

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

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In this brief essay I will review the legacy of the NLRA for dispute resolution – which is a mixed legacy, for both employment and labor rights, as well as for other areas of human disputing. The processes which grew around labor rights, including collective bargaining, negotiation, arbitration, mediation, med-arb and other “impasse” breaking techniques are good developments, demonstrating 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 spawned a whole new field in dispute resolution – dispute system design.³ But, in what many regard as a distortion of using alternative processes to reduce the contentiousness of litigation, or to save costs, or to serve some other (usually, employers’) interests, arbitration placed in mandatory, pre-dispute contracts of employment (and now all other kinds of contracts) and then interpreted to be the only form of dispute resolution available, is a controversial legacy which is hardly producing labor “peace.”⁴ Indeed, the very goals of

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

³ William Ury, Jeanne Brett & Stephen Goldberg, *Getting Disputes Resolved: Designing Systems to Cut the Costs of Conflicts* (1988).

⁴ Since the *Gilmer* decision, *Gilmer v. Interstate Johnson Lane Corp.*, 500 U.S. 20 (1991), employment lawyers (often joined by consumer lawyers) have been lobbying heavily for new laws to prohibit the mandatory use of pre-dispute arbitration in employment (and certain consumer, franchise and other) contracts, See proposed Arbitration Fairness Act of 2009, S. 931 as of June 2010; H.R. 1409. 111th Congress (2009). For an excellent review of the full extent of the controversies on this issue (and others) see, Theodore J. St. Antoine, *ADR in Labor and Employment Law During the Past Quarter Century*, 25 *ABA J. Lab. & Employ. L.* 411 (2010).

“collective” employment rights may be eroded as rulings from non-union individual employment matters (and commercial contracts more generally) are being “blended” with and eviscerating what were often intended to be collective rights.⁵ The legal processes that have developed around the separation of legal concepts and consciousness⁶ of “employment” (seen as individual rights) versus labor (seen as collective rights) is one of the major themes of this essay.⁷

In this examination of the NLRA’s legacy it is important to recognize how much processes used to deal with 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 pluralism⁸— 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, including limited (under current law and practice) labor negotiation and bargaining strategies, “mandatory” commitment to grievance or employment arbitration in different contexts, whether contractual or statutory, and in my view, insufficient attention to mediation, for both collective and union-management, as well as individual, issues and disputes. My own views of what processes are best used for what

⁵ Though beyond the scope of this essay, the question of whether class actions can be conducted in arbitral fora (whether in the employment context or the consumer or commercial context) parallels refusals to allow collective justice processes to proceed in a variety of fora, see, e.g. *Stolt-Nielsen S.A. v. Animal Feeds Int’l*, 130 S. Ct. 1758 (2010), where 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, where the parties had not explicitly agreed to allow class arbitration.

⁶ A focus on the legal consciousness of labor regulators, organizers and workers is an old story in labor law, see Karl Klare, *The Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness*, 62 *Minn. L. Rev.* 265 (1978).

⁷ I am most certainly not alone in making these claims, see e.g., Wilma Liebman, *Labor Law Inside Out*, 11 *WorkingUSA: J. of Labor & Society* 9, at 19-20 (2008); Marion Crain & Ken Matheny, *Labor’s Identity Crisis*, 89 *Cal. L. Rev.* 1767 (2001); Sharon Rabin Margalioth, *The Significance of Worker Attitudes: Individualism as a Cause for Labor’s Decline*, 16 *Hofstra Lab. & Emp. L. J.* 133 (1998); 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).

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

kind of “work” (a more capacious and fruitful term for developing collective consciousness than labor or employment) disputes have changed over time, even as I completed this essay.

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, as well as dispute resolution:

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?⁹
3. What processes are more likely to produce access to relief (or justice) and effective relations and remedies in the highly conflictual arena of labor relations, including new forms of mediated labor-management partnerships?¹⁰
4. Having “spawned” or “birthed” different dispute resolution processes, can the labor movement and management learn to use different forms of process to reconfigure their relations in a new era, both processually and substantively?¹¹
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 and communities to consider more varied use of more kinds of processes, including new

⁹ Thomas A. Kochan & David Lipsky (eds.), *Negotiations and Change: From the Workplace to Society* (2003)

¹⁰ See, e.g., Thomas A. Kochan, Adrienne E. Eaton, Robert B. McKersie and Paul S. Adler, *Healing Together: The Labor-Management Partnership at Kaiser Permanente* (2009).

¹¹ See e.g., Cynthia Estlund, *Regoverning the Workplace: From Self-Regulation to Co-Regulation* (2010).

hybrid forms of multi-party union-management partnerships, facilitated integrative interest based bargaining and consensus building mechanisms to expand our repertoires of behaviors to jointly confront the new struggles we face in a new and difficult economy with far more complex work relations than the older forms of “simple” adversarial labor-management relations.

A Brief History of the NLRA and 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 provided for the use of mediation and arbitration procedures, particularly in unionized contexts. Until the (shockingly wrong to many of us) decision in *Circuit City Stores v. Adams*,¹² which applied the Federal Arbitration Act to ordinary (non-union) employment contracts (except those involving workers actually engaged in transportation and “interstate commerce” work), it was generally thought that arbitration was a process most associated with collective bargaining and grievance processes. Most of us in the labor and employment field believed that the Federal Arbitration Act was designed to deal with commercial, not employment, contracts.¹³

The passage of the National Labor Relations Act in 1935¹⁴ was intended to usher in an era of both collective rights for workers and encourage labor peace where once there had been

¹² *Circuit City Stores v. Adams*, 529 U.S. 1129 (2000).

¹³ This turned on the Supreme Court’s interpretation of § 1 of the FAA, 9 U.S. C. § 1, which governs “coverage” of that Act. That section excludes coverage under the FAA of “contracts of employment of seaman, railroad employees, or any other class of workers engaged in foreign or interstate commerce.” Many scholars believed (and still do) that the legislative history of the FAA clearly indicated that arbitration covered by the Act was intended to be purely commercial. 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 just about the same time, 1925-6.

¹⁴ 29 U.S.C. § 151-169.

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.”¹⁵ As a condition of promoting labor peace, judicial recognition of internal grievance processes (usually arbitration¹⁶) to sort out internal (disputes between signatories of the collective bargaining agreement) labor disputes¹⁷, and eventually the use of mediation and arbitration to break bargaining impasses in some labor contract formation¹⁸, also provided an important processual goal – the use of various forms of dispute resolution that were “alternatives” to violence, conflict, courts, and later even administrative agencies, charged with the legal obligations to enforce those labor and contract rights.¹⁹

¹⁵ One of the lasting legacies of the NLRA (or the climate in which it was created) is the on-going polarization of the labor movement and management interests. Over the years many labor and dispute resolution practitioners (see e.g., Robert McKersie and Richard E. Walton, *A Behavioral Theory of Labor Relations* (1965); Thomas Kochan & David Lipsky (eds.), *Negotiations and Change: From the Workplace to Society* (2003)) 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. 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, see K. Dau-Schmidt, Martin Malin, Roberto Corrada, Christopher Cameron and Catherine Fisk, *Labor Law in the Contemporary Workplace* (2009), ch. 1, page 50, as well as by most business interests who perceived collective labor rights as infringing on their freedom to control the workplace as “freedom of contract.” See most recently, Richard Epstein, *One Bridge Too Far: Why the Employee Free Choice Act Has, and Should Fail*, available at <http://ssrn.com/abstract=1660683> (2010). 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., Kaiser Permanente, Kochan, et. al., *supra* note 8.

¹⁶ *Textile Workers v. Lincoln Mills* 353 U.S. 448 (1957).

¹⁷ *Steelworkers Trilogy* (1960); In *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960), 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.”

¹⁸ *Railway Labor Act*, 45 U.S. C. §§ 151-88; Federal Mediation and Conciliation Service, (created as separate federal agency in 1947 at time of Labor Management Relations Act (Taft-Hartley).

¹⁹ Those labor and employment related agencies initially included the National Labor Relations Board and the Department of Labor (for wage and hour enforcement) but later included the Equal Employment Opportunity Commission (discrimination claims under Title VII, 42 U.S. C. § 2000e-2; the Americans with Disabilities Act, 42 U.S. C. § § 12101-12213; and the Age Discrimination in Employment Act, ADEA, 42 U.S.C. §§ 621-634)), the Fair Labor

The use of arbitration in labor relations is both much older than many people think and quite relevant to our current issues. Both in England and in the United States in the late 19th century, during the period of the worst (and most violent) labor actions and strikes, the idea of requiring “compulsory” arbitration of employers and employees, through unions was a common suggestion by both sides of labor conflict. Alternatively, requests or demands to use a compulsory investigation of a dispute by an impartial body, to attempt to settle such disputes more peacefully than strikes, were often made and frequently used.²⁰ The idea was that proposed findings and outcomes would still have to be voluntarily accepted (making such processes more like evaluative mediation, or non-binding arbitration than binding arbitration as we know it today).²¹ 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 1913 as a branch of the Department of Labor. So what we now call “alternative (or in more modern parlance ‘appropriate’) dispute resolution” has a much longer history associated with labor relations in its collective, not individual, employment form. The United States Conciliation Service performed mediation and arbitration services on jurisdictional work disputes (which building trades could perform certain classes of work), both mediating such disputes and creating more permanent fora for arbitrating those disputes. The AFL’s Joint Board on Jurisdictional Disputes, was, what one

Standards Act, 29 U.S. C. §§ 201-209; Occupational Safety and Health Act, 29 U.S. C. §§ 651-678, and other federal and state agencies charged with enforcing labor and employment laws.

²⁰ Jerome T. Barrett with Joseph P. Barrett, *A History of Alternative Dispute Resolution: The Story of a Political, Cultural and Social Movement* (2004) at 86-91; 99; Jerold S. Auerbach, *Justice Without Law? Resolving Disputes Without Lawyers* (1983) at 60-68.

²¹ See John T. Dunlop & Arnold M. Zack *Mediation and Arbitration of Employment Disputes* (1997) at 3. This practice, now argued for again 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.

commentator has called, an early form of “dispute system design.”²² Both World Wars (the first before the NLRA was enacted and the second afterward) spurred the development of War Labor Boards that used arbitral processes to resolve labor conflicts in times of labor and resource shortages with great needs for minimal production disruptions. Labor-management cooperation, labor codes, and (temporary) recognition of trade unions or bargaining agents developed precursors to many of the processes we look to now to resolve labor disputes. But the inter-war years were also a time of great labor conflict, during the depression and mass dislocation of unemployed workers.

The New Deal formulation of first, the National Industrial Recovery Act (declared unconstitutional), and later the National Labor Relations Act (declared constitutional²³), finally established official legal rights to bargain collectively in 1935, thus formally recognizing in federal law the dispute resolution processes of negotiation and bargaining. Though case law developed, first by the NLRB, and ultimately by the courts²⁴, never required more than “good faith bargaining” and thus, could not compel agreements or enforce substantive terms on the parties (as arbitration can), certain subjects of bargaining were made “mandatory” (wages, hours, and certain other “terms and conditions” of employment.)²⁵ 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

²² Barrett & Barrett, *supra* note 20 at 106.

²³ NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937) (considered the “switch in time, that saved nine” preventing the Court Packing Plan of President Franklin Roosevelt from having to be used.)

²⁴ NLRB v. Insurance Agents International Union, 361 U.S. 477 (1960) and NLRB v. Katz, 369 U.S. 736 (1962). See Hardesty Co, Inc DBA Mid Continent Concrete, 336 NLRB 258 (2001), *enfd* 308 F. 3d 859 (8th Cir. 2002) for standards of what constitutes “bad faith” or “surface” bargaining.

²⁵ See, e.g., Fibreboard Paper Products v. NLRB, 379 U.S. 203 (1964).

conditions of employment,” even if “such obligation does not compel either party to agree to a proposal or require the making of a concession.”²⁶

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.²⁷ In a somewhat ironic interpretation of this phrase (in my view), “good faith” bargaining has been interpreted to mean a very low *de minimus* 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 negotiation problems which involve both shared and conflicting interests.²⁸

In both Railway Labor Act cases (railroads and airlines) and in most public employment, federal and state governments may actually require mediation and arbitration and compel certain forms of bargaining and agreements, establishing 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, in balance with a prohibition or some limitations on the right of public employees to strike. 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

²⁶ Section 8(d) of the NLRA.

²⁷ 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).

²⁸ See Roger Fisher, William Ury and Bruce Patton, *Getting to YES* (2nd ed. 1991) and Carrie Menkel-Meadow, *Toward Another View of Legal Negotiation: The Structure of Problem Solving*, 31 *UCLA L. Rev.* 754 (1984)

now commonly thought to be available in the larger dispute resolution world of civil disputes generally.

Although there is no explicit mention of these processes in the NLRA, following the Supreme Court's decision in *Lincoln Mills* (1957), authorizing the development of federal substantive labor law, and the recognition of an "implicit" understanding that a contractual agreement to arbitrate "is the quid pro quo for an agreement not to strike," followed by the deferential standard of review for such grievance (contractual) arbitration in the *Steelworker's Trilogy*, arbitration as legal process for resolution of labor (grievance) disputes became the norm and was more fully recognized in the Labor Management Relations Act (Taft-Hartley) of 1947²⁹.

Initially commercial arbitration developed on a separate track, fully recognized by Justice Douglas in one of the *Steelworkers* cases³⁰: "in the commercial case, arbitration is a 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 evidenced by courts (in *Wilko v. Swan*³¹) toward arbitration of commercial disputes has no place here. For arbitration of labor disputes under collective bargaining agreements is part and parcel of the collective bargaining process itself." As judicial hostility to commercial

²⁹ Section 203 (d).

³⁰ *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960).

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

arbitration was dislodged in a series of cases decided by the Supreme Court³², so did the dividing line between commercial, employment and now labor dispute resolution disappear.³³

Though the NLRA (and before that the Railway Labor Act³⁴) were intended primarily to apply to collective bargaining and union issues in formal recognition of the substantive right to collectively bargain as a process, the NLRA 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 not protected by collective union rights (which are still called *labor issues*).

Employment vs. Labor Rights and Remedies

This rhetorical (and legal) 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 one of the major questions in assessing the legacy of the NLRA. To what extent are labor and employment issues (and “rights”) experienced as “collective” or “individual” as processes to “resolve” disputes are structured and delivered? 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

³² See, e.g., *Moses H. Cone Memorial Hospital v. Mercury Construc.* 460 U.S. 1 (1983); *Rodriguez de Quijas v. Shearson/ American Express, Inc.* 490 U.S. 477 (1989). 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.

³³ Stephen L. Hayford, *Unification of the Law of Labor Arbitration and Commercial Arbitration: An Idea Whose Idea Has Come*, 52 *Baylor L. Rev.* 781 (2000).

³⁴ 45 U.S. C. §§ 151-88.

individuals, in legal claims asserted under contracts and statutory protections)? 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 or not unionization is alive or dead, or has benefitted workers or not, the dispute resolution processes which have grown up around the NLRA may continue to affect worker's rights and conditions of employment long beyond the protection of particular substantive and collective rights in the NLRA itself. In the era of the Civil Rights movement in the 1960s and later, when more and more statutory protections were provided to some (not all) workers as protections against discrimination on the basis of race, sex, national origin, religion, age, and disability, Congress faced the choice of what enforcement mechanisms to select for these new laws. The EEOC was not granted the full authority and power, as an administrative agency, to issue self-executing (but appealable) orders, but instead individual litigants (and larger groups of litigants in class actions) began to sue directly for redress, often gaining reinstatement, back pay, attorneys fees, and eventually, compensatory damages,³⁵ through litigation (and negotiation of settlements).

Litigation of employment civil rights was the norm until another form of arbitration – contractual or pre-dispute mandatory assignment to employment arbitration as the only permitted process (not collective or grievance arbitration or other forms of dispute resolution), began to be imposed on individual employees, initially those not represented by unions, but now, applied more or less to all workers.³⁶ “Mandatory” pre-dispute contractual employment arbitration (also known as “cram down” arbitration) grew up along side commercial (business or “B2B”) arbitration, under the Federal Arbitration Act, which has, over the last few decades been applied

³⁵ Amendments to Title VII, 1991. 42 U. S. C. § 1981(a).

³⁶ 14 Penn Plaza v. Pyett, 129 S.Ct. 1456 (2009).

to both employment and consumer contracts and sustained as lawful by United States (both federal and state) courts over many legal objections as violations of contract law (unconscionability), constitutional law (denial of rights to trial by jury), and procedural principles (denial of various due process rights),³⁷ in contrast to legal developments in other parts of the world, where such forms of compulsory pre-dispute contractual arbitration cannot be applied to employment or consumer issues.³⁸

As I recall writing my student law review note in 1973 about the “inevitable interplay” between the NLRA and Title VII³⁹, my concern was with the potential substantive clashes between statutory schemes that protected collective (seniority) versus more “individual” rights (the anti-discrimination protections of Title VII for more recently hired [and therefore more likely to be laid off under seniority agreements] minority and female workers). Of course, as I and others had written at the time and since⁴⁰, this was also interpreted as the conflicts between one set of collectivities (mostly white male unions) with other collectivities (minority and women workers). In the middle of my writing that note the Supreme Court decided *Alexander v. Gardner-Denver*, 415 U.S. 36 (1974)⁴¹ which, instead, confronted the “inevitable interplay” of

³⁷ Jean 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 *Tulane L. Rev.* 1 (1997).

³⁸ Jean Sternlight, Is the US 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).

³⁹ Carrie Menkel-Meadow, “The Inevitable Interplay of Title VII and the National Labor Relations Act: A New Role for the NLRB,” 123 *U. Penn. L. Rev.* 158 (1974). My note was inspired by some defense contractors seeking advice about how they could reconcile the requirements of their collective bargaining agreements to honor seniority agreements when their most recent hires had been to conform to requirements under Title VII which diversified their work forces but made lay-offs, as the Viet Nam war wore down, likely to have a “disparate impact” on the most recently hired minority and female workers.

⁴⁰ See Crain & Matheny, *supra* note 7.

⁴¹ The issue in *Alexander v. Gardner Denver* was whether an employee/union member who lost his discharge case in a grievance arbitration proceeding could still file a separate discrimination claim in another forum. The court

the different processes used to assert rights under different employment protective schemes, including litigation, labor arbitration of contract grievances, and arbitration (or other forms of dispute resolution) 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 who later urged similar developments, both in legal interpretations and in organizing strategies, though we all remain largely unsuccessful (and naïve?).⁴²

And so, as we say in the law, “the issues were joined” – what processes would be used to vindicate what rights under labor (“the law of the shop”) and employment laws (“the law of the land”)⁴³, and more importantly, what difference would different processes make for the

held that labor arbitration which dealt with “the law of the shop” (the collective bargaining agreement) could not preclude another proceeding which was designed to deal with “the law of the land” (the statutory protections of Title VII).

⁴² In addition to the labor law scholars cited in note 7 *supra*, 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 (and more workers were actually members of unions or collective organs at work) 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* (2003) at 154; Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 *Columbia L. Rev.* 458 (2001).

⁴³ In *Gilmer v. Interstate/Johnson Lane Corp*, 500 U.S. 20 (1991) (a much criticized decision) it looked as if mandatory assignment of arbitration processes via employment (not labor) 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 v. Pyett*, 129 S. Ct. 1456 (2009), which held in a 5-4 decision that union members, like non-unionized employees, can be contractually required to arbitrate statutory, as well as contractual, claims. 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).

adjudication of what are considered “collective” vs. “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 procedural statutory rights⁴⁴, or whether unionized employees would continue to have (under *Gardner-Denver*) the ability to use union (grievance arbitration) and some litigation (in duty of fair representation cases), and individual statutory (arbitration and litigation) processes to vindicate statutory (mostly anti-discrimination) claims. And for some years it was possible to argue that important statutory claims, representing “public policy” (like anti-discrimination laws) had to be vindicated in courts, not arbitral settings. Once this claim was lost in the commercial setting (as the Supreme Court allowed pre-dispute contractual arbitration to resolve antitrust, securities, RICO and other statutory claims⁴⁵), it was also lost in the employment-contract setting as the Supreme Court upheld mandatory assignment to contractual employment (non-union) arbitration in *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991).

Beginning with the decision in *Gilmer* (statutory employment issues are arbitrable), and moving through the issues of union waivers of statutory rights (*Wright*) or the inclusion of statutory rights within collective bargaining agreements with arbitration clauses applying to “any and all disputes arising out of the collective bargaining agreement, including statutory rights (*Pyett*), the use of labor grievance arbitration processes looks close to fully merged with contractual (commercial-employment) arbitration. Thus, the collective power of the union may be used by the employer to bargain away, or “waive” or control the processes to be used by employees (including union members) to vindicate both labor and other statutory rights. Efforts

⁴⁴ *Wright v. Universal Mar. Serv. Corp.* 525 U.S. 70 (1998).

⁴⁵ *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.* 473 U.S. 614 (1985); *Shearson/American Express Inc. v. McMahon*, 482 U.S. 220 (1987); *Rodriquez de Quijas v. Shearson/American Express, Inc.*, 490 477 (1989)

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.⁴⁶ The legal question of whether class actions in arbitration can be waived by contract continues to be litigated in the Supreme Court.⁴⁷

Which Processes are Appropriate in Which Work Contexts?

Although lawyers representing individual employees, dissenters in *Pyett*, and many legal commentators have expressed concerns that the collective interest of unions to “waive” process issues for individuals is not fair just because collective interests may be in “conflict” with individual interests, the majority in *Pyett* and a few commentators think that arbitration, just because it originated in labor processes may be a totally appropriate forum for resolution of both labor and employment issues.⁴⁸ Sarah Cole⁴⁹, for example, thinks that arbitrators (especially labor arbitrators) will be especially well suited to both factual and legal determinations in statutory employment cases, although following the decision in *Gilmer* many such labor arbitrators and labor specialists thought just the opposite.⁵⁰ Professor Cole also suggests that unions are now more likely than in the past to use their experience in collective bargaining

⁴⁶ See e.g., *Gentry v. Superior Ct.* 165 P.3d 556 (Cal. 2007), *cert denied*, 128 S. Ct. 1743 (2008), see Memorandum General Counsel, NLRB, Guideline Memorandum Concerning Unfair Labor Practice Charges Involving Employee Waivers in the Context of Employers’ Mandatory Arbitration Policies, June 16, 2010.

⁴⁷ See e.g. *AT& T Mobility v. Conception* 130 S. Ct. 3322 (2010) (granting certiorari on whether Federal Arbitration Act preempts voiding a class action waiver as unconscionable when clauses in arbitration contracts treated differently from other contract terms).

⁴⁸ Most recently distinguished labor law professor Theodore St. Antoine has opined just this on these pages, see *supra* note 4.

⁴⁹ *Supra* note 43

⁵⁰ See, e.g., Reginald Alleyne, *Statutory Discrimination Claims: Rights “Waived” and Lost in Arbitration Forum*, 13 Hofstra Lab. L. J. 381 (1996); Katherine Van Wezel Stone, *Mandatory Arbitration of Individual Employment Rights: The Yellow Dog Contract of the 1990s*, 56 Wash & Lee L. Rev. 395 (1999); Robert A. Gorman, *The Gilmer Decision and the Private Arbitration of Public-Law Disputes*, 1995 U. of Ill. L. Rev. 635 (1995); Harry T. Edwards, *Alternative Dispute Resolution: Panacea or Anathema*, 99 Harv. L. Rev. 668 (1986).

grievance arbitration, and their need to represent their newest minority and women members fairly, 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.⁵¹ 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. Extensive empirical research has suggested that employees actually fare quite well in arbitral settings in (some) employment cases (that is, they have higher “win” rates, even if actual monetary amounts of damages or compensation may not be as great as in some forms of litigation, such as jury trials), as compared to both litigation, and more recently, in comparison to employee discharge cases in labor arbitration.⁵² Some of these commentators also suggested that arbitrating employment claims within the labor grievance umbrella would not only benefit workers (with cheaper and experienced arbitral

⁵¹ Bales, *supra* note 34 at 752-760. See also Becky L. Jacobs, *Often Wrong, Never in Doubt: How Anti-Arbitration Expectancy Bias May Limit Access to Justice*, 62 *Maine L. Rev.* 532 (2010).

⁵² See, e.g., for summary of this research, St. Antoine, *supra* note 4 and Elizabeth Hill, *AAA Employment Arbitration: A Fair Forum at Low Cost*, *Disp. Resol. J.* May-Jul 2003; David Sherwyn, Samuel Estreicher & Michael Heise, *Assessing the Case for Employment Arbitration: A New Path for Empirical Research*, 57 *Stan. L. Rev.* 1557 (2005); Lewis Maltby, *Employment Arbitration and Workplace Justice*, 38 *U.S. F. L. Rev.* 105 (2003); Lisa 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*, 53 *Nat'l. Acad. Arb.* 303 (2004); Samuel Estreicher, *Saturns for Rickshaws: The Stakes in the Debate over Predispute Employment Arbitration Agreements*, 16 *Ohio St. J. Disp. Resol.* 559 (2001); see also Carrie Menkel-Meadow, *Do the Haves Come Out Ahead in Alternative Judicial Systems? Repeat Players in ADR*, 15 *Ohio St. J. on Dispute Resolu.* 19 (1999)

representatives⁵³) but would also give union representatives another important role within the workplace, which would be beneficial to both current workers and a useful role to use in organizing campaigns.

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 versus litigation fora, scholars continue to study and argue about this important issue.⁵⁴ 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 (race, gender, national origin, even age and disability) are conceptualized by many to be “group” rights – that is one’s individual discrimination claim is actually based on one’s “membership” (whether “voluntary,” “involuntary” (suspect class or “insular minority” in constitutional parlance) or attributed (by others) in a group or collectivity. In the past, with the assumptions of or reality of discrimination against many of these groups by predominantly white male unions, it was thought by many (including this author) that we actually had a situation of conflicts among groups or collectivities

⁵³ Much of the newer empirical work on success in arbitral fora can often be explained by quality of or even existence of representatives, see e.g., Lisa Bingham, *supra* note 52 and Lisa Bingham, *Employment Arbitration: The Repeat Player Effect*, 1 *Empl. Rts. & Empl. Pol’y J.* 189 (1997).

⁵⁴ See e.g., Alexander J.S. Colvin, *Empirical Research on Employment Arbitration: Clarity Amidst the Sound and Fury?* 11 *Emp. Rts. & Empl. 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; Carrie Menkel-Meadow, *Dispute Resolution in Oxford Handbook of Empirical Legal Studies* (Peter Cane and Herbert Kritzer, eds. 2010); Tina Nabatchi and Anya Stanger, *Using ADR to Resolve Federal Sector EEO Complaints: An Evaluation of Management Directive 110* (paper prepared for 23rd IACM Conference, available on ssrn.com); see also Theodore J. St. Antoine, *Mandatory Arbitration: Why It’s Better than It Looks*, 41 *U. Mich. J. L. Reform* 783 (2008)

– and one group was better “represented” by traditional union interests and grievance arbitration than the others. Anti-discrimination lawyers have long argued that courts and litigation are better for plaintiff-claimants, though the empirical research on this important question may actually contradict this claim (or at best, it remains unresolved).⁵⁵ 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)⁵⁶. Tensions *between* groups in the workplace is probably a more accurate way of describing 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,⁵⁷ then the issue of which processes are best (arbitration, litigation) 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, and other human resource, personnel, and complaint or grievance functions within large organizations (both public and private) also has caused splits among scholars and practitioners about whether there is more “internalized” justice

⁵⁵ Theodore Eisenberg and Elizabeth Hill, Employment Arbitration and Litigation in *ADR in the Law* (20th ed. 2006, JurisNet); Theodore Eisenberg, Kevin M. Clermont and Stewart J. Schwab, How Employment Discrimination Plaintiffs Fare in Federal Courts of Appeals, 7 *Employ. Rts. & Employ. Policy J.* 547-67 (2004).

⁵⁶ 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. See, e.g., *U.S. vs. International Union of Operating Engineers, Local Union No. 520* 476 F. 2d. 1201 (7th Cir. 1973) and *Commonwealth of Pa. and Raymond Williams v. Local Union 542, International Union of Operating Engineers*, 648 F. 2d 922 (3rd Cir. 1981) as examples of successful discrimination cases against major union. See also A. Leon Higginbotham, Jr., *The Commonwealth of Pennsylvania and Raymond Williams, et. al. vs. Local Union 542, Int’l Union of Operating Engineers*, 60 *J. of Negro History* 360-396 (1975) (opinion on recusal motion against African American federal judge in proceeding against union for race discrimination).

⁵⁷ And some argue that worker solidarity for both union purposes and non-discrimination purposes are best served when workers see their common goals, see Cynthia Estlund, *Working Together: How Workplace Bonds Strengthen a Diverse Democracy* (2003); see also Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 *Columbia L. Rev.* 458 (2001).

in employment settings (better or worse outcomes for employees in internal organizational settings, compared to “externally” litigated processes)⁵⁸ or more “privatization” and “individualization” (and ultimately, “pacified”) justice in employment settings.⁵⁹ 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 reps, employment lawyers, internal organizational human resource or dispute resolution personnel) will benefit from the process chosen (or mandated).

While the debates continue about whether mandatory pre-dispute arbitration in the employment setting (both union and non-union) 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 (and not yet totally resolved) legal landscape of class action litigation in consumer and other (e.g. securities) 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 (collective) form in contractual arbitration.⁶⁰ Thus, collective action in dispute resolution may be as endangered in the non-union, non-employment context as in employment and labor relations generally.

⁵⁸ Susan Sturm & Howard Gadlin, *Conflict Resolution and Systemic Change*, 2007 *J. Disp. Resol.* 1. (suggesting that systematizing employee grievances in certain Ombuds settings can lead to systemic change in the workplace, perhaps more effectively than in formal and external and public litigation).

⁵⁹ Lauren Edelman, Howard Erlanger and John Lande, *Internal Dispute Resolution: The Transformation of Civil Rights in the Workplace*, 27 *Law & Society Rev.* 497 (1993) (arguing that requiring individual complaint processes kept “inside” the organization prevents publicity of wrongdoing (as in litigation) and prevents systemic or class action-like relief).

⁶⁰ *Stolt-Nielsen SA v. Animal Feeds Intern.*, 130 St. Ct. 1758 (2010) (holding that class actions not permissible in arbitration unless explicitly agreed to by parties in pre-dispute contractual allocation to arbitration). See discussion *infra* at notes 46-47.

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 integrative processes and outcomes.⁶¹ As unions struggle with each other (the AFL split), and with management, and 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.

The Way Forward? From Old Legacy to New Learning

So 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, as some have suggested, with one form of dispute resolution for conventional labor 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 among workers and among workers and management be formed to develop fairness and benefits for all?

Many different issues are often conflated in consideration of these questions and all too often the sides (as in labor relations) are polarized. Plaintiffs’ lawyers in statutory employment cases seek elimination of compulsory pre-dispute arbitration processes, even though there is

⁶¹ See Mary Parker Follett, *Constructive Conflict in Prophet of Management: A Celebration of Writings from the 1920’s* (Pauline Graham, ed. 1995) at 67-86.

some evidence that (some) arbitration (in that context) 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 (with both lobbying and academic weight⁶²) the notion that the Employee Free Choice Act might provide for compulsory arbitration to fix first contracts where employer delay can easily defeat a newly recognized union.⁶³ These employer efforts to fight compulsory arbitration, after a clearly demarcated statutory negotiation period, assume that such arbitration would necessarily cut all deals in “favor” of 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 (which provides for voluntary party choice in any agreement reached), 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.⁶⁴ 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 pluralist⁶⁵, 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 (see current, as always, battles in proposed labor law reform) are not the way to move forward. Polarization on substantive issues has led to manipulation of all processes.

⁶² See Epstein, note 15.

⁶³ Catherine Fisk & Adam R. Pulver, *First Contract Arbitration and the Employee Free Choice Act*, 70 *La. L. Rev.* 47 (2009).

⁶⁴ See e.g. Moti Mordehai Mironi, *Mediation and Strategic Change: Lessons From Mediating a Nationwide Doctor’s Strike* (2008).

⁶⁵ Carrie Menkel-Meadow et al. *Dispute Resolution: Beyond the Adversary Model* (2nd ed. 2010).

So, as I see the legacy of the NLRA in the many different forms of dispute resolution it has spawned or encouraged in labor relations, including negotiation, bargaining, arbitration, mediation, and the hybrid forms of med-arb and arb-med, and interest-based, as distinguished from, grievance, arbitration, it seems now that labor relations must learn from the expansion, 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 and examples in new conceptions of labor-management partnerships and multiple-union coalitions, which may require suspension of some of the old adversarial paradigm.⁶⁶

The legacy or hope of the continued purposes of the NLRA might be (as I first suggested in 1974⁶⁷) that labor relations should expand its concerns and find avenues for worker collective interest and solidarity in many (not just largely economic) issues. 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* (wages, hours, retirement, retraining, education, working conditions, non-discrimination, fair treatment, health care, worker “dignity,” family work balance, and yes, even social relationships, as work becomes the site not only of “self-governance,” but also, for many, “home” and family⁶⁸) 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 terms that are more inclusive than labor or employment or laborer or employee. Work is something we all do

⁶⁶ As in Kaiser-Permanent partnership described in Kochan et al., supra note 8.

⁶⁷ And many many others have done since, see e.g. Crain & Matheny, Estlund, Sturm cited herein.

⁶⁸ Arlie Hochschild, *The Time Bind: When Work Becomes Home and Home Becomes Work* (2001).

and it can form the basis of a renewed collective consciousness in both bargaining for and resolving disputes about work.

Unfortunately, it can be said that there appears to be one distressing and perhaps counterproductive cultural understanding in many of these current issues and conflicts about work, rights, and legal processes. American culture is individualistic. The NLRA of 1935 and the first few years of its enforcement (and through the mid-1950s as the high point of union membership in the US at somewhere between 35-40% of the workforce) is 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, with greater statutory protection of work (in just cause dismissal or redundancy payments), or in some countries' work councils, the majority of American workers operate without formal statutory protections, without enforceable work rules, even without contract or formal agreement (including those who may not even know they are governed by an employer written personnel manual about which they understand little) 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 the rhetoric does not match the reality on the ground. 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 non-discrimination, wage rates, and worker safety and health. Many other countries have successfully used different methods of labor and employment regulation and dispute resolution. Ranging from workers' 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 many other ways to 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 ways 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 (including interest based collective bargaining, problem solving negotiation, partnering, consensus building, facilitated negotiation and mediation, as well as newer hybrid forms of process) 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.