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The Constitutionalization of Employment Rights: A Comparative View

Ian Holloway†

In this comparative analysis, Mr. Holloway suggests that before advocating the further constitutionalization of labor law as a means of improving the legal protection offered to working people, American jurists and lawmakers should examine other countries' experiences. He argues that the examples provided by England and Germany, as well as America's own experience as exemplified by Lochner and the Court-packing crisis of the New Deal era, indicate that those who advocate importing constitutional values into the employment relationship must proceed with caution. He concludes that while those who support the application of "constitutional values" to employment disputes may be well-intentioned, the political and social culture of the United States is such that the political process, rather than the judicial system, is a more appropriate vehicle for change in the area of employment rights protection.

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INTRODUCTION

A nation may make a Constitution, but a Constitution cannot make a nation.¹

In an article recently published in the Industrial Relations Law Journal,² Professor Joseph Grodin asserts that much of the recent history of American labor law³ can be viewed as an importation of constitutional values into the private sector workplace. Professor Grodin argues that workers are beginning to enjoy rights "analogous in some significant respects to the kinds of rights that citizens enjoy within the political community."⁴ He approves of this development and suggests that constitutional theory provides a helpful model for conceptualizing how labor law should develop. His thesis is intended to be normative as well as descriptive.⁵

In making this point, Professor Grodin strikes a chord which has become familiar to students of labor law in the United States. In recent years, a number of scholars have argued that the power an employer exercises over its employees is just as coercive as that exercised by the state over its citizens—and is, therefore, in just as much need of control.⁶ Professor Clyde Summers states the proposition in a very appealing way. Drawing on a historical analogy, he writes:

For the Founding Fathers, the greatest threat to personal freedom was the state with its capacity to control individuals. For us, there is a corresponding threat to personal freedom from private action which has the power to control individuals, deprive them of their life or livelihood, or invade their privacy and personal integrity.⁷

Accordingly, "[w]hen we privatize control over people’s lives we must protect constitutional values against private control. We must privatize personal freedom."⁸ Given that "one of the compelling responsibilities of government is the enlargement of personal freedoms and en-

³. Unless the context otherwise requires, the term "labor law," as used in this article, includes both the law of union-management relations and the law of individual employment contracts.
⁴. Grodin, supra note 2, at 3.
⁵. Id. at 3-4.
⁷. Summers, supra note 6, at 692.
⁸. Id. at 691.
employment of the democratic process,” the duty of the judiciary is to act as legislators’ partner to “aid and reinforce the constitutional values protected by the legislature in the private sphere.”

This article examines the thesis advanced by Professors Grodin and Summers, among others, through comparative analysis. The inquiry will not be empirically comprehensive, for Professor Grodin has thoroughly catalogued the development of American labor law in this regard. Rather, it will focus on whether the experience of other nations supports the argument that the constitutionalization of labor law in the United States would be desirable—or whether there is something in the nature of American society which suggests that caution is advisable in viewing the Constitution as the preferred vehicle for normative change in labor law.

In addressing these questions, I will focus on the experiences of Great Britain and the Federal Republic of Germany. I have chosen the latter because like Japan, Germany often is held up to Americans as a country with “model” industrial relations. I have chosen Britain, on the other hand, because, as with most of American common law, the American conception of the employment relationship is largely an outgrowth of its colonial experience, and because modern American labor law is in many ways a reaction to perceived deficiencies in the classical common law of master and servant. Unlike the United States, though, there exists in Great Britain neither a written constitution nor a Supreme Court to act as the final arbiter of constitutional questions. It is therefore interesting to compare the American legal system with the British one, particularly the degree to which each may be said to embody “constitutional” values.

I

THE VALUE OF COMPARATIVE LEGAL ANALYSIS

Perhaps because the United States itself generates so much jurisprudence, American legal scholars are significantly less likely than their foreign colleagues to approach legal issues from a comparative

9. Id. at 723.
10. Id.
12. For an example of the degree to which early American labor law involved a direct application of English legal principles, see Walter Nelles, The First American Labor Case, 41 Yale L.J. 165 (1931). America’s legal heritage also is typified by Oliver Wendell Holmes, Jr., THE COMMON LAW & OTHER WRITINGS (Legal Classics Library 1982). Though written more than a century after the Revolution, THE COMMON LAW refers to many more English cases than American ones.
perspective.\textsuperscript{13} This is unfortunate, for an examination of differences in approach to legal issues provides insight into one's own lawmaking process. To use the language of Professor Grodin's thesis, comparative analysis helps identify the values reflected in one's own legal system.\textsuperscript{14} As Professor Summers has described it,

\begin{quote}
[w]e are jolted into awareness that particular rules which we have unquestionably accepted as fundamental and inevitable are neither fundamental nor inevitable. We realize that the reasons which gave birth to those rules were never good reasons or no longer exist, and that the system could function quite well with different rules. . . . [C]omparative labor law enables us to know ourselves better, to dispel myths and question our assumptions, and to recognize the relevance of particular rules in shaping our system.\textsuperscript{15}
\end{quote}

In addition to highlighting national values, comparative analysis allows one to recognize commonalities: it "permits identification of behaviors or phenomena which seem to flow out of the common characteristics of societies and to be little influenced by national cultures and institutions."\textsuperscript{16}

The issue here is whether values regulating the relationship between the individual and the state also should govern relations between private parties in the usually unequal bargaining positions of employee and employer. This issue is particularly well-suited to comparative analysis for at least two reasons.

First, the United States has had a comparatively long tradition of emphasizing individual freedom over the interests of collective regulation in formal constitutional arrangements.\textsuperscript{17} Americans who contemplate

\begin{itemize}
\item \textsuperscript{13} See, e.g., Hessel E. Yntema, The American Journal of Comparative Law, 1 AM. J. COMP. L. 11, 13 (1952). This is true even when compared with other common law countries. My own experience in the British Commonwealth, for instance, is that the resolution of virtually every complex legal question involves comparative analysis. Most often, the comparison is with English law, but it is not at all uncommon for a judgment to contain references to case law in half a dozen countries. In the United States, by contrast, a court's analysis is, more often than not, restricted to an examination of the laws of other American jurisdictions. See, e.g., id. In a purely literal sense, of course, this may be described as a "comparative" exercise, but because the legislative and judicial base in the United States is to a great extent homogenous, the utility of the examination as a cultural illuminator is limited.
\item \textsuperscript{14} Grodin, supra note 2, at 3.
\item \textsuperscript{15} Clyde W. Summers, Comparisons in Labor Law: Sweden and the United States, 7 INDUS. REL. L.J. 1, 2 (1985).
\item \textsuperscript{16} Frederic Meyers, The Uses of Comparisons of Labor Law, 2 COMP. LAB. L. 238, 239 (1977).
\item \textsuperscript{17} For a thought-provoking discussion of the extent to which this is the case, see generally Mary Ann Glendon, Rights Talk: The Impoverishment of Political Discourse (1991); see also Cass R. Sunstein, After the Rights Revolution: Reconceiving the Regulatory State 15-22 (1990).
\end{itemize}

In saying this, I realize that American notions of freedom and personal liberty are in many ways a product of British parentage. A.J. Balfour, who served as Britain's Prime Minister between 1902 and 1905, described the post-revolutionary relationship between the two countries in elegant terms. It was an "unquestioned fact," he said,

\begin{quote}
that the growth of British laws, British forms of Government, British literature and modes
changing the degree to which government involves itself in shaping employment contract law could learn a great deal by examining the experience of other nations.

Secondly, but equally importantly, much of the resistance which will arise in response to attempts to change the legal balance of power between employers and employees likely will be based on unease over the business ramifications of such a change. Opposition almost certainly will be framed as concern for the implications on America's international economic position: if America is to regain its position on the cutting edge of industry, power will have to be reconcentrated in the hands of industry leaders. Rather than democratization of the workplace, American business needs someone "in charge." Given this argument, it seems appropriate to consider the experience of America's competitors.

II

THE AMERICAN SITUATION

Given that the American Constitution is among the oldest of such written documents, and that it was composed "at the commencement of the industrial revolution in a society still reliant upon slavery," it is hardly surprising that it failed to address in any substantive way the rights of workers as individuals. Rather, the Constitution's effect on the private employment relationship is only indirect: current American labor law is largely a creature of the common law as modified by statute.

Professor Grodin notes that the constitutionalization of the substance of American labor relations marks a change in American legal thought. As he puts it, "[t]raditional labor policy focused more upon process than substance. It established the framework for collective bar-

---

of thought was the slow work of centuries; that among the co-heirs of these age-long labours were the great men who founded the United States; and that the two branches of the English-speaking peoples, after their political separation, developed along parallel lines. So it has come about that whether they be friendly or quarrelsome, whether they rejoice in their agreements or cultivate their differences, they can no more get rid of a certain fundamental similarity of outlook than children born of the same parents and brought up in the same home.


The significance of this point to my thesis will be discussed in greater detail infra part IV.

18. Witness the success of H. Ross Perot's 1992 presidential election campaign. Many people believe that Mr. Perot's unprecedented success as an Independent candidate was attributable at least in part to a perception (fostered by Perot's campaign rhetoric) that an extraordinarily successful businessman was exactly the medicine America needed in a time of economic crisis.


20. In fact, the Constitution's only direct reference to labor appeared in Article IV, § 213, which dealt with the return of runaway slaves. Consider whether the constitutional value reflected in this provision has had a positive effect on American society.

gaining, but refrained (with minor exceptions) from regulating the outcome."²² Nonetheless, the Constitution has had a significant impact on the shape of labor law. As Professors Grodin and Summers point out, courts and tribunals at all levels have invoked constitutional principles when interpreting statutes and when developing common law principles.²³ For example, the Supreme Court has said that the duty of fair representation owed by a union to its members entails "at least as exacting a duty to protect equally the interests of the members of the craft as the Constitution imposes upon a legislature to give equal protection to the interests of those for whom it legislatess."²⁴

After conducting an extensive review of the case law, Professor Grodin concludes that constitutional values currently are reflected in many areas of labor law.²⁵ The constitutional principles invoked in these cases include the basic privileges and immunities of citizens (i.e., those rights which conform broadly to the rights guaranteed by the Fourteenth Amendment),²⁶ the freedoms of expression and association,²⁷ the right to privacy,²⁸ the right to due process,²⁹ and the principle of equal treatment.³⁰ One would be hard-pressed to take issue with Professor Grodin’s contention that, in real terms, the average American worker is much better off for these developments than he was in the days when courts regularly were prepared to countenance the wielding of whatever coercive power an employer could bring to bear on his employees.³¹

There exists a darker side to the courts’ willingness to impose constitutional values on private relationships, however. In this century, one may begin by examining the Supreme Court’s decision in Lochner v. New York,³² which struck down a state statute limiting bakers’ working hours. The Court’s rationale was that the Fourteenth Amendment’s Due Process Clause embodied freedom of contract, thus prohibiting state governments from interfering with the employment relationship.³³ Justice

²² Grodin, supra note 2, at 8.
²³ See Grodin, supra note 2; Summers, supra note 15.
²⁴ Steele v. Louisville & N. R.R., 323 U.S. 192, 202 (1944) (holding, among other things, that the Railway Labor Act imposed a duty on trade unions to fairly represent the interests of their members).
²⁵ Grodin, supra note 2, at 7.
²⁶ Id. at 17-18.
²⁷ Id. at 18-24.
²⁸ Id. at 25-32.
²⁹ Id. at 35-37.
³⁰ Id. at 32-35.
³¹ Id. at 5 (discussing Payne v. Western & Atl. R.R., 81 Tenn. 507 (1884)).
³² 198 U.S. 45 (1905) (5-4 decision).
³³ The groundwork for Lochner actually was established eight years beforehand in Allgeyer v. Louisiana, 165 U.S. 578 (1896). In finding that Louisiana could not forbid one of its citizens from contracting through the mails with a company located in another state which did not adhere to Louisiana’s business laws, the Court held that the word "liberty" in the Due Process Clause included the "liberty to contract." Id. at 589-91. The Lochner Court relied on Allgeyer for the proposition
Peckham, writing for the majority, stated that bakers were not "wards of the State," and that there existed "no reasonable ground for interfering with the liberty of person or the right of free contract, by determining the hours of labor, in the occupation of a baker." 

Lochner was followed by a series of Supreme Court decisions which expanded on the notion that the Constitution permitted the state only a limited role in the labor relations process. In Adair v. United States, the Court used the Due Process Clause to strike down section 10 of the Erdman Act, which barred "Yellow Dog" contracts in interstate shipping. The Court noted that the Fifth Amendment protected both "the right of a person to sell his labor on such terms as he deems proper" and the right of an employer to "prescribe the conditions upon which he will accept [it]." Thus, it stated, "In all such particulars the employer and the employé [sic] have equality of right, and any legislation which disturbs that equality is an arbitrary interference with the liberty of contract which no government can legally justify in a free land."

In Hammer v. Dagenhart, the Supreme Court struck down a federal statute prohibiting interstate trade in the products of child labor as outside the scope of the Commerce Clause. The Court concluded that the use of child labor did not contaminate the commercial transactions at issue. Implicit in the judgment was an underlying belief in the primacy that "[t]he general right to make a contract in relation to his business is part of the liberty of the individual protected by the Fourteenth Amendment of the Federal Constitution." Lochner, 198 U.S. at 53.

34. Lochner, 198 U.S. at 57.
35. Id. While this case often is cited as an illustration of the "bad old days," it should be noted that some scholars believe that the statute in question was not as benevolent as it may have appeared on its face. Some scholars have suggested that the maximum hour law really constituted a veiled attempt by the established bakeries to prevent recent European immigrants from out-competing them. See, e.g., Geoffrey R. Stone et al., Constitutional Law 801 (2d ed. 1986). If this is so, then as strange as it may seem to the late 20th Century reader, the decision actually served to improve the economic situation of the downtrodden.

36. 208 U.S. 161 (1908), overruled by Phelps Dodge Corp. v. NLRB, 313 U.S. 177 (1941).
38. "Yellow dog contracts are contracts by which employees pledge not to join a union as a condition of being offered work." Adair, 208 U.S. at 174.
39. Id.
40. Id. at 175; see also Coppage v. Kansas, 236 U.S. 1, 10 (1915) (reaching the same conclusion with respect to a state law), overruled by Phelps Dodge Corp. v. NLRB, 313 U.S. 177 (1941).
41. 247 U.S. 251 (1918), overruled by United States v. Darby, 312 U.S. 400 (1941).
42. 247 U.S. at 271-72. Hammer, though, was in many ways an anomaly in the Court's treatment of the Commerce Clause at the time. In other cases involving federal pre-emption of state and local ordinances, the Court interpreted the federal power broadly, even when the restricted state power was only tangentially related to interstate commerce. See, e.g., City of Sault Ste. Marie v. International Transit Co., 234 U.S. 333 (1914) (holding that a municipality could not interfere with the operation of a ferry service between the United States and Canada through its power to issue licenses); Adams Express Co. v. City of New York, 232 U.S. 13 (1914) (holding that a New York City ordinance which provided that only American citizens and those who had declared their intention to obtain American citizenship could obtain licenses to operate as express drivers was unconsti-
of unrestricted free enterprise over attempts to use the law to implement social change.  

This belief in the sanctity of the free market also is evident in *Adkins v. Children's Hospital,* in which the Court struck down a District of Columbia statute which set a minimum wage for women. The Court reasoned that with the passage of the Nineteenth Amendment, the legal inferiority of women was at a "vanishing point." The majority thus rejected "the doctrine that women of mature age, *sui juris,* require or may be subjected to restrictions upon their liberty of contract . . . ."  

Yet notwithstanding the robust language in which these holdings were cast, and regardless of their supposed foundation in the Constitution, the capriciousness of the Supreme Court in its enunciation of constitutional values—and, hence, the fragility of the values themselves—was illustrated in the 1937 "Court-packing" crisis. Because the episode demonstrates the degree to which the courts are prepared to vacillate, even on issues presumably fundamental in nature, it is important to consider this when analyzing the wisdom of relying on the judicial branch for the determination of employment standards.  

The story may be summarized briefly. Between January 1935 and June 1936, the Supreme Court handed down a number of decisions
which invalidated statutes vital to the New Deal.\textsuperscript{49} When President Roosevelt became concerned that judicial resistance would gut his recovery program, he proposed a measure to thwart the Court. Professor Kahn-Freund neatly described the political dilemma facing Roosevelt, and his chosen solution:

The tremendous power which the control over the distribution between federal and state legislative jurisdiction gives to the judiciary became a menace to the New Deal on which in a very real sense the survival of the United States depended. Small wonder that the President envisaged a change in the composition of the court [sic] which would have removed or reduced this menace.\textsuperscript{50}

In early 1937, Roosevelt drafted a bill which would have empowered him to appoint an additional justice to the Supreme Court when a sitting justice who had reached the age of seventy declined to retire.\textsuperscript{51} In his message to Congress,\textsuperscript{52} the President emphasized that the measure’s purpose was to promote the Court’s efficiency.\textsuperscript{53} In a fireside chat, however, he outlined the extent to which the constitutional values underpinning the Court’s decisions failed to conform with his own political aims:

The American people have learned from the depression [sic]. For in the last three national elections an overwhelming majority of them voted a

\textsuperscript{49} See Carter v. Carter Coal Co., 298 U.S. 238 (1936) (striking down a number of provisions of the Bituminous Coal Conservation Act of 1935, which, among other things, granted the federal government the power to regulate the terms and conditions of employment in the coal mining industry and to impose an excise tax on the sale of bituminous coal); United States v. Butler, 297 U.S. 1 (1936) (striking down the Agricultural Adjustment Act of 1933, which imposed certain “processing taxes” on the agricultural industry, on the basis that it violated states’ rights); Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935) (striking down § 3 of the National Industrial Recovery Act, which gave the President the power to approve “codes of fair competition” for certain industries which could then be enforced by the Federal Trade Commission, on the basis that it amounted to an unconstitutional delegation of legislative authority); Railroad Retirement Bd. v. Alton R.R., 295 U.S. 330 (1935) (striking down the Railroad Retirement Act of 1934 on the basis that its compulsory pension scheme violated the Fifth Amendment’s Due Process Clause); Panama Ref. Co. v. Ryan, 293 U.S. 388 (1935) (striking down § 9(c) of the National Industrial Recovery Act, which gave the President the power to limit interstate and foreign trade in petroleum products, on the basis that it amounted to an unconstitutional delegation of legislative authority).

\textsuperscript{50} Kahn-Freund, \textit{ supra} note 48, at 249.

\textsuperscript{51} The President would be able to appoint a maximum of six justices in this manner. At the time, six sitting Justices were over the age of seventy: Chief Justice Hughes (75), and Justices Butler (71), Sutherland (75), McReynolds (75), Van Devanter (78) and Brandeis (81). \textit{See} HART \& WECHSLER, \textit{ supra} note 48.

\textsuperscript{52} President Franklin Delano Roosevelt, \textit{The President Presents a Plan for the Reorganization of the Judicial Branch of Government} (Feb. 5, 1937), \textit{in} \textit{THE PUBLIC PAPERS AND ADDRESSES OF FRANKLIN DELANO ROOSEVELT} 55 (1937).

\textsuperscript{53} In one brief passage, though, he hinted at his real motivation in advancing the proposal:

Modern complexities call also for a constant infusion of new blood in the courts, just as it is needed in executive functions of Government and in private business. A lowered mental or physical vigor leads men to avoid an examination of complicated and changed conditions. \textit{Little by little, new facts become blurred through old glasses fitted, as it were, for the needs of another generation; older men, assuming that the scene is the same as it was in the past, cease to explore or inquire into the present or the future.}

\textit{Id.} (emphasis added).
mandate that the Congress and the President begin the task of providing . . . protection [against further economic catastrophe] . . .

The courts, however, have cast doubts on the ability of the elected Congress to protect us against catastrophe by meeting squarely our modern social and economic conditions. . . .

When the Congress has sought to stabilize national agriculture, to improve the conditions of labor, to safeguard business against unfair competition, to protect our national resources, and in many other ways to serve our clearly national needs, the majority of the Court has been assuming the power to pass on the wisdom of these acts of the Congress—and to approve or disapprove the public policy written into these laws.54

Roosevelt's description of his proposal makes little sense to the lawyer, but his political frustration is obvious nonetheless:

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—not over it.55

Though the President's bill eventually died, the Court did reverse its direction and uphold several sweeping pieces of economic legislation soon after the proposal was publicized. The President's message was delivered to Congress in February, 1937; within four months the Supreme Court upheld a minimum wage law56 (thus reversing its previous "freedom of contract" emphasis by acknowledging the state's special interest in protecting women); the National Labor Relations Act57 (on the basis that the Commerce Clause was broad enough to encompass the entire realm of labor relations, a striking departure from the Court's holdings of the previous two years); and the Social Security Act.58 The long-term effect of President Roosevelt's plan was equally dramatic—the Court did not rule an Act of Congress unconstitutional during the following six years, and between 1937 and 1954 it struck down only two statutory provisions,59 both of which were relatively insignificant.

55. Gunther, supra note 54, at 151.
57. NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937). While the effect of the holding may have been to encompass all labor relations under the Commerce Clause, the Court's rationale was that industrial strife within a large company would adversely effect interstate commerce. See id. at 41.
59. See Steamer, supra note 48, at 217 (citing Tot v. United States, 319 U.S. 463 (1943) (striking down provisions of the Federal Firearms Act of 1938 which contained a presumption of
There is no hard evidence that the Court was bullied into its change of heart, but one cannot help but wonder what prompted the panel to retreat from its view that it was the appropriate arbiter of institutional values in American society. The full truth behind the change probably never will be known, but most commentators agree that, in Professor Freund's words, "a switch in time saved nine." The line of decisions spanning from Lochner in 1905 to the New Deal cases three decades later show two things: first, that constitutional values are subject to fundamental variation, even within the span of a single generation; and secondly, that when judges purport to speak in terms of "constitutional values" in the context of the employment relationship, what they most often are doing is imposing their view of the appropriate scope of state regulation through the political process. The problem with this—apart, of course, from concerns about the harm it might pose to a democratic system of government—is that courts run the risk of falling out of step with contemporary political and social reality. As Professor Archibald Cox has written:

Constitutional adjudication depends, I think, upon a delicate, symbiotic relation. The Court must know us better than we know ourselves. Its opinions may, as I have said, sometimes be the voice of the spirit, reminding us of our better selves. In such cases, the Court has an influence just the reverse of what Thayer feared; it provides a stimulus and quickens moral education. But while the opinions of the Court can help to shape our national understanding of ourselves, the roots of its decisions must already be in the nation. The aspirations voiced by the Court must be those the community is willing not only to avow but in the end to live by. The legitimacy of the great constitutional decisions rests upon the accuracy of the Court's perception of this kind of common will and upon the Court's ability, by expressing its perception, ultimately to command a consensus.

In other words, the political legitimacy of the Supreme Court's constitu-
tional rulings rests upon the accuracy of its perception of the common will. The events of 1937 show us the price of inaccuracy. They may not represent a particularly proud page in the American constitutional story, but their lessons should be borne in mind when considering the implications of framing the norms which govern private employment relationships in terms of "constitutional values."

III
THE GERMAN EXPERIENCE

A. The German Judicial System

To better understand the process through which German labor law has been "constitutionalized," it is helpful to begin with a brief overview of the German judicial system.64

As its name implies, the Federal Republic of Germany is a federal union which now consists of sixteen states known as Länder.65 The German constitution66 divides the federal government into the three familiar branches: executive, legislative and judicial. Each German state administers its own court system, but the courts are created by federal legislation and are virtually identical in structure and jurisdiction throughout the Republic.67

Unlike the United States, Germany's judicial system does not consist of courts of broad, generalized jurisdiction. Instead, a series of specialized federal high courts supervises the work of the state courts: the Federal Supreme Court,68 the Federal Labor Court,69 the Federal Administrative Court,70 the Federal Social Insurance Court,71 and the Federal Tax Court.72 Germany also has a Federal Constitutional Court,73 which possesses the power of constitutional review.

64. See generally THOMAS H. REYNOLDS & ARTURO A. FLORES, FOREIGN LAW: CURRENT SOURCES OF CODES AND LEGISLATION IN JURISDICTIONS OF THE WORLD (1991), for a more complete introduction to the German legal system.

65. The five newest Länder, which comprise the former East Germany, joined the Federal Republic on October 3, 1991, under the Vertrag Zwischen der Bundesrepublik Deutschland und der Deutschen Demokratischen Republik über die Herstellung der Einheit Deutschlands—Einigungsvertrag vom 31.8.1990 [Treaty Between the Federal Republic of Germany and the German Democratic Republic Regarding the Establishment of the Unity of Germany—Unification Treaty of August 31, 1990] (usually referred to simply as the Einigungsvertrag [Unification Treaty]).

66. GRUNDGESETZ FÜR DIE BUNDESREPUBLIK DEUTSCHLAND [GG] [BASIC LAW FOR THE FEDERAL REPUBLIC OF GERMANY], adopted in 1949 [hereinafter "Basic Law"].

67. For amplification, see 2 REYNOLDS & FLORES, supra note 64, at Germany 9-11.

68. The Bundesgerichtshof, or "BGH," which deals with civil matters.

69. The Bundesarbeitsgericht, or "BAG."

70. The Bundesverwaltungsgericht, or "BVerwG."

71. The Bundessozialgericht, or "BSG."

72. The Bundesfinanzhof, or "BFH."

73. The Bundesverfassungsgericht, or "BVerfG."
B. German Constitutionalism and Labor Relations

In keeping with its long-held philosophy of viewing the law in essentially positivist terms, the German parliament has gone much further in codifying positive norms in labor law than has been the case in either the United States or Great Britain. The German Works Constitution Act, for example, mandates employee participation in the day-to-day running of plant or shop operations in the form of works councils. By contrast, American law merely permits such worker involvement if the employees are able to secure management acquiescence through collective bargaining. Similarly, the German Employment Dismissal Security Act prohibits dismissals unless they are “socially warranted,” and codifies the right of dismissed employees to involve the Works Council in the resolution of their employment disputes.

What is interesting from the standpoint of Professor Grodin’s thesis,


75. See Jura Europae (C.H. Beck Verlag, Munich), a multi-volume loose-leaf set, for a useful legislative summary of German labor law. The first volume discusses labor law (Droit du Travail-Arbeitserch); see also Paull, supra note 11. Interviews with Professor Ingo Richter, Second Faculty of Law, University of Hamburg (Dec. 1991) provided an additional helpful source.


77. “In Betrieben mit in der Regel mindestens fünf ständigen wahlberechtigten Arbeitnehmern, von denen drei wählbar sind, werden Betriebsräte gewählt.” [“In works where, as a rule, there are at least five workers who are entitled to vote of whom there are at least three who are eligible to be elected, works councils are elected.”] BetrVG § 1, 1972 BGBI I 13. See Paull, supra note 11, at 634-35 (outlining provisions of the Weimar Republic’s Works Councils Act, early precursor to the current Works Constitution Act), 648-50 (describing the “key” role that the Works Constitution Act assigns works councils in review of all proposed dismissals); Business Law Guide to Germany 251-57 (CCH, 2d ed. 1988) (describing duties and authority of the “shop council,” as this source translates Betriebsrat).


79. “Die Kündigung des Arbeitsverhältnisses gegenüber einem Arbeitnehmer, dessen Arbeitsverhältnis in demselben Betrieb oder Unternehmen ohne Unterbrechung länger als sechs Monate bestanden hat, ist rechtsunwirksam, wenn sie sozial ungerechtfertigt ist.” [“Termination of the employment of an employee, whose employment has existed in the same works or enterprise without interruption for more than six months, is legally invalid if it is socially unwarranted.”] KSchG § 1(1), 1951 BGBI I 499, reprinted and translated in Gres & Jung, supra note 76, at 269 (original), 268 (translation).

80. “Hält der Arbeitnehmer eine Kündigung für sozial ungerechtfertigt, so kann er binnen einer Woche nach der Kündigung Einspruch beim Betriebsrat einlegen. Erachtet der Betriebsrat den Einspruch für begründet, so hat er zu versuchen, eine Verständigung mit dem Arbeitgeber herbeizuführen.” [“Where the employee regards the termination to be socially unwarranted, he may file an objection with the works council within one week following notice. If the works council considers the objection to be justified, it shall try to reach an understanding with the employer.”] KSchG § 3, 1951 BGBI I 499, reprinted and translated in Gres & Jung, supra note 76, at 270 (translation), 271 (original).
however, is the degree to which German courts have involved themselves in the formulation of workplace values, despite what Americans generally would consider progressive labor legislation. Although the Basic Law contains almost as little reference to labor rights as does the United States Constitution, German courts have assumed an activist stance in applying the German constitution to labor relations.

The Basic Law contains several provisions which tangentially affect labor relations. Article 74 provides the federal government and the Länder with concurrent jurisdiction over labor law (though in fact, the field is occupied almost entirely by federal legislation). Article 48(1) requires that candidates for the Bundestag be granted leave for their election campaigns, and Article 48(2) prohibits the dismissal of such employees if they are elected. However, the only provision explicitly relating to substantive labor law is Article 9(3), which includes freedom of association for workers among the nation's constitutionally protected fundamental rights. Beyond these few provisions, the Basic Law does not mention the relative rights of employers and employees in the workplace.

Moreover, unlike the United States, Germany has no tradition of judicial review of legislation for constitutionality. A limited form of constitutional review existed from the German Confederation of 1815 to the collapse of the German Empire at the end of World War I, but it related chiefly to the division of powers between the principalities and the Imperial Government. Modern judicial review, in the sense in which this

81. In this respect, the Basic Law differs markedly from its counterparts in many other countries whose constitutions are of a similar vintage. See generally David Ziskind, Labor Law in 143 Constitutions, 1 COMP. LAB. L. 205 (1976); Ziskind, supra note 19.

82. "Die konkurriende Gesetzgebung erstreckt sich auf folgende Gebiete: ... 12. das Arbeitssrecht einschließlich der Betriebsverfassung, des Arbeitsschutzes und der Arbeitsvermittlung sowie die Sozialversicherung einschließlich der Arbeitslosenversicherung." ["Concurrent legislative powers shall extend to the following matters: ... 12. labor law, including the legal organization of enterprises, protection of workers, employment exchanges and agencies, as well as social insurance including unemployment insurance."] GG art. 74, translated in BASIC LAW FOR THE FEDERAL REPUBLIC OF GERMANY (Press and Information Office of the Government of the Federal Republic of Germany publ., 1973).

83. The lower house of the German Federal Parliament.

84. GG art. 48(1), translated in BASIC LAW FOR THE FEDERAL REPUBLIC OF GERMANY, supra note 82.

85. GG art. 48(2), translated in BASIC LAW FOR THE FEDERAL REPUBLIC OF GERMANY, supra note 82.

86. "Das Recht, zur Wahrung und Förderung der Arbeits- und Wirtschaftsbedingungen Vereinigungen zu bilden, ist für jedermann und für alle Berufe gewährleistet." ["The right to form associations to safeguard and improve working and economic conditions is guaranteed to everyone and to all trades, occupations, and professions."] GG art. 9(3), translated in BASIC LAW FOR THE FEDERAL REPUBLIC OF GERMANY, supra note 82.

87. See KOMMERS, supra note 74, at 4-5 (discussing the concept and history of "Verfassungsstreitigkeit," constitutional review on a division of powers basis, as distinguished from "richterliches Prüfungsrecht," or judicial examination of the substance of the law).
term is understood in the United States, was an invention of the judiciary during the Weimar Republic.\textsuperscript{88}

In a series of pronouncements arising from Germany's postwar financial crisis (which bear an interesting resemblance to Chief Justice John Marshall's reasoning in \textit{Marbury v. Madison}),\textsuperscript{89} the Weimar Supreme Court\textsuperscript{90} stated in dicta that the courts had the power to undertake substantive constitutional review of legislation.\textsuperscript{91} But while the Weimar Supreme Court continued to assert this power throughout the remaining years of the Republic, it exercised its purported authority sparingly.\textsuperscript{92} Only after World War II, when the Basic Law was being drafted, was the Federal Constitutional Court established and formally vested with such jurisdiction as a means of guaranteeing the perpetual rule of law.\textsuperscript{93} Despite the absence of a tradition of curial intervention, and the lack of substantive labor provisions in the Basic Law, though, German labor law has become significantly constitutionalized through judicial interpretation in the forty years since the Basic Law was adopted.

Because of the tragedy from which it was conceived, the post-war Basic Law was designed not only to create a framework for federal government, but also to "foster a secure and preferred way of life."\textsuperscript{94} Professor Kommers has observed that, unlike the situation in the United States, there exists no debate in Germany over whether its constitution is meant to be primarily procedural or substantive in nature. Germans, he states, "commonly agree that the Basic Law is a constitution of substantive values, embracing both rights and duties."\textsuperscript{95} This spirit is reflected in a 1967 decision of the Federal Constitutional Court which declared that fundamental constitutional rights are not meant merely to provide a shield against state interference, but rather represent "objective norms which establish a system of values comprising all branches of the law."\textsuperscript{96}

\textsuperscript{88} See J.J. Lenoir, \textit{Judicial Review in Germany Under the Weimar Constitution}, 14 \textit{TUL. L. REV.} 361 (1940), for a good English-language discussion of the evolution of judicial review during the Weimar Republic.

\textsuperscript{89} 5 U.S. (1 Cranch) 137 (1803).

\textsuperscript{90} Called the Reichsgericht.

\textsuperscript{91} Judgment of Dec. 15, 1921, 56 Entscheidungen des Reichsgerichts in Strafsachen 179, 182 (1922); Judgment of Oct. 1, 1924, 4 Entscheidungen des Reichtsversorgungsgerichts 168 (1925); Statement of the Association of German Judges of Jan. 15, 1924. All are discussed in \textsc{Kommers}, supra note 74, at 7.

\textsuperscript{92} Interview with Professor Ingo Richter, Faculty of Law, University of Hamburg (Dec. 10, 1991).

\textsuperscript{93} \textsc{Kommers}, supra note 74, at 8.

\textsuperscript{94} \textit{Id.} at 45.

\textsuperscript{95} \textit{Id.} at 37.

In keeping with this outlook, the Constitutional Court has held that provisions of the German Civil Code\textsuperscript{97} which prohibit certain actions deemed "offensive to good morals"\textsuperscript{98} allow the courts to import values reflected in the Basic Law when judging private conduct.\textsuperscript{99} This "extended effect," as Professor Kahn-Freund has described it,\textsuperscript{100} is known as \textit{Drittwirkung} (literally "third effect"). Its use by the courts has been controversial,\textsuperscript{101} but it forms a firm part of German constitutional jurisprudence.

This manner of interpreting the Basic Law has had important consequences. From the beginning of the postwar German Federal Republic, the Federal Constitutional Court has assumed a central role in German political and constitutional life. This role has been so strong that just ten years after its creation, one commentator said that "[t]he Basic Law is now virtually identical with its interpretation by the Federal Constitutional Court."\textsuperscript{102}

Professor Kommers describes this development as representing a major break from the German tradition of considering the state the source of fundamental rights.\textsuperscript{103} Under this new regime, "[t]he core of individual freedom, like human dignity itself, is anterior to the state, and law \textit{and} justice . . . now measure the validity of governmental actions . . . ."\textsuperscript{104}

Applying this conception, the Federal Constitutional Court has felt free to adopt an expansive, value-based interpretation of the Basic Law when deemed necessary. One of its earliest decisions recalled the experience of Nazi adjudication and specifically rejected the notion of "value-free legal positivism" as a sufficient foundation for legality.\textsuperscript{105}

This type of reasoning sounds familiar to the student of American constitutional law, and its results seem to lend support to Professor Grodin's thesis. But it is interesting to note some of the criticism of the Constitutional Court's activist stance. The court has been criticized repeatedly—in some instances by its own former justices—for "judicializ-
Some have gone further, charging that the Court’s activism has dampened legislative confidence and impaired parliament’s willingness to act. Another stream of criticism comes from the political left, which claims the Constitutional Court has acted as a “brake on social change.”

Within the interpretational framework developed by the Constitutional Court, the Federal Labor Court has issued a number of rulings on the applicability of Basic Law values to the employment relationship. As mentioned earlier, the right of worker organization is given express protection by Article 9(3) of the Basic Law. However, the Labor Court has adopted a much broader view of the applicability of constitutional norms to private legal relationships. In a 1955 decision, the Labor Court held that the parties to a collective bargaining relationship exercise what is effectively a rule-making power delegated to them by the legislature. The court concluded that the Basic Law was therefore directly applicable and thus evaded consideration of the issue of Drittwirkung. Subsequently, the Labor Court ruled that even where an employer is acting unilaterally—absent a collective agreement—the rule-making analogy applies, thus requiring the employer’s rules to conform to constitutional norms.

On the other hand, the Labor Court also has determined that certain constitutional rights must be severely circumscribed in the employment context. In its decision of December 3, 1954, for instance, the Labor Court considered the case of an employee who had been dismissed for distributing political propaganda during working hours. Applying the Drittwirkung principle, the Court held that the right of free speech existed in the workplace, but was qualified by any other rule which established legal relations between the employer and its employees—in this instance a rule requiring a worker to abstain from acts which might endanger a peaceful workplace atmosphere.

While this reasoning may make perfect sense from a labor relations standpoint, the court purported to hold that a certain constitutional

106. Kommers, supra note 74, at 64.
108. Kommers, supra note 74, at 65.
109. Supra note 86 and accompanying text.
111. Kahn-Freund, supra note 48, at 267-68 and n.27. See text accompanying supra notes 97-100, for a translation and discussion of “Drittwirkung.”
114. Id.
value which applied to all citizens, including workers in the workplace, could be limited by what was, in effect, a *private contractual term*!

C. Conclusions

American observers may draw a number of interesting conclusions from the German experience. First, it is clear that the German courts have gone a long way toward adopting an approach similar to that advocated by Professor Grodin. They have been far more willing to impose constitutional values on private relationships than have their American counterparts. To the extent this represents an overt entry by the judiciary into the political arena, one may point out that judges on the Federal Constitutional Court are elected by parliament and restricted to a single, twelve-year term.115 This may give the court’s partisan activism a degree of political legitimacy not possessed by a judiciary selected by the Chief Executive to serve life terms.116

At the same time, however, it is important to remember that the two principal players in German labor law—the elected Constitutional Court and the *unelected* Labor Court—have adopted fundamentally different means to achieve the common end of ensuring that private parties observe values embodied in the Basic Law. The Constitutional Court has found that constitutional values can be incorporated by reference through other statutory provisions.117 The Labor Court, on the other hand, has determined that in some instances it can apply the Basic Law *directly*.118

While the substantive result may not appear much different, in terms of the nature of the relationship between the courts, the constitution, the legislature and the individual, the juridical distinction is of some consequence. The Constitutional Court’s approach mirrors that advocated by Professor Grodin. But the Federal Labor Court’s interpretation, which has most directly shaped German labor law,119 would represent a profound change in the nature of American constitutional thought—that is, an acceptance that the constitution should apply to private activity absent any governmental involvement.

This leads to the key difference between the German and American systems: the fact that for historical and sociological reasons, German citizens are more accustomed to, and accepting of, the imposition of a value system than are Americans.120 Regardless of the legitimacy of the rea-

115. KOMMERS, *supra* note 74, at 24-25.
116. On the other hand, one could point to the American Senate confirmation process as a justification for whatever political activism is engaged in by the American federal judiciary.
117. *See supra* notes 97-101 and accompanying text.
118. *See supra* notes 109-12 and accompanying text.
119. *See supra* notes 109-13 and accompanying text.
120. Without meaning to sound trite, regardless of material similarities, American and German
soning behind the formulation of the values themselves, the Basic Law is as general in its content as is the United States Constitution, and it is clear that in reaching decisions which, for example, balance freedom of expression against the economic desirability of an orderly workplace, Federal Labor Court judges are "translat[ing] into principles of law their own moral and social preferences."¹²¹ Judicial activism, one might say, has been supplanted in Germany by judicial positivism.

By contrast, the cases leading up to the 1937 Court-packing crisis illustrate the difficulty that segments of American society faced in coming to grips with limitations on absolute freedom of private action. Coming from a deep positivist tradition, German workers may be better situated to embrace an activist approach to employment regulation—whether by the legislature or the courts—than their American counterparts.

IV
ENGLAND: A COMMON LAW NATION AT THE CROSSROADS

A. The Rule of Law and Parliamentary Supremacy¹²²

The English situation is of particular interest in examining Professor Grodin's thesis for three reasons. First, American labor law is largely an outgrowth of, and a reaction to, English employment law. Secondly, a comparison with the substantive legal protection offered to English workers is valuable since England does not have an American-style bill of rights. Finally, the present British situation vis-à-vis the European Community can be quite instructive to someone from the common law world who might contemplate a change in the scope of involvement of "external" authorities, whether in the form of the European Commission or the American federal courts, in shaping the substance of private relationships.

To begin with constitutional arrangements, while it is not the case that Britain lacks a constitution, it remains obvious that the nature of the relationship between the political and judicial branches in that country differs fundamentally from that in either the United States or Germany. Unlike the American Constitution, which is founded on a notion of checks and balances embodied in the complementary principles of federalism and the separation of powers, Great Britain is a "unitary state"¹²³

¹²¹ Kahn-Freund, supra note 48, at 269.
¹²³ Though England (with Wales), Scotland and Northern Ireland have separate judicial sys-
whose fundamental constitutional tenet is parliamentary supremacy. According to this principle, there is nothing that Parliament cannot do: "The courts recognize no limits to Parliament’s legislative power." Authority is further concentrated because the Prime Minister and Cabinet are, by convention, chosen from the party whose members comprise a majority in the House of Commons. Moreover, under British constitutional theory the supreme judicial authority is the “High Court of Parliament.”

The House of Lords, Britain’s upper, non-elected chamber, assumes Parliament’s actual judicial duties. In theory, cases before the House of Lords are parliamentary debates in which any member of the House may take part. In reality, however, cases are heard by a special group of Peers called “Law Lords,” all of whom have considerable judicial experience. Thus, for all intents and purposes, the House of Lords is Britain’s court of final resort.

The British judiciary wields considerable power and it may re-

124. 8 Halsbury’s, Constitutional Law ¶ 811. British constitutional law recognizes the “functional” (or de facto) separation of powers, but it is misleading to describe the separation of powers as an axiom of the British constitution. As Holmes said of Montesquieu, “[T]he England of the threefold division of power into legislative, executive and judicial was a fiction invented by him.” Holmes, supra note 12, at 263. Indeed, one senior government official, the Lord Chancellor, sits in all three branches: he serves as head of the judiciary; a member of the Cabinet; and Speaker of the House of Lords. See 8 Halsbury’s, Constitutional Law ¶¶ 1176-1179.

125. 8 Halsbury’s, Constitutional Law ¶ 811. Theoretically, Parliament has the right to abolish itself. Furthermore, it could in principle recreate the British Empire by repealing the statutes which granted independence to Britain’s former colonies. Id.

126. “[I]ts duties are mainly deliberative and legislative: the judicial duties are only part of its functions.” 10 Halsbury’s, Courts ¶ 701. Some historians believe that the “High Court” of Parliament was a fiction concocted by Sir Edward Coke to buttress his struggle for parliamentary supremacy after James I had removed him as Chief Justice of the Court of King’s Bench. See, e.g., 1 Coke’s Institutes, Vol. II 22-24 (Legal Classics Library ed., 1985).

127. Judicial opinions in the House of Lords thus are referred to as “speeches.”

128. But see O’Connell v. Regina, 8 Eng. Rep. 1061 (1844) (the “Lay Lords” voted that it would be wrong of them to interfere with the House’s judicial business). The last occasion on which a Lay Peer voted on an appeal to the House of Lords was in Bradlaugh v. Clarke, 8 App. Cas. 354 (1883), cited in 10 Halsbury’s, Courts, ¶ 746 n.2. O’Connell probably represents one of the most significant milestones in the development of the modern conception of the rule of law. The case overturned the convictions of a group of Irish nationalists on conspiracy charges. It speaks to the strength of contemporary British justice that a group of largely conservative, upper-class Members of Parliament would voluntarily, and as a matter of principle, divest themselves of the opportunity to determine the outcome of this case.

129. Their proper title is “Lords of Appeal in Ordinary.”

130. While the separation of powers doctrine is not a strict part of British constitutional law, see supra note 125, the British judiciary remains fully separated from the executive and legislative branches. For this reason, the Law Lords do not take part in parliamentary debates over politically contentious subjects. See 8 Halsbury’s, Constitutional Law ¶ 813 n.7 and accompanying text.

quire the legislature to state its intention with considerable exactitude before finding that Parliament intended to interfere with a traditionally held civil right. Nevertheless, the notion of parliamentary supremacy remains the foundation of British constitutional law. To be sure, the English common law is in many ways as much an accumulation of judicial prejudices and moral judgments as is American or German case law. In the end, however, the British judiciary is bound to bow to the will of Parliament, no matter how offensive the legislation in question may seem. As Professor Dicey put it, "there is no law which Parliament cannot change." 133

B. The Character of English Labor Law

In modern times the British Parliament has paid substantial attention to the comparative rights of workers and employers. Indeed, since enactment of the Industrial Relations Act of 1971, British labor law has been largely statutory in character. Thus, if worker well-being is to be measured by the degree to which legislation has supplanted the common law, then English workers can be said to be infinitely better off than their American counterparts.

The practical effect of British constitutional arrangements is that,

132. See, e.g., Managers of Metro. Asylum Dist. v. Hill, 6 App. Cas. 193, 208 (1881) ("It is clear that the burden is on those who seek to establish that the Legislature intended to take away the private rights of individuals, to show that by express words, or by necessary implication, such an intention appears.") (Lord Blackburn).


134. For descriptions of the legislative history of English labor law, see Paull, supra note 11, at 636-37, 651; Martin Vranken, Deregulating the Employment Relationship: Current Trends in Europe, 7 COMP. LAB. L. 143, 158-64 (1986) (focusing on the European movement toward deregulating the employment relationship and the concurrent movement toward increased regulation in Britain); Jack Stieber, Protection Against Unfair Dismissal: A Comparative View, 3 COMP. LAB. L. 229, 233-36 (1980) (comparing the approaches of the International Labor Organization, the European Community, and Great Britain to the American policy on unfair dismissal, and proposing that the United States protect against unfair dismissal for employees not currently safeguarded).

135. See Paull, supra note 11 (arguing this point). It is far too simplistic to compare statutory regimes among countries without also considering related social, economic, and historical issues. For example, while Ms. Paull is technically correct that the Industrial Relations Act "created a cause of action for unfair dismissal in the United Kingdom for the first time," supra note 11, at 637, a common law right of action previously existed. In fact, the chief aim of the 1971 legislation was to simplify procedure and reduce costs to place a legal remedy within the reach of those who could not afford to prosecute an action in the courts. For a discussion of the historical divergence of British and American law in this regard, see Sanford M. Jacoby, The Duration of Indefinite Employment Contracts in the United States and England: An Historical Analysis, 5 COMP. LAB. L. 85 (1982).

136. The statutory character of British labor law held true in the 1980s. Though they typically are viewed as supporting and pursuing similar policy initiatives, Prime Minister Margaret Thatcher and President Ronald Reagan often employed dramatically different means to achieve the shared end of reforming society. Mrs. Thatcher did not so much deregulate as re-regulate. During her tenure, the degree of statutory control over British labor relations actually increased, albeit with a different orientation than under her predecessors. See, e.g., Vranken, supra note 134, at 143-44.
flawed as it may be, modern British labor law is the product of political
debate rather than judicial opinion—in much the same way New Deal
legislation purportedly reflected American political will in the 1930s.
This is the first lesson to be learned from the British example: significant
judicial activism is not a necessary condition for the protection of em-
ployment rights.

Having said this, it is worthwhile to note that the pre-1971 situation
reflected a political consensus: "trade unionists, employers and politi-
cians alike were agreed that industrial relations needed a minimum of
state intervention." The early development of British labor law, par-
ticularly the law of trade union recognition, was accomplished prin-
cipally by granting statutory immunities against common law offenses:
working people thus were able to band together on a voluntary basis.
British labor law in the early part of the modern era emphasized proce-
dural facilitation rather than substantive change. In this sense, modern
American labor law did not stray far from its British roots. Indeed,
when Senator Robert Wagner introduced the National Labor Relations
Act, he stressed the importance of self-help ideology. In his words, a
"despotic state" could result from direct regulation of terms and condi-
tions of employment.

This is most unlike the situation in Germany, where labor law al-
ways has embodied a series of positive rights and norms. In the lan-
guage of Professor Grodin's thesis, the English historical experience
reflects the British constitutional value of self-regulation. Lord Justice
Alfred Denning, for example, described the overriding constitutional phi-
losophy in characteristically noble language: "a sense of the supreme im-
portance of the individual and a refusal to allow his personality to be
submerged in an omnipotent state."

Because of this shared philosophical tradition with the United
States, the British experience with the EEC's continental system of
positive regulation can be enlightening to one considering a fundamental
change in the American conception of employment relations through the
imposition of values—constitutional or otherwise—irrespective of the
wishes of those who are actually parties to an employment contract.

137. The Making of Labor Law in Europe—A Comparative Study of Nine Coun-
tries up to 1945 194 (Bob Hepple ed., 1986); see also Jacoby, supra note 135, at 102.
139. See Summers, supra note 6, at 698; see also Grodin, supra note 2, at 7-8.
140. See discussion supra part III.
141. Sir Alfred T. Denning, The Spirit of the British Constitution, 29 Canadian B. Rev. 1180,
1182 (1951).
142. See Balfour, supra note 17.
C. Britain and the European Economic Community

Britain’s problems with the European Community are extremely complex. A complete analysis of the often acrimonious debate over Britain’s future in an integrated Europe is beyond the scope of this article. One recent series of events, however, epitomizes the opposing views.

When the EEC governments met in Maastricht in December 1991 to conclude the European political union treaty, negotiations were “taken to the brink” by British intransigence over proposals which appeared to be acceptable to the other EEC members. The sticking points were not issues related to the common currency (as many North Americans might have anticipated), but provisions in the European Social Charter which would have given “Europe” quasi-constitutional authority over British labor law. In the end, the impasse was resolved by dropping the Social Charter from the formal portion of the negotiations and arranging a “side-agreement” for other countries to sign. The Netherlands’ European Affairs Minister aptly described this conflict as “a cultural difference between the continentals and the United Kingdom. There is no room for compromise.”

Much of the conflict between Great Britain and her European partners may be explained as a function of this basic cultural difference—a fundamental difference in the conception of the proper relationship between the individual and the state. At the risk of overstatement, British political history since the Magna Carta (at least until this century) arguably can be viewed as a continuous struggle against direct sovereign involvement in private affairs. For that reason, it has long been a point of pride to British constitutional theorists that the British monarch reigns, but does not rule.

Democratic tradition on the Continent tends to be much more recent. To take the German example, with the exception of the Weimar Republic, the notion that authority emanates from the people has taken root only in the latter half of this century. This suggests two

143. See Robin Oakley & George Brock, Major Wins All He Asked for at Maastricht, LONDON TIMES, Dec. 11, 1991, at 1; see also related articles.
144. Id.
145. See Robin Oakley & George Brock, Majors’ Refusal To Give Way Leaves EC “Goggle Eyed,” LONDON TIMES, Dec. 11, 1991, at 11; see also various editorials at 11, 14, 15.
146. For an early-20th Century discussion of the role of the British monarchy, see WALTER BAGEHOT, THE ENGLISH CONSTITUTION chs. 3-4 (1907). Professor Bagehot’s book, which ranks with Dicey’s as one of the classics of British constitutional law, was actually written in part with an American audience in mind.
147. “Alle Staatsgewalt geht vom Volke aus. Sie wird vom Volke in Wahlen und Abstimmungen und durch besondere Organe der Gesetzgebung, der vollziehenden Gewalt und der Rechtssprechung ausgeübt.” [“All state authority emanates from the people. It shall be exercised by the people by means of elections and voting and by specific legislative, executive, and judicial organs.”] GG art. 20(2), translated in BASIC LAW FOR THE FEDERAL REPUBLIC OF GERMANY, supra note 82.
things. First, German legislation might have a different "feel" to it than does British or American legislation. Indeed, it would be shocking if it did not, considering the circumstances out of which the current Federal Republic of Germany was created.

Secondly, the German legal system has readily adapted to external imposition of positive values on private relationships. In Britain, on the other hand, the natural aversion to this is apparent in the current debate over European unification. British opposition to the present arrangement under which the European Commission operates chiefly by executive directive promulgated in Brussels (a phenomenon similar to that of a judge imposing a value system on a private relationship) is based on the notion that self-governance, whether individual or collective, lies at the root of British society.\textsuperscript{148}

V

CONSTITUTIONAL VALUES IN THE WORKPLACE: LESSONS TO BE LEARNED

The most striking characteristic which emerges from any comparative examination of American labor law is the emphasis which American society places on individual, as opposed to collective, rights. This is evident in Professor Grodin's list of employment rights.\textsuperscript{149} They are overwhelmingly individualistic in nature: individual free speech, protection from retribution against whistle blowers, privacy, due process in dismissal cases. In short, the cases to date have provided minimal protection for collective organization and group rights.

It is telling that, as Professor Grodin points out, claims for the protection of privacy interests have become widespread in employment-related litigation.\textsuperscript{150} Contrast this with the limitations which have been placed on individual rights by the German courts. As has been noted,\textsuperscript{151} the German Federal Labor Court has held that the right of free speech can be overridden by the desire to preserve order and discipline in the workplace. Professor Grodin refers to a case that could not be more opposite in underlying philosophy, a Supreme Court decision striking down the dismissal of an employee in a county sheriff's office who indicated support for the attempted assassination of President Reagan.\textsuperscript{152}

\textsuperscript{148} Though this inquiry is beyond the scope of this article, if it is true that self-governance is the essence of being English, one wonders what long-term effects membership in a federal Europe will have on British society. To borrow from Lord Justice Denning's characterization, what will happen to the British personality, which has hitherto been deemed to be of supreme importance, when it becomes submerged in an omnipotent European state? Denning, supra note 141, at 1182.

\textsuperscript{149} See supra notes 25-31 and accompanying text.

\textsuperscript{150} Grodin, supra note 2, at 25-32.

\textsuperscript{151} See supra note 114 and accompanying text.

\textsuperscript{152} Grodin, supra note 2, at 23 n.104 (citing Rankin v. McPherson, 483 U.S. 378 (1987) (hold-
This stark difference is not surprising, given America's constitutional and legal history. The cases leading up to the Court-packing crisis, including *Lochner*\(^\text{153}\), *Hammer v. Dagenhart*,\(^\text{154}\) and the New Deal cases cited above,\(^\text{155}\) all show the emphasis that American society has placed on individual freedom of action. Professor Thomas Barnes has argued that the United States Constitution represents a frozen image of the British constitution of the 18th Century—a constitution which reflected a highly politicized, extremely litigious, and rhetorically inflamed society.\(^\text{156}\) If this is so, then it is only to be expected that America remains a country where the paramount constitutional value is, to transplant the words of Lord Denning, "a sense of the supreme importance of the individual."\(^\text{157}\)

Thus, to the extent that people advocate the constitutionalization of American labor law as a first step in the democratization of the workplace, they should not expect a German-style result. Indeed, one could argue that the typical American workplace already represents a model of American-style democracy, with its emphasis on individual employment contracts and the prevailing notion of "every person for herself.” The fact that the organized segment of the workforce has been in a state of continual decline since the 1950s\(^\text{158}\) is in this sense merely a manifestation of the dominant American constitutional value—individual autonomy.

An additional point of concern with Professor Grodin's thesis is that in the American context, "constitutionalization" is very much a loaded expression. Professor Grodin states that in postulating his theory as to how labor law should develop, he is not talking so much about the direct application of constitutional provisions as he is about the application of constitutional values.\(^\text{159}\) One appreciates the distinction he attempts to

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\(^{154}\) 247 U.S. 251 (1918), *overruled by United States v. Darby*, 312 U.S. 100 (1941); see also supra notes 36-47 and accompanying text.

\(^{155}\) See supra note 49 and accompanying text.

\(^{156}\) Thomas Barnes, Lecture to Students at Boalt Hall School of Law (Dec. 5, 1991).

\(^{157}\) Denning, supra note 141, at 1182.


\(^{159}\) Grodin, supra note 2, at 3.
draw, but the problem remains that the United States Constitution is both phrased in generalities and riddled with internal conflict. Unless one accepts the doctrine of "interpretivism," i.e., interpreting the Constitution according to the original intent of the Framers, one must accept that to a large extent, the values inherent in the Constitution will be what judges say they are.\textsuperscript{160} American courts are prisoners of \textit{Marbury v. Madison}.\textsuperscript{161} Having assumed responsibility for determining which laws may stand under the Constitution, they have no real alternative but to translate their own value judgments into law.

Professor Grodin suggests that the introduction of constitutional values into labor law reflects the "moral claim that a worker is entitled to make as a member of a community."\textsuperscript{162} Unfortunately, the moral preferences that constitutional law reflects are those of the judiciary, rather than the citizenry. President Roosevelt's exhortations\textsuperscript{163} notwithstanding, there is no appeal to the Constitution, only to those who comprise the Supreme Court. If they happen to be in step with prevailing political sentiments, we may view their actions with approval, as many did in the 1960s. But if they are lagging behind mainstream thought, as they seemed to be in the mid-1930s, their imposition of "constitutional values" is unacceptable. Either way, the ordinary citizen has little or no say in the matter.

The perplexity inherent in trying to justify constitutionalization was examined in a recent article by Professor Donald Liveley.\textsuperscript{164} According to him, whether judicial activism is acceptable boils down to a question of whether in imposing values, the court is acting on the basis of personal ideology—as he believes the Supreme Court did in \textit{Lochner}—or whether it reflects "the conscience of an enlightened and reflective citizenry."\textsuperscript{165} This begs the obvious question, though, of whether a judge is ever likely to be aware that he or she is acting on the former rather than the latter. Doubtless the anti-New Deal Justices, who were raised in the school of classic liberalism, thought they were espousing an enlightened and reflective view. The Supreme Court's decision in \textit{Adkins v. Children's Hospital},\textsuperscript{166} for example, is replete with language which would be considered


\textsuperscript{161} 5 U.S. (1 Cranch) 137 (1803).

\textsuperscript{162} Grodin, \textit{supra} note 2, at 4.

\textsuperscript{163} See \textit{supra} notes 54-55 and accompanying text.


\textsuperscript{165} \textit{Id.} at 22.

\textsuperscript{166} See \textit{supra} notes 44-47 and accompanying text.
“empowering” by a classical liberal. Moreover, as has been noted above, some believe that the *Lochner* Court was acting in the best interests of the disadvantaged.

The Supreme Court’s labor law judgments over the past decade generally have been in step with the conservative, perhaps even libertarian, tendency of American politics since President Reagan’s election. One wonders, though, what will happen under the Clinton Administration. Another crisis of the magnitude of 1937 is unlikely, but it is probable that the conception of American constitutional values held by Republican-appointed federal judges again will clash with that of a Democratic President and Congress.

This concern is not exclusively American. The German courts, as has been discussed, have been criticized by both the right and the left for their perceived over-involvement in political affairs. And in a recent piece, Professor Sir William Wade noted some of the apprehension caused by the British courts’ expansion of the scope of judicial review in non-traditional fields. What separates the American situation from that of Britain or Germany, though, is that the call for law reform in the United States so often is styled as a call for the judicial importation of constitutional values into private relationships.

This reliance on the judiciary could result from a perceived inability of legislatures to effect desired changes, but if this perception is accurate, it is most unfortunate, since courts are not as well-situated to enact reform of private legal conduct as are the elected organs of government. Indeed, looking at the matter in purely substantive terms, one would be hard-pressed to find a worse source of workplace norms than the courts. Proceeding as they must on a case-by-case basis, limited as they are in their inquiry by rules of evidence, yet producing rules of universal application, judges can do little more than grope their way through the maze of modern industrial relations law.

While it is true that change through judicial fiat might be preferable to none at all, these factors surely suggest that legislation, rather than

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167. See supra note 35.
168. The same may not be said in other areas. It sounds almost trite to say, but the current state of the abortion debate in the United States, for example, illustrates just how controversial the decisions of the courts can be in areas of deep political division.
170. Which will in most cases require affirmation by appellate courts on the basis of sterile and often incomplete records.
171. In addition, the courts have no direct power to enforce their orders. Professor Cox suggests that the Supreme Court declined to order *mandamus* in *Marbury v. Madison* because it was certain that President Jefferson would have ignored the writ. *Cox, supra* note 63, at 10. He also points out that Lincoln disregarded a *habeas corpus* order at the beginning of the Civil War. *Id.* at 7. One wonders what would have happened had the military refused to obey President Eisenhower’s order to move into Little Rock in the 1950s.
constitutionalization, represents a superior vehicle for labor law reform. It is interesting to note Professor Gerald Rosenberg's argument that decisions like *Brown v. Board of Education* and *Roe v. Wade* notwithstanding, the real agents of change in American society have been Congress and the President; acting alone, the courts have, at best, been marginally effective at altering private behavior. Admittedly, his examination was aimed at areas other than labor law, but his thesis is convincing.

In addition to the "institutional" problems which are inherent in an attempt to constitutionalize private relations, there is an important functional concern that cannot be overlooked. Apart from whatever substantive short-term benefit a particular constitutional ruling may bring, excessive reliance on the judiciary to shape and define the nature of American society may create a long-term risk of numbing the public's sense of responsibility for its own future, whether at the ballot box or at the bargaining table.

Specifically, one might ask whether part of the problem facing American industry is that too many individuals believe that primary responsibility for the health of their working environment rests with someone other than themselves. That alone should give rise to second thoughts when debating the wisdom of using standards defined by courts so distant from the parties at the workplace.

**Conclusion**

If workplace democracy is meant to represent a sense of duty to work for the success of the enterprise at hand, then the experience of countries like Germany and Japan bears out its wisdom as a management principle. Moreover, there is no doubt that values like respect for individual privacy, tolerance of alternative viewpoints, and fairness in dealing with one's peers are, as Professor Grodin suggests, critical factors in creating and maintaining a productive workforce.

At the same time, it would be a grave mistake to speak of these values in purely constitutional terms, for that places their definition within the realm of the courts, and the power to interpret is the power to

175. Professor Cox wrote:
[T]here is a fear that excessive reliance upon courts instead of self-government through democratic processes may deaden a people's sense of moral and political responsibility for their own future, especially in matters of liberty, and may stunt the growth of political capacity that results from the exercise of the ultimate power of decision.

Cox, supra note 63, at 103.
I would prefer to describe them as *societal* values, for this would not only place them within the boundaries of legislative competence, but it would also match them to the theme one sees running through American social history perhaps more than any other—the importance of individual responsibility.