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AMERICAN LABOR & EMPLOYMENT LAW
November 16, 2005
Kathy Barnard

History of Legal Regulation of Labor and Employment

- Industrialism and Unionism
- Progressivism and Social Darwinism
- Modern Civil Rights Movement and Identity Politics
- Labor and the New Deal
- Corporatism and Globalization

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Industrialization and Unionism

- Migration from rural to urban
- Rise of work outside home
- Civil War and more African Americans in paid workforce
- Jim Crow in South, Discrimination in the North
- Industrial revolution – rise of unions
- More women in paid workforce

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Fourteenth Amendment to the United States Constitution

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

1868

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2000 **Bradwell v. State, 16 Wall. 130, 140-141 (1873)**
(BRADLEY, Justice, concurring)
 Upholding Illinois law prohibiting women from practicing law

1873

- It certainly cannot be affirmed, as an historical fact, that this has ever been established as one of the fundamental privileges and immunities of the sex. On the contrary, the civil law, as well as nature herself, has always recognized a wide difference in the respective spheres and destinies of man and woman.

1800

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2000 **CONTINUED...**
Bradwell v. State, 16 Wall. 130, 140-141 (1873)
(BRADLEY, Justice, concurring)
 Upholding Illinois law prohibiting women from practicing law

1873

- Man is, or should be, woman's protector and defender. The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life. The constitution of the family organization, which is founded in the divine ordinance, as well as in the nature of things, indicates the domestic sphere as that which properly belongs to the domain and functions of womanhood. The harmony, not to say identity, of interest and views which belong, or should belong, to the family institution is repugnant to the idea of a woman adopting a distinct and independent career from that of her husband.

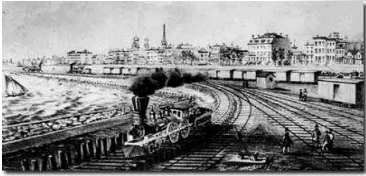
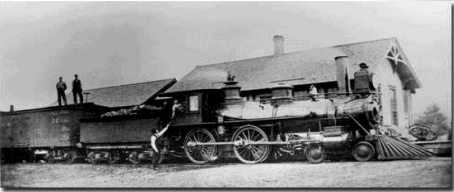
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2000 **Capital, Infrastructure and Wealth**

1879

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2000 **Haymarket Riot & the 8 hour day**

1886



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Civil Rights Act of 1866

[C]itizens, of every race and color, without regard to any previous condition of slavery or involuntary servitude, except as a punishment for a crime whereof the party shall have been duly convicted, shall have the same right, in every State and Territory in the United States, to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of the laws and proceedings for the security of person and property, as is enjoyed by white citizen

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Sojourner Truth, "Ain't I a Woman" 1889

Dat man ober dar say dat womin needs to be helped into carriages, and lifted ober ditches, and to hab de best place everywhar. Nobody eber helps me into carriages, or ober mud-puddles, or gibs me any best place!" And raising herself to her full height, and her voice to a pitch like rolling thunder, she asked "And a'n't I a woman? Look at me! Look at my arm! (and she bared her right arm to the shoulder, showing her tremendous muscular power). I have ploughed, and planted, and gath-ered into barns, and no man could head me! And a'n't I a woman? I could work as much and eat as much as a man--when I could get it--and bear de lash as well! And a'n't I a woman?"

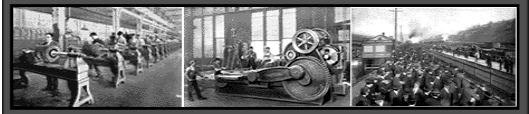
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Manufacturing

Westinghouse factories 1904



Model T, 1908



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The Lawrence Textile Strike and a living wage

PER CENT OF EMPLOYEES EARNING EACH CLASSIFIED RATE OF WAGES PER HOUR, BY SEX AND AGE GROUPS—WOOLEN AND WORSTED MILLS.

[The rates shown in this table are based on the hourly rates of time workers and on the earnings and actual hours worked, during the week for which data were secured, of pieceworkers. See page 76 to 78 as to amount of work available.]

Sex and age groups.	Employees.		Average rate of wages per hour.	Per cent of employees earning each classified rate of wages per hour.			
	Total.	Per cent working less than 56 hours during week.		Under 12 cents.	Under 15 cents.	Under 20 cents.	20 cents and over.
Males, 18 years and over.....	8,407	22.3	\$0.180	12.4	44.9	65.6	34.6
Males, under 18 years.....	844	20.5	.112	78.4	97.9	99.0	4.4
Total.....	9,251	22.2	.174	18.4	49.8	68.7	31.5
Females, 18 years and over.....	6,034	27.2	.147	30.1	69.0	87.1	12.9
Females, under 18 years.....	1,180	30.0	.116	69.1	92.8	98.2	1.9
Total.....	7,214	27.6	.142	36.5	73.0	80.1	11.1
Grand total.....	16,478	24.6	.160	28.3	59.8	77.4	22.6

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Bread and Roses: Lawrence Strike

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The Triangle Waist factory fire

Safety

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Progressivism and Social Darwinism: *Progressivism*

- Suffrage. In the new 20th Century, many women were demanding suffrage, or the right to vote.
- Race. During the 1800s, African American slaves were freed and became citizens, at least in name. But as blacks began to move around the country, tensions between the races boiled over.
- Child Labor. The 20th Century saw a movement to outlaw child labor.
- Workers compensation. Workers, young and old, were simply out on the street if they were injured on the job. Workers' compensation systems were devised during the early 1900s.
- Anti-Monopoly Reforms. In the new 20th Century, many businesses were becoming big business. The U.S. was a huge marketplace with lots of potential consumers, and businesses began to try and monopolize that market. They wanted to limit or eliminate competition so they could control prices and profits. Reformers said their business practices were unfair and sought to break up the monopolies or "trusts."

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Progressivism and Social Darwinism: *Social Darwinism*



- Survival of the fittest
- Social Darwinism held that Darwin's theory of evolution by natural selection can also be applied to human social institutions.
- Social Darwinists argued that governments should not interfere with human competition by attempting to regulate the economy or cure social ills such as poverty. Instead, they advocated a laissez-faire political and economic system that favors competition and self-interest in social and business affairs.

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Progressive politics and organizing

Robert Follett Congressman & Governor of Wisconsin
Eugene Debs, Union leader, anti-war protestor, socialist candidate for President

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President Teddy Roosevelt



1898 Theodore Roosevelt Collection
Harvard College Library


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Progressive and collective perspectives

- Suffrage Movement
- NAACP
- National Colored Women's Association
- I W W
- Settlement houses
- Muckraking Journalism
- Socialist Politics
- Progressive Politics
- Regulatory Legislation



Mary McLeod Bethune
President National Association of Colored Women, 1924

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Federal Progressive Legislation Concerning Unions

The Clayton Act

In response to pressure to clarify labor's position under antitrust laws, Congress, in 1914, enacted the Clayton Act, which included several major provisions protective of organized labor. The Act stated that "the labor of a human being is not commodity or article of commerce," and provided further that nothing contained in the Federal antitrust laws: shall be construed to forbid the existence and operation of labor... organizations... nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade under the anti-trust laws.

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Continued... Federal Progressive Legislation Concerning Unions

Railway Labor Act

In 1926, the RLA was passed, requiring employers to bargain collectively and prohibiting discrimination against unions. It applied originally to interstate railroads and their related undertakings. In 1936, it was amended to include airlines engaged in interstate commerce.

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Natural Law, Social Darwinism and Liberty of Contract

- Natural law: given by God or by nature in sense that human reason and morality are thought to be natural
- Laissez-faire economics ("laissez faire, laissez passer," a French phrase meaning "let do, let pass" was first used by the eighteenth century French economist/philosophers, the Physiocrats as an injunction against government interference with trade (1770's)
- Social Darwinism – advocated by Herbert Spencer (Social Statistics, 1851)
- Roscoe Pound's "Liberty of Contract" 18 Yale Law Journal 454, 1909

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Substantive due process: distrust of legislatures' regulation of employment

Ironically, the conjunction of natural law, Darwin translated to Laissez-faire and the 14th Amendment resulted in a period of judicial activism in extreme defense of "liberty of contract" --what Justice Oliver Wendal Holmes would criticize in dissent by stating that that "the Fourteenth amendment does not enact Mr. Herbert Spencer's statistics."

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The Lochner Era: Substantive Due Process and Distrust of Legislative Regulation of Employment

- *Lockner v. New York* 198 US 45 (1905)(60 hour work week for bakers)
- *Adair v. United States*, 208 US 161 (1908) (invalidating federal prohibition of "yellow dog" contracts, which required employee to refrain from union membership as a condition of employment)
- *Coppage v Kansas*, 236 US 1 (1915)struck down Kansas law prohibiting "yellow dog" contracts
- *Liggett Co. v. Baldridge*, 278 US 105 (1928) Struck down Pennsylvania restrictions on corporate ownership of pharmacies (legislature had enacted in interest of public health)

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Substantive Due Process and African American's Work

- African Americans who found work were affected similarly as whites.
- Lochner* doctrine in State courts in some ways may have helped African Americans: State emigrant agent laws prevailed in the South, occupational licensing was used to restrict the entry of blacks throughout the country, particularly in the construction industry. *Only One Place of Redress: African Americans, Labor Regulations, and the Courts from Reconstruction to the New Deal*, by David E. Bernstein.

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Labor Action In The Depression Years

1930's

1934 Coast Longshore Strike



1937 UAW Flint Sit Down Strike

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The Norris-LaGuardia Act

- Norris-LaGuardia Act (or Anti-Injunction Bill) outlawed yellow dog contracts in which a worker agreed as a condition of employment not to join a labor union. This act declared as public policy labor's right to organize. It also restricted court injunctions in labor disputes
- Many states followed with "little" Norris-LaGuardia Acts

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The Social Security Act

1935

- 1935, Congress enacted the Social Security Act of 1935 (and later amendments) that provided pensions to the aged, benefit payments to dependent mothers, crippled children and blind people, and unemployment insurance.

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The National Labor Relations Act

1935

- This Act defines, as a part of our substantive law, the right of self-organization of employees in industry for the purpose of collective bargaining, and provides methods by which the Government can safeguard that legal right. It establishes a National Labor Relations Board to hear and determine cases in which it is charged that this legal right is abridged or denied, and to hold fair elections to ascertain who are the chosen representatives of employees.

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Continued... The National Labor Relations Act

1935

- A better relationship between labor and management is the high purpose of this Act. By assuring the employees the right of collective bargaining it fosters the development of the employment contract on a sound and equitable basis. By providing an orderly procedure for determining who is entitled to represent the employees, it aims to remove one of the chief causes of wasteful economic strife. By preventing practices which tend to destroy the independence of labor, it seeks, for every worker within its scope, that freedom of choice and action which is justly his.

Franklin Roosevelt's Statement on Signing the NLRA, July 1935

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The Fair Labor Standards Act

1938

- The Fair Labor Standards Act was passed by Congress on 25th June, 1938. The main objective of the act was to eliminate "labor conditions detrimental to the maintenance of the minimum standards of living necessary for health, efficiency and well-being of workers".
- The act established maximum working hours of 44 a week for the first year, 42 for the second, and 40 thereafter. Minimum wages of 25 cents an hour were established for the first year, 30 cents for the second, and 40 cents over a period of the next six years.

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Continued... The Fair Labor Standards Act

1938

- The Fair Labor Standards Act also prohibited child labor in all industries engaged in producing goods in inter-state commerce. The act set the minimum age at 14 for employment outside of school hours in non-manufacturing jobs, at 16 for employment during school hours, and 18 for hazardous occupations.

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Court invalidation of early New Deal Legislation

- 1935** In May, 1935, the court had struck down the regulatory business codes of the National Recovery Administration.
- 1936** In May 1936, the court struck down the Bituminous Coal Conservation Act.
- In June, 1936, the Court invalidated a New York State minimum wage law.

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Roosevelt's Failed Court Packing Plan

1937

- The Court in addition to the proper use of its judicial functions has improperly set itself up as a third house of the Congress - a super-legislature, as one of the justices has called it - reading into the Constitution words and implications which are not there, and which were never intended to be there.
- We have, therefore, reached the point as a nation where we must take action to save the Constitution from the Court and the Court from itself. We must find a way to take an appeal from the Supreme Court to the Constitution itself. We want a Supreme Court which will do justice under the Constitution and not over it.

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Continued... Roosevelt's Failed Court Packing Plan

1937

- What is my proposal? It is simply this: whenever a judge or justice of any federal court has reached the age of seventy and does not avail himself of the opportunity to retire on a pension, a new member shall be appointed by the president then in office, with the approval, as required by the Constitution, of the Senate of the United States.

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The New Deal Court

Upheld:

- On March 29, 1937 the Court sustained the constitutionality of the Washington statute *West Coast Hotel Co. v. Parrish*, 300 U.S. 379, overruling *Morehead v. Tipaldo*, 298 U.S. 587 (1936), which had invalidated a New York minimum wage statute on June 10, 1936.
- On April 12, 1937 in *Jones & Laughlin* 301 U.S. 1, the Court upheld the constitutionality of the NLRA in substance overruling *Carter v. Carter Coal Co.*, 298 U.S. 238, which eleven months before had found that the commerce power did not permit federal regulation of labor regulations in the coal industry.

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African Americans and WW II

1941-1948

- Civil rights leaders such as A. Philip Randolph saw the unique situation created by World War II and the acute need for workers as an opportunity to demand equality. In 1941 Randolph threatened President Roosevelt with a 100,000-person march on Washington, D.C., to protest job discrimination.
- In response, Roosevelt issued Executive Order 8802, prohibiting discrimination in defense jobs or the government.



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Continued... African Americans and WW II

1941-1948

- 1942 The Fair Employment Act required that all federal agencies include in their contracts with private employers a provision obligating such employers not to "discriminate against persons of any race, color, creed, or nationality in matters of employment." The act set up the Committee on Fair Employment Practice (FEPC) that was empowered to investigate all complaints of discrimination, take appropriate steps to eliminate such discrimination, and make recommendations to Franklin D. Roosevelt concerning discrimination in war industry.
- In 1948 President Truman signed Executive Order 9981, which desegregated the army and the civilian government.


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Asian Americans and WW II

- In 1996 Congress directed the Secretary of the Army to conduct a review of all Asian Americans and Pacific Islanders who were awarded the Distinguished Service Cross in World War II "to determine whether any such award should be upgraded to the Medal of Honor."
- The Command History Office at the Defense Language Institute Foreign Language Center, Presidio of Monterey, California completed their research in September 1998 and turned their findings over to the US Army's Military Awards Branch. On 21 June 2000 President William Clinton awarded the Medal of Honor to 22 Asian-Pacific Americans.




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1947
1948

Women and WW II



- In 1947, the United States, the Army-Navy Nurse Act creates permanent commissions for military nurses. The first officer commission goes to Florence Blanchfield.
- Goesaert v. Cleary*, 335 U.S. 464, 466, 69 S.Ct. 198, 93 L.Ed. 163 (1948) (upholding Michigan law prohibiting women from owning and operating a bar) (prohibiting women from bartending work where no male relative provided protection from “moral and social problems” inherent in “bartending by women”)



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Modern Civil Rights Movement





Formal Equality

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1963
1965

Civil Rights Legislation

- Equal Pay Act of 1963 to enforce equality in wages between women and men
- Civil Rights Act of 1964 (Title VII) prohibits discrimination on the basis of race, color, religion, sex, or national origin
- The Voting Rights Act of 1965 to protect right to vote

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2000
1960's

Black Power, Women's Liberation, AIM and the beginning of Identity Politics






Betty Friedan & Pauli Murray, founders of NOW

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Occupational, Health & Safety Act

1970

Congress enacted broad protections for worker Safety, imposing safety requirements, and an administrative agency to enforce those regulations.




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Disability Activism and the Americans With Disabilities Act of 1993

1990



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GLBT Movement



Bayard Rustin, civil rights leader, advisor to Dr. Martin Luther King, imprisoned because he was gay



Out activism since the 1970's

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Family & Medical Leave Act

1993

Covered employers must grant an eligible employee up to a total of 12 workweeks of unpaid leave during any 12-month period for one or more of the following reasons:

- for the birth and care of the newborn child of the employee;
- for placement with the employee of a son or daughter for adoption or foster care;
- to care for an immediate family member (spouse, child, or parent) with a serious health condition; or
- to take medical leave when the employee is unable to work because of a serious health condition.

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WORLD TRADE ORGANIZATION

The WTO is the successor to the GATT (General Agreement on Tariffs and Trade) Which was set up in 1947 and operates with the broad goal of reducing or abolishing international trade barriers.



2005



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Modern Legal Regulation of Labor and Employment

- Contract: individual and collective
- Statutory: Working conditions and non-discrimination
- Common law: Public Policy Exceptions to the At-Will Doctrine

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Contract -Individual

- Term, no cause/just cause
- Duty of Loyalty
- Confidentiality
- Non Compete

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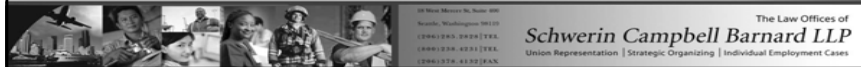
Contract -Collective

- Term
- Just cause
- Duty of Fair Representation
- Employer's non-interference

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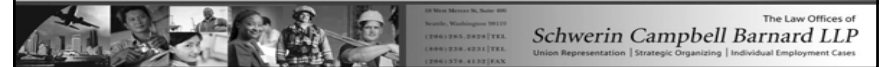
Statutory

- ERA
- Title VII
- ADEA
- ADA
- FMLA
- FLSA
- OSHA
- Similar State laws
- Duty of Fair Representation
- Employer's non-interference



Common law – state protections

- Exceptions to the “at will” doctrine:
- Statutory torts – protect against retaliation for enforcing statutory employment regulations
- Wrongful discharge in violation of public policy – protects against retaliatory discharge for promoting clear public policy



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AMERICAN LABOR & EMPLOYMENT LAW
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