2000

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

Daniel R. Ernst
Georgetown University Law Center, ernst@law.georgetown.edu

This paper can be downloaded free of charge from:
https://scholarship.law.georgetown.edu/facpub/513


This open-access article is brought to you by the Georgetown Law Library. Posted with permission of the author.
Follow this and additional works at: https://scholarship.law.georgetown.edu/facpub
Part of the Labor and Employment Law Commons
SYMPOSIUM:
LOOKING BACK ON LABOR LAW AND THE STATE IN THE EARLY TO MID-
TWENTIETH CENTURY

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

Daniel R. Ernst*

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

* Professor of Law, Georgetown University Law Center. A.B. 1980, Dartmouth College; J.D. 1983, University of Chicago; LL.M. 1988, University of Wisconsin; Ph.D. 1989, Princeton University. The author served as Chair of the Program Committee for the 1998 annual meeting of the American Society for Legal History. Like the panelists, he is grateful to Wythe Holt, University Research Professor at the University of Alabama School of Law and a member of the audience in Seattle, for urging that the symposium be published, to Eric A. Chiappinelli, Professor of Law at the Seattle University School of Law and Chair of the Local Arrangements Committee for the meeting, for suggesting that the editors of the Seattle University Law Review consider soliciting papers from the conference, and to the editors and staff of the Review for being undaunted by topics and sources not typically encountered in the pages of student-edited law journals.

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

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

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

---


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


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

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

---

8. Tomlins, supra note 1, at 328.
10. See Christopher L. Tomlins, The Heavy Burden of the State: Revisiting the History of Labor Law in the Interwar Period, 23 SEATTLE U. L. REV. [note 84]; (referring to MELVYN DUBOFSKY, THE STATE AND LABOR IN MODERN AMERICA (1994)). Another development in the 1990s was the entry of political scientists into the fray with books celebrating the NLRA for ending "feudalism" in America, for creating a "democratic political order" that persisted well into the 1960s, and as a paradigm of state building in defense of individual rights. See RUTH O'BRIEN, WORKERS' PARADOX: THE REPUBLICAN ORIGINS OF NEW DEAL LABOR POLICY, 1886–1935 (1998); KARREN ORREN, BELATED FEUDALISM: LABOR, THE LAW AND LIBERAL DEVELOPMENT IN THE UNITED STATES (1991); DAVID PLOTKE, BUILDING A DEMOCRATIC POLITICAL ORDER: RESHAPING AMERICAN LIBERALISM IN THE 1930s AND 1940s (1996).