OVERVIEW OF THE LABOR AND EMPLOYMENT LAW LANDSCAPE — PAST AS PROLOGUE

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The American political landscape changed dramatically during 1994. It may be fairly assumed that the changing dynamics of labor law reform will reflect the shift of power occasioned by the new Republican domination of both Houses of Congress. Other chapters in this volume will focus upon critical issues in contemporary labor and employment law. This introductory Chapter will review historical developments as they affect broad trends in the field.

Soon after he was sworn into office, President Clinton directed the Secretary of Labor and the Secretary of Commerce to form a Commission on the Future of Worker/Management Relations.[1] On March 24, 1993, the two Secretaries announced that the Commission was established, and John T. Dunlop, former Secretary of Labor, was appointed as the Commission Chairman. The Commission was directed to investigate the status of worker/management relations and respond to three specific questions concerning labor/management cooperation and employee participation, enhancements for cooperative behavior, and enhancement of direct resolution of workplace disputes by the parties themselves rather than resolution by recourse to governmental bodies.[2]

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1. The establishment of the Commission and the first meeting were announced in the Federal Register of May 7, 1993.

2. The charge of the Commission was to:

> investigate the current state of worker-management relations in the United States and report back to the Secretaries [of Labor and of Commerce] in response to the following questions:
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> 1. What (if any) new methods or institutions should be encouraged, or required, to enhance work-place productivity through labor-management cooperation and employee participation?
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> 2. What (if any) changes should be made in the present legal

The Dunlop Commission submitted an Interim Fact-Finding Report to the Secretaries in May 1994. Although the final report originally had been scheduled to issue that month, the Commission was granted a six-month extension to prepare final recommendations.[3]

Among other things, the Interim Report [hereinafter "Report"] concluded that "most employers and union representatives support the social goals of workplace laws and regulations but see them as highly complex and unresponsive to their needs."[4] The Commission further found increasing difficulty in developing and enforcing standard regulations to meet the needs of diverse employment settings and changing workplace practices in the modern economy.[5]

Many observers consider the federal collective bargaining laws studied by the Commission archaic and unresponsive to the condiing the labor/management relationship remains rooted in the events of the Great Depression and the system of mass industrial production that predominated sixty years ago. To a large extent, the traditional laissez-faire foundations of government's limited involvement in the labor/management relationship has remained unchanged. American labor organizations also continue to spurn broad, positivist state intervention in the employment relationship, such as state intervention existing in Europe and most civil law countries. Against this backdrop of entrenched traditionalism, an increasing number of analysts, scholars, and practitioners have called for a rethinking of American labor law.

In January, 1994, while the Dunlop Commission was formulating its report, the Stetson University College of Law Center for Dispute Resolution convened the Ninth Annual National Conference on Labor and Employment Law. This annual conference brought together a national faculty of speakers from law practice and the highest policy levels of government, business, labor, academic, and neutral forums to critically examine recent trends and developments and to assess the future of American labor policy. The two-day con-

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framework and practices of collective bargaining to enhance cooperative behavior, improve productivity, and reduce conflict and delay?

3. What (if anything) should be done to increase the extent to which work-place problems are directly resolved by the parties themselves, rather than recourse to state in federal courts and the government regulatory bodies?

COMMISSION ON THE FUTURE OF WORKER-MANAGEMENT RELATIONS, FACT FINDING REPORT at xi (1994) [hereinafter DUNLOP COMM'N REPORT].

3. Additional extensions have been granted and the report has not yet been issued at the time of this writing; see text under "Conclusion" *infra* page 22.

4. DUNLOP COMM'N REPORT, *supra* note 2, at 108.

5. *Id*. The Commission noted that this is true particularly for the growing number of temporary or contract workers and the firms that employ them or utilize their services. *Id*.

ference addressed some of the critical issues of contemporary labor and employment law. This Chapter summarizes the presentations of speakers at the 1994 Conference as a foundation for considering new developments in labor and employment law at the 1995 Conference.[6]

THE CHANGING LABOR MARKET

The Dunlop Commission found that the United States labor market is becoming more bifurcated due to the stagnation of real earnings and the increased inequality of earnings, with an upper tier of high-wage skilled workers and a growing "underclass" of low-paid labor.[7] Moreover, the industrial composition of employment has changed dramatically from that of the 1930s when the National Labor Relations Act was passed. Industry now demands workers with different skills and responsibilities, contributing to the relative decline in the number of high-paying jobs for manual workers.[8] The significant growth in the highly skilled work force also has generated worker needs different than those of workers envisaged under traditional labor laws. The form of relationship between labor and management that spawned the NLRA simply does not fit well within the contemporary workplace with its more highly trained and educated work force.[9]

The growing number of "contingent" and other nonstandard workers in the American work force broadens the number of jobs that are subject to lack of job security and benefit protections.[10] Em-

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6. Four of the papers presented at the 1994 Stetson Conference are included in the Fall 1994 symposium issue of the *Stetson Law Review* and are considered in this Chapter. This Chapter also highlights issues addressed in selected other papers presented at the 1994 Conference and relates them to the issues treated in the Dunlop Commission's findings. Gerald E. Berendt & David A. Youngerman, *The Continuing Controversy over Labor Board Deferral to Arbitration — An Alternative Approach*, 24 STETSON L. REV. 175 (1994); C. John Cicero, TNS, Inc. — *The National Labor Relations Board's Failed Vision of Worker Self-help to Escape Longterm Health Threats from Workplace Carcinogens and Toxins*, 24 STETSON L. REV. 19 (1994); Janet E. Goldberg, *Employees with Mental and Emotional Problems — Workplace Security and Implications of State Discrimination Laws, the Americans with Disabilities Act, the Rehabilitation Act, Workers' Compensation, and Related Issues*, 24 STETSON L. REV. 201 (1994); Lorraine Schmall & Charles Cappell, *The Impact of* Dubuque Packing Co. *upon the Collective Bargaining Practices of Attorneys and Their Clients*, 24 STETSON L. REV. 111 (1994).

7. DUNLOP COMM'N REPORT, *supra* note 2, at 19.

8. *Id*. at 6.

9. *Id*. at 13.

10. The term "contingent workers" encompasses part-time workers, employees of temporary health agencies (who may be full-time workers), and some of the self-employed, including "owner/operators" or independent contractors with only a single contract or employer. *Id*. at 20, 21. It has been estimated that perhaps seven million part-timers work fewer than one thousand hours per year and therefore are exempt from Employee Retirement Income Security Act and Family and Medical Leave Act benefits.

ployers have learned that by employing contingent workers, they may minimize benefit and wage costs while maintaining greater flexibility of control over their work force. The Dunlop Commission found that the growth in federal regulation of the workplace leaves less room for local parties to determine the workplace rules that best meet the needs of their situations.[11]

Joseph F. Coates, president of a consulting firm dedicated to the study of the future, spoke at the 1994 Stetson Conference and observed: "The American corporation and other large and small organizations are caught up in a 20-year transition from the business practices of the post-World War II era to the new business practices of the Third Millennium. The next two decades will be the culmination of that transition."[12] He further predicted that the resolution of a dozen human resources issues[13] will transform large and small corporations over the next two decades. He considered the evolution of "nontraditional work" to be one of the most important developments: "[D]istributed work — work done outside the workplace — and particularly computer-supported work, is potentially one of the most exciting things happening in the workplace today."[14] Mr. Coates noted that while such nontraditional work opportunities do afford workers greater flexibility and savings on travel time and improve workplace efficiency, these opportunities also raise issues of pay, supervision, and workers' compensation coverage.[15]

The labor/management environment of the 1990s is changing in other more fundamental respects, as witnessed by the conjunction of

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Id. at 21. Moreover, state unemployment insurance earnings and full-time availability requirements exclude most part-time workers from unemployment insurance benefits. *Id*. The Department of Labor estimates that in 1992, there were 2.5 million temporary employees, approximately half hired through temporary agencies and half hired directly by employers. These workers are disproportionately young, female, and black and tend to be in relatively low wage occupations. *Id*.

11. *Id*. at 25.

12. Joseph F. Coates, The Top Dozen Human Resources Issues for Years 2000–2010, *in* NINTH ANNUAL NATIONAL CONFERENCE ON LABOR AND EMPLOYMENT LAW, at 1 (Jan. 27–28) (on file with the Stetson University College of Law Center for Dispute Resolution).

13. Mr. Coates identified the "Top Dozen Human Resources Issues for Years 2000 to 2010" as follows: (1) the power imbalance between management and labor; (2) distributed work, particularly computer-supported work; (3) the African-American worker; (4) human resources in business alliances; (5) the future of testing; (6) white collar and service sector productivity; (7) human resources lessons from European and Japanese experience; (8) the contingent work force; (9) women in the executive suite; (10) the catastrophic cognitive collapse of K-12; (11) images of worklife in America; and (12) executive leadership. Coates, *supra* note 11, at 1.

14. INSIGHT, 389 Lab. L. Rep. (CCH) No. 627, at 6 (Feb. 25, 1994) [hereinafter INSIGHT].

15. *Id*.

three major forces during recent years: the increased internationalization[16] of production with fewer limits on the mobility of capital, intensified foreign competition, and the precipitous decline of the trade union movement.

THE DECLINE OF UNIONIZATION

It is common knowledge that the prevalence of collective bargaining has been in a state of decline for decades. By 1993, the proportion of private sector nonagricultural workers who were union members had declined to only eleven percent, less than one-third of the thirty-five percent of the work force unionized in the 1950s.[17] The Dunlop Commission concluded that the decline in collective bargaining in the private sector has created an arena for worker/management relations in which most employees have no independent organization to discuss issues with management.[18]

Charles B. Craver, Merrifield Research Professor of Law at George Washington University National Law Center, spoke at the 1994 Stetson Conference and surveyed the union scene and its declining membership.[19] He offered a preview of its possible future and suggested the following self-help steps that unions should pursue in order to survive: (1) develop techniques to organize those workers who are traditionally non-union; (2) devise programs designed to enhance union economic power to counterbalance the significant power possessed by corporate employers; (3) expand the political influence of unions; and (4) work together with management to further their joint interests.[20]

William B. Gould, IV, Professor of Law at Stanford University Law School, also spoke at the 1994 Stetson Conference and called for "mature industrial relations" to replace industrial strife.[21] He

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16. Donald C. Dowling, Jr., suggested in his conference paper that advising U.S. multi-nationals on comparative employment issues is "an untapped speciality with huge potential." Donald C. Dowling, Jr., Special Employment Problems of U.S. Multi-National Corporations, *in* NINTH ANNUAL NATIONAL CONFERENCE ON LABOR AND EMPLOYMENT LAW, *supra* note 11, at 1. He observed that the globalization of employment raises four problems: (1) it injects comparative employment issues into international business transactions; (2) it requires U.S. corporations to coordinate global hiring strategy; (3) it imposes U.S. employment laws on U.S. companies' foreign operations; and (4) it injects a "treaty" defense into foreign employment law suits. *Id*. at 2–3.

17. DUNLOP COMM'N REPORT, *supra* note 2, at 24.

18. *Id*.

19. Charles B. Craver, The Future of American Labor Organizations, *in* NINTH ANNUAL NATIONAL CONFERENCE ON LABOR AND EMPLOYMENT LAW, *supra* note 11, at 1.

20. Craver, *supra* note 18, at 8–10; *see* CHARLES B. CRAVER, CAN UNIONS SURVIVE? (1993).

21. William B. Gould, IV, A View from the National Labor Relations Board, *in*

suggested that alternative dispute resolution (ADR) procedures should be used at the Administrative Law Judge level to encourage voluntary resolution of disputes under the NLRA.[22]

Leo Geffner, attorney for employees and labor organizations and Chairman of the ABA Section on Labor and Employment Law, observed that the past twenty years of declining membership will force unions to change. He speculated that American labor organizations of the future will resemble their European counterparts.[23] He cited the Family and Medical Leave Act as an example of how the United States is moving toward the European model, adopting this view: "If you can't get it at the bargaining table, look to legislation."[24] Mr. Geffner also called for basic reforms to protect workers against protracted litigation and encourage the prompt resolution of refusal-to-bargain cases.[25]

The controversy over recent NLRB rulings[26] on labor/management cooperation techniques has generated considerable debate.[27] Patrick Hardin, Professor of Law at the University of Tennessee College of Law, spoke at the 1994 Stetson Conference and suggested that there is little reason for "heroic measures," such as passage of amendments to § 8(a)(2).[28] Professor Hardin noted that the volume of these cases is minuscule, citing NLRB Member Devaney's statement in *E.I. du Pont de Nemours & Co.* that only twenty alleged violations of § 8(a)(2) arose out of the 9,300 complaints filed with the Board during 1993.[29] Professor Hardin also noted that the General

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NINTH ANNUAL NATIONAL CONFERENCE ON LABOR AND EMPLOYMENT LAW, *supra* note 11, at 1; *see* WILLIAM B. GOULD, IV, AGENDA FOR REFORM (1993); William B. Gould, IV, *The Employment Relationship Under Siege: A Look at Recent Developments and Suggestions for Change*, 22 STETSON L. REV. 15 (1992). At the time of his presentation, Professor Gould was President Clinton's nominee for NLRB Chairman and was on the Dunlop Commission. He subsequently was confirmed by the Senate and now serves as NLRB Chairman.

22. Gould, *supra* note 20. The traditional weapons of self-help are no longer as effective for labor as they were several decades ago and the number of both strikes and lockouts have declined appreciably. The number of work stoppages involving one thousand or more workers and the number of workers involved in these disputes per year has dropped sharply in the 1980s. DUNLOP COMM'N REPORT, *supra* note 2, at 24. During the 1970s, there were 289 major work stoppages involving 1,488,000 workers; in the 1980s, there were only 83 major work stoppages involving only 507,000 workers. *Id*. In 1992, there were only 35 such work stoppages involving 182,000 workers. *Id*.

23. INSIGHT, *supra* note 13, at 2.

24. *Id*.

25. *Id*.

26. *See, e.g.*, E.I. du Pont de Nemours & Co., 311 N.L.R.B. 893, *corrected*, 143 L.R.R.M. (BNA) 1268 (NLRB 1993); Electromation, Inc., 309 N.L.R.B. 990 (1992).

27. *See, e.g.,* Dennis M. Devaney, *Much Ado About Section 8(a)(2): The NLRB and Workplace Cooperation After* Electromation *and* du Pont, 22 STETSON L. REV. 39 (1993).

28. INSIGHT, *supra* note 13, at 2.

29. *du Pont*, 309 N.L.R.B. at 899 n.4 (Devaney, Member, concurring).

Counsel's nonreviewable discretion allows him or her to refuse to issue complaints that "pursue technically defined violations at the price of penalizing management initiatives that promote efficient and collaborative work practices but which do not jeopardize the central purpose of the NLRA."[30]

It is noteworthy that while organized labor appears to be in a continuous state of numerical decline,[31] government intervention in the worker/management relationship appears to be increasing. The growing body of employment-related legislation may manifest congressional and state legislative concern that the voluntaristic collective bargaining process is inadequate to provide those protections considered most vital and necessary for application to workers who are particularly vulnerable to employer unilateralism.[32]

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30. *Id*.

31. In contrast to the precipitous decline of private sector worker organization, public sector unionization has continued to grow in recent decades. INSIGHT, *supra* note 13, at 2. Over a third of public sector workers were union members in 1993, compared to only ten or eleven percent in the 1950s. *Id*.

32. Noting that both houses of Congress and the executive branch are now headed by the Democratic party, J.D. Thorne expressed concern at the 1994 Conference that the current political landscape will now unfairly favor labor. J.D. Thorne, Annual Review of Legislative and Administrative Developments, *in* NINTH ANNUAL NATIONAL CONFERENCES ON LABOR AND EMPLOYMENT LAW, *supra* note 11, at 2–4. One of the harbingers of such change, Mr. Thorne observed, was the then-pending bill which would prohibit the hiring of permanent replacements for strikers. Workplace Fairness Act, H.R. 5, 103d Cong., 1st Sess. (1993); S. 55, 103d Cong., 1st Sess. (1993). However, the bill was defeated on July 14, 1994. Catherine S. Manegold, *For Second Time, Senators Block Bill to Bar Replacement of Strikers*, N.Y. TIMES, July 14, 1994, at D23.

THE GROWTH OF FEDERAL EMPLOYMENT REGULATION

Although the National Labor Relations Act and the Railway Labor Act represent a national commitment to voluntaristic determination of workplace standards, Congress never fully abdicated responsibility for those standards to negotiation by the parties. For example, the Federal Fair Labor Standards Act of 1938, which establishes minimum pay and overtime requirements, sets minimum standards below which contract negotiators may not fall.[33] It was one of the most important enactments of the New Deal era.

The most significant growth in federal legislation regulating employment in the last thirty years has occurred in the area of value-laden issues, such as discrimination, workplace hazards, invasion of employee privacy,[34] and related matters of concern to individual employees. A major stimulus for growth in employment law practice has been employment discrimination legislation. The single most important development was the enactment of Title VII of the Civil Rights Act of 1964, which prohibits private employers with fifteen or more employees from discriminating against employees on the basis of race, sex, religion, or national origin.[35] Title VII was extended by the Equal Employment Opportunity Amendment Act of 1972 to cover state and local governments.[36] Three years later, Congress enacted the Age Discrimination in Employment Act of 1967, which prohibits discrimination against employees over forty years old on the basis of age.[37]

The 1970s witnessed a new emphasis upon worker safety and health issues. The Occupational Safety and Health Act of 1970 (OSHA) imposed a general duty on employers to provide a safe

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33. Fair Labor Standards Act of 1938 (FLSA), 29 U.S.C. § 201 (1988).

34. Attorney James D. Allen spoke at the 1994 Conference on the subject of employee privacy issues, such as statutory restrictions on employee surveillance and monitoring, employee searches, inquiries about medical history (including HIV infection), and monitoring of E-mail. James D. Allen, Employee Privacy Issues: Telephone and E-mail Monitoring, Surveillance and Searches, *in* NINTH ANNUAL NATIONAL CONFERENCE ON LABOR AND EMPLOYMENT LAW, *supra* note 11, at 5–13; *see* 18 U.S.C. §§ 2510–2711 (1988). Mr. Allen noted that recent changes in the workplace have resulted in the need to change the way employers observe, evaluate, and monitor their employees. INSIGHT, *supra* note 13, at 5.

35. Civil Rights Act of 1964 (Title VII), 42 U.S.C. § 2000e (1988). In 1963, Congress amended the FLSA with the Equal Pay Act of 1963, prohibiting discrimination of the basis of sex in wages and benefits. Equal Pay Act of 1963, 29 U.S.C. § 206(d) (1988).

36. Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 103 (1972) (codified at 42 U.S.C. § 2000e (1988)).

37. Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621–634 (1988).

workplace and required employers to comply with specific safety and health standards developed by OSHA under the Department of Labor.[38] The Federal Mine Safety and Health Act of 1977 imposed similar obligations on employers in the mining industry.[39] Other important legislative innovations in the 1970s included the Employee Retirement Income Security Act of 1974, which imposed comprehensive requirements concerning access, vesting, security, and fiduciary responsibilities in pension and health and welfare benefits provided by employers to employees.[40]

The 1980s witnessed enactment of additional important legislative protections for workers. The Immigration Reform and Control Act of 1986 prohibited employers from hiring illegal aliens and prohibited employers from discriminating against legal aliens.[41] The Employee Polygraph Protection Act of 1988 prohibited employers from requiring employees to undergo lie detector tests.[42] The Worker Adjustment and Retraining Notification Act of 1988 requires sixty days notice by employers with one hundred employees or more to employees of pending plant closings and mass layoffs.[43]

The momentum of increased legislative regulation has continued during the 1990s. The Americans with Disabilities Act of 1990 prohibits employers with more than fifteen employees from discriminating against disabled workers and requires reasonable accommodation to an employee's disabling condition.[44] The Civil Rights Act of 1991 was designed to counteract certain United States Supreme Court decisions that had weakened Title VII.[45] It also provided for

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38. Occupational Safety and Health Act, 29 U.S.C. §§ 651–678 (1988).

39. Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 801–962 (1988).

40. Employee Retirement Income Security Act of 1974, 29 U.S.C. §§ 1000–1461 (1988).

41. Immigration Reform and Control Act of 1986, 8 U.S.C. § 1324a (Supp. V 1993).

42. Employee Polygraph Protection Act of 1988, 29 U.S.C.A. §§ 2001–2009 (West Supp. 1994).

43. Workers Adjustment and Retraining Notification Act, 29 U.S.C. §§ 2101–2109 (West Supp. 1994).

44. Americans with Disabilities Act of 1990, 42 U.S.C. 12101 (Supp. IV 1992).

45. Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (codified as amended in scattered sections of 42 U.S.C.A. (West Supp. 1992)); *see, e.g.*, Wards Cove Packing v. San Antonio, 490 U.S. 642 (1989) (relaxing the Court's "disparate impact" standard of discrimination announced in Griggs v. Duke Power, 401 U.S. 424 (1971)). Section 105 of the Civil Rights Act of 1991 nullifies this aspect of *Wards Cove*. *See* EEOC v. Arabian American Oil Co., 499 U.S. 244 (1991); Patterson v. McLean Credit Union, 491 U.S. 164 (1989); Lorance v. AT&T Technologies, Inc., 490 U.S. 900 (1989); Martin v. Wilks, 490 U.S. 755 (1989); Price Waterhouse v. Hopkins, 490 U.S. 228 (1989); Crawford Fitting Co. v. J.T. Gibbons, Inc., 482 U.S. 437 (1987). For a general discussion of the impact of the Civil Rights Act of 1991, see Hon. Theodore McMillian, *The Civil Rights Act of 1991 — One Step Forward on a Long Road*, 22 STETSON L. REV. 69 (1992).

jury trials and additional damages for intentional violations.[46] The Family and Medical Leave Act of 1993 (FMLA) requires both public and private employers (with more than fifty employees) to provide up to twelve weeks of leave without pay, with health benefits, to employees who have given birth to or adopted a child, or who themselves, whose spouse, or whose children had developed a medical condition needing care.[47]

Professor Nancy E. Dowd of the University of Florida College of Law spoke at the 1994 Stetson Conference on the FMLA, observing that the conflict between work and family still continued one year after passage of the Act.[48] She concluded that:

> [T]he FMLA is inadequate as a lead policy due to the 50%–60% of the work force in various situations the Act doesn't cover. In order to make family leave a real benefit, wage replacement is needed to provide adequate income for a working parent to sacrifice income for the benefit period.[49]

She also suggested that restructuring the time benefit would encourage maximum flexibility and that expanding benefits to include sick leave to care for sick family members is essential.[50]

The above summary of legislation is only illustrative. The General Accounting Office recently identified a general framework of twenty-six key federal statutes and one executive order, with their thousands of implementing administrative rules, constituting an intricate web of workplace regulations.[51]

ISSUES RAISED BY THE PROLIFERATION OF EMPLOYMENT LAWS

If one distinguishes between traditional "labor law" (i.e., NLRA and RLA) and "employment law," it appears that the United States is experiencing a subtle shift away from the traditional laissez-faire policies of the early twentieth century. This raises an important question: Is this increasing government intervention in the employment relationship really meeting the needs of society? Considering this proliferation of legislative protections, the Dunlop Commission

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46. Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071, 1072–74 (1991).

47. Family and Medical Leave Act of 1993, Pub. L. No. 103-3, 107 Stat. 6 (1993).

48. INSIGHT, *supra* note 13, at 5; *see* Nancy E. Dowd, *Family Values and Valuing Family: A Blueprint for Family Leave*, 30 HARV. J. ON LEGIS. 1 (1993).

49. INSIGHT, *supra* note 13, at 5.

50. *Id*.

51. UNITED STATES GENERAL ACCOUNTING OFFICE, REPORT TO CONGRESSIONAL REQUESTORS, WORKPLACE REGULATION (1994).

expressed concern that the hodgepodge of federal and state regulation results in a wide variety of possible fora with overlapping jurisdiction, different remedies, and different procedures.[52]

One product of increased legislation has been the dramatic growth of litigation arising from the worker/employer relationship. Employment law cases in federal courts increased fourfold between 1971 and 1991, making employment law one of the fastest areas of litigation in the United States.[53]

The relative roles of state and federal courts also continues to be debated. Henry H. Drummonds, Associate Professor of Law at Lewis and Clark, Northwestern School of Law, spoke at the 1994 Stetson Conference on the federal preemption doctrine. Professor Drummonds criticized *San Diego Building Trades Council v. Garmon*[54] and urged adoption of the "baseline" model, under which preemption occurs only when state enactments conflict directly with federal rights or duties.[55] He noted an "emerging consensus" among the United States Supreme Court justices against preemption and in favor of shared authority.[56] Professor Drummonds sug

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52. The Dunlop Commission Report describes the problem as follows:

> Some cases the individual employee alone can bring (e.g., wrongful dismissal suits); others only the administrative agency can file (e.g., FLSA). Some cases go directly to court (wrongful dismissal); some remain within the agency (OSHA); some go to the agency for investigation and then to the courts for adjudication (ADA), while some conduct adjudication within the agency but leave enforcement (and review) up to the courts (NLRA). Some legal rights carry open-ended compensatory and punitive damages (wrongful dismissal); some provide for general damages under a ceiling, but attorney fees are also assessed against losing employers (Title VII; ADA); while . . . the NLRA is unique in restricting the damages assessed against guilty employers to the net back pay lost by the employee — along with the prospect of reinstating the employee if the latter is willing to return to the position from which he or she was fired.

DUNLOP COMM'N REPORT, *supra* note 2, at 108.

53. Between 1971 and 1991, the number of cases filed increased by the indicated percentage in the following areas: civil cases 110%; industrial and service sector Fortune 500 cases combined 121%; personal injury (excluding asbestos cases) 17%; labor law (including cases under the NLRA, LMRADA, and RLA) -3%; and employment law 430%. *Id.* at 131.

54. 359 U.S. 236 (1959).

55. INSIGHT, *supra* note 13, at 6; *see* Henry H. Drummonds, *The Sister Sovereign States: Preemption and the Second Twentieth Century Revolution in the Law of the American Workplace*, 62 FORDHAM L. REV. 469 (1993).

56. Some observers believe, however, that reform is proceeding at the legislative level rather than through the judiciary. In reviewing the Supreme Court decisions from 1992 to 1993, former NLRB Chairman Edward B. Miller observed in his Conference presentation that "[b]road policy pronouncements are not the hallmark of the Court's current majority." Edward B. Miller, The Supreme Court 1992–93 Term: Major Labor and Employment Law Decisions, *in* NINTH ANNUAL NATIONAL CONFERENCE ON LABOR AND EMPLOYMENT LAW, *supra* note 11, at 21. Mr. Miller noted that traditional labor law cases had once again taken a "back seat" to cases involving other aspects of the employ-

gested that such an approach makes sense particularly in the context of employment law.[57]

The administrative agency workload has experienced similar growth. It has been estimated that from 1960 to 1974, the number of regulatory programs administered by the Department of Labor tripled.[58] The expansion of the Department of Labor's responsibility for new programs has continued to grow significantly since 1974.[59] Unfortunately, the significant increase in government regulation of the workplace during the past twenty-five years has not been accompanied by proportional appropriations for organization and staff to secure enforcement of these new regulatory schemes. In short, enforcement ability has not kept pace with the increased responsibilities of federal agencies.[60]

Considerable concern continues to be expressed about the administrative agency rulemaking processes. The United States Labor Department began to experiment with negotiated rulemaking in 1975, inviting interested parties to meet with agency officials to present and discuss various views of the facts and issues.[61] The exchange between department representatives and interested parties allowed for agreement upon data sources, facilitated the mediation process, and promoted consensus. Draft regulations were then issued in the Federal Register for general comment, followed by issuance of the final rules. The system was institutionalized and formally endorsed when Congress passed the Negotiated Rulemaking Act of 1990.[62] Despite this legislative encouragement, however, the negotiated rulemaking process has seldom been used in the employment law field since passage of the Act, although it has been widely used in environmental rulemaking.[63]

Donald R. Livingston, General Counsel of the EEOC from 1991 to 1993, spoke at the 1994 Stetson Conference and commented on the rapidly growing number of racial and gender-based discrimination lawsuits brought against employers in federal court. He noted that the greater number of court actions is accompanied by a rapid

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ment relationship and that judicial restraint seemed to be a "very noticeable trait" of the 1992–1993 Court. *Id*.

57. INSIGHT, *supra* note 13, at 6.

58. John T. Dunlop, *The Limits of Legal Compulsion*, 97 LABOR L.J. 67 (Feb. 1976).

59. OFFICE OF THE ASSISTANT SECRETARY OF POLICY, U.S. DEPT. OF LABOR, OUTLINE OF STATUTES AND REGULATIONS AFFECTING THE WORKPLACE (1993).

60. DUNLOP COMM'N REPORT, *supra* note 2, at 24.

61. Dunlop, *supra* note 57, at 67–74.

62. Negotiated Rulemaking Act of 1990, Pub. L. No. 101-648 (1990); *see* DAVID M. PRITAKER & DEBORAH S. DALTON, ADMINISTRATIVE CONF. OF THE U.S., NEGOTIATED RULEMAKING SOURCEBOOK (Jan. 1990).

63. DUNLOP COMM'N REPORT, *supra* note 2, at 124.

rise in the size of settlement agreements and jury damage awards.[64] He further observed that passage of the 1991 Civil Rights Act, making available jury trials, compensatory damages, and punitive damages, has produced new incentives for lawsuits.[65] Mr. Livingston expressed skepticism that the EEOC could handle the avalanche of charges now being filed under existing law, because the agency's budgetary and staffing resources are insufficient to cope with the increased workload.[66] Moreover, House Resolution 2721, which would give the EEOC responsibility for investigating and adjudicating federal employee complaints, would, if enacted, only compound the EEOC's problems.[67] The administering agencies have seldom resorted to alternative dispute resolution methods,[68] despite the fact that they are encouraged to do so by federal legislation.[69] One notable experiment conducted in recent years was the Philadelphia Area Alternative Dispute Resolution Pilot Project.[70]

THE GROWTH OF ALTERNATIVE DISPUTE RESOLUTION

The use of ADR techniques in the resolution of labor and employment disputes has received considerable encouragement from the Supreme Court[71] and Congress. The Supreme Court's decision in *Gilmer v. Interstate/Johnson Lane Corp.*[72] has virtually opened a new field of arbitration for individual employment issues.

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64. 2 Empl. Discrimination Rep. (BNA) No. 5, at 141 (Feb. 2, 1994).

65. *Id*.

66. INSIGHT, *supra* note 13, at 4.

67. H.R. 2721 was approved without amendment by the Select Education and Civil Rights Subcommittee for the Full Education and Labor Committee on January 26, 1994. At the time of this writing, this bill had been approved by the House Labor Committee and the Post Office and Civil Service Committee. Amendments, such as a provision which would fully cover members of Congress under the Civil Rights Act and the Americans with Disabilities Act, are also being discussed and considered. Daily Lab. Rep. (BNA) No. 145, at D-11 (Aug. 1, 1994).

68. *Id*.

69. Administrative Dispute Resolution Act of 1990, Pub. L. No. 101-552, 104 Stat. 2736 (codified at 5 U.S.C. § 581 (1990)); *see* Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1081 (codified at 42 U.S.C. § 1981a (1993)); Judicial Improvements Act of 1990, Pub. L. No. 101-650, 104 Stat. 5089 (codified at 28 U.S.C. §§ 471, 473(a)(6)(A)–(B) (1990)); Exec. Order No. 12,778, 56 Fed. Reg. 55, 195 (1991).

70. *See* U.S. DEP'T OF LABOR, A COST ANALYSIS OF THE DEPARTMENT OF LABOR'S PHILADELPHIA ADR PILOT PROJECT (Aug. 26, 1993).

71. *See, e.g.,* Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20 (1991); United Paperworkers Int'l Union v. Misco, Inc., 484 U.S. 29 (1987); W.R. Grace & Co. v. Local Union 759, Int'l Union of United Rubber, 461 U.S. 757 (1983); United Steelworkers of America v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960).

72. 500 U.S. 20 (1991).

A variety of federal legislation and executive orders were promulgated from 1990 to 1991 to encourage further use of ADR in employment cases. The Administrative Dispute Resolution Act of 1990[73] authorizes and encourages federal administrative agencies to use mediation, conciliation, arbitration, and other techniques to resolve disputes. Agencies are directed to establish an ADR policy for formal and informal adjudications, rulemaking, enforcement actions, issuance and revocation of licenses or permits, contract administration, litigation, and other agency actions. The Civil Justice Reform Act of 1990[74] establishes principles for an effective litigation management and cost/delay reduction program in the federal courts. Among other things, the Act authorizes the courts to refer appropriate cases to ADR programs, including mediation, mini-trial, and summary jury trial. District courts are encouraged to implement new ADR programs or expand existing programs. The Judicial Improvements Act of 1990[75] authorizes federal district courts to refer cases to ADR processes. The Civil Rights Act of 1991 encourages ADR in employment discrimination cases, "including settlement negotiations, conciliation, facilitation, mediation, mini-trials, fact-finding, and arbitration."[76] Executive Order No. 12,778, signed by President Bush on October 23, 1991, requires that federal litigation attorneys undergo training in ADR techniques and make reasonable efforts before trial to resolve civil disputes involving the United States government.[77]

Arnold M. Zack, President of the National Academy of Arbitrators, spoke at the Stetson Conference and observed that there is no shortage of issues to be confronted as we enter the new field of ADR.[78] Mr. Zack noted that one of the most pressing issues is the development of standards to ensure that ADR processes are carried out in a manner that engenders a level of respect comparable to that now afforded to dispute settlers in the labor/management arena.[79] He questioned whether collective bargaining can withstand the pressures attendant to the growth encouraged by judicial endorsement of ADR in *individual* worker rights cases. Referring to the Model Em-

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73. Administrative Dispute Resolution Act, Pub. L. No. 101-552, 104 Stat. 2736 (codified at 5 U.S.C. § 581 (1990)).

74. Judicial Improvements Act of 1990, Pub. L. No. 101-650, 104 Stat. 5089, 5092 (codified at 28 U.S.C. §§ 471, 473(a)(6)(A)–(B) (1990)).

75. *Id.*

76. Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1081 (codified at 42 U.S.C. § 1981a (1993)).

77. Exec. Order 12,778, 56 Fed. Reg. 55,195 (1991).

78. INSIGHT, *supra* note 13, at 4.

79. *Id.*

ployment Termination Act,[80] Mr. Zack suggested that "the ability to bring an action with potential reimbursement of attorneys' fees . . . holds the prospect of employees securing what they may perceive as the crucial benefit of union membership without the burden of having to pay union dues."[81]

CONCLUSION

Clearly, these developments and concerns show that the landscape for labor and employment law continues to undergo significant change. Recent changes in the American political landscape, culminating in the Republican ascendancy in the November 1994 elections, no doubt will affect the process of consensus building after the Dunlop Commission Report is published.

The Commission was appointed in March 1993, and the final report was due in May 1994. After being granted a six-month extension to produce the final report, the Commission issued a 163-page Interim Fact-Finding Report in May 1994. Subsequently, it was granted another six-month extension. By the end of 1994, Labor Department officials were saying that "the report will be out shortly." The final report had not been issued by the time this volume was bound, although the Labor Department had announced a planned publication date of January 9, 1995.

It has been the mission of Stetson's Annual National Conference on Labor and Employment Law to critically survey this landscape each year. On behalf of the Center for Dispute Resolution at Stetson University College of Law and the cosponsors of Stetson's Annual National Conference, we express special appreciation for the contribution of the following papers by leaders of the labor and employment relations and law community.

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80. The Model Uniform Employment Termination Act, adopted August 8, 1991, by the National Conference of Commissioners on Uniform State Laws, provides for the arbitration of disputes involving terminated employees. Daily Lab. Rep. (BNA) No. 156, at D-1 (Aug. 13, 1991).

81. INSIGHT, *supra* note 13, at 4–5.