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## Keeping Hope Alive

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# Keeping Hope Alive

David Millon\*

These are hard times for organized labor. Once a hallmark of the American industrial landscape, union membership has declined steadily in recent decades. In the aftermath of World War II, over a third of all American workers belonged to labor unions.<sup>1</sup> By 1980, membership had fallen to approximately 23%,<sup>2</sup> and the number has decreased since then, seeming to shrink further each time one looks into it. Today under 7% of the private sector workforce is unionized.<sup>3</sup> Public opinion of labor unions is at an all-time low.<sup>4</sup>

The reasons for the decline of union membership are complex.<sup>5</sup> Growth in service and technology industries and shrinkage in manufacturing as jobs have moved overseas find more and more workers in sectors in which unions have traditionally been relatively weak. Other economic changes have brought more women, young people, members of racial and ethnic minority groups, and part-timers into the workforce, all populations that historically have been less interested in union membership. In addition, much job growth has occurred in areas of the United States that historically have been resistant to unionization. A strong economy, marked by low unemployment, during the later 1990s and early years of the new century further reduced the demand for unionization. And, as membership has declined along with public views about unions, large corporations have been increasingly willing to resist efforts to organize.

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1. Larry T. Adams, *Changing Employment Patterns of Organized Workers*, MONTHLY LAB. REV., Feb. 1985, at 25, 26.

2. *Id.*

3. BUREAU OF LABOR STATISTICS, U.S. DEPT. OF LABOR, USDL-11-0063, UNION MEMBERS—2010, at 1 (2011). Membership rates are higher among public sector employees. *Id.*

4. James Surowiecki, *State of the Unions*, NEW YORKER, Jan. 17, 2011, at 24.

5. See generally Jack Fiorito & Cheryl L. Maranto, *The Contemporary Decline of Union Strength*, 5 CONTEMP. ECON. POL'Y 12 (1987); Palash R. Ghosh, *Union Movement in U.S. in Serious Decline*, INT'L BUS. TIMES (Sept. 22, 2010, 3:48 PM), <http://www.ibtimes.com/articles/64737/20100922/unions-jobs-protest.htm#> (last visited Feb. 16, 2011) (on file with the Washington and Lee Law Review).

All of this has happened against the backdrop of accelerating economic disparities. Income inequality in this country is at its highest levels since the 1930s. As of 2007, close to 50% of the nation's income went to the top 10% of households,<sup>6</sup> with the richest 1% of Americans now taking home 24% of the total.<sup>7</sup> These numbers are the culmination of a trend that began around 1980.<sup>8</sup> From 1980 to 2005, a period of remarkable economic growth, over 80% of this increase went to the wealthiest 1% of the population.<sup>9</sup> Meanwhile, real wages for middle- and lower-income earners remained essentially stagnant.

The decline in union membership does not itself explain these alarming developments, but it certainly hasn't helped. Whether workers are able to join labor unions remains an important issue. Unionization can mean greater bargaining power, which in turn can yield better wages, benefits, and working conditions. Unionized workers are thought to earn on average approximately 15% more than their nonunionized counterparts.<sup>10</sup> They are also much more likely to enjoy defined-benefit (as opposed to defined-contribution) pension plans.<sup>11</sup> Of course, all this means higher costs for business, and with so much at stake resistance to unionization becomes a standard business practice in many industries.

A principal battleground is the legal distinction between "employees" and "independent contractors." The right to organize under the National Labor Relations Act (NLRA) is limited to employees.<sup>12</sup> Potential tort liability, withholding and employment tax expenses, workers' compensation, and other legal issues are also implicated. Large corporations thus have strong incentives to structure employment relations in ways that avoid employee status in favor of independent contractor status. Not surprisingly, their efforts have given rise to substantial litigation.

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6. Steven Pearlstein, *The Costs of Rising Economic Inequality*, WASH. POST, Oct. 6, 2010, at A13.

7. Timothy Noah, *The Great Divergence*, SLATE (Sept. 3, 2010), <http://www.slate.com/id/2266025/entry/2266026> (last visited Feb. 16, 2011) (on file with the Washington and Lee Law Review).

8. *Id.*

9. *Id.*

10. ARCHIBALD COX ET AL., LABOR LAW 1088 (14th ed. 2006).

11. Surowiecki, *supra* note 4, at 24.

12. See 29 U.S.C. § 152(3) (2006) (defining the term "employee" and listing categories of workers excluded from the NLRA's coverage).

Under the NLRA, the classification question is generally determined according to common law principles as expressed in the Restatement of Agency. The central question has traditionally been the employer's right of control over the worker, but the Restatement explains the law in more elaborate terms. Its test takes the form of a list of ten factors.<sup>13</sup> However, it doesn't indicate which are more important or how they should be weighted and, furthermore, the list is said to be nonexhaustive.<sup>14</sup> The result is a legal standard that is often vague and indeterminate. Sometimes the answers are clear—some workers obviously qualify as employees while others obviously do not—but there is a large gray area consisting of employment relationships some of whose features seem to fall in one category and others in the other. The National Labor Relations Board and the courts thus are forced to work through these cases one at a time. The decisions often have an ad hoc flavor and many of them have been bad for organized labor.

In his excellent Note,<sup>15</sup> Micah Jost explains this confused area of the law clearly and thoroughly. Against this backdrop he then focuses on the recent *FedEx Home Delivery* case<sup>16</sup> and exposes with devastating effect the D.C. Circuit's flawed reasoning. FedEx had long attempted to achieve independent contractor classification for its delivery drivers. The standard contract at issue in the case gave each individual driver the freedom to organize his or her work as an independent business, potentially managing several routes, owning several trucks, hiring drivers to work as employees, and enjoying the right to sell routes without permission from FedEx. Some FedEx drivers actually chose to organize their work in this way but many did not. The latter, being subject to FedEx's control, looked like employees and as such presumably would ordinarily enjoy the right to join a union. The D.C. Circuit, relying on its own recent decision,<sup>17</sup> held otherwise. As

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13. RESTATEMENT (SECOND) OF AGENCY § 220(2) (1958) [hereinafter RESTATEMENT OF AGENCY]. The IRS has developed an even more elaborate twenty-factor test. Rev. Rul. 87-41, 1987-1 C.B. 296. More recently, it has identified three broad categories of evidence that may be relevant to a particular case. DEPARTMENT OF THE TREASURY, INTERNAL REVENUE SERVICE, INDEPENDENT CONTRACTOR OR EMPLOYEE? TRAINING MATERIALS, TRAINING 3320-102 (10-96) TPDS 84238I, at 2-7 (1996).

14. See RESTATEMENT OF AGENCY, *supra* note 13, § 220(2) (noting that the listed factors are to be considered "among others").

15. Micah Prieb Stoltzfus Jost, *Independent Contractors, Employees, and Entrepreneurialism Under the National Labor Relations Act: A Worker-by-Worker Approach*, 68 WASH. & LEE L. REV. 311 (2011).

16. See generally *FedEx Home Delivery v. NLRB*, 563 F.3d 492 (D.C. Cir. 2009).

17. See generally *Corp. Express Delivery Sys. v. NLRB*, 292 F.3d 777 (D.C. Cir. 2002).

in its prior decision, the court again rejected the common law's traditional focus on the right of control as a key indicator of employee status. Even though many of the FedEx drivers had chosen not to pursue the opportunity to structure their work in the form of independent businesses, the court held that entrepreneurial *potential* offered to all drivers rather than the realities of the actual relationships between the drivers and FedEx should be determinative. Therefore, *all* the drivers were deemed to be independent contractors, even though there was no question that many of them appeared to be employees under traditional, long-established principles of agency law.

When the law is vague and the stakes are high and you read a decision that seems not to make sense, you may be tempted to say, "This isn't law, it's just politics. It's just the judges letting their personal political preferences influence their judgment." It might be especially tempting to dismiss an opinion in this way when labor law is involved: After all, everyone has strong views about unions one way or the other. So, you say further, "Maybe cases like this are just part of the general legislative and judicial campaign against organized labor that has been going on for over half a century." Veteran observers of this history may find themselves especially prone to respond in this cynical manner.

The most impressive thing about Jost's Note is his refusal to succumb to this kind of cynicism. He takes the legal analysis very seriously and carefully reveals how the analysis doesn't make sense according to its own logic. He then proposes a compelling, carefully thought out alternative approach to the problem. He levels two powerful critiques of the *FedEx* case. First, he faults the court for applying the law—and revising it, as in *FedEx* and the recent case relied on by the court in that decision—with explicit disregard for the policies underlying the labor laws. These include, according to the NLRA, redress of "inequality of bargaining power" by "encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection."<sup>18</sup> An interpretation of the law restricting opportunities to organize that is not compelled by statutory text or precedent will inevitably appear to be arbitrary if it ignores labor law's fundamental policies.

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18. 29 U.S.C. § 151 (2006).

Second, Jost levels a penetrating critique of the court's own logic in the *FedEx* case. He acknowledges the potential superiority of a test that takes entrepreneurialism into account in comparison to the traditional control test, in at least some cases. However, he explains why entrepreneurial potential should not itself be enough to deny opportunities for collective bargaining. Not all the drivers act as business owners, even though all have the right to do so, and, importantly, many will never choose to do so. This is due to the psychological fact that many people prefer the stability and security of employee status over the responsibilities, risks, and less certain (though potentially greater) rewards of business ownership. At the same time, those who prefer employee status lack the bargaining power to negotiate an alternative to the one-size-fits-all entrepreneurial opportunity contract. In short, Jost reveals how the legal standard is being applied in ways that defy its own logic, based on a sophisticated and insightful understanding of the economic and psychological realities of entrepreneurship.

Accordingly, Jost argues, actual rather than potential exercise of entrepreneurial opportunities provided by the employer should be the key to determining who enjoys statutory rights under the labor laws. This should be determined on a worker-by-worker basis.

Jost's critical analysis of the *FedEx* case exemplifies the best kind of lawyer's argument. He takes the court's reasoning seriously, looks carefully at the facts, the law, and the policy questions that are at stake, and then explains clearly and persuasively the errors in the court's analysis. His proposal for reform is thorough and effectively addresses potential objections.

In a time of conservative ascendancy, it can be hard for people of a progressive bent—especially those of us who have been around for a while—to continue to have faith in law as a vehicle for social justice, especially with regard to the worsening inequalities of wealth and income. Sometimes it seems that the political forces—and their economic advantages—are too powerful. Even so, Jost reminds us that important battles are still being fought in the courts, where legal argument supplies the primary weapons. Jost's Note is a brilliant example of how top-quality legal argument might actually make a difference in people's lives. As such it should serve as an inspiration for all who seek social justice.