A Wagner Act for Today: Save the Preamble but Not the Rest?

Dorothy Sue Cobble

Joseph A. McCartin offers in this issue a deeply informed, perceptive, at times elegant review of the scholarly assessments of the Wagner Act, stretching from the "postwar celebrants" to the 1970s New Left, from critical legal studies skeptics to the present-day embrace of Christopher L. Tomlins's prescient 1985 rotten-to-the-core analysis. "In 2010," McCartin concludes, the act "began to noticeably loosen its grip on the imaginations of labor intellectuals," and "a consensus has taken shape" around the need for a "new, twenty-first-century Wagner Act." McCartin too is ready for a new labor law, though he rightly cautions that in the clamor for this or that legislative fix we not forget the necessity for worker mobilization and favorable public opinion before any "significant reform" can be won.[1]

In a final section of the essay, McCartin applies "lessons of the last Wagner Act to the next" and draws our attention to the act's inspiring preamble. Fighting for a "big new vision," he believes, even if a "losing fight," can play an "educative role" and "serve as the starting point for action when the opportunity arises." He identifies three "essential elements" in the Wagner Act preamble "worthy of emphasis": its "vision of political economy," its protection of "organizing rights in ways that promoted worker bargaining power," and its importation of "basic tenets of democracy . . . into the workplace."[2]

In McCartin's view, we should foreground the act's economic and collective orientation, not its nod to individual and human rights. The act was "less about ensuring freedom of association than about empowering workers to bargain," he observes. And he warns against "would-be reformers" who see "labor's problem today as being primarily rooted in the law's failure to protect the 'right to organize'" and who "promote workers' freedom of association" in ways that "risk exacerbating the problem of how to enhance workers' bargaining power." For McCartin, rights

1. McCartin, "'As Long as There Survives,'" 38.
2. Ibid., 37.

Labor: Studies in Working-Class History, Volume 14, Issue 2
DOI 10.1215/15476715-3790152

language can be part of the problem, and the labor movement's reliance on "the right to organize" in the Employee Free Choice Act left it vulnerable to employer counterattack.

I applaud much of what McCartin has to say. I have long been a fan of the Wagner Act preamble, and at the 2010 National Labor Relations Board (NLRB)/George Washington School of Law Symposium on the National Labor Relations Act, titled "The NLRA at 75," I offered an account of the intellectual origins of the preamble and the subversive labor traditions it embodied.[3] At the same time, the rest of the act, I concluded in the early 1990s, perpetuated fundamentally flawed, outmoded assumptions about work, workers, and labor-management relations; we needed a radical makeover of labor law, not merely a few nips and tucks.

In 1992, Karen Nussbaum, then Director of the US Women's Bureau, asked me for a research paper on labor law reform and women workers. She feared President Clinton's Commission on the Future of Worker-Management Relations would pay insufficient attention to the workplace representational needs of women and those in "women's jobs"—a sector filled with workers now dubbed "precarious" or "non-standard." She was right. But as I found out, the act was failing almost everyone: men as well as women, those in "core" jobs as well as those on the "periphery."

I presented my findings in 1993 at labor law reform conferences called by the AFL-CIO and the US Department of Labor and at other, more solely academic venues. The 1935 Wagner Act was a creature of its times, I argued; its Taylorist, industrial-union premises were problematic from the onset, and subsequent amendments only sealed its irrelevancy. The act defined workers narrowly, limiting coverage to a minority group of waged "dependent employees" in industrial-type occupations, and it enshrined an organizing and representational model ill suited to those who moved from job to job or worked in settings without a "boss." If the majority of workers were to have access to collective voice and power once again, we needed, at minimum, a law covering all workers—white-collar, managerial, self-employed, mobile, and contingent—and a law acknowledging and fostering new and multiple forms of unionism.[4] Those contentions were not in sync with the times. The priority I observed in the 1990s was amendment of the act to help extend traditional forms of collective bargaining, not reconception of labor law for the majority. But times have changed, it seems, and that is all to the good.

Yet the conversation has not changed enough. Troubling continuities and omissions persist in today's debates over labor law that keep us stuck in the past. Let me discuss three: an overestimation of the power of labor law; the marginalization of labor's freedom struggle, in part due to a dichotomous framing of individual and collective rights; and the privileging of traditional contract unionism over other forms of worker bargaining power—a bias not that dissimilar to what I witnessed twenty-five

3. Published subsequently as Cobble, "Intellectual Origins of an Institutional Revolution."

4. For published versions, see Cobble, "Making Postindustrial Unionism Possible"; and Cobble, "Labor Law Reform and Postindustrial Unionism."

years ago. McCartin largely steers clear of the first of these problems but falls prey at times to the others.

Unlike many others now weighing in on labor law reform, McCartin is careful not to give the law too much agency. He calls our attention to the great 1937 Flint Michigan auto sit-down and to the essential role of worker militancy in the 102–day transformation he chronicles in late 1936 and early 1937. He reminds us of the writings of Staughton Lynd and James Green with their stress on worker agency; he recalls Melvyn Dubofsky's crucial insight—that shifts in political power largely determine whether the law hinders or helps workers.

I agree. In the end, the legal order is more reflective of relations of power than transformative of them. The law ratifies social movements; it does not create them, and too much attention to legal regulation perpetuates the legalistic illusion that you can legislate worker power. We will have a new labor law *after* we have a new labor movement and not before. And if that is true, labor scholars should be spending less time parsing regulatory policy and more time trying to understand how people come to believe they can create a better world and what ideas inspire workers to act together for progressive change.

Here is where the Wagner Act's preamble is helpful: it reveals much of what workers wanted historically and what motivated them to organize. As I have elaborated elsewhere, the preamble embodied the labor movement's long-standing rejection of laissez-faire economics, social Darwinist social theories, and workplace rule by elites.[5] From the early nineteenth century forward, Ira Steward, Samuel Gompers, and a host of other labor leaders preached an alternative economics: economic prosperity flowed not from capital but from higher wages, enhanced consumer purchasing power, and greater bargaining equality between labor and capital. And as McCartin's creative scholarship in *Labor's Great War* (1998) helped recover,[6] pre–New Deal workers also demanded industrial democracy, self-organization, and self-representation—a democratic political tradition eventually institutionalized in the act.

But the act's preamble also articulated the labor movement's own long freedom struggle. The preamble's commitment to "full freedom of association" and to "actual liberty of contract," a phrase McCartin does not mention, is well worth pondering. It would be a mistake to downplay the preamble's rights language as McCartin does. Workers cared deeply about civil and human rights, including the right to free speech, assembly, and the right to quit or refuse work, and the pre–New Deal labor movement made the achievement of real freedom for workers central to its mission. The pre–New Deal labor movement did not abandon the terrain of freedom; it sought instead to change ideas about what freedom meant. By calling for real or "actual liberty of contract," the labor movement unmasked the false "liberty of contract" preached by employers and judges. Individual bargaining was not liberty or

5. Cobble, "Intellectual Origins of an Institutional Revolution"; Cobble, "Pure and Simple Radicalism."
6. McCartin, *Labor's Great War.*

freedom: real freedom rested on workers having access to collective association and bargaining power. Freedom was a social right, a right given to a group. The labor movement did not see individual and collective rights as opposed. Rather, these rights were intertwined and mutually reinforcing. Individual rights were best realized collectively; respect for individual difference and human rights strengthened solidarity.

The phrase "actual liberty of contract" appeared first in the 1932 Norris-LaGuardia Act, a realization of the AFL's legislative agenda. Three years later, it found its way into the Wagner Act preamble. Tomlins captured this intellectual reform stream brilliantly. He did more than critique the "counterfeit liberty" of the Wagner Act: he recognized the power of the pre–Wagner Act labor movement and its desire for freedom, autonomy, and self-determination.[7] For the last two centuries, the labor movement has been part of a long and wide struggle for the abolition of involuntary servitude and the sanctity of human rights and dignity. This heritage is not one to fear but to continue: it speaks loudly to workers today, especially those in the growing rightless, paperless, stigmatized, and involuntary underclass.

Lastly, McCartin's essay fails to appreciate fully the new forms of bargaining power being invented by workers today. He longs for another great Flint strike but doubts it possible given today's service, gig economy and the rise of a more formidable global capitalism. Labor, he observes, is in a "dismal state." I disagree.

To be sure, the older labor movement is in crisis, but a new, reconfigured labor movement is being born. There is significant new organizing currently underway among workers in the United States and around the world. And it is not just at the "margins." Nor is the evidence for it merely anecdotal. Workers of all sorts are boosting their bargaining power collectively and inventing new forms of mutualism. The rise of new worker institutions (centers, associations, networks, cooperatives) and social movements (for living wages, citizenship rights, paid family leave, paid sick leave) in the United States is well known.[8] But there are even more signs of uptick globally. Organizing among the informal and the self-employed—street vendors, domestic workers, small producers—is growing worldwide, but most surprising is the persistence, even revival, of contract unionism. The "decline" and "crisis" of contract unionism is real in the wealthier Organisation for Economic Co-operation and Development countries but not so elsewhere.[9]

The growing collective power of those at the "margins" and the not-so-dismal state of labor movements are often ignored because our notions of collective action and of workplace power are still tied to outmoded theories of proletarian upsurge. It is no longer true, if it ever was, that factory workers are more likely than others to organize collectively. Nor is contract unionism the only—or necessarily the most—effective form of worker bargaining power. Global, networked capitalism is

7. Tomlins, Christopher L., *The State and the Unions*.

8. For a popular overview, see Eidelson, "Alt-Labor." For a recent scholarly account, see Milkman and Ott, eds. *New Labor in New York*.

9. For further data and examples of the rise of labor movements in the United States and globally, see Cobble, "Worker Mutualism in an Age of Entrepreneurial Capitalism."

just as vulnerable to disruption as other forms of capitalism. We need a kind of figure-ground switch to see the new face of labor and the new tactics it relies upon, but it is a shift we should make. A more capacious view of worker power and of labor movements is required at this transitional moment, both in how we write our histories and in how we think about the future. It will make us more comfortable about letting go of old forms of bargaining power and better able to envision new. It also will make us more sanguine about the prospects for labor law reform and position us to help further the inclusive, democratic labor movements we desire.

DOROTHY SUE COBBLE is distinguished professor of history and labor studies at Rutgers University. In 2016 she held the Swedish Research Council's Kerstin Hesselgren Chair at Stockholm University. She is currently finishing a book on US women and global politics.

References

Cobble, Dorothy Sue. 1994. "Labor Law Reform and Postindustrial Unionism," *Dissent* 19, no. 1: 474–80.

———. 1994. "Making Postindustrial Unionism Possible." In *Restoring the Promise of American Labor Law*, edited by Sheldon Friedman, Richard W. Hurd, Rudolph A. Oswald, and Ronald L. Seeber, 285–302. Ithaca, NY: Cornell University Press.

———. 2011. "The Intellectual Origins of an Institutional Revolution." *ABA Journal of Labor and Employment Law* 26, no. 2: 201–12.

———. 2013. "Pure and Simple Radicalism: Putting the Progressive Era American Federation of Labor in Its Time." *Labor* 10, no. 2: 61–87.

———. 2016. "Worker Mutualism in an Age of Entrepreneurial Capitalism." *Labour and Industry* 26, no. 4: 38–56.

Eidelson, Josh. 2013. "Alt-Labor." *American Prospect*, February 24. www.prospect.org/article/alt-labor (accessed December 15, 2016).

McCartin, Joseph A. 1998. *Labor's Great War: The Struggle for Industrial Democracy and the Origins of Modern American Labor Relations, 1912–1921*. Chapel Hill, NC: University of North Carolina Press.

———. 2017. "'As Long as There Survives': Contemplating the Wagner Act after Eighty Years." *Labor* 14, no. 2: 21–42.

Milkman, Ruth, and Ed Ott, eds. 2014. *New Labor in New York: Precarious Workers and the Future of the Labor Movement*. Ithaca, NY: Cornell University Press.

Tomlins, Christopher L. 1985. *The State and the Unions: Labor Relations, Law, and the Organized Labor Movement in America, 1880–1960.* New York and Cambridge: Cambridge University Press.