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Unions & the Great Recession: Is Transnationalism the Answer?

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UNIONS & THE GREAT RECESSION: IS TRANSNATIONALISM THE ANSWER?

BY
MICHAEL J. ZIMMER*

It would be a betrayal of the bold and pioneering heritage of our union if we did not engage in bold and dramatic change to address the challenges of rebuilding a global middle class for the 21st century.

U.A.W. President Bob King, *A UAW for the 21st Century*¹

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I. INTRODUCTION

For at least thirty years, the union movement at a worldwide level is downward if its movement is judged by union density.² The volume and

* Professor of Law, Loyola University Chicago. My thanks to the participants at the Fifth Annual Labor & Employment Law Colloquium (2010) for their many helpful comments. Bill Corbett gave me some wonderful comments. In addition to Bill, my other co-authors of THE GLOBAL WORKPLACE, Roger Blanpain, Susan Bisom-Rapp, and Hilary Josephs, have helped me in numerous ways. Also, thanks to Furqan Mohammed for his fine research and Joe Mitzenmacker, a reference librarian at Loyola, for his intrepid work answering my numerous questions. Margaret Moses has been an inspiration and a support. Thanks also to Loyola University Chicago School of Law for its support, including financial support.

1. Bob King, President, United Auto Workers, Speech to the Center for Automotive Research Conference: A UAW for the 21st Century (Aug. 2, 2010), *available at* <<http://www.uaw.org/articles/uaw-21st-century>>.

2. Dan Gallin, *Contemporary Issues in the International Trade Union Movement*, GLOBAL LABOR INST. (Sept. 26, 2007 11:06 AM), <http://www.globallabour.info/en/2007/09/contemporary_issues_in_the_int.html> (providing that union density in 2003 was 13 percent; 165 million unionized workers out of 1.3 billion wage earning workers). In 2010, the union membership rate was 11.9 percent,

size of strike activity have also declined substantially.³ With the onslaught of the Great Recession, that decline has continued.⁴ Over that thirty year period, economic inequality at a worldwide level has been generally increasing.⁵ In the U.S., for example, most of the economic growth has gone to the very top of the income and wealth ladder.⁶ Increasing inequality correlates with increased financial risk.⁷ There is evidence that declining

with 36.2 percent of public sector workers and 6.9 percent of employees in the private sector. Union Members Survey, U.S. Bureau of Labor Statistics, January 21, 2011, <http://www.bls.gov/newsrelease/union2.MRO.htm>, last visited, March 5, 2011. LAURA D. APPLEBAUM & BEN ZIPPERER, *THE STATE OF THE UNIONS IN 2010: A PROFILE OF UNION MEMBERSHIP IN LOS ANGELES, CALIFORNIA AND THE Nation 3* (2010) (citing CEPR Uniform Extracts of the Outgoing Rotation Groups from the U.S. Current Population Survey). The movement has not been all downward. Interestingly, that data does not appear to include the consequences of the recent expansion of union membership in China. See CHINA LABOUR BULLETIN, *GOING IT ALONE: THE WORKERS' MOVEMENT IN CHINA (2007-2008)* 32 (2009) ("At the end of 2008, the All-China Federation of Trade Unions announced that it had increased union membership to 212 million, including about 70 million migrant workers."). Since unions in China are required to be affiliated with the ACFTU and are not the product of the exercise of freedom of association of the workers, it may be that these membership figures do not count because the ACFTU is not a true union. See generally Ronald C. Brown, *China's Collective Contract Provisions: Can Collective Negotiations Embody Collective Bargaining?*, 16 DUKE J. COMP. & INT'L L. 35 (2009) (describing developments in the regulation of labor law in China and the role of the ACFTU).

3. Harry Arthurs, *The Constitutionalization of Labour Rights: What Bliss in this Dawn to be Alive* 4 (July 5, 2010), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1634902 [hereinafter Arthurs, *Constitutionalization*]. Exact comparison between transnational union densities is difficult because of differences in the way the data is computed; but virtually all countries saw significant declines in union coverage over the past few decades. See ORG. FOR ECON. CO-OPERATION AND DEV., *TRADE UNION DENSITY IN OECD COUNTRIES 1960-2008* (n.d.), available at <<http://www.oecd.org/dataoecd/25/42/39891561.xls>>.

4. Michael Lynk, *Labour Law and the New Inequality*, 59 U. NEW BRUNSWICK L.J. 14, 19-20 (2009).

5. *Id.*; *New Figures Detail Depth of Unemployment Misery, Lower Earnings for All but Super Wealthy*, HUFF. POST (last updated Nov. 2, 2010, 3:23 PM), <http://www.huffingtonpost.com/2010/10/25/income_inequality_statistics_tax_code_n_773392.html> (reporting that the seventy-four people in the U.S. who earned more than \$50 million in 2009 "made as much as the 19 million lowest-paid people in America, who constitute one in every eight workers.").

6. See PEW RESEARCH CTR., *A BALANCE SHEET AT 30 MONTHS: HOW THE GREAT RECESSION HAS CHANGED LIFE IN AMERICA* 6, 34 (2010), available at <<http://pewsocialtrends.org/assets/pdf/759-recession.pdf>> (reporting that the two highest socioeconomic classes were relatively unchanged while a greater percentage of people consider themselves lower class now and had the biggest change in terms of wealth); see also G. William Domhoff, *Wealth, Income, and Power*, WHORULESAMERICA.NET (Sept. 2005, updated Dec. 2010), <<http://sociology.ucsc.edu/whorulesamerica/power/wealth.html>> ("So far there are only tentative projections – based on the price of housing and stock in July 2009 – on the effects of the Great Recession on the wealth distribution. They suggest that average Americans have been hit much harder than wealthy Americans. . . . [T]here has been an 'astounding' 36.1% drop in the wealth (marketable assets) of the median household since the peak of the housing bubble in 2007. By contrast, the wealth of the top 1% of households dropped by far less: just 11.1%. So as of April 2010, it looks like the wealth distribution is even more unequal than it was in 2007.").

7. Louise Story, *Slicing the Pie*, N.Y. TIMES, Aug. 22, 2010, at WK5, available at, Louise Story, *Income Inequality and Financial Crises*, N.Y. TIMES.COM (Aug. 21, 2010), <<http://www.nytimes.com/2010/08/22/weekinreview/22story.html?ref=todayspaper>>.

Income disparities before [the Great Depression] and before the recent [Great Recession] were the greatest in approximately the last 100 years. In 1928, the top 10 percent of earners received 49.29 percent of total income. In 2007, the top 10 percent earned a strikingly similar percentage: 49.74 percent. In 1928, the top 1 percent received 23.94

union density is a partial cause of that increasing economic inequality.⁸ Nevertheless, public polling since the start of the Great Recession demonstrates a sharp decline in public support for unions.⁹ This recession has resulted in huge economic dislocations, to say nothing of the personal difficulties many people face, particularly on the lower end of the income and wealth scales.¹⁰ In short, there is a crisis, and so, as former White House Chief of Staff, Rahm Emmanuel, has said, “[N]ever let a serious crisis go to waste.”¹¹

The question this paper raises is whether the union movement can be proactively involved in not wasting this crisis – in helping the recovery from the Great Recession with a stronger, more equal economic order. Answering that question is not easy. On one hand it is clear that the union movement is unlikely to have a positive impact if it continues in its decline. On the other hand, it also seems clear that if the union movement continues to do what it has always done, the decline will continue.¹² If national unions, including U.S. unions, need to change their ways, the thesis of this article is that they need to refocus their organizational strategies toward building transnational unionism. Part II will set forth the public policy basis for unionism – that labor is not a commodity and that economic inequality

percent of income. In 2007, those earners received 23.5 percent.

Economists are seeking to determine if inequality causes the increase in financial risk.

8. Lynk, *supra*, note 4, at 18; see also ROBERT KUTTNER, *EVERYTHING FOR SALE: THE VIRTUES AND LIMITS OF MARKETS* 100 (1997) (arguing that unions are “a force for greater equality, because they [have] promoted a more egalitarian distribution of earnings”).

9. DAVID MADLAND & KARLA WALTER, CTR. FOR AM. PROGRESS ACTION FUND, *WHY IS THE PUBLIC SUDDENLY DOWN ON UNIONS?: THE BAD ECONOMY’S TO BLAME – SUPPORT SHOULD RECOVER WHEN THE ECONOMY DOES* 1 (2010), available at <<http://lawprofessors.typepad.com/files/why-is-the-public-suddenly-down-on-unions.pdf>> (stating that support for all institutions, including unions and their leaders, declines in bad economic times such as the Great Recession).

10. See ANDREW SUM ET AL., CTR. FOR LABOR MKT. STUDIES, NORTHEASTERN UNIV., *LABOR UTILIZATION PROBLEMS OF U.S. WORKERS ACROSS HOUSEHOLD INCOME GROUPS AT THE END OF THE GREAT RECESSION: A TRULY GREAT DEPRESSION AMONG THE NATION’S LOW INCOME WORKERS AMIDST FULL EMPLOYMENT AMONG THE MOST AFFLUENT* 9 (2010), available at <http://www.clms.neu.edu/publication/documents/Labor_Underutilization_Problems_of_U.pdf> (discussing that lower income persons were predominantly affected by recession and affluent were not). This report also contains statistics for the Great Recession as of February, 2010.

At the end of 2009, the overall unemployment rate for European Union member states was 8.9 percent. The range for EU members was 3.5 percent for the Netherlands at the low end to 18.1 percent in Spain at the high end. The unemployment rate in the U.S. at the end of 2009 was 9.3 percent. See News Release, Org. for Econ. Co-operation and Dev., *OECD Harmonised Unemployment Rates* 3 (Feb. 8, 2010), available at <<http://www.oecd.org/dataoecd/17/54/44563975.pdf>>.

11. See Editorial, *A 40-Year Wish List*, WALL ST. J., Jan. 28, 2009, at A14, available at <<http://online.wsj.com/article/SB123310466514522309.html>>.

12. National unions have focused on national markets within the context of national labor laws. That has allowed global enterprises to divide and conquer unions across the globe. See Kate Bronfenbrenner, *Introduction*, *GLOBAL UNIONS: CHALLENGING TRANSNATIONAL CAPITAL THROUGH CROSS-BORDER CAMPAIGNS* 4 (Kate Bronfenbrenner ed., 2007).

is best redressed through freedom of association and collective bargaining. Part III describes the prevailing social, political, and economic policy – neoliberalism¹³ favoring unregulated markets – which the union movement confronts and which is one cause for the movement’s decline. Part IV demonstrates how the unexamined assumptions underlying neoliberalism have made it difficult for the union movement to be successful within the present environment of global enterprise contrasted with national unions. Part V suggests a path – developing transnational unionism – that is not now well developed but that may turn around the general downward movement of unionism. A strengthened labor movement can then, more readily, help bring about stronger economies with greater economic equality.

II. PUBLIC POLICY SUPPORTING UNIONISM

It has long been an established public policy that labor is not a commodity and that freedom of association and collective bargaining are the preferred method for organizing employment. In the United States, as early as 1914, Congress enacted the Clayton Antitrust Act, section 6 of which provided, “[t]hat the labor of a human being is not a commodity or article of commerce.”¹⁴ That statement of policy became an international public policy with the resurrection of the International Labour Organization (ILO) toward the end of World War II.¹⁵ In its 1944 Declaration, the ILO channeled the Clayton Act by declaring that “labour is not a commodity.”¹⁶ More recently, in its 2008 Declaration, which added the objective of decent work to its four fundamental principles, the ILO reaffirmed “that labour is

13. Neoliberalism is a philosophy in which the existence and operation of free markets are valued in themselves. The operation of a market or market-like structure is seen as an ethic in itself, capable of acting as a guide for all human action, and substituting for all previously existing ethical beliefs. In the United States, it is also called “neoclassical” economics. See generally MANFRED B. STEGER & RAVI K. ROY, NEOLIBERALISM: A VERY SHORT INTRODUCTION (2010). For a description of the impact of Milton Friedman’s “Chicago Boys” on this development, see generally, NAOMI KLEIN, THE SHOCK DOCTRINE: THE RISE OF DISASTER CAPITALISM (2007).

14. Pub. L. No. 63-212, § 6, 38 Stat. 730, 731 (1914) (codified at 15 U.S.C. § 17 (2006)). The Clayton Act attempted, ultimately unsuccessfully, to eliminate the issuance of injunctions by federal courts in labor disputes.

15. Founded in 1919 as part of the push to form the League of Nations, the ILO survived the League’s demise but struggled through the Great Depression and World War II. See generally ANTHONY E. ALCOCK, HISTORY OF THE INTERNATIONAL LABOUR ORGANIZATION (1971).

16. Wang Jiyuan, Deputy Director for ILO Subregional Office for East Asia, Opening Remarks on the Occasion of the ILO’s 90th Anniversary (Apr. 28, 2009), available at <<http://www.ilo.org/public/english/anniversary/90th/download/events/laos/ilodirspeech.pdf>> (giving a recap of the ILO ninety years later). For the proposition that the ILO followed U.S. law, see Harry Arthurs, *Extraterritoriality by Other Means: How Labor Law Sneaks Across Borders, Conquers Minds, and Controls Workplaces Abroad*, 21 STAN. L. & POL’Y REV. 527, 532 (2010) [hereinafter Arthurs, *Extraterritoriality*].

not a commodity.”¹⁷

U.S. law has also addressed economic inequality and its connection with the protection of the union movement. The Findings and Declaration of Policy of the Wagner Act of 1935 states that economic inequality burdens and does not expand economic efficiency:

The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce, and tends to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners in industry and by preventing the stabilization of competitive wage rates and working conditions within and between industries.¹⁸

Just as the Wagner Act valued freedom of expression and collective bargaining as the primary way for setting the income of workers, the foundational 1944 Declaration of the ILO included as a core principle that “freedom of expression and of association are essential to sustained progress.”¹⁹ More recently, in its 1998 Declaration, the ILO reemphasized the importance of freedom of expression and expanded it to include collective bargaining so that its basic principles now clearly include the “freedom of association and the effective recognition of the right to collective bargaining.”²⁰

In response to the Great Recession, the ILO called for a Global Job Pact to create decent work while also calling for stronger collective bargaining.²¹ In April 2009, Director General Somavia reported that 80

17. *Fundamental Rights at Work*, INT’L LABOUR ORG. (last updated Feb. 6, 2009), <http://www.ilocarib.org.tt/portal/index.php?option=com_content&task=view&id=1152&Itemid=1216> (discussing the four principles of the 1998 declaration, which includes right to associate); see also INT’L LABOUR OFFICE, *INFOCUS PROGRAMME ON PROMOTING THE DECLARATION ON FUNDAMENTAL PRINCIPLES AND RIGHTS AT WORK* (n.d.), available at <http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---declaration/documents/publication/wcms_095898.pdf> (providing an overview of the 1998 declaration).

18. 29 U.S.C. § 151 (2006).

19. See ILO Constitution, Annex I, available at <<http://www.ilo.org/ilolex/english/iloconst.htm>>; see also ILO, *INTERNATIONAL LABOUR ORGANIZATION* (n.d.), available at http://www.ilo.int/wcmsp5/groups/public/---dgreports/---dcomm/---webdev/documents/publication/wcms_082361.pdf (recapping basic ILO documents which include this famous phrase).

20. ILO, *ILO DECLARATION ON FUNDAMENTAL PRINCIPLES AND RIGHTS AT WORK: ANNUAL FOLLOW-UP CONCERNING NON-RATIFIED FUNDAMENTAL CONVENTIONS* (n.d.), available at <http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---declaration/documents/genericdocument/wcms100453.pdf>.

21. Press Release, Int’l Labour Org., *ILO Adopts “Global Jobs Pact” Aimed at Creating Jobs, Protecting Workers and Stimulating Economic Recovery* (June 19, 2009), available at <http://www.ilo.org/global/About_the_ILO/Media_and_public_information/Press_releases/lang--en/WCMS_108482/index.htm>.

percent of the workers in the world had no social protections and that millions of workers had lost their jobs in the Great Recession. One of his eleven proposed responses dealt with unions and collective bargaining: "Strengthened collective bargaining arrangements to facilitate negotiated wage settlements, especially regarding low-paid workers, aimed at sustaining real incomes and thus consumer demand."²² In his report to the 2010 Conference of the ILO, Director General Somavia presented extensive discussion about all of the necessary responses to the employment consequences of the Great Recession. His only reference to unions and collective bargaining was his call for social dialogue among the social partners – unions and employers.²³ There were, however, no concrete proposals to make this come to fruition. Absent developing some alternatives, it appears that the ILO assumes that unions can succeed if they continue to do what they have always done in the manner they have always done it.

The question addressed in the next section is how well the policy that labor is not a commodity and that freedom of association and collective bargaining are valued because they lead to greater economic equality fares when neoliberal economic and social theory prevails.

III. THE LABOR MARKET FROM A NEOLIBERAL VIEWPOINT

The prevailing, but largely unexpressed, assumption is that the most important basis for policy decisions well beyond economic policy is neoliberal theory. From the viewpoint of labor, our social policy at the operational level treats it as a commodity, like any other commodity, that should be subject to a free market without government intervention.²⁴

22. Juan Somavia, Director-General of the International Labour Office, Statement to the International Monetary and Finance Committee and Development Committee: Shortening the Global Recession, Accelerating Recovery and Setting Course for Inclusive and Sustainable World Development, (Apr. 25-26, 2009), available at <<http://www.ilo.org/public/english/bureau/dgo/speeches/somavia/2009/ifi.pdf>>.

23. JUAN SOMAVIA, RECOVERY AND GROWTH WITH DECENT WORK 8 (2010) (report of Director General Somavia to the 2010 ILO Conference), available at <http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meetingdocument/wcms_140738.pdf>.

24. In situations where the workers bring special skills and attributes to the job, the labor market will value those contributions without need for regulation. Even as to workers without special skills, collective action by a group of them could, theoretically, be the result of bargaining between labor and capital if left free of regulation. Up until the passage of the Wagner Act in 1935, the primary legislative goal of the U.S. union movement was to take the thumb off the scale of the federal courts' use of antitrust law restricting union activity. The Norris-LaGuardia Act in 1932 gave the union movement what it asked for. But, in the depth of the Great Depression, a labor market free of legal regulation did not provide any real benefit to the union movement. Milton Friedman, however, viewed that such a free market approach to the labor market would not result in much of a difference in result since, in his view, unions were not very effective in achieving the redistribution to labor from capital. See Milton Friedman, *Some Comments on the Significance of Labor Unions for Economic Policy*, in THE IMPACT

Neoliberal,²⁵ or neoclassical, theory was articulated by and identified with Milton Friedman.²⁶ At the onset of the Great Recession, there were pronouncements that neoliberalism was dead, that Keynesian theory would be revived to supplant it.²⁷ Initially, there had been some movement towards the adoption of some Keynesian-based policies, which are based on a macroeconomic view of the economy.²⁸ Those efforts have receded,

OF THE UNION 204, 204 (David McCord Wright ed., 1951). The primary political goal of unions to free the labor market of government regulation lasted much longer in the United Kingdom. It lasted until the formation of the new Labour Party under the leadership of Tony Blair in the mid-1990s. During the 1980s and 1990s, for example, the United Kingdom resisted extension of European Union employment protection rights by opting out of the Social Chapter to the Maastricht Treaty which Tony Blair signed in 1997. See JOHN DEARLOVE & PETER SAUNDERS, INTRODUCTION TO BRITISH POLITICS 429-34 (3d ed. 2000).

25. Harry Arthurs, a prominent Canadian law professor, claims that Canada has constitutionalized a contractarian view of employment and "under American tutelage, we have accepted neo-liberalism as the default policy of [Canadian] political economy." See Arthurs, *Constitutionalization supra* note 3, at 9.

26. See generally Milton Friedman, *The Role of Monetary Policy*, AM. ECON. ASS'N, Mar. 1968, at 1; see also Paul Krugman, *Who Was Milton Friedman?*, N.Y. REV. BOOKS, Feb. 15, 2007, at 27, available at <<http://www.nybooks.com/articles/archives/2007/feb/15/who-was-milton-friedman/>>.

Harry Arthurs recently described the migration of neoliberalism ideas transnationally and its impact on workers:

[O]ver the past three decades or so, the extraterritorial migration of neoliberal ideas, propagated largely in British and American intellectual circles, has persuaded other countries to adopt policies that have led to widespread deregulation of labor markets, reduction of worker entitlements, flexibilization of the workforce, disempowerment of unions, growth in income inequality, [and the] contraction of social safety nets. . . .

Harry Arthurs, *Extraterritoriality, supra* note 16, at 112.

27. Brian Langille, *Imagining Post "Geneva Consensus:" Labor Law for Post "Washington Consensus" Development*, 31 COMP. LAB. L. & POL'Y J. 523, 523-30 (2010) (showing how the consensus has broken down about international economic policy that had been characterized as the "Washington Consensus"); see also Paul Krugman, *Keynes: The Return of the Master* by Robert Skidelsky, THE OBSERVER, Aug. 30, 2009, available at <<http://www.guardian.co.uk/books/2009/aug/30/keynes-return-master-robert-skidelsky>> (stating that people giggled at the thought of reviving Keynesian economics in the 1980s, but it looks like Keynes got the final giggle since many governments are increasingly turning back to Keynesian economic principles). For an essay describing Keynes' view of economic globalization, see David Singh Grewal, *What Keynes Warned about Globalization*, SEMINAR MAG. (2009), available at <http://www.india-seminar.com/2009/601/601_david_singh_grewali.htm>.

28. See J.D. Foster, *Keynesian Fiscal Stimulus Policies Stimulate Debt – Not Economy*, THE HERITAGE FOUND. (July 27, 2009), <<http://www.heritage.org/Research/Reports/2009/07/Keynesian-Fiscal-Stimulus-Policies-Stimulate-Debt-Not-the-Economy>> (discussing Japan and a few other countries which used Keynesian economic principles, along with the stimulus package in the U.S.); see also *Economic Stimulus (Jobs Bill)*, NYTIMES.COM (updated Dec. 15, 2010), http://topics.nytimes.com/top/reference/timestopics/subjects/u/united_states_economy/economic_stimulus/index.html (discussing cost of Stimulus Bill in 2008 as well as the most recent "Jobs Bill" which passed as well); *EU Plans 130-Billion-Euro Stimulus Plan: Germany*, THE ECONOMIC TIMES (Nov. 20, 2008, 3:59 AM IST), <<http://economictimes.indiatimes.com/articleshow/3734526.cms>> (discussing EU stimulus package in 2008); Gonzalo Vina, *British PM Unveils US\$22B Stimulus Package*, NATIONALPOST.COM (Nov. 24, 2008), <<http://www.nationalpost.com/story.html?id=987952>> (discussing Britain's stimulus package in 2008).

There has been considerable effort to attempt to replace this narrow economic basis for social policy with broader, more humanistic bases. For one example, DEREK BOK, *THE POLITICS OF HAPPINESS: WHAT GOVERNMENT CAN LEARN FROM THE NEW RESEARCH ON WELL-BEING* 3-7 (2010),

however, in the face of strong pressure from those committed to neoliberalism. The unstated assumption remains that the neoliberal theory of free markets with minimal regulation is the starting point not only of our economic but also of our social policy.²⁹ A mantra that continues to resonate despite all that has happened recently is Ronald Reagan's aphorism from his first inaugural address: "[G]overnment is not the solution to our problem; government is the problem."³⁰ Under that view, all government regulation is suspect because it interferes with the operation of the markets and that interference reduces total economic activity. The only justification for regulation is when market failures are clearly established.

These neoliberal assumptions that continue to dominate discourse about economic as well as social policy put the union movement at a tremendous disadvantage. Neoliberalism assumes that labor relations is a zero-sum game between two players, capital and labor: what one side gains, the other loses.³¹ All that changes is the distribution of resources between the union and the employer, with the result being the reduction in overall production and employment since unionism interferes in markets that are presumed to be efficient. Redistribution of resources is not a goal of neoliberal economic and social policy. Instead, economic growth is the

argues that, even if it does not totally supplant neoliberal economic theory, sociologically and psychologically based "happiness" theory should be used to evaluate social policies. Amartya Sen has developed an entire field of economic theory – welfare economics – that looks far beyond neoliberal norms. See AMARTYA SEN, *COLLECTIVE CHOICE AND SOCIAL WELFARE* (1970). For a searing indictment of economic determinism and an argument for a fundamentally different way to look at capitalism, see WOLFGANG STREECK, *RE-FORMING CAPITALISM: INSTITUTIONAL CHANGE IN THE GERMAN POLITICAL ECONOMY* (2009). For a critique of neoliberal theory with the focus on labor law and policy, see STEPHEN F. BEFORT & JOHN W. BUDD, *INVISIBLE HANDS, INVISIBLE OBJECTIVES: BRINGING WORKPLACE LAW & PUBLIC POLICY INTO FOCUS* (2009).

29. See Robert Reiner, *Citizenship, Crime, Criminalization: Marshalling a Social Democratic Perspective*, 13 NEW CRIM. L. REV. 241, 256 (2010) (discussing how neoliberalism became the new economic and social policy starting point in U.S., Britain, and other countries). Britain immediately implemented neoliberalism in its new "law-and-order agenda." *Id.*; see also Layna Mosley, *Globalisation and the State: Still Room to Move?*, 10 NEW POL. ECON. 355, 358 (2005) (neoliberalism has limited even larger governments intervening in areas of social policy); James J. Varellos, *The Constitutional Political Economy of Free Trade: Reexamining NAFTA-Style Congressional-Executive Agreements*, 49 SANTA CLARA L. REV. 717, 756-57 (2009) (neoliberalism has had the effect of limiting governments in terms of social policies). Also, for a broad perspective on the rise of neoliberalism, its precepts, and its implications for social policy, see generally DAVID HARVEY, *A BRIEF HISTORY OF NEOLIBERALISM* (2005); see also ROBERT POLLIN, *CONTOURS OF DESCENT: U.S. ECONOMIC FRACTURES AND THE LANDSCAPE OF GLOBAL AUSTERITY* 3-20 (2003).

30. Drew Westen, *Rebranding Government: It's Time Politicians Stopped Running for or against Government and Started Running It Well*, HUFFINGTON POST, (Jan. 26, 2009, 10:16 AM), <http://www.huffingtonpost.com/drew-westen/rebranding-government-its_b_160851.html> (discussing how Reagan's words in his inaugural speech (i.e., branding government as evil) still has impact on government).

31. Jeffrey M. Hirsch, *Making Globalism Work for Employees*, 54 ST. LOUIS U. L. J. 427, 431-32 (2010).

singular goal, which makes capital the preferred player vis-à-vis labor.³² The distribution of the economic benefits is of no concern because it is assumed that an unfettered market will produce the largest amount of economic activity with the fruits of that economy distributed better than any alternative. Simply, the goal is to enlarge the economic pie and not to worry about who gets the slices or what size the slices are. By 1989, this came to be characterized as the so-called “Washington Consensus”³³ because it was the basis for U.S. domestic economic and social policy and for U.S. international relations, as well as for the international institutions headquartered in Washington, D. C.³⁴

Neoliberalism focuses on microeconomics – how individuals and individual entities operate in the larger economy.³⁵ Thus, for each enterprise, low labor costs – the payment of low wages and the provision of minimal employment benefits – contributes to the ability of each enterprise to compete successfully in its product market. From that viewpoint, the cost of labor is a commodity because it is one element in the total costs of production. While the policies underpinning the Wagner Act do take a

32. Eric Tucker, *Re-Norming Labour Law: Can We Escape Labour Law's Recurring Regulatory Dilemmas?*, 39 INDUS. L.J. 99, 102-03 (2010).

33. John Williamson coined the phrase in 1979. John Williamson, *A Short History of the Washington Consensus* (2004), <<http://www.iie.com/publications/papers/williamson0904-2.pdf>> (recapping the coining of the term “Washington Consensus” and the subsequent different uses of the term and expressing amazement that people could reach the conclusions based on the ten points that he said formed the consensus).

34. More recently, there has been a movement away from that consensus, even among those international institutions. By 1996 in a speech at New York University, Pascal Lamy, Director-General of the World Trade Organization, indicated that the time for the Washington Consensus had passed.

I know that some believe that governments can only do harm. I dare to disagree – markets do a better job, the better the institutional environment in which they act. The hand that determines the quality of institutions tends not to be invisible but, instead, often belongs to a policy maker. Markets do a good job in creating wealth, but they do not care about the distribution of this wealth. I therefore strongly believe in the positive role of governments and I agree with others that we have passed the time of the Washington Consensus. It is time for a new consensus. Call it “Geneva consensus”, if you like.

Pascal Lamy, *Making Trade Work for Development: Time for a Geneva Consensus* (Oct. 20, 2006), <http://www.wto.org/english/news_e/sppl_espp145_e.htm>.

35. Michael J. Malinowski, *Dealing with the Realities of Race and Ethnicity: A Bioethics-Centered Argument in Favor of Race-Based Genetics Research*, 45 Hous. L. Rev. 1415, 1440 n.101 (2009).

The basic distinction is that microeconomics is about how markets operate, while macroeconomics is about how economies function. See Peter Howitt, *Macroeconomics: Relations with Microeconomics*, in 3 THE NEW PALGRAVE: A DICTIONARY OF ECONOMICS 273-75 (John Eatwell et al. eds., 1998) (outlining the disjunction between micro- and macroeconomics); Douglass C. North, *Economic Performance Through Time*, in NOBEL LECTURES: ECONOMICS 1991-1995, at 112, 112 (Torsten Persson ed., 1997) (describing neoclassical microeconomic theory as concerned with market operation and not economic function); see also LEONARD SILK & MARK SILK, MAKING CAPITALISM WORK 165, 175 (1996).

microeconomic viewpoint, these policies, with their focus on unequal bargaining power of individual workers versus their organized employers, also focus on macroeconomics – how the economy overall operates. From a macroeconomic view, the smaller the aggregated labor costs are for all enterprises in an economy, the smaller the resulting economy will be because workers are also consumers.³⁶ Increasing workers' pay so that, as consumers, they have greater amounts of disposable income is not a new concept. It goes back at least to Henry Ford's decision to raise the pay of all his employees to five dollars per day in part to increase the ability of consumers to have income sufficient to purchase his cars.³⁷

Consumer buying is a large share of the total economic activity in this country, and a significant percentage of all consumers are workers. The difference between micro- and macro-economic perspectives demonstrates the difficult logic of the collective action problem that enterprise faces:³⁸ Overall, business collectively would have greater demand for products and services if consumers collectively had more income available to purchase those goods and services. But, each enterprise individually will be best off if it has low labor costs while operating in the most robust economy possible.³⁹ With labor costs that are lower than its competitors, that

36. The U.S. economy has been driven by consumer spending. In the post-World War II era, when economic inequality was being reduced, the economy grew because of the emergence of a substantial middle class that was created as a result of the increased income of a growing part of the population. Since the 1970s, the growth in the economy increasingly went to the top of the economic hierarchy, and, as a result, inequality grew. See generally Daniel P. Gitterman et al., *Confronting Poverty: What Role for Public Programs*, 10 EMP. RTS. & EMP. POL'Y J. 9 (2006) (describing the macroeconomic policies from the New Deal era to the late 1990s as providing greater wages to more people to ensure economic growth and to end poverty); David Cay Johnston, *Richest are Leaving Even the Rich far Behind*, N.Y. TIMES, June 5, 2005, at 11 (reporting that the share of the top .1 percent of households more than doubled between 1980 and 2002 while the share earned by the bottom 90 percent of households fell).

37. *The Five Dollar Day*, <http://web.bryant.edu/~ehu/h364proj/summ_99/armoush/page3.html> (last viewed Jan. 9, 2011); see also, Mark Barenberg, *Law and Labor in the New Global Economy: Through the Lens of United States Federalism*, 33 COLUM. J. TRANSNAT'L L. 445 (1995) (stating that New Deal legislation helped construct the huge U.S. domestic market). It has been speculated that China is attempting to increase the incomes of workers in order to build a more robust domestic economy, see, *The Next China: China's Labour Market*, THE ECONOMIST, July 31, 2010, at 49, available at <http://www.economist.com/node/16693397?story_id=16693397&fsrc=rss>.

38. See MANCUR OLSON, *THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS* 1-3 (1965) (articulating logic of collective action analysis).

39. Robert Reich, *How to End the Great Recession*, N.Y. TIMES, Sept. 3, 2010, at A21, available at <www.nytimes.com/2010/09/03/opinion/03reich.html>, explains that the reason that the economy seems not to be rising out of the Great Recession is that the middle class no longer has middle class earnings necessary to support a robust economy: "[C]onsumers no longer have the purchasing power to buy the goods and services they produce as workers; for some time now, their means haven't kept up with what the growing economy could and should have been able to provide them. . . . The median male worker earns less today, adjusted for inflation, than he did 30 years ago." He explains that families kept up with middle class needs until the Great Recession by women entering the workplace, all workers putting in more hours worked, and pulling money out of the increasing value of their homes.

enterprise is better able to compete on product or service pricing. So, despite the advantages to the collectivity, it is very hard to hold all the enterprises together because of the incentive of each enterprise to try to be a “free rider” on that collective advantage.

When the capital side of the equation organizes itself by creating corporations, partnerships, or independent contractual relationships, the resulting organization of economic activity is viewed positively from the neoliberal perspective. It is presumed that such enterprise formation is done as a rational economic decision to increase efficiency. All the economic activity in the nation, including that of all of enterprise, is aggregated with the sum equal to its Gross Domestic Product (GDP). Dividing GDP by the population gives the per capita GDP. The goal of neoliberal or neo-classical social and economic policy is to increase GDP, which results in a higher per capita GDP. But higher per capita GDP says nothing about the distribution of income or wealth in a society. While the per capita GDP was estimated to be about \$46,000 in the United States in 2009,⁴⁰ the total income and wealth included in it is distributed very unequally with that inequality growing dramatically so far this century.⁴¹ While the GINI index shows how economically equal societies are,⁴² it has not been the focus of public policy because of neoliberal theory that the key focus must be on GDP, not distribution or redistribution issues.

When the labor side of the equation organizes itself, i.e., forms a union, the collective strength of labor is presumed to be greater than the sum of the bargaining power of workers individually. Think about it in terms of the core exercise of collective employee action – a strike – versus the actions of an individual employee. If one employee is so upset with her conditions of employment that she tells the employer she will quit unless those conditions are improved, most employers in most situations will not be affected very substantially if they refuse and the employee carries out

40. *The World Factbook*, CENT. INTELLIGENCE AGENCY, <<https://www.cia.gov/library/publications/the-world-factbook/rankorder/2004rank.html>> (last viewed Jan. 19, 2011).

41. James Surowiecki, *Soak the Very, Very Rich*, THE NEW YORKER, Aug. 16 2010, <<http://readersupportednews.org/off-site-opinion-section/83-83/2680-soak-the-very-very-rich>>:

[From 2002 to 2007], the top one per cent has seen its share of national income double; in 2007, it captured twenty-three per cent of the nation's total income. Even within the top one per cent, income is getting more concentrated: the top 0.1 per cent of earners have seen their share of national income triple over the same period. All by themselves, they now earn as much as the bottom hundred and twenty million people.

42. The GINI index shows the proportion of the income going to the poorest people, middle-income people, and richest people. In a group of 134 countries, Namibia was the most unequal while Sweden was the most equal. The United States was number forty-two. *The World Fact Book: Country Comparison: Distribution of Family Income – GINI Index*, CENT. INTELLIGENCE AGENCY, <<https://www.cia.gov/library/publications/the-world-factbook/rankorder/2172rank.html>> (last viewed Jan. 19, 2011).

her threat.⁴³ So, if the employer does not address one employee's concerns and the employee either quits or learns to live with the conditions of the job, there is little negative impact on the business. If individual employees over time continue to complain, the employer can usually replace them individually without too much interruption with the ongoing business.⁴⁴

In contrast, if all the employees are so upset with the conditions of their work and if they can present more or less a united front vis-à-vis the employer,⁴⁵ the employer may suddenly be faced with a much more immediate and potentially larger impact on operations. The collective action by substantially all the workers – a strike – could bring the business to a halt in the short term as well as disrupt operations for a prolonged period of time.⁴⁶ While unions in collective bargaining can sometimes offer “carrots” to employers to improve business,⁴⁷ the “stick” of a strike has been effective historically at getting employers to agree to collective bargaining agreements that improved wages and other terms and conditions of employment. In short, a strike by employees of an employer joined together, whether or not in a union, can result in redistributing benefits from the capital to the labor side of the ledger.⁴⁸ From the neoliberal point

43. Some workers, of course, are unique. LeBron James recently demonstrated that very powerfully. They have bargaining power with their employers because they cannot be readily replaced. When looked at from the viewpoint of individual employees, the burden of replacement sets the level of bargaining power the individual employee has. See, e.g., Lisa Dillman, *Griffin a Selling Point in Pursuit*, L.A. TIMES, July 3, 2010, at 7, available at <<http://articles.latimes.com/2010/jul/02/sports/la-sp-clippers-lebron-20100703>> (reporting that LeBron asked teams questions regarding their coaching, and their rosters; decisions not generally asked by players, and teams were using other star players to lure him in).

44. Too rapid and sustained turnover of workers, however, may raise the cost of replacement to a level that the employer will respond by improving conditions for its incumbent workers.

45. See *NLRB v. Washington Aluminum Co.*, 370 U.S. 9 (1962) (holding that employees' strike to protest working conditions is concerted action protected by the National Labor Relations Act (NLRA)). In economic terms, a successful strike gives the workers, at least in the short term, monopolistic power over the supply of labor. See, Hirsch, *supra* note 31, at 432-33.

46. Thomas A. Kochan, *Restoring Workers' Voice: A Call for Action*, Presented at the Ray Marshall Center for the Study of Human Resources Conference: The Future of Organized Labor 4 (Apr. 23, 2003), available at <http://mitsloan.mit.edu/iwer/pdf/America_labor_movement_5.pdf> (revised Aug. 15, 2003), claims that the two conditions necessary for collective bargaining to work to the advantage of workers are:

(1) Unions organized, or served as a credible threat to organize a sufficient part of the relevant labor and product market to “take wages out of competition,” and (2) unions could mount a credible strike threat as their key source of power.

47. The Service Employees International Union (SEIU), for example, has utilized the “carrot” of multiemployer bargaining among janitorial contractors, which has the effect of taking labor costs out of the competition these contractors face in dealing with building owners. See Christopher L. Erickson et al., *Justice for Janitors in Los Angeles: Lessons from Three Rounds of Negotiation*, 40 BRIT. J. INDUS. REL. 543, 560-62 (2002).

48. From a neoliberal point of view, collective action by workers in one part of the economy impacts employment generally but also affects the relationship in the market for goods produced by union versus nonunion employers. Neoliberals characterize that effect as distorting the market and reducing its overall size.

of view, enacting laws that require employers to bargain with representatives of their workers is presumed to be unjustified since these laws are not limited to correcting market failures but, instead, supposedly impact negatively on overall economic growth that neoliberalism predicts can only be achieved through free markets.⁴⁹ In short, our social policy treats labor as a commodity that should be subject to a free market without government intervention. That puts workers at a serious disadvantage.

Recent events in China show how this works, even without the involvement of the union that supposedly represents the workers.⁵⁰ The All China Free Trade Union (ACFTU) is the only union that can legally operate in China, which makes the ACFTU essentially part of the government.⁵¹ Historically, the ACFTU has failed to fulfill the role of a union by representing workers vis-à-vis their employers, especially in collective bargaining.⁵² Instead, it has focused on "labor discipline," which means that the unions side with the employers and the government. Thus, the workers do not think the union is on their side versus their employers.⁵³ In essence, there appears to be no freedom of association or collective bargaining that is legally recognized. Yet, "more than 60,000 mass protests occur in China every year, many of which are labor disputes."⁵⁴ The heightened demand for workers in the labor market, particularly in eastern China, has given the workers leverage against their employers, even in the absence of a real union. To utilize that leverage, workers self-organize. It appears that the general labor supply is tight in areas where the strikes occur. That increases the possibility that the workers can gain monopolistic control over the labor market through an effective strike.

Some of the major strikes that have taken place recently in China have gotten international attention. The workers in a number of Honda joint venture factories have gone out on strike seeking better pay.⁵⁵ "The state-controlled labor union said it had played no role in the action. The Honda workers in Foshan said they had independently organized the strike."⁵⁶

49. Long ago, Milton Friedman argued that the net effect of labor union activity on the economy was small. See Friedman, *supra* note 24, at 204.

50. See generally *The Next China*, *supra* note 37.

51. The ACFTU is the only confederation of unions allowed. All individual unions must affiliate with the ACFTU to be legal. Since workers lack the freedom to organize unions not affiliated with the ACFTU, Chinese unions are more so in name than in deed. See generally Brown, *supra* note 2.

52. Ronald C. Brown, *Reform for the Benefit of Workers*, CHINA DAILY, July 14, 2010, at 9, available at <http://www1.chinadaily.com.cn/opinion/2010-07/14/content_10102732.htm>.

53. *Id.*

54. *Id.*

55. Keith Bradsher, *Workers Squeezing Honda with Especially Costly Strike*, N.Y. TIMES, May 29, 2010, at A3.

56. David Barboza, *Workers in China Accept Deal, Honda Says*, N.Y. TIMES, June 5, 2010, at B3.

After several weeks, the strike was settled with some workers claiming they had received 34 percent pay increases.⁵⁷ So, even without the support of the organized union, these Chinese workers organized themselves to use their leverage to improve their wages and working conditions.⁵⁸ In terms of neoliberal theory, these workers, through their collective action, created an immediate shortage in a tight labor market with high demand for workers.⁵⁹ So the workers won bargaining gains. The impact of the strike on Honda caused it to shut all four of its assembly plants in China at a time when the market for new cars was strong.⁶⁰ From the viewpoint of the employer, the economic consequences of an ongoing strike outweighed the labor costs that would be added by increasing wages in order to settle the strike.

In contrast to the apparent success of Chinese workers, a recent strike in the U.S. that has gotten some public attention was not as successful. Employees at a Mott's apple juice plant in upstate New York went on strike on May 23, 2010, seeking a new collective bargaining contract. The strike continued until September 13, 2010.⁶¹ During the strike, the plant continued to operate using replacement workers. The issues involved demands by the employer, which is part of the Dr Pepper Snapple Group, to seek substantial concessions from the union. The employer wanted to cut wages by about \$3000 per year, freeze pensions, end pensions for new hires, reduce the company's 401(k) contributions and increase the employees' co-pay for health insurance.⁶² Though the Dr Pepper Group earned record profits in 2009, it argued that the workers averaged twenty-one dollars per hour while comparable workers in the area made only fourteen dollars.⁶³ The company claimed as its goal bringing its labor costs more in line with local, weak labor market conditions. Defending its demands, Mott's apple argued that, "as a public company, Dr Pepper Snapple Group has a fiduciary responsibility" to more than just its workers.⁶⁴ Therefore, it contested the union argument that "a profitable

57. *Id.*

58. Keith Bradsher, *Parts Strike Forces a Honda Shutdown in China*, N.Y. TIMES, May 28, 2010, at B1.

59. Barboza, *supra* note 56.

60. Bradsher, *supra* note 58.

61. During the production of this article, the strike settled, with the union accepting a pay freeze and management giving up on demanded reductions in pay. The union and management also compromised on retirement and health plan cost issues. Steven Greenhouse, *Ending Strike, Mott's Plant Union Accepts Deal*, N.Y. TIMES, Sept. 14, 2010, at B6, available at <<http://www.nytimes.com/2010/09/14/business/14mott.html>>.

62. Steven Greenhouse, *In Mott's Strike, More Than Pay at Stake*, N.Y. TIMES, Aug. 17, 2010, at B1.

63. *Id.*

64. *Id.*

company shouldn't seek concessions from its workers." A union representative characterized the employer as simply arguing, "We have no financial need for this, but we just want it anyway because we figure we can get away with it."⁶⁵

While the plant continues to operate with replacements, the parties dispute how much it is producing. As of this writing, the fall 2010 was arriving and with it the annual apple harvest. The reality of whether or not the plant can keep up with the supply of apples is likely to influence the outcome of a strike at this plant.⁶⁶ If production falls short of processing the annual apple harvest, that will give some leverage to the union and the workers. If, however, the plant comes close to meeting normal expectations, the employer gains leverage.⁶⁷

In sum, the economic dynamics of the labor and product markets have a significant impact on the outcome of labor disputes, whether or not the workers are represented by a union that is working on their behalf. Presumably, at the time of this writing, the labor market in China gives leverage to the workers, even in the absence of any involvement of their union, while the union representing the workers in the U.S. apple processing plant lacks sufficient leverage to force a settlement because new employees can be found in the local labor market who will work for substantially less than the incumbent workers. The success or lack thereof of the strikes in China and in upstate New York appear to be a product of local labor conditions. Organized collective action by the workers must work within the local labor market. But, those local labor markets are impacted by the larger national and worldwide labor markets. In other words, labor is a commodity at the worldwide level. When workers organize, they may be able to seek greater gains than the individual workers could attain, but all of this happens subject to the confines of local labor markets. Local labor markets all around the world are increasingly affected by the growing access enterprise has to the global labor market.

65. *Id.*

66. Traditionally the plant buys half the apples grown in this region with many orchards. *Id.* In a report filed with the Securities Exchange Commission, Dr. Pepper Snapple Group indicated the strike cost the company \$19 million, 2010 Mott's Strike Cost Parent Company \$19 million, Feb. 23, 2011, Steven Greenhouse, *Ending Strike, Mott's Plant Union Accepts Deal*, <http://www.nytimes.com/2010/09/14/business/14mott.html>, dated September 13, 2010.

67. Mott apple had more arrows in its quiver. It could have permanently replaced all the strikers. See *NLRB v. Mackay Radio & Telegraph Co.*, 304 U.S. 333, 345-46 (1938) (stating in dicta that employers could replace strikers to keep operating and promise them permanent positions even after the strike is over).

IV. LABOR AS A COMMODITY IN A NEOLIBERAL WORLD

Legislatively announcing that labor is not a commodity and that economic growth can best be achieved through freedom of association and collective bargaining unfortunately does not by itself affect economic equality.⁶⁸ That is because the economic incentives, though modified by various laws including the legal protection of freedom of association and collective bargaining, still drive individual employers to avoid or at least minimize dealing with unions and to minimize the costs associated with compliance with other labor standards legislation. While legal rules may alter the economic calculus for employers, these rules do not overcome the inherent logic of collective action problems,⁶⁹ on either the employer or the worker side equation: Collectively, enterprises would enjoy stronger market success the larger the demand for their products and services. While the economy generally would become larger by increasing the disposable incomes of workers as consumers, employers act independently vis-à-vis their workers. One of the “carrots” unions can give enterprises in the same product market is to impose uniform labor costs through multiemployer or pattern collective bargaining. That takes labor costs out of product competition. But still, individual entities are better off to the extent they can minimize total labor costs. Almost all workers on the other hand would be best off if they stood united against employers to maximize the gain for all while individual workers might be better off if they could cut individual deals while everyone else stayed united.⁷⁰

To go back to the example of the strike at the Mott’s apple juice plant, a member of the union bargaining team claimed that the plant manager even told him that labor in fact is only a commodity. “He said we’re a commodity like soybeans and oil, and the price of commodities go up and down. . . . [T]here are thousands of people in this area out of jobs, and they could hire any one of them for \$14 an hour.”⁷¹ Mott’s rested its claim for concessions from its workers on local labor market conditions in upstate

68. KAREN E. BRAVO, THE FOUND. FOR LAW, JUSTICE & SOC’Y, TRANSBORDER LABOUR LIBERALIZATION: A PATH TO ENFORCEMENT OF THE GLOBAL SOCIAL CONTRACT FOR LABOUR (2009), available at <<http://www.fljs.org/uploads/documents/Bravo.pdf>>, acknowledges that in fact aspects of labor involve it being a commodity:

I acknowledge the fundamental moral, philosophical and ethical truth that labour is not merely a commodity. . . . [W]hile *more* than a unit of production or economic input, human labour providers are *also* just that: economic units and factors of production.

Id. at 6 (emphasis in original).

69. See Olson, *supra*, note 38.

70. The exception would be a superstar like LeBron James, who would no doubt lose when a collective deal would be reached.

71. Greenhouse, *supra* note 62.

New York. But local and national labor markets are affected by the expanding global economy without regard to the national laws that apply.⁷² First, expanding the reach of free trade rules and relatively free investment opportunities globally gives businesses an expanded range of alternatives of where and how they operate.⁷³ More countries, with varying labor costs, labor laws, and other conditions, are available to enterprises to operate as the free trade/free investment regime has expanded. With the availability of a variety of legal forms of relationship and access to numerous countries within which to operate, businesses can minimize their obligations to deal with the collective power of workers in any particular jurisdiction just as they can structure their operations to take advantage of certain markets for raw materials or to avoid certain types of taxation.⁷⁴

Second, with the expanded globalization of economic activity, employers can take advantage in their operations of access to the national labor markets in many more countries. Those countries provide a wide array of different labor costs, labor standards, and the enforcement of those standards including laws supposedly protecting the freedom of association and collective bargaining rights of the workers.⁷⁵ While local and national labor markets still matter, the workers in each national labor market are ultimately competing with the workers in all of the other countries.⁷⁶ In other words, the labor market has gone global.⁷⁷

The ability to structure a business through various contractual

72. See BRAVO, *supra* note 68, at 2:

The forces of globalization – transborder economic and other trends – are such that domestic governments, standing alone, cannot control the effects on existing domestic [labor] contracts. Individual states cannot adequately provide protection for their national, including labour providers.

See also Michael J. Zimmer, *Escaping the Westphalian Trap: Unionism and Equality in China, Mexico and the United States*, REVISTA LATINOAMERICANA DE DERECHO SOCIAL, Enero-Junio 2010, at 347 (Mex.).

73. See, Tony Royle, *Book Reviews*, 31 COMP. LAB. L. & POL'Y J. 867, 870 (2010). After reviewing two recent books about Wal-Mart, Royle observes:

Overall one cannot but help conclude that giant corporations like Wal-Mart have successfully avoided government regulation in many areas (especially in the United States) and increasingly answer only to themselves in a world still dominated by free market ideology (despite the obvious failure of the market in the current crisis).

Id.

74. Katherine Van Wezel Stone, *To the Yukon and Beyond: Local Laborers in a Global Labor Market*, 3 J. SMALL & EMERGING BUS. L. 93, 95-97 (1999). An example is the move by Halliburton from its Houston headquarters to Dubai. Brett Clanton, *Halliburton CEO says Dubai Base the "Right Decision"*, HOUS. CHRON. (May 21, 2008, 10:31 PM) <<http://www.chron.com/disp/story.mpl/headline/biz/5795524.html>>; see BEFORT & BUDD, *supra* note 28, at 117.

75. Stone, *supra* note 74, at 95-97.

76. Kochan, *supra* note 46, at 4 ("Global competition and the rise of non-union competition in all but a few industries and some large cities makes it difficult to take wages out of competition.").

77. See Zimmer, *supra* note 72.

techniques furthers an enterprise's ability to achieve what it considers its most efficient form of operation. Combining outsourcing to independent legal entities within one country with offshoring of work to another country, with or without outsourcing,⁷⁸ allows employers to put operations, either as an integral part of the parent businesses or through supply chains of independent contractor relationships, wherever it is most consistent with their overall business plans.⁷⁹

Work that requires low skill levels can be done at an employer's own operation in a low labor cost country or, more likely, by outsourcing and offshoring the work through supply chains. These supply chains can be so extensive that they reach beyond the formal economy so that the work is performed by workers without any of the protections that labor standards theoretically provide.⁸⁰ Most workers in the informal economy lack even enough bargaining leverage to get within the formal labor market. While these workers would have greater leverage if they acted collectively, their ability to organize themselves or to be reached by a union to organize them is not any more likely than that the government agency enforcing labor standards can reach them.⁸¹

Even if the work is done in a low labor cost country, these workers, whether they work in the formal or the informal economy, face the prospect that their jobs will be moved to even lower labor cost countries. To again use the example of the recent labor turmoil in China, the consequences of increasing the pay of Chinese workers can lead to the increase in domestic and export prices for the goods produced.⁸² As that turmoil has received international attention, the possibility of offshoring from China to even

78. See U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-06-05, OFFSHORING OF SERVICES: AN OVERVIEW OF THE ISSUES 5 (2005), available at <<http://www.gao.gov/new.items/d065.pdf>> (stating that offshoring generally refers to an organization's purchase of goods or services from abroad that were previously produced domestically):

Outsourcing is the delegation of tasks or jobs from internal production to an external entity (such as a subcontractor). It has come to mean the elimination of native staff to overseas, where salaries are markedly lower. The majority of outsourcing occurs within country boundaries, especially in North America. Offshoring is the term used to describe activities performed overseas. The term is also used to describe investment and trade activity abroad. Offshoring may be within the same company/subsidiary, or an outsourced activity.

Id.; see Bradley S. Butterfield et al., *Human Resources and Intellectual Property in a Global Outsourcing Environment: Focus on China, India and Eastern Europe*, INT'L HR J., Spring 2006, at 1.

79. Of course, many other factors in addition to labor costs and labor standards typically enter into the equation of a business implementing its operational scheme.

80. David J. Doorey, *In Defence of Transnational Domestic Labor Regulations*, 6 COMP. RES. L. & POL. ECON. 1, 5 (2010).

81. *Id.* at 13.

82. David Barboza, *As China's Wages Rise, Export Prices Could Follow*, N.Y. TIMES, July 7, 2010, at B1, available at <www.nytimes.com/2010/06/08/business/global/08wages.html?ref=business&src=me>. See generally Brown, *supra* note 52.

lower labor cost countries, such as Bangladesh, has been suggested.⁸³ So, the gains of those particular workers may be short lived unless they can find other work at the same skill level or gain training to reach higher skilled jobs.⁸⁴ Allowing these unskilled jobs to leak out of China may not, however, negatively affect the overall economy of the country. From a macroeconomic policy perspective, it appears that China wants to upgrade the value of the work and therefore the income of workers who, as consumers, would then have greater purchasing power to help the economy grow.

The dispute in the upstate New York apple juice plant centers on the alleged difference between the wages the organized workers have been earning pursuant to the previous collective bargaining agreement versus the general level of wages in the area. However, the broader product and labor markets that have resulted from economic globalization inevitably influence what those who are available to work in any particular area will be able to earn.

In sum, the economic backdrop in terms of product and labor markets is a strong determinant of whether workers will be in the circumstance to undertake collective action (from organizing themselves or joining an existing union to going out on strike) and, if they do, what the outcome of that action will be. Juxtaposing the 126 strikes last year in the U.S. with the thousands in China reflects in part the differences in the two national labor markets. Presumably, one reason for the tremendous difference is that there is a much greater demand for labor in China than in the U.S.⁸⁵ The neoliberal description of how the labor market works appears to be closer to reality than the idealized goals of refusing to treat labor as a commodity and of achieving greater economic equality through the freedom of association and collective bargaining.

83. Vikas Bajaj, *Bangladesh, With Low Pay, Moves In on China*, N.Y. TIMES, July 16, 2010, available at <www.nytimes.com/2010/07/17/business/global/17textile.html?r=1&hp-&pagewanted=> (reporting that China "is slowly losing work to countries like Bangladesh, Vietnam and Cambodia – at least for cheaper, labor-intensive goods like casual clothes, toys and simple electronics that do not necessarily require literate workers and can tolerate unreliable transportation systems and electrical grids"). The U.S. Chamber of Commerce in Shanghai and the EU Chamber of Commerce filed extensive comments criticizing China's new labor law when it was first promulgated. *Foreign Corporations' Opposition to the New Chinese Labor Contract Law and their Impact*, THE NAT'L LABOR COMM. (Sept. 8, 2007), <<http://www.nlcnet.org/alerts?id=0129>>.

84. Chinese governmental policy is generally inscrutable but it appears that it is attempting to increase incomes of workers in order to increase their ability as consumers. Further, China appears to be trying to raise the level of skills of its workers so that they are able to perform higher value jobs. See *The Next China*, *supra* note 37.

85. It is easy to overstate this conclusion since factors other than the economics of the labor market, including cultural differences, influence the incidence of strikes.

V. THE CHALLENGES UNIONS FACE

Unlike enterprises that operate transnationally, unions, with a few exceptions, have not so far expanded their reach across national borders to follow the enterprises in which they have an interest in collective bargaining.⁸⁶ They continue to be tied to the nations where they were first organized, where they continue to operate and where their members live and work.⁸⁷ Until now, labor law, in the sense of law dealing with employer/union relations and labor unions, has also been paradigmatically local.⁸⁸ As such, the strength of unions has been dependent in significant ways upon the height each national economy reaches because of national economic policies. In the present era, unions have been weakened by the ability of employers to escape the limits set by their particular national economies and by national laws.⁸⁹ In other words, employers have increasingly been able to gain access to an ever broader array of national labor markets even as they face increased competition in a global market

86. See Alan Hyde & Mona Ressaissi, *Unions Without Borders: Recent Developments in the Theory, Practice and Law of Transnational Unionism*, 14 CAN. LAB. & EMP. L.J. 47 (2010) (describing how ad hoc attempts of unions to work transnationally have been inadequate).

87. See Zimmer, *supra* note 72, at 348-49.

88. See Harry Arthurs, *Reinventing Labor Law for the Global Economy: The Benjamin Aaron Lecture*, 22 BERKELEY J. EMP. & LAB. L. 271, 275 (2001) (stating that practitioners think, "Labor Law is local law, plain and simple").

The ILO is an international organization dealing with labor and employment laws and issues. Yet, it, too, focuses on labor laws to be adopted and implemented at the national level. This is no surprise since its members are made up of nation states and all the representatives to the ILO, including the representatives of the workers, come from the individual member nations. See, e.g., Supplement to the Provisional Record, Final List of Delegations, International Labour Conference, 98th Sess. (June 18, 2009), available at <http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meetingdocument/wcms_107502.pdf> (providing list of all representatives from individual countries). The doctrine of extraterritoriality protects national labor laws by limiting the scope of each nation's laws that can govern employment relations in other countries. See Arthurs, *Extraterritoriality*, *supra* note 16, at 527. To make the argument that extraterritoriality has considerable impact, Arthurs defines the "law of the workplace" very broadly:

The "law of the workplace" thus comprises not only state labor law but also (and more importantly) formal contractual understandings; workplace customs explicitly acted on and implicitly accepted . . . and low-visibility behavioral norms embedded in operating manuals, daily routines, and workplace cultures. The law of the workplace has long been understood . . . to exist apart from – and sometimes in contravention of – state law.

Id. at 528. With that expansive definition, Arthurs shows how the combined actions of many actors, within and without transnational business, create the extraterritorial movement of law. For a more general discussion of how such cultural transmission occurs, see BRYANT GARTH & YVES DEZALAY, *THE INTERNATIONALIZATION OF PALACE WARS: LAWYERS, ECONOMISTS AND THE CONTEST TO TRANSFORM LATIN AMERICAN STATES* (2002).

89. The ability of nation states to control and regulate their national economies has been eroded in part because of globalization. Tied to their organizing nation state, unions have correspondingly lost leverage against global employers. See Kochan, *supra* note 46, at 4 ("Global competition and the rise of non-union competition in all but a few industries and some large cities makes it difficult to take wages out of competition.").

for the goods and services that they provide.⁹⁰ And, as the claim of the Mott's apple workers' bargaining team suggests, the employer can treat labor as a commodity as the significance of separate national economies declines.⁹¹

In the not too distant past, unions that focused on the industrial sector of the economy were among the strongest unions. For example, the United Auto Workers was considered a premier union because the auto industry was such a strong part of the U.S. economy.⁹² The American auto industry is now a shadow of its former self and so too is the UAW.⁹³ Transnational competition in the auto industry has been quite successful in the U.S. as in much of the rest of the world. Such success has contributed to the decline of the U.S. automakers.⁹⁴ Automobile businesses now reach around the world both for production and sales.⁹⁵ Within that potentially global scope of operations, automakers inevitably make business decisions that have consequences for auto workers worldwide.⁹⁶

To the extent unionized workers around the world can be efficiently replaced by capital investment in more sophisticated production equipment or the work outsourced and/or offshored, the workers and their nationally focused unions lose traction against employers.⁹⁷ If the employees are represented by a union where their work disappears, the union loses members unless these workers are rehired by another enterprise where that

90. See Zimmer, *supra* note 72.

91. Greenhouse, *supra* note 62.

92. See JULIUS G. GETMAN, RESTORING THE POWER OF UNIONS: IT TAKES A MOVEMENT 311 (2010) (relaying the author's own experience in 1980 as a young labor law professor advising clerical personnel at Yale to choose the UAW over the Hotel and Restaurant Employees union because the UAW was such a superior union; he quickly learned that the UAW lacked the organizational skills necessary to be effective with these workers); Owen Bieber, *For American Workers American Government is Not Working Well at All: De-Industrialization and the Perversion of Basic Worker Rights*, 15 CAP. U.L. REV. 475 (1986) (former UAW President, describing that background); *Union Profile, United Auto Workers (UAW)*, UNION FACTS, <<http://www.unionfacts.com/unions/unionProfile.cfm?id=149>> (describing decline in UAW membership).

93. See *supra* note 92.

94. There are a number of reasons why the American car manufacturers have, until recently, declined with the emergence of this transnational industry. The manufacturers failed to come to grips with the globalization of their industry, and they changed their methods of operating only marginally. The union worked within the industry as it was operating. See generally GLOBALIZATION OR REGIONALIZATION OF THE AMERICAN AND ASIAN CAR INDUSTRY? (Michel Freyssenet et al. eds., 2003).

95. STEPHEN COONEY & BRENT D. YACOBUCCI, CONG. RESEARCH SERV., RL 32883, U.S. AUTOMOTIVE INDUSTRY: POLICY OVERVIEW AND RECENT HISTORY 2 (2005).

96. It is, of course, wrong to conclude that lower total labor costs are the only factor a business considers when deciding where to put different parts of the enterprise.

97. See Kochan, *supra* note 46, at 5 ("The decline in union membership has a double edged effect. Fewer workers are covered by union negotiated benefits and unions have less bargaining power to achieve gains for those who remain covered by union contracts.").

union represents the workers. While a union may be able to follow the work by organizing workers even in outsourced enterprises in the home country,⁹⁸ the threat and reality of offshoring weakens its bargaining power even as to the employees it continues to represent.⁹⁹ As has been true in much of unionized America, these industrial unions have in the current era been engaged in concession bargaining to the extent they maintain any foothold at all representing employees of an employer.¹⁰⁰ That will not change simply by stating a public policy, or passing a law, that labor is not a commodity and that freedom of association and collective bargaining should be honored.

The problem is that the conduct of the parties can conform to law¹⁰¹ — there have been so far no claims of illegal actions by Mott's Apple in its relationship to the union representing its workers in upstate New York — but that does not mean that a collective agreement will ever be reached, or, if reached, that the terms will not involve substantial concessions. In the scheme of American labor law, the right of a union to bargain collectively does not include a duty on the part of the employer to reach any agreement, much less an agreement favorable to the workers.¹⁰² So, concession bargaining is entirely consistent with the freedom of association and the right to collectively bargain. Because of economic globalization,¹⁰³ the particular work performed by any group of unionized workers that can be efficiently outsourced and/or offshored reduces the leverage on the employees' side of collective bargaining. At some point, the employer may demand "give backs" that are impossible for the union and the workers to accept in our higher cost-of-living country. In those situations, a strike may

98. The UAW has, so far, been unable to organize any of the auto plants located in the U.S. by foreign competitors. See, e.g., Brett, *UAW To Amp Up Organizing Efforts At Toyota Plants*, MAJORITYINMS.COM (June 18, 2010), <<http://majorityinms.com/2010/06/18/uaw-to-amp-up-organizing-efforts-at-toyota-plants/>>.

99. For example, Mott's Apple argues that the labor costs of the workers that the union represents, which it claims is twenty-one dollars per hour, should be reduced to the fourteen dollars per hour that is paid generally to similar workers in the area. While that focuses on local market conditions the \$14 per hour rate reflects the competitive relationship of a local market with broader markets in the U.S. and abroad. Offshoring connects national labor markets. Greenhouse, *supra* note 62.

100. *Id.*; see also Brian E. Becker, *Concession Bargaining: The Meaning of Union Gains*, 31 ACAD. MGMT. J. 377 (1988); Robert B. McKersie & Peter Cappelli, *Concession Bargaining* (WP 1322-82, June 1982), <<http://dspace.mit.edu/bitstream/handle/1721.1/2014/SWP-1322-09057890.pdf>>.

101. This is not to say that U.S. labor law provides in any way an adequate legal basis for a fulsome exercise of collective bargaining. See Cynthia L. Estlund, *The Ossification of American Labor Law*, 102 COLUM. L. REV. 1527 (2002).

102. Section 8(d) of the NLRA, 29 U.S.C. § 158(d) (2006), provides that the duty to bargain "does not compel either party to agree to a proposal or require the making of a concession."

103. Economic globalization is only one factor in all this. The ability of businesses to utilize the digital world to run very flat operations globally, which contributes to their ability to escape the restraints of any particular national economy including its national labor laws, is also significant.

occur, but it is unlikely by itself to be effective.¹⁰⁴ Where workers can be replaced or the work outsourced and/or offshored, the higher the level of protection of the right of freedom of association and collective bargaining by law, the greater the incentive employers have to escape unionization by using those techniques or by engaging in illegal activity that, under the National Labor Relations Act, is not of great consequence even when the law is enforced.¹⁰⁵

The unions representing workers who perform jobs that cannot be readily outsourced or offshored, even though they may involve unskilled and therefore low paid work, are the unions that maintain some bargaining power, and so they may be able to continue to bargain for agreements that move the rights of workers forward rather than involve "give backs."¹⁰⁶ The Service Employees International Union (SEIU) and HERE are good examples of American unions that have continued to expand the scope of their representation of workers in some service sectors of the economy where the jobs the workers perform cannot be readily offshored or even outsourced through the use of independent contractor relationships.¹⁰⁷ For example, the work of hotel employees changing the sheets and cleaning rooms cannot be moved outside of the hotel.¹⁰⁸ Other unions that may be

104. "Reportedly more than 60,000 mass protests occur in China every year, many of which are labor disputes." Brown, *supra* note 52. In contrast, there were only 126 strikes in private sector employment in the U.S. in 2009. See Greenhouse, *supra* note 62. While there are no doubt many other elements as to why there is such a difference, labor market conditions and the impact they have on the leverage between the workers and their employers must be a significant reason for the difference.

105. See Kate Bronfenbrenner, *No Holds Barred: The Intensification of Employer Opposition to Organizing* (Econ. Pol'y Inst. Briefing Paper No. 235, 2009), available at <http://epi.3cdn.net/edc3b3dc172dd1094f_0ym6ii96d.pdf> (describing the ever increasing illegal action taken by employers to resist and undermine the unionization of their workers). Replying on "New Governance" theory, David Doorey argues that, at present, Wagner-style union regulation no longer serves a primary policy goal of promoting collective bargaining but has devolved into a secondary policy of acting as an element of risk for managers in how they treat employees. In other words, nonunionized employers have an incentive to not violate labor regulations for fear that the workers will form or join a union in protest to that treatment; David J. Doorey, *Decentring Labour Law*, <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1625044> (cited with permission of the author).

106. Even those workers doing jobs that cannot be easily outsourced or offshored lose leverage against their employers because of added competition in the labor market. See Greenhouse, *supra* note 62. For an extended discussion of the variety of techniques still available to unions representing low wage workers, see GETMAN, *supra* note 92. While focusing on the HERE union, which represents low wage workers doing work that cannot be offshored, Getman does not appear to take much account of the impact of economic globalization on the ability of industrial unions that face the threat and the reality of offshoring.

107. GETMAN, *supra* note 92, at 120-37.

108. Such work may, however, be outsourced to a supposedly independent contractor, or the jobs could be filled using a labor contractor supplying temporary or leased employees. In *Oakwood Care Center*, 343 N.L.R.B. 659 (2004), the National Labor Relations Board ruled that a unit made up of the enterprise's employees and the employees of an employee lessor could not be in the same bargaining unit even though the enterprise and the lessor were joint employers of these leased workers.

For a description of the development of agency law in the U.K. to overcome the independent

able to escape the general downward movement of the union movement include some public employee unions¹⁰⁹ as well as unions that represent highly skilled workers if their work would be more difficult to outsource or offshore.¹¹⁰

In sum, the union movement seems to face a bleak future.¹¹¹ If the union movement continues to do what it has always done in the current environment where neoliberal economic theory prevails as the basis for social, political, and economic policy, its downward movement is likely to continue.¹¹² The movement may well be seen as an artifact of the industrial era that is rapidly diminishing in the present information age. Except for those pockets of jobs that can neither be offshored or outsourced, unions will do well to maintain their present extent of organization and the present level of wages and benefits in collective bargaining. So, it appears that the union movement should reconsider its strategies and tactics. My notion is that they have little choice but to go global.

contractor distinctions, see Guy Davidov, *Joint Employer Status in Triangular Employment Relationships*, 42 BRIT. J. INDUS. REL. 727 (2004), available at <http://www.ilo.org/public/english/iira/pdf/congresses/world_13/track_2_davidov.pdf>.

109. While the dynamics of public employee collective bargaining differ substantially from private sector bargaining, outsourcing, and in some situations offshoring, is a substantial threat to the future of these public sector unions. For example, many municipalities have outsourced such traditional public sector work as garbage collection. Some states have even outsourced the operation of prisons and privatized the operation of toll roads. For the extreme example where a city replaced all of its employees by contracting to have the work done by third parties, see David Streitfield, *A City Outsources Everything. Sky Doesn't Fall*, N.Y. TIMES, July 20, 2010, at A1, available at <www.nytimes.com/2010/07/20/business/20maywood.html?_r=1>.

110. Many developing countries, such as China and India, have devoted significant resources to education so that high skilled workers will be available to be hired by foreign direct investors to facilitate the offshoring, if not also outsourcing, of enterprise operations and jobs from abroad.

111. This is not to say that unions are without means to protect and even expand the scope of their representation. See GETMAN, *supra* note 92, for a critique of the failure of most unions to reach their full organizational potential along with a discussion of a variety of techniques; for example he describes the advantages of organizing from below through organizing committees made of the workers to be represented as well as comprehensive campaigns that focus on weaknesses of target employers that can be used to advance organization while avoiding resort to the NLRB. He, however, gives only minimal attention to transnational union efforts and then only in the context of specific labor disputes.

112. See Kochan, *supra* note 46, at 20:

Workers have lost their voice at the workplace, in the key processes and forums in which their employment terms and long term security and careers are decided and in national political discourse. Standard calls for reform – to put more resources toward traditional union organizing, to reform labor law, or even to promote greater dialogue, cooperation, or consensus between business and labor – have not worked and will not on their own reverse the long run trend in union decline and influence.

VI. THE FUTURE ROLE FOR UNIONS IN A GLOBALIZED ECONOMY

A. Political Goals for Unions

When looking internationally, both U.S. union confederations have made it a priority goal to stop the expansion of free trade agreements.¹¹³ Assuming that these agreements expand transnational economic activity and therefore further weaken U.S. unions domestically, the opposition is quite understandable as a means to protect U.S. workers and the unions that represent them. U.S. unions have also cooperated with some unions in other countries on specific labor disputes that have transnational consequences.¹¹⁴

Beyond trying to stop the expansion of global free markets, one large step further would be for unions to join with efforts to pursue de-globalization.¹¹⁵ Reestablishing the primacy of national economies over free movement of goods and capital would help U.S. unions, but it would also help unions in other countries, particularly in the more developed world. If de-globalization would be successful,¹¹⁶ unions might improve their chances to regain lost ground. Unions from a number of countries could join other groups that have pushed in the same direction globally since the creation of the World Trade Organization (WTO).¹¹⁷ In opposition, the supporters of globalization will point to data that shows that globalization has resulted in declining poverty at the worldwide level.¹¹⁸

113. See, e.g., *Issues*, CHANGE TO WIN, <<http://www.changetowin.org/issues.html>> (last viewed Jan. 21, 2011) (calling for "fair trade" not free trade); see also *Why is "Free Trade" Conventional Wisdom?*, AFL-CIONOWBLOG, <<http://blog.aflcio.org/2010/06/02/why-is-free-trade-conventional-wisdom/>> (last viewed Jan. 21, 2011) (AFL-CIO blog on problems with free trade).

114. See Zimmer, *supra* note 72. The business community and a large percentage of the members of Congress are inclined to be free traders and will push for expansion of free trade rules.

115. See Steve Coll, *De-Globalization*, THINK TANK, THE NEW YORKER (May 26, 2009), <<http://www.newyorker.com/online/blogs/stevecoll/2009/05/deglobalization.html>>; see also WALDEN BELLO, *DEGLOBALIZATION: IDEAS FOR A NEW WORLD ECONOMY* (2004).

116. The drag that terrorism and the response to it, especially after 9/11, cause may slow down and even reverse the movement toward expanded global economic activity. But it is too early to know that.

117. See Clyde Summers, *The Battle in Seattle: Free Trade, Labor Rights, and Societal Values*, 22 U. PA. J. INT'L ECON. L. 61 (2001); see also Stephen F. Diamond, *Bridging the Divide: An Alternative Approach to International Labor Rights After the Battle of Seattle*, 29 PEPP. L. REV. 115 (2001).

118. Rhoda E. Howard-Hassmann, *Globalization, Poverty Reduction, and Economic Rights*, GLOBAL-E: A GLOBAL STUDIES JOURNAL (Mar. 9, 2009, 9:00 PM), <<http://global-ejournal.org/2009/03/09/globalization-poverty-reduction-and-economic-rights>>:

World Bank calculations show that using a poverty line of \$US 1.25 per day, between 1981 and 2005 the percent of the world's population living in poverty decreased from 51.8 to 25.2. Using a poverty rate of \$2.50 per day, the decrease was from 74.6 per cent (sic) of the world's population to 56.6 per cent. Nevertheless, even if one uses the most optimistic figures, 322 million people lived below the WB \$1 per day poverty line in 2000; 600 million lived below \$2 per day and 1.2 billion below \$3 per day. Using \$2.50 per day as a benchmark, the majority of the world's population, 56.6 per cent, was still

Given the connections between the ILO and the WTO,¹¹⁹ unions would likely have to work outside that framework to organize a transnational effort to turn back from economic globalization. From a human rights point of view, de-globalization has costs that would be considerable for a great percentage of humanity, even as it would likely aid unions around the world.¹²⁰ The potential impact of de-globalization on poor people would make it difficult for unions to reconcile with their general goal of helping all workers to achieve decent work.¹²¹

A less radical approach to de-globalization would be for the union movement to join with those who are attempting to reform the unfair aspects of the present system.¹²² While eliminating the worst aspects of the present globalization system could be a great improvement for people all around the world, especially people in parts of the developing world who have not done well in this era, it is not clear what advantages diminishing the unfair elements of globalization would give to unions *qua* unions. The World Commission on the Social Dimension of Globalization concluded that decent work and strong employee representation are necessary to reduce the unfairness in the present system of global economic and social policy:

There is wide international agreement on the essentials which we must all urgently strive for [including]: . . . strong representative organizations of workers and employers[, which] are essential for fruitful social dialogue. The highest priority must be given to policies to meet the central aspiration of women and men for decent work Decent Work

poor in 2005.

119. When the issue of including labor standards in the new free trade standards was first being considered, the WTO declined to adopt any but justified its action by claiming international labor standards were the work of the ILO.

120. The idea that the recent increasing economic globalism has had a positive outcome for any outside the transnational elites working in the financial sector is contested. See DAVID McNALLY, *ANOTHER WORLD IS POSSIBLE: GLOBALIZATION & ANTI-CAPITALISM* (2d ed. 2006).

121. In contrast to efforts to reverse the process of globalization, a recent, controversial proposal would be to extend its free market approach from trade and finance to the labor market by removing national restrictions on the movement of labor.

Individual labour providers should be able to freely trade their labour internationally within the institutional framework of the General Agreement on Tariffs and Trade (GATT)/WTO system. The negotiation and entry into force of a multilateral agreement on trade in labour offers the prospect of achieving distributive justice as well as both human rights (combating labour exploitation) and trade liberalization (more efficient use of economic resources with welfare enhancing effects) goals.

BRAVO, *supra* note 68, at 6-7. Such an approach would appear to undermine present nationally-oriented labor law and labor unions operating on a national basis. Removing restrictions on immigration of workers would work to the advantage of workers in low wage, low labor standard countries to the extent they could move to countries with higher wages and labor standards.

122. WORLD COMM'N ON THE SOC. DIMENSION OF GLOBALIZATION, *A FAIR GLOBALIZATION: CREATING OPPORTUNITIES FOR ALL* (2004), available at <<http://www.ilo.org/public/english/wcsdg/docs/report.pdf>>.

for all should be made a global goal and be pursued through coherent policies within the multilateral system¹²³

Since its 1996 and 2008 Declarations, the ILO has set forth as foundational the goals of freedom of association and decent work for all. Allowing the opportunity for "strong representative organizations of workers" at the nation state level, without more, sounds good but it does not necessarily provide much of a base for a renaissance of the union movement. The economic realities will likely prevail, at least as long as neo-liberal economic and social policy persists.¹²⁴

Given the powerful position of the U.S. in global politics and economics, success at achieving a correction of the aspects of globalization that are unfair has the strongest impact of improving the lot of workers worldwide, but it is not clear that the U.S. labor movement has the strength to be successful by itself. Joining other groups with similar goals, including unions in other countries, might increase the likelihood of success. While improved labor standards have historically aided unionization efforts, it is not clear that such changes would do the same in the present global climate.¹²⁵

B. Organizing Unions Transnationally

While there have been numerous efforts at union organizational efforts across borders,¹²⁶ the principal focus of national unions appears to continue

123. *Id.* at xii-xiii.

124. Developing a new paradigm that would overturn neoliberalism seems beyond the ability of the union movement, though it should obviously participate in that new paradigm's creation, promulgation, and broad acceptance.

125. While unions in the U.S. have supported improved labor standards for all workers, part of their rationale is to set a new, higher base upon which unions can bargain for more for their workers. It may be, however, that at some point increased labor standard protections would create a disincentive for workers to join and support unions.

126. For a general account of a number union attempts at transnational organization, the response of multinational employers to nevertheless divide and conquer those attempts, and development of new, sophisticated strategies for the development of effective transnational unionism, see GLOBAL UNIONS, *supra* note 12; see also James Atleson, *The Voyage of the Neptune Jade: The Perils and Promises of Transnational Labor Solidarity*, 52 BUFF. L. REV. 85 (2004) (describing an effort at ports across the globe by unions to protest the loading of the *Neptune Jade* in the U.K. by nonunion workers and showing the legal issues that arose in virtually every port where the ship attempted to dock); Hirsch, *supra* note 31, at 439; Hyde & Ressaissi, *supra* note 86 (describing a number of *ad hoc* transnational efforts and criticizing their inadequacy); Stephen B. Moldof, *Union Responses to the Challenges of an Increasingly Globalized Economy*, 5, RICH. J. GLOBAL L. & BUS. 119 (2005) (describing efforts of pilot unions to deal with global airlines); Robert Taylor, *Trade Unions and Transnational Industrial Relations* (Labour & Soc'y Programme of the Int'l Inst. for Labour Studies, ILO DP/99/1999, 1999), available at <<http://library.fes.de/pdf-files/gurn/00169.pdf>>. There have been efforts at building transnational cooperation among unions in the auto industry. See generally Ian Greer & Marco Hauptmeier, *Political Entrepreneurs and Co-Managers: Labour Transnationalism at Four*

to be domestic with transnational issues taking second place.¹²⁷ Given the challenges the union movement faces in our currently more globalized economy, the thesis of this article is that the union movement, not only in the U.S but worldwide, needs to refocus itself. Instead of first focusing on domestic issues with a secondary look at the transnational dimension of specific circumstances, the union movement will more likely achieve greater success, even domestically, if the primary focus is on the development of a transnational perspective, leaving domestic issues to be fit within that global strategy.¹²⁸ A fundamental shift in focus of the unions of the world is a tremendous challenge.

One model for moving to a transnational focus can be based on the flag-of-convenience program of the International Transport Workers' Federation (ITF), which is a unique example to date of a functioning international trade union.¹²⁹ The ITF has essentially displaced national maritime unions in the representation of transnational seafarers working on ships flying flags of convenience.¹³⁰ The ITF established this program in response to the efforts ship owners were taking to escape national seafarers unions (and the national labor laws pursuant to which they were organized) by reflagging ships in countries that had low wages, low labor standards, and weak or nonexistent unions.¹³¹ If successful, this reflagging put the very existence of all the national seafarers unions at risk. In face of that challenge, the ITF, which is the international confederation of those

Multinational Auto Companies, 46 BRIT. J. INDUS. REL. 76 (2008).

While acknowledging that transnational union activities have not afforded "relief to victimized workers and trade unions, or deterrent sanctions against employers," Marley S. Weiss, *International Labor and Employment Law: From Periphery to Core*, 25 LAB. LAW. 487, 506-07 (2010) describes what unions have been doing transnationally:

Transnational trade union confederations and global workers' rights networks are deploying countervailing corporate campaigns, consumer boycott appeals, and legal strategies on the international plane. . . . They utilize domestic and international legal proceedings both for the legal remedies they may supply and for the additional publicity and veracity a legal ruling can provide to fuel public political, economic and social pressure campaigns.

127. Generally, unions realize the need to look transnationally. They seem, however, reluctant to announce those goals very clearly but instead publicize transnational activity in specific disputes.

128. The union movement might organize transnationally but then have each national union adopt a political plan in its own jurisdiction to strengthen its labor laws. Collectively, then, it is possible that individualized effort in a good number of countries might succeed in strengthening the union movement generally.

129. INT'L TRANSP. WORKERS' FED'N, SOLIDARITY: THE FIRST 100 YEARS OF THE INTERNATIONAL TRANSPORT WORKERS' FEDERATION 135-44 (1996), available at <<http://www.itfglobal.org/files/extranet/-1/6301/chapter14.pdf>> (describing the ITF's organization of global efforts to challenge the use of flags of convenience by ship owners to escape representation by national seafarers' unions); see also NATHAN LILLE, A GLOBAL UNION FOR GLOBAL WORKERS: COLLECTIVE BARGAINING AND REGULATORY POLITICS IN MARITIME SHIPPING (2006).

130. See INT'L TRANSP. WORKERS' FED'N, *supra* note 129, at 143-44.

131. *Id.* at 135.

national unions, adopted its Flag of Convenience strategy. That strategy is to coordinate the efforts of its national unions, both ITF members as well as other unions representing workers in the shipping industry, to minimize the use of flags of convenience by forcing ship owners to flag their ships in the country of ownership where higher labor standards generally apply. These national unions use their traditional collective activity that had been focused on the ships owned and flagged in their own country and expand it to all ships flying flags of convenience wherever they were owned.¹³²

At least one U.S. union has announced that it would change its focus, including at least a step toward greater transnational focus. This small step toward a transnational focus was part of the announcement that the United Auto Workers is reinventing itself.¹³³ On August 2, 2010, Bob King, the incoming President of the UAW, delivered what has been characterized as a major speech to the Center for Automotive Research Conference.¹³⁴ He called for the UAW “of the 21st century [to] be fundamentally and radically different from the UAW of the 20th century.”¹³⁵ Contrasting the twentieth century success of his union in helping to build the middle class in the U.S., the union’s goal is to do the same globally this century.¹³⁶ Acknowledging that this is an era of global economics with employers facing “the intense pressure of global competition,” King then announced that the UAW “recognizes that flexibility, innovation, lean manufacturing and continuous cost improvement are paramount in the global marketplace.”¹³⁷ This seems to be focused on its existing role as the union for the Big Three U.S. automakers.

King’s next step can be construed as moving toward transnational unionism, or at least a greater transnational perspective: “The 20th-century

132. *Id.* at 135-44.

133. It is ironic that the UAW is moving toward a transnational perspective since it started as an international union – acting in Canada and the U.S. – shortly after the union was founded but there was a parting of the ways in 1986. See Sam Gindin, *Breaking Away: The Formation of the Canadian Auto Workers*, CAW, <<http://www.caw.ca/en/3276.htm>> (last viewed Jan. 21, 2011). On the effects of globalization on the industry, see GLOBALIZATION AND EMPLOYMENT RELATIONS IN THE AUTOMOTIVE ASSEMBLY INDUSTRY: A STUDY OF SEVEN COUNTRIES (Roger Blanpain ed., 2008).

134. The Center for Automotive Research describes itself as follows:

The Center for Automotive Research, a nonprofit organization, is focused on a wide variety of important trends and changes related to the automobile industry and society at the international, federal, state and local levels. CAR conducts industry research, develops new methodologies, forecasts industry trends, advises on public policy, and sponsors multi-stakeholder communication forums.

About CAR, CAR: CTR. FOR AUTOMOTIVE RES., <<http://www.cargroup.org/>> (last viewed Jan. 21, 2011).

135. King, *supra* note 1.

136. *Id.*

137. *Id.*

UAW was dealing with a market dominated by the [U.S.] Big 3. The 21st-century UAW is dealing with at least the Big 7 *and probably more*.¹³⁸ Beyond General Motors, Ford, and Chrysler, it is not clear which of the many other global automakers are included to make up the Big Seven.¹³⁹ Assuming it first targets the U.S. assembly plants of the four foreign automakers with the most sales in the U.S., the UAW could attempt to organize the Toyota, Honda, Nissan, and Hyundai plants located in the U.S.¹⁴⁰ King indicated that the union had “enormous respect for the transnational companies who have built factories in the United States. We welcome you as partners and colleagues in the industry.”¹⁴¹ While indicating the goal was “not to force auto companies to unionize [but it is about] the right of workers to organize unions and collectively bargain for fairness, dignity, and a democratic voice.”¹⁴² He further found it “unacceptable for a corporation to allow unionization in other countries, but treat American workers as second-class citizens who are not entitled to unionize.”¹⁴³ So far the only transnational aspect of this new direction is that these U.S. auto plants are foreign-owned.

In further remarks, however, King expanded the global dimension of his union’s goals, “The 21st-century UAW is adopting a constructive and positive approach to global trade and global development, and we are committed to being citizens of the world and achieving trade that spreads prosperity and lessens poverty.”¹⁴⁴ Calling up the memory of Walter Reuther, one of the founding leaders of the UAW,¹⁴⁵ King described Reuther as “an internationalist who favored trade, but who also stressed the need for trade to take place on an equitable basis.”¹⁴⁶ King closed with a

138. *Id.* (emphasis added).

139. Nine foreign auto manufacturers have plants in the United States – BMW, Honda, Hyundai, Mazda, Mercedes, Mitsubishi, Nissan, Subaru, and Toyota. *See Foreign Auto Manufacturers with U.S. Assembly Plants*, AUTOMOTIVE DIGEST, <<http://www.automotivedigest.com/content/displayArticle.aspx?a=55946>> (last viewed Jan. 21, 2011).

140. By sales in the U.S. in July, 2010, the four foreign manufacturers with the biggest U.S. sales were Toyota, Honda, Nissan, and Hyundai. *See Sales and Share of Total Market by Manufacturer*, WALL ST. J.: MARKET DATA, <http://online.wsj.com/mdc/public/page/2_3022-autosales.html#auto salesE> (last viewed Jan. 21, 2011).

141. King, *supra* note 1.

142. *Id.*; see GETMAN, *supra* note 92, at 312. “The UAW has failed repeatedly to organize the foreign car companies, and it has continued to use old-fashioned NLRB-oriented organizing tactics.” *Id.*

143. King, *supra* note 1.

144. *Id.* This is consistent with an effort to fix globalization, not end it. *See* discussion at notes 122-124 *supra*.

145. Reuther was the President of the UAW from 1946 to 1970. *See No Greater Calling: The Life of Walter P. Reuther*, WALTER P. REUTHER LIBRARY, <<http://reuther100.wayne.edu/>> (last viewed Jan. 21, 2011); *see also* NELSON LICHTENSTEIN, WALTER REUTHER: THE MOST DANGEROUS MAN IN DETROIT (1997).

146. King, *supra* note 1.

call to the transnational business community "to respect the right of workers to organize unions globally."¹⁴⁷ While looking transnationally, this still stops short of the UAW organizing workers outside the U.S or even working cooperatively with the auto unions in other countries.

To be effective in organizing the foreign automakers' plants in the U.S., the UAW may have no choice but to expand its target to include autoworkers worldwide in some sort of organized or at least coordinated structure within the union movement at the worldwide level. To see that, assume the union simply targets the foreign-owned auto plants located in the U.S. Since these plants have been opened here, the UAW has been unsuccessful in organizing any of them. These plants are predominantly located in right-to-work states¹⁴⁸ that in general have had limited union organization up until now. So, the local political and the cultural norms make it more difficult for unions to be successful organizing in these states. Further, these foreign plants offer wages and benefits that are better than those available in the local labor markets even if they do not quite match the benefits the UAW has bargained for with the Big Three.¹⁴⁹ Without the prospect of substantially better wages, benefits, and working conditions, workers in these plants may not see much of an economic benefit to unionizing. Also, their employers have, in general, created positive work environments.¹⁵⁰ Finally, and most importantly for this paper, is that the jobs of these workers are threatened by the possibility the employer will offshore their work. After all, these plants were not set up because the U.S., even its Southern tier of states, is a low labor cost country.¹⁵¹

147. *Id.*

148. See 29 U.S.C. §169 (2006). The right-to-work provision of the NLRA grants to states the power to enact legislation prohibiting union security agreements that otherwise would be legal. States with weak union traditions have enacted them. At present, twenty-two states have enacted such laws. For a map showing that these states predominantly include states in the south and the plains states, see *Right to Work States*, NAT'L RIGHT TO WORK LEGAL DEF. FOUND., <<http://www.nrtw.org/rtws.htm>> (last viewed Jan. 21, 2011).

149. Doorey, *supra* note 105, argues that the role of labor law plays now is as the "stick" that causes employers to treat their employees well. To say this another way, the general organization of labor relations is through the development of "New Governance" techniques within the employers themselves with unionization being the default outcome if the employer fails to meet the needs of its workers.

150. See Kochan, *supra* note 46, at 5, quoting Stephen Lerner, Director of Building Services for the SEIU:

Increasingly unions face a catch 22. They are in the position of losing members and market share if they force standards up for the ever-shrinking percentage of unionized employers. If, in an attempt to protect current members and unionize employers, a union accepts lower standards, they lessen the reason for workers to want to organize, join or support the union.

151. The fact that nine foreign auto makers have built factories in the U.S. despite the availability of much lower labor cost countries demonstrates that multiple factors are weighed in making these siting decisions.

The globalization of the auto industry increases the difficulty for unions in any country to organize domestically. In the immediate post-World War II era, when there was little foreign product competition for the American automakers, the UAW could, because it organized the whole domestic industry, offer the entire industry the "carrot" of more or less uniform labor costs.¹⁵² The tradition of the UAW was to have all the collective bargaining agreements expire in the same year. As that expiration date approached, the UAW would pick one auto maker as its target, presumably because it thought it could get the best contract from that employer.¹⁵³ Once an agreement was reached with the target company that collective bargaining agreement became the standard that all the other auto companies were expected to meet.¹⁵⁴ By establishing relatively uniform labor costs across the domestic industry – the "carrot" – the union made it possible for the companies to take labor costs out of price competition in the product market.

With the coming of foreign competition to the product market and the opening of foreign-owned plants in the U.S., the union lost the ability to offer that carrot to the unionized employers. Even if the UAW was now successful at organizing all of the auto plants in the U.S., whether the plants were domestically or foreign owned, it could not offer these organized companies the carrot of taking labor costs out of price competition because the business is so globalized. Labor cost differences at all the auto plants outside the U.S.¹⁵⁵ could still be the basis for price competition. Further, the possibility of offshoring the work done in the U.S. to a lower labor cost country would minimize the advantage to the automakers of having uniform labor costs in the U.S. Finally, with the prospect of employers being able to more easily sustain business in face of a strike, that "stick" would be smaller, giving less leverage to the union than it had back in its heyday.

152. Without foreign product competition, the UAW could bargain to equalize labor costs across the industry, thus taking wages out of competition. See Kochan, *supra* note 46, at 4.

153. WILLIAM H. HOLLEY, KENNETH M. JENNINGS, *THE LABOR RELATIONS PROCESS* 256 (2009).

154. See LICHTENSTEIN, *supra* note 145.

155. *The Crisis and the Future of the Automobile Industry: Putting the Spark back into the Automobile Industry*, WORLD OF WORK: THE MAGAZINE OF THE ILO, Aug. 2009, at 12, 13, available at <http://www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/documents/publication/wcms_113838.pdf>:

The auto industry has today become a major source of employment worldwide. . . [I]n 2004 about 8.4 million people worked in automotive production (including the manufacturers and component firms) across the globe: around 2 million in Europe, over 1.6 million in China, 1.1 million in North America, 750,000 in both Russian Federation and Japan, as well as smaller but still significant numbers elsewhere. The global workforce total probably climbed to just under 10 million by the end of 2007.

The question is whether a transnational auto workers union, whether by one union or a tight combination of national unions, could be achieved. The ideal would be to have all of the auto workers, wherever they were working, organized so as to be capable of implementing a transnational strategy. Not only would that bring back the possibility of establishing, at some level, the "carrot" of a smaller range of labor costs among the different auto plants and manufacturers, this would strengthen the "stick" of worker collective action: A worldwide strike of auto workers would put tremendous pressure on the industry because of the size of its impact. If the unions representing the workers in the major sectors of the economy would be successful at coordinating their bargaining at a worldwide level, that would be a tremendous force pushing toward the reduction of economic inequality both within nations and transnationally.¹⁵⁶

Achieving this ideal is at a minimum tremendously daunting and, it must be recognized, perhaps impossible. One considerable barrier is the absence of much of a structure within the predominantly domestically oriented union movement to be the organizational base for this new transnational unionism. At the broadest level, the ILO could be the focus, but it, so far, has not worked directly toward transnational unionism.¹⁵⁷ The primary confederation of unions at the global level is the International Trade Union Confederation (ITUC).¹⁵⁸ It claims to represent 168 million workers in 155 countries and territories and has 311 national affiliates. Rather than a structure aiming at developing a transnational union movement, however, the principal function of the ITCU has been to represent worker interests at the ILO, which itself focuses on establishing labor standards and policies to be adopted at the nation state level.¹⁵⁹ ILO standards are international in that the goal is to have all nations adopt them but not in the sense that they form a basis for transnational unionism. Instead, the standards focus on the national laws of each member state.

156. Zimmer, *supra* note 72; Michael J. Zimmer, *Decent Work with a Living Wage*, in BULLETIN OF COMPARATIVE LABOUR RELATIONS: THE GLOBAL LABOUR MARKET: FROM GLOBALIZATION TO FLEXICURITY 61 (Roger Blanpain & Michele Tiraboschi eds., 2008).

157. Turning the ILO toward transnational unionism might well provoke the opposition of the U.S. because of our neoliberal bias as well as many of the developing countries that might fear the loss of their comparative advantage based on low labor standards and weak unions.

158. The new ITUC General Secretary, Sharan Burrow, may be moving toward more focus on the global economy and transnational unionism. See Sharan Burrow, Address to DGB 2nd Congress on Capitalism (Oct. 7, 2010), available at <http://www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/documents/publication/wcms_113838.pdf>.

159. See Hyde & Ressaissi, *supra* note 86; see also Moldof, *supra* note 126, at 122 (describing "the International Air Line Pilots Association, International (IFALPA), the international pilot union umbrella organization that includes ninety member unions worldwide collectively representing over 100,000 pilots").

Utilizing the ITCU to attempt to redirect the ILO away from its present focus on improving labor laws at the national level may prove difficult because the national confederations that are party to the ITCU would have to agree to the shift in institutional direction, which, if successful, might diminish the role of these national confederations and the national unions that form these confederations. Even if the ITCU would attempt to change the focus of the ILO, that effort would face daunting obstacles because the ILO is made up of nation state members with each country being represented by worker, employer, and government delegates.¹⁶⁰

One step below the ITCU is a group of Global Union Federations that link national unions in particular sectors.¹⁶¹ The Global Union Federation that covers the auto industry among other sectors is the International Metalworkers' Federation.¹⁶² This federation should more easily be receptive to calls for developing transnational unionism in the auto industry just as the national seafarers' unions deepened their connections and cooperation through the flags of convenience program of the ITF.¹⁶³ One final step would be to, by merger, create a transnational auto workers union.¹⁶⁴ In fact, some national unions have merged to create what they call a transnational union, though the resulting organization appears to be more like a confederation than a true merger.¹⁶⁵

Joining the national auto workers unions together more tightly, whether by expanding the present global federation or by merging national unions into one, presents a tremendous series of challenges. First, these national unions vary considerably in terms of structure and methods of operation. To go back to the recent strikes of the Honda workers in China,

160. For a critique of the ILO written by employees of the ILO, see GERRY RODGERS ET AL., *THE INTERNATIONAL LABOUR ORGANIZATION AND THE QUEST FOR SOCIAL JUSTICE 1919-2009* (2009).

161. See Hyde & Ressaissi, *supra* note 86.

162. *Global Union Federations*, in *MAKING A WORLD OF DIFFERENCE: GLOBAL UNIONS AT WORK* 199, 208 (Aidan White ed., 2006), available at <http://www.global-unions.org/IMG/pdf/MakingWorldDifference_4.pdf>.

163. A difference that might be significant between the shipping and auto industries is that the use of flags of convenience by ship owners appeared to be the death knell of all the national seafarer unions. See *supra* notes 129-32 and accompanying text. So far, that does not seem to be the case in the auto industry.

164. There have been efforts at building transnational cooperation among unions in the auto industry. See generally Ian Greer & Marco Hauptmeier, *Political Entrepreneurs and Co-Managers: Labour Transnationalism at Four Multinational Auto Companies*, 46 *BRIT. J. INDUS. REL.* 76 (2008).

165. A recent example of a transnational merger is the July, 2008, decision of Unite, Britain's biggest union, to join with the United Steelworkers of the U.S. to form Workers Uniting, a union representing three million people. *Merger Forms Transatlantic Union*, BBC NEWS (last updated July 2, 2008, 9:01 AM GMT), <<http://news.bbc.co.uk/2/hi/business/7484639.stm>>. The unions will maintain separate identities, but Workers Uniting "will be governed by a Steering Committee with equal membership from each participating union." *About Us, WORKERS UNITING: THE GLOBAL UNION*, <<http://www.workersuniting.org/default.aspx?page=1>> (last viewed Jan. 21, 2011).

the union supposedly representing these workers did not participate in the strike.¹⁶⁶ As an institution closely tied to the government and dedicated to maintaining labor discipline, the ACFTU was for a long time not recognized by the ITCU as a union since it was not considered an organization formed through the free association rights of workers.¹⁶⁷

Second, important differences that affect the possibility of creating a transnational auto workers union extend well beyond the differing union structures. "Differences of culture, language, and history provide serious obstacles to cooperation."¹⁶⁸ In addition to significant differences in the national laws governing unions,¹⁶⁹ "workers, suppliers, communities, states, and provinces and countries are all in competition for production facilities and for the jobs and taxes which they generate."¹⁷⁰

Third, and perhaps the most daunting challenge that "workers in different countries may well see foreign workers as competitors, as part of 'the problem.'"¹⁷¹ All the auto workers in the world, and their national unions, would be better off if they all stand together, but each national union and its members may be better off if it acts individually while the others stay united. For example, there are tremendous differences in national labor costs. While the average hourly compensation costs for all manufacturing jobs in Germany in 2007 were \$50.73, they were \$30.56 in the U.S. and \$3.91 in Mexico.¹⁷² If the auto unions in these countries attempt to work together, by having a common expiration date for labor contracts and by holding fast to a common bargaining strategy, the result would likely be better for the workers in all three countries than if each national union bargained separately. Developing a common strategy and sticking to it would be extremely difficult because of the tremendous differences among the three countries and because of the potential competition among the national unions to strike deals advantageous to their

166. Barboza, *supra* note 56.

167. Recently, the ITUC has begun to interact with the ACFTU. John Vandaele, *International Union Sets up Chinese Link*, IPS: INTER PRESS SERV. (Jan. 21, 2011, 8:22 PM GMT), <<http://ipsnews.net/print.asp?idnews=40871>>. Nevertheless, the failure of the ACFTU unions to lead, or even to sanction, the recent strikes by Chinese auto workers suggests that these unions have a far way to go. The workers assume that the union is of no help to them. See Brown, *supra* note 52.

168. James Atelson, *The Voyage of the Neptune Jade: Transnational Labour Solidarity and the Obstacles of Domestic Law*, in *LABOUR LAW IN AN ERA OF GLOBALIZATION: TRANSFORMATIVE PRACTICES & POSSIBILITIES* 399 (Joanne Conaghan et al. eds., 2002).

169. *Id.* These legal differences are a major point made by Professor Atelson.

170. *Id.*

171. *Id.* This problem may explain why unions are less than fully candid about their increasing focus on transnational unionism.

172. BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, CHARTING INTERNATIONAL LABOR COMPARISONS 24 tbl.3.1 (2010), available at <<http://www.bls.gov/fls/chartbook/chartbook2010.pdf>>.

members even at the expense of union members in another country.

The national unions representing auto workers around the globe demonstrate the issues facing the union movement generally. Without doing something different, it is hard to see that the union movement will do anything other than continue its decline. The need is to reconstruct those unions into transnational organizations or, at least, have them refocus to transnational organization. That could be attained by much tighter confederation or actual merger. It may be that the widespread resistance to the move toward transnational unionism may be overcome only in response to a crisis like that faced to the existence of the national seafarers unions when ship owners began registering their ships under flags of convenience. It might be a crisis of such seriousness that Rahm Emmanuel was referring to with his famous quote.

VII. CONCLUSION

This article paints a dismal picture of the fate of unionization even as the world economy hopefully comes out of the Great Recession. It would be a shame if national unions fail to see the crisis they presently face to cause them to reconsider and to redirect their future directions. The ITF set the pace back when the ship owners were adopting flags of convenience that threatened the existence of the national seafarers unions. More recently, in the U.S., the UAW may be starting to move in the direction of having a transnational viewpoint around which it directs its work. If nothing else, the Great Recession should trigger at least the beginnings of new visions and new approaches. If the union movement can change its direction from downward to upward, it could play a crucial role in addressing the increasing economic inequality within nations and among nations. That would address one of the most significant problems resulting from the present system of economic globalization.