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Articles

Law and Labor in the New Global Economy: Through the Lens of United States Federalism

MARK BARENBERG*

The heightened economic globalization of the last quarter century presents a welter of new questions for legal scholars, policymakers, and practitioners. In many specialized fields, lawyers and academics are reskilling in comparative and international law in response to the growing importance of the transnational linkages and competition facing economic and regulatory actors in the United States. Concurrently, dramatic economic and political “transitions” in Asia, Latin America, and Eastern Europe have created legal uncertainties and innovations that compound the challenges of transnationalization. Issues of labor and employment law are at the center of both of these epochal transformations—globalization and regime-transition. The articles in this symposium reflect well the range and urgency of these issues.

Economic Globalization. Two broad aspects of economic globalization are particularly relevant to labor lawyers. The first is the growing international integration of product, capital, and labor markets.¹ Transnational flows of labor have again become a flashpoint of electoral politics in the United States and elsewhere. The controversy has spilled into the legislative arena in proposals to limit immigrant workers’ access to jobs and government benefits.² It has also renewed perennial debates over the stringency and enforcement of domestic immigration law and minimal labor conditions, such as child labor, sweatshop, and wage and hour rules.

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1. See, e.g., PETER DICKEN, *GLOBAL SHIFT: THE INTERNATIONALIZATION OF ECONOMIC ACTIVITY* 3-5 (2d ed. 1992).

2. See, e.g., the pending Welfare Reform Act of 1995 which was passed by the House of Representatives on March 24, 1995. H.R. 4, 104th Cong., 2d Sess. (1995).

It is true that the volume of transnational labor migration remains small compared to international flows of products and capital.³ But the integration of world product and financial markets itself generates de facto integration of world labor markets.⁴ For example, the threatened or actual movement of light-assembly operations from the United States to developing economies effectively places low-skilled United States workers in competition with poorly paid workers abroad. Imports of manufactured goods from emerging economies have a similar practical consequence. That is, cross-border movements of capital and products entail transnational labor competition even in the absence of direct labor mobility. Such labor competition both affects and is affected by the domestic and international labor laws enforced in each country.

The second relevant aspect of globalization is the spread of new types of workplace and corporate organization. There are lively debates among political economists about whether *strategic, financial* decisionmaking power within multinational corporations is growing more or less concentrated.⁵ There is, however, a broadening consensus that the *production process* is increasingly embodied in decentralized, flexible units that form networks within and across corporate boundaries.⁶ This organizational trend challenges the viability of labor-law and social-insurance regimes rooted historically in bureaucratic mass-production enterprises, whether in capitalist or collectivist polities.⁷ It also poses intricate, novel problems for lawyers (representing governments, investors, or workers) who negotiate foreign investment deals or employment contracts, collective or individual, that seek to exploit the advantages of flexible work systems. In their contribution to this Symposium, Professors Woo and Williams compare the responses of the social insurance regimes of the United States and China to the growth of insecurity and segmen-

3. DAVID E. BLOOM & ADI BRENDER, LABOR AND THE EMERGING WORLD ECONOMY 22 (National Bureau of Economic Research Working Paper No. 4266, 1993).

4. *Id.* at 10-16.

5. BENNETT HARRISON, LEAN AND MEAN: THE CHANGING LANDSCAPE OF CORPORATE POWER IN THE AGE OF FLEXIBILITY 3-12, 171 (1994).

6. *E.g.*, Charles Sabel, *Moebius-Strip Organizations and Open Labor Markets: Some Consequences of the Reintegration of Conception and Execution in a Volatile Economy*, in SOCIAL THEORY FOR A CHANGING SOCIETY 23, 23-46 (Pierre Bourdieu & James S. Coleman eds., 1991).

7. *See* Mark Barenberg, *Democracy and Domination in the Law of Workplace Cooperation: From Bureaucratic to Flexible Production*, 94 COLUM. L. REV. 753, *passim* (1994).

tation in two very different national labor markets.⁸ Mao-chang Li's contribution to this Symposium illustrates the specific transactional problems facing practicing lawyers in the context of China's transition from a system of lifetime employment security in state enterprises to a flexible, contract-based labor market.⁹

Regime Transitions. The recent developments in political regimes that are particularly relevant to labor law also fall into two broad categories. First, the 1980s and 1990s have witnessed a surge in international trade agreements—bilateral, regional, and global. There are now more than thirty multilateral, regional trading blocs in the world economy.¹⁰ The potential impact of these agreements on labor conditions burst into popular consciousness in the United States during debates over the ratification of the North American Free Trade Agreement (NAFTA). European legal culture has longer-standing familiarity with the issue of transnational labor standards, reflected in the Social Protocol of the European Union (EU).¹¹ Last year, the Clinton Administration proposed the inclusion of international labor standards in United States legislation implementing the Uruguay Round of the General Agreement on Tariffs and Trade (GATT).¹²

Second, the global wave of political reforms—capsulized in the concept of “transitions to market and democracy”—has necessarily shaken old regimes of labor and employment law.¹³ Political contests continue over the privatization of state enterprises, the introduction of new forms of corporate governance, the deregulation of labor markets; the structure and autonomy of labor unions, and the provision of social insurance to dislocated workers. So long as these

8. Lucy Williams & Margaret Woo, *The “Worthy” Unemployed: Societal Stratification and Unemployment Insurance Programs in China and the United States*, 33 COLUM. J. TRANSNAT'L. L. 457 (1995).

9. Mao-Chang Li, *Legal Aspects of Labor Relations in China: Critical Issues for International Investors*, 33 COLUM. J. TRANSNAT'L. L. 521 (1995).

10. Vincent Cable, *Overview*, in TRADE BLOCS? THE FUTURE OF REGIONAL INTEGRATION I, 1 (Vincent Cable & David Henderson eds., 1994).

11. For a summary of European initiatives under the Social Protocol, see John T. Addison & W. Stanley Siebert, *Recent Developments in Social Policy in the New European Unions*, 48 INDUS. & LAB. REL. REV. 5 (1994).

12. On the vicissitudes of proposals for inclusion of labor standards in the GATT regime, see Gary Yerkey, *U.S. Failing to Convince Other Countries to Use Sanctions to Enforce Labor Rights*, Daily Lab. Rep. (BNA) (Feb. 28, 1995).

13. See, e.g., LABOR MARKETS AND SOCIAL POLICY IN CENTRAL AND EASTERN EUROPE: THE TRANSITION AND BEYOND (Nicholas Barr ed. 1994); see also Frederic C. Deyo, *State and Labor: Modes of Political Exclusion in East Asian Development*, in THE POLITICAL ECONOMY OF THE NEW ASIAN INDUSTRIALISM 182, 182-202 (Frederic C. Deyo ed. 1987).

and other basic elements of economic restructuring are unsettled, the future path of labor laws remains open to political conflict and imaginative policy making. For the same reason, the current practice of labor law occurs on a treacherous terrain of uncertain rules, administrative discretion, and disjunctures between laws on the book and the law in action. These developments are illustrated in Professors Vause and Judge de Holanda Palhano's account of Brazilian labor law and in Professor Josephs's discussion of the new labor laws in China.¹⁴

"Social Dumping" and Multistate Labor Standards. From this maelstrom of rapid change in the global political economy, the concept of "social dumping" has emerged as a focus of debates about desirable regimes of comparative and international labor law.¹⁵ The concept itself is straightforward, although its empirical importance and its implications for legal reform are hotly contested. Social dumping refers to the actual or threatened movement of capital from high-wage economies to low-wage economies. Such cross-border mobility of capital, it is argued, diminishes labor's distributive share of enterprise returns, worsens workplace conditions, and induces a "race to the bottom" among governments forced to compete for capital by weakening legal protections for labor.

Two of the most important empirical questions about social dumping remain unresolved. First, how significant are labor costs in fact as a determinant of overall capital-location decisions? Highly visible examples of cross-border movements of labor-intensive production (e.g., in garments, footwear, and other manufactured-goods assembly) suggest that social dumping is very real.¹⁶ There is, nonetheless, substantial evidence that, in many sectors of advanced economies, the advantages of "network" or "agglomeration" externalities among firms, and the presence of value-adding human and physical infrastructure, outweigh the disadvantages of higher labor

14. W. Gary Vause & Dulcina de Holanda Palhano, *Labor Law in Brazil—Statism and Classical Liberalism Compared*, 33 COLUM. J. TRANSNAT'L. L. 583 (1995); Hilary K. Josephs, *Labor Law in a "Socialist Market Economy": The Case of China*, 33 COLUM. J. TRANSNAT'L. L. 559 (1995).

15. E.g., Christopher Erickson & Sarosh Kuruvilla, *Labor Costs and the Social Dumping Debate in the European Union*, 48 INDUS. & LAB. REL. REV. 28, 29-32 (1994).

16. E.g., WALTER RUSSELL MEAD, *THE LOW-WAGE CHALLENGE TO GLOBAL GROWTH*, *passim* (1990).

costs.¹⁷ Second, when capital does move to lower-wage economies, do wage shares rise in tandem with productivity in the receiving country?¹⁸ An answer to this unsettled empirical question may be relevant to the following difficult normative question: Do even minor welfare gains among wage-earners in poor countries justify the greater inequality, diminished employment opportunities, and worsened working conditions that (by hypothesis) befall wealthier countries that experience capital outflow?¹⁹

Assuming social dumping is adjudged a significant practical and normative problem, the actual impact of legal interventions designed to counter the problem is similarly contested. The most widely proposed intervention—mandating the “upward harmonization” of transnational labor standards, as a means of preempting the race to the bottom—has some familiar potential drawbacks. Employers or governments in poorer countries may respond to specific labor mandates (e.g., wages and hours) by lowering other specific standards (e.g., worker safety and health) in order to avoid overall increases in unit labor costs.²⁰ Even if a multistate regime were to harmonize all labor conditions, governments or employers may attempt to maintain low overall production costs by implementing subsidies or lower standards in non-labor fields of regulation, such as environmental law.

Further, to the extent that mandated labor standards do succeed in raising labor costs in poorer countries, capital inflows and whatever welfare gains accrue therefrom (including jobs, technology transfers, and development of indigenous managerial skill) may diminish.²¹ Many developing countries oppose legally mandated upward harmonization of labor standards on these or similar grounds.²² The rela-

17. See, e.g., HARRISON, *supra* note 5, at 225-27; Erickson & Kuruvilla, *supra* note 15, at 45; C. KEITH HEAD, ET. AL., THE ATTRACTION OF FOREIGN INVESTMENTS: INVESTMENT PROMOTION AND AGGLOMERATION ECONOMIES, 26 (National Bureau of Economic Research Working Paper No. 4878, 1994).

18. See MEAD, *supra* note 16, *passim*; BLOOM & BRENDER, *supra* note 3, at 20.

19. The gains to consumers from lower-priced products, as well as a plethora of unpredictable social and economic effects on third parties in sending and receiving countries, should also be counted in the calculus of overall well-being.

20. This is the standard “argument from futility” advanced by legal economists. For competing views on the strength of this argument, compare RONALD G. EHRENBERG, LABOR MARKETS AND INTEGRATING NATIONAL ECONOMIES 6-7 (1994) with MARK KELMAN, A GUIDE TO CRITICAL LEGAL STUDIES 176-85 (1987).

21. John T. Addison & W. Stanley Siebert, *The Social Charter of the European Community: Evolution and Controversies*, 44 INDUS. & LAB. REL. REV. 597, 618 (1991).

22. These arguments may be self-interested rationalizations when advanced by state and business elites who benefit from the taxes and profits accrued through low-wage development strategies.

tively weak standards and enforcement mechanisms in the labor side agreement of NAFTA—described in Joaquin Otero's contribution to this Symposium—reflect these interests in part.²³ The same interests, compounded by the self-interest of multinational investors, propel political resistance to the kind of multinational codes of conduct discussed by Lance Compa and Tashia Hinchliffe-Darricarrère in this Symposium.²⁴

Another legal policy to prevent social dumping is the large-scale transfer of public funds from high-wage to low-wage countries. The goal, of course, is to encourage rapid economic development in poorer countries in order to diminish the very wage gap that creates the incentive for social dumping. (The various structural funds of the European Union embody this policy.²⁵) Although such transfers, ironically, are simply a different form of capital flow (public rather than private), the difference may have important implications. Unlike competition in the market for private capital, countries and employers need not compete for public capital by means of a race to the bottom in labor standards. In addition, systems of progressive taxation in the richer, sending country may be a pre-existing political mechanism for raising such public funds, by contrast with the politically difficult implementation of new "trade adjustment" programs targeted to compensate workers hurt by private capital outflows.²⁶ Nonetheless, as a practical political matter, implementation of the basic policy of large-scale, international transfers of public resources is itself less likely than mandated labor standards, at a time when wealthier countries are gripped by the politics of secular productivity slow-downs and large budget deficits.

Transnational harmonization of labor standards thus remains very much at the forefront of reform efforts in international and comparative labor law. Indeed, as discussed presently, quite similar problems of harmonization face large *domestic* legal systems, such as China's, which seek to avoid excessive inequalities among provinces and localities when markets replace central governments in the allocation of labor and capital.²⁷

23. Joaquin Otero, *The North American Agreement on Labor Cooperation: An Assessment of Its First Year's Implementation*, 33 COLUM. J. TRANSNAT'L. L. 637 (1995).

24. Lance Compa & Tashia Hinchliffe-Darricarrère, *Enforcing International Labor Rights through Corporate Codes of Conduct*, 33 COLUM. J. TRANSNAT'L. L. 663 (1995).

25. See generally Addison & Siebert, *supra* note 21, at 619-623 (discussing the European Social Charter).

26. See, e.g., EHRENBERG, *supra* note 20, at 2.

27. See CHINA DECONSTRUCTS (David Goodman and Gerald Segal eds., 1994).

Harmonized Labor Standards in Multistate Systems: Some Familiar Legal Models from United States Federalism. There are already a variety of emerging or proposed forms of transnational legal harmonization of labor standards. *Multilateral* instruments, some of which are mentioned above, include the NAFTA side agreements, the Social Protocol of the EU, various non-binding covenants of the International Labor Organization (ILO),²⁸ and proposals to add labor standards to the GATT. *Unilaterally* imposed standards are contained in various United States statutes that condition trade and investment benefits on the maintenance of minimum labor conditions in countries producing for export to the United States and in countries receiving United States foreign investment. These include the Generalized System of Preferences (GSP)²⁹ and the Caribbean Basin Initiative (CBI),³⁰ which afford tariff preferences to certain developing countries' exports; the Overseas Private Investment Corporation (OPIC),³¹ which provides guarantees and other assistance to United States investors in developing countries; Section 301 of the United States Trade Act of 1974 (as amended),³² which authorizes certain punitive action against trading partners; and legislative proposals to impose codes of conduct on United States-based multinational corporations.³³

Although these fledgling transnational initiatives deserve close examination, the most fully developed models of labor standards within multistate systems are the longstanding regimes of *domestic* labor law *within federally* structured nation-states. The United States' multistate regime contains at least six legal-harmonization models that are useful exemplars (good or bad) both for transnational regimes and for domestic federal systems currently undergoing restructuring. The first and most obvious is the model of national or multistate uniformity, exemplified by United States legislation on collective bargaining and on pensions.³⁴ This legislation preempts all state regulation that is either more or less stringent than federal standards. The domestic

28. See INTERNATIONAL LABOUR OFFICE, SUMMARIES OF INTERNATIONAL LABOUR STANDARDS (1988).

29. 19 U.S.C. §§ 2461-2466 (1994).

30. See Caribbean Basin Economic Recovery Act, 19 U.S.C. § 2702(c)(8) (1994).

31. Authorized by the Foreign Assistance Act of 1961, 22 U.S.C. § 2191a (1994).

32. 19 U.S.C. §§ 2411-2420 (1992).

33. See Compa & Hinchliffe-Darricarrère, *supra* note 24.

34. *E.g.*, Lodge 76, International Ass'n of Machinists v. Wisconsin Employment Relations Com'n, 427 U.S. 132 (1976) (preemption of state collective bargaining law by National Labor Relations Act); Alessi v. Raybestos-Manhattan, Inc., 451 U.S. 504 (1981) (preemption of state pension law by federal Employee Retirement Income Security Act).

model of national uniformity is analogous to the most blunt form of transnational harmonization, namely, specific mandated standards that are binding on all nation-state parties to a multilateral agreement.³⁵

The second model in United States federalism imposes nationwide minimum standards, but allows the several states to provide greater labor protection. This model prevails in the areas of minimum wages and maximum hours,³⁶ health and safety,³⁷ and anti-discrimination law.³⁸ A third model—programs which offer federal financial incentives for heightened state standards in order to preempt the race to the bottom among states—is best illustrated by the unemployment compensation system.³⁹ In fields in which the states have successfully avoided the race to the bottom, a fourth model has prevailed: state regulatory primacy, that is, complete non-intervention by the federal government. It is no coincidence that this model applies to programs, such as workers' compensation, which afford benefits to employers as well as workers.⁴⁰ Such mutual benefits may diminish the threat of capital mobility across states and therefore lessen the likelihood of federal intervention to solve the collective action problem created by state competition for mobile capital.

The fifth model is characterized by explicit cooperative initiatives among groups of states, such as regional economic development programs. In effect, these programs upwardly harmonize labor market conditions by means of states' horizontal agreement (rather than the federal government's vertical mandate) to preempt competitive deregulation among potentially competing states. A final model is individual states' unilateral "tit for tat" penalties (in the form of taxes or import restraints) against sister states whose lax labor standards threaten to induce a downward regulatory spiral among the several states. Although such unilateral penalties are a staple of United States *transnational* policies,⁴¹ the United States constitution

35. Examples include various health and safety, antidiscrimination, and child labor standards under the EU's Social Protocol. Note that the NAFTA side agreement does not include such specific substantive standards, but instead calls only for the enforcement of non-harmonized domestic labor laws of the NAFTA members.

36. See Fair Labor Standards Act, 29 U.S.C. § 218 (1988).

37. See Occupational Safety and Health Act § 4(b)(4), 29 U.S.C. § 653 (1988).

38. See Title VII of the Civil Rights Act of 1964 § 708, 29 U.S.C. § 2000e-7 (1988).

39. See Federal Unemployment Compensation Act, 42 U.S.C. §§ 501-504, 1101-1105 (1988).

40. See PRICE V. FISHBACK & SHAWN EVERETT KANTOR, DID WORKERS PAY FOR THE PASSAGE OF WORKERS' COMPENSATION LAWS? 2-4 (National Bureau of Economic Research Working Paper No. 4947, 1994).

41. See *supra* note 32.

generally withholds such weaponry from the domestic states. The Supreme Court has so interpreted the Commerce Clause's implicit prohibition of excessive state interference with interstate commerce, even when a state's unilateral penalties are designed to serve the larger constitutional goal of sustaining a harmonized national market.⁴²

Historical Patterns of Labor Conditions Generated By United States Federalism. How have the idiosyncracies of United States labor law affected the multistate pattern of actual labor conditions? In the twentieth century, the United States has witnessed both substantial variation in labor standards among its several states, and great ease of capital mobility to low-wage, relatively non-unionized states. First, the historical combination of the six models of labor federalism discussed above has afforded individual states much room for regulatory balkanization. By way of example, during the most recent recession, the percentage of unemployed workers who actually received unemployment benefits ranged from a low of 18 percent in Virginia to a high of 63 percent in Rhode Island.⁴³ The amount of compensation also varies widely across states. Maximum weekly unemployment benefits range from \$154 in Nebraska to \$468 in Massachusetts. Welfare benefits for indigent children offer another important example of the variability of social protection across states. (Such welfare protection is a component of the so-called "social wage." It significantly affects the bargaining power and labor standards of unskilled workers, because it comprises part of the default income when workers hold out during wage negotiations or when employers threaten retaliatory dismissals against union supporters.) The average monthly benefit for a family of three ranges from \$120 in Mississippi to \$950 in Alaska.⁴⁴

Second, even in fields covered by the model of federal uniformity, the substance of federal law has not effectively prevented the modes of capital mobility that generate downward spirals in labor

42. *New Energy Co. of Indiana v. Limbach*, 468 U.S. 269 (1988). Apart from the six models of harmonized labor standards, United States law also implements many programs that reflect, intentionally or not, the second broad response to social dumping discussed above — that is, the redistribution of public resources among states of varying wealth. Two examples include the linkage of unemployment compensation funds to state levels of unemployment, and various programs that target federal benefits to workers displaced by certain designated international trade policies.

43. MARC BALDWIN & RICHARD MCHUGH, *UNPREPARED FOR RECESSION: THE EROSION OF STATE UNEMPLOYMENT INSURANCE FOSTERED BY PUBLIC POLICY IN THE 1980S* 3 (Economic Policy Institute Briefing Paper, Feb. 1992).

44. HOUSE COMM. ON WAYS AND MEANS, 1994 GREENBOOK, *passim* (1994).

conditions. The federal law of collective bargaining preempts state law, but many specific rules permit capital to escape unionized sectors and regions of the economy. Two rules are especially important in this regard. The National Labor Relations Act (NLRA) does not allow workers to create multi-employer units of bargaining without the consent of all affected employers.⁴⁵ This rule impedes unions from achieving their fundamental goal of "taking labor standards out of market competition." That is, non-unionized employers may out-compete higher-cost unionized employers and therefore erode the unionized sector. Even among unionized employers, the opportunity for separate wage settlements puts pressure on different units of workers to compete for jobs through concessions in labor standards. The NLRA also allows a unionized employer to relocate to a non-union facility if the employer justifies the decision on economic grounds and shows no emotional hostility to unionism *per se*.⁴⁶

Third, after World War II, the formal sovereign supremacy of the national government was overshadowed by the substance of federalist party politics, which helped preserve balkanized labor market standards across the several states. The dominant New Deal coalition within the Democratic Party included strange bedfellows: the pro-labor, urban liberals of the Northeastern and Midwestern states, and the anti-union, white supremacist political machines controlled by Southern state elites.⁴⁷ The latter blocked the kind of aggressive implementation of high federal labor standards that would have threatened Southern low-wage economic strategies. Southern elites, of course, also vetoed civil rights policies that may have eased the unionization of the racially divided Southern labor force. Thus, the nation remained divided between high and low labor-standard states. The long-term movement of capital from the unionized North to the nonunion South after the 1930s⁴⁸ can thus be understood as a classic instance of social dumping within a multistate regime.

Lessons For Transnational Labor Law from United States Federalism. The United States experience shows that the construction of centralized decisionmaking structures, even if vested with supreme

45. ROBERT GORMAN, BASIC TEXT ON LABOR LAW: UNIONIZATION AND COLLECTIVE BARGAINING 87 (1976).

46. NLRB v. Adkins Transfer Co., 226 F.2d 324 (6th Cir. 1955).

47. RICHARD BENSEL, SECTIONALISM AND AMERICAN POLITICAL DEVELOPMENT: 1880-1980, *passim* (1984).

48. See MIKE DAVIS, PRISONERS OF THE AMERICAN DREAM: POLITICS AND ECONOMY IN THE HISTORY OF THE U.S. WORKING CLASS 137 (1986).

sovereign authority over labor standards, is insufficient to avoid social dumping within multistate systems. The substantive legal standards implemented by federal authorities may permit social dumping in the form of movements of capital *either* across the borders of geographic, public institutions (federal states) *or* across the boundaries of functional, private institutions (labor federations).⁴⁹ Whether the central legal system has the will and capacity to impose upwardly harmonized labor standards depends on many historical contingencies. The example of United States federalism illustrates that local political mobilization and contestation is likely to be one crucial historical variable. The eventual breakup of Southern political machines—under the hammer of the civil rights movement and a variety of new economic pressures—came too slowly and too late to produce effective, high labor standards with nationwide scope. The recent de-unionization and rapid increase in inequality of incomes within the United States workforce—unmatched in any other advanced industrial economy⁵⁰—are the twin progeny of the domestic, multistate politics of social dumping.

49. Of course, such “private,” federally structured institutions are themselves creatures of public law. See, e.g., Mark Barenberg, *The Political Economy of the Wagner Act: Power, Symbol, and Workplace Cooperation*, 106 HARV. L. REV. 1379, 1424 n.209 (1993).

50. E.g., Richard Freeman & Lawrence Katz, *Rising Wage Inequality: The United States Vs. Other Advanced Countries*, in WORKING UNDER DIFFERENT RULES 29, 29-56 (Richard Freeman ed., 1994).