ARE UNIONS DOOMED TO BEING A "NICHE MOVEMENT" IN A COMPETITIVE ECONOMY?

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In response to Michael L. Wachter, *Labor Unions: A Corporatist Institution in a Competitive World*, 155 U. PA. L. REV. 581 (2007).

Professor Wachter has done something quite extraordinary in the long-running scholarly debate over the causes of union decline: he has said something new. Wachter contends that the "corporatist" regime inaugurated in the early New Deal served as the necessary incubator for union growth in the 1930s and 1940s, and that unionization has inexorably declined with the gradual dismantling of the complementary institutions and the restraints on competition that made up that corporatist regime. That is because unions' goal of "taking wages out of competition," as well as union wage gains, fit with a corporatist commitment to "fair" rather than "free" competition, but are unsustainable in a free market in which cost-based competition is inevitable.[1]

The novelty of Wachter's argument does not lie in linking union decline and more competitive markets—including deregulation and lower trade barriers. What is new here is the claim that union *growth* in the 1930s and 1940s depended on a set of "corporatist" policies that were briefly in place in the early New Deal.[2] Wachter contends that union growth needs explaining as much as union decline does, and that both stem from the rapid rise and slow fall of "corporatism." He traces unions' initial growth in the 1930s to a burst of organizing during the short-lived National Industrial Recovery Act (NIRA), which

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[1] Michael L. Wachter, *Labor Unions: A Corporatist Institution in a Competitive World*, 155 U. PA. L. REV. 581, 585 (2007).

[2] The importance and novelty of the NIRA's broad move toward recognition of collective rights and collective institutions has not gone unnoticed, see James Brudney, *A Famous Victory: Collective Bargaining Protections and the Statutory Aging Process*, 74 N.C. L. REV. 939, 952-53 (1996), but Wachter is the first, as far as I know, to attribute nearly the entirety of union growth to this brief experiment with corporatism and its echoes in wartime labor policy.

promoted unions as the necessary counterparts to trade associations that were to establish "fair" wages and prices in key sectors.[3] Union gains were extended by quasi-corporatist economic policies of World War II and the Korean War; subsequent losses were slowed by the sector-specific systems of industry regulation (in trucking, air transportation, communications, and public utilities, for example) that kept competition at bay. But unions declined steadily as vestiges of corporatism gave way to policies of "free competition" beginning in the 1970s.

With that one powerful claim, Wachter seeks not so much to refute as to explain the role of employer resistance to unionization and to labor law reform to which union allies have long pointed as major culprits in union decline: "As long as unions raise labor costs in competitive sectors of the economy, unionized firms will continue to lose market share, managers in the nonunion sectors will continue to strongly resist unionization, and labor law reforms that facilitate unionization will remain unpopular."[4] The upshot is that unions, if they seek a wage premium without "other offsetting economic advantages," are doomed to become "a niche movement," one that is confined to the public sector and to "sectors where individual firms or industries take advantage of either uninformed or immobile workers to enforce below competitive pay packages."[5]

One might question how such a short-lived romance with corporatism—which Wachter acknowledges came to an end even before the NIRA was struck down as unconstitutional in 1935—could explain virtually the entire growth of the labor movement from 1933 through 1950. Wachter's answer is that most subsequent union growth came under wartime labor and economic policies in World War II and the Korean War that were quasi-corporatist in nature. As for the very rapid growth that took place after the NIRA was struck down and before World War II, Wachter puts much weight on the fact that the unions that grew most, like the United Auto Workers (UAW), were formed under the NIRA, and gained "impetus" from the NIRA policies. But when we consider what it took to achieve those organizing gains—for example, the UAW's recognition by General

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[3] Crucial support was provided by an antitrust policy committed as much to small producers as to competition, and by corporate governance doctrines that permitted managers to sacrifice shareholder interests to broader public interests.

[4] Wachter, *supra* note 1, at 627.

[5] *Id.* at 626, 633.

Motors after the Flint sit-down strike in 1936-1937—we may wonder whether Wachter is overstating the case for the causal role of the NIRA scheme.

One might question, too, why it took so long for labor's share of the labor force to decline even after the Korean War and that period's quasi-corporatist regime. Wachter's answer to this puzzle is that "the dismantling of the corporatist economy was itself a long, drawn-out process, taking roughly half a century," and that the longer-lived policies of industry-specific regulation within key infrastructural industries perpetuated elements of corporatism (and protected unions from wage competition) for several more decades.[6]

That leads me to two quibbles with terminology—one on each end of Wachter's dichotomy. First, Wachter's characterization of industry-specific regulation as "corporatist" is at least unconventional. While industry regulation did reflect the corporatist commitment to constraining competition in the public interest, it was a far cry from the model of governance through group representation—industrial and trade groups, occupational groups, unions—that was the signal feature of European corporatism and of the NIRA. That quibble, however, does not strike much of a blow to Wachter's basic thesis that unions thrived only where and when government policies shielded them and their counterpart employers from "free competition."

On the other side of the dichotomy, Wachter's characterization of contemporary economic policy as one devoted to "free competition" needs qualifying. In particular, I do not take Wachter to be challenging here the viability or desirability of minimum labor standards, such as wage and hour laws and health and safety standards, or of insurance-based protections such as unemployment compensation, workers compensation, or Social Security. Those laws do constrain competition, of course, but they do not *manage* competition in the way that corporatist or industrial regulation policies do. It is *managed* competition that Wachter denominates as corporatist, and it is the decline of managed competition that he portrays as driving union decline.

With these qualifications, I find Wachter's thesis quite powerful, and, as one who believes unions are crucial institutions for workers and the society as a whole, deeply unsettling. Before accepting the argument, we would need closer empirical study, and in particular a comparison of the experiences of other countries with a history of

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[6] *Id.* at 613.

greater or lesser governmental management of competition in the public interest. I will return below to the question of whether the increasingly consistent U.S. commitment to "free competition" is either inevitable or good policy. But first let us consider a few points that go to the size of the "niche" to which unions are likely to be confined in a competitive economy.

First, there is a layer of the U.S. labor market in which minimum labor standards and mandated benefits (wage and hour laws, unemployment compensation and workers compensation benefits, Social Security, etc.) are routinely flouted, in part because of reliance on undocumented workers who are afraid (even more than other workers) to enforce their legal rights. These sectors persist not because employers "take advantage of either uninformed or immobile workers to enforce *below competitive* pay packages,"[7] but because of overly "free competition" that is unconstrained by even minimum legal standards. If the government is committed to enforcing these minimum standards—which would require more resources and better regulatory models—unions can play an important role in enforcement, and in improving wages, benefits, and working conditions in this low-wage sector. That sector has not historically been a stronghold of organized labor, but the Service Employees International Union's successful campaigns among janitors and home health care workers, for example, suggest that may be changing.

Second, unions can achieve sustainable wage and membership gains in other competitive sectors by organizing all or nearly all of the firms in markets that cater to necessarily local customers. Many services must be performed where customers or users are located, such as hospitality and entertainment, health care, construction and maintenance of buildings and infrastructure, and domestic transportation of goods and people.[8] Firms in those locality-bound

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[7] *Id.* at 633 (emphasis added).

[8] These are also sectors in which global competition is not much of a threat, and in which significant state or national improvements in labor standards are sustainable—i.e., are unlikely to lead to the loss of those jobs. The parts of the economy in which importing, outsourcing, and offshoring are not major factors add up to much, perhaps most, of the private sector economy. *See* Daniel Gross, *Why "Outsourcing" May Lose Its Power as a Scare Word*, N.Y. TIMES, Aug. 13, 2006, at 5. A smaller share of manufacturing may be insulated from global competition, for example, by a high cost of transportation, as in the case of goods that are bulky (large appliances, assembled vehicles) or time sensitive (trendy apparel, perishable foods). Some industries extract and process natural resources that are scarce enough to be

sectors can potentially absorb higher labor costs, or pass them onto customers, if local competitors have to do so as well.[9] And indeed, the most dynamic unions are focusing their organizing efforts in those sectors, as well as in the public sector, often with an eye toward city-wide organizing.[10] That is also the logic of local "living wage" campaigns, which can incidentally help underwrite union organizing and wage gains at the low end of a local labor market.[11]

Beyond those locality-bound sectors, Wachter acknowledges that higher union wages may be sustainable if they come with productivity (including quality) improvements. Wachter finds that several decades of empirical studies have largely deflated the efficiency case for unions: the evidence indicates that unions tend to have little positive effect on productivity (and that any gains are more than offset by increased labor costs).[12] But even if unionization itself does not bring productivity enhancements, it may be possible for forward-looking unions, in cooperation with managers who regard them as partners, to find ways to improve productivity. The prospects for such cooperation are likely to be improved when unions secure "neutrality agreements" that aim to create a less conflict-ridden path toward unionization.[13]

Outside of those sectors and strategies, unions face a steep uphill battle in securing sustainable wage gains. Unions might still pursue

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worth extracting domestically (oil and gas, lumber, coal).

[9] Some caveats are in order. First, some components of these products or services may prove to be separable and transportable (e.g., modular construction). Second, maintaining high union density may require barriers or costs to entry—as in the case of luxury hotels, hospitals, or the like. Third, if higher labor costs reduce profits and thus returns to owners/shareholders (even if they do not reduce market share), owners may shift their capital elsewhere. For, even if production cannot move overseas, capital can, sometimes with a few keystrokes. The globalization of capital markets puts even locally rooted producers into competition for capital with producers in other markets who can extract greater profits.

[10] For example, the SEIU's campaigns to organize janitors in Los Angeles, Washington, D.C., and Houston, and UNITE-HERE's campaign to organize the Las Vegas casinos.

[11] While economists conventionally predict job losses as a result of locally higher minimum wages, empirical studies have found little or no disemployment effect. *See, e.g.*, David Neumark & Scott Adams, *Detecting Effects of Living Wage Laws*, 42 INDUS. REL. 531, 559 (2003) (finding small but statistically insignificant decreases in employment associated with living wage laws).

[12] Wachter, *supra* note 1, at 625 & n.190. I take Wachter's assessment of the evidence at face value for these purposes.

[13] For an argument to this effect, see James J. Brudney, *Neutrality Agreements and Card Check Recognition: Prospects for Changing Paradigms*, 90 IOWA L. REV. 819 (2005).

other noneconomic goals. If they do so, they should meet less employer resistance and less market pressure; however, they may also meet less worker enthusiasm. Workers want union representation for much more than higher wages, but they will want it less if higher wages are not part of the package.

Still, the upshot of these observations is that unions' potential "niche" in the private sector labor market is probably considerably larger, not smaller, than their current share of about eight percent, even if they continue to decline in the sectors in which they are most exposed to nonlocal and even global competition. A labor movement that is concentrated in the service sector rather than in auto, steel, and heavy industry is likely to be a less wealthy labor movement. But something like that happened in the 1930s with the shift from the skilled trades to the mass production industries.

Thus far I have discussed the implications of Wachter's argument for unions and their prospects for survival and growth. But what about the implications for society and policymakers? A higher-wage labor force can generate collective benefits for the community as a whole: a stronger tax base and consumer economy, stronger families, better mental health, less crime and social conflict, and so forth. A decent society thus has good reason to promote higher labor standards, as well as higher levels of unionization, than the market would otherwise produce.[14] Some gains could be achieved, at least in the sectors and along the lines suggested above, simply by reducing barriers to entry into unions: at a minimum, by combatting illegal forms of employer resistance, but also by promoting less adversarial procedures for resolving representation disputes, either through neutrality agreements or labor law reform.

Wachter's argument implies that any large union gains would require the renewal of economic policies that constrain market competition, and he implies that he would be among those who oppose such policies. However, years of corporate scandal, eye-popping executive pay packages, and growing economic inequality might eventually persuade the large majority of voters who are

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[14] For a game-theoretic account of why societies—especially in developing countries—gain from higher labor standards and yet may be induced to "defect" and compete to attract low-wage jobs, see Alan Hyde, *A Stag Hunt Account and Defense of Transnational Labour Standards: A Preliminary Look at the Problem* 7 (Cornell Law Sch. Legal Studies Research Paper Series, Paper No. 06-008, 2006), *available at* http://ssrn.com/abstract=896362.

ordinary workers to take another look at the idea of "fair competition."

National policies that promote significantly higher wages and labor standards may ultimately require international coordination of some kind, lest the whole nation "lose market share" in a more competitive global economy.[15] In any event, societies, as well as workers and their organizations, have good reason to pursue these objectives in ways that take account of both intense competitive pressures on firms and the multitude of ways in which firms might respond to or escape those pressures, including importing, outsourcing, and offshoring. The range of responses will vary from sector to sector, firm to firm, locality to locality, and time to time. That is one of the virtues of unionization as a strategy for improving labor standards: collective bargaining, with its underlying architecture of contract, is well suited, at least in principle, to accommodating the varied and changing needs and opportunities that firms and workers face throughout the economy.

Finally, a word on the political side of corporatism: corporatism in its fascist form—that is, as a substitute for electoral democracy—was indelibly discredited in the mid-twentieth century. But much of Europe, and the European Union itself, continues to be governed in part through democratic forms of corporatism, in which individuals are represented within government not only through elected officials but also through organizations such as unions that represent them "as workers" (or as shopkeepers or as manufacturers). Even as union membership has declined (to levels that are typically well above those in the United States), unions and the large union federations are still regarded as legitimate political representatives of workers in their respective sectors for purposes of negotiating wage levels and participating in deliberations over other matters of social policy.

One need not advocate the wholesale adoption of European social policy to recognize the potential virtue of multiple forms of political representation, including representation through collective institutions with the resources and expertise to investigate and promote policies that advance collective interests. Corporatism in that form is not necessarily tied to policies that constrain market competition in the public interest (though it is easy to see why the two might be linked historically). It may even have something to teach us about intelligent self-governance in a complex market society that

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[15] *See id.* at 19.

aspires to economic prosperity as well as liberty, equality, and justice for all.