The NLRA's Legacy: Collective or Individual Dispute Resolution or Not?

26 A.B.A. J. LAB. & EMP. L. 249-266 (2011)

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ABA JOURNAL OF

Labor & Employment Law

The Journal of the ABA Section of Labor & Employment Law
Volume 26, Number 2, Winter 2011

ABA AMERICAN BAR ASSOCIATION Section of Labor and Employment Law

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I. Introduction

In this brief essay, I review the legacy of the National Labor Relations Act (NLRA)[1] on labor and employment dispute resolution, as well as on other areas of human disputing. The processes that grew around labor rights—including collective bargaining, negotiation, arbitration, mediation, med-arb, and other impasse-breaking techniques—are good developments. This variety of processes demonstrates that there are other forms of dispute resolution, rather than winner-take-all litigation; brute struggles of power within unassisted negotiation; or, worse, violent conflict. Labor processes, beginning with collective bargaining and grievance arbitration that became hybridized and more complex—such as grievance mediation and med-arb[2]—were important innovations that have spawned a new field in dispute resolution called dispute system design.[3] But, in what many regard as a distortion of using alternative processes, arbitration specified in mandatory, pre-dispute contracts of individual employees (and now all other kinds of contracts) and then interpreted to be the only form of dispute resolution available to the contracting parties is a controversial legacy that is hardly producing labor peace.[4] Indeed, the very goals of collective employment rights may be eroding as rulings from nonunion individual employ-

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1. 29 U.S.C. §§ 151–69 (2006).

2. Stephen B. Goldberg, *Grievance Mediation: A Successful Alternative to Labor Arbitration*, 5 NEGOTIATION J. 9 (1989).

3. *See* WILLIAM L. URY ET AL., GETTING DISPUTES RESOLVED: DESIGNING SYSTEMS TO CUT THE COSTS OF CONFLICTS 41–64 (1988).

4. Since the *Gilmer* decision, employment lawyers (often joined by consumer lawyers) have been lobbying heavily for new laws to prohibit the mandatory use of predispute arbitration in employment and other contracts. Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20 (1991); *see* Arbitration Fairness Act of 2009, S. 931, 111th Cong. (2009); Theodore J. St. Antoine, *ADR in Labor and Employment Law During the Past Quarter Century*, 25 A.B.A.J. LAB. & EMP. L. 411, 415–34 (2010) (reviewing the full extent of the controversies on this issue).

ment matters (and commercial contracts more generally) are blending with and eviscerating collective rights.[5] The legal processes that have developed around the separation of legal concepts and consciousness[6] of employment (seen as individual rights) and labor (seen as collective rights) are the major themes of this essay.[7]

In this examination of the NLRA's legacy, it is important to recognize how much processes used in labor-management relations have given us but also how different processes for different purposes might be essential for producing not only labor peace, but labor justice. As I have argued about processes in general, process pluralism,[8] process choice, and variety may be essential for delivering some form of justice in different contexts. Labor relations might benefit from learning that lesson: one size will not fit all. In fact, participants in labor-management disputes often by rote choose conventional labor dispute resolution processes—such as limited labor negotiation and bargaining strategies and then mandatory commitment to grievance arbitration—without paying sufficient attention to other forms of dispute resolution, such as mediation for both collective, union-management, and individual issues and disputes. My own views of what processes are best used for what kind of work disputes have changed over time, even as I completed this essay.[9]

In assessing the legacy of the NLRA and the labor dispute resolution processes that have grown up around it, we must consider some important issues in modern labor relations and dispute resolution:

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5. Though beyond the scope of this essay, the question of whether class actions can be conducted in arbitral fora parallels refusals to allow collective justice processes to proceed in a variety of fora. The Supreme Court recently considered whether an arbitration panel's decision potentially allowing a matter to proceed as a class action should be allowed to stand. The Court vacated the panel's award on the ground that the arbitrators had exceeded their powers in violation of section 10(a)(4) of the Federal Arbitration Act, 9 U.S.C. § 10(a)(4) (2006), where the parties had not explicitly agreed to allow class arbitration. Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp., 130 S. Ct. 1758 (2010).

6. A focus on the legal consciousness of labor regulators, organizers, and workers is an old story in labor law. *See* Karl E. Klare, *Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness, 1937–1941*, 62 MINN. L. REV. 265, 268 (1978).

7. I am most certainly not alone in making these claims. *See, e.g.*, Richard A. Bales, *The Discord Between Collective Bargaining and Individual Employment Rights: Theoretical Origins and a Proposed Solution*, 77 B.U. L. REV. 687 (1997); Marion Crain & Ken Matheny, *Labor's Identity Crisis*, 89 CAL. L. REV. 1767 (2001); Wilma B. Liebman, *Labor Law Inside Out*, 11 WORKINGUSA: J. LAB. & SOC'Y 9, 19–20 (2008); Sharon Rabin Margalioth, *The Significance of Worker Attitudes: Individualism as a Cause for Labor's Decline*, 16 HOFSTRA LAB. & EMP. L.J. 133 (1998).

8. Carrie Menkel-Meadow, *Peace and Justice: Notes on the Evolution and Purposes of Legal Processes*, 94 GEO. L.J. 553 (2006).

9. In this essay, I use the term *work*, which is a more capacious and fruitful term for developing collective consciousness than *labor* or *employment*.

1. When is justice best achieved through collective (whether union or other forms of class or group-based action) versus individual actions?
2. Which processes (bargaining and negotiation, mediation, arbitration, litigation, or other hybridized forms of dispute resolution) are best utilized for which kinds of labor disputes?[10]
3. What processes are more likely to produce access to relief and effective relations and remedies in the high-conflict arena of labor relations, including new forms of mediated labor-management partnerships?[11]
4. Having spawned different dispute resolution processes, can labor and management learn to use different forms of process to reconfigure their relations in a new era, both in process and in substance?[12]
5. What is the relation of collective rights, processes, and remedies to individual rights, processes, and remedies in the labor context?

In this essay, I want to urge the labor, employment, and fair work movements to consider more varied use of processes—including new hybrid forms of multiparty union-management partnerships, facilitated integrative interest-based bargaining, and consensus-building mechanisms—to expand our repertoires of devices available to resolve the more complex work disputes arising in today's difficult economy.

II. A Brief History of the NLRA and the Dispute Processes

The use of different forms of dispute resolution has long been associated with labor relations. Even before the enactment of the NLRA, the Railway Labor Act[13] provided for the use of mediation and arbitration in a unionized context. Until the decision in *Circuit City Stores Inc. v. Adams*,[14] where the Supreme Court applied the Federal Arbitration Act (FAA)[15] to ordinary nonunion employment contracts in most circumstances, it was generally thought that arbitration was a process most associated with collective bargaining and grievance processes.[16]

10. NEGOTIATIONS AND CHANGE: FROM THE WORKPLACE TO SOCIETY (Thomas A. Kochan & David B. Lipsky eds., 2003).

11. *See, e.g.*, THOMAS A. KOCHAN ET AL., HEALING TOGETHER: THE LABOR-MANAGEMENT PARTNERSHIP AT KAISER PERMANENTE (2009).

12. *See, e.g.*, CYNTHIA ESTLUND, REGOVERNING THE WORKPLACE: FROM SELF-REGULATION TO CO-REGULATION (2010).

13. 45 U.S.C. §§ 151–88 (2006).

14. 532 U.S. 105 (2001).

15. 9 U.S.C. § 1 *et seq.* (2006).

16. This turned on the Supreme Court's interpretation of section 1 of the FAA, 9 U.S.C. § 1 (2006), which defines the Act's coverage. *Circuit City*, 532 U.S. at 119. That

The passage of the NLRA in 1935 was intended to usher in an era of collective rights for workers and labor peace where there had been labor strife. Designed to grant workers the rights to collectively organize and negotiate for fair conditions of employment—including hours, wages, and other elements of work life—through a collective bargaining agreement with their employers, the Act was and still is controversial. Both advocates of labor rights and employers claimed the Act granted too much to "the other side."[17] As a condition of promoting labor peace, the judiciary recognized the value of internal grievance processes, usually arbitration,[18] to sort out internal labor disputes.[19] Eventually both the judiciary and legislatures recognized the benefit of mediation and arbitration to break bargaining impasses in the labor contract formation context.[20] These forms of dispute resolution satisfied an important procedural goal: they were alternatives to violence, conflict, courts, and

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section excludes coverage of "contracts of employment of seaman, railroad employees, or any other class of workers engaged in foreign or interstate commerce." 9 U.S.C. § 1. Many scholars believe that the FAA was clearly intended only to cover commercial arbitrations. Others believe that the exclusion was framed this way because this particular class of workers (workers in interstate commerce, such as seaman and railroad employees), already were required to use their own arbitration and dispute resolution processes under the Railway Labor Act. These two acts were passed at about the same time, 1925 to 1926.

17. One of the lasting legacies of the NLRA is the ongoing polarization of labor and management interests. Over the years, many labor and dispute resolution practitioners have tried to narrow this gap with interest-based bargaining and other integrative approaches to labor relations, but we seem to be unable to climb out of an adversarial and increasingly polarizing frame for worker-employer relationships. *See, e.g.*, NEGOTIATIONS AND CHANGE, *supra* note 10; RICHARD E. WALTON & ROBERT MCKERSIE, A BEHAVIORAL THEORY OF LABOR RELATIONS (1965). At the time of its passage, the NLRA was opposed by left pro-labor groups who thought the Act was designed to pacify and deceive workers, as well as by most business interests who perceived collective labor rights as infringing on their freedom to control the workplace through freedom of contract. *See* KENNETH G. DAU-SCHMIDT ET AL., LABOR LAW IN THE CONTEMPORARY WORKPLACE 50 (2009); Richard A. Epstein, *One Bridge Too Far: Why the Employee Free Choice Act Rightly Fell Short* (Univ. of Chi. Law & Econ., Olin Working Paper No. 528, 2010), *available at* http://ssrn.com/abstract=1660683. But it is also true that there have been some successful efforts at more collaborative labor-management relations, including coalitions and partnerships of many unions in several workplaces, within a single industry. *See, e.g.*, KOCHAN ET AL., *supra* note 11.

18. Textile Workers Union of Am. v. Lincoln Mills of Ala., 353 U.S. 448, 456 (1957).

19. *See* United Steelworkers of Am. v. Am. Mfg. Co., 363 U.S. 564 (1960); United Steelworkers of Am. v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960); United Steelworkers of Am. v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960) (collectively, *Steelworkers' Trilogy*). The Court stated: "The present federal policy is to promote industrial stabilization through the collective bargaining agreement. A major factor in achieving industrial peace is the inclusion of a provision for arbitration of grievances in the collective bargaining agreement." *Warrior & Gulf Navigation Co.*, 363 U.S. at 578 (internal citations omitted).

20. *See* Railway Labor Act, 45 U.S.C. §§ 151–88 (2006). Another example is the Federal Mediation and Conciliation Service created as a separate federal agency in 1947 at the time of the Labor Management Relations (Taft-Hartley) Act. *See* Labor Management Relations (Taft-Hartley) Act, Pub. L. No. 80-101, § 202, 61 Stat. 136, 153 (1947).

later even administrative agencies, and they were charged with the legal obligations to enforce labor and contract rights.[21]

The use of arbitration in labor relations is both much older than many people think and quite relevant to our current issues. In both England and the United States in the late nineteenth century, during the period of the worst and most violent labor actions and strikes, both sides of the labor conflict suggested compulsory arbitration. Alternatively, labor and management frequently requested compulsory investigation of disputes by an impartial body to attempt to settle disputes.[22] However, the parties still voluntarily had to accept proposed findings and outcomes, making such processes more like evaluative mediation or nonbinding arbitration than binding arbitration as we know it today.[23] Arbitration has been frequently used in railroad and airline industry disputes, and the mediation and conciliation services of the predecessors to the Federal Mediation and Conciliation Services (now an independent federal agency) actually date from 1918 as a branch of the Department of Labor.[24] What we now call "alternative dispute resolution" or, in more modern parlance, "appropriate dispute resolution," has a much longer history associated with labor relations in its collective employment form. The U.S. Conciliation Service performed mediation and arbitration services on jurisdictional work disputes, such as which building trades could perform certain classes of work. It mediated such disputes and created more permanent fora for arbitrating those disputes. The American Federation of Labor's (AFL) Joint Board on Jurisdictional Disputes was, what one commentator has called, an early form of "dispute system design."[25] Both world wars (the first before the NLRA was enacted and the second afterward) spurred the development of War Labor Boards, which used arbitral processes to resolve labor conflicts in times of labor shortages where there was

21. These labor- and employment-related agencies initially included the National Labor Relations Board and the Department of Labor (for wage and hour enforcement) and, later, the Equal Employment Opportunity Commission and other federal and state agencies charged with enforcing labor and employment laws.

22. JEROLD S. AUERBACH, JUSTICE WITHOUT LAW? 60–68 (1983); JEROME T. BARRETT & JOSEPH P. BARRETT, A HISTORY OF ALTERNATIVE DISPUTE RESOLUTION: THE STORY OF A POLITICAL, CULTURAL, AND SOCIAL MOVEMENT 86–91, 99 (2004).

23. *See* JOHN T. DUNLOP & ARNOLD M. ZACK, MEDIATION AND ARBITRATION OF EMPLOYMENT DISPUTES 3 (1997). This practice, again sought by labor groups as part of the Employee Free Choice Act, is called *interest* arbitration (in formation of collective bargaining agreements or settlement of union and collective labor disputes), as distinguished from *grievance* arbitration, or disputes arising under an existing collective bargaining agreement.

24. *See FMCS: Who We Are—Our History*, FED. MEDIATION & CONCILIATION SERVICE, http://www.fmcs.gov/internet/itemDetail.asp?categoryID=21&itemID=15810 (last visited Feb. 16, 2011).

25. BARRETT & BARRETT, *supra* note 22, at 106.

great need for minimal production disruptions.[26] Labor-management cooperation, labor codes, and temporary recognition of trade unions or bargaining agents developed as precursors to many of the processes now used to resolve labor disputes. But the interwar years were also a time of great labor conflict, due to both the Depression and the mass dislocation of unemployed workers.

The New Deal formulation of the National Industrial Recovery Act (declared unconstitutional)[27] and later the NLRA (declared constitutional)[28] finally established official legal rights to bargain collectively in 1935. Thus, federal law formally recognized the dispute resolution processes of negotiation and bargaining. The case law, developed first by the National Labor Relations Board and ultimately by the courts, never required more than good-faith bargaining and thus could not compel agreements to be reached or impose substantive terms on the parties.[29] However, certain subjects, such as the contracting out of work, were deemed subject to mandatory bargaining under NLRA section 8(d).[30] In a theme I will return to below, the NLRA firmly enshrined in the law the requirement that employers and representatives of the employees must "confer *in good faith* with respect to wages, hours and other terms and conditions of employment," even if "such obligation does not compel either party to agree to a proposal or require the making of a concession."[31]

This important statutory duty is one of the NLRA's lasting legacies of dispute resolution as various bodies, courts, and scholars now discuss what good-faith bargaining requires in a variety of other dispute resolution fora, including court-based mediation and arbitration.[32] In a somewhat ironic twist, good-faith bargaining under the NLRA has been interpreted to mean a very low de minimis standard of negotiation; in some contexts, merely showing up is enough. This is in sharp contrast to more modern theories of problem-solving negotiation, which suggest that good-faith bargaining actually means looking for integrative solutions to problems that involve both shared and conflicting interests.[33]

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26. DAVID I. LEVINE, REINVENTING THE WORKPLACE: HOW BUSINESS AND EMPLOYEES CAN BOTH WIN 148 (1995).

27. *See* Schecter Poultry Corp. v. United States, 295 U.S. 495 (1935).

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

29. *See* NLRB v. Katz, 369 U.S. 736, 747–48 (1962); NLRB v. Ins. Agents Int'l Union, 361 U.S. 477, 483–90 (1960); *see also* Hardesty Co., 336 N.L.R.B. 258, 259–61 (2001), *enforced*, 308 F.3d 859 (8th Cir. 2002) (stating standards of what constitutes "bad faith" or "surface" bargaining).

30. *See, e.g.*, Fibreboard Paper Prods. Corp. v. NLRB, 379 U.S. 203, 213 (1964).

31. 29 U.S.C. § 158(d) (2006) (emphasis added).

32. *See, e.g.*, John Lande, *Using Dispute System Design Methods to Promote Good-Faith Participation in Court-Connected Mediation Programs*, 50 UCLA L. REV. 69 (2002).

33. *See* ROGER FISHER ET AL., GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN (2d ed. 1991); Carrie Menkel-Meadow, *Toward Another View of Legal Negotiation: The Structure of Problem Solving*, 31 UCLA L. REV. 754, 826–27 (1984).

In both the Railway Labor Act and most public employment settings, federal and state governments may actually require mediation and arbitration and compel certain forms of bargaining and agreements. These government requirements establish stronger precedents for the use of different forms of dispute resolution processes, with a little bit more substantive bite. Thus, public employment statutes often model a panoply or menu of dispute resolution processes, including mediation, fact-finding, and both interest and grievance arbitration that must be used to resolve labor disputes. These dispute resolution processes are then balanced with a prohibition or some limitations on the right of public employees to strike.[34] This recognition of a wider possibility of processes to choose from—including both consensual (negotiation and mediation) and command (arbitration) processes—is closer to what is available in the larger dispute resolution world of civil disputes.

In *Lincoln Mills*, the Supreme Court authorized the development of federal substantive labor law and recognized an implicit understanding that a contractual agreement to arbitrate "is the quid pro quo for an agreement not to strike."[35] Following the deferential standard of review for contract grievance arbitration in the *Steelworkers' Trilogy*, arbitration became the norm as the legal process for the resolution of labor disputes.[36] Arbitration was more fully recognized in the Labor Management Relations (Taft-Hartley) Act of 1947.[37]

Initially, commercial arbitration developed on a separate track, which was fully recognized by Justice Douglas in one of the *Steelworkers* cases:

> In the commercial case, arbitration is the substitute for litigation. Here arbitration is the substitute for industrial strife. Since arbitration of labor disputes has quite different functions from arbitration under an ordinary commercial agreement, the hostility evinced by courts [in *Wilko v. Swan*[38]] toward arbitration of commercial agreements has no place here. For arbitration of labor disputes under collective bargaining agreements is part and parcel of the collective bargaining process itself.[39]

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34. Tim Schooley, Comment, *The Reinstatement Rights of Striking Public Employees*, 9 INDUS. REL. L.J. 283, 283–84 (1987).

35. Textile Workers Union of Am. v. Lincoln Mills of Ala., 353 U.S. 448, 455 (1957).

36. United Steelworkers of Am. v. Am. Mfg. Co., 363 U.S. 564 (1960); United Steelworkers of Am. v. Warrior & Gulf Navigating Co., 363 U.S. 574 (1960); United Steelworkers of Am. v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960).

37. Pub. L. No. 80-101, 61 Stat. 136 (1947) (codified as amended in scattered sections of 29 U.S.C.).

38. 346 U.S. 427 (1953) (refusing to allow contractual arbitration in a case involving statutory securities claims).

39. *Warrior & Gulf Navigating Co.*, 363 U.S. at 578.

As judicial hostility to commercial arbitration was dislodged in a series of cases decided by the Supreme Court,[40] the dividing line between commercial, employment, and now labor dispute resolution began to disappear.[41]

Though the NLRA was intended primarily to apply to collective bargaining and union issues in formal recognition of the substantive right collectively to bargain,[42] it has had a much broader legacy in application of its *processes* to what we now call *employment* issues—issues that deal with the working conditions and rights of employees—rather than *labor* issues—issues protected by collective union rights.

III. Employment Versus Labor Rights and Remedies

This rhetorical device of separating *labor* from *employment* issues is, in my view, key to understanding the current separation of collective and individual rights consciousness in employees and in the laws and processes that claim to protect those rights. Whether modern American workers will ever regain a sense of collective interests in work issues is a major question in assessing the NLRA's legacy. To what extent are processes to resolve disputes of labor and employment issues experienced as collective or individual in structure and delivery? And of key importance to this issue, *who* has the right or authority to determine which processes will be used (e.g., employers, in mandatory pre-dispute arbitration clauses in contracts; unions, in collective bargaining agreements; or individuals, in legal claims asserted under contracts and statutes)? What are the implications of whether rights and remedies are pursued at individual or collective levels?

While we continue to argue about the substantive legacy of the NLRA and whether unionization is alive or dead, the dispute resolution processes that have grown up around the NLRA may continue to affect workers' rights and conditions of employment beyond the protection of particular substantive and collective rights afforded by the NLRA itself. During the civil rights movement in the 1960s and later, more and more statutory protections were provided to some workers on the basis of race, sex, national origin, religion, age, and disability. Congress faced the choice of which enforcement mechanisms to select for these new laws. The EEOC was not granted the full authority and

40. *See, e.g.*, Rodriguez de Quijas v. Shearson/Am. Express, Inc., 490 U.S. 477 (1989); Moses H. Cone Mem. Hosp. v. Mercury Constr. Corp., 460 U.S. 1 (1983). Why the Supreme Court reversed its hostility to commercial arbitration is a subject of much academic and practice commentary. My own view is a cynical one—of the desire of the Court to reduce its docket and to remove certain classes of cases from its consideration.

41. Stephen L. Hayford, *Unification of the Law of Labor Arbitration and Commercial Arbitration: An Idea Whose Time Has Come*, 52 BAYLOR L. REV. 781, 925–27 (2000).

42. 29 U.S.C. §§ 151–69 (2006).

power, as an administrative agency, to issue self-executing but appealable orders. Instead, individual litigants (and larger groups of litigants in class actions) sued directly for redress, often gaining reinstatement, back pay, attorneys' fees, and eventually compensatory damages.[43]

Litigation of employment civil rights was the norm until another form of arbitration—contractual or pre-dispute mandatory assignment to employment arbitration—was imposed on individual employees. Initially, only those not represented by unions were in such relationships, but now most workers may theoretically be subject to some type of mandatory dispute resolution.[44] Mandatory pre-dispute contractual employment arbitration (also known as "cram down" arbitration) grew up alongside commercial arbitration under the FAA. The FAA has, over the last few decades, been applied to both employment and consumer contracts. Courts have upheld employment arbitration agreements in the face of diverse legal objections including whether they violate contract law (unconscionability), constitutional law (denial of rights to trial by jury), and procedural principles (denial of various due process rights).[45] American judicial holdings directly contrast with legal developments in other parts of the world, where compulsory pre-dispute contractual arbitration cannot be applied to employment or consumer issues.[46]

As I recall, writing my student law review note in 1973 about the inevitable interplay between the NLRA and Title VII,[47] my concern was with the potential substantive clashes between statutory schemes that protected collective versus more individual rights. For example, collective rights protect seniority. But these rights may conflict with individual rights, such as the antidiscrimination protections of Title VII for more recently hired minority and female workers, who are more likely to be laid off under seniority agreements. Of course, as I and others had written at the time and since,[48] this was also interpreted as a conflict

43. Civil Rights Act of 1991, 42 U.S.C. § 1981a(a) (2006).

44. 14 Penn Plaza LLC v. Pyett, 129 S. Ct. 1456, 1474 (2009) (holding that provisions in collective bargaining agreements requiring arbitration of individual statutory causes of action are enforceable).

45. *See* Jean R. Sternlight, *Rethinking the Constitutionality of the Supreme Court's Preference for Binding Arbitration: A Fresh Assessment of Jury Trial, Separation of Powers, and Due Process Concerns*, 72 TUL. L. REV. 1, 10–14 (1997).

46. *See* Jean R. Sternlight, *Is the U.S. Out on a Limb? Comparing the U.S. Approach to Mandatory Consumer and Employment Arbitration to That of the Rest of the World*, 56 U. MIAMI L. REV. 831 (2002).

47. Carrie Menkel-Meadow, Comment, *The Inevitable Interplay of Title VII and the National Labor Relations Act: A New Role for the NLRB*, 123 U. PA. L. REV. 158 (1974). My note was inspired by defense contractors seeking advice about how they could reconcile the seniority requirements of their collective bargaining agreements with their most recent hires of minorities and females that had been made to conform to Title VII requirements. However, as the Vietnam War wore down, the contractors' layoffs were likely to have a disparate impact on the most recently hired minority and female workers.

48. *See* Crain & Matheny, *supra* note 7.

between one set of collectivities (mostly white male unions) and other collectivities (minority and women workers). In the middle of my writing that note, the Supreme Court decided *Alexander v. Gardner-Denver Co.*,[49] which instead confronted the inevitable interplay of the different processes used to assert rights under different employment protective schemes, including litigation, labor arbitration of contract grievances, and arbitration of statutory employment protections. As I argued then (and was called "naïve" by my nationally renowned labor law professor and friend Howard Lesnick), I urged a recognition that the NLRA could be interpreted to treat some of these statutory claims (like discrimination) as another form of unfair labor practice to enforce the federal fair labor policies in one setting, in order to promote solidarity among all workers and encourage cooperation, not competition, among different classes of workers. It was heartening to see some labor law scholars urge similar developments, both in legal interpretations and in organizing strategies, though we all remain largely unsuccessful.[50]

So as we say in the law, the issues were joined. Which processes would be used to vindicate which rights under labor ("the law of the shop") and employment laws ("the law of the land")?[51] And more importantly, what impact would different processes have on the adjudication of collective rights or individual rights? For many years, both case law and scholarly critique focused on the question of whether unions could waive, through collective bargaining agreements, both substantive and

49. 415 U.S. 36, 57 (1974). The issue in *Alexander* was whether an employee/union member who lost his discharge case in a grievance arbitration could still file a separate discrimination claim in another forum. The Court held that labor arbitration that dealt with "the law of the shop" (the collective bargaining agreement) could not preclude another proceeding that was designed to deal with "the law of the land" (the statutory protections of Title VII). *Id.*

50. *See* sources cited *supra* note 7. In addition, other scholars like Cynthia Estlund and Susan Sturm have urged that discrimination issues and issues of fairness and equity in employment generally should be embraced as collective labor issues, uniting rather than dividing workers in a more democratic workplace. If all work issues were part of the collective consciousness of workers and part of the collective bargaining regime, then the issues of where employment disputes should be resolved (whether in internal grievance arbitrations or in employment arbitrations or court) might have been easier to resolve. *See* CYNTHIA ESTLUND, WORKING TOGETHER: HOW WORKPLACE BONDS STRENGTHEN A DIVERSE DEMOCRACY 145–56 (2003); Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 COLUM. L. REV. 458, 530–35 (2001).

51. In *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 23 (1991) (a much criticized decision), it looked as if mandatory assignment of arbitration processes via employment contracts would force many statutory employment claims to employer-controlled dispute resolution processes. In recent years the worries of many labor and employment lawyers that contract-based mandatory assignment to arbitration would be applied to union workers also seemed to come true. *See* 14 Penn Plaza LLC v. Pyett, 129 S. Ct. 1456, 1474 (2009). For one view that this is not a bad development, see Sarah Rudolph Cole, *Let the Grand Experiment Begin:* Pyett *Authorizes Arbitration of Unionized Employees' Statutory Discrimination Claims*, 14 LEWIS & CLARK L. REV. 861 (2010).

procedural statutory rights[52] or whether unionized employees would continue to have the ability to use union grievance arbitration, some litigation (in duty of fair representation cases), and individual statutory processes to vindicate statutory claims. For some years, litigants argued that important statutory claims representing public policy had to be vindicated in courts, not arbitral settings. However, this claim was lost in the commercial setting as the Supreme Court allowed predispute contractual arbitration to resolve antitrust, securities, Racketeer Influenced and Corrupt Organizations (RICO), and other statutory claims.[53] Consequently, it was also lost in the employment setting as the Supreme Court upheld mandatory assignment to contractual arbitration in *Gilmer v. Interstate/Johnson Lane Corp.*[54]

The Court in *Gilmer* held that statutory employment issues are arbitrable.[55] From there, the Supreme Court moved through the issues of union waivers of statutory rights (*Wright*)[56] and the inclusion of statutory rights within collective bargaining agreements with arbitration clauses applying to disputes arising out of the collective bargaining agreement (*Pyett*).[57] These developments make the use of labor grievance arbitration processes look close to fully merged with contractual arbitration. Thus, the employer may use the collective power of the union to waive or control the processes used by employees to vindicate both labor and other statutory rights. Efforts to characterize union waivers of both statutory rights—and the more restricted waiver of class actions in employment arbitration—as unfair labor practices under the NLRA have so far failed, even if a few courts have held that waivers of class actions in employment settings may constitute unconscionable contracts.[58] The legal question of whether class actions in arbitration can be waived by contract continues to be litigated in the Supreme Court.[59]

52. *See, e.g.*, Wright v. Universal Mar. Serv. Corp., 525 U.S. 70 (1998).

53. Rodriguez de Quijas v. Shearson/Am. Express, Inc., 490 U.S. 477 (1989); Shearson/Am. Express, Inc. v. McMahon, 482 U.S. 220 (1987); Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614 (1985).

54. 500 U.S. at 23.

55. *Id.*

56. *Wright*, 525 U.S. at 72.

57. *See* 14 Penn Plaza LLC v. Pyett, 129 S. Ct. 1456, 1461 (2009).

58. *See, e.g.*, Gentry v. Super. Ct., 165 P.3d 556, 575 (Cal. 2007); OFFICE OF THE GENERAL COUNSEL, NLRB, MEM. GC 10-06, GUIDELINE MEMORANDUM CONCERNING UNFAIR LABOR PRACTICE CHARGES INVOLVING EMPLOYEE WAIVERS IN THE CONTEXT OF EMPLOYERS' MANDATORY ARBITRATION POLICIES (June 16, 2010), *available at* http://www.nlrb.gov/ shared_files/ GC%20Memo/2010/GC%2010-06%20Guideline%20Memorandum.pdf.

59. *See, e.g.*, AT & T Mobility LLC v. Concepcion, 130 S. Ct. 3322 (2010) (granting certiorari on whether the FAA preempts voiding a class action waiver as unconscionable when clauses in arbitration contracts are treated differently from other contract terms).

IV. Which Processes Are Appropriate in Which Work Contexts?

Lawyers representing individual employees, dissenters in *Pyett*,[60] and many legal commentators have expressed concerns that permitting unions to waive individual rights to litigate statutory claims is not fair because collective interests may conflict with individual interests. However, the majority in *Pyett* and a few commentators think that arbitration, just because it originated in labor processes, may be an appropriate forum for resolution of both labor and employment issues.[61]

Professor Sarah Cole, for example, believes that arbitrators will be especially well suited to both factual and legal determinations in statutory employment cases,[62] although, following the decision in *Gilmer*, many such labor arbitrators and labor specialists thought just the opposite.[63] Professor Cole also suggests that unions are now more likely than in the past to use their experience in collective bargaining grievance arbitration to the advantage of individuals and groups with statutory claims in employment arbitration. About a decade ago, Professor Richard Bales also suggested that a "comprehensive-arbitral approach," which combined arbitration of private (collective bargaining agreement and contractual disputes) with public issues (statutory claims) in labor arbitration would be more likely to unify and fortify organized labor and preserve the employment relationship.[64] Professor Bales, like more recent commentators, argued that the labor arbitral forum would prove cheaper and faster and could be fairer than court settings for statutory claims, especially for low-wage workers who could not easily afford legal representation and litigation costs, thus providing greater access to justice in the arbitral settings.[65]

Extensive empirical research has suggested that employees actually fare quite well in arbitral settings in some employment cases as

60. 129 S. Ct. at 1475 (Stevens, J., dissenting); *id.* at 1478 (Souter, J., dissenting).

61. Most recently, distinguished labor law professor Theodore St. Antoine has opined just this on the pages of this journal. *See* St. Antoine, *supra* note 4, at 421.

62. Cole, *supra* note 51, at 877–78.

63. *See, e.g.*, Reginald Alleyne, *Statutory Discrimination Claims: Rights "Waived" and Lost in the Arbitration Forum*, 13 HOFSTRA LAB. L.J. 381 (1996); Harry T. Edwards, *Alternative Dispute Resolution: Panacea or Anathema*, 99 HARV. L. REV. 668 (1986); Robert A. Gorman, *The* Gilmer *Decision and the Private Arbitration of Public-Law Disputes*, 1995 U. ILL. L. REV. 635; Katherine Van Wezel Stone, *Mandatory Arbitration of Individual Employment Rights: The Yellow Dog Contract of the 1990s*, 73 DENV. U.L. REV. 1017 (1996).

64. Bales, *supra* note 7, at 751–60; *see also* Becky L. Jacobs, *Often Wrong, Never in Doubt: How Anti-arbitration Expectancy Bias May Limit Access to Justice*, 62 ME. L. REV. 531 (2010).

65. *See* Bales, *supra* note 7, at 754–59.

compared to litigation.[66] That is, employees have higher win rates in employment arbitration settings, even if actual monetary amounts of damages or compensation may not be as great as in some forms of litigation, such as jury trials. Some of these commentators also suggested that arbitrating employment claims within the labor grievance umbrella would not only benefit workers with cheaper and more experienced arbitral representatives[67] but give union representatives another important role within the workplace.

Many other scholars and practitioners disagree with this assessment of arbitral justice.

Since we do not yet have consistent empirical results on the comparative efficiency, efficacy, and fairness of arbitral and litigation fora, scholars continue to argue this important issue.[68] Can unions be trusted to fairly represent, in a collective environment, the so-called individual interests of employees with statutory claims against their employers? Can labor arbitrators fairly and correctly enforce public statutory provisions as well as collective agreements?

In many respects, I have often thought this to be quite an ironic issue. Many of the so-called individual claims of statutory discrimination are conceptualized by many to be group rights—that is, one's individual discrimination claim is actually based on one's member-

66. For summaries of this research, see, for example, Lisa B. Bingham & Shimon Sarraf, *Employment Arbitration Before and After the Due Process Protocol for Mediation and Arbitration of Statutory Disputes Arising Out of Employment: Preliminary Evidence That Self-Regulation Makes a Difference, in* ALTERNATIVE DISPUTE RESOLUTION IN THE EMPLOYMENT ARENA: PROCEEDINGS OF NEW YORK UNIVERSITY 53RD ANNUAL CONFERENCE ON LABOR 303 (Samuel Estreicher & David Sherwyn eds., 2004); Samuel Estreicher, *Saturns for Rickshaws: The Stakes in the Debate over Predispute Employment Arbitration Agreements*, 16 OHIO ST. J. ON DISP. RESOL. 559 (2001); Elizabeth Hill, *AAA Employment Arbitration: A Fair Forum at Low Cost*, DISP. RESOL. J., May–July 2003, at 8; Lewis L. Maltby, *Employment Arbitration and Workplace Justice*, 38 U.S.F.L. REV. 105 (2003); David Sherwyn et al., *Assessing the Case for Employment Arbitration: A New Path for Empirical Research*, 57 STAN. L. REV. 1557 (2005); St. Antoine, *supra* note 4; *see also* Carrie Menkel-Meadow, *Do the "Haves" Come Out Ahead in Alternative Judicial Systems?: Repeat Players in ADR*, 15 OHIO ST. J. ON DISP. RESOL. 19 (1999).

67. Much of the newer empirical work on success in arbitral fora can often be explained by the quality or even existence of representatives. *See, e.g.*, Bingham & Sarraf, *supra* note 66; Lisa B. Bingham, *Employment Arbitration: The Repeat Player Effect*, 1 EMP. RTS. & EMP. POL'Y J. 189 (1997).

68. *See, e.g.*, Carrie Menkel-Meadow, *Dispute Resolution, in* OXFORD HANDBOOK OF EMPIRICAL LEGAL STUDIES 596 (Peter Cane & Herbert M. Kritzer eds., 2010); Alexander J.S. Colvin, *Empirical Research on Employment Arbitration: Clarity Amidst the Sound and Fury?* 11 EMP. RTS. & EMP. POL'Y J. 405 (2007); Theodore Eisenberg & Elizabeth Hill, *Arbitration and Litigation of Employment Claims: An Empirical Comparison*, DISP. RESOL. J., Nov. 2003–Jan. 2004, at 44; Tina Nabatchi & Anya Stanger, *Using ADR to Resolve Federal Sector EEO Complaints: An Evaluation of Management Directive 110* (2010), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1615038 (paper prepared for 23d International Association for Conflict Management Conference); *see also* Theodore J. St. Antoine, *Mandatory Arbitration: Why It's Better Than It Looks*, 41 U. MICH. J.L. REFORM 783 (2008).

ship in a group. In the past, with the assumptions of discrimination against many of these groups by predominantly white male unions, it was thought by many that conflicts existed among groups and that one group was better represented by traditional union interests and grievance arbitration than the others. Antidiscrimination lawyers have long argued that courts and litigation are better for plaintiff-claimants, though the empirical research on this question may actually contradict this claim.[69] Indeed, at least in the earlier days of employment discrimination litigation, the most successful claims were group-based class actions, and some of those against unions were successful.[70] Tensions *between* groups in the workplace are probably a more accurate description of the inevitable interplay of the NLRA and at least the earlier years of Title VII enforcement.

If more recent commentators are right about the need to organize and fairly represent minority and women workers,[71] then the issue of which processes are best can be separated from who will control that process or offer better, faster, cheaper, or more effective representational services (union representatives or employment lawyers). And apart from post-dispute litigation strategies, the growth of internal dispute resolution in the form of ombuds, internal equal opportunity officers, other human resource personnel, and complaint or grievance functions within large organizations also has caused splits among scholars and practitioners about whether there is more internalized justice in employment settings. The question still exists whether employees fare better or worse in internal organizational settings compared to externally litigated processes,[72] or whether there is more privatized and individu-

69. Theodore Eisenberg & Elizabeth Hill, *Employment Arbitration and Litigation, in* ADR & THE LAW 8, 22 (20th ed. 2006); Kevin M. Clermont et al., *How Employment Discrimination Plaintiffs Fare in the Federal Courts of Appeals*, 7 EMP. RTS. & EMP. POL'Y J. 547 (2003).

70. In my early years as a lawyer, I brought several duty of fair representation claims against powerful unions on behalf of African-American and female employees. I think I lost all of them. For examples of successful discrimination cases against major unions, see, for example, Commonwealth of Pa. v. Local Union 542, Int'l Union of Operating Eng'rs, 648 F.2d 922 (3d Cir. 1981) (per curiam); United States v. Int'l Union of Operating Eng'rs, Local Union No. 520, 476 F.2d 1201 (7th Cir. 1973); *see also* A. Leon Higginbotham Jr., *The Commonwealth of Pennsylvania and* Raymond Williams, et al. vs. Local Union 542, International Union of Operating Engineers, 60 J. NEGRO HIST. 360 (1975) (opinion on recusal motion against African-American federal judge in proceeding against union for race discrimination).

71. And some argue that worker solidarity for both union purposes and nondiscrimination purposes is best served when workers see their common goals. *See* ESTLUND, *supra* note 50; *see also* Sturm, *supra* note 50.

72. *See* Susan Sturm & Howard Gadlin, *Conflict Resolution and Systemic Change*, 2007 J. DISP. RESOL. 1, 4 (suggesting that systematizing employee grievances in certain ombuds settings can lead to systemic change in the workplace, perhaps more effectively than in formal, external, and public litigation).

alized (and, ultimately, pacified) justice in employment settings.[73] It is sometimes not clear to me whether the arguments are about which processes will provide better or more efficient justice for the disputants or which dispute resolution professionals (union representatives, employment lawyers, internal organizational human resource personnel, or dispute resolution personnel) will benefit from the process chosen.

While the debates continue about whether mandatory pre-dispute arbitration in the employment setting harms individual interests in employment equity, outside of employment settings, the controversies about mandatory arbitration in consumer and other settings have presented another relevant challenge. Without fully reviewing the now complex legal landscape of class action litigation in consumer and other settings, it is instructive to note here that in a series of recent cases, the Supreme Court has been ruling in ways that signal disapproval of the use of the class action form in contractual arbitration.[74] Thus, collective action in dispute resolution may be as endangered in the nonunion, nonemployment context as in employment and labor relations generally.

On the other hand, the need for collective action, especially in these troubled economic times, could not be greater. In times of scarce resources, negotiations and other forms of dispute resolution are much more likely to become zero-sum distributive processes rather than occasions for exploring, sharing, and integrating processes and outcomes.[75] As unions struggle with each other and with management and as individuals compete for ever-scarcer jobs, it is even harder to encourage newer forms of integrative and collaborative bargaining and dispute resolution, though the necessity would seem even greater.

V. The Way Forward? From Old Legacy to New Learning

What is the legacy of the NLRA for dispute resolution and labor and employment rights? Is it better to separate purely economic conditions of work from other, more social justice issues in the workplace? Should there be one form of dispute resolution for conventional labor

73. Lauren B. Edelman et al., *Internal Dispute Resolution: The Transformation of Civil Rights in the Workplace*, 27 LAW & SOC'Y REV. 497, 521, 524 (1993) (arguing that requiring individual complaint processes to be kept inside the organization prevents publicity of wrongdoing, litigation, and systemic or class action types of relief).

74. Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp., 130 S. Ct. 1758, 1775–77 (2010) (holding that class actions not permissible in arbitration unless explicitly agreed to by parties in pre-dispute contractual allocation to arbitration). See discussion *supra* notes 58–59.

75. *See* Mary Parker Follett, *Constructive Conflict, in* MARY PARKER FOLLETT—PROPHET OF MANAGEMENT: A CELEBRATION OF WRITINGS FROM THE 1920S, at 67, 67–86 (Pauline Graham ed., 1995).

collective interests and other forms for statutory claims? Or would it make sense for collective strength and individual rights to link all employment and labor interests within similar forms and methods of dispute resolution? What is the relation of substantive rights to procedures and processes for their enforcement? How are workers best served for fairness, equity, and justice in the workplace? What forms of process are available? How might collaborations form among workers, and among workers and management, to develop fairness and benefits for all?

Many different issues are often conflated in consideration of these questions, and all too often the sides are polarized. Plaintiffs' lawyers in statutory employment cases seek elimination of compulsory predispute arbitration processes, even though there is some evidence that some arbitration might, in fact, be cheaper, faster, and actually produce higher win rates (if lower damage awards) than court hearings. Advocates for employers resist with all their might[76] the notion that the Employee Free Choice Act might provide for compulsory arbitration to create first contracts where employer delay can easily defeat a newly recognized union.[77] These employer efforts to fight compulsory arbitration, after a clearly demarcated statutory negotiation period, assume that such arbitration would necessarily favor labor.

In this odd matrix, different forms of arbitration are seen as bad for workers in the individual statutory rights context and good for workers in the organized union context. Mediation, though long a staple of labor relations and negotiations, seems lost in the middle of these loud claims for and against arbitration or litigation, despite its great success in some very difficult labor settings.[78] Unions are seen as hostile to individual rights, which, in much of the rhetoric, actually has to do with other group-based rights. Strong-arm or overtly adversarial negotiation or litigation processes are seen as the only way to win both labor rights and statutory employment claims. As a process pluralist,[79] I have long been skeptical of the notion that any one process is the only way to resolve a dispute. In current times, it appears that overly brittle conceptions of winners and losers in conventional labor negotiations, litigation, arbitration, and even political battles are not the way to move forward. Polarization on substantive issues has led to manipulation of all processes.

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76. *See* Epstein, *supra* note 17.

77. Catherine L. Fisk & Adam R. Pulver, *First Contract Arbitration and the Employee Free Choice Act*, 70 LA. L. REV. 47, 48 (2009).

78. *See, e.g.*, MOTI MORDEHAI MIRONI, MEDIATION AND STRATEGIC CHANGE: LESSONS FROM MEDIATING A NATIONWIDE DOCTORS' STRIKE 4–5 (2008).

79. CARRIE J. MENKEL-MEADOW ET AL., DISPUTE RESOLUTION: BEYOND THE ADVERSARIAL MODEL (2d ed. 2011).

As I see the legacy of the NLRA in the many different forms of dispute resolution it has spawned in labor relations, it seems now that labor relations must learn from the expansions, variations, and developments in those processes outside of the labor sphere. If we are to move forward in labor relations, we need to engage in problem-solving processes to lead to other conceptions of what to do and how to get to new outcomes in labor-management relations. There are some successes in new conceptions of labor-management partnerships and multiple-union coalitions, which may require suspension of some of the old adversarial paradigm.[80]

As I first suggested in 1974,[81] I still hope that the collective spirit of the NLRA might expand to embrace other workplace issues beyond labor-management relations. As we say in negotiation theory, the more issues available for trade, the better the chance of making a deal. To the extent that we can expand the issues of worker interests and rights and needs—such as wages, hours, retirement, retraining, education, working conditions, nondiscrimination, fair treatment, health care, worker dignity, family-work balance, and even social relationships[82]—and find processes for bargaining about all of these things together, the more likely we can improve the work lives of all workers. Thus, I prefer to talk about *work* or *workers* as more unifying and more inclusive terms than *labor* or *employment* or *laborer* or *employee*. Work is something we all do, and it can form the basis of a renewed collective consciousness in both bargaining for and resolving disputes about work.

Unfortunately, there appears to be one distressing and perhaps counterproductive cultural understanding in many of these current issues about work, rights, and legal processes. American culture is individualistic. The NLRA of 1935 and the first few years of its enforcement were probably the high point of collective action on the part of workers in the United States. Unlike in Europe, with higher rates of trade union membership and with greater statutory protection of work, the majority of American workers operate without formal statutory protections, without enforceable work rules, even without contract or formal agreement and are subject to totally individualized treatment in the workplace.

Many applaud our culture of individual rights and freedoms, including our right to sue on behalf of those individual rights. But often

80. See, for example, the Kaiser-Permanente partnership described in KOCHAN ET AL., *supra* note 11.

81. Many others have made similar suggestions. *See, e.g.*, ESTLUND, *supra* note 50; STURM, *supra* note 50; Crain & Matheny, *supra* note 7.

82. *See generally* ARLIE RUSSELL HOCHSCHILD, THE TIME BIND: WHEN WORK BECOMES HOME AND HOME BECOMES WORK (1997).

the rhetoric does not match the reality. Workers may work for large and powerful companies that can dictate terms and conditions of employment, and many individuals may not have the resources to challenge even statutorily protected rights of nondiscrimination, wage rates, and worker safety and health. Many other countries have successfully used different methods of labor and employment regulation and dispute resolution.[83] Ranging from work councils, to worker ownership or representation on management committees, to state-organized mediation and arbitration agencies, to separate specialized employment tribunals to adjudicate all work and labor-related disputes, to the use of mandated mediation or arbitration processes, there are many other ways to conduct labor-management relations and resolve labor-management disputes. The United States has been pushing hard on its culture of individualism and entrepreneurial freedom in the workplace, yet we can no longer claim a bigger, more profitable, and more successful economy on these grounds.

It is time for us to look for more and different ways to organize our collective work lives. As the NLRA has encouraged the development of different forms of dispute resolution, in its birthing of collective bargaining and some forms of arbitration, we must now use a greater variety of different forms of dispute resolution to brainstorm and construct new forms of work relations and decision making in American business and government. Process matters, and newer forms of collective processes in the workplace are more likely to generate more creative and newer forms of workplace options and worker justice.

83. Matthew W. Finkin, *Privatization of Wrongful Dismissal Protection in Comparative Perspective*, 37 INDUS. L.J. 149 (2008).