January 2010

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EMERGING ISSUES IN NORTH AMERICAN TRADE – LABOR LAW

Session Chair and Canadian Speaker – Chi Carmody
Canadian Speaker – Kevin Banks
United States Speaker – Robert Strassfeld

CANADIAN SPEAKER

Chi Carmody*

MR. CARMODY: Good Morning. For those of you I have not had a chance to meet, my name is Chi Carmody, and I am speaking in place of Michael Lynk. Michael's wife has had a bit of a mishap, which keeps him back in London, Ontario, where both he and I teach.¹ Michael and I began teaching together a decade ago at the University of Western Ontario, Faculty of Law.² He was somewhat more fortunate than I, because he a few years after both of our arrivals in London he met a lovely lady named Jill, who subsequently became his wife. They have two wonderful little children, which keep Mike very busy. Michael e-mailed me late Thursday night to say that Jill came down with something, and that it was impossible for him to get

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¹ See The University of Western Ontario, Professors, http://www.law.uwo.ca/Faculty_Staff/Professors.html (last viewed Dec. 20, 2009).
² See generally The University of Western Ontario, Carmody, Chi, https://www.law.uwo.ca/lawsys/pages/contents.asp?contentName=Instructors&contentFileName=ccarmody (last viewed Dec. 20, 2009); see also The University of Western Ontario – Western Law, https://www.law.uwo.ca/lawsys/pages/contents.asp?contentName=Instructors&contentFileName=mslynk (last visited Dec. 20, 2009).
away, and asked if I would not mind standing in for him, and present his work, the paper that he was going to present to you here today.

However, I am not, thankfully, the only person on this panel. We are joined by two very distinguished speakers. The first of these is Bob Strassfeld.\(^3\) Bob is a professor here at Case Western Reserve University School of Law.\(^4\) He teaches in the field of Torts, Federal Courts, Labor Law, and Legal History.\(^5\) Prior to teaching here at Case Western and beginning his teaching career in 1988, Bob practiced for three years at the Washington, D.C. firm of Shea & Gardner.\(^6\) His current research includes continuing work on the legal history of the Vietnam War and a history of African American lawyers in Cleveland and he has published extensively in a wide range of journals and other legal periodicals.\(^7\)

In addition to Bob, we are also joined today by Kevin Banks.\(^8\) Kevin is a professor at Queens University Faculty of Law in Kingston, Ontario.\(^9\) Kevin and I originally met about a decade ago when Kevin was working with the Commission on Labor Cooperation, an arm of the North American Agreement on Labor Cooperation, at one time headquartered at Dallas, Texas and then subsequently moved to Washington, D.C.\(^10\) At the time, Kevin was also working as a director for Inter-American Labor Cooperation.\(^11\) He then went on from 1998 to 2001 to work with the commission full-time, and he also then began his S.J.D. degree at Harvard University, which he completed, and some of which is forthcoming in a volume from Cambridge University Press, *The Impact of Globalization on Labor Standards*.\(^12\)

Labor is often said to be one of these fields that has been somewhat neglected, if not overlooked, in the North American Free Trade Agreement (NAFTA).\(^13\) We seemed to have moved towards a much more free market,
an open market in North America today. What I wanted to do was to present Michael's paper to you entitled Labor and the New Inequality. Michael begins his concerns and his discussion with this idea that there has been in labor law something of a change from what we saw in the years immediately after the Second World War. What we had was a period that has been classically referred to as The Great Compression. That great compression was composed of rising unionization rates, but it was also composed of rising middle class incomes and rising educational attainment. This, in Michael's view, led to greater social equity across the board, a view which resonates very much with the words of the current administration in Washington. This, in Michael's view, led to and was productive of greater social cohesion across the board, something obviously very desirable.

Now, since 1980, that great compression has been followed by something of a sea shift; and that sea shift has been movements very much in the opposite direction. This movement away from equality and rising income inequality has been recognized. There has been a sort of a surge of inequality, and many of the benefits from globalization have been shared by an increasingly small percentage of the population. As a result, this has generated a host of social tensions and economic fissures.

Michael quotes from the Indian political economist, Amartya Sen, with the proposition that the central issue in globalization today really is the issue of growing inequality. What are we to do about this growing inequality, given that it is so pervasive and given that globalization, while so very successful, has in some sense exacerbated the tensions between those who do not have and those who do have? This has led some commentators such as Paul Krugman, but also others, to refer to what we have seen since 1980 as "The Great Divergence," a divergence in material standards in the quality of living and opportunities of life.

14 See Amir H. Khoury, Dubai's New Intellectual Property-Based Economy: Prospects for Development Without Dependency, 9 J. MARSHALL REV. INTELL. PROP. L. 84, 94 (2009) (stating that countries have been obligated through international agreements to adopt free-market systems and shift their economy towards openness).
15 See Michael Lynk, UNBLJ Forum: Recent Developments in Canadian Labour and Employment Law, 59 UNIV. N. BRUNSWICK L. J. 14, 16 (2009) (stating that economists such as Paul Krugman have labeled the period immediately following the Gilded Age as the Great Compression).
16 See id. at 17.
17 Id.
18 Id. at 19 (explaining what has occurred after the end of the Great Compression).
19 Id. ("The world economy since the mid-1980s has been marked by rising prosperity and rising inequality.").
20 Id.
22 See generally PAUL KRUGMAN, THE CONSCIENCE OF A LIBERAL: RECLAIMING AMERICA
Now what do we have? Well first of all, this inequality and the place of labor law is something that Michael has been concerned about. He has noted, for example, that there has been a slight decrease in unionization rates in Canada but a much more precipitous decrease in unionization rates in the United States. These rates have, in the United States, resulted in a unionization rate of about twelve percent of the population today. The redistributive effects of unionization have therefore, largely been foregone. Individuals have been forced to compete directly in the market, and as a result, what has happened is that not only unionization but labor laws themselves have, in fact, fallen back and have weakened in vitality, and the good benefits that come out of strong labor laws have been lost.

Michael suggests in his paper that strong labor laws are part of an array of strong social measures such as dynamic social programs, fairness in taxation, protective labor and employment, occupational health and safety standards, and effective levels of public spending on education, health care, and infrastructure. As was alluded to last night by Jessica LeCroy in her remarks, while the United States spends a tremendous amount of money on health care and education, Canadians, generally speaking, tend to, at least on the education side, and if you look on the health care side as well, come out ahead.

So Michael says all of this is really developing three trends. First of all, we have this broad concern about rising inequality. At the same time, as we have rising inequality, there is decreasing unionization and stagnating labor laws. Michael's suggestion, therefore, is that perhaps, if we revitalize unionization and start thinking anew about unionization and about labor laws, perhaps we will be able to redress some of this balance.

Well, it comes as no surprise then that this idea of rising income inequality or economic inequality has created a host of social problems. He suggested that it could be linked to such things as the environmental concerns we have, as well as the rise of a class of individuals for whom the benefits of globalization really are not tangible. If you take a look, for example, on MSN, yesterday there was an interesting article on its website about jobs that...
pay twelve dollars an hour. That is the sort of new environment in which young people are having to struggle for employment and are having to struggle to try to put together conditions in which they can establish themselves, establish their families, and move forward.

So the ideas about the benefits of globalization, when you are confronted with that kind of an employment and economic future, really are further and further away from the real benefits left for other individuals. Michael also suggests that we have the rise of a number of other problems that we really have not acknowledged. For example there is the fact that a lot of people are working part-time jobs and are therefore formally excluded from the benefits of unionization. In addition we have the rise of child labor, forced labor, and people working long periods of time in a lot of different jobs that in effect do not remunerate people for the work they do. What he suggests is that this inequality is really acting to destabilize the sorts of benefits that many have touted as coming from economic liberalization.

In particular, he also goes on to talk about the fact that a lot of this economic well-being that we are so proud to speak of today has in fact been achieved at the expense of stagnant purchasing power. Most middle-income people today, he suggests, and certainly lower-income people, are no better off than they were prior to 1980. There has been a steep increase in executive pay, and we have seen tremendous concern about that not only here in the United States, but also in Canada and many other countries, where, for example, CEO pay has rocketed skywards, while the average worker has continued to work for wages that in many instances have not kept up or simply remained stagnant. He has also suggested that out of this, there has been a sort of wanting influence of organized labor, which has led to its inability to counteract a lot of changes that we see on the political front.

The consequences of this, he suggests, are particularly noticeable. The Gini Coefficient, a standard measure of deviation between the highest and

30 See generally Lynk, supra note 15.
31 Id.
32 Id.
33 Id.
34 Id.
36 See generally Lynk, supra note 15 (discussing the economic and social impact of increasing executive pay in the United States and Canada).
37 Id. at 21 (noting the increase in executive pay compared to that of the average worker).
lowest income earners, has actually widened considerably. Here, in the
United States, the Gini Coefficient is sixteen to one. Canada's is somewhat
less unequal but still increasing. He suggested that this widening coeffi-
cient produces a growing level of social dysfunction, which we view, for
example, in rising criminality and rising levels of incarceration, in more illi-
teracy, in less social mobility and opportunity, in lower life expectancy, and
in the erosion of ties that keep us together as a nation. I just quoted for you
this very famous book by Robert Putnam, Bowling Alone: The Collapse and
Revival of American Community. So these are the consequences of eco-
nomic inequality, and he suggests that this has been accompanied by declining
unionization levels.

He takes a look at a broad range of behavior in a series of other countries,
and observes, as a number of international organizations have observed, that
countries with higher unionization rates tend to have lower inequality, lower
income inequality, and that this higher unionization rate has a lot of flow-
through effects that can be traced, for example, to the virtuous circle that I
mentioned a few moments ago. He says, for example, that higher unioniza-
tion tends to increase the wages of non-unionized workers. It tends to in-
crease the wages of the lowest unionized workers, which tend to be predo-
minantly those groups who would have the hardest time getting ahead: wom-
men, visible minorities, and other groups. It says unions also act as a check on
executive pay, and unions tend to also reinforce other socially progressive
and egalitarian policies.

What this has meant, at least in Canada's situation, is that declining unio-
nization has been cited as a significant factor in falling average wages and in
shrinking pension plans, and this has been observed across a wide range of
countries. I have just produced a few of the statistics. You will note, for

39 See Lynk, supra note 15, at 20; see also Angel Gurria, Remarks by the OECD Secretary-General: Launch of Growing Unequal? (Oct. 21, 2008), available at http://www.oecd.org/document/14/0,3343,en_2649_33933_41533262_1_1_1_1,00.html (not-
ing the gap between the richest and the poorest in the United States and Canada).
40 See Lynk, supra note 15.
43 Id. at 131.
44 Id.
45 Id.
46 René Morissette, Grant Schellenberg & Anick Johnson, Diverging Trends in Unioniza-
example, that in some countries like Australia, the decline unionization rates has been extremely precipitous over the last three decades,\textsuperscript{47} falling by about half in countries like the United Kingdom\textsuperscript{48} and Japan's has also fallen substantially.\textsuperscript{49}

Now what has happened in Canada? Well in the Canadian situation, our unionization rate has fallen slightly.\textsuperscript{50} It has fallen by about four percent from 1970 to 2003.\textsuperscript{51} This decline masks a number of very significant shifts. First of all, that portion of the labor force which is unionized is very heavily represented by the public sector,\textsuperscript{52} and seventy-one percent of those in the public sector are now unionized.\textsuperscript{53} As a law professor I am unionized. Sounds strange, but I am unionized.

On the other hand, the private sector has fallen far behind. The unionization rate in the private sector has fallen to about seventeen percent in Canada,\textsuperscript{54} and Michael also notes that the phenomenon that he speaks about globally, this idea of income inequality and low unionization rates is actually observable in Canadian jurisdictions individually. So those provinces where income and inequality is the highest tend to have the lowest unionization rates,\textsuperscript{55} and those that are most equal tend to have the highest unionization rates.\textsuperscript{56}

This has also led to stagnating labor laws, and he refers for example, to the fact that in Canada, for instance, the number of strikes has decreased markedly since 1976.\textsuperscript{57} Labor has been essentially unable to mobilize a lot of its political power, and it has been very hard for organized labor groups to have an impact on a wide range of social programs, government policy,

\textsuperscript{47} See Visser, \textit{supra} note 46, at 43 (Australian union membership dropped 25.7\% from 1970 to 2003).

\textsuperscript{48} Id. (United Kingdom union membership dropped 44.1\% from 1980 to 2003).


\textsuperscript{50} See Morisette, \textit{supra} note 46, at 6 (table showing the decline of unionization in Canada).

\textsuperscript{51} See id.

\textsuperscript{52} See id. at 6.

\textsuperscript{53} See id. at 7.

\textsuperscript{54} See id. at 7 (table showing a unionization rate of twenty percent for the private sector).

\textsuperscript{55} See id. at 8.

\textsuperscript{56} See id.

budgets, level of employment insurance, and industrial strategy the way they did in the past. This is most apparent, in his view, in the change with respect to the unionization process.

The card check certification system has, in many instances, been replaced by the ballot system for unionization. It used to be, in many Canadian jurisdictions, that you simply signed the union card, and if the union got fifty-five percent or more, there was no question, there was no ballot, you simply unionized the shop.

Now what many jurisdictions have moved to, in Canada, is a ballot-type approach where you have unionization or certification of a union that follows upon a ballot. He suggests that the card check process, which enhances certification, is somewhat more favorable to labor, while mandatory election provisions stunt unionization efforts and therefore, hold it back. His view is obviously that we should be moving towards a card check process system because labor is inherently much more fragmented than management is. That, if you will, the cards should be stacked in favor of those with lesser power, in order to serve as something as a check. We have seen what the effects of unequal income are; we have seen what the effects of all this liberalization are. Let us step back, let us take things back, and let us try to do away with some of this inequality and move towards a greater equality so that we have, in a sense, more of the benefits of globalization flowing to those who actually work for globalization. So those are my comments for today, and I would like to invite Kevin to come up. Kevin is going to address us next. Thank you.

59 See id. at 493 (noting that until the late 1980s, essentially all Canadian provinces used the card check method to certify unions).
60 See id. at 494 (noting that today, six provinces covering approximately seventy-five percent of Canada’s workforce have mandatory elections for union certification).
MR. BANKS: Michael asked me to see if I could find a topic that would do-ve-tail with his presentation, and I think I have. The stagnation of labor law, which he describes, arguably led to the pursuit of labor law reform in Canada by novel strategies, and in particular through constitutional litigation. I see in this strategy and its early successes some commonalities with the model of governance that is being developed in international trade-related labor agreements. This model stands to influence reform of the labor side agreement to the North American Free Trade Agreement (NAFTA) and the North American Agreement on Labor Cooperation (NAALC). These two distinct developments reflect a new approach to labor law and policy which I will refer to as the new labor law constitutionalism.

What I would like to do in this somewhat speculative talk is explore some of the prospects and implications of the new labor law constitutionalism. I think it is an interesting phenomenon for a number of reasons. First, it represents a significant shift from the way in which labor law and policy issues have traditionally been handled in North America, where legislative supremacy and government policy discretion have been the norm. Secondly, this way of proceeding does stand to reshape at least Canadian laws to a certain extent. Finally, I think that despite some recent successes, labor law

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61 See BRYM, supra note 57 (discussing various labor movements since the mid-1970s).
constitutionalism has some important limitations. Those who hope to reform the NAALC approach to labor standards under the NAFTA need to be attentive to these limitations. First, I will provide some background.

Labor law constitutionalism in Canada only recently came of age in 2007, with the decision of the Supreme Court of Canada in Health Sector and Support Facilities Bargaining Association versus British Columbia, commonly referred to as the B.C. Health decision. In that case, the Supreme Court ruled that where a government substantially interferes with the right to bargain collectively, it violates Section 2(d) of the Canadian Charter of Rights and Freedoms, which protects freedom of association. In B.C. Health, the government had reopened and rewritten a number of collective bargaining agreements with public sector unions. It had also legislatively limited what subjects could and could not be bargained in future negotiations. It did this without any meaningful consultation with the affected unions. The Supreme Court found a number of those measures to violate the Charter of Rights. The Court's decision established a broad protection for collective bargaining rights, but left its contours to be defined in future case law.

Let us turn now to the international governance model embedded in the new United States labor chapters in free trade agreements. As recently as mid-February, when President Obama visited Ottawa, he indicated that it might be appropriate to reopen the North American Agreement on Labor Cooperation and perhaps include a labor chapter directly in the NAFTA. This position reflects the direction that United States policy with respect to trade-related labor provisions has followed over the last decade. The United States now negotiates requirements to reflect in national laws internationally recognized fundamental principles and rights, and sharply defined obligations to effectively, fairly, and transparently enforce those laws. The primary means of ensuring compliance with these international obligations is through adjudication-based dispute settlement mechanisms which can lead to the imposition of trade sanctions or fines. The aim is to provide parity of treatment in trade law between labor and commercial obligations. This has meant that dispute settlement can potentially operate in a much more expeditious and

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63 See id. (holding that sections 6(2), 6(4) and 9 of the Health and Social Services Delivery Improvement Act interfered significantly with the right to collectively bargain).
65 See Health Serv. & Support, 2 S.C.R at 62 (noting the measures of the Health and Social Services Delivery Improvement Act which violate the Charter of Rights and Freedoms).
judicial manner than was the case under the first trade-related labor agreement, the North American Agreement on Labor Cooperation.

Constitutionalism has two defining features. One is that it empowers adjudicators to sit in judgment on the outcomes of politics as usual, and to articulate and seek to directly impose constraints or new directions on those outcomes, based on a constitutional framework of rules. More subtly, but perhaps more importantly, it may also entail a legalization of politics. Legislators and policy makers are called upon to respond to judgments in their compliance work and in settlement negotiations. It becomes less politically legitimate to simply avoid issues that can be characterized as matters of constitutional right or obligation. Governments, to varying degrees, also build mechanisms to deliberate upon the requirements of constitutional rights as they are formulating their agendas and plans of action. This may involve no more than considering how to minimize impacts on rights in order to survive constitutional scrutiny. In Canada, where a government is determined to proceed in the face of anticipated Canadian Charter of Rights problems, it may seek to justify its actions under Section 1 of the Charter, which provides, generally speaking, that a government may infringe upon constitutional rights if it can show that it is advancing a compelling purpose in a way that minimally impairs those rights. On the other hand, it is possible that constitutional rights or norms could form part of a positive government agenda, as it did with the passage of the Civil Rights Act in 1964.

In the case of a new NAFTA labor agreement, it is very likely that the United States administration will eventually seek a labor chapter or something like it under which trade tribunals will determine whether national governments have complied with internationally agreed upon substantive labor norms, and authorize enforcement through withdrawal of trade benefits. Labor standards will enter North America's trade constitution, to borrow and paraphrase a term coined by noted international trade law scholar John Jackson.

These two developments in labor law reflect very different debates and struggles. The first originates in the politics of public sector collective bargaining in Canada at the provincial level. These are matters about as domestic as labor policy confronts in today's internationally integrated global economy. The second reflects by contrast the outcome of political struggle over how the United States should seek to influence and reshape globalization, a struggle that determined the capacity of United States administrations to pursue trade openings internationally for much of the last two decades. Yet,

67 See Canadian Charter of Rights and Freedoms, R.S.C., App. II, No. 44, Sched. B, Pt. I, s.1 (1985) (Section 1 guarantees the rights and freedoms described in the Charter subject only to reasonable limits that can be demonstrably justified).

both are also a response to the perceived incapacity of legislatures to deliver on fundamental workplace principles and rights in today's economic and political environment. The hope underlying both is that law will discipline politics, and that adjudication will trigger reform.

The experience of the new labor law constitutionalism may prove to be more complex, and perhaps more disappointing to its proponents. The empirical political science studying constitutionalism dealing with complex social policy issues such as those handled by labor law suggests not only can that law can constrain politics but also that politics can constrain law. Harvard constitutional scholar Richard Fallon has argued that we can learn a lot as lawyers from the political science tradition of treating courts as political actors engaged in a system of governance. From that perspective, constitutions are political coordinating conventions. They are useful to everybody because they constrain the future actions of political opponents, establishing ground rules that enable peaceful political competition and transfers of power. As actors within such a political system, courts are constrained not only by the legal norms that they have to apply but also by the risk of being inefficacious, that is, of having their decisions avoided or ignored if they become politically unrealistic. Political actors on the other hand are constrained by the risk of negative consequences, notably the loss of legitimacy that may result from defying court decisions. The strength of those constraints depends on the political support for norms that support compliance such as the legitimacy of courts as interpreters of the law, the illegitimacy of political acts not in accordance with the law, support for particular constitutional norms, and so on.

The greater the political change entailed by a court decision, the greater the risk that political actors will tilt towards avoidance or even open defiance. There is a well-documented history of this in the United States. Gerald Rosenberg, in an important book called The Hollow Hope, has shown that where constitutional decisions require very significant social and political change, such as the desegregation of schools, to cite one of several examples that he discusses in his book, court judgments, including those of the Supreme Court of the United States, have been routinely ignored for many years until political change takes place elsewhere in the system. Early victories arguably did more to strengthen resistance to change than to bring it about, and may have produced reluctance in the United States Supreme Court to accept further cases for review.

Where constitutional norms call for significant political and social change, the legalization of politics plays a significant role in achieving such change, in addition to or instead of the adjudication of constitutional claims. Human rights norms and laws informed the civil rights movement in its early days almost entirely independently of Supreme Court decisions. Successful implementation of contemporary civil rights orders often requires ongoing political negotiation and policy experimentation in which many outcomes are possible, rather than being commanded and controlled by court order. The “international trade constitution” has, to a great extent, succeeded through the legalization of politics by creating a perpetual negotiating process, not only around new agreements but around the better implementation of old agreements. Those who were concerned with trade and labor issues might do well to look at how that process has worked. Let us turn back to our two instances of the new labor law constitutionalism.

As a result of the BC Health decision, Canadian courts will face a wave of litigation addressing the extent to which legislatures can regulate the right to strike, restructure the way unions and employers negotiate with each other, determine the topics that can be negotiated at the bargaining table, and regulate who has access to collective bargaining. Courts facing such claims have already begun to strike down legislation.\(^7\) The courts have also called upon legislatures to provide protections against antiunion discrimination, at least for more vulnerable workers. The courts have little textual guidance in the Charter of Rights to interpret what the right to bargain collectively means. The BC Health decision leaves most of these questions unanswered. There is little guidance in other common law legal traditions to draw upon. So courts will likely turn to the body of jurisprudence developed by the International Labor Organization (ILO), which has developed an extensive set of interpretations of that particular right, and in particular, of the rights and obligations that Canada has assumed under Convention 87 of the ILO.\(^7\) Canadian governments may thus face pressure to adjust Canadian law in the direction of international consensus. On the other hand, some of this harmonization may be blunted by application of the “reasonable limitation” provisions of the Charter's Section 1.\(^7\) Any changes will of course face political resistance, but are not likely to go to the roots of the Canadian labor and employment law system. Rather, they may close gaps in the current system that have reflected the hold of special interests on aspects of the system with a relatively

\(^{7}\) See Fraser v. Ontario, [2008] ONCA 760 (Can.).


\(^{7\text{b}}\) See Canadian Charter of Rights & Freedoms, R.S.C., APP. II, No. 44, Sched. B, Pt. I, s. 1 (1985) (Section 1 states that the rights and freedoms of the Charter are subject to reasonable limits prescribed by the law).
low political profile, or constrain the way in which governments deal with public sector unions.

On the whole I would hazard a guess that the reform process can largely be managed without straining the current constitutional legal framework and relationship between judiciary and legislatures. On the other hand, I think that it is a lot less clear that the governance model likely to be proposed for a new NAFTA labor chapter will be adequate to the task set down in front of it. This is because its nearly exclusive focus on adjudication mechanisms deprives it of other means to legalize politics.

The North American Agreement on Labor Cooperation (NAALC) has been roundly criticized over the years because its substantive obligations do not constrain how states set their own labor laws, because its dispute resolution processes are convoluted and avoid dealing with critical issues like the right to bargain collectively, and because the Agreement and its institutions have failed to deal effectively with many key issues that it has been called upon to address. These include most notably a recurring problem with some jurisdictions in Mexico refusing to recognize independent trade unions and refusing to address intimidation of workers who seek to organize them.

The new labor chapter model addresses these flaws through stronger substantive obligations and parity of treatment through dispute resolution and remedies between labor and commercial matters in international trade agreements, as I described earlier. In addition to addressing criticisms of the NAALC, this model resolves long-standing political debate within the United States Congress over the trade and labor standards linkage. Those wishing to deal with the labor issues under the NAFTA in a way that strengthens support for it will be justifiably drawn to this option.

It may not work as well as hoped. The issues are big and politically sensitive. Let us return to the example of lack of protection for independent unions and their members in Mexico. There is a reason why tribunals in Mexico have consistently had problems handling issues with respect to independent union representation. Resistance to independent unionism has deep roots in the Mexican political economy. In the absence of other ways of legalizing politics, of making labor reform subject to ongoing debate and deliberation guided by international norms, and of seeking, with the help of international cooperation, to change some of the background conditions that

75 See id. at 749 (noting freedom of association and right to collective bargaining as central issues).
76 See generally id.
77 See Unions, Workers and the State in Mexico (Kevin Middlebrook, ed., 1991).
contribute to non-compliance with international norms, I suspect that a new NAFTA labor chapter will achieve only piecemeal results in the form of minimal compliance accompanied by avoidance of the larger implications of any enforcement rulings. This will test the willingness of the United States in particular to convincingly threaten the use of trade sanctions to achieve enforcement results. However, United States practice has been very susceptible to the geopolitical considerations. In any event this is not something that one would hope to rely upon frequently in international relations.

There is an alternative model for linking labor standards to international trade, one which more systematically introduces international labor standards into national political and economic life, and one which the United States has also led the way in developing. The centerpiece of the United States-Cambodia Textiles Agreement was a cooperative program which sought to strengthen labor laws and inspection in Cambodia, and established a system of labor standards monitoring in factories by International Labor Organization officials. The agreement provided enhanced access to the United States market as an incentive for progress in improving labor standards on the ground. By most accounts the Agreement was successful; at least in relation to any other trade-related labor provisions currently in effect. The keys to the Agreement's success appear to have been: (1) ILO monitoring in factories and public disclosure of its findings, which changed incentive structures faced by employers, spurred changes in their production systems, and allowed Cambodia to develop a competitive advantage in ethical clothing and textile production; and (2) regular and well-informed reviews of progress by the parties against agreed upon goals, which brought the incentive structure of the agreement to bear on the small decisions on the shop floor and in government policy making that cumulatively can transform working conditions and labor standards regulation.

While this is but one instance, it is instructive in light of the theories and evidence with respect to complex social policy constitutionalism that I outlined earlier. An effective and therefore stable approach to the labor standards issues associated with international trade agreements probably demands that we move beyond adjudication coupled with the threat of sanctions. A new labor constitutionalism should bring international norms into national politics in more subtle, less coercive but more systematic ways. The challenge is to adapt the lessons of the United States-Cambodia Agreement to new and more complex contexts.

MR. STRASSFELD: Good morning, it being Saturday, you have probably been welcomed several times over, but as a member of the faculty, I would like to personally welcome you to Cleveland and to Case Western Reserve University. I titled my talk, "Is It Time for the United States to Be More Like Canada?" My task today is to sketch out developments in United States labor law that might be of interest to people who are doing business in the United States or have concern about what is going on in the United States.

I will focus mainly on the Employee Free Choice Act (EFCA), but there are a couple of quick hits that I would like to make first. Kevin Banks and I had a brief conversation before we sat down, in which I expressed my pessimism that, given the array of topics on the Agenda and the pressing weight of those, I am not sure when we will get to the North American Free Trade Agreement (NAFTA). However, I will not discuss NAFTA. First, let me make some statements of changes in the world since the last Canada-United States Conference in the world, Barack Obama was elected President of the United States, and the financial markets have collapsed leading to a near freefall of the economy.

Both of these events are significant, and they are particularly significant for those of us concerned about workers' rights and labor law. The election
of Obama means obviously a great many things. With regard to United States labor law, it also means that there will be changes in the personnel of the National Labor Relations Board, which normally happens fairly incrementally, as board members are appointed to five-year terms. There happens to be three vacant seats on the Board right now. The Bush board or the "Batista" board has generally been regarded as extremely unfriendly to labor. For those of you who are labor practitioners, this will not come as news. For those of you who are not, this may also not come as news. The board is highly political, and it shows in the history of labor law doctrine. Frequently the board will reverse precedent from prior boards, only to have that precedent reversed once the composition of the board changes again. Therefore, I expect that there will be a change in direction of the board. I think it will shift more to the center, vaguely left, and there are a number of board decisions that may be given the axe sometime in the future.

Included in this range are decisions defining who is covered by the act. The most recent board greatly expanded the definition of "supervisor," which meant that a variety of people who were thought to be employees protected by the act were not. For example, graduate student teaching assistants lost protection under the act. The current board also limited the value of voluntary recognition of a union by employers. However, that may change legislatively. Additionally, the current board limited the rights in non-unionized workplaces for employees to seek the assistance of fellow workers, and also limited electronic solicitation rights in the workplace. Those and a variety of other decisions may meet their fate. The other obvious

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82 See National Labor Relations Act, 29 U.S.C. § 153 (1935) (noting board members are appointed by the President every five years).
85 See In re Oakwood Healthcare, Inc., 348 NLRB No. 37 (2006) (deciding that 12 charge nurses were supervisors rather than employees).
86 See In re Brown University, 342 NLRB No. 42 (2004) (finding that graduate students and teaching assistants are not employees covered under the NLRA because their relationship with their employer is primarily educational).
87 See In re New Otani Hotel and Garden, 331 NLRB No. 159, 167 (2000) (deciding that a union's organizing activity did not constitute a request for recognition).
88 See In re IBM Corp., 341 NLRB No. 148 (2004) (finding that employees who work in a nonunion workplace are not entitled from having a co-worker accompany them to an interview with their employer).
89 See Washington Fruit and Produce Co., 343 NLRB No. 125 (2004) (stating that partial union access to the workforce was lawful for solicitation purposes during an election).
change in the world has been economic distress, which historically has sometimes led to new life being breathed into the labor movement. Canadian labor scholar Harry Arthurs suggested that we might be on the brink of seeing that. You may have already gotten the sense that labor scholars are pretty pessimistic. My expectations are not as high as Harry Arthurs'. It is true that in the 1920s, the labor movement in the United States was viewed as essentially moribund, and that changed both with the depression and significant labor legislation. However, I am not holding my breath, which brings us to the EFCA.

Why is it that we are talking about the EFCA? The reason is because there is a perceived problem on the part of the labor movement. Everything that Michael Lynk described for Canada has happened with a vengeance in the United States. The decline of union density and the difficulty of organizing new workers both have happened. It happened for a lot of reasons, which are also acknowledged by the individuals who study the labor movement.

Labor law is actually viewed as a significant part of the problem. How so? It makes it difficult for workers to act on the promise of the National Labor Relations Act, which is the right to self-organization, and encourages a lawless reaction on the part of employers to efforts to self-organize. The EFCA is viewed as a mechanism to alter that balance, to restore some of that promise. Where does Canada come into all of this? Canada is involved, because the model is, in many ways, drawn from Canada. Indeed the advocacy for the changes that the EFCA brought about began in United States labor scholarship with the writings of Paul Weiler more than twenty-five years ago. Paul Weiler is a Harvard law professor. He was also the chairman of the British Columbia Labor Board before he got into legal academia. In a series of articles followed by a book, he described how labor law had inhibited the ability of workers to organize unions in the first in-

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93 See id. at 488-98.


stance and then to act collectively effectively, thereby undermining unions, even if they did have electoral success in the organizational campaign. So what does the EFCA set out to do? Well, I will start actually at the tail end, with Section 4, which alters remedies.97 The general consensus is that labor law remedies under the National Labor Relations Act are inadequate, because they do not inhibit violations of the act.98 Indeed the sanctions are so low they encourage violations of the Act.99 This occurs especially in the context of union election campaigns. Part of Weiler’s work was to show the correspondence between increased lawlessness and firings of workers.100

One of the things that Weiler argued was that if you were a worker in a workplace that was being unionized, there was a one in twenty chance that you would be fired just by virtue of the fact that you were a worker in a setting where a union organizing campaign was going on.101 The remedies for that are fairly toothless. As a consequence, the rational utility maximizing profit employer does the calculations and finds it is well worth it to intimidate workers, threaten to close shop, fire workers, inhibit their communication all in violation of the act, because the cost down the road will be fairly trivial. In a variety of ways EFCA would bolster the remedies available for violations of the act.102 This is not uncontroversial. Indeed a couple of congresses ago, when the board was considered to be using one of its remedial powers too aggressively, specifically the 10(j) injunction, Congress threatened to cut funding for the board.103 However, it is probably the least controversial aspect of the act. The other two are Section 2 streamlining union certification, and Section 3, facilitating initial collective bargaining agreements. Here is where Canada comes into play. Section 2 creates a mechanism for certification based on card checks.104 Section 2 is not quite what either its

99 See ELLEN DANNIN, TAKING BACK THE WORKER’S LAW: HOW TO FIGHT THE ASSAULT ON LABOR RIGHTS 25 (ILR Press, 2006).
100 See WEILER, supra note 96.
103 See Matthew M. Bodah, Congress and the National Labor Relations Board: A Review of the Recent Past, 22 J. LAB. RES. 699, 705 (Fall 2001) (“The original House bill provided for a fifteen percent cut in Board funding and included riders to make it more difficult for the Board to issue Section 10(j) injunctions).
104 See H.R. 1409 §2.
critics or its proponents say it is. It neither completely eliminates the election option nor does it, as the proponents say, leave it intact. In the language of the statute, Section 2 certainly does eliminate the election option, but it is as if I were to say to my class you have two options, you can take the midterm or you could bypass the midterm. Technically, they have two options. Practically, I do not expect to have to grade many midterms. Under the current regime, ironically, it is the employee who can deprive employees of their right to an election. Often that is quite the norm, the employer can voluntarily recognize a union, and so long as the union has majority support of the employees, there is nothing unlawful about it. The Supreme Court told us in an old case that the inability to do math is an unfair labor practice if you cannot count and divide properly. That does violate the rights of employees.

This is of course highly controversial because it is viewed as the last best hope, perhaps, for the United States labor movement as it makes organizing easier. The longer the election campaign, the more likely it is that support for the union will erode. That will happen for a variety of reasons, but partly to do with illegality and intimidation. Unions do better under card check systems.

Section 3 deals with contract negotiations. This too, has been regarded as a significant problem, and this is also an area that Weiler, drawing on his Canadian experience, pointed to. In the glory days of high union-density, most unions that won an election or achieved voluntary recognition successfully managed the negotiation process. Overwhelmingly, most unions successfully managed the negotiation process and reached a first contract. Here is an instance where the “toothlessness” of remedies makes a difference. Employers who resist negotiations, or go through sham processes of negotiations, can drag out the process for years, thereby eroding union support, and leaving workers thinking, “why did I bother to stick my neck out on behalf of the union that cannot bring me anything? They cannot even get a contract.” The remedy at the end is that the board will tell the employer shame on you; you should go back and negotiate in good faith.

In 1973 the British Columbia Labor Code adopted a provision for interest arbitration, essentially allowing for negotiations, eventually, to go to arbitra-

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105 See Int’l Ladies’ Garment Workers’ Union v. Nat’l Labor Rel. Bd., 366 U.S. 731, 739 (1961) (“The act made unlawful by § 8 (a) (2) is employer support of a minority union. Here that support is an accomplished fact. More need not be shown, for, even if mistakenly, the employees’ rights have been invaded.”).
106 See id.
107 See H.R. 1409.
109 See H.R. 1409.
tion, where a panel of arbitrators would write the collective bargaining agreement based on the last positions of the two parties.\textsuperscript{110} Quebec has also adopted that;\textsuperscript{111} I do not know if any other Canadian provinces have. That is the model that EFCA chooses.\textsuperscript{112} It is after a process of negotiation and then the option to seek mediation, and only after mediation has failed, that it might lead to interest arbitration.\textsuperscript{113}

Surprisingly, this has not garnered a lot of response; so far, the focus has been on elections. I think this is, in fact, the most radical change proposed by EFCA. We have a strong tradition in our labor law of respect for freedom of contract,\textsuperscript{114} which includes, most importantly, freedom not to contract.

I probably have about a minute in which to do what I typically do not do. As Chi told you, I spend most of my time wrestling with the past. It is especially foolhardy on my part since the proceedings will be published, probably, within a week of when Congress comes out and does something completely different from what I anticipate, but this is what I anticipate.

The least controversial, the remedial, some of that legislation will be passed, but it will not be precisely the legislation as it currently looks. It is now in the House working its way through. I think that the most likely significant change will look to Canada, which is to adopt in lieu of card check, a system of expedited elections. That is an improvement over the current United States system. It leaves, until later, disputes that drag out the election process, over who are eligible voters and the like. That would be a good thing. As Michael suggested in his talk, a far less good thing, which is where the irony comes in my title. Perhaps the real question is, is it time for Canada to be more like Canada becomes more like the United States in step. Thank you.


\textsuperscript{114} See generally FREDERIC JESUP STIMSON, HANDBOOK TO THE LABOR LAW OF THE UNITED STATES 1-3 (BiblioLife 2008) (1896) (describing the origins and tradition of freedom of contract in United States' labor law).
DISCUSSION FOLLOWING THE REMARKS OF CHI CARMODY, KEVIN BANKS, AND ROBERT STRASSFELD


MS. TODGHAM CHERNIAK: I have a question probably directed more towards Kevin, but anyone on the panel can answer it. Does the United States really want to have this change to free trade agreements? The reason why I am asking is, because the labor laws are not perfect in the United States and they are not perfect in Canada either. There are free trade agreements with a number of countries. So for example if there is a remedy and you are able to take retaliation action after a negative decision, you can have a whole series of countries taking retaliatory action because there is no trumping country, these are bilateral free trade agreements. Is that really a situation that would be beneficial in the free trade context?

MR. BANKS: Well, I think about how it plays out. In each of those bilateral agreements, the United States is the dominant party. So I think, first of all, it is unlikely that other countries could do much to the United States, even if they were inclined to act. The second thing is that labor issues are not typically the kinds of issues that you can get an easy domestic consensus on to go and then seek trade action from your government. So there is a political filter on whether that can go ahead or not.

Perhaps the more cynical and more subtle part of my response is that because what I was saying at the end of my talk, the way that these disputes may play out, will put a large emphasis on the discretionary use of trade remedies down the road. That gives the United States an opportunity to pick and choose the issues that it wants to act on, and perhaps avoid some of the implications of taking on substantive labor commitments for its own domestic labor policy. If it is pairing up with trading partners that are, first of all, unwilling to take it on labor issues, then it is insulated in that way, then it can pick and choose which issues it enforces so it avoids having the mirror held up to its own system as well.

MR. CARMODY: Jon.

MR. ENTIN: There are mostly economic arguments about the benefits or the disadvantages to Canadians. There are also some proper political arguments about this. One of the critiques of unions is that they are not democratic, or lost in the sense that the internal dynamics tend to be of one-party operations. Further, lots of unions, whatever benefits they may provide for the workers, also have an unfortunately high level of corruption. I wonder

to what extent this sort of political critique has been driving some of the debates both in the United States and in Canada about how reasonably we ought to make unionization and collective bargaining work.

MR. STRASSFELD: There was a long historical argument about how images of labor violence and corruption have been used over a century; if you look at the old American cases and the language and the metaphors used. In 1959, we have what purports to be major reform to deal with issues of union democracy. 116 In the Landrum-Griffin Act, it is only so effective. 117 There are real fiduciary duties that are owed by union officials. 118 There is this labor Bill of Rights. I think there are many examples one can point to, if one wants to make the case that unions are corrupt and undemocratic. One could similarly do that with business, in terms of representing shareholder rights, in terms of representing other stakeholder rights, in terms of corruption. It ultimately becomes an argument by anecdote, but a very powerful one, so, which is, I think, really your point. That does drive this image of the idea that some big burly thug is going to be standing over all these powerless workers collecting authorization cards. It is an image that resonates because it has been part of our culture for a long time. There is a second part to it, which is that unions, while they may not be democratic, they are quite frequently Big D democratic. In the United States, people have recognized that there is something at stake politically, whether or not the labor movement is vibrant and strong. In this post-post-partisan world that we seem to be living in now, that is going to matter, that is going to play out, and that is one of the reasons why I think EFCA, as it has been introduced, is not the bill that will ultimately be signed.

MR. BANKS: I think in Canada the situation may be somewhat different. I am not a student of the history of the Canadian labor movement, so to a certain extent I am just giving you impressions based on my practice and time as an academic. However, I think the culture of unionism has been different. There is not the same degree of discussion and concern about corruption in the union movement. You can see that evidenced in a couple of

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things. One, we do not regulate to nearly the same extent on internal union affairs;\textsuperscript{119} it is largely left to competition between unions or internal union democratic processes to sort things out.

Second, is that the move away from card checking towards quick votes has really been spurred by the employer community.\textsuperscript{120} There has not been a groundswell of employees demanding this change. So, where employers get a sympathetic ear from a government, they bring this demand forward, it resonates well with the general public, how can you argue against an election? Then it is implemented, but it is not people in unionized workplaces that are bringing this concern forward.

I guess the last point I make is somewhat speculative, but I think perhaps the fact that representation campaigns, who like to bargain, and generally are less contentious and confrontational, not to say that they are contentious and confrontational but I do not think that stakes are as high, and that the acrimony is as intense as it is in the United States. So I think that may have shaped the extent to which unions configure themselves as authoritarian organizations in order to confront an organization that is hostile to their interests, so they may be a little more open in that way.

MR. CARMODY: Jon.

MR. GROETZINGER: Bob, I think you had mentioned that you expect the Obama Administration to be more pro-labor. One of the first acts the President did was something that no President before him had ever had the courage to do, which is to criticize the National Teachers Union.\textsuperscript{121} He basically said that education should be based on performance.\textsuperscript{122} Is that out of character or does that indicate a different direction than the democratic atti-


\textsuperscript{120} See Michele Campolieti et al., *Labor Law Reform and the Role of Delay in Union Organizing* 32 (2007) ("Legislated quick-vote elections appear to be Canada's new choice for union recognition, as many provinces . . . have recently moved away from the traditional card-check procedure whereby unions typically became certified without a vote.").

\textsuperscript{121} See Lee E. Ohanian, *Anti-Union Obama?*, FORBES, Mar. 18, 2009 ("Most surprising is that the president, de facto, criticized education unions, who have been among his strongest political supporters.").

\textsuperscript{122} See, e.g., Elizabeth Lazarowitz, *President Obama Education Plan for Performance-Based Teachers' Pay Pushes Hot Buttons in New York*, N.Y. DAILY NEWS, Mar. 10, 2009 ("The President called for teacher merit pay for boosting student performance, but also for moving quickly to get bad teachers out of the classroom.").
tude towards unions is taking? I wondered whether, that type of direction is also in Canada.

MR. STRASSFELD: I do not know that that is out of character. I mean, I do not think it is out of character in terms of President Obama in the sense that his track record as a friend of the laborer is quite solid, but his track record as a politician who is not necessarily bound by old commitments and is looking towards new pragmatic responses to old questions also seems to be pretty well established at this point. So I think we see that in his choice of Secretary of Education. 123

I think we have seen that in more or less everything he has done with the legislative agenda. I mean, I understand clearly there is a significant portion of Congress that does not read this as gravitation towards the center, but he certainly has his critics from the left, sometimes me included, in this short period of time. So I do not find it surprising or inconsistent at all. I think probably there is a willingness on the part of most of us to see how this plays out because the old battles have not played out all that successfully.

I did work long ago in my practice days for what used to be the International Lady Garment Workers Union, and every conversation started with the triangle shirtwaist factory fire. 124 I understand it is this critical moment in the history of the Garment Workers Union, but there was also this kind of backwards-looking commitment. The labor movement can be moribund. That is one of the reasons for its decline in addition to some of the things that we have and have not talked about. It is time perhaps to reopen issues like what do we do about failing schools, and what incentives can we have that are both fair and effective?

MR. CARMODY: Well, if there are no more questions, I am going to bring this session to a close. We have actually run a little over time. I would like to thank all of our speakers for a tremendously stimulating overview. Thanks very much.


124 See generally The Triangle Factory Fire, Introduction, http://www.ilr.cornell.edu/trianglefire/narrative1.html (last visited Dec. 20, 2009) ("This incident has had great significance to this day because it highlights the inhumane working conditions to which industrial workers can be subjected").