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## Foreword

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## Foreword

*Kerri Lynn Stone\**

A confluence of several crucial and fortuitous events led to the inception of the *FIU Law Review*'s spring 2010 symposium, and we are grateful that it was attended by some of the greatest minds and most prominent players in the field of labor law. We at the Florida International University College of Law hope that this edition will be a go-to volume for those seeking insight into this very unique moment in the history of labor law and of the National Labor Relations Board (NLRB). The collection of these attendees' and authors' thoughts, contributions, and robust debate at the Symposium is one of the greatest accomplishments of our young Law Review to date. It has truly been our school's privilege to host this event and to record the conversations, proposals, and debates surrounding labor law in this issue.

The first event was the appointment of R. Alexander Acosta as the second Dean of Florida International University College of Law in 2009. Dean Acosta, a former Member of the NLRB, brought to FIU a unique depth of experience with and insight into labor law, which served to further pique student interest in the subject. The second event was the seventy-fifth anniversary of the National Labor Relations Act (NLRA), passed in 1935 with the goal of engendering and sustaining industrial peace and promoting commerce through the establishment and protection of employees' right to bargain collectively with management through the use of their own chosen representation.<sup>1</sup> Finally, late 2009 and 2010 saw renewed public discourse on the topic of labor law, and focus had turned to the continuing efficacy of the NLRA and the future of the NLRB, which had been, as the Supreme Court recently determined,<sup>2</sup> without a quorum since 2008. The decline of unionism, the rise of administrative delay, and what some perceived as the futility of the Board's limited remedies for unfair labor prac-

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<sup>1</sup> 29 U.S.C. § 151 (2006).

<sup>2</sup> See *New Process Steel, L.P. v. NLRB*, No. 08-1457, slip op. (U.S. June 17, 2010).

tices – among numerous other trends and perceptions – suggested a need for the reform of the system and heralded a crisis of confidence pertaining to the Act.

The Symposium's chosen title, *Whither the Board*, was an ironic but fitting choice that resonated with its organizers, who sought, as the name suggests, both to point to the Board and the law's uncertain state, and to entreat its invitees to posit a vision for the future of the NLRA and the NLRB as both turned seventy-five. Our symposium brought together many of the key individuals – the scholars, the government officials, and union and management practitioners – whose ideas, decisions, and influences will likely shape the future of the Board and of labor law itself. Our students were thrilled when both sitting Board Members, Chairman Wilma Liebman and Member Peter Schaumber, agreed to participate. They were joined by former Board Members Marshall Babson, Dennis Walsh, and R. Alexander Acosta. Professor Samuel Estreicher of the New York University School of Law provided invaluable suggestions regarding the composition and organization of panels, and for that, we are grateful to him. Presenting at the Symposium, he was joined by Professors Matthew T. Bodie, James J. Brudney, Catherine Fisk, David Gregory, Michael Harper, Jeffrey Hirsch, Anne Marie Lofaso, Jeffrey Lubbers, Ediberto Roman, John Sanchez, and Paul M. Secunda. Attending as well were representatives of labor and of management, including Judy Scott (General Counsel, SEIU), Jennifer Hill (Workplace Justice Project, Florida Immigrant Advocacy Center), Joan M. Canny (Morgan Lewis), Andrew Kramer (Jones Day), Thomas Brudney (Senior Field Attorney, NLRB), and Thomas Mead Santoro (Jackson Lewis).

The remarks of Chairman Wilma Liebman and Dean R. Alexander Acosta, published in this volume, reflect quite diverse perspectives. Remarkably, these current and former Members find common ground in the thesis that the Board today is less relevant than it was a decade ago. Chairman Liebman acknowledges this fact, but suggests confidence in the Board's future and deliberate caution regarding potential changes. Dean Acosta, by contrast, expresses concern that absent fundamental change in the structure of the Board's decision-making process, the Board will continue its slow decline. Each piece sets forth their reflections at this crossroads in labor law and their unique vantage points, suggestions, and predictions. Their incisive questions and insightful observations will surely prove invaluable to the blueprints of labor law reform.

Similarly, the pieces in this volume urge innovative strategies and solutions to problems that will take labor law outside of its traditional box and onto previously untrodden territory. Professor Estreicher has long advocated improved administration of the NLRA by the Board to enhance

the speed of representation elections, better deter unlawful behavior, improve access rights, and promote confidence by all parties in the integrity of the statutory scheme. Thus, his piece, *Improving the Administration of the National Labor Relations Act Without Statutory Change*, first published in 2009, helped to inspire much of the debate and discussion at the Symposium.

In his article, *The Contemporary "Fist Inside the Velvet Glove": Employer Captive Audience Meetings Under the NLRA*, Professor Secunda argues that in order to facilitate free choice in representational elections, the NLRB should revert to its former stance and hold that so-called "employer captive audience speeches" are per se violations of the NLRA. This construction of the statute, Professor Secunda maintains, is entirely supported by its language, and he alludes to the Board-coined term, the "fist inside the velvet glove," to illustrate the type of force that such meetings, currently permissible, can have.

Professor Jeffrey Lubbers questions what he terms the NLRB's long-standing antipathy toward rulemaking in his article, *The Potential of Rulemaking by the NLRB*. To streamline appellate review of the Board's rulemaking process, Professor Lubbers proposes amending the NLRA to provide for direct judicial review of rules in the courts of appeals. And more radically, he also proposes a time limit for bringing certain types of challenges, along with the elimination of what he describes as the NLRA's "apparent prohibition on the Board's employment of economists."

In *Defending the NLRB: Improving the Agency's Success in the Federal Courts of Appeals*, Professor Hirsch posits strategies that the Board could employ in its handling of its cases that would increase its chances of having its decisions and orders enforced by federal courts of appeals. Focusing on what he calls the most "contentious cases" that the Board decides, Professor Hirsch concludes that courts of appeals are not, according to the Board, giving it the deference that it ought to warrant. His article sets forth strategic reforms like bettering the format and substance of Board decisions, weighing the Board's option to engage in some limited forum shopping, more Board engagement in rulemaking as opposed to adjudication, minimizing delay, and asking for additional injunctive relief.

*Victims on Trial? A Backpay Case at the NLRB* is Thomas Brudney's first-person account of his work on a backpay case. From his unique vantage point as a trial attorney for the NLRB, he critiques what he perceives as the NLRB's outdated approach to enforcement in backpay cases. He suggests that union decline may be attributable to the dearth of protections afforded to workers who risk, and subsequently lose, their jobs in the course of exercising their Section 7 rights. He also urges sweeping change in the Board's attitude toward and engagement with such situations, criticizes the

mitigation principles at play in cases like the one he examines, and suggests sweeping reform.

Professor Lofaso's piece, *The Vanishing Employee: Putting the Autonomous Dignified Union Worker Back to Work*, references to what she terms the "vanishing employee," discussing the narrowing of the statutory definition of the word "employee" to illustrate her insight that the "withering" of the NLRA's regime is ultimately attributable to the legal institutions charged with protecting workers. She advocates a bold congressional amendment that would eliminate the supervisory and independent contractor exemptions in the Act and the managerial exemption that has been read into the Act in order to enable the Act to better effectuate its policies and better safeguard employees' sacrosanct right to band together in furtherance of their common goals.

Jennifer Hill, in her article, *Can Unions Use Worker Center Strategies?: In an Age of Doing More With Less, Unions Should Consider Thinking Locally but Acting Globally*, explores the application of worker center strategies to unions in her article, informing her suggestions with her own experiences with and observations of unions and employees.

In his article, *A New Board Policy on Deferral to Arbitration: Acknowledging and Delimiting Union Waiver of Employee Statutory Rights*, Professor Harper advocates that the NLRB reevaluate the relevance of arbitration to the NLRB's adjudication of unfair labor practice charges. He urges that whenever it is alleged that represented employees were denied their waivable Section 7 rights only, and the Board has no reason to believe that the union's consent to the authorization was in breach of its duty of fair representation, "the Board should defer to a fair and regular arbitration award or settlement that clearly and unmistakably authorized the action."

In his article, *Mandatory Disclosure in the Market for Union Representation*, Professor Bodie thoughtfully examines the Board's "laboratory conditions" doctrine, whereby it is mandated that during a representational election, "it is the Board's function to provide a laboratory in which an experiment may be conducted, under conditions as nearly ideal as possible, to determine the uninhibited desires of the employees." Professor Bodie observes (and marvels at) the stark contrast between the extensive list of prohibited conduct during an election period and the limited affirmative steps that the Board has taken to arm employees' electorates with the vast amounts of information needed for each employee to arrive at his true uninhibited choice. To fill this chasm, Professor Bodie proposes an organized mandatory disclosure regime that would, among other things, bring to light conflicts of interest between labor organizations and employers in order to cultivate awareness of the landscape and dynamics of the election and its implications and to encourage rational, informed choice.

We were also fortunate to have a lively discussion among three labor law experts, Dennis Walsh, Professor Catherine Fisk, and Professor John Sanchez, on the question of the legitimacy of the assertion that the two member Board that sat from 2008-2010 constituted a quorum within the meaning of the NLRA. This issue was argued before the Supreme Court just three days before our Symposium began, and the Court came down with its decision just a few weeks after our symposium concluded, holding that once the Board's delegee group and membership fell from three people to two people, the group could not keep exercising its delegated authority.<sup>3</sup>

Professor Fisk regards the Supreme Court opinion as "a lost opportunity for the Court to address some important questions about the role of reviewing courts when the nomination process stalls." In her article, *The Role of the Judiciary When the Agency Confirmation Process Stalls: Thoughts on the Two-Member NLRB and the Questions the Supreme Court Should Have, but Didn't, Address in New Process Steel L.P. v. NLRB*, she poses these questions and calls for "a functional analysis of what courts should do when a failure to nominate or confirm replacements threatens to render an agency incapable of enforcing the law."

Professor Sanchez, in his article, *Two Is Company, but Is It a Quorum?*, argues that the quorum issue was capable of resolution simply by resort to the plain language of the statute; he asserts this route leads to the inexorable conclusion that in order for there to be a quorum, there need to be, at all times, three NLRB members. He urges the congressional amendment of the vacancy provision of Section 3(b) of the NLRA to provide that NLRB members whose terms expire will continue to serve on the NLRB until their successors take office.

Former Board member Dennis Walsh responds to Professor Sanchez's article in *Two Is Company "and" Two Can Be a Quorum*. In this response, he highlights what he asserts are the main flaws in the reasoning endorsed by Professor Sanchez. He argues that the Supreme Court incorrectly failed to construe the National Labor Relations Act in support of the Board's continuing authority to render decisions via a two-member quorum of a three-member panel to which the Board has properly delegated its powers. Indeed, he concludes, "if the Court had properly read Section 3(b) as embodying a true two-member quorum exception when the Board properly delegates its authority to a three-member panel, then today's Board would have been free to focus on important questions of labor-management policy in its current caseload."

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<sup>3</sup> See *New Process Steel, L.P.*, No. 08-1457, slip op.

Finally, Professor James Brudney advocates for more proactive Board measures to effectuate the Act's objectives and ideals in his article, *Private Injuries, Public Policies: Adjusting the NLRB's Approach to Backpay Remedies*. Professor Brudney critiques extant Board backpay and mitigation guidelines and their application processes, delving into the sometimes perverse incentives they generate and the backlash that they unleash on unionization. His searching article questions whether the Board possesses the authority to reform its backpay and mitigation guidelines and processes, and concludes that it has, as he says, "more [authority] than has previously been understood." He proposes that the Board create a mandatory minimum backpay award using a two-tiered approach premised on the disparity in the time it takes to process backpay claims that are resolved through settlement and those resolved after litigation.

As Dean Acosta concluded the Symposium's final session on March 27, 2010, no one present in the room knew that President Obama was, almost at that very moment, making the recess appointments of Craig Becker and Mark Pearce to the NLRB. The Supreme Court had just, days earlier, heard oral argument in *New Process Steel*, in which the legitimacy of the NLRB's asserted quorum was at issue. One point of consensus was that change was needed for the current legal and administrative regime to remain relevant and effective. Even as we debated the means by which that change would be brought about and the direction in which it would guide the law, it was apparent that a new era of labor law was dawning, and many of the leaders who would shape, nurture, and lead this new era were sitting in the same room and engaging one another in conversation. The collection of articles, essays, and speeches that follow track the main themes presented and the streams of ideas exchanged.

It has been the privilege of the Florida International University College of Law to host this very special event, and the Law Review Boards of 2009-10 and 2010-11 are to be congratulated for all of their hard work on the symposium and on this volume. We are also very grateful to our thoughtful commentators who enriched the symposium by providing feedback to our presenters and guiding the ensuing discussions.