

ADVANCES IN INDUSTRIAL AND LABOR RELATIONS

Edited by David Lewin
and Paul J. Gollan

ADVANCES IN INDUSTRIAL
AND LABOR RELATIONS

VOLUME 27

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INTRODUCTION

David Lewin and Paul J. Gollan

INTRODUCTION

Volume 27 of *Advances in Industrial and Labor Relations* (AILR) contains five papers featuring original research on several aspects of employment relations. Consistent with previous AILR volumes, these papers contain a variety of disciplinary perspectives and feature quantitative and qualitative research methods. Also consistent with previous AILR volumes, some of these papers were originally presented at a Labor and Employment Relations Association annual meeting.¹

In the paper titled “A Differentiated Model of Work Regulation?,” David Jacobs analyzes what he regards as the contemporary departure from long-established unitary approaches to industrial and employment relations – approaches reflected in such concepts as job consciousness and industrial relations systems and in such legislation as the National Labor Relations Act (NLRA). In doing so, Jacobs emphasizes multiple spheres of labor policy characterized by political dynamics that yield varied approaches to industrial and employment relations, especially as reflected in recent actions of US state governments. Jacobs imaginatively uses state-level data on private and public sectors unionism, the minimum wage, right-to-work laws, and Medicaid expansion to bolster his argument and concluded that varied labor policies rather than a universal labor regime now dominate the regulation and practice of work in the United States. Whether such variation will continue to differentiate the so-called blue states from red states or evolve beyond this dichotomy to yield shades of gray in terms of state-level labor and employment policies remains an open question. An answer to this question is key to ultimately assessing the future

¹These include R. Trivedi, “Consequences of a Mismatch: Remedial Philosophy and Statutory Rights Under the National Labor Relations Act,” presented at the June 2021 annual meeting of the Labor and Employment Relations Association; D. Jacobs, “Toward a Differentiated Model of Industrial Relations in the United States,” presented at the June 2021 annual meeting of the Labor and Employment Relations Association.

viability of a unitary approach to national labor relations standards reflected in Federal government regulation of private sector employment relationships as well as state-level regulation that initially replicated such regulation.

In the paper titled “Consequences of a Mismatch: Remedial Philosophy and Statutory Rights Under the National Labor Relations Act,” Rita Trivedi offers a detailed legal analysis of remedial powers and decisions of the National Labor Relations Board, as limited by the US Supreme Court’s 1940 *Republic Steel* decision. The main limitation appears to be the prohibition on the use of punitive damages by the Board. A related limitation appears to be the limited use of deterrence as a remedial justification by the Board. Exploring the consequences of these limitations, the paper is organized into several sections, including where we are: the current scope of NLRA remedies, echoes of contract law’s ex-post philosophy in Board remedies under the NLRA, an alternative: the remedial role of deterrence as seen in tort and statutory law, consequences of the absence of ex-ante deterrence, the particular impact of a lack of ex-ante deterrence during union organizing, and concluding thoughts: the broader effect of the mismatch. Using this disciplined framework as well as analyses of various cases litigated under the NLRA, Trivedi clearly shows that the ex-ante deterrent approach to violations of the NLRA that was envisioned in this landmark legislation has not been effectuated. Instead, an ex-post make-whole remedies approach to such violations has and continues to be dominant. This particular dichotomy can, without overreaching, be analogized to the movement away from unitary and toward varied conceptual and regulatory approaches to industrial and employment relations analyzed in the paper by Jacobs.

In the paper titled “Thinking Globally, Acting Locally: Applying Internal Labor Market Theories to Firms with Multiple Branch Offices,” Joon W. Sohn and Mark D. Gough present and apply a framework for analyzing the effects of organizational factors on firms’ adoption of internal development programs and selection of entry-level employees. In doing so, they raise important questions about human resources practice and policy objectives at both the centralized (i.e., headquarters (HQs)) level and branch level, and focus on factors that may explain differences between these two levels. In this regard, Sohn and Gough argue for a reversal of the contemporary trend toward research on external labor markets and for a renewed focus on internal labor market (i.e., ILM) analysis. In pursuing the latter, the authors also address issues of organizational reputation. They conclude that the traditional model of ILM “no longer applies” in a contemporary context and, relatedly, propose avenues for future research. In developing their conceptual approach to this topic, the authors derive and empirically test five hypotheses. Their two dependent variables are firms’ adoption of internal development programs and firms’ hiring of entry-level employees. The independent variables are branch size, use of a two-tier (i.e., two types of partners) employment system, leverage ratio (i.e., number of associates to number of partners), and organizational prestige. Some of these variables are operationalized as dichotomous variables, others as continuous variables.

Methodologically, the authors used fixed effects regressions models to test the hypotheses. Their empirical findings support some of the hypotheses, with firm

size being significantly positively correlated with the adoption of development programs and branch size being significantly positively correlated with the hiring of entry-level employees. However, the use of a two-tier system is insignificantly correlated with the two dependent variables, leverage ratio is significantly positively correlated with the hiring of entry-level employees but not development programs, and organizational prestige is significantly positively correlated with development programs but not entry-level employee hiring.

In the paper titled “Bargaining Against the Machine: A Theory of Bargaining Power in the Gig Economy,” Michael Maffie and Mark D. Gough apply the concept of associational power to online platform work or what they term the “multisided market.” This type of market is characterized by those who work for more than one company and typically do so as contractors rather than employees. Whether such workers can collectively influence their terms and conditions of “employment” through associational power and the extent to which they conceivably can do so is the focus of the authors’ paper. In this regard, Maffie and Gough develop a model of associational power in (what they term) the ride-hail industry but claim that the model can be extended to markets defined by geographically specific platforms, including delivery, domestic work, and home health care. They then illustrate this reasoning by applying the model to several specific gig economy examples. The authors conclude that there is substantial potential for labor unions and other worker associations to organize the gig economy. They do so based on conceptual reasoning and empirical evidence indicating that rather than the traditional basis of labor’s power, which is to withdraw its work effort from a single employer, labor’s power in the gig economy inheres in its ability to withdraw its labor from a competitor and promise its exclusive labor to a single platform.

In the paper titled “Online Participant Experience at the Equal Employment Opportunity Commission – Do the Data Herald the Creative Destruction of In-Person Dispute Resolution?,” E. Patrick McDermott and Ruth Obar report and analyze findings from a survey of participants in online video mediation (OVM) of disputes brought to the Commission that supplanted traditional in-person mediation (IPM) due to the COVID-19 pandemic. The OVM survey was conducted in 2021 and yielded a 53% response rate. In designing the survey, the authors initially relied upon but then modified a 2000 survey of IPM that had been conducted by the Commission. The 2021 survey contained several measures of procedural fairness, including overall fairness, satisfaction with results, and willingness to use the procedure again. The survey findings indicated that about two-thirds of the respondents favored OVM over IPM. Analysis of qualitative responses to the survey indicated that respondents singled out convenient location, lower costs, and greater flexibility as the leading attributes of OVM. The authors’ careful, deep analysis of the data pertaining to OVM versus IPM is especially notable. It also (implicitly) raises the question of whether online proceedings in court trials and arbitration hearings more broadly will potentially yield net benefits relative to in-person proceedings.

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A DIFFERENTIATED MODEL OF WORK REGULATION?

David Jacobs

ABSTRACT

This chapter presents an alternative model of industrial relations in which multiple spheres of labor policy coexist with varied political dynamics and contrasting outcomes. Despite evidence of wide public support for unionism and collective action, uneven patterns of voter participation, racial polarization, and political structures determine policies. Disparate historical trajectories also influence local variance. The unusual level of differentiation in US industrial relations ultimately derives from the constitutional regime: the absence of a nationally guaranteed right to vote and right to organize despite the 13th, 14th, and 15th Amendments.

Keywords: Industrial relations theory; federalism; states rights; labor law; Jim Crow; labor history; unitarism; equilibrium; laborist capitalism; upheaval

INTRODUCTION

Classic works in industrial and labor relations find uniformity across the US environment in industrial relations system and labor philosophy despite historic differentiation in the federal structure originating in the history of slavery. In this chapter I will consider evidence for the existence of multiple, differentiated systems of workplace governance associated with the distinctive histories of states and dominant enterprises.

ONE OR MANY INDUSTRIAL RELATIONS SYSTEMS

The overall decline in union density across the states and the extension of right to work, contrasted with localized successes in organizing and improvements in labor protections in some cities and states are a few of the developments that may

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place elements of the conventional wisdom in industrial relations in question. Selig [Perlman's](#) (1949) concept of “job consciousness,” [John Dunlop's](#) (1958) theory of industrial relations systems, the [Hall and Soskice](#) (2001) model of a liberal market capitalism, and other approaches that assume a unitary character to US institutions appear not to reflect the contemporary reality. So-called “blue states” with labor-friendly policies and “red states” with negligible labor movements show few signs of convergence. The polarization of state policies evident since the origins of the nation persist with occasional shifts from one category to another. Clearly, these uneven and contradictory developments require new attempts at explication.

In the chapter that follows, I will present an immanent argument based on influential unitaristic analyses of US industrial relations. I will derive elements of an alternative interpretation that emphasizes multiple spheres of labor policy in which varied political dynamics produce contrasting outcomes. Despite evidence of wide public support for unionism and collective action, uneven patterns of voter participation, racial polarization, and political structures sharply limit policy advances. I will explore varied historical trajectories and provide details of state variance in outcomes. I will relate the unusual level of differentiation in US industrial relations to the constitutional regime: the absence of a nationally guaranteed right to vote and right to organize, despite the 13th, 14th, and 15th Amendments. It is the occasional “great upheaval” or “populist moment” that has generated historically contingent labor policy victories. A political transformation would be required to sustain them (also see [Jacobs & Kahn](#), 2014).

The argument here is, ironically, a call to alter the conception of pluralism within industrial relations. The pluralism within organizations is well recognized. However, the unstable and contested terrain of industrial relations reveals a tortured pluralism across institutions, where the lack of consensus generates a mutating conflict that has, as yet, failed to generate any lasting equilibrium.

UNITARISTIC MODELS

Few would maintain today that Selig [Perlman](#) (1949) was correct in his claim that wage-conscious business unionism uniquely fits the US environment. Unions of all kinds have suffered losses, but the union sponsored community organizations which have won local and state-level minimum wage increases clearly do not represent traditional business unionism. A variety of forms of labor organizations coexist across the federal structure. Immigrant communities in the cities appear to play an outsized role in new organizing. Wherever organizing is occurring, neither “scarcity consciousness” nor “prosperity consciousness” fully describe the mood that stimulates activism.

Like many other scholars, Perlman looked for the theory of evolution to provide guidance in the understanding of labor movements. He argued that job-conscious business unionism was uniquely adapted to the American environment. As late as the 1940s, he continued to deny that emerging unions were departing significantly from business unionism. Of printers' unionism he claimed,

“we have encountered a truly stable and mature type of collective behavior by labor” (Perlman, 1949, p. 272). He considered business unionism the final stage in a process of adaptation and equilibration.

The transformation wrought by industrial unionism in the labor movement led another generation of scholars to declare that a new equilibrium had emerged. John Dunlop (1958) found a stable industrial relations system in the United States and expected that consensus on major labor-management issues was within reach given the assistance of third-party professionals. His resignation as Labor Secretary over the collapse of construction labor (common situs picketing) compromises during the Ford administration revealed the limits of his ability to build consensus. Consensus also remained elusive in the Clinton era Dunlop Commission on the Future of Worker-Management Relations. Neither in his scholarship nor in his practice did Dunlop fully acknowledge the persistence of distinct subsystems of industrial relations. Dunlop did nod to Southern differences in his broad sketch of the US industrial relations system (and he also noted the intransigence of most business lobbies), but his assumption of worldwide convergence toward a nonideological pluralist model minimized this concession.

Dunlop identified these distinctive features of the US system: the [large] size of the system; the role of immigration; the federal structure of government; the independence of entrepreneurs and managements; their deep hostility to labor organizations and the relatively low degree of union penetration in employment; and the dominant elements of business unionism in the policies and practices of labor organizations (Dunlop, 1958, pp. 20–21). While Dunlop recognized the impact of the size and federal structure of the nation, he found essential stability in the system.

In *Varieties of Capitalism*, Hall and Soskice (2001) and the other contributors advance the parallel claim that the US political economy has a unitary, liberal market capitalist character (the Anglo-American model), with congruent labor relations and a supportive cultural individualism. Hall and Soskice assign unions a limited and derivative role in a political economy dominated by aggressive capital markets. They assume equilibrium and little turbulence or dissensus. (The functionalism of Talcott Parsons [Parsons & Smelcer, 2012] is reflected in the arguments described above.) Hall and Soskice did not employ a regional lens which might find the policy variance between New England and the South sufficient to undermine the liberal market model.

AMERICAN INDIVIDUALISM: THE REPEATED REFRAIN

Many scholars have stressed an underlying American individualism as the root of union weakness. In doing so, they revisit the work of sociologist Werner Sombart (1976), who sought to explain the absence of a powerful socialist movement in the United States through an appeal to individualism. Hofstede’s (1984) influential portrait of American cultural values also emphasized individualism (and yet failed to explain the gravitational pull of church, corporation, and other private bodies). Of course, individualism, however defined, is not the whole story.

Claims about American individualism describe an important part of the American context but fail to adequately acknowledge counterevidence. Perhaps the arguments mistake the part for the whole. Piore (1980), Cowie and Salvatore (2008), and Godard (2009), among others, have written of ideological obstacles to the robust institutionalization of unions in the US context. They assert a conflict between American individualism and the fundamental collectivism underlying unions. However, these scholars provide hints of an alternative interpretation.

One can actually find a dualism buried in the institutionalism of Selig Perlman (1949) and John R. Commons (1967). While Perlman asserted that “scarcity consciousness” was a stable foundation of unionism, he also acknowledged the pull of “prosperity consciousness” for the middle class. Commons found that unions turn to politics in harsh economic times. Grudgingly, they conceded some alternative conceptions of unionism.

Michael Piore (1980) writes cogently of the disjunction between collective labor rights and individualism embedded in the legal order. In *The Shrinking Perimeter: Declining Unionism in the Manufacturing Sector* (Juris & Roomkin, 1980), he is one of a small minority of contributors to question traditional industrial relations theory. Piore searches for an alternative to business unionism capable of commanding broad public support and resolving differences with the environmental and civil rights movements. He reaffirms the common characterization of America as highly individualistic: “the basic philosophic difficulty which organized labor faces in this country is that Americans conceive of themselves and their society in highly individualistic terms.” Neoclassical economics and conservative interpretations of pluralism are hegemonic in practical and academic discourse, he argues. Piore claims, “the basic task of a philosophy of organized labor is to create ‘space’ within the individualistic self-conception of Americans for such a group.” Piore is right to locate resistance to labor rights in prevailing doctrines of jurisprudence. However, the doctrine is not necessarily “individualistic” in that it curiously privileges a collective form, the corporation (Piore, 1980).

Piore notes a weakness of business unionism: that it lacks an activist politics to sustain unionism in a “hostile” environment. It should be noted that the environment is hostile particularly as a result of the disproportionate influence of conservative interests, amplified by advantages in the federal structure, rather than directly a matter of public opinion, as subsequent sections suggest.

Piore asserts that the limited acceptance of unions that has occurred in American society has been pragmatic and unstable. He explains that the Wagner Act stresses instrumental values of unionism and frames the labor question in individualistic terms. On the other hand, the Wagner Act does, in fact, uphold the value of “concerted activity.” The authors of the Wagner Act were well aware of the peril to labor policy in the conservative doctrines dominant at the Supreme Court but identified strongly with alternative legal philosophies emerging from the states.

Piore recognizes in the “Wisconsin school” a set of Gramscian organic intellectuals who sought to articulate a philosophy for organized labor based on the