

# SAVING THE RIGHT TO ORGANIZE

## *Substituting the Thirteenth Amendment for the Wagner Act*

NOW THAT THE ELECTION IS OVER, DEBATES OVER THE FUTURE OF THE LABOR MOVEMENT will begin in earnest. These debates will be about the crisis, not the dreams and promise, of the labor movement. They will not address how to build a full employment economy, shorten the hours of work, distribute an ever-increasing surplus, or establish structures of codetermination. Now we face the fundamental issue of the very survival of the labor movement.

**M**ODERN LABOR MOVEMENTS MUST BE able to do two things: organize expansively and bargain effectively. Before the mid-1970s, these core capabilities were taken for granted in the United States. In fact, the rights to organize and bargain formed the very basis of the post-World War II social

contract. But unlike in other industrialized nations, these rights remained under attack and were never fully institutionalized. Today, these rights are virtually nonexistent.

At its peak in 1953, nearly 36 percent of U.S. workers were unionized. Today the percentage of organized workers is below 13 per-

cent. In the private sector, it has fallen below nine percent.<sup>1</sup> Bargaining power—that complex equation determined by union density, leverage and will—has declined precipitously with few notable exceptions. The number of workers on strike has experienced a seven-fold decline between 1974 and 2001.<sup>2</sup> During that same period, average inflation adjusted wages have declined by over eight percent<sup>3</sup> while income and wealth have been steadily redistributed upward at unprecedented rates.<sup>4</sup> Some activists joke that collective bargaining has been replaced by collective begging.

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And those activists are the lucky ones—at least they are allowed to beg. Thirty years ago, the largest private employers in the United States were General Motors and U.S. Steel, companies that were, since the 1940's, heavily unionized and held accountable for a steady increase in the standard of living of their employees. Today, the largest employers are Wal-Mart and McDonalds. As Nelson Lichtenstein argues in “Wal-Mart—Template for a New Economy,” dominant corporations set the wage standards and employment conditions for the entire economy.<sup>5</sup> The inability of the labor movement to establish a serious foothold in any of the corporations dominating the “new” economy threatens that today’s unions may soon go the way of medieval guilds.

In less than a generation, the American labor movement has gone from a vital institution at the very core of a pluralistic society to a marginalized anomaly hanging on for its very life. This counterrevolution was accomplished without a single substantial change in the labor laws that govern organizing and collective bargaining. Nor has it required the overt government repression of unions that characterized many authoritarian regimes’ attacks on the labor movement during this period (Brazil in the 1970s, Argentina and South Korea in the 1980s, and contemporary China). Rather, it has been the victim of a concerted employer attack utilizing existing laws and regulations, and abetted by almost unrestricted employer access and control over the appointments and agendas of the courts and regulatory apparatus that govern labor relations.

Kate Bronfenbrenner and others have been eloquent in documenting the unremitting employer reign of terror that characterizes almost every attempt of workers to exercise their right to organize.<sup>6</sup> The “laboratory conditions” established by the National Labor Relations Board make it almost impossible for workers to exercise this right in the real world. By establishing employer rights to “free speech” (translation: captive audience meetings, coercive one-on-one interviews, un rebutted use of fear, threat, innuendo, etc.) and privileging employer “property rights” (translation: no union access to the work site, complete employer control over the activities and speech of union supporters on the job), contemporary labor law has created an electoral scenario that any ruler of a one party state would die for. Not satisfied with these extensive rights, most employers actually break the

law. In at least 25 percent of all organizing efforts, workers are illegally fired.<sup>7</sup> Countless other unfair labor practices are routinely committed because the consequences for such violations are almost nil.

Not surprisingly, many leaders and activists have concluded that traditional NLRB-based organizing is a dead end. Instead, they have tried to bring outside pressures and resources to counteract the overwhelming economic and legal power that employers have within the workplace. AFL-CIO Executive Vice President Linda Chavez-Thompson has been a forceful advocate of “enlarging the playing field” by reaching out to natural allies in the community, exposing and stigmatizing antiunion employers, mobilizing members and developing alternative dispute resolution mechanisms.<sup>8</sup> The United Auto Workers have begun to use their still considerable leverage with primary industry employers to pressure parts and subsidiary employers to adopt a neutral posture. Many unions in construction, health care, and service industries have utilized state and local political influence and/or their capacity to create some amount of social turmoil, to bring outside powers to bear on recalcitrant employers.

Organizations like Jobs with Justice and American Rights at Work have vigorously supported these new organizing directions. They have established community worker rights boards, recruited prominent citizens as watchdogs, and engaged in aggressive street mobilizations that confront antiunion employers and indifferent government agencies. They seek to recast the issue of worker rights as a human rights issue and portray the denial of these rights as fundamentally antidemocratic and un-American. Recent legislative and regulatory initiatives to outlaw card check recognition are

evidence of the success of these new approaches.<sup>9</sup> Needless to say, the loss of card check recognition could well be the last nail in the coffin of the right to organize.

Support for new organizing directions, coupled with a demand that unions devote a far greater portion of their resources to organizing, has been the cornerstone of the New Voices leadership of the AFL-CIO. It has produced some notable successes and breakthroughs. Nonetheless, the unionized percentage of the total workforce has continued to decline and none of the “template corporations” of the new economy has been organized. This has led to increased emphasis on labor law reform as the solution to the crisis. In late 2003, the Employee Free Choice Act was introduced. It would produce a limited, but substantial, reform of labor law by providing for automatic union certification whenever a majority of eligible employees sign authorization cards, provisions for mandatory mediation and arbitration to make it easier to achieve a first contract, and stronger penalties against employers who violate the right to organize and bargain.

Many unions have insisted that support for this act be the *sine qua non* for their support of any politician seeking their endorsement. They have been remarkably successful, recruiting over 200 sponsors in the House. But before this bill becomes the cornerstone of labor’s efforts to revitalize itself, two questions should be answered: Is it possible for such a bill to pass and be signed into law? Will the passage of this bill make a substantial difference in the labor movement’s ability to organize and bargain?

History has not been kind to labor law reform efforts. Since the passage of the hated Taft-Hartley Act in 1947, there have been at least eight attempts to enact some aspect of

proworker labor law reform ranging from the effort to secure a wholesale repeal of the Act in 1948–1949 through the Clinton era attempt to outlaw the permanent replacement of striking workers. All started out with substantial legislative majorities and expressions of support from the executive branch. All failed in the face of united and unrelenting employer opposition, usually coupled with the betrayal from key “allies” in the legislative or executive branches.<sup>10</sup>

In their article *Toward A New Labor Law*, Pope, Bruno, and Kellman argue that when it comes to labor law reform, “[t]he fact is that—absent very extraordinary circumstances—business interests hold a veto power over labor rights legislation in this country.”<sup>11</sup> Business exercises this veto not only because it outspends labor by a margin of 15 to 1 on campaign contributions,<sup>12</sup> but also because of its economic

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capacity to make good on its threats to respond to any initiative that undermines its “competitiveness” through the withdrawal or redirection of investment, and the closing or relocation of facilities. Under the proper conditions, some measures that may hurt the inter-

ests of some segments of business may be enacted into law—minimum wage increases, environmental legislation, unemployment insurance extensions, and so on. But any measure that increases worker rights or their bargaining power meets a united front of employer opposition and has gone down in flames.

This grim reality has led many to abandon the dream of comprehensive labor law reform and propose other strategies. David Brody, for example, understanding that the National Labor Relations Act has been “hijacked by its natural enemies,” and seeing the futility of achieving any comprehensive labor law reform “absent a New Deal,” has called for attempting to reestablish the right to organize on a state level.<sup>13</sup> Even assuming that this approach could survive the half-century of case law establishing that almost all state-level private sector labor laws are “preempted” by federal labor law, it is still hard to see how such a strategy could overcome the concentrated veto power of capital as described above.

Others have called for the adoption of “minority unionism” or “open source unionism.”<sup>14</sup> They would utilize the National Labor Relations Act’s protection of the rights of workers to self-organization and concerted action, in situations where workers would not seek union certification as a majority representative or to negotiate a collective bargaining agreement. (“Open-source unionism” adds the twenty-first century twist of servicing minority unionists through the Internet at a marginal cost of close to zero.) While these may be important ways to begin to reestablish a foothold in the vast unorganized sections of the economy, it is hard to see how this approach could be an end in itself. And it seems to be no

more than wistful thinking that workers could do this “without going to war with their employers.”<sup>15</sup> The likelihood of any foreseeable NLRB defense of the rights of workers in this situation, when it has proven woefully incapable of defending organized workers backed by (relatively) well-financed unions, appears utopian at best. Further, self-organization has little value to workers unless it can increase their relative bargaining power. Absent European-style mandatory workplace representation structures that give voice to workers and their representatives regardless of a union’s majority status, this power can be effectively and consistently exercised only through collective bargaining by a majority representative on behalf of all affected workers.

Here lies the Achilles heel of much of the “rights talk.” Workers do not sacrifice their livelihoods to join unions in order to appease some abstract democratic impulse. Workers, as Peter Olney points out, organize unions in order to build power and establish a degree of control over their lives. The right to organize is important but, “the quality of that organizing and the fate of those workers once organized is the key to building power.”<sup>16</sup> The right to join a union may get you to the table, but without a meaningful right to strike and without the ability of workers to act in solidarity with one another, it is hard to envision how workers can exercise any effective power in the face of concentrated corporate power.

Further, a focus on worker rights as exclusively individual human rights can lead to some pretty strange places. As the National Right to Work Foundation will tell you, if a worker has an absolute human right to join a union, then

she has an equally absolute right not to join it. Articulating this right solely as an individual right leads to its “balancing” with other rights.

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Human Rights Watch, for example, opposes any expansion of worker rights that would limit the “free speech rights” of employers.<sup>17</sup> Even more pernicious is the balance between the right to join a union and an employer’s property rights. From the very beginning, the courts have used this right to constantly erode and undermine union rights.

As Joseph McCartin has pointed out, when workers organize and bargain, they are not so much exercising their individual rights as they are establishing a form of *democratic control*. And rights and democracy are “naturally in tension with each other.” This is particularly true in a union organizing fight asserting the “claims of the many against the few, of the pro-union majority against the anti-union minority.”<sup>18</sup> This language of democracy has much more in common with the language of self-determination than with that of abstract human rights.

This perspective is consistent with the

meaning and spirit of internationally accepted labor standards. It underlies the Norris-LaGuardia Act—the first significant piece of New Deal labor rights legislation—whose preamble states:

*Whereas, under prevailing economic conditions, developed with the aid of governmental authority for owners of property to organize in the corporate and other forms of ownership association, the individual unorganized worker is commonly helpless to exercise actual liberty of contract and to protect his freedom of labor and thereby to obtain acceptable terms and conditions of employment. . . .*

And it is consistent with the theory and practice of the American labor movement from the birth of the American Federation of Labor (AFL) until the passage of the Wagner Act. The labor movement made it a question of principle to defy any unconstitutional injunction limiting workers ability to organize and bargain. In fact, in 1909, the AFL made it its official policy to instruct members to “refuse obedience” to any such injunction and “take whatever consequences may come.”<sup>19</sup>

Unionists maintained that the Thirteenth Amendment to the Constitution provided the legal basis for their resistance. The first Reconstruction amendment stated plainly that “Neither slavery nor involuntary servitude . . . shall exist” anywhere in the United States, and empowered Congress to pass appropriate legislation to enforce its provisions. Unionists viewed it as “the Glorious Labor Amendment”<sup>20</sup> and argued that, in the contemporary world of large, integrated corporations, restrictions on workers’ right to organize and bargain led to a de facto condition of involuntary ser-

vitute. Echoes of this perspective could be heard right into the preamble language of the Wagner Act.

The Thirteenth Amendment is unique in many ways. It is the only extant constitutional amendment that goes beyond the regulation and limitation of government duties and power to place a positive responsibility upon government to eliminate a system of labor. Its forthright language makes it ill-suited for balancing its purpose with property rights or freedom of contracts. It applies to everyone everywhere, so artificial distinctions based on occupation or sectors do not apply. In fact, much of the work of the pre-Brown Department of Justice Civil Rights Section (established in 1939) focused on using the Thirteenth Amendment to challenge coercive labor systems in sectors such as agriculture and domestic employment where African Americans predominated, and the New Deal labor laws did not apply.<sup>21</sup> Taken together with the First Amendment guarantee of speech, assembly and association, the Thirteenth Amendment would appear to provide an expansive constitutional basis for labor rights in ways that would have them precede and override employer’s property rights.

Pope, Bruno, and Kellman argue that the “original sin” of modern labor law was the abandonment of the Thirteenth Amendment approach. Instead, the National Labor Relations Act and subsequent pieces of federal labor legislation were grounded in the Constitution’s Commerce clause.<sup>22</sup> This decision was made for purely tactical reasons—much of New Deal legislation was upheld by the courts because of Congress’s power to regulate interstate commerce. And labor law proponents sought to broaden its ideological appeal by maintaining that it would promote “labor peace” and, hence,

a smoother flow of commerce. But these decisions had wide ranging negative implications for worker rights. From the very start, courts began to chip away at workers' fundamental rights based on what they thought was good for "commerce" rather than on the premise that the right to organize and bargain was itself constitutionally protected. James Gross has meticulously documented how laws originally passed to promote workers rights to organize and bargain have, over a 50-year period, been transformed into their opposite. U.S. government policy has gone from the official promotion of collective bargaining to official indifference to outright hostility.<sup>23</sup>

The Labor Party has called for a return to the constitutional roots of the First and Thirteenth Amendments as a way to revitalize the worker rights movement. We assert that any labor law that is premised on the Constitution's commerce clause is fundamentally flawed and cannot be "fixed." Our proposal, *Toward a New Labor Law*, was widely discussed among organizers, activists, and labor leaders in meetings around the country. Many have found the call to rethink the very foundations of labor law to be profoundly liberating.

Liberating though it is, this perspective does not provide a road map for organizers. Asserting the existence of a constitutional right does not, of itself, make it so. Just as the courts, for more than half a century, upheld the "separate but equal" doctrine of Plessy, no federal court has ruled that the Thirteenth Amendment applies to anything more than an individual worker's right to leave a job. It will not be the logic and eloquence of our constitutional arguments that compels them to do so.

So if judicial relief is no more forthcoming than legislative relief, where does that leave us? Here, the experience of the Civil Rights movement is most instructive. Over several decades, a campaign of agitation, education, and mass civil disobedience worked in tandem

## *The Thirteenth Amendment . . . places a positive responsibility upon government to eliminate a system of labor.*

with a targeted and incremental legal strategy that removed all of the legal underpinnings of the Jim Crow regime. The mass unionization of millions of public sector employees starting in the 1960s followed the same dynamic. The establishment of a new worker rights paradigm must surely follow a similar trajectory.

That is not to say that it is a waste of time to focus on small, incremental reforms. There has always been a complex "push-pull" relationship between government policies and popular movements. Small changes in labor policy, such as those at the beginning of the Roosevelt administration, were perceived by workers, and consciously magnified by organizers in the field, to be a signal that the government would support and protect them. This empowers and emboldens people to take matters into their own hands.

But the fight that labor is taking on today to build a new labor law is of historic proportions. Its unfolding will test the capacity and

creativity of labor as it confronts a united front of employer opposition. And its outcome will determine the very survival of the American labor movement. Any change at all will require years of struggle and massive mobilization. In such a contest, “ideas do matter.”<sup>24</sup> We need to enter into this battle with the same kind of long term strategic thinking that employers used to transform the Wagner Act into its opposite. And we have to be clear about what we are fighting for. All too often our movement commits resources and power to win victories that turn out to be meaningless.

The Employee Free Choice Act may well prove to be an important way station on the journey toward a new labor law. But its passage would not definitively establish workers’ rights to organize, bargain, and act in solidarity with one another. Workers would still be tethered to a law that privileges property rights over the right to organize and bargain. These rights would still be subjected to the vicissitudes of the courts and to politically appointed boards and bureaucrats. As we enter this fight, the labor movement would be well served to begin by articulating a vision of what labor law would

look like if it were fundamentally committed to workplace democracy and the promotion of collective bargaining.

We believe that the Labor Party’s proposals can help inform the important, ongoing debates on worker rights. Clearly, we haven’t solved the crucial problem of translating a more expansive, constitutional perspective into a practical program of action. Concern with crafting such a practical course of action unites all of us who grapple with ways to get beyond the statutory NLRA system. And that objective must shape and discipline the general debate about rethinking the basis of worker rights.

We are convinced, though, that the long-term project of building an independent, working class politics goes hand in hand with any meaningful labor law reform. Even at the height of the New Deal coalition, issues such as these have always suffered from the “veto power” of capital in multiclass political parties. Placing the establishment of an independent, labor-based political party at the top of the agenda may well be our best hope for enacting the kind of far-reaching reforms that could begin to change the balance of power in the United States. ■

## Notes

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By Larry Cohen

# COLLECTIVE BARGAINING IS THE PRIORITY

## *A Response to Mark Dudzic*

MARK DUDZIC'S ACCOUNT OF THE 30-YEAR ATTACK THAT HAS MARGINALIZED AMERICAN unions is a thought provoking contribution to labor's post-election debate about next steps in our uphill fight to defend and extend workers' rights.

**W**HILE MUCH HAS BEEN WRITTEN ABOUT the decline of private sector union membership in the United States, labor's current crisis is less frequently framed in terms of the erosion of collective bargaining, particularly compared to other industrial democracies. It's certainly true that union density and bargaining success are often linked. But, as Mark suggests, focusing on the latter—and its contribution to a healthy, democratic society—better positions reformers to appeal for public support based on gains that are good for everyone. For more than 75 years, since

passage of the Wagner Act, America's stated national policy has been to favor collective bargaining. But if outcomes matter, in recent years, it is only in the public sector that we have actually promoted it. Since 1950, private sector collective bargaining coverage has dropped from 35 percent to eight percent of the workforce, while public sector collective bargaining rates have risen from under 10 percent to 35 percent in the same period.

These membership gains are important even beyond the numbers they add to organized labor's overall headcount because of what they

demonstrate about workers' willingness and ability to organize under conditions of relative management neutrality and noninterference. If the National Labor Relations Act (NLRA) had been expanded to include all government employees 30 years ago, when health care and non-profit entities were finally covered, it's likely that public sector unionization in the U.S. today would be at least 80 percent—strikingly similar to Canada, Europe, South Africa, Korea, Japan, and every other democracy. Instead, the existence or scope of collective bargaining in half the states is still being determined by state legislators or governors, who favor either no bargaining at all or limited “meet and discuss” arrangements.

If collective bargaining in either private industry or public employment is indeed a public good, we need to focus more on explaining and defending that process, rather than just highlighting the obstacles that individual unions face while trying to boost their own membership. For example, in France, unions count only 10 percent of the workforce as dues payers, and actively compete against each other both for membership and votes in enterprise committee elections open to all workers in the same workplace or firm. The country's various labor federations then find ways to engage in common struggles with management or the government. As a result, nearly 90 percent of French workers have collective bargaining agreements. The right to strike is well-established and widely exercised by members and nonmembers alike. While sometimes inconveniencing the public, strike activity often resonates with broader sectors of the population. Past gains in living standards and social benefits—such as paid time off, pensions, and universal health coverage—have thus proved to be

much harder for management to roll back in France than in the United States.

Similarly, U.S. unions should not write off nonmembers. During Communication Workers of America's (CWA) four-day national work stoppage at SBC Communications last May, most of the 15,000 nonmembers joined 80,000 members in support of bargaining on health care and “jobs of the future.” Factors influencing the outcome included the level of workplace education, real workplace structure, and public sympathy and support.

Just as France shows that collective bargaining coverage can be more important than union density, Mexico illustrates that high level of union dues payers and official recognition on paper don't necessarily translate into workplace influence or protection for workers. Unions in Mexico are recognized at virtually every workplace, but many of them hardly resemble workplace organizations run by members. In many cases, *sindicatos blancos* (ghost unions) are created in collaboration with management solely to prevent workers from forming their own organizations. In other cases, unions in the Mexican labor federation *Central de Trabajadores Mexicanos* (CTM), are recognized but have little real membership involvement. In both cases, strike activity is often suppressed through the combined efforts of government officials, employers, and employer-oriented union management. Hundreds of thousands of workers have never even seen a copy of their union contract. So the issue can't just be union membership rates or we would view Mexico as positive and France as negative. Mexican workers in unions like the *Telefonistas* (STRM) at Telmex understand this as they work to change the labor movement as well as national labor policy.

Similarly, we cannot, in the name of density driven restructuring, tell workers in this country which unions they can join or not join nor, as in Mexico, discourage them from starting new ones. If we take that approach, we risk losing any public debate about collective bar-

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gaining being an essential element of a democratic workplace. During the period of labor's greatest growth in America, between 1935 and 1945, 10 million private sector workers organized, and many of them started new unions including ones affiliated with neither the AFL or the CIO. Workers made ample use of the organizational choices and opportunities for self-organization which existed then. As important as touting existing unions may be to each of us today, we should remember that they're unlikely to be the sole vehicle for achieving worker aspirations during labor's next organizing upsurge.

In the past two years, the AFL-CIO has done some of its best grassroots work ever to prepare the ground for such a resurgence. Rather than rehash older, more narrow approaches to labor law reform, the Federation has shaped the Employee Free Choice Act

(EFCA) which now has nearly a majority of House members as cosponsors, as well as 30 cosponsors in the Senate. EFCA would provide union recognition and possible first contract arbitration whenever a bargaining unit majority is established via card check.

Uniting labor around this approach was, and is, no small feat. Many unions were involved in a failed effort in 1992–1993, when the Federation instead put its hopes in the Dunlop Commission appointed by President Clinton. Now, the Federation actively supports coalition work with Jobs with Justice and American Rights at Work, both of which are focused on building popular support for collective bargaining rights. But their combined efforts to line up legislative backing for EFCA is not, by itself, going to be sufficient to secure its adoption in the new Congress. The AFL-CIO and its affiliates must do much more to mobilize their own members on the job and in local communities.

On December 10, 2003, rallies and demonstrations supporting EFCA were held in nearly 100 locations around the country. Several hundred thousand union members and allies participated, and this was a good first step towards the type of popular education and mobilization that is needed. Last summer, Voice@Work followed up with educational material that was to be distributed at work sites, with a goal of collecting tens of thousands of postcards directed to both of last year's presidential candidates, seeking their support for EFCA. CWA locals collected about 20,000 of these cards, more than any other AFL-CIO affiliate, but our own mobilization capacity is at least 10 times our results in this case. Based on

overall card signing and collection totals reported back to the Federation, there appears to be even more room for improvement elsewhere. Some unions are instead questioning the effectiveness of the AFL-CIO in this area and others. It might be helpful, as part of that debate about the federation's future viability, to examine why affiliate follow-up is not producing adequate results.

Now that the time-consuming tasks of presidential election voter turn-out are behind us, there's no more important political challenge facing unions than conducting renewed worksite education and mobilization about collective bargaining rights including EFCA among our own members.

Two years ago, the CWA executive board adopted a seven-point program entitled Collective Bargaining and Organizing Rights. It emphasizes the importance of making the crisis in collective bargaining a membership issue, even when workers' own contracts may not be up for renegotiation. CWA is also trying to set new "bargain to organize" goals, for con-

tract campaigns seeking expansion of existing card check and neutrality agreements or negotiation of new ones. In implementing this program, we realize that no union, or small group of unions, can go it alone. To achieve our common goals, the labor movement as a whole and all of our allies need to go on the offensive, with the rallies and demonstrations like those held in Madison Square Garden and stadiums around America, when the Taft-Hartley Act was looming.

Defending union bargaining is even more critical today, because the patient is in much worse shape than half a century ago. What is the likelihood that we can address America's health care crisis, the collapse of retirement security, the threat of outsourcing, workplace safety and health hazards, or growing income inequality without far more workers winning the right to bargain? We know the answer, and that's why we need to keep investing our time, resources and best activists, not only in building our own unions but in working together to bring back collective bargaining. ■

By Joshua B. Freeman

# THE THIRTEENTH AMENDMENT IS NO MAGIC BULLET

*Joshua B. Freeman Replies  
to Mark Dudzic*

WITH GRIM PRECISION, MARK DUDZIC CAPTURES THE PLIGHT OF ORGANIZED LABOR: declining membership, diminishing bargaining power, receding economic influence, social marginalization. Twenty years ago, labor seemed stunned by its decline. More recently, as Dudzic shows, it has not been inert, trying various strategies to break out of its confinement, including devoting more money to organizing, organizing in ways that do not depend on federal labor law, building community alliances against antiunion employers, and using influence with local and state governments and unionized employers to pressure firms to ease their antiunionism. Still, the percentage of the work force that carries a union card continues to shrink.

**D**UDZIC SEES THE ROOT OF LABOR'S PROBLEMS in the success employers have had in turning federal labor law from a tool for facilitating unionization into a means to block or contain it. He concludes, rightly I think, that organized labor needs labor law reform for a reversal of fortune to occur. The AFL-CIO concurs; after putting labor law reform on the back burner, late last year it backed the introduction of the Employee Free Choice Act. But Dudzic, in the heart of his argument, questions the legislative vehicle the AFL-CIO has chosen.

Dudzic faults the current reform initiative on several grounds, some of which can be quickly dismissed. First, he doubts that labor can get its bill through Congress. Perhaps, but this would be a problem for any labor law reform. If anything, the current bill seems more likely to win passage than the wholesale, radical restructuring of labor law Dudzic proposes. Second, Dudzic questions the efficacy of the bill's incremental changes even if passed. But one provision, allowing union recognition through card check, might well make a huge difference, circumventing a whole category of employer abuses by ditching certification elections. Many scholars have argued that a major reason for the much higher union density in Canada than in the United States is the more favorable labor law north of the border, including the use in several provinces of card check for recognition.

Dudzic's deeper and more interesting objection to the AFL-CIO-backed bill goes beyond its particular features to a more abstract and sweeping argument. For Dudzic, the failure of current labor law lies in its justification of the commerce clause of the Constitution, which, in the view of various legal scholars he

cites, predisposes courts toward balancing workers' rights with the smooth operation of a corporate economy, to labor's detriment. Without throwing out the current constitutional basis for labor law, Dudzic questions if statutory changes can ever amount to much (though, somewhat contradictorily, he also contends that power, not intellectual rationale, determines court interpretation).

Dudzic's points about deep flaws in the Wagner Act are well taken, but the Labor Party proposal that Dudzic backs, which calls for a new approach to labor law resting on the First and Thirteenth Amendments to the Constitution (actually, an old approach, given the fascinating history of labor thinking about the Constitution that Dudzic relates) seems at least as problematic. First, as Dudzic himself acknowledges, the courts always have interpreted the Thirteenth Amendment narrowly. The constitutional ban on involuntary servitude never proved effective in stopping even so gross a violation as the debt peonage that plagued Southern agriculture for generations, so it is hard to imagine how it will be useful with the murkier issue of employer antiunionism. I suspect most Americans, including most workers, think that if you can quit your job whenever you want, you are not in involuntary servitude, and I think the courts (even if repopulated with liberal Democrats) will agree. As an argument against court injunctions forbidding strikes, the Thirteenth Amendment made some sense, but injunctions are not the central problem labor faces today. The First amendment is no magic bullet either, as evident in the very limited protection the Supreme Court has deemed it provides for free speech in the quasi-public space of the shopping mall. Dudzic does not explain why a First Amendment-based

law would provide stronger free speech rights than the Wagner Act to workers inside a workplace (normally considered a much more private space than a shopping mall), yet as he himself states it is precisely speech limits there that present so great a problem in union organization.

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Narrowly read, the proposal for a new constitutional basis for labor law seems like a gimmick, a modern version of Henry George's "single tax," in which a highly specific legislative measure is held forth as the key to broad social change. But like the "single tax," Dudzic's proposal, even if strategically irrelevant, raises important questions that are well worth pondering, and it is here that he does us a great favor. First, the exercise he engages in, thinking for ourselves what kind of labor law we would like to have if we were starting from scratch, pushes us beyond the usual debate about specific, incremental modifications to thinking more deeply about the position of workers in society, the nature of unions, and the structures most likely to protect labor's in-

terests. Second, he himself advances that discussion with his comments on the problems with the formulation of "labor rights as human rights," which has become popular as notions such as solidarity and class conflict have come to be seen as atavistic at the same time that human rights talk has acquired cachet. Unionism

rests on and protects individual rights, including the right to join a labor organization without reprisal, but it can be coercive in its relations with workers as well as employers. Most obviously coercive, as conservatives like to point out, are union shop contracts that require employees to belong to a specific union to maintain their jobs, even if they oppose its policies. In the post-World War II evolution of human rights thinking, social and economic rights, which tend to have a collective character, have been overshadowed by the classic liberal stress

on individual political rights, a discourse that undermines as much as it strengthens the idea of unionism. A more frank discussion, along the lines Dudzic suggests, of the conflicts between individual rights and class advancement can only benefit labor. Finally, in pounding away at the need for major labor law reform, Dudzic sharpens a debate about labor movement priorities that needs to continue. We can overstress the efficacy of labor law reform; by itself, I doubt that even an ideal labor law, one written by Dudzic himself, would lead to the rapid unionization of either Wal-Mart or McDonald's. But without labor rights that can actually be exercised, it seems unlikely that organized labor will be able to reverse its slide downward. ■



By Mark Dudzic

# MARK DUDZIC

## REPLIES

THE EMPLOYEE FREE CHOICE ACT (EFCA) IS A GOOD PIECE OF LEGISLATION. ITS PASSAGE would eliminate some of the most egregious roadblocks to organizing under current NLRB procedures. I think that unions and progressive organizations should certainly make its passage a priority and make its support a litmus test for contributing to and endorsing political candidates.

**T**HAT SAID, WE NEED TO AVOID THE PITFALLS OF believing our own rhetoric. The danger here is that all the components, hopes and aspirations of the historic project of labor law reform will get compressed into the confines of this one bill. We need open discussion and debate about what a new labor law that supports workers' rights to organize and encourages collective bargaining would look like. We need to explore how the interaction of law, politics, public opinion, and the courts affect the concrete organizing activities of workers themselves. I think that a discussion of the constitutional roots of labor law is a good starting point for that debate. The body of post-New Deal labor laws has proven a dismal failure. Why is

that so and how will any proposed legislation or activity address that fundamental truth? Further, I do not believe that our movement is well served by underestimating the level of united employer opposition that is sure to emerge against the EFCA or any other piece of "viable" labor law reform legislation.

Josh Freeman clearly sees the full scope and breadth of the crisis of labor law yet still struggles mightily to fit everything into the framework of the latest *reforme du jour*. He suggests that an approach that seeks to redefine the constitutional roots of labor law is a "gimmick." Yet he falls victim to the gimmickry of an approach that constantly seeks to find the magic formula that will get a bill passed into law. There

is a certain amount of bargaining against ourselves in this approach. Injunctions are not the central problem of labor today (try telling that to the West Coast longshoremens, public employees around the nation, or transportation workers covered by the Railway Labor Act), so

*The danger . . . is that all the components, hopes, and aspirations of the historic project of labor law reform will get compressed into the confines of [The Employee Free Choice Act.]*

we need not address this important strategic issue. The courts have been reluctant to extend free speech rights into privatized public spaces such as shopping malls, so, Freeman contends, a campaign to establish a new constitutional bias for labor law is “strategically irrelevant.” From labor law reform to healthcare to trade, the labor movement has, time and again, tried this “politics of the possible approach” to di-

sastrous results. It would be better to follow the example of right-wing social activists—or of the employer groups who, over 50 years, subverted and overthrew the Wagner Act—and boldly articulate a position and a goal and then utilize every single legal, legislative, and administrative opportunity to move closer to that goal while keeping the base mobilized.

Larry Cohen eloquently discusses many of the ways that creative unions are trying to break out of the box of current labor law, and establish new, worker-driven organizing paradigms. He understands that the fundamental question is building power for working people through effective collective bargaining, and that this means that how workers organize and exercise their power is just as important as the fact of their formal organization. Yet he, too, fails to explain how the EFCA fits into this project. Is it important because it will provide an impetus to these activities? Because it will neutralize political opposition to worker rights? Or is it an end in itself?

Now is the time to debate these issues. History is unforgiving. If we fail to fully exploit any opportunity for change that emerges, we could very well doom our movement to another generation of marginalization and decline. ■