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A CENTURY AND HALF CENTURY OF ADVANCE AND RETREAT: THE EBBS AND FLOWS* OF WORKPLACE DEMOCRACY

WILLIAM B. GOULD IV[†]

It is a pleasure to return here to Cambridge yet again where my wife and three sons and I spent a half year, both idyllic and stimulating, at Churchill College in 1975. Two of my three sons are here this time—and the oldest, who went on to play outfield for his college baseball team, won the cricket-throwing contest in his local school when he was here at that time.

In particular, I value the friendships that I formed that year with Paul O'Higgins and Brian Bercusson,¹ with whom I was at work on a joint project at the moment of his untimely death three years ago.

Thus, this is hardly our first contact with Britain—certainly not for my wife Hilda, both born in Lancashire and a citizen of the U.K. And my three sons would have been entitled to dual nationality here in the U.K. had their father been British and mother American.² (Though this obviously discriminatory policy was changed by the European Union,³ it was not done so retroactively until 2002.⁴)

* Inspired by Leo Wolman, *Ebb and Flow in Trade Unionism* (1936).

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¹ Some recollections of Professor Bercusson and his work are contained in William B. Gould IV, *Tribute to Professor Brian Bercusson*, 21 *STAN. L. & POL'Y REV.* 399 (2010).

² British Nationality Act, 1948, 11 & 12 Geo. 6, c. 56, § 5, *repealed by* British Nationality Act, 1981, c. 61, § 52(8).

³ *See* British Nationality Act, 1981, c. 61, § 2.

⁴ Nationality, Immigration and Asylum Act, 2002, c. 41, § 13(1).

My connection to Great Britain goes back now to almost a half century when I came here as a young student at the London School of Economics and first looked at British and comparative labor law at the feet of the late Professor Otto Kahn-Freund⁵ in the era of the classic movie, which resonated throughout English culture, *I'm All Right Jack*. This was the age of Kingsley Amis and John Wain (not the one who resembled the great Ted Williams⁶) and one in which I read Graham Greene as I rode the London Underground Northern Line, the scene of one of his classic novels that I devoured at the time.

Beyond working under Kahn-Freund, attending classes on British politics and economics, I was rushing over to the House of Commons as often as I could to hear live what Norman Shrapnel of the *Guardian* was reporting about when Harold Wilson squared off first with Harold Macmillan and later Sir Alec Douglas Home; and, earlier, within a week of my arrival in Britain, to see Hugh Gaitskell in the bracing October wind of Brighton at the Labor Party conference; to meet with front and back benchers in Parliament and, of course, to watch Saturday night political satire on *That Was The Week That Was*—a sparkling and provocative TV show which swept Britain at that time, a precursor to our own *Saturday Night Live*.

During this period, I proclaimed the virtues of the National Labor Relations Act and ran into heavy weather here—it still had not yet begun to unravel and union decline was just beginning.⁷ The British, quoting and relying upon Kahn-

⁵ See generally OTTO KAHN-FREUND, *LABOUR RELATIONS AND THE LAW: A COMPARATIVE STUDY* (1965). For a comparative discussion of British and American labor law, see generally William B. Gould, *Taft-Hartley Comes to Great Britain: Observations on the Industrial-Relations Act of 1971*, 81 *YALE L.J.* 1421 (1972). For a different and undoubtedly sounder perspective, see generally Otto Kahn-Freund, *On Uses and Misuses of Comparative Law*, 37 *MOD. L. REV.* 1 (1974).

⁶ That John Wayne, of course, spelled his name differently.

⁷ This was chronicled initially in PAUL JACOBS, *OLD BEFORE ITS TIME: COLLECTIVE BARGAINING AT 28* (1963); see also Robert Taylor, *The Crisis of American Labour* 1–4 (Fabian Research Series No. 346, 1980.); A.H. Raskin, *The Squeeze on the Unions*, *ATLANTIC MONTHLY*, Apr. 1961, at 55, 55; SOLOMON BARKIN, *THE DECLINE OF THE LABOR MOVEMENT—AND WHAT CAN BE DONE ABOUT IT* 5–6, 20 (1961); William B. Gould IV, Charles A. Beardsley Professor of Law, Emeritus, Stanford Law Sch.; Former Chairman, Nat'l Labor Relations Bd., *The Decline and Irrelevance of the NLRB and What Can Be Done About It: Some Reflections on Privately Devised Alternatives*, Keynote Address to the State Bar of California Labor and Employment Law Section Annual Meeting (Oct. 31, 2008), available at

Freund's ideas about collective *laissez-faire*, dismissed this statutory scheme as too much regulation, and, ironically, sounded like the 2011 Republicans, who are so enraged by the Boeing complaint attacking their South Carolina investment that they seek NLRB de-funding as well as outright elimination of the Board by refusing to allow President Obama to appoint or re-appoint enough individuals to possess a quorum.⁸ Of course, the philosophical motivation of the two were and are poles apart. But at the point of this debate I began to see and perceive the wisdom of a comment attributed to George Bernard Shaw, that is, that the Americans and British are "two nations divided by a common language."⁹

Yet much has changed. When I was here in the early '60s, we were at the dawn of promise in both the United States and Europe. At that juncture I had not yet fully focused upon the fact that my great-grandfather had been here in this country nearly a century before the 1960s—at a dawn constituting earlier promise—only two years after having emerged from slavery and fighting for Uncle Samuel, as he called our Uncle Sam, in the United States Navy pursuing Confederate ships in European waters. On June 24, 1864, the first William B. Gould ("WBG"), according to his diary, was "running up the English Chanel"

http://www.law.stanford.edu/display/images/dynamic/publications_pdf/The%20Decline%20and%20Irrelevance%20of%20the%20NLRB1%20-%202010-27-08.pdf.

⁸ Joseph Williams, *NLRB Turns up the Heat*, POLITICO (July 18, 2011), <http://www.politico.com/news/stories/0711/59314.html>; see also Kendra Marr, *South Carolina Boeing Factory Turns Sour for Obama*, POLITICO (Sept. 23, 2011), www.politico.com/news/stories/0911/64199.html. The quorum problem stems from a 2010 Supreme Court ruling, *New Process Steel, L.P. v. NLRB*, 130 S. Ct. 2635, 2645 (2010), in which a divided Court held that the Board could not function without a quorum of three members. From January 2008 through March 2010, the Board had operated with just two members, issuing about 600 decisions during that time. See Press Release, Nat'l Labor Relations Bd., Supreme Court Rules Two-Member NLRB Lacked Authority To Issue Decisions (June 17, 2010), available at <http://mynlrb.nlr.gov/link/document.aspx/09031d458037644a>. As of the fall of 2011, there were three Board members, but the recess appointment of Craig Becker expired on December 31, 2011. Williams B. Gould IV, Op-Ed., *Crippling the Right To Organize*, N.Y. TIMES (Dec. 16, 2011), <http://www.nytimes.com/2011/12/17/opinion/crippling-the-right-to-organize.html>. In anticipation of the loss of a quorum, the Board delegated authority for certain actions—such as initiating and prosecuting 10(j) injunctions—to the NLRB General Counsel. Michelle Amber, *NLRB Delegates Authority to General Counsel if Quorum Ends, Details Activity for FY 2011*, BNA LAB. REL. WK., Nov. 10, 2011.

⁹ Michael O'Sullivan, *America and England: An Enduring Bond*, WASH. POST, Jan. 21, 2000, at N39.

when he learned of the sinking of the *Alabama* by the *Kerasage* off Cherbourg five days earlier, and expressed disappointment that they did not get “a shot” at her first.¹⁰ His ship, the *Niagara*, was considerably more formidable than the *Kerasage*. Nonetheless, said WBG, “we are satisfied that she is out of the way,”¹¹ and on the fiftieth anniversary of the Civil War in 1911, he said that the crew, upon learning of the news, was “as delighted and as proud of the deed as if they had done it themselves.”¹²

After passing through the “straits of Dover early this morning [June 26, 1864] into the North Sea,” he returned from the Continent on July 5, running along the coast of England with “land in full view, [and] verry fine perfectly lovely in the Chanel.”¹³ On August 3, having passed through Land’s End of England, he was “[s]tanding up for Liverpool” where on that day he saw anchored “two Rams that was intended for the Rebs . . . [that] would give our Gun Boats some trouble,” and, upon leaving Britain pursuant to the “English *Newtrality* Law,” his ship was disguised.¹⁴ His ship then seized the *Georgia* in the Bay of Biscay in August after it came out of Liverpool. Said WBG,

We Beat to Quaters and Fird A shot. She show’d the English Collors we Fird another when she came to we boarded her and found her to be the Rebel Privateer “Georgia” from Liverpool on her way to refit as A cruiseer, but the next cruise that she makes will be for Uncle Samuel. . . . This capture makes our Crew feel verry proud. . . . That is one good deed for the “Niagara” and we hope that she will do many more before the cruise is up.¹⁵

¹⁰ WILLIAM B. GOULD IV, *DIARY OF A CONTRABAND: THE CIVIL WAR PASSAGE OF A BLACK SAILOR 196–97* (2002) [hereinafter GOULD, *CONTRABAND*]. I have not corrected any of the misspellings in this text or in the book itself.

¹¹ *Id.* at 362.

¹² *Id.* at 77.

¹³ *Id.* at 198, 200.

¹⁴ *Id.* at 206.

¹⁵ *Id.* at 208–09.

And on the following day he said, “We will now take A look for some of the other cruiseers of would be King Jeff [Jefferson Davis, President of the Confederacy].”¹⁶ Twice more he returned to Britain before proceeding back to the United States in 1865.¹⁷

On May 18, 1865, he proceeded ashore in Plymouth and “[f]ound the [British] verry friendly . . . England have removed th[e] Restrictions of our Ships in thair ports.”¹⁸ He said in his understated manner, “The[y] see that it is time.”¹⁹ And a month later in Southampton, he said: “I found Southhampton to be quite A Citty. The People verry obligeing.”²⁰

Soon thereafter he departed back across the Atlantic to Massachusetts to make a new life for himself and others.

This was then a period of great constitutional change—one in which the ideals expressed in President Lincoln’s Gettysburg Address are well reflected: The great post-Civil War amendments in the form of the Thirteenth, Fourteenth, and Fifteenth reversing slavery²¹ and the *Dred Scott* decision of the Supreme Court which endorsed this institution yet to come.²² The greatest constitutional decision, as a professor of mine at Cornell Law School said during his lecture in my first year, was when Pickett’s charge failed at Gettysburg. Out of this came the inspiration for the changes in the United States as well as Great Britain through the enactment of its Reform Act of 1867—and these efforts are the driving force behind both the reforms of the 1960s when I was here in London.

The 1960s was a period of turmoil and change. Amidst organized riots, James Meredith was admitted to the University of Mississippi—the very day that my plane touched down in London. Civil rights demonstrations and protests throughout the South were to gather steam soon thereafter. Later, as the result of enacted civil rights legislation, I was to become lead counsel in

¹⁶ *Id.* at 209.

¹⁷ *Id.* at 238.

¹⁸ *Id.* at 246 (alteration in original).

¹⁹ *Id.* (alteration in original). Here he obviously refers to the considerable British sympathy for the Confederate cause during the War of the Rebellion. *See generally* AMANDA FOREMAN, *A WORLD ON FIRE: BRITAIN’S CRUCIAL ROLE IN THE AMERICAN CIVIL WAR* (2010).

²⁰ GOULD, *CONTRABAND*, *supra* note 10, at 250.

²¹ *See generally* ERIC FONER, *THE FIERY TRIAL: ABRAHAM LINCOLN AND AMERICAN SLAVERY* (2010).

²² *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857), *superseded by constitutional amendment*, U.S. CONST. amend. XIV.

employment discrimination class actions²³—now considerably circumscribed by the United States Supreme Court ruling in the *Wal-Mart* case in 2011.²⁴

This past half century and the century that went before it have gone so quickly. “[T]he time of life is short,” William Shakespeare tells us.²⁵ I was able to come here to Britain and to work in the United States in my chosen field because of my great-grandfather and his work, in substantial part. And in the main, upon my arrival in 1962, I too found the people here in Britain to be both friendly and obliging, just as WBG did 100 years earlier, notwithstanding the above-noted differences between the two countries in labor law and, upon occasion, politics. And notwithstanding the fact that that earlier century from the 1860s through the 1960s, has witnessed diminished societal concern for those, to paraphrase the Comfortable Words in the Episcopal Book of Common Prayer, who “travail and are heavy laden.”²⁶

Much later—fourteen years ago—when I was NLRB Chairman, I was in London speaking to the Royal Institute of International Affairs. While here, I saw a “tale of two centrist countries” play out between the Democratic and Labor governments led by Messrs. Clinton and Blair. Both were promoting freedom of association for workers and yet simultaneously accepting the accommodation that existed by virtue of Messrs. Taft and Hartley on our side of the Atlantic, and the complex web of Mrs. Thatcher’s anti-union labor law schemes over here which were followed in the wake of Edward Heath’s attempt to import a badly misunderstood version of Taft-Hartley.²⁷

²³ See William Wong, *Energetic Advocate: Lawyer William Gould Prods Courts To End Job Bias; His Activism Sometimes Irks Peers*, WALL ST. J., Aug. 21, 1974, at 28; *Stamps v. Detroit Edison Co.*, 365 F. Supp. 87 (E.D. Mich. 1973), *rev'd in part sub nom. EEOC v. Detroit Edison Co.*, 515 F.2d 301 (6th Cir. 1975).

²⁴ *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2556–57 (2011) (holding, inter alia, that a nationwide class of current and former female employees of Wal-Mart had been improperly certified because it lacked common questions of law or fact).

²⁵ WILLIAM SHAKESPEARE, *THE FIRST PART OF KING HENRY THE FOURTH* act 5, sc. 2.

²⁶ *The Holy Eucharist: Rite One*, in *THE BOOK OF COMMON PRAYER* 323, 332 (1979).

²⁷ William B. Gould IV, Chairman, Nat'l Labor Relations Bd., *A Tale of Two Centrist Countries: Taft-Hartley, the Thatcher Reforms 1997, and All That*, Address

Now today we have another Democratic administration in America and, of course, a new Conservative government led by Mr. Cameron whose approach to the budget seems remarkably similar to the Republican House, which confronts President Obama. Both Cameron and Speaker Boehner seem taken by the idea that job creation is caused by a *decrease* in government spending—an assumption which runs contrary to the experience with the American Recovery Investment Act of 2009, let alone a substantial majority of economists.

The Great Recession of 2007–08 has emboldened the successors to the so-called Gingrich Revolution, whose fortunes were high when I was in Washington in the ‘90s. One of a number of ironies is that this approach is substantially responsible for the Great Recession itself. Given almost a decade to ply their handiwork, 2011 is even more ominous than the divided government which I endured in the ‘90s.

Even when I was here in the early ‘60s, the first signs of the decline of organized labor in the private sector in the United States—and eventually throughout the world—were just beginning to appear.²⁸ In part, this was obscured by the rapid rise of both the public sector and public employee unions during this period, a phenomenon that would have otherwise seen the decline go down to single digit numbers in our country. Similarly, like the rise of public employee unions in the ‘60s, the development of grievance-arbitration machinery enshrined in what we call the *Steelworkers Trilogy* produced enduring democratic changes in the workplace²⁹—though the emergence of the ever-expanding non-union sector altered these developments

at the Royal Institute of International Affairs, Chatham House, London (June 2, 1997), in William B. Gould IV, LABORED RELATIONS: LAW, POLITICS, AND THE NLRB—A MEMOIR 362, 362–70 (2000).

²⁸ See *supra* note 7 and accompanying text.

²⁹ *United Steelworkers v. Am. Mfg. Co.*, 363 U.S. 564 (1960); *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); *United Steelworkers v. Enter. Wheel & Car Corp.*, 363 U.S. 593 (1960); cf. William B. Gould IV, *A Half Century of the Steelworkers Trilogy: Fifty Years of Ironies Squared*, in ARBITRATION 2010: THE STEELWORKERS TRILOGY AT 50: PROCEEDINGS OF THE SIXTY-THIRD ANNUAL MEETING: NATIONAL ACADEMY OF ARBITRATORS 35 (Paul D. Staudohar & Mark I. Lurie eds., 2011) [hereinafter Gould, ARBITRATION 2010]; David L. Gregory et al., *The Fiftieth Anniversary of the Steelworkers Trilogy: Some Reflections on Judicial Review of Labor-Arbitration Decisions—Will Gold Turn to Rust?*, 60 CATH. U. L. REV. 47 (2010).

considerably.³⁰ But the rise of public employee unions, the development of grievance-arbitration machinery and even the rise of new unions in all the major professional sports in the United States³¹ complemented the civil rights protest of the '60s. Well here we are, a half century later and, as noted, the landscape is a different one. In some respects, notwithstanding the fact that there is more contact between blacks and whites today than there was when I was here in London in the '60s, inequality on the basis of race and income has worsened. The assault on organized labor has been undertaken both at the federal level as it relates to private sector workers and in the public sector as well, with the legislation overriding public employee rights well exemplified by Wisconsin, where collective bargaining rights were eliminated altogether.³²

³⁰ *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 35 (1991) (holding that statutory claims under the Age Discrimination in Employment Act are subject to the Federal Arbitration Act, which provides for judicial enforcement of private arbitration); *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 109, 124 (2001) (holding 5-4 that only transportation workers are exempt from the Federal Arbitration Act). See generally William B. Gould IV, *Kissing Cousins?: The Federal Arbitration Act and Modern Labor Arbitration*, 55 EMORY L.J. 609 (2006) [hereinafter Gould, *Kissing Cousins?*].

³¹ See generally ROBERT C. BERRY ET AL., *LABOR RELATIONS IN PROFESSIONAL SPORTS* (1986); WILLIAM B. GOULD IV, *BARGAINING WITH BASEBALL: LABOR RELATIONS IN AN AGE OF PROSPEROUS TURMOIL* (2011); Jonathan B. Goldberg, *Player Mobility in Professional Sports: From the Reserve System to Free Agency*, 15 SPORTS LAW J. 21 (2008).

³² At the state level Governor Scott Walker of Wisconsin has led the charge in eliminating collective bargaining for public sector workers in Wisconsin. See A.G. Sulzberger, *Union Bill Is Law, but Debate Is Far From Over*, N.Y. TIMES (Mar. 11, 2011), <http://www.nytimes.com/2011/03/12/us/12wisconsin.html>. Thus far, the law has survived one legal challenge and an attempt by voters to recall Republican state senators who voted for its passage. Scores of other states have debated, and in a few cases passed, legislation limiting the rights of public employees to bargain collectively. See Richard Simon, *Anti-Union Push Gains Steam Nationwide*, L.A. TIMES (Apr. 2, 2011), <http://articles.latimes.com/2011/apr/02/nation/la-na-unions-20110402>. Governor John Kasich of Ohio, for example, has signed legislation which allows public employers to unilaterally impose their last offer or final position upon the unions with which they bargained without a lawful right to strike or an impartial dispute resolution process. Steven Greenhouse, *Ohio's Anti-Union Law Is Tougher than Wisconsin's*, N.Y. TIMES (Mar. 31, 2011), <http://nytimes.com/2011/04/01/us/01ohio.html>. Subsequently, Ohio repealed this legislation by referendum. Hal Weitzman & Richard McGregor, *Ohio Rejects Move To Limit Workers' Rights*, FIN. TIMES (Nov. 9, 2011), <http://www.ft.com/cms/s/0/67037430-0a86-11e1-92b5-00144feabdc0.html#axzz1e4hlNEhy>; Sabrina Tavernise & Steven Greenhouse, *Ohio Vote on Labor Is Parsed for Omens*, N.Y. TIMES, Nov. 10, 2011, at A16. Because the United States Supreme Court has limited the right of workers' freedom of association protected by the First Amendment to the right to organize—

And on June 13, 2011, all of the Republican candidates for the Presidency in a nationally televised debate appeared to concur in the “de-funding” of the National Labor Relations Board and to subscribe to the enactment of national right to work legislation which would prohibit the negotiation of any so-called union security provision compelling the payment of financial dues as a condition of employment in any collective bargaining agreement throughout the United States.³³ So much for the previously cherished principle of freedom of contract!

The double whammy of anti-regulatory and anti-labor vitriol exceeds congressional hostility to the Board and the Act between 1953–55, and even the abuse heaped upon my agency when I was Chairman in the ‘90s. In fact, I do not subscribe to the NLRB General Counsel’s complaint theory—which has attracted so much hostility among Republicans and others—where he has alleged that Boeing violated federal labor law by investing the Dreamliner 727 in South Carolina because, in part, strikes interfered with production deadlines and commercial arrangements in the future.³⁴ In my view, an attempt to limit strikes cannot be equated with hostility to unions and collective bargaining.³⁵

But attempts to harass both the General Counsel and the Obama Board are inconsistent with the rule of law inherent in independent regulatory agencies created by FDR. Of course, there is no pristine demarcation line between politics or law here—we can see that from the contentiousness regarding the Supreme Court itself and the appointments process. While law and politics have always been enmeshed, the past quarter century or so and its political polarization has made the Court even more of a political football. In the case of the NLRB and its relationship to politics, the fact that NLRB members have less

in contrast to both the Supreme Court of Canada and the European Union—it seems unlikely that a constitutional challenge to these new statutes will succeed. *Compare* *Smith v. Ark. State Highway Emps., Local 1315*, 441 U.S. 463 (1979), *with* *Health Servs. & Support-Facilities Subsector Bargaining Ass’n v. British Columbia*, [2007] 2 S.C.R. 391 (Can.), *and* *Charter of Fundamental Rights of the European Union*, art. 28, Dec. 18, 2000, 2000 O.J. (C 364) 15.

³³ *Republican Debate* (CNN television broadcast June 13, 2011), *available at* <http://transcripts.cnn.com/TRANSCRIPTS/1106/13/se.02.html>.

³⁴ James Rosen, *Dispute Over Boeing Plant Becomes Political Brawl*, DALLASNEWS.COM (June 12, 2011), <http://www.dallasnews.com/business/headlines/20110612-dispute-over-boeing-plant-becomes-political-brawl.ece>.

³⁵ *See, e.g., Am. Ship Bldg. Co. v. NLRB*, 380 U.S. 300, 305, 309 (1965).

than life tenure³⁶ means that there is an assumption that the President will be able to influence new Labor Boards with new appointments.³⁷ Thus far, the Obama White House, like the Clinton administration before it,³⁸ has not responded to calls for its administration to take the Board to the woodshed. And I submit that this is as it should be in a society that values the rule of law.

Again, I do not agree with the General Counsel's complaint. Whether there is more to the story will emerge through the evidence adduced before the administrative law judge, his decision and subsequent argument before the Board and the courts and, in the absence of settlement, their decisions. But, it is ironic that Senator DeMint of South Carolina has characterized the attempt to impede Boeing's investment as something that would happen in a "third world" country.³⁹ The political harassment engaged in against an independent agency is what one might expect in a country where the rule of law is unknown or not valued—that is, in short, in a country where democratic institutions have not taken root—that is, a "third world" country.⁴⁰

Thus truly, as was the case here in Britain when my great-grandfather first came to Dover, Liverpool, and Southampton in 1864 and '65, the world seems on fire—or at least in this case this characterization is accurate on our side of the Atlantic. Perhaps Mr. Cameron's budgetary policies have enhanced turmoil on this side of the water as well.

Let me nonetheless suggest to you that rational ideas are emerging—perhaps just not in the English speaking world. Last week I was in Germany where despite its adherence to austerity, the policy known as *kurzarbeit* appears to be at least partially responsible for Germany's boom today. *Kurzarbeit* is a bailout

³⁶ 29 U.S.C. § 153(a) (2006); see also *The Board*, NLRB, <http://www.nlr.gov/who-we-are/board> (last visited Sept. 30, 2012).

³⁷ Clyde W. Summers, *Politics, Policy Making and the NLRB*, 6 SYRACUSE L. REV. 93, 99 (1955); W. Willard Wirtz, *The New National Labor Relations Board: Herein of "Employer Persuasion"*, 49 NW. U. L. REV. 594, 611–12 (1954).

³⁸ See generally WILLIAM B. GOULD IV, LABORED RELATIONS: LAW, POLITICS, AND THE NLRB—A MEMOIR (2000) [hereinafter GOULD IV, LABORED RELATIONS].

³⁹ Steven Greenhouse, *Boeing Labor Battle Is Poised To Go Before Judge*, NY TIMES (June 13, 2011), <http://www.nytimes.com/2011/06/14/business/14boeing.html?pagewanted=all>.

⁴⁰ Compare today's debate with attempts by Republicans to pressure the Board in the 1990s. See GOULD IV, LABORED RELATIONS, *supra* note 38, at 121–48.

(dare I use that word in either country today?!) in a slightly different form than that to which we are accustomed. It is a policy through which the German government provides up to two-thirds of the salary of employees who would otherwise be laid off as long as they remain employed.⁴¹ The employer covers hours actually worked and keeps up the employees' pension and benefit payments.⁴² The Organisation for Economic Co-operation and Development ("OECD") has proclaimed *kurzarbeit* as a "successful policy for helping employers to hold on to skills and for keeping unemployment at bay during the crisis."⁴³

This policy, which, so far as I am aware, has never been seriously discussed in the United States in our recent years of economic crisis, was pursued by a conservative government in a country where union density is superior to both that of the United States and Great Britain. It seems unlikely that these measures would have been instituted without a measure of partnership with the German unions and acceptance of collective bargaining itself—policies which exist by virtue of the fact that Germany sees the unions as social partners with employers and government.⁴⁴

Make no mistake about it. The decline of labor has harmed both the United States and Britain not just in terms of a representative democracy but also inequality and income—two of the most fundamental ingredients in any just society. As David Leonhardt has recently pointed out in the *New York Times*, the top one percent of German households earns about eleven percent of all income, a figure that is virtually unchanged since 1970.⁴⁵ In 2011, the top one percent in the United States makes up more than twenty percent of all income—up from nine percent

⁴¹ Nicholas Kulish, *Aided by Safety Nets, Europe Resists Stimulus Push*, N.Y. TIMES (Mar. 26, 2009), <http://www.nytimes.com/2009/03/27/world/europe/27germany.html?pagewanted=all>.

⁴² *Id.*

⁴³ *Keeping Germany at Work*, OECD OBSERVER, JULY 2010, at 9, 9.

⁴⁴ Contrast the American approach, *First National Maintenance Corp. v. NLRB*, 452 U.S. 666, 676 (1981) ("Congress had no expectation that the elected union representative would become an equal partner in the running of the business enterprise in which the union's members are employed"); cf. William B. Gould, *The Supreme Court's Labor and Employment Docket in the 1980 Term: Justice Brennan's Term*, 53 U. COLO. L. REV. 1, 6–8 (1981).

⁴⁵ David Leonhardt, *The German Example*, N.Y. TIMES (June 7, 2011), <http://www.nytimes.com/2011/06/08/business/economy/08leonhardt.html>.

in 1970.⁴⁶ Thus 40 years ago Germany was a more unequal country than the United States—today the roles have been reversed.⁴⁷ Across the board, there is now much more ebb than flow.⁴⁸

Meanwhile, this decline of labor law alongside of trade unions and absence of collective bargaining in the United States has meant that the protection of freedom of association may be increasingly in private hands and private agreements negotiated sometimes as the result of union corporate campaigns.⁴⁹ I want to conclude with a brief discussion about a private agreement that was fostered here in Great Britain by FirstGroup.⁵⁰ That company, based in Aberdeen, Scotland, took an unprecedented approach to the claims of unions that its U.S. subsidiary was interfering with the right of employees to unionize. Influenced, in part, by ILO and European Union standards, the company devised and implemented a corporate social responsibility policy in 2001 that protected freedom of association through the exercise of a secret ballot.⁵¹ In the wake of union rallies protesting conduct of FirstGroup America in the United States, FirstGroup CEO Sir Moir Lockhead invited me to serve as an Independent Monitor hearing freedom of association complaints. I negotiated a policy with the company that was subsequently communicated to both the shareholders and the unions. (The Teamsters had organized the bulk of the union represented.) Initially skeptical, the Teamsters began to speak favorably about the program in the summer of 2008.⁵²

Acting as Independent Monitor, with the assistance of a staff of investigators with expertise in the labor law arena chosen by myself, we investigated complaints, and without a formal

⁴⁶ *Id.*

⁴⁷ See generally CONG. BUDGET OFFICE, TRENDS IN THE DISTRIBUTION OF HOUSEHOLD INCOME BETWEEN 1979 AND 2007 (2011), available at <http://www.cbo.gov/publication/42729>.

⁴⁸ With apologies to LEO WOLMAN, *EBB AND FLOW IN TRADE UNIONISM* (1936).

⁴⁹ The best discussion on this is Laura J. Cooper, *Privatizing Labor Law: Neutrality/Card Check Agreements and the Role of the Arbitrator*, 83 IND. L.J. 1589 (2008).

⁵⁰ I have discussed this process in William B. Gould IV, *Using an Independent Monitor To Resolve Union-Organizing Disputes Outside the NLRB: The FirstGroup Experience*, DISP. RESOL. J., May–July 2011, at 46 [hereinafter Gould IV, *The FirstGroup Experience*].

⁵¹ *Id.* at 50.

⁵² *Id.* at 51–52.

hearing,⁵³ reported facts as found and provided recommendations to both the complaining party and the company within thirty to sixty days of the filing of each complaint.⁵⁴ The company was free not to accept the recommendations—and rejected them in their entirety in thirty-three percent of the cases, but accepted them, in whole or in part, in a substantial majority of instances.⁵⁵ In each case, the company was required to explain in public its reasons for non-acceptance—and it did so.⁵⁶ The complaint could be filed by an employee or any representative including, of course, a union. Five complaints were filed by the company itself, sometimes alleging that the right *not* to associate—which I held was subsumed within freedom of association—was being violated by pro-union employees or the union itself.⁵⁷ At any point prior to or subsequent or simultaneous with the filing, the employee was free to resort to the NLRB or any other agency. This avoids many of the problems that have arisen with regard to employer-promulgated wrongful discharge arbitrations.⁵⁸

The Freedom of Association (“FOA”) policy was more expansive than the National Labor Relations Act in that the employer, though free to engage in speech to inform and influence employee decisions, proclaimed employer neutrality towards the employees’ self-organizational rights. Moreover, in contrast to the National Labor Relations Act to date, the Obama Board has devised rule-making in this regard,⁵⁹ and the program was publicized to all employees through three principal avenues.

⁵³ For “fair and regular” within the meaning of *Spielberg Manufacturing Co.*, 112 N.L.R.B. 1080, 1082 (1955) and *Mobile Oil Exploration & Producing, U.S., Inc.*, 325 N.L.R.B. 176, 180 (1997) (Chairman Gould, concurring), *enforced*, 200 F.3d 230 (5th Cir. 1999), the absence of the hearing makes the process both effective and expeditious. See George A. Bermann, *Administrative Delay and Its Control*, 30 AM. J. COMP. L. 473, 474 (Supp. 1982) (“The path to systemic reform . . . probably lies not only in easing agency workloads and increasing their resources, but also in recognizing that trial-type procedures are not necessarily the best or only fair means of reaching administrative decisions.”).

⁵⁴ Gould IV, *The FirstGroup Experience*, *supra* note 50, at 53.

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ See Gould, *ARBITRATION 2010*, *supra* note 29; Gould, *Kissing Cousins?*, *supra* note 30, at 655.

⁵⁹ The Board’s recent proposed rule requiring companies to post notices informing employees of their right to organize has been strongly opposed by Republicans and business groups. See Melanie Trottmann, *Manufacturers Move To Block Union Rule*, WALL ST. J., Sept. 10, 2011, at A2. On October 5, 2011, the Board announced its decision to postpone implementation of the new posting rule—just one

In the first place, in the spring of 2008, the company mailed a letter authored by me to more than 81,000 FirstGroup employees, advising them of the program, the complaint procedure, and the machinery attached to it.⁶⁰ My letter was accompanied by a supportive letter from the then Chief Operating Officer for FirstGroup America.⁶¹ Second, each of the approximately 1,000 facilities throughout the United States was outfitted with a glass-enclosed bulletin board which contained both a copy of the FOA policy and an overview of the Program.⁶² It provided contact and additional information.⁶³ Third, the company conducted a web-based training program for FirstGroup managers throughout the United States advising them how to conduct themselves under the program and, most importantly, the company also filmed and distributed a DVD video in which both the Chief Executive Officer of the company and I explained the content of the program and enforced complaint, investigation and reporting procedures.⁶⁴ This video was shown at all monthly meetings.⁶⁵

To sum up, the program offered more than the law provides in a number of critical respects including speed (principally attributable to the fact that no hearings were held—in contrast to the public law system which now can easily last three to four years),⁶⁶ publicity, and employer neutrality. The program lasted

hour before Republican Congressman John Kline introduced a bill that would thwart a separate Board proposal to expedite union elections. Lawrence E. Dubé, *NLRB Delays New Notice Posting Deadline as Republicans Offer Bill, Continue Criticism*, BNA DAILY LAB. REP., Oct. 5, 2011, at A1. The posting rule is currently set to take effect on January 31, 2012. *Id.*; see also Stephanie Armour, *Speedy Union Elections by NLRB Curbed by Republican Measure*, BUS. WK. (Oct 5, 2011), <http://www.businessweek.com/news/2011-10-05/speedy-union-elections-by-nlr-curbed-by-republican-measure.html>. This is reminiscent of the Republican-controlled Congress's refusal to allow the Clinton Board to expend funds for expedited elections. See GOULD IV, LABORED RELATIONS, *supra* note 38, at 73–74.

⁶⁰ Gould, *The FirstGroup Experience*, *supra* note 50, at 52.

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ The entire procedure is described in more detail in WILLIAM B. GOULD IV, A PRIMER ON AMERICAN LABOR LAW 60–62 (4th ed., 2004). The delays noted above are further exacerbated by the appointment process for NLRB members, which has become politically polarized since the 1980s, contributing to agency paralysis. Appointees concerned about reappointment can be less than forthright and prompt in their analysis of pending cases, contributing to the delay problem. See generally

for three years from 2008 through the end of 2010, concluding with the retirement of one of its authors, Sir Moir, the increased unionization of the company—from approximately eighteen to eighty percent of the workforce—and a consequent decrease in the number of complaints filed.⁶⁷ It may be instructive to employers and unions which seek to avoid lengthy and sometimes acrimonious procedures contained in the National Labor Relations Act.

Of course, I don't think that the FirstGroup approach is necessarily going to sweep the industrialized world. Yet, as my Canadian friend and colleague Harry Arthurs suggested at a conference that we had on international labor standards at Stanford a couple of years ago, the conduct of multinationals can affect new codes established by other companies and ultimately codes of conduct adopted by industry and organizations—which inevitably have some impact upon national law and policy. All too often, the multinationals have done as the Romans do⁶⁸ when they have operated in an environment hostile to collective bargaining. The non-union automobile industry in the United States is thus far illustrative of this point.

GOULD IV, LABORED RELATIONS, *supra* note 38. *See also* NLRB v. Anchor Concepts, Inc., 166 F.3d 55, 59 (2d Cir. 1999) (“[T]he Board stands out as a federal administrative agency which has been rebuked before [and] for what must strike anyone as a cavalier disdain for the hardships it is causing” through its vulnerability to the “dilatatory virus[] and delay.”); NLRB v. Thill, Inc., 980 F.2d 1137, 1141 (7th Cir. 1992) (Judge Richard Posner commenting that an eight-year delay by the Board was “inexplicable”); Local Joint Exec. Bd. of Las Vegas v. NLRB, 657 F.3d 865, 874 (9th Cir. 2011) (“[T]he Board’s inability to resolve the issue repeatedly presented to it and its failure to produce a reasoned ruling is no less frustrating to the timely, final disposition of the dispute between the Employers and the Union.”); *In re Pirlott*, No. 06-1188, 2007 U.S. App. LEXIS 1352 (D.C. Cir. Jan. 18, 2007). *See generally* William B. Gould IV, *The Labor Board’s Ever Deepening Somnolence: Some Reflections of a Former Chairman*, 32 CREIGHTON L. REV. 1505 (1999). To compound matters, during the last administration, the NLRB was unable to operate because of the failure of George W. Bush and the Senate to appoint and confirm a quorum. *See New Process Steel, L.P. v. NLRB*, 130 S. Ct. 2635, 2644–45 (2010). This is now happening again. *See supra* note 8.

⁶⁷ Gould, *The FirstGroup Experience*, *supra* note 50, at 52.

⁶⁸ *Cf.* William B. Gould, *Multinational Corporations and Multinational Unions: Myths, Reality and the Law*, 10 INT’L LAW. 655 (1976).

Yet the title of Professor Arthurs' paper, "How Labor Law Sneaks Across Borders, Conquers Minds, and Controls Workplaces Abroad,"⁶⁹ highlights one of Professor Arthurs' points, that is, that whatever the extraterritoriality litigation outcome,⁷⁰ practices like those of FirstGroup inevitably sneak across borders and affect new situations. FirstGroup was influenced by European and British law and the attitude of its British unions. Its North American workplace was considerably transformed in the process!

Yet again, there is more ebb than flow in the establishment of democratic or representative workplace democracy in 2011 than in 1962. Yet in 1962, one could be lawfully denied a job or housing on the basis of race in much of the U.S. and the U.K. 1864, when my great-grandfather first came to Great Britain, brought with it so much promise, and still awaited the great post-Civil War amendments and new reforms a century later.

So the future here in 2011, though discouraging when one views both the economic and political climate, is not devoid of promise. After all, it took more than a century for the promises which brought my great-grandfather to the shores of Great Britain in 1864 to be redeemed. The policy of freedom of association, directly derived in my view from some of the Civil War's objectives, could take a comparable period of time.

Unions and collective bargaining are not dinosaurs in 2011 as some would wish. The broad trend of these past 200 years, let alone 150, in the political arena suggests that democratic principles in the workplace are not easily eviscerated.

This then is our challenge. It is not a new challenge, though the past 150 years since our Civil War have produced institutions and dynamics of which we did not think of just a few years ago—representative democracy, freedom of association, and a quest for equality. Next year is tomorrow. In a very different form, this is what WBG wrote of when he spoke of the "holiest of all causes," the cause of "Right and Equality" during some of the most difficult days of our Civil War.

⁶⁹ Harry Arthurs, *Extraterritoriality by Other Means: How Labor Law Sneaks Across Borders, Conquers Minds, and Controls Workplaces Abroad*, 21 STAN. L. & POL'Y REV. 527 (2010).

⁷⁰ William B. Gould IV, *Labor Law Beyond U.S. Borders: Does What Happens Outside of America Stay Outside of America?*, 21 STAN. L. & POL'Y REV. 401 (2010).