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## INTRODUCTION

### SYMPOSIUM ON *THE CONSTITUTIONALIZATION OF LABOR AND EMPLOYMENT LAW*

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For better or worse, 2011 will be remembered as the year that public sector employees fought for their collective bargaining rights in the state of Wisconsin.<sup>1</sup> During that time, Wisconsin reformed its public sector collective bargaining law from being one of the most robust in the country, to being one of the most restrictive. Act 10, the law enacted by Governor Scott Walker and his allies in the state legislature, virtually repealed collective bargaining rights for most state and local public employees, depriving roughly 200,000 state and local governmental employees of the right to bargain collectively. These

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1. For a general discussion of the battle in Wisconsin for public sector collective bargaining rights, see generally Paul M. Secunda, *The Wisconsin Public Sector Labor Dispute of 2011*, 27 ABA J. LAB. & EMP. LAW 293 (2012).

developments reversed Wisconsin's historic position as a progressive leader in employee rights, generally, and in public sector collective bargaining rights, in particular.

Yet, public sector employees in Wisconsin and other states have more than just statutory-based collective bargaining rights to assist in the protection of their workplace rights. A myriad of federal and state statutes, as well as the common law, also play a significant role in ensuring workplace justice in the American workplace. Additionally, public employees, unlike their private sector workplace counterparts for the most part, have another source of legal protection: the federal constitution.

Conventional wisdom has long held that public employees with federal constitutional protections have stronger workplace rights than their private sector counterparts. For instance, Professor Samuel Issacharoff observed in 1990 that, "[s]ince the 1960s, the public sector has been the source of dramatic expansions in employee rights to free expression, due process, and privacy."<sup>2</sup> That this "dramatic expansion" occurred primarily in the public sector stems from the fact that federal constitutional claims are only able to be brought against public employers as a result of the state action doctrine.<sup>3</sup> However, even private sector workers have some direct constitutional rights under the Thirteenth Amendment, which prohibits involuntary servitude, because that Amendment does not have a state action requirement.

This understanding that public employees have more workplace protections than their private sector counterparts because of the existence of certain constitutional rights has been placed in considerable doubt by recent U.S. Supreme Court case law. A series of cases have had the effect of diminishing public employee First Amendment free speech rights, Fourth Amendment privacy rights, and Fourteenth Amendment Equal Protection rights.<sup>4</sup> At least three reasons exist why public employees should be endowed with meaningful constitutional rights. First, the federal constitution textually requires such a distinction. Second, and relatedly, the government employer has substantially more power over its employees than private corporations do.

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2. See Samuel Issacharoff, *Reconstructing Employment*, 104 HARV. L. REV. 607, 616 (1990). See also Joseph R. Grodin, *Constitutional Values in the Private Sector Workplace*, 13 INDUS. REL. L. J. 1, 2 (1991) (maintaining that positive changes in the private-sector workplace law at that time derived from "bringing [ ] constitutional values to the private sector workplace.").

3. Under the state action doctrine, only injuries attributed to the "state" are subject to most constitutional provisions. See Richard S. Kay, *The State Action Doctrine, the Public-Private Distinction, and the Independence of Constitutional Law*, 10 CONST. COMMENT. 329, 330 (1993).

4. See, e.g., *Garcetti v. Ceballos*, 547 U.S. 410 (2006) (eliminating public employee free speech protections under First Amendment when employee speaks pursuant to their official duties); *Engquist v. Or. Dept. of Agriculture*, 553 U.S. 591 (2008) (creating new substantive rule excepting state employees from the Fourteenth Amendment's protection against unequal and irrational treatment at the hands of the State); *City of Ontario v. Quon*, 130 S. Ct. 2619 (2010) (validating use by government employers of technological methods to invade public employees' privacy interests).

Third, public employees function as the eyes and ears of the citizenry to help keep government free from waste, abuse, fraud, and corruption and to, consequently, insure government accountability and transparency. When you add to this reasoning the fact the Thirteenth Amendment has been under-utilized to provide important constitutional rights to all employees, and that certain existing statutory workplace frameworks like Title VII of the Civil Rights Act of 1964<sup>5</sup> and the National Labor Relations Act (NLRA)<sup>6</sup> are continually subject to constitutional challenge, it is easy to see the importance of exploring the constitutionalization of labor and employment law and consider whether this is a good or bad legal development for workers in the United States.

*The Constitutionalization of Labor and Employment Law* Symposium therefore filled a pressing need for an innovative and timely conference at the intersection of constitutional law and labor and employment law. Broadly speaking, the Symposium explored, on the one hand, whether constitutional law concepts are infiltrating public and private labor and employment law, and whether this development is beneficial or detrimental to the rights of workers. On the other hand, the Symposium examined whether, rather than elevating private-sector privacy rights to the public-sector level, recent case law developments suggest that public employee workplace rights are being “privatized” and reduced to the level of employees in the private sector.<sup>7</sup>

Some of the top names in the United States and Canada in constitutional, labor, employment, and employment discrimination law participated in the Symposium on October 28 and 29, 2011, at the University of Wisconsin Law School in Madison, Wisconsin. In all, five panels, consisting of twenty-four panelists, spoke on a wide array of these topics.<sup>8</sup> The panels were organized according to constitutional right and included panels on: Equal Protection, Thirteenth Amendment, Fourth Amendment Privacy, Freedom of Association, and Freedom of Speech.

On the Equal Protection Panel, Professors Cheryl Harris, Marcia McCormick, and Susan Carle all discussed the status of disparate impact law under Title VII in light of the Supreme Court’s decision in *Ricci v. DeStefano*,<sup>9</sup> which cast doubt on the viability of a disparate impact model of discrimination under the equal protection clause. Professor Sophia Lee, for her part, built on her previous work on administrative constitutionalism and maintained that

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5. 42 U.S.C. §§ 2000e-2000e-17 (2000).

6. 29 U.S.C. §§ 151-169 (2005).

7. For an example of this privatizing dynamic in the context of privacy rights in the public sector workplace, see generally Paul M. Secunda, *Privatizing Workplace Privacy*, 88 NOTRE DAME L. REV. (forthcoming 2012), available at SSRN: <http://ssrn.com/abstract=1928817>.

8. Each panel had a moderator and/or discussant as well. Professors Clauss and Secunda would like to particularly thank their colleagues, Professors David Schwartz, Brad Snyder, Martin Malin, Vicki Schultz, and Anuj Desai, for filling these roles during the Symposium.

9. 557 U.S. 557 (2009).

thinking about the constitutionalization of labor and employment law requires not only asking whether to constitutionalize the workplace, but also where to do so. As commentator for the panel, Professor Vicki Schultz then synthesized the various strands of argument and considered whether the use of equal protection law in the workplace would lead to the increase or decrease of workplace rights.

On the second panel, concerning the Thirteenth Amendment, Professors George Rutherglen, James Pope, Maria Ontiveros, and Lea VanderVelde examined the language of that Amendment to consider its relevancy to modern workplace regulation. For her part, Professor Julie Suk examined in detail the *Slaughter House* cases,<sup>10</sup> with specific attention given to the U.S. Supreme Court's discussion of the relationship of the peasants and nobility in France as a means to interpret the Thirteenth Amendment. Jennifer Rosenbaum, the Legal Director for the New Orleans Workers' Center for Racial Justice, concluded the panel by drawing from recent examples where guest workers publicly claimed Thirteenth Amendment protections and theorized the specific elements that constitute involuntary servitude.

The third and last panel of the first day of the Symposium focused on workplace privacy rights under the Fourth Amendment. Professors Pauline Kim and Paul Secunda discussed broader questions of the relationship between constitutional privacy rights for public employees and tort-based privacy rights for private-sector workers. Professors Rafael Gely and Leonard Birnbaum discussed the "race to the bottom" aspect of privacy workplace case law, where employers are given incentive to lower the privacy expectations of their employees. Professor Susan Freiwald concluded the panel by considering the implication of the Sixth Circuit's *Warshak* decision<sup>11</sup> involving the Fourth Amendment and privacy rights for stored employee email. At the conclusion of the first day's proceedings, participants and attendees were treated to engaging remarks from Dean and Professor Theodore St. Antoine entitled: *Personalizing the Constitutionalizing of Labor and Employment Law – Some of Us Have Been at It for Years*. This informative and light-hearted presentation by one of the most distinguished labor and employment law academics and arbitrators in the country placed into sharp relief the fact that constitutional rights have in fact been playing an important role in workplace legal debates for many decades in the United States.

The second day of the Symposium focused on the First Amendment. The first panel focused on the freedom of association. Professor Roy Adams looked to Canada to undertake a comparative study of the Canadian Constitution which has already been interpreted to include a right to freedom of association in the workplace. Professor Mark Tushnet undertook a historical look at how the U.S. Supreme Court has tackled workplace freedom of association issues under the federal constitution. Professor Ken Dau-Schmidt then discussed a general empirical study on the costs and benefits of public sector collective

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10. 83 U.S. 36 (1872).

11. 532 U.S. 521 (6th Cir. 2008).

bargaining and examined some of the traditional arguments against a constitutional right to collectively bargain. Finally, Professor Ruben Garcia discussed how the Supreme Court's decision in *Borough of Duryea v. Guarnieri*<sup>12</sup> further dichotomizes work and citizenship for public employees.

The last panel of the Symposium explored First Amendment free speech issues. Professors Kermit Roosevelt, Scott Bauries, and Randy Kozel explored the continuing impact of the First Amendment public employee free speech case of *Garcetti v. Ceballos*,<sup>13</sup> which deconstitutionalized public employee speech when such employees speak pursuant to their job duties. Professor Michael Harper, for his part, addressed the protection that union publicity and consumer boycotts receive under the First Amendment, and considered both National Labor Relations Board (NLRB) and U.S. Supreme Court precedent in this context.

In all, the Symposium contained an extremely impressive array of international and nationally-renowned scholars considering the consequences of constitutionalizing and deconstitutionalizing the American workplace. We are lucky in this Symposium Issue of the *Wisconsin Journal of Law, Gender, and Society* to feature four of these presentations: (1) Professor McCormick on *Ricci* and equal protection issues; (2) Professors Ontiveros and Rutherglen on different approaches to the potential application of the Thirteenth Amendment to workplace regulation; and (3) Professor Harper on the interaction of the First Amendment free speech clause and judicial and administrative cases concerning union publicity and consumer boycotts.

In *Disparate Impact and Equal Protection After Ricci v. DeStefano*,<sup>14</sup> Professor McCormick discusses the formalist turn of the U.S. Supreme Court in *Ricci* when it instituted a color-blind standard to define discrimination under Title VII. Of particular note in *Ricci*, Justice Scalia suggested Title VII's disparate impact provisions might violate the equal protection guarantee of the federal constitution. McCormick maintains that the question in *Ricci* is: to the extent that the prohibition on disparate impact discrimination requires employers to take race conscious action, can Congress enact it consistent with the Fifth Amendment's guarantee of due process? In her paper, McCormick argues that the answer is "yes" after the cases of the federalism revolution and that Congress' power comes from the Fourteenth and Thirteenth Amendments. However, she contends that, "the greatest dangers to disparate impact are the passage of time since the civil rights movement, the lack of consensus that disparate impact *is* discrimination, and the worldview by several of the Justices that discrimination against people of color and women is a thing of the past."<sup>15</sup>

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12. 131 S. Ct. 2488 (2011).

13. 547 U.S. 410 (2006).

14. Marcia L. McCormick, *Disparate Impact and Equal Protection After Ricci V. DeStefano*, 27 WIS. J.L. GENDER & SOC'Y 100 (2012).

15. *Id.* at 104.

In her contribution to the Symposium, *A Strategic Plan for Using the Thirteenth Amendment to Protect Immigrant Workers*,<sup>16</sup> Professor Ontiveros explores how to actively use the Thirteenth Amendment to protect immigrant workers. She notes that the ground work for unleashing the potential of the Thirteenth Amendment “has been laid. Activists, attorneys, and legislatures have been using the Amendment to protect the most vulnerable workers in our society, specifically ‘trafficked’ workers.”<sup>17</sup> Ontiveros therefore asserts that it is time to move from a theoretical approach of the Thirteenth Amendment to an activist one. To do so, she draws on the successes found in the anti-trafficking movement and seeks to chart a strategic plan to actively use the Thirteenth Amendment to help immigrant workers. Her five action items include: (1) litigating cases based on a Thirteenth Amendment cause of action to create a new and helpful body of law; (2) utilizing administrative processes to increase the issuance of certain types of visas to define the types of labor arrangements that violate the Thirteenth Amendment; (3) challenging the constitutionality of the agricultural and domestic work exclusions from the NLRA; (4) lobbying to amend Title VII to cover discrimination based on migrant or immigration status; and (5) building coalitions to oppose anti-immigrant laws.

In *Constitutionalizing Employees’ Rights: Lessons From the History of the Thirteenth Amendment*,<sup>18</sup> Professor Rutherglen takes a more skeptical view of the potential use of the Thirteenth Amendment in the workplace context. He maintains that the “transformative potential of the Thirteenth Amendment cannot be denied, but it was immediately subdued, for both good reasons and bad.”<sup>19</sup> The good reasons revolve around the fact that the Fourteenth and Fifteenth Amendments became the principal doctrinal vehicles for pursuing equality in American life. The bad reasons involve the abandonment of Reconstruction after the Civil War. He maintains that the Thirteenth Amendment is now narrowly focused on a core of labor practices that amount to slavery or its equivalent and it is unlikely that this Amendment will ever be expanded beyond this narrow interpretation. In the end, any attempt to more actively use the Thirteenth Amendment must take its distinctive history into account and only a legislative endorsement of labor’s goals under the enforcement section of the Thirteenth Amendment will work to revive its use in the workplace.

Focusing on the First Amendment’s free speech provisions and labor law under the NLRA, Professor Harper in *First Amendment Protection for Union Appeals to Consumers*<sup>20</sup> considers the interaction between constitutional law and a union’s ability to engage in publicity and consumer boycotts. More

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16. Maria L. Ontiveros, *A Strategic Plan for Using the Thirteenth Amendment to Protect Immigrant Workers*, 27 WIS. J.L. GENDER & SOC’Y 133 (2012).

17. *Id.* at 134.

18. George Rutherglen, *Constitutionalizing Employees’ Rights: Lessons from the History of the Thirteenth Amendment*, 27 WIS. J.L. GENDER & SOC’Y 162 (2012).

19. *Id.* at 163.

20. Michael C. Harper, *First Amendment Protection for Union Appeals to Consumers*, 27 WIS. J.L. GENDER & SOC’Y 176 (2012).

specifically, he discusses the recent NLRB decision in *United Brotherhood of Carpenters & Joiners of America, Local Union No. 1506 v. Eliason & Knuth of Arizona, Inc. (Carpenters)*,<sup>21</sup> in which the Board held that “a union’s non-obstructive display to the public of a large stationary banner declaring ‘shame’ on a nearby business and announcing a ‘labor dispute’ in smaller lettering was not a violation of the secondary boycott provisions of the NLRA.”<sup>22</sup> Harper argues that this NLRB decision, and related U.S. Supreme Court precedent, were indeed a necessary construction of the law to avoid “serious” constitutional problems that would be posed by a First Amendment challenge to a prohibition on union consumer appeals. He further contends that both the Board’s decision in *Carpenters* and previous Supreme Court precedent require and deserve First Amendment support because there exists a compelling argument for First Amendment protection of unions’ appeals to consumers.

In all, then, this issue based on *The Constitutionalization of Labor and Employment Law* Symposium provides an important forum for diverse legal scholars to share their thoughts, insights, and proposals on how constitutional law should be, or should not be, utilized in the modern American workplace. Although the authors sometimes frankly disagree on whether the further constitutionalization of labor and employment law is a promising or problematic development, each writes eloquently about the need to explore this topic in discussing various Amendments to the federal constitution. These four innovative and thoughtful articles are likely to occupy labor and employment law scholars and practitioners for many years to come.

In the last analysis, our hope is that the Symposium presentations in October 2011 and the articles included in this issue will keep this important area of workplace law front and center during the ongoing debates in Wisconsin and elsewhere concerning the future of American workplace regulation. Moreover, we would be remiss if we did not acknowledge our debt to our illustrious University of Wisconsin Law School predecessors who initially paved the way for these types of labor and employment law discussions and policy debates. Without the trailblazing work in labor and employment law started by University of Wisconsin Professors John R. Commons, Nathan Feinsinger, Willard Hurst, Jim Jones, and June Weisberger, we would have not had the good fortune to inherit their legacy and continue their fine tradition of innovative labor and employment law studies and scholarship in Madison. Our fondest hope is that this Symposium spurs further growth of, and commitment to, a thriving program in labor and employment law studies at the University of Wisconsin Law School. Such a program will no doubt help again make Wisconsin a national model for social welfare, labor, and economic reform.

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21. 355 N.L.R.B. No. 159 (N.L.R.B. Aug. 27, 2010).

22. Slip op. at 15.