

Moving beyond the critical synthesis: does the law preclude a future for US unions?

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This retrospective essay on Tomlins' *The State and Unions* assesses the durability of his observations in light of developments over the past quarter century. The decline of unions in the context of minimal protections offered under contemporary labor law seems to fit Tomlins' thesis that the New Deal offered only a counterfeit liberty to labor. A brief review of failed efforts at union revitalization demonstrates that labor's waning fortunes are as much a sign of institutional rigidity and internal weakness as result of external constraints. Any current semblance of liberty offered to the U.S. working class is indeed counterfeit, but the source of fraud is the full set of neoliberal economic policies, not the narrow constraints of labor law alone.

As Jean-Christian Vinel reminds us, when Christopher Tomlins' *The State and Unions* was published in 1985 it was embraced by left academics as a 'devastating analysis of the labor relations regime erected by Progressive and New Deal reformers.' Indeed Tomlins' portrayal of the original National Labor Relation Act (NLRA) as the foundation of a set of 'legal rules and institutional constraints' that would curb workers militance and ultimately weaken the labor movement was particularly pertinent in the mid-1980s. At that juncture, private sector union density was in sharp decline, and even prominent labor leaders seemed to be echoing Tomlins with their outspoken criticism of the law and the National Labor Relations Board (NLRB).

Vinel appropriately positions Tomlins contribution within an interdisciplinary paradigm that he labels the 'critical synthesis' encompassing New Left social scientists and Critical Legal scholars. Indeed those of us with roots in the New Left greeted Tomlins work as a vindication of our skepticism regarding the New Deal and its supposed left-progressive tilt, and as a piece of thorough scholarship that confirmed our own less well-framed arguments.¹

Of course *The State and the Unions* was not met with universal praise, but like all good scholarship served as a catalyst for healthy debate. As noted by Vinel, among the critics was Melvyn Dubofsky, who questioned whether a militant labor movement would have emerged even if conflict had not been channeled into the bureaucratic procedures of the NLRB. Dubofsky went beyond this basic criticism (which was raised as well by others at the time) and also disagreed with Tomlins' main thesis, arguing instead that the law and its administration can be understood only in the broader context of shifting economic and political power relations.² The latter point has been developed more fully by James Gross

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in his three-volume history of the NLRB, the first two of which were published before Tomlins' book.³

Perhaps more intriguing as we look back on Tomlins' contribution is the reaction of Craig Becker in a full-length *Harvard Law Review* article, relevant for both its content and its author. Parallel to Dubofsky, Becker argued that Tomlins failed to appreciate internal complexities of the labor movement and its responses to the NLRA. Furthermore, although agreeing that the New Deal 'was hardly an unalloyed victory for unions,' Becker chided Tomlins for dismissing 'far too hastily the rights the NLRA afforded labor.'⁴ Given Becker's recent position on the NLRB (as an Obama recess appointee loudly condemned by the Republican right), a careful read of his reaction to *The State and the Unions* should prove valuable for those who are monitoring the actions of the Board a quarter of a century later.

Indeed, even those of us who praised Tomlins in the mid-1980s have cause to re-evaluate the efficacy of his damning of the NLRA. Vinel captures this revised perspective in his thoughtful essay when he notes, 'Thirty years of conservative rule have fundamentally changed the debate on the merits of the system created by the pluralists of the 1930s.' The New Deal may have done less to create a just society than recalled by champions of Franklin Delano Roosevelt among historians and labor relations academics, but it most certainly offered more to workers and unions than the current neoliberalism that dominates the thinking and policies of both major political parties. To fully appreciate how a recasting of Tomlins may make sense in light of what has transpired over the succeeding quarter century, we need to go beyond Vinel's rendering and consider developments in union strategy and practice, including the push for labor law reform that has dominated the political agenda of unions since before the Reagan era.

Union transformation: the search for a militant working class

As if on cue from Tomlins and the publication of his book, 1985 was a pivotal year for the labor movement with the release of the American Federation of Labor – Congress of Industrial Organizations (AFL-CIO's) blueprint for revitalization, *The Changing Situation of Workers and Their Unions*. The culmination of a strategic planning process that involved the presidents of most major unions, *The Changing Situation*, offered five sets of recommendations, two of which are relevant here: increase member participation/activism and improve organizing methods.⁵

Initiatives to address members' apathy were initially framed as internal organizing, then later as the *organizing model* that was contrasted with the *servicing model*, or the traditional insurance agent approach to union representation.⁶ Most unions endorsed the *organizing model* at least rhetorically, and several initiated broad-based efforts to inspire activism and militancy. For example, the Communications Workers of America devoted considerable resources to a mobilization structure that increased member involvement in both workplace actions and coalitions with other unions and community organizations.⁷ Similarly, the Service Employees International Union (SEIU) designed a contract campaign framework to increase militancy during contract negotiations,⁸ and encouraged locals to experiment with approaches to implement the *organizing model* in all aspects of their work.

On the external organizing front, the AFL-CIO created the Organizing Institute (OI) to recruit, train, and place union organizers. The OI adopted a grassroots style that paralleled

the mobilization efforts being developed to increase member activism. This bottom-up organizing contrasted with the traditional method of selling union representation to prospective customers. By the mid-1990s there were hundreds of OI trained organizers working in the labor movement, and the OI method of member recruitment was accepted as the preferred 'model' of organizing. Perhaps because of the parallels to the mobilization of current members being promoted simultaneously, it became common for those in union circles to refer to the OI style as the *organizing model*. Thus, for the past 15 plus years, the term has been used indiscriminately to refer to both internal and external organizing with an activist core.⁹

In spite of nearly a decade of concerted efforts to build an activist culture, union density continued to decline into the mid-1990s. Frustration among the more engaged elements of the labor movement culminated in a successful effort to oust long time President Lane Kirkland and elect a new slate of AFL-CIO officers in 1995: John Sweeney, Richard Trumka, and Linda Chavez-Thompson. This 'New Voice' team promised to 'organize at a pace and scale that is unprecedented.'¹⁰ Under the strategic guidance of Richard Bensinger, who moved from the OI to become Organizing Director, a blueprint for growth was adopted and vigorously promoted as 'Organizing for Change, Changing to Organize.'¹¹

These efforts at revitalization are relevant to an assessment of Tomlins' enduring contribution because they offered the potential for radical change in organized labor even within constraints of the NLRA framework. Indeed specific unions and groups of unions began to look tantalizingly like a left, militant labor movement. Many of us in scholarly circles reported, analyzed, and hailed the transformation in progress as the beginning of a new social movement unionism, or social justice unionism.¹²

The enthusiasm was never fully justified. It became clear within relatively few years that the internal application of the *organizing model* was proving to be difficult except during the period immediately preceding the expiration of a collective bargaining agreement. Even then, mobilization required careful planning and intense efforts by staff and elected leaders. Burnout was a common problem, and rank-and-file enthusiasm was difficult to sustain. It seemed that union members did not have a taste for perpetual warfare, preferring stability rather than class struggle.¹³

External organizing seemed to offer more potential, especially with enthusiastic leadership from John Sweeney and the AFL-ICO. But the Changing to Organize agenda included not only a grassroots approach (which proved threatening to elected leaders at the local level) but also a substantial shift of resources. Individual national unions were happy to proclaim support for the organizing priority, but union officers jealously guarded their authority over resource allocation, organizing strategy, target selection, and all decisions regarding coordination with other unions. Efforts by the AFL-CIO to take the strategic lead and build a movement wide growth agenda were effectively rejected.¹⁴

The end result was continued decline, and growing frustration among those unions that were most committed to the organizing priority. Dissension came to a head in 2005 when the SEIU led the exodus of six key unions from the AFL-CIO to form Change to Win (CTW). Some saw the new federation as yet another sign that union revitalization was still vibrant, and indeed for the first few years strategic coordination among CTW unions suggested potential vitality. But internal warfare at SEIU and UNITE-HERE undermined potential gains. Realistically, the split and subsequent events merely sealed the fate of a 24-year failed attempt to transform and revitalize a declining movement.¹⁵

Could labor's failure to rekindle the flames of rank-and-file militancy be blamed on the strictures of law, and therefore be interpreted as a confirmation of the durability of Tomlins thesis over time? Perhaps but other factors were clearly also at play. As Vinel reminds us, many scholars have expressed doubts that there was ever any real potential for a left-progressive labor movement in the USA. For these skeptics, it was not the law that de-radicalized unions in the 1940s and 1950s; labor de-radicalized itself. Similarly, over the past 20 years the inability to overcome institutional rigidity and build a more activist movement is as much a sign of internal weakness as of external constraints.

Unions and the law: labor's campaign to restore the promise of the Wagner Act

Vinel presents us with two complementary interpretations of labor's view of the law. First, based on public posturing by two prominent labor leaders in the 1980s, Vinel asserts that 'Tomlins' conclusions gained particular favor. Second, Vinel proclaims that in recent years labor has pursued a 'new progressive statist agenda' with its campaign for the Employee Free Choice Act (EFCA). A careful review of criticisms of the NLRB in the 1980s, and of the labor movement's political program reveals neither an embrace of Tomlins nor a *new* progressive agenda.

Regarding labor's supposed endorsement of Tomlins' thesis, Vinel relies on quotes from AFL-CIO President Lane Kirkland and United Mineworkers of America President Richard Trumka. Kirkland's call for a return to 'the law of the jungle' (repeated several times during the 1980s) should be interpreted in light of his reputation for bombast and rhetorical flourish. Samuel Estreicher and Matthew Bodie appropriately suggest that Kirkland made this proclamation 'with tongue firmly implanted in cheek.'¹⁶ Kirkland's wrath was aimed not at the law itself, but at the Reagan presidency (which he described as 'guided doggedly by myth and fallacy'), and particularly at the decisions of the NLRB during the Reagan years. As for the New Deal, Kirkland was an enthusiast and particularly fond of Senator Wagner.¹⁷

Vinel's claim that Trumka 'rejected the Progressive ideal of administrative government through experts and agencies' is also misleading. Indeed Trumka did write 'abolish the Act' in a law review article, but as with Kirkland this was to drive home his criticism of the Reagan NLRB. In the same article he was explicit about this distinction, arguing that 'labor law has become a dangerous farce' because 'the National Labor Relations Board has transformed itself under Ronald Regan into an active and conscious proponent of the destruction of unions.' In contrast, he praised NLRB decisions during the Ford and Carter administrations. It was the NLRB headed by Reagan appointee Donald Dotson that Trumka condemned, not the Wagner Act itself, whose underpinnings he described as 'fairness, rights of employees, and collective bargaining.'¹⁸

As this brief review of the essence of Kirkland's and Trumka's position regarding the NLRA should make clear, labor did not accept Tomlin's perspective of the law as offering a 'counterfeit liberty' that had from the outset put unions 'on a road of secular stagnation and decline.' Rather, organized labor's official position (and the personal views of most prominent labor leaders) consistently has been much closer to James Gross's analysis: the intent of the Wagner Act was frustrated by the Taft-Hartley amendments, the politicization of the NLRB, and substantial intervention into labor policy by a conservative judiciary.¹⁹ This perspective is even more obvious when we consider labor's efforts to reform the law.

Labor's political program dating back to the Carter administration is most accurately defined as an effort to return to the original purposes of the Wagner Act. In 1977, the

Carter Administration introduced a set of proposed amendments to the NLRA that was strongly supported by unions. The Labor Reform Act of 1977 would have accelerated the representation election process, increased penalties for unfair labor practice (ULP) violations related to illegal discharge for union activity, and provided for automatic wage increases based on a Bureau of Labor Statistics index in those first contract negotiations in which employers refused to bargain. Testifying before the Senate on behalf of the AFL-CIO, Lane Kirkland expressed regret that the proposal did not provide for the repeal of key anti-labor provisions of Taft-Hartley, but nonetheless praised the bill because it would further 'the effective pursuit of the basic purpose of the Act, which is to assure the worker the right to be represented.'²⁰ The bill passed the House but fell two votes short of the super majority required to stop debate in the Senate.

Sixteen years later, during the Clinton administration, reform again seemed possible when the Secretary of Labor appointed the Dunlop Commission (officially the Commission on the Future of Worker-Management Relations). Testifying before the Commission, Lane Kirkland explicitly endorsed yet again the 'policy embedded in the NLRA,' which he described as promoting 'private dispute resolution and labor-management cooperation.' He went on to complain that this policy had been undermined by Congressional amendments and 'sixty years of judicial interpretation.'²¹ The AFL-CIO submitted to the Commission a detailed set of proposals that included repeal of many of the provisions of Taft-Hartley, plus these familiar changes in the representation process: increased penalties for ULP violations during union organizing campaigns, card-check certification, and first contract arbitration.²² Although the latter proposals were included (in modified form) in the Dunlop Commission's recommendations, other aspects of its final report were unsavory to the labor movement. This proved irrelevant when Republicans regained control of the House of Representatives in the 1994 elections which erased any chance of Congressional action. Ironically, the 1994 election defeat of labor-backed candidates also paved the way for the ouster of Lane Kirkland at the AFL-CIO.

Labor law reform was not a priority during the early years of the 'New Voice' leaders at the AFL-CIO, who were convinced that aggressive organizing could reverse labor's fortunes even given the weak protections afforded by the law (especially with help from a labor friendly NLRB headed by William Gould). But the organizing program faltered as noted, and by 2000 the pursuit of labor law reform was renewed. Now the AFL-CIO Secretary-Treasurer, Richard Trumka, became a leading voice in the campaign. He argued that in order to succeed with the organizing priority, labor had to support the Democratic Party: 'We can't organize new workers unless we are successful politically . . . We should and must win labor law reform.'²³ Although it had not yet been drafted, the 10-year campaign for the EFCA effectively began with the 2000 presidential elections.

And what would EFCA have changed? Like the Carter amendments, it was restricted to securing representation rights; its provisions were similar to Carter's and identical to the relevant portions of the AFL-CIO recommendations to the Dunlop Commission: EFCA would have eased union organizing by allowing card-check certification to replace elections in most cases, it would have increased penalties for management of ULPs, and it would have provided for arbitration of first contracts if bargaining failed after certification. These modest proposals, patterned after Canadian practice, were designed *not* to replace the New Deal framework but to improve its effectiveness. There was not even an effort to repeal the more pernicious provisions of the Taft-Hartley amendments, such as restrictions on secondary boycotts and organizing strikes and those weakening union security.

In contrast to Vinel's presentation, then, the campaign for EFCA did not signify a new progressive statist agenda, but rather the continuation of labor's long-term acceptance of the general framework of labor relations established by the Wagner Act. Had EFCA been enacted, some of the original promise of the Act would have been restored and it is possible that private sector union density would have increased modestly, but the Taft-Hartley restrictions on militance and state Right-to-Work laws would have remained, as would the inherent weakness in the duty-to-bargain provisions along with employers' right to permanently replace striking workers.

It is worth noting that the Obama NLRB is endeavoring to uphold recent member Becker's 25-year-old assertion that the NLRA confers important rights for workers and unions. New rules proposed by the board would speed the certification process much like the Carter bill of old, and are being vigorously supported by the AFL-CIO.²⁴ Also the Board's decisions have tilted in labor's direction (consistent with Gross's framework of a political process), including a rebuke of Boeing for relocating work from a unionized facility in Washington to a nonunion plant in South Carolina.²⁵ But alas, labor had a friendly board during the Clinton years as well, but was unable to overcome internal inertia and external economic hurdles to mount effective revitalization.

Does the law preclude a future for US unions?

With the failure of the campaign for EFCA and the continuing decline of unions in the private sector, the future of US labor appears to be bleak. As one leading union strategist proclaimed in a conversation with *American Prospect* editor Harold Meyerson, 'It's Over.'²⁶ Does this mean that the law as currently amended, interpreted and applied dooms labor to oblivion? It is easy to see how advocates for Tomlins' basic analysis could make a strong case that his original conclusions have stood the test of time and have been confirmed by the disappearing US labor movement. Indeed, there is little doubt that in the early twenty-first century any semblance of liberty offered to the US working class is counterfeit, much as Tomlins asserted regarding the New Deal policies of the 1930s. But the source of the contemporary fraud is the full set of neoliberal economic policies, not the narrow construct of labor law alone. Richard Trumka, now President of the AFL-CIO, explicitly recognizes the threat posed by neoliberalism, noting that 'Workers voices have been silenced in the workplace.' Although this recognition is paired with an overly sanguine portrayal of Roosevelt's New Deal as 'characterized by imagination and vision and a focus on the plight of the public,'²⁷ this is understandable given the dismal prospects faced by the movement he leads. In reality, of course, unions clearly share the blame for their own decline, and the limitations of labor law (including the Wagner Act and subsequent amendments) have certainly contributed. But in the current era it is deregulation, global free trade, privatization, and financial market speculation that have combined to reshape labor and product markets, and thereby to undermine the potential of collective action and union power.

It is in this vein that Vinel's most salient observations are offered in his concluding section regarding the 'Right Nation.' Neoliberal ideas with roots in the Austrian school of economics now dominate the thinking of the Republican right, and inexplicably influence even 'left leaning' Democrats and social democratic parties globally. It is only in this context that the EFCA campaign appeared to represent a new progressive agenda, although in reality it was little more than an effort to recapture a semblance of what the

New Deal promised. In retrospect, then, the Wagner Act may have offered a constrained liberty, but that liberty was far more real than what seems possible in the contemporary political wasteland.

Notes on contributor

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Notes

1. See for example this author's modest contribution published a decade earlier, Hurd, "New Deal Labor Policy."
2. Dubofsky, "Review of *The State and the Unions*."
3. Gross, *The Making of the National Labor Relations Board; The Reshaping of the National Labor Relations Board; Broken Promises*.
4. Becker, "Individual Rights and Collective Action," 684.
5. AFL-CIO, *The Changing Station of Workers and Their Unions*, 23–4, 27–9.
6. AFL-CIO, *Numbers That Count: a Manual on Internal Organizing*, 6–7.
7. Communications Workers of America, *Mobilization to Build Power*.
8. Service Employees International Union, *Contract Campaign Manual*.
9. Hurd, "Rise and Fall of the Organizing Model," 194–6.
10. Sweeney, Trumka, and Chavez-Thompson, *A New Voice*.
11. AFL-CIO, "Organizing for Change."
12. Turner, Katz, and Hurd, *Rekindling the Movement*.
13. Hurd, "Rise and Fall of the Organizing Model," 199.
14. Hurd, "The Failure of Organizing," 10.
15. Milkman, "Divided We Stand"; Hurd, "US Labor 2006," 318–9.
16. Estreicher and Bodie, "Administrative Delay at the NLRB," 87.
17. Kirkland, "The Class of 1930 Fellowship," 6.
18. Trumka, "Why Labor Law has Failed," 871, 874, 877.
19. Gross, "The Demise of the National Labor Policy," 46, 47, 49.
20. Kirkland, Statement of Lane Kirkland, Secretary Treasurer, 1589.
21. Kirkland, "Statement of Lane Kirkland," 9, 20.
22. AFL-CIO, *Recommendations of the AFL-CIO*, 6, 10, 13.
23. Trumka, "Building to Win."
24. Greenhouse, "NLRB Rules would Streamline Unionizing."
25. Johnson and Snell, "Sparks Fly on NLRB's Modest Proposal."
26. Meyerson, "Labor's Hail Mary Pass."
27. Trumka, "The Crisis of Neo-liberalism," 255, 264.

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