The History of Public-Sector Unionism

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To understand the history of public-sector unionism, we need first to understand the development of the private-sector unionism that it is replacing. We can call this the first Wagner era, from 1935 until 1958. And that will require saying a few words about the labor policy that preceded the first Wagner Era, what might be called the labor policy of the free society, or relatively classically liberal society. But let me tall you the end of the story first—or at least where we are today, for the story is probably not finished yet. The best description of public sector unionism comes from the Rutgers University labor economist Leo Troy. He describes it as the New Socialism.[1] The Old Socialism was about the state taking over the means of production and distribution. The perfect example would be the old Soviet Union. England after the Second World War had quite a bit of this. We never had much of it in the United States. After the New Deal the U.S. had a system of what has been called private socialism, or the private welfare state, and might also be described as union syndicalism. It was erected by unions like the United Auto Workers and companies like General Motors. In this system, unions voted for politicians (Democratic ones, for the most part) who enacted legislation (like the Wagner Act) that gave unions the power to extract more of the income of their employers. This system began to unravel in the 1970s; its decline accelerated in the 1980s; and it is nearly defunct today. Private sector unionism is actually *less* powerful in the American economy today than it was before the Wagner Act.

Public sector unionism works like private sector unionism, but it cuts out the middleman. Rather than voting for politicians who enact laws that enable unions to gain more private income, unions simply elect their employers and bargain with them. As Victor Gotbaum, the head of the New York City chapter of the American Federation of State, County, and Municipal Employees (AFSCME), famously put it, "We have the power, in a sense, to elect our own boss."[2] Thus the strongest public sector unions today are in secondary education, which has always been overwhelming a government-provided service. Why bother organizing a private health care industry? Have the government take over that industry and bargain with the government—the one that your members' dues helped to elect.

Now, let me start from the beginning, to try to explain how we got here. My talk will cover three periods: the employment-at-will period before the Wagner Act of 1935; the Wagner Act period of the mid-twentieth century; and the public union period since 1958.

As the United States became an industrial economy in the nineteenth century, its labor law adapted to that new economy. The common law of labor relations had been

[1] Leo Troy, *The NewUnionism: Public Sector Unions in the Redistributive State* (Fairfax: George Mason University Press, 1994).
[2] "Captive Politicians," *New Y ork Times*, 9 Jul. 1975, p. 30.

known under the heading of "master and servant," redolent of the paternal, personal, feudal world of the Middle Ages. Although this is not an uncontested point among historians, most saw the shedding of this premodern system in the nineteenth century and the adoption of employer-employee relations appropriate to a modern, democratic, egalitarian society.[3] The abolition of slavery with the Civil War made this system of "free labor" the national norm. The law treated all individuals (and corporations were considered individuals) as equal before the law. Their relations were to be entirely voluntary and contractual. Nobody could coerce someone else to work for him; nobody could coerce someone else to employ him. Either party to an employment contract could terminate the agreement for a good reason, a bad reason, or no reason at all.

Groups of workers were perfectly free to form labor unions. (Despite many historical legends, American courts had probably never regarded trade unions as inherently criminal conspiracies, as English courts had.) And they were perfectly free to quit *en masse* (to strike) to achieve their goals. But the employer was equally free to replace those who had quit. When this happened, unions often resorted to threats and violence against the replacement workers (known as scabs or finks) or sabotage against employers, to prevent their carrying on their business. This is the point at which the law stepped in, to maintain order and protect the rights of employers and non-striking workers to carry on their business.

Labor leaders claimed that the "free labor" system was a sham, that the apparent system of freedom of contract was in reality a coercive one in which employers had all the power. Chattel slavery, they claimed, had been replaced by "wage slavery."[4] As American businesses became gigantic in the late 19th century, this became an increasingly plausible argument. How, after all, could a penniless immigrant from Poland be able to bargain individually with the billion-dollar United States Steel Corporation? This claim that unions are necessary to redress the unequal bargaining power of unorganized workers was the principal basis for doing away with the old employment-at-will doctrine and replacing it with one in which government tries to build up unions by legislature that gives them special privileges. So it is important to observe that it is a specious claim.[5] In economic terms, it confuses *monopoly* power in product markets with *monopsony* power in labor markets. In other words, just because US Steel has a monopoly selling steel (which it never did, by the way) doesn't mean that it is the only purchaser of labor.

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[3] Robert J. Steinfeld, *The Invention of Free Labor: The Employment Relation in English and American Law and Culture, 1350-1870* (Chapel Hill: The University of North Carolina Press, 1991); Karen Orren, *Belated Feudalism: Labor, the Law and Liberal Development in the United States* (New York: Cambridge University Press, 1991).

[4] Marcus Cunliffe, *Chattel Slavery and Wage Slavery: The Anglo-American Context, 1830-60* (Athens: University of Georgia Press, 1979).

[5] For a classic statement, see Roscoe Pound, "Liberty of Contract," *Yale Law Journal* 18 (1909). For the refutation, see Richard Posner, "Some Economics of Labor Law," *University of Chicago Law Review* 51 (1984), 991-92; Henry C. Simons, "Some Reflections on Syndicalism," *Journal of Political Economy* 52 (1944), 1-2, 7; Morgan O. Reynolds, "The Myth of Labor's Inequality of Bargaining Power," *Journal of Libertarian Studies* 12 (1991), 173; Morgan O. Reynolds, *Power and Privilege: Labor Unions in America* (New York: Universe, 1984), 59; Herbert Hovenkamp, *Enterprise and American Law, 1836-1937* (Cambridge: Harvard University Press, 1991), 213.

Rather, it competed with lots of other monopolistic producers in the labor market, along with innumerable small business employers. The individual worker was free so long as employers competing with one another for labor, in the same way that an individual consumer is free of monopoly power so long as large producer firms compete among one another for customers. On further reflection, the idea of employer monopsony in 1908 seems manifestly absurd. The United States had always suffered a labor shortage, making American wages higher than those in Europe. In a typical year around a century ago, over a million and a quarter immigrants came to the United States. The U.S. absorbed over 25 million immigrants between the Civil War and World War One, yet real wages for unskilled labor rose 44% over these years. They rose 35%, and rose almost every year, from the end of the depression of 1893 until the beginning of the First World War. Real wages of all workers rose more than fifty percent 1860-90, and rose by another third in the next twenty years.[6]

Be the economic facts what they may, the cornerstone of American labor law, the National Labor Relations (Wagner) Act of 1935, was based on this premise of unequal bargaining power. (Actually, this was prefaced in the Norris-LaGuardia Act of 1932, which concerned a set of privileges regarding injunctions and the antitrust laws that time and space did not permit me to detail.) But this would be just one example of the lack of congruence between popular or political economy and technical economics. A similar one would be the careless use of the term "exploitation." Technically, labor is exploited when its wage is less than its marginal product. But this can mean that a 12-year old girl in a central American sweatshop earning 20 cents an hour is not exploited, while a Major League shortstop earning eight million dollars a year is.

What did the Wagner Act do? In a nutshell, it required employers to bargain collectively with any organization chosen by a majority of its employees. Those are the basic principles—compulsory unionism, and majority unionism. It was an unabashedly pro-union measure. It outlawed a host of "unfair labor practices" by employers, but not for unions. Congress probably enacted it only because it expected the Supreme Court to declare it unconstitutional. Though the Taft-Hartley Act of 1947 tried to restore some balance to the law, it still maintained the compulsory and majority principles of the Wagner Act. The most important change that the Taft-Hartley Act made was section 14(b), which allowed states to enact right-to-work laws. Over the course of time, industries relocated from Wagner Act or union-shop states to right-to-work states. Even more than the competition of right-to-work states, the rise of global competition in the late 20th century is the principal reason for the decline of private-sector unionism. Quite simply, they priced themselves out of the market, or killed the goose that laid the golden eggs.

[6] *Historical Statistics of the United States*, ed. Susan B. Carter et al., 5 vols. (Cambridge: Cambridge University Press, 2006), I: 541, II: 257; Stanely Lebergott, *The Americans: An Economic Record* (New York: W. W. Norton, 1984), 380; Thomas C. Reeves, *Twentieth-Century America: A Brief History* (New York: Oxford University Press, 2000), 6.

Now to the public sector union story. Section 2 of the Wagner Act explicitly exempted public employees from its coverage. Congress declared that the United States, states, and political subdivisions of states were not "employers" under the terms of the act. Many of you may be familiar with the letter that President Roosevelt wrote to the President of the Federation of Federal Employees in 1937, in which he explained why this must be. "All government employees should realize that the process of collective bargaining, as usually understood, cannot be transplanted into the public service. It has its distinct and insurmountable limitations when applied to public personnel management. *The very nature and purposes of government* make it impossible for administrative officials to represent fully or to bind the employer in mutual discussions with government employee organizations. *The employer is the whole people, who speak by means of laws* enacted by their representatives in Congress. Accordingly, administrative officials and employees alike are governed and guided, and in many instances restricted, by laws which establish policies, procedures, or rule in personnel matters."[7] The crucial phrases are Roosevelt's references to "the very nature and purposes of government," and his definition of a public employer as "the whole people, who speak by means of laws"—that is to say, the government is sovereign. Some economic principles, like labor's unequal bargaining power or an exploited Major-League shortstop, are understandably difficult to grasp right away. But this one—that you could not compel the sovereign power to bargain collectively—because whoever can compel the sovereign must perforce become the sovereign power—this one was such a no-brainer that even F.D.R. could understand it.[8]

But this basic principle is one that most of today's scholars of the public sector labor movement deny. Joseph Slater, for instance, the author of what I take to be the standard narrative history, entitled *Public Workers*, makes this the central theme of his work.[9]

Public unions began much as private unions did, as voluntary associations that tried to improve the working conditions of their members. A century ago they were especially prominent among postal workers, since the Post Office was one of the few large-scale federal services. In the first decade of the 20th century Presidents Theodore Roosevelt and William Howard Taft recognized the danger of these federal employee organizations lobbying Congress and issued executive orders prohibiting federal employee membership in such organizations. Organized labor leaders and historians have condemned these as "gag orders" and limitations of free speech.[10] But T.R. was hardly a reactionary, and consider what another eminent progressive, Justice Oliver Wendell Holmes, said when he upheld a Massachusetts law that prohibited police officers from soliciting contributions to political organizations. "The petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman."

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[7] F.D.R. to Luther Steward, 16 Aug. 1937, in *The Public Papers and Addresses of Franklin D. Roosevelt*, comp. Samuel I. Rosenman, 13 vols. (New York: Macmillan and Harper, 1938-50), VI: 325.

[8] For a thorough discussion of the issue, see Sylvester Petro, "Sovereignty and Compulsory Public-Sector Bargaining," *Wake Forest Law Review* 10 (1974), 25-165.

[9] Joseph E. Slater, *Public Workers: Government Employee Unions, the Law, and the State, 1900-62* (Ithaca: I.L.R., 2004).

[10] *McAuliffe v. New Bedford*, 155 Mass. 216 (1892), 220.

Congress overturned these executive orders in the 1912 Lloyd-La Follette Act. (Notably, the La Follette was Senator Robert La Follette of Wisconsin. Wisconsin was the seedbed of many progressive initiatives, and that of union empowerment especially. As we will see Wisconsin became the first state to promote public employee unions.) But this at was limited to Post Office employees. It did not establish collective bargaining or the right to strike, but merely the freedom to petition Congress. There was no significant extension of federal employee organizing rights until the 1960s.

The decisive episode in public sector unionism was the 1919 Boston police strike. The public reaction to this strike probably set back public sector unionism several decades. No public service better underscored the sovereign nature of government than the police. The federal equivalent would be to allow the soldiers and sailors of the Army or Navy to form unions. (This is not as far-fetched as it sounds. Norway and Germany allow army unions. Maybe we could have avoided World War II if that had been part of the Treaty of Versailles.) The strike made a national hero of Calvin Coolidge, who succinctly explained that "There is no right to strike against the public safety by anybody, anywhere, any time."[11] President Woodrow Wilson called the strike "an intolerable crime against civilization."[12] Today, the American left is chagrined that liberal Democrats like Governor Andrew Cuomo of New York are taking tough stands with state employee unions, but this is not new. Mayor Fiorello LaGuardia of New York City did the same in the 1940s when the city took over the subways and 26,000 members of the Transport Workers Union became public employees. John Lindsay took a similar stance in the 1970s—until Governor Nelson Rockefeller undercut him.

By the late 1950s, public opinion had become more open to the prospect of public labor unions. Private sector unions began to decline in relative terms in the mid-1950s, and they had become much less radical, less prone to strike, and less prone to violence when they did strike. The expansion of business in the right-to-work states of the South and West probably made union leaders more cautious. [Ironically, insofar as the Taft-Hartley Act weakened private-sector unions by section 14(b), and spurred economic growth, it paved the way for the buildup of public unions.] The postwar prosperity of the American economy also made the potential costs of unionization seem manageable. It is also likely that Supreme Court decisions in the early 1960s ordering state legislative reapportionment helped, by strengthening liberal, urban areas of states. Above all, there was tremendous growth in the public sector work force—nearly 9 million by 1962, or one of every 8 workers. This proportion would reach nearly 1 in 5 (18%) by 1970. The American Federation of State, County, and Municipal Employees led the effort to get a state to allow public employee unionization. AFSCME originated in Wisconsin, and Wisconsin had been a leading state in enacting pro-union legislation. Less well known was the fact that Wisconsin also was one of the first states to have second thoughts about such legislation, which it began to amend as early as 1939. The state was dominated by Republicans in the 1950s—this was the era of Joseph McCarthy, after all. But the Democrats swept the state in the 1958 elections, and public employees won the right to

[11] Coolidge to Samuel Gompers, 14 Sep. 1919, in Coolidge, *Have Faith in Massachusetts: A Collection of Speeches and Messages,* 2d ed. (Boston: Houghton Mifflin, 1919).
[12] Speech, 11 Sep. 1919, in *Papers of Woodrow Wilson*, ed. Arthur S. Link. 69 vols. (Princeton: Princeton University Press, 1966-94), LIII: 196.

organize and bargain collectively, but not to strike. New York City actually preceded Wisconsin with similar legislation in 1958, and many other states and cities followed.

The federal government followed suit when President Kennedy signed Executive Order 10988 in 1962. This order permitted federal employees to form unions and bargain collectively, but it did not grant the right to bargain over wages, which remain under Congress' control. Unions could not compel federal employees to join, and they cannot strike. This order was strengthened by President Nixon, and finally given a statutory basis by Congress in the Civil Service Act of 1978.

With these new federal and state policies in place, the numbers of pubic union members swelled rapidly, from 400,000 to 4 million by 1970. This was largely because many public employees were already organized. Old professional associations simply became labor unions. The National Educational Association, for example, had been formed in 1857, as the National Teachers Association. It regarded itself as a professional association, like the American Bar Association or the American Medical Association. [Indeed, the NEA was formed by anti-union administrators and given a congressional charter in 1906.] But when it faced the trade unionism of the American Federation of Teachers-AFL-CIO, it had to convert or die. The NEA is today the largest labor union in America, but it remains unaffiliated with the AFL-CIO.

When the Wagner Act promoted private-sector unionization in the 1930s, the principal justification for the policy was that it would promote industrial peace and facilitate interstate commerce. It actually had the opposite effect, producing more strikes and greater labor militancy in 1937. State and federal encouragement of public-sector bargaining had a similar—and even greater—effect. Unprecedented strikes by teachers, garbage collectors, postal workers and others became common in the late 1960s and 1970s, despite the fact that every state prohibited strikes by public employees. The issue reached the crisis point in the mid-to-late 1970s. AFSCME pushed for Congress to force all the states to recognize public employee unions, and to give public employee unions even greater powers than private-sector unions enjoyed. The push for the National Public Employment Relations Law,--what was called "a Wagner Act for public employees"--was led by Representative William Clay of Missouri (his son William Clay Jr. holds this seat today).[13] AFSCME was encouraged by the Supreme Court's willingness to let Congress regulate just about anything under the interstate commerce clause. In 1968, for example, it allowed Congress to extend the Fair Labor Standards Act to employees of public schools and hospitals. The Watergate crisis helped the effort, as a flood of liberal Democrats were elected to Congress in 1974. The next year, the Senate amended its cloture rule, requiring 60 rather than 67 votes to end filibusters.

While the prospects for public employee unionism seemed bright, there were also foreboding signs. AFSCME had begun to arouse resentment from other union federations—the AFL-CIO and the Service Employees International Union especially. Its president, Jerry Wurf, was notably abrasive and became an easy target for his opponents. He said, for example, that police and firefighter unions should "Let our cities burn" if

[13] Joseph A. McCartin, "'A Wagner Act for Public Employees': Labor's Deferred Dream and the Rise of Conservatism, 1970-76," *Journal of American History* 95 (2008), 123-48.

they didn't get what they demanded—the phrase became the title of a book by Ralph Toledano. But most of all, the disruptive and illegal strikes of the period—like the sit-down strikes of the 1930s—began to turn public opinion against public unions. The Supreme Court began to get cold feet. In March, 1976 it decided that Congress could not extend the Fair Labor Standards Act to state employees. Justice Harry Blackmun, a recent Nixon appointee, was the swing vote. For the first time since the New Deal, the Court had recognized a limit on Congress' power to regulate interstate commerce. The Court recognized the fact that "the States as states stand on a quite different footing from an individual or a corporation."[14]

This decision, *National League of Cities v. Usery*, took the wind out of the sails of the public-employee union movement. It may have prevented the United States from going the way of Great Britain and Italy in the late 1970s. It prevented the nationalization of union policies adopted in states like New York and Wisconsin. It is often said that one of the fundamental differences between private- and public-sector labor markets is that a local government, unlike an auto maker, cannot respond to excessive union demands by moving to another location. The *National League of Cities* decision at least ensured that, if unions drove up the cost of government, *individuals* could relocate to cities or states that were less expensive. In this sense it acted like section 14(b) of the Taft-Hartley Act, which permitted private employers to move from union-shop to right-to-work states, and preserved an element of competitive federalism.

The reaction to the costs of public unions helped revive conservative movements, electing Margaret Thatcher in 1979 and Ronald Reagan in 1980. The defeat of the National Public Employment Relations Act was decisive but, since it involved complicated and technical legislative and judicial doctrine and maneuvers, it was overshadowed by the dramatic confrontation of Ronald Reagan and the air traffic controllers in 1981. Ironies abound in this episode. Reagan had been not only a union member but the president of the Screen Actors Guild. He had also signed California's 1968 law permitting public employee unions. The Professional Air Traffic Controllers Organization (PATCO) had endorsed him in the 1980 election. But when their demands were not met, the union decided to play hardball. They took the advice of Representative Clay, who made the following statement to the 1980 PATCO convention:

> "Your plan must be one which completely revises your political thinking. It should start with the premise that you have no permanent friends, no permanent enemies, just permanent interests. It must be selfish and pragmatic. You must learn the rules of the game and learn them well:
>
> Rule Number 1 says that you don't put the interest of any other group ahead of your own. What's good for the federal employees must be interpreted as being good for the nation.

[14] *National League of Cities v. Usery*, 426 U.S. 833 (1976). The Court overturned this decision in *Garcia v. San Antonio M.T.A.*, 469 U.S. 528 (1985). Nevertheless, there are good reasons to believe that it would still hold such an act unconstitutional. See Richard W. Noble and W. Terrence Kilroy, "The Constitutionality of a National Public Employee Relations Act: A Case for States' Rights," *Valparaiso University Law Review* 13 (1978), 1-31.

> Rule Number 2 says that you take what you can, give up only what you must.
>
> Rule Number 3 says that you take it from whomever you can, whenever you can, however you can.
>
> If you are not prepared to play by the rules then you have not reached the age of political maturity and perhaps you deserve everything that's happening to you."[15]

We can call this the Melian Dialogue of the PATCO strike. It makes it easy to understand why Reagan was able to take the strong stand that he did, firing and replacing the striking controllers, and why the public overwhelmingly supported him.

The PATCO strike is invariably depicted as a replay of the 1919 Boston police strike. Reagan, after all, had taken down FDR's portrait in the Oval Office and replaced it with one of Calvin Coolidge. PATCO was the opening salvo of the Republicans' campaign to repeal the New Deal, destroying organized labor in order to redistribute income from Main Street to Wall Street, et cetera. But breaking the PATCO strike had approximately zero impact on public sector unionism. It may have cooled their willingness to strike, but their numbers continued to flourish. In the 1980s, state employment grew 20%, or twice the rate of population growth. The number of public employee union members has grown over 25% in the last 25 years, keeping pace with the growth of population, and becoming a majority of all union members in 2010. The PATCO replacements soon joined the National Air Traffic Controllers Association and carried on PATCO's work. The failure to reverse public-sector unionism—indeed, the failure even to *attempt* it—is another indication of how limited the impact of the so-called "Reagan Revolution" was in domestic affairs.

It is often said that Reagan's breaking of the PATCO strike "sent a signal" to private-sector employers, that it was now acceptable to take a hard line against their unions. But this is also dubious. The factors responsible for private-sector union decline long antedated the PATCO strike and continued after it. I would argue that Reagan actually *helped* the public employee union movement. By reviving the private sector economy, he caused public opinion to lose concern about the issue. Public unions do well in flush times—thus their rapid growth in the 1950s and 1960s. And they become unpopular when the taxpayers begin to feel the cost of them—as in the 1970s and today. During the flush times, they add to the cost of government. (Government at all levels consumed 13% of GDP in 1929, 33% in 1960, and 45% in 1994.) And the time may come when we will be unable to revive the private economy due to that burden.

This leads to one final point. Defenders of public unions often deny that union-negotiated wages and benefits—even pensions—are responsible for the tremendous state and federal deficits and debts. But the direct costs of public employment are only the tip of the iceberg. Consider, for example, the decline in the *quality* of education along with its increased cost since unionization. Public employee unions do not simply lobby for

[15] Bernard D. Meltzer and Cass R. Sunstein, "Public Employee Strikes, Executive Discretion, and the Air Traffic Controllers," *University of Chicago Law Review* 50 (1983), 765.

greater benefits for their own members, but for the expansion of government at all levels. Was there any greater supporter of President Obama and Obamacare than the public employee unions? (Private-sector union members, who have to pay higher taxes for an expanded public sector, were bought off with an exemption for their "Cadillac" health insurance plans.) When the health care industry is fully nationalized, it will add some 15% to the government share of GDP. (Actually less than that, because the industry is already half-nationalized by Medicare and Medicaid.) Once the federal government is the employer, it will be that much easier to organize the unorganized health care workers.

But I have done speaking as a historian, now speaking about the future. But it is obvious that this cannot go on forever if the US is to remain a constitutional republic. More than the economic or social costs of public-sector unionism is the political question of *sovereignty*.