

SYMPOSIUM: LOOKING BACK ON LABOR LAW AND THE STATE IN THE EARLY TO MID- TWENTIETH CENTURY

Introduction

Taking Stock: New Views of American Labor Law Between the World Wars

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This symposium originated in a session at the annual meeting of the American Society for Legal History held in Seattle in October 1998. Entitled "Labor, Law, and the State in the Interwar Period," the panel provided four different views of a decisive period in the development of labor law in the United States. In the 1980s the panel's chair, Katherine Van Wezel Stone, and commentator, Christopher L. Tomlins, published works that helped spark a modern revival in the historical study of U.S. labor law.¹ The authors of the four

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1. See CHRISTOPHER L. TOMLINS, *THE STATE AND THE UNIONS: LABOR RELATIONS, LAW, AND THE ORGANIZED LABOR MOVEMENT IN AMERICA, 1880-1960* (1985); Katherine Van Wezel Stone, *The Post-War Paradigm in American Labor Law*, 90 *YALE L. J.* 1509 (1981).

papers presented at the session were more recent entrants into the field and had significantly different perspectives on their subject. As members of the audience quickly realized, the panel as a whole provided an excellent opportunity for taking stock, not only of labor law in the 1920s and 1930s, but also of how historians' understanding of the role of the state in American labor relations has changed in recent years.

The first historical accounts of U.S. labor law were written by figures who were thoroughly engaged in shaping the labor policy of their day. Writing during the heyday of the labor injunction, they tried to demonstrate that courts lacked the capacity to make a fair and effective law of the workplace.² After the passage of the National Labor Relations Act (NLRA), most accounts argued that the statute's supplanting of judge-made law with a system of state-sponsored collective bargaining was a functional response to modern industrial conditions. While by no means blind to the shortcomings of the system, these authors applauded the regime inaugurated by the NLRA for protecting workers' rights, materially improving their standard of living, and recognizing their collective role in the American polity.³

By 1980, however, a major interpretive change was underway, as radical legal scholars and historians commenced an attack on the New Deal collective bargaining regime from the left. Stone, Tomlins, James B. Atleson,⁴ Karl Klare,⁵ and Staughton Lynd⁶ argued that the liberal principles embraced by the regime's architects, applied in an industrial context, systematically disadvantaged workers. As established by the NLRA and later statutes, Klare charged, collective bargaining was "a system for inducing workers to participate in their own

2. See, e.g., FELIX FRANKFURTER & NATHAN GREENE, *THE LABOR INJUNCTION* 1-46 (1930); Walter Nelles, *A Strike and Its Legal Consequences—An Examination of the Receivership Precedent for the Labor Injunction*, 40 *YALE L.J.* 507 (1931); Edwin E. Witte, *Early American Labor Cases*, 35 *YALE L. J.* 825 (1926). On Witte, Frankfurter, and Nelles, see Daniel R. Ernst, *Common Laborers? Industrial Pluralists, Legal Realists, and the Law of Industrial Disputes, 1915-1943*, 11 *LAW & HIST. REV.* 59 (1993).

3. See, e.g., ARCHIBALD COX, *CASES ON LABOR LAW* 1-126 (1948); CHARLES O. GREGORY, *LABOR AND THE LAW* (1946); HARRY H. WELLINGTON, *LABOR AND THE LEGAL PROCESS* 7-46 (1968). Even Richard B. Morris, the first professionally trained historian to study U.S. labor law, wrote *GOVERNMENT AND LABOR IN EARLY AMERICA* (1946) in part to help establish a pedigree for the New Deal's labor policy. See Christopher Tomlins, *Why Wait for Industrialism? Work, Legal Culture, and the Example of Early America—An Historiographic Argument*, 40 *LABOR HIST.* 5, 19 (1999).

4. See JAMES B. ATLESON, *VALUES AND ASSUMPTIONS IN AMERICAN LABOR LAW* (1983).

5. See Karl Klare, *Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness: 1937-1941*, 62 *MINN. L. REV.* 265 (1978).

6. See Staughton Lynd, *Government Without Rights: The Labor Law Vision of Archibald Cox*, 4 *INDUS. REL. L. J.* 483 (1981).

domination by managers and those whom managers serve.”⁷ Although disagreeing with Klare on important particulars, Tomlins similarly concluded, in a widely quoted sentence, that “a counterfeit liberty is the most that American workers and their organizations have been able to gain through the state.”⁸

“Published simultaneously with the Reagan administration’s first attacks on organized labor,” the labor historian Ronald Schatz has observed, this wave of scholarship “erupted like a bomb under earlier, liberal, optimistic interpretations of American labor history.”⁹ After nearly two decades, echoes from the blast can still be heard—for example, in Tomlins’ passing reference to the historian Melvyn Dubofsky’s defense of New Deal labor policy in his contribution to this symposium.¹⁰ But what is most exciting about this symposium is the willingness of all its participants to take a fresh look at the liberal state, to see it as more complex and internally divided than it was commonly portrayed in the 1980s, and to recognize both the perils and the opportunities that its fragmented nature offered workers and their allies.

7. Karl E. Klare, *Labor Law as Ideology: Toward a New Historiography of Collective Bargaining Law*, 4 INDUS. REL. L. J. 450, 461 (1981).

8. Tomlins, *supra* note 1, at 328.

9. Ronald W. Schatz, *Into the Twilight Zone: The Law and the American Industrial Relations System Since the New Deal*, 36 INTERNATIONAL LABOR AND WORKING-CLASS HISTORY 51, 58 (1989).

10. See Christopher L. Tomlins, *The Heavy Burden of the State: Revisiting the History of Labor Law in the Interwar Period*, 23 SEATTLE U. L. REV. [note 84]; (referring to MELVYN DUBOFSKY, *THE STATE AND LABOR IN MODERN AMERICA* (1994)). Another development in the 1990s was the entry of political scientists into the fray with books celebrating the NLRA for ending “feudalism” in America, for creating a “democratic political order” that persisted well into the 1960s, and as a paradigm of state building in defense of individual rights. See RUTH O’BRIEN, *WORKERS’ PARADOX: THE REPUBLICAN ORIGINS OF NEW DEAL LABOR POLICY, 1886–1935* (1998); KARREN ORREN, *BELATED FEUDALISM: LABOR, THE LAW AND LIBERAL DEVELOPMENT IN THE UNITED STATES* (1991); DAVID PLOTKE, *BUILDING A DEMOCRATIC POLITICAL ORDER: RESHAPING AMERICAN LIBERALISM IN THE 1930S AND 1940S* (1996).