Labor Organizing as a Civil Right

by Richard D. Kahlenberg and Moshe Z. Marvit • March 13, 2012 • original
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On January 20, 2009, when Barack Obama assumed the presidency, labor found the stars aligned to pass meaningful labor law reform. It had a friend in the president and vice president, with both Obama and Biden having been co-sponsors of the Employee Free Choice Act (EFCA) when they were in the Senate. The Democrats had a majority in the House and a near filibuster-proof majority in the Senate, if one counted the independents that caucused with the party. They even had a Republican on board who had previously voted for cloture on EFCA (then-Republican Arlen Specter), providing the possibility that the legislation would not only pass but would have the all-important veneer of bipartisanship. EFCA would have made several moderate, but important, amendments to the National Labor Relations Act (NLRA). These included card-check (which would have allowed a majority of workers to sign cards to organize a union, rather than proceed under the more difficult National Labor Relations Board–supervised election process), mandatory interest arbitration on stalled negotiations, and increased penalties for employers that commit violations of labor law.

Even under these optimal conditions, which are unlikely to repeat in the near future, EFCA was not even put to a formal vote in the Senate. EFCA's defeat marked the fourth time since the 1947 passage of the Taft-Hartley Act, which diminished labor rights under the NLRA, that Democrats controlled the presidency and both houses of Congress, pushed for labor law reform, and failed. Under Lyndon Johnson, Democrats fell short in a Senate effort to modify Taft-Hartley. Under Jimmy Carter, labor law reform that would have enhanced penalties for unfair labor practices failed by two votes in a Democrat-controlled Senate. During Bill Clinton's first term, legislation to outlaw the permanent replacement of strikers stalled. And EFCA, which many called "labor's last stand," died the slow death of the silent filibuster. Republican-controlled bodies of Congress are unlikely to support efforts to strengthen labor under any circumstances, but progressives need to begin developing a new strategy now so that when they do regain full political power, they do not miss a fifth chance to revitalize labor.

It is time for supporters of labor to try an approach to reforming labor laws that does not involve a national conversation on the pros and cons of procedures like "card-check"—which most Americans know little about—and instead focuses on the fact that labor organizing is a civil right and should be written into our civil rights laws. Title VII of the Civil Rights Act, which extends the public protections for fundamental rights articulated in the Constitution to the private sphere, is the appropriate legislative vehicle to reform labor law. The result of an amendment to the Civil

Rights Act would be significant: just as it is now illegal to fire or discipline someone for race or gender or national origin or religion, it would be illegal under the Civil Rights Act to fire or discipline someone for trying to organize or join a union.

Conceptually, amending the Civil Rights Act would not break new ground. It is already illegal, under the NLRA, to fire someone for organizing. But amending the Act to protect union organizing would offer two advantages. First, it would put teeth into the existing NLRA prohibition by applying the full force of Civil Rights penalties and procedures to businesses, which currently break the law with relative impunity. Today, labor leaders note, the right to form a union is "the only legally guaranteed right that Americans are afraid to exercise." Amending the Civil Rights Act would provide a far more effective deterrent to lawbreaking than the current statute, thereby finally recognizing the theoretical right to organize as authentic.

The second advantage to this approach lies in its potential to break a longstanding political logjam surrounding labor law reform. Amending the Civil Rights Act rather than the NLRA would, for the broader American public, help elevate the debate from the obscure confines of labor law to the higher arena of civil rights, which Americans readily understand. Whereas labor law is seen by many as a body of technical rules governing relations between two sets of "special interests"—business and labor—Americans understand the principle of nondiscrimination as an issue of fairness. Employment rights have long been considered civil rights, and there is no reason to exclude labor rights from this formulation.

Previous efforts to amend the NLRA have encountered the Catch-22 of labor reform. In order to achieve reform, labor needs political power, which requires expanding union membership; but in order to grow, unions need labor law reform. As Harvard Law Professor Paul C. Weiler noted more than a decade ago, "No part of American law in the last fifty years has been less amenable to reform than labor law." The Civil Rights strategy would offer a fresh approach.

Recent developments suggest that labor may have the public on its side. Following the 2010 elections, Republican governors in Wisconsin, Ohio, Indiana, and elsewhere took what had primarily been an assault on private sector collective bargaining rights to the public sector, which had previously faced a more favorable climate. These attacks on public sector collective bargaining prominently raised issues about the role of labor in American society and energized many progressives who had taken the right of employees to band together collectively for granted. Indeed, recent polling suggests that while the opinions of Americans are mixed on unions, they strongly believe, by margins of two-to-one or even three-to-one, in the basic right of collective bargaining. In November 2011, the people of Ohio overwhelmingly voted to repeal an anti-union law that restricted public employee collective bargaining rights.

Moreover, the attack on public sector unions for receiving more generous pension and health benefits than private sector workers raises the possibility of a different discussion: rather than pursuing a race to the bottom, where the diminishing benefits of nonunionized private employees are used as a club against unionized public employees, why not take steps to strengthen private sector unionization, so that private sector employees can enjoy the same level of benefits that those employed in the public sector do?

SOME HAVE argued that organized labor is an anachronism and that its decline in the United States is due to economic and technological changes, like the advent of globalization. However, strong union movements in other industrialized democracies that are affected by these same changes show that story to be incomplete. Likewise, the notion that modern workers no longer desire to join unions is contradicted by evidence suggesting that, in 2007, 53 percent of non-managerial, nonunion workers would probably or definitely vote for a union if they could—up from 30 percent in 1984. If just one-quarter of those people unionized, the labor movement would double in size.

Instead, the social science evidence suggests that the NLRA has failed to deter employers from firing workers who are trying to organize a union. The chief problem: while existing labor law makes it technically illegal to fire employees for trying to organize, the price for violating the law is extremely small, leading employers to break the law with increasing frequency. Cornell University researcher Kate Bronfenbrenner found that, between 1999 and 2003, employees were illegally dismissed in 34 percent of union drives for engaging in union organizing. Similarly, a 2007 study by the Center for Economic and Policy Research estimated that "almost one in five union organizers or activists can expect to be fired as a result of their activities in union election campaigns."

One exception to the general decline in labor is the increase in union density among public sector workers, where state statutes rather than the NLRA govern union elections and more than one-third of workers are organized. The fact that public sector unionization has grown in the past half-century while private sector union representation has plummeted suggests that the very real threat of termination may be a significant deterrent to successful organizing efforts. As journalist Hendrik Hertzberg has written in the *New Yorker*, "It's not that toll-booth attendants, clerks in government bureaucracies and schoolteachers are by nature tough, hardened militants or have bulging, ropy forearms. It's that their employer, the government, is in a poor position to routinely and brazenly flout the plain language of the law."

A review of the international landscape finds that the United States is an outlier among advanced industrial nations in failing to protect worker rights. In a 2010 report, Freedom House found that the United States is less free than forty-one other nations when it comes to protecting labor rights. The report declared, "The United States is almost alone among economically advanced democracies in its lack of a strong trade union movement in the private sector," and cited weak penalties for illegal worker discharges as among the causes. Freedom House and other researchers find that our major European competitors—such as Germany, France, and the United Kingdom—protect labor rights far more effectively than the United States. (In contrast to the low ranking of the United States in protecting labor rights, Freedom House commended the United States for the strength of its civil rights laws.)

Amending Title VII of the Civil Rights Act would immediately strengthen the procedures and remedies available to aggrieved employees, by permitting pre-trial discovery (http://en.wikipedia.org/wiki/Discovery_(law)) and providing jury trials, attorneys' fees for successful plaintiffs, and compensatory and punitive damages. These procedural and remedial changes would not only help make employees whole after they suffer discrimination for seeking union representation, but would also create powerful deterrents to employers who consider breaking the law.

Writing labor organizing protections into the Civil Rights Act could also spawn a cultural shift in employer behavior. Employers who are found guilty of racial or gender discrimination are today seen to have done something shameful—a seismic shift from the days when businesses routinely espoused racist and chauvinistic attitudes. While the lucrative "labor consulting" industry works with employers to keep unions out, there is no comparable industry to aid employers in thwarting civil rights laws. In fact, it's the opposite: employers spend billions of dollars a year on human resource departments, in part to ensure that all employees understand and follow the requirements of Title VII.

By contrast, managers are unapologetic about wanting to silence the voice of workers. Walmart CEO Lee Scott, for example, famously said, "We like driving the car and we're not going to give the steering wheel to anybody but us." Shifting labor organizing protections to civil rights legislation could, over time, make Americans, like Europeans, see corporations that fire employees for trying to form a union, join the middle class, and have a say in the workplace as morally suspect.

Beyond practical and economic considerations, there are also deep historical and conceptual connections between the labor and civil rights movements in the United States that show why the Civil Rights Act is the right vehicle for protecting those trying to organize a union: (1) labor organizing is a basic human right, which is bound up with an important democratic right to association; (2) strengthening labor advances the values and interests of the civil rights movement by promoting dignity and equality, particularly for people of color; and (3) stronger unions can enhance existing protections against discrimination by race, gender, national origin, and religion by reducing employer discretion and enhancing processes for redress.

Labor organizing is connected to the fundamental constitutional right of association that is recognized as part of the First Amendment. In a democracy, individuals have a right to join together with others to promote their interests and values. Just as the original Civil Rights Act extended the Fourteenth Amendment's prohibition against government discrimination to private sector employers, adding anti-discrimination protection for labor organizing would extend a First Amendment right against government restraint of free association to private sector employers. In 1935, Congress voted to protect workers in exercising their fundamental rights to organize a union and bargain collectively; the protections of the Civil Rights Act would reemphasize that national commitment.

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