

# SHOULD WE RETURN TO THE POLICY OF THE WAGNER ACT?

Michael D. Yates†

I have organized these remarks around four questions: What was the Wagner Act? What was its impact? Why was it enacted? How might we return to the policy of the Act? The last question tells you that I will answer the title question affirmatively. Now, let us look at each question in turn.

## I. WHAT WAS THE WAGNER ACT?

There are those who argue that the Wagner Act<sup>1</sup> was a conservative law, aimed ultimately at circumscribing the ability of workers and their unions to engage in direct actions against their employers by legally confining them to bureaucratic elections and collective bargaining. While in hindsight it is possible to make this argument, I do not think it could plausibly have been made in 1935. At that time, quite simply, the Wagner Act was the most pro-worker law ever enacted by the federal government. There are at least three reasons for saying this.

First, the Act ended more than 100 years of quasi-legality of unions and their actions. From the *Commonwealth v. Pullis*<sup>2</sup> decision of 1806 to the notorious *Red Jacket*<sup>3</sup> injunction of the 1920's, and from the use of local, state, and federal troops to defeat the Great Uprising of 1877 to similar use in the Pullman Strike, the Great Coal Wars, and numerous other labor rebellions, the judicial, legislative, and executive branches of

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† Michael D. Yates is Emeritus Professor of Economics at the University of Pittsburgh at Johnstown.

1. Wagner Act, 29 U.S.C. §§ 151-169 (1998). On the interpretation of the Act as a conservative law, see Rick Hurd, *New Deal Labor Policy and the Containment of Radical Union Activity*, 5 REV. RADICAL POL. ECON., 32-43 (1976).

2. *Commonwealth v. Pullis*, Mayors Court of Philadelphia, 3 John R. Commons, Doc. Hist. Am. Indus. Society 59 (1958). On the early conspiracy cases, see Marjorie S. Turner, *The Early American Conspiracy Cases; Their Place in Labor Law, A Reinterpretation* (San Diego State College Press 1967).

3. *United Mine Workers of Am. v. Red Jacket Consol. Coal Co.*, 18 F.2d 839 (4th Cir. 1927). See also Peter Graham Fish, *Red Jacket Revisited: The Case that Unraveled John J. Parker's Supreme Court Appointment*, 5 LAW & HIST. REV. 51, 51-104 (1987).

government considered unions to be somewhat beyond the legal pale.<sup>4</sup> Here is how I once described the Great Coal Wars:

The year is 1922. In southern West Virginia, coal miners and coal operators have been at war for the past five years. . . . The miners are on strike; they want a union and an end to the industrial serfdom which defines their lives. They live in squalid and isolated mining towns, owned lock, stock, and barrel by their employers. Their streets are patrolled by company police, who take a dim view of the Bill of Rights. When they lose their jobs, they lose their homes. To get work in the brutally dangerous mines, they must sign "yellow dog" contracts, swearing that they are not union members and will not join a union while working for the company.

The operators enforce this harsh regimen to minimize their labor costs and thereby maintain an advantage over their northern competitors. They are able to enforce it because they wield enormous economic and political power and because the nation's legal system, courts and police alike, is uniformly hostile to working people. During the strike, aptly named the West Virginia Coal Wars, thousands of miners are fired and evicted from their homes. Baldwin-Felts detectives terrorize them, assassinating two unarmed defendants on trial after the famous "Matewan Massacre"; operators form a private army complete with airplanes which bomb miners who have mobilized to liberate Mingo County and restore their union.

These things are done with complete disregard for the niceties of the law. And no wonder. State police are virtual agents of the owners throughout the War, and in September 1921 federal troops invade the coal fields and destroy the union. What is more, the courts issue sweeping injunctions forbidding any union activity in the entire region.<sup>5</sup>

Second, the Act gave full government legal sanction to labor's direct action weapons: the strike, picketing, and boycott. These were protected either directly or indirectly in several parts of the Act. Under the Act's provisions, it was, and still is, possible for workers to strike for a union or organize a boycott to force an employer to recognize their union. Nothing in the Act explicitly prohibited a union from using direct actions even after signing a collective bargaining agreement.<sup>6</sup> Moreover, in 1932 Congress

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4. See William Forbath, *The Shaping of the American Labor Movement*, 102 HARV. L. REV. 1111, 1111-1236 (1989).

5. Michael D. Yates, *From the Coal Wars to the Pittston Strike*, 42 MONTHLY REV. 25, 25-39 (June 1990).

6. See, e.g., 29 U.S.C. § 157, 29 U.S.C. § 163.

had enacted the Norris-LaGuardia Act<sup>7</sup> with its sweeping anti-injunction legislation. So, in 1935 unions were also free to use various secondary actions without an overriding fear that an injunction would be issued to stop them.

Finally, the Wagner Act put the federal government on record as admitting that the individual worker is powerless in any struggle against a large corporation, and that in such circumstances unions and collective bargaining are the preferred methods of settling industrial disputes.<sup>8</sup> It is ironic, in light of this, that Ronald Reagan appointed to chair the NLRB a man, Donald Dotson (lately chief of labor relations for that egregious violator of labor law, Beverly Enterprises) who did not believe in the law he was duty-bound to enforce.

Not only was the Wagner Act a pro-worker law, it was also a powerful civil rights law. The Constitution has no weight when we enter a private workplace as a wage laborer. The Wagner Act guarantees workers certain speech and assembly rights both inside and outside the workplace. It provided the first great assault on the concept of at-will employment, since a worker could no longer be fired for reasons protected by Section 7 of the Act.<sup>9</sup> The Act guarantees a certain amount of due process in the selection of a union representative. By giving full government sanction to collective bargaining, it also gives support to the due process provided by ubiquitous "just cause" provisions and attendant grievance procedures. These civil rights features of the Act must have loomed large in 1935. In the mass production industries in which workers were then organizing into what would become the CIO unions, working and living conditions can best be described as industrial feudalism. Labor organizers, supporters, and strikers were routinely fired, blacklisted, beaten, and arrested in such communities. Coal companies were even permitted by Pennsylvania state law to hire their own "coal and iron" police to run roughshod over the rights of workers.<sup>10</sup> When the Supreme Court upheld the constitutionality of the Wagner Act in its 1937 *Jones & Laughlin*<sup>11</sup> decision, workers in J & L's Aliquippa, Pennsylvania plant could finally see the end of their degradation at the hands of their corporate masters.

I note in passing that, while the Wagner Act was a significant civil rights law, it failed to deal directly with the scourge of racial discrimination, both by corporations and by labor unions. If I am not

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7. 29 U.S.C. § 104 (2001).

8. 29 U.S.C. § 151-169.

9. See generally MICHAEL YATES, *POWER ON THE JOB: THE LEGAL RIGHT OF WORKING PEOPLE* (South End Press 1994).

10. For all too many examples of these things as well of the responses of workers, see JEREMY BRECHER, *STRIKE* (South End Press 1972).

11. *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937).

mistaken, the NAACP opposed passage of the Act for this reason. The law could have explicitly outlawed Jim Crow unions, for example, but it did not. The NLRB does have some power in this area, but it has, for the most part, failed to use it, either in its establishment of appropriate bargaining units, or in its power to uphold a worker's right to fair representation.<sup>12</sup>

## II. THE IMPACT OF THE WAGNER ACT

In assessing the impact of the Act, we run into intractable problems of causation. No doubt, the passage of the Act encouraged union membership because it fundamentally changed the terrain of the class struggle (the National Industrial Recovery Act of 1933<sup>13</sup> had done something similar: after its passage, United Mine Workers organizers fanned out into the nation's coalfields telling miners that the President wanted them to join the unions). However, some organizing drives in mass production industries pre-date the passage of the Act. It is possible to argue that the entire panoply of events of the Great Depression, including the militant organizing of both the employed and the unemployed, was what led to the passage of the Wagner Act. In fact, organizing slowed down in 1938 (the Steel Workers Organizing Committee (SWOC) lost the Little Steel strike just the year before), after the Supreme Court had ruled on the Act's constitutionality. Membership rose substantially during the Second World War, but it could be argued that this was due more to government pressure on employers than to the Wagner Act. After all, union membership rose during World War I as well, and there was no protective legislation then. However, in my view, the effect of the Wagner Act on union membership can best be seen in what happened after the war. After World War I employers went on the offensive, aided by the government and the courts, with the latter issuing a record number of injunctions. Yet, after the Second World War, there were mass strikes in nearly every major industry, and employers and the government were not able to suppress them or the unions that waged them. It is true that Congress passed the Taft-Hartley Act<sup>14</sup> and that this weakened the labor movement, but union density continued to grow after the war, and this must be credited at least in part to the changed legal climate brought about by the Wagner Act. Unions had shed their quasi-criminal character and were now a permanent part of the economic and political landscape.

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12. See HERBERT HILL, *BLACK LABOR AND THE AMERICAN LEGAL SYSTEM* 124-26 (1977); Elizabeth M. Iglesias, *Structures of Subordination: Women of Color at the Intersection of Title VII and the NLRA*, 28 HARV. C.R.-C.L. L. REV. 395 (1993).

13. National Industrial Recovery Act of 1933, 15 U.S.C. §§ 701-13 (2001).

14. Labor Management Relations Act of 1947, 29 U.S.C. §§ 141-197 (1994).

### III. WHY THE WAGNER ACT?

In asking whether we should return to the policy of the Wagner Act, we need to first ask what the original purpose of the Act was. This may also tell us what will have to happen for us to return to the Wagner Act policy. As I see it, the Act was the result of relentless pressure from organizing forces below and accommodation by economic and political elites above. The agitation from the lower socio-economic class is well-documented, but it is worth noting the strong presence of communists and others on the political left in the unemployed councils and in nearly all of the industrial unions. The various marches on Washington, the sit-down strikes, the alliance of many progressive intellectuals with both the communists and the new industrial unions, the talk of a labor party, and more defined a unique period, very likely the most radical in our history. The entrenched powers were shaken by all of this and realized that a direct and violent assault on the workers' movement, so common in the past, would not work this time. What more powerful sign of accommodation at the top could there be than the *Jones & Laughlin* ruling itself, made by what was still a politically reactionary Supreme Court?<sup>15</sup>

It is important here to argue against the hypothesis that the Wagner Act was really a conservative piece of legislation aimed at ultimately taming the industrial labor movement. If we look at the left-wing unions, such as the United Electrical Workers, Mine, Mill, and Smelter Workers, International Long Shore Workers Union, and the United Packing House Workers of America, we find (using the path-breaking studies of Maurice Zeitlin and Judith Stepan-Norris) that forming unions under the auspices of the NLRB and engaging in collective bargaining did not inevitably bureaucratize and make more conservative the labor movement.<sup>16</sup> Zeitlin and Stepan-Norris found that the left-wing unions won better contracts than more conservative unions in a number of important respects: contracts of shorter duration, contracts with fewer steps in the grievance procedure, and contracts more likely not to contain either "management's rights" or "no strike" clauses. These unions, typically more democratic than the conservative unions, were more likely to fight for an end to racism, both inside and outside of the plants, with the United Packing House Workers of America ("UPWA") achieving some remarkable results. They also showed

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15. See DAVID MILTON, *THE POLITICS OF U.S. LABOR: FROM THE GREAT DEPRESSION TO THE NEW DEAL* (Monthly Review Press 1982).

16. See Judith Stepan-Norris & Maurice Zeitlin, *'Red' Unions and "Bourgeois" Contracts?*, 96 AM. J. SOC. 1151 (1991); Judith Stepan-Norris & Maurice Zeitlin, *Union Democracy, Radical Leadership, and the Hegemony of Capital*, 60 AM. SOC. REV. 829 (1995); Judith Stepan-Norris & Maurice Zeitlin, *Insurgency, Radicalism, and Democracy in America's Industrial Unions*, 75 SOC. FORCES 1 (1996).

considerable willingness to use direct action, even when it was technically forbidden by the collective bargaining agreement. Finally, they were the most likely to urge a path of political independence for the labor movement and to oppose the Cold War and United States imperialism.<sup>17</sup>

All of which is to say that what is important in assessing the Wagner Act is the context in which it came into being. The Act was a powerful enabler of a progressive and militant labor movement already in existence at the time of its passage. Once the Act was on the books, it could be used by this labor movement to further its growth and development. The resultant labor movement proved impervious to destruction after the war, and, in terms of numbers, continued to grow.

#### IV. RETURNING TO THE POLICY OF THE WAGNER ACT

Working people benefited greatly from the Wagner Act, and the labor movement that made it possible was, in turn, strengthened by it. The living standards of working men and women rose considerably (my own life growing up in a unionized working-class community gives personal testimony to this fact). This group experienced a giant leap in dignity and respect vis-a-vis their employers, and their political influence increased markedly. In the best unions, workers also experienced a sharp change in their consciousness and came to view the world from a much more egalitarian perspective. So, it is obvious to me that workers, and society as a whole, would be better off if we were to return to the policy of the Wagner Act.<sup>18</sup> However, to me this means not just that the current, amended Wagner Act be amended again and new pro-worker parts added. For this begs the question for which I tried to give an answer above, namely, how did the Wagner Act come to be enacted.

To return to the heady days of the Wagner Act, it will be necessary for the labor movement to regenerate itself, that is, to transform itself into a movement akin to, but transcending, the CIO. Today's AFL-CIO is a pale imitation of the labor movement of the 1930s and early 1940s. While the Federation of Sweeney, Trumka, and Chavez-Thompson is decidedly better than the moribund and class collaborationist organization of Meany and Kirkland, it is still weak compared to the CIO of John L. Lewis, much less Harry Bridges.<sup>19</sup> Let us consider some of the main differences and use

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17. See Stepan-Norris & Zeitlin, "Red" Unions and "Bourgeois" Contracts?, *supra* note 16, at 1151-1200; Stepan-Norris & Zeitlin, *Union Democracy, Radical Leadership, and the Hegemony of Capital*, *supra* note 16, at 829-850; Stepan-Norris & Zeitlin, *Insurgency, Radicalism, and Democracy in America's Industrial Unions*, *supra* note 16, at 1-32.

18. See MICHAEL D. YATES, *WHY UNIONS MATTER* 8-23 (Monthly Review Press 1998).

19. Michael D. Yates, *Does the U.S. Labor Movement Have a Future?*, 48 MONTHLY REV. 1, 1-18 (Feb. 1997).

these to examine how a CIO-like movement might be created:

1. The Wagner Act became law during the nation's greatest economic crisis. The economic collapse created a crisis of political legitimacy in which it became possible for people to entertain notions much more radical than was normally the case. As the popularity of business leaders sank, that of labor leaders and working class militants rose, making conceivable the development of a labor movement massive enough and powerful enough to generate sweeping political changes. Today the situation is vastly different. After ten years of economic expansion, the U.S. economy has gone into a slump, along with most of the advanced capitalist economies. But while the recession may turn out to be deeper than most economists think, it will surely not be a Depression-like crisis. Around the world, however, many nations are in dire economic straights, and even here in the United States there are increasing signs of dissatisfaction with the rapid development of a market society devoid of compassion and any hint of equality. Perhaps this disaffection, shown most notably in the variety of recent anti-globalization movements, can be built upon to create a Wagner-era labor movement. If the AFL-CIO fully embraces these movements and tries to build long-term alliances, perhaps a labor movement can be created that is even more powerful than the CIO of the 1930's.<sup>20</sup>

2. The crisis of legitimacy in the 1930s made pro-labor rhetoric acceptable. Workers could be portrayed as what they were, people without fundamental rights, and it was impossible for the business class to successfully counter this argument. Congressional hearings and books such as Leo Huberman's *The Labor Spy Racket*<sup>21</sup> showed clearly and incontrovertibly that workers were systematically being denied the rights to free speech and assembly, not just in private workplaces but in public spaces as well. Today, pro-labor rhetoric is rarely encountered. For example, one seldom sees the right-wing attempt to dismantle social security or of President Bush's anti-worker policies and programs described as class legislation aimed at making the working class less secure and therefore more vulnerable to their employer's demands. Perhaps again, however, the climate is now right for this to change. If a union president could ask the crowd at the Seattle World Trade Organization (WTO) protests to "name the system" and, if at that same protest the name of Karl Marx could be mentioned without fear of red-baiting, then now might be the time to begin to talk about worker's rights and how these rights are still being systematically denied. Elaine Bernard, Director of Harvard's Trade Union Program, argues that instead of trying to get the NLRA—with its troubling interstate commerce language—reformed, we should push hard for

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20. Fernando Gapasin & Michael D. Yates, *Organized the Unorganized: Will Promises Become Practices?*, 49 MONTHLY REV. 46, 46-62 (July 1997).

21. LEO HUBERMAN, *THE LABOR SPY RACKET* (Modern Age Books, Inc. 1937).

a wider interpretation of the First, Fourth, and Thirteenth Amendments to the United States Constitution.<sup>22</sup> After all, most Americans would be shocked to know the limited reach of their most revered document; I know my students, including the many union members I have taught, do not know this. Through union radio shows, newspapers, op-ed pieces, and organizing campaigns, we could once again make it legitimate to talk about class and class rights.

3. Although much of the literature on the period focuses on leaders like John L. Lewis, the truth is that the CIO and the labor movement of the 1930's (including the unemployed) were built mainly from below, with workers and their often radical leaders engaging in direct actions to get what they wanted. This movement from below was successful, and in those unions willing to continue to build on the power and knowledge of their members (UPWA immediately comes to mind), it continued to be successful until the Cold War and McCarthyism destroyed it. Today, the AFL-CIO is long on creating new organizations and short on building a real rank-and-file movement. Little has been said by the New Voices leadership about democracy within the member unions or in the Federation itself. Corruption at the top actually helped to weaken the budding democracy movement in the Teamsters Union. Richard Trumka may be a hair breadth's away from prosecution for his participation in the Carey fiasco. I strongly believe that an educated and active membership is the sine qua non of any return to the Wagner Act era. But here there is not much hope that organized labor's leadership will get the job done. Pressure will have to build from the reformers and their allies.<sup>23</sup>

4. Some of the unions in the CIO pioneered multiracial industrial unionism, helping to break down racial barriers both inside and outside of the workplace and forging a racial solidarity extremely rare in the United States. Today's AFL-CIO has made a few strides along the same path, but it has not done enough. Positive developments are the Federation's championing of immigrant workers, who have become the shock troops of the labor movement, especially in progressive labor areas such as Los Angeles. However, the Federation needs to break decisively with the racism that exists in many unions. It needs to hold a series of town meetings in which top Federation officers speak frankly about race, and it needs to make much stronger efforts to organize the South and the Southwest, still home to a majority of Black and Hispanic workers. It also needs to address issues such as the abolition of welfare and the burgeoning prison population, which is overwhelmingly Black and other racial

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22. Elaine Bernard, *Workplace Democracy Through Labor Law*, DOLLARS & SENSE, Sept.-Oct. 1999, at 7.

23. Mike Parker and Martha Gruelle, *Democracy is Power: Rebuilding Unions from the Bottom Up* (Lab. Notes 1999).



minorities. It needs to revisit the sad demise of the racially revolutionary CIO unions and examine the failure of the half-hearted and disingenuous efforts of the CIO leadership to organize the South after the Second World War.<sup>24</sup>

5. In the 1930's, capitalism was more nation-centered than it is today, and the CIO unions did not have to worry much about global competition, runaway shops, and the like. It was easier for a state to place controls upon capital movements, and the architects of the post-Second World War trade system, such as John Maynard Keynes, understood that such controls were necessary to prevent the recurrence of another depression. Today, Keynesianism is dead, and full-scale globalization is the order of the day. So, the labor movement faces economic conditions considerably different than those faced by the CIO. I do not want to overemphasize this, because the situation is not nearly as dire as some would have us believe. There is still plenty of scope for national union organizing (think of all the service sector employment sites that cannot be physically moved and the large fixed capitals that must be depreciated before a firm will contemplate relocation), and there is still a lot of muscle residing in national governments, especially that of the world's hegemonic power, the United States. Therefore, the AFL-CIO must organize as much of the national workforce as it can, and it must continue to exert as much political influence nationally as it can.

However, the AFL-CIO must also internationalize its operations, building as much solidarity and cooperation with labor movements in other countries as it can. There have been some successes here, as I have pointed out in a recent article.<sup>25</sup> I noted, however, that the Cold War complicity of the AFL-CIO, in the oppression of racial and ethnic minorities, has perhaps not yet ended, and it is certainly the case that the Federation has not yet critically examined and criticized this sordid part of its past, as urged recently by the Bay Area Labor Council.

6. Although top CIO leaders like Sidney Hillman and Philip Murray were eventually and firmly co-opted by Roosevelt and the Democratic Party, during the CIO's 1930s heyday there was a real possibility of constructing an independent labor politics, even a labor political party on the European model. The early CIO took independent and bold stands on issues ranging from racism to public housing, and some of its leaders had a vision of a more egalitarian and cooperative society. Today, the picture is much different. The New Voices leadership has spent a lot of money in political campaigns, with some success, but it is tied tightly to the

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24. Michael Goldfield, *Race and the CIO: The Possibilities for Racial Egalitarianism During the 1930s and 1940s*, 44 INT'L LAB. & WORKING-CLASS HIST. 1, 1-32 (1993).

25. See generally Michael Yates, "Workers of all Countries, Unite:" Will this Include the U.S.?, 52 MONTHLY REV. 46, 46-59 (Nov. 2000).

Democratic Party, which only by a very large stretch of the imagination, can be called the party of labor. In the last presidential election, for example, the Federation went all-out for Al Gore, without getting any commitment from him whatsoever to support specific pro-labor programs. Gore had already supported a raft of anti-labor initiatives, including massive cuts in public employment, all of the trade treaties and organizations, and the destruction of the system of public welfare, to name a few. Then, when the Florida voting fiasco was unfolding, Gore operatives told Jesse Jackson and the AFL-CIO to cool it, just when they might have done Gore some good. A Wagner-era labor movement cannot be constructed through such subservience to a Democratic Party as fully dominated by corporate capital as the Republicans. Political independence is perhaps a *sine qua non* for labor's revival.

7. The Wagner Act era, and the vibrant labor movement that made it possible and benefited from it, was marked by a strong left-wing within the house of labor. This is perhaps the most important difference between then and now. The left, with all of its faults, was the driving force in organizing the mass production industries and the conscience of the labor movement. It stood for something much larger than the bread and butter unionism of Samuel Gompers: for an end to racism and sexism, for industrial democracy, for an anti-imperialist government, for an egalitarian society. What is more, the left-led unions won better contracts and had more democratic practices than most other unions. Without this left, I do not think that the CIO would have grown the way it did, and perhaps the Wagner Act, itself, would never have been enacted. The demise of organized labor after the Second World War was, in my opinion, due in large part to the conscious destruction by organized labor of its left flank. Therefore, a vibrant left is critical to recreating the conditions which would allow a return to the Wagner-Act era. To its great credit, the new leadership in the AFL-CIO has been reasonably congenial to the left, and there is some space now for the left to prosper. Recently there was a large meeting of labor leftists in Los Angeles, the goal of which was to coordinate the various left-wing forces within unions and in the larger labor movement. If we are lucky, an independent left will develop within organized labor and at least act as a pressuring agent to keep the Federation from slipping too far to the right.

## V. CONCLUSION

It is one thing to say that we should return to the heady days of the Wagner Act. It is quite another to say how we should get there. I have laid out some of the preconditions for a return in the seven points just made. I suppose it is only fair to conclude with the obvious question: how likely are

these things to happen? Right now I am not especially optimistic, at least as far as the AFL-CIO is concerned. It is, I fear, too much the product of its past, and there are many labor right-wingers waiting to undo even what Sweeney and company have achieved. The return of a Hoffa to the Teamsters is an unmitigated disaster and does not bode well for labor's progressives, much less its leftists. Yet, all is not well in the house of capital, and the future might create economic conditions ripe for mass challenge and protest. Maybe the anti-globalization protests we have been witnessing the past few years are a harbinger of things to come. And at least in some unions, the Teamsters especially, a strong, left-wing, rank-and-file movement exists and is growing. A combination of struggle from below and another crisis of legitimacy could pave the way for a 21st century equivalent of United States labor's shining moment.