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Negotiating the People's Capital Revisited *

Samuel Estreicher

[Editor's Note: What follows is the second part of an unofficial transcript of an off-the-record conversation among three of the labor movement's leading strategists. (The first installment appeared under the title "Strategy for Labor," 22 J. Labor Research 569 (Summer 2001), and has been updated as "Strategy for Labor Revisited," available www.ssrn.com). This second meeting was also convened by C, or "**cooperationist**," who had been for over ten years the president of a local union, part of a major industrial union, representing 3,000 employees who had been hired to staff a new manufacturing plant in a Southern town ("Newplant"). Newplant had been widely touted as a breakthrough in U.S. labor-management relations because it was consciously designed to promote greater participation of production and maintenance workers in business decisions and a "partnership" role for union officials alongside traditional management officials. In bitterly contested local elections last year, C was voted out of office and now serves in a staff capacity at the AFL-CIO. A, or "**adversarialist**," perhaps surprisingly a longstanding friend of C, is the research director of another industrial union. A was very active in the Students for a Democratic Society in the 1960s, and after graduating from Oberlin College began his career as a labor organizer, working for a succession of unions that had been active in the McGovern-Kucinich wing of the Democratic Party. S, or "**stay the course**," is the highly respected chief of staff for a national union representing government workers. Section headings and parenthetical references are supplied by the editor and do not appear in the original transcript.]

I. Setting the Stage

C: Tonight we discuss the future of public sector labor relations in this country. It would seem quite a success story. In 2010, 8.4 million government workers were covered by collective agreements out of a total of 21.03 million workers in the public sector, or a union coverage rate of 40% (compared to a private sector coverage rate of 7.7 %).¹ Union-represented government workers now outnumber their private sector counterparts even though government work is about

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¹ See U.S. Dept. of Labor, Bureau of Lab. Stats., News, USDL-11-0063 (Jan. 21, 2011) & Table 3.

one-fifth of all work in this country.² What started as a movement of workers against private capital increasingly is becoming a movement arrayed against the people's capital.³

S: That's a barbed way to put it. Governments are bureaucracies; they are not direct representatives of the people. Politics is what moves government -- not intellectual thought, not merit, not performance, not even efficient delivery of services. Without organization, the people who do the work, the police, the firefighters, the teachers, the sanitation workers, will not get a fair shake in that political process. That is what public sector unionism is about, and it is every bit as legitimate – every bit as necessary to workplace justice – as collective bargaining for workers in private companies.

The “tea party” Republicans, echoing the early commentators like Harry Wellington and Ralph Winter,⁴ like to “cry wolf.” But they cannot prove that public sector unions are too strong, that public sector workers get paid or are coddled too much, that cities are nearing bankruptcy because of the contracts they have agreed. In most situations, we may get more in benefits but union-negotiated pay for public workers is quite comparable with what analogous workers in

² In 2009, U.S. public-sector workers had a union membership rate (37.4%) that was over five times that of private-sector employees (7.2%) and accounted for half of total union membership, even though government work is only one-fifth the size of the private workforce. See U.S. Dept. of Labor, Bureau of Lab. Stats., News, USDL-10-0069, Table 3: Union Affiliation of Employed Wage and Salary Workers by Industry (Jan. 22, 2010), available www.bls.gov/news.release/union2/t03.htm. In 2010, total U.S. union membership declined by 612,000 and the union membership rate fell to 11.9 % from 12.3% the year before. See U.S. Dept. of Labor, Bureau of Lab. Stats., News, USDL-11-0063 (Jan. 21, 2011).

³ See Samuel Estreicher, Trade Unionism Under Globalization: The Demise of Voluntarism?, 54 St. L. U. L. Rev. 415 (2010).

⁴ See Harry H. Wellington & Ralph K. Winter, The Limits of Collective Bargaining in Public Employment, 78 Yale L.J. 1107 (1969). For an updating of this perspective, see John McGinnis & Mazx Schanzenbach, The Case Against Public Sector Unions, Hoover Policy Review No. 162 (Stanford Univ., Hoover Institution, Aug. 1, 2010), available www.hoover.org/publications/policy-review/article/43255 (visited Sept. 20, 2010).

private firms get.⁵ Public managements know how to bargain hard and make sure contractual gains do not go too far. If anything, government doesn't play fair. In many states, when the politicians don't like the outcomes at the bargaining table, they simply pass laws to restrict what unions can bargain about.⁶ If they don't like the interest arbitrator's award, they claim legislative supremacy.⁷ In the federal government, we can't even bargain over pay or benefits.⁸

C.: Perhaps I went a bit far with my rhetoric. I only wanted to suggest that, with almost one out of every two union members working for the government, we are entering a new era. A labor movement so constituted will determine how labor federations operate on local, state and national levels, will shape the strategies for all organized labor. I am also concerned that with the pressure on public budgets and the contrasts people draw between government and private sector pensions and health benefits, the current rash of anti-union governors, legislators and mayors is not a temporary thing, that we are in for stormy weather for quite some time.

S: All we can do is fight back and teach the Republicans a lesson during the next election cycle.

C: Maybe. But I am thinking we need to do more to explain better our positions, to explain that there is a public interest not only in what the governors and mayors but a countervailing public interest in what public workers are demanding. In the schools, for example, we want fairness for

⁵ See Keith A. Bender & John S. Heywood, *Out of Balance? Comparing Public and Private Sector Compensation Over 20 Years* (Center for State & Local Government Excellence, National Institute on Retirement Security (April 2010); Jeffrey H. Keefe, *Are Wisconsin Public Employees Over-Compensated?*, EPI Briefing Paper #290 (Feb. 2011); Alan B. Krueger, *Are Public Sector Workers Paid More Than Their Alternative Wage? Evidence from Longitudinal Data and Job Queues*, in *When Public Sector Workers Unionize 217-42* (Richard B. Freeman & Casey Ichniowski eds. 1998). See generally David Lewin et al., *Getting It Right: Empirical Evidence and Policy Implications from Research on Public-Sector Unionism and Collective Bargaining* (Employment Policy Research Network & Labor and Employment Relations Assn., March 16, 2001, available: <http://ssrn.com/abstract=1792942>).

⁶ See David J. Strom & Stephanie S. Baxter, *From the Statehouse to the Schoolhouse: How Legislatures and Courts Shaped Labor Relations for Public Education Employees During the Last Decade*, 30 *J. L. & Educ.* 72 (2001).

⁷ John Lund & Cheryl L. Maranto, *Public Sector Labor Law: An Update*, in *Public Sector Employment in Time of Transition 21-57* (Dale Belman, Morley Gunderson & Douglas Hyatt eds. 1996).

⁸ See Jon O. Shimabukuro, *Collective Bargaining and Employees in the Public Sector 1-3* (CRS 7-5700, March 30, 2011).

teachers, to recognize that a long-service teacher is more valuable because of her experience, not to be jettisoned because some young “Teach for America” graduate has helicoptered in and needs to be kept happy. For the cops and fire fighters, they have a right to more pay and benefits because they lay the lives on the line every single working day. The government union movement is about fairness – bring merit to the fore, pushing politics to the background.

A: You should have been in public relations. Gompers said it a long time ago – we are not running things; we are about getting “more” for our members. The politicians are about managing the place; and they are responsible for their bad decisions, for not financing our pay and benefit improvements appropriately, for not cleaning the streets, for allowing the bad apples to roam the school hallways.

II. Leveraging Public Sector Union Power to help Private Sector Workers

C: Maybe. Let’s shift the discussion a bit. How can we use union strength in the public sector to improve the dismal state of union representation among private employees?

S: A lot already has been done (and, of course, more can be done). We are the principal political force in getting Democrats elected to office. President Obama is doing what he to use the procurement power to get responsible labor relations behavior from government contractors. We have also put our political muscle behind organizing the unorganizable in the home health care field, where the real “employer” is the state funding agency. Major building projects in many states and localities use “project labor agreements” to make sure that construction work financed by government uses union labor.⁹

A: I would add to the mix the political clout of public and private sector pension funds, which hold 11 percent of the U.S. equity market. Activism by the California public pension fund

⁹ See generally Benjamin I. Sachs, *Despite Preemption: Making Labor Law in Cities and States*, 124 Harv. L. Rev. 1153 (2011).

(CALPERS) and others around the country promotes not only shareholder rights but, more to the point, provides a lever for inducing corporate social responsibility in employment and other areas of decision-making.¹⁰ C speaks of the “people’s capital”; this is the way to make sure that the people’s capital is deployed for the people’s needs!

C: All well and good. But aren’t there some problems here we should not be ignoring? For example, are these pension funds doing a good job of representing the interests of plan participants, or are they taking on risky projects that will leave retirees high and dry? Who actually controls these enormous public funds: Is it the unions or the politicians?

A: There are unfunded liabilities out there,¹¹ but we haven’t had any public sector pension failures. There is plenty of latitude for choosing among socially responsible projects without sacrificing retiree welfare.¹²

C: But the returns aren’t all in. These are, as you know, “pay as you go” defined benefit plans; there is very little advance funding of the type required of private pensions under ERISA. If the stock market keeps going south, many of these funds will be in trouble. And if the funds have to be bailed out, future generations will pay.¹³

III. Lessons for the Private Sector

C: Before we turn to some of the issues that are specific to public sector labor relations, are there any lessons from the public experience for organizing in private firms?

¹⁰ See generally David Hess, Protecting and Politicizing Public Pension Assets: Empirical Evidence on the Effects of Governance Structures and Practices, 39 U.C. Davis. L. Rev. 187 (2005).

¹¹ See generally Joshua Rauh & Robert Novy-Marx, Policy Options for State Pension Systems and Their Impact on Plan Liabilities (NBER Working Paper No. 16453, Oct. 2010); Robert Novy-Marx & Joshua Rauh, The Liabilities and Risks of State-Sponsored Pension Plans, 23 J. Econ. Persp. 191 (No. 4, 2009).

¹² See Theresa Ghilarducci, Employee Investment on Pension Investment Boards: An Economic Model of the Pension Contract, in Employee Representation in the Emerging Workplace; Alternatives/Supplements to Collective Bargaining: Proceedings of NYU 50th Ann. Conf. on Labor 703-734 (S. Estreicher ed. 1998).

¹³ See Roberta Romano, Pension Funds and Corporate Governance, in id. At 493-511; Roberta Romano, Public Pension Fund Activism in Corporate Governance Reconsidered, 93 Colum. L. Rev. 795 (1993).

A: The principal lesson is that workers, public and private, want (and will get) collective representation if they have no reasons to fear losing their jobs in the process.¹⁴ Public workers are no different, in what they want and need, than private workers; and yet one of every two government workers is under a labor contract, compared to less than one in ten in private companies. The reason for the difference is that private employers by means lawful and unlawful have effectively conveyed the message to their employees: seek out a union but only if you don't care about keeping your job. In the government sector, however, once the jurisdiction comes to support the principle of collective representation for its workers, the pitched battle comes to an end; workers can then decide whether to unionize without fear of retaliation.¹⁵ What the public sector experience teaches is that we need risk-free card check certification procedures for private workers under the NLRA. The representation question is simply no business of the employers.

C: We have been over this ground before.¹⁶ I agree that public and private sector workers are likely to have the same underlying preferences. And, sure, we've got to stiffen penalties for unlawful employer opposition under the NLRA.¹⁷ But we shouldn't lose sight of the fact that most public employers operate as virtual monopolies, and for that reason are less concerned over the costs of, and hence less likely to resist, unionization and, until recently, union bargaining objectives. Moreover, they operate in a political environment, which makes them reluctant to take strikes and highly responsive to the pressures that organized constituencies like labor can

¹⁴ See Richard B. Freeman & Joel Rogers, *What Workers Want* (1999).

¹⁵ See Casey Ichniowski, Public Sector Union Growth and Bargaining Laws: A Proportional Hazards Approach to Time-Varying Treatments, in *When Public Sector Workers Organize*, supra note 5, at 19-38.

¹⁶ See Samuel Estreicher, *Strategy for Labor*, 22 *J. Labor Res.* 569 (Summer 2001).

¹⁷ See Samuel Estreicher, *Improving the Administration of the National Labor Relations Act Without Statutory Change*, 25 *ABA J. of Lab. & Empl. L.* 1 (Fall 2009).

bring to bear. We can pass laws to make it easier for unions to organize private workers, but these larger differences in the bargaining environment cannot be legislated away.

For me, a key lesson of the public sector experience is its tolerance of a variety of approaches to how employee organizations can take form. Unlike the NLRA, nonunion employee representation committees are often lawful;¹⁸ “meet and confer” laws permit an alternative short of full-scale collective bargaining;¹⁹ and supervisor unionism is generally permitted.²⁰ We also have a strong tradition of career-based professional.²¹

IV. Educational Reform

S: Enough of this private sector stuff! You’re both suffering from the same myopia as the law schools, where they pore over the details of an (increasingly irrelevant) NLRA with nary a word about government workers.

C: Good. If you don’t mind, let’s start with educational reform. Why are the teacher unions (and here I include the National Education Association) so opposed to improvements in the public schools?²²

S: Your question surprises me. The teacher unions are not opposed to reform; they are opposed to privatization of our common schools. We have been in the forefront of responsible charter school legislation which preserves hard-fought contractual commitments. In the traditional

¹⁸ See Samuel Estreicher, Nonunion Employee Representation: A Legal/Policy Perspective, in Nonunion Employee Representation: History, Contemporary Practice, and Policy 1996, 216 (Bruce E. Kaufman & Daphne Gottlieb Taras eds. 2000).

¹⁹ See Lund & Maranto, *supra* note 7.

²⁰ See Adrienne E. Eaton & Paula B. Voos, Wearing Two Hats: The Unionization of Public Sector Supervisors, ch. 10 in *Going Public: The Role of Labor-Management Relations in Delivering Quality Government Services* (Jonathan Brock & David B. Lipsky eds. 2003). Stephen Hayford & Anthony Sinicropi, Bargaining Rights of Public Sector Supervisors, 14 *Industrial Rels* 44 (1976).

²¹ See Charles Taylor Kerchner & Julia E. Koppich, *A Union of Professionals: Labor Relations and Educational Reform* (1993).

²² See Myron Lieberman, *The Teacher Unions: How They Sabotage Government Reform and Why* (2000).

public schools themselves, we have supported site-based decision-making, peer review of teacher performance, and productivity improvements in exchange for higher pay.²³

C: Maybe it's a misperception, but (I suspect) one generally held, that the teacher unions are a major obstacle to school reform, especially in the inner city schools. From a quick scan of the news it seems that the unions doggedly fight to keep in place bad teachers, insist on certification requirements that prevent young college graduates from entering the field without taking pointless teacher education courses, and oppose vouchers even as a remedy for failing schools.

S: You're right about vouchers. They are an unmitigated disaster, that will deprive the inner city schools you care about of needed funding and will lead to taxpayer-financed private schools that teach sectarian, in some cases hate-filled, doctrine. You're only half right about certification. Teaching is a profession that builds on acquired skills; it is not something you can do well coming off the streets with a college degree in postmodernism. We do not oppose the hiring of uncertified teachers; we do insist that teacher pay be linked to formal education in teaching skills.

On the other discipline point, you are simply wrong. We do not manage the schools; we represent teachers. Tenure was hard-fought; it is absolutely necessary if teachers are to be a force for independent thinking, for civilization in the schools. If a teachers fails to perform to standard, and that standard has been clearly announced, let the school board make its case. Often the principals are looking for a scapegoat, and it our job to make sure that teachers are held accountable only for their shortcomings, not management's.

There's a lot of faddism here. Recall, we opposed politicization through Ford Foundation-funded decentralization of New York City schools in the 1960s. Now after four

²³ See Saul A. Rubinstein & John E. McCarthy, Collaborating on School Reform: Creating Union-Management Partnerships to Improve School Systems (Rutgers Univ., School of Management and Labor Relations, October 2010).

decades of local school board corruption, the powers that be all agree that centralized accountability for New York schools is what's needed. Vouchers, the Edison School projects will share this same fate.

V. Privatization

A: Let's turn to the issue of privatization. What position should labor take here? As I read the NLRB law on this subject, privatized (former government) workers now to have the right to strike.²⁴ If I am right, should this change our thinking?

S: I am not a lawyer, but doubt the NLRB decisions go far as you suggest. In any event, we oppose privatization because it is not in the public interest. Inevitably, private management results in a loss of public accountability and introduction of a profit element which requires deterioration in the quality of services. When public services privatize, this only means that a private manager is being substituted for a government body. Competition is not introduced for uniquely public services, such as police and fire protection, that provided by government precisely because there is no private alternative.²⁵

C: But you can't take an ostrich's approach here. If government finds itself under budgetary pressure, it is going to look for lower cost alternatives.

S: Of course, that is why despite our opposition in principle, we take a pro-active approach. We first want to be involved in the decision-making process, for often we can convince the public authority that the gains anticipated from privatization are largely illusory. We also work closely with the public body to explore how existing services can be more efficiently provided under

²⁴ See *Spectrum Healthcare Services, Inc.*, 325 N.L.R.B. 1061 (1998); *Aramark Corp.*, 323 N.L.R.B. 256 (1997), enforced, 179 F.3d 872 (10th Cir. 1999) (en banc); *Management Training Corp.*, 317 N.L.R.B. 1355 (1995).

²⁵ See Elliot Sclar, *The Privatization of Public Service: lessons from Case Studies* (Economic Policies Institute 1997).

public management.²⁶ If the decision is go to private management, we then insist on contractual guarantees of continued employment, a right of first refusal for jobs with the contractor, payment of prevailing wages and benefits, and continuation of union recognition.²⁷

VI. Labor-Management Cooperation

S: What we are doing to avert privatization is of a piece with daily instances of labor-management cooperation to help government work smarter without undermining union standards.²⁸ The key is worker empowerment – treating your people with respect, motivating them to share their know-how, sharing the gains from working together, and providing ongoing assurance of job security.

VII. The Challenge

C: Despite your excellent advocacy, I still see trouble ahead. As former president Clinton put it, “the era of Big Government is over”. Even the Democrats we’re helping put in office sound like fiscal conservators. Public concern over the cost and inefficiency of government will embolden politicians to find ways of doing without certain services, subcontracting or privatizing others, and insisting on limits on the scope of collective bargaining. Even when the “tea party” folks leave the scene, this is a challenge to public sector unions that they will not be able to ignore.

S: But we have been and are meeting the challenge. Government will not get smaller. Given 9/11, national and homeland defense will claim a larger share of public resources. So will environmental concerns: getting our economy on a “green” footing. Since the 1980s, we have gotten smarter at what we do – more willing to explore gainsharing improvements in

²⁶ See Michael Glanzer, Union Strategies in Privatizations: Shakespeare-Inspired Alternatives, 64 Albany L. Rev., 437, 458-70 (2000).

²⁷ See American Fed. Of State, County and Municipal Employees, AFL-CIO, Government for Sale: An Examination of the Contracting Out of State and Local Government Services (AFSCME, (8th ed., No.299-06).

²⁸ See U.S. Dept. of Labor, Working Together for Public Service: Report of the U.,S. Secretary of Labor’s Task Force on Excellence in State and Local Government Through Labor-Management Cooperation (Co-chairs: James J. Florio & Jerry Abrahamson, 1996).

productivity, relying more on legislation than collective bargaining to secure gains. In the public sector, labor has an effective voice, and there are spillover benefits for all workers. The challenge is for public management to do its job better, not for labor to concede its position.