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Foreword to The Developing Labor Law: The Board, the Courts, and the National Labor Relations Act

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The Developing Labor Law

The Board, the Courts, and
the National Labor Relations Act

Second Edition

Volume I

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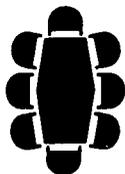
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FOREWORD

Over a dozen years ago, while I was serving as Secretary of what was then styled the Section of Labor Relations Law, I had a ringside seat at the production of the first edition of *THE DEVELOPING LABOR LAW*. I remember counting myself thrice blessed. I had no role whatsoever to play in the impossible task Charlie Morris had undertaken. Yet if by some miracle he succeeded, I could join my fellow Council members in taking due credit for our sagacity in sponsoring such an ambitious and imaginative project. And as a teacher and researcher, I would have available a truly unique resource. All that was problematic. But on one point I was absolutely certain. The Section would have to look elsewhere for an editor for any succeeding edition. No man in his right mind would twice attempt to ride herd on such a formidable collection of mavericks as had been assembled from the union, management, and public segments of the labor bar to essay this monumental feat. Obviously, I failed to reckon with the almost infinite dedication, perseverance, and patience—not to mention wiliness—of Professor Morris.

The first edition, which then-Dean Michael Sovern confessed in the Foreword had left him “in awe of the accomplishment,” has been with us for more than a decade. Now its successor has arrived, with some different faces among the contributors but with the same indomitable figure holding the reins. The new edition covers much the same ground as its predecessor, and is similarly organized. It is nearly twice as long, however, reflecting a considerably more refined and exhaustive analysis of the material. The superiority of the current work is epitomized by its keener, more thorough treatment of such subtle and controversial topics as mandatory subjects of bargaining and the relationship of the National Labor Relations Board to the arbitration process. Indeed, *THE DEVELOPING LABOR LAW (Second Edition)* can fairly be described as the most comprehensive, reliable, and objective study ever published on the National Labor Relations Act.

That last sentence is of course intended as high praise. Yet indirectly it suggests the intrinsic limitations as well as the strengths of this imposing set of books. The very objectivity of this collaborative effort, which makes it an ideal starting point for research and ensures that it will continually be cited in both management and union briefs, also means that it lacks some of the critical punch and creative thrust that characterize the best writing of the freewheeling individual scholar or advocate, including quite specifically the often-provocative Professor Morris and some of his often-provocative colleagues. Neutrality is plainly the price of a joint endeavor like this one, however, and the results are well worth the price. Few law review articles arguing an idiosyncratic thesis come close to packing as much usable information into every page as does *THE DEVELOPING LABOR LAW*. And no single labor specialist could hope to match the combined expertise represented in these volumes.

The mildly misleading title invites mention of another limitation (not defect) of the work. Its actual scope is better defined in its subtitle, "The Board, the Courts, and the National Labor Relations Act." That puts the emphasis on the regulation of the union-management relationship, which was the primary focus of labor law for the three decades beginning with the New Deal era. Probably the most significant development in the whole field during the past two decades has been the shift of the spotlight from more conventional labor relations, with heavy stress on voluntary collective bargaining, to what might be termed the employment relationship, with much more direct governmental regulation of employer-employee relations and to a lesser extent of union-employee relations. The contemporary retreat from voluntarism began with Landrum-Griffin, and continued with the Equal Pay Act, Title VII of the 1964 Civil Rights Act, the Occupational Safety and Health Act, and the Employee Retirement Income Security Act. The states have recently furthered the trend with an increasing number of modifications of the at-will employment doctrine. Even the renaming of our Section in 1978 as the Section of Labor and Employment Law was in keeping with this new pattern.

Quite properly, the editors of *THE DEVELOPING LABOR LAW* have not diluted their product by trying to encompass this vast body of fresh material, although they have superbly treated "the mutual aid and protection" coverage which the NLRA provides

for nonunion as well as unionized employees. Nevertheless, at a time when union membership in the United States has dipped below 20 percent of the total labor force, and when half the standing substantive committees of our Section do not deal directly with collective bargaining, we must recognize that "labor law" today embraces far more than the application of the NLRA. If it is conceivable that there exist within the Section the counterparts of Professor Morris and his doughty band, there is work aplenty for them to do. At any rate I no longer feel my initial twinge of regret that the present publication was not put off until 1985, when it would have coincided with the fiftieth anniversary of the Wagner Act. In some respects it is just as fitting that the work should be published on the fiftieth anniversary of that important path-breaking transitional statute, the National Industrial Recovery Act.

What is the overall impression conveyed by these weighty tomes concerning the state of the NLRA as it rounds out its first half century? In 1970 Dean Sovern found much stability, and indeed some stodginess, amidst labor law's fabled volatility. But he also remarked that even such a settled doctrine as federal preemption "has a way of coming unglued." That dual theme of a relatively stable framework housing a frequently swinging pendulum is still with us. There is more consensus than ever on the right of employees to be free from all manner and kind of economic coercion or direct interference by employers and unions. At the same time our Editor in Chief must frantically juggle page proof to take account of the Labor Board's latest gyrations on the effect of an employer's misrepresentations preceding a union election. The most substantial empirical study ever carried out on a labor law problem has apparently done little to resolve disputes about the appropriate treatment of employer and union speech and conduct during representation campaigns. Participants and decision makers in the labor law community still seem to prefer in many instances to base their judgments on their hunches or their politics, rather than on an effort to dig out the hard facts. What I said years ago before this Section about the first term of the Burger Court thus remains generally true of the Board and the courts in dealing with the NLRA: "Plus ça change, plus c'est la même chose!" ("The more things change, the more they stay the same!")

I tell my students there are three reasons they should practice labor law rather than one of those dreary other specialties. It is

intellectually exciting; it treats of profound social values; and it involves real (and often colorful) human beings. Anyone who peruses the present text will find ample evidence of the first factor; those who read between the lines will sense the second; and all one need do is meet a few of the editors and contributors to be convinced of the third. Finally, the active practitioner, whether specialist or generalist, could not hope for a more satisfactory guide than these volumes to the intricacies of the law governing union-management relations. Professor Morris, his associates, and the Section deserve plaudits for a signal achievement and a major contribution to the profession.

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March 1983

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