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Saying Goodbye to Unions in Higher Education: Labor Policy under the Trump Administration

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Abstract

The purpose of this article is to analyze the effects of the Trump Administration on collective bargaining in higher education. I examine three core areas of labor relations. First, appointees to the National Labor Relations Board will change our labor laws to the disadvantage of unions. This change impacts private universities. Second, the appointment of a new Supreme Court justice affects public sector bargaining law through constitutional decisions. Third, more state legislatures will enact right to work laws because the political climate is favorable to it. All three policy changes will keep labor unions weak and ineffectual in bargaining with university administrators.

Graduate student assistants at Yale staged a hunger strike on April 25, 2017, in support of collective bargaining demands through their union representative, Local 33 of UNITE HERE. Despite a highly publicized protest during Yale's commencement ceremony, the institution continued to challenge the union's legitimacy, and the matter of collective bargaining rights is now pending before the National Labor Relations Board (Rondinone). Yale's position follows the pattern of employer resistance to collective bargaining that pervades American labor relations generally and has led to a steady decline in overall union membership density over the past four decades (Goldfield). The Yale case illustrates the political and legal obstacles that impede unionization in higher education.

This article analyzes the deteriorating status of unions and collective bargaining in the American higher education system. It begins with a description of the distinctive bargaining regimes in private and public sector institutions, followed by an analysis of the present condition of organized labor in the United States. With the election of President Donald Trump, unions most probably will continue to decline in membership and influence as a result of adverse policy decisions. The

Trump administration has control over the composition of the National Labor Relations Board, and recent appointments to the Board indicate a shift toward more restrictive rules for organizing. Trump's recent selection to fill the vacancy on the Supreme Court could tilt the playing field against public sector unions through the Court's adverse constitutional decisions. The outcomes for higher education faculty are likely to be diminished power and influence in the academic environment as administrators exercise a greater degree of discretion over wages, hours, and conditions of work.

Bargaining Frameworks

Labor union organizing and bargaining in the United States proceeds under two very different regulatory regimes. In the 1935 National Labor Relations Act (NLRA), Senator Robert Wagner excluded government workers from the coverage of his bill in the definition of an "employer" in Section 2 (3) of the statute (Wagner). Wagner justified the exclusion on various grounds, including constitutional considerations of our federal system of governance. As a result, private sector workers are covered by the NLRA and regulated by the National Labor Relations Board (NLRB or Board). Federal, state, or local laws and administrative bodies, in contrast, govern public sector unions. Because public educational institutions by definition involve "state action," they are further subject to legal doctrines developed under the U.S. Constitution. The Universities of Michigan, Wisconsin, and Illinois fall into the latter category, while Harvard, Yale, Columbia, and Duke are considered to be in the private sector.

Public sector bargaining law generally does not give employees the broad panoply of rights available to workers under the NLRA (National Council of State Laws). Senator Wagner ensured that private sector employees had important protections such as the right to negotiate over wages, hours, and working conditions, and to strike in support of their demands for concessions. Strikers did not abandon their employment but were entitled to reinstatement as vacant positions became available. In the case of a strike over the employer's unfair labor practices rather than economic conditions, strikers could demand immediate reinstatement if they were willing to give up the strike. In the public sector, strikes may be prohibited, bargaining may be confined to a more limited agenda, and rights of reinstatement may be unavailable (Corder). For both private and public sector unionism, the legal rules governing union formation and operation play a crucial role in allocating balances of power in the economic sphere.

Unions and Wealth Distribution

Historically, labor union membership density in the U.S has been associated with union bargaining power and contracts that promote a more equitable distribution of income in this country. During the two decades after World War II, wealth became more evenly distributed, but as membership density declines, union influence over labor markets becomes relatively weaker. An important study by sociologists Bruce Western and Jake Rosenfeld examined the effects of union decline on

rising wage inequality in the United States. Analyzing various explanations for union weakness, they concluded that unions traditionally performed a role in labor markets by acting as “pillars of the moral economy” (517). Institutionally, unions supported “norms of equity that claimed the fairness of a standard rate for low-pay workers and the injustice of unchecked earnings for managers and owners” (518). Such norms arose through three distinct union functions: “(1) culturally, through public speech about economic inequality, (2) politically, by influencing social policy, and (3) institutionally, through rules governing the labor market” (Western and Rosenfeld 518). Declining unions exert less control over labor markets, culture, and national politics.

According to observers of the 2016 national election, white middle-aged men without college degrees tilted the electoral vote in favor of Donald Trump (Cohn). Those voters acted out of a sense of economic desperation, believing that the era of good jobs and increasing incomes had ended for them. Three well-known economists, Thomas Piketty, Emmanuel Saez, and Gabriel Zucman, published a commentary describing the “two countries” making up the U.S. political economy. Their analysis showed that in 1962, the share of pre-tax income in this country going to the top one percent and the bottom 50 percent of income earners was approximately 20 percent to the lower earners and just above 12 percent for the top earners. By 2014, the numbers had reversed, with 20 percent of wealth going to the top one percent and just over 12 percent to the bottom 50 percent. One of their recommendations to meliorate the trend is political action leading to “reforms of labor market institutions to boost workers’ bargaining power and including a higher minimum wage.”

If weaker unions result in higher levels of inequality and undermine standards of social justice, a relevant point of inquiry is whether President Trump’s labor policies are more likely to strengthen or debilitate labor organizations across the economy, including those in higher education. The likely answer is that unions will suffer under his administration. Inadvertently or intentionally through his administration, the demographic that successfully installed Trump as President will endure the most serious economic injury during his time in office (Krugman). The harm inflicted on unions has three aspects. The first is Trump’s recent appointment of Neil Gorsuch to the Supreme Court and the Court’s future labor decisions. The second is the present membership of the National Labor Relations Board following Trump’s appointment of two members to vacant positions. The third is the favorable political condition for the enactment of right-to-work laws in state legislatures under the guise of “economic development,” a strategic choice that results in lower wages and benefits for workers. Taken together, Trump’s influence in those legal domains has serious implications for collective bargaining, specifically for academic unions.

The National Labor Relations Board and Private Sector Educational Institutions

As noted, private sector higher education institutions bargain under the regulatory authority of the NLRB. The Board membership in May 2017 consisted of Chairman Philip A. Miscimarra, a Republican appointed by former president Obama, and Democrats Lauren McFerran and Mark Gaston Pearce, whose terms end in 2018 and 2019, respectively. Trump has the authority during his term to appoint two additional members to bring the Board to its full complement of five members. If those appointees share Miscimarra's views on labor issues, then Board doctrine will likely drift in favor of employers, and it could return to more restrictive rules about student workers.

According to a news report in July 2017, a Senate committee approved two Trump appointees, William Emanuel and Marvin Kaplan, to the Board (Lanard, 2017). Emanuel is with the firm of Littler Mendelson, which represents management in labor relations matters, and Kaplan presently works for the Occupational Safety and Health Review Commission. Three labor relations experts predicted, "If confirmed, Kaplan and Emanuel would give the five-member board a Republican majority. The NLRB is widely expected to use that majority to reconsider big ticket labor issues, including rulings that expanded joint employer liability and recognized 'micro-units' for collective bargaining purposes" (Eidelson, Opfer & Penn).

The Board's most recent decisions involving student assistants at Columbia University illustrate both the decisional processes of the Board and likely direction of Trump's appointees. In August 2016, the Board ruled that student assistants employed at the university were statutory employees entitled to vote in a certification election (National Labor Relations Board). The employees voted in favor of unionization by a margin of 1,602 votes for the union and 623 opposed, and Columbia then filed exceptions to the election arguing that students were improperly designated as employees (Harris, 2016). As of April 2017, the Board had not resolved the matter, and the case was still pending. The Union attorney informed the Regional Director's office in March 2017 that further delay would lead to substantial changes in the makeup of the union because many of the students would be graduating (Meiklejohn). While the case languishes, new Trump appointees could reach a different result concerning the eligibility of graduate students to vote in a certification election.

The more recent case at Yale raises the same issues as at Columbia. The Yale administration refuses to bargain with the certified union, Local 33 UNITE HERE, on the theory that the Board made an inappropriate unit determination. If Columbia prevails with the Trump Board on the issue of whether or not graduate students are statutory "employees," the Yale proceeding will be moot because the students do not fall under the protections of the NLRA. Even if Yale entered into negotiations with the students, no collective bargaining through a representative outside the NLRA framework can legally occur without violating the NLRA prohibition against employer-dominated "company unions" in Section 8 (a) (2) of the Act. Given an adverse decision by the Board on the definitional issue, Local 33 might pursue judicial review

through the federal court system, but the case likely would consume at least three years before resolution.

After fourteen days of Yale's strike, three union supporters were continuing the fast (Ricks). Yale officially criticized the work action, commenting that the "actions this week by members of Local 33 raise concerns about the safety and well-being of the demonstrators and about their apparent disregard for longstanding university policies and principles regarding the appropriate time, place and manner for exercising freedom of expression" (Yale News). Yale also retained a well-known labor law firm to defend its interests before the National Labor Relations Board (NLRB). The university's strategy challenges the "micro unit" approach adopted by the union and approved by the NLRB, which fragmented the class of graduate teaching assistants along departmental lines. Yale claimed that "the low vote count (under 9%) was due to Local 33's 'micro-unit' strategy of holding nine separate union elections, and preventing students in the rest of the school's departments from having a say on the question of unionization" (Yale News).

If a new Board rejects the Columbia and Yale decisions, graduate student unions will disappear. Even more damaging, the Board might use its rulemaking power to overturn regulations of the Obama Board that favor union organizing. One of the most contentious areas of rulemaking involves streamlining the elections process toward the goal of faster elections and certification. Employers dubbed the new procedures as the "quickie election" rule and argued that it disadvantaged employers who had little opportunity to inform employees of their views of unionization and imposed intrusive rules that violated employee rights of privacy. Despite those objections, the rule survived judicial challenge in the federal court system (Fisher Phillips), but they may not withstand a change in Board composition. With two new members, the Board could quickly overturn the election rule and reinstate the previous election procedures.

In 2017, private sector union membership fell to 6.4 percent of the nonsupervisory, nonagricultural workforce. The decline spanned some five decades from a peak of nearly 35 percent in 1945 to its present rate (Freeman). Because unions historically influenced labor markets such that unionized workers gained more bargaining power and compensation, trends in membership suggest that middle-income employees will continue to lose ground. President Trump's policies will do nothing to resurrect private unions; to the contrary, his appointments will lead to even weaker unions. In the public sector, the U.S. Supreme Court will accomplish a similar agenda through a five-member majority having little understanding of, or consideration for, organized labor.

The Fate of Public Sector Unions in the New Supreme Court

In January 2016, the Supreme Court heard oral arguments in the case of [*Friedrichs v. California Teachers Association*](#), which involved the compulsory payment of union dues by teachers covered under a collective bargaining agreement. The controlling precedent in the litigation, *Abood v. Detroit Bd. of Educ.* (1977), upheld the

constitutionality of public sector union security and announced the standard applicable to the issue of union dues. The Ninth Circuit Court of Appeals (*Friedrichs v. California Teachers Association*, n.d.) followed the precedent of *Abood* and declared, “Upon review, the court finds that the questions presented in this appeal are so insubstantial as not to require further argument, because they are governed by controlling Supreme Court and Ninth Circuit precedent.” In short, compulsory dues were an accepted dimension of public sector bargaining and were not constitutionally suspect.

Legal commentators suggested that the Supreme Court might use *Friedrichs* as the vehicle for changing the rules of dues payments to public sector unions. In *Knox v. Service Employees International Union*, a majority made up of Alito, Roberts, Kennedy, Scalia, and Thomas invalidated a union dues assessment because the union failed to give notice to members that the assessment would be imposed, and Sotomayor and Ginsburg concurred with the majority on this point. Alito added that all compulsory dues would be constitutionally suspect if members had failed to “opt in” to dues payments as opposed to an “opt out” rule. Alito proposed the notion that public sector union security was only valid if the employee had “opted in” to dues payments. Otherwise, Alito said, no required dues payments were constitutionally permissible (Hogler, “Constitutionalizing Paycheck Protection”). Fortunately for unions, Alito was merely indulging in dicta that had nothing to do with the actual case itself because the facts did not raise the question (Fisk & Chemerinsky). Justice Sotomayor convincingly made the point in her dissenting opinion in the case.

Plaintiffs in the *Friederich* litigation anticipated that the Supreme Court would finish the job begun in *Knox* and do away with compulsory dues payments in the public sector. They developed a litigation strategy that directly attacked union security by focusing on First Amendment protections against “coercive” support for unions’ political agendas. As the case moved through the lower courts, the union prevailed based on the *Abood* precedent. On further appeal following Scalia’s death, the Supreme Court divided equally with four Justices on each side and affirmed the lower court decisions approving compulsory dues. In the absence of a fifth vote, right to work proponents were stymied momentarily. When President Obama nominated federal Circuit Court judge Merrick Garland to the Supreme Court, Senate Leader McConnell refused to proceed with the nomination. Trump, consequently, picked a more conservative jurist, Neil Gorsuch, for appointment and McConnell successfully moved the nomination through the Senate.

In the interim, the National Right to Work Foundation and their anti-union allies quickly procured another set of plaintiffs to challenge public sector dues payments. In *Janus v. American Federation of State, County, and Municipal Employees*, two public employees sued the union representing them, claiming their constitutional rights of free speech were violated by the compelled payment of union dues. The Seventh Circuit Court of Appeals dismissed the case (*Janus*), and the plaintiffs are now appealing that dismissal to the Supreme Court. A similar case

from California, *Yohn v. California Teachers Association*, is funded by the same litigation machine and will replace the *Friedrichs* decision with essentially the same facts and arguments (Blume). Gorsuch, an admirer of Justice Scalia and an acolyte of Justice Kennedy, will presumably follow the lead of his doctrinal progenitors. The most likely outcome will be that public employment in the future will take place under the right to work principle of allowing free riders (Higgins).

For collective bargaining units on public campuses, the immediate effect of the teachers' cases will be to reduce the resources available to sustain union power. If the Court adopts the conservative formulation announced by Alito in *Knox*, that ruling would immediately impose a constitutional burden on teachers' unions to suspend all required dues payments unless members expressly agree to the deductions. That outcome effectively results in the creation of a right to work rule. A substantial body of research indicates that right to work laws reduce workers' incomes and reduce union density (Gould & Kimball). Public sector unions now make up a larger proportion of total union density than at any time in modern labor relations. As they erode, unionization generally suffers, and private sector density will likewise continue to decline.

How Right to Work Laws Affect both Private and Public Sector Unions

One of the most debilitating factors in union decline is the weakening of collective security through right to work laws. Beginning during World War II, several states attacked labor unions with laws that prohibited contracts requiring all individuals covered by the agreement to pay dues to the union representative (Gall; Hogler, *End of American Labor Unions*). Historian Michael Goldfield attributed union decline to the "changing balance of class forces" and presciently argued that membership density would continue to fall because of employer hostility to unionism. Right to work is the hinge of anti-unionism in the United States and a powerful manipulation of cultural shifts against collective bargaining.

Section 14(b) allows states to enact right to work laws, and since the implementation of the statute, 28 states have enacted such laws (National Right to Work Committee, 2017). Various studies convincingly document the damage to unions caused by right to work laws. Hogler, Hunt, and Weiler analyzed the downward trajectory of union strength in right to work states and concluded that the presence of right to work is negatively correlated with union density. The mechanism underlying the decline is a failure of generalized *trust* between citizens of a state and their fellows; that is, most people believe others cannot be trusted. A key finding of the study is that the declining level of trust is correlated with declining union membership. That is, the less trust that exists within a given community, the less likely that the community will commit to collective action on behalf of the group. Trust is lower in right to work states because free riders can obtain the benefits of group effort

without incurring the costs, which in turn negatively influences union membership density and incomes.

The expansion of right to work laws accelerated between 2012 and 2017. There are now twenty-eight Right-to-Work states, with the states of Kentucky and Missouri adopting laws in 2017. Beginning in the South and West in the 1940s, the movement was transparently anti-union in its objective and designed to counter the growth and influence of organized labor (Tandy, 81-118). Right to work sentiment will flourish under the Trump presidency and its business-friendly agenda. Since its inception, right to work has appealed to the ideology of development by arguing that unions interfere with legitimate business operations and stifle innovation and growth (Hogler, *End of American Labor Unions*).

Conclusion: No Way Out

The election of Donald Trump will have detrimental consequences for the American labor movement in three significant ways. First, his appointments to the National Labor Relations Board will reverse decisions of the Obama Board that facilitated union organizing and empowered employees by strengthening their rights to unionize. Second, with the appointment of Neil Gorsuch to the Supreme Court, Trump ensures a continuing tilt toward the politicized views of Thomas, Alito, and Roberts on labor issues. Finally, the Court's future decisions will degrade workers' opportunities for collective action and enhance managerial power in the workplace, especially in public sector employment. As the conflictual political division in our system ossifies into ongoing stalemate, Trump comes to represent the apogee of ineptitude. White, working class voters brought him to power, but his allegiance is to the wealthy financial interests that stand to gain from his administration.

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