



**THE RULE OF LAW GOES TO WORK:
HOW COLLECTIVE BARGAINING MAY PROMOTE ACCESS TO
JUSTICE IN THE UNITED STATES, CANADA, AND THE REST OF
THE WORLD**

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Christopher David Ruiz Cameron -- Draft as of 1 May 2013

Abstract

In the United States, the perceived costs of the institution of collective bargaining are under scrutiny as never before. But the benefits of collective bargaining tend to receive little or no attention, except in the law and economics academies. This raises some very good questions: does collective bargaining confer advantages on the society at large beyond the individual employees it covers? If so, what are those advantages? And can those advantages be communicated to the public in an accessible way? This Paper proposes that unionization promotes the rule of law. Access to collective bargaining in the workplace is a key indicator of access to justice in the society generally. Evidence of this can be found in the fact that a country having a high score on the World Justice Project's Rule of Law Index is likely to have a relatively high union density rate. By comparing data from the U.S. and Canada with data from European Union countries and others around the world, the Paper suggests in an accessible way that collective bargaining confers benefits throughout society that ought to receive as much or more attention as its purported costs.

· © 2013 by Christopher David Ruiz Cameron, Professor of Law, Southwestern Law School, Los Angeles, California. The idea giving rise to this Paper was originally presented at the UNLV Symposium on Democracy and the Workplace on February 24, 2012. Thanks to Jean Sternlight, Ruben Garcia, Ann McGinley, and the organizers of the conference for inviting me to participate. Thanks also to Susan Bisom-Rapp, Lance Compa, Bill Corbett, Bryant Garth, Joe Grodin, Kevin Johnson, Ron McCallum, Richard Mitchell, Dennis Nolan, Marley Weiss, and Steve Wilborn for each reviewing a prior draft. Any remaining errors are mine alone.

I. A PROPOSITION

In the United States, the perceived costs of the institution of collective bargaining are under scrutiny as never before. True or not, collective bargaining gets blamed in many quarters for contributing to a long list of society's ills: business bankruptcies, government budget deficits, unreasonably high expectations about wages and benefits, coddling bad workers, undue political influence, corruption, and disdain for its spillover effects on the rest of the economy, to name but a few.¹ To most domestic critics, the institution is indistinguishable from the agency most responsible for creating and delivering it: organized labor.² So whereas the costs of collective bargaining are circulated widely, its benefits tend to receive scant attention, at least in the popular press and social media.³ Which raises some questions worth exploring: does collective bargaining confer advantages on the society at large beyond the individual employees it

¹ See, e.g., WILLIAM G. FLETCHER, JR., "THEY'RE BANKRUPTING US!" AND 20 OTHER MYTHS ABOUT UNIONS 8, 28, 38, 58, 65, 79, 121 (2012).

² See, e.g., "Unnecessary" and "Political": *Why Unions Are Bad for America*, THE ATLANTIC, Jun. 12, 2012, available at <http://www.theatlantic.com/business/archive/2012/06/unnecessary-and-political-why-unions-are-bad-for-america/258405/>.

³ By contrast, the literature produced by labor economists and other academics is home to a lively debate about the pros and cons of collective bargaining. Compare, e.g., MILTON FRIEDMAN & ROSE D. FRIEDMAN, *FREE TO CHOOSE: A PERSONAL STATEMENT* 228-47 (1980), with, e.g., RICHARD FREEMAN & JAMES MEDOFF, *WHAT DO UNIONS DO?* 162-80, 247 (1984) [hereafter FREEMAN & MEDOFF]; see also, e.g., Christopher David Ruiz Cameron, *The Wages of Syntax: Why the Cost of Organizing a Union Firm's Non-Union Competition Should Be Charged to "Financial Core" Employees*, 47 CATH. U.L. REV. 979, 993-1003 & table 1 (1998) (reviewing 30 years' worth of labor economists' literature examination cause of union wage differential).

covers? If so, what are those advantages?⁴ And can they be communicated to the public at large in an accessible way?

Answers to these questions may follow from studying and applying the Rule of Law Index (“RoL Index”). The RoL Index is an exciting new tool developed by the World Justice Project (“WJP”) to promote the rule of law around the globe.⁵ Sponsors⁶ and financial supporters⁷ of the WJP hope that, by providing a comprehensive picture of each country’s adherence to the rule of law as measured by the components of the RoL Index, it can help “policy makers, businesses, and civil society to identify trends, make

⁴ Again, a rich academic literature treats this subject. For example, there is substantial evidence that on balance unionized firms are more productive and efficient (though not necessarily more profitable) than their non-union competition, and reduce inequalities in the distribution of income across society. See FREEMAN & MEDOFF, *supra* note ____, at 162-80, 247; see also, e.g., Thomas Karier, *Trade Deficits and Labor Unions: Myths and Realities*, in UNIONS AND ECONOMIC COMPETITIVENESS 115-17 (Lawrence Mishel & Paula B. Voos, eds., 1992) (finding no statistical support for proposition that unions make American business less competitive in international markets).

⁵ The mission of the WJP “is to lead a global, multidisciplinary effort to strengthen the rule of law for the development of communities of opportunity and equity.” The WJP “is based on two complementary premises.” The first is “the rule of law is the foundation for communities of opportunity and equity”; the second is “multidisciplinary collaboration is the most effective way to advance the rule of law.” The World Justice Project, *About the WJP*, available at <http://worldjusticeproject.org/about/> (Aug. 15, 2012).

⁶ Among the 28 diverse organizations listed as sponsors of the WJP are the U.S. Chamber of Commerce, Human Rights Watch, and the American Bar Association. See *The World Justice Project, About the World Justice Project, Sponsoring Organizations*, available at <http://worldjusticeproject.org/?q=sponsoring-organizations> (available Aug. 15, 2012).

⁷ Among the 14 foundations, 16 corporations, and 18 law firms listed as financial supporters of the WJP are the Bill & Melinda Gates Foundation, National Endowment for Democracy, Neukom Family Foundation, Microsoft Corporation, LexisNexis, General Electric Company, K&L Gates, Nelson Mullins Riley & Scarborough LLP, and Boies Schiller & Flexner LLP. See *The World Justice Project, The World Justice Project Supporters*, available at <http://worldjusticeproject.org/?q=financial-supporters> (available Aug. 15, 2012). A more complete list of financial supporters is available on the WJP’s website. See *id.*

arguments for action regarding important public policy issues, and place their country's performance relative to others at the center of the policy discourse."⁸

I propose that a country's adherence to the rule of law and the prevalence of collective bargaining in it are closely linked. In both the U.S. and around the world, access to collective bargaining in the workplace – as measured partly by a nation's union density rate – is a key indicator⁹ of access to justice in the society generally. If my proposition holds true, then the higher a country's union density rate, the higher its score will be on the RoL Index. Such a result could show that collective bargaining confers benefits throughout society that ought to receive as much or more attention as its purported costs.¹⁰

To test my proposition, this Paper proceeds in three Parts. Part II presents the RoL Index in general and how the U.S. ranks on it in particular. Part III presents data comparing the relatively modest RoL ranking of the U.S. versus other countries, including our major economic and ideological competitors. It also sharpens the picture

⁸ The World Justice Project, Frequently Asked Questions, Answer to Question No. 13: What Is the Purpose of the Index, para. 1, available at <http://worldjusticeproject.org/?q=rule-of-law-index/index-faq> (available Aug. 15, 2012).

⁹ An emerging academic literature treats the promises, as well as the perils, of the “indicator” movement, which is built on the idea that it is possible to use quantification, rankings, and other measurements to tell whether government regulation is working. See, e.g., GOVERNANCE BY INDICATORS: GLOBAL POWER THROUGH QUANTIFICATION AND RANKINGS (Kevin E. Davis, Angelina Fisher, Benedict Kingsbury & Sally Engle Merry, eds., 2012); Sally Engle Merry, *Measuring the World: Indicators, Human Rights, and Global Governance*, 52 CURRENT ANTHROPOLOGY S83 (Supp. Apr. 2011). Although an assessment of this literature is beyond the scope of this Article, I am keenly aware that understanding the impacts of this new type of knowledge production is critical to the validity of my proposition.

¹⁰ Or as much attention as the well-documented globalization of labor and employment law. See, e.g., Marley S. Weiss, *International Labor and Employment Law: From Periphery to Core*, 25 ABA J. of Lab. & Emp. L. 487 (2010).

by presenting comparative data regarding union density rates in the same countries.

Finally, Part IV makes some observations about what the relationship between the RoL

Index and union density may mean for policymakers and workers.

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II. THE RULE OF LAW INDEX AND COLLECTIVE BARGAINING: HOW THE U.S. RANKS VERSUS CANADA

A. *Some Background on the RoL Index and the WJP*

Although the Rule of Law Index is not intended by the World Justice Project to be used in “policy design,” it is intended serve as

a tool to monitor the health of a country’s institutional environment – such as whether government officials are accountable under the law, and whether legal institutions protect fundamental rights and allow ordinary people access to justice. Its value lies in providing standardized indicators across countries, which allows cross-country comparisons and macro-level analysis.¹¹

The RoL Index assumes a working definition of the rule of law based on four “universal principles”: first, government, including its officials and agents, are held accountable; second, the laws governing the society are clear, publicized, stable, and fair, and protect fundamental rights, including the security of persons and property; third, the process by which those laws are enacted, administered, and enforced is accessible, efficient, and fair; and fourth, justice is delivered by competent, ethical, and independent representatives as well as neutrals who are of sufficient number, have adequate resources, and reflect the makeup of the communities they serve.¹²

The Index compiled by the WJP is the product of surveys of in-country experts – including academics and practitioners¹³ – who score their country’s performance on nine separate dimensions, or factors, of the rule of law: (1) limited government powers, (2) the

¹¹ *Id.* at para. 2.

¹² The World Justice Project, About the WJP, Working Definition of the Rule of Law, available at <http://worldjusticeproject.org/about/> (Aug. 15, 2012).

¹³ The methodology used is discussed in detail on the WJP’s website. See The World Justice Project, Methodology, available at <http://worldjusticeproject.org/?q=rule-of-law-index/methodology> (Aug. 15, 2012).

absence of corruption, (3) order and security, (4) fundamental rights, (5) open government, (6) effective regulatory enforcement, (7) effective civil justice, (8) effective criminal justice, and (9) informal justice.¹⁴ Each dimension is scored on a scale of 0.00 to 1.00; the higher the score, the more successful the country is deemed to be at delivering positive results along the dimension.

The RoL Index has been published annually since 2008. This Paper is based on data reported in *Rule of Law Index 2011*,¹⁵ which treated conditions in 66 countries, including updated data for the 35 countries indexed the prior year, plus new data for 31 additional countries.

For purposes the proposition tested herein, two of the nine dimensions are thought to be of the greatest importance: dimension (4) relating to fundamental rights, and dimension (7) relating to effective civil justice. Each of these dimensions, and how the U.S. measures up, is discussed in turn.

B. Fundamental Rights and Effective Civil Justice in the U.S. and Canada

1. *Dimension (4) relating to fundamental rights.* – According to the WJP, dimension (4) relating to fundamental rights refers to factors measuring effective enforcement of laws that ensure the following basic human rights: equal protection;

¹⁴ The World Justice Project, Dimensions of the Rule of Law, available at <http://worldjusticeproject.org/?q=rule-of-law-index/dimensions> (available Aug. 15, 2012).

¹⁵ The World Justice Project, Rule of Law Index 2011 (Mark David Agrast, Juan Carlos Botero & Alejandro Ponce, eds.) [hereafter *Rule of Law Index 2011*], available at <http://worldjusticeproject.org/?q=rule-of-law-index/index-2011> (available Aug. 15, 2012).

freedom of thought, religion, and expression; freedom of assembly and association¹⁶; fundamental labor rights (including the right to collective bargaining, the prohibition of forced and child labor, and the elimination of discrimination); the rights to privacy and religion; the right to life and security of the person; and due process of law and the rights of the accused. For purposes of the Index, these fundamental rights are broken down into 115 variables combined to form the following eight sub-factors,¹⁷ which are measured by surveys of in-country academics and practitioners:

- 4.1 Equal treatment and absence of discrimination are effectively guaranteed
- 4.2 The right to life and security of the person is effectively guaranteed
- 4.3 Due process of law and rights of the accused are effectively guaranteed
- 4.4 Freedom of opinion and expression is effectively guaranteed
- 4.5 Freedom of belief and religion is effectively guaranteed
- 4.6 The right to privacy is effectively guaranteed
- 4.7 Freedom of assembly and association is effectively guaranteed
- 4.8 Fundamental labor rights are effectively guaranteed

At least three of these sub-factors relate specifically to the institution of collective bargaining: sub-factor 4.1 relating to the guarantee of equal treatment and the absence of discrimination; sub-factor 4.7 relating to the guarantee of freedom of assembly and association; and sub-factor 4.8 relating to fundamental labor rights. Not surprisingly,

¹⁶ In international parlance, “freedom of association” is a term of art that refers to the fundamental rights of workers, among other things, to form and join labor organizations, petition the employer for redress of grievances, and go on strike.

¹⁷ See *id.*, available at <http://worldjusticeproject.org/?q=rule-of-law-index/dimensions#anchor4> (factor 4).

each of these three sub-factors is associated with various conventions of the International Labour Organisation (ILO) that guarantee core human rights in the workplace. These conventions treat the rights of equal pay,¹⁸ non-discrimination,¹⁹ freedom of association and the right to organize,²⁰ and collective bargaining.²¹

In reviewing a country's performance on dimension (4) relating to fundamental rights, I am making two critical, but I think defensible, assumptions: first, the country's combined scores on sub-factors 4.1, 4.7, and 4.8, all of which are closely associated with the institution of collective bargaining, have a measurable impact on its score along this entire dimension; and second, the country's score for this entire dimension has a measurable impact on its overall performance on the RoL Index.

For each dimension and each country measured, the Index provides a score, a global ranking, a regional ranking, and an income group ranking. For dimension (4), the data for the U.S. are reported in Table A:

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¹⁸ Convention on Equal Remuneration of 1958 (ILO Convention No. 100), 165 U.N.T.S. 303 (entered into force May 23, 1953).

¹⁹ Convention on Discrimination (Employment and Occupation) of 1958 (ILO Convention No. 111), 362 U.N.T.S. 31 (entered into force Jun. 15, 1960).

²⁰ Convention on the Freedom of Association and Protection of the Right to Organise Convention of 1948 (ILO Convention No. 87), 68 U.N.T.S. 17 (entered into force July 4, 1950).

²¹ Convention on the Right to Organise and Collective Bargaining of 1949 (ILO Convention No. 98), 96 U.N.T.S. 257 (entered into force July 18, 1951).

TABLE A²²

**How United States and Canada Rank on RoL Dimension (4)
Relating to Fundamental Rights (Including Collective Bargaining)**

	U.S.	Canada
Score	0.73	0.79
Global ranking	16/66	14/66
Regional ranking	10/12	9/12
Income group ranking	16/23	14/23

Table A shows that, regarding respect for fundamental human rights, including collective bargaining, the United States ranks in the top 25 percent of countries by global standards, in the bottom 20 percent by regional standards, and in the bottom 30 percent by income standards. Although this is not a poor showing by any means, it is hardly the best showing either.

How does the U.S. compare to Canada?

Canada is used as a comparator for many familiar reasons. Foremost is that, like the U.S., Canada professes a strong allegiance to the rule of law. More to the point, the U.S. and Canada embrace similar common law legal traditions; follow similar democratic governance principles; rank among the world's eight largest economies; are each other's largest and most important trading partner; and play host to major operations of many of the same unionized, transborder employers. Their legal systems and economies are different, yet not so different that they defy useful comparison.²³

²² See *Rule of Law Index 2011*, *supra* note ____, at 109.

²³ See generally PAUL C. WEILER, RECONCILABLE DIFFERENCES: NEW DIRECTIONS IN CANADIAN LABOUR LAW (1980).

Table A shows that Canada ranks slightly ahead of the U.S. in its respect for fundamental rights, including collective bargaining. It is in roughly the top 20 percent of countries by global standards, in the bottom 25 percent by regional standards, and in the bottom 40 percent by income standards. But the two countries are more or less where one would expect them to find them: high-ranking overall and similar-ranking globally, in their respect for fundamental rights, including collective bargaining.

2. *Dimension (7) relating to access to civil justice (including employment disputes)*. – According to the WJP, dimension (7) relating to access to civil justice refers to factors measuring whether the country’s civil justice system is affordable, effective, impartial, and culturally competent. Impartiality includes the absence of arbitrary or irrational distinctions based on social or economic status and other forms of bias. It also includes decisions that are free of improper influence by public officials or private interests. Accessibility includes general awareness of available remedies; availability and affordability of legal advice and representation; and the absence of excessive or unreasonable fees, procedural hurdles, and other barriers to access to formal dispute resolution systems, including the civil courts. This dimension also measures whether the system provides for fair and effective enforcement. It consists of 57 variables combined to form the following nine sub-factors,²⁴ which are measured by surveys of in-country academics and practitioners:

7.1 People are aware of available remedies

7.2 People can access and afford legal advice and representation

²⁴ See *id.*, available at <http://worldjusticeproject.org/?q=rule-of-law-index/dimensions#anchor7> (factor 7).

- 7.3 People can access and afford civil courts
- 7.4 Civil justice is free of discrimination
- 7.5 Civil justice is free of corruption
- 7.6 Civil justice is free of improper government influence
- 7.7 Civil justice is not subject to unreasonable delays
- 7.8 Civil justice is effectively enforced
- 7.9 ADR systems are accessible, impartial, and effective

At least five of these sub-factors relate specifically to the institution of collective bargaining: sub-factor 7.2 relating to access to and affordability of legal advice and representation; sub-factor 7.3 relating to access to and affordability of the civil courts; sub-factor 7.4 relating to freedom from discrimination; sub-factor 7.8 relating to effective enforcement of civil justice; and sub-factor 7.9 relating to accessibility, impartiality, and effectiveness of alternative dispute resolution (ADR) systems.²⁵ Each of these five sub-factors is associated with the substantive and procedural due process protections of grievance adjustment provisions often found in collective bargaining agreements, at least in the U.S. and Canada²⁶: respect for seniority of workers; the principle of progressive discipline; the requirement of just cause to impose discipline; the prohibition of disparate treatment of similarly situated employees; notice of charges and the opportunity to be heard; multi-step adjustment procedures, including formal and informal steps

²⁵ These sub-factors square with the view most of U.S. trade unionists that collective bargaining serves two functions: setting the wage and benefit bargain, and establishing a measure of civil rights in the workplace. *See, e.g.,* FREEMAN & MEDOFF, *supra* note ____, at 3-4.

²⁶ Of, course, ideally these five sub-factors, along with the other sub-factors, are associated with the vindication of workers' rights in the civil courts too.

culminating, when settlement cannot be reached, in final and binding arbitration before a neutral decision maker; and enforcement of arbitration awards and settlements.

In reviewing a country's performance on dimension (7) relating to access to civil justice, I am making the same critical, but I think defensible, assumptions I made with regard to dimension (4) relating to fundamental rights: first, the country's combined scores on sub-factors 7.2, 7.3, 7.4, 7.8, and 7.9, all of which are closely associated with the institution of collective bargaining, have a measurable impact on its score along this entire dimension; and second, the country's score for this entire dimension has a measurable impact on its overall performance on the RoL Index.

Once again, for each dimension and each country measured, the Index provides a score, a global ranking, a regional ranking, and an income group ranking. For dimension (7), the data for the U.S. are reported in Table B:

TABLE B²⁷

**How the United States and Canada Rank on RoL Dimension (7)
Relating to Access to Civil Justice (Including Employment Disputes)**

	U.S.	Canada
Score	0.63	0.66
Global ranking	21/66	16/66
Regional ranking	11/12	9/12
Income group ranking	20/23	16/23

Table B shows the U.S. to have a somewhat weaker ranking on dimension (7) relating to access to civil justice than it did on dimension (4) relating to fundamental rights. On dimension (7), the United States ranks roughly in the top 30 percent of

²⁷ See *Rule of Law Index 2011*, *supra* note ____, at 111.

countries by global standards, in the bottom 10 percent by regional standards, and in the bottom 15 percent by income standards.

How does the U.S. compare to Canada?

Table B shows that Canada again ranks slightly ahead of the U.S. in providing access to civil justice. It is in roughly the top 25 percent of countries by global standards, in the bottom 25 percent by regional standards, and in the bottom 30 percent by income standards.

In sum, the U.S. and Canada countries provide more access to civil justice than most of the rest of the world, but comparatively less than their regional and economic competitors, and comparatively less access to civil justice than protection for fundamental rights – according to the WJP, at least.

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III. THE RULE OF LAW INDEX AND COLLECTIVE BARGAINING: HOW THE U.S. RANKS VERSUS THE REST OF THE WORLD

A. *The American Perspective: We're Number One*

We Americans hold ourselves in the highest regard. This esteem extends to our legal institutions, which since the time of de Tocqueville, if not before, have been hailed as the world's most democratic.²⁸ The term "American exceptionalism," which is embraced with pride by many of our leaders,²⁹ was coined to convey the quasi-religious fervor with which many if not most of us perceive this country to be superior to other countries.³⁰ Evidence confirming the fervor with which American exceptionalism is

²⁸ See, e.g., 1 ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* ____ (Phillips Bradley ed., 1845) ("The greatness of America lies not in being more enlightened than any other nation, but rather in her ability to repair her faults.").

²⁹ Although the term is sometimes uttered in criticism, former U.S. Secretary of State Condoleezza Rice, speaking at the Republican National Convention, took it as a compliment to the way in which America opens the doors of opportunity:

After all, when the world looks to America, they look to us because we are the most successful political and economic experiment in human history. That is the true basis of "American Exceptionalism." The essence of America, that which really unites us is not ethnicity, or nationality or religion. It is an idea, and what an idea it is – that you can come from humble circumstances and do great things. That it doesn't matter where you came from but where you are going.

Brenda Kruger Huffman, Condoleezza Rice Reaffirmed "American Exceptionalism" During Her Republican Convention Speech Last Night, Aug. 30, 2012 (remarks of Condoleezza Rice), available at <http://www.businessinsider.com/condoleezza-rice-rnc-speech-reaffirmed-american-exceptionalism-2012-8#ixzz26620weps>.

³⁰ See generally UNDERSTANDING AMERICA: THE ANATOMY OF AN EXCEPTIONAL NATION (Peter H. Schuck & James Q. Wilson, eds. 1997); see, e.g., Dan Gilgoff, *Despite Fights About Its Merits, Idea of American Exceptionalism a Powerful Force Through History*, Jun. 30, 2012, available at http://religion.blogs.cnn.com/2012/06/30/despite-fights-about-its-merits-idea-of-american-exceptionalism-a-powerful-force-through-history/?iid=article_sidebar.

embraced was recently proffered by the Organization for Economic Cooperation and Development (OECD). According to data reported by the OECD's Program for International Student Assessment (PISA) in 2009, American 15-year-olds demonstrate more self-confidence in their academic skills than their counterparts in virtually all other OECD nations – even though their reading, mathematics, and science literacy ranks not at the top, but in the middle of the pack.³¹

As noted in Part II, the empirical evidence does not always support claims of American exceptionalism, at least when exceptionalism is defined as superiority, which is probably how most Americans would define the term.³² Let's examine that evidence here.

B. *The American Reality: We're Number Nineteen (or Twenty-One)*

1. *Dimension (4) relating to fundamental rights.* – As noted above, with regard to dimension (4) relating to respect for fundamental rights, the U.S. ranks Number 19 among 66 countries measured on a global scale. How does the U.S. measure up on this dimension versus the rest of the world? Data comparing the U.S. to the ten highest-ranking nations, plus Canada, are reported in Table C:

³¹ See Secretary Arne Duncan's Remarks at OECD's Release of the Program for International Student Assessment (PISA) 2009 Results, Dec. 7, 2010, available at <http://www.ed.gov/news/speeches/secretary-arne-duncans-remarks-oecd-release-program-international-student-assessment>- (“This stunning finding may be explained because students here are being commended for work that would not be acceptable in high-performing education systems.”).

³² See, e.g., Jeffrey M. Hirsch, *A Comparative Perspective on Unjust Dismissal Laws* (challenging common “American exceptionalism” premise holding that adoption of “just cause” standard would place U.S. in same worker-protective company as rest of world), in *GLOBAL LABOR AND EMPLOYMENT LAW: REPORTS FROM LAW OFFICES WORLDWIDE* (Samuel Estreicher, ed., 2012), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2095336.

TABLE C³³

**How the United States and Canada Compare to the Global Top Ten
On RoL Dimension (4) Relating to Respect for Fundamental Rights
(Including Collective Bargaining) and Union Density**

Rank	Country	RoL Score	Union Density (UD) ^a	UD Rank ^a
#1	Sweden	0.92	68.3%	#2
#2	Norway	0.90	53.3%	#5
#3	Netherlands	0.87	18.9%	#18
#4	New Zealand	0.86	20.6%	#15
#5	Austria	0.85	29.1%	#10
#6	Germany	0.84	19.1%	#17
#7	Australia	0.83	18.2%	#19
#8	Estonia	0.82	7.0%	#32
#9	Czech Republic	0.81	17.4%	#22
#10	Poland	0.80	15.6%	#26
#14	Canada	0.79	27.2%	#12
#19	U.S.	0.73	11.9%	#29

^a Reported by OECD as of 2008, the last year for which complete data for all 33 OECD countries were reported.

Table C shows that the Global Top Ten countries each rank ahead of the U.S. on dimension (4) relating to respect for fundamental rights. Of particular interest, the RoL rank of each country seems to be linked to its union density rate (the percentage of the workforce in both the private and public³⁴ sectors that is covered by collective bargaining

³³ Data are collected from *Rule of Law Index 2011*, *supra* note ____, at 109, and the Organization for Economic Cooperation and Development, Trade Union Density, available at http://stats.oecd.org/Index.aspx?DataSetCode=UN_DEN (extracted Aug. 18, 2012).

³⁴ The relatively high union density rates reported for the U.S. and elsewhere suggest that the OECD combined data from the private and public sectors of the countries studied. Among U.S. academics, it is common to distinguish between union density in these two sectors. For example, according to the U.S. Bureau of Labor Statistics, in 2008, the union density rate was 7.6% in the private sector and 36.8% in the public sector, which combined for a reported overall rate of 12.4% (as opposed to the OECD's reported overall rate of 11.9%) See U.S. Dept' of Labor, Bureau of Labor Statistics, News: Union

representation). Although the data range widely, all but one of the countries in the Global Top Ten has a union density rate of 15 percent or greater. (Only the Number 8 country, Estonia, comes in under 15 percent.) In fact, seven of the 10 countries have a union density rate in the range of 20 percent or higher. The Number 1 country on the RoL Index, Sweden, has an astounding union density rate of 68.3 percent.³⁵ The Number 10 country, Poland, has a union density rate of 15.6 percent. Indeed, every country but one has a higher union density rate than the Number 14 country, Canada, and the Number 19 country, the U.S.

To put this in perspective, we may compare the U.S. not only to the Global Top Ten, but also to the Global Bottom Ten. Among the ten lowest ranking nations measured for dimension (4), only Turkey is a member of the OECD, so except for Turkey (5.8 percent), no union density data were available through that source.³⁶ Perhaps this makes sense; none of these countries, save perhaps Turkey, has a substantial independent trade union movement either.

Members in 2008 (released Jan. 28, 2009), available at http://www.bls.gov/news.release/archives/union2_01282009.pdf.

³⁵ Sweden has the second-highest union density rate. Iceland has the highest union density rate, but RoL data for that country were not reported on the 2011 Index. Similarly, Denmark has the fourth-highest union density rate, but RoL data for that country were not reported on the 2011 Index either.

³⁶ The Global Bottom Ten – by rank order Number 66 through Number 57 – are as follows: Iran (0.32), Ethiopia (0.39), China (0.40), Pakistan (0.40), Cambodia (0.41), Uganda (0.42), Morocco (0.44), Malaysia (0.45), Turkey (0.46), and Cameroon (0.48). See *Rule of Law Index 2011*, *supra* note ____, at 109.

To put this in further perspective, we may look to a handful of emerging nations for which union density data are available. Data comparing the U.S. and Canada to Brazil, Chile, the Czech Republic, and South Korea are reported in Table D:

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TABLE D³⁷

**How the United States and Canada Compare to Emerging Nations
On RoL Dimension (4) Relating to Respect for Fundamental Rights
(Including Collective Bargaining) and Union Density**

Rank	Country	RoL Score	Union Density (UD) ^a	UD Rank ^a
#9	Czech Republic	0.81	17.4%	#22
#14	Canada	0.79	27.2%	#12
#17	South Korea	0.76	10.3%	#30
#18	Chile	0.74	13.6%	#28
#19	U.S.	0.73	11.9%	#29
#25	Brazil	0.67	-- ^b	--

^a Reported by OECD as of 2008, the last year for which complete data for all 33 OECD countries were reported.

^b Although no OECD data are available, “trade unions have played a very important role in Brazilian society” since the introduction of re-democratization. Of 1,000 firms surveyed during the period 1990-2000, about half had less than 25% of their workforces unionized, with the other half “split among the other quartiles of union density.” Naércio Aquino Menzes-Filho, José Paulo Chahad, Hélio Zylberstajn & Elaine Toldo Pazello, *Trade Unions and the Economic Performance of Brazilian Establishments*, 38 ESTUDIOS ECONÔMICOS 55, 57, 60 (Jan.-Mar. 2008), available at <http://www.scielosp.org/pdf/ee/v38n1/03.pdf>.

Table D shows that some of the world’s emerging economies are giving the U.S. a run for its money. The Czech Republic, a former Soviet satellite country,³⁸ ranks far ahead of the U.S. on dimension (4); South Korea and Chile each rank a step or two ahead of the U.S.; and Brazil ranks a few steps behind. The union density rate in each county is

³⁷ Data are collected from *Rule of Law Index 2011*, *supra* note ____, at 109, and the Organization for Economic Cooperation and Development, Trade Union Density, available at http://stats.oecd.org/Index.aspx?DataSetCode=UN_DEN (extracted Aug. 18, 2012).

³⁸ The Czech Republic is listed as an emerging European nation and to demonstrate how far it has come since the collapse of the Soviet Union in the early 1990s. Estonia and Poland, two other former Soviet satellites, each made the Global Top Ten for this dimension, and could be included as emerging nations too. The emerging nations included in Table E are non-European.

somewhat comparable to that of the U.S., but it should be noted that the Czech Republic and Chile each has both a higher RoL ranking and a higher union density rate.

Do these observations hold up if we test another dimension?

2. *Dimension (7) relating to access to civil justice.* – As noted above, with regard to dimension (7) relating to access to civil justice, the U.S. ranks Number 21 among 66 countries measured on a global scale.

How does the U.S. measure up on this dimension versus the rest of the world?

Data comparing the U.S. to the ten highest-ranking nations, plus Canada, are reported in

Table E:

TABLE E³⁹

**How the United States and Canada Compare to the Global Top Ten
On RoL Dimension (7) Relating to Access to Civil Justice
(Including Employment Disputes) and Union Density**

Rank	Country	RoL Score	Union Density (UD) ^a	UD Rank ^a
#1	Norway	0.81	53.3%	#5
#2	Germany	0.79	19.1%	#17
#3	Netherlands	0.79	18.9%	#18
#4	New Zealand	0.78	20.6%	#15
#5	Sweden	0.76	68.3%	#2
#6	Estonia	0.73	7.0%	#17
#7	Japan	0.73	18.2%	#19
#8	Austria	0.72	29.1%	#10
#9	Belgium	0.71	51.9%	#6
#10	United Kingdom	0.71	27.1%	#13
#16	Canada	0.66	27.2%	#12
#21	U.S.	0.63	11.9%	#29

^a Reported by OECD as of 2008, the last year for which complete data for all 33 OECD countries were reported.

³⁹ Data are collected from *Rule of Law Index 2011*, *supra* note ____, at 111, and the Organization for Economic Cooperation and Development, Trade Union Density, available at http://stats.oecd.org/Index.aspx?DataSetCode=UN_DEN (extracted Aug. 18, 2012).

Table E shows that the Global Top Ten countries each rank ahead of the U.S. on dimension (7) relating to access to civil justice. Of particular interest, the RoL rank of each country continues to be linked to its union density rate. Although the data still range widely, all but one of the countries in the Global Top Ten has a union density rate of 15 percent or greater. (Only the Number 8 country, Estonia, comes in under 15 percent.) Indeed, all but one of these countries has a union density rate in the range of 20 percent or higher. The Number 1 country, Norway, has a union density rate of 53.3 percent. The Number 10 country, the United Kingdom, has a union density rate of 27.1 percent. And every country but one – again, Estonia – has a higher union density rate than the Number 16 country, Canada, and the Number 21 country, the U.S.

To put this in perspective, we may compare the U.S. not only to the Global Top Ten, but also to the Global Bottom Ten. Among the ten lowest ranking nations measured for dimension (4), only Mexico is a member of the OECD, so except for Mexico (15.7 percent), no union density data were available through that source.⁴⁰ Again, perhaps this makes sense; none of these countries, save perhaps Mexico in recent years, has a substantial independent trade union movement either.

To put this into greater perspective, we may compare the U.S. to a handful of emerging nations for which union density data are available. Data comparing the U.S. and Canada to Brazil, Chile, and South Korea are reported in Table F:

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⁴⁰ The Global Bottom Ten – by rank order Number 66 through Number 57 – are as follows: Pakistan (0.32), Liberia (0.35), Cambodia (0.36), Ukraine (0.40), Bangladesh (0.41), Cameroon (0.42), Venezuela (0.43), Kenya (0.44), Kyrgyzstan (0.44), and Mexico (0.46). *See Rule of Law Index 2011, supra* note ____, at 111.

TABLE F⁴¹

**How the United States and Canada Compare to Emerging Nations
On RoL Dimension (7) Relating to Access to Civil Justice
(Including Employment Disputes) and Union Density**

Rank	Country	RoL Score	Union Density (UD) ^a	UD Rank ^a
#16	Canada	0.66	27.2%	#12
#17	South Korea	0.66	10.3%	#30
#18	Chile	0.65	13.6%	#28
#20	Czech Republic	0.64	17.4%	#22
#21	U.S.	0.63	11.9%	#29
#25	Brazil	0.59	-- ^b	--

^a Reported by OECD as of 2008, the last year for which complete data for all 33 OECD countries were reported.

^b Although no OECD data are available, “trade unions have played a very important role in Brazilian society” since the introduction of re-democratization. Of 1,000 firms surveyed during the period 1990-2000, about half had less than 25% of their workforces unionized, with the other half “split among the other quartiles of union density.” Naércio Aquino Menzes-Filho, José Paulo Chahad, Hélio Zylberstajn & Elaine Toldo Pazello, *Trade Unions and the Economic Performance of Brazilian Establishments*, 38 ESTUDIOS ECONÓMICOS 55, 57, 60 (Jan.-Mar. 2008), available at <http://www.scielo.org/pdf/ee/v38n1/03.pdf>.

Table F shows that some of the world’s emerging economies are giving the U.S. a run for its money. South Korea, Chile, and the Czech Republic each rank a step or two ahead of the U.S. on dimension (7); Brazil ranks a few steps behind. The union density rate in each county is comparable to that of the U.S., although Chile and the Czech Republic each continue to has have both a higher RoL ranking and a higher union density rate.

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⁴¹ Data are collected from *Rule of Law Index 2011*, *supra* note ____, at 111, and the Organization for Economic Cooperation and Development, Trade Union Density, available at http://stats.oecd.org/Index.aspx?DataSetCode=UN_DEN (extracted Aug. 18, 2012).

IV. SOME OBSERVATIONS ABOUT THE RULE OF LAW INDEX, COLLECTIVE BARGAINING, AND THE U.S.

This Paper began with a proposition: a country's adherence to the rule of law and the prevalence of collective bargaining in it are closely linked. Part I proposed that, in both the U.S. and around the world, access to collective bargaining in the workplace – as measured partly by a nation's union density rate – is a key indicator of access to justice in the society generally. It was stated that, if the proposition holds, then the higher a country's union density rate, the higher its score will be on the RoL Index. Part II laid out the relatively modest rankings of the U.S. and Canada along two dimensions of the rule of law related to collective bargaining. And Part III analyzed data showing precisely the type of relationship that Part I had expected to find.

Here I pause to make some preliminary observations about these results, and to offer some caveats.

A. Preliminary Observations

The data suggest at least three preliminary, but important, observations.

The first preliminary observation is that a society with a healthy respect for the rule of law is likely to be society with a healthy respect for the institution of collective bargaining too. This is hardly surprising to anyone familiar with the work of labor economists who have studied the effects of unionization.

Richard Freeman and James Medoff⁴² explain that collective bargaining gives voice to workers' concerns. Borrowing from the work of sociologist Albert Hirschman,⁴³

⁴² See FREEMAN & MEDOFF, *supra* note ____, at 7-11 (1984).

⁴³ ALBERT O. HIRSCHMAN, *EXIT, VOICE, AND LOYALTY: RESPONSES TO DECLINE IN FIRMS, ORGANIZATIONS, AND STATES* 4 (1970).

they note that society has two mechanisms for dealing with social and economic problems: exit-and-entry, in which the individual responds to the divergence between desired and actual conditions by exercising mobility (such as not going back to a store offering poor service, seeking a divorce from a difficult spouse, or quitting a lousy job); and voice, in which individuals respond to the divergence by communicating with others in an effort to improve things (such as complaining to the store manager, seeking marriage counseling, or pressing the boss for a raise). Whereas the free market relies primarily on exit-and-entry, collective bargaining relies primarily on voice. A democratic society tends to value institutions that enhance the voice mechanism: political parties (whether Democratic, Republican, Green, or Tea Party); civic organizations (ranging from the NAACP to the local PTA to the National Rifle Association); and of course, collective bargaining through labor unions are each examples of voice institutions. As one Canadian scholar has put it, “there is an important symmetry – here in Canada and throughout the world – between vibrant labour laws and healthy unionization rates, on the one hand, and relative economic equality levels and social well being on the other.”⁴⁴

The role of voice in the workplace is not something to take lightly. It is critical to ensuring that “public goods” are provided there. Public goods are things that affect the well-being of every employee “in such a way that one’s individual partaking of the good does not preclude someone else from doing so.”⁴⁵ As Freeman and Medoff explain:

⁴⁴ Michael Lynk, *Labour Law and the New Inequality*, 59 U. NEW BRUNS. L.J. 14, 18 (2009).

⁴⁵ FREEMAN & MEDOFF, *supra* note ____, at 7 (emphasis added).

Safety conditions, lighting, heating, the speed of the production line, the firm's formal grievance procedure, pension plan, and policies on matters such as layoffs, work-sharing, cyclical wage adjustment, and promotion all obviously affect the entire workforce in the same way that defense, sanitation, and fire protection affect the community at large. *One of the most important economic theorems is that competitive markets will not provide enough of such goods; some form of collective decision making is needed.* Without a collective organization, the incentive for the individual to take into account the effects of his or her actions on others, or to express his or her preferences, or to invest time and money in changing conditions, is likely to be too small to spur action. Why not "let Harry do it" and enjoy the benefits at no cost?⁴⁶

The second preliminary observation is that an important question now begs to be answered: does a society's reduced adherence to the rule of law have something to do with the reduced prevalence of the institution of collective bargaining?⁴⁷

It should be noted here that the U.S. does not have to be ranked Number 1 to profess its profound and substantial allegiance to the rule of law. The fact that other countries, especially in Europe,⁴⁸ rank higher on the RoL Index can be viewed as a

⁴⁶ *Id.* at 7-8. The Great Recession in the U.S. is a reminder, among other things, of the importance of pensions as a "public good." Due to a longstanding decline in retirement security – marked especially by the disappearance of defined benefit plans – more older workers are entering the workforce. *See, e.g.,* Susan Bisom-Rapp, Andrew Fraser & Malcolm Sargeant, *Decent Work, Older Workers, and Vulnerability in the Economic Recession: A Comparative Study of Australia, the United Kingdom, and the United States*, 15 EMP. R. & EMP. POL'Y J. 43, ___ (2011) [jump page at TAN 355-377]. In their heyday, defined benefit plans were often established by collective bargaining.

⁴⁷ It is beyond the scope of this Paper to suggest what might take the place of collective bargaining were it to disappear, but others have taken up the task. *See, e.g.,* Matthew W. Finkin, *The Death and Transfiguration of Labor Law*, 33 Comp. Lab. L. & Pol'y J. 171, 172-77 (2011) (book review) (summarizing various views of Alan Hyde, Harry Arthurs, Brian Langille, Judy Fudge, Adelle Blackett, Kamala Sankaran, Simon Deakin, John Howe, Guy Mundlak, Mark Freedland and Nicola Kountouris, Guy Davidov, Bob Hepple, and Manfred Weiss).

⁴⁸ A fourth preliminary observation might be that eight of the Global Top Ten as to both dimension (4) and dimension (7) are European countries. Of interest, although transborder employers based in Europe generally profess respect for the institution of

testament to the great American experiment in democracy. Throughout our history, the U.S. has lit the path of the law for the rest of the world by our example, our economic success, and our diplomacy. After all, the United Nations was created and remains housed on U.S. soil. And when the path needed to be defended from the enemies of the rule of law, America has responded with her might. Thanks to U.S.-led success in two world wars, Europe survived and set its own course along the path. In any event, the critical role played by this country in promoting equal justice under law throughout the world is second to none.

That said, there is something odd about the fact that a country so dedicated to the rule of law is not ranked in the Top Ten of the RoL Index – not overall, and not as to dimensions (4) or (7).⁴⁹ It is something startling to realize that emerging nations like Chile, the Czech Republic, and South Korea now rank ahead of us, and that Brazil is not far behind. Not too long ago, these countries were run by dictators and military juntas. What happened? Have we failed, or have they succeeded? We should wonder whether

collective bargaining, their approach to labor relations on U.S. soil sometimes belies that respect. *See, e.g.,* Lance Compa & Fred Feinstein, *Enforcing European Corporate Commitments to Freedom of Association by Legal and Industrial Action in the United States*, 33 COMP. LAB. L. & POL'Y J. 635, 636 (2012).

As to dimension (4), the two non-European countries in the Global Top Ten are English-speaking common law countries: New Zealand and Australia. As to dimension (7), the two other countries in the Global Top Ten are New Zealand and Japan. The evolution of labor law in New Zealand and Australia is a fascinating subject all its own. *Compare* Gordon Anderson, Peter Gahan, Richard Mitchell & Andrew Stewart, *The Evolution of Labor Law in New Zealand: A Comparative Study of New Zealand, Australia, and Five Other Countries*, 33 Comp. Lab. L. & Pol'y J. 137 (2011), *with* Richard Mitchell, et al., *The Evolution of Labour Law in Australia: Measuring the Change*, 23 AUSTL. J. LAB. L. 61 (2010).

⁴⁹ *See, e.g.,* James Podgers, *Playing Catch-Up: U.S. Lags Behind Other Wealthy Nations in Rule of Law Index*, ABA J., Dec. 2010, at 58.

part of the reason lies in the well-documented decline of collective bargaining in the U.S.⁵⁰ – and whether there is anything we can or should do about it.⁵¹ At the least, these questions deserve further study.⁵²

The third preliminary observation is that the findings of this Paper are accessible to a non-academic audience. Just about everybody, especially in the U.S., appreciates rankings. We use them to determine the best restaurants, the best colleges and universities, the best sports teams. Not everyone can appreciate the nuances of collective bargaining law or relative union density from country to country. But most lay people, at least in the U.S., can appreciate the difference between being ranked Number 1 and being ranked Number 19 (or Number 21) – even if they don’t necessarily agree with the rankings themselves.

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⁵⁰ See, e.g., William R. Corbett, “*The More Things Change . . .*”: *Reflections on the Stasis of Labor Law in the United States*, 56 VILL. L. REV. 227, 240 (2011) (documenting decline in private sector union density rate, which is now about 7%).

⁵¹ Harry Arthurs believes that a series of factors, including a switch in emphasis from “hard” to “soft” labor law regimes, is responsible for weakening the institution of collective bargaining throughout the industrialized democracies. Included in his assessment are the countries of the Europe Union and the English-speaking common law tradition, notwithstanding the recent restoration of certain “hard” labor law rights in Australia and the United Kingdom. See H.W. Arthurs, *Making Bricks Without Straw: The Creation of a Transnational Labour Regime*, 8 Osgoode Comp. Res. in L. & Pol. Econ. No. 6, Research Paper No. 28/2012, at pp. 13-14, available at <http://ssrn.com/abstract=2139204>.

⁵² Such further study could well treat an important subject that is beyond the scope of this Paper: the increased reliance by major industrial employers in the U.S. and elsewhere on independent contractors and self-employed workers. In the U.S., such workers are generally not entitled to engage in collective bargaining. For a thoughtful comparison of different approaches to this issue in Canada and Spain, see Judy Fudge, *A Canadian Perspective on the Scope of Employment Standards, Labor Rights, and Social Protection: The Good, the Bad, and the Ugly*, 31 COMP. LAB. L. & POL’Y J. 253 (2010).

B. *Some Caveats*

The foregoing observations are preliminary because I lay no claim to having made the case for a cause-and-effect relationship between a country's RoL ranking and its union density rate. I do not know if the former causes the latter; if the latter causes the former; or if the results I have reported are merely unrelated coincidences. Moreover, I cannot be certain that RoL ranking and union density are accurate measurements of the subjects I have tried to investigate, or simply too crude to be useful.

So a number of caveats must be borne in mind.

A first caveat is that the measurements relied upon here may have been over-inclusive.⁵³ For example, as to dimension (4) relating to respect for fundamental rights, it should be remembered that collective bargaining is not the only fundamental right for which the data were collected. Fundamental rights necessarily span a wide range of rights, including due process of law, access to criminal as well as civil justice, freedom from forced labor, freedom from child labor, non-discrimination against women, and payment of a living wage, among others. As to dimension (7) relating to access to civil justice, it should be remembered that employment disputes are not the only type of dispute adjudicated by the civil courts and administrative agencies. The whole range of

⁵³ As suggested above, *see supra* note ____, the promises and perils of the growing use of "indicators" such as the Rule of Law Index are yet to be fully understood or studied, despite their wide acceptance by such diverse public actors as the World Bank and the U.S. State Department, NGOs such as Freedom House, and hybrid organizations such as the Global Fund. But important work in this area is being undertaken by a number of academics, including those associated with New York University School of Law's Institute for International Law and Justice. *See* Kevin E. Davis, Benedict Kingsbury & Sally Engle Merry, *Indicators as a Technology of Global Governance*, IILJ Working Paper 2010/2 Rev (finalized Aug. 2, 2011), available at <http://www.iilj.org/publications/documents/2011.8.IndicatorsasaTechnologyofGlobalGovernance.pdf>.

common law and contemporary rights – from contracts, property, and torts to civil rights, consumer protection, environmental justice, and securities fraud, to name but a few – are also adjusted in those tribunals.

A second caveat is that the measurements used here may have been under-inclusive. For example, if collective bargaining may properly be considered a form of informal justice, then perhaps data as to dimension (9) relating to access to informal justice should be analyzed as well. Although WJP describes “informal justice” as including “traditional, tribal, and religious courts, as well as community-based systems,”⁵⁴ it may well be, at least in the contemporary U.S. economy, that the advent and growth of mandatory alternative dispute resolution (ADR) mechanisms, such as mediation and arbitration, is the functional equivalent of traditional, tribal, or religious justice.

A third caveat is that cross-border comparisons of the type analyzed here are fraught with difficulties. As Dean Ron McCallum of the University of Sydney has put it, one must “always be very careful when attempting to compare quite similar labor law regimes because labor laws operate in accordance with the values of the society that they are designed to serve.”⁵⁵ For example, in the case of the U.S. and Canada, a multitude of factors have contributed to the decline of union density in the public as well as private sectors, but they are not necessarily the same factors.⁵⁶ Moreover, not everyone in the

⁵⁴ See *Rule of Law Index 2011*, *supra* note ____, at 13.

⁵⁵ Ron McCallum, *American and Australian Labor Law and Differing Approaches to Employee Choice*, 26 ABA J. LAB. & EMP. L. 181, 181-82 (2011).

⁵⁶ Among these factors are the economic pressures of globalized trade in general, *see, e.g.*, Kevin Banks, *Trade, International Labor, and International Governance: An Inquiry Into the Potential Effectiveness of the New International Labor Law*, 26

U.S. or Canada places the same value on collective bargaining – or for that matter, the rankings of the RoL Index – that other countries do.

Caveats aside, the evidence analyzed here is intriguing. If nothing else, it would seem to call for further empirical study of the relationship between adherence to the rule of law and the prevalence of the institution of collective bargaining. In light of recent trends in the international workplace, we really have no choice but to undertake such comparative and transnational studies.⁵⁷ Given the prominence of law and the legal profession in our society, the stakes could not be higher. As de Tocqueville famously observed:

The courts of justice [in the U.S.] are the visible organs by which the legal profession is enable to control the democracy. . . . Scarcely any political questions arises . . . that is not resolved . . . into a judicial question. Hence all parties are obliged to borrow, in their daily controversies, the ideas, and even the language, peculiar to judicial proceedings. . . . The language of the law thus becomes, in some measure, a vulgar tongue; the spirit of the law . . . penetrates . . . into the bosom of society . . . even to the lowest classes⁵⁸

BERKELEY J. EMP. & LAB. L. 45, 136 (2011) (arguing that, to be effective, “an international labor law regime needs either to provide states with some effective assurance that competitors will not undercut them or to directly alter payoffs by providing an offsetting advantage for core labor standards compliance), and international trade agreements in particular, *see, e.g.*, Eric Tucker, “*Great Expectations*” *Defeated? The Trajectory of Collective Bargaining Regimes in Canada and the U.S. Post-NAFTA*, 26 COMP. LAB. L. & POLICY J. 97, 98-99 (2005) (arguing that NAFTA has hastened the decline of collective bargaining in both countries, but not as much as predicted).

⁵⁷ *See, e.g.*, Katherine V.W. Stone, *A New Labor Law for a New World of Work: The Case for a Comparative Transnational Approach*, 28 COMP. LAB. L. & POL’Y J. 565, 567 (2007) (identifying three major challenges to labor law in developed nations that call for such study: “flexibilization,” globalization, and privatization); Katherine V.W. Stone, *Flexibilization, Globalization, and Privatization: Three Challenges to Labour Rights in Our Time*, 44 OSGOOD HALL L. REV. 77, 77 (2006).

⁵⁸ DE TOCQUEVILLE, *supra* note ____, at 278-80.

Besides, to the ultra-competitive among us, what could be more important than making America truly Number 1 again?

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