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William B. Gould IV
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FOR LABOR TO BUILD UPON

One of the enduring legacies of the United States Civil War is that democracy in the workforce is an essential part of societal democracy. But the past century has seen a marked decline in the number of unionized employees, a trend that has increased with the rise of the Internet and low-paying, gig-economy jobs that lack union protection. William B. Gould IV takes stock of this history and finds that unions, frequently providing inadequate energy and resources in organizing the unorganized, have a mixed record in dealing with many public-policy issues, particularly involving race. But Gould argues that unions, notwithstanding these failures, are still the best means to protect essential workers in health, groceries, food processing, agriculture, and the meatpacking industry, and that the law, when properly deployed, can be a remedy not only for trade union–employer relationships, but also for the ailments of democracy itself.

William B. Gould IV is Charles A. Beardsley Professor of Law, Emeritus, at Stanford Law School. A prolific scholar of labor and discrimination law, Gould has been an influential voice in worker–management relations for more than fifty years and served as Chairman of the National Labor Relations Board (NLRB, 1994–98) and subsequently Chairman of the California Agricultural Labor Relations Board (2014–2017). Professor Gould has been a member of the National Academy of Arbitrators since 1970. As NLRB Chairman, he played a critical role in bringing the 1994–95 baseball strike to its conclusion and has arbitrated and mediated more than three hundred labor disputes, including the 1992 and 1993 salary disputes between the Major League Baseball Players Association and the Major League Baseball Player Relations Committee. He served as Secretary, Labor and Employment Law Section, American Bar Association (1980–81) as well as Independent Monitor for FirstGroup America, addressing freedom-of-association complaints (2008–10). Shortly after the passage of Title VII of the Civil Rights Act of 1964, Professor Gould served as a Consultant to the Equal Employment Opportunity Commission (1966–67) providing recommendations on seniority disputes and conciliation procedures and in 1967 he was a member of the very first Fact Finding Board established under the New York Taylor Law. Gould also served as Special Advisor to the U.S. Department of Housing and Urban Development on project labor agreements (2011–12) and as Independent Reviewer on Equal Employment Opportunity for the Mayor of San Francisco (2020–21). A critically acclaimed author of 11 books and more than sixty law review articles, Professor Gould is the recipient of five honorary doctorates for his significant contributions to the fields of labor law and labor relations.

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For Labor to Build Upon

WARS, DEPRESSION AND PANDEMIC

WILLIAM B. GOULD IV

Stanford University Law School



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This book is dedicated to the memory of those who steered me on to the path of labor law, most notably, the late Kurt Hanslowe and the late Jack Sheinkman.

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Preface

The beginnings of this book are in a number of writing initiatives over the years. The first comprehensive cut that I took at labor policy and reform in the early 1990s in *Agenda for Reform: The Future of Employment Relationships and the Law* (1993) is the most directly relevant – though earlier comparative writing of mine in *Japan's Reshaping of American Labor Law* (1984) had me think carefully about the roots of and assumptions about our system. My years as chairman of the National Labor Relations Board (1994–98) carried some of this thinking into the world of government in *Labored Relations: Law, Politics and the NLRB: A Memoir* (2000). But the Black Lives Matter movement, which assumed a crescendo-like upward movement in the wake of George Floyd's murder in May 2020, took me back to my earlier work in *Black Workers in White Unions: Job Discrimination in the United States* (1977) and my other work in the 1960s and 1970s, which was rekindled by my 2021 *Equal Employment Opportunity Report* for the mayor of San Francisco as an independent reviewer. Some earlier works, “American Amateur Players Arise: You Have Nothing to Lose but Your Amateurism” (2021) in the *Santa Clara Law Review* and my *Bargaining with Baseball: Labor Relations in an Age of Prosperous Turmoil* (2011) are developed further in Chapter 7.

I benefited from a series of talks delivered at the University of Missouri Law School in 2018 under the auspices of Professor Rafael Gely. My speech at Newport, Rhode Island, “The Old Order Faileth: Can Anything Take Its Place?” (Nov. 1, 2019), which was the keynote address under the auspices of the American Arbitration Association and Professor Matthew Bodah, assisted me in developing some of the broad themes relating to law and union organizing contained in this book. So also did a seminar and conference at Princeton University's Law and Politics Department, “The Future of Workers' Rights in America: Bernstein Lecture” (Apr. 11, 2019), organized by Professor Paul Frymer, at which I delivered a paper connecting earlier views with the gig or fissured economy as well as subsequent NLRB, judicial, and trade union developments, which became this book's basic ingredients.

But in a sense this book is based upon much more: my days as a small child and young man when I became acquainted with the cadence, music, and passion of the War of the Rebellion and the work done by the Grand Army of the Republic. I examined this in *Diary of the Contraband: The Civil War Passage of a Black Sailor* (2002). My experience has developed and expanded with what I have seen and learned since I began my legal career as assistant general counsel for the United Auto Workers in Detroit in 1961, and learned the fundamentals of mediation and arbitration under the tutelage of the late Theodore Kheel in New York City. This book is based upon first-hand exposure to labor and management at the negotiation table, in the arbitration hearing room, and in the courtroom over sixty years.

The book contains nine chapters, which are devoted to (1) a historical overview demonstrating the development of the rights of labor, attitudes toward unions by government, and reasons for union decline; (2) the lack of organizational and bargaining focus by unions in the modern era, the connection between this and the inferior economic standards existing in the United States, and what unions can present as a vision to recruit members and participate more directly in the political process; (3) an examination of “American exceptionalism” as it relates to union involvement with both health care and racial discrimination, and the impact of such on union growth; (4) an examination of history and how the crisis of war (the First World War) elevated the strength of labor; (5) the new crises of the Second World War and Korea and how the pandemic might stimulate growth as did those wars; (6) the challenge of the gig economy; (7) the development of the student-athlete movement; (8) labor’s decline in organizing and labor law reform; and (9) a conclusion, with renewed focus upon the pandemic. Generally, developments beyond October 2021 could not be included and discussed. President Biden’s Occupational Safety and Health Act November 2021 emergency temporary standard rule and its rejection by the United States Supreme Court in *National Federation of Independent Business v. Department of Labor*, __U.S.__ (Jan. 13, 2022); *Biden v. Missouri*, __U.S.__ (Jan. 13, 2022) are discussed in Stanford’s Bill Gould on Pandemic Vaccine Mandates at the Supreme Court, January 14, 2022 (<https://law.stanford.edu/2022/01/14/stanfords-bill-gould-on-pandemic-vaccine-mandates-at-the-supreme-court/>).

The writing of this book began just as my labor law class at Stanford Law School was completed in the spring of 2020 and the pandemic’s changes for society and labor were beginning. Extremely able Stanford Law School research assistants were integral to the completion of it – David Huang, Armando Fernandez, Elizabeth Spaeth, and Zijun “Sam” Xu. Messrs. Huang and Fernandez and Ms. Spaeth helped with earlier relevant articles. The bulk of research and organizational assistance on the book itself was provided by Mr. Xu.

The Stanford Law Library was a vital resource, with George Wilson in the lead as he had been so often in the past – as well as the able Taryn Marks. The Stanford Law Library (as well as Stanford Baseball) have been the most important and valuable

feature of my half-century at Stanford Law School. Eun Sze, Valerie Cordova, and Skylar Rios-Merwin were extremely important in the organization of the book.

Much of my early thinking about the book's ideas, particularly relating to union organizing, were stimulated by interviews and conversations with Stewart Acuff, former organizing director and special assistant to the president of AFL-CIO, and Tom Woodruff, former director of organizing and executive vice president of SEIU.

Kathleen Schneider, regional attorney of the NLRB San Francisco office (Region 20) was invaluable with advice and help – and she enlisted her daughter, Jordan Okonkwo, to help with much of the typing. A number of able friends and colleagues read earlier drafts and provided useful and helpful commentary as well: William Abrams of Seattle; Leonard Bierman of Texas A&M University; Jeremiah Collins, formerly of Bredhoff and Kaiser in Washington, D.C.; Kate Dowling of the National Mediation Board in Washington, D.C.; Robert Flanagan of Stanford Business School; Rafael Gely, University of Missouri Law School; Robert Giannasi, chief administrative law judge (NLRB in Washington, D.C.); William Schmidt, former administrative law judge (at both the NLRB, where he was San Francisco chief judge, and the Agricultural Labor Relations Board); Sally Spencer, formerly of the NLRB San Francisco office (Region 20); Paul Spiegelman of Carmel, California; and John Trumpbour of the Harvard Trade Union Program. I am extremely grateful to all these talented people. Of course, I, alone, take full responsibility for any deficiencies in this work.

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