



The Great Polarization Economics, Institutions and Policies in the Age of Inequality

A conference sponsored by the Department of Economics at the University of Utah

Law and the Collective Struggle for Economic Justice

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Abstract

In a legal and political regime tilted toward protecting the interests of the propertied, American labor unions historically served as the source of countervailing economic power for workers, striving to ensure equitable distribution of the wealth generated by the American industrial machine. Unions achieved critical gains for millions of American workers, allowing them to attain a middle class standard of living with no more than a high school education. Unions also served as the primary channel for worker voice and political influence: they leveraged worker power in the workplace through collective bargaining, in the courts through advocacy for worker-friendly interpretation of labor and employment legislation, and at the polls through campaigns for candidates whose political platforms promised law and policy changes advantageous to workers. Today, that stable labor relations regime with its promise of economic opportunity, security and meaningful political participation is in tatters. Union membership is in free fall, and with it unions' political clout and ability to influence law and policy. The decline in union density correlates closely with rising income inequality over the past four decades, accounting for between one-third and one-fifth of the growth in wage inequality.

While there are many factors contributing to the decline in union density and the rise in income inequality, law and policy have played a major role. The Supreme Court's decisions last term in *Janus v. AFSCME, Council 31* (finding fair share fee arrangements designed to cover public sector union collective bargaining and contract administration costs unconstitutional) and in *Epic Systems v. Lewis* (upholding employers' ability to mandate individual arbitration of employment-related class claims) are the most recent illustrations of the difference law makes. These decisions symbolize and reflect the Court's fundamental hostility not only to unions, but to collective action by workers in other forms, such as group litigation. *Janus* and its legal aftermath decimated public sector union coffers, with significant ripple effects on the Democratic Party and other progressive causes that historically relied upon financial support from the labor movement. *Epic Systems* consigned the nonunion working poor to a system in which it often costs more to enforce rights under wage and hour statutes, antidiscrimination laws and other workplace legal regimes than an individual can expect to recover if she prevails.

Does the decline of labor unionism and the law's hostility to collective action doom us to becoming a nation of "two Americas," the wealthy and the poor, the middle class obliterated? Fortunately, the impulse toward collective action is not so easily cabined. A number of new change agents have evolved, working both in tandem with and in lieu of labor unions in sectors where unionism never penetrated. Workers' centers, community-based organizing, and identity-based social movements have used



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collective action to move the needle significantly even where a supportive legal frame was lacking. The Fight for \$15 has successfully pressed cities and localities to enact legislation to increase the minimum wage, even in an era when Republican pro-business sympathies clearly dominate at the polls. A wave of teachers' strikes in "red" states traditionally hostile to labor unionism and collective bargaining garnered widespread public support, obtaining wage increases for public school teachers and staff and stemming the tide of disinvestment in public schools. The #MeToo movement focused national attention on the systemic problem of sexual harassment and its economic impact on working women, resulting in legislative reforms and voluntary agreements by major employers to exempt sexual harassment from the mandatory arbitration agreements and nondisclosure agreements that constrain so many workers' claims.

As important as these legal reforms are, they are not themselves the source of workers' power. The lesson we should draw from these successes is that law is useful, but only when it reflects and reinforces worker power established through bottom-up mobilization and group action. Thus, it is critical to develop legal frames that support collective action broadly. One forgotten frame for such rights is the First Amendment right of assembly, which offers a protective haven for the background relationships and informal activities that foreground the formation of groups that advocate for social, political and legal change. The assembly right could be used to shield the kinds of coordinated action that have been most successful on the streets, in legislatures, and before agencies and courts; and it could be harnessed to support alliances between workers' organizations and non-labor organizations around social issues that extend beyond workplace boundaries. Ultimately, these sorts of alliances will be instrumental in igniting the passion necessary to produce sustainable changes in policy and law.