

Cambridge University Press
978-1-108-47197-8 — A Primer on American Labor Law
William B. Gould IV
Frontmatter
[More Information](#)

A PRIMER ON AMERICAN LABOR LAW, SIXTH EDITION

There are many new realities confronting labor in the United States. Technology is redefining traditional employment, and globalization continues moving manufacturing as well as service jobs to lower-cost jurisdictions. This timely sixth edition discusses the recent political developments that impact American labor as well as new court cases and the social and economic issues American workers are confronting. For union and employer representatives and labor lawyers alike this volume not only describes the labor law system briefly and clearly, but also attempts to further an understanding among workers, unions, and businesses in order to promote an improved working environment. Professor William B. Gould IV brings to this work more than a half-century of experience as a practicing labor lawyer and academic, as well as practical exposure to the relationship between administrative agencies and the public.

William B. Gould IV is Charles A. Beardsley Professor of Law, Emeritus, at Stanford Law School. He was Chairman of the National Labor Relations Board (1994–1998), Chairman of the California Agricultural Labor Relations Board (2014–2017), and Independent Monitor for FirstGroup America from 2008 to 2010. Professor Gould is a critically acclaimed author of ten books and more than sixty law review articles, and in 2011–2012, he was Special Advisor to the Department of Housing and Urban Development on project labor agreements. Named to the first public sector fact finding board under the New York Taylor Law in 1967, Professor Gould has served as Impartial Chairman of the Fact Finding Panel establishing administrative disciplinary procedures between the San Francisco Police Officers Association and the City and County of San Francisco (2018–2019).

Cambridge University Press
978-1-108-47197-8 — A Primer on American Labor Law
William B. Gould IV
Frontmatter
[More Information](#)

Cambridge University Press
978-1-108-47197-8 — A Primer on American Labor Law
William B. Gould IV
Frontmatter
[More Information](#)

A Primer on American Labor Law

Sixth Edition

William B. Gould IV

Stanford Law School



CAMBRIDGE
UNIVERSITY PRESS

Cambridge University Press
978-1-108-47197-8 — A Primer on American Labor Law
William B. Gould IV
Frontmatter
[More Information](#)

CAMBRIDGE UNIVERSITY PRESS

University Printing House, Cambridge CB2 8BS, United Kingdom

One Liberty Plaza, 20th Floor, New York, NY 10006, USA

477 Williamstown Road, Port Melbourne, VIC 3207, Australia

314–321, 3rd Floor, Plot 3, Splendor Forum, Jasola District Centre,
New Delhi – 110025, India

79 Anson Road, #06-04/06, Singapore 079906

Cambridge University Press is part of the University of Cambridge.

It furthers the University's mission by disseminating knowledge in the pursuit of education, learning, and research at the highest international levels of excellence.

www.cambridge.org

Information on this title: www.cambridge.org/9781108471978

DOI: 10.1017/9781108571296

Fifth and Sixth editions © William B. Gould IV 2013, 2019

This publication is in copyright. Subject to statutory exception and to the provisions of relevant collective licensing agreements, no reproduction of any part may take place without the written permission of Cambridge University Press.

Fifth edition published 2013

Sixth edition 2019

Printed and bound in Great Britain by Clays Ltd, Elcograf S.p.A.

A catalogue record for this publication is available from the British Library.

Library of Congress Cataloging-in-Publication Data

Names: Gould, William B., IV, author.

Title: A primer on American labor law / William B. Gould IV, Stanford Law School.

Description: Sixth edition. | New York, NY: Cambridge University Press, 2019. |

Includes bibliographical references and index.

Identifiers: LCCN 2019002043 | ISBN 9781108471978 (hardback) |

ISBN 9781108458894 (paperback)

Subjects: LCSH: Labor laws and legislation – United States.

Classification: LCC KF3369.G68 2019 | DDC 344.7301–dc23

LC record available at <https://lccn.loc.gov/2019002043>

ISBN 978-1-108-47197-8 Hardback

ISBN 978-1-108-45889-4 Paperback

Cambridge University Press has no responsibility for the persistence or accuracy of URLs for external or third-party internet websites referred to in this publication and does not guarantee that any content on such websites is, or will remain, accurate or appropriate.

Cambridge University Press
978-1-108-47197-8 — A Primer on American Labor Law
William B. Gould IV
Frontmatter
[More Information](#)

*For Edward, who always wanted me to write a book that would reach
a large and diverse audience*

Cambridge University Press
978-1-108-47197-8 — A Primer on American Labor Law
William B. Gould IV
Frontmatter
[More Information](#)

Contents

<i>Preface to the Sixth Edition</i>	<i>page ix</i>
<i>Preface to the Fifth Edition</i>	xv
<i>Preface to the Fourth Edition</i>	xxi
<i>Preface to the Third Edition</i>	xxv
<i>Preface to the Second Edition</i>	xxxix
<i>Preface to the First Edition</i>	xxxiii
1. An Overview	1
2. Industrial Relations and Labor Law before Modern Legislation	9
3. The National Labor Relations Act and Related Labor Law	29
4. Unfair Labor Practices	87
5. Establishing the Collective Bargaining Relationship: Organization and Recognition	119
6. Economic Pressure and Bargaining Tactics in the Established Relationship	177
7. Remedies, the Labor Reform Bill of 1978, and the Employee Free Choice Bill of 2009	253
	vii

viii	A PRIMER ON AMERICAN LABOR LAW
8. Dispute Resolution in the Established Relationship	279
9. The Duty of Fair Representation	333
10. The Public Sector	367
11. Public-Interest Labor Law	395
12. Labor in Professional Sports: Collective Bargaining and Dispute Resolution Procedures	491
13. Conclusion	533
Index	537

Preface to the Sixth Edition

The most dramatic changes since the publication of the fifth edition took place at the level of the United States Supreme Court. The High Court delivered an opinion in 2018 which reversed more than four decades of precedent in the public sector and held that nonunion dues-paying employees or nonunion members have a First Amendment right under the Constitution not to pay dues as a condition of employment even though the union is obliged to provide them with the same services and benefits as union members. A 5–4 majority concluded that the previously established demarcation line between dues that are used for purposes germane to collective bargaining and political objectives (the former previously regarded as appropriate and the latter one to which employees would object) made no sense in the public sector because all conditions of employment which are germane are by definition matters relating to the public and public expenditure and therefore dues to which employees could properly object. Indeed, the Court in its landmark opinion, *Janus*,¹ held that the burden was not on the employee to object as had been the case previously, but rather explicit authorization was required before dues could be compelled. The decision will undoubtedly affect union treasuries and union involvement in the political process.

Ironically, the decision was rendered during the year of teacher upheaval in, principally, the so-called “Red” states, where unions have

¹ *Janus v. American Federation of State, County, and Municipal Employees, Council 38*, 138 S. Ct. 2448 (2018). William B. Gould IV, “How Five Young Men Channeled Nine Old Men: Janus and the High Court’s Anti-Labor Policymaking,” 53 *U.S.F. L. Rev.* (2019).

not been strong. The year 2018 saw teacher demonstrations protesting the failure to provide education expenditures in states like West Virginia, Oklahoma, Arizona, and Colorado outside the collective bargaining process and state labor legislation.

Meanwhile, in the private sector, the numbers of states which enacted right-to-work legislation prohibiting “fair share” or union security agreements in the private sector – the analog to the *Janus* decision which creates national right-to-work legislation for the entire country judicially – began to increase. The number of right-to-work states now constitutes 27 jurisdictions and the Court of Appeals for the Sixth Circuit has held that counties and local governments may enact such legislation as well,² a matter sure to come before the Supreme Court in the future.

The second major ruling by the Supreme Court, *Epics Systems, Corp. v. Lewis*,³ constituted bad news for nonunion employees protected by individualized arbitration (in contrast to union-negotiated grievance-arbitration) which, as Justice Ginsburg has said, was “unbargained for.” After the employer promulgation of such procedures, employees were required to waive the right to initiate a class action. Such actions have been the engine for reform in much of the employment relationship as individual actions are frequently not worth the cost of litigation for employees or lawyers. The *Epic Systems*, in an opinion authored by Justice Gorsuch, held that such agreements were valid notwithstanding the National Labor Relations Act’s protection of employee “concerted activity” or group action.

Another key development arose out of the shifting composition of the National Labor Relations Board during the Trump administration. The most significant controversies arose out of Obama Board decisions (some of which have been rendered since the appearance of the Fifth Edition and thus are discussed for the first time here) related to the extent to which franchisors would have responsibility for the conduct of

² *United Auto., Aerospace and Agricultural Implement Workers of Am. Local 3047 v. Hardin County, Ky.*, 842 F.3d 407, 417 (6th Cir. 2016), *cert denied*, 138 S. Ct. 130 (2017); *Contra, Int’l Union of Operating Eng’rs Local 399 v. Vill. of Lincolnshire*, 905 F.3d 995 (7th Cir. 2018).

³ *Epic Systems Corp. v. Lewis*, 137 S. Ct. 809 (2018).

PREFACE TO THE SIXTH EDITION

xi

their franchisees. The Trump Board, which narrowed the circumstances under which franchisors' liability could take place, had to vacate its decision because of the disqualification of one of the Board members who had voted for reversal. This could be a temporary setback as the Board has announced a decision to engage in rulemaking in this arena – but the Court of the Appeals for the District of Columbia subsequently substantially upheld the Obama Board's ruling.⁴ On the other hand, other Obama Board reversals are sure to follow.

Some of the most significant developments took place at the state and local level. In *Chamber of Commerce v. City of Seattle*,⁵ a panel of the Ninth Circuit held that a collective bargaining ordinance for independent contractors was not preempted by the National Labor Relations Act and although, in its opinion, the court concluded that antitrust law barred the enactment of the ordinance, it provided a roadmap for the localities and states which want to enact such legislation. The Supreme Court of California in an important decision adopted a presumption that workers caught up in employee-independent contractor classification disputes⁶ are employees, a decision sure to be tested at the federal level for preemption once again and a reevaluation by both California and state governments elsewhere.

The so-called Fight for \$15, aimed at particular employers and designed to produce state and local legislation on minimum wages, has in fact both (1) obtained some measure of protection under the National Labor Relations Act when employees engage in concerted activity for this objective and (2) helped promote widespread enactment of minimum wage legislation above the federal level where lawmaker activity remained dormant subsequent to the Fifth Edition.

Penultimately, both the women's Me Too Movement, though thus far not mirrored in a substantial increase in sexual harassment litigation, has brought forth new legislation designed to remedy sex discrimination. And

⁴ *Browning-Ferris Indus. of Cal. v. NLRB*, 911 F.3d 1195 (D.C. Cir. 2018).

⁵ 890 F.3d 769 (9th Cir. 2018).

⁶ *Dynamex Operations West, Inc. v. Superior Court of Los Angeles County*, 4 Cal. 5th 903 (2018). William B. Gould IV, "Dynamex Is Dynamite, but Epic Systems Is Its Foil – *Chamber of Commerce*: The Sleeper in the Trilogy," 83 *Mo. L. Rev.* 989 (2018).

sexual orientation discrimination decisions, drawing upon three decades of Supreme Court jurisprudence equating the prohibition of gender life style stereotypes with sex discrimination, has moved most of the federal appellate courts toward the logical conclusion that discrimination against gay workers is unlawful. Undoubtedly the Supreme Court will decide this issue shortly, in the wake of the High Court's 2015 same-sex marriage ruling.

Finally, the Sixth Edition includes a new chapter on collective bargaining and related disputes in sports. The relationship between labor and management in baseball, football, basketball, and hockey remains difficult, notwithstanding the fact that it is not in the interest of the owners to eliminate unions, the presence of which affords them a measure of immunity from antitrust law prohibitions because of the so-called nonstatutory labor exemption. One of the most important and well-publicized disputes has arisen in football where a substantial number of National Football League players have refused to stand for the National Anthem, either kneeling or raising a fist because of racial discord throughout the United States and shooting incidences involving the police and black victims. The dispute became and has been particularly visible because of President Trump's rhetorical intervention, advising the public that the owners should penalize and dismiss the players who engage in such conduct.

In sum, the changes since the Fifth Edition are substantial and the sports chapter, *Labor in Professional Sports: Collective Bargaining and Dispute Resolution Procedures*, has added to the scope of this book.

I thank in particular a number of people who helped me complete this edition. First, the Stanford Law Library which is so prompt and expeditious in providing me with information, cases and articles that I seek on a constant basis. I am extremely grateful to the wonderful, first-rate staff. Special thanks go to George Wilson who gave me generous assistance at all hours on all days.

Second, I am particularly grateful to two research assistant students at the Stanford Law School, David Huang and Neil Damron. Mr. Damron came in toward the end of the project's conclusion and Mr. Huang was involved in most of it from beginning to end.

PREFACE TO THE SIXTH EDITION

xiii

Some aspects of my work as Chairman of the California Agricultural Labor Relations Board (2014–2017) have woven their way into the Sixth Edition as well. Less turbulent than the NLRB, where I served in the same capacity in the 1990s, this work gave me new insights into the status of undocumented workers, covered by a fundamentally moribund law more theoretically muscular than the NLRA.

Finally, I want to thank Eun Sze of the Stanford Law School who undertook a substantial challenge in the organization of this book, and who obtained the permissions as well. Patricia Adan was of help to me as well in preparing some of the materials required by the press. All of these parties have provided enormous help and I am grateful to them for their work in the production of the Sixth Edition.

The dedication remains as it always was from 1982, the date of the First Edition, onward to my youngest son, Edward Blair, now a middle-aged gentleman.

I am grateful to McFarland & Co. for granting permission for *Bargaining with Baseball: Labor Relations in an Age of Prosperous Turmoil*,⁷ *Florida International University Law Review*⁸ and *Stanford Law & Policy Review*.⁹

⁷ © 2011 William B. Gould IV by permission of McFarland & Company, Inc., Box 611, Jefferson NC 28640. www.mcfarlandbooks.com.

⁸ William B. Gould IV, Football, “Concussions, and Preemption: The Gridiron of National Football League Litigation,” 8 *FIU L. Rev.* 55 (2012).

⁹ William B. Gould IV, “Labor Issues in Professional Sports: Reflections on Baseball, Labor, and Antitrust Law,” 15 *Stan. L. & Pol’y Rev.* 61 (2004).

Cambridge University Press
978-1-108-47197-8 — A Primer on American Labor Law
William B. Gould IV
Frontmatter
[More Information](#)

Preface to the Fifth Edition

The pace of developments in the decade since the fourth edition was published in 2004 has been brisk. Perhaps in part because of the continued decline of the organized sector of the economy – organized labor shrank to 11 percent in 2012, constituting slightly less than 7 percent of the private sector – the focus on labor law reform, which had been debated in the 1970s and 1990s, emerged anew between 2007 and 2009. This took the form of the Employee Free Choice Act, which President Barack Obama supported in the 2008 presidential campaign and again subsequent to his inauguration in 2009 – and it was unsuccessful primarily for the same reason that labor law reform did not see the light of day in 1978, that is, the filibuster in the United States Senate, which requires a supermajority of sixty votes to obtain consideration on the merits. Disillusionment with the appointments of President George W. Bush accelerated demand for labor law reform, producing a veritable boycott of the National Labor Relations Board akin to what had transpired in the presidency of Ronald Reagan in the 1980s, as well as greater reliance upon voluntary “card check” agreements between labor and management, which thus far appear to be atypical. The so-called September Massacre of 2007 of labor rights by the Bush Board was part of this piece. The failure of President Bush and the Democratic Senate to agree on new appointees between 2007 and 2009 led to what the Supreme Court characterized as the lack of a statutory quorum, invalidating all of its decisions from 2007 through 2009.¹

¹ *New Process Steel, LP v. NLRB*, 130 S. Ct. 2635 (2010).

Meanwhile, the Obama Board ran into heavy weather with the Republicans in Congress who attacked NLRB rulemaking, some Board decisions, as well as the General Counsel's issuance of a complaint against Boeing² – and, in the process, the inability of the White House to obtain a consensus with the Republican Congress in 2011 produced a round of recess appointments early in 2012.³ In January 2013, a panel of the Court of Appeals for the District of Columbia held unanimously that President Obama's 2012 recess appointments were unconstitutional under the Recess Clause of the U.S. Constitution, which threatened to put the Board out of business, as it had been earlier between 2007 and 2009.⁴

A similar posture was adopted by Republican state governments that enacted unconstitutional legislation purporting to regulate the basis upon which private-sector unions could be recognized. Paradoxically, given domestic legislative antipathy toward organized labor, increased globalization produced arrangements such as that promoted by the British multinational FirstGroup, which established a process, rooted in part in international labor law, for the purpose of resolving so-called freedom-of-association complaints.⁵ Litigation under the 1789 Alien Tort

² James Rosen, "Fight over Boeing's S.C. Factory Erupts onto National Stage," *Fresno Bee*, September 12, 2011; Kevin Bogardus, "Senator Threatened Board Before Boeing Complaint," *The Hill*, November 9, 2011. Indeed Governor Mitt Romney attacked the Board's Boeing complaint as well. Jon Greenberg, "Mitt Romney Attacks Barack Obama over Boeing Plant Question," *PolitiFact.com* (October 14, 2011), www.politifact.com/truth-o-meter/statements/2011/oct/14/mitt-romney/mitt-romney-attack-barackobama-over-boeing-plant.

³ William B. Gould IV, "Crippling the Right to Organize," *New York Times*, December 17, 2011, at A25.

⁴ *Noel Canning v. NLRB*, No. 12–1115 (D.C. Cir. Jan. 25, 2013). See also Charlie Savage and Steven Greenhouse, "Court Rejects Obama Move to Fill Posts," *New York Times*, January 25, 2013; Editorial, "A Court Upholds Republican Chicanery," *New York Times*, January 25, 2013. *Contra Evans v. Stephens*, 387 F.3d 1220 (11th Cir. 2004) (en banc). A more detailed discussion of the decision's impact upon the Board as well as labor and management is contained in Melanie Trotman and Kris Maher, "Companies Challenge Labor Rulings," *Wall Street Journal*, March 9, 2013, at 1.

⁵ William B. Gould IV, "Using an Independent Monitor to Resolve Union-Organizing Disputes Outside the NLRB: The FirstGroup Experience," 66 *Dispute Resol. J.* 46 (2011).

PREFACE TO THE FIFTH EDITION

xvii

Claims Act utilizing international labor law for the purpose of adjudicating extraterritorial labor disputes was another significant development.⁶ Simultaneously, labor law constitutional protection for the right to organize and engage in collective bargaining in Canada and Europe received more attention in the United States.

Meanwhile, in the wake of the 2010 elections, which saw considerable gains for the Republican Party, Indiana became a new right-to-work state in which union security agreements compelling membership as a condition of employment were prohibited in the private sector in that state. And attention was also turned toward the public-employee unions, particularly in Wisconsin, where public-employee collective bargaining legislation, the first of its kind at a state level in the United States, was repealed in 2011, triggering a recall election, which itself failed in 2012. A different result was obtained in Ohio, where a more moderate repeal was repudiated at the polls in a rebuke to Ohio Governor John Kasich. Legislation or ballot initiatives prohibiting the checkoff of union dues for public-sector labor were enacted in a number of states. The most remarkable legislative shift of all was the enactment of right-to-work legislation in Michigan, long considered a bastion of organized labor, particularly given the presence of the United Auto Workers.⁷ All of this recalled the dramatic confrontation between the Republican Party and organized labor that had taken place on the right-to-work issue in the late 1950s in a number of industrialized states such as California.⁸

As immigration became politically contentious and irreconcilable at the national level, state legislatures jumped into the fray, enacting legislation designed to prohibit or exclude undocumented workers. Aspects of

⁶ *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004). This process may be imperiled in 2013 by the Court's grant of certiorari in *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111 (2d Cir. 2011), *cert. granted*, 132 S. Ct. 472 (2011).

⁷ Monica Davey, "Limits on Unions Pass in Michigan, Once a Mainstay," *New York Times*, December 11, 2012.

⁸ A. H. Raskin, "5 of 6 States Beat 'Work' Proposals," *New York Times*, November 6, 1958, at 19.

this were declared to be unconstitutional by the Supreme Court in 2012.⁹ Prior to the Great Recession of 2007–2008 undocumented workers were employed in relatively well-paying jobs in construction as well as unskilled and menial work that citizens and local residents had scorned. Numerous controversies arose over the application of a 2002 Supreme Court ruling involving labor law protection (or lack thereof) for undocumented employees and other statutes.

Penultimately, the law of both arbitration and antidiscrimination began to change as well. In the former arena, the Supreme Court, reviving and utilizing the Federal Arbitration Act of 1925, promoted labor, individual employment, and commercial arbitration, initially relying upon the idea that arbitral expertise in public law allowed private procedures to replicate public-law protection. But in 2011 the Court, in the same breath, in *AT&T v. Concepcion*¹⁰ reversed course and expressed its hostility to class action arbitrations, emphasizing the nonlegal and informal characteristics of arbitration. In the discrimination arena, in 2008 Congress plugged some of the loopholes created by Supreme Court decisions under the Americans with Disabilities Act identified in the fourth edition. Litigation involving age discrimination, pregnancy discrimination, sexual harassment, as well as same-sex harassment and in some circumstances sexual orientation itself brought more attention. President Obama in 2011 eliminated “Don’t Ask, Don’t Tell” in the armed forces and subsequently expressed his support for same-sex marriages.

Finally, in the area of professional sports, where collective bargaining has been well accepted, both football and basketball players had to retreat in the wake of owner-instituted lockouts against them. Hockey, in which a lockout produced the cancelation of an entire season in 2004–2005, witnessed another use of this tactic in 2012–2013, resulting in a shortened season, just as basketball had experienced on two occasions. But in the

⁹ *Arizona v. United States*, 132 S. Ct. 2492 (2012).

¹⁰ 131 S. Ct. 1740 (2011).

PREFACE TO THE FIFTH EDITION

xix

same year as the recent hockey dispute, the National Football League overreached considerably in locking out referees, whose replacements were deemed incompetent by the public.¹¹ The erstwhile bad boys of baseball, involved in a thirty-year war of strikes and lockouts since the early 1970s through NLRB intervention in 1995, continued to enjoy a peaceable relationship, as in 2002 and 2006, carried forward in a collective bargaining agreement in 2011 that was characterized as a model, given the considerable benefits for both sides.¹²

The past decade thus contains a variety of new and important developments. They are described and discussed in this fifth edition, which appears thirty-one years after the first edition's publication.

In completing this fifth edition I relied heavily upon the Stanford Law Library led by Paul Lomio and, particularly, the ever resourceful and effervescent Erika Wayne – the nerve center of the law school and its library. The Law Library team, including others who work with Ms. Wayne, like George Wilson, Rachael Samberg, Sergio Stone, Alba Holgado, and Richard Porter, are the very best in the United States and, most probably, the world. It understates the matter to say that they are extremely invaluable.

I am also indebted to a number of very bright people who have helped me with this fifth edition, in particular Mike Scanlon (Stanford Law School, 2010); Christopher Hu (Stanford Law School, 2013); Alison Jones (Stanford Law School, 2013); Anna Yi (University of California, Davis, School of Law, 2014); Eric Weitz (Stanford Law School, 2014); as well as Suzanne Keirstad of Stanford Law School, who did some of the typing. Mr. Scanlon, as well as my research assistants of a decade ago, Paul Edenfield, Henry Dinsdale, and Melanie Vipond – now distinguished labor lawyers all, in Honolulu; Washington, D.C.; Toronto; and Vancouver,

¹¹ Judy Battista, "The Cost of the NFL's Will to Win," *New York Times*, September 24, 2012, at D2.

¹² William B. Gould IV, "Baseball: A Poster Child of Labor Peace," *Chicago Tribune*, December 2, 2011, articles.chicagotribune.com/2011-12-02/site/ct-perspec-1202-baseball-20111202_1_world-baseball-classic-poster-child-competitive-balance.

respectively – jumped back into the fray and helped me on particular sections of this new edition. I am grateful to all of the above-mentioned extremely talented people.

Finally, I should note that since the fourth edition appeared, I have acted as an Expert Witness for the Province of British Columbia; Santa Clara County, California; and the National Hockey League in both Vancouver, British Columbia, and Montreal, Quebec, in the two most recent lockouts; as an Independent Monitor for FirstGroup America; as Consultant to the Department of Housing and Urban Development; and as an Independent Investigator for the Writers Guild of America West. This work has given me insights and points of view with regard to some of the issues involved in these assignments.

Preface to the Fourth Edition

The period of time between the third and fourth editions constitutes the longest period between any of the editions of this book published thus far. Much of the discussion of the National Labor Relations Act relates to decisions and policy changes instituted by the National Labor Relations Board when I was its Chairman, appointed by President William Jefferson Clinton on June 28, 1993, and confirmed by the Senate on March 2, 1994. As noted in this fourth edition, perhaps the most important development during my tenure was a sharp and unprecedented upsurge in cases brought under the Board's injunctive authority set forth in section 10(j). The focus on the NLRA in this edition is also upon a number of important policy decisions issued during my tenure as well as those submitted to the Board while I was Chairman, but decided only subsequent to my departure. Similarly, there is discussion of Supreme Court decisions involving the National Labor Relations Act both prior and subsequent to my tenure. I have chronicled the events preceding my appointment, between appointment and confirmation, and during my four and a half years as Chairman in *Labored Relations: Law, Politics, and the NLRB – A Memoir*. Insofar as relevant to the work of the National Labor Relations Act, this fourth edition attempts to chronicle only the decisions and policy changes without reference to much of the political drama surrounding them. For the latter, the reader can consult *Labored Relations*.

For the same basic reasons alluded to in earlier editions, union representation during these past eleven years has continued to decline

to 13.5 percent, 9 percent in the private sector, and 37.4 percent in the public sector. As was the case in previous editions, courts of general jurisdiction at the state level have continued to establish job security rights as an exception to the principle that the contract of employment is terminable at will. In the 1990s and at the turn of the century, however, the courts have begun to address employer-devised arbitration procedures designed to substitute that forum for individual claims involving unfair dismissals for courts and jury trials. This constitutes one of the new frontiers of not only judicial decision-making but also the policy debate in the political arena.

As anticipated in the third edition, the Americans with Disabilities Act of 1990 became an important area of litigation. But in virtually all cases, the United States Supreme Court rejected the positions of plaintiffs. In addition to cases involving sexual orientation, some of them arising out of President Clinton's 1993 "Don't Ask, Don't Tell" policy applicable to the military, the number of sexual harassment cases increased enormously, most of them involving alleged harassment of women by men. Much new law was made as a result of the Civil Rights Act of 1991 at both the Supreme Court and Circuit Court of Appeals levels. This was attributable to the 1991 amendments' provision for compensatory and punitive damages triggered by the 1991 Anita Hill hearing relating to Justice Clarence Thomas. Some of the cases involved alleged same-sex harassment. And the Supreme Court's 2003 holding that private homosexual conduct between consenting adults is protected by the Constitution¹ will fuel the campaign to make antidiscrimination laws fully applicable to gay and lesbian people.

Labor conflicts in the professional sports arena continue to be an important part of labor-management controversy. A new comprehensive collective bargaining agreement was negotiated in football and baseball (though baseball did endure a substantial strike, unprecedented in length, during 1994–1995). The basketball owners successfully instituted

¹ *Lawrence v. Texas*, 539 U.S. 558 (2003).

PREFACE TO THE FOURTH EDITION

xxiii

a lockout in 1998–1999, the result of which ushered in new salary cap restraints as part of the agreement in that sport. Collective bargaining agreements were negotiated in women's professional basketball.

The Curt Flood Act of 1998 made the same antitrust standards previously applicable to other sports' labor-management relations apply to the realm of labor activities in baseball, but a 1996 Supreme Court decision narrowed the scope of antitrust law and pronounced the preeminence of labor law in all sports.² However, in 2002, the Major League Baseball Players Association and Major League Baseball were able to resolve their differences by negotiation unlike the case in 1994–1995 when the sport was decimated by a substantial strike.

An important new frontier has emerged as the result of globalization and increased focus on human rights and international labor standards.³ This is the extraterritorial application of American statutes to the conduct of corporations doing business abroad.⁴ Unions, corporations, and nongovernmental organizations are the major participants in this debate which is on the streets (1999 in Seattle is the most prominent illustration), as well as in the courts.

Finally, in 2002, California became a pioneer by enacting the first paid-leave statute in the country, following up on President Clinton's establishment of unpaid leave a decade ago through the Family and Medical Leave Act of 1993. Shortly thereafter, former governor of California Gray Davis signed into law new legislation providing for mediation and arbitration for farm workers – they continued to be excluded from the National Labor Relations Act – when employees were unable to negotiate a collective bargaining agreement.

² *Brown v. Professional Football*, 518 U.S. 231 (1996). Cf. William B. Gould IV, "Baseball and Globalization: The Game Played and Heard and Watched 'Round the World (with Apologies to Soccer and Bobby Thomson)," 8 *Ind. J. Global Legal Stud.* 85 (2000).

³ Robert J. Flanagan and William B. Gould IV, eds., *International Labor Standards: Globalization, Trade, and Public Policy* (Stanford University Press, 2003).

⁴ *Doe I v. Unocal*, 395 F.3d 932 (9th Cir. 2002), *vacated by and rehearing en banc granted by* 403 F.3d 708 (9th Cir. 2005).

In this fourth edition, I am indebted to Stanford Law School students Paul Berks '00, Paul Edenfield '02, Michael Meuti '03, William Adams '04, and Glenn Truitt '05; Carrie Williamson of Boalt Hall School of Law '03; and Timothy Snider of Willamette University College of Law '03 for providing research assistance. Mr. Adams played a particularly important and outstanding role in the latter stages of work on this new edition. I am also grateful to Sarah Preston of the London School of Economics for both outstanding research and the typing of this manuscript, and to Kim Dempsey for typing assistance. Similarly, I am appreciative of the typing done by Mary Ann Rundell at the final stages of this fourth edition.

Preface to the Third Edition

There have been numerous developments since the second edition of this book appeared seven years ago. Inevitably there is a seemingly endless train of litigation before the National Labor Relations Board. The Board now appears to be less ideological and more balanced than at the time of the second edition and thus its decisions and conduct as of the end of 1992 are less controversial than was the case throughout most of the 1980s. Though some of the decisions are significant and thus worthy of attention in this third edition, the shrinking percentage of employees represented by unions in the United States – it is now approximately 15 percent of the work force – has reduced the Board's impact and influence and that of the American labor arbitration system as well.

Deregulation in transportation has produced nonunion competition for the organized sector, and that in turn appears to be primarily responsible for more litigation in the organized sector of those industries. One of the consequences of deregulation is thus the emergence of new precedent under the Railway Labor Act, which covers both railroads and airlines.

Nature abhors a vacuum and individual rights – both of the statutory and common law varieties – have continued to expand for unorganized employees who constitute the vast majority of the work force in the United States. Wrongful-discharge litigation is even more important in this arena than it was at the time of the second edition. Although there have been important state supreme court decisions in jurisdictions like California and Michigan, which have limited employee rights and

remedies, a new line of authority – again, emphasizing the relationship between the unorganized and organized sectors – has sanctioned the filing of wrongful-discharge actions under certain circumstances by employees who are represented by unions and covered by collective bargaining agreements containing clauses that provide for the invocation of arbitration procedures. The complete impact of these decisions has yet to be felt.

Moreover, intertwined with many of the wrongful-discharge common law actions are drug and alcohol testing issues involving dismissals or sometimes simply the institution of new policies that might lead to dismissals. (Unions have been active in protecting such individual rights under both the National Labor Relations Act and the Railway Labor Act as well as in arbitration.) Although Montana has enacted a wrongful-discharge statute discussed in this new edition, no state thus far has fashioned a comprehensive statute in this arena notwithstanding proposals by a California state bar committee in 1984 (the author was cochairman of this committee) as well as more recent ones of a similar nature emanating from the Uniform Law Commissioners. But Congress and the state legislatures have enacted a series of statutes affecting employment relationships – two of the more prominent being the Workers' Adjustment and Retraining Notification Act of 1988 and the Employee Polygraph Protection Act of 1988. The former law modestly emulates legislation and case law already in existence in western Europe and Japan which provides employees with notice, consultation, and other rights in connection with layoffs triggered by economic considerations.

But two of the most important legislative ventures have provided for new forms of protection against discrimination. The Americans with Disabilities Act of 1990 provides far-reaching protection against discrimination in employment for both the physically and mentally handicapped. In October 1991, after two years of bitter dispute, a Democratic Congress and President George Bush agreed upon amendments to Title VII of the Civil Rights Act of 1964 in a new law, the Civil Rights Act of 1991 (sometimes referred to as the Danforth-Kennedy Act). This Act was triggered

PREFACE TO THE THIRD EDITION

xxvii

by a series of Supreme Court decisions in 1989 and 1991 that interpreted civil rights legislation in a narrow fashion and the new legislation was a manifestation of Congress' disagreement with the Court in this arena.

The Civil Rights Act of 1991, however, went beyond reversal of Supreme Court decisions. It allowed for applicants and employees to obtain punitive and compensatory damages already available in racial discrimination and wrongful-discharge actions in sex, religious, and disability discrimination cases. Many believe that the debate about the new law increased the attention given to sexual harassment in the workplace and the Senate Judiciary Committee hearings involving the confirmation of Justice Clarence Thomas to the United States Supreme Court – Justice Thomas was alleged by Professor Anita Hill to have sexually harassed her when she was employed by the Equal Employment Opportunity Commission – triggered the statute's enactment with its newly established remedies for sexual harassment as well as other forms of discrimination.

Although federal legislation and most state laws do not address the issue, more focus is now being provided to discrimination on the basis of sexual orientation against men and women who are homosexuals. In California, where the issue has been particularly prominent, Governor George Deukmejian and Governor Pete Wilson have vetoed legislation that would have prohibited this kind of discrimination in the workplace. (However, in 1992 Governor Wilson signed into law more legislation that is slightly more limited than that which he had previously vetoed.) This, like the kind of discrimination addressed by the 1990 and 1991 federal statutes, will continue to receive attention throughout this decade.

The Family and Medical Leave Act of 1993, signed into law by President Clinton on February 5, addresses issues that possess some relationship to antidiscrimination law. It provides that employers with fifty or more workers are obliged to allow employees to have up to twelve weeks of unpaid, job-protected leave to take care of a newborn or newly adopted child, to take care of a sick child or parent, or because of an employee's own serious health problem. Under fair-employment-practices legislation,

frequently such leaves could be obtained only if it could be shown that the policy was sexually discriminatory.

A particularly interesting development is a consent decree entered into between the United States Department of Justice and the International Brotherhood of Teamsters, which provided for highly detailed governmental supervision of union elections as well as substitution of the secret ballot box direct election procedure for the indirect election of national leaders at a convention. Of course many other labor organizations provide for indirect election of leaders. But the Teamsters' consent decree should not only enable reform inside that union and deal with problems of corruption, it also may have implications for the labor movement and encourage secret ballot box internal union procedures.

While the labor movement has had more than its share of difficulties in the United States in the past couple of decades, one small but highly visible segment has gone from success to success. It consists of the unions that represent professional athletes, particularly the Major League Baseball Players Association¹ and the National Basketball Players Association. These unions have negotiated collective bargaining agreements that have facilitated average compensation in the million dollar range. Even the football players, without a union since their 1987 strike,² have been able to improve their position by virtue of antitrust litigation³ and a new collective bargaining agreement negotiated early in 1993.

¹ The Association was successful in obtaining relief against collusion engaged in by the owners toward player free agency for the 1985, 1986, and 1987 championship seasons. See *Major League Baseball Players Association and the Twenty-Six Major League Baseball Clubs*, Panel Decision No. 76 (Roberts, Chairman, September 21, 1987); *Major League Baseball Players Association and the 26 Major League Baseball Clubs*, Grievance No. 87-3 (Nicolau, Chairman, August 31, 1988); *Major League Baseball Players Association and the Twenty-Six Major League Clubs*, Grievance 88-1 (Nicolau, Chairman, July 18, 1990).

² The football owners were found by the National Labor Relations Board to have engaged in illegal conduct during the 1987 strike. *National Football League Management Council*, 309 NLRB 78 (1992).

³ See Oates, "NFL's Free Agency System Rejected in Antitrust Case," *Los Angeles Times*, September 11, 1992, at A1. Cf. *McNeil v. The National Football League*, 764

PREFACE TO THE THIRD EDITION

xxix

Finally, one of the most important issues in the 1990s and the early part of the next century is likely to be whether the American industrial relations system can become more cooperative rather than adversarial. The Board's 1992 *Electromation, Inc.*⁴ decision is but the first of a number of decisions dealing with the unlawfulness of employer-assisted or -inspired employee committees that operate in a nonunion environment and sometimes where a union can exist as exclusive bargaining representative. This will be an issue that will be discussed both in the courts and in Congress.

I am indebted to Sheila Cohen, Barry Deonarine, Timothy S. Gould, and Henry Y. Dinsdale for research conducted in connection with the third edition, as well as Kathleen Schneider who has not only typed the manuscript but played a major role in the technical problems as well as legal research involved in organizing a newer edition such as this one. Mr. Dinsdale – a distinguished Canadian labor lawyer in his own right and a JSD candidate at Stanford – has been especially helpful in providing me with a number of memos that have served both to update information previously presented in the first and second editions and to address issues covered for the first time in this one.

F. Supp. 1351 (D. Minn. 1991); *Jackson v. National Football League*, 802 F. Supp. 226 (D. Minn. 1992).

⁴ 309 NLRB 990 (1992).

Cambridge University Press
978-1-108-47197-8 — A Primer on American Labor Law
William B. Gould IV
Frontmatter
[More Information](#)

Preface to the Second Edition

There have been a number of significant developments in labor law since 1982, when the first edition of this book was published. In industries confronted with deregulation or with foreign competition, the advent of concession bargaining (coupled, in some instances, with new limitations on management's prerogatives) has changed the labor-management landscape. Numerous decisions – many too inconsequential to be mentioned in a book such as this – have been issued by the National Labor Relations Board (whose composition and outlook changed dramatically before the end of President Reagan's first term) and the Supreme Court. Indeed, the labor movement's disillusionment with the NLRB prompted AFL-CIO President Lane Kirkland to opine about the desirability of repealing the National Labor Relations Act.¹

The decline of the labor movement to approximately 19 percent of the work force has led to unprecedented soul-searching on the part of labor.²

An interesting by-product of the decline of organized labor has been the growth in the importance of the rights of individual employees outside the union environment. Wrongful-discharge litigation initiated by

¹ W. B. Gould, "Mistaken Opposition to the N.L.R.B.," *New York Times*, June 20, 1985, at 31.

² This took the form of an AFL-CIO report, "The Changing Situation of Workers and Their Unions: A Report by the AFL-CIO Committee on the Evolution of Work" (February 1985). See W. B. Gould, "Labor Takes Look at Itself, Finds Unsettling Things," *Los Angeles Times*, March 29, 1985, pt. 11, at 7.

nonunion employees has become the most discussed issue in the field of labor law.

As I have reflected on the changes for this second edition, I have found the comments and criticisms of Reinhold Fahlbeck, Professor of Law at the University of Lund and the Stockholm School of Economics and Visiting Fellow at the Stanford Law School, particularly insightful. Professor Fahlbeck, a Swedish labor lawyer with expertise in American Labor Law, has been both generous and unrelenting, and I am most grateful to him.

I am also grateful to Joseph Costello and Elizabeth Smith of the Stanford Law School for providing material for the notes, and to Mary Ann Loughram and Maxine Emery for their skillful typing.

Preface to the First Edition

The idea of this book grew out of lectures that I gave in the early 1970s at the AFL-CIO Labor Studies Center in Washington, D.C., and at the University of Illinois Institute of Industrial Relations in Champaign, Illinois. The audiences were trade unionists (mostly local officers and shop stewards), and the subject was labor law and labor arbitration. The discussions were lively and the questions stimulating. I became aware that many people had an institutional incentive to learn about labor law, and I quickly realized that the existing literature was not reaching them; in fact there really was no book aimed specifically at such an audience. This impression was confirmed by a series of talks that I gave to similar audiences at the Institute for Industrial Relations at the University of California at Berkeley. My contact with corporate representatives at some of the institute's functions made it clear that both sides of the bargaining table were interested in obtaining a basic outline of the labor law system, one that would not be so encyclopedic as to be intimidating.

In the mid-1970s I began to lecture on American labor law to labor academics, American-studies specialists, trade unionists, employers, and government officials in various countries in Europe, Asia, Africa, and Latin America. In most of these countries I was asked to recommend a book that provided foreigners with an outline of American labor law. My inability to recommend such a book finally induced me to write *A Primer on American Labor Law*. Structured seminars sponsored by the U.S. Department of State and the U.S. International Communications Agency in such countries as India and Brazil and lectures given under

the auspices of the Kyoto American Studies Seminar helped organize my thinking for this book, as did some of my lectures to my Labor Law I classes at the Stanford Law School.

There are other books on American labor law that are more detailed and involved than this one. Readers who wish to go farther should consult the lengthier volumes aimed at university students, such as *Labor and the Law* by Charles O. Gregory and Harold A. Katz (third edition), or those written for American academics and lawyers, such as *Basic Text on Labor Law* by Robert A. Gorman and *The Developing Labor Law*, edited by Charles Morris. Those who desire to explore employment discrimination problems further may wish to consult my *Black Workers in White Unions: Job Discrimination in the United States*. The most encyclopedic text in this area is *Employment Discrimination Law* by Barbara Schlei and Paul Grossman. The best case book aimed at American law students as of this writing is *Employment Discrimination Law: Cases and Materials* by Arthur B. Smith.

A Primer on American Labor Law is more descriptive than analytic. It is intended for those who would not otherwise be exposed to the American labor law system: labor and management representatives, foreigners, neutral parties involved in labor dispute resolution and having a special interest in the United States or industrial relations, general-practice lawyers who occasionally represent a union or a company but are not specialists in the field, students of labor relations and labor law, and even practicing labor law specialists who have some interest in a brief comparison with foreign systems.

Many people have helped make this book a reality. My audiences and classes made me think and rethink my material and its presentation. William Keogh of the Stanford Law School, Robert Flanagan of the Stanford Business School, and the late Norman Amundsen of the University of California's Institute of Industrial Relations read and commented on my drafts. I am grateful to the Stanford Law School students who provided valuable research and note material: Debra Roth, Todd Brower, Alan Reeves, and Karen Snell. I am particularly

PREFACE TO THE FIRST EDITION**xxxv**

appreciative of the work done by Mr. Reeves, who suggested some textual changes and shouldered the major burden of the notes. And it would have been impossible to produce this work without the extremely valuable and skillful typing and organizational work of Clarie Kuball and Mary Enright.

The research for this book was supported by the Stanford Legal Research Fund, which was made possible by a bequest from the estate of Ira S. Lillick and by gifts from Roderick E. and Carla A. Hills and other friends of the Stanford Law School.

Finally, I could not have completed the book without the patience of my wife, Hilda, and my three sons, Bill, Tim, and Ed, during my long absences abroad and in my office at the Stanford Law School.

Cambridge University Press
978-1-108-47197-8 — A Primer on American Labor Law
William B. Gould IV
Frontmatter
[More Information](#)
