoans the decline of labor voluntarism at the hands of the administrative state. In legal terms, unions lost the status they had finally won as autonomous entities with legal rights of their own and became reduced to mere agents of the employees they represented. The triumph of the civil rights of individual employees over the jurisdictional or property rights of unions, Tomlins suggests, made the achievement of labor goals less likely. When he discusses NLRB decisions after the appointment of Leiserson in 1939, however, Tomlins reverses his complaint. He faults the NLRB for entrenching unions at the expense of the indi-

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[16] I am grateful to William Forbath for directing my attention to the hostile state as an important factor in understanding the constriction of labor's goals. Tomlins himself hints at but does not develop this point (pp. 60-61). See Laslett, Samuel Gompers, in Dubofsky and Van Tine, eds., Labor Leaders at 82 (cited in note 10) (labor defeats resulting from government intervention on behalf of employers taught Gompers that accommodations with employers must be made at the workplace).

vidual rights of employees that lie at the core of the NLRA.

Tomlins cannot have it both ways. As his own book repeatedly illustrates, the collective strength of unions requires some restrictions on the individual rights of workers. There are many possible ways to balance collective and individual interests, but in any accommodation something must give. Rather than confront this issue, Tomlins simply objects to virtually everything the Board did.

Tomlins does, of course, have an underlying objection to all Board and court decisions interpreting the NLRA. Whatever legal theory they used, Tomlins maintains, these decisions were guided by the view that Congress passed the NLRA primarily to promote the public policy of industrial peace. This public policy is the constant villain of *The State and the Unions*. The promotion of industrial peace through law, according to Tomlins, aids productivity and capital accumulation while suppressing more voluntary and militant actions by which workers are better able to achieve their own interests. In allocating power between unions and individual employees, Tomlins apparently approves the balance that would favor his view of a better society. Tomlins is less interested in the legal issue of whether a union should be treated as a legal entity or as an agent of employees than in the practical issue of whether unions or individual employees are more likely to challenge the existing economic and political order, an issue he never really resolves.

Tomlins would have been more convincing had he confronted more directly the Board's consistently conservative interpretation of the Act's purposes. Tomlins implies that other constructions of the NLRA were not available in the 1930s. Yet the introductory "findings and policies" of the NLRA stress not only the importance of "removing certain recognized sources of industrial strife and unrest," but also the goal of "restoring equality of bargaining power between employers and employees."[17] Nor does Tomlins explore the possibility that the two consecutive legal rationales used by the Board, while inconsistent with each other, had progressive as well as conservative implications. State enforcement of the individual rights of employees against the power of their unions could encourage rank-and-file militancy, just as state support of powerful unions at the expense of some individual rights could strengthen labor opposition to powerful employers. Would either employees or unions have taken advantage of these opportunities had they been

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[17] 29 U.S.C. § 151.

presented? Given the significance he attributes to the New Deal as a crucial turning point in American labor history and his dismay at the subsequent course of labor relations in the United States, it would have been interesting for Tomlins to have reflected about whether alternative roads might have been taken during the 1930s.

Substantial evidence, moreover, undermines Tomlins's basic assertion that the public policy of industrial peace was the fundamental factor guiding Board decisions on majority rule and unit determinations. Staff members of the original NLRB thought that their primary objective in adopting majority rule was to strengthen weak unions rather than to achieve stability. Thomas Emerson, who was an attorney on the NLRB staff, maintained that the development of majority rule must be understood as a response to a situation in which "unions as a whole were in a very inferior, weak, and rather precarious position," industry was largely antiunion, "and the whole idea of the legitimacy of a union representing employees was not accepted." In these circumstances, Emerson argued, "it became even more necessary to subordinate whatever rights of the individual might be involved to the rights of the union."[18] Similar considerations led many on the staff of the Board to favor large industrial over small craft bargaining units. Allowing more than one unit in a single plant or company, they feared, would encourage minority groups to seek recognition and endanger majority rule, thereby undermining "labor solidarity."[19]

Tomlins accurately describes the tendency of the NLRB after the appointment of Leiserson to support union interests in stable collective bargaining relationships and to deny protection to various forms of concerted activity by individual employees. But he may have overstated the extent to which these developments serve as evidence of the legal pacification of American labor. One scholar of labor relations in the 1940s persuasively concludes that managers, though bothered by wildcat strikes and other militant rank-and-file attempts at control in the workplace, were much more concerned about the threat to their prerogatives from the orderly process of collective bargaining with bureaucratic unions.[20]

In revealing the dangers of labor's reliance on the state, Tomlins seems to romanticize the lost potential of AFL voluntarism, even as redefined simply to seek better economic benefits for workers within the accepted structure of corporate capitalism. It is un-

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[18] James A. Gross, The Making of the National Labor Relations Board 96 (1974).

[19] Id. at 98-99.

[20] Howell John Harris, The Right to Manage 67 (1982).

clear how progressive a force the AFL would have been in the 1930s had the law not restricted its traditional methods of organization by imposing majority rule and administrative determinations of bargaining units. Most labor historians consider the insurgents in the CIO who broke away from the timid leadership of the AFL to be the real labor progressives of the 1930s. The CIO, with the substantial assistance of NLRB rulings declaring industrial rather than craft units to be appropriate bargaining units, organized vast numbers of industrial employees previously ignored by the AFL.[21] Indeed, many staff members of the NLRB considered the AFL to be the "company union" of the 1930s because it attempted, often successfully, to convince employers to recognize it as an alternative to the allegedly communist and radical CIO.[22] As the Chairman of the NLRB bluntly told the AFL convention in 1937, the NLRA did not mean that "it shall be an unfair labor practice for an employer to coerce his employees to join a union unless he coerces them to join an American Federation of Labor Union."[23] And the AFL, as part of its efforts to restrict the power of the NLRB through amendments to the NLRA, entered into alliances with both employers and conservative members of Congress.[24]

Tomlins accurately observes that unions accepted the acknowledged risks of state intervention in labor relations not just in 1934 and 1935, when the NLRA was first debated and passed, but in 1939, when some of these risks had become realities. Most union leaders, Tomlins concedes, were willing to exchange voluntarism for the advantages of legal enforcement of the rights to organize and bargain collectively. However, unlike other labor historians who share his view that the New Deal collective bargaining policy fostered government intervention and public accountability that

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[21] See, e.g., Irving Bernstein, A History of the American Worker: Turbulent Years 432-634, 653-56 (1970); Walter Galenson, The CIO Challenge to the AFL 610-15 (1960); Robert H. Zieger, American Workers, American Unions, 1920-1985 at 41-55 (1986). Although Tomlins has effectively argued that the AFL's role as a progressive force in the 1930s has been underestimated, he concedes that the CIO organized the predominantly semiskilled and unskilled workers in the mass production industries, where the AFL had a record of vacillation and failure. Christopher L. Tomlins, AFL Unions in the 1930s: Their Performance in Historical Perspective, 65 J. Am. Hist. 1021, 1033-34 (1979).

[22] Gross, Making of the NLRB at 248 (cited in note 18).

[23] Id. at 250.

[24] James A. Gross, The Reshaping of the National Labor Relations Board 67-68, 75-76, 108 (1981). According to Gross, these alliances continued even after the AFL had regained the initiative in its conflict with the CIO. Id. at 263.

restricted the scope of union and worker activity,[25] Tomlins refuses to recognize that the new role of the law introduced by the NLRA was liberating as well as cooptive.

The vigorous enforcement of the NLRA in the 1930s helped unions organize the very industries that had successfully resisted them in the past.[26] The NLRB's orders in unfair labor practice cases, especially those requiring reinstatement and back pay to employees discharged for union activities, alleviated worker fears of discrimination by employers. The Board effectively eliminated the company unions that had plagued the organized labor movement before the enactment of the NLRA. Tomlins's preference for spontaneous action notwithstanding, the orderly procedures of the NLRA helped unions avoid the often suicidal organizational strikes that had previously crippled them.[27] Furthermore, the contractual stability that Tomlins disparages provided legally enforceable rules limiting arbitrary employer actions and protecting job seniority.[28] Union leaders were not as misguided as Tomlins suggests in their acceptance of admittedly flawed state intervention. Tomlins is persuasive in attacking the paean to American labor relations popularized by the industrial pluralists. But he is unconvincing when he concludes his book by asserting unequivocally that "a counterfeit liberty is the most that American workers and their organizations have been able to gain through the state" (p. 328).[29]

Tomlins continues his one-sided approach in his discussion of

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[25] See David Montgomery, Workers' Control in America 165 (1979); David Brody, Workers in Industrial America 143-44 (1980).

[26] Montgomery, Workers' Control at 165 (cited in note 25).

[27] Brody, Workers in Industrial America at 100-02 (cited in note 25).

[28] Montgomery, Workers' Control at 156, 165 (cited in note 25); Zieger, American Workers at 157-58 (cited in note 21).

[29] A provocative essay by the great English scholar, R. H. Tawney, stands in fascinating contrast to Tomlins's analysis. R. H. Tawney, The American Labor Movement and Other Essays (J. M. Winter ed. 1979). Tawney, like Tomlins, concluded that through passage of the NLRA the American labor movement had become "the creation of the State." Id. at 17. Yet Tawney maintained that the "sensational importance" of the NLRA, id. at 11, lay in its assumptions that the previous "industrial autocracy" must cease and that the resources of the state must be available to compel employers to deal in good faith with unions freely elected by workers. Id. at 13-14. Tawney also characterized the achievements of the CIO, which were assisted by the state, as the most significant contribution to economic freedom in the United States since the founding of the AFL. Id. at 81-82. According to Tawney, the CIO represented "a departure, not only from the less desirable practices of business trade unionism, but from its depressing propensity to mental stagnation." Id. at 83. The AFL's commitment to traditional jurisdictional practices, which Tomlins perceives as a heroic assertion of labor voluntarism, was for Tawney an archaic invocation of property and contractual rights that prevented effective organization and exhibited the "stiffness in the joints" from which the AFL suffered. Id. at 27-30.

legal developments since the New Deal. He presents only cases that restricted the rights of unions and workers. For example, Tomlins mentions a Supreme Court decision that allowed employers to refuse to bargain about subjects "at the core of entrepreneurial control" (pp. 319-20)[30] without even indicating that the courts, over vociferous employer objections, previously had expanded the mandatory subjects of bargaining to include medical and insurance benefits and pensions.[31] He also gives the misleading impression that all legal decisions promoted industrial peace in a variety of ways, from repressing many forms of concerted action to favoring stability in collective bargaining agreements whose provisions covered only a narrow range of issues. While he emphasizes Supreme Court holdings that restricted the right to strike over arbitrable matters (p. 321),[32] Tomlins ignores another important decision requiring employers to bargain with unions even when their members are engaging in unprotected slowdowns.[33] Surely this decision does not reveal an unbending adherence to the goal of industrial peace.

Many decisions by the NLRB and the courts, of course, did not favor worker or union interests. Tomlins frequently seems to suggest that these decisions represent the inevitable outcome of legal intervention in labor relations. But both mainstream and radical scholars of labor law have argued, often persuasively, that a large number of these decisions were not compelled by the NLRA and could have been decided differently within standard modes of legal analysis. Indeed, one of the most influential works by any radical scholar of labor law refers in its title to the "judicial deradicalization" of the NLRA that undermined the Act's liberating potential.[34] Tomlins indicates in his bibliography that he has been influenced by this scholarship (p. 336), but he never confronts its challenge to his own conclusions.

Tomlins not only underestimates the benefits of law for the labor movement; he also exaggerates law's importance as an explanation for the current weaknesses of organized labor. Law may have had a significant role in limiting the horizons of workers, particularly as the early doctrines announced by the NLRB and the

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[30] Fibreboard Paper Products Corp. v. NLRB, 379 U.S. 203 (1964).

[31] See, e.g., Inland Steel Co. v. NLRB, 170 F.2d 247 (7th Cir. 1948). See also Zieger, American Workers at 150 (cited in note 21).

[32] See, e.g., Textile Workers Union v. Lincoln Mills, 353 U.S. 448 (1957).

[33] NLRB v. Insurance Agents' International Union, 361 U.S. 477 (1960).

[34] Klare, 62 Minn. L. Rev. 265 (cited in note 6). See also Atleson, Values and Assumptions (cited in note 6).

courts gained the authority of tradition. Yet by narrowing his analysis to the legal triumph of industrial pluralism in the decades following the New Deal, Tomlins implies that state intervention through the NLRA has been the primary, if not the exclusive, cause of labor's decline. This implication cannot withstand analysis.

In many respects, unions and workers have allowed law to play a greater role than the NLRA or its subsequent legal interpretation required. For example, judicial decisions precluding strikes over grievances designated as arbitrable by a collective bargaining agreement, on which Tomlins places so much emphasis (pp. 320-22), do not require unions and employers to negotiate agreements that make grievances arbitrable. Arbitration limits both the worker's right to strike and management's authority to decide unilaterally. Unions can reserve the right to strike over mandatory subjects if they do not agree to submit grievances over these subjects to arbitration. Yet pressure for arbitration historically has come more from unions eager to limit managerial discretion than from managers eager to obtain labor peace. To some extent, unions and employers share an interest in restraining rank-and-file militancy through expansive arbitration clauses. But in many instances, even militant workers have supported collective bargaining agreements that voluntarily extend the rule of law to the workplace beyond anything required by the NLRA or the Board's interpretations of it. These workers have wanted better collective bargaining agreements, not restrictions on their scope. They themselves have often supported the rule of law that arguably has restricted their own power.[35]

The fact that unions and workers make conscious choices about the issues over which to strike provides more evidence that decisions within the labor movement, and not simply restraints imposed by the law, account for developments in industrial relations. Contrary to the impression left by Tomlins, there has been no significant reduction in the number of strikes in the United States during recent decades.[36] Workers have struck over pension and health plans, the speed of the assembly line, work standards, and job assignments. They even have engaged in illegal wildcat strikes and in other unprotected activities over these issues. But they have been reluctant to use the strike weapon to attack managerial prerogatives more remote from their immediate economic and working

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[35] See Brody, Workers in Industrial America at 201-11 (cited in note 25).

[36] Richard B. Freeman and James L. Medoff, What Do Unions Do? 218 (1984).

interests.[37]

Union negotiating tactics, which Tomlins does not discuss, reveal even more clearly the importance of nonlegal factors within the labor movement itself in understanding contemporary labor relations. Only months after the end of World War II, labor leaders—most notably Walter Reuther of the United Auto Workers (UAW)—advocated an expansion of the scope of collective bargaining to include topics such as subcontracting, technological change, plant location, and company financial policies that arguably related to wages. At a conference of labor and management intended to promote industrial peace, the union representatives refused to concede any specific function as a managerial prerogative. Managers saw the specter of socialism.

A strike against General Motors in late 1945 brought these issues to a head. Reuther demanded that General Motors open its books so that the union could prove that the company would be able to give a 30 percent wage increase without raising its prices. Management felt that this demand constituted an unacceptable attack on the company's fundamental managerial prerogative to establish prices. To a member of the UAW staff, by contrast, the strike seemed "the first act of a new and significant era . . . in which labor might break away from the bonds of business unionism, to wage an economic struggle planned to advance the welfare of the community as a whole, and to lay the foundations for new economic mechanisms designed to win security without sacrificing liberty."[38] This language recalls the collective vision of republicanism that the redefined voluntarism of the AFL had superseded in the early twentieth century.

This vision, however, never materialized, and the law had little to do with the outcome. General Motors suffered through an expensive 113-day strike to preserve its managerial prerogatives. It offered the union an attractive financial package, but refused to budge on disclosing information and bargaining about prices. Faced with this choice, the union took the money. No other union attempted a similarly ambitious bargaining strategy; they all chose monetary benefits over redistribution of power and industrial democracy. Even Reuther himself never again challenged such a basic management prerogative.[39]

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[37] Zieger, American Workers at 150-55 (cited in note 21); Brody, Workers in Industrial America at 194-95 (cited in note 25).

[38] Brody, Workers in Industrial America at 176 (cited in note 25).

[39] Id. at 175-91. See also Nelson Lichtenstein, Walter Reuther and the Rise of Labor-

The new subjects over which unions did insist on bargaining after the war—such as pensions, health benefits, and other welfare issues—emphasized that they were interested in guaranteeing the security of their members, and not in participating in the determination of broader company policies that might ultimately affect workers.[40] Most union bargaining demands remained focused on workplace concerns. Even with respect to these central interests, unions wanted only to negotiate rules. Unions preferred policing management's enforcement of the rules to administering them jointly.[41] The relative absence of pressures on unions from their members throughout the late 1940s and 1950s suggests that they supported, or at least did not oppose, the policies of their unions.[42]

Tomlins's exclusive focus on the NLRA as the explanation for the current status of the American labor movement ignores many other important nonlegal issues. The position of American workers derives at least in part from their involvement in social and political movements that have repercussions beyond the workplace. For example, large numbers of union members voted for Eisenhower in the 1950s and for Reagan in the 1980s. Union leaders eagerly participated in the cold war policies of the 1950s, aiding the State Department in overthrowing leftist governments abroad and purging the unions' own radical members. Two decades later the AFL-CIO leadership supported American participation in the war in Vietnam while many of its former allies led the increasingly powerful antiwar movement. Since World War II, the AFL-CIO helped elect Democrats to Congress and supported progressive social legislation dealing with civil rights, social security, health care, and low-income housing. Though it has been less successful in obtaining legislation of more immediate benefit to workers and unions, organized labor was instrumental in passing laws that prohibit employment discrimination, protect occupational safety and health, secure pension reform, and limit the impact of bankruptcy on collective bargaining agreements. A new workplace militancy arose among a younger generation of American workers in the late 1960s and early 1970s, at the same time that many of their contemporaries became involved in the black power and antiwar movements (and that many radical scholars reached political and

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Liberalism, in Dubofsky and Van Tine, eds., Labor Leaders at 280, 289-94 (cited in note 10).

[40] Brody, Workers in Industrial America at 192-95 (cited in note 25).

[41] Harris, The Right to Manage at 70-71 (cited in note 20).

[42] Id. at 156; Zieger, American Workers at 139 (cited in note 21).

intellectual consciousness).[43]

These examples undercut Tomlins's implication that the "state" and the "law" sapped the activism of American unions and workers. They also demonstrate that American labor has not been reduced to any specific ideology. Even if its traditions of voluntarism had withstood the onslaught of the state better than Tomlins perceives, the radical reshaping of society that he longs for might not have come to pass. In any event, these nonlegal events cry out for explanations that Tomlins's legal analysis cannot provide.

Conclusion

Had Tomlins been a bit more modest in his aims and a bit more cautious in his conclusions, it would not be fair to criticize him for neglecting nonlegal factors that influence contemporary American labor relations. *The State and the Unions* makes enormous contributions to scholarship in labor history and labor law by creatively integrating work in these related fields. It helps readers reevaluate the crucial developments of the New Deal by contrasting them with earlier traditions and by discussing previously unknown and extremely important sources that reveal ideologies and strategies within the AFL and the NLRB. Harnessing original findings to sophisticated theoretical analysis, Tomlins is able to demonstrate, particularly in the context of unit determinations by the NLRB, the costs of labor's reliance on the state and its laws. In the process, he persuasively challenges the theory of industrial pluralism that has smugly exaggerated the effectiveness of American labor law and industrial relations. And for many readers on the left, his historical discussion of labor's republican traditions will provide an attractive alternative to the current union movement.

Unfortunately, Tomlins was not content with these remarkable achievements. Appropriately convinced of the importance of law, which has a strong grip on American unions and workers, he exaggerates its capacity for evil and unconvincingly elevates its significance into the major, if not the only, explanation for the contemporary position of American labor. The NLRA cannot bear the interpretive burdens Tomlins places on it. Additional factors, particularly the activities and ideologies of workers and unions, must also be appreciated, even to understand the role the law might have had in shaping them. Building on Tomlins's refutation of the

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[43] For an account of most of these developments, see generally Zieger, American Workers (cited in note 21).

tradition of industrial pluralism, others should seek to reveal more fully the function of law in the wider world of labor. Even when it disappoints, *The State and the Unions* helps set the agenda for future scholarship.