Commentary

The “Changing of the Guard” from Labor Law to Employment Law

Daniel J. Galvin¹

In the 2016 presidential campaign, income inequality finally became a central topic of national debate, as all three major candidates (Bernie Sanders, Hillary Clinton, and Donald Trump) raised the issue and offered various explanations and remedies. That income inequality was roundly discussed was a development of major significance in and of itself, and should not be downplayed.

But I would submit that there is still a different kind of inequality that did not get talked about nearly enough, despite it being an underlying cause of income inequality—and that is the vast asymmetry of power in the workplace. Unfortunately, unless something really surprising happens, this power imbalance will likely grow during a Trump administration, and workers’ rights will only be further diminished.

How workers and their advocates respond to this imbalance will tell us a lot about the thrust of the contemporary labor movement and where it might be headed in the future. One thing that is clear, though, is that their response will necessarily be shaped and channeled by existing organizational supports (such as labor unions and alt-labor groups) and existing institutional arrangements (such as labor and employment laws).

My aim with these comments is to try to capture in some broad strokes some of the historical-institutional developments that have shaped the current moment and are likely to be important going forward.

It all starts with the observation that there has always been a vast power asymmetry in the American workplace—a great imbalance between the rights of employees, on one hand, and the prerogatives of employers on the other—but the particular means and mechanisms available for workers to redress it have varied over time. For example, the collective bargaining system established during the New Deal helped to even the scales somewhat and protect many workers’ rights. But as private-sector unions have declined, this power asymmetry has grown, and workers have become increasingly vulnerable to abuse and exploitation. Manifestations include the pernicious...

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problem of wage theft, which I have been studying (Galvin 2016), but also growing reports of discrimination, harassment, uncompensated workplace injuries, infringements of civil liberties, abuse, political pressure on employees (Hertel-Fernandez 2016), and more. To be sure, there are many causes of these problems. But the decline of the New Deal collective bargaining regime and the near disappearance of private-sector labor unions, once the primary guardians of workers’ rights for over one-third of all workers, have undoubtedly contributed as well.

In the late 1980s, the late great legal scholar Clyde Summers contemplated the effects of union decline and put a name to what was happening. He declared that we were witnessing a “changing of the guard” from labor law to employment law. He wrote,

The significant fact is that . . . unions and collective agreements do not guard employees from the potential deprivations and oppressions of employer economic power. The consequence is foreseeable, if not inevitable; if collective bargaining does not protect the individual employee, the law will find another way to protect the weaker party. The law, either through the courts or the legislatures, will become the guardian. Labor law is now in the midst of that changing of the guard. There is current recognition that if the majority of employees are to be protected, it must be by the law prescribing at least certain rights of employees and minimum terms and conditions of employment. (Summers 1988, 10)

In other words, as unions have declined and labor law has “ossified” (Estlund 2002), workers have had nowhere else to turn than to employment law to vindicate their rights.¹

Others have similarly remarked on the simultaneous growth of employment law and decline of union density and speculated on the relationship between these twin developments. Most have emphasized the expansion of federal employment law from the Civil Rights Act to the Family Medical Leave Act to more recent acts such as the Lilly Ledbetter Fair Pay Act (Befort 2001; Brudney 1996; Corbett 2002; Rabin 1990; Sachs 2007, 2008).

Concerned that this did not afford enough variation to adequately study the relationship, I assembled a small team of research assistants to code the enactment of state-level employment laws over several decades and found that the same trend is evident at the state level as well. Employment law has expanded dramatically at the state level, both in the types of laws passed and in the sheer number of them, at precisely the same time that union density has declined.

But why does this “changing of the guard” matter? I think there are a number of tradeoffs inherent in this shift that we have not fully wrestled with, but are likely to be important in the years ahead.

First, public policy is clearly an inferior guardian of workers’ rights relative to labor unions. Consider enforcement. Statutory rights and protections are extremely difficult to enforce. State regulatory capacities are inadequate everywhere, and the annual probability that a given employer will be inspected by the labor department is only about 0.5 percent (Weil 2014). So it almost always pays for the employer to violate the law.
Second, adding a private right of action is often inadequate, as our most vulnerable workers do not often have the means to exercise their private right of action. As such, employment law often privileges those with resources, information, and organization: usually white-collar workers.

Third, employment law is a blunt instrument that is not usually tailored to specific industry, workplace, or labor force characteristics, and may therefore create additional problems in its implementation.

Fourth, removing enforcement authority to the state agency or courtroom can potentially be disempowering and alienating, adding to the sense of powerlessness and dependency for some and reducing the incentives for collective action, worker solidarity, and mass mobilization (Weiler 1990).

Fifth, some economists argue that the benefits and protections afforded through employment laws effectively serve as a “substitute” for what unions might otherwise provide, thereby reducing the incentives for would-be members to form or join unions (Coombs 2008; Moore, Newman, and Scott 1989; Neumann and Rissman 1984). This “substitution hypothesis” posits one important mechanism through which employment law may contribute to union decline.

In a similar vein, legal scholars and political scientists have observed that the interpretation and implementation of employment laws have undermined labor law, dampened collective action and self-organization, and worked to the detriment of unions (Bales 1997; Frymer 2008; Orren 1991; Stone 1992).

And historians including most prominently Nelson Lichtenstein (2013) have observed a stark ideational dichotomy “between the concept of rights and that of solidarity,” arguing that “rights consciousness subverts the mechanisms, both moral and legal, that sustain the social solidarity upon which trade unionism is based.”

But perhaps the biggest problem with employment law is simply that it does not do anything to redress the power imbalance in the workplace. It does not give employees any louder of a voice, and by making the employment relationship only that much more antagonistic, it precludes negotiation and the fashioning of more constructive relationships.

Clearly, there are many downsides to this “changing of the guard.” But there are upsides as well, including links between employment law and the generation of new forms of collective action, self-organization, political activism, and potentially even unionization.

As legal scholar Benjamin Sachs (2007, 2008) has shown, employment laws like the Fair Labor Standards Act and the Civil Rights Act can under certain conditions actually function as “the locus of the workers’ collective activity and as the legal mechanism which protects that collective activity.” Sachs describes how in several instances workers have relied on employment laws to mobilize other workers to collectively protest their shared experiences of exploitation while being insulated by those laws’ anti-retaliation provisions. This process, he notes, then has the potential to set “in motion dynamics that can generate successive forms of collective activity that go beyond demands for statutory rights.” This is not altogether different from Eileen Boris and Jennifer Klein’s (2015) masterful study of how the fight for individual rights fostered collective action and strengthened the concept of collective rights in the case of home care workers.
Second, the effort to draft, lobby, pass, and help enforce new employment laws can also foster collective action and promote coalition building at the organizational level, as we have recently seen in Chicago and Cook County in successful efforts to pass earned paid sick leave and raise the minimum wage. The nonprofit group Raise the Floor Alliance (RTF) here in Chicago is a great example of how policy campaigns can bring disparate “alt-labor” workers’ advocacy groups together in common purpose. Eight different worker centers representing and serving different constituencies and geographical areas found that by forming RTF and setting common policy goals together, they could capture efficiency gains, magnify each group’s core activities, and amplify their collective efforts as they looked to the future.

Third, such policy campaigns have sometimes morphed into unionization campaigns or provided leverage for ongoing unionization efforts. Sometimes workers who become activists form or join unions, sometimes they end up forming National Labor Relations Act (NLRA)-protected worker committees, and sometimes they just continue to be important foot soldiers in ongoing campaigns and protests alongside labor unions and alt-labor groups.

Increasingly, too, we have seen policy campaigns and protests like the Fight for $15 join forces with other social movements such as civil rights movements like Black Lives Matter, immigrant rights movements, and more—hinting at the potential formation of a broad-based “social movement unionism” here in the United States.

Finally, I would note that it is not like traditional labor unions have been passive onlookers while employment law has grown. Unions have been on the frontlines pushing and lobbying for pro-worker policies at all levels of government. So either they are shooting themselves in the foot—working to build the very institutions that undermine their existence as the “substitution hypothesis” would suggest—or there really is no tradeoff between employment law and the incentive to join labor unions (or there is less of a tradeoff than we have long thought). It could also be that fighting for employment laws is a (perhaps overly optimistic) means of logrolling for stronger labor laws (Freeman and Medoff 1984). Or it could simply be that labor unions have long conceived of themselves as integral parts of a broader movement to improve the lives of all working people, and stronger employment policies constitute another important tool to do that. Whatever the explanation, labor unions have often found legislative campaigns to be focal points for collective action and worker mobilization; their turn to public policy has not always undermined the broader goals of the labor movement.

In short, the implications of this shift are many. As the primary guardian of workers’ rights in the 21st century, public policies bring both pluses and minuses. My point here is simply to note that employment law is likely to remain of central importance to the labor movement going forward.

In the wake of the 2016 election, with unified Republican control of the federal government, workers and their advocates have no other choice but to focus on effecting policy change at the subnational level to better protect workers and promote their rights. Unfortunately, their success will likely be shaped by partisan politics and confined to the mere six states where Democrats enjoy unified control, and to cities, where more favorable political conditions can often be found (Galvin 2016). Whether these
policy campaigns can keep up the momentum and help to fortify the labor movement in the long run is an open question: as I have discussed, employment law contains built-in incentives that work against collective action and built-in incentives that also promote it. The law will likely always be an inferior substitute for labor unions. But with other avenues exhausted, a focus on employment law may yet lead to new forms of worker activism that are, at present, still inchoate.

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Notes
1. Sometimes the terms “labor law” and “employment law” are used interchangeably, but legal scholars draw an important distinction between them: whereas labor law focuses on laws governing collective bargaining, unionization, and other issues related to organized labor, employment law covers all other laws, regulations, and policies regarding the employee-employer relationship. Most importantly, employment law establishes minimum workplace standards (like the minimum wage) and individual rights and protections (like worker privacy and freedom from discrimination) that may be vindicated in court.
2. RI, DE, WA, OR, CA, HI (and DC). Democrats control both state houses in thirteen states, plus DC.

References


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