

AMERICAN UNIONS AND THE ECONOMY — THE UNHEARD VOICE OF A SHRINKING SECTOR

JANICE BELLACE

*The Wharton School, University of Pennsylvania
3730 Walnut Street – 672 JMHH
Philadelphia, PA 19104-6340 USA
bellace@wharton.upenn.edu*

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Prior to the 1970s, unions in America represented nearly a third of the non-agricultural labor force with a significantly higher percentage in major manufacturing industries. Since then, union membership in the private sector has mirrored the steep decline in manufacturing jobs. Reduced numbers means greatly reduced political clout, such that unions today exercise almost no influence on national economic policy, even at a time of deep recession. From the 1980s onward, there has been a marked shift from a Keynesian macroeconomic framework toward a monetarist and liberal market model of economic policy, such that unions are viewed by many as anti-competitive in nature and as a constraint on a free market. This has further weakened their voice on policies relating to globalization. The minimal influence of unions and the lack of other mechanisms for collective employee voice have led to a weakening of policies designed to promote employment, even at a time of high unemployment. For over a decade, there have been no formal, or even regular informal tripartite discussions on employment policy matters. Moreover, even during a Democratic administration, unions have not been given a seat at the policy table.

Keywords: Employment policy; industrial relations; collective bargaining; labor law; union density.

1. Introduction

Prior to the 1970s, unions in America represented nearly a third of the non-agricultural labor force with a significantly higher percentage of workers in major manufacturing industries. Unions exercised significant influence in policies relating to labor issues, and had a voice on broader economic policy matters within the Democratic Party. Since the 1970s, union membership in the private sector has mirrored the steep decline in manufacturing jobs in the US, with the result that unions today exercise almost no influence on national economic policy, even at a time of deep recession. Moreover, from the 1980s onward, there has been a marked shift from a Keynesian macroeconomic framework toward a monetarist and liberal market model of economic policy, such that unions are widely viewed as anti-competitive in nature and as a constraint on a free market. This has further weakened their voice on policies relating to globalization.

Employers continue to resist collective bargaining strongly, in part because of the union wage premium and the desire for managerial flexibility but also for reasons of ideology. In absence of a union, American employers have substantial flexibility compared to their European counterparts. There are few laws in the US covering dismissals (for cause or for reasons of redundancy) and almost no federal laws mandating holiday, vacation or benefit payments. Employers feel that their flexibility to shed labor quickly and at little cost is unduly restrained by unions because unions nearly always include detailed clauses on these matters in collective agreements.

The minimal influence of unions and the lack of other mechanisms for collective voice have led to a weakening of policies designed to promote employment, at a time when the country is entering its fifth year of high unemployment. In the 1990s, President Bill Clinton was the last president to accord organized labor a voice in policy formulation as led by Secretary of Labor Robert Reich. Under President George W. Bush, the Secretary of Labor was not seen as influencing policy in the Cabinet, and there were no formal, or even regular informal tripartite discussions. Even under the Democratic President, Barack Obama, unions have not been given a seat at the policy table in large part because Obama is operating in a sharply polarized political environment where he risks attack if he accords organized labor. This status encounters no rebuke from his own party if he refrains from accommodating organized labor.

2. The Muted Voice of Organized Labor

Compared to most advanced market economies, and even compared to prior recessions in the US, the current recession is notable for the missing voice of the American labor movement from the public arena. Since 2008, the state of the economy has been at the forefront of the news, almost daily. Yet rarely does one see the name of Richard Trumka, the president (and thus prime spokesperson) of the central labor federation, the AFL-CIO in the media, not even in the newspapers or TV news shows in the major cities of the Northeast and Midwest which are still considered unionized cities. Similarly, the Secretary of Labor, Hilda Solis, did not play any role in influencing policy on how the Obama Administration should respond to the unemployment crisis.

Unlike many other countries, in the USA there is no formal mechanism for tripartite discussions of employment policy. Traditionally, the Secretary of Labor has decided upon some mechanism for engaging with unions and employers, sometimes with a general mandate and sometimes with a more focused agenda.¹ This continued through President Clinton's administration in the 1990s. But since then, tripartite discussion has disappeared. Under President George W. Bush, there was no formal role for unions in discussions of policy. Confronted with the worst financial and economic recession since the 1930s, President Obama has endeavored to improve the employment picture, but this has not led to the convening of any tripartite group to discuss policy options as the basis for reaching a

¹ For instance, under President Kennedy, Secretaries of Labor Arthur Goldberg and Willard Wirtz convened what was called "the President's Labor Management Committee." About 15 years later, President Carter's Secretary of Labor, Ray Marshall, convened a "Steel Industry Tripartite Commission."

consensus on what action to take. Rather, there have been episodic instances where the Obama administration has worked with a particular union for a specific objective. The most prominent example of this were discussions that Obama administration had with the United Auto Workers concerning the bailout of General Motors and Chrysler, both of which had declared bankruptcy.²

In most countries some institution, such as the central labor federation, is seen as expressing the voice of the average working person. But this has ceased to be the case in the US. In some countries, a political party tightly aligned to trade unions might be seen as speaking for average working people. Historically, at least since the 1930s, this was the case in the US, with the Democratic Party seen as being aligned with labor. But in this recession, the ability of the Democratic Party to speak for working persons has been diminished by the fact that a segment of the working class, and in particular, white men, are now seen as more aligned with the Republican Party.³ Moreover, for the first time the organized labor movement has indicated that its views are not fully represented by the positions of the Democratic Party.⁴

Rather, economists and political ideologues have dominated the current debate on whether austerity⁵ or stimulus is the best response to the recession. To understand why the voice of organized labor is no longer heard on issues central to its mission, such as job creation and employment security, requires a review of the philosophy of the American labor movement and its history over the past 50 years.

3. Steadily Declining Union Density

Long-term trends in American society resulted in labor unions reaching a point where their voice is not heard in the national media. Different scholars identify different years as turning points for American unions, with some pointing to the 1970s as the decade when decline started. But the decline had started in the 1950s, although to many the trend was not yet perceptible (Freeman and Medoff, 1979; Voos, 1984).

The major fact is that in terms of membership as a percentage of the labor force, the high point for American unions was in the late 1940s, with 35% of workers unionized.⁶

² GM and Chrysler received USD \$80 billion in federal funding in 2008–2009.

³ This phenomenon began with the election of Ronald Reagan in 1980.

⁴ The AFL-CIO organized a major demonstration in August 2012 to coincide with the Democratic Party's convention being held in North Carolina. In part this indicated its disenchantment with the decision to hold the party's convention in the state with the lowest unionization rate in the country and its frustration with its very minor role in shaping the agenda of the party's convention. In part the AFL-CIO wanted to gain media attention for its call for a "second bill of rights," one that calls for economic and social rights. <http://www.aflcio.org/Blog/Political-Action-Legislation/Workers-Stand-for-America-and-a-Second-Bill-of-Rights>.

⁵ In the US, the term "austerity" is not used in the popular media to describe an approach which advocates cutting government spending and taking other measures to reduce government debt. Typically, advocates of an austerity approach speak about "cutting taxes" and "reducing the size of the government."

⁶ The Bureau of Labor Statistics estimates that 35.5% of the non-agricultural labor force was unionized in 1945. The figure stayed in the 31–34% range throughout the 1950s. From 30.2% in 1960, it began a slow but inexorable slide down, to 27.3% in 1970 and to 21.9% in 1980. Figures are from BLS's Union Members Data from the National Directory Series 1930–1980. By 2000, it had dropped to 13.9%.

By 1983, the union membership rate had dropped to 20.1%.⁷ Over the next 30 years, union membership declined steadily. In 2011, the union membership rate was 11.8% with 14.8 million unionized workers.⁸ The figure for the overall unionization rate in the US mask a striking change with a major impact on union influence: the difference between the unionization rate in the private and public sectors over a 50 year period. Prior to 1960, very few public sector workers were unionized. About 50 years later, the picture had changed radically. In 2011, when 37% of public sector workers were unionized, only 6.9% of workers in the private sector were unionized, with the total number of public sector unionized workers greater than the number of unionized private sector workers (7.6 million members in the public sector employees compared with 7.2 million in the private sector).

The stark reality is that the decline in union membership has reached the point where unionized employees make up too small a percentage of the total labor force of 125 million persons to be of importance on the national scene. The situation in the private sector is even more bleak. Moreover in some states, the percentage of unionized workers is so low that unions are barely visible.⁹

While various causes can be listed as responsible for this decline, two have been identified. The first is that union membership was concentrated in declining industries. The second is that the ability of unions to recruit new members (inflow) did not come near to matching the number of unionized jobs lost (outflow), with many studies pointing to very strong employer resistance as a major cause (Abowd and Farber, 1990). Some assert that the reason for this lies with employers who adopted strong “union free” strategies, and the US is unusual among advanced market economies in having employers who openly proclaim their anti-union (“union free”) stance, but other factors were important contributors to this decline (Goldfield, 1987).

3.1. Union strength in declining industries

After World War II, unions were strongest in manufacturing, mining and transportation. In the 1950s, manufacturing generated 28% of GDP, and employed one-third of the civilian labor force. About 50 years later, manufacturing generates 12% of GDP and employs 9% of the civilian labor force. The decline of American unions mirrors this decline in manufacturing employment.

Historically, the American labor movement was divided in its philosophy on how workers should be organized into unions. At the end of the 19th century, socialist unions existed, but they never gained much of a foothold in the US. The unions that emerged as successful tended to be more pragmatically focused and non-political by European standards. Formed in 1881, the American Federation of Labor (AFL) focused on those workers who had inherent bargaining power; namely, craft (skilled manual) workers. For the first

⁷The Bureau of Labor Statistics changed its methodology for calculating the number of unionized workers in 1983. Thus, 1983 is the first year for which union data comparable to that used today are available. In 1983, there were 17.7 million union workers although the population was significantly smaller.

⁸Data for 2011 were reported by the Bureau of Labor Statistics on January 27, 2012. <http://www.bls.gov/news.release/union2.nr0.htm>.

⁹An example is North Carolina which has a large manufacturing sector. Its unionization rate, at 2.9%, is the lowest in the US.

decade of its existence, the AFL opposed government regulation of labor relations, believing that the best approach was to rely on bargaining power to achieve better conditions of employment for its members. By the early 1930s, the percentage of workers unionized was about 8%.¹⁰

The growth of mass manufacturing in the early years of the 20th century created a huge class of unskilled and semi-skilled workers that did not interest the AFL. Responding to this, an AFL breakaway group established the Congress of Industrial Organizations in 1935 to organize mass industry, and in particular semi-skilled and unskilled workers. The most significant period of growth for the union movement came in the late 1930s and early 1940s, when the CIO organized the auto, steel and rubber industries. In contrast to the AFL which had developed a doctrine of “exclusive jurisdiction” by which it meant one union per craft, the CIO followed the one industrial union per industry approach to organizing. The operational difficulty that would arise was an implied, self-imposed limitation on organizing. The union organizing department of a given industrial union focused its efforts on its industry. As a result, some industries which had little or no unionization, such as retail banking, attracted little or no attention from union organizers who were uncomfortable committing time and money to the formidable task of organizing workers in an industry with which they were unfamiliar.

Conceivably the central federation might have led the effort to organize nonunion industries but until 1955 when they merged, the AFL and the CIO were rival federations more intent on making sure that they did not lose potential members to the other federation. (Goldfield, 1987, p. 208) George Meany, president of the AFL–CIO from 1955–1970 appeared never to grasp that there was a need for the central labor federation to invest in organizing new industries, and the opportunity that may have been present in the 1950s and 1960s to organize new industries was lost.¹¹ Thus, unions entered the stagflation decade of the 1970s confined to industries that were soon to decline. In 1973, the year of the first oil crisis, the rate of private sector unionization was 25.6%, which dropped to 14.1% by 1984. Over a 14-year period (1984–1997), union members held 80% of the jobs lost in major declining industries, but gained only 5% of the new jobs in the fastest growing industries (Chaison, 2010). With the accelerating rate of job loss in unionized industries, it was almost inevitable that union density would decline (Freeman, 1998).

3.2. Obstacles to organizing

One can debate why American unions failed to organize service industries such as banking in the 1960s and 1970s. The central labor federation did not mount a massive organizing

¹⁰There are various estimates of union membership for this period. All agree that it was below 10%. One study undertaken in early 1933 by the Conference Board (a business group) looked at the methods by which over 10,000 employers in manufacturing and mining, where unions were most likely to exist, and asked how they dealt with their employees. It estimated that 9.3% were unionized. Morris, 2005, pp. 226–227.

¹¹Several of the largest affiliates of the AFL-CIO, including the Service Employees union and the Food & Commercial Workers Union, left the federation in 2005 to form the Change to Win coalition. Their main disagreement was over the lack of new, innovative and intense organizing efforts supported financially by the federation. They did not, however, intend to set up a rival federation but rather to spur action. Since 2009, there have been discussions on resuming their membership in the federation.

drive of non-union industries, and national unions tended to organize companies in their own industries. This might be a failure of imagination, and/or a failure to perceive how the American labor force would change the consequences for unions. But it was also a consequence of the difficulty of union organizing in the US. For instance, unions have never mounted a campaign to organize workers in nationwide chain establishments, such as Walmart or McDonalds, where there was no threat of jobs going overseas. There was, however, the huge challenge of taking on very determined, very anti-union companies willing to devote substantial resources to defeating unionization attempts. Although a decline in unionization rate since the 1960s¹² is typical of liberal market economies, the decline in the US is especially steep (Hall and Soskice, 2001). This indicates that some other factor is operating in the American environment not generally found in other liberal market economies. Those supportive of unions in the US typically identify the weakness of the law as an important factor explaining the decline in unionization.

The National Labor Relations Act, enacted in 1935, has generally been seen as a major piece of pro-union legislation.¹³ For a very considerable period, unions themselves failed to recognize that the statute, and especially the statute as interpreted by the courts, puts many hurdles in the path of unions seeking to represent workers in collective bargaining. For the most part, this results from the fact that the drafters of the legislation did not consider what sort of arrangements, such as industry-wide agreements, sustain collective bargaining and thus did not setup mechanisms that would have facilitated such arrangements. Americans often do not realize that the law effectively requires that unions surmount a series of hurdles to succeed in organizing. First, a union must persuade 30% of workers in a “unit”¹⁴ to sign cards saying that they want the union to represent them in collective bargaining. If the union can achieve this, it can then petition for an election in that unit. At this point, the employer can challenge the validity of the cards or the appropriateness of the unit. If the regional office of the National Labor Relations Board upholds the validity of the cards and the appropriateness of the unit, it sets an election date. It is only at this point that the union can obtain a list of the names of all the workers in the unit so that it can embark on the basic task of contacting those who will vote. At no time may non-employee union organizers go on to company property (not even the parking area) to communicate with the workers. Yet, at any time, the employer may communicate with the employees, including in sessions the workers are obligated to attend, a surprisingly powerful tool of persuasion (Getman *et al.*, 1976). The employer may inform the workers of actions that are legally entitled to take, such as permanently replacing workers who go on strike (even though they have a “right” to strike). In addition, employers are legally entitled to point to instances where companies moved to lower cost parts of the

¹²Union Density in OECD countries 1960–2010. http://www.oecd.org/document/34/0,3746,en_2649_33927_40917154_1_1_1_1,00.html.

¹³The sole federal labor relations statute prior to the 1930s was the Railway Labor Act of 1926, which was subsequently amended in 1936 to cover the airline industry. There was no doubt that railways and airlines are in interstate commerce and thus subject to regulation by Congress.

¹⁴In a statutory scheme where employees are given rights to bargain, the statutory draftsman must consider the question of the geographic scope of bargaining or, in a practical sense, in what grouping will bargaining occur. In American terminology, this is the “bargaining unit” and only workers in the unit will be covered by the terms of the collective agreement.

country or moved operations abroad where wage levels are lower, in order to remain competitive. Thus, the employer may communicate fairly directly the message that if workers vote for the union, they may lose their jobs. Thus, the state of labor law in the US permits employers to express their opposition to unionization and to discuss possible severe negative consequences of unionization during the organizing campaign.

Assuming the union wins the election, the NLRB's unit determination decision may well have an effect later that affects the entire bargaining relationship. Because unit determinations occur at the time, the union seeks representation rights and it usually does this on a location-by-location basis, it often occurs that a union may represent workers who work at different locations of the same company but these workers are covered by different collective bargaining agreements.¹⁵ The union may ask the company to join the different units under the same collective agreement, but companies usually refuse because they realize that to do so would give the union greater strike power.¹⁶ As a result, an employer can keep different parts of the company that make or are capable of making the same product in competition with each other on wage levels and other conditions of employment. This has the effect of restraining the union's wage demands at any one location and of weakening union solidarity. Also, as a strategic decision, the company may decide to expand at its nonunionized locations and phase out of its unionized locations (Kochan *et al.*, 1986). Because of the changes in the National Labor Relations Act since 1947 and in the way it has been interpreted by the courts, in practice it has become impossible to establish new, nationwide collective agreements on an industry basis.¹⁷

Besides the inherent difficulties unions face in organizing workers on a company-wide basis under one collective agreement, unions also argue that the statute's provisions do not provide a sound basis for freely chosen employee representation and that the penalties for violating the statute are too weak (Kleiner and Weil, 2010). During the Clinton Administration, a fact-finding commission was appointed to evaluate the state of worker-management relations and to make recommendations for improvement. The 113 page Dunlop Commission (1994)¹⁸ identified deficiencies with the statute, most of which had been exhaustively detailed in academic literature (Weiler, 1983). Subsequent research showed that the unfair labor practice provisions of the National Labor Relations Act do not deter

¹⁵ This results from the fact that it is difficult for a union to organize all the workers of the same company across the US at the same time. Since organizing drives take time and resources, usually a union will focus on organizing one plant, or one company, or the industry in one region at a time.

¹⁶ That is, if the union goes on strike at one location, the company may transfer production to another location. Even if the latter location has unionized workers, who are members of the same union, usually they cannot lawfully refuse to perform this work in support of the striking workers.

¹⁷ After World War II, Japan enacted a labor relations statute modeled after the American NLRA. Researchers in Japan have identified the same problem; namely, that the union has to "win" an election in a unit and this pushes down bargaining to enterprise or even workplace level. That unit then has higher wage costs compared to non-union locations making the unionized unit uncompetitive compared to others in the industry (Tsuru, 1995).

¹⁸ The 1994 Dunlop Commission on the Future of Worker-Management Relations: Final Report was a major review of U.S. labor law and contained recommendations for reform. The Dunlop Commission, chaired by Harvard Professor John Dunlop was established by the U.S. Department of Labor and the U.S. Department of Commerce, and as such, the Commission reported to Secretary of Labor Robert Reich and Secretary of Commerce Ronald Brown during the Administration of President Bill Clinton.

employers from violating the statute,¹⁹ and that unions were much less likely to get to an election and win where violations had occurred (Ferguson, 2008). Despite such findings, none of the Dunlop Commission's recommendations were acted upon by Congress.

Most recently, unions mounted an effort to have the NLRA amended to provide for speedier elections, having long known that a particularly effective employer tactic for resisting unionization was to draw out the pre-election stage by litigating unit and voter eligibility issues. The proposals, known as the "Employee Free Choice Act," provoked fierce resistance from employers. In Barack Obama's first term, this piece of proposed legislation was set aside as it seemed impossible to get it passed and the Obama Administration preferred to devote its attention to passage of its major health care legislation. Over the past half century, unions have been unable to secure passage of any amendments to the NLRA that would make it easier for them to gain recognition rights, despite more than one president supporting such efforts (Brudney, 2011). This in itself highlights the daunting political reality unions confront.

Various scholars have found that workers, when asked, express an interest in union representation (Freeman and Rogers, 2006, p. 2). However, to gain recognition, a union must achieve a majority vote of 50% plus 1 of those voting in the unit. It may be although a sizable percentage of workers expressing an interest in unionism, at most workplaces a union cannot achieve the 50% they need.²⁰ It may be, however, that once they have considered the benefit a union might bring and they weigh that against the potential risks of being unionized, they decide that it is not worth the risk. Unions will note that often a unit where 70% of workers have signed cards fails to produce a majority in favor of union representation and will assert that this is due to employer threats. Employers will say that workers often are not familiar with what happens in a collective bargaining relationship, and that once they are informed and can better calculate the cost versus the benefit of unionization, they change their minds and decide not to vote for the union. Regardless of the validity of these views, it is undeniable that over the years unions have found it very difficult to organize workers, and have complained that the statutory mechanism for determining recognition results in a very litigious process is cumbersome, time consuming and costly (Dannin, 2006).

3.3. Philosophy

A further obstacle to the success of American unions in organizing workers is the philosophy articulated by the AFL's first president, Samuel Gompers, in the late 19th century. Unlike his European contemporaries, he was avowedly an anti-socialist. He had no view that unions would advance the entire working class, or that they should have broader,

¹⁹Based on a decade of research, Kate Bronfenbrenner of Cornell University estimated that "...the overwhelming majority of employers do everything possible, both inside and outside of the law, to keep their workplaces union free. One in four workplaces discharge workers for union activity, more than half threaten to close down all or part of their facility if workers succeed in organizing (Bronfenbrenner, 2001, p. 387).

²⁰The US by statute follows a "winner-takes-all" approach. If a union achieves 50% +1 in an election, it is certified as the exclusive bargaining agent for all workers in the unit. But if it does not reach that level of support, it loses and cannot engage in collective bargaining.

political goals of improving access to health, education and other services. He concentrated on the role of unions in helping their members achieve better terms and conditions of employment through collective bargaining. Once asked what unions want, Gompers famously replied, “More.” Unlike European workers, American workers in the critical formative period for unions were not attracted by socialist goals and found the more pragmatic message of the AFL appealing.²¹ Scholars have labeled Gompers’ approach “bread and butter” or business unionism. Although many national unions have espoused a broader view of their role, in the public’s mind what unions want is “more” for their members. For whatever reason, organized labor’s role in proposing and lobbying for major pieces of legislation that benefit all working persons is largely unknown.²²

In many countries, another aspect of unionism, “voice,” is often promoted as one of the major reasons why workers should join unions. While American union leaders will acknowledge that voice is a benefit of unionization, they typically do not tout it as a major benefit. In the US, in the first part of the 20th century there were discussions of unionism leading to industrial democracy, a vision in which workers were sometimes analogized to citizens with a voice at the workplace (Derber, 1970). Yet, from the 1940s onward, this vision was replaced by a “system of legally established contract-oriented unionism” that essentially supplanted any aspect of the social transformation of industrial governance (Lichtenstein and Harris, 1993, p. 3). Similarly, in contrast to European unions who in the 1970s determinedly sought expanded information and consultation rights, American unions never made any proposal in these areas. As such, operating within the framework of a 1935 statute, American unions became confined to the use of adversarial bargaining seeking to extract more, at a time when the average worker was no longer in a manufacturing plant but more likely in an office or shop, a setting where many workers shy away from strikes and aggressive behaviors.

Although the “bread and butter” business unionism approach of seeking “more” definitely has appeal, it does have an obvious weakness. If a union cannot deliver “more,” most likely because it lacks a credible strike threat, it is seen as being useless (Clark *et al.*, 2002). Over time as the percentage of workers unionized declined, the “more” philosophy also had the disadvantage of making union members look privileged in comparison to other workers. In addition, it made it easy for opponents of unions to target them as simply a “special interest group.”

One example demonstrates the double edged sword of unions’ ability to bargain for “more.” In the last 30 years, the percentage of working Americans who have a defined benefit pension plan has declined greatly. Once the norm, particularly for unionized workers such plans began to decline in the 1980s, when defined contribution plans (which shift the risk of being able to attain a set payout far in the future to the employee) became

²¹ The standard explanation is labeled “exceptionalism.” In the late 19th and early 20th century, most industrial workers were immigrants or children of immigrants. They typically found living conditions in the US superior to conditions in their home country. Thus, they had no desire for radical change to American society but did wish to improve their own standard of living.

²² Two prominent examples would be the Pregnancy Discrimination Act of 1977 (flowing directly from a lawsuit brought by the union at General Electric), the Employee Retirement Income Security Act of 1974 (promoted by the unions in the male and female garment industries). The latter for the first time established maximum vesting periods for pensions.

tax advantaged. Since employers in non-union companies can unilaterally determine whether to offer a pension plan and what type to offer, the shift to defined contribution plans was predictable. What might not be predictable, however, is the resentment shown felt by those without defined benefit plans to those with defined benefit plans (Lofaso, 2011). It is not uncommon to read today of someone castigating unionized workers and saying they have “gold plated” defined benefit plans. This illustrates that even where unions have secured a certain level of benefit, this can be viewed as union members only enriching themselves.

4. Property Rights and Flexibility

American employers have consistently taken the view that collective bargaining infringes their constitutionally protected property rights, which includes the right to manage the enterprise (Harris, 1982). Unlike their counterparts in other developed capitalist countries, most American employers never fully accepted the legitimacy of unions (Goldfield, 1987). In different decades, the particular issue and the tactics used might differ, but usually opposition stemmed from the ideological position that the owner of property has a right to control it and that the government should not interfere with the exercise of that right.

In the case²³ that went to the Supreme Court testing the constitutionality of the National Labor Relations Act, the employers’ main argument challenged the power of Congress to regulate private sector employers under the commerce clause of the Constitution. Employers, however, also argued that the statute permitted the imposition of terms of employment on them and that constituted an infringement of their property rights (the right to contract being seen as a form of property).²⁴ The Supreme Court upheld the statute by distinguishing the difference between compelling employers to bargain in good faith with workers from compelling them to agree to a set of terms put forward by workers. This judicial view has cropped up in a number of cases where employers have argued that some union action constitutes a limitation on their “management rights” and is thus an impermissible restraint of their property rights (Atleson, 1983). An example would be a clause in a collective agreement which limits the employer’s ability to outsource work of a type that can be done by bargaining unit workers.

In most democratic countries, the legislature has recognized that while employers’ have private property rights, employees have rights to freedom of association and collective bargaining and that these rights also deserve public support. Sometimes this may be expressed in a statute, but often the tension between the employer’s private property rights and the employees’ rights requires courts to strike a balance. In doing so, judicial philosophy is critically important and can result in major differences between countries that seem relatively similar (Sack, 2010). In the US, judges have tended to embrace individual

²³National Labor Relations Board v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937).

²⁴Filing an amicus curiae brief when the Jones & Laughlin Steel case went to the Supreme Court was the American Liberty League, a group of leading industrialists and corporate lawyers (Irons, 1993, p. 81). Founded in 1934 and financially supported by the DuPont family and other wealthy donors, the American Liberty League was opposed to various pieces of New Deal legislation. It was generally viewed as the voice of the top corporations in America.

rights and viewed the free market as producing the best (that is, the most efficient) outcome for society. Over the past 20 years, this tendency has been reinforced as a result of the law and economics movement, with an increasing number of judges viewing labor law through the lens of classical economics. Judges, however, should not be viewed as expressed a class-based elitist view. Rather, they were reflecting a change in American society as a whole, where there was a growing acceptance of a classical, liberal economic philosophy. This change started in the early 1980s, when President Ronald Reagan persuasively communicated a view that individual freedom, guaranteed in the Constitution, rests upon a free market, deregulated industries, and a smaller role for government.

4.1. Competitive pressures

Aside from ideology, many employers have resisted unionization on purely pragmatic grounds; namely, that a union is a significant constraint on management. If an employer's workers are not unionized, the American employer's ability to terminate employment quickly and cheaply is almost unparalleled among advanced market economies. Employment law is state (not federal) law, and very few states have deviated from the "employment-at-will" doctrine which states that a worker can be dismissed for "good reason, bad reason, or no reason at all."²⁵ If an employer wants to reduce staffing levels or wishes to shut down a production line or office, there is no federal redundancy payments law. In many situations, the employer need not even give notice.²⁶ Compared to many advanced countries, the law relating to the individual contract of employment is undeveloped. There is no statutory requirement that an employee receives a written contract of employment that states the basic terms of the person's employment. Combined with the employment-at-will doctrine, this means that an employer can change the terms of employment at any time, and if the employee does not find this acceptable, the law takes the view that he/she can quit. Moreover, an employee who leaves generally would not be eligible for state unemployment compensation. All of this combines to give the US one of the most flexible labor markets among advanced economies. Unions, however, seek to limit an employer's flexibility by bargaining for a right to dismissal only for just cause, for redundancy (severance) pay, for advance notice of layoffs or closings, and for restrictions on the ability to outsource work.

Employers have also resisted unionization because of the union wage premium (Linneman *et al.*, 1990) Although union wages tend to be higher than their non-union counterparts, the more striking difference in compensation costs relates to benefits. In the US, there is no federally mandated maternity pay, no requirement of a private pension or sickness/disability benefit, and no requirement that medical insurance to be provided by the employer. Typically, the level of benefits found in collective agreements adds 30–40% on top

²⁵The major limitation on this employer power flows from federal anti-discrimination legislation which prohibits an employer from terminating someone for a proscribed reason, such as race or sex discrimination.

²⁶The Worker Adjustment and Retraining Notification Act of 1988 covers only those employers with more than 100 employees. It applies only in situations where the facility is completely shut down or where there are mass layoffs. Also, exceptions are made for faltering businesses where the employer has unsuccessfully sought capital and must close on very short notice or where unforeseeable business circumstances necessitate redundancies on short notice.

of wage costs, far higher than the benefit costs for comparable nonunion workers.²⁷ (Mishel and Walters, 2003). In addition, collective agreements often contain provisions relating to the deployment of labor, such as manning levels, skill levels related to specific jobs, and restrictions on the use of temporary employees. Such provisions result in higher labor costs, and equally importantly, are perceived by line managers as hampering flexibility.

In many countries, unions that achieve higher wages are able to sustain this level against possible undercutting from non-union companies in two ways. Sometimes, employers belong to industry associations and by virtue of their membership, they are required to follow the terms of the framework collective agreement negotiated by the industry association with the relevant unions. For the most part, in the USA, multi-employer bargaining was never the norm, and it has been in decline since the 1980s. In some European countries, the doctrine of extension of the agreement applies; that is, where an industry collective agreement has been signed, the parties can apply to the relevant ministry to have the terms extended to all employers in the industry. As such, those engaging in collective bargaining can prevent non-signatory employers from undercutting wage standards. No such approach has ever existed in the US. As a consequence, American unions developed techniques such as coordinated bargaining and pattern bargaining whereby they sought to achieve a collective bargaining settlement with a lead company in the industry and then to press other companies in the industry to accept that agreement. To some extent this could simulate the more formal European extension of the collective agreement but only if the industry was relatively highly unionized and competition among the major companies in the industry was not intense. This was most likely to occur in heavily regulated industries. But in the late 1970s, President Jimmy Carter, a Democrat, pushed forward legislation that deregulated the airline industry, and in 1980 the trucking industry, thus ushering in a period of intense competition. Wages in both industries dropped, and in trucking, union density declined sharply.²⁸ (Cappelli, 1985; Hirsch, 1988). The 1980s was the decade of “hard, confrontational bargaining” where employers challenged pattern agreements within an industry or even within the same company. In general, they were successful in decentralizing bargaining and putting workers within the company in competition with each other (Voos, 1994).

5. Public Sector Unionism

Prior to 1960, few workers in the public sector were permitted to unionize and engage in collective bargaining. Since the federal constitution grants no such right, and since the National Labor Relations Act is limited to the private sector,²⁹ it is a matter for each state

²⁷ Figures vary depending on the industry and time period selected for comparison. Mishel estimates that in the 1990s, a variety of studies showed a union wage premium in the 15–25% range with the union impact on total compensation about 35% greater than on the impact of wages alone (Mishel and Walters, 2003).

²⁸ Entry barriers were much lower in trucking than in airlines, and as a result, many new companies sprung up in trucking, most of them non-union. Moreover, the skill level of pilots and mechanics in the airline industry and the certifications required of these skills made it much more difficult to start an airline with non-union labor.

²⁹ The power of Congress to regulate labor relations matters is predicated on the commerce clause of the Constitution. A state’s public employees are not deemed to be in interstate commerce and as such, Congress has no power to regulate state employees.

(and the federal government) to decide for its workers. Before 1960, very few public sector workers were unionized and only three states had laws granting collective bargaining rights to public sector workers. For a long period of time, courts had thought collective bargaining incompatible with sovereignty, and many public sector employees appeared to be satisfied with the job security provided by Civil Service regulations. In 1962, President Kennedy issued an executive order that gave federal public sectors workers the right to join unions and to negotiate on certain issues (Hegji, 2012). This emboldened those pressing for these rights at state level, and within a decade, the number of unionized public sector workers almost doubled (Edwards, 1989). At present, 30 states permit public sector workers to unionize.³⁰

Over the past 30 years, public sector unions have been much more successful in organizing workers than their private sector counterparts. One major reason is typically cited namely, the lack of employer opposition. There is another major reason but one not often mentioned: the lack of global competition and little use of outsourcing or “privatization.” Many public sector jobs must be performed by those living within the state, for practical reasons or because state law requires residency. In addition, unless the state or municipal authority is willing to outsource work to a private company, generally the public sector workers have had no competition at home. As a result, the normal market mechanisms for injecting financial reality into bargaining have not applied, at least to the same extent, in public sector negotiations. Because those negotiating on the side of management are often reporting to politicians who must be re-elected, typically there has been great reluctance to take a tough stance in bargaining. All of this have produced a situation where the terms and conditions of employment public sector workers seem to be many, higher than the private sector counterparts.³¹

Since the onset of the recession, many state budgets have been hard hit by declining tax revenues. In some states, this has precipitated a budget crisis. In light of commitments owed to public sector workers, and in particular to funding requirements for defined benefit pension plans,³² it has become difficult in some states to balance their budget without increasing taxes.³³ In such a situation, some governors have resorted to privatization and have attacked public sector collective bargaining and even sought to repeal the statutes

³⁰ Every state can decide which categories of workers can join unions, and can decide what process the state will use to determine union representation rights, and can determine what matters are subject to collective bargaining. Each state can also decide whether public sector workers have the right to strike, and if not, whether there is any alternative such as binding interest arbitration.

³¹ This is often asserted although there is no conclusive proof that this is correct. When academics attempt to evaluate this claim, there is often the problem of determining who the comparable worker in the private sector is. In many occupations, such as police or teachers, the public sector dominates and sets the market rate.

³² As of 2004, approximately 75% of public sector workers participated in a pension plan compared to 43% of all private sector workers and 56% of full time, year round private sector workers. Data were compiled by the Employee Benefit Research Institute using information from the Current Population Survey. <http://www.ebri.org/publications/benfaq/index.cfm?fa=retfaq14>.

³³ In general, income or property taxes are the main revenue source for states. The crisis in the housing industry means that some states have witnessed a large drop in their property tax revenues. The increase in unemployment results in lower income tax revenues. As of 2012, California and Pennsylvania have cities seeking to declare bankruptcy. Whether a city can discharge in bankruptcy its pension fund liabilities (to public sector employees under the terms of a collective agreement) is a question that remains to be litigated.

granting public sector workers the right to bargain or to limit sharply the subjects which are subject to bargaining (Dannin, 2012). Notable examples of this approach are Wisconsin and Ohio.

6. Union Response to Economic Trends

Prior to the 1970s, unions focused on bread and butter issues namely, wages, benefits and terms and conditions of employment. Some of their goals in collective bargaining reflected societal arrangements. For example, immediately after World War II, unions sought employment-based health insurance coverage. In contrast, British unions supported the Labor Party's goal of a national health service, thus making any employer-based insurance coverage largely irrelevant. But in US, where any sort of nationalized health service was vehemently opposed as "socialist," progressive unions bargained for the next best thing. Since large companies, such as General Motors, already covered their executives and managers in a health insurance plan, the union sought to have workers covered similarly. Nearly all large companies provide health insurance to regular workers. Yet, nothing in American law required any employer to provide health insurance coverage to its employees, letting alone any specific level of health coverage. Decades later, employers would cut costs with regard to non-union employees, often by not providing health insurance or by providing coverage that was more limited.

By the 1970s, with the oil crisis and stagflation, employers were focused on labor costs. Union labor was more expensive than similar non-union labor.³⁴ Unions sought cost-of-living escalator clauses in the face of very high inflation. The 1970s marked the beginning of the end of the post-war consensus on collective bargaining as a means of building a stable middle class. Rather, many companies saw unions as a threat to their continued existence in the face of growing competition and pressure to lower costs. At first, many followed a strategy of moving production to parts of the US that had lower labor costs and historically had been viewed as hostile to unions. Sometimes factories were shut in what became to be known as the "Rust Belt," but more often what occurred was simply that new factories were built in the South and older factories in the North were eventually shut down as they became outmoded. Union efforts to combat this "Southern strategy" were largely unsuccessful. Many economists proposed ways to spur competitiveness during the sluggish 1970s. Deregulation of highly regulated industries was proposed, and for the first time a Democratic president, Jimmy Carter, backed proposals to deregulate industries that were highly unionized, such as telecommunications, airlines and trucking. Although unions condemned deregulation, they were unsuccessful in stopping the legislation.

In the 1980s, Ronald Reagan embodied an ideology that was hostile to collective action. Compared to Margaret Thatcher in the UK, Reagan was less overtly antagonistic to organized labor. There were no in-the-streets battles with unions, such as the one that occurred in the UK with the miners' union. But in 1981, Reagan did terminate all 11,000

³⁴ Studies have shown that in some sectors unionized workers had greater productivity than non-union workers, thus to some extent offsetting the larger wage bill. The size of the union wage premium is critical (Belman and Voos, 2004).

air traffic controllers who went on strike, a move that was in sharp contrast to what Republican President Richard Nixon did when over 200,000 workers in the US Post Office went on a two-week strike in 1970. In both cases, the strike was unlawful.³⁵ Yet, although Nixon used the armed forces to deliver the mail, he did not fire the striking workers, but instead promised reform in the postal service. Reagan's tough action against the striking air traffic controllers was taken as a signal that it was acceptable for companies to fire striking workers, even when the strike is lawful³⁶ (McCartin, 2011). The 1980s became the decade when companies, even those in established bargaining relationships, engaged in concession bargaining and were willing to break a strike by operating during a strike and if need be, by hiring replacements (Perry *et al.*, 1982; Estreicher, 1987).

With the economy registering high inflation and high unemployment in the late 1970s, there were calls for deregulation of certain highly regulated industries, such as over-the-road trucking and the airline industries. The first wave of deregulation occurred during the presidency of Jimmy Carter, a Democrat, and it was at this time that the largest private sector employer in the country³⁷ was broken up as the telecommunications industry was deregulated. Carter was succeeded by Ronald Reagan who was a forceful advocate for competition and free markets. This ideology was antithetical to the foundational belief of unions that labor is not a commodity and that wages should be taken out of competition. Although most unions did not support Reagan and opposed deregulation, they did not have sufficient political influence to stop the implementing legislation.

Unions were also opposed to a shift that placed the risk of long-term investments in pension funds to employees, in part on philosophical grounds and in part on pragmatic grounds. However, the response to tax law changes during the Reagan Administration that made defined contribution plans more attractive to employers was muted, because there was nothing that penalized or outlawed defined contribution plans. As such, the relative proportions of those with defined benefit plans compared to those with defined contribution plans changed slowly over a two-decade period.³⁸ Only recently has academic research showed what some suspected: that most average American working persons have saved much too little to meet income needs in retirement and that they are not sufficiently financially literate to handle their own pension fund investments (Mitchell and Lusardi, 2011).

It was in the area of free trade that unions faced their greatest setbacks. Unions did see the threat that manufacturing jobs would go overseas, and that wages at home would be

³⁵ The federal instruments that grant federal employees the right to unionize and to engage in collective bargaining do not grant them the right to strike. This contravenes internationally accepted notions of freedom of association, in particular under ILO Convention No. 87. The US has not ratified Convention No. 87.

³⁶ Under the National Labor Relations Act, if negotiations on a collective agreement have reached an impasse, an employer may permanently replace striking workers, although technically the workers may not be discharged (that is, they have rights of recall if job openings should occur).

³⁷ The American Telephone & Telegraph Company had over one million employees, employed at AT&T, at Western Electric and its operating companies known collectively as the Bell System.

³⁸ In 1979, 62% of private sector workers participated in a defined benefit plan. By 2008, this had dropped to 7%. In contrast, 16% of private sector workers participated in a defined contribution plan in 1979 and this had risen to 67% by 2008. Figures are those of the Employee Benefit Research Institute, based on U.S. Department of Labor 5500 forms (employer reporting). <http://www.ebri.org/publications/benfaq/index.cfm?fa=retfaq14>.

under severe strain in addition to jobs being lost. It was under the Democratic presidency of Bill Clinton in the 1990s that free trade agreements blossomed. This was another indicator that those elected political officials who had traditionally supported the position of organized labor no longer felt compelled to do so.

Compared to unions in many other advanced economies, American unions have suffered from being placed in a reactive position. Bargaining in the USA is viewed by all as adversarial with unions thrust into an adversarial posture because they have no options. There is no governmental support for cooperative behaviors, such as joint consultation committees (Bellace, 1997). Employers for the most part resist partnerships with unions. Moreover, there has always been a tension in the relationship of unions with the Democratic Party, since the latter is responsive to a diverse constituency, some not at all sympathetic to unions. As a result, unions have not been able to see their views on the economy expressed in a complete, coherent manner by the Democratic Party. Rather, they are consigned to the position of one power bloc among many seeking to see its views supported by the Party.

6.1. *Impact of a lack of worker voice*

The US labor market is extremely weak by any historical standard. From a rate of 4.4% in 2007 before the recession began, unemployment went above 10%, and is now hovering around 8.0%. Above 8% for over three years, this is the longest period that unemployment went this high since World War II (Rothstein, 2012). Although the rate edged down to 7.7% at the end of 2012, there is a cause for substantial concern because of the drop in the employment-population rate, which has fallen by over 4.2% points since 2008.³⁹ The labor market data leads to a sobering conclusion: the job market is improving too slowly to lower unemployment significantly and to boost economic growth. In light of this gloomy prognosis, one would expect that organized labor would have an important voice in the debate over what policy initiatives should be pursued to improve the employment picture. But this is not the case.

Having reviewed how and why American unions reached the point where only 6.9% of workers in the private sector are unionized, and where public sector unionism is under threat, one is better placed to comprehend why the voice of organized labor is not heard. It is not because the American labor movement has failed to speak out, but merely that the media pays little attention because the media covers what interests its audience.

It is often said that America has the most flexible labor market in the advanced world. This flexibility, however, does have costs. One is that many employers refrain from investing in their employees' human capital since they anticipate that the employee may leave and go elsewhere, or that they might lay off the person when demand declines. Rather than waste money on someone who will not stay with the firm, they do not invest in training (Kochan, 2012). Instead they prefer to purchase required skills on the open market, in a sense a "just-in-time" strategy for acquiring labor. While this may make sense for an

³⁹For a detailed discussion of labor force data and trends, see Toossi (2012).

individual company, for the entire economy it presents problems. For instance, younger workers coming on to the job market have found it much more difficult to obtain stable employment, as employers say that they do not have the exact combination of skills required for open positions (Cappelli, 2012). At the same time, in the current recession workers over the age of 50 have much longer periods of unemployment than those in their 40s, yet one must assume that they had relevant skills until their layoff. These are the type of policy issues that the American labor movement has historically seen as central to its members and to society: the development of working persons' skills and job security. The labor movement has always been a fervent support of job training programs and for policies that support education. Yet at the current time, the views of the labor movement are thought irrelevant.

Views being articulated about the state of the economy and prescriptions for change with which unions would agree emanate from left-of-center economists, such as Paul Krugman and Joseph Stiglitz. In the current recession sharply divergent views, mostly ideological, are at the forefront of the political debate. These tend to focus on the role and size of government as viewed through a social/collectivist or individual rights lens. On the right is the view that smaller government permits private enterprise to flourish and that this is what is needed to put American back on track. On the left is the view that government needs to invest in rebuilding the infrastructure of America and in upgrading the skills of American workers through greater educational and training opportunities. Among economists, there is disagreement about the assumption that flexible labor markets contribute to economic strength, with some arguing that the imbalance of economic power and the weakness of unions have led to a situation where those who want worker protections and a higher quality labor force have no effective voice in the political sphere (Stiglitz, 2012).

The current recession has brought to the public's attention the impact of changes that have occurred over the past four decades. Fiercely debated are questions such as what should be the path forward as American competes in a globalized world, and whether the benefits will accrue to all in a fair manner. What is not clear is whether unions will have any meaningful voice in this debate. As one commentator has noted about the plight of American unions, "out of sight, out of mind" could become "out of mind, out of existence" (Clark *et al.*, 2002, p. 5). Surveys repeatedly show that American workers do want cooperative mechanisms for collective voice at work (Freeman and Rogers, 2006). Proposals for legislative change to achieve this have been made (Bellace, 1993). But thus far, employers have shown no interest whatsoever in independent worker bodies, even those limited to consultation, and unions have made no proposals. If they are to survive and play an effective role in policy formation designed to benefit working persons, American unions most likely will have to seek a radical change in American labor law so that they can reinvent the mechanisms by which they represent working persons and are able to make an impact in the larger public policy arena.

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