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Foreword, Symposium Issue: Major Issues For Collective Bargaining in the Nineties

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Foreword

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This issue of the law review is dedicated to collective bargaining in the nineties. Let us begin by considering what bargaining has been, and will become. Doomsayers, or perhaps celebrants, point to the fact that a smaller percentage of American workers belong to labor unions than ever in the history of lawful employee collectives. In 1992¹ X% of the country's work force paid union dues. However, in real numbers, X million people were covered by union negotiated contracts. The numbers may belie the importance of the phenomenon known as collective bargaining. It has been said, "[t]he historical significance of the duty to bargain cannot be exaggerated."² It took more than a century of American history to get the government to recognize the efficacy of getting the parties in an employment relationship to bargain over the terms and conditions of employment in order to satisfy both humanitarian and distributive goals.³ By the end of the century, unions that sought collective economic goals through

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1. According to the U.S. Labor Department's Bureau of Labor Statistics February 10, 1992 Report, the percentage of employed wage and salary workers who are members of unions was 16.1% in 1991, the same figure as in 1990. Union membership reached a high of 34.7% of American workers in 1954, and has steadily declined since then. Union membership rose in government service during 1991, constituting approximately 38=7% of government workers. In the private sector, union members account for only 11.9% of all those employed during 1991, compared to 12.1% during 1990. *Union Membership Unchanged Last Year*, 139 Lab. Rel. Rep. (BNA) 182 (Feb. 17, 1992).

2. Phillip Ross, *The Government as a Source of Union Power* 3 (19____).

3. Cf. Weiler, *Promises to Keep: Securing Workers Rights to Self-Organization Under The NLRA*, 96 HARV. L. REV. 1769 (1983) (Workers are non-fungible and have personal interests in and rights devolving from work) and Schwab, *Collective Bargaining and the Case Theorem*, 72 CORNELL L. REV. 245 (1987) (collective bargaining does reallocate wealth but may be the most efficient means toward achieving the goal of industrial peace and unfettered flow of goods in commerce). Early in the 19th Century, it was still the dominant view in this country that a "combinations of workmen to raise their wages may be considered from a two-fold point of view: one is to benefit themselves. . . The other is to injure those who do not join their society. The rule of law condemns both." [Commonwealth v. Pullis, Philadelphia Mayor Court (1806) cited in 3 JOHN RODGERS COMMONS AND EUGENE ALLEN GRIMORE, A DOCUMENTARY OF HISTORY OF AMERICAN INDUSTRIAL SOCIETY 140 (1910).]

lawful means were no longer illegal. Congress declared that antitrust laws would not apply to collectivization and that "The work of an individual is not an article of commerce."⁴

The Senate Commission on Industrial Relations found violence and destructive work stoppages "as Characteristic result[s] of the refusal to bargain."⁵ By 1935, Congress was willing to adopt the National Labor Relations Act, the articulated purpose of which is "encouraging the practice and procedure of collective bargaining and . . . protesting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection."⁶ Collective bargaining changed forever the way America does business. By creating some parity of bargaining power, it "implies restrictions upon an employer's complete freedom of action, and contemplates at least a minimum of employee participation in the establishment" of those terms and conditions.⁷ What had previously been the purest exercise of management prerogative became the subject of mandated good faith bargaining. The resolution of the issues depends not upon the will or caprice of the owners of capital, but upon the relative strength of the parties negotiating. Some historians identify "The redistribution of wealth in this country" as the original goal of legalizing collective bargaining.⁸ There is almost universal agreement that unions have raised wages — not only for their own members but also for the rest of the workers in each particular industry.⁹ Some free market adherents consider this wage elevation as anticompetitive, inefficient and leading to the creation of fewer new jobs.¹⁰ Others salute the process

4. Clayton Act, Act of October 15, 1914, 38 Stat. 730.

5. "We find that the direct and proximate cause of the killing of men, women and children, destruction of property, and looting of the homes of the striking miners from the Southern Colorado coal fields during the strike. Therein was the arbitrary refusal of the coal mine operators to meet and confer with the representatives with workers in their several mines." U.S. Congress, Senate, Commission on Industrial Relations, final report and testimony, 64th Congress, 1st Session, Senate documents #415, Vol. 1 (Washington, TPO, 1916) page 266 in Ross, *infra* note at 9.

6. 29 U.S.C. § 151 (1988).

7. Findling and Colby, *Regulation of Collective Bargaining by The National Labor Relations Board — Another View*, 51 COL. L. REV. 170, 177 (1951).

8. Duvin, *The Duty to Bargain: law in Search of Policy*, 64 COL. L. REV. 248 ().

9. See, e.g., R. FREEDMAN & J. MEDOFF, *WHAT DO UNIONS DO?*

10. See, e.g., Richard A. Posner, *Some Economics of Labor Law*, 51 U. CHI. L. REV. 988 (1984).

as the source of harmonious relationships between owners and efficiency.¹¹ The debate about the virtues of collectivizing will, one can presume, continue as long as unions exist. In many respects the statute that legalized unions can be viewed as a set of procedures for organized industrial warfare. Although the goals of workers and management often overlap, and sometimes coalesce, they have frequently been at odds.

The parties' to a collective bargaining contract have the ability to act strategically. They can bargain for as long and as hard as their respective wills hold out. Unions can strike. Employers can lockout. Beyond that in *NLRB v. MacKay Radio & Telegraph Co.*¹² companies were given the right by the U.S. Supreme Court to permanently replace striking workers—a nearly sixty-year old decision that created what Harold Katz calls in his paper “The major issue . . . of collective bargaining . . . in the nineties.” Although the changes wrought by unions emerged despite the fact that any striker could be replaced for good by any employer who could find a replacement, current union strategists and sympathizers are almost universal in their adoption of Mr. Katz' views. The last decade of the twentieth century, some say, finds workers with less protection, and considered more fungible, than they have been since the NLRA was enacted. The new political administration supports legislation to end employers' right to replace strikers. Although it is too early to predict congressional reaction, especially in view of the fact that, in one form or other, striker replacement legislation has been around since Mackay was decided. An attorney and former legislator, Harold Katz may be in the best position to crystallize the argument for organized labor, and not only help us to understand what is at stake, but contribute meaningfully to the debate so crucial to continued labor law reform.

NLRB General Counsel Jerry Hunter begins his paper from a perspective that collective bargaining is labor law. Rather than discuss what reforms are needed, he theorizes about how the present legislative labor scheme must accommodate new laws that have an impact upon what employers and their workers must bargain about. Mr. Hunter deals specifically with the American with Disabilities Act of 1990, a statute he and others he cites consider “the most significant civil rights legislation in more than twenty-five years.” It is undisputable

11. See, e.g., Wachter & Cohen, *The Law and Economics of Collective Bargaining: An Introduction and Application to the Problems of Subcontracting Partial Closure and Relocation*, 136 U. PENN. L. REV. 1349 (1988).

12. 304 U.S. 333 (1938).

that any law affecting thirty-four million disabled workers, two-thirds of whom are kept out of the workplace because of fear, ignorance, or purposeful discrimination, is important. Mr. Hunter, as the Chief lawyer for the National Labor Relations Board, worries over the potential conflict between the requirements of the ADA and the labor law he administers. As a former teacher, practitioner and in his present position with a bird's-eye-view of those unfair labor practice charges that have an will be filed under the ADA/NLRA, Mr. Hunter can give us insights into the potential problems in a way that can lead us to anticipate and avoid them.

The ADA can be considered as much a result of collective bargaining as the current contracts between any union and employer in the country. This is because much of the civil rights legislation—as well as other worker protection statutes—have been attributed, in great part, to the political activity of organized labor.¹³ As with anything involving laws in the workplace, whether unions helped or hindered the creation of effective civil rights proscriptions is a matter of controversy. Some laws, like the occupational Safety and Health Act, are more directly the result of positive union effort.¹⁴ Others, like the Employee Retirement Income Security Act, may have been passed to obviate problems with pension and other funds incompetently or fraudulently managed and administered by some unions. And despite union claims that they have lobbied for the passage of effective civil rights laws, the need to legalize union discrimination against all the protected classes covered by civil rights acts passed since 1964.¹⁵ Unions may be called upon, as Mr. Hunter discusses in his paper, to surrender some of their zealously guarded rights to exclusively represent the members of their bargaining units — or to waive seniority requirements — to accommodate a disabled worker. The irony of union involvement in Congressional action to prevent discrimination in the workplace is that it may have led to the diminution, in numbers strength, and authority in the workplace, of organized labor.

Cheryl Bryson, a management attorney whose work involves both organized and non-union workplaces, addresses collective bargaining by endorsing one of its most enduring and significant creations—

13. See, e.g., P. TAFT, *ORGANIZED LABOR IN AMERICAN HISTORY*; P. WEILER, *GOVERNING THE WORKPLACE: THE FUTURE OF LABOR AND EMPLOYMENT LAW* (1990).

14. See, e.g., Schroeder & Shapiro, *Responses to Occupational Diseases: The Role of Markets, Regulation and Information*, 72 *GEO. L.J.* 1231 (1984).

15. Cite Title VII discrimination by Union's - See also provision of ADA covering union discrimination.

arbitration—as a way out of the morass created by the plethora of individual lawsuits filed under the civil rights acts, which now will include the ADA. Arbitration is an agreement by two parties to be bound by the decision of an impartial outsider to the dispute. Although arbitration—which implies process—and mediation, are referred to in Greek and Nordic myths, the procedure most of us understand evolved from labor law. It has been peculiarly successful and suited to workplace disputes; because of the inability of a judiciary to comprehend the “common law of the shop.” Unions have embraced and refined the process, and the Supreme Court gave its imprimatur to arbitration in the now-famous *Steelworkers Trilogy*.¹⁶ Ms. Bryson argues that, although arbitration of civil rights cases raises questions of the adequacy of representation for individual litigants unrepresented by a union, the honored and orderly process derived from the collective bargaining model can be employed successfully.

16. *United Steelworkers v. American Mfg. Co.*, 363 U.S. 564 (1960); *United Steelworkers of America v. Warrior and Gulf Navigation Co.*, 363 U.S. 574 (1960); *United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960).

