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“THINK GLOBAL, ACT LOCAL”: EMPLOYEE REPRESENTATION IN A WORLD OF GLOBAL LABOR AND PRODUCT MARKET COMPETITION

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INTRODUCTION

TRADE unionism in private companies is a declining phenomenon in nearly all developed countries. In the United States, for example, unions represent fewer than eight percent of workers in the private sector; 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.¹ 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.² What started as a movement of workers against private capital is now increasingly a movement of government workers against public capital.³

An enormous literature has developed to attempt to explain this phenomenon. Four categories of explanation have emerged:

1. *Employer Opposition*: Many academics, especially in the United States, point the finger at employer opposition (lawful and unlawful) and the weak remedies of labor law that fail to deter retaliation against union supporters.

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1. In 2007, union members accounted for 12.1 percent of employed wage and salary workers; in 1983, the first year for which comparable data are available, the union membership rate was 20.1 percent. Workers in government offices had a union membership rate nearly five times that of private sector employees, and account for nearly half of total union membership even though government work is about one-fifth the size of the private workforce. See U.S. DEPT. OF LABOR, BUREAU OF LABOR STATISTICS, USDL 08-0092, UNION MEMBERS IN 2007 (2008). The split within the U.S. labor movement 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).
 2. 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., IZA Discussion Paper No. 2016, 2006).
 3. See Samuel Estreicher, *Negotiating the People's Capital*, 25 J. LAB. RES. 189, 191 (2004).
 4. See generally PAUL C. WEILER, GOVERNING THE WORKPLACE: THE FUTURE OF LABOR AND EMPLOYMENT LAW (Harvard University Press 1990); Paul Weiler, *Promises to Keep: Securing Workers' Rights to Self-Organization Under the NLR Act*, 96 HARV. L. REV. 1769 (1983). It is claimed that employers discharge one in five union organizers or activists because of their

2. *Worker Attitudes*: Other academics have focused on changes in the preferences and orientation of workers, observing a shift from class-based solidarity to individualism—sometimes aided by “minimum standards” laws that may be seen as providing an individual-rights-oriented, outwardly cost-free substitute for workplace representation.⁵

3. *Structural Change*: A third group stresses structural change in developed economies. With the shift away from large-scale manufacturing towards services, abetted by computer-driven replacement of blue-collar work, and the demographic shift from homogenous to multi-cultural workforces, unions are finding it increasingly difficult to retain membership and attract new followers.⁶

4. *Global Product and Labor Market Competition*: A fourth explanation urges that traditional trade union goals, such as a union wage premium, shorter work week, staffing rules, and seniority, are increasingly difficult to maintain in an era of global product and labor market competition.⁷

activities in a union election campaign. See John Schmitt & Ben Zipperer, CENTER FOR ECONOMIC & POLICY RESEARCH, DROPPING THE AX: ILLEGAL FIRINGS DURING UNION ELECTION CAMPAIGNS, 1951-2007, AT 1 (March 2009).

5. See Henry S. Farber & Alan B. Krueger, *Union Membership in the United States: The Decline Continues*, in EMPLOYEE REPRESENTATION: ALTERNATIVES AND FUTURE DIRECTIONS 105-34 (Bruce E. Kaufman & Morris M. Kleiner eds., 1993); Sharon Rabin Margalioth, *The Significance of Worker 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). On the other hand, some survey data show a consistent, substantial unfulfilled demand for union representation among nonunion workers. See SEYMOUR MARTIN LIPSET, NOAH M. MELTZ, RAFAEL GOMEZ & IVAN KATCHANOVSKI, THE PARADOX OF AMERICAN UNIONISM: WHY AMERICANS LIKE UNIONS MORE THAN CANADIANS DO BUT JOIN MUCH LESS 94-95 (Cornell University Press 2005) (noting that 48.2% of nonunion workers would “definitely” or “probably” vote for a union if they had the opportunity); RICHARD B. FREEMAN & JOEL ROGERS, WHAT WORKERS WANT 69 (Cornell University Press 1999) (noting that 32% of nonunion workers say that they want a union).
6. See Leo Troy, *Is the U.S. Unique in the Decline of Private Sector Unionism?*, 11 J. LAB. RES. 111, 137-138 (1990). For criticism, see Richard B. Freeman, *Contraction and Expansion: The Divergence of Private Sector and Public Sector Unionism*, J. ECON. PERSP., Spring 1988, at 63, 67. An example of the structural change school is Henry S. Farber & Bruce Western, *Round Up the Usual Suspects: The Decline of Unionism in the Private Sector* (Princeton Univ. Dept. of Econ., Working Paper No. 437, 2001).
7. See Samuel Estreicher, *Labor Law Reform in a World of Competitive Product Markets*, 69 CHI.-KENT L. REV. 3, 10 (1993). For a related perspective, see Hirsch, *supra* note 2; Michael Wachter, *Labor Unions: A Corporatist Institution in a Competitive World*, 155 U. PA. L. REV. 581, 582 (2007).

I. TWO MODELS OF WORKPLACE REPRESENTATION

To help assess these explanations and provide a framework for evaluating proposals for altering existing labor law regimes, consider two basic models of workplace representation.⁸

A. Redistributive Bargaining Agent Model

The first model, and the one that is most familiar, is the “*Redistributive Bargaining Agent*” Model. Here, the interests of the employer and those of its workers are viewed as fundamentally antagonistic. It is a “zero sum” game: worker gains detract from firm profits, and vice versa. What trade unions do is improve worker leverage or bargaining power in this distributional struggle over the division of the firm's surplus. To obtain such enhanced bargaining power, unions need to function as militant organizations in which they simplify worker preferences into commonly shared goals, such as increased pay, more leisure, seniority protection, and mobilize successful strikes in pursuit of those goals. In addition, unions need to develop industry-wide alliances with other worker groups in order to impose collectively-bargained labor standards against all competitors in the same product market.

The achievement of industry-wide standards is essential under this model. To avoid losses for unionized firms, wages must be taken out of competition. This could be called the lesson of “Gompers 101”, in honor of Samuel Gompers, the founding president of the American Federation of Labor. Where possible, the state is enlisted in this endeavor; thus, trade tariffs, minimum-

8. The focus here is on collective workplace representation of employee interests. Unions also seek to advance their goals through political organization. In addition, workers can join groups like the Association of Retired Persons and the National Organization of Women to pursue objectives that may redound to the advantage of working people generally, and sometimes with the help of unions seek to vindicate their individual employment rights through litigation in the courts or in arbitration. Where an organization functions primarily as a political group, it does not ordinarily perform, or seek to perform, a bargaining agency function. Such an organization may help spur enactment of legal mandates, but does not negotiate contracts on behalf of employees. The organization will be responsive, at best, to its membership, board of directors and funders (if any) but lacks an organic connection to a workplace-based constituency. Indeed, some organizations have developed considerable political clout even without members. See generally Theda Skocpol, *Associations Without Members*, AMER. PROSPECT, July-Aug. 1999, at 66.

standards laws, immigration laws, and extension laws, as in Germany and France, can help further the “Gompers 101” strategy.

B. Integrative Bargaining Agent Model

A second model of trade union objectives is what might be called the “*Integrative Bargaining Agent*” Model.⁹ Here, the objectives of the firm's owners and those of its workers are viewed as largely complementary. Despite periodic disputes over the division of firm profits, the relationship most often resembles a “positive sum” game: unions help firms achieve results that increase profits and hence enlarge the size of the “pie” available for distribution to workers and shareholders. Examples of this sort of union role include (1) giving “voice” to workers who cannot readily “exit” from the firm because they have made investments in firm-specific skills or in their communities; (2) negotiating “collective goods” such as grievance procedures and pension plans that better reflect employee preferences without detracting from profits; (3) providing a channel for workers to share information with owners in efficiency-enhancing “employee participation” programs; and (4) conferring legitimacy on inside-the-firm grievance procedures to resolve disputes internally and without resort to the courts.

The organization of the Integrative Bargaining Agent deemphasizes militancy. In continental Europe and Israel, the inside-the-firm organization, often called “works council,” is legally distinct from the Redistributive Bargaining Agent organization.¹⁰ Participation in the works council is available to all workers irrespective of union membership. These internal bodies generally may not conclude collective agreements or engage in work stoppages. The theory of the positive law is that works councils are principally consultative organs; they do not engage in redistributive wage bargaining, which remains the province of the external trade union organization. In some countries, employers are required to “consult” with employee representatives over certain issues and to pay for economic and other experts to help the works councilors perform their duties. The

9. The concept is inspired by RICHARD B. FREEMAN & JAMES MEDOFF, *WHAT DO UNIONS DO?* 5-11 (Basic Books, Inc. 1984), which speaks in terms of the “monopoly” and “voice” faces of unionism.

10. See generally *WORKS COUNCILS: CONSULTATION, REPRESENTATION, AND COOPERATION IN INDUSTRIAL RELATIONS* (Joel Rogers & Wolfgang Streeck eds., University of Chicago Press 1995).

European Commission also requires multinational firms doing business in Europe to establish multinational works councils.¹¹

C. Relationship Between Redistributive and Integrative Bargaining Agent Models

In the United States, Canada, and Great Britain, the same employee organization plays both redistributive and integrative roles. In continental Europe, as mentioned previously, legislation provides for the formation of works councils. The degree to which trade unions are involved in the conduct of works councils varies by country. In Germany, the original intent was to establish considerable distance between redistributive and integrative agencies. Over time, however, trade unions have taken over the leadership of most works councils and coordinate their strategy with those of the works councilors. Whether German works councils in fact improve the efficient allocation of social resources is very much in dispute.¹²

In the United States, Canada, and Great Britain, integrative activities will occur only when traditional unions agree to engage in them, because integrative bargaining agencies are not established by law and, at least in the U.S., employers actually violate the law if they attempt to form or encourage employees to form integrative groups even where no independent union represents or seeks to represent the employees.¹³ Paradoxically, a union's willingness to engage in integrative bargaining may be a function of its institutional security within the particular firm and its strength in the industry. The integrative approach is not likely to be embraced by unions when organizing a new workforce or seeking to maintain or improve upon previously negotiated terms in the face of a determined employer seeking concessions. Although survey evidence suggests workers strongly prefer a cooperative relationship between management and their union,¹⁴ it is an open

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11. For a discussion of works councils in the U.S. context, see GOVERNING THE WORKPLACE: THE FUTURE OF LABOR AND EMPLOYMENT LAW, *supra* note 4, at 282-306; Stephen F. Befort, *A New Voice for the Workplace: A Proposal for an American Works Councils Act*, 69 MO. L. REV. 607, 637 (2004).
 12. See John T. Addison, Thorsten Schank, Claus Schnabel & Joachim Wagner, *Do Works Councils Inhibit Investment?* (Inst. for the Study of Lab., IZA Discussion Paper No. 1473, 2005); John T. Addison, Claus Schnabel & Joachim Wagner, *Works Councils in Germany: Their Effects on Establishment Performance*, 53 OXFORD ECON. PAPERS 659, 661 (2001).
 13. See Samuel Estreicher, *Employee Involvement and the 'Company Union' Prohibition: The Case for Partial Repeal of Section 8(a)(2) of the NLRA*, 69 N.Y.U. L. REV. 125, 126 (1994).
 14. See FREEMAN & ROGERS, *supra* note 5, at 56, 59 ("63 percent of nonmanagerial employees favored management cooperation and no power, as compared with 22 percent who

question whether employees will pay for representation that appears insufficiently militant in its pursuit of redistributive bargaining objectives.

II. THE CHALLENGE OF GLOBAL COMPETITION

A. Does “Gompers 101” Remain a Viable Strategy?

Until the recent era, trade unions sought to pursue their redistributive objectives through a combination of industry-wide or sectoral collective bargaining and protective labor legislation. The theory underlying labor’s traditional objectives was that, although unionism did indeed create additional costs that outweighed productivity gains for firms, these costs need not have harmed the competitive position of unionized firms. This assumes that these increased costs could be imposed on all competitors operating in the same product market, through a combination of industry pacts, extension laws, and immigration and tariff barriers. This state of affairs persisted in the automobile, steel and rubber industries until well into 1960s. For a time, “Gompers 101” was a viable, if difficult, strategy.

In the United States, 1947 and 1959 amendments to federal labor law governing private employment substantially curtailed the unions’ ability to mount secondary boycotts and enlist neutral employers to agree not to handle products manufactured under non-union conditions. This legal change hampered labor’s ability to realize the “Gompers 101” strategy by confining the use of economic weapons to immediate employers with whom the unions had disputes.¹⁵

Beyond legal intervention, with the revolution in communications and transportation aided by computer technology, the increasing acceptance of “free trade” principles, and the spread of world-wide equity markets, “Gompers 101” may no longer be a viable strategy for unions in any country.

Ultimately, if unionism creates net costs for an employer, and unions are not able to impose similar terms on the employer’s competitors in the U.S. and abroad, unionism must either change its objectives to take greater account of the costs of union demands or provide benefits to unionized firms not available in the non-union sector, perhaps in the form

wanted more power even if management opposed it”; however, “preference for influence through a cooperative management rather than through a strong worker organization does not mean that workers reject an independent organization.”)

15. The historic role of secondary boycotts in enabling labor to maintain its “Gompers 101” strategy is an understudied aspect of U.S. labor history.

of relative immunity from employment litigation. Without such benefits, capital itself will 'go on strike,' starving the union sector of capital needed for growth.

The current focus of the U.S. labor movement and its political allies is to seek the enactment of laws that will make it easier to organize workers and impose first-time contracts by legal fiat where agreements with employers cannot be reached.¹⁶ While some features of current proposals are problematic, a general strengthening of the labor laws is desirable to give practical effect to the federal guarantee of workers' rights to engage in self-organization and collective bargaining. Workers should not have to risk their jobs in choosing union representation; and unions should have better access to the employee electorate when there is sufficient employee interest to warrant a representation election.

Better remedies and stiffer penalties for labor law violations can slow the de-unionization process, but, as the Canadian experience suggests, the weakening of redistributive bargaining will continue apace despite strong pro-union laws.¹⁷ Germany, to offer another example, provides substantial institutional support for trade unionism. This support includes extension laws, wrongful dismissal protections, public provision of healthcare, and mandatory works councils and employee participation on supervisory boards of corporations.¹⁸ However, the attempt is faltering as German firing costs discourage job growth and German consumers increasingly

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16. See Employee Free Choice Act of 2007, H.R. 800, 110th Cong. (2007); S. 1041, 110th Cong. (2007), discussed in Arlen Specter & Eric S. Nguyen, *Representation Without Intimidation: Securing Workers' Right to Choose Under the National Labor Relations Act*, 45 HARV. J. ON LEGIS. 311, 318-20 (2008).
17. 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, Grant Schellenberg & Anick Johnson, *Diverging trends in unionism*, PERSP. LAB. & INCOME, Apr. 2005, at 1, 5. In 2007, the unionization rate for private sector workers declined to 17%; for the first half of 2008, it declined to 16.3%. See *Unionization*, PERSP. LAB. & INCOME, Aug. 2008, at 1, 4 (Table 1). The figure for employees covered by collective agreement is a percentage point higher. *Id.*
18. See MANFRED WEISS, ROGER BLANPAIN & M. SCHMIDT, LABOR LAW AND INDUSTRIAL RELATIONS IN GERMANY (4th ed. 2008); Otto Jacobi, Berndt Keller & Walther Müller-Jentsch, *Germany: Codetermining the Future?*, in INDUSTRIAL RELATIONS IN THE NEW EUROPE 218-69 (Anthony Ferner & Richard Hyman eds., Blackwell Business 1992); Wolfgang Streeck, *Codetermination: the Fourth Decade*, in INTERNATIONAL PERSPECTIVES ON ORGANIZATIONAL DEMOCRACY, 391-422 (Bernhard Wilpert & Aindt Sorge eds., 1984). For a critical assessment of the German experience, see Addison, *supra* note 12; John T. Addison, *The Dunlop Report: European Links and Other Odd Connections*, 17 J. LAB. RES. 77, 81 (1996).

purchase products manufactured across the globe under very different labor standards. Meanwhile, German capital increasingly turns to places like Hungary, Ireland, the United States, and now China, India and the Pacific Rim countries to manufacture products that will be exported around the world.¹⁹ The result is not only significant unemployment and underemployment in Germany but also the beginning of an erosion of industry-wide bargaining structures.²⁰

Flexibility in labor markets is increasingly the theme of industrial relations reform. The evidence suggests an emerging decentralization of bargaining, even in continental Europe.²¹ In Australia and New Zealand, a century-old system of mandatory interest arbitration has given way to firm-based and individual bargaining, with a renewed scope for collective bargaining restored by a new Australian Labour administration.²²

B. The Potential of Multinational Labor Standards

The “social charter” campaign of the European Union (EU) suggests one response to this state of affairs. Organized Europe is attempting partially to promulgate uniform labor standards which would apply to all companies doing business within Europe. For other regions, similar efforts may take the form of the “labor side” agreement annexed to the North American Free Trade Agreement (NAFTA),²³ the minimum labor standards in the

19. See Katharina Bluhm, *Exporting or Abandoning the ‘German Model’?: Labour Policies of German Manufacturing Firms in Central Europe*, 7 EUR. J. INDUS. REL. 153, 153 (2001).

20. See Horst Siebert, *Why the German Labor Market is Failing*, 20 INT’L. J. COMP. LAB. L. & INDUS. REL. 489 (2004); and early work in Oliver J. Blanchard & Lawrence H. Summers, *Hysteresis and the European Unemployment Problem*, in UNDERSTANDING UNEMPLOYMENT 227-85 (Lawrence H. Summers ed., MIT Press 1990). For the suggestion that globalization paradoxically may make German employers more vulnerable to labor pressures, see Kathleen Thelen & Christa Van Wijnbergen, *The Paradox of Globalization*, 36 COMP. POL. STUD. 859, 859 (2003).

21. See HARRY C. KATZ & OWEN DARBISHIRE, CONVERGING DIVERGENCES: WORLDWIDE CHANGES IN EMPLOYMENT SYSTEMS 130 (2000); Harry C. Katz, *The Decentralization of Collective Bargaining: A Literature Review and Comparative Analysis*, 47 INDUS. & LAB. REL. REV. 3 (1993); Richard B. Freeman & Robert Gibbons, *Getting Together and Breaking Apart: The Decline of Centralised Collective Bargaining* (Nat’l. Bureau Econ. Res., Working Paper No. 4464, 1993).

22. See Ronald McCallum, *Australian Labour Law and the Rudd Vision: Some Observations*, in REMAKING AUSTRALIAN INDUSTRIAL RELATIONS 21-30 (Joellen Riley & Peter Sheldon eds., 2008).

23. The labor provisions of this treaty are excerpted and discussed in SAMUEL ESTREICHER, GLOBAL ISSUES IN LABOR LAW 107-13 (2007).

Central Americas Free Trade Agreement (CAFTA)²⁴ or initiatives within the World Trade Organization (WTO)²⁵ and the International Labor Organization (ILO),²⁶ or applications under U.S. trade law.²⁷

Undoubtedly, some progress can be achieved on this front.²⁸ China is a prime target for campaigns seeking to improve labor conditions. Over time we will see broad multinational acceptance of “free” (i.e., non-government dominated) trade unionism and restrictions on the use of “unfair” or “immoral” modes of labor market competition, such as child and compelled labor. Perhaps countries in the developing world will come to accept a right of association that allows workers to form trade unions free of government controls.²⁹

These emerging social standards are important, and much work remains to be done, but they do not equalize labor costs among nations. There are substantial real-world constraints on the ability of countries with high labor costs to impose their labor laws on competitors in other countries. We are not likely ever to see a universal minimum wage, a universal 35-hour work week, or universal health care coverage.

The limits of multinational cooperation in the field of labor standards are a product of the “comparative advantage” of different nations. Countries differ in their mix of labor and capital, bringing different levels of skill, educational attainment, infrastructure development and the like to the competitive process. What may be workable for, say, the highly skilled, productive labor force in Germany does not readily translate to the very different workforces in the United Kingdom or Ireland, to say nothing of the even more dissimilar situations in many Eastern European, Pacific Rim and African countries. For the latter countries to accept the high-labor-cost regime of Germany would be a form of economic self-

24. See *id.* at 113-22.

25. See *id.* at 127-38.

26. See *id.* at 55-84.

27. See, e.g., *id.* at 129-38.

28. For an insightful evaluation, see Jeffrey M. Hirsch, *Employee Collective Action in a Global Economy*, in *ENCYCLOPEDIA OF LABOR AND EMPLOYMENT LAW AND ECONOMICS* (Kenneth Dau-Schmidt, Seth Harris & Orley Lobel eds., Elgar Publishing Company 2008).

29. See generally BOB HEPPLER, *LABOUR LAWS AND GLOBAL TRADE* (Hart Publishing 2005). See also Int'l Lab. Org., *ILO Declaration on Fundamental Principles and Rights at Work*, 37 INT'L LEGAL MATERIALS 1237 (1998), which marks a major advance in the articulation of an international consensus favoring freedom of association, elimination of all forms of compulsory labor and employment discrimination, and “effective abolition” of child labor. See generally ESTREICHER, *supra* note 23, at 55-60.

destruction, for they would be giving away the part of their comparative advantage that lies in more flexible labor market arrangements.

Very little is added to the analysis by rhetorical invocations of a “race to the bottom” or “social pollution.” We are talking about the real productive capacity of these nations and their ability to deliver full, meaningful employment for their citizens. Unless all countries approach the bargaining process with identical endowments, or we have in place a global system of compelled redistributive transfer payments so as to level the “playing field,” competition along the lines of “comparative advantage” is both inevitable and largely desirable.

In sum, we may see an emerging rhetoric of multinational labor cooperation but, in substance, widely-shared rules will not extend beyond recognition of basic rights of association and collective bargaining, and restrictions on the use of child and prison labor.

III. THE CHALLENGE FOR PUBLIC POLICY

The challenge for public policy extends beyond the achievement of these minimum standards of multinational labor market competition. Public policy is essentially a domestic undertaking. The late Speaker of the United States House of Representatives, Tip O’Neill (D.Mass.), used to quip that “all politics are local;” to this it could be added that “all labor and employment law is local.” Each country must examine its own labor and capital mix to determine where its competitive advantage lies, and must develop rules for labor-market competition within its borders that, while consistent with national values, will help it achieve success in the worldwide marketplace.

One place to look for improvements in domestic labor market policy is to determine whether institutional arrangements can be restructured so that integrative models of workplace representation can compete along with redistributive bargaining agencies. Workplace representation is important both as a laboratory for democracy and for giving voice to worker perspectives in firm and societal decision-making. Unions need to reorient themselves in order to develop a package of services that appeals to mobile, educated workers and that promotes worker voice without detriment to firm economic performance.³⁰

30. For a helpful consumer-orientation model for labor unions, see Matthew Bodie, *Information and the Market for Union Representation*, 94 VA. L. REV. 1, 4 (2008).

Some possible moves include:

First, for workers who are employed in career jobs, the union's focus has to turn to the enterprise level to promote worker objectives in a manner that improves, or at least leaves undisturbed, the firm's competitive position. Unions have to be more receptive, for example, to compensation arrangements that incorporate elements of performance-based pay, modifying rigidities in staffing rules before firms face financial troubles, and responsibly exercising their role as advocates for disciplined workers so that employees proven to be unproductive can be dismissed. Also, unions need to work with firms to provide fair disciplinary systems that channel all claims, statutory as well as contractual, away from the courts. Employers have a critical role to play here, for unions are not likely to embrace these objectives where their institutional security is threatened.

Second, for workers who are employed in short-term, project-based "contingent" positions, unions have to develop as career-based organizations that provide portable, inter-firm health insurance and pension coverage, as well as training, information-sharing and placement services for mobile workers. The craft union model, once derided by "progressive" forces, remains instructive but needs to be revised in a somewhat new form that minimizes rules promoting union control of jobs in favor of rules promoting "employability" career ladders for its members. To some extent, U.S. unions in the entertainment industry use a modified craft model that promotes a career-based affiliation with its members.³¹

Third, without gainsaying the need to strengthen protections for workers seeking to organize and bargain collectively, greater flexibility is needed in U.S. labor law to allow a variety of forms of union organization to develop. It is not accidental that the period of greatest union growth in private companies (1935-1954) coincided with a period of intense inter-union rivalry as two rival labor movements, the American Federation of Labor (AFL) and the Congress of Industrial Organizations (CIO), were vying for the hearts and minds of American workers. Competition among union organizations is essential, for monopoly here, as in product markets, leads to non-responsive agencies and dissatisfied consumers. We need to inject an element of competition into the market for workplace

31. See generally UNDER THE STARS: ESSAYS ON LABOR RELATIONS IN ARTS AND ENTERTAINMENT (Lois S. Gray & Ronald L. Seeber eds., Cornell University Press 1996).

representation.³² The “Change to Win” split off from the AFL-CIO may be a harbinger of such competition, but time will tell to what degree.³³

Moreover, structural reform may be needed. For the United States, there should be a broad deregulation of the internal form of bargaining agencies.³⁴ U.S. law should be indifferent to the form that bargaining agencies take, whether they continue to be traditional non-profit membership organizations or for-profit providers of representational services. As Freeman & Rogers have shown,³⁵ workers are not a monolith and they want different things from their bargaining agencies. If we are concerned about the responsiveness of these agencies to their principals, the way to ensure responsiveness is to require periodic secret ballot votes by a majority of all affected workers over critical economic decisions, including whether they wish to be represented by a labor union, whether they endorse the employer's final offer, whether they authorize a strike, whether they approve of the negotiated pact, and what level of dues they wish to pay. In the U.S. context, this proposal envisions an “easy in, easy out” framework for deciding these issues in place of the “hard in, hard out” approach of current law, which makes it difficult to install a bargaining agent and equally difficult to withdraw such bargaining authority, or the “easy in, hard out” approach of the Canadian model that has garnered significant support in U.S. labor circles. If these voting opportunities are provided by law, we can have both more flexibility and more responsiveness to worker preferences.

Fourth, as a significant exporter, and perhaps the largest importer of goods and services, the American public has an interest in “free trade.” If, say, our textile industry is no longer competitive with its counterparts in other countries, both U.S. consumers and the economy of the trading country benefit from removing tariff walls even if it means the decimation of that industry. The American public, however, also has an interest in “fair trade.” While we should not, and ultimately cannot, impose our labor standards on other countries, just as labor has a legitimate interest in insisting that U.S. production conform to U.S. laws, it has a comparable

32. See Kye D. Pawlenko, *Reevaluating Inter-Union Competition: A Proposal to Resurrect Rival Unionism*, 8 U. J. LAB. & EMPL. L. 651, 656-657 (2006); Brian Petruska, *Choosing Competition: A Proposal to Modify Article XX of the AFL-CIO Constitution*, 21 HOFSTRA LAB. & EMP. L.J. 1, 3 (2003).

33. See Estreicher, *supra* note 1. The breakaway group may soon rejoin the AFL-CIO. See Kris Maher, *AFL-CIO, Breakaway Unions Discuss Reuniting*, WALL ST. J., Jan. 9, 2009, at A4.

34. See Samuel Estreicher, *Deregulating Union Democracy*, 21 J. LAB. RES. 247, 247 (2000).

35. See FREEMAN & ROGERS, *supra* note 5, at 4-7.

interest in insisting that production in other countries at least conform to the laws of those countries. In addition, U.S. labor and its supporters properly can seek to condition removal of trade barriers on conformity to certain basic standards, such as nonuse of convict or other compelled labor and free rights of association along the lines of the ILO's 1998 Declaration of Fundamental Principles and Rights at Work.³⁶ Moreover, because it is the right thing to do as well as necessary to engender political receptivity to free trade, the government must do a better job of delivering trade adjustment assistance for U.S. employees adversely affected by the removal of trade barriers than it has to date.³⁷

Fifth, U.S. employment regulation increasingly takes the form of legislated mandates enforced by under-resourced administrative agencies and private rights of action. The costs of employment litigation are a growing concern of U.S. employers, and yet, even where unions vigorously enforce the rights of employees and take cases to arbitration, the prospect of litigation cannot be eliminated. Policymakers need to consider ways of empowering unions to act as inside-the-firm agents for enforcement of both contractual and statutory rights in a manner that accords true finality to the outcomes of arbitrations under collective bargaining agreements, and also gives the bargaining agent a measure of flexibility to negotiate, within defined limits, modifications in legal mandates to reflect local realities. Unions may well be lower cost providers of workplace representation services than government agencies or lawyers, and legal fetters preventing this role from emerging warrant reexamination.³⁸

Lastly, another area that needs to be reexamined is corporate governance. As we enter an era when firms increasingly look to worldwide equity markets for financing, public policy must be concerned with the problem of impatient capital. Managers overly concerned about short-term changes in share value

36. See ILO Declaration, *supra* note 29.

37. See U.S. GOVERNMENT ACCOUNTING OFFICE, GAO-04-1012, TRADE ADJUSTMENT ASSISTANCE REFORMS HAVE ACCELERATED TRAINING ENROLLMENT, BUT IMPLEMENTATION CHALLENGES REMAIN (2004); William J. Mateikis, *The Fair Track to Expanded Free Trade: Making TAA Benefits More Accessible to American Workers*, 30 Hous. J. INT'L L. 1, 5-7 (2007).

38. See Samuel Estreicher, *Strategy for Labor*, 12 J. LAB. RES. 569, 578 (2001); Samuel Estreicher, *Freedom of Contract and Labor Law Reform: Opening Up the Possibilities for Value-Added Unionism*, 71 N.Y.U. L. REV. 827, 829-830 (1996) (1995 Benjamin Aaron Lecture on the Role of Public Policy in the Employment Relationship at UCLA). The Supreme Court's decision in *14 Penn Plaza LLC v. Pyett* (No. 07-581, Apr. 1, 2009), may open up developments along these lines.

will fail to make necessary investments with long-term payoffs, whether in the area of technology research or human capital improvements. Executive compensation needs a thorough reexamination so as better to reflect broader social goals. Recent events confirm the need for greater regulation of financial markets.

CONCLUSION

All unionism, like all politics, is, at its core, local. The future of workplace representation in a world of global labor and product market competition depends on local economic and political conditions. Transnational cooperation among employers, labor organizations and other actors can play only a limited role in establishing conditions for work without undermining the comparative advantage of individual nations. Traditional union goals require reexamination in light of global competitive conditions that are eroding the ability to take wages out of competition. Unions can still perform important integrative roles for workers in particular firms, industries, and career paths if they recast their objectives and methods, aided by institutional reforms that spur competition among providers of representation services and permit bargaining agents to provide comprehensive resolution of workplace disputes.