

## The Employee: A Political History

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The legal act of defining the ‘employee’ is about drawing lines. Those boundaries are often artificial, legally structured, and forged in an array of contests over power, ideology, and economics. They may be artificial, but they are powerful, demarcating who is in and who is out, who is us and who is them. Out of wars led by lawyers and politicians, treaties get drawn up to settle the question, as the old labor anthem put it, ‘Which Side Are You On?’ By defining an employee in broad or narrow terms, a society establishes the terrain around which questions of loyalty, opposition, harmony, and bargaining must inevitably cleave. And in the United States, that cleavage has often been sharp.

Jean-Christian Vinel’s fine new book, *The Employee: A Political History* offers a deep history of the legal definition of the employee and its near enemy, the doctrine of ‘supervisory exclusion’. A juicy, dense, legalistic read about a subject rarely if ever explored in depth, *The Employee* opens up a vast world of inquiry. Vinel has pinpointed an important conceptual problem, one that, when given the seriousness it deserves, forces a rethinking of many core ideas in labor, working-class, legal, and social history. Although the title is a bit misleading (the subject is more legal than political), this well-researched, closely argued book dissects a subject that we too often take for granted. If the narrative grace is not what one might hope, the book rewards close attention.

*The Employee* begins and ends with the notorious 2006 *Kentucky River* cases, a set of legal disputes that decided that ‘charge nurses’, those with a modest degree of supervisory authority at a subsidiary of Kentucky River Community Care, did not have the protected right to bargain collectively because their

responsibilities made them supervisors not employees. If they're not employees, goes the catch, then they do not have protected collective bargaining rights. The nurses, unlike those automaton stereotypes of the assembly line era, allegedly demonstrate discretion, exercise autonomy, and wield some authority in such ways as to exclude them from the category of employee (a fiction that Vinel shreds). The highly technical decision is typically regarded as an end-run assault on collective bargaining in the United States. Rather than attack the mechanisms of unionization and collective bargaining, the *Kentucky River* cases eviscerates the subject: the employee.

On the surface, the *Kentucky River* cases seem like the thousandth of the thousand cuts that have tortured the labor movement in the United States. But one of historians' favorite arguments is that it has always been thus. And Vinel makes this grand old argument with regard to the narrow definition of the worker in American life with devastating thoroughness. By the time the author is done with his subject, *Kentucky River* looks like a pretty obvious outcome for American labor history. Yet Vinel's inquiry goes beyond debates over who should be excluded from bargaining and who should not. Rather, he interrogates the existence of the question. The implicit puzzle of this book is why there are any such divisions in the first place, and why all citizens do not have bargaining rights. American workers, Vinel believes, have lost the connection between citizen and worker in a legalistic cauldron of divide and conquer.

Vinel begins his story by rolling back the clock to the origin of the term 'employé', which, given that the author is French, must have been a fascinating process of untangling how his nation bequeathed such a problematic term to American legal history. Why did this term take root, he queries, when a host of words like mechanic, workingman, hireling, journeyman, worker, and laborer, among others, were available in the American lexicon? In adopting this once obscure French term American language created a muddy discursive and political 'respectability that bridged social classes' (p. 21). The result was a language about work 'rooted in opposition to class antagonism' (p. 22). Thus begins one of his key themes: that the social, political, and legal definitions of the employee undermined a broad sense of class identity. He pushes the story through early industrial relations theory and practice, with a skillful reading of the fetish of class harmony as naïve and detrimental as compared to the actual workings of American capitalism. Vinel soldiers on through National Labor Relations Board decisions, court decisions, and industrial relations literature, parsing the cases, precedents, and ideas in intricate detail. Americans are not citizen workers, he concludes, but rather lost in the illusion of class harmony – and wearing a name badge given to them by the bosses.

This is fascinating stuff, but the author's sense of causation is not always clear as he risks placing language, and the legal regimes that grew up around it, on the cusp of historical causation. The author also stops just short of taking responsibility for the full argument. Rather than being the product of historical circumstances, this language seems to (maybe) cause history. Vinel implicitly posits the 'Marxian collective worker' as a sort of obvious alternative to the fragmentation and legal traps that did happen in the United States (p. 47). A reader might bristle, given the immense number of variables that scholars have pointed to in trying to account for the comparative weakness of the working-class in American political life, none of which are mentioned here. At other points, Vinel argues simply that 'language bore the mark of the defeat of the ideal of working-class emancipation' (p. 39). We are left to puzzle whether Vinel believes the definition of the employee is a mere historical scar or the actual knife of history.

It was a minor miracle that the National Labor Relations Act (NLRA or Wagner Act) of 1935 made no distinction between employees, workers, and supervisors. He shows how unions of foremen actually sprouted up in the brief political sunshine between the 1935 NLRA and the 1947 Taft-Hartley Act – whose amendments to the NLRA radically narrowed its purview. Those curtailments to the once capacious labor law restricted its subject considerably, creating a claustrophobic and technocratic definition of the employee by excluding a mouthful of potential workers, including:

any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to

direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment (p. 152).

These exclusions made some sense, however flawed, in the strict hierarchies of Fordist production, but they ended up increasingly irrelevant in the technologically driven service economy that grew to replace post-war industry. Vinel shows how this deep-seated conceptual problem in postwar American history grew to be a crisis in recent decades.

The exclusion of foremen, Vinel suggests, recognized that the 'right to organize was not universal social right of the wage or salary worker, but rather a kind of compensation for factory workers who accepted the strict work regime of the mass-production system' (p. 141). So many white-collar workers, the group C. Wright Mills once called the 'managerial demiurge' of the postwar economy, ended up outside of the labor relations framework – despite, or more accurately, because of the fear that that would and did start unions of their own (p. 113). Foremen, whether they wanted to or not, ended up having to sidle up alongside management, becoming *them* rather than *us* for the rank and file workers. This book is ultimately about loyalties on the job, and here the issue is seen in stark relief. While a problem during the height of the industrial economy, this complexity becomes all the more severe in the information and service economies where the illusion of autonomy and discretion are everywhere.

The author is very good in his treatment of the post-war industrial pluralists' 'chameleon'-like position on the employee. As he states, 'industrial pluralism appears bland against the grand reformist schemes [of the] 1930s, but in view of the stakes inherent in the definition of "employee" and "manager", in a context of growing anti-unionism it takes much brighter colors' (p. 185). Reframed, he means that the ideas of those working in the post-war paradigm were positively utopian compared with those to come. They believed that the route to social harmony could be found in all groups finding representation, while at the same time they thought that disruption, alienation, and conflict were things of the past. The new route forward was through stability, incorporation, bargaining, and growth. Yet few foresaw the opportunity for business to close down the New Deal opening just decades after it began.

The author has fascinating conclusions, but he is just not quite sure how much to make of them. Ultimately, he risks putting the cart of legalism before the horse of class consciousness. Vinel's belief that class consciousness got funneled through legalism is sound. But he may have developed too much of a crush on his subject when he concludes, 'one may argue that the entire American working class was defeated when supervisors and managers were framed and defined as being impervious to freedom of association and collective bargaining' (p. 234). Note the rhetorical slight of hand: 'one may argue'. Perhaps if American workers had a clearer sense of themselves as a class, an elusive thing in American history, then others might not be able to stamp them so readily with elusive labels and slippery legal categories. In short, it might have been a more effective approach had the author had let the legal language speak for itself rather than placing upon it all the burdens of class in America. The slender intellectual threads here simply cannot hold all of the weight of American exceptionalism.

There is a way to flip part of Vinel's argument on its head. 'The success of foremen's unions', he argues, 'would have durably altered the common sense of the social meaning of unionism by turning the right to organize and bargain collectively into a right that all citizens enjoyed in American democracy' (p. 156). That's a beautiful idea. Rather than wondering why supervisors were excluded, perhaps the more fascinating question might be how they ever got included in the first place in American legal history. Vinel's argument about the Wagner Act depends upon some pretty rare historical circumstances between 1935 and 1947. Here, the author risks naturalizing and even romanticizing the extraordinary period of labor relations from 1935 to 1947, rather than continuing to problematize the deeper and more fundamental issues in the history of class relations in the United States. As a labor historian writing in the 2014, it sometimes seems like a miracle that anybody ever got the right to organize in the United States – let alone the fact that some people were excluded. For all of the deft Vinel brings to his legal readings, he seems just a bit too preoccupied with the

'correct' version of class expression rather than the complexities of American history outside of his well-parsed legal decisions.

Today, with all of the retail associates, assistant managers, and other fuzzy titles that obfuscate the service sector employment relationship, the most miserable aspects of Vinel's story have come to bear. As the ACLU's Lewis Maltby explained back in the 1990s, 'Given the way industry is involving employees in day to day operations, it won't be long before everyone is a supervisor under the NLRA, and no one has a theoretical right to join a union' (p. 213). The state of affairs illustrates Vinel's case that 'the postindustrial reading of the Wagner Act' is more than conservative, it is 'the product of business hegemony over labor law' (p. 198) Yet we cannot have the argument that it has always been a slippery definitional mess and a recent tragedy. We cannot have a case in which legal decisions restrain class consciousness without class consciousness having an *a priori* vulnerability to being restrained.

Although a bit confusing about its sense of causation and sometimes hanging too much weight on its conclusions, *The Employee* nonetheless invigorates the stale paradigms of labor history and the anachronistic systems of labor law by asking questions in new ways, brings new perspectives and intellectual energy to the subject. By drawing together law, history, and industrial relations, this book changes the way we think. In an age of independent contractors and assistant managers to the assistant managers – with nary a worker in sight – his history is relevant to the highest order. We are all supervisors now, one might readily conclude, and the nation is all the worse for it.

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