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### A Response

*Constitutional Labour Rights in Canada: Farm Workers and the Fraser Case*, By Fay Faraday, Judy Fudge and Eric Tucker (2012), Toronto: Irwin Law, 322 pages. ISBN: 9781552212912.

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## A Response

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We want to thank the editors for choosing our book for a review forum and for their recognition that it raises important issues regarding farm workers' struggles for labour rights, and the institutional and jurisprudential debates over the meaning of freedom of association. We also appreciate the difficulties that reviewers face when writing about edited collections rather than authored books, since by their very nature they bring together different ways of approaching common themes and concerns rather than presenting a single, unified argument.

So it will be useful to begin our response by reiterating the common commitments that brought together the book's editors and contributors: we all shared a commitment to the goal of promoting labour rights for agricultural workers and a belief that constitutional litigation could be a tool through which that objective was advanced. We want the implication of this formulation to be clear: we do not believe that constitutional rights and constitutional litigation were ever or are now the only or even the best means for advancing the struggle for labour rights for farm workers. That is not a position that is advocated in the volume.

However, the reality is that laws actively prescribe and sustain a particular balance of power. Laws actively construct relationships of domination/subordination and constrain the space for particular kinds of collective workplace action. In this context, *Charter* litigation is one tool that is available to hold governments accountable, to require governments to give real meaning to the most fundamental rights and freedoms, and to thereby open space for different forms of collective engagement and interaction. With respect to farm workers, *Charter* litigation is a tool that, for a while at least, held some promise of forcing governments to extend to farmworkers labour rights enjoyed by most other workers in Canada in an environment in which grassroots organizing and political lobbying had limited success in achieving even this modest goal.<sup>1</sup>

The book was structured around these commitments. Some of the chapters (Tucker; Preisbisch; Pietropaolo's photo essay) focused on mapping the historical and social context of the exclusion of farm workers from labour rights, including the enormous increase in the use of temporary migrants in recent decades. But rather than portraying farmworkers as victims, we wanted to document their struggles. Wayne Hanley, the president of the UFCW, the union that has principally

been in engaged in farm worker organizing, addresses these efforts in his chapter. It is important to emphasize that these efforts were not and are not limited to organizing bargaining units that could be certified under *Wagner Act Model Collective Bargaining Statutes* or challenging the constitutionality of farm worker exceptionalism. Rather, as Hanley emphasizes, the UFCW has been involved in “community building with workers and social justice allies; worker education and political lobbying (here and abroad); and legal challenges” (p. 66). We think that Donald Swartz unfairly characterizes Hanley’s account as “surprisingly satisfied,” without acknowledging the significant efforts that the UFCW has made for decades, working with a range of progressive groups to create and support the Agricultural Worker Alliance and the 10 community centres that have been established in rural communities across the country to provide legal support services and training in human rights, labour rights, housing and health and safety for migrant farm workers while in Canada, as well as organizing language training and social events for migrant workers. Swartz also fails to acknowledge the innovative transnational organizing and cooperation agreements that UFCW has undertaken. All of this deep community organizing and community building happen well outside any *Wagner Act Model* bargaining units or even bargaining legislation. To write the union off as Swartz does, based on its position regarding the NDP’s 1993 legislation, is not a very productive way to engage with a union, indeed the only union, that is active in the field, and is not a very productive way to engage with the question of alternative forms of organizing.

While we tried to be clear about our understanding that *Charter* litigation was just one tool for challenging farm worker exceptionalism, the focus of the book was on this experience. It is important to understand how the law operates and how courts operate to have a clear eyed view on the potential impact of different strategies for change. A different edited book could have been assembled about other facets of farm worker struggles and set as its agenda the important task of trying to devise new strategies to gain and benefit from labour rights, but that was not the goal of this book, as it was made clear from its title, *Constitutional Labour Rights in Canada*. Swartz does not seem to think that this is a worthy subject, but we do not feel defensive about our choice.

There are obviously differences among the contributors in how they view *Charter* litigation. Some have written more critically about *Charter* litigation elsewhere. Others have been actively engaged in *Charter* litigation for decades and so have a unique insight into where it can have leverage and also what its limitations are. Regardless of these different starting points, *Charter* litigation has been a significant feature of the struggle to obtain labour rights—and other rights for marginalized groups—and so we think a critical examination of that experience is timely if we are to better understand both its possibilities and limits. This is not

the place to engage in a lengthy discussion of the articulation of law and political economy, but we believe it is important to make clear that we do not think the outcomes of particular cases can be read off social structures of accumulation. This is not to say that the law, and especially *Charter* litigation, are autonomous practices performed outside of relations of domination and subordination; but rather we also think it is important to recognize there are complex mediations that sometimes create spaces for progressive legal challenges that can be pried open and exploited when possible.

The experience of the farm workers with the *Charter* is a good illustration of this. We would disagree with Travis Fast that 1982 and the adoption of the *Charter* was “the high water mark of social democratic instincts in the Canada body politic” and there is, certainly, no straight line trajectory in the court’s freedom of association jurisprudence that follows the rightward shift in Canadian politics. Indeed, the Supreme Court of Canada began its engagement with freedom of association by adopting a very thin view of its scope in the first trilogy of labour rights cases decided in 1987. It was the decision of the court in *Dunmore*, decided in 2001, at a time when neo-liberalism was more ascendant than it had been 14 years earlier, that opened the door to holding governments accountable to ensure labour laws complied with the *Charter* by requiring the State to protect the freedom of vulnerable workers to engage in associational activity. Six years later, in 2007, the court went one step further in *Health Services* and held that freedom of association protects the right to bargain collectively in the face of government assaults on public sector collective bargaining. Simply put, the original labour trilogy did not establish the limits of what is constitutionally possible in an increasingly hostile, neo-liberal environment.

Since the outcomes of constitutional litigation are not directly determined by broader political and economic forces, it is worthwhile considering the internal dynamics of law and the possibilities for making legal arguments that might persuade courts to rein in neo-liberal State practices. Many of the chapters in this book, written by academics and practicing lawyers, engage in this project (Fudge; Faraday; Cavalluzzo; Barrett and Poskanzer; Macklem; and Ewing and Hendy). They saw an opportunity in *Fraser* to build on the precedents established in *Dunmore* and *Health Services*, to force the Ontario government to provide agricultural workers with a statutory regime that would give them a meaningful and effective opportunity to engage in collective bargaining.

We want to emphasize here the point made by Judy Fudge and Paul Cavalluzzo in their chapters. This was not a case about constitutionalizing the *Wagner Act* Model, and in particular majoritarian exclusivity. Rather, to repeat, it was about imposing a constitutional requirement on the State to provide workers with a meaningful and effective statutory collective bargaining scheme.

So the failure of the court to take this step, one that was within legal reach given existing precedent, was a disappointment, but it was also a reminder of the limits of constitutional litigation. The authors in this volume recognize that courts are not autonomous and will only go so far in challenging the *status quo*, especially where its decisions impinge on the State's ordering of class relations. But a loss in the courts is never the end of the discussion. It is only one more piece in a continuing dynamic. The contraction of constitutional space is expressly acknowledged in many chapters, something recognized by Travis Fast in his review, and we see no basis in the text for Swartz's claim that the book only "steers the labour movement back towards to the courts." And yet, it must be emphasized that, like it or not, some of the continuing struggle for labour rights inevitably takes place in the courts. Workers continue to assert their rights in reaction to actions that governments take. This volume was intended as a critical intervention in that legal discussion. As a series of cases challenging federal and provincial incursions on the right to strike and the right to bargain have been heard in the Supreme Court of Canada this spring, essays in this volume have been expressly cited in the parties' arguments and so the discussion continues.

Indeed, Swartz's criticism of the book seemingly operates from an underlying premise that *Charter* litigation and grassroots organizing are dichotomous activities. We think Swartz is right to call the labour movement broadly to task for emphasizing litigation over mobilizing strategies (although, we are more skeptical of this critique in the context of farm workers) to challenge laws that constrain collective action. But we do not think an either/or approach is the most productive way to think strategically, either for lawyers or activists. As Faraday has repeatedly advocated, a litigation strategy for social change will only succeed in conjunction with robust, collective action and mobilization of a broad community of allies. We agree with Fast's observation that courts have role to play in democratic deliberation, but cannot be relied upon to sustain that deliberation. The challenge may be to think creatively about how to use demands for fundamental rights, like freedom of association and equality, demands that are powerful tropes and resonate in the body politic, in ways that support mobilizing strategies, support broad coalition building, and promote more democratic forms of constitutionalism.<sup>2</sup>

Finally, while we are on the topic of the relation between constitutional litigation and organizing mobilization strategies, we want to address a point raised by Fast in regard to the *Temporary Foreign Worker Program* (TFWP). He correctly notes that the *Fraser* case was not about ending Canada's growing use of unfree migrant labour. But we are not sure what follows from that observation. The *Fraser* case was—as all cases are—responsive to the particular circum-

stances of a specific group of workers. The farm workers in *Fraser* organized and voted overwhelmingly to unionize. They were, by operation of the law, denied the right to do so and they objected. The range of issues that can be addressed in any piece of the litigation are bounded by the facts of the specific case and the goals of the litigants. What the workers in *Fraser* wanted was the right to unionize.

If Fast's suggestion is that constitutional litigation should be brought to challenge the *Temporary Foreign Worker Program* itself, this raises very different questions, most significantly, what do migrant workers *themselves* want? What does *real* worker solidarity look like? What legal and systemic change is needed to build real security for migrant workers? Over the past decade, low-wage migrant workers have been organizing themselves across all four temporary migration streams, and migrant workers themselves have very nuanced and conflicting views about the TFWP. What is clear is that some of the most exciting and innovative community organizing today is happening among migrant workers themselves and their allies. We can see that broad organizing and coalition building, including significant grassroots involvement by some of the editors and authors of chapters in this book, including the UFCW, is building the political momentum necessary to shift deeply entrenched and ideological policies around temporary labour migration.

To conclude, this book was about farm workers and their experience of attempting to use the *Charter* to gain access to a legal regime that would provide them with a meaningful and effective collective bargaining regime. That effort was not quixotic and merits the attention the contributors to this volume have given it. We were never under the illusion that this comprised the entirety of the struggle. Our reviewers should not be either.

## Notes

- 1 In this context, it is important to recall that regulations to extend health and safety protection to farm workers in Ontario were only made after a constitutional challenge was filed by UFCW Canada. Constitutional litigation in Quebec has removed restrictions on farm worker organizing in that province.
- 2 We explore this possibility at greater length in Fay Faraday and Eric Tucker, "Who Owns Charter Values?: A Mobilization Strategy for the Labour Movement", chapter 8, in *Unions Matter: Advancing Democracy, Economic Equality and Social Justice*, edited by Matthew Berens for the Canadian Foundation for Labour Rights, Toronto: Between the Lines, 2014.