

Rebuilding Labor in the Era of Trump

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ABSTRACT

Whether or not labor protections, civil rights precedents, and other social policies will survive the Trump administration depends upon our ability to rebuild a labor movement broadly defined and reform a federal structure that provides multiple opportunities for oligarchies to undermine putatively democratic institutions. Local communities will need to develop and practice effective solidarities, to reproduce countervailing powers, and to rebuild laborist democracy from below. The following analysis will exclude the possibility that labor power can be restored without a wholesale democratic reconstruction.

INTRODUCTION

I write this note in a moment of uncertainty. In its first year the Trump administration has been met by massive opposition demonstrations, leaks from disgruntled federal employees, adverse judicial decisions, and an intelligence community revolt. Trump thus far has historically low approval ratings. We are clearly entering a period of turbulence and unpredictability. Whatever happens next, American politics have been roiled by the success of a white nationalist force long barely concealed within the conservative establishment.

The election of Donald Trump is a test of the ostensible pluralism of the American political system. It is an open question as to whether the social protections laboriously constructed over the past 150 years (already attenuated for nearly the entire period from the Civil War to the Great Society), worker rights, and environmental standards will survive the Trump administration. The opponents of labor and civil rights and social protections have gained a considerable amount of power. The resources of the advocates of social rights are limited and their cause will require extraordinary action. This latter group I do not necessarily identify with the Democratic Party; it is broadly the “economic non-authorities,” workers, professionals, consumers, and the poor (Greenstone, 1976)

For the labor movement the Trump administration threatens could what Harold Myerson (2016) has called “an extinction level event.” Union density has been in decline since the 1970s, temporarily masked by progress in the public sector, but Republican state governments have recently eroded labor power there as well. President Obama’s National Labor Relations Board demonstrated the potential value of appointees unambiguously committed to the right to organize. Unfortunately, their progressive initiatives are being rolled back under Trump.

Employers’ hostility to labor organizing in the US means that unionism depends upon a regulatory framework. The NLRB and Wagner Act framework have been under unrelenting assault from the political representatives of the business community since the New Deal.

Successful organizing did occur when leading employers chose not to exercise their advantages and courageous worker organizing destabilized the system in the 1930s and 1940s.

The *MacKay Radio* decision of the NLRB and Supreme Court reveals in miniature the underlying reality of rights honored in the breach. The Wagner Act was meant to protect labor's concerted activity rights, including the right to strike. *MacKay* allowed employers to hire permanent replacements for strikers (given a dispute focused on economic issues rather than unfair labor practices). *MacKay* undermined the right to strike, but the full effect did not materialize until the Reagan administration's firing of air traffic controllers and Phelps Dodge's union busting in 1981 signaled that employers would choose to exercise their powers.

As late as the 1970s, the Labor-Management Group (in both governmental and private forms), provided a forum for employers open to dialog with unions. (The Reich Commission under the Clinton administration reproduced this model with little effect.) However, the celebrated Powell memorandum proclaimed a new ideological offensive that would marginalize all employers committed to dialog. Labor leaders sought a reform of labor law in 1978 which would enact effective penalties for anti-union activities but opponents staged a successful filibuster.

I am inclined to attribute the embedded anti-labor bias of US industrial relations to the federal structure which has historically enhanced the power of reactionary employers nurtured in the Old South. Labor law enforcement has consistently been hobbled by Southern power. The Wagner Act was anticipated in the little New Deals of New York and Wisconsin, where economic adversity and crisis stimulated historic compromises. Reform-oriented factions in the business community emerged outside the South. On the other hand, Southern employers from J P Stevens

and Milliken to Wal-Mart symbolized anti-unionism, applied their economic power to heighten worker exploitation, and provided support to local and national campaigns that undermined labor law enforcement.

Effective labor law depends upon a pluralistic, democratic order that subjects private authority to constraints. Rebuilding labor in the first instance requires a renewal of democratic institutions; the obstacle is the NeoConfederate power structure.

Piore (1979), Godard (2009), Salvatore and Cowie (2008), among others, have written of cultural obstacles to the robust institutionalization of unions in the US context. Many have insisted that "American individualism" has been a challenge to the collectivism underlying unions. However, Republican ideology, relying as it does on the consolidation of corporate power, the enhancement of the privileges of private equity, and the politicization of Evangelical Christianity, appears not be about individualism at all. Particular collective forms, from AmWay to Wal-Mart, have stood behind an ersatz individualism. The rightwing network of foundations, think tanks, and political organizations that emerged in the 1970s has deployed its economic power effectively, isolating moderate employers and politicians, and developing aggressive policies for governments and potent anti-union doctrines for the courts. It has substantially advanced a "union-free" agenda.

Let us consider the NeoConfederate infrastructure of repression and ultimately turn to the questions of resistance and rebuilding.

THE PECULIAR CONSTITUTION AND THE ELECTION

The US political structure is a confusing mix of democratic and oligarchical elements. The election system is riddled by contradictions. One fundamental problem is that there is no effective constitutional guarantee of voting rights. The Fifteenth Amendment prohibits the exclusion of African-Americans from voting, but state-based administration of voting systems provides considerable opportunity for local elites to shape the actual electorate and influence outcomes. Section Four of the Constitution promises the states a ‘republican’ form of government but this provision has been largely overlooked. All in all, there are multiple nodes at which determined elites can frustrate electoral majorities, thwart democracy, and reinforce corporate authoritarianism. This may assuage Madison's concern about majority factions in Federalist No. 10, but it does not assure justice for broad constituencies with legitimate grievances. (Lazare, 1996)

The Constitution originally stipulated the selection of Electors by the state legislatures. The states moved to employ simultaneous popular votes for this purpose. This change was not written in the Constitution, leaving states free to cause mischief by restriction of the vote as did the Florida legislature in 2000 and the Michigan and Wisconsin legislatures in 2016. Even the winner take all model observed in 48 states is required by no provision of the Constitution. The original plan for state legislature selection of Electors has been altered but no internally consistent popular vote model has replaced it.

Trump's election in the Electoral College was made possible by coordination among Republican officeholders minimally constrained by standards of democratic accountability. Following practices promulgated by the American Legislative Exchange Council, a parallel quasi-legislative body that meets in private, Republican-controlled states enacted policies that limited the vote (through, for example, Voter ID requirements, fewer polling places, and sharply limited voting windows, etc.). The purpose of these changes was laid bare in North Carolina, at least, where the state Supreme Court struck down voting restrictions in 2016 declaring that they “target African-Americans with almost surgical precision.” Similarly oppressive rules remain on the books in several states. (Editorial Board, 2016)

Moreover, the urban centers of Michigan had found their elected leaders removed from power and public assets liquidated under “financial emergency” legislation. The extraordinary failure rates of the voting machines in Wayne County in the 2016 elections (not to mention the poisoned water in Flint) may have been an unsurprising outcome of governments designed to fail. It is difficult to escape the conclusion that Republican leaders have sought to disable the machinery of government as a tool for social benefit. Trump's victory depended upon numerous failures of government accountability. (Soave, 2016)

ALEC strategy, in total, has sought the enduring transformation of states toward reliably red politics (Weiser and Opsal, 2014). Voting limitations combined with “right-to-work” and other attacks on unionism, the termination of campaign finance regulation, secret legislative committee sessions, and other maneuvers may shift the underlying political balance of power. The state of

Wisconsin has been a progressive exemplar but Governor Scott Walker and his allies have rolled back signature policies. Critics say he has brought Mississippi to Wisconsin. ALEC's "extra-parliamentary" role has generated extra-parliamentary responses. Democratic legislators fled to prevent a quorum in 2011. Trade unionists occupied the state capital. However, Walker has prevailed. (On the other hand, street activism appears to have contributed to Democratic victories and ALEC defeats in North Carolina. (Jacobs and Kahn, 2014)

The Republican electoral strategy may have involved inter-state coordination among Republican Secretaries of State in pruning voter rolls. Journalist Greg Palast has claimed that Republican Secretaries of State utilized a voting records database, CrossCheck (a venture of Kansas Republican Kris Kobach), to match similar names in different states and purge them from the rolls ostensibly to avoid double voting. In so doing they removed many more voters than objective assessments of voter fraud would justify, and the removed names tended to be minority group members. (Palast, 2016)

Rebuilding the labor movement cannot be addressed without facing this structure of repression which is the guarantee of the power of an inner anti-democratic anti-union oligarchy.

THE SESSIONS APPOINTMENT AND VOTING RIGHTS

Jeff Sessions' appointment to the post of Attorney-General may yet prove to be the equivalent of the withdrawal of federal troops from the post-Civil War South and end of the First Reconstruction. He may or may not be more racist than Reagan's Attorney-General Ed Meese.

However, Democrats controlled one or both House of Congress during the Reagan years and set limits on the Administration's extremism. Democrats are currently out of power in Congress and vastly weakened in state governments. Under Attorney-General Sessions, the Justice Department may accelerate efforts at voter suppression in keeping with his previous prosecution of voting rights workers (in accord with the tactics of a long line of Republicans like William Rehnquist who “protected the ballot” in Arizona) and has already withdrawn from active monitoring of police misconduct (Townes, 2017).

The Sessions Justice Department has chosen not to pursue a challenge to restrictive voting policy in Texas. Given the *Shelby County* decision of the Supreme Court, a history of voting discrimination no longer directs preclearance of new policy in those jurisdictions. The Justice Department shows no sign of the necessary vigilance to detect evidence that local practice may result in depressed voting by minorities given the suspension of the preclearance provision. The majority on the Supreme Court declared a new era of racial equity much too soon. A Justice Department willfully blind to voting rights violations would permit the enactment of more policies designed to secure indefinite Republican control of many state governments.

One must recall the history of subnational repression. Without an aggressive federal role, Mississippi and other states fashioned Jim Crow regimes with one dominant party, unchallenged business dominance, wide political surveillance, and terror as an instrument of state policy. Certainly among Trump's and Sessions' supporters there are some who are nostalgic for the white nationalism of the former Confederate states. Consider, for example, recently defeated Alabama

Senate candidate Roy Moore. His absurd comments indicating nostalgia for slavery reveal both his own ideology of bigotry and the Republic party's embrace of authoritarianism.

Sessions' nomination for the federal bench was rejected in the 1980s. He is clearly an exponent of "NeoConfederate" politics. Let us look to the Courts to establish what the larger aims of the NeoConfederate formation might be. (MacLean, 2007)

THE FEDERALIST SOCIETY AND NEOCONFEDERATE POLITICS

There continues to be a party system in the federal courts. The decisions of Federalist Society judges (the conservative legal network upon whom Republican Presidents invariably depend) are in many respects the most forthright accounts of the conservative Republican program. (Avery 2013) Consider the Federalist majority rulings in *Bush v. Gore*, *Citizens United*, *Shelby County* (and potentially in *Friedrichs*). Judge Scalia in *Bush v. Gore* reminded us that the state legislature could recapture its role to choosing Electors. (Curiously, the majority also relied upon an equal protection argument but contained it so that it would not prove effective in advancing voting rights). *Citizens United* gave corporations across the states the power to intervene in elections with "independent expenditures." *Shelby County* provided cover for renewed voter suppression. Decisions are likely to come which would further erode "union security" and delegitimize the collective nature of unionism even as the corporate form is freed to apply a financial advantage.

The Roberts Court upheld the constitutionality of the Affordable Care Act (much to the dismay of Federalist Society members) but denied the federal requirement of Medicaid expansion, which

allowed conservative Southern states to continue to deny protections to their citizens. This decision also potentially weakened the Commerce Clause as a foundation for economic regulation.

Federalist Society lawyers (as counsels or judges) gave us the endless investigation of President Clinton's real and alleged scandals, the halted recount in *Bush v. Gore*, the deregulation of corporate money in politics in *Citizens United*, and the several constitutional challenges to the Affordable Care Act. The Federalist Society campaign to delegitimize Clinton, ending with the failure to achieve conviction in the Senate, appears to have rested on the meaning of sex, but must have instead been a strategy to undermine health care reform and any other enhancement of social protections. What Trump proposes to do in many areas is fully consistent with Federalist Society doctrine. The Society was founded with contributions from conservative foundations including Olin, Bradley, and Scaife. The sum total of their program would be the repeal of the New Deal, Southernization of US politics, and near total deunionization.

Also note the practice of "constitutional hardball" (Tushnet, 2004) on the Republican side as informed by Federalist Society doctrine. Senate Republicans denied President Obama's nominee for the Supreme Court, Merrick Garland, an opportunity for confirmation. Congressional Republicans denied funding to federal agencies under Obama. Now Trump has appointed Cabinet members with a mission to destroy their agencies. In many cases, the underlying

Republican (and NeoConfederate) certainty about their claim to govern has allowed them to violate norms where those norms limit their access to power.

Congressional Republican exercise power out of proportion to their popularity because of the perverse effects of gerrymandering, an undemocratic Senate and Electoral College, states with dominant business elites, a collection of nodes which advantage and propagate conservative policies. (I use the term ‘nodes’ to suggest a system in which NeoConfederate politics can persist in spaces in the federal structure without much challenge and much opportunity to spread.) Democrats seem to have accepted the resulting diminution of pluralist space and then have struggled to survive.

RESISTANCE AND REPAIR

President Trump, a Republican Congressional majority, and a majority of Republican-controlled state governments, and a temporarily evenly divided Supreme Court provide opportunities to nullify or repeal labor law, civil rights enforcement, and environmental standards. An intimidated and subverted National Labor Relations Board will countenance aggressive union avoidance. A national right to work law could decimate union resources and further debilitate a weakened labor movement. The Justice Department can suspend its investigation of hate crimes and white nationalist terror groups. States are poised to enact laws to expose protestors to liability for any property damage for which they have no personal responsibility (although such a law has been defeated in Arizona). The “enemy of the people” media may find themselves constrained by libel law and pressures by alternative media.

The most valuable guide to struggle in this era may be supplied by the experience of the civil rights movement in the South. African-Americans and allies organized under the kind of repression that may emerge on the national level. Reverend William Barber II has led “Moral Monday” protests to combat the hard-right government in North Carolina and contributed to the election of a new Governor and Supreme Court in 2016. In his inspiring sermons, Barber recalls the violent coup against Reconstruction in North Carolina and uncovers the NeoConfederate character of Republican politics in the state. (Barber & Wilson-Hartgrove, 2016)

Cooperation Jackson in Jackson, Mississippi demonstrates the potential of grassroots economic organizing without the state. (“Getting in Touch,” 2017) One might characterize these initiatives as strategies to repair local communities and the concept of democracy itself.

Labor unions will likely survive in unusual spaces, and there will be rounds of negotiations. However, the labor movement must become ever more political, focused both on democratic process and economic gains. Given the unreliability of NLRB remedies, labor must build power in other ways. The Imokalee Worker fair food campaign is an example of a non-NLRB strategy. The Justice for Janitors struggle is another. In part, labor activists must introduce a measure of turbulence that upsets business and political practice. We must refine our own “constitutional hardball,” not to intimidate but to exercise and extend democratic rights.

Staughton Lynn's concept of "bicameralism from below" is instructive. In order to contest political structures that result in entrenched oligarchical control in government, we must assemble in large numbers in an unmistakable demonstration of public will. The workers of Wisconsin actions in opposition to Governor Scott Walker did not prevent draconian labor law reforms, but they are likely to be an important step in a process of mobilization. Organizing in the churches and local communities in Alabama were preconditions for the massive African-American turnout that defeated Roy Moore and elected a trade unionist to the Senate from Alabama. Efficacy-enhancing demonstrations and extraordinary voter turnout upset existing precedents. Purged voter rolls (and even partisan gerrymandering) have limited effect when voter turnout breaks records (the NeoConfederate objective is a relatively passive electorate).

Labor activists will be forced to return to older "voluntaristic" models of insurgency. These initiatives will be based upon rights guaranteed by the First and Thirteenth Amendments and ILO Conventions rather than New Deal statutes. This will coincide with bottom-up activism centered in the cities. A local strategy would produce highly differentiated models for worker representation, ranging from worker councils or mandated unionism in industries with government contracts. Worker centers and other alternative labor formations would be key. The degree of differentiation may disorient the NeoConfederate institutions, now facing a less agreeable form of decentralization.

One advantage of the modern era is that Internet communication makes the concealment of abuse more difficult. Jacobs (2005) wrote hopefully about this in *Ephemera*. Clearly, the Internet has

facilitated the organization of demonstrations to challenge Trump's immigrant ban and continues to reduce the coordination costs for mobilizing protests. It has not yet assured robust debate and accountability in the authoritarian red states. The Internet is also well-suited to disinformation campaigns, expertly targeted to vulnerable and susceptible voters, guided by Facebook-based databases. The Internet remains fertile terrain for both democratic action and elite manipulation.

While the end of net neutrality is a grave threat, opposition groups may still have the capacity to mobilize demonstrations and protests through digital media. Republican power grabs in North Carolina and elsewhere will be reported quickly and easily. Of course, the platforms we use for protest are often profit-making ventures which might transmit information to Cambridge Analytica or the National Security Administration. Opponents of the Trump administration need to identify means to protect access to the Internet and to limit commercial and governmental abuse of social media platforms.

Given the collapse of many sources of countervailing power within existing institutions, Trump's opposition will have to create new power centers. Among other things, this means building a new form of labor movement depending on continuous member mobilization (often under "right to work") rather than increasingly difficult path of legal recognition. If social security and Medicare are cut, there must be a militant seniors organization and even a renewal of non-governmental forms of social insurance.

If more state governments are won by the Republicans, they will be in a position to invoke a Constitutional Convention. This could be an extinction level event for democratic republicanism unless a movement of “economic non-authorities” can secure maximum voter registration and participation.

Large and medium-sized cities are likely to continue to build alliances in order to protect targeted immigrants, combat carbon emissions, and advance high wage employment. The Trump administration and allied state governments will seek to prohibit such progressive initiatives on the local level as they have fought increases in the local minimum wage. On multiple levels activists will seek to defend endangered “democratic spaces” and reverse the oligarchic modes of governance arising in authoritarian nodes of the federal structure.

As Harry Boyte (2016) has written, there are “free spaces” within the federal structure as well as nodes of oligarchic power. Many cities and town have thus far shown a willingness to build unifying coalitions to protect immigrant labor. The challenge of coalition and inclusion will determine whether the democratic spaces grow or face elimination.

Jefferson Cowie (2017) and others have exposed a conundrum at the heart of US politics. The full incorporation of immigrants into US politics would vastly improve progressive prospects. However, fear of immigrants (or African-Americans) has been used repeatedly as a weapon against reform, and Cowie worries that the successes of the New Deal were only possible because immigration had been restricted in the 1920s.

It remains to be seen whether an alliance of rebel cities and bicameralism from below can preserve the gains in labor standards that have been implemented in the cities and whether these ideas may diffuse more broadly in the suburban and rural communities decimated by economic change and susceptible to white nationalism.

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