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A COMPARATIVE ASSESSMENT OF LABOR AND EMPLOYMENT DISPUTE RESOLUTION IN THE UNITED STATES AND UNITED KINGDOM FROM 2006 THROUGH 2011

DAVID L. GREGORY[†] & MICHAEL HARARY^{††}

INTRODUCTION

On July 26, 2006, the *Transatlantic Perspectives on Alternative Dispute Resolution* Conference was convened in the Old Hall of Lincoln's Inn in London.¹ Five years later, almost to the day, the *Worlds of Work: Employment Dispute Resolution Systems Across the Globe* Conference was convened on July 20, 2011 at Fitzwilliam College, Cambridge University.² On both occasions, we had the privilege and opportunity to reflect upon lessons learned via a comparative assessment of labor and employment dispute resolution mechanisms in the United States

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¹ Conference highlights were subsequently published in the Symposium issue of the *St. John's Law Review*. See generally Symposium, *Transatlantic Perspectives on Alternative Dispute Resolution*, 81 ST. JOHN'S L. REV. 1 (2007).

² Both conferences were hosted and sponsored by St. John's University School of Law. *St. John's Law Review* has dedicated a forthcoming symposium issue to the publication of the 2011 conference highlights.

and the United Kingdom.³ This Article traces the law governing employment dispute resolution systems in the international economic crisis through the lens of economic statistics, one of the most compelling events in employment law today—involving the *Boeing* company, and ObamaCare. The latter part of this short piece discusses the legislative changes effected by the United Kingdom in the realm of ADR as related to labor disputes from July 2006 to July 2011 and a new resolution by the United Kingdom, the Dispute Resolution Commitment, professing a positive trend toward the formal adoption of ADR as a best practice for the United Kingdom government.

I. DISPUTE RESOLUTION IN THE CONTEXT OF THE INTERNATIONAL ECONOMIC CRISIS

While changes in labor and employment dispute resolution in the United States and the United Kingdom over the past five years are at the center of this short piece, any meaningful analysis must appreciate the larger context of the international economic crises that have afflicted the world since the fall of 2008. In retrospect, late July 2006 in London was an almost festive time. The U.S. and the U.K. economies were booming, and Londoners and international visitors alike were in an almost giddy celebratory mood—especially when contrasted to the current grim austerity necessitated by the economic collapse.

In July 2006, the Gross Domestic Product (“GDP”) of the United States was \$13.16 trillion, the approximately \$750 billion deficit was below 6 percent of GDP, the debt was \$10.04 trillion, and the unemployment rate was 4.8 percent. Compare July 2006 with the most recent 2011 data—\$15.09 trillion GDP, deficit projected at almost \$1.3 trillion—8.6 percent of GDP, debt at \$14.71 trillion—an incredible 97.5 percent of GDP, and perhaps worst, and certainly most immediate and tangible of all in the litany of woe, in July 2011 the U.S. unemployment rate is 9 percent, perniciously coupled with virtually no new job creation.⁴

³ David L. Gregory & Francis A. Cavanagh, *A Comparative Assessment of Labor Dispute Resolution in the United States and the United Kingdom*, 81 ST. JOHN'S L. REV. 29 (2007).

⁴ Compare CENT. INTELLIGENCE AGENCY, THE WORLD FACTBOOK 2007 (2007), available at <https://www.cia.gov/library/publications/download/download-2007/index.html>, and Steven R. Weisman, *For 5th Year, Trade Gap Hits Record*, N.Y. TIMES, Feb. 14, 2007, at C1, with INTELLIGENCE AGENCY, THE WORLD FACTBOOK 2007 (2007), available at <https://www.cia.gov/library/publications/the-world-factbook/geos/>

Labor management relations, while an important part of the political and social calculus, ultimately are only a part of a much larger contextual map.

A. *The United States: Boeing and ObamaCare as Metaphors for Economic Apocalypse?*⁵

Most informed analysts agree that there was a very real risk, only narrowly averted, of a global Great Depression in the fall of 2008.⁶

In the midst of this maelstrom, President Barack Obama, elected in November 2008, appointed as Secretary of Labor Hilda Solis, a Congressional Democrat from Los Angeles. Secretary Solis promptly stated that there was a “new Sheriff in town.”⁷ Naturally, everyone assumed that it would be Secretary Solis, proactively enforcing the nation’s labor laws in the role of the “new Sheriff.” Unfortunately, Secretary Solis has been a non-factor in the issues of the day. The United States is in dire need of a Frances Perkins to be the Chief Spokesperson for the Obama administration on labor management matters. While Secretary Solis sends out her very able deputy Seth Harris,⁸ she herself is nowhere to be found. Fortunately however, Wilma Liebman, the intrepid and courageous former Chair of the National Labor Relations Board (“NLRB”), has fearlessly become the symbol of federal labor law administration.⁹ In frequent and astute dissent

us.html. See also Justin Lahart & Joe Light, *Worries Grow Over Jobs—Stocks Drop as Unemployment Rate Climbs to 9.2%*, WALL ST. J., July 9, 2011, at A1;

⁵ Editors Note: The NLRB’s action against Boeing was settled in December 2011, and the United States Supreme Court rendered its decision on the Affordable Care Act in June 2012. Both resolutions occurred after the June 2011 conference for which this Article was written.

⁶ See RICHARD A. POSNER, *A FAILURE OF CAPITALISM: THE CRISIS OF ‘08 AND THE DESCENT INTO DEPRESSION* vii (2010). See also MICHAEL ROBERTS, *THE GREAT RECESSION: PROFIT CYCLES, ECONOMIC CRISIS A MARXIST VIEW* (2010); PAUL KRUGMAN, *THE RETURN OF DEPRESSION ECONOMICS AND THE CRISIS OF 2008* 180 (2009).

⁷ Steven Greenhouse, *At Labor Gathering, Luxury, Jockeying and Applause for Secretary*, N.Y. TIMES, Mar. 8, 2009, at A22.

⁸ Seth Harris was also Deputy Secretary of Labor during the Clinton Administration.

⁹ Andrew J. Rolfes & Jeffrey L. Braff, *NLRB Update—The Legacy of Former Chairman Liebman*, LEGAL INTELLIGENCER, Feb. 2, 2012. Subsequent to the July, 2006 conference, Wilma Liebman’s term as Chair of the NLRB expired, and the current Chair is Mark Pearce. For a comprehensive assessment of the National Labor Relations Board’s labor law jurisprudence, including discussion of the Boeing episode, see David L. Gregory, Ian Hayes, & Amanda Jaret, *The Labor Law*

during the last years of the radical right wing National Labor Relations Board wedded to the reactionary ideology under President George Bush,¹⁰ with exquisite timing, President Obama appointed Wilma Liebman Chairman of the NLRB. This will endure as one of the most important decisions made throughout the course of the Obama administration. Several of the most obsolete and deeply problematic decisions of the Bush Board were repudiated under Chairman Liebman's leadership.¹¹

1. The Boeing Company

Boeing, in the summer of 2011, became a cultural metaphor in the broader political discourse.¹² On June 14th, the NLRB Office of the General Counsel, having issued a complaint against Boeing, went before an NLRB administrative law judge, following a March 26, 2010 charge by the Machinists Union.¹³ Many observers are on an inherent employer rights spectrum, baffled and infuriated at the temerity of a sleepy backwater agency holdover from the New Deal—the NLRB—presuming to tell the single largest private sector exporter in the United States—Boeing—where it must do business and, presumably, whom it must employ and what compensation it must pay them.¹⁴ Labor supporters recognize that this case is not nearly so stark; other than the formidable respective resources of the parties, this case is a garden-variety of an infelicitous—and egregiously unlawful—series of bald statements by the executive leadership of Boeing, readily offering that union strike proclivities at Boeing's Washington state facilities are a markedly disruptive interference with the employer's production

Jurisprudence of Wilma Liebman, 30 HOFSTRA LAB. & EMP. L.J. (forthcoming 2012); and David L. Gregory, Ian Hayes, & Amanda Jaret, *Reflections on the NLRB's Labor Law Jurisprudence After Wilma Liebman*, 43 LOY. U. CHI. L.J. (forthcoming 2012).

¹⁰ There is panoply of controversial decisions extensively examined in various symposia commemorating the 75th anniversary of the National Labor Relations Act. See Wilma B. Liebman, *Introduction*, 5 FLA. INT'L U.L. REV. 335 (2010).

¹¹ See *The Guard Publ'g Co.*, 351 N.L.R.B. 1110 (2007). Dissenting, Liebman castigated the Board majority for its befuddlement with the inexorability of universal email technology. Her metaphor of the Board majority as a collective "Rip Van Winkle" powerfully resonates.

¹² See Steven Greenhouse, *Boeing Labor Dispute Is Making New Factory a Political Football*, N.Y. TIMES, July 1, 2011, A1.

¹³ Carl Horowitz, *NLRB Drops Complaint Against Boeing; Unions May Be the Real Winner*, NLPC.ORG (Dec. 15, 2011, 7:05 PM), <http://nlpc.org/stories/2011/12/15/nlr-b-drops-complaint-against-boeing-unions-may-be-real-winner>.

¹⁴ *Id.*

processes, whereas the South Carolina facility had a docile, acquiescent work force antithetical to even the thought of going on strike.¹⁵

In 2007, Boeing was assembling seven 787 Dreamliner airplanes per month in the Puget Sound area of Washington state, where Boeing employees have long been represented by the International Association of Machinists and Aerospace Workers (“IAM”).¹⁶ The company announced in 2007 that it would create a second production line to assemble an additional three planes a month to address a growing backlog of orders.¹⁷ Boeing announced that it would locate that second line in South Carolina, where its \$750 million new facility is the largest single investment in the history of the state.¹⁸

On October 21, 2009, in a quarterly earnings conference call posted on Boeing’s intranet website for all employees, the President, Chairman, and CEO of Boeing, Jim McNerney, “made an extended statement regarding ‘diversifying [Boeing’s] labor pool and labor relationship.’”¹⁹ He explained that the decision to move the 787 Dreamliner work to South Carolina was “due to ‘strikes happening every three . . . to four years in Puget Sound.’”²⁰

On October 28, 2009, based on its October 28 memorandum *787 Second Line, Questions and Answers for Managers*, Boeing “informed employees, among other things, that its decision to locate the second 787 Dreamliner line in South Carolina was made in order to reduce [Boeing’s] vulnerability to delivery disruptions caused by work stoppages.”²¹

On December 7, 2009, Vice President of Boeing Ray Conner and Boeing Spokesman Jim Proulx were widely quoted in the press as having attributed Boeing’s “787 Dreamliner production

¹⁵ See Steven Greenhouse, *Labor Board Tells Boeing New Factory Breaks Law*, N.Y. TIMES, Apr. 21, 2011, at B1 [hereinafter Greenhouse, Apr. 21, 2011]; Steven Greenhouse, *Labor Board Case Against Boeing Points to Fights To Come*, N.Y. TIMES, Apr. 23, 2011, at B1 [hereinafter Greenhouse, Apr. 23, 2011].

¹⁶ Greenhouse, Apr. 21, 2011, *supra* note 14.

¹⁷ *Id.*

¹⁸ See *id.*; Steven Greenhouse, *Boeing Labor Dispute Is Making New Factory a Political Football*, N.Y. TIMES, July 1, 2011, at A1.

¹⁹ *Boeing Co.*, Case 19-CA-32431, 2011 WL 2597601 (N.L.R.B. June 30, 2011).

²⁰ *Id.*

²¹ *Id.*

decision to use a 'dual-sourcing' system and to contract with separate suppliers for the South Carolina line" to bypass any Union strikes.²²

On March 2, 2010, Executive Vice President of Boeing Jim Albaugh, "in a video-taped interview with a Seattle Times reporter, stated that [Boeing] decided to locate its 787 Dreamliner second line in South Carolina because of past . . . strikes" in Washington state.²³ He went on to "threaten[] the loss of future Unit work opportunities because of such strikes."²⁴ When describing the decision to transfer the line, Albaugh said that "[t]he overriding factor was not the business climate. And it was not the wages we're paying today. It was that we cannot afford to have a work stoppage, you know, every three years."²⁵

On March 26, 2010, the IAM filed charges with the NLRB, alleging that Boeing unlawfully retaliated against Union employees for participating in past strikes by building a second production line for the 787 Dreamliner airplanes in a non-union facility in South Carolina.²⁶ Furthermore, the IAM alleged that Boeing utterly failed to bargain over the effects of what the IAM viewed as a managerial decision at the heart of entrepreneurial control, or to negotiate about the decision to transfer the production line.²⁷

On April 20, 2011, the NLRB's Acting General Counsel Lafe Solomon issued a complaint against Boeing.²⁸ Settlement discussions continued through the commencement of the hearing before an NLRB administrative law judge on June 14, 2011.²⁹ The complaint alleges that Boeing violated the NLRA by:

²² *Id.*

²³ *Id.*

²⁴ *Id.*

²⁵ Greenhouse, Apr. 21, 2011, *supra* note 14.

²⁶ Complaint and Notice of Hearing at 1, 6, *Boeing Co.*, 2011 WL 2597601, available at http://www.nlr.gov/sites/default/files/documents/443/cpt_19-ca-032431_boeing_4-20-2011_complaint_and_not_hrg.pdf (last visited Feb. 8, 2013).

²⁷ Press Release, Nat'l Labor Relations Bd., Boeing complaint background, available at <https://www.nlr.gov/node/1809>.

²⁸ Press Release, Nat'l Labor Relations Bd., Nat'l Labor Relations Bd. Issues Complaint Against Boeing Co. for Unlawfully Transferring Work to a Non-union Facility (Apr. 20, 2011) (Available at <https://www.nlr.gov/news/national-labor-relations-board-issues-complaint-against-boeing-companyunlawfully-transferring->).

²⁹ Boeing Co., Case 19-CA-32431, 2011 WL 2597601 (N.L.R.B. June 30, 2011) (order denying Respondent's motion to dismiss).

(1) making coercive statements and threats to employees for engaging in statutorily protected activities, (2) deciding to place the second line at a non-union facility in retaliation for past strike activity and to chill future strike activity by its union employees, and (3) acting in a way “inherently destructive of the rights guaranteed employees by § 7 of the Act.”³⁰

Ultimately, “[t]he investigation did not find merit to the union’s charge that Boeing failed to bargain in good faith over its decision regarding the second line,” because “[a]lthough a decision to locate unit work would typically be a mandatory subject of bargaining, in this case, the union had waived its right to bargain on the issue in its collective bargaining agreement with Boeing.”³¹

As a remedy, the Acting General Counsel “[sought] an order that would require Boeing to maintain the second production line in Washington State. The complaint [did] not seek closure of the South Carolina facility, nor [did] it prohibit Boeing from assembling planes there.”³²

In its answer, dated May 4th, Boeing stated that

[Its] decision to place the second 787 assembly line in North Charleston was based upon a number of varied factors, including a favorable business environment in South Carolina for manufacturing companies like Boeing; significant financial incentives from the State of South Carolina; achieving geographic diversity of its commercial airline operations; as well as to protect the stability of the 787’s global production system. In any event, even ascribing an intent to Boeing that it placed the second line in North Charleston so as to mitigate the harmful economic effects of an anticipated future strike would not be evidence that the decision to place the second assembly line in North Charleston was designed to retaliate against the IAM for past strikes. Nevertheless, Boeing would have made the same decisions with respect to the placement of the second

³⁰ Complaint and Notice of Hearing at 4-6, Boeing Co., Case 19-CA-32431 (N.L.R.B. Apr. 20, 2011).

³¹ *Boeing Complaint Background*, NLRB, <https://www.nlr.gov/node/1809> (last visited Feb. 8, 2013).

³² Press Release, Nat’l Labor Relations Bd., National Labor Relations Board Issues Complaint Against Boeing Co. for Unlawfully Transferring Work to a Non-union Facility (Apr. 20, 2011), *available at* <http://www.nlr.gov/news/national-labor-relations-board-issues-complaint-against-boeing-company-unlawfully-transferring->

assembly line in North Charleston even if it had not taken into consideration the damaging impact of future strikes on the production of 787s.³³

The NLRB's legal theory of the case is straightforward—there is no dispute that Section 7 of the NLRA protects collective activity by workers and extends to striking, if the activity is otherwise lawful.³⁴ It does not matter whether the workers are in a union; these rights also belong to and protect the individual worker.³⁵

Long settled case law establishes that the Act prohibits employers from retaliating against workers for having engaged in collective bargaining activity in the past.³⁶ It is also well established that an employer may not retaliate against workers due to anticipated future collective activity.³⁷ Transferring away work opportunities and jobs in retaliation for exercising collective bargaining rights, as Boeing has admitted, is facially unlawful.³⁸

³³ Answer at 2, Boeing Co., Case 19-CA-32431, 2011 WL 2597601 (N.L.R.B. May 4, 2011).

³⁴ *National Labor Relations Act*, NLRB, <http://www.nlr.gov/national-labor-relations-act> (last visited Feb. 9, 2013).

³⁵ *Employee Rights*, NLRB, <http://www.nlr.gov/rights-we-protect/employee-rights> (last visited Feb. 9, 2013).

³⁶ *See, e.g.*, NLRB v. Erie Resistor Corp., 373 U.S. 221, 235–37 (1963) (unlawful to grant super-seniority to strike replacements); *Molon Motor & Coil Corp. v. NLRB*, 965 F.2d 523, 528 (7th Cir. 1992) (discharge of employee for engaging in protected work stoppage is an unfair labor practice); *Reno Hilton Resorts*, 326 NLRB 1421, 1422 (1998) (contracting out security work in reprisal for strike violated NLRA); *Direct Transit, Inc.*, 309 NLRB 629, 632 (1992) (decision to close a facility two days after a newly formed union demanded recognition is unlawful).

³⁷ *See, e.g.*, *Nat'l Fabricators, Inc. v. NLRB*, 903 F.2d 396, 399–400 (5th Cir. 1990) (employer may not discriminate against certain employees because it anticipates they will act collectively); *Parexel Int'l, LLC*, 356 NLRB No. 82, 2 (2011) (firing employee to prevent future concerted activity unlawful); *Ky. Tenn. Clay Co.*, 343 NLRB 931, 931 (2004) (threat to fire employees who struck unlawful); *WestPac Electric, Inc.*, 321 NLRB 1322, 1367 (1996) (unlawful to punish employee with isolated assignment to avoid collective activity); *Lear Siegler, Inc.*, 295 NLRB 857, 857 (1989) (company discriminatorily transferred work to another location to avoid unionization); *General Electric Co.*, 215 NLRB 520, 522 (1974) (threats to “provide more and better job opportunities at nonunion plants than at organized plants . . . is the plainest kind of discriminatory conduct”).

³⁸ *See, e.g.*, *St. Vincent Med. Ctr.*, 349 NLRB 365, 366–67 (2007) (employer ordered to restore discriminatorily contracted-out respiratory care department); *Titan Tire Corp.*, 333 NLRB 1156, 1160 (2001) (employer ordered to restore and resume discriminatorily-relocated operations); *Cold Heading Co.*, 332 NLRB 956, 956 (2000) (employer unlawfully transferred work away from unionized workforce to avoid collective activity; the Board held that it is “usual practice in cases involving the discriminatory relocation of operations to require the employer to restore the

In *NLRB v. Gissel Packing Corp.*, the Supreme Court adopted the position that the Taft-Hartley amendments to the National Labor Relations Act did not restrict employers' duty to bargain solely to unions whose representative status was certified after an NLRB election.³⁹ The Court held that the NLRB can require a non-union employer to bargain with a union where an employer committed unfair labor practices that made holding a fair election unlikely.⁴⁰ Board considerations include the extensiveness of an employer's unfair labor practices, the effect of those actions on union elections, and the likelihood that similar practices would occur in the future.⁴¹ In *General Electric Co.*,⁴² the NLRB applied *Gissel* to set aside an election because the employer, citing concerns about possible future strikes, stated that the plant's nonunion status was a primary factor in choosing to locate a production line for a new motor there.⁴³ In its decision, the Board distinguished an employer's right to take defensive action when threatened with an imminent strike from threats to transfer work "merely because of the possibility of a strike at some speculative future date."⁴⁴

Since then, the Board has repeatedly held that an employer violates section 8(a)(1) by threatening that employees will lose their jobs if they join a strike, or by predicting a loss of business and jobs because of unionization or strike disruptions without any factual basis. For example, in *First National Maintenance Corp. v. NLRB*,⁴⁵ a corporation that provided housekeeping, cleaning, maintenance, and other related services to commercial customers supplied each of its customers, at their premises, contracted-for workers and supervisors in exchange for reimbursement of its labor costs and payment of a predetermined

operations in question"); *Adair Standish Corp.*, 290 NLRB 317, 319–20 (1988) (employer must restore equipment which has been discriminatorily diverted from union plant because diversion aimed to reduce job opportunities for workers who exercised collective bargaining rights).

³⁹ *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 600 (1969) (holding that "the 1947 [Taft-Hartley] amendments did not restrict an employer's duty to bargain under s 8(a)(5) solely to those unions whose representative status is certified after a Board election").

⁴⁰ *See id.* at 579.

⁴¹ *See id.* at 614–15.

⁴² 215 N.L.R.B. 520 (1974).

⁴³ *Id.* at 522–23.

⁴⁴ *Id.* at 522 n.6.

⁴⁵ 452 U.S. 666 (1981).

fee.⁴⁶ The corporation contracted for and hired personnel separately for each customer, and did not transfer employees between locations.⁴⁷ After a dispute with a nursing home over the size of its management fee, the corporation terminated its contract with the home and discharged its employees who worked at the nursing home.⁴⁸ During the tenure of the management contract, a labor union had been certified as the bargaining representative of the corporation's employees at the nursing home and the union requested a delay in the employees' discharge for the purpose of bargaining.⁴⁹ Explaining that the termination of the nursing home operation was purely a matter of money, the corporation refused the offer to bargain, and the union thereupon filed an unfair labor practice charge against the corporation charging that the corporation had violated its duty to bargain in good faith.⁵⁰

The United States Supreme Court held that an employer's decision to shut down part of its business for clearly economic reasons is not part of the "terms and conditions" noted in 8(d) of the National Labor Relations Act, over which Congress has mandated bargaining, and that therefore the corporation was not required to bargain over its decision to terminate its operation at the nursing home.⁵¹ The Court reached this conclusion because: (1) the corporation, upon deciding to terminate its nursing home contract, had no intention of replacing the discharged employees or of moving the operation elsewhere; 2) the corporation's only goal was to reduce its economic loss and there was no claim of anti-union mentality; (3) the corporation's dispute with the nursing home was solely over the size of the management fee, a factor over which the union had no control or authority; (4) the nursing home had no duty to consider any advice and concessions offered by the union; (5) the employer had not abrogated ongoing negotiations for an existing bargaining agreement; and (6) the absence of significant investment or withdrawal of capital by the

⁴⁶ *Id.* at 668.

⁴⁷ *Id.*

⁴⁸ *Id.* at 668–70.

⁴⁹ *Id.* at 669.

⁵⁰ *Id.* at 669–70.

⁵¹ *Id.* at 686.

corporation was not a crucial factor in view of the fact that its decision to halt work at the specific location represented a significant change in its operation.⁵²

The crux of the case against Boeing hinges upon its intent to build the new factory in South Carolina. At the heart of the matter is the fundamental question of whether an employer has the untrammelled right to operate a business as the employer sees fit, with all decisions at the heart of entrepreneurial control reserved exclusively to the employer and not subject to bargaining within the meaning of the National Labor Relations Act; or, whether the employer can be compelled to resume operations in a higher cost, higher wage, and significant union density state if the employer's move to a lower cost state is in fact unlawful retaliation against unionized workers for having exercised their fundamental right to engage in a lawful economic strike. In all likelihood, the Boeing situation is likely to reach the United States Supreme Court.⁵³ The ultimate Boeing decision should definitively elucidate the scope and depth of the fundamental right of the employer to operate its business as it sees fit, and, correspondingly, the scope of the NLRB's remedial authority when management rights are instead warped into a pernicious retaliatory instrument against employees and unions exercising NLRA statutory rights.

B. ObamaCare

This landmark legislation, more than 900 pages long, disclaims any effect on collective bargaining until January 1, 2014.⁵⁴ There is, however, a pervasive uncertainty in the labor management community.⁵⁵ The cosmic "then what?" looms everywhere. There may be massive terminations of collective

⁵² *Id.* at 687–88.

⁵³ *But see* Steven Greenhouse, *Labor Board Drops Case Against Boeing After Union Reaches Accord*, N.Y. TIMES, Dec. 10, 2011, at B3.

⁵⁴ *See* Patient Protection and Affordable Care Act, Pub. L. No. 111-148, § 124 Stat. 119, 162 (2010).

⁵⁵ *See The Impact of the Healthcare Law on the Economy, Employers, and the Workforce: Hearing Before the H. Comm. on Educ. and the Workforce*, 112th Cong. 3 (2011) (statement of Hon. John Kline, Chairman, H. Comm. on Educ. and the Workforce).

bargaining health care plans and the moderate, but still severe, alternative of retaining private plans could see costs go through the roof.⁵⁶

Meanwhile, everyone awaits the ultimate decision by the United States Supreme Court regarding the (un)constitutionality of the Obama healthcare legislation,⁵⁷ affecting roughly twenty percent of the entire United States economy.⁵⁸ Nothing else in the United States has had, or will have, such a dramatic influence on labor management relations. This is the most sweeping and significant factor in labor management relations in the United States in the course of the past several years. While there is currently no definitive decision on the matter,⁵⁹ what is certain is that the outcome of Obama healthcare will have tremendous ramifications for the future of the economy and labor management relations. Although the transformation of the NLRB, the Boeing situation, and the healthcare crises have their roots earlier in the past several decades, their full consequences will be definitively elucidated over the course of the next several years.

⁵⁶ See PRICEWATERHOUSE COOPERS L.L.P., BEHIND THE NUMBERS: MEDICAL COST TRENDS FOR 2012 (2011), available at <http://www.ahipcoverage.com/wp-content/uploads/2011/05/2012-Medical-Cost-Trends.pdf> (reporting that healthcare costs and premiums continue to rise and that nearly half of employers will drop their coverage, dumping employees into the government-run exchanges).

⁵⁷ See *Florida v. Dep't of Health & Human Servs.*, 716 F. Supp. 2d 1120, 1165 (N.D. Fla. 2010) (holding that the plaintiffs adequately pled facts demonstrating that the legislation might contain provisions that are unconstitutional); *Virginia ex rel. Cuccinelli v. Sebelius*, 728 F. Supp. 2d 768, 790 (E.D. Va. 2010) (holding that plaintiffs adequately pled facts demonstrating that the Obama healthcare legislature might contain unconstitutional provisions). *But see* *Liberty Univ., Inc. v. Geithner*, No. 10-2347, 2011 WL 3962915, at *1 (4th Cir. Sept. 8, 2011) (granting defendant's motion to dismiss); *Thomas More Law Ctr. v. Obama*, 651 F.3d 529, 534 (6th Cir. 2011) (upholding federal healthcare law); *Peterson v. United States*, 774 F. Supp. 2d 418, 426 (D.N.H. 2011) (granting defendant's motion to dismiss).

⁵⁸ See Stephen M. Blank et al., *Health Care Fraud*, 46 AM. CRIM. L. REV. 701, 703 (2009).

⁵⁹ *Thomas More Law Ctr.*, 651 F.3d at 534, 560 (affirming the district court's holding in favor of the federal health care law and acknowledging that the issue will ultimately be decided by the Supreme Court).

II. EMPLOYMENT DISPUTE RESOLUTION IN THE UNITED KINGDOM, 2006 TO 2011

In the United Kingdom, the tectonic shifts in the broader political economic structure may be more immediately tangible. The ramifications of the international collapse have landed more catastrophically in the shorter term in the United Kingdom than in the United States,⁶⁰ while the U.S. and the U.K. face the humiliation of the downgrading of their sovereign ability to meet debt obligations in the international bond market,⁶¹ many nations are in much more dire straits—Greece, Portugal, and Ireland—and appear destined to follow Iceland into the economic oblivion of the IMF draconian austerity regime.⁶²

Unfortunately, the United Kingdom's all-too-brief experiment with the dispute resolution provisions of the Employment Act of 2002 was repealed in 2008.⁶³ However, in this time of international economic crises and consequent stringent austerity, the deregulatory ethos of the Gordon Brown government and the current coalition government of David Cameron have ironically converged to reiterate the great utility of ADR as a major policy initiative of the nation. The government has taken a very significant pro-active position regarding ADR, reaffirming the U.K.'s role as an international leader in government commitment to ADR.⁶⁴

⁶⁰ See Clyde Mitchell, *Commentary The State of the Fed.; How Did We Get Here?; Banking & Accounting*, THE LEGAL INTELLIGENCER, Feb. 25, 2010.

⁶¹ Damian Paletta & Matt Phillips, *S&P Strips U.S. of Top Credit Rating*, WALL ST. J., Aug. 6, 2011, <http://online.wsj.com/article/SB10001424053111903366504576490841235575386.html>; Luciana Lopez, *Egan-Jones Cuts UK Sovereign Rating to A-Minus*, REUTERS, June 4, 2012, <http://uk.reuters.com/article/2012/06/04/uk-united-kingdom-rating-eganjones-idUKBRE8530ZR20120604>.

⁶² See *Ireland-Iceland Comparison is No Joke*, DOW JONES FACTIVA, Feb. 1, 2012.

⁶³ Employment Act 2008, 2008, c. 24 (U.K.) (repealing Employment Act 2002, 2002, c. 22, §§ 29–33, sch. 2–4 (U.K.)), available at http://www.legislation.gov.uk/ukpga/2008/24/pdfs/ukpga_20080024_en.pdf.

⁶⁴ See MINISTRY OF JUSTICE & ATTORNEY GENERAL'S OFFICE, THE DISPUTE RESOLUTION COMMITMENT 2–3 (May 2011) (U.K.) [hereinafter THE DISPUTE RESOLUTION COMMITMENT], available at <http://www.justice.gov.uk/downloads/guidance/mediation/drc-may2011.pdf>.

A. *The 2008 Repeal of the Employment Act of 2002*

So much for our caution in 2006 of “creeping legalism infecting the ADR regime in the U.K.”⁶⁵ In light of the 2011 Dispute Resolution Commitment (“DRC”), legalisms have been relegated to the back of the dispute resolution line, a last resort after all ADR modes have been exhausted.⁶⁶

On November 13, 2008, in response to Michael Gibbons’s independent review of the procedures created by the Act of 2002,⁶⁷ Parliament took a major step toward deformalizing ADR statutory procedures.⁶⁸ Gibbons’ review “concluded that the statutory procedures, whilst right in principle . . . as a result of their mandatory nature led to unforeseen consequences,” such as the premature involvement of lawyers in employment disputes.⁶⁹ With the repeal of all of the employment dispute resolution provisions in the Act of 2002⁷⁰ came the passage of the Employment Act of 2008 (“Act of 2008”)⁷¹ and the Advisory, Conciliation, and Arbitration Service’s (“ACAS”)⁷² new Code of Practice (“Code”)⁷³—the potential success of which can only be evaluated years from now.

⁶⁵ Gregory & Cavanagh, *supra* note 3, at 40.

⁶⁶ See THE DISPUTE RESOLUTION COMMITMENT, *supra* note 63.

⁶⁷ Employment Act 2002, 2002, c. 22 (U.K.). The Act of 2002’s statutory provisions came into force in October 2004, and introduced a mandatory “three step process.” Employment Act 2008, 2008, c. 24 (U.K.) (quoting Employment Act 2002, 2002, c. 22, §§ 29–33, sch. 2–4 (U.K.) (repealed 2009)).

⁶⁸ See Employment Act 2002, 2002, c. 22, Explanatory Notes 1, 5 (U.K.).

⁶⁹ Employment Act 2008, 2008, c. 24, Explanatory Note 15 (citing MICHAEL GIBBONS, A REVIEW OF EMPLOYMENT DISPUTE RESOLUTION IN GREAT BRITAIN 1, 6 (Dep’t of Trade & Industry) (2007) (U.K.)) (addressing the fact that the 2002 Act that took effect in 2004 failed to produce the desired outcomes).

⁷⁰ See Employment Act 2008, 2008, c. 24 (U.K.). The Act of 2008 partially repealed several other pieces of legislation including the Employment Rights Act of 1996 and the Employment Tribunals Act of 1996. See *generally id.*

⁷¹ *Id.*

⁷² ACAS is an independent body founded in 1975 by the terms of the Employment Protection Act of 1975. See *Our History*, ACAS, www.acas.org.uk/index.aspx?articleid=1400 (last visited Feb. 9, 2013). ACAS has a legal duty to offer free conciliation in employment right disputes made to an employment tribunal, and also has the power to do so where a claim has not yet been made. See *Conciliation*, ACAS, <http://www.acas.org.uk/index.aspx?articleid=2010> (last visited Feb. 9, 2013). ACAS conciliation is voluntary, independent of the Employment Tribunal Service, and confidential. *Id.*

⁷³ ACAS, CODE OF PRACTICE 1: DISCIPLINARY AND GRIEVANCE PROCEDURES (2009) [hereinafter CODE OF PRACTICE 1], available at <http://www.acas.org.uk/index.aspx?articleid=2174>.

1. Employment Act of 2002: Formalizing Dispute Resolution Procedures

The Act of 2002, in conjunction with the Employment Rights Act of 1996,⁷⁴ outlined prerequisite procedures for settling disputes among employers and employees post-2003.⁷⁵ This dual legislation introduced a mandatory “three-step process” for workplace disciplinary and dismissal matters raised by an employer, and grievances raised by an employee.⁷⁶ Given their nature, compliance with all three steps was required before an employer could dismiss an employee, or an employee could make an employment tribunal⁷⁷ claim.⁷⁸ Each process required: (1) “written notification of the issue to the party on the other side,” (2) “a meeting between the two sides,” and (3) a possible “appeal”—if appropriate.⁷⁹ Where the employer or employee did not follow the outlined procedures, any resulting dismissal was deemed automatically unfair, and required an employment tribunal to increase or decrease any award.⁸⁰

Severe criticism of the enhanced due process dynamics ensued. Upon request by the Secretary of State for the Department of Trade and Industry, Michael Gibbons⁸¹ provided an independent review of the new procedures.⁸² Gibbons found

⁷⁴ Employment Rights Act 1996, 1996, c. 18 (U.K.), available at <http://www.legislation.gov.uk/ukpga/1996/18/contents>.

⁷⁵ See *Employment Act 2002 Outlined*, EIRONLINE, <http://eurofound.europa.eu/eiro/2002/10/feature/uk0210103f.htm> (last visited Feb. 9, 2013) (stating that the Act of 2002 did not take effect until April 2003).

⁷⁶ Employment Act 2002, 2002, c. 22, Explanatory Notes, 1, 5 (U.K.).

⁷⁷ See *Employment Tribunal Guidance*, MINISTRY OF JUSTICE, <http://www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/employment/index.htm> (last visited Feb. 9, 2013) (noting that employment tribunals are independent judicial bodies that hear employment related claims such as unfair dismissals, redundancy payments, and discrimination).

⁷⁸ See Employment Act of 2002, c. 22, sch. 2 (mandating that in the case of an employee grievance, if the requisite statutory procedures were not followed, the employee would be barred from raising a claim with the employment tribunal).

⁷⁹ Employment Act 2002, 2002, c. 22, Explanatory Notes, 1, 5 (U.K.).

⁸⁰ Employment Act 1996, 1996, c. 22, Explanatory Notes, 1, 5 (U.K.).

⁸¹ See *Michael Gibbons OBE: Chair of the Regulatory Policy Committee*, INDUSTRY-FORUM.ORG, <http://www.industryforum.org/biography.cfm?speakerid=210> (last visited Feb. 9, 2013) (explaining that Michael Gibbons was a member of the Better Regulation Commission and a former director of a major utility company).

⁸² MICHAEL GIBBONS, *BETTER DISPUTE RESOLUTION: A REVIEW OF EMPLOYMENT RESOLUTION IN GREAT BRITAIN* 4 (2007), available at <http://webarchive.nationalarchives.gov.uk/+http://www.dti.gov.uk/files/file38516.pdf>.

that the steps provided employers and employees alike with more clarity on how to process and administer workplace disciplinary and grievance issues.⁸³ He nevertheless insisted that the return to the deregulatory informality would be superior.⁸⁴ Gibbons found that the statutory procedures made employment dispute resolution more complex, costly, and reduced “certainty and predictability in their operation.”⁸⁵ As a result, early resolution of disputes was impeded.⁸⁶ Gibbons’s key recommendation: Repeal all of the dispute resolution procedures set out in the Act of 2002.⁸⁷ One year later, that is exactly what Parliament did.⁸⁸

2. The Employment Act of 2008: Abolishing Statutory Dispute Resolution Procedures

The Act of 2008 overhauled the aforementioned processes—reinstating the pre-2003 status quo.⁸⁹ The Act of 2008 repealed all provisions in the Act of 2002 relating to dispute resolution procedures.⁹⁰ This left employment tribunals, once again, without statutorily defined procedures as benchmarks against which to assess the fairness of a particular employment dispute procedure.

While repealing all of the dispute resolution provisions, Parliament simultaneously passed several new provisions.⁹¹ Amongst the new provisions provided by the Act of 2008, three in particular have received a lot of attention post-enactment. First, failure by the employer to follow statutory procedures is no longer automatically unfair.⁹² Instead, breaches are to be governed by case-law, and in particular, the House of Lords’

⁸³ *See id.* at 8.

⁸⁴ *Id.* at 4, 8.

⁸⁵ *Id.* at 4–5.

⁸⁶ *See id.* at 8.

⁸⁷ *Id.* at 4.

⁸⁸ *See* Employment Act 2008, 2008, c. 24 (U.K.).

⁸⁹ *See Employment Act 2002 Outlined*, EIRONLINE (Oct. 22, 2002), <http://eurofound.europa.eu/eiro/2002/10/feature/uk0210103f.htm> (explaining that the Act of 2002 did not take effect until April 2003).

⁹⁰ Employment Act 2008, 2008, c. 24, §§ 1, 3, Explanatory Notes 13, 16, 19 (U.K.) (repealing sections 29 to 33 and Schedules 2 to 4 of the Employment Act of 2002, which comprised the statutory dispute resolution procedures of the Act of 2002).

⁹¹ *Id.*

⁹² Employment Act 2002, 2002, c. 22, Explanatory Notes, 1, 5 (U.K.).

judgment in *Polkey v. A E Dayton Services Ltd.*⁹³ Second, employer and employee breaches of procedure may result in a twenty-five percent, rather than fifty percent, increase or decrease in the employee's compensation—depending on which party breaches.⁹⁴ Finally, employment tribunals are no longer authorized to decide cases without any hearing, unless they ensure that all parties to the proceedings—most notably, employees—“consent in writing to the [determination without a hearing].”⁹⁵

3. ACAS Responds to the Act of 2008

In response to the Act of 2008, ACAS issued a new Code—effective in April 2009.⁹⁶ The purpose of the Code is to provide “practical guidance to employers, workers and their representatives,” and to serve as a discretionary guideline for employment tribunals—the breach of which “does not, in itself, make a person or organisation liable to proceedings.”⁹⁷ Despite their non-binding nature, without statutory benchmarks to gage procedures, employment tribunals “will take the Code into account when considering relevant cases” and whether fair procedures were followed.⁹⁸ The Code retains the “three step process” and the general statutory framework of the Act of 2002,

⁹³ *Id.* at Explanatory Notes 17–18; *Polkey v. A. E. Dayton Servs. Ltd.*, [1988], A.C. 344 (H.L.) (holding that “a dismissal could be unfair purely on procedural grounds, but that in those circumstances the tribunal should reduce or eliminate the compensation payable (other than the basic award) to reflect the likelihood (if any) that the dismissal would have gone ahead anyway if the correct procedures had been followed”).

⁹⁴ See Employment Act 2008, 2008, c. 24, Explanatory Notes, 22–23 (U.K.); Employment Act 2002, 2002, c. 22 (U.K.).

⁹⁵ Employment Act 2008, 2008, c. 24, Explanatory Notes, 27 (U.K.). An employment tribunal may also authorize the determination of proceedings without any hearing if “the person . . . against whom the proceedings are brought” either “(i) has presented no response in the proceedings, or (ii) does not contest the case.” Employment Act, 2008, c. 24, § 4 (U.K.).

⁹⁶ See CODE OF PRACTICE 1, *supra* note 72; Ruth Bonino, *Revised ACAS Code of Practice Approved*, EMPLOYMENT LAW WATCH (Nov. 21, 2008), <http://www.employmentlawwatch.com/2008/11/articles/employment-uk/dispute-resolution-1/revised-acas-code-of-practice-approved/>.

⁹⁷ CODE OF PRACTICE 1, *supra* note 72, at 1.

⁹⁸ *Id.*

and applies to misconduct and poor performance, but expressly excludes dismissals on the ground of redundancy or the non-renewal of fixed term contracts on their expiry.⁹⁹

B. *Deformalization of Employment Disputes Before 2008*

Although the formal statutory dispute resolution procedures were not repealed until 2008, deformalization of employment disputes began in 2006 with a pilot mediation program for employment tribunals.¹⁰⁰ Now available in England, Wales,¹⁰¹ and Scotland,¹⁰² this pilot program has become part of the tribunal process¹⁰³—with over sixty-five percent of mediated cases reaching a successful settlement on the day of mediation.¹⁰⁴ An employment judge identifies suitable cases and if both parties agree to mediation the regional employment judge considers whether to make an offer for judicial mediation.¹⁰⁵ An employment judge who has been trained in mediator serves as the mediator.¹⁰⁶ While remaining neutral, the mediator's goal is to help the parties find a resolution to their dispute that is mutually acceptable.¹⁰⁷

C. *Dispute Resolution Commitment*¹⁰⁸

More recently, in May, 2011, the Ministry of Justice, together with the Attorney General's Office, promulgated the Dispute Resolution Commitment, "aimed at encouraging the

⁹⁹ See Employment Act 2002, 2002, c. 22, § 29, sch. 2 (U.K.); CODE OF PRACTICE 1, *supra* note 72, at 3, 5–6, 8.

¹⁰⁰ See *Employment Tribunal Guidance*, *supra* note 76.

¹⁰¹ See MINISTRY OF JUSTICE, EMPLOYMENT TRIBUNALS (ENGLAND AND WALES) [hereinafter EMPLOYMENT TRIBUNALS (ENGLAND AND WALES)], *available at* <http://www.justice.gov.uk/downloads/guidance/courts-and-tribunals/tribunals/employment/judicial-mediation/JudicialMediationEnglandandWales.pdf>.

¹⁰² See MINISTRY OF JUSTICE, EMPLOYMENT TRIBUNALS (SCOTLAND), *available at* <http://www.justice.gov.uk/downloads/guidance/courts-and-tribunals/tribunals/employment/judicial-mediation/JudicialMediationScotland.pdf>.

¹⁰³ See EMPLOYMENT TRIBUNALS (ENGLAND AND WALES), *supra* note 100.

¹⁰⁴ See *id.* (explaining that mediations are confidential and held in private, and the mediator will not offer legal advice to the parties).

¹⁰⁵ See *id.*

¹⁰⁶ See *id.*

¹⁰⁷ See *id.*

¹⁰⁸ Although the DRC is a new initiative that demonstrates the movement of the UK toward ADR, it has not specifically been attributed to dispute resolution in the labor realm. Nonetheless, it is a trend worth noting and keeping abreast of in the future.

increased use of flexible, creative and constructive approaches to dispute resolution.”¹⁰⁹ The adoption of the DRC communicates to government clients, as well as to all of the United Kingdom, that the United Kingdom is “serious about effective dispute resolution.”¹¹⁰ Additionally, “[t]he terms of the [DRC] are mandatory in relation to government departments and their agencies.”¹¹¹ Justice Minister Jonathan Djanogly stated that the “government should be leading by example by resolving issues away from court using alternatives which are usually quicker, cheaper and provide better outcomes.”¹¹²

Having disputes settled without reaching the courts can save parties time and money. Since the Alternative Dispute Resolution Pledge made by the United Kingdom in 2001, the government has saved an estimated £360 million.¹¹³ Attorney General Dominic Grieve explained that under the DRC, government departments and agencies should seek alternatives to litigation whenever possible.¹¹⁴

The DRC offers the government a “best practice approach to business” to manage and resolve disputes quickly and effectively.¹¹⁵ Throughout the Commitment there is recognition of how important inter-party relationships are, emphasizing the importance of maintaining a positive relationship throughout the ADR process.¹¹⁶ Furthermore, the DRC appreciates the fact that it is in all parties’ interest to work to avoid disputes, but, when they do occur, to use cost effective dispute resolution as a

¹⁰⁹ THE DISPUTE RESOLUTION COMMITMENT, *supra* note 63, at 1.

¹¹⁰ *Id.*

¹¹¹ MINISTRY OF JUSTICE & ATTORNEY GENERAL’S OFFICE, THE DISPUTE RESOLUTION COMMITMENT: GUIDANCE FOR GOVERNMENT DEPARTMENTS AND AGENCIES 4 (May 2011) (U.K.) [hereinafter GUIDANCE FOR GOVERNMENT DEPARTMENTS AND AGENCIES], *available at* <http://www.justice.gov.uk/downloads/courts/mediation/drc-guidance-may2011.pdf>.

¹¹² *Djanogly: More Efficient Dispute Resolution Needed*, MINISTRY OF JUSTICE (June 23 2011), <http://www.justice.gov.uk/news/press-releases/moj/moj-newsrelease230611a.htm>.

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ GUIDANCE FOR GOVERNMENT DEPARTMENTS AND AGENCIES, *supra* note 110, at 2.

¹¹⁶ *Id.* at 5.

primary resource.¹¹⁷ This involves commitment to educating employees and officials, reviewing complaints, and handling procedures with a prompt and cost effective process.¹¹⁸

A key objective of the DRC is to make litigation a last resort.¹¹⁹ Within the Guidance for Government Departments and Agencies on the DRC, the government reiterates its practical commitment to dispute avoidance, dispute management, and dispute resolution.

To achieve this end, the DRC lists seven dispute resolution techniques, including negotiation, mediation, and arbitration.¹²⁰ The Commitment recommends flexibility in deciding which techniques fit each specific case, as well as negotiations between the parties, followed by a non-binding ADR procedure—usually primarily mediation.¹²¹ If those techniques fail, the DRC recommends binding arbitration.¹²²

III. OVERVIEW OF THE UNITED KINGDOM TODAY: ECONOMIC, POLITICAL, AND SOCIAL EFFECTS ON EMPLOYMENT

While the deregulatory gap in employment dispute resolution in 2006 can purportedly be succinctly explained, the economic, political, and social circumstances of the United Kingdom cannot. This essay is thus reduced to speculation; dispute resolution and labor management relations must be assessed in a much broader context. The comparative data between mid-2006 and mid-2011 stunningly corroborate the gravity of the international economic decline.

On July 26, 2006, the U.K. GDP was £1.3 trillion with the deficit below three percent of the GDP,¹²³ and the debt at nearly £572 billion.¹²⁴ Productivity increased 1.9 percent from its

¹¹⁷ *Id.* at 3–4.

¹¹⁸ *Id.*

¹¹⁹ *Id.* at 2.

¹²⁰ *Id.* at 8–13.

¹²¹ *Id.* at 2, 14.

¹²² *Id.* at 14.

¹²³ Euro-Indicators News Release 113/2007, EuroStat, UK Government Deficit at 2.7% of GDP and Government Debt at 42.5% of GDP for Financial Year 2006/2007 (Aug. 17, 2007) [hereinafter Euro-Indicators News Release 113/2007], available at http://epp.eurostat.ec.europa.eu/cache/ITY_PUBLIC/2-17082007-AP/EN/2-17082007-AP-EN.PDF.

¹²⁴ *Id.*

previous year, and the deficit was £37.9 billion, while the debt was £572 billion.¹²⁵ Additionally the unemployment rate was 5.4 percent.¹²⁶

In 2010, the newly appointed Chancellor of the Exchequer, George Osborne, announced plans to eliminate the bulk of the United Kingdom's deficit.¹²⁷ Stating that "everyone had to share the pain to repair 'the ruins' of the economy," Osborne set out what he considered an "unavoidable Budget."¹²⁸ A combination of spending cuts, pay freezes, approximately 490,000 job cuts for public sector workers,¹²⁹ made Osborne's plan "the biggest cuts in public spending for almost a century."¹³⁰

In response, the Trades Union Congress organized "the largest public protest since the Iraq war rally in 2003."¹³¹ Over 250,000 attended this anti-cuts march and rally in central London to protest the new coalition's plans.¹³² With job cuts passing 150,000 since Osborne's announcement in October 2010,¹³³ rising inflation and consumer prices,¹³⁴ and exports on the decline, Osborne closed his budget speech in March 2011 by saying, "[w]e want the words 'made in Britain,' 'created in

¹²⁵ *Labour Productivity Growth in the Total Economy*, OECD, <http://stats.oecd.org/Index.aspx?DatasetCode=PDYGTH> (last visited Feb. 9, 2013); Euro-Indicators News Release 113/2007, *supra* note 122.

¹²⁶ Euro-Indicators News Release 130/2006, EuroStat, Euro Area Unemployment up to 7.9% (Oct. 3, 2006), *available at* <http://www.lex.unict.it/eurolabor/documentazione/statistiche/agosto2006.pdf>.

¹²⁷ Andrew Porter, *Budget 2010: George Osborne the Enforcer Issues Toughest Budget for a Century*, TELEGRAPH, (June 22, 2010, 10:14 PM), <http://www.telegraph.co.uk/finance/budget/7848086/Budget-2010-George-Osborne-the-enforcer-issues-toughest-Budget-for-a-century.html>.

¹²⁸ *Id.*

¹²⁹ CNN Wire Staff, *UK Slashes 490,000 Jobs Amid Deep Budget Cuts*, CNN (Oct. 20, 2010), http://articles.cnn.com/2010-10-20/world/uk.budget.cuts_1_cuts-government-spending-s-deficit?_s=PM:WORLD.

¹³⁰ Porter, *supra* note 126.

¹³¹ *Anti-Cuts March: Tens of Thousands at London Protest*, BBC News (Mar. 26, 2011, 8:09 PM), <http://www.bbc.co.uk/news/uk-12864353>.

¹³² *Id.*

¹³³ Patrick Butler, *Job Cuts Latest: Council Job Losses Total Passes 150,000*, PATRICKBUTLER'SCUTSBLOG (Feb. 2, 2011, 7:00 AM), <http://www.guardian.co.uk/society/patrick-butler-cuts-blog/2011/feb/02/council-job-cuts-total-hits-150000>.

¹³⁴ Gonzalo Vina, *Osborne Says U.K. Inflation 'Temporary,' Supporting Bank of England's King*, BLOOMBERG NEWS (Feb. 21, 2011, 3:39 AM), <http://www.bloomberg.com/news/2011-02-21/osborne-says-u-k-inflation-temporary-supporting-bank-of-england-s-king.html> (noting that, in February 2011, inflation in the United Kingdom was at a two-year high of 4%, estimated to increase to 4.4% by mid-2012).

Britain,' 'designed in Britain,' 'invented in Britain' to drive our nation forward."¹³⁵ Did the "grandeur die[] with the new century[?]"¹³⁶ Only time will prevail in telling us whether the new coalition's efforts will bring down the deficit and bring mining, shipbuilding, and textiles back to United Kingdom soil.¹³⁷

The most recent economic data in the United Kingdom listed the deficit at 10.2 percent of the GDP,¹³⁸ while the debt reached £1,105.8 billion.¹³⁹ The productivity was down 0.3 percent from the recent quarter. Perhaps the most telling and unfortunate number was the unemployment rate at 7.7 percent.¹⁴⁰

CONCLUSION

Two major foundational realities have changed dramatically with respect to labor and employment in the United Kingdom and the United States since 2006. The most glaring and unfortunate is the inexorably worsening unemployment incidence. In the United Kingdom, the rate increased nearly fifty percent and nearly doubled in the U.S., increasing by an outstanding ninety-four percent.¹⁴¹ The human tragedy of this economic reality must be the primary motivating factor of both governments' salient initiatives toward a viable future economy. Employment stimulus and job creation must be at the forefront.

Chancellor Osborne's recent decision to freeze all salaries and cut close to half-a-million public sector workers will drastically accelerate the unemployment rate. Fortunately, there has not yet been fatalistic utter resignation. On June 30, 2011, four public sector unions representing 750,000 teachers and

¹³⁵ Ian Jack, *Time for a Royal Wedding . . . While England Is Royally Screwed*, NEWSWEEK, May 2, 2011, at 47.

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ OFFICE FOR NATIONAL STATISTICS, GOVERNMENT DEFICIT AND DEBT UNDER THE MAASTRICHT TREATY (March 31, 2011), available at <http://www.ons.gov.uk/ons/rel/psa/eu-government-debt-and-deficit-returns/march-2011/government-deficit-and-debt-under-the-maastricht-treaty.pdf>.

¹³⁹ *Id.*

¹⁴⁰ Heather Stewart, *UK Unemployment Numbers Fall but Jobless Rate Stuck at 7.7%*, THE GUARDIAN, July 13, 2011, <http://www.guardian.co.uk/business/2011/jul/13/unemployment-falls-but-jobless-rate-unchanged>.

¹⁴¹ See *Unemployment Rate, United Kingdom 2000-2012*, PORTAL SEVEN http://portalseven.com/employment/unemployment_rate_euro.jsp?region=uk (last visited Feb. 9, 2013); see also BUREAU OF LABOR STATISTICS, LABOR FORCE STATISTICS FROM THE CURRENT POPULATION SURVEY (2012), available at <http://data.bls.gov/timeseries/LNS14000000>.

other public-sector workers protested the unfair cuts and intended pension reforms.¹⁴² The reforms include an increase in the retirement age for teachers, as well as increasing their percentage contribution to their pensions.¹⁴³ These reforms come against a bleak economic backdrop. Jobless benefits claimants have been increasing, a nearly-certain auger of further employment market deterioration.¹⁴⁴

Concurrently, there is negligible GDP growth forecast, and likely further increases in unemployment.¹⁴⁵ At the current rate of negligible conventional progress, it will take five-and-a-half years for the U.K. to return to pre-recession job levels.¹⁴⁶

The most formidable obstacle to authentic economic recovery is deeply suppressed hiring.¹⁴⁷ Meanwhile, however, more companies are reporting profits without increasing the workforce.¹⁴⁸ While The American Recovery Act spurred some degree of recovery, it had little effect on the unemployment rate.¹⁴⁹ An example of the latest failure of Congress to pass a bill stimulating job growth is the Economic Development Revitalization Act of 2011 (“EDRA”).¹⁵⁰ The EDRA was a bill to expand the Economic Development Administration, a job creation

¹⁴² Alistair MacDonald & Nicholas Winning, *U.K. Public Workers Mount One-Day Strike*, WALL ST. J., July 1, 2011, at A8.

¹⁴³ Polly Curtis, *Public Sector Pensions: Work Longer and Pay More, Says Danny Alexander*, THE GUARDIAN, June 17, 2011, <http://www.guardian.co.uk/society/2011/jun/17/public-sector-pensions-danny-alexander>.

¹⁴⁴ Heather Stewart, *UK Unemployment Falling at Fastest Pace in a Decade*, THE GUARDIAN, June 15, 2011, <http://www.guardian.co.uk/business/2011/jun/15/uk-unemployment-fastest-fall-in-10-years>.

¹⁴⁵ *Id.*

¹⁴⁶ Stephen Cape, *TUC Paints a Bleak Picture of North East Jobs Future*, JOURNALLIVE, <http://www.journallive.co.uk/north-east-news/todays-news/2011/06/15/tuc-paints-a-bleak-picture-of-north-east-jobs-future-61634-28879685/>.

¹⁴⁷ See Tom Precious, *Paterson Seeks Utility Surtax: Proposal Would Add 2% to Everyone's Bill*, BUFF. NEWS, Mar. 26, 2009, <http://www.highbeam.com/doc/1P2-21698964.html>; see also *Smith Receives U.S. Chamber "Spirit of Enterprise" Award*, STATES NEWS SERVICE, Mar. 31, 2011.

¹⁴⁸ See Nell Henderson, *Wholesale Inflation Rises Sharply; Energy, Food Prices Drive Index's Increase*, WASH. POST, Nov. 17, 2004, at E01.

¹⁴⁹ Neil Irwin, Lori Montgomery & Alec MacGillis, *White House Crafts Jobs Bill, a Year Into Stimulus Effort*, WASH. POST, Feb. 18, 2010, <http://www.washingtonpost.com/wp-dyn/content/article/2010/02/17/AR2010021701958.html>.

¹⁵⁰ See generally Economic Development Revitalization Act of 2011, S. 782, 112th Cong. (2011).

agency that enjoyed bipartisan support.¹⁵¹ The bill was introduced with bipartisan co-sponsorship.¹⁵² However, current political tensions in Congress prevented the passage of a bill that could have had pragmatic and beneficial incentives and influences.¹⁵³

It remains to be seen if Parliament will follow the lead of the government and pass an act formalizing the DRC into a statute applicable to both public and private sectors. With the Attorney General and the Ministry of Justice unequivocally reaffirming the government's hearty support for ADR shortly before this Conference convened,¹⁵⁴ the prognosis for ADR in the U.K. remains very viable.

ADR in the United States is less regulated and is done primarily through private arbitrators selected by the parties, especially with regard to employment disputes in the private sector.¹⁵⁵ In the public sector, the avenue for remedy is more constrained and limited to traditional relief of making whole and restoring employees with full back pay and benefits.¹⁵⁶

In the United States, the most recent proliferation of Supreme Court decisions is fraught with internal convolution and external contradiction.¹⁵⁷ Most of the controversial cases

¹⁵¹ See *id.*; see also *S.782 – Economic Development Act of 2011*, OPENCONGRESS, <http://www.opencongress.org/bill/112-s782/show> (last visited Feb. 6, 2013); *Boxer Praises Announcement of \$3.48 Million Investment To Support Job Creation in Salinas*, TARGETED NEWS SERVICE, Sept. 15, 2011.

¹⁵² S. REP. NO. 112-782 (2011).

¹⁵³ Yesenia Amaro, *Higher Education; Boxer Touts Clean Energy in UC Merced Visit Senator Tours Campus, Meets with a Group of Students*, MERCED SUN-STAR, Aug. 26, 2011, <http://www.mercedsunstar.com/2011/08/26/2018054/barbara-boxer-touts-clean-energy.html>.

¹⁵⁴ See MINISTRY OF JUSTICE, THE DISPUTE RESOLUTION COMMITMENT, available at <http://www.justice.gov.uk/downloads/courts/mediation/drc-may2011.pdf>.

¹⁵⁵ Gary S. Fealk, *Arbitration and Mediation Can Help Resolve Disputes*, MICH. EMP'T. L. LETTER, April 2008.

¹⁵⁶ Gregory & Cavanagh, *supra* note 3, at 33.

¹⁵⁷ See *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.* 130 S. Ct. 1758, 1775 (2010) (holding that parties may settle disputes through class arbitration, rather than litigation, only if all the parties specifically agree to it); *Rent-A-Center, West, Inc. v. Jackson*, 130 S. Ct. 2772, 2778–79 (2010) (holding that if parties agree to arbitration rather than litigation in court and one side challenges the arbitration provision itself, then a court must decide the challenge; however, if only the enforceability of the agreement is challenged, then the challenge must be decided by an arbitrator); *Granite Rock Co. v. Int'l Bhd. of Teamsters*, 130 S. Ct. 2847, 2860 (holding that a dispute over the ratification date of a collective bargaining agreement was a matter to be resolved by the District Court, instead of an arbitrator).

within this latest flurry of decisions are from beyond the immediate labor and employment niche, but their ramifications for labor and employment arbitration are already subject to incisive critiques.¹⁵⁸

Measured against the jurisprudential and practical tumult in the wake of the most recent Supreme Court decisions, the U.K.'s reaffirmation of ADR is a paradigm of clarity, a virtually seamless interweave of policy and pragmatism. It is obviously too soon to ascertain with any degree of certainty the practical consequences of the government's reiteration of the U.K.'s commitment to ADR.

A primarily political assessment of the largely aspirational policy reaffirmation could plausibly regard the government's June 2011 action as an implicit, but nevertheless highly transparent and completely obvious, signal to the unions to refrain from emulating the near-ubiquitous strikes of the Winter of Discontent.¹⁵⁹ Since the government is obviously favorably disposed to acceleration of ADR mechanisms to meet all serious demands, it would be pointless for the unions to nihilistically cripple the economy. Concomitantly, a primarily jurisprudential assessment of the government's June 2011 action can readily trace direct continuity from one of the world's greatest proponents of ADR, the Right Honorable Harry Kenneth Woolf, Former Lord Chief Justice of England and Wales. On the morning of July 27, 2006, he concluded his keynote address to our *Transatlantic Perspectives on ADR* Conference at the

¹⁵⁸ Nicholas R. Weiskopf, *Unnecessary Decision Making: A U.S. View of the Supreme Court's 2010 Arbitration Cases*, AM. ARB. ASS'N. DISP. RESOL. J., Feb.–Apr. 2011, at 32, 42–43. See also David L. Gregory, Rowan Foley Reynolds, & Nadav Zamir, *Labor Contract Formation, Tenuous Torts, and the Realpolitik of Justice Sotomayor on the 50th Anniversary of the Steelworkers Trilogy: Granite Rock v. Teamsters*, 1 AM. U. LAB. & EMP. L.F. 5, 21–26 (2011); David L. Gregory & Edward McNamara, *Mandatory Labor Arbitration of Statutory Claims, and the Future of Fair Employment: 14 Penn Plaza v. Pyett*, 19 CORNELL J.L. & PUB. POL'Y 429, 451–52, 54, 57 (2010). See generally David L. Gregory, Michael K. Zitelli, & Christina E. Papadopoulos, *The Fiftieth Anniversary of the Steelworkers Trilogy: Some Reflections On Judicial Review of Labor-Arbitration Decisions—Will Gold Turn to Rust?*, 60 CATHOLIC U. L. REV. 47 (2010).

¹⁵⁹ David L. Gregory, *Why Not A General Strike?*, 20 NOTRE DAME J.L. ETHICS, & PUB. POL'Y 621, 629 (2006) (written by invitation for Symposium on the American Workforce).

University of London with these words: “[T]he more constructively managed dispute resolution process . . . should be the hallmark of a contemporary justice system.”¹⁶⁰

The U.S. and the U.K. continue to learn much from one another. Synergistically, the meld of practical and jurisprudential commitments to ADR, and the benefits flowing therefrom, should continue to enrich the viability and acceptability of Employment Dispute Resolution Systems Across the Globe.¹⁶¹

¹⁶⁰ Harry Kenneth Woolf, *Keynote Address*, 81 ST. JOHN'S L. REV. 5, 14 (2007).

¹⁶¹ *Worlds of Work: Employment Dispute Resolution Systems Across The Globe Symposium Conference* sponsored by St. John's University School of Law and hosted at Fitzwilliam College, Cambridge University, July 20-22, 2011, with publication of selected papers forthcoming in the *St. John's Law Review*.