CHAPTER TEN

The Crisis in the US Litigation Model of Labour Rights Enforcement

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To each individual classified as an "employee," the United States guarantees a suite of legal rights that, in international comparison, is noteworthy primarily for its (1) paucity and (2) extraordinary difficulty of enforcement. The US maintains what Canadians call a "litigation model," under which statutory claims for labour standards and anti-discrimination claims must normally be brought to court for enforcement. This US model is what Canada's *Weber* doctrine is seeking to avoid.[1] I am sincerely grateful to the organizers of this symposium for the opportunity to reflect on this litigation model, something taken for granted in the extensive and outstanding literature on the current crisis in US labour rights enforcement. My preliminary conclusions are that the origins of the litigation model are obscure and its maintenance poorly-defended; that it is rapidly approaching crisis; that the Canadian practice of encouraging arbitration of statutory claims is unlikely to work well in the US; but that it is long past time for the US to design administrative agencies with full authority to reinstate and compensate victims of labour standards violations and workplace discrimination.

Recent scholarship on statutory labour rights enforcement in the US reflects a sense of crisis, yet this extensive, illuminating literature takes for granted the litigation model that is the very source of the crisis. Other

1 I owe this insight to Chris Dassios, who chaired the symposium panel where I initially presented this paper.

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aspects of enforcing statutory labour rights have been much discussed. The growth of the temporary-help sector and other labour market intermediaries has created complex structures in which many employees are, for legal purposes, ostensibly employed by small, undercapitalized entities, rather than the more powerful ultimate purchasers of labour services.[2] Increasingly, this problem is being addressed through more liberal findings of "joint employment," under which the worker is jointly employed by more than one beneficiary of his or her work.[3] In addition, state statutes increasingly impose legal responsibilities on ultimate purchasers of labour even where relations of joint employment cannot be found. This concept of "responsibility" for labour conditions should be, I have argued, the preferred framework for discussion of the problem.[4] There has been much concern about misclassification: that is, denying working people their statutory rights by describing them, for example, as independent contractors or student interns. For federal statutes, the definition of "employee" involves one of a number of multi-factor factual inquiries into the control of work, and generalization is difficult. (While most federal statutes are interpreted to adopt a common law definition of employee, state law is permitted to adopt a more-inclusive definition of employee.[5]) Also

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2 See David Weil, *The Fissured Workplace: Why Work Became So Bad for So Many and What Can Be Done to Improve It* (Cambridge MA: Harvard University Press, 2014); Alan Hyde, "To What Duties Do Global Labour Rights Correlate? Responsibility for Labor Standards Down the Production Chain" ["To What Duties"] in Yossi Dahan, Hanna Lerner & Faina Milman-Sivan, eds, *Global Justice and International Labour Rights* (Cambridge UK: Cambridge University Press, 2016) 209.

3 For example, see *Browning-Ferris Industries of California Inc,* 362 NLRB No 186, 204 LRRM 1154 (2015) (recycling plant and labour supply firm joint employers); *Cano v DPNY Inc*, 287 FRD 251 (SDNY 2012) (franchisor and franchisee; triable issue of fact whether they are joint employers); *Lin Nan Zheng v Liberty Apparel Co*, 617 F 3d 182 (2d Cir 2010) (the garment needle shop and garment label for whom garments were produced are joint employers).

4 Cal Lab Code §2810 and 2810.3 (responsibility of those who contract for labour through intermediary; no finding of joint employment required); NY Lab Law §§240, 241-a, 241(6) (various "non-delegable duties" of landowners who hire construction labour through intermediaries; no finding of joint employment required). See generally *Hyde*, "To What Duties," above note 2.

5 See *e.g.*, *O'Connor v Uber Technologies Inc*, 82 F Supp 3d 1133 (ND Cal 2015) (labour standards suit by on-call drivers, denying summary judgment to employer); *Alexander v FedEx Ground Package Sys,* 765 F 3d 981 (9th Cir 2014) (FedEx drivers are statutory employees and not self-employed, relying in part on California law); *Hargrove v Sleepy's LLC*, 106 A 3d 449 (NJ Sup Ct 2015).An individual is presumed to be statu-

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much-discussed is the practice of having employees who are not represented by unions — that is, the overwhelming majority of employees in the US — sign boilerplate clauses agreeing not to sue their employers, but instead to submit claims to arbitrators.[6] US courts normally uphold such clauses,[7] at least where they refer to the right to sue that they purport to waive,[8] and bind the employer as well as the employee.[9] The heavy proportion of immigrant workers — many in the US without authorization, and many concentrated in the worst jobs — creates practical difficulties in effective enforcement of labour rights, despite the fact that such workers are statutory employees covered by labour law and labour standards law.[10] Finally, Janice Fine and Jennifer Gordon have criticized the passive role given to worker organizations in labour standards enforcement, and advocated a more active role in cooperation with administrative agencies.[11]

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tory employee for purposes of labour standards, unless the putative employer shows that he or she is either "free from control or direction" and the service provided is "outside the usual course of business" or "in an independently established . . . business." This is sometimes called the "ABC test" and is used in several US states. *Ibid* at 458. But see *Glatt v Fox Searchlight Pictures Inc*, 791 F 3d 376 (2d Cir 2015) (claims of interns to wages depend on assessment of comparative benefit to the intern and the putative employer). In my opinion, there is a decided trend toward classifying disputed individuals as employees rather than independent contractors.

6 Margaret Jane Radin, *Boilerplate: The Fine Print, Vanishing Rights, and the Rule of Law* (Princeton NJ: Princeton University Press 2014); Katherine Van Wezel Stone, "Mandatory Arbitration of Individual Employment Rights: The Yellow Dog Contract of the 1990s" (1996) 73 Denv U L Rev 1017; Imre Szalai, *Outsourcing Justice: The Rise of Modern Arbitration Laws in America* (Durham NC: Carolina Academic Press 2013) (showing clear original understanding not to apply federal *Arbitration Act* to contracts of employment).

7 *Gilmer v Interstate/Johnson Lane Corp.*, 500 US 20 (1991); *Circuit City Stores Inc v Adams*, 532 US 105 (2001).

8 *Atalese v US Legal Services Group LP*, 99 A3d 306 (NJ Sup Ct 2014), cert denied 135 S Ct 2804 (2015).

9 *Armendariz v Foundation Health Psychcare Services, Inc*, 24 Cal 4th 83 (Cal Sup Ct 2000).

10 *Sure-Tan Inc. v NLRB*, 467 US 883 (1984) (unauthorized migrants are statutory employees covered by federal labour laws); *Hoffman Plastic Compounds Inc v NLRB*, 535 US 137 (2002) (reaffirming holding that unauthorized migrants are statutory employees, but holding that Board remedial powers may be limited by their unauthorized status); *Lucas v Jerusalem Café LLC*, 721 F 3d 927 (8th Cir 2013) (unauthorized migrants must be paid statutory wages).

11 Janice Fine, "Solving the Problem from Hell: Tripartism as a Strategy for Addressing Labour Standards Non-Compliance in the United States" ["Solving the Problem from

It is seldom if ever observed, however, that all these problems presuppose that the enforcement of labour rights will occur in courts, and will be decided using common-law standards and litigation methods for finding facts, defining employment, and enforcing contracts. This essay will examine that assumption.

Part A will describe the current multiplicity of decision-makers involved in the enforcement of statutory labour rights, and the resultant jurisdictional morass. Part B will describe the historical evolution of this crisis, emphasizing how each of the prominent institutions enforcing labour rights was, by the time it emerged from a hostile Congress, designed to fail. I shall discuss three models of labour rights enforcement, in chronological order of their historical appearance: the "administrative model" of the National Labor Relations Board (NLRB), an agency empowered to grant reinstatement and compensatory damages, subject to limited judicial review; the "litigation model" of the *Fair Labor Standards Act* (*FLSA*) and subsequently various antidiscrimination statutes, in which administrative agencies have no such remedial power and claimants must eventually sue in general courts of law; and the "arbitration model" under collective bargaining agreements.[12] Part C will discuss the collision of these institutions in recent years, in which a foolish Supreme Court decision has led to the crisis identified in Part A, in which no claim of labour law is too simple to be immune from extensive jurisdictional conflict.[13] The conclusion offers preliminary speculation on reform of the system,

Hell"] (2013) 50:4 Osgoode Hall LJ 813; Janice Fine & Jennifer Gordon, "Strengthening Labor Standards Enforcement through Partnerships with Workers' Organisations" ["Strengthening Labor Standards Enforcement"] (2010) 38:4 Politics & Society 552; Janice Fine, "Co-Production: Bringing Together the Unique Capabilities of Government and Society for Stronger Labor Standards Enforcement" ["Co-Production"]. *Labor Innovations for the 21st Century (LIFT) Fund,* online: theliftfund.org/wp-content/uploads/2015/09/LIFTReportCoproductionOct_ExecSumm-rf_4.pdf.

12 In this essay, "arbitration" refers exclusively to grievance arbitration under collective bargaining agreements. I do not deal with the quite different systems mentioned above (see sources in above notes 6-9), also called "arbitration," which cover employees without union representation and are imposed by boilerplate contracts of employment; nor do I deal with commercial arbitration.

13 I refer to *14 Penn Plaza LLC v Pyett*, 556 US 247 (2009) [*Pyett*], in which the Court ordered dismissal of an employee's suit alleging age discrimination on the grounds that the applicable collective bargaining agreement called for submission of such claims to grievance arbitration. While this result is unsurprising to Canadians, it represents an abrupt change in US practice and has led to the jurisdictional confusion illustrated in Parts A and C of this essay.

suggesting that enforcement of labour standards and anti-discrimination legislation could occur at the state level without federal legislation.[14] This makes reform at least plausible, since there has been no labour legislation of this scope at the federal level in half a century. However, it would come at the price of creating significant differences among the US states.

A. THE PROBLEM: "ANFRACTUOUS" LITIGATION[15]

Reference to a crisis in enforcement is not hyperbole. To illustrate that fact, consider the following recent sequence of decisions. I would not describe this sequence as typical — it is among the worst I have recently encountered — but it arises from a simple factual situation and, as we shall see, could easily arise in many similar scenarios. It has also occasioned unusually critical language from the courts.

Richard Wawock is an electrician in Los Angeles County, employed by CSI Electrical Contractors and represented by the International Brotherhood of Electrical Workers. His employer required him and others to attend mandatory training courses on topics such as safety, first aid, and preventing harassment. The employer did not pay wages for time spent at such courses. Wawock filed suit in California state court in September 2012, claiming that such time must be compensated under the *California*

14 US Federal legislation requiring minimum wage and premium pay for overtime hours (*FLSA,* 29 USC §§201-219, and the various federal statutes prohibiting discrimination in employment: *Civil Rights Act of 1964*, Title VII (race, color, religion, sex, national origin), 42 USC §§2000e to 2000e-17 [Title VII]; *Age Discrimination in Employment Act of 1967*, 29 USC §§621-633a; *Americans with Disabilities Act of 1990*, 42 USC §§12101-12212; *Family and Medical Leave Act*, 29 USC §2601 et seq. All these statutes set national minimum levels of protections. States are permitted to provide more protection to employees, and many have. The classic treatment of the economics of diverging state minima is David Card & Alan B Krueger, *Myth and Measurement: The New Economics of the Minimum Wage* (Princeton NJ: Princeton University Press, 1995). By contrast, for private sector employees, rights to collective action under *the National Labor Relations Act*, 29 USC 151-169 [*NLRA*], and rights concerning pensions and benefit plans (*Employee Retirement Income Security Act* or ERISA, 29 USC §§1001) may not be supplemented by additional state rights, since the federal statute has been held to preempt any such state law.

15 *Wawock v CSI Elec Contractors Inc* (Oct 10, 2014), Case No. 2:14-cv-06102 SVW-MAN (United States District Court, CD Cal) at 2 (order denying in part defendant's motion to dismiss Wawock's application to vacate arbitration award). This decision reviews much of the procedural history of Wawock's claim for wages.

Labor Code. He raised no claims under federal labour standards law or under the applicable collective bargaining agreement.[16]

The applicable law is not in dispute. The federal law (which Wawock chose not to invoke) is found in regulations of the US Department of Labor that require payment of wages to employees attending training courses unless four criteria are met: (a) attendance is outside of the employee's regular working hours; (b) attendance is voluntary; (c) the course, lecture, or meeting is not directly related to the employee's job; and (d) the employee does not perform any productive work during such attendance.[17] Applicable California state law generally requires wage payment for work and lacks any distinct regulation of training courses.[18] The employer has at no time suggested any substantive reason why wages are not required. If the course content is as Wawock claims, the employer will be unable to show that the courses lack direct relation to the job. Resolution of this simple factual question, could it be obtained, should result in back wages paid to Wawock and other members of the class.[19]

Instead of challenging the claim on its merits, the employer has instead engaged in vigorous litigation on the jurisdictional issue. First, the employer petitioned the state trial court to send Wawock's wage claim to arbitration by the joint Labor-Management Committee that hears grievances arising under the collective bargaining agreement.[20] Wawock, of course, had raised no claim under his collective bargaining agreement. However, in 2009 the US Supreme Court, in an abrupt change from prior federal law, held in *14 Penn Plaza LLC v Pyett* that a trial court might

16 Most lawyers representing individual employees in suits under labor standards law prefer state court over federal court where possible, particularly in jurisdictions like California and New Jersey. Procedures are often less formal; the substantive law may be more favorable; and there is much more willingness in state court to let disputes go to a jury in situations in which a federal court would likely grant summary judgment to the defendant.

17 *FLSA*, 29 CFR §§785.27

18 Wawock claimed under the general provisions of *California Labor Code* §510, requiring payment for hours worked.

19 Not all courts would agree. One Court of Appeals, applying the federal *FLSA*, has held that a safety course required by the employer as a condition of employment was "voluntary" if employees could schedule it at their convenience: *Chao v Tradesmen International, Inc.*, 310 F 3d 904 (6th Cir 2002). This decision is hard to fathom.

20 Such joint committees often replace arbitration in Teamsters contracts and in the building trades. See generally Clyde Summers, "Teamster Joint Grievance Committees: Grievance Disposal Without Adjudication" (1985) 7:3 Berkeley J Emp & Lab L 313.

dismiss an individual claim under federal age discrimination legislation if the claimant is covered by a collective bargaining agreement which clearly waives the employees' right to sue and provides for resolution of their statutory claims in grievance arbitration.[21] Applying *Pyett*, the state trial court sent Wawock's state law wage claim to arbitration by the Joint Committee.[22]

The California trial courts order ignored at least three potentially significant distinctions from the claim sent to arbitration in *Pyett*. First, and most importantly, the trial court made no finding that the dispute resolution clause in the collective bargaining agreement waived the employees' right to sue under California wage law. Instead, it directed the Joint Committee to determine the question of whether Wawock's claim was within its jurisdiction (i.e., was arbitrable). (In *Pyett*, the US Supreme Court had made a finding of waiver a prerequisite to a district court's sending a statutory claim to arbitration. In addition, an earlier case, undisturbed by *Pyett*, held that the federal district court must decide statutory claims for itself where the arbitration clause in the applicable collective bargaining agreement did not clearly cover them.[23]) Second, the trial court did not consider whether California courts applying California state law should apply the federal dismissal standard, or instead provide more protection, as California frequently does. Third, the trial court did not consider whether a joint committee should be treated as the equivalent of the neutral arbitrator in *Pyett*.[24] Wawock appealed the dismissal and the order to arbitrate, but the Court of Appeals (in California, an intermediate appellate level between trial courts and the Supreme Court of California) denied review.[25]

The Joint Committee found that Wawock's claim was arbitrable, and rejected that claim on its merits, denying any compensation for the time spent in class. Wawock then filed suit in federal court, seeking to vacate the award on the grounds that the Committee's finding that the claim

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21 *Pyett,* above note 13.

22 *Wawock v Superior Court*, 197 LRRM (BNA) 2056, 2013 WL 5273230 (Cal. Ct App, Sept 17, 2013)

23 *Wright v Universal Maritime Service Corp*, 525 US 70 (1998)

24 For federal labour law purposes, a joint committee is normally treated as equivalent to arbitration. *See* e.g., *General Drivers, Warehousemen and Helpers, Local Union No 89 v Riss & Co*, 372 US 517 (1963), though some courts have questioned this (for example, *Taylor v. NLRB*, 786 F 2d 1516 (11th Cir 1986)). *See* also *Summers*, above note 20.

25 *Wawock v Superior Court*, above note 22.

was arbitrable manifestly disregarded federal labour law.[26] At the same time, the employer sued in state court, seeking to confirm the award in its favor. Wawock's federal suit was heard first. The federal court vacated the Joint Committee's award, finding that the Joint Committee had disregarded federal law in finding that Wawock's claim was within its jurisdiction. The court found that since the collective bargaining agreement made no mention of statutory claims (let alone clearly commit them to private dispute resolution), it did not represent the clear and unmistakable waiver that *Pyett* has established as a prerequisite to a court's refusal to decide a statutory claim.[27] The employer appealed this decision to the US Court of Appeals for the Ninth Circuit, where it languishes as of this writing for reasons that Wawock's counsel cannot determine (I asked).

The parties then returned to state court to deal with the employer's suit to confirm the award. Wawock now argued that the suit to confirm should be dismissed, because the state court was required to give full faith and credit to the federal decision that the suit was not arbitrable. The state court, however, refused to dismiss the suit, retaining jurisdiction pending the decision of the federal appeals court. Wawock's application to the state appellate court for a writ of mandamus to the state trial court was successful; the appellate court issued the writ, holding that after the federal decision, the state court should have dismissed, rather than adjourned, the employer's suit to confirm the award.[28]

Thus, as I write this essay in April 2016, Wawock's simple factual claim has, in three and a half years, engendered two state trial court decisions, a decision by a Joint Committee, two decisions by the state intermediate court of appeals, and a federal court decision on appeal to the federal

26 A suit raising substantive claims that arise only under state law may not be removed to federal court by the defendant. However, a suit to confirm a labor arbitration award, like any suit to enforce a collective bargaining agreement, necessarily arises under federal law; accordingly, if the plaintiffs do not file the suit in federal courts, it may be removed there by the defendants: *Avco Corp. v. Aero Lodge No. 735, Intern. Ass'n of Machinists and Aerospace Workers*, 390 US 557 (1968); Local 174, *Teamsters v Lucas Flour Co*., 369 US 95(1962).

27 *Wawock* v CSI Elec. Contractors Inc, 2014 BL 170,439, 2014 WL 5420900 (USDC, CD Cal). The court had previously denied the employer's motion to dismiss Wawock's suit: see above note 15.

28 *Wawock v Superior Court*, 2015 LRRM (BNA) 180683, 2015 WL 1577428 2015 BL 99732 (Cal. Ct App, Apr 8, 2015). One of the factors contributing to the dysfunction of the US litigation model is the baseline lack of clarity in US employment law over the division between federal and state jurisdiction.

appeals court. His claim is still unresolved. This is the sign of a system for enforcing labour standards that has reached almost total breakdown.

How did the US arrive at this farcical carnival of litigation?[29] More importantly, what should replace it? The confusion in Wawock does not represent "bad lawyering." Nor does it represent temporary confusion, as courts adjust to the 2009 *Pyett* decision. Instead, it reflects an employer who has decided to exploit strategic moves potentially open in many ordinary cases in which unionized employees claim that their statutory rights have been violated. A Canadian reader might be tempted to support arbitration as the preferred institution for resolution of statutory claims like Wawock's, since this approach has proven largely successful in Canada. I believe that Wawock's case instead demonstrates that the Canadian approach of promoting arbitration would not be a good solution in the US. Wawock received a *sort* of arbitration, but it was by a Joint Committee, not an arbitrator. The Committee was inexperienced in addressing statutory claims. It was flatly wrong in assuming jurisdiction over the controversy, and fairly clearly wrong in its understanding of the substantive law of labour standards. Designing an effective system for US labour rights enforcement is a problem without an obvious solution. But first, let us understand the origins of the current crisis.

B. LABOUR RIGHTS ENFORCEMENT IN THE US: UNCOORDINATED INSTITUTIONS

Part B introduces the confusing multiplicity of institutions that enforce labour rights, such as the right to be paid for work (Wawock's goal), the right to form unions or take collective action, and the right to be free of discrimination on the basis of race, color, national origin, religion, sex, age, or disability. It does not rest on archival research and contains no information that will surprise the reader familiar with US law. Nevertheless, the story is never told this way. American lawyers take for granted that each of the developments discussed here has its own trajectory and does not coordinate with others. There has been little emphasis in the literature on the way each individual enforcement scheme was deliberately

29 The federal district court used words like "tortuous," "labyrinth," "anfractuous" : *Wawock* v CSI Elec. Contractors Inc, Order Denying Defendants' Motion to Dismiss (CD Cal, Oct 10, 2014).

created to fail. And there has been little appreciation of how simple problems like Wawock's can generate quantities of useless litigation, threatening the breakdown of the entire system.

Viewed as a system, US statutory labour rights carry one or more of three distinct enforcement models: administrative, litigation, and arbitration. Administrative enforcement applies to rights to take group action under the *National Labor Relations Act* (*NLRA* or *Wagner Act*); the aggrieved worker lodges a claim with an administrative agency, which thereafter takes it over. There is no charge to the worker, and the agency is empowered to award full reinstatement and compensation.[30] The litigation model is used for claims of violation of labour standards legislation such as the *FLSA*,[31] and for all of the federal laws prohibiting employment discrimination;[32] a worker may be required to complain to an agency, such as the US Department of Labor or Equal Employment Opportunity Commission, or their state analogs. However, that agency has no authority to adjudicate his or her claim. Instead, either the agency, or more usually the worker, will have to litigate the claim in state or federal court. Finally, workers covered by collective bargaining agreements — that is, 6.6 percent of workers in the private sector[33] — usually have an option to file a grievance for violations of their collective bargaining agreements. Such grievance may eventually reach a neutral decision-maker: typically a labour arbitrator, although joint boards like Wawock's are not uncommon. However, grievances belong to the union, not the worker; the worker has no right to compel the union to take up his or her grievance. When the union does so, there is no cost to the worker, but should the union refuse, there is little practical way of reviving the grievance unless the union has violated its duty of fair representation. That duty is rarely enforced by the courts.[34] Arbitration is limited to claims that the collective agreement

30 29 USC §§151-169.

31 29 USC §§201-219.

32 Principally the *Civil Rights Act of 1964*, Title VII (race, color, religion, sex, national origin), 42 USC §§2000e to 2000e-17; *Age Discrimination in Employment Act of 1967*, 29 USC §§621-633a; *Americans with Disabilities Act of 1990*, 42 USC §§12101-12212.

33 US Department of Labor: Bureau of Labor Statistics, News Release: "Union Members — 2014" (USDL-15-0072) (January 23, 2015), online: www.bls.gov/news.release/archives/union2_01232015.pdf.

34 Michael J Goldberg, "The Duty of Fair Representation: What the Courts Do in Fact," (1985) 34:1 Buff L Rev 89.

has been violated. Collective agreements in the US, unlike Canada, do not incorporate by reference the entire suite of statutory labour standards.[35]

It is an easy matter to explain why (unlike in Canada) arbitration has played a limited role in the enforcement of statutory individual labour rights in the US. Grievance arbitration as we know it barely existed at the origin of federal enforcement of minimum wages and premium pay for overtime work, provided by the *FLSA* of 1938. When the *Civil Rights Act of 1964* recognized individual rights to be free from workplace discrimination, unions were often defendants in such claims, along with employers, since many unions were discriminators.[36] Turning discrimination claims over to arbitrators responsible to unions and employers would effectively have eliminated those rights. Finally, the legal framework for arbitration, established in a series of Supreme Court cases brought by unions in the 1950s and 1960s, emphasized and perhaps exaggerated the gulf between public law claims and institutions, and private law claims and institutions under collective bargaining agreements. Arbitration was clearly identified with the latter.[37] As a result, American grievance arbitrators have little experience with statutory claims and have never contributed anything significant to the development of statutory labour law.[38]

It is much more difficult to explain why statutory labour rights have never been consolidated into a single federal agency (or labour court) with enforcement powers, but are instead parceled out among a variety of agencies and tribunals, none particularly effective. Some themes recur.

35 *Wright v Universal Maritime Service Corp*, 525 US 70 (1998) (federal district court must decide statutory claims for itself where the arbitration clause in the applicable collective bargaining agreement did not clearly cover them).

36 *Civil Rights Act of 1964*, §703(c), 42 USC §2000e-2(c).

37 *United Steelworkers of America v American Manufacturing Co*, 363 US 564 (1960) (enforcing executory promise to arbitrate; court not to find facts); *United Steelworkers of America v Warrior & Gulf Navigation Co*, 363 US 574 (1960) (enforcing executory promise to arbitrate; court not to construe any substantive provisions of collective agreement); *United Steelworkers of America v Enterprise Wheel & Car Corp*, 363 US 593 (1960) (enforcement of arbitrator's award without review of the merits). Collectively, these cases are known as the *Steelworkers Trilogy*. See generally David Feller, "The Coming End of Arbitration's Golden Age," (1976) 29 The Proceedings of the National Academy of Arbitrators 97, online: NAARB http://naarb.org/proceedings/pdfs/1976-97.PDF.

38 Ariana R Levinson defends arbitral competence with fact-finding and application of known law, but fails to identify any way in which arbitrators have contributed to the development of the underlying law ("What the Awards Tell Us about Labor Arbitration of Employment Discrimination Claims," (2013) 46:3 Mich JL Reform 790).

Passage of any labour legislation is extraordinarily difficult in the US, normally requiring years of Congressional effort, overcoming intense opposition from employers, messy compromises, and enforcement schemes deliberately designed to fail. However, there appears to have been little attention to the precise problem of jurisdictional conflict that has become such a significant (if unnoticed by scholars) feature of statutory labour rights enforcement in recent years.

1) Administrative Model: National Labor Relations Board (NLRB)

While this essay does not deal with collective labour rights, I start here because the NLRB, while far from perfect, is a model that might well have been, but was not, emulated in subsequent statutes.

New Deal labour law actually began with a different model — the industry boards of the *National Industrial Recovery Act*, designed to limit competition and raise wages. This statute was held by the Supreme Court to be an unconstitutional delegation of government power to private interests.[39] The second model — the administrative model — has proved more enduring. Since 1935, charges of employer or union interference with employee rights to collective action may be brought to an independent administrative agency with power to issue complaints, try cases, and award legal and equitable relief subject to minimum judicial review.[40] These procedures were specifically held to be constitutional, along with the Act generally.[41] The Board from its inception has been entirely focused on enforcing statutory rights, and is forbidden by statute from employing individuals for conciliation or mediation.[42] Since 1947, prosecutorial and adjudicatory functions are separate. The NLRB maintains doctrines (too complex to explain here) for deferral to grievance arbitration where appropriate, but these affect a relatively small portion of the NLRB caseload, since that caseload deals mainly with workplaces where no union yet represents employees. It is interesting that this administrative model has not been employed again in federal labour legislation in the eighty years since passage of the *Wagner Act*.

39 *A.L.A. Schechter Poultry Corp v United States*, 295 US 495 (1935).

40 *NLRA*, 29 USC §§151-169.

41 *National Labor Relations Board v Jones & Laughlin Steel Corp*, 301 US 1, 46-49 (1937).

42 NLRA §4(a), 29 USC §154(a).

2) Litigation Models

a) *Fair Labor Standards Act* of 1938

When newly-elected President Franklin Roosevelt asked Frances Perkins in 1933 to serve as Secretary of Labor, she advised him that her acceptance was conditional on the administration introducing legislation requiring a national minimum wage, a cap on working hours, and the abolition of child labour. Drafts of such legislation had been prepared during the constitutional crisis over the *National Industrial Recovery Act*[43] but, as Perkins told Roosevelt at the time, they had been "locked in the lower left-hand drawer of my desk against an emergency." Roosevelt laughed and said: "There's New England caution for you. . . . You're pretty unconstitutional, aren't you?"[44] In March 1937, the Supreme Court, in the famous "switch in time that saved the Nine," (from Roosevelt's plan to expand the size of the Court, permitting new, progressive appointments), upheld a state minimum wage law.[45] Roosevelt reportedly asked Perkins, "What happened to that nice unconstitutional bill you had tucked away?"[46] Less than two months later, Roosevelt sent a version of Perkins' *FLSA* to Congress, where it encountered strong opposition from Republicans and southern Democrats but ultimately passed a year later, after amendments weakening its substantive provisions. The *FLSA* is generally regarded as the final piece of New Deal legislation.

It also appears to be, as nearly as I can figure out, the origin at the federal level of what Canadians call the "American litigation model." Ruth O'Brien argues that adoption of a litigation model represents Congress's weakening of the original draft *FLSA* as prepared by Benjamin Cohen and

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43 See above note 39. Before 1937, New Deal and state employment legislation was frequently found unconstitutional by the US Supreme Court as an interference with liberty of contract, unconstitutional delegation to private bodies, or (in the case of federal legislation) beyond federal power to regulate interstate commerce.

44 Kirstin Downey, *The Woman Behind the New Deal: The Life of Frances Perkins, FDR'S Secretary of Labor and His Moral Conscience* (New York: Anchor, 2010) at 265–69; Jonathan Grossman, "Fair Labor Standards Act of 1938: Maximum Struggle for a Minimum Wage," (1978) 101:6 Monthly Lab Rev 22 at 24.

45 *West Coast Hotel Co. v Parrish*, 300 US 379 (1937). *Jones & Laughlin Steel Corp*, *above* note 41, expanding the federal government's power to regulate interstate commerce (and, as we have noted, upholding a powerful administrative agency), followed *Parrish* by two weeks.

46 Grossman, above note 44 at 24.

Thomas Corcoran for Attorney General Robert Jackson.[47] That original draft proposed a Labor Standards Board, an independent "quasi-judicial" agency modeled on the Federal Trade Commission and NLRB, with power to establish and enforce labour standards after public hearings. [48] That Board would have had investigatory and rule-making powers. Congress eliminated the board, largely because of union opposition (the American Federation of Labor (AFL) and the Congress of Industrial Organizations (CIO) each fearing it would assist the other), and replaced it with a division within the Department of Labor that lacked independent power to issue wage orders. [49] In the intense battle over the legislation, there seems to have been no discussion of the merits of opting for a litigation model.[50] (In fact, even the independent Board, had it emerged, would have had to resort to litigation to enforce its orders, as is true of the Division eventually reflected in the statute.[51]) Congress kept for itself the power to set minimum wage and maximum hours standards, which it retains to this day. The elimination of an independent, evidence-focused Labor Standards Board is part of what I am describing as a system designed to fail.

As a result, no agency of the federal government may order wage payment. Either the aggrieved employee (like Wawock), or the Department of Labor must sue in federal court.[52] The Department also lacks power to issue administrative interpretations, a deficiency noted at the time.[53] The *FLSA* makes no provision for the use of grievance arbitration, as I shall discuss in the next section.

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47 Ruth O'Brien, "A Sweat Shop of the Whole Nation: The *Fair Labor Standards Act* and the Failure of Regulatory Unionism," (2001) 15:1 Studies in Am Polit Devel 33 at 38–43. The original bill was S. 2475, 75th Congress, 1st Session, introduced on May 24, 1937 by Senator (later Supreme Court Justice) Hugo Black.

48 S. 2475, Sec. 3.

49 O'Brien, above note 47 at 38-43.

50 See generally Willis J Nordlund, *The Quest for a Living Wage: The History of the Federal Minimum Wage Program* (Westport CT: Greenwood Press, 1997) at 46–52. Nordlund summarizes the Congressional debates but does not report any debate about the requirement of enforcement litigation.

51 S. 2475, Sec. 16 authorized the Labor Standards Board to sue for equitable relief in federal district courts. Section 21 would have authorized suits by employees.

52 *FLSA* §16(b), 29 USC §216(b).

53 "[P]erhaps the outstanding difficulty, from the point of view of employer compliance, has been the lack of an administrative rule-making power": Samuel Herman, "Administration and Enforcement of the *Fair Labor Standards Act*: The *Wage and Hour Law*" (1939) 6:3 Law & Contemp Probs 368, at 378.

No doubt several factors combined to create the federal litigation model. First, some states had parallel wage and hour legislation before 1938 which involved a variation on a litigation model, under which either an aggrieved employee or a government official could go to court;[54] it is likely that the federal legislation drew on these precedents. However, there was surely no well-established tradition in the US prior to 1938 of employees suing under state wage legislation; many state statutes lacked enforcement of any kind, while others had failed to go into effect.[55] Congress in any case was not compelled to follow pre-1938 state law models. Second, enthusiasm in Congress for administrative agencies specifically, and the New Deal generally, had cooled by Roosevelt's second term. Congress's elimination of an independent Board suggests that it would have been equally or more hostile to administrative determination of wage claims, though in theory this responsibility could have been given to the Department of Labor. Third, both the AFL and CIO, each convinced by 1937 that the NLRB was favoring the other, welcomed the elimination of the Board. In addition, they had succeeded in clarifying that collectively-bargained wages could exceed the statutory level.[56] With good reason, the US labour movement hated and distrusted the courts.[57] But once they had exempted themselves from judicial interference with their own wage bargains, they had no objection to such a litigation model for employees unrepresented by unions.

With hindsight, the *FLSA*'s litigation model is at best an enormous opportunity missed, a capitulation to a Congress uncommitted to the success of the program.[58] In a case such as Wawock's claim to payment for training, enforcement options today are artificially limited to state court, federal court, or grievance arbitration, when most effective for Wawock's purpose — and frankly, his employer's — would be a swift administrative ruling from a state or federal Department of Labor.

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54 Ronnie Steinberg, *Wages and Hours: Labor and Reform in Twentieth-Century America* (New Brunswick NJ: Rutgers University Press, 1982) at 25.

55 Frank T deVyver, "Regulation of Wages and Hours Prior to 1938" (1939) 6:3 Law & Contemp Probs 323 at 327.

56 Howard D Samuel, "Troubled Passage: the Labor Movement and the Fair Labor Standards Act," (2000) 123:12 Monthly Labor Review 32.

57 William E. Forbath, *Law and the Shaping of the American Labor Movement* (Cambridge MA: Harvard University Press 1991) at 37–57.

58 Equally damaging were Congress's elimination of the independent agency and serious legislated restrictions on the Act's coverage: Fine & Gordon, "Strengthening Labor Standards Enforcement," above note 11; O'Brien, above note 47.

b) Civil Rights Legislation

There are two chief statutory sources of labour rights held primarily by individual US workers. The first, as noted, is the *FLSA* and parallel state legislation. The second is the series of anti-discrimination statutes enacted by Congress between 1963 and 1993.[59] All of these anti-discrimination statutes share two broad structural similarities among themselves and with the *FLSA*. First, they provide minimum levels of coverage; states may, and often do, extend additional protections. Second, they adopt a litigation model. For simplicity we examine the most important, *Title VII of the Civil Rights Act of 1964*. Like the *FLSA*, its passage through Congress was protracted and difficult, opposed by southern Democrats, necessitating negotiations with Republicans who focused most intensely on details of enforcement. Like the *FLSA*, it was set up by Congress to fail, specifically by stripping a proposed administrative agency of any power and instead requiring litigation for enforcement.

Title VII does create an administrative agency, the Equal Employment Opportunity Commission (EEOC). Later statutes expanded that agency's jurisdiction to age and disability cases. By design, the EEOC does not promulgate regulations because it has no statutory authority to do so. Nor does it decide cases, which means that it cannot makes rules as part of the decision-making process, a method employed by the NLRB throughout its history.[60] Its circumscribed powers were the Republican price for support of the legislation, another example of deliberate Congressional creation of an agency designed to fail, as was fairly obvious at

59 *Equal Pay Act of 1963*, 29 USC §206(d): equal pay for men and women who perform "equal work" in the same "establishment."; *Civil Rights Act of 1964*, Title VII (race, color, religion, sex, national origin), 42 USC §§2000e to 2000e-17 (no employment discrimination by race, color, religion, national origin, or sex); *Age Discrimination in Employment Act of 1967*, 29 USC § 621-633(a); *Americans With Disabilities Act of 1990* (amended 2008), 29 USC §12101-12212; *Family and Medical Leave Act of 1993*, 29 USC §2601 et seq (held to have been enacted by Congress under its power to legislate equal protection and thus binds state governments. *See Nevada Department of Human Resources v Hibbs*, 538 US 721 (2003)).

60 The Supreme Court has approved the Board's usual practice of announcing rules as part of decided cases, which thereafter serve as precedent: *NLRB v Bell Aerospace Company Division of Textron Inc*, 416 US 267 at 294 (1974). It also approved the only substantive use by the Board of its rule-making power: *American Hospital Association v NLRB*, 499 US 606 (1991). In each case employers argued unsuccessfully that the alternative method was required. The EEOC cannot employ either procedure.

the time.[61] Sovern described it as a "poor enfeebled thing,"[62] while Blumrosen predicted that it would actually be effective.[63] Time has proven Sovern correct.

What does the EEOC do if it doesn't enact regulations or decide cases? Precious little. Filing a discrimination claim with the EEOC or its state analog is a jurisdictional prerequisite to filing a suit to enforce the statutes. The EEOC can conciliate or mediate, a little-studied process. It can litigate the case itself, representing simultaneously the interests of the individual or group complainant and the independent interest of the public in ridding workplaces of discrimination.[64] The EEOC does not characteristically take the broadest or most cutting-edge cases. Most of the cases it litigates are fairly routine, and often seem selected to give junior lawyers training and practice in employment litigation before they are hired by private law firms.[65] Not surprisingly, the EEOC is not an effective litigator; most individuals would be better represented by private counsel, who accept compensation on a contingent-fee basis and achieve higher damage verdicts than the EEOC.[66] In the vast majority of complaints, the EEOC neither conciliates effectively nor takes the case to litigation. It instead issues a "right to sue letter." This is a jurisdictional prerequisite enabling a complainant to sue in federal or state court, but normally means only that the EEOC has not evaluated the case.

This enforcement method was designed to be ineffective, and has proven so over time. If the EEOC were abolished tomorrow, no one would miss it except for private law firms forced to train their own litigators. As with the *FLSA*, its creation was an opportunity missed. Congress should have created an administrative agency like the NLRB, with administra-

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61 Alfred W Blumrosen, *Modern Law: The Law Transmission System and Equal Employment Opportunity* (Madison: University of Wisconsin Press, 1993) at 47–49.

62 Michael I Sovern, *Legal Restraints on Racial Discrimination in Employment* (NY: Twentieth Century Fund, 1966) at 205.

63 Alfred W Blumrosen, *Black Employment and the Law* (New Brunswick NJ: Rutgers University Press, 1971).

64 *Employment Opportunity Commission v Waffle House Inc*, 534 US 279 (2002)(EEOC may seek all appropriate relief under statute, possibly including damages and reinstatement for individual employees who had agreed to arbitrate their claims, since the EEOC vindicates both public and individual rights).

65 Michael Selmi, "The Value of the EEOC: Reexamining the Agency's Role in Employment Discrimination Law" (1996) 57:1 Ohio St LJ 1

66 *Ibid.*

tive law judges to compile factual records, and a board in Washington to decide cases and set policy.

By contrast, however, the failure of Title VII to refer to grievance arbitration is not an opportunity missed, but instead a reflection of the sad reality of race discrimination in 1964 America. Of course there were unions that played a crucial role in the civil rights coalition. But there were far too many that discriminated along with employers. Unions in the building trades and maritime industries limited access to their trades to the legitimate sons of their white membership. They did not admit African-Americans to membership, conduct that was legal until passage of the *Civil Rights Act of 1964*.[67] By 1964, most collective agreements had established grievance systems that ended in arbitration. However, conspicuous exceptions included unions in the building trades and the Teamsters, whose grievance systems then (and, as Wawock's case shows, now), typically terminated in joint boards that were (and are) the vehicle for union-employer horse-trading, not protection of individual rights.[68] There has thus never been any interest in the civil rights community in channeling discrimination claims to private union-management dispute resolution.

3) The Arbitration Model: Rise of Grievance Arbitration during World War II

While the history of grievance arbitration under collective bargaining agreements in the US is fairly well-known, it is worth pointing out a few features that historically made it undesirable as a location for statutory grievances.

First, US grievance arbitration is a creature of World War II labour policy. It was not well-established as a coherent system of labour rights enforcement at the time of the passage of the *FLSA* in 1938, and in any event, that statute, on the insistence of the labour unions, focused on

67 At the insistence of the labour movement, union control of membership admission was specifically protected by the Taft-Hartley amendments to *the National Labor Relations Act*, §8(b)(1)(A), 29 USC §158(b)(1)(A)(proviso permitting unions to prescribe rules for acquisition and retention of membership), and the *Labor-Management Reporting and Disclosure Act of 1959* (LMRDA) §3(o), 29 USC §402(o), limiting its protections to union members who have complied with the union's membership criteria.

68 Ralph C James & Estelle Dinerstein James, *Hoffa and the Teamsters: A Study of Union Power* (Princeton NJ: Van Nostrand, 1965) at 167-85.

workers without union representation. United States Steel had recognized the United Steelworkers, but the other steel employers ("Little Steel") had violently and successfully resisted recognition.[69] General Motors had recognized the United Automobile Workers but Ford had not, and even at GM, arbitration was not institutionalized.[70] The term "arbitration" was commonly used but covered a wide range of institutions.[71] It is idle to speculate what system of workplace justice would have developed had war not come, but it is undeniable that modern grievance arbitration — arbitration before a professional arbitrator empowered to decide rights claims under the collective bargaining agreement, but not new interest claims — became widespread only under the orders of the National War Labor Board.[72]

Second, grievance arbitration achieved legal status and autonomy by emphasizing a rigid split between statutory rights, and rights under a collective bargaining agreement. By the end of the war, large employers and unions were comfortable with the standard wartime agreement

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69 See generally Ahmed White, *The Last Great Strike: Little Steel, the CIO, and the Struggle for Labor Rights in New Deal America* (Berkeley: University of California Press, 2016).

70 In 1938, grievors at General Motors were required to sign the grievance and present it to the foreman before presenting it to the grievance committeeman. National UAW officials could not be involved for the first twenty-four hours. After Walter Reuther became director of the UAW's GM department in March 1939, he worked to rebuild grievance processes, which became established in the June 1940 collective bargaining agreement, with detailed provisions for resolving disputes, ending in decisions by a permanent umpire. Nelson Lichtenstein observes that "the UAW-GM arbitration experiment was a remarkable innovation, for it represented the very first such permanent mechanism established in heavy industry. . . .": "Great Expectations: The Promise of Industrial Jurisprudence and its Demise, 1930-1960," in Nelson Lichtenstein & Howell John Harris eds, *Industrial Democracy in America: The Ambiguous Promise* (Cambridge UK: Cambridge University Press, 1993) 113 at 126–29.

71 Dennis R. Nolan & Roger I. Abrams, "American Labor Arbitration: The Early Years," (1983) 35 U Fla L Rev 373. While Nolan and Abrams argue that American labour arbitration was mature by 1941 and correspondingly owed less than is often claimed to the World War II experience (420-21), their examples in fact show the wide variety of institutions labelled "arbitration" in the 1930s, including mechanisms in anthracite coal and garment production that made little distinction between rights and interest claims. They also show how much changed between 1938, the year the *FLSA* was enacted, and 1941.

72 James B. Atleson, *Labor and the Wartime State: Labor Relations and Law During World War II* (Urbana: University of Illinois Press, 1998) at 60-85.

prohibiting strikes during the life of the contract, and instead referring rights disputes to arbitration. Arbitration law, however, was rickety state law often hostile to arbitration, and the *Federal Arbitration Act* excluded contracts of employment.[73] Unions began a concerted and successful litigation campaign to establish ready enforcement of promises to arbitrate (without judicial scrutiny of either the facts or merits of the claim), and minimal judicial review of the dispute either pre- or post-arbitration. This campaign culminated in the so-called *Steelworkers Trilogy* of 1960.[74] It succeeded by convincing (or perhaps scaring) the Supreme Court that "[t] he labor arbitrator performs functions which are not normal to the courts; the considerations which help him fashion judgements may indeed be foreign to the competence of courts."[75] Chief among these considerations was the avoidance of industrial strife,[76] which empowered the arbitrator to render rulings that drew on the "common law of the shop" and other unarticulated "needs and desires of the parties." The Court perhaps exaggerated the supposed incompatibility of private arbitration and public law.[77] But the very premise of the successful campaign to remove labour arbitration from judicial scrutiny was the assumption that such arbitration deals only with rights under labour agreements, and not statutory claims; the Court's hypothesized "common law of the shop" and "needs and desires of the parties" hardly seem like appropriate vehicles for statutory interpretation.

In a series of thirteen decisions between 1974 and 1998, the Supreme Court consistently maintained this sharp conceptual and practical distinction between (on the one hand) claims under collective bargaining agreements, appropriate for union-management dispute resolution with minimal judicial review, and (on the other hand) statutory claims, for

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73 9 USC §1. See generally *Szalai*, above note 6.

74 See above note 37.

75 *United Steelworkers v Warrior & Gulf Navigation Co*, above note 37 at 581

76 "In the commercial case, arbitration is the substitute for litigation. Here arbitration is the substitute for industrial strife": *ibid* at 578. For the reference to the "needs and desires of the parties," *see ibid* at 81.

77 In *United Steelworkers v Enterprise Wheel & Car Corp*, above note 37 at 596 n2, the Court quoted Charles R. Walker's "Life in the Automotive Factory," (1958:1) 36 Harv Bus Rev 111 at 117: "Persons unfamiliar with mills and factories — farmers or professors for example — often remark upon visiting them that they seem like another world." The *Steelworkers Trilogy* is peppered with similar quotes emphasizing — perhaps overemphasizing — the distinct world of the workplace and the distance between its normative universe, and that of the general law.

which access to public courts and agencies must always be preserved.[78] Of course, these cases arose because the very same incident may easily give rise to both kinds of claims. An individual who believes that his or her discharge represents illegal racial discrimination may be said, with no stretch of the imagination, to be simultaneously and necessarily alleging a discharge without "just cause," normally prohibited by collective bargaining agreements, as both Canadians and Americans well know. Nevertheless, the Court held consistently that the two claims must be kept conceptually distinct. An arbitrator's decision that the employee was discharged for cause did not preclude his or her suit under civil rights statutes, and was admissible in the civil rights suit only for whatever weight the court chose to give it.[79] This conceptual wall between private claims under collective bargaining agreements, and public claims under statutes, so different from the Canadian conceptualization, rested on

1) the unions' insistence in the *Steelworkers Trilogy* and other cases from the 1950s and 60s that arbitration reached only claims under collective agreements — as the phrase at the time went, it was "the substitute for industrial strife," not "the substitute for litigation";[80]
2) Congress's presumed intention to make statutory rights effective;[81] and

78 See generally Alan Hyde, "Labor Arbitration of Discrimination Claims After *14 Penn Plaza v Pyett*: Letting Discrimination Defendants Decide Whether Plaintiffs May Sue Them," (2010) 25 Ohio St J on Dispute Resolution 975 at 983–98 ["Labor Arbitration of Discrimination Claims"]

79 *Alexander v Gardner-Denver Com*, 415 US 36 (1974)(employee may sue employer under Title VII despite arbitrator's finding that his discharge was for cause). See also, *e.g.*, *Barrentine v Arkansas-Best Freight System Inc*, 450 US 728, 745) (1981) (allowing employee to sue employer in federal court under the *FLSA* seeking compensation for time spent inspecting trucks, despite collective bargaining agreement requiring compensation for all time spent in employer's service, and adverse ruling by joint employer-union grievance committee); *Lingle v Norge Div of Magic Che Inc*, 486 US 399, 407–10 (1988) (employee may sue in state court alleging that her discharge was retaliation for filing workers compensation claim, despite arbitral finding that she was discharged for cause, because state law remedy is independent of the collective bargaining agreement).

80 *United Steelworkers v Warrior & Gulf Navigation Co*, *above* note 37

81 See, for example, *Atchison, Topeka & Santa Fe Ry Co v Buell*, 480 US 557, 567 (1987) ("It is inconceivable that Congress intended that a worker who suffered a disabling injury would be denied recovery under the [*Federal Employer Liability Statute*] simply because he might also be able to process a narrow labor grievance under the [*Railway Labor Act*] to a successful conclusion.")

3) practical aspects of the arbitration process which make it unacceptable as a forum for statutory claims.[82]

C. THE CURRENT CRISIS OF THE LITIGATION MODEL

The Court has recently cast doubt on how much of this wall remains intact. In 2009, it held, abruptly reversing course, that a federal trial court should dismiss an individual employee's discrimination suit where the applicable collective bargaining agreement between his union and employer specifically gave arbitrators jurisdiction to decide claims of discrimination.[83] The Court failed to take into account that the union had already decided not to submit the employee's claim to arbitration, despite the fact that the lower courts had expressly noted that key fact. Accordingly, the Court's decision effectively killed the claim. The Court did not attempt to reconcile its decision with, or even mention, the previous thirty years of precedent insisting on a sharp demarcation between an individual's public law claim to be free of discrimination, and the same individual's parallel (but distinct) private law claims under his collective bargaining agreement.[84]

Understandably, the lower federal courts have since been quite confused about their role in similar disputes in which individual employees (or groups of employees) want to litigate a statutory claim, while their employers want it dismissed from court and sent to actual or hypothetical arbitration. Some courts send all statutory claims by employees represented by unions to labour arbitration.[85] Some send such claims to

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82 *Alexander v Gardner-Denver Com*, above note 79 at 56-58, noted the legal incompetence of many US arbitrators; the limited fact-finding in arbitration; the usual practice of arbitrators, approved by the Court, of failing to give reasons for awards; the general informality of procedures; the union's exclusive control over whether and how to present a claim to arbitration; and potential lack of harmony between the interests of an individual claimant and the majority of the bargaining unit

83 *Pyett*, above note 13

84 Hyde, "Labor Arbitration of Discrimination Claims, above note 78

85 See, for example, *Portis v Ruan Transp Mgt Sys*, 2015 BL 205580 (WD Va, June 26, 2015) (suit under state whistleblower statute stayed pending arbitration; applicable collective bargaining agreement made no reference to statutory claims and provide for arbitration of any dispute "arising under the agreement"); *Hodges v All Transit LLC*, 198 LRRM 2513, 2014 BL 37580 (ED NY, Feb. 7, 2014)(dismissing *FLSA* claim for compensation for hours worked because employee was covered by a collective bargaining

arbitration (or equivalent) with instructions to the arbitrators to determine their own jurisdiction.[86] Some carefully scrutinize the arbitration clause of the collective bargaining agreement to see whether it expressly commits statutory claims to arbitration; these courts disagree about what presumptions, if any, they should apply to this contractual construction.[87] Some make distinctions among statutes.[88] Some act as if *Pyett* never existed.[89] The one point that is clear is that arbitrators, who now hear statutory claims that they would never have seen pre-*Pyett*, have not yet risen to the challenge. There are simply no interesting post-*Pyett* opinions by US labour arbitrators on important questions of statutory or other public labour law.

It is idle to wonder whether, had the US gone down the *Weber* path at an earlier time, it might have evolved a Canadian-style cadre of arbitrators

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agreement with a grievance procedure; agreement made no reference to statutory rights; no attempt to determine "clear and unmistakable" waiver of right to sue).

86 *Wawock v Superior Court*, above note 22.

87 See, for example, *Gilbert v Donahoe*, 751 F3d 303 (5th Cir 2014). Plaintiff claimed that the employer violated rights under disability rights law and the *Family and Medical Leave Act*. Held, the disability bias claim should have been dismissed for want of jurisdiction since the applicable collective bargaining agreement required the employer to comply with discrimination statutes. However, the court should have retained the claim under the *Family and Medical Leave Act*, as the employer's obligation of compliance was found only in an employee manual, not in the text of the collective bargaining agreement.

88 *Manning v Boston Medical Ctr Corp*, 725 F3d 34, 52 (1st Cir 2013) (questioning whether *FLSA* claim may ever be waived by a collective bargaining agreement, noting that the *FLSA*, unlike Title VII or the *Americans with Disabilities Act*, lacks language encouraging arbitration; holding that an arbitration clause applying to "any dispute" is not an effective waiver of the right to sue: "Something closer to specific enumeration of the statutory claims to be arbitrated is required").

89 *US v Brennan*, 650 F3d 65 at 122-23 and n.56(2d Cir 2011)(claim under Title VII: "It is, we emphasize, well established that collective-bargaining remedies are separate and independent from Title VII remedies. . . . When an employee believes that she has suffered discrimination, she may proceed with the grievance procedure, under Title VII, or both, but the fact that the employee has one of these independent types of rights does not entitle her to anything with respect to the other . . . [N]othing in *Pyett* suggests any wavering in the Court's commitment to the traditional separation between contractual collective bargaining agreement rights and statutory Title VII rights."); *Bell v Southeastern Pa. Transp. Auth.*, 733 F3d 490 at 496 (3d Cir 2013) ("Here, where the Operators rely solely on their statutory, rather than their contractual, rights to recovery, district courts have had no difficulty concluding that such plaintiffs may proceed on their *FLSA* claims without first seeking arbitration.")

adept at statutory analysis. (Path dependence has its problems.) On my side of the border, we still have the arbitration system described by the Supreme Court in the *Steelworkers Trilogy* in 1960: "Arbitration is the means of solving the unforeseeable by molding a system of private law for all the problems which may arise and to provide for their solution in a way which will generally accord with the variant needs and desires of the parties [i.e., unions and employers]."[90] For determining whether a given employee was discharged or disciplined for cause, this system works fine. But US arbitrators are almost never called upon to deal with claims of statutory rights, a reality confirmed in the scant literature on the role of arbitration in statutory enforcement, which makes it clear that where unions can choose between arbitral and administrative processes, they take statutory claims to public law institutions for enforcement.[91] Unions simply do not regard arbitration as a viable avenue of enforcement for statutory rights, and US labour arbitration law has yet to contribute anything to the development of statutory labour law.

CONCLUSION

I regard the current jurisdictional confusion in the enforcement of statutory labour rights as a threat to workplace standards every bit as big as the more-commented-upon problems of diversion of unrepresented employees' claims to individual arbitration; employer off-loading of statutory responsibilities to less-capitalized staffing agencies and subcontractors; misclassification of employees; securing effective labour rights enforcement for the large population working in the US without legal authorization; and exclusion of worker organizations from participating in statutory rights enforcement.

Even more fundamentally, I take the view that enforcement through litigation leading to judicial decisions contributes mightily to these other problems. Litigation is expensive, unpredictable, lacks mechanisms to

90 *United Steelworkers v Warrior & Gulf Navigation Co*, above note 37 at 581

91 See Levinson, above note 38. See also Pauline T. Kim, *"Collective and Individual Approaches to Protecting Employee Privacy: The Experience with Workplace Drug Testing,"* (2006) 66 La L Rev 1009 (dealing with legal strategies for challenging drug testing); David Weil, "Regulating the Workplace: The Vexing Problem of Implementation," (1996) 7 Advances in Indus & Lab Rel 247 (dealing with the enforcement of federal employment regulation in unionized workplaces).

overcome inequality of resources, and frequently resorts to common law analogies of dubious relevance, such as the common law definitions of employee or vicarious liability. Despite my respect for the Canadian experience, however, I do not believe that the solution to this problem in the US lies in channeling statutory claims to labour arbitrators. US arbitrators have historically failed this task. In addition, enforcement through labour arbitration would benefit only the 6.6 percent of private sector workers in the US currently represented by a labour union;[92] most US employees would have no access to arbitration of this type.

Rather, I believe that experts in labour rights should have "sitting in the drawer," just as Frances Perkins had the draft *Fair Labor Standards Act*, legislation creating a unified labour court or agency that could, without cost to employees, investigate and remedy violations of such employment-related statutes as labour standards and antidiscrimination legislation. Should the occasion arise for enactment of such a statute at the federal level, it could be pulled from the drawer. Such an agency could profitably adopt the tripartite model advocated by Janice Fine and Jennifer Gordon, who provide detailed examples of best practices.[93] It could also make much more effective use of mediation than the existing EEOC, Department of Labor, or state analogs.

Vastly more likely, however, is the creation of such agencies in states such as California, New York, New Jersey, or Massachusetts, or cities like San Francisco or New York, which already provide substantive labour standards and protection against discrimination far superior to the federal minima. Effective enforcement will then become just one more dimension of the dissolution of federal labour law in the US and the rise, familiar to a Canadian audience, of primary state (provincial) responsibility for standards in the labour market.

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92 US Department of Labor, above note 33.

93 See Fine, "Solving the Problem from Hell"; Fine & Gordon, "Strengthening Labour Standards Enforcement through Partnerships with Workers' Organisations"; Fine, "Co-Production," all above note 11. For such an enforcement agency to supplant the litigation model, it would have to be considerably more responsive than even the best existing US labour standards enforcement. In a personal communication on February 2, 2016, Janice Fine said: "I hear over and over again from organizations that they prefer to go the private right of action route, rather than filing complaints, because it allows them to maintain much greater control over the cases as they progress. They hate the cone of silence that descends so often when they help workers file wage claims with state departments of labor or the USDOL."