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## FOREWORD

### THE DEPRIVATIZATION OF LABOR RELATIONS LAW

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In 1960, just as the Supreme Court in the *Steelworkers Trilogy* was singing the praises of collective bargaining and arbitration as cogs in a great regime of "industrial self-government,"<sup>1</sup> a dramatic change was about to take place. Beginning with the Equal Pay Act of 1963<sup>2</sup> and extending for more than a decade thereafter, Congress enacted a series of statutes concerned with employment discrimination, occupational health and safety, and pension rights.<sup>3</sup> In a number of respects, these enactments marked the end of the view of labor relations celebrated in the *Steelworkers Trilogy*.

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\* Professor of Law, Duke University. I am grateful to Richard Maxwell and C. Allen Foster for their cooperation in organizing the conference on which this symposium is based. The conference was held at Duke Law School on November 16-17, 1984.

1. *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 580 (1960); *see also* *United Steelworkers v. American Mfg. Co.*, 363 U.S. 564, 568-69 (1960); *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 596-98 (1960).

2. Equal Pay Act of 1963, Pub. L. No. 88-38, 77 Stat. 56 (codified at 29 U.S.C. § 206(d) (1982)).

3. Title VII of the Civil Rights Act of 1964, Pub. L. No. 88-352, § 701, 78 Stat. 241, 253-66 (codified as amended at 42 U.S.C. §§ 2000e to 2000e-17 (1982)) (prohibiting employment discrimination on the basis of an individual's race, color, religion, sex, or national origin); Age Discrimination in Employment Act of 1967, Pub. L. No. 90-202, 81 Stat. 602 (codified as amended at 29 U.S.C. §§ 621-634 (1982)) (prohibiting employment discrimination against individuals between 40 and 70 years of age); Consumer Credit Protection Act of 1968, Pub. L. No. 90-321, § 304, 82 Stat. 146, 163-64 (codified at 15 U.S.C. § 1674 (1982)) (prohibiting discharge of an employee because his earnings have been subject to garnishment for one indebtedness); Construction Safety Act of 1969, Pub. L. No. 91-54, 83 Stat. 96 (codified at 40 U.S.C. § 333 (1982)) (establishing safety and health requirements in the construction industry); Occupational Safety and Health Act of 1970, Pub. L. No. 91-596, 84 Stat. 1590 (codified as amended at 29 U.S.C. §§ 651-678 (1982)) (establishing safety and health requirements for all covered employers); Rehabilitation Act of 1973, Pub. L. No. 93-112, 87 Stat. 355 (codified as amended at 29 U.S.C. §§ 701-796 (1982 & Supp. I 1983)) (prohibiting, generally, employment discrimination against handicapped individuals); Employee Retirement

At the time of enactment of both the Wagner<sup>4</sup> and Taft-Hartley<sup>5</sup> Acts, the prevalent notion was that labor relations were essentially private matters, to be regulated by contract.<sup>6</sup> The principal role of public law was to insure that unions were accorded an opportunity to organize and bargain collectively and to regulate the tactics of labor and management in the processes of organizing, bargaining, and pressuring. Within very broad limits, what the two sides agreed upon was their business alone. The same notion applied to the resolution of grievances. For a considerable time, there were even inhibitions about citing arbitral awards construing similar contract provisions as persuasive authority in arbitration proceedings—so private and *sui generis* was each proceeding thought to be.

Nor was this mere *laissez-faire*. The matter went further, and here, too, the *Steelworkers Trilogy* is the high water mark of the prevailing ideology: the business of collective bargaining was so complex that it was futile for public bodies to attempt to specify terms or to participate too actively in their enforcement. Collective bargaining entailed a series of intricate mutual adjustments that only the parties could make; grievances involved a “common law of a particular industry or of a particular plant”<sup>7</sup> that only experts, immersed in labor lore, but not necessarily in labor law, could fathom. Hence the extraordinary deference accorded by the *Trilogy* to the mystique of the arbitral process.<sup>8</sup>

The 1960's were a decade when, perhaps above all, arcane arrangements were distrusted and expertise was debunked. It is therefore not surprising that Congress should be far less reticent than it had been previously about laying down standards at the workplace. To be sure, Congress had earlier done some of the same. The Fair Labor Standards Act<sup>9</sup> is most notable in this respect, for it established unequivocal wage and hour limits. But the Fair Labor Standards Act was passed in 1938, and it is fair to say that, for a quarter century thereafter—despite the ineluctable tendency toward federal control during wartime—the dominant view of labor legislation was the *framework view*, the view that conceived the National Labor Relations Board as an umpire monitoring a game played by others.

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Income Security Act of 1974, Pub. L. No. 93-406, 88 Stat. 829 (codified as amended at 29 U.S.C. §§ 1001-1461 (1982 & Supp. I 1983)) (establishing standards for employee pension plans).

4. National Labor Relations Act of 1935, Pub. L. No. 74-198, 49 Stat. 449 (codified as amended at 29 U.S.C. §§ 151-168 (1982)).

5. Labor-Management Relations Act of 1947, Pub. L. No. 80-101, 61 Stat. 136 (codified as amended at 29 U.S.C. §§ 141-197 (1982)).

6. Even at the ebb of union influence, at the time the Landrum-Griffin Act was passed, there was no notion of substituting rights under public law for rights gained by contractual negotiation. Rather, the thrust of the Landrum-Griffin Act was to cleanse and democratize union operations. See Labor-Management Reporting and Disclosure Act of 1959, 29 U.S.C. §§ 401-531 (1982).

7. *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 579 (1960); see also *Republic Steel Corp. v. Maddox*, 379 U.S. 650, 653 (1965).

8. See *United Steelworkers v. American Mfg. Co.*, 363 U.S. 564, 568-69 (1960); *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 581-82 (1960); *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 596-99 (1960).

9. 29 U.S.C. §§ 201-219 (1982).

The new view did not, of course, wholly supplant the old—although the extent to which the two can coexist remains an open question. But the new view, which perhaps can be called the *substantive rights view*, was that in certain areas what labor and management agreed to, or failed to agree to, was very much everybody's business, not just their own. In age, sex, and race discrimination, in health and safety at the workplace, and in the retirement field, collective bargaining fell short of public expectations in two respects. First, the National Labor Relations Act may have encouraged unionization—although some would say it merely encouraged free choice on the question—but it did nothing if employees declined the opportunity to join unions and to bargain collectively. For the majority of the work force that was not subject to collective bargaining, the most stringent antidiscrimination and health and safety provisions in collective agreements obviously provided no protection whatever. Moreover, in the area of discrimination, many unions did not have a particularly enviable record and could hardly be expected to use collective bargaining as a weapon against discrimination, even in the sector subject to collective bargaining. Second, in any case, the evolving national consensus was that in these areas uniform treatment of the entire labor force, rather than merely of those employees subject to collective bargaining, was required. This uniform treatment could not be accomplished by anything resembling a framework view—substantive rights had to be conferred.

Those substantive rights have tended to become more detailed over the years. Despite the copious provisions of the Employee Retirement Income Security Act of 1974 (ERISA), for example, in the main it merely put regulatory limits on pension plan provisions excluding employees from participating in such plans or becoming eligible for benefits.<sup>10</sup> The Retirement Equity Act of 1984, however, went much further; its manifest purpose was to provide greater pension equity for women and spouses of employees, and to that end it actually required spousal consent to certain beneficiary designations by employees.<sup>11</sup> Likewise, in the case of race, sex, and age discrimination, the fairly cryptic requirements of the applicable statutes have been developed by judicial decision into formidable bodies of doctrine.<sup>12</sup> In the case of occupational health and safety, the appropriate administrative agencies have produced voluminous regulations.<sup>13</sup> Whether by statute, judicial decision, or regulation, the substantive requirements of the law have grown increasingly specific.

In a fairly short time, therefore, the employment relation has become, to a considerable extent, deprivatized. Indeed, the employment relation is now heavily regulated by public, largely federal, law. The framework view of labor

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10. See Leibig, *The Deprivatization of Employee Benefit and Labor Law: The Surprising Conservative Erosion of Trusts and of the Competitive Labor Model*, LAW & CONTEMP. PROBS., Autumn 1986, at 185, 194.

11. Retirement Equity Act of 1984, Pub. L. No. 98-397, § 103, 98 Stat. 1426 (amending 29 U.S.C. § 1055 (1982)).

12. See, e.g., *Texas Dep't of Community Affairs v. Burdin*, 450 U.S. 248 (1981); *McDonnell-Douglas Corp. v. Green*, 411 U.S. 792 (1973); *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971).

13. See, e.g., Occupational Safety and Health Standards, 29 C.F.R. § 1910 (1984).

law is a thing of the past. The shop steward is no longer—if he ever was—the exclusive guardian of employee welfare, even in the union shop.

That is not to say, of course, that discontinuity is the only theme worthy of emphasis. Some of the new rights are traceable ultimately to the earlier law. The drive to place pension benefits on a secure statutory footing, culminating in the enactment of ERISA in 1974, has roots in judicial decisions of a quarter century earlier, decisions holding pensions to be a mandatory subject of collective bargaining.<sup>14</sup> Roughly at the same time as the enactment of Title VII of the Civil Rights Act of 1964, a doctrine was evolving that racial discrimination by a labor union in the administration of a collective agreement was a breach of the union's duty of fair representation.<sup>15</sup> But it certainly cannot be claimed that the Wagner Act framework was in any way adequate to meet the problems for which new statutory responses were devised, beginning around 1963. To have put the National Labor Relations Board wholeheartedly in the business of insuring safety, enforcing pension requirements, or eradicating discrimination would have taxed its process with enforcement demands so inapt for the Board's existing structure as to invite failure on several fronts.<sup>16</sup>

The problems to which the statutes responded were various, and readers of this volume will no doubt be struck by the diversity of specific issues as they move from one subject area to another. But in a sense that is exactly the point: the newer statutory interests do not necessarily have very much in common except that they are intended to redress felt deficiencies in the employment relation left in some considerable measure unredressed by the collective bargaining regime. The result is that the employment relation is now freighted with a plethora of different regulatory requirements and enforcement mechanisms. Some rights are left to private negotiation and enforcement, some to wholly public enforcement, some to public action upon the complaint of private parties. Some matters are left to contract, some to statute and regulation, some to common law. Some issues are confided to arbitration, some to administrative agencies, some to the courts, even in the first instance. The sheer range of enforcement procedures and forums is testimony to the recognition of particular rights at various times.

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14. *Inland Steel Co. v. NLRB*, 170 F.2d 247 (7th Cir. 1948), *cert. denied*, 336 U.S. 960 (1949); *see also NLRB v. Jacobs Mfg. Co.*, 196 F.2d 680 (2d Cir. 1952).

15. *See Local Union No. 12, United Rubber Workers v. NLRB*, 368 F.2d 12 (5th Cir. 1966), *cert. denied*, 389 U.S. 837 (1967); *NLRB v. Local 1367, International Longshoremen's Ass'n*, 368 F.2d 1010 (5th Cir. 1966), *cert. denied*, 389 U.S. 837 (1967); *Independent Metal Workers*, 1964 NLRB Dec. (CCH) ¶ 13,250; *cf. NLRB v. Miranda Fuel Co.*, 326 F.2d 172 (2d Cir. 1963). The right to nondiscriminatory access to union membership dates back to *Steele v. Louisville & N. R.R.*, 323 U.S. 192 (1944), decided under the Railway Labor Act.

16. In a much discussed decision, *NLRB v. Miranda Fuel Co.*, 326 F.2d 172 (2d Cir. 1963), the Second Circuit had split three ways on whether the National Labor Relations Act rendered discrimination by a union based on grounds other than union membership or nonmembership an unfair labor practice. The case did not involve discrimination on grounds of age, sex, or race, but it was understood to implicate the role of the Board in racial discrimination cases. Underlying the various opinions were divergent views on the ability of the Board to cope with such matters on a large scale.

The enforcement of these public law rights raises many questions relating to their fit with rights achieved through collective bargaining and with remedies for enforcing collective agreements. The tensions between seniority rights deriving from collective agreements and affirmative action rights deriving from interpretation of Title VII are well known.<sup>17</sup> Similar tensions exist with respect to safety standards laid down in collective agreements and those required by the Occupational Safety and Health Administration.<sup>18</sup> It must not be supposed, of course, that these tensions present altogether new problems, for the same issues have arisen with respect to overtime pay due under a collective agreement and overtime pay due under the Fair Labor Standards Act.<sup>19</sup> What is new is the extent to which these tensions are now built into labor law.

The matter extends to remedies as well, for, as the *Trilogy* made clear, the arbitral remedy, described by Justice Douglas as "therapeutic,"<sup>20</sup> was the drug of choice for putative violations of the collective agreement. But if there is one thing that is clear about arbitration, it is that it is a private proceeding, largely unaccountable to public law standards. The new statutory rights are squarely in the domain of public law, enforceable by public bodies, such as the Equal Employment Opportunity Commission. Where an employer's conduct was arguably an unfair labor practice *and* a violation of the collective agreement, the law had earlier struggled with the question of whether the union was to proceed first with the National Labor Relations Board or with the arbitrator, and it had finally established doctrines relating to which body would defer to which and what effect a prior determination by one or the other would have.<sup>21</sup> The matter is now complicated in two additional ways. First, the rights conferred by statute are granted to individual employees, who had previously for the most part been content to let unions pursue alleged violations with arbitrators or with the Board. Now, however, individuals might go one way with their public law rights while unions go another with their grievances or unfair labor practice charges.<sup>22</sup> Second, there are no longer two forums but three: the arbitrator, the NLRB, and the administrative agency (and/or court) charged with enforcement of the new public law rights. The *Trilogy* has given way to the triangle.

All decisionmakers, including the Supreme Court, have had to grapple with a new layer of legal issues surrounding the apportionment of authority to bring and to hear claims. And arbitrators have increasingly been faced with

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17. *Firefighters Local Union No. 1784 v. Stotts*, 467 U.S. 561 (1984); *W.R. Grace & Co. v. Local Union 759, United Rubber Workers*, 461 U.S. 757 (1983).

18. For a discussion, see Feller, *The Impact of External Law Upon Labor Arbitration*, in American Arbitration Ass'n, *THE FUTURE OF LABOR ARBITRATION IN AMERICA* 83, 97-99 (1976).

19. *Barrentine v. Arkansas-Best Freight Sys.*, 450 U.S. 728 (1981).

20. *United Steelworkers v. American Mfg. Co.*, 363 U.S. 564, 568 (1960).

21. See generally Bond, *The Concurrence Conundrum: The Overlapping Jurisdiction of Arbitration and the NLRB*, 42 S. CAL. L. REV. 4 (1968). Absent an arbitration clause, there was and is also the possibility of an action under section 301 of the Taft-Hartley Act, 29 U.S.C. § 185 (1982), for breach of the collective agreement. Cf. *NLRB v. C & C Plywood Corp.*, 385 U.S. 421 (1967).

22. See, e.g., *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974).

problems that arose only rarely under the former regime—namely, whether and to what extent they should entertain arguments founded upon public law in proceedings that derive from a collective agreement. The arbitration of pension claims had just become a new specialty, complete with a separate set of American Arbitration Association rules, when ERISA claims began to be raised in tandem with claims deriving from pension trust agreements. If arbitrators do not hear such arguments, the arbitrators will no longer be the final authority, the *Trilogy* to the contrary notwithstanding. If arbitrators do hear the arguments, they can hardly maintain the private character of their proceedings, which is the *raison d'être* of arbitration. On such grounds, David Feller has suggested that the growth of substantive public law sounds the death knell of the arbitral process.<sup>23</sup> Yet labor arbitration continues to grow, which in some ways is more troublesome, for the system of grievance processing has become increasingly complex. In the United States, few policy problems are solved by scratching out the old arrangements and starting fresh. Accretion is the characteristic way of solving problems in this country. The disposition to add rather than to start over is very much in evidence in the labor relations field.

Indeed, the diversity of rights and forums is increasing yet again. In the late 1970's, the doctrine of employment at will began to erode very seriously, so much so that about half the states have now created important exceptions to the doctrine.<sup>24</sup> State courts are hearing cases of employee discharge with increasing regularity and finding a significant number of discharges unlawful as a matter of common law or state public policy.

The ironies of this development are manifold. The common law courts, once so hostile to labor as to thwart collective organization at every turn, are now hospitable to claims that augur considerable enhancement of job security across the board. The new common law rights<sup>25</sup> are enunciated and vindicated at the very moment the Labor Board and reviewing courts evince serious, perhaps excessive, solicitude for management flexibility, concern that neither the Wagner Act nor collective agreements be construed to lock management into expensive, inefficient job security arrangements.<sup>26</sup> Moreover, the states that have carried exceptions to at-will employment furthest tend to be those with the largest number of unionized workers.<sup>27</sup> It is thus quite possible that an employee in a nonunion shop in such a state may

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23. Feller, *supra* note 18.

24. For a state-by-state survey, see A.B.A. LIT. SEC., 1984 REPORT (report of the Employment and Labor Relations Law Committee).

25. How new these rights are remains open to question. There is an argument to be made that employment at will was a doctrine firmly established only in the last quarter of the nineteenth century, prior to which there existed certain implied obligations prohibiting termination without just cause. L. Wirthlin, Factors Spurring Judicial Modification of the Employment at Will Doctrine 1-2 (Dec. 6, 1984) (unpublished manuscript).

26. See *First Nat'l Maintenance Corp. v. NLRB*, 452 U.S. 666 (1981); *United Technologies Corp.*, 1984-5 NLRB Dec. (CCH) ¶ 17,159; *Illinois Coil Spring Co.*, 1983-84 NLRB Dec. (CCH) ¶ 16,029; *aff'd sub nom. UAW v. NLRB*, 763 F.2d 34 (D.C. Cir. 1985); *cf. NLRB v. Bildisco & Bildisco*, 465 U.S. 513 (1984).

27. L. Wirthlin, *supra* note 25, at 17-18.

have *more* protection against arbitrary discharge than an employee in a union shop subject to explicit contract provisions that are enforceable by arbitration.

Exceptions to the doctrine of employment at will are certainly no major cause of the continuing decline in union membership. These doctrinal changes may even make management marginally more receptive to unions, because the alternative of costly suits can be much less attractive than an orderly grievance procedure. But the at-will litigation surely does nothing to make employees more receptive to the appeal of unions; it may make them marginally less receptive to unions, because it makes available a nonunion alternative affording security against arbitrary dismissal. The lure of precisely such job security traditionally constituted a major attraction of unionization.

To be sure, changes in the employment at will doctrine are not attributable to federal regulation, although it should be noted that much of the state law in this area has actually been made by lower federal courts.<sup>28</sup> Nevertheless, the decline of employment at will fits the general picture very well. Common law exceptions to employment at will impose uniform requirements on the work relation as a matter of public regulation, signifying, above all, the deprivatization of the employment relation and what I should like to call the pluralization of labor law. What began as one fairly coherent scheme in 1935 has become many schemes. Indeed, even some of the newer federal regulatory schemes have their own multilayered features. Enforcement of some statutes, such as the Occupational Safety and Health Act of 1970 (OSHA), is delegated to state agencies that present acceptable enforcement plans.<sup>29</sup> More than twenty states participate in OSHA enforcement, thus proliferating the agencies involved and adding—as the employment at will cases also add—a federal-state or vertical dimension to the horizontal complexity that I have depicted.

What has emerged, then, is a speckled pattern of rights and remedies. Standing, sequencing, duplication, and finality are among the issues long recognized to arise from the pattern of statutory and decisional accretion sketched here. What is more rarely discussed is at least equally fundamental: the anomalous combination of intense regulation and intense indifference. Powerful efforts are devoted to securing uniformity on some matters. In principle, at least, no one, anywhere, working for any employer affecting interstate commerce, can be dismissed for racially or sexually discriminatory reasons—although the mode of redress for such a dismissal may well vary, depending on whether the employee is subject to a collective agreement with a grievance procedure. Equally powerful efforts are devoted to guaranteeing diversity on other matters, most notably the decision of employees to engage in collective bargaining, on which turns the employees' freedom from

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28. See, e.g., *Klages v. Sperry Corp.*, 118 L.R.R.M. (BNA) 2463 (E.D. Pa. 1984); *Sherman v. St. Barnabas Hosp.*, 535 F. Supp. 564 (S.D.N.Y. 1982); cf. *Cales v. Chesapeake & O. Ry.*, 300 F. Supp. 155 (W.D. Va. 1969).

29. See Viscusi, *The Structure and Enforcement of Job Safety Regulation*, LAW & CONTEMP. PROBS., Autumn 1986, at 129, 136.

arbitrary discipline or discharge on any but the grounds forbidden by statute or state judicial decisions. A few subject areas thus receive intense scrutiny, but there is virtually no mechanism to regulate a matter that is presumably of far greater importance to most employees most of the time: actual working conditions. Short of discrimination, short of violation of pay, pension, or safety standards, and short of discharge, nonunion employers in the private sector remain free to embitter the lives of employees with disagreeable physical surroundings, oppressive foremen, or an unpleasant workplace atmosphere. On these matters, laissez-faire is alive and well. The patchwork extremes, of regulation and immunity from regulation, can only be explained in terms of the incremental process by which regulatory measures were enacted against a historical background that placed the constitutionality of even the framework regulation in doubt as late as 1937.<sup>30</sup>

It goes without saying—but it needs underscoring—that this complex system, with all of its anomalies and loose ends, is quintessentially American. In countries with centralized collective bargaining and collective agreements with widespread or universal effect, the mix of public and private rights, the proliferation of overlapping and conflicting forums, and the contrast between uniformity and diversity would be inconceivable.<sup>31</sup> The American law of employment has approximately the neatness and symmetry of a Kandinsky canvas.

This mix, this proliferation, this contrast form the subject of the present issue. The aim is to explore the new public-law labor law, the labor law that has its source in federal statute and that reaches into virtually every employment relation, regardless of whether the relation subsists in a right-to-work state or not, in a shop subject to a collective agreement or not. The contributors impart a sense of these rights and remedies and how they fit with the old labor law. Despite the diversity of the subject matter, the collection also provides the flavor of what the statutory arrangements have in common and what they do not, as well as how and with what effect they are enforced.

It has been said that inside every large problem there is a small problem struggling to get out. The small problems of each of these fields hold a considerable degree of intrinsic interest. Nevertheless, what puts them all in the same arena is the large problem, the new labor regulation that is public, rights-oriented, and enforced uniformly. The collection of papers assembled here amply documents the wide range of protections that have their source in federal statutory law. Of this we are already certain: it is no longer adequate to speak of labor relations law. It has become necessary to speak of the public-private mix in labor law and of the regulation of work, from recruitment all the way to retirement.

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30. See *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937).

31. See Bok, *Reflections on the Distinctive Character of American Labor Laws*, 84 HARV. L. REV. 1394 (1971).