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A Primer on American Labor Law, By William Gould IV (2019)
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left and green political parties that share the aspiration to build a more democratic and egalitarian economy, whether this is labelled anti-capitalist or not, and recognizing the difficulties of becoming incorporated into existing elite projects and overcoming complicit trade union and social democratic actors.

The audience for whom this short (140 pages) book is apparently intended are those who, like him, consider themselves “radical anti-capitalist economic democrats.” The author wants them to work with political entities that challenge the status quo while seeking to put an end to “existing elite projects” and “complicit” trade unions and social democrats. Cumbers presupposes his readers are well versed in these issues because, other than citing some British literature, he says very little otherwise about them.

Most of the literature on “Industrial Democracy” or “Workplace Democracy” focuses on the revision of economic enterprises by way of some combination of collective bargaining and statutory change to worker and community participation in corporate governance. In this book, Andrew Cumbers provides a broader vision of what is required for modern economies to be truly and thoroughly democratized. Unfortunately, he offers only a broad outline and several lightly documented examples of what the final product might look like. This approach has promise but a lot of work remains to be done.

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Note

- 1 See, for example, Isabelle Ferreras (2017) *Firms as Political Entities: Saving Democracy through Economic Bicameralism*, Cambridge: Cambridge University Press; Elizabeth Anderson (2017) *Private Government: How Employers Rule Our Lives (and why we don't*

talk about it), Princeton: Princeton University Press, (both recently reviewed in *R/IR*). See also Rafael and Juan Gomez (2016) *Workplace Democracy for the 21 Century, Towards a New Agenda for Employee Voice and Representation in Canada*, Broadbent Institute; Roy J. Adams (2016) *Economic Democracy Now: Why Liberal Democracy's Best Chance for Survival is the Establishment of Universal, Effective Economic Democracy*, Director's Debate Series, online at <<https://cirhr.library.utoronto.ca/digital-collections/directors-debate-series/>>; Work: Democratize, Decommodify, Remediate, A Manifesto, written by Isabelle Ferreras, Julie Battilana, Dominique Meda and 3000 others, published on line at <<https://global.ilmanifesto.it/democratizing-work/>> and in periodicals around the globe on 15 May 2020; Sharon Block and Benjamin Sachs (2020) Clean Slate for Workers Power, Building a Just Economy and Democracy by, a project of the Labor and Worklife Program of Harvard Law School (online at: <<https://www.cleanslateworkerpower.org/>>).

A Primer on American Labor Law

By William Gould IV (2019) Cambridge: Cambridge University Press, 300 pages.

ISBN: 978-1-10845-889-4.

The latest edition of Professor Gould's primer on American labour law follows the path and theme laid out in the first edition nearly 40 years ago. In response to feedback from both union and employer representatives in the U.S. and government officials, and other industrial relations specialists abroad, Gould set out to write a book providing a basic outline of the American labour law system. The preface contains a summary of significant developments since publication of the previous edition including, for example, the landmark *Janus* decision of U.S. Supreme Court, which held that non-union dues-paying employees or non-union members in the public sector “have a First Amendment Right under the Constitution not to pay dues as a condition of employment”. It also includes a new chapter on collective bargaining and dispute resolution in professional sports.

Chapter 1 provides an overview of key features of the American industrial relations system (including selective comparisons with practices abroad) and Chapter 2 traces the evolution of American industrial relations and labour law leading to the modern era, the *National Labor Relations Act* (NLRA) or *Wagner Act*. For the most part, Chapters 3-7 focus on core elements of the NLRA (administration of the *Act*, union organizing and representation, unfair labour practices, the remedial powers of the National Labor Relations Board (NLRB) and several unsuccessful legislative efforts to revise and update the NLRA). This is followed by a discussion of dispute settlement procedures in rights and interest disputes (Chapter 8) and the duty of fair representation (Chapter 9). Chapters 10-12 examine public sector collective bargaining laws, developments in public-interest labour law since the advent of modern labour legislation (e.g., employment discrimination, occupational safety and health, and the common law of wrongful discharge), as well as collective bargaining and dispute resolution in professional sports. In the concluding chapter, Gould suggests that given "American society is litigious and dynamic and because labor law will evolve and change in the coming years", more attention will likely focus on the deficiencies as opposed to the strengths of the American system. He also anticipates the most rapid change will be in the area of public-interest labour law.

As the foregoing description of the book indicates, the subject matter covered is sweeping and, as a result, this review will focus on three areas. The first area is how well the book achieves its stated objective. Second, I have chosen a few subjects for commentary. The third area considers the current state of American labour law and the prospects for the future.

In the preface to the first edition, Gould's stated purpose was to fill the gap

in the literature and provide an outline of American labour law as opposed to more detailed volumes aimed at university students, academics and lawyers. The aim was to offer a "more descriptive than analytic" approach to the American labour law system, e.g., for those with a "special interest in the United States or industrial relations generally". On this score, the book succeeds, although some readers might find its length (500+ pages) and case citations a little overwhelming. Nevertheless, the author does an admirable job following the historical path of the jurisprudence. The result is, at times, a *detailed primer*. As well, the volume is informed by the author's scholarly background and his administrative experience as Chair of the National Labor Relations Board (1990s) and the California Agricultural Labor Relations Board (2014-2017). The book is well written and meticulously organized. One small quibble: it would have been beneficial to include the subheadings within each chapter in the table of contents.

One cannot help feeling demoralized about the state of the *NLRA* and the plight of American unions seeking to organize new members. Over time, employees' freedom of choice respecting union representation cannot be viewed as free in the face of employer unfair labour practices. The NLRA may have been "modern" at one time, but the politicization of labour policy and the Congressional approval process for appointments to the NLRB represent significant obstacles to meaningful and sustainable labour law reforms. This is especially problematic in a federalist system reflecting the doctrines of federal pre-emption and primary jurisdiction that regulate labor relations under the NLRA. Of note, Canada was at one time the "sibling" of the *Wagner Act*. However, given provincial jurisdiction over industrial relations, labour law evolved and experimentation and innovations flourished, including features

such as card check certification and first contract arbitration, both of which were features of the *Employee Free Choice Act of 2009* that failed to pass in the U.S. This is not to say the Canadian system is without flaws (vestiges of the *Wagner Act* model remain and seem outmoded to the modern labour market). The point is the federalist system seems impervious to reform.

Although the author discusses workers excluded from the NLRA, the employee/independent contractor controversy and the push for a higher minimum wage, it would be interesting to have more information (a “bigger picture”) of the extent to which states (and even municipalities like Seattle) represent the new frontier of American labour law. While recognizing states have jurisdiction over intrastate commerce, to what extent have states/municipalities become a more significant and dynamic second-tier of labour law? If this is the case, the second-tier could provide the impetus for union expansion in the future. My comment is not intended to change the narrative (from “descriptive” to “analytic”), but rather to suggest this labour law issue might be worth mentioning in the future.

The book also benefits from Gould’s candid commentary about certain aspects of the NLRA. Consider for example a landmark U.S. Supreme Court decision classifying the three categories of subject matter for collective bargaining. In general terms, mandatory subjects can be pursued to impasse and non-mandatory subjects may be discussed, but not pursued to impasse (illegal subjects cannot be negotiated). Even assuming there is an underlying logic to a mandatory/non-mandatory dichotomy (a distinction that has not been adopted in Canada), one might reasonably ask whether such a distinction provides clarity or a litigation minefield. Gould candidly acknowledges there are difficulties with such a distinction, including: 1- it can be

hard to assess whether the parties are at impasse; 2- it represents “an indirect method of regulating the substance of the collective bargaining agreement”; 3- the NLRB becomes involved in establishing the parties’ bargaining ground rules; and 4- it is difficult to define mandatory and non-mandatory.

A similar concern about impacting the substance of the collective agreement is found with respect to the concept of the duty to bargain in good faith and regulating bargaining tactics. In discussing the concept generally and General Electric’s Boulwarism tactics in particular, he refers to the “schizoid tendencies” in the NLRA. Gould notes, “the law tries to ride two difficult horses; preservation of the collective bargaining process (which argues for condemnation of Boulwarism) and freedom of contract (which eschews regulation)”.

As if this were not difficult enough, there is the added burden of rising NLRB caseloads and the attendant delays to the administrative process. A further problem is the limited remedial powers of the NLRB to effectively regulate employer unfair labor practices. There is little doubt that employer interference and delaying tactics have contributed to the decline in American unionism in recent decades. The failure of Congress to enact legislative reforms led Gould to conclude: “Clearly, in addition to failing to deter violations of the act, remedies under existing law also fail to compensate the victims of such illegal conduct”. In response to the failure of the NLRA to fully protect the right to union representation, some unions turned to organizing outside the law by negotiating neutrality and card check agreements with employers, a clear indicator they had lost confidence in their ability to successfully organize new members under the NLRA.

Chapter 10 highlights some of the major legal and collective bargaining changes in the public sector. At one time in the history

of public sector bargaining, the primary focus was on strikes and dispute resolution. Gould captures the legal developments signaling harder times for public sector unions in the wake of the Great Recession, the 2010 elections, fiscal crises and austerity measures targeting wages, pensions and health care benefits. As noted above, another major setback for public sector unions was the *Janus* decision affecting the payment of union dues.

Gould notes public-interest law directly affects “the substantive terms of the employment relationship”, but is distinguishable from earlier chapters that largely deal with the balance of power in labour-management relations under the NLRA. As such, it represents the “new frontier” in labour law and may already dwarf “more traditional labor law as the twenty-first century unfolds”. There is ample reason to believe the “new frontier” may expand based on recent events. For example, Covid-19 likely will lead to new safety and health regulations, reforms for long-term care workplaces and front-line workers, and an increase in disputes involving the right to refuse unsafe work. As well, employment discrimination, probably “the most litigated area of public-interest labor law” will be influenced by social developments, e.g., rising racial tensions and the “Me Too” movement.

The new chapter on professional sports is a valuable addition to the sixth edition. It traces the history of professional sports unions, contrasts the “personalities” and militancy of the respective unions, and highlights differences in player compensation schemes across professional sports. Although economic issues always appear to be the focal point of collective bargaining, Gould reviews a broad range of other controversial issues such as personal conduct rules and drug testing. He also discusses two other issues likely to attract future litigation, namely compensation for university athletes and concussion inju-

ries for current and former collegiate and professional athletes. Cheating, e.g., the recent sign-stealing incidents in baseball, represents another frontier for litigation.

On a personal note, the review of the transition from antitrust exemption to collective bargaining in major league baseball omits one important development, namely the pivotal role of Marvin Miller, who became the Executive Director of the players’ union in 1966. In addition to negotiating the first collective agreement in professional sports, he had a huge influence on many of the legal cases discussed in the book, e.g., free agency, and contributed to changes in labour-management relations in other professional sports. Although Miller was blacklisted for many years by the baseball establishment, his achievements were finally recognized when he was inducted into the Baseball Hall of Fame in 2019. The historical significance of Miller’s contribution to professional sports should be recognized in the next edition of the book.

In the final analysis, this book is very readable and should appeal to academics, students, industrial relations practitioners, and anyone interested in the distinct aspects of American labour law.

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In the Name of Liberty: The Argument for Universal Unionization

By Mark R. Reiff (2020) Cambridge:
Cambridge University Press, 432 pages.

ISBN: 978-1-10884-978-4.

In his recently published book, Reiff proposes a case for universal unionization based not on the effects of unionization but on freedom; a defense of universal unionization that is said to be moral rather than consequentialist. In a context of declining unionization rates (in both Canada and the United States) and a rise in “Right to Work”