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RESEARCH ARTICLE

Union Exemption: Nonprofit Work and the Boundaries of the Commercial Economy, 1951–1976*

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Abstract

From 1951 to 1976, the United States National Labor Relations Board enforced a policy of union exemption, analogous to tax exemption, which categorically dismissed union petitions from workplaces deemed to have a charitable purpose. Controversies over the nonprofit sector's place in American society during the twentieth century are well-known, but most historical analysis of this topic focuses on its political influence. Union exemption and its reversal demonstrate that the nonprofit sector's economic status was contested too: employees, executives, and policy makers wrestled with the relationship of institutions that carried out the work of social reproduction to the structures of the postwar economy. Union exemption rested on an assumption that nonprofits and the work they did were naturally sequestered from commercial life. Its reversal signified a shift, driven by mobilizations of nonprofit employees and elite philanthropists alike, to a view of nonprofits as a "third sector" inextricably embedded in commercial life.

"There is government. There is the economy. And then there is something else," wrote Waldemar Nielsen in 1978.[1] A former Ford Foundation officer and nonprofit executive, Nielsen was one of many Americans in the 1970s engaged in a course of soul-searching over the status of that "something else," variously dubbed at the time the "third sector," "independent sector," "voluntary sector," or "nonprofit sector."[2] Each term carried its own valence, but they all described a sprawling set of private institutions organized around something other than profit-seeking as an end in itself—from large universities and hospital systems, to grantmaking foundations, to social work agencies, to fraternal organizations and clubs. Most were exempt from taxation by the Internal Revenue Service; all, sector advocates like Nielsen contended, needed to be understood as a cohesive whole—one distinct from the rest of the national economy.

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[1]Waldemar Nielsen, *The Endangered Sector* (New York, 1979), 1.

[2]John Gardner, "Preserving the Independent Sector," remarks to Council on Foundations, May 16, 1979, folder 12, box 1, Independent Sector Records, Indiana University Indianapolis Philanthropic Studies Archives, Indianapolis, IN.

Viewed as a set of economic institutions, however, the nonprofit sector was also growing in prominence. In 1950, "nonprofit activity" accounted for about 1.3 percent of national GDP; by 1975, that proportion had more than doubled, to 2.9 percent.[3] By one estimate, from 1950 to 1973, the number of people in the United States employed at nonprofits nearly tripled from 1.8 million to 5 million, and the share of all employed people working in the sector rose from about 3 percent to about 6 percent.[4] "Are we really so different from the teachers, plumbers, bricklayers, truckdrivers, etc.?" asked a group of Detroit social workers seeking to unionize their agency in the 1960s. "We work for wages. We want hospitalization, holidays, vacation and decent working conditions the same as other workers who are union members."[5]

Was nonprofit work different? During the middle of the twentieth century, there were two visions. On one hand, perhaps nonprofit institutions and the things that went on within them were qualitatively distinct in fundamental ways from the rest of American life: charitable endeavors sustained voluntarily, rather than to comply with the law or to turn a profit. Other workplaces were motivated by personal gain; the nonprofit workplace was driven by altruism. The bureaucratic machinery of the New Deal–era regulatory state, in this framework, was not just an awkward fit for nonprofits; it threatened to compromise their missions and dull the very qualities that made the sector valuable. On the other hand, in the "nonprofit work" equation, perhaps the "work" side was more significant. Regardless of their individual motivations or the missions of their employers, nonprofit workers still had to sustain themselves in the same economy as everyone else—and might well use the same tactics to earn a fair wage as their for-profit counterparts.

Tax policy was a well-known domain for nonprofit-sector boundary disputes during the twentieth century. Yet federal labor law was a unique and underappreciated venue for debates about the nature of the nonprofit sector, the reproductive labor carried out within it, and its relationship with the national economy—ones that brought the substance of nonprofit work front and center. The National Labor Relations Act (NLRA)'s regulation of union recognition and activity was intended to maintain the stability of the country's "free flow of commerce," and the National Labor Relations Board (NLRB) was the administrative body tasked with carrying the law out.[6] At first, from 1951 to 1976, the NLRB declined jurisdiction over most nonprofit workplaces, arguing that they fell outside its regulatory bounds. A diverse cross-section of nonprofit workers, from university library employees to blind workers in sheltered workshops to orchestra musicians to hospital nurses, found their collective bargaining efforts frustrated as a result. The NLRB's legal rationale for the policy flowed most directly from an exemption for nonprofit hospitals added to the NLRA in 1947; the board used its own discretion in extending that logic to nonprofit employers beyond the hospital.

This policy is best interpreted as union exemption. Akin to their exemption from most forms of taxation, federal policy held that nonprofits' charitable purposes granted them an exemption from collective bargaining obligations. Through union exemption, nonprofit employers were regulated distinctly from the industrial ones at the supposed heart of the capitalist economy. In this, they were not alone: workers in agriculture, domestic work, and the public sector faced similar barriers to legal protections. Scholars have noted how, in specific sectors, these barriers

[3]Colin Burke, "Nonprofit History's New Numbers (and the Need for More)," *Nonprofit and Voluntary Sector* 30, no. 2 (2001): 174–203.

[4]Dale L. Hiestand, "Recent Trends in the Not-For-Profit Sector," in *Research Papers Volume I: History, Trends, and Current Magnitudes*, ed. U.S. Department of the Treasury and Commission on Private Philanthropy and Public Needs (Washington, DC, 1977), 336, Filer Commission Publications, Philanthropy eArchives, Indiana University Indianapolis Philanthropy Studies Archives, http://hdl.handle.net/2450/807 (accessed Sept. 27, 2024) [hereafter FCP].

[5]"Open Letter to Our Fellow Social Workers," May 19, 1966, folder 14, box 1, Milton Tambor Papers, Walter P. Reuther Library, Wayne State University, Detroit, MI [hereafter MTP].

[6]National Labor Relations Act, 29 U.S.C., sec. 151 (1934).

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reinforced and deepened racial and gender inequalities in economic life.[7] Indeed, a robust body of historical literature examines the politics of healthcare workers' exclusion from the NLRA, tying it to a broader exclusion of reproductive labor from the protections of the New Deal state.[8] However, labor historians have generally not extended this analysis to other areas of the nonprofit sector, despite the NLRB's sweeping application of the law to these workplaces.

Recent historical work has also framed the 1960s–1970s as a pivotal moment in the history of American philanthropy and the nonprofit sector. The nonprofit corporate form was a central and growing pillar of the postwar U.S. political economy, yet an increasingly contested one during the 1960s and 1970s.[9] Elite philanthropists involved themselves in political struggles in newly visible ways, but their influence could distort or marginalize grassroots actors' social and political goals.[10] While foundations battled for democratic legitimacy, nonprofit service providers were further integrated into the postwar state, and distinctions between the three sectors became harder to parse in many contexts.[11] Yet, analysis of nonprofit labor as a category during this period is sparse, with the historiography focusing on large philanthropic foundations as political actors and their relations to civil society and state power. For all the attention paid to the politics of philanthropy, historians examining the nonprofit sector have often overlooked questions facing the workers whose labor underpinned it.[12]

The nonprofit sector, in short, occupied a nebulous zone of the postwar political-economic order, employing a growing proportion of the population but treated as exceptional by the law. The tension between the two visions of nonprofit work before the NLRB—perhaps an act of altruism, perhaps wage labor like any other—illuminates how the growth of this sector forced a range of historical actors to articulate the boundaries of commercial life and the regulatory state in new ways. Eventually, continued organizing by nonprofit workers rendered union exemption untenable. As the NLRB pivoted from a vision of union exemption to one of nonprofits

[7]Prominent accounts of the general pattern of exclusion include Alice Kessler-Harris, *In Pursuit of Equity: Women, Men, and the Quest for Economic Citizenship in 20th-Century America* (New York, 2001); Nelson Lichtenstein, *State of the Union: A Century of American Labor* (Princeton, NJ, 2002); and Ira Katznelson, *When Affirmative Action Was White: An Untold History of Racial Inequality in America* (New York, 2006).

[8]Leon Fink and Brian Greenberg, *Upheaval in the Quiet Zone: 1199SEIU and the Politics of Health Care Unionism* (Champaign, IL, 1989); Eileen Boris and Jennifer Klein, *Caring for America: Home Health Workers in the Shadow of the Welfare State* (New York, 2012); Gabriel Winant, *The Next Shift: The Fall of Industry and the Rise of Health Care in Rust Belt America* (Cambridge, MA, 2021).

[9]Jonathan Levy, "From Fiscal Triangle to Passing Through: The Rise of the Nonprofit Corporation," in *Corporations and American Democracy*, eds. Naomi Lamoreaux and William Novak (Cambridge, MA, 2017), 213–44; Peter Dobkin Hall, *"Inventing the Nonprofit Sector" and Other Essays on Philanthropy, Voluntarism, and Nonprofit Organizations* (Baltimore, 1992).

[10]Claire Dunning, *Nonprofit Neighborhoods: An Urban History of Inequality and the American State* (Cambridge, MA, 2022); Karen Ferguson, *Top Down: The Ford Foundation, Black Power, and the Reinvention of Racial Liberalism* (Philadelphia, 2013). For a theoretical framework rooted in a case study from an earlier era, see Megan Ming Francis, "The Price of Civil Rights: Black Lives, White Funding, and Movement Capture," *Law and Society Review* 53, no. 1 (2019): 275–309.

[11]Hall, *"Inventing the Nonprofit Sector"*; Levy, "Fiscal Triangle to Passing Through"; Dunning, *Nonprofit Neighborhoods*; Eleanor Brilliant, *Private Charity and Public Inquiry* (Bloomington, IN, 2000); Alice O'Connor, "The Politics of Rich and Rich: Postwar Investigations of Foundations and the Rise of the Philanthropic Right," in *American Capitalism: Social Thought and Political Economy in the Twentieth Century*, ed. Nelson Lichtenstein (Philadelphia, 2006), 228–48; Olivier Zunz, *Philanthropy in America: A History* (Princeton, NJ, 2013).

[12]One notable exception is Claire Dunning, "New Careers for the Poor: Human Services and the Post-Industrial City," *Journal of Urban History* 44, no. 4 (2019): 669–90, which highlights the growth of low-wage human services jobs, often in the nonprofit sector, as an antipoverty strategy in Great Society programming. Another notable exception is Katherine Turk, "'Saints' or 'Scabs': Contesting Feminized Labors, Social Needs, and the Welfare State in the Volunteering Wars of the 1970s," *Modern American History* 5, no. 2 (2022): 187–208, which highlights a "volunteer war" between the Nixon administration and the National Organization of Women (NOW) over the role that volunteer labor ought to take in social welfare, and by extension the valuation of reproductive labor. While this article focuses on paid nonprofit labor, it is thematically resonant with Turk's analysis in many ways.

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integrated into commercial life, the policy's end in the 1970s signaled a changing understanding of the nonprofit sector's relationship to economic life. In 1974, Congress amended the NLRA to remove union exemption for nonprofit hospitals, and in 1976, the NLRB extended this reversal to all nonprofit employees. Union organizers celebrated the extension of the New Deal state's protections to a group it had left behind. For sector leaders, meanwhile, the specter of unionization added to the list of factors forcing a rethinking of the "third sector." Before, charitable activity had been considered outside the purview of the market and the regulatory state; now, sector advocates embraced a view of its embeddedness but argued that it had unique vulnerabilities requiring unique protections. Union exemption's end extended labor law to nonprofit employees—but alone, this could not fully resolve the tensions underpinning the position of nonprofit work in a capitalist economy.

"Out of the Category of Ordinary Business"

Union exemption's most proximate roots were found in the Taft-Hartley Act of 1947, a bill of significant amendments to the NLRA to weaken organized labor. The notion that certain kinds of work fell outside the bounds of economic life, however, had a longer history. Advocates for the law argued that nonprofit labor was crucial but ought to be cloistered away from the mainstream of economic life, and that treating it as regular work would be corrupting. This mirrored American capitalism's tendency to simultaneously valorize and sideline the work of social reproduction, from the "pastoralization" of women's household work in the nineteenth century to the systemic exclusion of domestic work from the welfare and regulatory states in the twentieth.[13] Not all nonprofit employees were engaged in activities typically considered reproductive labor, but many who were not were nonetheless governed by this logic.

Surprisingly, then, union exemption was not a default state of legal precedent that the post–Taft-Hartley NLRB merely formalized or protected. Rather, the winds of administrative law had seemed, for a moment, to be blowing in the other direction.[14] Before the Taft-Hartley Act, the NLRB and other institutions had begun to hash out how the NLRA's new labor protections—designed by architects of the New Deal state with industrial workplaces in mind—would apply to charitable employers. In 1942, the board's majority rejected a union exemption argument from management at a hospital in Washington, DC, arguing that union exemption would have arbitrary consequences for workers: "Employees of hospitals, like employees of automobile manufacturers, must live upon their wages," wrote the board members, paraphrasing an observation from a recent Minnesota court ruling.[15] Nonprofit employers, however, resisted the idea that unions were compatible with the caring labor done in their workplaces. An expectation, often unspoken, that the interests of workers were subservient to the mission of the employer shaped their responses. A representative of the Los Angeles County Medical Association, for example, argued in 1946 that nurses "entered upon long courses of training motivated by love for their work," and complained that "as they stood, carrying lighted candles, to take the Florence Nightingale oath, it was not for the purpose of squeezing the last penny

[13]Jeanne Boydston, *Home and Work: Housework, Wages, and the Ideology of Labor in the Early Republic* (New York, 1990); Kessler-Harris, *In Pursuit of Equity*.

[14]Frederick E. Sherman and Dennis Black, "The Labor Board and the Private Nonprofit Employer: A Critical Examination of the Board's Worthy Cause Exemption," *Harvard Law Review* 83, no. 6 (April 1970): 1329–53.

[15]*The Central Dispensary and Emergency Hospital*, 44 NLRB 533 (1942). The Minnesota court case cited was 208 *Northwestern Hospital of Minneapolis v. Public Building Service Employees' Union Local 113*, Minn 384 (1938). The board also asserted its jurisdiction over other nonprofit employers in the years preceding 1947, including a YMCA, the Urban League, a Polish-American fraternal order with an insurance business, and a nonprofit trade school operated by the Ford Motor Company. This legal history is summarized in Sherman and Black, "The Labor Board and the Private Nonprofit Employer," 1332–4.

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from wretched humanity." Further, he accused them of being "used as pawns by union organizers seeking always to increase the number of contributors to their own prosperity."[16]

When the U.S. Senate considered the Taft-Hartley Act in 1947, nonprofit leaders consolidated their opposition to union recognition at their organizations. Several testified in favor of union exemption, emphasizing their organizations' existence outside the scope of normal commerce on one hand and the threats that unionization and strikes posed to the continuity of their services on the other. "The nation has been annoyed at strikes which, by cutting off power, light, heat, and transportation, caused severe inconvenience," testified John Hayes, the president of the American Hospital Association (AHA), an advocacy group for hospital management with about 2,500 nonprofit members, "but interruption of hospital service would immediately jeopardize human life." Hayes referred to the typical voluntary hospital as a "cooperative community project" and contended that workers' roles had to remain flexible for a hospital to "adapt itself to the needs of the community."[17] The president of the board at Johns Hopkins Hospital in Baltimore argued that if the NLRB forced recognition, the resulting contract would amount to an "added burden of a million-dollar operating expense" and worsen the economic condition of an already-precarious hospital.[18] The chairman of the American National Red Cross implored Congress to specifically exempt the Red Cross from unions, arguing that its purpose was self-evidently too important to be compromised by a strike.[19]

As the bill made its way through the legislative process, the precise terms of union exemption changed repeatedly. During negotiations over the bill, a Congressional committee initially recommended a sweeping union exemption for all nonprofits that fit a set of criteria quite close to the Internal Revenue Service's (IRS's) definition of a charitable organization.[20] The final version of the bill, by contrast, included only a single sentence specifically exempting nonprofit hospitals.[21] A joint committee report downplayed the change, arguing that the decision was largely academic since nonprofit unionization had been considered by the NLRB "only in exceptional circumstances and in connection with purely commercial activities."[22]

The compromise solution—to exempt nonprofit hospitals and leave discretion about other nonprofit organizations to the NLRB—emerged because of an eleventh-hour amendment suggested on the Senate floor by Senator Millard Tydings (D-MD). The explanation Tydings offered for the proposal, and an exchange that followed with Senator Glen Taylor (D-ID), articulated how proponents of union exemption excluded charitable organizations from the mainstream of commercial life. Tydings argued that since a hospital was not "a business operating on a profit basis," his amendment would "lift it out of the category of ordinary business" and "relieve [it] from the pressures that normally go with business." He added, "A charitable institution is away [sic] beyond the scope of labor-management relations in which a profit is involved," equating the possibility of an antagonistic relationship between labor and management with the profit-seeking corporate form.

[16]E. T. Remmen, "Labor Unions and Nurses," *Los Angeles Times* (reprinted from the *Bulletin of the Los Angeles County Medical Association*), May 22, 1946, A4.

[17]U.S. Congress, Senate, Committee on Labor and Public Welfare, *Hearings Before the Committee on Labor and Public Welfare on S. 55 and S.J. Res. 22, Part 4*, 80 Cong., 1st sess., Mar. 5–13, 1947, 2182–3 (statement of John H. Hayes).

[18]Committee on Labor and Public Welfare, *Hearings Before the Committee on Labor and Public Welfare on S. 55 and S.J. Res. 22, Part 4*, 2242 (statement of W. Wallace Lanahan).

[19]Committee on Labor and Public Welfare, *Hearings Before the Committee on Labor and Public Welfare on S. 55 and S.J. Res. 22, Part 4*, 2058 (statement of Basil O'Connor).

[20]U.S. Congress, House, Committee on Education and Labor, *Labor-Management Relations Act, 1947 (to accompany H.R. 3020)*, 80 Cong. 1st sess., Apr. 11, 1947, 47.

[21]Labor Management Relations Act, Pub. Law No. 80-101, 61 Stat. 136 (1947).

[22]U.S. Congress, House, Committee on Education and Labor, *Labor-Management Relations Act, 1947 (to accompany H.R. 3020)*, 80 Cong. 1st sess., June 3, 1947, 32.

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In the end, the Tydings amendment made union exemption for nonprofit hospitals one in a long list of tools that the eventual Taft-Hartley law would use to curtail the power of organized labor. Taft-Hartley was a sprawling omnibus bill, and its most newsworthy provisions were rules that banned closed shop floors and sectoral bargaining, allowed states to pass right-to-work laws, and constrained unions' abilities to strike. In this context, the exemption for nonprofit hospitals largely escaped notice. (In a *New York Times* article summarizing the original bill passed by the House, for instance, "Workers excluded from the act" were listed as the very last item, and "employes of charitable organizations" were last in *that* list.[23]) Yet, the implications were significant. The logic of the Tydings amendment seemed, in short, to suggest qualitative differences between the ways that nonprofits interacted with workers and the "economy" at large and that of other employers. As Gabriel Winant writes, the exemption of nonprofit hospitals from labor law "positioned health care as an intimate sphere, more akin to the family than the factory."[24] Much of the work done in these institutions, like that done in public or for-profit hospitals, was care work by any reasonable definition. Indeed, in many cases, social workers and healthcare professionals in the postwar era indeed carried out work that, in prior historical eras, had largely been uncompensated, "invisible caretaking labor" in domestic settings.[25] Yet while healthcare during this period was a significant form of nonprofit employment, it was far from the only one: studies in the 1970s found that hospitals accounted for fewer than half of all nonprofit employees.[26] The association of nonprofit employment's "charitable purposes and educational activities" with reproductive labor segmented from the mainstream of economic life brings into focus a new way that twentieth-century observers thought about the nonprofit sector: it was conceptualized as an institutional container for the work of social reproduction.

The idea that nonprofit workplaces were noncommercial informed arguments before the NLRB. The board's first test case came in an October 1951 hearing about a union drive for library workers at Columbia University. As an educational institution, university administrators argued, the university was simply not a participant in interstate commerce, a key criterion for NLRB jurisdiction. The union countered by pointing out several commercial activities that the university did engage in: it traded securities, owned real estate and rented to commercial tenants, and operated a press that published and sold books.[27] The NLRB sided with Columbia's management, taking the opportunity to establish a precedent of exemption for employers engaged in "charitable purposes and educational activities." While acknowledging that the university's activities would "affect commerce sufficiently to satisfy the requirements" for its jurisdiction in a normal case, the board declined to assert that jurisdiction because the university's activities were "noncommercial in nature and intimately connected with the charitable purposes and educational activities of the institution."[28]

The *Columbia* case produced a lasting precedent. From 1951 to 1976, the NLRB cited it twenty-five times.[29] These were cases in which the amount of money that moved through the organization would, in quantitative terms alone, mean that it had enough of an impact on interstate commerce for the NLRB, as a federal agency, to get involved in the absence of a

[23]United Press, "Text of House Omnibus Bill Slashing Powers of Unions," *New York Times*, Apr. 13, 1947, 3.
[24]Winant, *The Next Shift*, 15.
[25]Jane Berger, *A New Working Class: The Legacies of Public-Sector Employment in the Civil Rights Movement* (Philadelphia, 2021), 57.
[26]T. Nicholaus Tideman, "Employment and Earnings in the Nonprofit Sector," *Research Papers Volume I*, 328, FCP; Hiestand, "Recent Trends in the Not-For-Profit Sector," 336, FCP.
[27]George F. Kwass, "CU Challenges NLRB Right in Library Issue," *Columbia Daily Spectator*, vol. XCVI, no. 21, Oct. 23, 1951.
[28]*Trustees of Columbia University in the City of New York*, 97 NLRB no 424 (1951).
[29]NLRB database search, "97 NLRB 424," http://nlrb.gov/cases-decisions/decisions/board-decisions (accessed Sept. 27, 2024).

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charitable purpose. The board made its own decisions about which activities were charitable and educational, as well as about which institutions practiced them. These guidelines tended to correspond roughly, but not always, with the IRS's 1954 guidelines for 501(c)3 designation, which exempted organizations "operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes, or for the prevention of cruelty to children or animals."[30] Union exemption did not prevent all nonprofit employees from unionizing: some smaller organizations based in one state did not fall under the NLRB's jurisdiction, but instead that of state labor boards, whose policies varied. Other nonprofit employees received voluntary union recognition or successfully won it through a strike or other collective action. NLRB policy, however, had a significant impact.

To take advantage of union exemption, employers could argue that their activities were themselves charitable, or that they were inextricably tied to a charitable organization.[31] Each approach produced edge cases that pushed unions, employers, and board members to articulate where the boundaries of commercial life lay. An influential 1964 case declared that employees of a New York–based for-profit food service company that operated the dining hall at Washington, DC's Trinity College was union exempt due to its close connection to the educational institution.[32] The NLRB ruled similarly about a food contractor at a nonprofit hospital in 1965.[33] Likewise, the board exempted semi-autonomous research centers at universities, though similar centers without a university affiliation were not.[34]

Union exemption affected a wide variety of organizations. Soon after the *Columbia* decision, the board cited it to dismiss an unfair labor practice complaint against the Philadelphia Orchestra Association.[35] In 1960, the board heard a case dealing with a sheltered workshop (a nonprofit corporation that employed disabled people to carry out a variety of contracted tasks and framed their activities on the job as training for employment elsewhere) for blind people in San Diego. This decision featured a rare dissent, with two members arguing that nonprofit employees' rights and working conditions were equally important to the social benefit that the organization provided. However, the majority concluded that "Since … the workshop's purposes are directed entirely toward rehabilitation of unemployable persons, its commercial activities should be viewed only as a means to that end," and it too was deemed union exempt.[36]

Throughout the era of union exemption, unions and management squabbled over what kinds of activities were commercial. Attempting to persuade the NLRB, lawyers for labor and management alike drew on quotidian details about the workplaces in question to interrogate questions about the nature of commercial activity. At Atlanta's Luckie Street Young Men's Christian Association (YMCA), workers complained of racism and union-busting from a manager who "didn't think his employees were ready for unionization" and was "cooking up something for them."[37] After a regional NLRB director sided with management, a request to the national NLRB for an appeal became a battle less over working conditions than over the commercial nature of the YMCA's activities waged on a multitude of fronts. Unambiguously, the organization operated a restaurant, a coffee shop, a "sundry shop," and a boarding house. The union argued that these were businesses offering similar rates in a district with direct competitors; management contended they were a service that the YMCA, as a charitable agency,

[30]Internal Revenue Code of 1954, Pub. Law No. 83-591, 68A stat. 3, sec. 170 (1954).
[31]Sherman and Black, "The Labor Board and the Private Nonprofit Employer," 1339–43.
[32]*Crotty Brothers, N.Y., Inc*, 146 NLRB no. 91 (1964).
[33]*The Horn & Hardart Company*, 154 NLRB no. 129 (1965).
[34]Sherman and Black, "The Labor Board and the Private Nonprofit Employer," 1343.
[35]*Philadelphia Orchestra Association*, 97 NLRB no. 80 (1951).
[36]*Sheltered Workshops of San Diego, Inc.*, 126 NLRB no. 119 (1960).
[37]Letter from Val Cox to John Wright, Apr. 23, 1969; and letter from Val Cox to David Sullivan, May 9, 1969, both in folder 20, box 52, Service Employees International Union (SEIU) Executive Office: George Hardy Records, Walter Reuther Library, Detroit, MI [hereafter GHR].

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provided to its clients at a loss. Each side's statement elaborated for pages about the rates charged by the different businesses, the nature of their clientele, and even, in one instance, the fact that the "coffee shop is not advertised and cannot even be located from the lobby without assistance."[38] (Would a sign for a coffee shop make the difference in determining the YMCA's charitable status? Its lawyers were not taking any chances.) To the union's frustration, the NLRB again sided with management, leaving a strike as its only option for recognition.

The Washington-based United States Book Exchange (USBE), a clearinghouse that redistributed American libraries' excess books and periodicals abroad, provides another stark case of an employer using the logic of union exemption to its advantage. Started by the federal government's Agency for International Development (AID) in 1949 and spun off as a private nonprofit soon afterward, the USBE shipped thousands of books in "seemingly endless" ten-foot stacks daily.[39] In 1962, management had voluntarily recognized a union drive, and the NLRB had certified Office and Professional Employees International Union's Local 2 as the bargaining agent. The next year, unable to reach a deal on a wage increase, workers went on strike.[40] AID, caught in its own belt-tightening directive and wary of getting involved with a labor dispute, pulled its funding, threatening to create a downward spiral for the USBE.[41] The strike ended in the mid-1960s, but the underlying dispute did not. Without an order from the NLRB, the organization would have no obligation to bargain with the union, and the USBE's leadership petitioned the board, arguing that the book exchange had no obligation to continue to recognize the union because of its nonprofit status. The union countered that, since it had already negotiated a contract in 1962, the issue was moot. The board's decision pushed the extrapolation from hospitals to any organization with "charitable purposes and educational activities" a step further: while the book depository was not "itself an educational institution," the NLRB found that it was "directly and exclusively engaged in the dissemination of knowledge and is an integral factor in the education system."[42] In other words, the book exchange was enough like an educational institution, which in turn was enough like a charitable hospital, that with the *Columbia* precedent, the law exempted it from the NLRB's recognition.

Challenging Involuntary Philanthropy

The growth of nonprofit employment during the postwar era was embedded in a broader macroeconomic process—a long-term shift away from agricultural and industrial employment toward a service-based economy.[43] In the late 1960s and 1970s, this material trend spurred two social and intellectual movements that challenged the foundational ideas of union exemption. The first was a well-publicized uptick in union organizing activity outside industrial workplaces: in state, local, and federal governments; among clerical and professional workers; and at hospitals, universities, and other nonprofit organizations. Fights for recognition in these union-exempt workplaces spurred nonprofit workers and their supporters to articulate arguments about the value of their labor and the exploitation they experienced, undermining the notion

[38]Statement from SEIU Local 579 before the National Labor Relations Board, Oct. 30, 1969; and Statement from Young Men's Christian Association of Metropolitan Atlanta, Inc. before the National Labor Relations Board, Nov. 6, 1969, both in folder 20, box 52, GHR.

[39]Florence K. Frame, "A World Book Pool," *The Christian Science Monitor*, June 7, 1958, 24; "Agency Given $90,000 Grant," *Washington Post*, Dec. 18, 1948, 17; Lowell E. Sunderland, "United States Book Exchange: Volumes of Work," *Baltimore Sun*, Feb. 14, 1966, B1.

[40]"32 Workers Strike at Book Office," *Washington Post*, Sept. 13, 1963, C2.

[41]Mary McGrory, "No More Books from Uncle Sam? Row Threatens Goodwill Project," *Boston Globe*, Feb. 16, 1964, A3.

[42]*United States Book Exchange, Inc.*, 167 NLRB no. 149 (1967).

[43]Michael Urquhart, "The Employment Shift to Services: Where Did it Come From?" U.S. Bureau of Labor Statistics, *Monthly Labor Review*, Apr. 1984, 15–22.

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that charitable institutions could be cordoned off from labor politics. The second was a sweeping effort by politicians, nonprofit executives, and public intellectuals to define a central role for the nonprofit sector in American political and economic life. Rather than an isolated and exceptional group of institutions, they argued, the nonprofit sector was a significant participant in the national economy. This intellectual intervention challenged the foundational rationale for union exemption by questioning the premise that charitable institutions existed naturally outside of commercial life.

During the 1960s, the growing proportion of service workers in the national economy played a newly prominent role in the labor movement. While historians' analysis of organized labor during this time period has often focused on the decline of industrial labor, recent historiography has reframed this process as a "recomposition" of the working class and highlighted the central role of public-sector unionism, as service-sector public workers fused class consciousness with the civil rights movements of the 1960s to produce a "new working class."[44] The results were quick and dramatic: following an executive order legalizing collective bargaining for federal workers, the percentage of unionized public workers rose from about 10 percent in 1960 to about 40 percent by the mid-1970s.[45]

From a legal perspective, public-sector workers, nonprofit hospital workers, and other nonprofit workers each faced distinct regulatory landscapes for union recognition. From the perspective of the labor movement, though, struggles at each were closely related. Workers at each had to justify, ideologically and sometimes legally, why their work deserved the same protections as the kind of blue-collar, industrial work that loomed large in the country's imagination of organized labor. The American Federation of State, County, and Municipal Employees (AFSCME), Service Employees International Union (SEIU), and Local 1199 (an independent healthcare union) were at the center of these efforts. Some of the most visible labor disputes during this period took place at nonprofit hospitals. Without the ability to pressure elected officials or the possibility of the NLRB's mediating presence, unions working in private nonprofit hospitals had to force management to recognize and negotiate with them directly. Most of the early hospital unionization drives were begun by the New York–based Local 1199. The union first led a series of strikes at nonprofit hospitals in the city in 1959.[46] During the 1960s, it expanded dramatically, both geographically and to include new types of workers, such as professional and technical workers.[47]

Local 1199's leaders had roots in New York's 1930s communist milieu and a long history of involvement in struggles for racial equality. In the late 1960s, its hospital drives connected the struggle for union recognition with broader struggles for civil rights happening under the banner of "Union Power, Soul Power," collaborating in particular with the Southern Christian Leadership Conference (SCLC) after Martin Luther King Jr.'s murder.[48] Perhaps most famously, in 1969, a months-long strike for union recognition at two public hospitals in Charleston, South Carolina, attracted national attention as police brutalized protesters and Ralph Abernathy and Coretta Scott King lent their support. The strikers persisted for 113 days by forging alliances with civil rights organizers, and eventually won recognition.[49] The next year, Local 1199 and the SCLC collaborated on another successful high-profile strike in 1970 at Johns Hopkins

[44]Winant, *The Next Shift*, 180; Berger, *A New Working Class.*

[45]Alexis N. Walker, *Divided Unions: The Wagner Act, Federalism, and Organized Labor* (Philadelphia, 2019), 4.

[46]Fink and Greenberg, *Upheaval in the Quiet Zone*, 21–7. 1199 would eventually merge with the SEIU, but at the time was an independent union.

[47]Ibid., 112–3.

[48]Gregg Michel, "'Union Power, Soul Power': Unionizing Johns Hopkins University Hospital, 1959–1974," *Labor History* 38, no. 1 (1996), 51.

[49]Jewell C. Debnam, "Mary Moultrie, Naomi White, and the Women of the Charleston Hospital Workers' Strike of 1969," *Souls* 18, no. 1 (2016): 59–79.

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University Hospital in Baltimore—the very institution that had lobbied Congress for the NLRA exemption in 1947.[50]

During its first wave of nonprofit hospital unionization efforts in 1959, Local 1199 developed a rhetorical framework emphasizing the "involuntary philanthropy" that underpaid hospital workers were forced to provide.[51] Union organizers in the 1960s extended the critique to other fields, questioning the notion of a zero-sum tradeoff between fair wages and charitable mission. In the late 1960s, AFSCME Local 1640—the Detroit-area union that encouraged social workers to ask themselves how different they were from bricklayers or truck drivers—encouraged nonprofit agency workers not to "confuse the role of the volunteer with the role of the employee," and cautioned the following:

> At this time, those areas where good pay can be found are most often where people's insecurities and ignorances are exploited for the profit motive. When we, in the moral, spiritual and helping professions are satisfied to accept inadequate remunerations for our services, we create and support a system where capable people must choose between often exploitive jobs which pay an adequate salary and jobs which would make a social contribution, but which come at the price of their own financial obligations.[52]

The class dimensions of nonprofit union organizing varied. Large nonprofit hospitals in some cities served essentially as an employer of last resort for workers marginalized by race and gender. With what Leon Fink and Brian Greenberg describe as an "hourglass figure" of employment, with highly paid doctors on one end and a large low-wage staff on the other, their bargaining units were often made up of workers carrying out unskilled jobs that paid at or below the minimum wage (from which they were also exempted). These workers challenged their employers not to treat them in a way that would render them in need of the very charity they were ostensibly providing to others.[53] At social service agencies, with bargaining units made up largely of professional and clerical staff, organizing took on a different tone. AFSCME organizers in Detroit appealed to social workers' identities as members of the professional class. A flier distributed to social workers, for instance, told workers, "You are not getting what you are worth!!" and compared their starting salaries to the averages in fields with equivalent educational requirements like accounting, engineering, and production management.[54] AFSCME also worked to counteract arguments from management that unionization conflicted with professionalism. "Your payment has always consisted of telling you that 'you must remember you are a professional and should be dedicated,'" read another union flier. "Well, we believe that professionals are also entitled to be paid for their dedication."[55]

Nonprofit unionism operated on the margins of national politics during much of the 1960s; salient for its participants, it rarely made much of a dent in the broader public conversation. Yet nonprofit workers did find certain allies. In 1959, an article in *The Nation* noted that for hospital workers, "philanthropy is not their benefactor, but their boss," and concluded that "these underprivileged workers are not the victims of profiteers, but of charity."[56] In the *New Republic* two years later, a journalist critiqued "involuntary philanthropy" and catalogued the numerous labor laws that nonprofits had been exempted from and the cultural norms that had devalued

[50]Michel's "Union Power, Soul Power" provides a case study of the movement's complexities through this strike.

[51]Fink and Greenberg, *Upheaval in the Quiet Zone*, 106.

[52]AFSCME Local 1640, "Questions and Answers About Social Service Employees Unionizing," undated, folder 8 (Unionization of Social Workers), box 1, Thelma Bernstein Papers, Reuther Library, Detroit, MI.

[53]Fink and Greenberg, *Upheaval in the Quiet Zone*, 6.

[54]AFSCME Local 1640, "Social Workers Unit" flier, undated, folder 14, box 1, MTP.

[55]AFSCME Local 1640, "How Long Shall Your Beard Grow?" flier, undated, folder 14, box 1, MTP.

[56]Dan Wakefield, "Victims of Charity," *The Nation*, Mar. 14, 1959, 226–9.

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their work.[57] At a 1961 conference of academics on philanthropy, the economist Eli Ginzberg noted that "many service personnel have worked for wages far below the minimum prevailing in the profit sector of the economy … many hospitals have succeeded in extracting a 'philanthropic' contribution."[58] Milton Tambor, a Local 1640 organizer and a social worker himself, began writing for academic publications about the practicalities of nonprofit unionism in the early 1970s.[59] The issue also dovetailed with a broader rethinking of the valuation of care work spurred by the second-wave feminist movement. As Katherine Turk notes, the National Organization for Women fought federal initiatives encouraging women to volunteer, arguing that they constituted "scab" labor for jobs that ought to be paid fair wages. The contemporaneous International Wages for Housework campaign, meanwhile, demanded a reckoning with the economic sidelining of household work.[60]

By the early 1970s, legal observers began to take notice of union exemption. In 1970, two lawyers, Fredrick Sherman and Dennis Black, took to the pages of the *Harvard Law Review* to question the practice of union exemption. Their article, "The Labor Board and the Nonprofit Employer," comprehensively examined cases where the board had employed what it called the "worthy cause exemption" and the logic that it used to do so. In an area of administrative law little-noticed by most judicial observers, Sherman and Black argued, the NLRB had allowed nonprofit employers to offload the costs of economic precarity on to their workers "in the form of lower wages and the denial of a collective voice in the terms of their employment."[61] Perhaps most importantly for the law review's audience, they argued that the board's policy of exemption contradicted its duty to enforce the letter of the NLRA by denying nonprofit workers the right to collective bargaining. In sum, they argued, the policy merited "condemnation not merely as an undesirable administrative practice but as a basic violation of federal labor policy."[62] Other legal scholars built on the work of Sherman and Black in the years that followed; for instance, a 1971 *Iowa Law Review* article argued that the NLRA's nonprofit hospital exemption violated the Constitution's equal protection clause, and a 1972 *Duke Law Journal* article focused on a recent labor dispute at Duke Hospital also cast a critical eye on the NLRB's exemption policies.[63]

Labor and the Birth of the Third Sector

The importance that the nonprofit sector's relationship to the wider commercial economy held in debates about union exemption, meanwhile, placed the topic within a much broader set of efforts by legal and economic thinkers to determine how large nonprofit institutions ought to be defined and regulated. Spooked by what they saw as the encroachment of the welfare state on domains occupied by private charity, by macroeconomic uncertainty, and most proximately by legislative scrutiny that culminated in new legal constraints on foundations in the Tax Reform Act of 1969, a cadre of foundation executives led by John D. Rockefeller III and their allies in the federal government soon convened a private commission on philanthropy.[64] Called the

[57]Theodor Schuchat, "Workers and Philanthropists," *The New Republic*, Sept. 11, 1961, 13–4.

[58]Eli Ginzberg, "Hospitals and Philanthropy," in *Philanthropy and Public Policy: Conference on Philanthropy*, ed. Frank Dickinson (New York, 1962), 82–3.

[59]See for example, Milton Tambor, "Unions and Voluntary Agencies," *Social Work* 18, no. 4 (July 1973), 41–7.

[60]Turk, "'Saints' or 'Scabs,'" 188.

[61]Sherman and Black, "The Labor Board and the Private Nonprofit Employer," 1349.

[62]Ibid., 1351.

[63]"Exemption of Non-Profit Hospital Employees from the National Labor Relations Act: A Violation of Equal Protection," *Iowa Law Review* 57, no. 2 (1971): 412–50; "The Nonprofit Hospital Exemption of the National Labor Relations Act: Application to the University-Operated Hospital in *Duke University*," *Duke Law Journal* 21, no. 3 (1972): 627–52.

[64]Brilliant, *Private Charity and Public Inquiry*, 26; O'Connor, "The Politics of Rich and Rich"; Zunz, *Philanthropy in America*, 220–5. The Filer Commission involved many of the same characters as an earlier commission, called the

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"Commission on Private Philanthropy and Public Needs" (or the "Filer Commission" after its chair, insurance executive John Filer), it sought to portray elite philanthropy as one component of a longstanding, pluralistic "voluntary sector" in American society. The recommendations it generated were, ostensibly, geared toward strengthening the entire sector.[65] In 1975, the commission published a report that highlighted the centrality of nonprofits to economic life while warning that their economic standing was precarious. The commission's policy recommendations focused on favorable tax policy for nonprofits, new norms and rules of accountability to "improve the philanthropic process," and a permanent federal agency focused on the nonprofit sector.[66]

Historians often tell the story of the commission's contentious history as a prelude to the emergence of an ecosystem of organizations dedicated to nonprofit issues in the years that followed.[67] Yet, the existing historiography's focus on the commission's politics and its institutional aftermath obscures the extent to which it was an unprecedented intellectual attempt to reconcile the large amounts of money flowing in and out of nonprofit organizations, and the impact that they had on the national economy, with a prevailing assumption that such organizations were economically marginal. The commission spent $2.5 million (along with, it estimated, about $1 million worth of volunteered professional time) enlisting a small army of researchers to produce a total of ninety-one white papers.[68] One focused on the "conceptual foundation for measuring the size of the voluntary nonprofit sector of the U.S. economy," discussing the difficulties of obtaining accurate measurements and proposing standards for use in future research.[69] Another produced some of the earliest comprehensive data about the wage penalty suffered by nonprofit employees.[70] The study that most excited the commission's members—an empirical analysis of the charitable tax deduction's impact on donation levels by the economist Martin Feldstein—found that charities gained somewhere between $1.15 and $1.29 for every tax dollar deducted.[71]

In the report's third chapter, "The Hard Economics of Nonprofit Activity," the commission drew on a report by the arts expert Caroline Hightower to argue that nonprofit organizations were subject, perhaps uniquely so, to difficulties wrought by macroeconomic forces. "The voluntary sector has hardly been alone in suffering the strains of inflation and recession," the commission wrote, but "indications are that the economic maladies of the nonprofit sector not only reflect economy-wide strains but are also the result of dynamics endemic to the nonprofit sector in particular."[72] The commission warned, "Without important new sources of funds amounting to many billions of dollars, our society will feel the full force of what can be called the charitable crisis of the 1970s."[73]

The Filer Commission's assessment of nonprofits' "hard economics" owed much to the work of William Baumol and William Bowen, a pair of Princeton economists who drew on the tools

"Commission on Foundations and Philanthropy," that had tried and largely failed to influence the direction of the 1969 tax reform bill. On the roots of the two commissions, see Brilliant, *Private Charity and Public Inquiry*.

[65]Commission on Private Philanthropy and Public Needs, *Giving in America: Toward a Stronger Voluntary Sector* (1975), FCP.

[66]*Giving in America*, 19–26.

[67]See for example, Zunz, *Philanthropy in America*, 240–7; Hall, "Inventing the Nonprofit Sector," 78–80; and Brilliant, *Private Charity and Public Inquiry*, 144–51.

[68]Gabriel Rudney, "Foreword," *Research Papers Volume I*, vii–viii, FCP.

[69]Burton Weisbrod and Stephen Long, "The Size of the Voluntary Nonprofit Sector: Concepts and Measures," *Research Papers Volume I*, 339, FCP.

[70]T. Nicholaus Tideman, "Employment and Earnings in the Nonprofit Sector," *Research Papers Volume I,* 325–31, FCP.

[71]*Giving in America*, 120.

[72]Ibid., 79–80.

[73]Ibid., 80.

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of neoclassical economics to produce an "anatomy" of the performing arts' "economic problems."[74] Far from mismanagement or a lack of generosity from benefactors, Baumol and Bowen attributed lean times for performing arts organizations to "something fundamental in the economic order."[75] Theaters—and all nonprofits, for that matter—were trying to maximize the quality of their products and trying to make them accessible to "the needy and the deserving," rather than trying to maximize their own revenues.[76] Their operations, however, could not be separated from their economic context—especially when it came to the labor market. In many industries, new technologies drove increases in workers' labor productivity that led to higher wages and salaries. In the performing arts, few such increases were possible. "The output per man-hour of the violinist playing a Schubert quartet in a standard concert hall is relatively fixed," they wrote, "and it is fairly difficult to reduce the number of actors necessary for a performance of *Henry IV*, Part I."[77] Yet, as wages rose across the entire labor market, the performing arts had to keep pace. Costs for the performing arts would thus tend to rise over time.[78]

The approaches of Baumol and Bowen, Feldstein, and many of the other economic researchers who influenced the Filer Commission were consonant with trends in the field of economics at the time—particularly an embrace of microeconomic reasoning in domains that prior generations of economists would have considered outside their purview.[79] As Gary Becker, perhaps the most prominent embodiment of the approach, wrote in a provocative paper on marriage in 1973, "Economic theory may well be on its way to providing a unified framework for all behavior involving scarce resources, nonmarket as well as market, nonmonetary as well as monetary, small group as well as competitive."[80] In this light, the nonprofit sector appeared less as a refuge from the market than as a set of economic actors in its own right. On many policy questions, the ascendant neoclassical microeconomists shared little with labor unions like AFSCME or Local 1199. Yet from different directions, each clashed sharply with the vision of nonprofit employers as non-economic entities.

Baumol and others quickly extrapolated his argument about the performing arts more broadly. The idea that "productivity lag" drives up costs in service-intensive economic sectors generally has come to be known as "Baumol's cost disease" and is frequently invoked to explain sharply rising costs in education and healthcare.[81] The Filer Commission was an early adopter of the idea. Trying to identify why the nonprofit sector was so economically precarious, the commission echoed Baumol and Bowen in placing labor costs front and center. The cost of labor mattered disproportionately to the nonprofit sector because of its labor intensiveness: "Because it is involved mainly in the provision of services rather than the manufacture of products," the commission wrote, "the nonprofit sector's primary resource is human labor."[82] Where capital-intensive industries had been able to weather rising labor costs by introducing "labor-saving technology" to automate production, this was not an option available to most nonprofits.

[74]Caroline Hightower, "A Report on the Arts," in U.S. Department of Treasury and Commission on Private Philanthropy and Public Needs, *Research Papers Volume II: Philanthropic Fields of Interest*, eds. U.S. Department of the Treasury and Commission on Private Philanthropy and Public Needs (Washington, DC, 1977), FCP; W. J. Baumol and W. G. Bowen, "On the Performing Arts: The Anatomy of Their Economic Problems," *American Economic Review* 55, nos. 1/2 (Mar. 1965): 495–502.

[75]Baumol and Bowen, "On the Performing Arts," 496.

[76]Ibid., 498.

[77]Ibid., 500.

[78]Ibid., 501–2.

[79]Daniel Rodgers, *Age of Fracture* (Cambridge, MA, 2011), 41–50.

[80]Gary Becker, "A Theory of Marriage: Part I," *Journal of Political Economy* 81, no. 4 (July–Aug. 1973), 814.

[81]For instance, see William Baumol, *The Cost Disease: Why Computers Get Cheaper and Health Care Doesn't* (New Haven, CT, 2012).

[82]*Giving in America*, 83.

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Here, the commission finally confronted, if briefly, the question of unionization within the third sector. The problem of growing labor costs stretching nonprofit budgets, it argued, was compounded by recent developments specific to the nonprofit sector—one of which was the growing prominence of organized labor. "Because of unionization, an increased minimum wage, and other factors," the commission wrote, "the gap between the third sector's wage and salary rates and those of the other two sectors has narrowed."[83] In the idea of nonprofit unionism, the Filer Commission perceived something ominous. The devaluation of nonprofit workers' labor had helped to keep cost disease in check. By advocating for wages and working conditions that more closely resembled their counterparts in the public and for-profit sectors, these workers threatened to ratchet the difficulty of funding nonprofit services up further still.

What economists saw as "cost disease," nonprofit workers saw as their livelihoods, and by the 1970s they were increasingly agitating for improvements—regardless of whether they would have the NLRB's recognition. It is notable, considering its wariness of unionization, that the Filer Commission report did not acknowledge that the NLRB's policy of union exemption was still technically on the books when it was written. Perhaps because of the well-publicized, contentious labor disputes that had recently happened at hospitals and other nonprofit employers, it assumed that unionization was, like inflation or other macroeconomic forces, something that nonprofit employers simply had to deal with. The commission wanted to strengthen tax exemptions for charitable activities not because government regulation infringed on a nonprofit sector that was otherwise existing in tranquility outside the world of commerce; rather, treating nonprofits as exceptional was necessary precisely because they were uniquely vulnerable to the vagaries of the market economy—and those vagaries included labor unrest.

The End of Union Exemption

By the early 1970s, the ideological foundation underlying union exemption—that, in the words of Millard Tydings, "A charitable institution is away beyond the scope of labor-management relations in which a profit is involved"—was cracking. Workers at organizations like hospitals or sheltered workshops relied on their wages for survival like any other workers, and they knew firsthand that their employers held the same kind of economic power over them as for-profit companies. Increasingly, these workers were demanding an end to a labor regime that treated them as "involuntary philanthropists." As their bosses and the (voluntary) philanthropists who cut them checks reckoned with work stoppages and rising labor costs, they observed that the antagonistic relationship between labor and capital could not be wished away at charitable organizations. In 1969, the administrator of a social work agency in Detroit represented by AFSCME Local 1640 took to the pages of a trade journal to process what he had learned from bargaining: "The problem of employee compensation is compounded by concepts of 'charity,' 'dedication,' and 'sacrifice,' which are now obsolete. Whether one likes it or not, these concepts are 'out' as far as most urban employer-employee relationships are concerned."[84]

The scholars and sector observers becoming increasingly influential in the world of philanthropy and public policy approached the situation more abstractly, seeking to convince their audiences that no realm of life was exempt from the marketplace, yet they arrived at a similar conclusion: nonprofits were commercial actors. Even if they were not geared toward returning a profit to investors, they bought and sold goods and services in the same markets as everyone else, and their fortunes rose and fell with macroeconomic forces beyond their control. Perhaps most importantly, the wages and salaries they paid shaped the economic lives of an ever-growing number of people. While maintaining that nonprofits were "noneconomic—even

[83]Ibid., 84.

[84]Howard Hush, "Collective Bargaining in Voluntary Agencies" (reprint from *Social Casework*, Apr. 1969), *Journal of Nursing Administration* 1, no. 6 (Nov.–Dec. 1971): 56.

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anti-economic—institutions," Nielsen acknowledged that they "must nonetheless struggle to exist in the real economic world, somehow obtaining the resources they require and balancing their budgets."[85]

In this context, between 1970 and 1976, the NLRB gradually undid its policy of union exemption. Congress, meanwhile, held extensive hearings and eventually removed union exemption for nonprofit hospitals from the NLRA. The first major change in the NLRB's policy of union exemption came in June 1970, with the board reevaluating its jurisdiction over large private colleges and universities.[86] Somewhat unusually, the case did not pit an employer's management against a union trying to organize a unit among its workers; rather, the two employers in question, Cornell University and Syracuse University, joined the unions trying to organize their workers in petitioning for the NLRB to begin recognizing them as employers, likely so that they could defer to the board's judgments about how to apportion bargaining units. The board agreed to assert jurisdiction over the universities, and in doing so, it partially (but not entirely) overturned the *Columbia* precedent that had supported union exemption for universities. Universities like Cornell and Syracuse, it argued, had to be understood as large commercial actors—not just because of ancillary activities like real estate or book publishing that looked more like for-profit enterprise than education, but because of the scale of economic exchange that occurred as part of their core institutional purposes. The board noted, for instance, that total national university revenues were over $6 billion annually, and that individual universities typically spent hundreds of thousands or millions of dollars on things like housing, dining services, and educational equipment.[87] By this point, when the institution had enough participation in the "free flow of commerce" that the NLRA tasked the NLRB with ensuring, the board was no longer convinced that charitable or educational purpose alone was a sufficient reason for an employer to be exempt from the legal obligation to recognize and bargain with a union.

In the months and years that followed, the NLRB extended the *Cornell* logic to some other large nonprofit employers, regardless of charitable purpose. Later in 1970, for instance, the board evaluated a petition from a nonprofit called the Pacifica Foundation that operated a set of radio stations in California. The foundation had asked the NLRB to dismiss a union recognition effort on the grounds that its programming was educational—a similar logic to the United States Book Exchange's successful argument a few years earlier. The board, however, ordered an election, deciding that if colleges and universities were no longer union exempt, then proximity to their purposes could not justify it either.[88] The Washington-based Corcoran Gallery of Art found itself in a similar position; the NLRB rejected its argument that it was "only incidentally an educational organization, and a small one at that" and asserted its jurisdiction.[89] These decisions essentially inverted the logic of *United States Book Exchange*, narrowing the scope of union exemption by the same principle of association—art galleries and educations radio stations were, the argument went, similar enough to universities—that had originally expanded it.

As with universities and cultural institutions, from 1970 to 1974, the NLRB steadily expanded the scope of care work that no longer qualified for union exemption. The same month as the *Cornell* decision, the board removed union exemptions for nonprofit nursing homes. This decision was particularly significant because it built on a decision three years prior that had, for the first time, asserted jurisdiction over a for-profit nursing home, finding that it had a large enough commercial impact to merit the board's oversight.[90] In the case involving a nonprofit

[85]Nielsen, *The Endangered Sector*, 9.
[86]*Cornell University*, 183 NLRB no. 41 (1970).
[87]Ibid.
[88]*Pacifica Foundation-KFPA*, 186 NLRB no. 120 (1970).
[89]*Corcoran Gallery of Art*, 186 NLRB no. 83 (1970).
[90]*University Nursing Home, Inc.*, 168 NLRB no. 263 (1967).

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nursing home in Chicago, the NLRB then wrote, "the impact on commerce is not necessarily lessened by the nonprofit nature of a nursing home performing the same type of services as for-profit homes, and the nonprofit character of part of this class is therefore irrelevant."[91] This was a clear shift from just a few years prior, when the board had, in cases involving dining workers at colleges or book clerks at university libraries, explicitly distinguished between the same services done at different kinds of employers. Childcare was another area in which the board reversed prior policies: in 1970, it granted a union election to workers at a secular home for troubled children in New York, and it extended the practice to a Jewish children's home the next year.[92] In 1971, the board also began ending union exemption for private secondary schools.[93] Finally, the same year, it granted a union election to employees of the Keystone, a philanthropically funded boarding house.[94] The gears seemed to be in motion for a full-scale end to union exemption for nonprofit employers. By November 1971, observing this industry-by-industry set of reversals, a congressional analysis found that "The only broad area of charitable, educational, eleemosynary institutions wherein the Labor Board does not now exercise jurisdiction concerns the nonprofit hospitals."[95]

That analysis was conducted as part of an effort to amend the NLRA, removing the exemption for nonprofit hospitals, that congressional Democrats began in 1971. Where hospital union exemption had been an afterthought in 1947, tacked on to an omnibus bill, in the early 1970s, it took center stage. The initial proposal, put forward by New Jersey congressman Frank Thompson, was a bill to simply remove the line exempting charitable hospitals from the law. The hearings on the bill in the House and Senate demonstrate the extent to which labor struggles had reframed ideas about the nature of charitable employers. High-profile strikes sweeping the country challenged he idea that union exemption under the NLRA was a path to avoiding work stoppages in hospitals. As a result, the bill's predictable supporters, such as Local 1199's leadership and many other unions working in hospitals, were joined by advocates for hospital management, who—like Cornell and Syracuse—viewed NLRB mediation as the best way to avoid costly and disruptive strikes.

Labor leaders like those of Local 1199, unsurprisingly, emphasized the arbitrary toll that union exemption took on the labor conditions of marginalized working-class healthcare employees. However, another argument focusing on the NLRA as a force for labor stability emerged too. Michael Browne of the Association of Hospital Personnel Administrators of Greater New York gave a statement contrasting its favorable experience with a New York law granting nonprofit hospitals the right to collective bargaining to those of hospital administrators elsewhere. Without a New York–style law, Browne argued, "unions are free to attempt to organize the employees and force the hospitals to recognize and bargain with them by engaging in massive strikes and violence." In an inversion of the pro-union exemption argument that NLRA recognition would lead to more labor trouble at hospitals, Browne's anti-exemption argument appealed to the board's role as a mediator of conflict, touting the "benefit of the [NLRA's] orderly representation election machine for resolving disputes concerning union recognition peacefully."[96] No friend of the unions, Browne was nonetheless willing to accept a world in which hospitals struck the same bargain that for-profit industrial employers had a

[91]*Drexel Home, Inc.*, 182 NLRB no. 151 (1970).

[92]*The Children's Village, Inc.*, 186 NLRB no. 137 (1970); *Jewish Orphan's Home of Southern California a/k/a Vista Del Mar Child Care Service*, 191 NLRB no. 11 (1971).

[93]*Shattuck School*, 189 NLRB no. 886 (1971).

[94]*Penn-Keystone Realty Corp.*, 191 NLRB no. 105 (1971).

[95]U.S. Congress, House, Committee on Education and Labor, *Hearings before the Special Subcommittee on Labor on H.R. 11357, A Bill to Amend the National Labor Relations Act to Extend Its Coverage and Protection to Employees of Nonprofit Hospitals, and for Other Purposes*, 92 Cong., 1st sess., Nov. 12, 1971, 4.

[96]U.S. Congress, House, Committee on Education and Labor, *Hearings before the Special Subcommittee on Labor on H.R. 11357, A Bill to Amend the National Labor Relations Act to Extend Its Coverage and Protection to Employees*

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generation earlier—a guarantee of some collective bargaining rights for workers in exchange for the mediating influence of the NLRB to head off the most militant labor action.

The bill received a chillier hearing in the Senate, where Ohio's Robert Taft Jr. (R-OH) worked with the AHA to stifle its passage.[97] For example, a hospital executive from Texas reflected common sentiments in these hearings when he testified on behalf of the AHA that hospitals had "no true analogy in industry" and that recognition under the NLRA as it stood would still allow hospital unions the ability to strike and compromise patients' well-being.[98] Yet by the 1970s, this was no longer the dominant position. Instead of rejecting it altogether, anti-union lawmakers reshaped the legislation to allow NLRA inclusion but rein in union militancy. The final law ended the practice of union exemption for charitable hospitals while carving out exceptional rules for this kind of employer that limited unions' abilities to divide workers into bargaining units and severely limited the possibilities for strikes.[99] For labor advocates fighting "involuntary philanthropy," these qualifications were a sore disappointment, even though the law allowed them NLRB recognition.[100]

The change in legal guidance brought by the NLRA amendment portended a flood of new cases for the NLRB, already wary of a heavy workload, as nonprofit hospitals suddenly entered its purview.[101] In May 1974, perhaps anticipating the passage of the NLRA amendment, the NLRB made one final stand in favor of union exemption in a ruling on a home for troubled children in California called the Ming Quong Children's Center. In this case, the board revisited the legislative history of the Taft-Hartley Act and reaffirmed that its original interpretation ought to guide the board's jurisdiction unless an institution had a "massive impact on interstate commerce" (like Cornell University) instead of a merely a "substantial" one (like the children's center in question).[102] The decision was also notable for featuring a sharp dissent from John Fanning, a liberal Democrat who had sat on the board continuously since the Eisenhower administration.[103] Fanning argued that the majority had erred in deeming the children's center a charitable institution at all; he described in detail the structure of its programs and the fees it charged, concluding that "there emerges the picture of a highly professional, intensive, extended care, mental health treatment center, operated on a fee basis" and that its nonprofit form did not "warrant the conclusion that it is not engaged in commercial operations."[104]

In the next two years, the board heard an unprecedented number of cases from nonprofits as it attempted both to adjudicate a new set of questions that arose with its jurisdiction over nonprofit hospitals on the one hand, and the new standards it had defined for nonhospital nonprofits in the *Ming Quong* decision on the other. Overnight, affiliation with, or resemblance to, a nonprofit hospital went from being a guarantor of union exemption to a guarantor of union recognition. A vivid example came from a 1975 case involving a blood bank in San Diego. Eight years earlier, the board had unanimously ruled that a blood bank in New York was union exempt because it delivered its blood to nonprofit hospitals.[105] The San Diego Blood Bank, likely

of Nonprofit Hospitals, and for Other Purposes, 92 Cong., 2nd sess., Jan. 18, 1972, 198 (statement of Michael Browne).

[97]Winant, *The Next Shift*, 157–8.

[98]U.S. Congress, Senate, Committee on Labor and Public Welfare, *Hearings before the Subcommittee on Labor on H.R. 11357, A Bill to Amend the National Labor Relations Act to Extend its Coverage and Protection to Employees of Nonprofit Hospitals, and for Other Purposes*, 92 Cong., 2nd sess., Aug. 16, 1972, 32 (statement of David Hitt).

[99]Winant, *The Next Shift*, 157.

[100]Fink and Greenberg, *Upheaval in the Quiet Zone*, 168.

[101]UPI, "NLRB Wary of Hospital Unionization," *Atlanta Constitution*, Aug. 25, 1974, 4B.

[102]*Ming Quong Children's Center*, 210 NLRB no. 125 (1974).

[103]Peter B. Flint, "John Harold Fanning Dies at 73; A Chief of Labor Relations Board," *New York Times*, July 23, 1990, D8.

[104]*Ming Quong Children's Center*, 210 NLRB no. 125 (1974).

[105]*Inter-County Blood Banks*, 165 NLRB No. 38 (1967).

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making its argument to the board before the NLRA amendment had passed, cited this case as an obvious precedent. With nonprofit hospitals now under NLRB jurisdiction, however, the legal logic was reversed, and the NLRB directed an election to be held.[106]

The case that finally brought the doctrine of union exemption to an end concerned a Catholic home for children in Rhode Island, the St. Aloysius Home. In some ways, the St. Aloysius Home was on the margin of the distinction that Fanning had drawn in his *Ming Quong* dissent between purely charitable institutions and commercial nonprofits. Top management brass consisted of the Roman Catholic Diocese of Providence, and the small staff spent its time caring for children. For many people, it played the cultural role of the small, community-based institution that proponents of union exemption had always invoked to represent charitable institutions. (Obituaries directed donations to the home in lieu of flowers; Catholic parishioners canvassed door-to-door to raise money; a student group at Brown University hosted a field day for the children.[107]) Its finances, however, revealed that it was also embedded in the larger-scale economy of social services that observers increasingly identified as the dominant model for nonprofit service providers; beginning in the 1960s, it had begun working with children referred by the state of Rhode Island, and it relied on state contracts for about $400,000 of its annual $459,000 budget.[108]

Regardless, for the NLRB's majority, questions about the character or structure of a nonprofit institution were no longer relevant. The central argument of the majority opinion was simple: with the line exempting nonprofit hospitals gone from the NLRA, the implied exemption that prior generations of NLRB members had relied upon for other charitable institutions was no longer valid.[109] Like the *Ming Quong* decision, this opinion sparked a vociferous dissent from the board's minority, which reiterated the logic of the *Ming Quong* decision and, opening up a new debate, dug into the legislative history of the 1974 amendment to argue that the intent of that law had not extended beyond nonprofit hospitals. The battle between individuals would rage on in the years to come, with board members on both sides penning law journal articles defending their positions in the decision.[110] Yet as a matter of policy, the issue would remain settled.

Conclusion

In July 1976, labor lawyer James Omvig made a jubilant address at the National Federation of the Blind's annual convention. A week after the *St. Aloysius Home* decision, the NLRB had ordered an election held among workers seeking to form a union at the Chicago Lighthouse for the Blind, a sheltered workshop.[111] Omvig's investment in the case was both personal and professional: he had served as the first blind staffer at the NLRB in the late 1960s, and more recently filed a brief in support of the Chicago Lighthouse workers in the case.[112] He told the convention:

[106]*San Diego Blood Bank*, 219 NLRB No. 13 (1975).

[107]Death Notice for Roger Amantea, *Providence Journal*, May 7, 1973, 23; "Catholic Charity Canvassers Ready," *Providence Journal*, May 1, 1976, 4; Ron Winslow, "Brown Group's Field Day Crams Dozens of Activities onto Pembroke Field," *Providence Journal*, May 10, 1976, B-1.

[108]Richard C. Dujardin, "St. Aloysius Home Gets One-Year Reprieve," *Providence Journal*, Mar. 28, 1975; *The Rhode Island Catholic Orphan Asylum, a/k/a St. Aloysius Home*, 224 NLRB No. 1344 (1976).

[109]*The Rhode Island Catholic Orphan Asylum*.

[110]John Fanning, "The Horizons of Jurisdiction," *Catholic University Law Review* 27, no. 4 (Summer 1978): 679–93; Betty Southard Murphy, "Labor Law and Nonprofit Organizations," *Labor Law Journal* (June 1979), 334–9.

[111]*Chicago Lighthouse for the Blind*, 225 NLRB no. 46 (1976).

[112]Gary Wunder, "A Modern-Day Pioneer in Our Midst: An Attempt to Say Thank You to a Civil Rights Leader for the Blind," *The Braille Monitor*, Feb. 2016, http://nfb.org/images/nfb/publications/bm/bm16/bm1602/bm160204.htm (accessed Sept. 27, 2024).

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> We now have the same rights as other employees in our country to unionize. No longer must we be willing to settle for the meager handouts of sheltered shop management. No longer can we be forced to tolerate oppression ... shop management personnel will be required to negotiate with us so that we can have some say in what kinds of wages and working conditions we will have. In other words, we can now have some voice in what life will be like for us.[113]

For Omvig, the end of union exemption represented the culmination of extensive legal advocacy and an essential step toward self-determination for blind workers. The victory extended those new possibilities to many other nonprofit workers. Despite regular dissents from board minorities that lasted into the 1980s, charitable purpose alone was never again treated as legitimate grounds for union exemption. The end of union exemption in the 1970s was a tangible change.

Rather than a saga of labor law alone, the end of union exemption for nonprofit organizations occurred in a historical moment that embedded the questions facing unions, nonprofit employers, and the NLRB within a broader conceptual shift. At the time of the 1951 *Columbia* decision, nonprofits tended to be seen as institutions that operated outside the laws and norms of mainstream economic life. The NLRB overturned the *Columbia* precedent in 1976 as expert opinion began to treat nonprofits as market actors after all—and ones that needed to be regulated by mediating institutions like the board to protect them from the threats that commercial life posed. Nonprofit sector advocates in the years after the Filer Commission report treated this policy trend ambivalently. Still primarily concerned about tax policy, they also increasingly adopted an impatient critique of state bureaucracy. Waldemar Nielsen bemoaned an "increasingly dense web of government rules and requirements" facing nonprofits that, although "seemingly reasonable and necessary," had "led to a profusion of petty but altogether burdensome difficulties."[114] John Gardner, a former Johnson cabinet member who had taken up a post as the chair of the board at Independent Sector (an advocacy group that grew, indirectly, out of the Filer Commission), warned that the nonprofit sector must be able to "hold [itself] free of central bureaucratic definitions of goals and prescriptions of rules."[115]

The Reagan era remade the political landscape for the nonprofit sector, whose advocates courted allies in the new White House. This sharpened the incompatibility between their aims and those of organized labor. A colleague of Nielsen's at the Aspen Institute, former Republican political staffer Bobbie Greene Kilberg, wrote a memo to the Reagan campaign in 1980 framing "strengthening the private, non-profit sector" as a "natural Republican philosophical issue" and castigating "government regulation" for "stifling its creativity and imposing tremendous administrative burdens."[116] Some of the thinkers whose work underpinned the Filer Commission's report, meanwhile, would become better known in the 1980s as architects of "Reaganomics." Martin Feldstein, for instance, served as chair of Reagan's Council of Economic Advisers from 1982 to 1984.

While the fortunes of labor unions tumbled in the Reagan era, the nonprofit sector's embeddedness in the market took on a new significance. Institutions formally incorporated as nonprofits became increasingly involved in unmistakably market-driven activities, such as financial investment and real estate development; as Jonathan Levy argued, "barriers that had

[113]James Omvig, "Why the National Federation of the Blind? How About Sheltered Workshops?" speech delivered July 1976, reprinted in *The Braille Monitor*, Oct. 1976, http://nfb.org/images/nfb/publications/bm/bm76/bm76-october.html#a6 (accessed Sept. 27, 2024).

[114]Nielsen, *The Endangered Sector*, 18–9.

[115]Gardner, "Preserving the Independent Sector."

[116]Bobbie Greene Kilberg, "Talking Points," Oct. 3, 1980, folder 22, box 3, Waldemar Nielsen Papers, Indiana University Indianapolis Philanthropic Studies Archives, Indianapolis, IN.

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separated the state, for-profits, and nonprofits disintegrated."[117] Yet, ideas about the sector's distinctiveness persisted too. In the 1940s, advocates of union exemption had typically emphasized the nonprofit sector's likeness to the public sector (as a provider of crucial services that could not risk interruption) and its differences from the for-profit sector (namely, the absence of a profit motive). A generation later, the logic was reversed. In a political environment characterized by a suspicion of government programs, figures such as Reagan promoted nonprofits as alternative providers of social services, emphasizing their difference from the public sector. Announcing his President's Task Force on Private Sector Initiatives in 1981, Reagan declared, "There are hardheaded, no-nonsense measures by which the private sector can meet those needs of society that the government has not, can not, or will never be able to fill. Volunteer activities and philanthropy play a role, as well as economic incentives and investment opportunities."[118] To an observer in the 1940s like Millard Tydings, charitable activities were sharply segmented from "economic incentives and investment opportunities"; now, Reagan emphasized their compatibility with the for-profit economy and contrasted them favorably with the New Deal state.

The moment that brought union exemption for nonprofits to an end, therefore, had a decidedly mixed set of implications for the labor movement. In the 1970s, as market fundamentalism and deregulation were ascendant, the NLRB, for a time, maintained and even expanded its place as an arbiter of labor relations. A peculiar set of conditions—labor action among a new set of workers on the one hand, a more expansive understanding of commercial life from sector observers on the other—led to the expansion of collective bargaining rights to a new class of workers at a historical moment when political trends seem to have run in the opposite direction. The fact of the decision's odd timing is not just a historiographical concern: it also meant that the victory was an empty one for most actual nonprofit workers. Collective bargaining rights, after all, are not the same thing as collective bargaining power. In the 1960s, as public sector employees were building that power, their nonprofit counterparts—sidelined by union exemption—missed the boat. By the time they were granted the right to unionize, the moment of political possibility that occurred during the 1960s and early 1970s was quickly dissipating. Even after the NLRB eliminated union exemption for nonprofits in 1976, union density in the nonprofit sector never approximated that among government employees. One 2019 estimate suggested that about 8 percent of nonprofit employees were unionized, compared to one-third of public employees.[119]

While this policy shift's immediate material impacts were limited, its history serves as a window not only into the significance of changing conceptions of the nonprofit sector, but also into the importance in workers' lives of debates over NLRB jurisdiction. After 1976, union exemption persisted in many other domains, such as agricultural and domestic work. In the first decades of the twenty-first century, the proportion of workers classified as independent contractors grew dramatically, increasing the salience of their exemption from labor laws as well.[120] In ways resembling the NLRB's tentative embrace of recognition for nonprofit workers in the 1970s, the changing makeup of the board in recent years has led to back-and-forth

[117]Levy, "From Fiscal Triangle to Passing Through," 216.

[118]Ronald Reagan, "Remarks at the Annual Meeting of the National Alliance of Business, October 5, 1981," *The Public Papers of Ronald Reagan,* Ronald Reagan Presidential Library, http://reaganlibrary.gov/archives/speech/remarks-annual-meeting-national-alliance-business (accessed Sept. 27, 2024).

[119]Larisa Klebe and Rebecca Long, "Nonprofit Workers, Unionize!" *Current Affairs*, Mar. 3, 2021, http://www.currentaffairs.org/news/2021/03/nonprofit-workers-unionize (accessed Sept. 27, 2024).

[120]Lawrence Katz and Alan Krueger, "The Rise and Nature of Alternative Work Arrangements in the United States, 1995–2015," *ILR Review* 72, no. 2 (Mar. 2019): 382–416.

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decisions on the inclusion of certain independent contractors, as well as others on the margins of its jurisdiction such as college athletes and graduate workers at private universities.[121]

Some of the cultural assumptions underpinning union exemption for nonprofits, meanwhile, persist: a recent survey, for instance, found that fewer than half of respondents agreed that nonprofit employees deserved the same compensation and workplace protections as their for-profit counterparts.[122] Evidence suggests, however, that nonprofits, particularly in white-collar professions, may be an important site of new union activity in a reinvigorated 2020s labor movement.[123] If disputes over the compatibility of nonprofit workplaces and collective bargaining persist, they do so in a legal environment shaped by profound contestations over the role of the nonprofit sector in the U.S. economy in an earlier moment of transformation.

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[121]Noam Scheiber, "Grad Students Win Right to Unionize in an Ivy League Case," *New York Times*, Aug. 23, 2016, http://nytimes.com/2016/08/24/business/graduate-students-clear-hurdle-in-effort-to-form-union.html (accessed Sept. 27, 2024); Noam Scheiber, "Labor Board, Reversing Trump-Era Ruling, Widens Definition of Employee," *New York Times*, June 13, 2023, http://nytimes.com/2023/06/13/business/economy/nlrb-labor-ruling.html (accessed Sept. 27, 2024); Santul Nerkar, "Dartmouth Players Are Employees Who Can Unionize, U.S. Official Says," *New York Times*, Feb. 4, 2024, http://nytimes.com/2024/02/05/business/dartmouth-basketball-nlrb-union.html (accessed Sept. 27, 2024).

[122]Jon Pratt, "It's Complicated: Nonprofit Organizations and Wage Equity," *Nonprofit Quarterly*, Mar. 15, 2022, http://nonprofitquarterly.org/its-complicated-nonprofit-organizations-and-wage-equity (accessed Sept. 27, 2024).

[123]For instance, see Jim Rendon, "Why Workers at Growing Number of Nonprofits are Unionizing," *Associated Press News*, Jan. 31, 2023, http://apnews.com/article/labor-unions-southern-poverty-law-center-business-race-and-ethnicity-7fd961c88c614db47db63ffcd80e084e (accessed Sept. 27, 2024); Julie Satow, "They Want to Change the World. They Would Also Like a Raise," *New York Times*, Apr. 28, 2023, http://nytimes.com/2023/04/28/nyregion/nonprofits-unions.html (accessed Sept. 27, 2024); and Sravya Tadepalli, "Unionizing Small Nonprofits Brings Unique Challenges and Benefits," *Prism*, Jan. 10, 2024, http://prismreports.org/2024/01/10/unionizing-small-nonprofits-brings-unique-challenges-and-benefits (accessed Sept. 27, 2024).

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