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Foreword: Labor Arbitration Thirty Years After the Steelworkers Trilogy, (symposium editor)

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FOREWORD:
LABOR ARBITRATION THIRTY YEARS
AFTER THE STEELWORKERS TRILOGY

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On June 20, 1960, the Supreme Court issued its decisions in what has become known as the *Steelworkers Trilogy*.¹ The *Trilogy* culminated the process of federalization of the law of collective bargaining agreements which began with the enactment of section 301 of the Taft-Hartley Act.² The Court held that an employer may not defend against an action to compel arbitration on the ground that the underlying grievance is frivolous, that grievances are presumed to be arbitrable and parties to a collective bargaining agreement should be compelled to arbitrate unless it can be said with positive assurance that the agreement withdrew the matter from arbitration, and that a court should enforce an arbitration award as long as the award draws its essence from the collective bargaining agreement. The Court's holdings freed the arbitration process from the threat of heavy-handed judicial regulation and allowed arbitration, which already was well-established as a system of industrial self-government, to flourish.

In the three decades since the *Trilogy* the Court has reaffirmed its principles on numerous occasions.³ The workplace, however, has experienced numerous changes in labor relations, union representation, demographic composition and in the nature of the law, among other areas. Many of these changes have had an impact on the institution of labor arbitration. Accordingly, as we mark the thirtieth anniversary of the

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1. *United Steelworkers of Am. v. American 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).

2. 29 U.S.C. § 185(a) (1988).

3. See, e.g., *United Paperworkers Int'l Union v. Misco, Inc.*, 484 U.S. 29, 36-38 (1987); *AT&T Technologies v. Communication Workers*, 475 U.S. 643, 648-51 (1986); *Schneider Moving & Storage Co. v. Robbins*, 466 U.S. 364, 371-72 (1984) (upholding general presumption of arbitrability but excepting employee benefit fund trustees' actions against employers); *W.R. Grace & Co. v. Local 759, Int'l Union of United Rubber Workers*, 461 U.S. 757, 764-65 (1983); *Buffalo Forge Co. v. United Steelworkers*, 428 U.S. 397, 405 (1976); *Gateway Coal Co. v. United Mine Workers*, 414 U.S. 368, 376-80 (1974); *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543, 549-551 (1964).

Trilogy, it is appropriate to examine the state of the institution of labor arbitration and the law of the workplace in light of these changes. This is the purpose of this special symposium.

In this foreword, I shall review the state of labor arbitration as it existed at the time of the *Trilogy*, the state of the law at the time of the *Trilogy*, and the contribution of the *Trilogy* to the institution of labor arbitration. Second, I will chronicle many of the changes which have occurred in the workplace and the law governing the workplace in the thirty years since the *Trilogy*. I will conclude by introducing the articles in this symposium in the context of the developments in the workplace since the *Trilogy*.

I. THE LAW AND PRACTICE OF ARBITRATION BEFORE THE *TRILOGY*

The use of arbitration to resolve labor disputes has been traced as far back as the Revolutionary War.⁴ During the late nineteenth and early twentieth centuries, labor arbitration began to gain favor as a means of settling labor disputes. In 1871 arbitration was used for the first time to resolve grievances in the anthracite coal industry.⁵ Thereafter, arbitration was used in the coal, apparel, entertainment and railroad industries, and, in 1937, received a major boost when the United Auto Workers and General Motors agreed to submit unresolved grievances to a neutral umpire.⁶

As World War II approached, labor arbitration gained acceptability as a method of settling grievances during the term of a collective bargaining agreement. During the second world war, arbitration became firmly established as the preferred method of resolving grievance disputes. This was due, in large part, to the policies of the National War Labor Board.

President Roosevelt established the National War Labor Board on January 12, 1942 and charged it with settling labor disputes that

4. Professor Lawrence Stessin has related the use of a local clergyman to arbitrate a dispute between an ironmonger and his employer over whether the employee was entitled to "danger pay" for forging a chain and stretching it across the Hudson River to protect George Washington's army from the British. Stessin, *Expedited Arbitration: Less Grief over Grievances*, HARV. BUS. REV. Jan.-Feb. 1977, at 128, 133 (1977).

5. The Anthracite Board of Trade and the Workingmen's Benevolent Association submitted disputes over allegedly discriminatory discharges to Judge William Ewell of Bloomsburg, Pennsylvania. Thereafter, the parties employed Judge Ewell to decide their "bill of wages." See R. FLEMING, *THE LABOR ARBITRATION PROCESS* 2 (1965); E. WITTE, *HISTORICAL SURVEY OF LABOR ARBITRATION* 11 (1952).

6. See generally, Nolan & Abrams, *American Labor Arbitration: The Early Years*, 35 U. FLA. L. REV. 373 (1983).

threatened to disrupt war time production.⁷ The WLB encouraged the parties to include grievance and arbitration provisions in their collective bargaining agreements and generally ordered the inclusion of such provisions when one party resisted it.⁸ The WLB's policies helped labor arbitration attain wide-spread acceptance as the preferred method for settling disputes over the interpretation and application of collective bargaining agreements. In 1944, seventy-three percent of all collective bargaining agreements contained arbitration provisions.⁹ In November 1945, President Truman convened a National Labor-Management Conference. One of the few matters on which representatives from employer groups, the American Federation of Labor and the Congress of Industrial Organizations were able to agree was the desirability of having a grievance procedure culminating in binding third party arbitration in every collective bargaining agreement.¹⁰

Prior to the Labor Management Relations Act of 1947¹¹ enforcement of collective bargaining agreements was left to state courts applying state law.¹² Initially, state courts were reluctant to enforce collective bargaining agreements at all, reasoning that they lacked mutuality and interfered with individual contracts of employment and the ability of the parties to terminate their relationships at will. The New York courts rejected the traditional arguments against enforcement. In *Schlessinger v. Quinto*¹³ the court found mutuality in an agreement between a multi-employer association and the International Ladies Garment Workers Union in each party's obligation and ability to discipline its members to compel them to abide by the agreement's provisions.¹⁴ Many other juris-

7. Exec. Order No. 9017, 7 Fed. Reg. 237 (1942).

8. See generally Freidin & Ulman, *Arbitration and the War Labor Board*, 58 HARV. L. REV. 309 (1945); R. FLEMING, *supra* note 5, at 14-21.

9. R. FLEMING, *supra* note 5, at 18. Today, 98 percent of all collective bargaining agreements have such provisions. BASIC PATTERNS IN UNION CONTRACTS 37 (12th ed. 1989).

10. Attendees at the conference were a virtual *Who's Who* of American Industrial Relations. See U.S. DEP'T OF LABOR, DIV. OF LABOR STANDARDS, BULLETIN NO. 77, THE PRESIDENT'S NATIONAL LABOR-MANAGEMENT CONFERENCE, NOVEMBER 5-30, 1945 77 (1946). President Truman charged them, among other things, "to find methods not only of peaceful negotiation of labor contracts, but also of insuring industrial peace for the lifetime of such contracts." *Id.* at 39. The conference delegates responded to this charge:

The parties should provide by mutual agreement for the final determination of any unsettled grievances or disputes involving the interpretation or application of the agreement by an impartial chairman, umpire, arbitrator or board.

Id. at 46.

11. Pub. L. No. 101, 61 Stat. 136 (1947) (codified as amended at 29 U.S.C. §§ 141-167 (1988)).

12. See generally Lenhoff, *The Present Status of Collective Contracts in the American Legal System*, 39 MICH. L. REV. 1109 (1941); Witmer, *Collective Labor Agreements in the Courts*, 48 YALE L.J. 195 (1938).

13. 201 A.D. 487, 194 N.Y.S. 401 (1922), *aff'g*, 117 Misc. 735, 192 N.Y.S. 564 (1921).

14. 201 A.D. at 498-99, 194 N.Y.S. at 410.

dictions followed *Schlessinger*, but several continued to adhere to their general positions that unions and employees could not enforce collective bargaining agreements because they lacked consideration or mutuality.¹⁵

Even though a pre-*Trilogy* court might enforce some provisions of a collective bargaining agreement, it might find others troublesome. Some state courts refused to enforce provisions requiring just cause for discharge on the ground that the employment relationship, being of an indefinite duration, was terminable at will.¹⁶ Even if a court enforced a just cause provision, it might refuse to award reinstatement because of the policy against enjoining breaches of personal service contracts, although some courts awarded reinstatement when the union, as opposed to the individual employee, brought the action.¹⁷ To the extent that enforcement of a collective bargaining agreement required that the union, rather than the individual employee, bring the action, the situation was complicated by the law in many states which refused to recognize a union as a legal entity with the capacity to sue unless it was incorporated.¹⁸

State law was as inconsistent in enforcing grievance arbitration as it was in enforcing collective bargaining agreements generally. The Wisconsin Employment Peace Act of 1939 authorized the Wisconsin Employment Relations Board to appoint competent, impartial and disinterested persons as arbitrators and provided that arbitration agreements were enforceable to the same extent as any other contract.¹⁹ Many courts in other jurisdictions, however, relying on common-law principles or state arbitration acts, were outwardly hostile to labor arbitration. A frequently cited example of state court hostility to labor arbitration is *International Association of Machinists v. Cutler-Hammer, Inc.*²⁰ A clause in the collective bargaining agreement provided that the company would "meet with the Union . . . to discuss the payment of a bonus" ²¹ The union grieved the company's refusal to pay any bonus, contending that the contract bound the company to pay a bonus and left the amount for negotiation, with the arbitrator to fix the amount if the parties could not agree. The court refused to compel the company to arbitrate, reasoning, "If the meaning of the provision of a contract

15. See Witmer, *supra* note 12, at 202-03; Hamilton, *Individual Rights Arising From Collective Labor Contracts*, 3 MO. L. REV. 252, 259-66 (1938)(discussing Missouri cases allowing enforcement despite the at will rule).

16. See, e.g., *Louisville & N.R. Co. v. Bryant*, 263 Ky. 578, 92 S.W.2d 749 (1936); *Crotty v. Erie R.R.*, 149 A.D. 262, 133 N.Y.S. 696 (1912).

17. See Hamilton, *supra* note 15, at 272 and n.97.

18. See generally M. MALIN, *INDIVIDUAL RIGHTS WITHIN THE UNION* 2-3 (1988).

19. Act of May 4, 1939, ch. 57, no. 154, A., 1939 Wis. Laws 77.

20. 271 A.D. 917, 67 N.Y.S.2d 317, *aff'd*, 297 N.Y. 519, 74 N.E.2d 464 (1947).

21. 271 A.D. at 918, 67 N.Y.S.2d at 318 .

sought to be arbitrated is beyond dispute, there cannot be anything to arbitrate, and the contract cannot be said to provide for arbitration.”²²

State courts also actively reviewed the merits of arbitral awards. They justified their intervention by relying on provisions in collective bargaining agreements which restricted the arbitrator to interpreting and applying the contract and prevented the arbitrator from modifying the contract. In many cases, pre-*Trilogy* courts, in the guise of determining whether the arbitrator exceeded the scope of his powers, interpreted the contract de novo. For example, in *Screen Cartoonists Guild, Local 852 v. Disney*,²³ the contract provided for paid holidays when they fell within the work week. The arbitrator held that this provision required the company to pay holiday pay when the holidays fell on the weekend. The arbitrator acknowledged that the contract defined the regular hours of work as five eight-hour shifts, Monday through Friday, but observed that the contract also provided for premium pay for the sixth and seventh days of a work week. Indeed, the only places where the contract used the term work week were the premium pay and holiday pay clauses. The arbitrator concluded that the parties intended that “work week” include Saturdays and Sundays.

The court refused to enforce the arbitrator’s award. The court reasoned that the term work week as used in the holiday pay clause had to refer to the regular eight hour shifts on Monday through Friday because, if the parties intended to include weekends, there would have been no reason to expressly provide for pay when holidays fell within a work week. Based on this de novo review of the arbitrator’s interpretation, the court concluded that the award conflicted with the clear language of the contract and therefore exceeded the scope of the arbitrator’s authority by modifying, rather than interpreting, the contract.

To a similar effect is the court’s decision in *Western Union Co. v. Communications Association*.²⁴ The arbitrator had held that the contractual no strike clause did not bar the union from refusing to handle “hot traffic,” that is messages for employers with whom the union had a dispute. The arbitrator based his conclusion on a custom in the trade whereby non-striking employees were generally allowed to refuse to handle hot traffic. The court, however, disagreed, finding that the award conflicted with the court’s broad interpretation of the no strike clause’s

22. *Id.* See generally Summers, *Judicial Review of Labor Arbitration or Alice Through the Looking Glass*, 2 *BUF. L. REV.* 1 (1952).

23. 74 Cal. App. 2d 414, 168 P.2d 983 (1946).

24. 299 N.Y. 177, 86 N.E.2d 162 (1949). For detailed criticism of the decision, see Mayer, *Judicial Bulls in the Delicate China Shop of Labor Arbitration*, 2 *LAB. L.J.* 502 (1951).

prohibition of "stoppages of work" and concluded that the arbitrator improperly modified the contract. These and similar decisions led Professor Clyde Summers to characterize judicial involvement in arbitration as follows:

Undaunted by their adventures in the Wonderland of labor disputes, the courts have eagerly entered the Looking Glass World of labor arbitration. Anxious to join in the activities, they have been unaware of their awkwardness and undismayed by their blunders. Like Alice, they have not been entirely content to be pawns, but have longed to be queens in this world quite reversed from their own.²⁵

II. THE FEDERALIZATION OF COLLECTIVE BARGAINING AND THE *TRILOGY*

The judicial hostility toward labor arbitration began to change with the federalization of collective bargaining. The Labor Management Relations Act of 1947 declared a federal labor policy favoring arbitration.²⁶ Section 301 provided that actions for breach of contracts between a labor organization and an employer may be brought in federal district court.²⁷ In its seminal *Lincoln Mills* decision,²⁸ the Supreme Court interpreted section 301 to federalize the common law of collective bargaining agreements.

Lincoln Mills produced considerable negative commentator reaction. Professors Alexander Bickel and Harry Wellington predicted that courts would be called upon to draft a law of labor contracts on a case-by-case basis and would rely primarily on the common law of commercial contracts. They considered this to be unfortunate, and predicted, in light of prior judicial involvement with collective bargaining, a negative result.

[A] half-century of often painful and disagreeable experience cries aloud that labor problems emphasize most dramatically the limitations of the judicial process as an instrumentation for the formulation of social policy. It is not likely that the common law of contracts will prove a more fitting source of rules to bridle the forces of labor unrest than the common law of property or the common or Sherman Act law of unfair competition, on which courts have drawn in the past.²⁹

Similarly, Professor Benjamin Aaron expressed concern that *Lincoln*

25. Summers, *supra* note 22, at 1; see also Scoles, *Review of Labor Arbitration Awards on Jurisdictional Grounds*, 17 U. CHI. L. REV. 616 (1950).

26. "Final adjustment by a method agreed upon by the parties is declared to be the desirable method for settlement of grievance disputes" 29 U.S.C. § 173(d) (1988).

27. 29 U.S.C. § 185(a) (1988).

28. *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448 (1957).

29. Bickel & Wellington, *Legislative Purpose and the Judicial Process: The Lincoln Mills Case*, 71 HARV. L. REV. 1, 24-25 (1957).

Mills signaled the coming of a heavy handed federal law of collective bargaining agreements which would ensure that those who lost in arbitration would seek and receive a more hospitable judicial forum in which the award would be reviewed.³⁰

With perfect hindsight, we can see that *Lincoln Mills* became the intermediate step between enactment of the LMRA and the *Trilogy*.³¹ Although the Court has ruled on other aspects of the federal common law of collective bargaining agreements,³² the *Trilogy* is certainly its most far-reaching interpretation.

In *American Manufacturing* and *Warrior and Gulf* the Court put such cases as *Cuttler-Hammar* to rest. The Court declared that the federal labor policy favoring arbitration required that courts not consider the merits of a grievance in the guise of ruling on arbitrability. The Court recognized that when parties agree to be bound by a grievance and arbitration procedure they agree that in the event they cannot settle a dispute over what their contract means, the contract means whatever a mutually selected arbitrator reads it to mean. Thus, although substantive arbitrability is an issue for the court, a court must avoid entanglement with the merits of the grievance and leave that matter entirely to the arbitrator. Therefore, unless it can be said with positive assurance that the grievance is not arbitrable, the court must order arbitration.

A comparison of Judge Fuld's dissent in *Cutler-Hammer* with Justice Douglas' opinion in *American Manufacturing* markedly demonstrates the *Trilogy's* impact on the judicial approach to determining arbitrability. Judge Fuld argued that the grievance was arbitrable because reasonable minds could differ over the interpretation of the contract's provision that the parties would discuss a bonus, but conceded that, "A claim may be so unconscionable or a defense so frivolous as to justify the Court in refusing to order the parties to . . . arbitration."³³ Justice Douglas, in contrast, opined that even patently frivolous grievances must proceed to arbitration. He quoted favorably from Professor Archibald Cox who urged that arbitration of even frivolous grievances

30. Aaron, *On First Looking into the Lincoln Mills Decision*, PROCEEDINGS OF THE TWELFTH MEETING, NATIONAL ACADEMY OF ARBITRATORS 1 (1959).

31. Other commentators, similarly aided by hindsight, have debated whether the fears of *Lincoln Mills* were justified or whether the *Trilogy* was pre-ordained. Compare Morris, *Twenty Years of Trilogy: A Celebration*, PROCEEDINGS OF THE THIRTY-THIRD MEETING, NATIONAL ACADEMY OF ARBITRATORS 331 (1981) with St. Antoine, *Judicial Review of Labor Arbitration Awards: A Second Look at Enterprise Wheel and Its Progeny*, 75 MICH. L. REV. 1137 (1977).

32. See, e.g., *Carbon Fuel Co. v. United Mine Workers*, 444 U.S. 212 (1979); *Local 721, United Packinghouse, Food & Allied Workers v. Needham Packing Co.*, 376 U.S. 247 (1964).

33. 297 N.Y. at 520, 74 N.E.2d at 464.

serves a therapeutic function in the work place.³⁴ Thus, the Court recognized that grievance arbitration serves broader purposes than does judicial resolution of disputes.

In *Enterprise Wheel* the Court put to rest decisions such as *Disney* and *Western Union*. The Court made clear that courts must not rely on contract language confining the arbitrator to interpreting the collective bargaining agreement as an invitation to review arbitral interpretations de novo. The Court reiterated that contract interpretation is for the arbitrator, and established the duty of a court to enforce the award as long as the award draws its essence from the collective bargaining agreement.

III. LABOR RELATIONS, LABOR LAW AND ARBITRATION 30 YEARS LATER

The environment in which labor arbitration operated in 1960 was characterized by a strong, stable labor movement, confined almost entirely to the private sector, negotiating collective bargaining agreements to regulate otherwise unregulated work places. Each of these characteristics has changed markedly over the last thirty years.

In 1960, organized labor was strong and stable. There were approximately 15,516,000 union members and unions represented 28.6 percent of the non-agricultural work force. Although union density had declined from a peak of 32.5 percent of the non-agricultural work force in 1953, union density remained stable while total membership grew over the next fifteen years.³⁵ Union influence on the work place, moreover, was not confined to the employees actually covered by collective bargaining agreements. Many employers extended many of the benefits that unions gained for their members through collective bargaining to the non-unionized segments of their work forces. Many non-unionized employers imported features of collective bargaining agreements into their work places as well. Collective bargaining had an overall effect of regularizing employment relations in union and non-union shops alike.³⁶

Union influence as a regulator of the work place has declined markedly since the *Trilogy*. In 1990, only 16.1 percent of the work force were

34. 363 U.S. at 568 n.6 (quoting Cox, *Current Problems in the Law of Grievance Arbitration*, 30 ROCKY MTN. L. REV. 247, 261 (1958)).

35. Congressional Research Service, Report on Implications for Economic Policy and Labor Legislation of Decline in Union Membership (1986). By 1975, union membership had grown to 22,153,000 and unions represented 28.9 percent of the non-agricultural work force.

36. See generally S. SLICHTER, J. HEALY & R. LIVERNASH, *THE IMPACT OF COLLECTIVE BARGAINING ON MANAGEMENT* (1960).

union members.³⁷ As the percentage of the work force represented by unions has declined, so has the extent of the collective bargaining agreement's role in regulating the work place.

In 1960, the nation relied on collective bargaining as the primary regulator of the work place. The only major federal legislation regulating the work place other than the National Labor Relations Act was the Fair Labor Standards Act. Indeed, this situation was consistent with the congressional vision in enacting the NLRA, a vision of private collective bargaining redressing inequality in the work place with enforcement through private grievance arbitration.³⁸

Collective bargaining, however, did not provide the solution to all problems of the work place. Perhaps collective bargaining's most significant inadequacy was its failure to handle racial discrimination in employment. In many areas of the economy, unions contributed to the problem. In others, they failed to be part of the solution.³⁹ Recognition of collective bargaining's failure to provide equal employment opportunity contributed to enactment of Title VII of the Civil Rights Act of 1964.⁴⁰ This was followed by the Age Discrimination in Employment Act,⁴¹ the Occupational Safety and Health Act,⁴² and the Employment Retirement Income Security Act.⁴³ More recent additions have included the Worker Adjustment Retraining Notification Act,⁴⁴ the Employee Polygraph Protection Act,⁴⁵ and Title II of the Americans with Disabilities Act.⁴⁶

In 1960 employees not protected by collective bargaining agreements were generally regarded as terminable at will. Although a year earlier, the California Appellate Court recognized a cause of action in tort for an employee fired allegedly for refusing to perjure himself before a legislative committee,⁴⁷ it would be another 14 years before a court in another jurisdiction recognized a similar tort claim.⁴⁸ Since that time, a majority of jurisdictions have come to recognize the tort of abusive dis-

37. *Union Membership Stays on Downward Trend, Falling to 16.1 Percent of Employment*, DAILY LAB. REP. (BNA) No. 26 at B-8 (Feb. 7, 1991).

38. See Summers, *Labor Law as the Century Turns: A Changing of the Guard*, 67 NEB. L. REV. 7, 8-10 (1988).

39. See generally W. GOULD, BLACK WORKERS IN WHITE UNIONS (1977); Summers, *supra* note 38, at 11.

40. 42 U.S.C. § 2000e (1988).

41. 29 U.S.C. §§ 621-50 (1988).

42. 29 U.S.C. §§ 651-78 (1988).

43. 29 U.S.C. §§ 1001-1381 (1988).

44. 29 U.S.C. § 2101 (1990), Pub. L. 100-379, 102 Stat. 890 (1988).

45. 29 U.S.C. §§ 2001-06 (1990), Pub. L. 100-347, 102 Stat. 646 (1988).

46. 42 U.S.C. §§ 12101-12213, Pub. L. 101-336, 104 Stat. 338 (1990).

47. *Petermann v. International Bd. of Teamsters*, 174 Cal. App. 2d 184, 344 P.2d 25 (1959).

48. *Frampton v. Central Indiana Gas Co.*, 260 Ind. 249, 297 N.E.2d 425 (1973).

charge.⁴⁹ Many jurisdictions have softened their inflexible rule in contract that indefinite employment agreements are terminable at will and have recognized contractual promises of job security.⁵⁰ Many jurisdictions have also applied traditional torts to the work place in new ways, recognizing claims for defamation,⁵¹ intentional infliction of emotional distress,⁵² and invasion of privacy.⁵³

Thus, unlike the arbitrator at the time of the *Trilogy* who generally was able to assume that he or she was the exclusive forum to redress alleged wrongs in the work place and that the collective bargaining agreement was the exclusive source of restraints on management's conduct, today's arbitrator is called on to resolve grievances which raise issues that also are capable of resolution before administrative agencies and courts. A consequence of increased statutory and judicial regulation of the work place is that today's arbitration award may draw its essence from the contract but still be denied enforcement if a court finds that it is contrary to public policy.⁵⁴ Furthermore, with increasing frequency, employees face situations where litigating may yield a significantly greater recovery than resorting to the grievance and arbitration procedure. For example, a discharged employee may decide to seek compensatory and punitive damages in a tort action instead of, or in addition to, reinstatement and back pay through the grievance procedure. This has led to frequent litigation over the degree to which a collectively bargained grievance and arbitration procedure precludes employees from alternative judicial and administrative forums.⁵⁵

49. See generally Lopatka, *The Emerging Law of Wrongful Discharge—A Quadrennial Assessment of the Labor Law Issue of the 80s*, 40 BUS. LAW. 1, 1, 1984 (suggesting that three-fifths of the states recognize a common-law cause of action for wrongful discharge).

50. See, e.g., *Hoffman-LaRoche, Inc. v. Campbell*, 512 So. 2d 725 (Ala. 1987); *Foley v. Interactive Data Corp.*, 47 Cal. 3d 654, 765 P.2d 373 (1988); *Toussaint v. Blue Cross & Blue Shield of Michigan*, 408 Mich. 579, 292 N.W.2d 880 (1980); *Pine River State Bank v. Mettelle*, 333 N.W.2d 622 (Minn. 1983).

51. See, e.g., *Churchey v. Adolph Coors Co.*, 759 P.2d 1336 (Colo. 1988); *Lewis v. Equitable Life Assurance Soc'y*, 389 N.W.2d 876 (Minn. 1986).

52. See, e.g., *Counce v. MBM Co.*, 266 Ark. 1064, 597 S.W.2d 92 (1979); *Murray v. Bridgeport Hosp.*, 40 Conn. Supp. 56, 480 A.2d 610 (1984); *Agis v. Howard Johnson Corp.*, 371 Mass. 140, 355 N.E.2d 315 (1976); *Contieras v. Crown Zellerbach Corp.*, 88 Wash. 2d 735, 565 P.2d 1173 (1977).

53. See, e.g., *Samore v. Eric Pool*, 217 Cal. App. 3d 1087, 266 Cal. Rptr. 280 (1990) (right based in California Constitution); *Patel v. Thomas*, 793 P.2d 632 (Colo. Ct. App. 1990); *Miller v. Motorola, Inc.*, 202 Ill. App. 3d 976, 560 N.E.2d 900 (1990).

54. See *United Paperworkers Int'l Union v. Misco, Inc.*, 484 U.S. 29 (1987); *W.R. Grace & Co. v. Local 759, Int'l Union of United Rubber, Cork, Linoleum & Plastic Workers*, 461 U.S. 757 (1983).

55. See, e.g., *Lingle v. Norge Div. of Magic Chef, Inc.*, 486 U.S. 399 (1988); *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202 (1985); *McDonald v. City of West Branch*, 466 U.S. 284 (1984); *Barrentine v. Arkansas-Best Freight Sys., Inc.*, 450 U.S. 728 (1981); *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974).

The increase in outside regulation of the work place has also increased the pressure on arbitrators to consider that regulation in addition to the express provisions of the collective bargaining agreement. The National Labor Relations Board has added to that pressure. Although the Board's seminal *Spielberg*⁵⁶ decision (announcing a policy of deferring to arbitration awards in certain unfair labor practice proceedings growing out of the same incident that gave rise to the grievance) was five years old when the *Trilogy* was decided, it was not until eleven years later that the Board announced its *Collyer*⁵⁷ doctrine denying charging parties who chose not to use the grievance procedure their choice of forum before the NLRB.

The increased pressure on arbitrators to consider the law external to the collective bargaining agreement when resolving grievances has spawned a debate among commentators over the degree, if any, to which arbitrators should succumb to this pressure.⁵⁸ It has also engendered debate over the degree to which the influence of increased legal regulation of the work place will erode the level of judicial deference to and, consequently, finality of arbitration awards.⁵⁹ Furthermore, as fewer employees have a collectively bargained grievance procedure available to them, commentators and policymakers have begun exploring arbitration's exportability from the collectively bargained grievance process to the unorganized work force.⁶⁰

Another major development in the thirty years since the *Trilogy* which has had a major impact on the institution of labor arbitration has

56. 112 N.L.R.B. 1080 (1955).

57. 192 N.L.R.B. 837 (1971).

58. See, e.g., Gross, *The Labor Arbitrator's Role: Tradition and Change*, 25 ARB. J. 221 (1970); Howlett, *The Arbitrator, The NLRB, and the Courts*, in PROCEEDINGS OF THE TWENTIETH MEETING, NATIONAL ACADEMY OF ARBITRATORS 67 (1967); Malin & Stallworth, *Affirmative Action Issues and the Role of External Law in Labor Arbitration*, 20 SETON HALL L. REV. 745 (1990); Meltzer, *Ruminations About Ideology, Law and Labor Arbitration*, in PROCEEDINGS OF THE TWENTY-FIRST MEETING, NATIONAL ACADEMY OF ARBITRATORS 1 (1967); Mittenthal, *The Role of Law in Arbitration*, in PROCEEDINGS OF THE TWENTY-FIRST MEETING, NATIONAL ACADEMY OF ARBITRATORS 43 (1968); Morris, *NLRB Deferral to the Arbitration Process: The Arbitrator's Awesome Responsibility*, 7 IND. REL. L.J. 290 (1985); Scheinholtz & Miscimarra, *The Arbitrator as Judge and Jury: Another Look at Statutory Law in Arbitration*, 40 ARB. J. 55 (1985); Sovern, *When Should Arbitrators Follow Federal Law*, in PROCEEDINGS OF THE TWENTY-THIRD MEETING, NATIONAL ACADEMY OF ARBITRATORS 29 (1970); Seitz, *The Arbitrator's Responsibility for Public Policy*, 19 ARB. J. 23 (1964); Zirkel, *The Use of External Law in Labor Arbitration: An Analysis of Arbitral Awards*, 1985 DET. C.L. REV. 31.

59. See, e.g., Feller, *The Coming End of Arbitration's Golden Age*, in PROCEEDINGS OF THE TWENTY-NINTH MEETING, NATIONAL ACADEMY OF ARBITRATORS 97 (1977); St. Antoine, *supra* note 31.

60. See, e.g., Blumrosen, *Exploring Voluntary Arbitration of Individual Employment Disputes*, 16 U. MICH. J.L. REF. 249 (1983); Edwards, *Alternative Dispute Resolution: Panacea or Anathema?*, 99 HARV. L. REV. 668 (1986); Getman, *Labor Arbitration and Dispute Resolution*, 88 YALE L.J. 916 (1979).

been the organization of public employees. In 1960, the public sector was almost completely unorganized. Only 6 percent of all union members worked in the public sector. Wisconsin had enacted a public employment statute a year earlier which guaranteed municipal employees the right to organize but which did not impose a duty to bargain on public employers and contained no administrative structure to enforce the act.⁶¹

In the years following the *Trilogy*, public sector collective bargaining began to take root. In 1962, President Kennedy issued Executive Order 10,988⁶² which granted federal government employees the right to organize and bargain collectively. In 1964, Congress enacted the Urban Mass Transit Act which provided funds for local governments to take over previously private mass transit systems. Section 13(c) of UMTA required that the collective bargaining rights of transit employees be preserved in the process of converting their employment from the private to the public sector. These and other developments led many states to enact statutes granting public employees collective bargaining rights. In 1962, Wisconsin placed administration of its public employee bargaining law in the hands of the Wisconsin Employment Relations Board.⁶³ WERB had been administering the Wisconsin Employment Peace Act since 1939. It naturally placed a private sector imprimatur on public sector labor law.

Today, most states have statutes granting public employees the right to bargain collectively. This has had a dramatic effect on the growth of public sector unions and the increase in the influence of public employees in unions. In contrast to 1960, in 1984, public employment accounted for 29 percent of all union members, and, a year later, 43.1 percent of all government workers were represented by a labor union.⁶⁴ These unions' collective bargaining agreements have accounted for a steadily increasing share of the labor arbitration conducted in the United States.⁶⁵

The articles in this symposium address the impact of the changes in

61. Act of Oct. 2, 1959, ch. 509, no. 309, A., 1959 Wis. Laws 623.

62. Exec. Order No. 10,988, 3 C.F.R. 521 (1962) (1959-63 compilation), *reprinted in* 1962 U.S. CODE CONG. & ADM. NEWS 4269.

63. Act of Feb. 7, 1962, ch. 663, no. 336, A., 1962 Wis. Laws 917.

64. Congressional Research Service, *supra* note 35.

65. For example, during the period August 1984 through August 1985, 61.7 percent of the labor arbitrations administered by the American Arbitration Association arose in the private sector and 38.3 percent arose in the public sector. During the period January 1990 through October 1990, the private sector's share of A.A.A.'s labor arbitrations declined to 50.6 percent and the public sector share increased to 49.4 percent. Data supplied in a telephone conversation with Earl Baderschneider, American Arbitration Association, January 24, 1991. *See also A Look at Labor Arbitration Trends of the '80's*, STUDY TIME No. 3 (1991) p.1, 3 (In 1981 35 percent of A.A.A. cases arose in the public sector; by 1990 the cases were almost evenly divided between public and private sectors).

the workplace in the three decades since the *Trilogy* on the law of and institution of labor arbitration. In *Labor Arbitration as a Continuation of the Collective Bargaining Process*, Professor Charles Craver observes that in the *Trilogy*, the Court recognized that labor arbitration must not be viewed as a quasi-judicial proceeding. Rather, it is an integral part of the collective bargaining process and the on-going relationship between the union and employer. Judicial recognition of the arbitrator's role as the parties' designated reader of the contract is the guiding force behind the *Trilogy's* broad deference to arbitration, both in deciding whether to order a reluctant party to arbitrate and in deciding whether to enforce an arbitrator's award. Professor Craver applauds the general acceptance of this view by the lower courts in applying the *Trilogy* and observes their salutary effects on labor relations. He criticizes the occasional decision which appears to stray from these principles of judicial restraint.

Professor Craver then turns to the arbitrator's role in an era of increased regulation of the work place from authority outside the collective bargaining agreement. He writes that where the parties in their contract or through their submission agreement authorize an arbitrator to consider legal authority external to the contract, they have agreed to be bound by that arbitrator's interpretation. They have concluded that submission of external legal controversies to the arbitrator will have the same salutary effects on their on-going collective bargaining relationship as does submission of contractual issues. Under these circumstances, courts should defer to the parties' agreement and enforce the arbitrator's award unless the arbitrator's legal interpretations are unequivocally erroneous.

Professor Craver next addresses the potential for conflict between an arbitrator's award and public policy embodied in the law external to the contract. To reconcile the arbitrator's role as part of the collective bargaining process with the court's role as guardian of public policy, Professor Craver urges that courts deny enforcement to arbitration awards only if they would refuse to countenance the same result if the parties had expressly agreed to it.

Turning to the National Labor Relations Board's policies for deferring unfair labor practice charges to the grievance and arbitration procedures, Professor Craver concludes that they too should be guided by the role of arbitration in the collective bargaining process. He concludes that current Board policy is over-broad. He urges that the NLRB defer prior to arbitration only those charges under section 8(a)(5) which turn on the interpretation of the collective bargaining agreement. He criticizes the Board for deferring charges which assert individual rights to be free from

anti- or pro-union discrimination and to be free from interference, restraint and coercion of section seven rights. He argues that such deferral effectively uses arbitration as a quasi-judicial procedure and undermines employee rights. Concerning post-arbitration deferral, Professor Craver argues for broad deferral to arbitration awards in section 8(a)(5) cases, but cautions against such broad deferral in individual rights cases. He argues that the Board should treat an arbitration award in section 8(a)(1) and section 8(a)(3) cases as it would a decision by an administrative law judge, reviewing the facts for substantial evidence support and reviewing the legal conclusions de novo.

Professor Craver expresses concern that labor arbitration has become more formalized in recent years. He is suggesting, perhaps, that arbitration is beginning to resemble a quasi-judicial proceeding. He concludes with recommendations to the parties and arbitrators to ensure that arbitration continues to play its salutary role as part of the on-going collective bargaining process.

Professor Ann Hodges focuses on the growth of collective bargaining and, with it, arbitration in the public sector in *The Steelworkers Trilogy in the Public Sector*. She observes that initially arbitration in the public sector was viewed as an unlawful delegation of governmental authority to a private party. Although courts today have generally rejected this blanket prohibition on arbitration, concerns over delegability continue to infect judicial attitudes toward arbitration in the public sector. Although some courts strictly apply the *Trilogy* to public sector labor arbitration, some expressly reject it and others give it lip service but reach results that are inconsistent with the *Trilogy*. Furthermore, in addition to pre-arbitration judicial review of the contract to determine arbitrability and post-arbitration judicial review of the award for consistency with the arbitrator's authority, courts in the public sector also review promises to arbitrate and arbitration awards for legality. The nondelegability doctrine furnishes the most common reason for judicial refusal to enforce a promise to arbitrate or an arbitration award.

Professor Hodges addresses four common arguments for treating public sector arbitration differently from its private sector counterpart. These arguments are (1) the lack of sufficient experience with public sector labor arbitration to establish it firmly as a preferred method of dispute resolution; (2) the need to preserve decisionmaking authority to those who are accountable to the public (an argument which Professor Hodges characterizes as a restatement of the nondelegability doctrine); (3) the public employer's statutory responsibility to provide services to

the public; and (4) the prevalence of law external to the contract governing public sector employment.

Professor Hodges rejects the contention of insufficient experience with public sector labor arbitration as empirically wrong and logically unsound. Arbitration in the public sector serves the same function as a continuation of the process of collective bargaining as it does in the private sector. She then focuses on the need for public accountability of decisionmakers. She argues that the nondelegability doctrine is really an issue of public policy review of the arbitration award. She argues for narrow public policy review because a broad standard of public policy would undermine the salutary effects of arbitration and interfere with the duty to bargain.

Professor Hodges unmasks the argument based on the employer's responsibility to provide services to the public as another version of the nondelegability doctrine. In essence, the argument states that the public employer has been delegated the authority to determine how best to carry out its mission. Professor Hodges rejects this as a general proposition limiting arbitration because it is inconsistent with mandatory, or even permissive, bargaining. She recognizes that there may be situations where the legislature has delegated to the employer the exclusive authority to implement its mission and that in those cases arbitration must be denied as a matter of law. She urges that such instances be confined to statutes which unequivocally commit a matter to the employer's exclusive determination.

Finally, Professor Hodges considers the impact of a pervasive system of legal regulation of public employment on arbitration. She observes that this may result in arbitration awards which do not violate any express command of positive law but, nevertheless, are based on an arbitrator's erroneous interpretation of the law. She urges that the arbitrator's error is not grounds for judicial intervention because the arbitrator's interpretation is what the parties bargained for, it is not binding on anyone other than the immediate parties, and the parties remain free to correct it in subsequent negotiations. She concludes that the *Trilogy* should apply with equal force in the public sector as it carries in the private sector.

In *Limiting Section 301 Preemption: Three Cheers for the Trilogy, Only One for Lingle and Lueck*, Professor Michael Harper addresses the relationship between labor arbitration and state employment law. He observes that the *Trilogy* developed a presumption that the parties intended to include all claims, including frivolous grievances, in their arbitration

procedure unless they stated with positive assurance claims which were to be excluded, and a presumption that the parties intended judicial enforcement of all awards based on the arbitrator's construction of the agreement.

Professor Harper defends the *Trilogy* presumptions on several grounds. The costs of bargaining for the level of arbitral authority established in the *Trilogy* may be high enough to make a difference in the arbitration clause agreed to without benefit of the *Trilogy* presumptions. This would be unfortunate because, in the *Trilogy*, the Court correctly divined the normal expectations of unions and employers regarding arbitration. Hindsight has validated the *Trilogy* presumptions as parties have rarely tried to contract around them. The Court took the best approach by requiring a specific listing of matters not subject to arbitration, as this provides greater ease and certainty when contracting around the presumptions than would a presumption of a narrower scope of arbitrability.

Professor Harper writes that all federal common law of collective bargaining agreements under section 301 is subject to contracting around. The *Trilogy* established a federal policy of channeling the parties toward broad arbitral authority but did not require it. In this manner, the *Trilogy* shows how a uniform section 301 law facilitates collective bargaining.

Turning to section 301 preemption of state employment law, Professor Harper finds that the Supreme Court has focused its inquiry on whether the state claim involves the interpretation of a collective bargaining agreement. Professor Harper criticizes this as confusing a federal policy that arbitrators should interpret collective bargaining agreements in the first instance which informs the content of section 301 law with the policy that dictates that section 301 law be applied uniformly in state, as well as, federal courts. He urges basing section 301 preemption on the need to apply uniform federal law to facilitate collective bargaining, rather than the need to have an arbitrator, instead of a court, interpret the provisions of a collective bargaining agreement.

Professor Harper thus writes that the key preemption question is whether state law rights exist independently of the collective bargaining agreement. Section 301 preempts only state laws which purport to grant additional negotiable rights to employees because of the terms of a collective bargaining agreement. The existence of such rights depends on the terms of the collective bargaining agreement and, therefore, must be governed by section 301.

Professor Harper contends that section 301 preemption, like other

aspects of section 301 law, only creates a presumption; in this case, a presumption that the parties do not intend to create obligations and rights defined by state law. This presumption makes sense in the same way as the *Trilogy*. It furthers the congressional policy that the parties control the collective bargaining agreement. It correctly divines that almost all parties will not want to complicate contract administration by incorporating state law. Finally, it places the burden on the party wanting to rely on state law to say so expressly in negotiations.

Turning to nonwaivable state employment rights, Professor Harper finds two problems with such state laws which leverage rights under a collective bargaining agreement. They inhibit bargaining by making its impact less certain and they inhibit bargaining by making the contractual rights being leveraged more expensive for the union to obtain. At one level, all state laws setting minimum employment standards raise overall labor costs and thereby make the attainment of other contractual rights more difficult for the union. But, Congress did not intend to preempt all such state laws. Therefore, the key is whether state law makes negotiating a particular benefit more costly by attaching consequences to it. Even here, Professor Harper sees a need to distinguish between state laws which attach procedural remedies and those which attach substantive rights to collectively bargained rights. Professor Harper applies his preemption analysis to numerous state employment laws yet to be considered by the Supreme Court.

Professor Samuel Estreicher in *Arbitration of Employment Disputes Without Unions* and Professor Matthew Finkin in his commentary on Professor Estreicher's article address exporting collectively bargained grievance arbitration into the nonunion setting. Professor Estreicher observes that the *Trilogy* is premised on a substantive policy in favor of arbitration because of its role in the collective bargaining process. He finds this model of arbitration as an element of industrial self-government inapplicable to the nonunion setting. Rather, in the absence of a union, arbitration must be viewed as a substitute for litigation.

Professor Estreicher argues that agreements to arbitrate employment contract disputes between relatively sophisticated parties should be enforced. Presumably, the parties are in the best position to decide which forum best suits their interests. Arbitration is usually cheaper, faster, produces a more acceptable result than litigation and saves public resources. Employers may have an advantage if they are represented by counsel when employees are not and because employers are repeat players who may be the source of future work for the arbitrators. Professor Estreicher cautions against overstating these advantages and suggests

that the development of an employees' bar may counter employer advantages. Professor Estreicher, however, rejects a *Trilogy* broad presumption of arbitrability because arbitration in the nonunion setting is based on principles of voluntarism and freedom of contract rather than a policy of promoting industrial self-government.

Professor Estreicher next considers the enforceability of arbitration provisions in unilateral employer employment policies. He recognizes that employees affected by these policies often will not be sophisticated and may be disadvantaged by the absence of representation and by not being repeat players. But, he argues, these potential disadvantages should not defeat enforcement of these arbitration policies. Courts should not pick and choose which unilateral employer policies they will enforce. Furthermore, if courts refuse to enforce employer arbitration policies, employers might be inclined to weaken or repeal their substantive employment policies, thereby leaving employees worse off.

Professor Estreicher writes that the impact of employees' lack of representation and the repeat player phenomenon will be diminished if the employer's policy provides for representation of employees. Although technically outside this symposium, Professor Clyde Summers' Kenneth M. Piper Memorial Lecture suggests one source of such representation—a union which has not attained the majority support necessary to serve as exclusive bargaining representative. Professor Estreicher focuses on the possibility of a system of peer representatives. He confronts the argument that such a system may violate the N.L.R.A.'s prohibition on employer interference, domination or support of a labor organization. He writes that it is difficult to understand why the use of employee-advocates to represent employee-claimants threatens the conditions for forming independent unions. He concludes that a peer representation system would not violate the N.L.R.A.

Professor Estreicher next turns to written agreements to arbitrate all employment claims. He contrasts the Supreme Court's consistent holdings that arbitration under collective bargaining agreements does not preclude litigation under employment statutes with the Court's decisions applying commercial arbitration agreements to claims under other regulatory statutes. He proposes that individual agreements to arbitrate employment claims be reconciled with employment statutes by requiring resort to pre-litigation administrative procedure before arbitrating and by subjecting awards to judicial review for errors of law and clearly erroneous findings of fact.

Finally, Professor Estreicher considers proposals for statutory just

cause protection for employees. He urges that arbitration of these claims is inferior to submission of the claims to an administrative agency. The agency can screen claims before hearing, can handle the claims at a lower public cost, and will be in a better position to interpret and apply a statutory, as opposed to a contractual, just cause standard.

Professor Finkin disagrees with Professor Estreicher on several points. He questions whether an employee, sophisticated or not, can prospectively knowingly and voluntarily waive the right to a judicial forum for federal statutory rights through a general agreement to arbitrate any disputes arising out of the employment relationship. He offers several reasons why employees should not be bound to arbitrate their statutory claims.

Professor Finkin writes that even the sophisticated employee who expressly bargained the terms of her employment contract may not have freely chosen prospectively to waive a judicial forum for her statutory claims. Arbitration, with its absence of judicial safeguards and pre-hearing discovery, may not be an advantageous forum for such claims and it is not likely that in making an initial employment contract, the employee even contemplates that the employer might violate a federal statute in the future. As for the unsophisticated employee who does not bargain over her employment contract, subjecting her statutory claims to final and binding arbitration allows the employer to dictate unilaterally the waiver of the right to a judicial forum. Furthermore, Professor Finkin argues, the enforcement of federal labor statutes implicates, not only the competing private interests of employer and employee, but also the public interest which led to the statutes' enactments. Public law should not be privatized.

Professor Finkin also questions the level of deference courts should give to arbitration awards regarding contractual employment rights. He would condition judicial deference on the provision of a truly independent third party arbitrator and the employee's ability to be represented by counsel of her choice.

Professor Finkin and Professor Estreicher agree that some of the dangers of non-union arbitration systems arise if the employees cannot secure competent representation. Professor Finkin disagrees with Professor Estreicher over the legality of employer-sponsored peer representation. Professor Finkin views such plans as falling within the broad sweep on what is now section 8(a)(2) of the N.L.R.A.

Professor David Lewin, in his article, *Grievance Procedures in Non-union Workplaces: An Empirical Analysis of Usage, Dynamics, and Out-*

comes, places the Estreicher-Finkin debate in an empirical context. Professor Lewin's study finds that most employers have some type of grievance procedure and a surprisingly substantial minority provide for third party arbitration. Grievance procedure usage in the nonunion firm is substantially lower than in a unionized company, but issues giving rise to grievances are similar. The nonunion represented grievant is more likely to intend to leave the employer whereas the union represented grievant is more likely to intend to stay. The nonunion represented grievant also is more likely to be subject to retaliation.

Finally, Professor Theodore St. Antoine's *Afterword* synthesizes all of the other papers examining the adaptability of labor arbitration to a changing workplace. After examining the numerous ways in which the institution of labor arbitration has been and will continue to be called upon to adapt to changing needs, Professor St. Antoine concludes the symposium on a optimistic note, suggesting that the institution of labor arbitration "go all the way from the private, contractual arbitration of statutory issues to public, contractual arbitration and eventually reach publicly mandated statutory arbitration in the private sector." In his view, the "now-almost-venerable process [of labor arbitration] is up to the challenge."