V. Perspectives on the Fight for Labor Law Reform and the Employee Free Choice Act — LERA Labor Studies and Union Research Section Meeting

The Ambiguities of History: The Employee Free Choice Act in the Context of Labor Law's History

ERIC ARNESEN
The George Washington University

Introduction

I have long held that historians' credentials grant those of us possessing them little by way of insight into the future; studying the past requires one set of skills, predicting the future a rather different set. Historians can, of course, render a valuable service to those engaged in contemporary political battles through our explication of *context* for understanding the present and how we got here. But the context that we offer is always filtered through our perspectives—our values, politics, and disciplinary skills; it is, in essence, an *argument*. We often hear the expression "history teaches us that . . ."; it is a phrase used promiscuously by historians and nonhistorians alike. I'm increasingly uncomfortable with the notion, however, for I don't, in fact, think that history shows or teaches us this or that per se. History is about interpretation, and historians use the history they construct to make their interpretive points. And those who *read* history draw lessons from it . . . based on *their* values and politics. Both Jonah Goldberg and Howard Zinn, for instance, have written books dealing with historical topics, but it's safe to say that they would hardly agree on what "history"—or anything else, for that matter—teaches us. (It is not always clear what "history"—as opposed to their own political agendas—has taught them either.)

What I want to address in these pages are the ambiguities of history when it comes to thinking about the Employee Free Choice Act (EFCA) and the broader historical context of labor law. The labor movement is betting heavily on EFCA, viewing its passage as essential to leveling a profoundly unlevel playing field and turning around several decades of disastrous union decline. Pro-management groups have invested heavily in blocking its passage, recognizing that the current pro-employer status quo could indeed be threatened by the act. For both sides, the stakes are apparently quite high. My purpose here is not to speculate on whether EFCA will or will not pass or, if it does, what its precise impact will be (though I obviously have views on both issues). Rather, it is to suggest that history's lessons are hardly clear cut and that, in at least one reading of the history of labor law in the United States, EFCA may well be important—but less important than its supporters and detractors claim. (For divergent views on EFCA from scholars supportive of organized labor, see Adams 2007 and Brody 2009.)

Over the past century and a half, some Americans have either celebrated or castigated the law as applied to the American workplace and those who work in it. In the Gilded Age of the late 19th century, the worshippers of the market and the upholders of laissez-faire decried any and all legislative interference with what they saw as the sanctity of the market. For their part, labor reformers and radicals, still possessed a faith

Author's address: 801 22nd Street, NW, Phillips 331, Washington, DC 20052

in the power of the ballot box, exercised their electoral strength and, in various places, pushed for laws at the municipal and state levels that regulated working conditions, shortened the working day, and (in one instance) banned cigar making in tenements. In that early showdown of *labor v. capital*, capital generally won, hands down. The courts assumed the role of guardian of the economic order, rolling back various labor-backed laws as unconstitutional infringements on liberty of contract. As legal historian William Forbath has shown, reformers across the nation had their efforts struck down "roughly sixty times" in this "era of rising judicial supremacy" (1991:3, 42).

That legal regime had severe consequences, and different groups of Americans drew different lessons from their experiences, from their history. Some labor activists soured on political action altogether; turning to syndicalism, they joined the new Industrial Workers of the World in the early 20th century and advocated the overthrow of capitalism at the point of production. Others embraced political action but gravitated toward socialism. Yet others—the mainstream of the American Federation of Labor—rejected electoral politics and socialism for voluntarism; workers' own skills and muscle power at the workplace, they believed, would deliver what the state could not. At least until the court's early-20th-century repression of labor got too intense—the judicial attack on boycotts and the dispensing of injunctions to businessmen like Halloween candy pushed AFL leaders into the embrace of the Democrats, in the hope of trading electoral support for political favor (Dubofsky 1994, Greene 1998, Enyeart 2009).

And they sometimes got something for their efforts. The railroad brotherhoods, in large part by flexing their economic muscle and threatening to shut down the nation's transportation system in 1916, forced the Wilson Administration into passing the Adamson Act, which granted them at long last the coveted eight-hour day and time-and-a-half for overtime. The Clayton Act, passed two years earlier, turned out to be more of a disappointment. Hailed by Samuel Gompers and others as "Labor's Magna Carta" (Gompers 1914), it declared that the "labor of a human being is not a commodity or an article of commerce" and promised to protect workers from injunctions and restraining orders in the event of labor conflicts. Finally, the rule of the courts was over; workers won the right to utilize their classic tactics of striking and boycotting. But a new day? Not really. The celebrations proved premature. The Act's loophole—injunctions were, in fact, permissible if "necessary to prevent irreparable injury to property, or to a property right"—rendered the act ineffectual. As soon as World War I was over, business took off the gloves, the wartime regulatory apparatus governing labor relations was dismantled, titanic struggles ensued, organized labor's gains were wiped out, and the judiciary threw itself back into the injunction-issuing business in a big way (McCartin 1997). On the ideological front, anti-unionism held sway, carefully packaged as "the American Plan." The roaring '20s were not organized labor's finest years (Frank 1994).

Then came the New Deal era, when everything changed. In the old days of the new labor history, the 1960s and 1970s, one could find historians of various New Left persuasions bemoaning the passage of the Wagner Act for imposing a straightjacket on organized labor and channeling its otherwise radical inclinations into safer channels; radical academics in law schools called it "juridical deradicalization" (Klare 1978). Cooler scholarly heads eventually prevailed, and the rank-and-file vogue in the historiography largely diminished by the late 1980s. The "turbulent years," in Irving Bernstein's long-lived phrase (Bernstein 1969), weren't so turbulent after all, some argued. Notwithstanding considerable social unrest, what workers wanted wasn't the overthrow of the industrial order but stability, improvement of wages and conditions, a modicum of respect, and what had once been called "industrial democracy" (Dubofsky 1986, Brody 1993). And workers in the industrial sector finally got just that, with a bit of help from the government. Between 1933 and 1945, the size of the labor movement shot up fivefold, with new recruits flooding into not just the AFL but the new herald of industrial unionism, the Congress of Industrial Organizations (Lichtenstein 1989).

These were heady days for organized labor. Its upward trajectory was facilitated—but not caused—by the passage of the National Labor Relations Act of 1935. For several years the Wagner Act's constitutionality remained in question; its *ideological* force was initially greater than its legal force. Labor historian Howell Harris once aptly described the law as "something of a dead letter" in its first two years of operation (Harris 1985). But even with the Supreme Court weighing in in the Act's favor in 1937, Harris reminds us, "[m]ore important was the uniquely favourable political context created by the ability and willingness of workers to help themselves . . . and the support or complaisance of public opinion." Yes, in the years that followed, the National Labor Relations Board served, in many ways, as a facilitator of union

organizing. Or at least federal agencies constituted a mechanism, particularly during the war, for enlisting workers in unions through maintenance of membership clauses (not exactly the same thing as "organizing" or signing up enthusiastic new members).

We know how this story ends; that's why the Employee Free Choice Act is on the agenda today. In the 1940s, the New Deal spirit sputtered, conservatives regrouped, the public grew tired of strikes, and Congress passed the Taft-Hartley Act over President Harry S Truman's veto in 1947. Taft-Hartley clipped labor's wings, to a degree, while "right-to-work" laws in the South made organizing an extremely arduous uphill climb in that already union-weak region. But it was only in the 1970s and subsequent decades that it all went to hell: Capital grew increasingly impatient with and resentful of the unions it had earlier bargained with; global pressures encouraged an anti-union esprit and concession bargaining; President Ronald Reagan gave the green light to union busters with his response to the PATCO strike in 1981; and anti-union consulting firms saw their business boom. Indeed, beginning in the 1980s, employers waged—and have now largely won—"one of the most successful anti-union wars ever," in *Business Week*'s memorable and often quoted words from (May 23) 1994. The numbers of organized workers and strikes kept going down, down, down. Public sector unionization kept—and still keeps—the movement alive . . . but barely (Greenhouse 2008).

So here we are: Conservatives have waged a fairly effective ideological offensive that has demonized organized labor; employers remain determined to resist unions at all cost; and the remnants of New Deal regulatory regime are in tatters. At the time of this writing, the Obama Administration can't get the Senate to consider its nominee to the NLRB—Craig Becker; Senator John McCain, in defeat, gummed up the works by placing a hold on the nominations, and Senate Democrats, in the post–Scott Brown era, failed to muster enough votes to put Becker over the top. So, for organized labor, it now all comes down to EFCA.

But history teaches us that . . . well, what does history actually teach us? In this instance, labor and business seem to have drawn a similar conclusion: that the Employee Free Choice Act will greatly facilitate union organizing, which is why labor is pushing so hard for it and business is pushing so hard against it.

Then there have been other times when both sides have invested mightily in a legislative outcome they thought would transform the playing field. As we have seen, the Clayton Act hardly lived up to its reputation as labor's Magna Carta. The passage of anti-child labor statutes or later legislative increases in minimum wages hardly drove business out of business. Denunciations by labor leaders notwithstanding, the Taft-Hartley Act was no "slave labor law," though it did kick unions in the stomach. The list could go on. Hopes and fears, centered on legislation, have sometimes proved exaggerated. This is not to say that law made no difference—of course it did. But the larger context—involving political economy, the disposition and practices of organized labor and business, and the broader ideological terrain—also matters greatly.

I want to end with one example about labor, law, and public policy that offers evidence for multiple interpretations. On the eve of World War II, black Americans surveyed the industrial scene and noticed the obvious: the war build-up was ending the Great Depression for whites, but not for African Americans. And, as the war preparations progressed, certain economic sectors experienced labor shortages while black Americans, locked out, looked on, unemployed. A. Philip Randolph, the anticommunist civil rights activist and the president of the all-black Brotherhood of Sleeping Car Porters, chose this moment—early 1941—to gamble: Unless the President banned Jim Crow in the armed forces and put an end to discrimination in war industries, he would lead 10,000—he then upped the number to 100,000—black Americans on a "pilgrimage" to "wake up and shock official Washington as it has never been shocked before" ("A. Philip Randolph," *Chicago Defender*, February 1, 1941; Barber 2002). Randolph's "March on Washington Movement," based on mass mobilization, would exert "[p]ower and pressure . . . the foundation . . . of social justice and reform" ("A. Philip Randolph," *Chicago Defender*, February 1, 1941). If FDR failed to put an end to discrimination, he concluded, they could at least "tear the mask of hypocrisy from America's democracy." ("Tear The Mask of Hypocrisy from Democracy, Says A. Phillip *[sic]* Randolph," Seattle *Northwest Enterprise*, March 21, 1941). Black periodicals predicted that thousands would "invade Washington, D.C., the nation's capital and the fountain head of racial prejudice, in a mammoth mass demonstration" (*Michigan Chronicle*, June 28, 1941; *Chicago Defender*, June 7, 21, 1941).

Long story short: Randolph and FDR squared off, and FDR blinked first. Randolph got Executive Order 8802 banning discrimination in defense industries but doing nothing about the military. Call it half a loaf? Randolph seized the moment as a victory. Some described the order, which created a Fair Employment

Practice Committee, as the "most significant move on the part of the government since the Emancipation Proclamation"; it did, after all, boldly position the government against employment discrimination, in defense industries, at any rate. Three decades later, an historian termed it "the greatest single Negro victory since the Civil War,"[1] (Sitkoff 1971: 679) while another later described it as "so weak as to have hardly any impact" at all (Harris 1982:117). As for conservatives at the time, they were beside themselves, bursting blood vessels in their denunciation of the agency as a harbinger of government mandated "social equality" and government abridgement of managerial prerogatives.

The FEPC was no emancipation proclamation; nor was it a harbinger of racial amalgamation or government control over the hiring process. It had limited success in cracking the racial bar in employment in some industries, in some localities (Kersten 2000). More important, I would suggest, was its role as both a catalyst for political mobilization and in making fair employment an ideologically legitimate demand, at least among growing numbers of white liberals (Arnesen 2001). Over the next two decades, numerous states in the North and West passed their own (weak) fair employment laws (Wolfinger 2007, Schultz 2008). Discrimination persisted. But in 1964, over two decades after Randolph's threatened march, Title VII of the Civil Rights Act outlawed employment and union discrimination once and for all. That too hardly resolved the matter, and battles over what was and was not discrimination played out in the EEOC and the courts. Those battles involved individual black workers, individual firms, entire industries, civil rights organizations, and, of course, many, many trade unions (Stein 1998). But that's another story.

My point in recounting this brief narrative? The wartime FEPC hardly ushered in an era of racial equality. Nor did the passage of the 1964 Act. Both have had their critics, on the right and the left. While the sun neither immediately set nor did a new day instantly dawn, Executive Order 8802 and the Civil Rights Act *did* transform the playing field and altered the ideological terrain in a way that allowed the battle to be conducted—and some victories to be won—over a long period of time.

As we think about the passage of the Employee Free Choice Act, these examples—I hesitate to call them "lessons" for the reasons I shared at the outset—might serve as cautions to both supporters and critics of the legislation that law is only a part of the story. Here, going against my own advice, I venture my tentative prediction: Should EFCA pass, the celebrations and the wailing will likely be short-lived, for the day after is when the next battle over its meaning and implementation will begin.

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