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# The Future of Organized Labor: Labor Law in the 21st Century

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## Foreword

# The Future of Organized Labor: Labor Law in the 21st Century

Matthew Norris\*

Everyone agrees it is broken. No one agrees on how to fix it. A topic tailor-made for a law review symposium. In the labor law field, where heated rhetoric often drowns out common-sense solutions, the *Minnesota Law Review's* 2013 Symposium, "The Future of Organized Labor: Labor Law in the 21st Century," aimed to assemble a roster of nationally-recognized experts and engage in substantive, measured debate about protecting the rights of workers while adapting to the global marketplace in which today's businesses operate.

In the months we spent planning the symposium and this issue of the *Law Review*, we saw the NLRB's future debated both in our courthouses and in the halls of Congress. We read stories about "the new economic reality" with American workers struggling to scrape by on lower wages as the country slowly rebounds from the Great Recession. We witnessed tragedies in workplaces in developing countries that prompted calls for improved worker safety in the factories that produce many of the clothes we wear and products we use. Just before this issue

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\* Symposium Articles Editor, Volume 98, *Minnesota Law Review*. The author is tremendously grateful to the impressive speakers, panelists, and moderators who graciously gave of their time to make the symposium a success. The faculty, staff, and administration at the University of Minnesota Law School, including Dean David Wippman, deserve a great deal of thanks for their help and support with the symposium. Special appreciation goes to Professors Laura Cooper and Stephen Befort for going above and beyond the call of duty in advising this author throughout the symposium planning process. Putting together a successful symposium is truly a team effort, and it would not have been possible without the tremendous help and dedication of the *Law Review* Board and Staff members. Emily Marshall, Inga Nelson, and Ross Pearson deserve particular credit for their efforts with the early planning of the symposium. Finally, Editor-in-Chief Jake Vandelist lent his steady leadership throughout the process and was always available to step in when needed and helped put out the occasional fire. Copyright © 2014 by Matthew Norris.

went to print, a Volkswagen plant in Tennessee became the latest flashpoint in the debate over organized labor's future, with workers voting down the United Auto Workers. Fueling the debate was Volkswagen management's decision not to oppose the effort while some conservative politicians made a full-throated assault on the organizing effort. The laws that govern our labor relations may be relics of a bygone era, but the topic is as important as it has ever been.

There is no doubt the topic of organized labor is a politically-charged one, but the *Minnesota Law Review* strove to craft a program the dove beneath the partisan talking points and plumbed for a more meaningful dialogue about how to guarantee rights for workers while keeping the wheels of commerce greased, both domestically and internationally. The symposium sprung out of the gate with keynote addresses from nationally-recognized leaders on both sides of the organized labor debate. Craig Becker, General Counsel of the AFL-CIO, and G. Roger King, Of Counsel at Jones Day, both addressed "The Current State of Unions and American Labor Law." Following their speeches, Mr. Becker and Mr. King participated in a moderated discussion led by Ronald Meisburg, a partner at Proskauer Rose LLP and the co-head of the firm's Labor-Management Relations Practice Group.

Mr. Becker explained the drop in private-sector union membership since 1979 has coincided with a decoupling of wages and productivity. In addition to economic consequences, the weakening of labor unions has also impacted the political realm, where business spending is fifteen times that of unions. Mr. Becker advocated for changes in the National Labor Relations Act (NLRA) to account for adaptations in parties' behavior since it was passed and to reflect the economy's evolution since 1935. He stressed the reforms should focus on the NLRA's second purpose—addressing inequality in the economy and bargaining power between employees and businesses. During his own keynote, Mr. King highlighted many headwinds facing unions including declining membership, technology replacing workers, fewer work stoppages, and the right-to-work movement. However, he also explained ways unions can remain relevant in this changing economy, such as worker centers, which allow union access to non-represented workers; implementing "worker councils" like in Europe; and the use of federal and state regulations to put pressure on employers.

Following the keynote addresses, the symposium shifted to the first panel discussion—"Unions in the Crosshairs: How It Happened and the Road Ahead for Labor." Professor Julius G. Getman of the University of Texas Law School examined the topic through the lens of the much-publicized dispute over Boeing's decision to shift assembly work on its 787 Dreamliner from Washington state to South Carolina. Professor Getman asserted that despite the rhetoric, the Boeing dispute actually demonstrated the weakness of organized labor and the NLRB. He cited several reasons for the NLRB's decline, including activism of reviewing courts and politically-motivated decisions by the Board. To solve these issues, Professor Getman advocated shifting away from the political focus of Board appointments by relying on labor relations neutrals and establishing a single appeals court composed of labor experts currently on the bench to review NLRB decisions.

As part of the same panel, Professor Ann C. Hodges, of the University of Richmond, pointed to the Supreme Court's recent class action jurisprudence and arbitration's increasing prevalence in the employment law realm as opportunities for unions to reassert themselves as defenders of workers' rights. Since private attorneys are less inclined to represent employees in individual arbitration cases compared to class action suits, Professor Hodges believes union representation in these cases would provide protection for workers and help recruit new union members. This strategy aligns with recently announced forms of union membership by the AFL-CIO for employees who are not part of collective bargaining agreements.

Joining Professors Getman and Hodges was Philip A. Miscimarra, a member of the NLRB. Inspired by Jared Diamond's Pulitzer Prize-winning book, *Guns, Germs, and Steel: The Fates of Human Societies*, Mr. Miscimarra argued *guns*, *firms*, and *zeal* are behind many issues in labor relations today. In his framework, "guns" refers to the NLRA bargaining model in which parties gain leverage by inflicting economic damage on each other, "firms" refers to companies and unions and their role in a nationwide economy that existed in 1935 when the NLRA became law, and "zeal" refers to the recent contentious discourse regarding labor-management policy. Mr. Miscimarra asserted the reason labor-management issues currently involve so much "zeal" is that union attempts to inflict economic injury on companies may result in economic ruin for businesses in this now-globalized economy, and unions view employer resistance

as a challenge to the unions' institutional existence. He also examined whether these three factors offer any insights about potential alternate paths for those advocating changes to American labor law.

After lunch, the second panel discussion took on a global focus with the topic, "International Labor Law: Opportunity, Solution, or Intrusion?" Mark Schneider, a shareholder at Littler Mendelson P.C., and co-chair of the firm's traditional Labor Law Practice Group, started the conversation with an overview of international labor law. Mr. Schneider addressed global union federations, labor relations in the European Union, works councils, and international framework agreements (IFAs). Professor César F. Rosado Marzán, Assistant Professor of Law at IIT Chicago-Kent College of Law, dove deeper into the topic of IFAs and the role they can play in protecting workers in a global economy. However, he highlighted the concern that disagreements over the interpretation of IFAs could hinder their adoption and usefulness. Professor Marzán recommended non-binding arbitration based on International Labor Organization (ILO) norms to resolve these disputes and suggested arbitration clauses be added to IFAs.

Professor Sara Slinn, Associate Professor at Osgoode Hall Law School at York University in Toronto, contrasted labor relations in the United States and Canada. Unlike the United States, Canada has seen only a slow decline in union density, which has stabilized in recent decades. Research shows the lower union density in the United States results from a lack of access to unionization, not a lack of demand for representation. Stronger labor laws also play a roll. However, Professor Slinn shared that some believe the difference stems from more fundamental cultural, historical, or institutional differences between the two countries, including two perspectives she details in her symposium article in this issue of the *Law Review*.

The fourth panel member was Professor David Weissbrodt from the University of Minnesota Law School. Professor Weissbrodt focused on the United States' compliance with the 189 conventions of the ILO. The United States has not yet ratified six core ILO conventions, and while the ILO and the United States recognize the same basic labor rights, there are differences in the implementation and application of those rights that result in a lower level of coverage and protection for American workers. The disparity between U.S. practice and the ILO principles the country is bound to follow is particularly appar-

ent in the right to strike, treatment of public employees, and the rights of noncitizen workers. Professor Weissbrodt asserted that if the United States wishes to improve its labor rights record, it should bring its labor law and practices into conformity with decisions by the ILO Committee on Freedom of Association.

The symposium's final panel discussion focused on "Achievable Labor Law Reform." Professor Samuel Estreicher of New York University Law School presented a concept he calls "easy in, easy out." Under the plan, employees in relatively broad units would vote every two years via secret ballot. The votes would be held every three years if the union achieved a collective bargaining agreement. The employees would have three options during the vote: continue the union's representation, select another organization, or have no union representation at all. Professor Estreicher explained this reform would make it easier for employees to vote in a union or to remove a union if the employees believe the union is no longer adequately representing them.

Also participating on the panel was Jim Rowader, Vice President and General Counsel of Employee and Labor Relations at Target Corporation. He presented ideas from the article co-authored by Professor Zev J. Eigen, Associate Professor at Northwestern University School of Law, and Sandro Garofalo, Senior Group Manager and Senior Counsel at Target Corporation. Citing problems with the current model of case-by-case adjudication by the NLRB, Mr. Rowader posited that the Board's adjudicative function be transferred to the federal district courts. The NLRB would retain its rulemaking authority, but it would be similar to the Equal Employment Opportunity Commission (EEOC), issuing administrative guidelines, which would not be binding on the courts, rather than legislative rules. Mr. Rowader asserted this reform would leave the Board responsible for its core functions—conducting elections, resolving representation issues, and investigating unfair labor practice charges.

The final panel participant was Javier Morillo-Alicea, President of SEIU Local 26 (Minnesota). He highlighted the rise of the contingent workforce as perhaps the most significant challenge facing labor unions today. Mr. Morillo-Alicea cited a statistic that 42.6 million Americans are part of this contingent workforce—working for subcontractors, at temp agencies, or part time. However, the good news according to Mr. Morillo-

Alicea is that there are many examples of organizations that are becoming more creative at organizing workers and drawing employers to the bargaining table through methods other than a collective bargaining agreement. He mentioned several areas of focus for the labor movement moving forward including rethinking and reinventing collective bargaining, building a workers' movement that is broader than only dues-paying members, organizing in ways that reflect today's economy, and providing retirement security for modern workers who switch jobs frequently.

The 2013 *Minnesota Law Review* Symposium illuminated the need for employers and labor organizations to find the right balance to protect workers' rights and encourage economic success. The discussions also revealed that ideas for achievable reform do exist. Policy makers, courts, and lawyers face difficult decisions in the years ahead as a legal framework created for a bygone era struggles to adapt to a rapidly changing marketplace. It is our hope that the discussions at the symposium and the articles in this issue spur a dialogue that prods this field of law forward into the 21st century and results in enhanced prosperity for workers and employers.