



**JEFFREY KAHANA, THE UNFOLDING
OF AMERICAN LABOR LAW:
JUDGES, WORKERS, AND PUBLIC
POLICY ACROSS TWO POLITICAL
GENERATIONS, 1790-1850**

Reviewed by Joseph Slater*

The overlap of labor history and legal history has been fertile ground for historians and legal academics for well over two decades now.² Studying the evolving notions and debates about the proper

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² A number of exciting new examinations of the history of labor law in the U.S. came out around the 1990s. DANIEL ERNST, *LAWYERS AGAINST LABOR: FROM INDIVIDUAL RIGHTS TO CORPORATE LIBERALISM* (1995); MELVYN DUBOFSKY, *THE STATE AND LABOR IN MODERN AMERICA* (1994); DAVID MONTGOMERY, *CITIZEN WORKER: THE EXPERIENCE OF WORKERS IN THE UNITED STATES WITH DEMOCRACY AND THE FREE MARKET DURING THE NINETEENTH CENTURY* (1993); VICTORIA HATTAM, *LABOR VISIONS AND STATE POWER: THE ORIGINS OF BUSINESS UNIONISM IN THE UNITED STATES* (1993); CHRISTOPHER TOMLINS, *LAW, LABOR AND IDEOLOGY IN THE EARLY AMERICAN REPUBLIC* (1993); ROBERT STEINFELD, *THE INVENTION OF FREE LABOR: THE EMPLOYMENT RELATION IN ENGLISH AND AMERICAN LAW AND CULTURE, 1350-1870* (1991); KAREN

allocation of legal rights to workers, unions, and employers can reveal much about the larger values of a society. Perhaps because of this, various historians of labor and employment law have drawn very different lessons from largely the same body of cases and doctrine. Jeffrey Kahana's understanding of these values are central to his interpretation of laws governing both individual workers and early forms of unions in his new study, *The Unfolding of Labor Law*.³

In this book, Kahana takes strong positions on two debates in the field of nineteenth-century labor law: (1) the extent to which American law in this area was largely based on English common law; and (2) the extent to which American legal rules were a product of class-bias and/or anti-union sentiment, as opposed to other principles and ideologies. On both issues, scholars have ranged considerably. As to the first, Karen Orren has insisted that U.S. law was not only based on English common law, but was essentially feudal, and Christopher Tomlins has argued that much of American law was at least significantly based on English common law; on the other hand, Robert Steinfeld and Victoria Hattam found more differences between American law and English common law.⁴ On this issue, Kahana is the furthest away from Orren, arguing that post-revolutionary America engaged in an almost wholesale rejection of English common law. On the second issue, Kahana also stakes out a position on the far end of the spectrum, arguing not only that laws regulating workers and unions were driven by concerns much different than

ORREN, *BELATED FEUDALISM, LABOR, THE LAW, AND LIBERAL DEVELOPMENT IN THE UNITED STATES* (1991); WILLIAM FORBATH, *LAW AND THE SHAPING OF THE AMERICAN LABOR MOVEMENT* (1989). For my take on the arguments of many of these authors, see Joseph Slater, *The Rise of Master-Servant and the Fall of Master Narrative: A Review of Labor Law in America*, 15 *Berkeley J. of Emp. & Labor Law* 141 (1994).

³ JEFFREY KAHANA, *THE UNFOLDING OF LABOR LAW: JUDGES, WORKERS AND PUBLIC POLICY ACROSS TWO POLITICAL GENERATIONS, 1790-1850* (2014).

⁴ See ORREN, *supra* note 2; TOMLINS, *supra* note 2; STEINFELD, *supra* note 2; HATTAM, *supra* note 2.

class bias but also that by 1840, unions had largely been liberated from the constraints of conspiracy law. Overall, one is unlikely to find a more positive, upbeat view of early American labor and employment law.

I. THE ARGUMENT OF THE UNFOLDING

“English common law did not define American labor law between the Revolution and the mid-nineteenth century,” Kahana begins. “Instead, American labor law was shaped by the new social realities and changing circumstances of American life.”⁵ Karen Orren and Christopher Tomlins were wrong in saying that American law adopted much of English common law.⁶ In the areas of the master-servant relationship, regulations governing the employment relationship, and the crime of labor conspiracy, Kahana insists, judges and commentators rejected English common law. Their thinking grew out of a “belief system shaped by American independence from England and steeped in values that drew up republican and Enlightenment sources.”⁷

For Kahana, republican ideals were central to the developments he discusses. Historians in general have long stressed the significance of republican ideology around the time of the American Revolution.⁸ For Kahana, republicanism means several things, including a rejection of feudal English common law and a vision of the law that was

⁵ KAHANA, *supra* note 3, 1.

⁶ *Id.* 2-3.

⁷ *Id.* 4.

⁸ The idea that republicanism was a key influence on political thought in this era at least mostly originated with BERNARD BAILYN, *THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION* (1967). For an overview by a leading historian of the era, see Gordon S. Wood, *Classical Republicanism and the American Revolution*, 66 CHICAGO-KENT L. REV. 13 (1990). For a lengthier discussion by another leading historian, see JOYCE APPLEBY, *CAPITALISM AND A NEW SOCIAL ORDER: THE REPUBLICAN VISION OF THE 1790S* (1984).

“optimistic, virtuous, and committed to the public good, as defined in American terms.”⁹ A chief concern of republicanism was “the law’s ability to restrain the passions of the people and limit more generally the exercise of power.”¹⁰

Kahana shows that various judges and commentators were quite skeptical about English common law.¹¹ For example, Jesse Root, Chief Justice of the Connecticut Supreme Court, wrote that American common law was not the same as English common law. Rather, it was “derived from the law of nature and of revelation” intended to fit the needs of “the rising empire of America.”¹² American law stressed the role of the Constitution in American life (including worries about excessive democracy).¹³ Also, while master-servant law in England was statutory, in America it was based on contracts.¹⁴ Further, English “master-servant” law was largely irrelevant in America because, aside from slaves, by the 18th century, “servants” meant only apprentices, domestic workers, and young workers. Even as to apprentices, while English law required a term of seven years before entering a trade, U.S. law specified no set time. U.S. courts in the post-revolutionary period expressed opposition to indentured servitude.¹⁵

Kahana gives several specific examples of how U.S. law diverged from English law. In England, leaving a job early was a crime; in the U.S., leaving early only meant the worker was generally barred from recovering in *quantum meruit* for work performed before quitting.¹⁶ This latter rule, based on the concept of “entirety contracts” was

⁹ KAHANA, *supra* note 3, 24.

¹⁰ *Id.* at 24.

¹¹ *Id.* at 16-19.

¹² *Id.* at 20.

¹³ *Id.* at 25-26.

¹⁴ *Id.* at 35.

¹⁵ *Id.* at 38-45.

¹⁶ *Id.* at 56-57.

“grounded in the moral and equitable precepts developed by judges whose concerns extended beyond the employment relationship.”¹⁷ Indeed, Kahana finds a sympathetic purpose for this rule: it was extended to farm laborers, because of the concern that workers might leave or threaten to leave just when their labor was most valuable, and yet still be able to recover for work actually done.¹⁸

Perhaps most interesting, Kahana writes that it “is difficult to know how frequently and successfully the entirety rule was in fact applied to prevent recovery for partial performance by farm workers.”¹⁹ Citing three cases from Massachusetts for support, he states that the rule had numerous exceptions: if an employer by “oppression” or “unkind treatment” caused the employee to quit; if the employee was a minor; if the employee had become sick; or if the term of contract was not clear.²⁰ Also, even when the rule was applied, it apparently was applied mostly to farm laborers.²¹ Moreover, citing one case from Massachusetts, Kahana insists that “[e]mployers were likewise held to standards of fair dealing and could not oust workers willy-nilly right before the contract’s termination without cause or payment of damages.”²²

Additionally, American law rejected the English common law right to physically discipline workers (while admittedly not his focus, Kahana does not discuss slavery here).²³ Further, American law generally did not allow specific performance as a remedy for personal service contracts.²⁴ In enticement actions (which he discusses only briefly) English law allowed an employer to recover damages

¹⁷ *Id.* at 58.

¹⁸ *Id.* at 59.

¹⁹ *Id.* at 60.

²⁰ *Id.* at 60-61.

²¹ *Id.* at 61.

²² *Id.* at 61-62.

²³ *Id.* at 62-64.

²⁴ *Id.* at 64.

from a competitor. In contrast, Kahana maintains, citing one Massachusetts case, "American courts rejected such a remedy on the grounds that it would undermine competition among employers and make it more difficult for workers to obtain alternative employment."²⁵

Kahana attributes these differences to a new American social order that was oriented around consent rather than status.²⁶ The Revolution "undermined an older social structure based on status, deference, and subordination," and new ideas of "democracy equality and republican citizenship challenged the feudal system of social organization that was reflected in the common law."²⁷ The high demand for skilled workers in the preindustrial economy as well as their capacity to move between jobs had a laudable leveling effect.²⁸

Kahana then turns to labor conspiracy law after the Revolution. His thesis is that in that period, "the focus turned to protecting the public from abuses by private and public associations seeking to advance their own interests at the expense of the community."²⁹ The concern was that personal freedom could undermine civil liberty and that associations could not be trusted to act justly.³⁰ He gives two main examples here: first, the fear of political parties, factions, and political associations;³¹ second, "[c]orporations as purely private associations were not readily accepted in early America."³²

²⁵ *Id.* at 66-67 (Perhaps significantly, in this case, the employees had already given their notice to quit).

²⁶ *Id.* at 48.

²⁷ *Id.* at 50.

²⁸ *Id.*

²⁹ *Id.* at 71.

³⁰ *Id.* at 73-74.

³¹ *Id.* at 76-85.

³² *Id.* at 86.

Kahana stresses concerns about “*Imperium in Imperio*.”³³ American labor conspiracy doctrine “began as a political question about the powers of nongovernmental bodies.”³⁴ The resolution of this question, at least as regards labor conspiracy doctrine, “depended not on the English common law but instead on the political principle that the state could not tolerate an *imperium in imperio* (a state with a state).”³⁵ This also means that early labor conspiracy cases cannot be explained in terms of pro-labor or anti-labor sentiment, or in class terms.³⁶ *Imperium in imperio* was a republican standard about private groups that harmed the public interest.³⁷

As Kahana explains, the general rule of conspiracy at this time made it illegal to combine to do an unlawful act, or even a lawful act for unlawful purposes.³⁸ He then turns to the Philadelphia Cordwainers case of 1806 (*Commonwealth v. Pullis*), in which journeymen bootmakers and shoemakers called a strike, and their leaders were indicted for criminally conspiring to raise their wages.³⁹

In *Pullis*, prosecutor Hopkinson announced the charges were brought “solely with a view to promote the common good of the community.”⁴⁰ Kahana insists that the main reason for the indictments was “the act of compelling ‘men to join their society . . . or be shut out of every job in the city,’” as this was a threat to individual and public liberty.⁴¹ Defense lawyer William Franklin responded that what was innocent for one man to do should be innocent for a

³³ *Id.* at 95-131.

³⁴ *Id.* at 96.

³⁵ *Id.*

³⁶ *Id.* at 96-97 (Kahana explains that this view is consistent with the view of Hattam, note 1, but not TOMLINS, *supra* note 2).

³⁷ *Id.* at 305-06.

³⁸ *Id.* at 105.

³⁹ *Id.* at 107-15 (A cordwainer is a boot or shoemaker).

⁴⁰ *Id.* at 108.

⁴¹ *Id.* at 108.

body of men; that it was the masters who were combining to keep the wages of workers down; and that the court should reject English common law which, among other things, favored the rich against the poor.⁴²

Judge Moses Levy instructed the jury that a journeyman's association that could control wages and restrict employment was from "every point of view [a] measure . . . pregnant with public mischief and private injury." Such a group "tends to demoralize the workman, . . . destroy the trade of the city, and leaves the pocket of the whole community to the discretion of the concerned." It was a threat to "individual liberty."⁴³ The journeymen's society was "selfish," and had "set up a rule contrary to the law of their country." Levy continued that it "is not a question, whether we shall have an *imperium in imperio*, whether we shall have, besides our state legislature a new legislature consisting of journeyman shoemakers."⁴⁴ The jury then convicted the society's leaders of conspiracy.⁴⁵ Kahana concludes that this evinced a sense of liberty that meant freedom from the arbitrary rules of the society, and that only the state should have that sort of enforcement power the workers claimed for themselves.⁴⁶

Kahana then turns to *People v. Melvin*, a New York case decided in 1810.⁴⁷ Here, the criminal conspiracy charge was based on the fact that members of a Cordwainers' Society had agreed not to work for anyone who employed someone not in the society. Kahana characterizes the real issue in this case as whether the Society was promoting independence of workers or causing their subordination.⁴⁸ The

⁴² *Id.* at 110-111.

⁴³ *Id.* at 113.

⁴⁴ *Id.* at 114.

⁴⁵ *Id.*

⁴⁶ *Id.* at 114-15.

⁴⁷ *Id.* at 115-21. On page 115, Kahana mistakenly gives the date of this case as 1809.

⁴⁸ *Id.* at 117.

prosecutor warned of *imperium in imperio*,⁴⁹ and the jury convicted. Kahana concludes that “the issue was not one of labor versus capital, but whether these associations posed the threat of *imperium in imperio*.”⁵⁰ Finally, in *Commonwealth v. Morrow*, a Pennsylvania case with similar facts and result,⁵¹ Kahana notes that the prosecutor asked jurors to “suppress a conspiracy, whose tendency must be peculiarly prejudicial to the interests of this borough and the whole western country.”⁵² Kahana stresses that not only did the workers argue against English common law, but the prosecutor also did not endorse it. Instead, the prosecutor cited Thomas Jefferson and the Declaration of Independence.⁵³

Part II of the book focuses on Lemuel Shaw of the Massachusetts Supreme Court, especially his jurisprudence on labor matters, and specifically two 1842 decisions: *Farwell v. Boston and Worcester Railroad* and *Commonwealth v. Hunt*. The former permitted employers to use the “fellow servant rule” as a defense to tort suits when workers were injured on the job, and the latter acquitted a labor organization of a criminal conspiracy charge. Kahana’s thesis is that Shaw “embraced a new conception of liability law, clarified the fellow servant rule, and held labor unions to be not only lawful but desirable entities.”⁵⁴ This law was based on English common law but rather imparted the “broad interests of the community” into “seemingly private disputes.”⁵⁵ The two cases reflected an approach that, in the famous phrase of legal historian Willard Hurst,⁵⁶ prioritized a “release

⁴⁹ *Id.* at 119.

⁵⁰ *Id.* at 120.

⁵¹ *Id.* at 121-27.

⁵² *Id.* at 122.

⁵³ *Id.* at 123-24.

⁵⁴ *Id.* at 4.

⁵⁵ *Id.* at 135.

⁵⁶ *Id.* at Chapter 8; J. WILLARD HURST, LAW AND THE CONDITIONS OF FREEDOM IN THE NINETEENTH CENTURY UNITED STATES (1956).

of energy,” along with a demand that people act responsibly in using their new-found freedoms.⁵⁷

For Kahana, in the period of 1815-60, the “commercial spirit” was central. This included relaxed control associations, including corporations and unions.⁵⁸ Still, many such associations were quasi-public, given limited power from the state (*e.g.*, banks and marine societies). Labor societies lacked such a public mandate and were often treated as oppressive.⁵⁹ Cases validating such business associations included *Charles River Bridge v. Warren Bridge* and the related passage of general incorporation laws.⁶⁰ In this era, liability law began to move away from strict liability toward a negligence/intent standard. This allowed law to “release energy,” in the famous phrase of legal historian Willard Hurst.⁶¹

Kahana puts the adoption of the fellow-servant rule in this context. *Farwell* was part of a transformation of liability law that increasingly required fault. Courts needed to balance interests, including the interest of employers in not being responsible for accidents over which they had no control. Disputing the interpretation by Tomlins and others that this rule aided business interests at the expense of workers,⁶² Kahana maintains it was “less a rule about the workplace and the diminished status of workers than it was an adaptation of the common law based on the increasingly important associational paradigm.”⁶³ It was the “expectation that individuals would be free to form associations . . . that the law now legitimized. This cultural perspective elevated both competition and cooperation, which were two

⁵⁷ KAHANA, *supra* note 3, 146.

⁵⁸ *Id.* at 160.

⁵⁹ *Id.* at 165.

⁶⁰ *Id.* at 175-78.

⁶¹ *Id.* at 146.

⁶² *Id.* at 216-17.

⁶³ *Id.* at 217.

key facets of the movement toward associationalism in public and private affairs.”⁶⁴ Workers had significant control over their work; there was a perception that “work culture” was to blame for many workplace accidents;⁶⁵ and employees knew of the risks as well as employers. While Tomlins saw *Farwell* as a “broad defense of the immunity of employers from liability for industrial injury,”⁶⁶ Kahana urges the reader to see this as “an important milestone along the road to employer liability based on a fault standard that expressed community norms for acceptable conduct.”⁶⁷

Kahana then moves to unions, in a chapter on *Hunt* provocatively titled “The Demise of the Labor Conspiracy Doctrine.”⁶⁸ In *Hunt*, a bootmaker named Horne filed a complaint against his union (the Bootmakers Society) after it fined him for working for an employer without being paid.⁶⁹ Horne was expelled from the union, and pursuant to union rules, his employer, Wait, fired him. Hunt was the president of the Bootmakers’ Society, and he and six other journeymen were charged with conspiring to impoverish Hunt.⁷⁰

The charge of having created “a government within a government” and the actions of the lower court judge Thacher against the union, Kahana explains, harkened back to earlier approaches that

⁶⁴ *Id.* at 218.

⁶⁵ *Id.* at 227-31.

⁶⁶ *Id.* at 238.

⁶⁷ *Id.* at 239.

⁶⁸ *Id.* at Chapter 10. Unions were not the major force in antebellum America that they would become in the late-19th and 20th centuries. Kahana’s period came well before even the Knights of Labor, much less the American Federation of Labor. Still, associations of journeymen did organize and try to take collective action to further their interests at work in the time the book covers, and in so doing had some notable encounters with the legal system.

⁶⁹ *Id.* at 265.

⁷⁰ *Id.* at 265-66.

Shaw would see as outmoded.⁷¹ Notably, Wait believed that the union rules were reasonable, and other employers had said that society's rules had improved productivity.⁷² The indictment essentially found the combination itself unlawful, independent of any acts.⁷³ The key issue, according to Kahana, was the "political question of how private power in the hands of workers should be regulated."⁷⁴ The defense argued that criminal conspiracy law was part of English common law that had not been brought to America, and that the bootmakers union was similar to lawful organizations such as lawyers in a bar association and doctors in a medical society.⁷⁵ Thacher instructed jury that a lawful act could be rendered unlawful by the effect of combination,⁷⁶ and he stressed that the bootmakers' society "was dangerous because it took power for itself at the expense of the state,"⁷⁷ making and enforcing its own laws, without accountability to the public.⁷⁸ Whether they actually did more harm than good did not matter.⁷⁹ The jury ruled against the union.⁸⁰

On appeal, the Bootmakers' lawyer argued that "English common law crime of conspiracy is not a force in this state."⁸¹ The Massachusetts Attorney General took the opposite view.⁸² Shaw held that common law criminal conspiracy rules applied, but what exactly that doctrine covered depended on the local laws of the country. Shaw

⁷¹ *Id.* at 266.

⁷² *Id.* at 266.

⁷³ *Id.* at 267.

⁷⁴ *Id.* at 267.

⁷⁵ *Id.* at 268.

⁷⁶ *Id.* at 270.

⁷⁷ *Id.* at 271.

⁷⁸ *Id.* at 272-73.

⁷⁹ *Id.* at 274.

⁸⁰ *Id.* at 275.

⁸¹ *Id.* at 279.

⁸² *Id.* at 280.

then limited conspiracy law by requiring specific acts of wrongdoing.⁸³ Kahana explains that Shaw's analysis turned less on English and early American precedents and more on a "social and economic analysis of the purpose and role of the labor association."⁸⁴ Such groups could have useful purposes, *e.g.* as a mutual aid society, supporting the sick, and raising standards of workers. They could even agree not to work for employers who employed journeymen who were not members — if they were not under contract, they could work or not work for whomever they chose.⁸⁵ Here, regarding the allegation that the union had insisted that Wait fire Horne, Shaw found one that union members would not work for Wait.⁸⁶ It would have been different (a criminal conspiracy) if the union had forced Wait to violate his contract to employ Horne.⁸⁷ Shaw also rejected the count based on the allegation that the union's intent was to impoverish Horne. Unions could provide a form of beneficial economic competition. Shaw used the analogy of a new baker competing with previously-established baker by offering goods at lower prices — this would hurt the original baker but help the public.⁸⁸ In short, *Hunt* held that a conspiracy must have either an unlawful purpose or use unlawful means, and a combination without a specific action was not a conspiracy.⁸⁹

Kahana then claims that the "conspiracy offense, in the context of labor cases, all but disappeared" after *Hunt* "and did not reappear in any meaningful way until the late nineteenth century."⁹⁰ Similarly,

⁸³ *Id.* at 282-83.

⁸⁴ *Id.* at 284.

⁸⁵ *Id.* at 285-86.

⁸⁶ *Id.* at 287.

⁸⁷ *Id.* at 288.

⁸⁸ *Id.* at 289-90.

⁸⁹ *Id.* at 298-99.

⁹⁰ *Id.* at 299.

he later concludes that “[e]arly nineteenth century labor law was unlike the emerging trends of labor law in the late nineteenth and early twentieth centuries.”⁹¹ Specifically, “[i]n the late nineteenth century, labor law came to be defined by new social and class antagonisms” that had been “largely absent from discussions of labor law in the early republic.”⁹² In the first half of the century, however, labor conspiracy doctrine “progressed from a check against private action taken by labor associations into a justification for labor to advance not only its parochial interests but also those of the public.”⁹³

II. KAHANA IN CONTEXT

This book does a number of things well. It is clearly written, displays a command of the relevant literature, and its arguments are clear. Kahana has found significant evidence from judges, treatise authors, and attorneys expressing deep skepticism about adopting English common law. He describes some real differences between American common law and English common law, including the right of discipline, and the use of civil, as opposed to criminal penalties, for workers who left early. His findings regarding exceptions to even the civil penalties are intriguing and could well be a rewarding area for further study. He also has considerable evidence that judges did not see themselves as intending to act against the interests of workers or unions. In that regard, Kahana ably reconstructs an ideology that is not explicitly or consciously anti-union or classist. The details of the cases are interesting. He is also relentlessly upbeat on a topic other authors have found less uplifting.

Still, even accepting Kahana’s evidence, skeptics may not be convinced. First, as to common law, were the differences in English and

⁹¹ *Id.* at 311.

⁹² *Id.* at 312-13.

⁹³ *Id.* at 310.

American law more significant than the similarities? *Hunt* aside, even by Kahana's telling, unions lost most common law criminal conspiracy cases in the first half of the nineteenth century, with the central doctrine remaining that conspiracies involved combinations to take illegal acts or use illegal means to accomplish legal acts. This was a fairly malleable standard that, as Kahana admits, was used even more forcefully against unions in the second half of the century. More broadly, even accepting the fact that the law did not sanction the physical discipline of adult workers who were not slaves, it still appears that the law of master-servant effectively gave a great deal of control to employer. In the absence of specific examples of workers successfully suing masters to enforce workers' rights⁹⁴ under master-servant law, it is hard to say that claims of other historians that the common law favored employers have been rebutted.⁹⁵ While Kahana notes his disagreement with the conclusions of such scholars, to convince the skeptical, Kahana would have had to engage more with the evidence that, for example, Christopher Tomlins uses in his book.⁹⁶ Also, one might have wanted a lengthier discussion from Kahana on Karen Orren's arguments that managerial prerogative inhered in managers as a matter of status more than contract and on the significance of enticement actions — such actions loom large for both Orren and Tomlins, but Kahana mentions them only briefly.⁹⁷

⁹⁴*Id.* at 45. Kahana asserts that the duties of master and servant were reciprocal, and that the failure of either party to comply with a duty resulted in stiff penalties, but does not provide examples of workers suing employers.

⁹⁵ See TOMLINS, *supra* note 2; MONTGOMERY, *supra* note 2. And even this is ignoring slavery — a very important labor system sanctioned by American laws existing in significant portions of Antebellum America that was much more oppressive than English common law. Kahana briefly discusses slavery, but makes no effort to connect it to his broader, positive views of American law. KAHANA, *supra* note 3, 46-47.

⁹⁶ See the discussions of Tomlins's takes on *Farwell* and *Hunt*, *infra* note 114.

⁹⁷ TOMLINS, *supra* note 2; ORREN, *supra* note 2.

Generally, Kahana echoes the theory first advanced by J. Willard Hurst that American law in the nineteenth century was in many ways about a “release of energy.” In an influential work now almost sixty years old, Hurst argued that this law properly sought to protect and promote the release of individual creative energy, and give men more liberty by increasing the practical range of their choices. Similar to Kahana, Hurst stressed that the increasing need for “fault” in tort law emphasized the desirability of free individual action.⁹⁸

While this approach has a distinguished pedigree, one might have wished that Kahana had taken on even more directly the evidence and interpretations of more recent authors. Morton Horwitz saw the same transfer from strict liability to negligence, including that in the law of workplace injuries, as part of a move that transferred the burden of the costs of injuries created by industry from business to weaker elements of society. Kahana puts a happier ideological frame on this move, but does not address the actual effects. Similarly, to the extent workplace law in general was moving more toward the law of contract, one would be interested in hearing Kahana’s response to Horwitz’s claim that the inherent unequal bargaining power in the workplace again made the actual effects of this shift to strengthen the position of employers and weaken that of workers.⁹⁹ Even Robert Steinfeld, who, like Kahana, found some significant breaks with English common law, notes that the increased ability of workers to quit their jobs hardly made them equal to employers. This right only “helped to obscure the systematic ways in which law continued to contribute to their oppression through the operation of ordinary rules of property and contract in a world in which productive assets were unequally distributed.”¹⁰⁰

⁹⁸ HURST, *supra* note 56.

⁹⁹ MORTON HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1780-1860* (1977).

¹⁰⁰ STEINFELD, *supra* note 2, 9.

More broadly, Mark Tushnet offered some thoughts on Hurst¹⁰¹ that some might find applicable to Kahana. "Hurst's theory is premised upon the existence of a consensus about how legal institutions ought to act,"¹⁰² but the "values on which all agree are generally so abstract that people may suggest a variety of concrete ways in which they could be implemented in specific cases."¹⁰³ Hurst did not "attribute different rankings to class or cultural divisions, since, in his view, all values were held in common."¹⁰⁴ Different parties may disagree sharply on how the same values should apply to specific circumstances. "Hurst ignores the possibility that some interpretations prevail because the people who offer them are more powerful in some simple sense than those who offer other interpretations."¹⁰⁵

More recently, David Montgomery has distinguished between "working class" and "classical" republican thought. Montgomery argues that the former was more egalitarian, as working people appropriated parts of the Jeffersonian discourse for their own use.¹⁰⁶ This involved "the infusion of collective action and mutualistic values into republican rhetoric."¹⁰⁷ Classical and working class republicanism could also have different emphases within the same position: Republicans of all types disliked judicial common law power, but classical republicans did not share working class republican concern with the common law doctrines used against workers and unions (most notably in labor conspiracy cases). Workers, Montgomery argues, believed that the Jeffersonian legacy supported their collective attempts to "regulate economic life for the common welfare," but courts

¹⁰¹ Mark Tushnet, *Lumber and the Legal Process*, WISC. L. REV. 114 (1972).

¹⁰² *Id.* at 118.

¹⁰³ *Id.* at 118-19.

¹⁰⁴ *Id.* at 119.

¹⁰⁵ *Id.*

¹⁰⁶ MONTGOMERY, *supra* note 2, 6-9.

¹⁰⁷ *Id.* at 1.

adopted an alternate form of republican rhetoric based on employer preferences.¹⁰⁸ Similarly, Sean Wilentz republicanism clashed with working class republicanism on issues such as whether workers or employers should set wages, prices, and hours of labor.¹⁰⁹

Along the same lines, Tomlins sees cases in this early period as making “implicit or explicit endorsements of one kind of political economy rather than another, one set of social relations or vision of social order over another.”¹¹⁰ Courts did not explicitly acknowledge that they were endorsing and legitimizing a workplace “structured by relations of domination and subordination.”¹¹¹ Judges were not “willing agents of employers,” but they did reinforce employer control as a result of being “ideologues committed to a particular conception of the role of law in republican society.”¹¹²

So, for example, when Kahana argues that post-revolutionary conspiracy law prized public over private interests, one might wish for more analysis about what those terms meant to the relevant actors in labor and employment matters. Kahana does well describing the arguments lawyers made in court, but uncovering the beliefs of, say, workers, unions leaders, and employers in statements made outside of court might bring a deeper understanding of contemporary society by teasing out contested visions of what “public interest” actually meant in specific instances. The point labor advocates made that they had the same right to organize into associations as doctors and lawyers is intriguing, and this sort of thing merits more discussion.

Along the same lines, developments Kahana describes as being part of neutral, even beneficial trends in the law could and have been

¹⁰⁸ *Id.* at 49.

¹⁰⁹ SEAN WILENTZ, *CHANTS DEMOCRATIC: NEW YORK CITY AND THE RISE OF THE AMERICAN WORKING CLASS, 1788-1850* (1984).

¹¹⁰ TOMLINS, *supra* note 2, xiv-xv.

¹¹¹ *Id.* at 290.

¹¹² *Id.* at 190.

seen as developments that favor employers. To take one relatively minor example, Kahana cites a move to limit the law of *respondent superior* to cases in which the employer had truly direct control of the worker.¹¹³ Whatever ideology spurred this development, objectively it helped employers by limiting their liability for the torts of their some workers and agents.

In this light, contrast Kahana's view of *Farwell* with that of Christopher Tomlins. Tomlins shows that plaintiff's attorney, Loring, made a conscious, and perhaps very mistaken, decision to avoid contesting the principle of the fellow-servant rule, instead emphasizing Farwell's lack of knowledge of the conditions that caused his injury. This was put in the frame of a contract claim, that the master was responsible for normal workplace safety issues over which the servant had no control. Furthering this point, Loring stressed the physical separation of plaintiff and the worker whose negligence caused the injury, claiming they could not truly be considered fellow servants. Tomlins argues that this conservative argument was doomed to fail. Defendant, in response, correctly urged that no legal principle, *respondent superior* or otherwise, permitted a recovery for plaintiff. The contract between the parties included the risks of the employment.¹¹⁴ The significance of *Farwell*, in Tomlins's view, was that it "was self-consciously a broad defense of the immunity of employers from liability for industrial injuries."¹¹⁵ Tomlins also differs significantly

¹¹³ *Id.* at 55.

¹¹⁴ *Id.* at 351-59. Tomlins differs with Horwitz by arguing that English common law never understood *respondent superior* to mean that employers had to pay for medical care for workers injured on the job. Thus, Tomlins argues, the fellow servant rule and assumption of risk doctrine, while "new" in that they described rules for accidents due to the negligence of fellow workers were not new in denying recovery to injured workers.

¹¹⁵ *Id.* at 360.

from Kahana regarding the dangers railroads presented to both passengers and workers (and thus the relevant social context).¹¹⁶ Thus, Tomlins concludes that *Farwell* “endorsed the structure of disciplinary power that permeated the employment relationship and yoked the public interest in industrial safety. . . .”¹¹⁷ It placed employees under the “constant gaze” of “peer-imposed discipline” which, given the structure of managerial power at the time, constituted legal responsibility without the power to make effective decisions. In contrast, the authority of the employer was power without responsibility.¹¹⁸

This also goes to Kahana’s thesis that the rules and decisions he discusses do not result from or display class bias or anti-union animus. In some significant ways, debates over this issue are not capable of resolution. Put most simply, advocates of one side stress, correctly, that at least most judges did not explain their decisions in terms of such bias, that there is little evidence that they understood them in terms of such bias, and that broader, different ideological trends are a simpler and more accurate explanation. Kahana makes his case well in these terms. On the other hand, those who find evidence of bias

¹¹⁶ KAHANA, *supra* note 3, 244. Kahana states that railroad accidents involved few passenger or worker harms through 1830s. This might be looking a bit too early. While railroads expanded considerably in the 1830s, as of 1830, there were only 23 miles of railroad in the U.S. See, *History: 1800*, HISTORY OF RAILROADS & RAIL WORKERS IN THE U.S., (Mar. 11, 2016, 11:32 am), <https://sites.google.com/site/historyofrrunions/home/early-history-1800-1899>. Also, Tomlins notes that during the four and a half years *Farwell* was pending, defendant Boston & Worcester had been involved in (among other incidents) ten collisions and accidents injuring four employees and killing two. Its sister railroad, the Western had, beginning in the winter of 1840, experienced various accidents that left seven employees dead and two injured. Indeed, in early 1842, the state legislature had created a special committee of inquiry to investigate the causes of accidents on the Western. TOMLINS, *supra* note 2, 360-61.

¹¹⁷ TOMLINS, *supra* note 2, 362.

¹¹⁸ *Id.* at 362-63.

tend to look at the actual effects of the legal rules, stress how contested notions of how broad concepts such as “liberty,” “freedom,” and “public good” were when applied to specific cases, and see arguably inconsistent applications of those terms made by those with power.¹¹⁹

So, for example, Kahana argues that the post-Revolutionary period featured skepticism about various types of group activity. His main examples are fear of political parties, factions, and associations and lack of ready acceptance of corporations and skepticism of corporations which, “as purely private associations were not readily accepted in early America.”¹²⁰ Yet he does not give any examples of either such group activity being prosecuted as a criminal conspiracy. He does cite a criminal conspiracy case that did not involve a union in which defendants were accused of attempting to abscond with goods they had obtained on credit.¹²¹ Kahana argues that the law of criminal conspiracy was not an attack on unions as much as it was a

¹¹⁹ I have previously expressed my sympathies with the latter camp, arguing that rejecting the idea that labor law decisions in this era reflected class bias involves defining class bias too narrowly, limiting it to self-conscious, explicit assertions of animosity. “[T]his type of naked intolerance in judicial opinions is rare, and its absence does not prove lack of prejudice. Judges, after all, are supposed to justify their decisions with arguably neutral rules. Moreover, seemingly neutral common law doctrines may contain class and other biases; applying them in good faith may lack subjective class bias, but not objective bias.” Similarly, unions and employers often had competing views of what constituted the “public good” and proper economics when it came to the workplace. Slater, *supra* note 2, 163.

¹²⁰ KAHANA, *supra* note 3, 244.

¹²¹ *Id.* at 104.

concern with “restraining unlawful and coercive power.”¹²² But a principle that treats unions like thieves rather than like corporations or political parties seems vulnerable to a critique that it contains at least implicit class bias.

Further, when discussing *People v. Melvin*, Kahana does not discuss the court’s apparent acceptance of the fact that it was entirely legal for *employers* to combine to lower the wages of employees, even though it was a criminal conspiracy for workers to combine in an attempt to raise wages. *Melvin* specifically rejected the journeymen’s defense that their organization was prompted by an agreement among their masters to lower wages.¹²³ Although slightly outside Kahana’s time period, *Bowen v. Matheson*¹²⁴ Kahana asserts that in *Melvin*, “the issue was not one of labor versus capital, but whether these associations posed the threat of *imperium in imperio*.”¹²⁵ generally without being treated as criminal conspiracies.¹²⁶

Similarly, in *Pullis*, defense attorney Franklin argued that the master craftsmen had combined for the purpose of determining the rate at which the journeymen should work.¹²⁷ In contrast, Levy told

¹²² *Id.* at 127.

¹²³ Moreover, as to whether the court was concerned with an uncontested version of the public good, it is worth noting that the masters/employers in *Melvin* were financing the prosecution, and the court denied the admission of evidence the journeymen offered meant to show that the wages they desired were reasonable and the profits of the masters were excessive. *Melvin*, 2 Wheeler Crim. Cas. 262, 268.

¹²⁴ 96 Mass. 499 (1867).

¹²⁵ KAHANA, *supra* note 3, 120.

¹²⁶ This also calls into question a quote that Kahana takes from *Commonwealth ex rel. Chew v. Carlisle* (PA 1821): “an association is criminal when its object is to depress the price of labour” (quoted in KAHANA, 255). Defendants in this case were masters, not journeymen (Hattam notes that this was one of the “few” examples of such cases). HATTAM, *supra* note 1, at 40. But, as Tomlins observes, *Carlisle*’s requirement for finding a bad purpose in a combination actually gave courts significant leeway in imposing their view of what did and did not constitute a valid purpose. TOMLINS, note 1, 147.

¹²⁷ STEINFELD, *supra* note 2, 125.

the jury that prices of work are regulated naturally by the demand for the article, its quality, and its scarcity. Historian John Nockleby argues that this not only ignored inequality of bargaining power, but also, more fundamentally, that at this time price-fixing among producers and employers was common and not criminal. Meanwhile, over two dozen criminal conspiracy cases were brought against unions by 1850, many successfully.¹²⁸

Most generally, Kahana argues that the issue for lower-court judge Thacher in *Hunt* was the “political question of how private power in the hands of workers should be regulated.”¹²⁹ Was there any truly analogous examination by any court of the private power of employers in labor relations?

Finally, Kahana may be overstating the effect of *Hunt* on conspiracy law. Chapter 10, which contains Kahana’s analysis of *Hunt*, is titled “The Demise of the Labor Conspiracy Doctrine.” Further, Kahana argues that “Shaw acknowledged that the power wielded by private associations of workers, like the power used by private corporations and political parties, was legitimate,”¹³⁰ and that *Hunt* “represented a reversal of the labor conspiracy doctrine.”¹³¹ This may be relying too much on one of the very few (if not only) pro-labor decisions of the 19th century.

Again, contrast the view of Tomlins on *Hunt*. First, Tomlins argues, the prosecution’s case was “very weak” and employers were “only peripherally involved.”¹³² Moreover, *Hunt* “was not perceived as sanctioning any kind of departure or shift in general conspiracy

¹²⁸ John Nockleby, *Two Theories of Competition in the Early 19th Century Labor Cases*, 37 AM. J. OF LEGAL HISTORY 452 (1994).

¹²⁹ KAHANA, *supra* note 3, 267.

¹³⁰ *Id.* at 290.

¹³¹ *Id.* at 291.

¹³² TOMLINS, *supra* note 2, 200. Interestingly, employee Horne was not even allowed to testify, as Thacher disqualified him as a witness because Horne was an atheist. *Id.* 201.

doctrine.”¹³³ *Hunt*’s endorsement of the pre-existing rule that a conspiracy could be accomplished by combining to accomplish even lawful goals via unlawful means was still quite open-ended, and “represented no particular restraint on the application of criminal conspiracy to journeymen’s combinations. . . .”¹³⁴ Once contracts had been entered into, any interference was criminal; collective quitting was criminal; and attempts by some employees to persuade others to abandon their jobs was criminal.¹³⁵ Indeed, an 1853 guide to Massachusetts law cited *Hunt* as an authority in support of the proposition that combinations to prevent another from exercising his trade or to raise the rate of labor were indictable at common law.¹³⁶

Further, this thesis relies on finding post-civil war conspiracy law — which, it is generally agreed, was used widely and aggressively against unions — was essentially discontinuous with pre-civil war law. While the decades surrounding the civil war may have seen fewer criminal conspiracy prosecutions, one wonders the extent to which this can be attributed to one decision of the Massachusetts Supreme Court. One also wonders if employers hit on somewhat simpler ways to discourage union activity: trespass, nuisance, and even injunction actions.¹³⁷ In any event, by the later nineteenth century, conspiracy law had returned with a vengeance as an effective tool against unions. These cases used the same rules: labor actions were

¹³³ *Id.* at 212-13.

¹³⁴ *Id.* at 213.

¹³⁵ *Id.*

¹³⁶ *Id.* citing Franklin Heard, ed., *Davis’s Criminal Justice* (3d ed. 1853).

¹³⁷ Cf. Catherine Fisk, *Still “Learning Something of Legislation”: The Judiciary in the History of Labor Law*, 19 *LAW & SOCIAL INQUIRY* 151, 164 (1994) (noting that Victoria Hattam stresses conspiracy to the exclusion of other sorts of legal doctrines used against unions); DAVID MONTGOMERY, *THE FALL OF THE HOUSE OF LABOR: THE WORKPLACE, THE STATE, AND LABOR ACTIVISM 1865-1925* (1987), 271 (stressing the importance of the laws of trespass, traffic obstruction, disorderly conduct, and riot as tools employers used against unions).

illegal if they either pursued illegal ends or used illegal means. And most means and ends that unions pursued were held illegal.¹³⁸ For example, in the famous case of *Vegeahn v. Guntner*,¹³⁹ the Massachusetts Supreme Court held that it was an illegal conspiracy for a union to use peaceful means to try to persuade workers and customers not to enter the premises of an employer from whom the union was trying to win a wage increase. Justice Holmes, dissenting, would have allowed this as the sort of permissible economic competition that Kahana says *Hunt* would have permitted, yet his opinion did not prevail.

In sum, Kahana's book enters a field already filled with rich studies and some sharp interpretative disagreements. If one imagines, on the issues of use of English common law and class bias, a spectrum going from Orren to Montgomery to Tomlins to Steinfeld to Hattam, Kahana occupies a place beyond Hattam. His work is unlikely to convince the already convinced, and it certainly does not resolve the debates it enters, but it is a valuable contribution to those debates.

¹³⁸ See, e.g., DANIEL ERNST, *LAWYERS AGAINST LABOR* (1995), 70-76.

¹³⁹ 167 Mass. 92 (1896).