

Unionization for Everyone?

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Why has the right to workplace representation been historically denied to millions of employees in the United States? In his highly original history of the category of “employee,” Jean-Christian Vinel lays bare the political stakes embedded in this term. In this way, he fills an important gap in the social history of the United States.

Reviewed: Jean-Christian Vinel, *The Employee: A Political History*, Philadelphia: University of Pennsylvania Press, 2013, 293 p.

To fully appreciate Jean-Christian Vinel’s excellent book on the American employee, it is best to abandon any attempt to find French parallels. In 1982, France’s INSEE (the official statistical agency) organized all professions into six socio-professional groups, slightly modifying them in 2003. These include: farmers (“*agriculteurs exploitants*”), artisans, merchants and CEOs, executives (“*cadres*”) and superior intellectual professions, intermediary professions, employees, and workers.¹ In this nomenclature, employees include people working in offices, businesses, and services, as well as caregivers. Foremen, supervisors, and technicians belong to the next hierarchical level, that of intermediary professions.

In France, workers and employees are almost placed at the same hierarchical level. In the United States, the situation is very different: for collective bargaining purposes, all workers are considered employees and have the right to be represented by a union. The debate, which continues even today, hinges on whether socio-professional categories other than workers should enjoy the same right to bargain collectively with management. Though it was borrowed from the French word “*employé*” in the nineteenth century, the term “employee” gradually acquired a distinct meaning, ultimately referring to manual workers with no managerial responsibilities. Behind these semantic questions lie very real struggles occurring in the American workplace relating to the right to unionize and to engage in collective bargaining. Over the course of this

¹ Alain Desrosières and Laurent Thévenot, *Les catégories socioprofessionnelles*, Paris, La Découverte, 1988.

long history, which Vinel analyzes in great detail, judges interpreted the law—and it would be naïve to believe that their decisions were not colored by their personal opinions.

Social Harmony vs. Loyalty

In the early nineteenth century, American labor law drew on English common law: any agreement by workers to increase their salaries was deemed a conspiracy, and thus illegal. An 1842 case in Massachusetts, *Hunt vs. Commonwealth*, brought this ban to an end, but this did not mean that unions received legal protection. Supreme Court decisions in 1908 and 1915 asserted the legality of so-called “yellow dog” contracts, which forbade workers from unionizing. Employers had to be certain of their employees’ loyalty. Consistent with the principles of liberal individualism, the labor contract was presumed to be an agreement between two independent individuals, with no third-party intervention.

At the beginning of the twentieth century, progressives began to challenge the idea that both contracting parties in the labor relationship were on an equal footing. Yet in contrast to the ideal of working-class emancipation embraced by Marxism, progressives advocated specific measures for each socio-professional group. Because the working class was, in their view, sociologically divided, it was considered necessary that social policy combine the individualism inherent in the freedom to contract with the necessary expansion of the state’s police powers. This marks the starting point of the contemporary debate over the definition of the “employee”: it involves a conflict between two visions, one based on social harmony, the other on loyalty.

The ideal of social harmony, developed in the early twentieth century by John R. Commons and the Wisconsin School,² was founded on the insight that capital and labor need not be irreconcilably antagonistic. It rejected class conflict in any form, in keeping with an American tradition of equal rights, mutually beneficial relationships between employers and employees, and rising social mobility in a fluid society. This school did not, however, deny the existence of conflicts of interest. It did, however, believe that solutions could be found that would prevent such conflicts from becoming violent. This is why the state had to intervene in social relations, particularly in favor of workers, who found themselves in a weak position vis-à-vis their employers. Thus the point was not to create a democratic workplace: the protection that workers received was tied to their status as employees, not citizens.

² John R. Commons (1862-1945), a professor at the University of Wisconsin, organized a group of brilliant students around an approach to economics that differed from the classical school. A founder of institutional economics, he played a major role in the development of a new discipline, known as industrial relations, which inspired the New Deal reformers.

This was the philosophy that infused the Wagner Act of 1935,³ which was passed at the height of the New Deal: it assumed that employees carry out routine tasks ordered by their hierarchical superiors; that workers could neither contest their orders nor act on their own initiative; and that they could be defended by an elected union, which was recognized as the only entity capable of engaging in collective bargaining. Conversely, employees who enjoyed some degree of discretionary authority, such as foremen or supervisors, were denied the right to engage in collective bargaining, as it was deemed unacceptable for them to have conflicting loyalties—to the company’s managers, as well to the unions of the workers who took their orders.

Reconquering Loyalty

Many foremen were unhappy about being deprived in this way of their right to organize collectively to defend their interests. In the modern factories built in the 1880s, they enjoyed extensive shop-floor powers: they hired and fired workers, often behaving like petty tyrants. As factories, under the influence of Taylorism, organized themselves along new lines in the 1920s, foremen gradually lost their discretionary authority to rising strata of middle management and union shop stewards. Feeling weakened and finding themselves in an increasingly uncomfortable position, they demanded the right to unionize.

Vinel offers a judicious analysis of this turbulent period, in which foremen took advantage of the exceptional circumstances arising first from the economic boom occurring during the Second World War, then from the strike wave that followed the return to peace, to obtain favorable rulings from the National Labor Relations Board (NLRB), the commission charged with interpreting the Wagner Act. This success proved ephemeral, as the CEOs of major corporations were able to rally to their point of view an electorate that had grown exasperated with the explosion of strikes between 1945 and 1947. Republicans hostile to the New Deal won a majority in Congress in the elections of November 1946. The following year, they passed the Taft-Hartley Act, which to this day remains labor law’s fundamental charter. It expressly stipulated that foremen were to be excluded from the collective bargaining processes, on the grounds that they were not employees. This is exactly what the vice president of Inland Steel declared in 1943: “In industry, as in government or anywhere else, there are two classes of people; there are those who decide and those who carry out. You cannot organize human society on any other basis than there be those who decide and those who carry out. In private enterprise management is the decider. A foreman or supervisor is management” (p. 256, note 80).

³ The National Labor Relations Act came into existence thanks to New York’s Democratic senator Robert Wagner. The Act corrects the inequities between employers and employees, who had been denied full freedom of association. It favors the creation of unions, promotes collective bargaining, and prohibits the “unfair practices” used by employers. An organization that was given broad powers, the National Labor Relations Board, was created to enforce the law. Even so, the law does not consider civil servants, rail workers, farmworkers, domestic servants, and supervisors to be employees.

In keeping with the principle that no man can serve two masters, foremen were considered leaders: if they were deemed workers, their loyalty would be divided between union and management. This would lead to chaos on the shop floor, whereas discipline is essential to the productive system's proper functioning. This reasoning was accepted beyond conservative circles. Liberals, like Frankfurter and Douglas, believed that, however sympathetic one might be to social questions, one could not pretend that the problem of loyalty did not exist.

This division among liberals explains why they proved unable to rescind this feature of the Taft-Hartley Act, even when they regained a majority in Congress. The pluralist industrialists remained powerful: they insisted that each employee has a right to unionize as an individual, claiming, among other arguments, that the unionization of white collar workers would mitigate radical labor activism, while rejecting any form of "industrial democracy" in the workplace. Between 1960 and 1970, new categories of employees began to form unions. Beginning in 1980, however, conservatism achieved intellectual hegemony. In Supreme Court decisions, realism gave way to literalism: rather than following society's evolution, judges limited themselves to the letter of the law and the Constitution became a sacred touchstone. They blocked the NLRB's efforts to interpret it, forcing it to renounce its ambitions.

With flair and exactness, Vinel demonstrates the rise of judicial conservatism, which successfully prevented procurement buyers (1974) and head nurses (2000) from organizing to engage in collective bargaining, which automatically excluded them from the world of employees. Consequently, as a result of the growth of the service sector, nearly a quarter of the United States' working population—some 24 million people—cannot or may not be able to benefit from the right to unionize and other protections offered by the Wagner Act.

Making Everyone an Employee?

After having rigorously examined relevant archives and closely read court decisions and the NLRB's deliberations, Vinel concludes his analysis by considering what the future has in store. Has conservatism, since 1947, so deeply anchored itself in the law and in prevailing thought that it cannot be dislodged? Or can one hope for change?

Vinel remains moderately optimistic. There is a danger that increasing inequality will shrink the middle class, to which most Americans used to believe they belonged. The Wagner Act is in need of revision, as it corresponds to the Fordist moment in industrialization, whereas at present, the boundary between decision-makers and executors has become blurred. There would seem to no longer be any reason to exclude supervisors from collective bargaining.

Yet obstacles remain. Recent debates over the employees' "free choice" bill (Employee Free Choice Act, EFCA) make clear how many hurdles must still be overcome. Free choice, which is a union demand, would allow employees simply to sign a card requesting that a union represent them in collective bargaining, without any interference on the part of the company. However, the business community has defended tooth and nail the need to continue the same kind of secret-ballot elections that are used in politics. Neither argument is entirely convincing; nor is it surprising that liberals do not unanimously support EFCA. Such circumstances demand major change, which is hard to imagine at present, to ensure that all workers be considered as employees.

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