

## Betting on New Forms of Worker Organization

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I have always admired labor organizers, in part because their long hours and incredible ability to listen, engage, and sympathize with people from every political persuasion make it possible for the labor movement to survive. I do not *envy* them, however, particularly at this moment in history. They often find themselves in untenable situations, faced with impossible moral and political dilemmas. As one Harvard Union of Clerical and Technical Worker organizer from the Tufts University campaign—where the union recently lost an election—explained to me in January 2010, “You can’t win an election without employer neutrality. Yet you can’t get neutrality without making concessions you don’t want to make.”

That is part of why I support the Employee Free Choice Act (EFCA): it aims to return responsibility for securing employer neutrality to the federal government, which will make it easier for workers to unionize and secure decent contracts. However, the charge for this Up for Debate exchange is not to defend or criticize EFCA. Nor is it to engage in “future think” about whether EFCA will come up for a congressional vote or—in what would be a surprising break from the past sixty-five years—pass. Given the volatile political climate in which we live, I appreciate this wise decision on the part of the editors. We would all do well to take a deep breath and hold off on rash political predictions, at least for a moment or two, whether it is hailing the triumphant return of the New Deal or pronouncing yet again the demise of labor.

Rather, *Labor* editors have asked first for reflection on the centrality of labor law reform in explaining the shifting fortunes of the U.S. labor movement. These fortunes, as measured by overall union membership figures, include the rise of organized labor from the 1930s to the end of the 1970s, when union membership peaked at 20 million, and its steady decline since 1980.<sup>1</sup> A second and related question for con-

1. The union density figures (the number of union members divided by the nonagricultural employment) tells a somewhat different story. Union density increased from the 1930s to the end of the 1950s and then slowly declined, with the steepest declines occurring after 1980. See Richard B. Freeman, “Spurts in Union Growth: Defining Moments and Social Processes,” in *The Defining Moment: The Great Depression*

sideration is whether and to what degree labor law reform might redress the current organizing problems confronting U.S. labor.

In the spirit of these directives, I focus initially on the rise and fall of contract unionism, or that group of workers with collective bargaining agreements, which is currently 8 percent of the private-sector labor force and 41 percent of the public-sector labor force, or 13.6 percent of all wage and salaried workers. The enormous and widening gulf between private- and public-sector contract coverage—what economist Paula Voos called in the *New York Times* a “sad commentary on the ability of private sector workers to unionize”—means that, for the first time in U.S. history, the majority of workers covered by collective bargaining agreements work for the government.<sup>2</sup>

Yet my analysis throughout this essay is informed by the growth of an “other” labor movement outside the tent of collective bargaining. This other movement shares the traditional labor movement’s goals of raising the living standards and status of working people, but it pursues these goals relying principally on mechanisms other than contract unionism. For example, community-based immigrant-worker centers, estimated by Janice Fine to have multiplied from 5 in 1992 to 140 in 2006, offer legal advice, education, and institutional support for low-wage immigrant-worker political and economic collective advocacy; none to my knowledge have signed contracts with employers.<sup>3</sup> Additional examples of the other labor movement abound: the living-wage campaigns that have resulted in new ordinances in more than 120 local governments; the thousands of immigrant marchers and their allies who thronged the streets on May Day 2006 and again on May Day 2010, pressing for political and labor rights; and the rise of professional, staff, and occupational associations such as the Freelancers’ Union, the 140,000–member New York-based group offering portable

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and the American Economy in the Twentieth Century, ed. Michael D. Bordo, Claudia Goldin, and Eugene N. White (Chicago: University of Chicago Press, 1998), table 8A.2.

2. U.S. Department of Labor, Bureau of Labor Statistics, “Union Members in 2009,” [www.bls.gov/news.release/union2.nro.htm](http://www.bls.gov/news.release/union2.nro.htm) (accessed March 29, 2010); the Voos quote is from Steven Greenhouse, “Most U.S. Union Members Are Now Working for the Government, New Data Shows,” *New York Times*, January 22, 2010. The Bureau of Labor Statistics reports two different sets of figures: the number of workers who belong to a union and the number of workers covered by a collective bargaining contract. The latter figure, slightly greater, is what I use here. Interestingly, the figure most widely used in discussing the fate of labor is 7 percent, the number of workers who belong to a union in the private sector. This figure not only underestimates contract coverage in the private sector but it also ignores the majority of union members. The growing and long-standing disparity between public- and private-sector unionism suggests that one strategy for union revitalization is to grow the government sector.

3. Janice Fine, “Worker Centers and Immigrant Women,” in *The Sex of Class: Women Transforming American Labor*, ed. Dorothy Sue Cobble (Ithaca, NY: Cornell University Press, 2007), 215. See also Fine, *Worker Centers: Organizing Communities at the Edge of the Dream* (Ithaca, NY: Cornell University Press, 2006), and Jennifer Gordon, *Suburban Sweatshops: The Fight for Immigrant Rights* (Cambridge, MA: Harvard University Press, 2005).

health insurance and other forms of mutual aid to contingent white-collar workers.<sup>4</sup> As labor historians who often teach about the great eight-hour strikes of the nineteenth century, the immigrant-oriented settlement houses of the early twentieth century, and the unemployed councils of the early 1930s, it is this larger labor movement that we usually have in mind. The labor movement has never been synonymous with collective bargaining, and it is important to distinguish the rise and fall of collective-bargaining unionism from the rise and fall of the labor movement.

At present, the vast majority of today's other labor movement exists outside the traditional labor bodies, including the AFL-CIO and Change to Win. Yet the line separating the traditional and the nontraditional labor movements is slowly eroding. Anyone who supports the political and economic goals of organized labor, for example, can join Working America, "the community affiliate of the AFL-CIO," founded in 2003. More than 2 million have, according to its director Karen Nussbaum, with most of these "working-class moderates" signing up in the two years preceding the 2008 presidential election.<sup>5</sup> In 2005, the AFL-CIO decided to allow independent local unions to affiliate directly with it after almost a half-century hiatus.<sup>6</sup> In 2006, the AFL-CIO also signed a historic agreement with the National Day Laborer Organizing Network (NDLON), encouraging its member organizations to join AFL-CIO state federations and central labor councils.<sup>7</sup> More recently, the Laborers International Union, a member of Change to Win, in partnership with worker centers in New Jersey and New York, chartered two new mixed local unions, composed of union and

4. On living-wage statutes, see Vicky Lovell, Heidi Hartmann, and Misha Werschkul, "More than Raising the Floor," in Cobble, *The Sex of Class*, 45. See also Paul K. Sonn and Stephanie Luce, "New Directions for the Living Wage Movement," in *The Gloves-Off Economy: Workplace Standards at the Bottom of America's Labor Market*, ed. Annette Bernhardt, Heather Boushey, Laura Dresser, and Chris Tilly (Ithaca, NY: Cornell University Press, 2008), 269–86; Victor Narro, Kent Wong, and Janna Shadduck-Hernandez, "The 2006 Immigrant Uprising: Origins and Future," *New Labor Forum* 16, no. 1 (2007): 49–56; Kevin R. Johnson and Bill Ong Hing, "The Immigrant Rights Marches of 2006 and the Prospects for a New Civil Rights Movement," *Harvard Civil Rights—Civil Liberties Law Review* 42, no. 1 (2007): 99–138; Sarah N. Kelly and Christine Tramontano, "Working Today," *New York Law School Law Review* 50 (2005–2006): 597–643; Charles Heckscher, Sara Horowitz, and Althea Erickson, "The Freelancers' Union and Civil Society Actors," undated manuscript in author's possession; Richard Hurd, "Professional Associations and Unions for the Twenty-first Century" (talk presented at Rutgers University Labor Education Center, New Brunswick, NJ, May 7, 2009). For further elaboration of these points, see Cobble, "Introduction," in Cobble, *The Sex of Class*, 1–12.

5. Brody Mullins and Kris Maher, "Labor Woos Whites for Obama," *Wall Street Journal*, October 7, 2008; Karen Nussbaum, "Working America: What It Is and What It Could Be" (talk presented at the Working America Conference, Harvard Law School, Cambridge, MA, November 13, 2007).

6. By my estimates, between its founding in 1886 and its merger with the CIO in 1955, the AFL chartered some twenty thousand federal or directly affiliated local unions (DALUs). Many of the largest international unions of the present began as DALUs. See Dorothy Sue Cobble, "Lost Ways of Organizing: Reviving the AFL's Direct Affiliate Strategy," *Industrial Relations* 36 (1997): 278–301.

7. Janice Fine, Jeff Grabelski, and Victor Narro, "Building a Future Together: Worker Centers and Construction Unions," *Labor Studies Journal* 33, no. 1 (2008): 36.

nonunion workers, to organize low-wage workers in residential construction.<sup>8</sup> These recent developments are a significant break with past AFL-CIO rules, which limited membership to those covered by collective bargaining.<sup>9</sup>

### **Labor Law and the Fall and Rise of Contract Unionism**

But let us return to the question of how much labor law is to blame for the dire straits in which the traditional labor movement finds itself. As any casual observer knows, there is more than enough blame to go around. The culprits include that sizable group of U.S. employers who, in the 1970s and 1980s, having bided their time for decades, constrained not by law but by public opinion, successfully toppled one mighty industrial union after another through the use of permanent striker replacements. In addition, one could point to a myriad of other unfortunate changes in the external environment: post-World War II employment shifts away from organized sectors and regions of the economy; the chill of McCarthyism and the breakup of the left-liberal coalition; technological changes eroding worker skill and power; the rise of a more sophisticated welfare capitalism with its promise of cross-training, employability, and peer management; and, last but not least, the move toward deregulated and globally competitive markets. Then, of course, there is the action or inaction of the labor movement itself.

In short, labor's decline cannot be pinned on any single factor, labor law or any other. Nor will its revitalization be spurred by attention to any single factor. There is no silver bullet, and the sooner we stop looking for one, the better our analysis of the problem will be. Put another way, I agree with William E. Forbath in *Law and the Shaping of the American Labor Movement* that labor law is not merely epiphenomenal or "reflective" but "constitutive."<sup>10</sup> Yet in my view, Forbath ends up overemphasizing the shaping force of the law. Labor law is always inseparable from and intertwined with other forces and factors.

Historically, labor law has both followed from and sparked labor organizing. The specific language of the Wagner Act as well as its actual passage cannot be understood without attention to the widespread strikes for union recognition that marked the 1930s, including the massive general strikes of 1934, as well as the years of protests and endless meetings, large and small, clandestine and public, that preceded these uprisings. At the same time, the extent and character of the 1930s labor upsurge was heavily influenced by the enactment of the Norris-LaGuardia Act in 1932, under the Hoover presidency, which restricted court injunctions against mass picketing, secondary boycotts, and recognition strikes; the passage of section 7 of the 1933 National Recovery Act, encouraging the organization of labor as well as capital; and the 1937

8. Tiffany Ten Eyck, "Laborers Join with Worker Centers, Aiming to Organize Residential Construction," *Labor Notes*, January 13, 2009, [www.labornotes.org/magazine](http://www.labornotes.org/magazine) (accessed February 13, 2010).

9. Cobble, "Lost Ways of Organizing," 278–301.

10. William E. Forbath, *Law and the Shaping of the American Labor Movement* (Cambridge, MA: Harvard University Press, 1991), ix–xiv.

Supreme Court ruling that upheld the Wagner Act and legitimized the nation's commitment, codified in the language of the act, to achieving "actual liberty of contract" and "full freedom of association" through "good faith bargaining" between parties of relative equality.<sup>11</sup>

Similarly, labor law both inspired and followed from the self-organization of government workers. The passage of the first state statute in Wisconsin in 1959, President Kennedy's 1962 executive order encouraging the collective organization of federal employees, and the subsequent flood of enabling legislation in numerous states and municipalities across the country in the late 1960s and 1970s all spurred unionization. Yet, in a replay of the 1930s, the enactment of public-sector labor laws occurred in a context of worker unrest, and the large-scale growth of public-sector unionism rested to a great degree on its connections to the civil rights movement and, later, the women's movement.<sup>12</sup>

It is impossible to know the extent of labor organizing that would have occurred in either the private or the public sector absent enabling labor legislation, but the history of unionism since the early 1930s suggests to me that significant worker self-organization can occur without the benefit of supportive labor legislation. In the private sector, as noted earlier, considerable worker organization was already under way before the Wagner Act was upheld in 1937. Furthermore, according to Richard Freeman's estimates, more workers were organized through recognition strikes during the 1934–39 organizing spurt than through National Labor Relations Board (NLRB) elections.<sup>13</sup>

Similarly, large numbers of government workers organized before they had a legal right to do so. Consider such crucial struggles as the 1968 Memphis garbage strike, the breakthrough battle for the American, State, County and Municipal Employees' subsequent successful organizing in the South. It began as a wildcat strike and was settled successfully not because of legal pressure but because Martin Luther King Jr.'s death focused the attention of the world on Memphis.<sup>14</sup> Of equal significance, union growth among government employees has continued *despite* the substan-

11. Both phrases "actual liberty of contract" and "full freedom of association" are found in the preamble to the Wagner Act. Because the historical literature on the 1930s is vast and familiar to readers of *Labor*, I do not cite it here in any comprehensive way. For an introduction, however, see Irving Bernstein, *Turbulent Years: A History of the American Worker 1933–1941* (Boston: Houghton Mifflin, 1970); David Brody, *Workers in Industrial America: Essays on the Twentieth Century Struggle* (New York: Oxford University Press, 1993); and Nelson Lichtenstein, *State of the Union: A Century of American Labor* (Princeton, NJ: Princeton University Press, 2003).

12. Thomas R. Brooks, *Toil and Trouble: A History of American Labor* (New York: Dell, 1971), 300–24; Deborah Bell, "Unionized Women in State and Local Government," in *Women, Work, and Protest: A Century of U.S. Women's Labor History*, ed. Ruth Milkman (Boston: Routledge and Kegan Paul, 1985), 280–99.

13. Freeman, "Spurts in Union Growth," 281.

14. Joan Turner Beifuss, *At the River I Stand: Memphis, the 1968 Strike, and Martin Luther King* (New York: B&W Books, 1985); Michael K. Honey, *Going Down Jericho Road: The Memphis Strike, Martin Luther King's Last Campaign* (New York: W. W. Norton, 2008).

tial weaknesses in public-sector labor legislation. Public-sector labor statutes routinely place severe limits on workers' right to strike as well as on the scope of bargaining: as Joe McCartin recently pointed out, public-sector unions failed in their efforts to pass a public-sector federal law with rights comparable to the Wagner Act.<sup>15</sup>

### **EFCA and the Revitalization of the U.S. Labor Movement**

The passage of EFCA would certainly be an occasion for celebration. But in the absence of other transformations, its impact will be limited. First, as the foregoing account of the rise of contract unionism suggests, labor law reform is at most one leg of the stool. It is helpful, and at times even crucial to growing the movement, but it cannot spark widespread labor organizing or bear the weight of labor revitalization by itself.

Second, because EFCA does not challenge the outmoded industrial framework of the Wagner Act, its impact will be largely felt by a declining minority of U.S. workers. The 1935 Wagner Act was passed to ensure the organizing of mass production workers, the majority of whom were in full-time, long-tenure jobs with clearly defined tasks and an identifiable employer. The act defined "employee" narrowly, and, subsequent court decisions and legislative amendments to the National Labor Relations Act (NLRA) further circumscribed who was eligible for protection. Currently, the NLRA exempts some one-third of the private-sector labor force. Excluded are domestic and agricultural workers and the rising number of professionals, managers, independent contractors, supervisors, or anyone with supervisory responsibility, including in one infamous NLRB ruling—also the subject of a hilarious *Colbert Report*—staff nurses. In addition, although the initial Wagner Act made some exceptions for certain groups of nonfactory workers, allowing prehire agreements and other nonelection procedures in industries without a stable workforce—think musicians who play one-night stands or construction workers—these exceptions have largely disappeared, leaving the contingent and mobile workforce, another growing sector, without suitable mechanisms for gaining collective bargaining rights. Lastly, the erosion of labor's economic rights, including restrictions on secondary economic actions that are in truth primary, makes it almost impossible for workers to organize in small retail, trucking, and service establishments and in industries with multiple contractors.<sup>16</sup>

Given the history just outlined, the large number of workers who would not necessarily benefit from EFCA, and the unpredictability of the political process, the

15. Richard B. Freeman, "Unionism Comes to the Public Sector," *Journal of Economic Literature* 24 (1986): 41–86; Joseph McCartin, "A Wagner Act for Public Employees: Labor's Deferred Dream and the Rise of Conservatism, 1970–1976," *Journal of American History* 95, no. 1 (2008): 123–48.

16. Dorothy Sue Cobble, "Making Postindustrial Unionism Possible," in *Restoring the Promise of America's Labor Law*, ed. Sheldon Friedman, Richard W. Hurd, Rudolph A. Oswald, and Ronald L. Seeber (Ithaca, NY: Cornell University Press, 1994), 285–302; U.S. General Accounting Office, "Collective Bargaining Rights: Information on the Number of Workers with and without Bargaining Rights" (GAO-02-835, September 2002).

U.S. labor movement needs to think of labor law reform as part of a broader strategy for revitalization. Labor law reform needs to be part of a larger vision for how the labor movement can reclaim its rightful place as an institution dedicated to representing the needs of all workers and contributing to the social good. As I have argued elsewhere, there is no quick fix. Fundamental questions need rethinking: who is a worker, what are the needs of the twenty-first-century workforce, and what are the means by which these diverse desires can be realized?<sup>17</sup>

The answers to these questions will be only partially the same as they were for the New Deal generation. There will be discontinuities as well as continuities. Certainly, standard-of-living issues will remain central, but other issues may emerge as equally pressing.<sup>18</sup> Such sacred union principles as seniority or homogeneity of treatment may not always turn out to be the best routes to security, equality, and dignity. Indeed, collective bargaining unionism itself may not be the primary mechanism by which workers sustain and institutionalize their collective power. In 2010, the U.S. labor movement experienced a historic shift: for the first time in U.S. history, contract unionism was found primarily among government workers. It is possible that another historic shift is under way: the rise of a new labor movement in which multiple forms of worker power flourish and noncontract unionism comes to be the norm. In that way, the twenty-first-century labor movement will look more like the labor movement of the nineteenth century than that of the twentieth century.

Yet none of this can be fully figured out ahead of time. What can happen, however, is a commitment by the labor movement and its allies not to be wedded to a single reform or a single model of unionism. Social movements are not willed from above; they emerge from below in response to contradictions and frustrations and hope. The most that the organized labor movement can do is be honest about the limitations of the power of any single reform, identify and support worker self-organization where it is occurring, open its arms wide to groups that share its broad political and economic goals, regardless of whether they are seeking union contracts, and think deeply about how worker institutions, including ones already built, can be structured to encourage democracy, creativity, and solidarity. ■

17. See, for example, Dorothy Sue Cobble and Leah Vosko, "Historical Perspectives on Representing Nonstandard Workers," in *Nonstandard Work: The Nature and Challenges of Changing Employment Arrangements*, ed. Francoise Carre, Marianne A. Ferber, Lonnie Golden, and Stephen A. Herzenberg (Ithaca, NY: Cornell University Press, 2000), 291–312; Cobble, "Introduction," in Cobble, *Sex of Class*, 1–12.

18. For exploration of the particular concerns of service and intimate workers, see Dorothy Sue Cobble and Michael Merrill, "The Promise of Service Worker Unionism," in *Service Work: Critical Perspectives*, ed. Marek Korczynski and Cameron Lynne Macdonald (London: Routledge, 2008), 153–74; and Dorothy Sue Cobble, "More Intimate Unions," in *Intimate Labors: Culture, Technologies, and the Politics of Care*, ed. Eileen Boris and Rhacel Parreñas (Stanford, CA: Stanford University Press, 2010), 280–95.

