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## Introduction

Laura J. Cooper and Catherine L. Fisk

# The Enduring Power of Collective Rights

In 1935, at the depths of the Great Depression when prospects for American workers and businesses seemed bleak, Congress sought to improve both the lives of workers and the economy by enacting the National Labor Relations Act (NLRA). While some pieces of New Deal legislation, such as the Social Security Act and the Fair Labor Standards Act, decreed specific rights for workers and obligations for employers to address specific workplace problems, the vision reflected in the NLRA, named after its principal sponsor Robert Wagner, was radically different. Rather than dictating substantive rights and obligations, the Wagner Act instead established a process under which firms and their employees could define their own rights and obligations. Even more radically, the process it created was not one in which workers, as individuals, could, for the most part, assert their rights. Instead it was a process in which workers would have to channel their efforts into a collective voice in order to advance their interests. Workers could gain substantive rights under the NLRA only by joining together in labor organizations and using their collective economic power to persuade employers to grant employees' rights in collective bargaining agreements. Unions of workers were granted rights that they could exercise collectively on behalf of their members. Individual employees were granted some rights—the rights to join unions and to engage in other concerted activity for mutual aid and protection—but the individual rights were granted to facilitate group activity. The government would police the process, but it would not define the terms of employment. The entire regime of individual and group rights is premised on assumptions about the social and economic importance of collective action. The chapters in *Labor Law Stories* consider the endurance of this collective model as the American workplace has evolved in the seventy years since enactment of the NLRA.

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The text of the NLRA was brief. Congress created an administrative agency, the National Labor Relations Board (NLRB), and entrusted it

T further to define the meaning of the statute and to implement its provisions. In the beginning, the agency was fragile. Statutes similar to the NLRA had recently been held unconstitutional by the Supreme Court. Some labor relations experts were so sure that the NLRA would meet the same fate that would-be appointees were reluctant to assume positions at the agency and many employers felt confident in ignoring its directives.

T Congress' decision to entrust enforcement of the National Labor Relations Act to an expert agency was animated by several concerns. Some were the same concerns that inspired the creation during the New Deal of expert administrative agencies in many areas of government, and some were unique to the field of labor relations. Congress distrusted the capacity and willingness of federal judges to resolve labor disputes because the federal courts had, in the view of Progressive supporters of labor legislation, completely disgraced themselves in the late nineteenth and early twentieth century by enjoining all manner of worker action. A politically accountable agency staffed with labor lawyers seemed infinitely preferable to federal courts. In addition, the New Deal was the high water mark of faith in the power of experts to resolve disputes in a way that could transcend politics. The NLRB was supposed to be staffed with expert labor economists, sociologists, and lawyers who would design a legal regime that would be the best it could be. The notion that the legal issues that emerged from the great contest of capital and labor could be resolved by the application of expertise has in retrospect come to seem hopelessly naive. Congress' early faith in experts never enjoyed the chance to be tested, as an early effort to purge the agency of suspected communists led to the elimination of the labor economists and sociologists. Yet the argument for judicial deference to the agency's expertise has persisted over time, if only because the Board and its staff examine thousands of labor disputes every year whereas any particular court sees only a handful. That labor policy should be made by a politically accountable agency remains a plausible justification for judicial deference to NLRB decisionmaking. But in labor law as elsewhere, courts find it extremely difficult to defer to the political judgments of an agency with which they strenuously disagree. In short, the dance between the agency and the judiciary—a dance that is done throughout the modern administrative state—is particularly elaborate and has an especially interesting and well-documented history in the field of labor relations, and its development over time merits study by anyone interested in modern American law and government.

T Also underlying Congress' decision to trust labor relations to an expert agency was the Progressive-era conviction that an accurate understanding of the facts of a dispute was absolutely crucial to appropriate application of law. In one respect, labor is no different than any other

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T field in the importance of facts. The facts of the case are crucial to the success of the litigants in many cases. Obviously that is true in the trial court or administrative agency where the facts are found, established, developed, or invented, depending on your point of view. Even in the appellate courts, where facts are conventionally thought to take a back seat to the law, facts matter. An eminent federal appellate judge once confessed that the most important part of a brief, the part most likely to persuade the court of appeals—after the names of the lawyers on the cover—was the statement of facts. A well-written statement of facts, in his view, could tell the court what the legal issues were and how they should be decided. Yet facts are given short shrift in most law school casebooks, and in most appellate opinions. Students learn to read facts in order to engage in common law reasoning, to distinguish the instant case from precedent, and they endure the recitation of old adages about facts (“hard cases make bad law” or “when the facts are in your favor, argue the facts; when the law is in your favor, argue the law, and when neither is in your favor, argue policy”). But students are sometimes not told much about how perceptions of facts shape the perceived need for legal rules. Nowhere is the importance of facts greater than in the area of labor law. Lawyers know, and young lawyers must learn, the importance of developing a solid factual record. In one case discussed here, for example, the most important “fact” to the Supreme Court may not have been a fact at all. But it was an assertion of fact that became part of the administrative record and that could not be challenged on appeal. Law students are ill-served by training that teaches them to be blind to the importance of facts in shaping perceptions of justice, and to the necessity of and techniques for establishing a desirable factual record on which to base their legal arguments.

T The chapters in this book tell the story of the development of labor law over the course of nearly seventy years, beginning with one of the earliest of the Supreme Court’s cases under the NLRB and ending with one of its most recent. The first story we present is that of Mackay Radio, which arose in a context when the employer believed it could avoid any liability for its actions by challenging the constitutionality of the Act. The case reached the Supreme Court in 1938, only one year after the constitutionality of the Act was established, and although the employer’s constitutional challenge to the statute failed, the case found the Court and the NLRB still very cautious about the power of Congress to regulate the workplace. The case offered the Court an opportunity to address one of the fundamental questions that the brief statutory language had failed to answer. If the design of the Act called for employees to gain rights through the use of economic force—going on strike—was the employer free to give their jobs to others if they did so? In dicta that eventually proved to be far more powerful than the case’s

T holding, the Court said that employers had the right permanently to replace striking workers. To contemporary ears, the conclusion seems profoundly at odds with the statute's express protection of the right to strike and reliance on economic power as exercised in a strike as the catalyst that would produce collective bargaining agreements which would be the source of employee rights. The chapter by Julius G. Getman and Thomas C. Kohler on Mackay Radio explains the puzzle of how such a basic principle of American labor law could appear to be established so casually. It also explains why the "right" permanently to replace striking workers was not exercised frequently enough for the Court's conclusion to seem controversial until decades after the case was decided. The chapter also examines the devastating impact of the recent widespread use of permanent replacements in a legal regime that rests on the ability of workers to exercise economic power through strikes.

T When the NLRA was first enacted, Congress is generally thought to have assumed that the process of collective bargaining could be advanced simply by protecting the right of employees to organize and by directing employers to bargain once their employees had chosen a labor organization as their representative. Economic power demonstrated, if necessary, through strikes and lockouts would determine the nature and results of the collective bargaining process. In 1947, however, with the Republican party in control of Congress and the post-war wave of strikes testing the limits of legislative patience with laissez faire, Congress enacted the Taft-Hartley Act which significantly modified the Wagner Act regime. While limiting the right of employees to use all sorts of economic weapons by adding union unfair labor practices to the statute for the first time, Congress also recognized that it would be necessary to establish legally-enforceable rules for bargaining to prevent union and employer behaviors that could make a mockery of the process. Although Congress in 1947 mandated that the parties bargain in good faith, again it left the details to the NLRB. Would collective bargaining be a rational process in which results arose from equal access to information and reflected the parties' mutual best interests? Or would it be an economic power struggle in which the stronger party, whether employer or union, would impose its will on the weaker? The chapter by Kenneth G. Dau-Schmidt on Truitt Manufacturing Company (1956) and Insurance Agents' International Union (1960) describes the struggle between the NLRB and the Supreme Court to define the duty to bargain in good faith. The chapter examines, from the perspective of economic analysis, the two cases, which seem paradoxically to expect collective bargaining to be both a battle of economic power and a process of rational decision-making.

T While Congress' answer to workplace regulation in 1935 had been to establish a collective bargaining process, it had surprisingly little to say

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T about the enforcement of the agreements reached through collective bargaining until it enacted the Taft–Hartley Act in 1947. In an effort to make unions and firms accountable for the agreements that they reached, Congress for the first time made unions subject to suit as entities and provided that collective bargaining agreements would be enforceable in federal court. Once again though, its language was extraordinarily modest. Section 301 of the Taft–Hartley Act simply gave federal courts jurisdiction to hear actions for enforcement of collective bargaining agreements without saying a word about the substantive law that would govern such actions. Union lawyers who remembered the hostility of federal courts to unions in the years before Congress eliminated federal court jurisdiction over labor disputes were skeptical about the prospects of judicial enforcement of collective bargaining agreements. Katherine V. W. Stone’s chapter on the *Steelworkers Trilogy* (1960) tells how a determined group of union attorneys conceived a vision of collective bargaining agreement enforcement in which courts would direct disputants to private arbitrators whose decisions would be final. The chapter explains how these lawyers persuaded the Supreme Court to accept that vision even if it required courts to refrain from overruling arbitral awards with which they fundamentally disagreed. She also tells though how the union lawyers’ success in keeping the courts out of the arbitration process ironically led to greater judicial intrusion into union internal affairs.

T Although the central theme of the NLRA initially had been protection of workers’ right to organize, the brief and deliberately vague language of the statute left many basic principles of the organizing process to be defined by the NLRB and the courts even decades later. In *Gissel Packing* (1969), the Supreme Court addressed two such issues. First, did the First Amendment permit the NLRB to preclude employers from making negative predictions about the effect of unionization on their businesses? Second, was the agency permitted to conclude that in some cases an employer’s misconduct during an organizing campaign so intimidated workers that the agency could order the employer to bargain with the union as the exclusive representative of its employees even though the union never won a representation election? The chapter on *Gissel Packing* by Laura J. Cooper and Dennis R. Nolan describes how the Supreme Court accepted the agency’s paternalistic image of worker vulnerability and answered both questions affirmatively but explains why that case’s holdings seem to have had so limited an effect.

T No story of American law or history, especially labor history, can be told without acknowledging the powerful legacy of slavery and the persistence of race discrimination. Not surprisingly, the law of labor relations struggled with issues of race over the course of the twentieth century. In the 1930’s, a group of talented black lawyers began a

T litigation campaign to challenge segregation in schools, places of public transportation, and the workplace. One of the cases they brought, *Steele v. Louisville and Nashville Railroad*, challenged the racial segregation on Southern railroads maintained by the all-white railroad workers' unions. During World War II, when blacks were conscripted to fight and die along with whites, and when America professed to the world its moral superiority to the Nazi regime, the black workers finally found a sympathetic forum in the U.S. Supreme Court when the legal system could no longer afford to ignore blatant race discrimination on the home front. Deborah Malamud's chapter on *Steele v. Louisville and Nashville Railroad Company* (1944) describes how a careful litigation strategy led the Court to find that when law permits a union to be the exclusive representative of workers at a firm it also imposes upon the union an implicit obligation to represent all workers fairly. More broadly, the chapter informs the longstanding debate about the relationship between litigation and social change.

T As the civil rights movement gained strength and a particularly forceful voice in the Black Power movement of the late 1960's, the fight over persistent racial inequality in employment continued. In *Emporium Capwell* (1975), a group of black department store employees in San Francisco were fired for picketing and demanding that the Emporium cease discriminating. The rule that the union is the *exclusive* representative of the workers—the very principle that had given rise to rights of black workers in *Steele*—now condemned the black department store workers for seeking to talk to their employer outside the collective bargaining process. Justice Thurgood Marshall, the first African-American to sit on the Supreme Court and a principal architect of the litigation strategy that struck down racial segregation, wrote the Court's opinion denying these workers the right to protest. In this chapter, Professors Marion Crain, Calvin William Sharpe and Reuel E. Schiller explore the painful dilemma posed by the principles of exclusive representation and majority rule upon which the labor law system rests. They offer diverse perspectives on whether the Supreme Court in *Emporium Capwell* properly balanced individual and collective rights.

T The NLRA's vision that a process of collective bargaining, rather than substantive rights, could best protect workers was again tested later in the twentieth century when American businesses found new ways to structure their operations in an effort to drive down labor costs. The Supreme Court concluded in *First National Maintenance* (1981) that the duty to bargain does not apply to the decision whether to eliminate unionized jobs by closing a part of a company's operations, at least in some situations. Of what value is collective bargaining if fundamental restructuring decisions that cost unionized workers their jobs can be made in the absence of an obligation to bargain? In the chapter on *First*

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T *National* Alan Hyde reveals the peculiar path that brought the case before the Supreme Court and the courtyard negotiations between Supreme Court law clerks that produced Justice Blackmun's bewildering answer to the question.

T As American businesses faced the challenge of global economic competition in the late 1980's they looked abroad to Japan and elsewhere and saw models of employee involvement in workplace decision-making that they thought enabled their foreign competitors to outdistance American productivity. Business owners asserted that a little-noticed provision of the NLRA, thought fundamental to prohibit employer-dominated "company unions" in the 1930's, was outdated and now prevented American firms from enjoying the benefits of worker participation. Unions feared a change in the law that had always prohibited employer domination of employee participation programs would pave the way for a resurgence of company unions to forestall employee demands for an independent union and full collective bargaining. In the chapter on Electromation (1992), Robert B. Moberly describes how employers and their lawyers organized a challenge to this provision before the NLRB and in Congress. Their argument that the NLRA's 1935 adversarial model of employer-union relationships could not meet the challenges of the twentieth century failed to persuade either the Board or Congress. The Act's mandate that worker-employer negotiations had to be channeled into a structure of collective bargaining and exclusive representation endured in the face of this powerful assault.

T Now, in the twenty-first century, the Act's language and vision are facing new questions as the structure and composition of the American workforce changes. Virtually every piece of protective labor legislation reflects major policy judgments about the scope of legal protection for workers in its definition of which workers are covered by it. The NLRA is no different. Particularly in the last two decades, as union organizing has spread into sectors of the economy where union density historically has been low—health care, white collar work, and low-wage workplaces dominated by recent immigrants—there have been pitched legal battles over which workers are to be protected. Two of the most controversial areas have been the exclusion of nominally supervisory workers and undocumented immigrant workers from the protections of the NLRA. The final two chapters deal with these issues, addressing the particular issue in each case in the context of the much broader legal and social dispute about the need and prospects for unions in the evolving globalized American labor market and in unconventional managerial structures where even relatively low-level employees have some supervisory responsibility.

T As the lines between employee and supervisor blur, will the result be that large proportions of the workforce become classified as supervisors

T with no protection from an Act that affords rights only to non-supervisory employees? Marley Weiss' chapter on *Kentucky River Community Care* (2001) addresses that question in the context of the growing health care industry. *Kentucky River* is the second of two cases decided by the Supreme Court within the space of relatively few years that addressed the question whether nurses working in nursing homes are exempt from labor law protections because they are "supervisors." The chapter examines the role of union organizing in the health care industry and the vexing question of how the exempt category of "supervisor" should be defined in an era of increasingly flat hierarchies.

T Another profound change in the twenty-first century workforce is the growing number of foreign-born workers. Much union organizing today is occurring in low-wage workplaces dominated by immigrant workers, many of whom are undocumented. While the NLRB seeks to protect the NLRA rights of all workers, both documented and undocumented, immigration laws seek to discourage illegal immigration by prohibiting employers from hiring undocumented workers. Should the objectives of the immigration laws preclude the NLRB from providing remedies to a worker, denied work in violation of the NLRA, when doing that work was unlawful under immigration statutes? Or would denying remedies to undocumented aliens under the NLRA increase incentives to employ undocumented workers by making them less risky to hire and cheaper to fire? Catherine L. Fisk and Michael J. Wishie in their chapter on *Hoffman Plastic Compounds* (2002) show how immigration law enforcement won the battle with labor rights enforcement, leaving an ever-expanding proportion of the workforce beyond the basic protections of the law.

T While the chapters describe the doctrinal evolution of law under the NLRA in the seventy years since its enactment, the fundamental purpose of this book is to tell the stories of the cases in which these doctrines emerged. The authors have interviewed dozens of participants in these cases—representatives of unions and management, union organizers, lawyers for unions, companies and the NLRB, members of the NLRB and Supreme Court law clerks. They have pored over archival records of the NLRB and the papers of lawyers and Supreme Court justices. They have read transcripts of agency hearings and Supreme Court arguments. They bring to this volume quite remarkable stories of how law gets made, how this process of law-making by litigation affects the lives of the people involved and their advocates, and how the law they make sometimes has an impact on others, and sometimes does not.

T Readers familiar with labor law may be charmed by some of the previously unknown anecdotes about these cases we discovered in our research. A worker's birth certificate dramatically thrown in the wastebasket in the midst of a hearing before an administrative law judge



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T became the crucial evidence that led the case to the Supreme Court. An NLRB lawyer falsely represented the agency's law to the Supreme Court because he thought it would help the case. A lawyer who won his case in the Supreme Court later served time in prison for arson. A lawyer tried to tell a judge what a Senator meant by language in the statute, only to have the judge reply that he'd been the Senator's staff member at the time and knew exactly what the Senator meant.

T There is more to knowing the story behind the leading labor law cases than the delight of surprise. This book resolves some of the mysteries that have puzzled generations of students and teachers. Few people who know Justice Thurgood Marshall's career as one of the pioneering lawyers who established the modern civil rights regime can read his opinion in *Emporium Capwell*, which paves the way to uphold the firing of black civil rights protesters *precisely because of their* civil rights protest, without wondering whether he felt any heartache about his decision, or worried if he was doing the right thing. The chapters on *Steele* and *Emporium Capwell* make clear that his views on the benefits of unionization for black workers were strong and longstanding. Ever since employers began in the 1980's to invoke in earnest the right established in *Mackay Radio* permanently to replace striking workers, labor law students have wondered why such a major limitation on the right to strike was so casually engrafted onto the statute by the Supreme Court in 1938, and whether it was considered at the time to be nearly the death blow to the labor relations regime that later critics believed it to have been. Why did the employer in *First National Maintenance* expend the funds necessary for Board, appellate court, and Supreme Court review when it could have instead just bargained to impasse with the union at seemingly little cost?

T The benefit of knowing the full story behind these cases is greater even than being charmed by stories or satisfied by the resolution of mysteries. The law of work shapes the life story of real people. Work is central to every aspect of our society. It is where we spend most of our waking hours. It is how we support ourselves and our families. It is the origin of much of society's wealth. Personal identity is often defined in significant part by our workplace role. We bring to the workplace our basic values of freedom, democracy, autonomy, and fairness. The stories we tell here are the stories of people from many walks of life—railroad firemen, nurses, factory workers, insurance agents, janitors, retail clerks and radio operators—who sought by collaborating with fellow workers to control their destinies. Some, like William Steele, succeeded. Winning a case worked a significant improvement in his life. Some failed, like the anonymous undocumented worker whose unsuccessful union organizing effort became *Hoffman Plastic*. These are also the stories of those whom they challenged—employers in a variety of industries who sought recog-

T nition of their rights as owners of capital to manage their businesses in  
the interests of owners and stockholders. For almost all of them, the case  
was not about the arcana of legal doctrine, it was about how the law and  
lawyers would treat their aspirations and fears.

T The ten chapters here present the story of fourteen decisions of the  
Supreme Court and one from the National Labor Relations Board that  
never made it to the Supreme Court. The cases were identified as the  
most important labor law decisions from a survey of professors who  
regularly discuss these cases in their labor law courses. The stories  
behind the cases show the great variety of ways in which landmark cases  
become landmarks. By itself, that process can be intriguing. To law  
students, it may help when wading through the darker moments of law  
school to realize that one day, sooner than you might think, it might be  
your case that makes it to the Supreme Court or that is reported in the  
newspaper or on TV. Some of these cases were planned to be landmarks  
from the very beginning. *Steele*, for example, was part of the decades-  
long legal strategy developed and implemented by African-American  
lawyers to challenge race discrimination in society. In this respect, the  
story of *Steele*, like the story of *Brown v. Board of Education*, is a story  
of the calculated use of law to effect radical social change. But other  
cases in this volume wound up as landmarks by fortuity, by the lawyer  
stumbling upon the right argument on the right facts in front of the  
right judge at the right time. Sometimes a case achieves prominence  
despite the parties' desires to the contrary, as in the unsuccessful effort  
of counsel on both sides to try to preclude oral argument before the  
NLRB in *Electromation*. More often, though, as with most of the cases in  
this book, routine cases that appear undifferentiated from the thousands  
of cases decided by the NLRB each year, by happenstance get selected for  
Supreme Court review, thrusting ordinary lawyers into the national legal  
spotlight. In some cases, the spotlight proved irresistible. In *Gissel* a  
management lawyer argued the case in the Supreme Court without  
compensation from the client, not revealing to the Court that the case  
was moot, because he so desired the experience. In *First National  
Maintenance*, the company's lawyer insisted on presenting the argument  
himself although the U.S. Chamber of Commerce reportedly offered him  
tens of thousands of dollars to let its lawyer present the argument  
instead.

T While the cases were selected because of professors' perceptions that  
they were the most important in the labor law cannon for their doctrinal  
holdings, our deeper research into the actual effects of these cases  
revealed the sometimes limited effect of Supreme Court decisionmaking  
to affect change in the conduct of real parties in labor relations. The  
Court's decision in *First National Maintenance* articulated a rule for a  
set of circumstances so unlikely that even that case did not really

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T manifest them. Neither of Gissel's holdings ended up truly governing union elections because lower courts proved so resistant to its directives. Truitt set the ground rules for employer disclosure of financial information so clearly that the case provided a script for avoiding disclosure, wholly undermining what the decision sought to achieve.

T To scholars, reading these chapters may shed light on the old question of the extent to which law changes because society changes and to what extent law changes because of debates internal to the law. All agree that the relationship between legal change and social change is extremely complex, and the last generation of legal scholarship has more or less established that no single theory can explain all cases. These stories confirm the multiple ways in which law and other social and economic forces contribute to change. The chapter on Steele, for example, shows that the multi-faceted litigation and political strategy that, eventually, dismantled the thorough-going racial segregation of so many aspects of life, played a major role in changing the lives of black workers. The reductionist position that litigation by itself dismantled Jim Crow is proven false, as is the equally reductionist position that litigation did nothing that would not have been achieved by social protest or lobbying. The interesting story is the complex mix of deliberate choices and luck, the differences that litigation made, and the significant limits on what litigation achieved.

T We hope that reading the stories behind these cases will deepen both your understanding of and your affection for labor law. Labor law is special because unlike nearly all other legal doctrines it prioritizes group collective rights above individual rights. It gives us the opportunity examine law-making in a real-world high-volume administrative agency that struggles to maintain uniform national application of the law while dependent for ultimate enforcement on appellate courts that sometimes, despite Supreme Court insistence on deference, cannot resist effectuating their own notions of how the law should be interpreted and applied. While other courses about the law of the workplace sometimes seem an incoherent collection of independent doctrines, labor law offers a comprehensive and consistent vision of workplace organization and decision-making, whose success can be tested against a constantly changing variety of issues.

T The collective model that captured Congress' vision of workplace governance in 1935 also is the organizational principle for the authors of this book. This book was written by the Labor Law Group, a non-profit organization created from the 1946 observation of W. Willard Wirtz, then a law professor at Northwestern University, that labor law professors, working collectively without individual compensation, could best bring to the law school classroom labor law teaching materials that truly reflected the real lives of employees and employers. The Labor Law

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Group, composed of approximately fifty professors in the U.S., Canada, Europe and Israel, today have in print six books on labor and employment law. All royalties generated by Group publications are held in trust for educational purposes and none inure to the benefit of any individual. This book, like the statute that gave rise to its subject, is inspired by the belief that people working together can achieve objectives that those working alone cannot.