CONTENTS

THE KENNETH M. PIPER LECTURE

LABOR LAW REFORM IN A WORLD OF COMPETITIVE PRODUCT MARKETS  
Samuel Estreicher 3

Professor Estreicher argues that the decline in union representation in private firms is largely the result of structural changes in the workplace and a lack of fit between the premises of the U.S. industrial relations system and the emergence of competitive markets in industries that previously were union strongholds. In his view, the agenda for labor law reform must take account of these new realities rather than simply seek to strengthen the ability of unions to pursue traditional objectives. Professor Estreicher then proposes a three-pronged agenda of reform involving (1) a relaxation of legal restrictions on employee involvement programs in nonunion firms; (2) a bolstering of the legal protections for employees seeking representation by independent organizations; and (3) a redirection of existing rules to reduce avoidable sources of adversarialism and encourage labor-management cooperation and mutual-gains bargaining in the union sector.

SYMPOSIUM ON THE LEGAL FUTURE OF EMPLOYEE REPRESENTATION

MATTHEW W. FINKIN
SYMPOSIUM EDITOR

FOREWORD  Matthew W. Finkin 49

IN DESPAIR, STARTING OVER: IMAGINING A LABOR LAW FOR UNORGANIZED WORKERS  Michael H. Gottesman 59

In this article Professor Gottesman submits his views as to why the NLRA has fallen so far. He argues that amending the NLRA’s now-evident weaknesses would only partially cure its problems. This is because most workers are not likely to embrace traditional collective bargaining even if it were available free of all its present legal infirmities. Professor Gottesman proposes instead a legal regime that would provide the grounds for the growth of a unionism which would reach these workers.

REFORMING U.S. LABOR RELATIONS  Joel Rogers 97

While the New Deal system of labor relations no longer works well for American workers or the American economy, there is no organized constituency for labor law reform—or at least no constituency powerful enough to overcome business objections to expanded worker rights. The organization of such a constituency will inevitably fall
to labor itself. In this article, after reviewing the structure and collapse of the New Deal system, Professor Rogers suggests some guidelines to the sort of labor reform now needed, and some speculations on how social support for it might be organized.

**EMPLOYEE VOICE AND EMPLOYER CHOICE:**
**A STRUCTURED EXCEPTION TO SECTION 8(A)(2)**

Clyde W. Summers 129

The author proposes a structured exception to section 8(a)(2) which will enable employers to establish an internal employee representation system, but which will protect the independence of that system from the employer's control. This would be an alternative to, not a replacement of union representation. It is to be available to employers who recognize the value of employee participation, but whose employees reject representation through a union. The author identifies basic elements of employee participation in Germany and Japan, and suggests the elements required here to insure the employees an independent voice with a measure of effectiveness.

**EMPLOYEE CAUCUS: A KEY INSTITUTION IN THE EMERGING SYSTEM OF EMPLOYMENT LAW**

Alan Hyde 149

Employees in nonunion workplaces often pursue grievances through identity caucuses such as women's, Black, Latino/a, or gay and lesbian caucuses; informal networking and griping; and ad hoc pressure groups. Professor Hyde suggests that these groups will play a crucial part in workplace life in the next few years. While many of their activities are protected by existing labor legislation, aspects of the law of protected concerted activities, and employer assisted labor organizations, should be changed to facilitate employee self-organization. The National Labor Relations Board should recognize a defense to section 8(a)(2) permitting employees to vote to be represented by employer-assisted organizations.

**THE ROAD NOT TAKEN: SOME THOUGHTS ON NONMAJORITY EMPLOYEE REPRESENTATION**

Matthew W. Finkin 195

An alternative for employee representation, debated at the time of the Labor Act, would allow organizations to represent those who voluntarily chose to join them instead of requiring exclusive representation by majority rule. Professor Finkin returns to this idea, to explore, with the hindsight of decades of experience under exclusive representation, whether or not it would make sense. He agrees that such a Balkanized approach to employee relations is fraught with difficulty. But he concludes that nonmajority representation could be made to work and that, on balance, it merits consideration.

**COMMENTARIES**

**REFLECTIONS ON LABOR LAW REFORM AND THE CRISIS OF AMERICAN LABOR**

Sanford M. Jacoby 219

This article critically evaluates recent proposals to change the laws affecting employee representation in the United States. Particular attention is given to the political and economic feasibility of proposals for enterprise- and plant-level representational units.

**THE OVERLOOKED MIDDLE**

Thomas C. Kohler 229

Humans can ignore anything, observed G.K. Chesterton, as long as the thing being ignored is big enough. The contemporary discussion about employee representation and the employment order well illustrates the accuracy of Chesterton's remark—for in this discussion we have managed to overlook some pretty big things. What we
have failed to take into account threatens not only the success of our schemes for reform, but the well-being of our economic and political order generally. This essay sets forth a few of the matters that we would do well to keep in mind.

**Reflections on Employee Voice and Representation for the Future**  
*Peter D. Sherer*  

The authors in this symposium make use of law to propose new models of what employee voice and representation (EVR) should look like in the future. These proposals converge around the two distinct ways that firms have responded to the new realities of highly competitive product markets. One has been for firms to adopt a more relational model with their work forces, dedicating them through lifetime employment, empowerment, and the like. The other has been for firms to adopt a more transactional model with their work forces, making use of free-lancers, independent contractors, and no longer providing employment security. These different firm responses have resulted in a wide variety of experimentation in new forms of EVR, some of which are prohibited under the New Deal legislation. This variety in actual practice mirrors the diversity of proposals expressed by the authors in this symposium, suggesting that the role of law should not be to take a unitary stand favoring one form of EVR but instead to enable the variety to flourish.

**Book Review**

**Labor Unions: Not Well But Alive**  
*Willard Wirtz*  

Willard Wirtz reviews Charles B. Craver's book *Can Unions Survive?: The Rejuvenation of the American Labor Movement*. Professor Craver's succinct summary of organized labor's prospects emphasizes the importance of legislation which many experts consider unlikely, including revitalization of the right to strike. Reviewer Wirtz draws on this and other related recent analyses for an evaluation of the possibilities of "constructive bargaining," relying on unions to evoke broader employee participation, and on fuller cooperation among employers, union, and government.

**Afterword**

**Labor Law Reform: Waiting for Congress?**  
*Martin H. Malin*  

This symposium has focused on reforming the nation's labor laws to facilitate alternatives to traditional collective bargaining as mechanisms for employee voice in the workplace. In closing the symposium, Professor Malin cautions that whatever alternative mechanisms are pursued, their effectiveness requires that traditional union representation remain a strong option for employees. He suggests that reforms need not be limited to congressional amendment of the National Labor Relations Act, and provides two examples where the National Labor Relations Board and the courts can, under the existing statute, begin to address two barriers to union representation: unequal access to employees during representation election campaigns and inability to negotiate first contracts.