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Labor Law and Its Reform

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Agenda for Reform: The Future of Employment Relationships and the Law. By William B. Gould IV. Cambridge: MIT Press, 1993. Pp. x, 313.

*Reviewed by Daniel J. Gifford**

In *Agenda for Reform: The Future of Employment Relationships and the Law,* William B. Gould IV, President Clinton's Chair of the National Labor Relations Board (NLRB) and former Stanford University law professor, outlines his views on the present state of labor legislation and recommends directions for reform. In his words, the book addresses "the central issues confronting the employee-employer relationship today."[1] Although *Agenda for Reform* perceptively presents a number of controversial issues involving employment relationships in insightful ways, it addresses these matters in isolation. Consequently, the book fails to adequately identify the "central issues." Gould's book takes a politically moderate, incrementalist approach to labor law reform. He assumes that the basic structure of the National Labor Relations Act (NLRA) will remain in its present form and proposes amendments and other legislative changes to solve specific problems. While this is a legitimate approach, Gould confronts social and economic problems in need of drastic remedial action too cautiously.

Undeniably, the laws governing employment relationships are in disarray and in urgent need of reform. The NLRA, originally established in 1935 to oversee the unionization of the work force, has long since lost its primary *raison d'etre.* Even the Taft-Hartley Amendments, intended to make the NLRB resemble an impartial referee in the great struggles between powerful unions and powerful employers, have lost their primary mission. Following the path marked out by Marver Bernstein in the 1950s,[2] intervening events have undermined the assumptions on which the NLRA and Taft-Hartley Act were based. The NLRB is now floundering, without a clear sense of an overriding goal. Meanwhile, industrial unions are in decline, and it is no longer clear (as it was in the 1930s) that unionization is the wave of the future or that the union movement will raise the economic status of the working class.

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1. William B. Gould IV, Agenda for Reform: The Future of Employment Relationships and the Law at ix (1993).

2. Marver H. Bernstein, Regulating Business by Independent Commission (1955).

The weakness in this book lies not in its call for reform, but in the limited nature of its recommendations and in its failed vision. Gould sees clearly the erosion of the union movement and treats particular symptoms of that erosion. He fails, however, to come forward with a comprehensive approach to reform. For example, Gould sees a need for employment security, and because of the declining state of organized labor, Gould focuses on the developing law of wrongful discharge to provide that security. He sees the legislative proposals of the Commissioners on Uniform State Laws[3] and possible federal wrongful discharge legislation as meeting this need.

Gould recognizes that worker participation in production decisions is, or can be, part of a wider strategy involving labor-management cooperation, benefiting both groups. Indeed, such strategies are almost imperative now that U.S. businesses are global competitors. This new cooperative model is gradually replacing the older adversarial model characterized largely by management production decisions subject to union-imposed work rules.

Gould appreciates the benefits of the new model. He extols the cooperative arrangements in place at General Motors' Saturn plant and the General Motors-Toyota joint venture in Fremont, California.[4] Yet the NLRA may impede movement towards this new cooperative model. Gould recognizes that the rationale for the 1992 NLRB decision in *Electromation*[5] threatens employer-instituted quality work circles. He also observes that the Supreme Court's broad interpretation of the phrase "managerial employees" in *NLRB v. Yeshiva Union*[6] may raise an additional obstacle to increased employee participation in workplace decisions.

Gould properly deplores the processes of the NLRB and the associated judicial review as unduly time-consuming and litigious. These processes work perversely from the perspective of the Act, delaying the commencement of collective bargaining and, in the process, undermining the position of the union. In the 1930s, when the NLRA was enacted, Congress expected government agencies like the NLRB to act swiftly and efficiently to implement the goals of recently passed legislation. The Taft-Hartley Act may have reinforced the NLRB's bureaucratic inertia. This Act transformed the NLRB from an agency with a mandate to protect collective

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3. Model Employment Termination Act, 7A U.L.A. 73 (Supp. 1994).

4. The name of that venture is New United Motors Manufacturing, Inc.

5. Electromation, Inc., 309 N.L.R.B. 990, 997 (1992); *see also* E.I. du Pont de Nemours & Co., 311 N.L.R.B. 893, 897 (1993) (confirming the interpretation of the NLRA which casts doubt on the lawfulness of worker-employer quality circles). The Labor Board's decisions in these cases were grounded in part upon the Supreme Court's reasoning in NLRB v. Cabot Carbon Co., 360 U.S. 203 (1959). In a concurring opinion in *Electromation*, Board Member Raudabaugh discussed the legislative history of the NLRA, concluding that the original NLRA imposed an adversarial model on labor relations but that subsequent legislation may provide grounds for incorporating cooperative elements into labor relations. *See* Electromation, Inc., 309 N.L.R.B. at 1011-13 (Raudabaugh, concurring).

6. 444 U.S. 672 (1980).

bargaining activities of labor into an agency monitoring both labor and management. At any rate, Gould's criticisms of the torpid pace of both NLRB and court procedures merely echo earlier critiques.[7]

Interim events, in addition to the Taft-Hartley Amendments, have altered the public's view of the NLRB and its work. Academic insights into the operation of regulatory agencies combined with the popularization of regulatory "capture" by Ralph Nader and others have drastically altered the context in which regulatory agencies operate.[8] The NLRB is subject to a gamut of influences: It is an old agency that no longer reaps much guidance from the circumstances surrounding its creation; it shares with other agencies a tendency to "satifice" (rather than to maximize or to excel); like all agencies, it is subject to a variety of external political, and internal bureaucratic, influences. The NLRB invariably muddles through, rarely using its rulemaking power or taking a comprehensive look at the larger context in which it acts, and consequently it fails to recognize major paradigm changes in employer-employee relations taking place around it. As pointed out below, the recent *Electromation* and *Du Pont* cases confirm the NLRB's attachment to the status quo.

The NLRB, of course, cannot be "captured" in the traditional sense because it continuously deals with two major, opposing interest groups, organized labor and management, each of which zealously approaches the issues that concern it. Yet the underlying enabling legislation itself reflects the shifting legislative influences of organized labor and employer coalitions in 1935, 1947, and thereafter. At the same time, American labor legislation ignores the interests of the unorganized, the unemployed, and those for whom the labor market could provide a path out of poverty. Moreover, the institutions of labor-management interaction that have grown up around the NLRA since the mid-1930s shape and confine the NLRB's perceptions. As a result, the NLRB is unable to free itself from the adversarial model of labor relations when circumstances present the

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7. Charles J. Morris, The NLRB in the Dog House—Can an Old Board Learn New Tricks?, 24 San Diego L. Rev. 9, 20 (1987); Paul Weiler, Promises to Keep: Securing Workers' Rights to Self-Organization Under the NLRA, 96 Harv. L. Rev. 1769, 1796 (1983).

8. *See* Daniel J. Gifford, The New Deal Regulatory Model: A History of Criticisms and Refinements, 68 Minn. L. Rev. 299, 312-19 (1983) (describing criticisms of regulatory agency behavior). Academic critiques of agency behavior include Bernstein's work in the 1950s, the revelations of March and Simon on organizational behavior, the impulse to "satisfying" behavior, Lindblom's "muddling through" analysis, Mancur Olson's insights into interest-group behavior, and modern policy choice theory. *See generally* Bernstein, supra note 2 (proposing a "life cycle" theory of agency behavior); James G. March & Herbert A. Simon, Organizations (1958) (describing how internal formal and informal structures of bureaucratic interaction affect organizational behavior); Mancur Olson, The Logic of Collective Action (1965) (proposing a theory of interest-group behavior and its impact on government); Charles Lindblom, The Science of "Muddling Through," 19 Pub. Admin. Rev. 79 (1959) (proposing a theory of why agencies act incrementally). On public choice, see Daniel A. Farber & Philip P. Frickey, Law and Public Choice (1991) (exploring the ramifications of public choice theory on the legal system).

possibility of a different paradigm, as in *Electromation.* The NLRB blames the statute for its inflexibility, but the NLRB lacks the imagination and creativity to transform the existing law into a structure tolerating cooperation and innovation.

Gould understands the need to reform the underlying legislation to overcome not only the problems raised by *Electromation,* but numerous other problems as well. His imagination fails, however, in addressing the role of labor and labor organizations in the larger context of the economic system as a whole. For example, although Gould would forbid permanent replacement of strikers,[9] he disfavors the Quebec labor-law provision prohibiting employers from operating during strikes. He also actively criticizes Ontario legislation barring employers from using the services of a bargaining-unit employee during a strike. Yet these Canadian approaches differ only in degree from his own position.

Furthermore, Gould does not consider how differences in the overall structure of labor relations affect the socio-economic repercussions of bans on permanent replacements in different nations. In the United States, labor unions advocate a ban on permanent replacements to strengthen their positions as bargaining agents. This addition to union negotiating power might nudge up the wage structure in heavily organized industries, but would not respond to many social concerns which are addressed in other societies that do ban permanent replacements. The different industrial and social contexts prevailing in other nations may make their experience inapt for assessing the advisability of incorporating particular provisions of their laws into United States labor law. Indeed, the historic industry-wide focus of American labor organization—a focus which is now unraveling—mandates that proposed changes in American labor law be evaluated in the light of their likely effects in the American setting.

Industrial unions in the United States traditionally have focused on organizing particular industries and have tended to seek identical contract terms from all the industry's employers. Leading unions such as the United Auto Workers, the United Steelworkers, the United Textile Workers, and the United Mine Workers have followed this industry-wide strategy.[10] In the mid-1980s, the industry-wide focus began to break down in the steel industry. The well-publicized, recent dispute between the United Auto

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9. Thus, Gould advocates the legislative abolition of the so-called *Mackay* rule. The *Mackay* rule originated in NLRB v. Mackay Radio & Tel. Co., 304 U.S. 333, 345 (1938) (indicating that the NLRA did not prohibit employers from replacing workers striking for economic benefits). In support of his position, Gould notes that the International Labor Organization (ILO) conventions—to which the United States does not adhere—guarantee workers the right to strike without fear of replacement. He further notes that these ILO norms are widely respected in the industrialized world.

10. Many of these unions, however, have extended their membership to industries outside the area of their traditional concerns. This fact does not detract from the point that, within each industry in which the union is active, the union's objective is identical contract terms with each of the major employers. *See* Richard B. Freeman & James L. Medoff, What Do Unions Do? 36-37 (1984) (describing union contract objectives).

Workers and Caterpillar may portend further breakdown in other industries.

The traditional industry-wide focus of labor relations has also been undercut by the increasing importance of unorganized components. These include the Japanese transplants in the automobile industry and new minimills, such as Nucor, in the steel industry. There also exists a traditional unorganized segment in the textile industry and a growing nonunion segment in the coal industry. These nonunion segments currently constrain union-employer bargaining in varying degrees, and their influence is likely to grow.

The operation of this historic industry-wide structure of labor relations and its current erosion should be the focal points for labor-law reform. My criticism of Gould's position on banning striker replacements is based upon his failure to explore the economic and social effects of such a ban in the American setting.

As suggested below, a ban on replacing strikers would become vastly less controversial in a revised collective-bargaining system in which union-employer negotiation across industries (as opposed to industry-wide or firm-wide negotiation) is encouraged and in which government actively ensures that concerns of the larger society in expanded employment, international competitiveness, and price stability are respected.

Gould's views of why society should be concerned about labor and labor organization, while unobjectionable, are limited in scope. He fails, for example, to address fundamental questions about how to determine the overall return to labor. His focus on labor and labor organization is largely limited to an analysis of the value of collective-bargaining as a process that facilitates worker participation in decisions affecting their environment. Unions exist, in Gould's view, to provide an array of workplace protections ranging from job allocation based on seniority to protection against arbitrary discharge. Commenting on recent case law developments in the wrongful-discharge area, Gould suggests that protections negotiated through employer-union bargaining are often superior in their design to the judicially or legislatively imposed substitutes that sometimes emerge when unions are absent. Finally, Gould believes that unions perform a social service to all workers when they exert their political power to back social-welfare and civil rights laws.

On the other side, Gould acknowledges certain negative aspects of labor organization in its present form, such as the "monopoly wage effect" of industry-wide unions and the "undesirable consequences for resource allocation"[11] of that wage effect. He also recognizes the potential for cost-

11. Gould, supra note 1, at 34. The "monopoly wage effect" refers to the fact that when a union organizes an entire industry, it controls the supply of industry-specific labor. As a consequence, the union can force the industry wage level significantly above the competitive wage level. In the absence of competition from abroad, the higher wage costs will be reflected in the prices of the industry's products.

A competitive economy allocates goods and services on the basis of their respective

push inflation and the disruption resulting from prolonged strikes or labor unrest.[12] These matters pose challenges for the design of the labor law of the future. Unfortunately, Gould does not grapple with these challenges in this book.

We should approach labor law reform with both an awareness of the problems to which earlier Congresses responded and a sensitivity to the problems of today. The primary articulated reason for the NLRA was to facilitate industrial peace, thereby avoiding disruption of the production process.[13] The legal protection of organizing behavior and of the right to strike were means of fostering collective bargaining and, paradoxically, of reducing labor's need to resort to strikes.

Another major reason for enacting the NLRA was to route more income to the classes who would spend more and therefore increase demand.[14] Society surely ought to be concerned that the working class prosper, but the reasons behind the NLRA are now obsolete. In the 1930s, the perceived problem was that American society spent too little and saved too much. In the 1990s, the opposite is true. Moreover, the adversarial model on which the NLRA is built may no longer be the best way to facilitate labor peace. We need to rethink the basic assumptions upon which our labor law is premised.[15]

Although Gould admits that the NLRA's rationale may be wanting,[16] he only partially responds to these matters. He would amend the law to allow quality work circles and other forms of labor-management cooperation on the plant floor and would like to see a broad transformation in labor relations away from the highly adversarial traditional model. He looks to European and Japanese institutional and customary practices,

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prices. When a union is successful in forcing the industry wage level significantly higher than the competitive level and the prices of that industry's products reflect those high wage costs, fewer such goods will be purchased. In this manner, the "monopoly wage effect" of industry-wide unions distort the allocation of resources.

12. Id. at 32. Cost-push inflation results when higher wage costs force prices to rise. Sometimes this occurs in a spiral: increasing wage costs force up prices. Higher prices induce unions to demand higher wages.

13. 29 U.S.C. § 141(b) (1988); NLRB v. Hearst Publications, Inc., 322 U.S. 111, 125, 128 (1944); NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 45 (1937).

14. *See* National Labor Relations Act, ch. 372, § 1, 49 Stat. 449 (1935) (current version at 29 U.S.C. § 151 (1988)) (referring to this objective); *see also* S. Rep. No. 573, 74th Cong., 1st Sess. 3-4 (1935)(same); 79 Cong. Rec. 7567-68 (1935)(same); 78 Cong. Rec. 9061, 12,018 (1934) (describing the same objective).

15. The present law is based upon the following assumptions common to the 1930s: The domestic market is largely isolated from the effects of international competition; mass production of goods of medium-range quality will guarantee success in the market; and the U.S. economy will benefit from a diversion of savings into consumption. As pointed out in text, the environment in which labor law operates has changed enormously since the 1930s. Today, we need a labor law designed to operate in a world characterized, inter alia, by rapid technological change and intense competition.

16. Gould, supra note 1, at 31.

but finds these have little to offer to the North American context.[17] Gould thus offers little hope for bringing about this transformation in the United States.

This reviewer suggests that, first, an affirmation that the working classes are entitled to a "fair" share of this society's productivity might aid our approach to the basic issue of labor's role in the economy. Such an open-textured statement is not highly controversial; controversy arises in the identification of the content of fairness and in the means for determining fairness. Nevertheless, initially casting the task in terms of fairness would help us to follow the lead of John Rawls' social contract analysis.[18] Under the Rawlsian approach, social and economic inequalities are justified insofar as they help to raise the absolute level of the working class's well-being and to transform the underclass into a prosperous working class.[19] The problem with this type of analysis, Gould might respond, is that there is no standard for determining what constitutes a fair share. Hence, labor's return must be determined in the collective bargaining process by the relative strengths of the parties. Moreover, the bargaining process absolves the government from responsibility for the results and thus contributes to political stability. Experience shows, however, that society does indeed have an interest in the results of the bargaining process, and that, accordingly, it must accept some responsibility. Indeed, society's interest in the process and results of bargaining has always been acknowledged in one way or another; as noted above, Congress designed the Wagner Act in part as an income redistribution measure.

The problems of the 1990s differ from those of the New Deal era. The manufacturing sector of the American economy increasingly competes in world markets and is subject to foreign competition in its home markets. American society will prosper only as its products and services succeed in the global marketplace. In this intensely competitive international environment, labor's interests coincide with employers as never before. This is the context of the new model of labor-management cooperation; cooperation in fostering productivity is essential to economic success. Yet the labor relations model spawned by the NLRA in a largely insulated domestic market has not only been an adversarial model, but has failed in other ways to foster productivity and competitiveness.

Under the NLRA, industry-wide unions have organized the automobile, steel, textile, and other manufacturing industries. In each industry, collective bargaining agreements between the companies and the union have tended, in past years, to contain identical terms. In good years,

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17. Id. at 120.

18. John Rawls, A Theory of Justice (1971).

19. *See* William J. Wilson, The Truly Disadvantaged: The Inner City, the Underclass, and Public Policy 122-24, 143-46 (1987) (viewing employment opportunities as the primary need of the black poor).

the industry-specific unions sought increased compensation on an hourly-wage basis, which gradually transformed the profits of the most productive industries into increasingly high hourly labor costs. In economic downturns, wages were not adjusted downwards. The burden of the downturn was felt in layoffs imposed upon the workers with the least seniority. The system operated to ratchet money wages up to increasingly higher levels and to provide effective lifetime job security to workers with the greatest seniority.[20]

This system has worked perversely in several ways. First, efficient industries have been transformed over time into high wage-cost industries. This effect was muted when American manufacturing firms competed primarily in the domestic market where they all experienced the same labor conditions. In a world of global competition, this effect transforms comparative advantages initially held by American manufacturers into comparative disadvantages with resulting injury to firms and their labor forces.[21] Professor Junichi Goto shows that the differential between the wages of auto workers and the general manufacturing wage rate within the United States is significantly higher than the comparable differential in Japan. He explains how that larger differential has significantly disadvantaged U.S. automobile manufacturers vis-à-vis their Japanese competitors and has created significant structural unemployment in the United States.[22]

Second, the high degree of employment security possessed by the most senior workers combined with an ever-increasing hourly wage rate isolates them from the factors that determine the fortunes of their employers. This fosters a model of adversariness and confrontation in labor relations. Commentators who praise Japanese industrial relations for providing permanent employment often miss the fact that American firms also provide permanent employment to those with the highest seniority. A major difference, however, is that the Japanese system combines employment security with fluctuating compensation tied to the fortunes of the employer.[23] Through this and other means, Japanese workers develop an identification of interest with their employers. The Japanese model thus avoids the traditional workplace hostility that infects American labor relations.

Third, the industrial-union and hourly-wage-bargain model of labor relations leaves out significant sectors of the work force and concentrates the burdens of economic downturns on new entrants into the work force.

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20. *See* Daniel J. Gifford, Redefining the Antitrust Labor Exemption, 72 Minn. L. Rev. 1379, 1420, 1423 (1988) (describing the incentives and operation of collective bargaining as structured in the United States).

21. Id. at 1423-25.

22. Junichi Goto, Labor in International Trade Theory: A New Perspective on Japanese-American Issues *passim* (1990); *see also* id. at 59-61, 130, 135 (identifying the impact of the different auto-worker and general-manufacturing pay differentials in the two nations).

23. *See* id. at 65.

Restrictive employment conditions imposed for the benefit of workers with the most seniority sacrifices employment for the younger generation and other new entrants. Minorities, immigrants, and women, as the newest population segments to enter the workforce, are the first to suffer when a downturn in the business cycle occurs and are generally more likely to be excluded from high-wage manufacturing industries. According to Professor Weitzman, the fixed-hourly-wage model of compensation exaggerates the effects of the business cycle on employment.[24] Moreover, a second trade-off for artificially high wage differentials among industries is greater structural unemployment.[25]

The United States should consider alternative models of labor relations such as those suggested by the European experience. In some countries of Europe, labor is organized across many industries. The metalworkers unions of Germany and Sweden, for example, represent workers in most of the manufacturing industries. Unions with wide membership are more likely to seek wage increases in all, as opposed to particular, industries. At least in Sweden, the unions have historically pursued a "solidaristic wage policy" designed to narrow the wage gap among workers in different industries.[26] Under this policy, the profits of efficient industries are not transformed by the collective bargaining process into differentially higher hourly wages, thereby eroding their comparative advantage in international trade.

Cross-industry unions may be a step towards single-union representation of the work force. A single union representing all workers would drastically change the responsibilities and, consequently, the perspectives of union leaders. The present system operates to skew union-bargaining goals in favor of the most senior segment of each industry's work force with results that are less than socially optimal. A responsibility to represent all workers—including both the employed and unemployed across industries—would shift the union's objectives in the direction of maximizing labor's aggregate return, thus maximizing aggregate output. Rational decisionmaking would move labor and management bargaining towards a participatory model, permitting increasing amounts of compensation in the form of bonuses or profit sharing. Compensation would vary from industry to industry, but not due to rigidly set wage rates. As a result, the market would allocate workers by skills. However, the comparative advantages of efficient industries would be subject to less erosion, and structural unemployment would be reduced.

In some European nations, the government takes an active role in wage negotiations. This may be salutary. During the Kennedy Administra-

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24. Martin L. Weitzman, The Share Economy 42-43 (1984).

25. *See* Goto, supra note 22, at 91.

26. *See* Robert J. Flanagan, Efficiency and Equality in Swedish Labor Markets, *in* The Swedish Economy 125, 130-33 (Barry P. Bosworth & Alice M. Rivilin eds., 1987) (describing the policies of the Swedish unions, including the solidaristic wage policy).

tion the government actively sought, through wage-price guidelines and persuasion, to hold the rate of wage increases to that of growth in productivity. In so doing, the social interest in the wage bargain was acknowledged. This interest lies not only in avoiding inflation (which was the underlying concern of the Kennedy Administration), but also in ensuring that profitable domestic industries remain internationally competitive. Indeed, American workers themselves have a strong interest in keeping their employers prosperous so that they may share in that prosperity. The older adversarial model of labor and management relations emphasizes conflicts in interest and obscures the shared goals of both parties. That model makes it more difficult for labor to participate actively with management in furthering efficiency and improving quality.

In the 1930s, the social interest lay in preserving industrial peace. In the 1990s, the social interest includes expanding economic opportunity for minorities and the poor, increasing labor participation in production decisions, maintaining and furthering the competitiveness of industries producing high-value-added products (because these industries provide high-wage employment), and protecting the economy from wage-push inflation. Both management and labor share these interests. The National Labor Relations Act must be drastically revised to further these manifest social needs.