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TRADE UNIONISM UNDER GLOBALIZATION: THE DEMISE OF VOLUNTARISM?

SAMUEL ESTREICHER*

Trade unionism and political organization are two different ways workers attempt to advance their economic and social objectives. Unions are the institutional expression of workers' self- (or third-party-aided) organization. Unions fund themselves through membership dues or other sources and their achievements historically have been measured in the negotiation and enforcement of collective bargaining agreements. Some political organizations (either political parties or nongovernmental organizations), also claim to represent the interests of worker-members (or persons aligned with their members). Both political parties and nongovernmental organizations are funded by membership dues and other sources; and their achievements are measured in legislation, regulations, and their enforcement. Unlike Europe, the United States has no enduring labor party tradition,¹ and the U.S. labor movement has historically separated its role as collective bargaining agency from its "political action" contributions to candidates for government office.

Over the last several decades, trade unions in the United States increasingly have been unable to realize their objectives at the bargaining table and have turned more and more to politics. The turn to the political has been true of labor movements in many European and developing countries for quite some time. Because of the great decline in U.S. manufacturing, and the much-weakened position of trade unions in the

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1. See *generally* SEYMOUR MARTIN LIPSET & GARY MARKS, *IT DIDN'T HAPPEN HERE: WHY SOCIALISM FAILED IN THE UNITED STATES* (2000).

private sector—due in significant part to globalization²—U.S. exceptionalism in this regard may be going by the boards as well.

Trade unionism in private companies is a declining phenomenon in nearly all developed countries. In the United States, for example, union contracts cover a little less than eight percent of workers in the private sector and over half of the members of the two leading union federations (the AFL-CIO and Change to Win) are workers in government offices even though public-sector employment is only one-sixth of the overall workforce.³ The rate of decline may be slower in other developed countries, but the story of private-sector unionism decline is nearly universal, at least if viewed in terms of membership as opposed to contract coverage (where because of multiemployer bargaining structures and extension laws, contract coverage in some European countries far outstrips union membership).⁴ What started as a movement of workers against private capital is, in a sense, now now a movement of government workers, government contractor employees, and aid recipients against public capital.⁵

2. My first sustained effort at exploring this issue is Samuel Estreicher, *Labor Law Reform in a World of Competitive Product Markets*, 69 CHI.-KENT L. REV. 3 (1993) (Kenneth M. Piper Lecture in Labor Law at IIT's Chicago-Kent School of Law).

3. See tbls. 1& 4, *infra* Part.II. In 2009, union members accounted for 12.3% of employed wage and salary workers, a slight decline from the previous year; in 1983, the first year for which comparable data are available, the union membership rate was 20.1%. (Because of the effect of union security clauses, the percentage of employees covered by union contracts is usually a percentage point higher than the membership rate.) Workers in government offices had a union membership rate (37.4%) over five times that of private sector employees (7.2%), and account for nearly half of total union membership even though government work is a little more than one-fifth the size of the private workforce. See U.S. DEPT. OF LABOR, BUR. LAB. STATS., NEWS USDL-10-0069, TABLE 3: UNION AFFILIATION OF EMPLOYED WAGE AND SALARY WORKERS BY OCCUPATION AND INDUSTRY (Jan. 22, 2010), <http://www.bls.gov/news.release/pdf/union2>. The data in this government release refers to “members of a labor union or an employee association similar to a union,” and presumably includes the three-million-member National Education Association which is not affiliated, though often politically aligned, with the AFL-CIO and Change to Win. *Id.* The split within the U.S. labor movement (which may soon be repaired) is evaluated in Samuel Estreicher, *Disunity Within the House of Labor: Change to Win or to Stay the Course?*, 27 J. LAB. RES. 505, 506 (2006); see also Samuel Estreicher, “Think Global, Act Local”: *Employee Representation in a World of Global Labor and Product Market Competition*, 4 VA. L. & BUS. REV. 81, 82 (2009).

4. See Jelle Visser, *Union Membership Statistics in 24 Countries*, MONTHLY LAB. REV., Jan. 2006, at 38. See also Barry T. Hirsch, *Sluggish Institutions in a Dynamic World: Can Unions and Industrial Competition Coexist?*, 22 J. ECON. PERSP., Winter 2008, at 153; David G. Blanchflower, *A Cross-Country Study of Union Membership*, INST. FOR THE STUDY OF LAB., No. 2016 (March 2006).

5. See generally Samuel Estreicher, *Negotiating the People's Capital*, 25 J. LAB. RES. 189, 191 (2004).

Unions also are decreasingly able to influence the terms and conditions of private employment by negotiating labor contracts. More and more, unions turn to the state to legislate (and guarantee) wages, hours, and benefits. What started as an expression of the self-organization of working people seeking what U.S. labor law terms “true freedom of contract,” now takes the form of organized participation in the pluralist group bargaining process that is our political democracy. The fabled “voluntarism” of Samuel Gompers, the founding president of the American Federation of Labor (AFL), the first successful union federation in this country—that workers have to improve their lot by their own struggle, secure those gains through their own efforts and not depend on the state—no longer expresses the view of any major labor organization or leader.

The increasing importance of politics to labor, and vice versa, finds expression in the influence of labor unions in the Obama administration and in its drive to legislate a public right to healthcare coverage and subsidize certain industries.⁶ We see a similar phenomenon in other countries. Recently, Germany enacted minimum wage laws in certain industries, replacing what had been a system based on the “normative” force of industry-wide collective bargaining agreements.⁷ Early in the Blair administration, the United Kingdom instituted minimum wage councils because collective bargaining agreements were not effectively setting minimum standards.⁸ Indeed, one could view much of the European Union project as an attempt to substitute public law for contract in many areas of economic life.

Of course, the dedication of U.S. trade unions to private market solutions, even in the supposed halcyon days of the Gompers presidency of the AFL, was never absolute.⁹ Along with opposition to certain legislative solutions, such as social insurance, the Federation supported workers’ compensation laws and “prevailing wage” laws for government

6. See, e.g., AFL-CIO, *Health Care Can't Wait*, <http://www.aflcio.org/issues/healthcare/> (last visited Feb. 15, 2010).

7. See Friederike Gobbels, German Minimum-Wage Law Enacted, 2 *Jones Day European Labor & Employment Law Update* 3 (Issue 1, Aug. 2009) (discussing *Mindestarbeitsbedingungensetz—MiARbG* (Minimum Working Conditions Act), ver. of April 22, 2009, *Bundesgesetzblatt—Teil I—Seite 818*, *Federal Law Gazette—Part I—Side 818*).

8. See David Metcalf, *The British National Minimum Wage*, 37 *BRIT. J. INDUS. REL.* 171 (Dec. 2002).

9. Some have argued that the voluntarism of Gompers and the early AFL reflected not so much deeply or sincerely held ideology but the brute reality of court hostility to maximum hours and other social legislation. See WILLIAM E. FORBATH, *LAW AND THE SHAPING OF THE AMERICAN LABOR MOVEMENT* (1991).

contractors.¹⁰ Moreover, with the onset of the Great Depression, which undermined faith in unregulated markets, both the AFL and the breakaway federation, the Congress of Industrial Organization (CIO), broadened their political aims, developed strong political action committees, and made significant contributions in cash and in kind, largely to Democratic candidates for the White House, Congress, and state houses. Indeed, with the AFL-CIO merger in 1955, organized labor's political influence expanded beyond purely labor relations concerns to include its critical backing of important social legislation such as the civil rights laws in the 1960s.¹¹

Thus by the mid-1930s, organized labor rejected narrow conceptions of voluntarism, but the essential focus of U.S. trade unionism until the recent period was on securing and enforcing strong contracts in existing bargaining units, with some limited organizing of new units. Politics was an adjunct, a supplement to trade unionism. We are now, however, beginning to see a qualitative change in labor's relationship to the state: trade unionism as a supplement to politics. Labor's economic objectives have not changed; the means are undergoing substantial transformation.

The thesis of this paper is that largely in response to the deepening of competitive forces in private markets in the United States—deregulation, changing technology, and the opening up of global labor and product markets (due to decreasing transportation and communication costs and the lowering of trade barriers)—organized labor increasingly will function predominantly as a political organization. Collective bargaining will continue to provide an institutional *raison d'être* and critical funding source for unions, but only one (and a diminishing one) of several means for advancing the interests of its members and other constituencies. This is not to suggest the emergence of a labor party on the European model; it is an American variant: the fortunes of the labor movement will become ever more tightly tied to the fortunes of the Democratic Party, and economic goals increasingly will be achieved not at the bargaining table, but through the provision of public resources.

10. See Theron Schlabach, *Rationality & Welfare: Public Discussion of Poverty and Social Insurance in the United States 1875–1935*, SOCIAL SECURITY ONLINE: RESEARCH NOTES & SPECIAL STUDIES BY THE HISTORIAN'S OFFICE, <http://www.socialsecurity.gov/history/reports/schlabach6.html> (last visited Feb. 15, 2010). For accounts of the passage of the Davis-Bacon Act of 1931 and other prevailing-wage legislation, see ARMAND J. THIEBLOT, JR., *PREVAILING WAGE LEGISLATION* (1986) and ARMAND J. THIEBLOT, JR., *THE DAVIS-BACON ACT* (1975). See also HERBERT R. NORTHRUP, *ORGANIZED LABOR AND THE NEGRO* (1946).

11. See generally John T. Delaney et al., *Evolutionary Politics? Union Differences and Political Activities in the 1990s*, 20 J. LAB. RES. 277, 278–79 (1999).

II.

The turn to politics is not necessarily a good or bad development; it is understandable, if not unavoidable, given the challenges that unions face in private firms.

The unions' problems are not in the public sector. In 2008, 36.8% of government workers were union members, and 40.7% were covered by collective bargaining contracts. In 2009, public-sector union members outnumbered public-sector members for the first time in history.¹² The extent of unionization of government workers is a remarkable achievement since not all states or localities recognize collective bargaining rights for their employees.¹³ Unions continue to register gains in the government sector—most recently by convincing a number of state governors and legislatures to establish an agency to act as the employer in collective bargaining with home health care workers.¹⁴

Labor's problems are in the private sector. Unions will continue to represent segments of the labor force where the costs of delay place a significant premium on avoiding labor stoppage (e.g., big-city commercial construction, airlines), where barriers to entry give incumbent firms some ability to absorb labor cost increases without losing patronage (e.g., construction, airlines, licensed engineers), or where regulation of acquisitions and new areas of service give unions special leverage to extract concessions (e.g., healthcare and communications). But for manufacturing generally, and the vast majority of private-sector companies, the unions' task both to organize the workforce and insulate the unionized firm from the ravages of product market competition seems daunting. Most unions, voting with their feet in terms of how they invest organizing resources, have essentially concurred by investing those resources elsewhere.

Determining how much globalization, as such, has contributed to union deterioration is difficult.¹⁵ U.S. consumers' ability to purchase high-

12. In 2009, for the first time, unions had more members employed in government offices (7.9 million) than in private companies (7.4 million). See tbl. 4 *infra*; U.S. DEPT. OF LABOR, TABLE 3, *supra* note 3.

13. See U.S. GEN. ACCOUNTING OFFICE, COLLECTIVE BARGAINING RIGHTS: INFORMATION ON THE NUMBER OF WORKERS WITH AND WITHOUT BARGAINING RIGHTS 8–9 (2002) (noting that twelve states lacked any collective bargaining laws for state and local employees).

14. See, e.g., Exec. Order No. 09-15, 33 Ill. Reg. 10087 (June 29, 2009) (directing the State of Illinois to establish an agency to bargain with home health care workers).

15. The existing empirical literature on union density and globalization does not clearly indicate a strong, unequivocal relationship. See, e.g., DAVID G. BLANCHFLOWER & ALEX BRYSON, THE UNION WAGE PREMIUM IN THE US AND THE UK 19 (Centre for Economic Performance, London Sch. of Econ. & Pol. Sci., 2004), available at <http://www.dartmouth.edu/>

quality goods made abroad at lower prices than charged for U.S.-made goods, and U.S. companies' ability to manufacture goods in places like China for sale back to the United States, has contributed to a shrinking of the manufacturing sector.

A substantial literature has developed to attempt to explain the decline of unionism in private companies.¹⁶ My own view is that unions have trouble in competitive markets because, at least from the firm's point of view, they are net cost-adding institutions¹⁷ but are unable to neutralize

~blnchflr/papers/irralong.pdf; Dale Belman & Paula B. Voos, *Changes in Union Wage Effects by Industry: A Fresh Look at the Evidence*, 43 INDUS. REL. 491, 518 (2004); Barry T. Hirsch et al., *Estimates of Union Density by State*, MONTHLY LAB. REV., July 2001, at 54; Elisabetta Magnani & David Prentice, *Did Globalization Reduce Unionization? Evidence from US Manufacturing*, 10 LAB. ECON. 705, 721 (2003); Matthew J. Slaughter, *Globalization and Declining Unionization in the United States*, 46 INDUS. REL. 329, 345 (2007).

16. Four major explanations have been offered: (1) Employer Opposition, see JOHN SCHMITT & BEN ZIPPERER, DROPPING THE AX: ILLEGAL FIRINGS DURING UNION ELECTION CAMPAIGNS, 1951–2007, at 1 (Center for Econ. & Pol'y Research 2009), available at <http://www.wapt.com/download/2007/0105/10678436.pdf>; PAUL C. WEILER, GOVERNING THE WORKPLACE: THE FUTURE OF LABOR AND EMPLOYMENT LAW 108–11 (1990); Paul Weiler, *Promises to Keep: Securing Workers' Rights to Self-Organization Under the NLRA*, 96 HARV. L. REV. 1769, 1769–70 (1983); (2) Changes in Worker Attitudes, see Henry S. Farber & Alan B. Krueger, *Union Membership in the United States: The Decline Continues*, in EMPLOYEE REPRESENTATION: ALTERNATIVES AND FUTURE DIRECTIONS 105, 130 (Bruce E. Kaufman & Morris M. Kleiner eds., 1993); Sharon Rabin Margalioth, *The Significance of Workers' Attitudes: Individualism as a Cause for Labor's Decline*, in EMPLOYEE REPRESENTATION IN THE EMERGING WORKPLACE: ALTERNATIVES/SUPPLEMENTS TO COLLECTIVE BARGAINING: PROCEEDINGS OF NEW YORK UNIVERSITY 50TH ANNUAL CONFERENCE ON LABOR 41–116 (Samuel Estreicher ed., 1998); RICHARD B. FREEMAN & JOEL ROGERS, WHAT WORKERS WANT 69 (1999); but see SEYMOUR MARTIN LIPSET ET AL., THE PARADOX OF AMERICAN UNIONISM: WHY AMERICANS LIKE UNIONS MORE THAN CANADIANS DO, BUT JOIN MUCH LESS 94–95 (2004); Leo Troy, *Is the U.S. Unique in the Decline of Private Sector Unionism?*, 11 J. LAB. RES. 111, 137–38 (1990); (3) Structural Change, see Henry S. Farber & Bruce Western, *Round Up the Usual Suspects: The Decline of Unions in the Private Sector, 1973–1998*, at 2, 36 (Princeton Univ. Dept. of Econ., Working Paper No. 437, 2001); see also LEO TROY, THE NEW UNIONISM IN THE NEW SOCIETY: PUBLIC SECTOR UNIONS IN THE REDISTRIBUTIVE STATE 1 (1994); but see Richard B. Freeman, *Contraction and Expansion: The Divergence of Private Sector and Public Sector Unionism in the United States*, 2 J. ECON. PERSP. 63, 70 (1988); and (4) Global Labor and Product Market Competition, see Estreicher, "Think Global, Act Local", *supra* note 3, at 81; Michael L. Wachter, *Labor Unions: A Corporatist Institution in a Competitive World*, 155 U. PA. L. REV. 581, 583 (2007); Estreicher, *Labor Law Reform*, *supra* note 2, at 10.

17. To employers in partially-organized industries, unions are perceived as net cost-adding institutions because unions seek to impose wage and benefit levels, seniority structures and job rules that increase the firm's net labor costs beyond where they would have been in the absence of unionization—hence, the unions' need, posited here, to impose the same cost regime on all competitors of the unionized firm. Unions have also been fairly consistently found to detract from firm profits. See BARRY T. HIRSCH, LABOR UNIONS AND ECONOMIC PERFORMANCE OF FIRMS 87–88 (1991); Richard B. Freeman, *What Do Unions Do?: The 2004 M-Brane*

those costs by organizing the entire product market or by tariffs or “prevailing wage” laws dampening product market competition.¹⁸ This ultimately fuels both employer opposition and withdrawal of capital from the union sector which, in turn, helps explain why there is so little natural growth of union membership or organization in private firms.¹⁹

The basic story set forth below in Table 1 is one of tremendous job growth in the private sector (at least until very recently), from 61.8 million jobs in 1973, nearly doubling to 108 million jobs in 2008 (down 5 million in 2009), with the total number of union members actually declining by around six million members during the same period:

<i>Year</i>	<i>Total Private Employment</i>	<i>Union Members</i>	<i>Covered by CBAs</i>	<i>% Members</i>
1973	61,886.5	14,954.1	N.A.	24.2
1980	71,440.7	14,331.6	15,525.7	20.1
1990	86,122.5	10,254.8	11,366.4	11.9
1995	91,680.5	9432.1	10,359.8	10.3
2000	101,809.9	9147.7	9968,5	9.0
2005	105,508.46	8225	8961.6	7.8
2008	108,072.6	8625.2	9084.4	7.6
2009	103,357.3	7430.8	8226.1	7.2

Table 1. Union Membership, Coverage, Density and Employment Among Private Sector Workers, 1973–2009 (in thousands)²⁰

If we look at the fortunes, over the same period, of a historically union density-rich sector like manufacturing, which has been substantially affected by globalization, the picture is somewhat different because manufacturing employment has declined (whereas overall private sector employment has grown substantially). As Table 2 indicates, private manufacturing lost around 6.5 million jobs, while unions lost nearly the same number of members during this period.

Stringtweeter Edition (Nat'l. Bur. Econ. Res., Working Paper No. 11410, 2005). This is not say, however, that unions necessarily impose net social costs—an inquiry beyond the scope of this paper.

18. For my most recent article along these lines, see Samuel Estreicher, “*Think Global, Act Local*”, *supra* note 3.

19. Barry Hirsch suggests that focusing on the overall decline in private sector manufacturing ignores the actual growth in nonunion manufacturing employment (an additional 1.5 million jobs) between 1973 and 2006, despite a 2.5 million decline after 2000. See Hirsh, *Sluggish Institutions*, *supra* note 4, at 156. For a positive account of the state of U.S. manufacturing, see DANIEL IKENSON, THRIVING IN A GLOBAL ECONOMY: THE TRUTH ABOUT U.S. MANUFACTURING AND TRADE (Cato Institute, No. 35, Aug. 28, 2007), available at http://www.cato.org/pub_display.php?pub_id=8750.

20. Data in the tables in this paper are adapted from Barry Hirsch & David McPherson’s website, Union Stats and Coverage Database, www.unionstats.com (last visited April 6, 2010).

<i>Year</i>	<i>Private Manuf. Employment</i>	<i>Union Members</i>	<i>Covered by CBAs</i>	<i>% Members</i>	<i>% Covered</i>
1973	20,107.6	7827.7	N.A.	38.9	N.A.
1980	20,850.4	6726	7251.9	32.3	22.2
1990	20,338.6	4197.3	4514.1	20.6	22.2
1995	19,520	3439.6	3657.3	17.6	18.7
2000	19167.3	2831.8	2999.4	14.8	15.6
2005	15,518.4	2016.9	2127.3	13.0	13.7
2008	15,131.4	1723.5	1862.5	11.4	12.3
2009	13,454	1469.5	1594.7	10.9	11.9

Table 2. Union Membership, Coverage, Density, and Employment Among Private Sector Manufacturing Workers, 1973–2009 (in thousands)

Table 3 combines reports to indicate the extent to which manufacturing workers during this period changed from being a central force in the trade union movement to account for just slightly more than one-fifth of total union membership.

<i>Year</i>	<i>Total Private Employment</i>	<i>Union Members</i>	<i>Manufacturing Employment</i>	<i>Union Members</i>	<i>% of Total Membership</i>
1973	61,886.5	14,954.1	20,107.6	7827.7	.523
1980	71,440.7	14,331.6	20,850.4	6726.0	.469
1990	86,122	10,254.8	20,338.6	4197.3	.409
1995	91,680.5	9432.1	19,520	3439.6	.364
2000	101,809.9	9147.7	19,167.3	2831.8	.309
2005	105,508.46	8225.0	15,518.4	2016.9	.245
2008	108,072.6	8265.2	15,131.4	1723.5	.208
2009	103,357.3	7430.8	13,454	1469.5	.19

Table 3. Overall Private Sector Union Membership Compared to Union Membership in Private Manufacturing, 1973–2009 (in thousands)

Table 4 offers a glimpse at the relevant importance of private and public sector membership to the overall trade union movement: from a ratio of one public sector member for every five private sector members in 1973 to near parity in 2008 and numerical predominance in 2009, despite the fact that public employment is only 20% of the overall labor market.

<i>Year</i>	<i>Total Private Employment</i>	<i>Members</i>	<i>Total Public Employment</i>	<i>Members</i>	<i>Public/Private</i>
1973	61,886.5	14,954.1	13,134.5	3134.5	.209
1980	71,440.7	14,331.6	16,308.8	5763.6	.400
1990	86,122.5	10,254.8	17,782.3	6485	.632
1995	91,680.5	9432.1	18,357.6	6927.4	.734
2000	101,809.9	9147.7	18,975.7	7110.5	.777
2005	105,508.46	8225	20,380.9	7430.4	.903
2008	108,072.6	8265.2	21,304.6	7832.3	.947
2009	103,357.3	7430.8	21,132	7896.5	1.06

Table 4. Overall Private Sector Union Membership Compared to Public Sector Membership, 1973–2009 (in thousands)

Unions have taken numerous steps to attempt to reverse their fortunes in the private sector, through coalitions with nonlabor groups as well as other unions. First, they have fashioned a strategy called the “corporate campaign” as an adjunct to traditional organizing. Unions here identify vulnerabilities in target corporations—whether a need for shareholder approval of executive compensation, antitakeover devices, or a “going private” decision; a need for government approval to build a new wing of a hospital or enter into a new line of service; the scrutiny of regulators over some product mishap; or concerns involving wages or hours worked, antitrust, or other difficulties warranting systemic litigation.²¹ Unions then organize a campaign of adverse publicity and religious and community boycotts directed at the target and its executives. The objective is to wrest from the target a “neutrality” and “card-check” agreement that facilitates union organization in some of the target’s facilities. The union’s leverage sometimes also comes from pension fund managers and other allies in the institutional shareholder community that organized labor has cultivated over the last two decades.²²

Second, unions have made important strides in forging alliances with critical constituencies within the Democratic Party, both through their

21. For approving accounts, see James J. Brudney, *Neutrality Agreements and Card Check Recognition: Prospects for Changing Paradigms*, 90 IOWA L. REV. 819 (2005); Adrienne E. Eaton & Jill Kriesky, *Union Organizing Under Neutrality Card Check Agreements*, 55 Indus. & Lab. Rel. Rev. 42 (2001). For a critical view, see JAROL B. MANHEIM, *THE DEATH OF A THOUSAND CUTS: CORPORATE CAMPAIGNS AND THE ATTACK ON THE CORPORATION* 39 (2000).

22. See Stewart J. Schwab & Randall S. Thomas, *Realigning Corporate Governance: Shareholder Activism by Labor Unions*, in *EMPLOYEE REPRESENTATION IN THE EMERGING WORKPLACE: ALTERNATIVES/SUPPLEMENTS TO COLLECTIVE BARGAINING: PROCEEDINGS OF NEW YORK UNIVERSITY 50TH ANNUAL CONFERENCE ON LABOR* 341–47 (Samuel Estreicher ed., 1998).

monetary and in-kind contributions to candidates²³ and their support of key causes pressed by those constituencies, including universal healthcare and legalization of undocumented aliens. The objective is to promote a widespread understanding among Democratic politicians and activists that broad-gauged labor law reform to facilitate union organization is essential. We see this, of course, in the current campaign for the Employee Free Choice Act (EFCA) and the vocal support of most of the media and activist NGOs like Human Rights Watch and moveon.org.

Third, unions have also forged ties with state and local legislators (some of whom may be especially indebted to public employee organizations) and community groups to promote enactment of “living wage” ordinances that, like “prevailing wage” laws in government-financed construction, arguably help mitigate some of the cost disadvantages of union representation.²⁴ Similarly, with limited success, they have urged that relaxation of trade barriers be accompanied by enforceable labor standards, as exemplified by the recent decision of the Obama administration to impose sanctions on Chinese tire imports.²⁵

23. Eight labor organizations figured among the top 20 political action committees (in terms of total expenditures in 2009–10 election cycle); the Service Employees International Union (SEIU) came in second at \$18,335,969, and the American Federation of State, County & Municipal Employee (AFSCME) came in fifth at \$9,514,653. See OpenSecrets.org, *Political Action Committees*, <http://opensecrets.org/pacs/> (last visited April 6, 2010). Eleven labor organizations are listed among the top 30 “All-Time Donors” for 1989–2010; AFSCME came in second with a \$40,965,173 total, 98% of which went to Democratic candidates; the National Education Association, not an affiliate of either labor federation, came in seventh at \$29,908,625, 92% of which went to Democratic candidates. OpenSecrets.org, Center for Responsive Politics, *Heavy Hitters: Top All-Time Donors 1989–2010 Summary*, <http://www.opensecrets.org/orgs/list.php> (last visited Feb. 15, 2010). Among top so-called “527” committees, SEIU came in first with \$27,839,177 in expenditures. OpenSecrets.org, Center for Responsive Politics, *527S Committees: Top 50 Federally Focused Organizations: 2008*, <http://www.opensecrets.org/527s/527cmtes.php> (last visited Feb. 15, 2010). The SEIU also engaged in an extensive “microtargeting” effort during the 2008 campaign. CATALIST, AGGREGATE ACTIVITIES OF PROGRESSIVE ORGANIZATIONS IN 2008: COMPILATION OF DATA FROM CATALIST SUBSCRIBERS 36–37 (2009); Posting of Marc Ambinder to The Atlantic Politics Channel, http://politics.theatlantic.com/2009/10/seius_data_footprint_in_2008.php (Oct. 6, 2009, 08:54 EST).

24. See Zachary D. Fasman, *Living Wage Ordinances and Traditional Labor Law: An Uneasy Conjunction*, in COMPENSATION, WORK HOURS AND BENEFITS: PROCEEDING OF NEW YORK UNIVERSITY THE 57TH ANNUAL CONFERENCE ON LABOR 110 (Jeffrey Hirsch ed., 2009); see also Scott L. Cummings & Steven A. Boucher, *Mobilizing Local Government Law for Low-Wage Workers* 1, 3–4 (The Univ. of Chicago Legal Forum Research Paper No. 09-23, 2009), available at <http://ssrn.com/abstract=1472039>.

25. See U.S. Office of the Trade Representative, *Information Regarding Application of Transitional Product-Specific Safeguard Measure to Chinese Tires*, Sept. 17, 2009, available at <http://www.ustr.gov/node/5068>. For a discussion of “buy American” provisions in recent economic crisis recovery legislation, see Angelo A. Paparelli & Ted J. Chiappari, *Employ*

This is a partial list but sufficient for present purposes to illustrate the kinds of efforts unions and their allies are engaged in to gain a stronger position in the U.S. private sector.

III.

Are these union efforts to retake the commanding heights of the private sector likely to succeed? It is too early, of course, to tell definitively. Conceivably, within a year or two, an Obama administration success on healthcare reform may engender sufficient public support for Democratic objectives to embolden U.S. Senators put in office with the help of labor dollars and sweat to vote for an unadulterated version of the EFCA, thus smoothing the path for union organizers. But there is reason to believe that even after passage of a law like EFCA labor's problems in the private sector will essentially continue, and that labor's turn to the political may produce less fruit than hoped.

The experience of Canadian unions in their private sector suggests that even with enactment of EFCA and other laws on labor's wish list, such as protections against strikebreakers, organizing rights for low-level supervisors, and mandatory bargaining over some permissive subjects, labor's fortunes in private firms are not likely to be reversed any time soon. Strong pro-union laws can slow down deunionization, but the Canadian experience provides little basis for hope that it will lead to significant increased membership or labor contract coverage.²⁶

This is because, if I may be allowed to lapse into old materialist ways of thinking, law can only do so much to curb material forces. A law like EFCA does not change the basic underlying economic dynamic. If unionization represents significant net labor costs (taking into account the quality and productivity of unionized labor) and unions cannot impose the same costs on the competition, legal employer opposition will continue unabated. Legal employer opposition may come earlier in the game under EFCA; employers of any significant size are likely to engage in a continuous anti-union educational campaign among their workforce. Many

America Workers Act: Protectionist Turducken, N.Y.L.J., Feb. 23, 2009, at 3; Laura M. Baughtman & Joseph F. Francois, Chamber of Comm., *Trade Action—or Inaction: The Cost for American Workers and Companies*, Sept. 15, 2009.

26. In 2004, the unionization rate in the Canadian "commercial sector" (which excludes public services but includes quasi-governmental Crown corporations and the publicly financed healthcare industry) hovered around 20%—a 10% drop from 1981. See Rene Morissette, et al., *Diverging Trends in Unionization*, PERSPECTIVES 5, Apr. 2005. In 2007, the unionization rate for private sector workers declined to 17%; for the first half of 2008, it dropped to 16.3%. See *Perspectives on Labour and Income: Unionization*, PERSPECTIVES 31, Aug. 2009. The figures for employees covered by collective agreement are a percentage point higher.

employees, once informed that unions cannot, in fact, deliver job security, will hesitate to sign union authorization cards, even under a card-check regime. Moreover, even if a unionization drive at a particular facility succeeds, this will be like being hit by lightning; because under EFCA, as proposed, an arbitrator will decide contract terms which, if the experience of the U.S. public sector is instructive, will have little relation to actual economic constraints on the organized firm. Companies are likely to do whatever they lawfully can to escape this fate. There is, moreover, no guarantee against “capital flight,” as well as no guarantee that the company will make needed capital investments in the unionized sector of its business rather than invest in other parts of the country or other countries where labor costs are considerably lower.

Concern about such a dynamic change helps explain why labor has strongly supported passage of single-payer universal healthcare, and is a leading proponent of Obama administration healthcare reform legislation. This campaign is also a reflection in part of labor’s diminishing bargaining power in private firms. Labor rightly fears that firms will seek to cut healthcare benefits even in the union sector, and that union resistance is likely to be costly, if not futile. By establishing a public entitlement to substantial healthcare benefits, this item is removed from the bargaining table, and, labor can try to negotiate for their members.enhancements to the publicly funded package.

The turn to the political campaign, while promising in some ways, may not deliver on the hoped-for contribution to organizing the private sector. Labor may find that its considerable contribution to enactment of healthcare reform also helps, paradoxically, diminish interest on the part of the unorganized in seeking union representation. Why pay for something you are getting for free?²⁷ It is going to be difficult to encourage employers to add on to what is already a hefty government mandate. Moreover, the need to find funding sources for comprehensive healthcare legislation has led Congress to cut back on the exclusion of employer-paid healthcare benefits from the taxable income of recipients, likely in many cases to be union members. Although labor opposition to taxation of so-called “Cadillac healthcare” plans led to a deferred effective date for the tax, the irony remains: To pay for a healthcare benefit that will be available to all, regardless of union affiliation, labor’s allies in Congress may cut the

27. For a discussion of the general “free rider” problem, see MANCUR OLSON, *THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS* (2d ed. 1971).

legs out from under a principal selling point for union organizers: union-negotiated healthcare benefits.²⁸

Familiar to students of U.S. labor history, such a dynamic was one of the reasons Gompers and the old AFL resisted social legislation and urged labor to negotiate its way—through its own economic muscle, scope of organization and appreciation of the economic constraints on organized employers—to a better life for its members.

28. See, e.g., Timothy Noah, *Parked Cadillac: Don't Blame Labor for Whittling Down the Tax on High-End Health Insurance*, SLATE, Jan. 15, 2010, www.slate.com/id/2241750.