

Legislative Deferrals

*Statutory Ambiguity, Judicial Power, and
American Democracy*

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Preface

During the first round of oral arguments in the 2000 Presidential election cases, the United States Supreme Court took part in a gripping discussion regarding the Florida Supreme Court's recent rulings on the counting of disputed presidential ballots. The central question in that discussion was whether the Florida court's interpretation of state election statutes was consistent with policy choices made by Florida's legislature before the election. During an exchange with Gore attorney Laurence Tribe, Justice Antonin Scalia drew one of the few laughs in the tense proceedings when he ridiculed Tribe's suggestion that Florida's legislature had wanted state courts to play an important role creating the boundaries for resolving post-election disputes. Scalia provoked the laughter by commenting: "I mean – maybe your experience with the legislative branch is different from mine, but in my experience they are resigned to the intervention of the courts, but have certainly never invited it." In the face of the ensuing laughter, Tribe quickly backpedaled by expressing agreement with Scalia ("I have to say that my experience parallels that") and attempting to change the subject. Unwilling to let the point drop, Scalia interrupted again to dismiss the suggestion that legislatures would want to give the courts policy-making responsibilities by saying, "I just find it implausible" (*New York Times*, December 2, 2000, A12).

This book makes an empirical inquiry into the processes through which federal judges and legislators make policies in the American constitutional system of separation of powers. Among other things, I find that Scalia's claim that legislators never invite judges to intervene in policy disputes is dead wrong. The book documents several important cases where legislators deliberately empowered judges to make important policy decisions

and provides some important reasons for thinking that legislators routinely invite the “intervention” of the courts by creating conditions that allow judges to make policy.

The book also tries to account for the fact that Scalia and Tribe, who disagree about almost everything else, are both willing to express agreement with the misleading claim that legislators never want judges to make policy. I argue that conservatives like Scalia, liberals like Tribe, and almost all judges and judicial scholars in between rely on the same theoretical framework to understand judicial power and judicial decision making in the American separation of powers system. This framework, which I will explain in considerably more detail in Chapter 1, is the foundation for a wide range of competing theories and models that address questions about the exercise of institutional power in the American constitutional system. The framework imagines that independent branches compete with each other for influence over policy and assumes that outcomes produced by elected legislators are more democratic than outcomes produced by unelected federal judges. The framework leads scholars and judges to address policy controversies by trying to identify the intent or meaning of choices made by elected legislators. The framework also makes it seem “implausible” that legislators would want judges to make policy because it imagines that elected legislators pursue their policy preferences by trying to minimize the powers of rival judges whose preferences are less constrained by electoral processes.

Given that thinkers as different as Scalia and Tribe publicly agree that legislators do not invite judges to make policy, my claim that legislators often invite such intervention should be quite shocking. In reality, however, it is not. At least one leading scholar has already carefully documented the importance of legislative deference to the courts as an important source of judicial power. Mark Graber’s path-breaking 1993 article documents the importance of legislative deference in three important constitutional cases and makes some sophisticated theoretical claims that can help scholars to understand such deference and uncover additional cases where deference occurs. Far from being the observation of a single academic commentator, the fact that legislators deliberately leave important policy issues for judges to decide has also been the subject of commentary in mainstream media sources like the *New York Times* and *Washington Post* (Greenhouse 1998, Bardash 1998). More generally, much that is known about the way legislators make decisions suggests that Scalia’s claim that legislators never invite the courts to decide substantive issues of policy is itself quite “implausible.” Members of Congress very often empower

actors in the executive branch and state governments to decide substantive policy issues. Legislators are obviously willing in such instances to trade control over policy outcomes for the practical and political benefits of shifting responsibility to other actors. It seems exceptionally unlikely that legislators who routinely pursue their goals by empowering independent actors in the agencies and states would *never* find it advantageous to empower judges. Legislators may have less control over judges than over state or executive branch officials, but that lack of control can sometimes make deference to the courts a politically attractive option to legislators.

Nevertheless, commentators who have drawn attention to legislative deference to the courts have faced an uphill struggle as they have tried to convince scholars and judges to take legislative deference more seriously as a source of judges' policy-making powers. Ironically, it is precisely because anomalous cases like the ones uncovered by Graber and others are *not* shocking that the importance of such cases has not yet been widely recognized. The real problem for those who want to establish the importance of such cases is not that they are "implausible," but that taking such cases seriously would require scholars to question the fundamental assumptions of a shared theoretical framework that they rely on to understand judicial policy making and separation of powers. The basic idea of that conventional framework is that outcomes created by elected legislators form a democratic baseline against which to evaluate outcomes produced by other branches, and thus that unelected judges have a responsibility in most cases to make choices that match the legislative baseline. That framework is so powerful and useful that those who rely on it have been reluctant to undermine it. The result is that scholars and judges would rather ignore legislative deference to the courts than confront the theoretical complications that would result from acknowledging deference. As I show in Chapter 1, the strategy of ignoring deference can be strained and awkward. Many scholars notice in passing that legislators sometimes make choices that empower the courts to make policy decisions, but then develop theories of judicial policy making or measures of judicial power that cannot make any sense of such cases.

The reluctance of judges and scholars to take legislative deference more seriously is understandable. For example, if Scalia and Tribe were to conclude that the Florida legislature deliberately empowered judges to make substantive policy choices as they resolved election disputes, they would be left without any familiar means of constructing legal arguments in favor of their positions. The tendency of judges and scholars to stick to the framework allows them to resolve many thorny policy issues more

comfortably, but that tendency is not without costs. In the 2000 election cases, the framework led Scalia and Tribe on a quest to identify baseline policy choices that Florida's legislature had never made. That quest forced them to downplay the extent to which the Florida electoral statutes had deliberately created conditions that made it more likely that judges would make substantive policy judgments in post-election disputes. The Florida legislature had delegated important decisions to local electoral officials, but had also included provisions in the election statutes stating that a wide range of parties could file lawsuits in state courts challenging the decisions made by those local officials. Those provisions were the reason state judges were in a position to influence the vote-counting process. Moreover, the legislature also included in the statute a provision stating that the judge hearing such suits "may fashion such orders as he or she deems necessary to ensure that each allegation in the complaint is investigated, examined, or checked, to prevent or correct any alleged wrong, and to provide any relief appropriate under such circumstances" (Florida Statutes, Title IX, 102.168(8)). This provision seems like a straightforward invitation to the courts to invoke flexible equity powers in election conflicts. Such provisions make it difficult to believe that legislators wanted to minimize the role of the courts. A legislature jealously guarding policy prerogatives and wary of the influence of the courts would never have included such open-ended, judge-empowering provisions in the election law.

The conventional theoretical framework creates problems that go beyond Florida's election statutes. The more general problem is not simply that cases where legislators deliberately empower the courts are poorly understood, but also that ignoring such cases has meant that scholars fail to ask and answer a variety of important questions about institutional interaction and institutional development. The framework has meant that scholars pay a great deal of attention to questions about how judges do or should make decisions in particular cases, but very little attention to important questions about how judges end up in a position to resolve policy issues. To answer such questions, scholars would have to make more of an effort to understand how well legislators anticipate judicial decisions, how legislators who expect judicial "interference" adjust their behavior, and how legislators themselves attempt to shape the role played by judges.

This book, the first to look in detail at congressional decisions that defer to the courts and at the implications of such decisions for democratic accountability, attempts to break the pattern of denial. I make a

conscious effort to undermine the conventional framework by making questions about whether and why legislators invite judges to become policy makers central to my analysis of interbranch policy making. I also uncover the often hidden assumptions of the dominant framework, show why those assumptions do not fit cases involving legislative deference, and explain why judicial decisions cannot be evaluated without paying more attention to legislative deference as a source of judicial power. The heart of the book is an exploration of four case studies that together provide several examples of legislative deference to the courts, as well as examples of more conventional interactions between Congress and the courts. My detailed examination of the case studies leads to some preliminary theory building about legislative deference. The findings show that even if legislative deference to the courts is a relatively uncommon phenomenon, scholars who rely on the dominant theoretical framework and ignore such deference will produce distorted accounts of judicial power.

The book presents a somewhat unusual combination of very detailed information about cases and very abstract theoretical claims about institutional processes and democratic accountability. Many of the theoretical claims cut across familiar divisions that scholars typically use to orient their commentary on judicial policy making, including divisions based on scholars' political orientations (e.g., liberal versus conservative), methodological perspectives (e.g., behaviorist versus rational choice versus historical institutionalist), and subject matter and focus (e.g., statutory versus constitutional interpretation, judicial decision making in individual cases versus longer term institutional and political development). Because the approach is unusual and the targets broad, it is worth sorting out three distinct levels of analysis in the presentation.

The first, least general level is my analysis of the cases. My four cases are federal labor statutes passed between 1898 and 1935, a crucial period of institutional development in American history. The cases are the Erdman, Clayton, Norris-LaGuardia, and Wagner acts. I chose these cases because many scholars of American political development and American courts have recently used these same cases to argue that the institutional and political autonomy of the judiciary allowed judges to have an important influence on the development of both public policies and political movements. Such scholars argue that judges used their independence to obstruct and distort more democratic processes in the legislative branch. In this study, I try to establish precisely the opposite conclusion. I argue that the ability of judges to influence policies was dependent on earlier choices made in the legislature and thus that the decisions that judges made

cannot be fairly understood as successful reversals of a robust democratic process in the legislative branch. By deliberately selecting cases that other scholars have used to establish the importance of independent judicial power, I hope to increase the impact of my finding that judicial power is dependent on choices made by legislators.

Using previously overlooked records, I show how participants in the legislative process (legislators, labor leaders, lobbyists for employers' organizations) tried to anticipate the reactions that judges would have to legislative proposals. The evidence shows that participants were aware that choices made in Congress before legislation passed would influence subsequent decisions by judges. Nevertheless, participants deliberately made strategic choices that they expected to empower judges to exercise discretion and set policies. I conclude that the ability of judges to shape labor policies cannot be read as a sign of the independent power of judges to reverse the will of elected legislators.

My case studies show how legislators use a variety of means to empower judges to make labor policy. They sometimes empower judges by including provisions in statutes that assign to judges broad and important enforcement and oversight responsibilities. (Much like the Florida legislature did in the provision inviting judges to provide "any relief appropriate under such circumstances.") More intriguingly, legislators sometimes deliberately include ambiguous language in statutes that allows judges to make policy choices as they resolve interpretive controversies about the meaning of the ambiguous language. I call the cases where legislators empower the courts through deliberately ambiguous statutory language *legislative deferrals* to the courts. I find that the legislators who create deferrals portray them as attempts to establish clear policies, and also that the judges who interpret such statutes claim (less convincingly) that their resolution of the interpretive controversy matches the intent or purpose of Congress. Such posturing has made the judicial decisions in these cases look in retrospect like reversals of legislative choices. However, the evidence in my cases shows that participants in the legislative process understood that features of the statutes would provide opportunities for judges to influence policy, and that participants nevertheless rejected alternative legislative proposals that they expected to limit judicial discretion.

Uncovering participants' expectations about judicial reactions is difficult because the participants in the legislative process all have incentives to be deceptive as they pursue strategies that shift responsibility and blame to judges. Nevertheless, it is possible to find evidence about anticipated reactions by carefully tracing the development of competing legislative

proposals. I can show, for example, that legislators deliberately made statutory language more ambiguous after clearer proposals that gave less discretion to judges failed to pass in Congress.

Taken together, the conclusions from my case studies support a dramatic reinterpretation of the labor politics of the time period. My analysis suggests that earlier scholars have overestimated labor's political success in the legislative branch, and that as a result they have overestimated the importance of judicial power. Such findings call into question the view of the "Lochner era" as a period when conservative judges repeatedly reversed the progressive outcomes of more responsive legislative processes in legislatures. My important findings about the widely studied labor cases make a very strong case for paying close attention to legislative deference as a source of judicial power.

In addition to making claims about particular cases and a particular time period, the book makes contributions at two other, more general, levels of analysis. At a second level, the book challenges conventional assessments of the relationships between electoral controls and institutional processes in the American constitutional system of separation of powers. More conventional studies are obsessed with instances where undemocratic and unaccountable courts appear to thwart victories won through political activities in the "democratic" branches. Conventional studies treat judicial decisions that appear to reverse legislative goals as though legislators (and voters) watch helplessly from the sidelines as unaccountable judges use fixed institutional powers to subvert democratically supported policies. By uncovering the important ways in which electoral pressures on Congress lead legislators to empower judges, the account here suggests that the conventional divide between "democratic" and "counter-majoritarian" branches is too simplistic to capture the complexity of the institutional mechanisms that provide accountability within a separation of powers system. Understanding legislative deference to the courts reveals that judicial policy making can be responsive to electoral controls in ways that conventional scholars ignore. At the same time, such cases show that Congress is less responsive and permeable than those same scholars assume.

At a third, most general level of analysis, the book challenges the way scholars conceptualize interaction among the different branches of government. While conventional theoretical frameworks incline scholars to see interaction between branches as conflicts between independent strategic actors seeking to pursue well-defined policy preferences, I find that the appearance of conflict between independent branches frequently masks

more cooperative interaction between interdependent branches. Dropping the assumption of conflict complicates the task of understanding interaction among branches. However, it also makes it possible to uncover important forms of interaction that are invisible to scholars who look at the same processes as though they are strategic games among independent actors pursuing sharply defined policy preferences.

This book is the first to make an extended empirical inquiry into legislative deferrals to the courts, why they occur, and the effects that deferrals have on accountability and institutional development. Because it focuses on a series of cases in a single policy area and involving many of the same principal decision makers, the study is able to explore the long-term effectiveness of deference as a political strategy and to explain how deference can both help and hurt the outside organizations seeking to use electoral processes to produce changes in policies. Because the cases straddle a period of tremendous institutional change, the cases provide variation on a number of important institutional and political variables.

The book is not, however, an attempt to offer the final word on legislative deference to the courts. Because the motives that lead legislators to defer to the courts also lead legislators to use deception to disguise deferrals as clear policy choices, it is necessary to examine and interpret a tremendous amount of contextual information before concluding that a statute is or is not a legislative deferral. The detailed analysis required to code cases makes it impossible to explore legislative deference across a large population of cases. Because I can only look at a small number of cases, I am not able to draw any precise conclusions about how often deferrals occur in other policy areas and time periods. Moreover, the theoretical claims that I make about the characteristics of legislative deference are preliminary and made in a spirit that I hope invites additional empirical inquiry and refinement. Nevertheless, it is possible to draw three important general conclusions based on the case studies presented here: 1) deferrals occur in some very important and highly contested policy areas, 2) legislators are quite likely to have both motive and opportunity to defer to the courts in a much larger number of cases, and thus 3) scholars should pay much more attention to legislative deference as a source of judicial power before attempting to characterize judicial power as a threat to democratic accountability.

Several features of this study help to support these three conclusions. The factors that I identify as the reasons legislators defer to the courts in these cases are all factors that are likely to occur in a much larger number of cases. Moreover, I show that the empirical methods most scholars use

to analyze interbranch interaction make it likely that they will have misinterpreted cases involving deference to the courts. Those methods make deferrals look like cases that fit the conventional framework, and therefore lead scholars to ignore the sources of evidence that make it possible to recognize deferrals and distinguish them from cases that better fit the conventional framework. By demonstrating the success of my alternative methods, this study suggests both that there is very good reason to think that the cases I look at here are not the only important cases where legislators defer to the courts, and that there is little reason to think that legislative deference to the courts is a rare or uncommon phenomenon.

While it is important for the purposes of this study to establish that deferrals do sometimes occur in important cases, it is not crucial to establish exactly how often they occur. The crucial question is not whether the conventional framework accurately describes more cases of interbranch interaction than a framework that takes deference more seriously. The small number of deferral cases uncovered here demonstrates that the conventional framework systematically obscures important features of interbranch interaction. Thus, even if cases involving legislative deference to the courts are less common than cases that fit the more conventional framework, it is still important to acknowledge and account for cases where legislators defer to the courts.

The book has two introductory chapters that precede the presentation of empirical evidence. Chapter 1 explains and challenges the dominant theoretical framework by uncovering its core assumptions and showing how those assumptions are challenged by the possibility of legislative deference to the courts. Chapter 2 introduces the case studies, sets the historical context, and explains how the findings here challenge the leading interpretations of the same cases. Chapters 3 through 6 consider my four case studies in chronological order. The concluding Chapter 7 reviews some of the conclusions about deferrals that emerge across the cases and explains some of the advantages of paying more attention to deferrals.

False Victories

Labor, Congress, and the Courts, 1898–1935

In a floor speech just before the House passed an early version of the Erdman Act in 1898, Representative Joseph Walker (R-MA) called the bill “the first step in a long line of legislation by which the twentieth century is to be ushered in.” Walker claimed that the new law would be the first piece of federal legislation to “recognize and make lawful and legal the ‘labor organizations’ of this country” (31 *Congressional Record* 4648).

Walker was right that the Erdman Act was the first step in a larger incremental process through which labor organizations would be released from a state of “semi-outlawry” (Forbath 1991, ch. 4) and eventually receive recognition from the government as legitimate aids to economic stability. Over the next four decades, Congress passed several additional labor statutes that addressed the legal status of labor organizations and changed the way the government regulated workers’ efforts to exert economic power through collective activities. The struggles that accompanied those legislative changes gradually ended the long-standing practice of allowing judges to assume primary responsibility for regulating workers’ collective actions and worker organizations.

Because subsequent chapters of this book focus on small details from my four case studies, the important broader story of institutional and political change that takes place over the time period covered by all four cases can be difficult to see. To clarify the bigger picture, this chapter establishes the context for the cases and explains how the interpretation that emerges here differs from earlier accounts of the same events.

JUDGES, LEGISLATORS, AND THE SHAPING OF THE AMERICAN LABOR MOVEMENT: A REASSESSMENT

The time period spanned by my case studies has been exceptionally important to scholars of American political development because it was a crucial period of transformation in the American state. Most famously, the period saw enormous growth in the administrative capacities of the federal government, a process often associated with the New Deal but that actually began much earlier (Skowronek 1982). In addition to a shift toward centralization of power in the federal government, regulatory power also shifted away from judges and toward legislatures and newly created administrative agencies in the executive branch. Both sets of transformations contributed to a series of dramatic confrontations between legislators and judges that occurred during the same period.

Scholars who have attempted to explain these transformative changes have long recognized that the activities of labor organizations are an important part of the story. In particular, scholars have made some of the unique characteristics of the American labor movement an important component in explanations of some of the unique or “exceptional” features of American politics, such as the relatively low level of social provision in the United States. Scholars have noted that unlike the labor movements of Britain and parts of continental Europe, American labor failed to develop a powerful and independent political voice. During the period covered here, the labor movement was dominated by the American Federation of Labor (AFL), an organization that opposed efforts to build a broad, class-based, and politically independent labor movement. The AFL instead favored the more cautious strategy of working within the existing two-party system to “reward friends and punish enemies.”¹

While many scholars have recognized labor’s organizational and political ideologies as a cause of some unique and persistent features of the American state, some innovative scholars have more recently pointed out that the causal arrow also runs in the opposite direction, that is, that unique features of the American state helped to shape the American labor movement. In particular, several recent studies of labor law and labor movement history have focused on the capacity of judges to interfere with labor legislation. The story that emerges from these recent studies is one of good legislatures and bad courts. Political scientist Victoria Hattam’s

¹ For perspectives on the AFL’s voluntarism, see Hattam 1993, Horowitz 1978, Montgomery 1987, and Rogin 1962.

Labor Visions and State Power (1993) documents judicial interference with nineteenth-century state legislation limiting criminal prosecution of labor organizations. Legal historian William Forbath's *Law and the Shaping of the American Labor Movement* (1991) documents a similar story of judicial interference during the Progressive Era, drawing particular attention to judicial interference with state and federal legislation targeting the use of injunctions. Finally, legal scholar Karl Klare argues in an influential series of law review articles (1978, 1981, 1985) that early judicial decisions interpreting the Wagner Act of 1935 were responsible for "deradicalizing" that important statute and thus for transforming an increasingly radicalized labor movement into a conservative and ineffective one.² These recent accounts of labor history are constructive and inventive because they focus not just on the short-term policy changes at stake in legislative and judicial decisions, but also on the radiating effects of law, legal ideology, and legal discourse on individuals and society.

Although they have covered different (but overlapping) periods and used very different assumptions and methods, the authors of these recent accounts have reached remarkably similar conclusions about the effect of law and judges on the development of the American labor movement. All three scholars find that rulings by judges who were hostile toward labor organizations helped to shape the legal ideologies that in turn shaped workers' organizing strategies and collective political aspirations. All three scholars also suggest that judicial rulings that thwarted statutory reforms discouraged labor organizations from developing a more aggressive and independent political voice in American politics.

The four statutes examined in this study cover a period that intersects with these recent and influential accounts of law's role in shaping the labor movement. Three of the four cases (the Erdman Act of 1898, the Clayton Act of 1914, and the Wagner Act of 1935) have been widely identified as instances in which conservative judges thwarted important prolabor policy reforms contained in the statutes. The fourth case (the Norris-LaGuardia Act of 1932) faced less difficulty in the courts and is included here because it provides a useful comparison case.

Like these earlier accounts, the one offered here finds that institutional (and particularly legal) processes helped to shape the American labor

² See also Stone 1981 and Atleson 1983 for arguments that judges' decisions have hurt workers' interests while shaping the values and aspirations of workers. Tomlins (1985) provides a comprehensive critique that covers a longer time period and looks at the actions of both the NLRB and the courts.

movement. However, I reject the claim that judges shaped the labor movement by thwarting important legislative victories that labor organizations thought they had won through democratic processes in the legislative branch. The good legislatures/bad courts story is replaced by one where both legislators and judges fail to advance the interests of workers and labor organizations. I find that earlier accounts have overestimated labor's accomplishments in legislatures, and thus overestimated the significance of judicial decisions that appeared to thwart political victories. I find instead that the hostile judicial rulings occurred in part because legislators deliberately created conditions that empowered judges to make important substantive decisions on labor policy. In two of the three cases that scholars have associated with judicial interference (the Clayton and Wagner acts), members of Congress built support for the legislation by deliberately using legislative ambiguity to create uncertainty about the meaning of the bill. In the third such case (the Erdman Act) members of Congress deliberately expanded the discretionary policy-making powers of the courts by giving judges vaguely defined enforcement powers that made it easy for employers to enlist the aid of judges to defeat strikes. Moreover, none of the four cases I look at were straightforward political victories for workers that legislators passed in response to the political might of labor organizations. The nation's largest labor organization during the period, the AFL, vehemently opposed passage of the Erdman Act. The AFL did eventually endorse the other two statutes that ran into difficulties in the courts, but both of those statutes were compromise substitutes for earlier proposals that AFL leaders expected to be more effective.

These findings mean that the power of unelected judges to decide issues of labor policy was not simply the result of some fixed institutional or ideological power of unelected judges, but also partly the result of decisions made by elected legislators in Congress. As a result, the judicial rulings cannot be understood as taking place independently of, or in opposition to, the democratic processes of legislatures. My findings also lead to a reassessment of labor's political success in Congress during this time period. The outcomes of the legislative process were not the clear policy choices that one would expect from responsive legislators facing a politically powerful labor movement. Moreover, I also find that labor leaders did not experience the judicial decisions that thwarted their goals as unexpected intrusions that betrayed a promise held out by the transparent democratic processes in the legislature. Labor leaders knew long before the courts ruled that troubling features

of statutes made outcomes uncertain by giving hostile judges discretion to decide policy issues. In fact, all the central participants in the legislative process (labor leaders, legislators, and representatives of employer organizations) had very sophisticated understandings of judicial doctrines and made effective efforts to anticipate and shape judicial reactions to legislation.

By recognizing that participants in the legislative process anticipated judicial reactions to statutes, this study reveals that the political strategies pursued by labor leaders were more complicated than earlier scholars have recognized. Judicial decisions were not bolts from the blue that surprised and eventually disillusioned labor leaders who thought they had won clear victories in the democratic process.³ To understand the extent to which the courts acted as barriers to labor's efforts to pursue goals through political processes, scholars need to know more about what labor expected to gain when Congress passed statutes that labor leaders recognized as compromises rather than clear victories.

I also find that it is essential to look beyond the public pronouncements that labor leaders and legislators made at the time the statutes passed. This is because participants in the legislative process all have incentives to exaggerate as they make claims about the likely effectiveness of new statutes. To get beyond such claims and better understand what participants expected from judges, I make a much broader inquiry into legislative records that allows me to compare what participants said publicly right after legislation passed to their earlier statements regarding other legislative proposals that members of Congress rejected. In the case of the Clayton Act, for example, the statute Congress eventually passed looks very similar to earlier proposals for compromise that the AFL had vehemently criticized. For several years prior to passage of the Clayton Act, AFL leaders had rejected those similar efforts at compromise precisely because they determined that such compromises gave too much power to judges.

Taken together, my findings challenge recent accounts that have accused judges of obstructing labor's successful efforts to use legislative processes to obtain favorable policy changes. Such accounts have mischaracterized the nature of the barrier created by judges. Judges did not cause labor leaders to become disillusioned by reversing what leaders thought were clear victories in the legislature. Labor leaders were well

³ This does not mean that judicial rulings are never mobilizing bolts from the blue. See Luker 1984, 137-44.

aware that they did not have the political power to produce the type of legislation that they thought would best control the courts. More generally, the findings here suggest that the approach earlier scholars have taken to understanding the effects of institutions on labor politics has been inadequate. To understand the importance of courts as barriers to democratic processes, it is not enough to compare the advertised goals of labor leaders and elected legislators to the outcomes that emerge in the aftermath of legal processes. Scholars need to reinterpret labor leaders' political strategies by examining how those leaders anticipated and tried to shape the role of the courts. Knowing what labor leaders hoped to gain from compromise statutes seems essential to understanding what, if anything, those leaders later lost in the courts. Unfortunately, however, Hattam, Forbath, and Klare have neither asked nor answered questions about how the ability of labor leaders to anticipate judicial hostility and how anticipated judicial reactions affected the strategies they pursued as legislators formulated legislative text.

Given that labor leaders expected judges to be hostile to the interests of their organizations, it is puzzling that labor leaders would accept compromises that forced them to take chances on winning from judges what they could not win directly from elected legislators. However, one of the more interesting findings in this study is that the occasional willingness of labor leaders to compromise cannot be explained by looking only at their expectations about the likelihood of achieving certain policy goals in the courts. I do not find, for example, that labor leaders were simply duped into believing that flawed statutes were certain to create dramatic policy gains for labor. The labor leaders who took part in legislative processes repeatedly demonstrated a very sophisticated understanding of likely judicial responses to competing legislative proposals. It also does not appear that the decisive factor for the decision to support compromises was that AFL leaders suddenly felt that changes in judicial attitudes had improved the prospects of winning in the courts.⁴

⁴ For example, there is no indication in the records that the AFL supported the Clayton Act because they expected Wilson to use his appointment power to nominate pro-labor judges and expected such judges to determine the meaning of the act. Wilson was not disposed by personality to use the appointment process to make the bench more prolabor, and new appointments could not make much of an immediate dent in the lower courts, where most injunction cases began and ended. AFL leaders were very attentive to changes in judicial attitudes over time. Their behavior suggests that they saw more general political pressure, rather than appointments, as the best way to nudge the courts toward more prolabor rulings.

To make sense of labor leaders' strategic decisions, scholars need to look beyond labor leaders' policy goals to other important effects that the new statutes were likely to have. The occasional decisions to endorse flawed statutes make more sense once attention is paid to organizational goals that were important to labor leaders but that had very little to do with the policy issues directly addressed in the text of the statutes. In effect, labor leaders were sacrificing some certainty about policy outcomes in order to obtain other goals that were less dependent on judicial reactions. More specifically, I find that labor leaders became more willing to compromise at crucial moments when they needed to be able to claim and celebrate a legislative victory. By declaring victory, labor leaders could justify and maintain internal support for their conventional political strategy of working within the existing two-party system. Passage of new legislation provided a concrete signal of progress, a signal that could be important and useful even if the courts later muted the long-run impact that the statute would have on actual policies. The available evidence supports the hypothesis that compromises were designed to fulfill such organizational imperatives. In addition, the hypothesis helps to explain why savvy labor leaders sometimes made Pollyannaish statements when legislation passed.

Oddly, labor leaders' organizational goals were more closely aligned with the preferences of legislators than were the labor leaders' policy goals. Members of Congress who explained their votes in favor of labor statutes often noted that the new statutes were designed to reward and thus stabilize the leadership of moderate labor organizations. For example, legislators explained that they preferred a labor movement dominated by the conservative organizing ideologies of the AFL to a more radical movement that might emerge if Congress appeared unresponsive to the AFL's relatively moderate demands. Such findings suggest that the real barrier to labor's political effectiveness was not that unelected judges did not have to face political pressures that labor organizations could create for elected legislators. However, the findings also suggest that the constraints on legislators created by congressional elections did not produce a majoritarian system that was responsive to the interests of labor organizations, as suggested in earlier accounts. Rather, the real barrier seems to have been that labor leaders were forced to covertly sacrifice policy goals for organizational goals, a finding that raises new concerns about the responsiveness of legislatures and about the transparency of democratic processes.

These findings, stated here boldly and without first presenting evidence to support them, may seem quite shocking. I seem to be portraying

legislation as a medium for deception as much as a medium for policy changes. Moreover, my suggestion that labor leaders advanced their own leadership goals through deceptive compromises seems quite harsh, and perhaps so cynical that it is implausible (Hattam 1994, 110). However, the appearance of cynicism can be alleviated by thinking more carefully about what labor leaders faced and what they were able to accomplish. Given labor's precarious political position and the continuing threat that legal doctrines posed to labor's capacity to organize new workers, there is nothing cynical about noting the need for labor leaders to respond to organizational imperatives. Thus, the lesson I draw is not that labor leaders acted in bad faith or made indefensible choices. The claim that labor leaders were responding to organizational concerns seems harsh or cynical only because scholars have underestimated the many difficulties that labor faced as they attempted to put political pressure on elected legislators. If large numbers of legislators had been eager to respond favorably to the demands of powerful labor organizations, then it would be quite difficult to justify decisions by labor leaders that sacrificed attainable policy gains for organizational goals. However, by showing that legislators' apparent responses to labor were typically hollow laws that allowed judges to continue making labor policy, I shatter the illusion of a Congress that was responsive and permeable to labor organizations. In reality, the legislators in Congress were very resistant to the core demands of labor organizations, and labor lacked the political power to change the membership of Congress. Moreover, labor's difficulties were compounded because the broader institutional system of separation of powers helped to insulate legislators from political pressures for change. The eagerness of judges to regulate workers meant that an antilabor policy regime could develop without legislators having to make overt antilabor decisions on statutes. Thus, judges made it easier for legislators to avoid the political costs of making clear choices on labor policy, and more difficult for workers to hold legislators responsible.

The difficult choices made by AFL leaders can also be viewed more sympathetically once choices made at isolated points are understood as part of a longer-term strategy for securing more favorable policies. Given the obstacles that labor leaders faced, even minor accomplishments might be enough to justify some unsettling compromises. Unfortunately, however, the recent tendency to focus on the cycle of apparent legislative victories followed by judicial defeats makes it easy to think of the period as one that produced only disheartening defeats for labor organizations. Such an