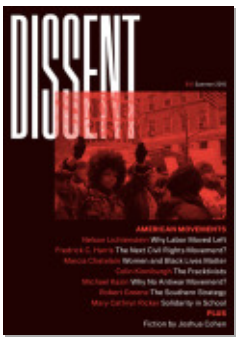
Reorganizing Labor

Andrew Elrod



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of religious redemption. He is disdainful of the "liberated individualism of identity politics." Again and again, he points out that an emphasis on individuation, whether healthy or debased, now permeates pretty much every nook and cranny of American life. He deftly fillets the counter-culture: "[W]hat began as a grand act of *épater la bourgeoisie,* a defiant laboratory of collective self-estrangement, soon enough evolved into a narrower existential search for personal authenticity."

Fraser is too ungenerous to the sixties. He does not give the utopian yearning of the era—palpable in central documents like the Port Huron Statement and in Dr. King's famous speech at the March on Washington—the same respect he gives that of the Populists and the single taxers and the Knights of Labor of the long nineteenth century. He also does not credit women and people of color, politicized by their participation in the era's social movements, with building a beleaguered, but still potent public sector unionism in the 1970s. It is noteworthy that it is also women and people of color who are today the prime actors in the fight for higher wages among retail and fast food workers, an issue that they have forced into the national conversation about inequality.

Without explicitly making the argument, Fraser seems to believe, like historians Thomas Frank and Mark Lilla, that the expansive social liberation of the sixties became the crabbed libertarian liberation of our own era. As he sees it, the entrancing power of the fables of freedom has diminished the very idea of a political culture centered on the interactions of the workplace (and the socialist ideology that assumed such a foundation). Moreover a cross-class alliance of white people, fatally marinated in their racial and sexual anxieties and resentments, effectively controls one of the major political parties. If Fraser is right, the left must honor but also transcend the great struggle of the age of primitive accumulation. In American society today, only those who continue to be marginalized but who are also inspired by the revolutionary gains of the sixties—feminists, African Americans, LGBT people and socially empathetic writers and intellectuals—are likely to generate a new resistance. To them we should also include the millions of immigrants from Mexico and Central America, often themselves seasoned combatants in the more recent fights over primitive accumulation in those nations. Every ongoing point of political or economic tension in the country today—over police misconduct, low-wage service work, reproductive rights, voter suppression, immigration reform, and gay and lesbian civil rights—has emerged from these politically disenchanted populations. So perhaps we must look to the long 1960s, rather than to the long nineteenth century, to inspire the next age of anti-acquiescence. Or perhaps something entirely new and intrinsic to our own moment—perhaps as fully international in its dimensions as Marx anticipated—will alchemize acquiescence into the cosmopolitan communitarianism that we need, but have never seen before.

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Only One Thing Can Save Us: Why America Needs a New Kind of Labor Movement
by Thomas Geoghegan
The New Press, 2014, 272 pp.

The National Labor Relations Act (NLRA) of 1935 was intended to end a fifty-year-long era of court-enforced union repression and the disruptive and often violent responses it provoked from both workers and management. Regulating industrial relations, the argument went—licensing unions and settling employment disputes with binding arbitration—would restrain the force of class conflict with the reason of corporatist responsibility. "The door of a court of equity," wrote federal judge Robert Wagner in a 1921 case enjoining a business to abide by a union contract, "is open to employer and employee alike."

It is difficult to imagine a judge making such a statement today. Even though the

NLRA, which Wagner went on to draft and sponsor as New York senator, is still in force, seventy years of judicial tinkering and two legislative amendments (Taft-Hartley in 1947 and Landrum-Griffin in 1959) have put organizers and negotiators, like their pre-NLRA predecessors, haplessly at the mercy of employer-side labor lawyers. The results will be familiar to those who follow labor politics: one in five workers are fired during NLRB election campaigns, according to Cornell's Kate Bronfenbrenner, and a third of all elections involve such firings; unlawful threats and inducements against organizing workers are ubiquitous; organizers and employers have unequal access to workers; striker replacement is legal; Board remedies to unlawful activity take several years and do not act as a deterrent. Little of this was intended when Congress passed the Wagner Act in 1935. They are the results of the decisions of judges.

Once softened by a full-employment economy, the courts' imprimatur on American employers' anti-union regime has plagued anyone wondering how to increase workers' bargaining power since the stagnation in real wages began forty years ago. So constrained are unions by contemporary labor law that some feel the need to act surreptitiously. The UFCW, in organizing Walmart workers, has denied that its goal is recognition by the corporation or bargaining on behalf of its employees. If it admitted these goals, it would, by force of law, be required to file a petition for a perilous NLRB election within thirty days. Unlike in the de facto restrictions listed above, here the statutory language is clear.

For four decades, organized labor's insider strategy to amend the NLRA and escape these restrictions has been nothing short of quixotic. Four times union-backed amendments have passed the House, four times they have had some degree of presidential support, yet not one has become law.[1] One might be inclined to give up the insider game, and this is what Thomas Geoghegan's advice in *Only One Thing Can Save Us* amounts to. "[W]e need something radically different than old-fashioned U.S.-style collective bargaining," he explains. In its place, Geoghegan proposes a grand bargain: organized labor sacrifices fair-share dues from nonmembers covered by collective bargaining agreements in exchange for legislation strengthening organizing rights. His amendment would throw the established postwar bargaining paradigm, and the union bureaucracies it engendered, out the window. To win it he proposes a series of mass mobilizations of the sort that won the Civil Rights and Voting Rights Acts.

This is risky advice, foremost because a victory would entail the decimation of organized labor as it exists today. Geoghegan admits as much. His proposed law is a federal right-to-work bill, albeit one which also includes strengthened protections for employees—making it easier for them to organize but harder for their unions to collect dues.

The preferred change is to place union membership under the protection of Title VII of the Civil Rights Act, which allows plaintiffs to subpoena, to win damages beyond back pay, and to claim legal fees from defendant employers. This idea is not his alone. Moshe Marvit and Richard

1. On July 28, 1965 the House passed a bill to repeal Section 14(b) of the NLRA allowing states to pass right-to-work laws, 221–203. It failed to win enough votes to overcome Senate filibusters in 1965 and 1966.

   On October 6, 1977 the House again passed a bill to amend the NLRA, 257–163. The Labor Law Reform Act would have expanded the Board from five to seven members, strengthened penalties for violations, and increased organizer access. It died next year during a nineteen-day Senate filibuster led by a young Orrin Hatch.

   On July 17, 1991 the House passed an NLRA amendment banning striker replacement, 247–182. President Bush promised a veto. The next year, under Clinton, it died in the Senate during a filibuster, again led by Hatch. EFCA would face a similar fate. On March 1, 2007 the bill passed the House 241–185. From then until the Republican sweep of 2010 it never gained enough Senate votes to beat a threatened filibuster.

New York Senator Robert F. Wagner (right), author of the National Labor Relations Act, and Massachusetts Rep. William P. Connery, Jr., who sponsored the act in the House, await a Supreme Court decision on its validity, April 5, 1937. Photo courtesy of the Library of Congress.

Kahlenberg argued for the same thing in 2012 in *Why Labor Organizing Should Be a Civil Right*, a book Geoghegan prefaced. But this time he has paired it audaciously with a challenge to the fundamental revenue-drawing power of industrial unionism.

Without mandatory fair-share fees from nonmembers, the rhetorical thrust of the National Right to Work Committee—as well as its prodigious legal campaign against American unions—would collapse, because it would have won. Organized labor as it exists today would be gone. Is this something Geoghegan is prepared to endorse?

"Let's face it," he writes, "we may not have the ability to hang on to the current system," pointing to the Supreme Court, to the two most recent right-to-work states—Michigan and Indiana, both former bastions of union strength where labor's reputation is in permanent disrepair (he can now add Wisconsin to the list)—and to declining membership across the country. "Besides, let's take a deep breath and think how the current system looks to many Americans," he writes, dependent as it is on "this kind of compulsory tax" where "an alien thing . . . can take a chunk of people's paychecks without their consent."

To their credit, some unions have slowed the decline. Membership as a percentage of the workforce fell by nearly 5 percent from 1983 to 1993, less than 3 percent from 1993 to 2003, and by less than 2 percent from 2003 to 2013. But the losses continue, and unions' efforts to stem the flow have relied too much on shaky legal foundations. For example, the "neutrality

agreement" that has been the cornerstone of most high-stakes campaigns of the past two decades is at risk of being declared illegal; in 2013 the National Right to Work Legal Defense Foundation argued to sympathetic ears on the Supreme Court that such agreements violated an anti-bribe section of the Taft-Hartley amendments. (The case was dismissed on a procedural matter, without a ruling on its merits, but the courts remain divided on the issue, and groups like the National Right to Work Legal Defense Foundation have reason to revive it.) Last year, the Supreme Court upheld Indiana's 2010 right-to-work law. In another case, *Harris v. Quinn*, the court outlawed the agency shop for 26,000 home-health aides in Illinois, creating a new class of public-sector worker exempt from the fair-share rule it established in 1977. The agency shop is now at risk not just for 600,000 aides represented by SEIU, but for the 7.2 million public-sector union members who make up half of organized labor's total membership today. It is with this in mind that Geoghegan can seriously endorse spending money on mass mobilizations and flaying union treasuries for fines and damages.

For Geoghegan, trying to rehabilitate labor's image is a lost cause. The mid-century American model of unionism has exhausted itself, and it's time for its scrappier members-only cousin to make a comeback. A union without mandatory representation fees "would have to scramble" to sell itself to the members, he writes. "Maybe it rakes your leaves. Maybe it starts delivering pizza." Anything to keep members in and dues flowing. It would have to be more like UNITE HERE, which has organized the central industry in the biggest city in Nevada, a right-to-work state, and less like the UAW, which lost an election after years of organizing in a plant where the company agreed to let the organizers in. Shorn of steady revenues, he argues, unions would have to act more aggressively and be more democratic, and learn to rely on the strength of an engaged membership rather than on bureaucratic finesse.

This sounds like a worthwhile experiment, and Geoghegan is not the first to propose it. The idea in its current form has been around for a decade, since Charles Morris first published *The Blue Eagle at Work* in 2004, but members-only bargaining is as old as unionism itself. More recently, Harvard's Benjamin Sachs and University of California's Catherine Fisk have endorsed a more restricted version of Geoghegan's argument, in which minority bargaining would be legalized in right-to-work states, but right to work (and the minority bargaining that comes with it) would not be extended beyond those states. As they write:

> Allowing members-only bargaining in these settings advances the preferences of workers who wish not to be in the union [by excluding them from union representation], the interests of unions who wish not to represent free-riding workers, and the interests of union members in not subsidizing the representation of their objecting coworkers.

Although Geoghegan's strategy, or Sachs and Fisk's more limited version, are hardly at the top of labor's agenda, several unions are already pursuing experiments in minority or members-only unionism. At the behest of the German autoworkers' union IG Metall, Volkswagen altered company policy last November to mandate that management meet with nonmajority workers' organizations. The UAW is the largest such group, and has established a local that now represents a minority union within Volkswagen's Chattanooga auto plant. But until the Labor Board announces a rule forcing employers to engage in minority bargaining, the policy will be trapped within the walls of the Volkswagen factory. [2]

2. Editor's note: As of April 30, the UAW is reporting 55 percent membership at its Chattanooga plant, which would allow the union to engage in conventional, majority collective bargaining.

Savvy employers recognize that minority bargaining could transform industrial relations. The U.S. Chamber of Commerce's Workforce Freedom Initiative noted in a May 2014 report, not without alarm, that "U.S. labor policy seems to have shifted subtly towards members' only representation." Meanwhile, the preemptive legal attack is well underway. In 2007 the Bush-appointed NLRB headed one step in the direction of members-only unionism by refusing to issue a "duty to bargain" rule with a minority union at the retail chain Dick's Sporting Goods. In 2013, with the Board back in Democratic hands, the Retail Industry Leaders' Association backed a congressional amendment to the NLRA, H.R. 2347, designed specifically to preclude organizing minority unions. But the amendment stalled and, unless it passes, there is still hope that the NLRB could announce a rule favorable to minority bargaining—something it did not rule out after the Dick's Sporting Goods case.

For supporters of organized labor, there is a strong case to be made for minority unionism. It is tempting to think, for example, that members-only unions would be more democratic. Without the guaranteed revenues secured by the dues checkoff under exclusive representation contracts, perhaps the UAW would not for fifty years have been led by the same political machine, whose leadership attempted in 2010 to persuade members to surrender the right to strike. Members-only unions would allow workers sympathetic to the idea to begin collective bargaining sooner, demonstrating the benefits of the process and paving the way to union growth. On the other hand, minority bargaining could also leave workers fragmented and weaker in the workplace—at least this is what the Wagner Act's framers thought. It would likely also reduce to a trickle the union largesse behind today's worker centers, community-labor coalitions, educational programs, and cultural institutions (including magazines such as this one).

What's more, the success of such an approach depends not only on the NLRB, but also on much larger political forces. A Board-mandated duty to bargain, on its own, does little to empower workers. It wouldn't go far without the second part of Geoghegan's proposed new labor paradigm: strengthened legal protections for pro-union workers. Achieving these organizing rights would require Congress to pass national legislation, which would first require a decades-long political campaign, such as that waged by laborites from the passage of the 1890 Sherman Act to the 1935 Wagner Act, or, more recently, the twenty-year fight that achieved the Civil Rights Act. The prospect of such a campaign, which would entail fundamentally transforming unions and their political activities, is the most appealing idea to emerge from Geoghegan's book—much more promising, indeed, than the litigation-driven, post-reform labor movement he envisions emerging from it.

But the odds against such a movement, at every step, are huge. For Geoghegan's strategy to succeed, it would need to overcome not only the prevailing wisdom of "big labor" but also the inertia of the Democratic Party. Even if the AFL-CIO put its muscle behind members-only bargaining, why would the Democrats support it? For the entire postwar era, unions have been a load-bearing pillar of the party. Since 2002, a half-dozen of the country's largest unions have accounted for over $600 million in Democratic campaign contributions. And still this has not been enough to win labor law reform.

Enter Geoghegan's program of civil disobedience, which, he argues with good reason, is what it would take to shake the calcified institutional bonds between unions and their allies in government. Only a mass movement by union members and sympathetic workers will transform organized labor into the kind of bold agent of change it once was. "Political-type strikes" that provoke Democratic leaders to "turn the hoses" on unions, such as the one the Chicago Teachers Union waged against Rahm Emanuel in 2012—strikes that go beyond wages to issues of workplace control and enlist the solidarity of communities served by labor's base in education and health care—those are "the kind that will most unnerve the Democrats and make mandarins in Washington think that the country is out of control."

About this Geoghegan is unequivocal: "I am arguing for disruption that might actually split the party." For two decades and in several books, as a labor lawyer practicing in Chicago, he has chronicled the protracted slump of the American labor movement and the Democrats' slide to the right. But living under a Democratic president, governor, and mayor in austere Chicago has sharpened his tone. In his first book, Geoghegan wrote with characteristic disillusionment that he was a "'new Democrat.' Which means, I go around having the same conversations all the time, how the Democrats are boring, how they stand for nothing." Now he simply implores "our Democratic Party leaders [to] please shut up." The party position that earns most of his ire is the continued peddling of higher education as a solution to economic insecurity and even income inequality. "[T]he party of the left has demoralized its base," he writes about the president's championing of college degrees, which he sees as leaving voters "to work out their salvation on their own, individually . . . by scoring well on standardized tests and getting into the right schools"—or by voting Republican.

But while Geoghegan knows what doesn't arouse voters, he is much less clear about what will. Defense of public servants' and health care workers' professionalism, sure, but this makes for a pretty weak economic-populist progressive plank. What's really at stake is a more comprehensive reimagining of social citizenship. Geoghegan's preferred model for this is a German-style capitalism, with its unique business laws requiring employee-elected representatives on corporate boards—what is known as co-determination. Having such worker-elected leaders in top management, it's argued, would help to curb the stock buyback programs and rampant restructuring that have oriented American firms away from the needs of the workforce and towards those of shareholders. Such comprehensive reform seems incomprehensible today, but a first step towards it is as simple as an executive order for public procurements (like the one FDR signed in 1941, establishing Fair Employment Practice Committees). Whether co-determination would actually win over the electorate, mobilize mass support, or have any impact on the growing third of the workforce already in non-traditional employment relationships, however, is another matter.

Nevertheless, Geoghegan is asking the right questions. Why wait until union treasuries are further depleted by funding diffident Democrats to build new institutions? Why waste organizational resources fighting right to work when unions as they exist today are so thoroughly discredited in the places that need them most? Successfully organizing workers in a changing economy, from self-employed taxi drivers to the remaining assembly-line autoworkers, has necessitated abandoning atrophied union formations. Labor leaders asking themselves how to expand beyond their core industries might consider Geoghegan's message: first, learn to accept when something isn't working. Then try something new.

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