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# THE WAGNER MODEL AND INTERNATIONAL FREEDOM OF ASSOCIATION STANDARDS

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## |||| INTRODUCTION

I first met Pierre Verge just before beginning my service with the NAFTA labour commission in 1995. Not long after that, Pierre Verge and my own labour law professor at Yale in 1972, Clyde Summers, jointly wrote a penetrating evaluation of the first years of the NAFTA labour side accord, which still serves as the best single analysis of that seminal but flawed instrument linking labour standards and a trade agreement (Summers, Verge and Medina, 1998; Verge, 1999; Verge, 2002). Since then, my understanding of international labour standards and how they relate to labour law in North America has been shaped and enriched by Pierre Verge's writing.

In this essay, I want to examine a question implicit in some of Pierre Verge's work: is the "Wagner model" that underpins both the U.S. and Canadian labour law systems consistent with international norms on freedom of association?<sup>1</sup>

Following this introduction, Section II provides a summary of relevant international standards and creates a context for analyzing the Wagner model. Section III takes up key elements of the Wagner model and how they compare with international norms.

Section IV discusses how specific features of labour law and practice flowing from the Wagner model indeed run afoul of international standards, especially in the United States—not because of intrinsic flaws in the Wagner model, but because of legislative amendments and court decisions that undermine it. Section V offers a defense of the Wagner model and reasons not to replace it with a multiple/minority representation system.

Here is my argument in brief:

Labour law and practice in the United States and Canada often violate international freedom of association standards. The International Labour Organization's Committee on Freedom of Association, an authoritative body that handles complaints against governments, has repeatedly found the United States and Canada in violation of the ILO's FOA norms.<sup>2</sup>

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1. See, among his prodigious output, Pierre Verge, "Réalité juridique du rapport du travail" in Gilles Trudeau, Guylaine Vallée and Diane Veilleux, *Études en droit du travail à la mémoire de Claude d'Aoust*, Cowansville, Yvon Blais, 1995; Pierre Verge and Guylaine Vallée, *Un droit du travail? Essai sur la spécificité du droit du travail*, Cowansville, Yvon Blais, 1997; Pierre Verge, *Configuration diversifiée de l'entreprise et droit du travail*, Québec, Presses de l'Université Laval, 2003; Christian Brunelle and Pierre Verge, "L'inclusion de la liberté syndicale dans la liberté générale d'association: un pari constitutionnel perdu?" (2003) 82 *Revue du Barreau canadien* 712; Pierre Verge, "Inclusion du droit de grève dans la liberté générale et constitutionnelle d'association: justification et effets" (2009) 50 *Les Cahiers de Droit* 267; Pierre Verge, "L'affirmation constitutionnelle de la liberté d'association: une nouvelle vie pour l'autonomie collective?" (2010) 51 *Les Cahiers de Droit* 353.
  2. For discussion of such violations in the United States, see Lance Compa, *Unfair Advantage: Workers' Freedom of Association in the United States*

Does this mean that the “Wagner model”<sup>3</sup> that underpins both countries’ labour law systems is contrary to international standards? No. The essential elements of the Wagner model comport with ILO requirements. But lacunae in the original statutes, subsequent amendments, and interpretation of the law by labour boards and courts (especially in the United States; Canadian authorities have remained more faithful to Wagner principles) mean that many specific features flowing from the model indeed violate international standards. The challenge is to fix those features, not to ditch the Wagner model.<sup>4</sup>

## 1. INTERNATIONAL STANDARDS

### 1.1 Human Rights Instruments

The Universal Declaration of Human Rights and related United Nations covenants, one on civil and political rights and one on economic and social rights, are a starting point for defining international norms. “Everyone has the right to form and join trade unions for the protection of his interests,” proclaimed the UDHR in 1948.<sup>5</sup> The 1966 International Covenant on Civil and Political

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*under International Freedom of Association Standards*, Ithaca, Cornell University Press, 2004; for violations in Canada, see Leo Panitch and Donald Swartz, *From Consent to Coercion: The Assault on Trade Union Freedoms*, Toronto, Garamond, 2003 and ILO decisions cited there.

3. The U.S. National Labor Relations Act (NLRA) and Canada’s federal and provincial labour law systems flow from legislation introduced in the U.S. Congress by Senator Robert Wagner of New York State. It became known as the Wagner Act upon its adoption in the United States in 1935, and the “Wagner model,” which served as the foundation of Canadian federal and provincial labour laws beginning in the 1940s.
4. This essay focuses on the Wagner model as it relates to private-sector workplaces—not the many ways in which federal, provincial, state, municipal, and other public-sector jurisdictions in Canada and the United States have adopted and applied variations of the Wagner model, often in ways that clearly contradict international standards.
5. *Universal Declaration of Human Rights*, GA Res 217(III), UNGAOR, 3d Sess, Supp No. 13, UN Doc A/810, (1948) 71, art 23.

Rights confirms that “Everyone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests.”<sup>6</sup> Its counterpart covenant on economic and social rights confirms “the right of everyone to form trade unions and join the trade union of his choice... the right of trade unions to function freely... the right to strike [...]”<sup>7</sup>

## 1.2 ILO Jurisprudence

These international human rights instruments define workers’ freedom of association at a high level of generality—too general to construct clear legal standards. The International Labour Organization’s Convention 87 on freedom of association and 98 on collective bargaining give them more shape and content. They call for:

- /// Free exercise of the right to form and join trade unions “without prior authorization” – meaning without needing government permission;
- /// Workers’ right to a trade union “of their own choosing”—not one chosen for them by the government or by the employer;
- /// Non-interference by the government or by employers with workers’ exercise of the right to freedom of association;
- /// Protection against acts of anti-union discrimination;
- /// Promotion of voluntary negotiation between workers and employers;
- /// The right to strike as an “intrinsic corollary” of freedom of association.

These are still not sharply defined rules. The ILO has two oversight bodies that interpret and apply the conventions: the Committee on Freedom of Association and the Committee of Experts on the

6. *International Covenant on Civil and Political Rights*, December 19, 1966, 999 UNTS 171, art 22.

7. *International Covenant on Economic, Social and Cultural Rights*, December 16, 1966, 993 UNTS 3, art 8.

Application of Ratified Conventions. They have made thousands of decisions over many decades analyzing and giving specific content to freedom of association conventions.

Strict constructionists insist these are not “decisions” in the usual legal sense. They are rather findings, recommendations, comments, observations and other soft pronouncements, driven by political differences and policy considerations rather than legal principles (Langille, 2007; 2009).

Actually, political differences and policy preferences among conservative, liberal, and middle-of-the-road jurists drive decisions of the Canadian Supreme Court and the U.S. Supreme Court, too. But as courts they can issue binding decisions in national legal systems.

ILO committees can only issue decisions that are more or less authoritative, persuasive, compelling, convincing, etc. in the softer international law sphere. Still, in contrast to many Canadian and American court decisions in which judges meander along preferred policy pathways, ILO committee decisions are narrowly focused on the question presented, tightly constructed, closely reasoned, rhetorically temperate, doctrinally cautious, and otherwise models of judicious judicial analysis. They examine facts in light of norms and decide whether norms were breached—a classic judicial function.

Decisions of the two main ILO oversight committees are authoritative and persuasive for international labour law purposes, at least with respect to Conventions 87 and 98. Those two conventions impose “constitutional” and “customary” obligations on all member countries, whether or not they have ratified them. But without an authoritative interpretation of what the Conventions mean, non-ratifiers like the United States (for both Conventions) and Canada (for Convention 98), which have not transposed the content of the Conventions into national law, would be off the hook for their international obligations.

Brian Langille objects that members of the Committee on Freedom of Association, unlike those of the CEARC, are selected as representatives of the ILO’s three constituencies, governments, employers, and

trade unions, and they are not always lawyers. But there is a positive side, perhaps, in having actors with real-life experience, who may or may not be lawyers, playing a quasi-judicial role handling cases that come before them. In any event, both committees are served by top-quality ILO lawyers who ensure the legal soundness of the committees' work.

Even for ratifying countries, decisions by both the CFA and the CEARC are needed for interpretation and application in the myriad concrete matters which these committees consider. Any well-functioning rule-of-law regime has to provide for a judicial system in which courts interpret the text of laws that cannot possibly anticipate every set of facts that might require their application. In the ILO, it is a quasi-judicial oversight system rather than "courts" as we know them in national systems, but its output is no less judicial.

Decisions by the ILO's oversight committees provide authoritative interpretations of the conventions and indicate with a high degree of precision how they should be applied in practice. But they do not impose "one size fits all" standards on the ILO's 185 member states. The committees clarify the rules, but allow the rules to take different forms in practice.

### |||| 1.3 Living with Ambiguity

The roots of labour law systems run deep in national territory, nourished by each country's labour relations culture and history of social struggles.<sup>8</sup> The ILO has to be flexible and pragmatic, allowing for sometimes wide differences. So, for example, the CFA has left to the discretion of each country "in conformity with national practice and the industrial relations system in each country" whether and how to compel dues payments by represented workers who are not union members. In seeming contradiction, the Committee says

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8. This is axiomatic in comparative industrial relations scholarship; see, for example, Otto Kahn-Freud, "The Uses and Misuses of Comparative Law" (1974) 37 *Modern Law Review* 1 (himself hearkening back to Montesquieu's *Spirit of the Laws*).

“both situations where union security clauses are authorized and those where they are prohibited can be considered to be in conformity with ILO principles and standards on freedom of association.” (International Labour Organization, 2006: para 365)

The United States and Canada diverge between and within themselves on this point, all within the framework of the Wagner Model. Some U.S. states (known as “union shop” states) permit unions and employers to negotiate compulsory dues payments by non-members. Other states (called “right to work” states) prohibit such agreements.

Dues obligations are separate from union membership. No one can be compelled to join a union in the United States or in Canada. However, if the employer agrees (and if such agreement is not prohibited, as in “right-to-work” states), non-union members can still have to pay an amount equal to dues payments by union members. In the United States, non-members who make payments under such contract clauses can request and receive a rebate of the portion of their payments unrelated to collective representation.<sup>9</sup>

Some Canadian provinces require compulsory dues by application of the “Rand Formula,” a union security arrangement requiring all represented employees to pay union dues or “agency fees” equal to union dues if they are not union members (named after a Supreme Court justice, Ivan Rand, who ordered such an arrangement in a famous 1946 decision resolving a strike at Ford Motor Co. of Canada). Other provinces leave the matter to collective bargaining. No province prohibits an agreement on mandatory dues, as in U.S. “right to work” states.

I have often had trade union friends ask; “Can we bring a case to the ILO saying that right-to-work laws violate freedom of association?” And I suppose, without knowing, that the National Right-to-Work Committee might be asked: “Can we file a complaint with the ILO arguing that compulsory dues violate freedom of association?” The

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9. The rebate system is based on a U.S. Supreme Court decision in *Communications Workers of American (CWA) v. Beck*, 487 U.S. 735 (1988).

answer in both cases is: You can bring a case, but you cannot win it, because the ILO leaves this question to national traditions and cultures.

## |||| 1.4 National Differences

I have had conversations with communist and socialist trade unionists in France who are firmly against compulsory dues, seeing them as an infringement of individual rights. For my part, I believe that right-to-work laws interfere with workers' freedom of association, not *per se* but because of how they solidify the anti-union culture that gives rise to them in conservative states where employers dominate the political power structure.

When I was a UE organizer in the 1970s, General Electric was an "open shop" company. The collective agreement did not contain a "union shop" clause requiring union membership and dues, even in states that allowed union shops. But at GE plants in Erie, Pennsylvania, in Schenectady, New York, in Lynn, Massachusetts, and at other big plants in traditional union strongholds, voluntary membership was 95 percent or higher.

Culture mattered, not the content of the law. The union was a force in the community. Young workers knew that the union made it a good place to work. Union stewards swiftly recruited newly hired employees.

In contrast, at the GE plant in Waynesboro, Virginia, the union won an NLRB election in 1969, just in time for a nationwide three-month strike at General Electric. Virginia is a redoubt of Southern anti-unionism in the United States. "Union" is a dirty word in much public discourse, while "right to work" is gospel. About one-third of the GE Virginia workers were brave enough to stay on strike, avoiding a back-to-work debacle. But over the following years the union core remained at one-third, and never reached sustained majority status.



## IIII 2. THE WAGNER MODEL AND INTERNATIONAL STANDARDS

### IIII 2.1 Wagner Model Principles

As with the diametrically opposed law and practice on compulsory dues discussed above, the ILO Committee on Freedom of Association has ruled that contrasting union representation and collective bargaining systems are compatible with the principles of freedom of association (International Labour Organization, 2006: para 950). In one case, one union with majority support in a defined “bargaining unit” enjoys exclusive bargaining rights for all represented employees in the unit. In the other case, multiple unions can bargain for members with or without majority status among employees in the putative “unit.”

The Wagner model in the United States and Canada reflects the majority union-exclusive representation system, sometimes under the ungainly label “majoritarian exclusivity.” But this just captures two of its several core elements. The Wagner model embraces the following principles:

- // freedom of association;
- // *protection* of freedom of association;
- // trade union independence;
- // workers’ choice of union representative;
- // workers’ ability to change or decertify unions;
- // a defined “appropriate” bargaining unit;
- // majority rule;
- // “certification” by labour law authorities;
- // exclusive representation;
- // a duty to bargain;
- // the right to strike for a new collective agreement.

How do these core features of the Wagner model comport with international standards on workers' freedom of association?

### |||| A. *Freedom of Association*

All workers in Canada and the United States enjoy freedom of association vis-à-vis the state. Workers can form unions, hold meetings, elect leaders, pay dues, hire staff, publish newsletters, build a website, host conferences, importune employers, petition the government, join rallies, marches, and other forms of protest, support candidates for public office, ally themselves with political parties, join national and international union federations, and otherwise act collectively to defend their interests. Government authorities cannot arrest, imprison, or take other action against workers or union leaders for such associational activity.

The Wagner Act and its Canadian counterparts reaffirm these basic rights. The Wagner Act declares, "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities..." Canada's federal labour code puts it even more pithily: "Every person is free to join a trade union of the person's own choice and to participate in its lawful activities."<sup>10</sup>

Federal, provincial, and state supreme courts in Canada and the United States have repeatedly recognized a "rights" foundation for workers' freedom of association. As the U.S. Supreme Court said when employers challenged the constitutionality of the Wagner Act, "Employees have as clear a right to organize and select their representatives for lawful purposes as the [employer] has to organize its business and select its own officers and agents."<sup>11</sup> Even the *Labour Trilogy* decisions of the Supreme Court of Canada, viewed at the

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10. Subsidiary questions whether workers have a constitutional basis for collective bargaining, strikes, boycotts, pickets, and other activities that implicate interests of employers, the community, and the public raise many complications, discussed below.

11. *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937).

time as anti-labour and later overturned in certain respects in *B.C. Health*, declared that “the Charter has reaffirmed the historical importance of freedom of association and guaranteed it as an independent right.” This is one positive element of the otherwise disturbing *Trilogy* that has not been called into question in later decisions.<sup>12</sup>

### |||| B. *Protection of Freedom of Association*

A key question is whether labour law *protects* the exercise of the right to freedom of association. Exercising the right without protection nullifies the right. The police might not arrest workers for union activity, but if employers can fire them with impunity, workers dare not organize. To guard against reprisals for associational activity, the state must protect employees by prohibiting such reprisals and providing a legal mechanism for recourse and remedy.

Under the Wagner model, U.S. and Canadian labour laws define and prohibit “unfair labour practices,” most notably 1) interference with union activity, 2) discrimination (such as dismissal) because of union activity, and 3) refusal to bargain with a certified trade union. They also create administrative tribunals that can act on claims and order remedies for violations, such as reinstatement and back pay for unlawfully dismissed employees, backed up by contempt of court power.<sup>13</sup>

U.S. law is even more favourable to workers than are ILO standards (and, on this point, more than Canadian law) because it protects *any* form of “concerted activity... for mutual aid and protection,” not just union activity. One worker who goes to her boss and says “I need a pay increase” can be fired; two workers who go together and say “we need a pay increase” are protected. If the boss fires them,

12. *Reference re Public Service Employee Relations Act (Alberta)* [1987] 1 S.C.R. 313.

13. Exclusion of some categories of workers from protection of freedom of association is a glaring example of shortcomings in North American labour law, to be discussed below.

they can file an unfair labour practice charge and win reinstatement and back pay.<sup>14</sup>

Workers need not have any intention of forming a union. They might even be ardently anti-union. It does not matter; they are “protected” under the Wagner Act.<sup>15</sup> In other words, U.S. law protects not only the relatively small portion of the labour force represented by unions or seeking to form a union at any given moment, but also tens of millions of private-sector workers everywhere whenever two or more of them stick together to improve their working conditions.

The reach of this “concerted activity” protection is reflected in a new spate of social media cases in which workers discussed working conditions on Facebook or Twitter and their employers fired them. The National Labor Relations Board ordered reinstatement and back pay for victims because they engaged in protected concerted activity under the NLRA (distinguishing cases in which the Facebook posting or Twitter comment was merely “individual griping” with no group aim or crossed bounds of decency).<sup>16</sup>

The importance of this concerted activity protection is also reflected in a recent NLRB decision that the Wagner Act overrides clauses in mandatory arbitration agreements in non-union workplaces that prohibit class actions by aggrieved employees. Many U.S. employers require workers unrepresented by unions to sign such mandatory arbitration clauses, waiving their right to bring an employment lawsuit to federal or state courts, as a condition of getting or keeping a

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14. I know that delays, weak remedies, difficulties in litigating mixed-motive discharges, and other problems plague the unfair labour practice system. But these problems are not inherent in the Wagner model.

15. It is not clear whether the same result can be inferred from CFA and CEARC decisions. Since only trade unions can file complaints to these ILO supervisory bodies (or employers or governments, but they would not normally have reason to file such complaints), the decisions only speak to workers’ trade union activity.

16. For an overall analysis, see NLRB Office of the General Counsel, *Memo-randum GC 12-05*, May 2, 2012. The NLRB recently created a special website devoted to protected concerted activity in response to frenzied reactions among employers, workers’ organizations, and the media, at <http://www.nlr.gov/concerted-activity>.

job. Such clauses typically prohibit any form of class action before an arbitrator.<sup>17</sup> The NLRB ruled that class actions are a form of protected concerted activity. The employer community is in an uproar, furious that unorganized employees would enjoy such protection, and has challenged the Board's decision in court (Dubé, 2012).

Social media cases have not yet come to the attention of the ILO oversight committees (just wait). But the NLRB's decision to apply Section 7 protection to non-union workers in their use of social media is at least consonant with Convention 87 standards on freedom of association, and may even go above and beyond the convention.

### ||| C. Trade Union Independence

Unions in the United States and Canada jealously guard their status as workers' organizations uncontrolled by government and uncontrolled by employers. Under the Wagner model, labour law in both countries prohibits employer formation or domination of trade unions. Section 8(a)(2) of the National Labor Relations Act in the United States is severe in this regard. It effectively prohibits many forms of labour-management consultation and cooperation schemes as stalking horses for despised "company unions" meant to prevent genuine union formation.<sup>18</sup>

American and Canadian trade unions are close to friendly political parties—the Democrats in the United States, the New Democratic Party in Canada. But they are not organically attached, as happens in many other countries. And they are often critical, as in the U.S. presidential campaign when trade unions withheld millions of dollars normally provided to support the Democratic National

17. *D.R. Horton Inc.*, 357 N.L.R.B. No. 184 (2012).

18. For comprehensive discussion, see Kenneth G Dau-Schmidt, "Employee Voice Symposium: Principal Paper: Promoting Employee Voice in the American Economy: A Call for Comprehensive Reform" (2011) 94 *Marquette Law Review* 765; Laura J Cooper, "Employee Voice Symposium: Responses and Critiques: Lessons from History: Letting the Puppets Speak: Employee Voice in the Legislative History of the Wagner Act" (2011) 94 *Marquette Law Review* 837.

Convention because party leaders chose to hold the convention in Charlotte, North Carolina, a right-to-work state where political elites are harshly anti-union and Charlotte itself is the epicentre of North Carolina anti-unionism (Mason, 2012: A10).

#### |||| *D. Choice of Representative*

Within the framework of the Wagner model, workers can choose any union to represent them as a bargaining agent. In many countries, workers in certain companies or industries can only have the one union prescribed by law for that type of company or sector—only one electronics union for electronics workers, only one apparel union for apparel workers, only one mine union for mineworkers, and so on, even if workers would rather have another union in which they have more confidence.

In Canada and the United States, the United Steelworkers can represent hospital staff, the Canadian or United Auto Workers can represent insurance company employees, the Teamsters can represent auto parts makers, predominantly public-sector unions can represent private-sector workers and vice versa, and so on in almost infinite permutation. In other words, workers can have the union “of their own choosing” which they feel will do the best job for them, not the union foisted on them by law.<sup>19</sup>

#### |||| *E. Changing or Decertifying Unions*

The Wagner model precludes a phenomenon prevalent in many countries: monopoly unions that can never be displaced, no matter how ineffective they are or how overwhelmingly workers want to rid themselves of the union and get better representation. In the United States and Canada, unions may hold exclusive bargaining rights because at a certain point a majority of employees chose them. But workers are entitled to change their minds.

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19. At my own university, the United Auto Workers represent hourly-paid maintenance workers, hotel workers, and food service workers, as well as the local municipal bus drivers.

The Wagner model provides legal avenues to change union representatives from one to another, or to decertify a union with which workers have become disenchanted. Not willy-nilly; to promote stability in labour relations, U.S. and Canadian labour law jurisdictions set up procedural requirements to decertify or displace unions. But the hurdles are not insurmountable for workers determined to get rid of an incumbent union. In 2007-2011, more than 1,300 NLRB decertification elections took place in the United States. Unions won 562 of them to retain bargaining rights, but lost the rest.<sup>20</sup>

### |||| F. Bargaining Unit

A linchpin of the Wagner model is the concept of the “appropriate bargaining unit,” a group of employees in a workplace entitled to choose a representative and whose interests, under the standard legal test of “sufficient community of interest” for defining a bargaining unit, will be represented by the union.<sup>21</sup> U.S. and Canadian labour laws empower labour law authorities to define such a bargaining unit of employees. Authorities look for enough community of interest among workers in a given workplace to be an effective bargaining group at a single negotiating table instead of many small, fragmented unions, each with special needs and demands, at multiple bargaining tables.

Employers and unions can agree on employees to be included in a bargaining unit, but they often disagree. Unions tend to prefer larger bargaining units (called “industrial” or “wall-to-wall” units) to enhance bargaining strength. Employers often resist them, arguing insufficient community of interest in the larger group of employees.

But this is not an iron rule. In the United States, roles are reversed in two key sectors: restaurants and retail stores. A recent NLRB decision favouring unions’ efforts to organize single establishments<sup>22</sup>

20. See BNA *Daily Labor Report*, “NLRB Decertification Elections 2007-2011,” June 7, 2012.

21. “Appropriate” and “sufficient” are mostly undefined, so disputes and adjudications keep coming.

22. *Specialty Healthcare & Rehabilitation Center*, 357 N.L.R.B. No. 83 (2011).

has provoked a furious legal and legislative response from national restaurant chains and national store chains, the latter led by Wal-Mart (Dubé, 2012). They insist that only a nationwide bargaining unit of all their restaurants or stores is an appropriate unit. Because of the overwhelming logistical difficulty of organizing hundreds or thousands of establishments at one time, unions want an appropriate unit at the single restaurant or store where they can gain majority support.

Each side calculates the effect on majority status of including or excluding a subset of employees in a workplace and adjusts its position in light of the desired result. Unions might try to have a group in which anti-union sentiment prevails excluded from the bargaining unit, while employers might want to include them in an effort to prevent the union from gaining majority support. For example, many disputes involve the status of “group leaders” who would be in the bargaining unit if they are not considered supervisors, but excluded if they are supervisors.

Majority status might hinge on whether such “group leaders” are included in the bargaining unit or not. In the end, labour law authorities resolve such disputes—the National Labor Relations Board in the United States (subject to appeals to federal courts), and federal and provincial labour boards and commissioners in Canada (with much more constricted right to judicial review).<sup>23</sup>

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23. In the United States, bargaining unit determinations by the NLRB are not directly appealable to the courts. Instead, judicial review of bargaining unit determinations is triggered by a so-called “technical refusal to bargain” under the following scenario: 1) the employer and the union disagree on the composition of the bargaining unit (typically, a dispute revolves around employees whom one side or the other insists are “supervisors” who must be excluded from the bargaining unit, while the other side argues that they are really employees who lack supervisory status—note that either side might argue either position, depending on its strategic assessment of how the determination will affect majority status); 2) the NLRB decides the bargaining unit dispute in the union’s favour; 3) the union wins an NLRB election and the NLRB certifies the union as the bargaining representative for the unit, meaning the employer must come to the bargaining table and bargain in good faith with the union; 4) the employer refuses to bargain (the “technical refusal”); 5) the union files an unfair labour practice charge based on the employer’s refusal to bargain; 6) the NLRB automatically finds



### |||| *G. Majority Rule*

Under the Wagner model, U.S. and Canadian laws require unions to be chosen by a majority of employees in a bargaining unit (usually in a single workplace or in a single company) whereupon labour law authorities will “certify” the union. Labour law authorities only certify a union that demonstrates majority support in a defined bargaining unit.

A secret ballot election is often the means of confirming majority status, but in some circumstances unions can show majority support by signed membership cards, petitions, and other methods. Correspondingly, labour law authorities will not certify minority unions.

This does not mean that minority unions cannot organize unions and seek to bargain with employers. It only means that workers without a majority cannot gain certification and the protections that accompany certification under the Wagner model. This is an important point in light of criticisms that the Wagner model’s “majoritarian exclusivity” violates ILO standards (Adams, 2008).

### |||| *H. Certification*

By certifying a union as the bargaining agent for workers in a bargaining unit based on majority status, labour law authorities confer certain protections for the employees and their union. The union speaks for all employees in the bargaining unit. The employer must “recognize” the union and negotiate in good faith with the union. Refusal to bargain is an unfair labour practice.

The union’s representative status and bargaining rights are insulated for a certain period of time (usually one year) against challenge

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that the employer acted unlawfully, and orders the employer to bargain; 7) now the employer appeals the unfair labour practice ruling to the federal court of appeals; and 8) the appeals court reviews the underlying dispute over the bargaining unit and whether the NLRB properly applied the “community of interest” standard, and decides whether to uphold the Board’s bargaining order or to relieve the employer of the bargaining obligation. All this takes years to unfold, frustrating employees’ freedom of association rights all the while.

by another union or a move by anti-union employees to decertify the union. This gives time to reach a collective agreement without the distracting fear of decertification or a “raid” by another union looking to poach its members.

In some Canadian jurisdictions, a certified union has recourse to mandatory arbitration to establish a first collective agreement if negotiations across the table are unsuccessful. U.S. trade unionists and congressional allies sought a similar “first-contract arbitration” provision in the proposed Employee Free Choice Act, a bill introduced in 2009 when President Obama took office. However, the bill stalled in Congress and died when Republicans took control of the House of Representatives in the 2010 elections.<sup>24</sup>

### |||| I. *Exclusive Representation*

In the Wagner model, U.S. and Canadian laws make a certified union the exclusive representative of all employees in the bargaining unit, whether or not they are union members, whether or not they support the union, whether or not they would prefer to bargain individually or in sub-groups for a better deal than they think the union will get them, and so on. A dissident minority is represented by the certified union, at least until they can convince their co-workers to create a new majority in favour of a different union or in favour of decertifying the union.

If 51% of employees choose union representation, and 49% are fiercely anti-union and want no part of it, too bad for them. The union is their bargaining agent, and their terms and conditions of employment are those negotiated by the union. Similarly, if the 49% are members and ardent supporters of a different union, too bad for them, too. The 51% union is their bargaining agent, and the 49% union cannot bargain on their behalf.

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24. For discussion, see Sara Slinn and Richard W Hurd, “First Contract Arbitration and the Employee Free Choice Act: Multi-Jurisdictional Evidence from Canada” (2011) 18 *Advances in Industrial and Labor Relations* 41.

However, even where a majority-selected union holds exclusive bargaining rights, represented employees are free to form and join another union or unions without reprisal. Members of a minority union can organize among co-workers to have their union displace an incumbent union if they can gain majority support for their union. Under Section 9(a) of the NLRA, a minority union can also present grievances to the employer and have the grievances adjusted without the intervention of the certified union, as long as the results are not inconsistent with the collective bargaining agreement.

### |||| *J. Duty to Bargain*

When a union is certified, the coercive power of the state forces the employer, willing or unwilling (and in many cases unwilling, where an employer mightily resisted his employees' organizing effort), to the bargaining table. The same coercive force requires him to bargain with the union in good faith, defined (in NLRB and court decisions, not in the statute) as having an open mind and sincere desire to reach an agreement. If an employer fails to meet this legal obligation, the union can file an unfair labour practice charge alleging bad-faith bargaining.

“Open mind” and “sincere desire” are imprecise standards not easily capable of proof or disproof. This leads to complicated litigation in refusal-to-bargain unfair labour practice cases, where openness and sincerity must be inferred from the parties' conduct. But these cases proceed and employers are often found guilty. The remedy is weak: usually an order to return to the bargaining table and try again, this time in good faith. But the employer is on notice, and one who adamantly refuses to bargain can be found in contempt of court and liable for large back pay liabilities.

At the same time the Wagner model does not require the employer to agree to any particular union proposal. The employer is entitled to engage in “hard bargaining” for proposals and counterproposals unpalatable to the union, as long as he does not engage in “surface bargaining”—going through the motions of bargaining with a hidden goal of never reaching an agreement in order to get rid of the union when employees become frustrated and dissatisfied.

Locating the line between hard bargaining and surface bargaining is just as challenging as the “open mind” and “sincere desire” problem. Still, labour law authorities will scrutinize bargaining conduct for evidence of surface bargaining and impose significant back pay remedies or other “make whole” measures upon finding violations.

On the face of it, this compulsory bargaining feature of the Wagner model goes beyond ILO Convention 98’s requirement that bargaining be “voluntary” on both sides. It greatly strengthens unions’ hands. Indeed, U.S. or Canadian employers might well bring a complaint to the ILO Committee on Freedom of Association, arguing that the Wagner model *violates* Convention 98 because it forces employers into involuntary negotiations.<sup>25</sup>

### |||| K. Right to Strike

ILO Conventions 87 and 98 do not expressly mention the right to strike. But the right has been carefully considered in many cases before the Committee on Freedom of Association and other supervisory bodies for many decades, and is now firmly established in ILO jurisprudence as an essential element of freedom of association—“an intrinsic corollary of the right of association protected by Convention No. 87.”<sup>26</sup>

Consonant with ILO standards, union-represented American and Canadian workers in the private sector have a relatively unfettered right to strike for a first collective bargaining agreement in a previously non-union workplace, or when a prior contract expires and

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25. As far as I can tell, employers have never brought such a case.

26. See International Labour Organization, *Freedom of association and collective bargaining: General survey of the reports on the Freedom of Association and the Right to Organise Convention (No. 87), 1948, and the Right to Organise and Collective Bargaining Convention (No. 98), 1949*, paragraph 194 (1994). At the June 2012 International Labour Organization Conference, the employer group mounted a constitutional challenge to the ILO’s position on the right to strike, arguing that the subject is outside the competence of the Committee of Experts. See “Employers’ Statement in the Committee on the Application of Standards of the International Labor Conference on 4 June 2012” (on file with author). The question remains unresolved as of this writing.

workers seek improvements (or resist concessions) in a new contract. In each country, however, strikes while a collective agreement is in effect are severely constricted. Most collective bargaining agreements in the United States contain a no-strike clause prohibiting a strike while the contract is in effect. Not all, however. Some contracts do not prohibit strikes over grievances or strikes over selected subjects, such as health and safety, while the contract is in effect. In contrast, legislation and court rulings in Canada completely ban strikes while a collective agreement is in effect.

Unorganized American workers can strike, and their strike is treated as “protected concerted activities.” The employer cannot retaliate against them for striking.<sup>27</sup> In a recent dramatic example, small groups of Wal-Mart workers around the United States staged work stoppages protesting working conditions and treatment (Greenhouse, 2012: B2). Canadian workers are less protected: only union-represented employees can strike, and they cannot strike even if provoked by employer unfair labour practices, in contrast to American workers’ right to strike.<sup>28</sup>

Each country has erected further obstacles to workers’ right to strike, especially in the public sector, but these cannot be attributed to the Wagner model as such, which generally applies to private-sector employees. At its core, the right to strike for a new collective agreement, whether for a first contract or upon expiration of a prior agreement, is relatively free and protected.

27. The Supreme Court case confirming this protection is *NLRB v. Washington Aluminum Co.*, 370 U.S. 9 (1962). The employer can replace them, as with any strike, but since strikes by non-union workers are often spontaneous and short, the employer is rarely in a position to replace them. He cannot replace them or otherwise take reprisals after they return to work.

28. Again, I leave aside public-sector strikes as too complex to weave into this essay. Legislatures in Canadian jurisdictions often enact back-to-work measures to end public employees’ strikes, and the ILO just as often finds them in violation of freedom of association standards. Most U.S. jurisdictions prohibit strikes by public-sector employees—a clear violation of ILO standards, most recently found by the Committee on Freedom of Association in a case involving New York City transit workers. See ILO, Complaint Against the United States (Case No. 2741), Report of the Committee on Freedom of Association (2011).

### 3. RUNNING AFOUL: HOW THE WAGNER MODEL'S PERVERSIONS VIOLATE ILO NORMS

#### 3.1. Wagner Perversions

The argument here that the Wagner model comports with international freedom of association standards must be tempered by acknowledgment that many features of labour law and practice in the United States run afoul of ILO standards (I leave to Canadian colleagues a fuller discussion of shortcomings there). But it is not the Wagner model as such that contradicts ILO standards. It is rather the perverse application of the Wagner model created by the 1947 Taft-Hartley amendments in the United States, which Canada was luckily spared, and by court decisions that inexorably moved labour law in a direction favourable to employers and contrary to international freedom of association norms.

The “exclusion” feature of U.S. and Canadian labour laws is a starting point. However, it did not start with the 1947 Taft-Hartley Act. The original Wagner Act notoriously excluded farmworkers from coverage, and thereby protection, of freedom of association under the Wagner Act.<sup>29</sup> Vis-à-vis the state, they had freedom of association. Government authorities would not arrest farmworkers if they formed unions. But employers could fire them, and they had no recourse to a labour board or other means to obtain reinstatement and back pay.<sup>30</sup>

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29. Most analysts attribute the exclusion of agricultural workers under the Wagner Act to political expediency because racist Democratic members of Congress from Southern states made it a condition of their votes for the NLRA, which were needed to secure passage. See Michael H LeRoy and Wallace Hendricks, “Should ‘Agricultural Laborers’ Continue to Be Excluded from the National Labor Relations Act?” (1999) 48 *Emory Law Journal* 489.

30. California and a handful of other states have enacted state-level agricultural labour relations acts granting protection for organizing. In Canada, the *Dunmore-to-Fraser* line of cases has established protection for farmworkers’ organizing. So have decisions of some state courts in the United States. The Supreme Court of New Jersey, for example, ordered

The 1947 Taft-Hartley Act went much further. It stripped union rights from low-level supervisors and independent contractors, taking millions of employees out from even the possibility of collective bargaining. It let states adopt “right to work” laws to undermine union strength. It outlawed worker solidarity moves under the rubric of “secondary boycotts.” It added an “employer free speech” clause permitting managers openly and aggressively to campaign against employees’ organizing efforts in the workplace.

Court decisions over many decades also took U.S. labour law in a direction harmful to workers and their unions. Well before 1947, the U.S. Supreme Court decided that employers can permanently replace workers who exercise the right to strike.<sup>31</sup> In the 1980s it got worse. This was a time when union membership fell and prevailing values shifted away from industrial democracy and social solidarity toward management control and global competitiveness. Permanent replacements became widespread, signaled by Ronald Reagan’s mass firing of air traffic controllers who struck in 1981.<sup>32</sup>

Landmark labour law decisions in the 1980s and 1990s continued the anti-union trend. The U.S. Supreme Court decided that workers

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reinstatement and back pay for farmworkers fired for union organizing based on state constitutional guarantees of the right to organize and bargain collectively. “Unless an employer’s unfair labor practices [the court borrowed this phrase from Wagner-style discourse; no law defined “unfair labor practices” in connection with farm labor] are effectively remedied, unions that represent migrant farm workers will be substantially weakened, if not decimated... [B]ackpay and reinstatement are appropriate remedies to enforce the constitutional guarantee of [the right to organize].” See *COTA v. Molinelli Farms*, 552 A. 2d 1003 (1989).

31. *NLRB v. Mackay Radio & Telegraph Co.*, 304 U.S. 333 (1938). The decision contained two provisos: 1) permanently replaced workers cannot be dismissed; they remain on a recall list if strikebreakers leave and create openings, and 2) employers cannot permanently replace workers who strike in response to an employer’s unfair labour practices.
32. See, for example, Jonathan D Rosenblum, *Copper Crucible: How the Arizona Miners’ Strike of 1983 Recast Labor-Management Relations in America*, Ithaca, Cornell University Press, 1998; on the air traffic controllers’ dispute, see Joseph P McCartin, *Collision Course: Ronald Reagan, the Air Traffic Controllers, and the Strike that Changed America*, New York, Oxford University Press, 2011.

have no right to bargain over an employer's decision to close their workplace because employers need 'unencumbered' power to make decisions speedily and in secret. The Court said that collective bargaining "could afford a union a powerful tool for achieving delay, a power that might be used to thwart management's intentions."<sup>33</sup> In another case, the Court found that workers have no right to receive information from trade union organizers in a publicly accessible shopping mall parking lot because the employer's private property rights outweigh workers' freedom of association.<sup>34</sup>

When NLRA policy supposedly came into conflict with immigration policy under the Immigration Reform and Control Act (IRCA), the Supreme Court declared IRCA the winner. Denying a back pay remedy for undocumented workers unlawfully fired for union organizing, the Court decided that immigration policy trumps protections for workers organizing and bargaining. Rather than viewing the NLRA as a guarantee of basic rights, the Court saw it as just another policy choice, one that must yield to immigration policy.<sup>35</sup>

### |||| 3.2 The United States before the CFA

The ILO Committee on Freedom of Association has found several of these aspects of U.S. labour law to be inconsistent with Conventions 87 and 98. In a complaint brought by the AFL-CIO against the court-created striker replacement doctrine, the ILO Committee on Freedom of Association said that "[t]he right to strike is one of the essential means through which workers and their organisations may promote and defend their economic and social interests" and that American employers' use of permanent replacements to break strikes violates this right (International Labour Organization, 1991: para 92).

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33. See *First National Maintenance Corp. v. NLRB*, 452 U.S. 666 (1981).

34. See *Lechmere, Inc. v. NLRB*, 502 U.S. 527 (1992).

35. See *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137 (2002).



The United Food and Commercial Workers (UFCW) and the IUF Global Union filed a complaint to the CFA against restrictions under U.S. labour law on access to employees at any employer-owned property, such as parking lots and other publicly accessible areas. The Committee concluded that union representatives must be granted an equal opportunity to inform workers about organizing, including through union representatives' access to the workplace, so that workers may hear from them (International Labour Organization, 1992).

In a case brought by the AFL-CIO and a Mexican union federation, the ILO committee on Freedom of Association concluded that “the remedial measures left to the NLRB in cases of illegal dismissals of undocumented workers are inadequate to ensure effective protection against acts of anti-union discrimination” and recommended legislative action to bring U.S. law “into conformity with freedom of association principles (International Labour Organization, 2003).

## |||| 4. IN DEFENCE OF MAJORITARIAN EXCLUSIVITY

### |||| 4.1 Minority Union Rights

Let me focus on the charge that the Wagner model’s “majoritarian exclusivity” violates ILO norms on the rights of minority unions. Under the Wagner model (and here I limit myself to discussion of U.S. law, not confident that I can get the nuances of Canadian law right), workers have the right to form minority unions, both in a non-union workplace and in a workplace with a majority-certified union. They can exercise all rights of association and self-organization in connection with their minority unions, and they are fully protected by the unfair labour practice regime.

In a non-union workplace, minority unions can request, and employers can consent to, bargaining on behalf of their members. They cannot do so in workplaces with certified union representatives

(i.e., employees can request, and they cannot be punished for requesting, but the employer cannot consent).<sup>36</sup> But even here, minority unions have the right to present grievances on behalf of their members and to have their grievances resolved without the intervention of the certified union (as long as the resolution is not contrary to the collective agreement).

These minority union rights are fully consistent with ILO norms, starting with convention 87's insistence on workers' right to form and join unions "of their own choosing." The only thing that minority unions cannot do—which certified majority unions can do—is to invoke the coercive power of the state to compel non-consenting employers to the bargaining table with a good faith bargaining obligation. Indeed, as mentioned earlier, compulsory good faith bargaining itself arguably violates convention 98's principle of voluntary collective bargaining. It goes beyond the standard set out by the Committee on Freedom of Association when it said: "If the union is found to be the majority union, the authorities should take appropriate *conciliatory* measures to obtain the employer's recognition of the union for collective bargaining purposes" (emphasis added, i.e., not *coercive* measures, as the Wagner model provides) (International Labour Organization, 2006: para 959).

When the law requires an unwilling employer not only to come to the bargaining table but also to "have a sincere desire" to reach a collective bargaining agreement, backed up by contempt-of-court power, collective bargaining is not voluntary. The employer did not want his employees to have a union, but now they do. He does not want to sit across the bargaining table from this union intruder who gulled a majority of his employees into voting for a union. He does not want to reward the union with a contract. But, under the law, he must bargain with a sincere desire to reach an agreement or he acts unlawfully.

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36. But employees can be disciplined (including dismissed) by the employer if they persist in picketing and other steps to interfere with the employer's business after the employer (properly) refuses to bargain with their minority group and asks them to halt their picketing. See *Emporium Capwell Co. v. Western Addition*, 420 U.S. 50 (1975).

## 4.2 The Wagner Trade-Off

The Wagner model reflects a trade-off. It says: We will impose on employers an obligation (*compulsory* good faith bargaining) that is not required by ILO standards (requiring *voluntary* good faith bargaining), but we impose on unions another obligation not required by ILO standards—to establish majority status—as a condition of compelling the employer to bargain.

This is the law in the United States and Canada under the Wagner model. It infringes the ILO requirement of voluntariness in collective bargaining. It empowers certified unions to the detriment of minority groups. But this is the legal method by which North American jurisdictions have chosen to implement workers' freedom of association and the right to collective bargaining based on history, tradition, culture, and social struggle in those societies.

The favour shown to certified unions under this regime does not mean that minority unions' rights are violated under ILO standards. In the same way, the ILO allows national differences on majority/minority and exclusive/plural representation systems to play themselves out without finding one or the other inconsistent with freedom of association standards.

The ILO allows the Wagner model as a legitimate outcome of the trajectory of labour relations in North America. An alternative model, equally tolerated by the ILO and prevalent in many countries, does not coerce employers into bargaining. Instead, it lets workers and unions strike to bring the employer to the bargaining table. Indeed, this was the situation in the United States and Canada in the pre-Wagner era, but mass strikes and social movements won passage of the Wagner Act.

## 4.3 The CFA and Minority Unions

Advocates of replacing majoritarian exclusivity with minoritarian pluralism often point to decisions of the ILO Committee on Freedom of Association that 1) “a provision [in the country's labour law] that stipulates that a collective agreement may be negotiated only by a

trade union representing an absolute majority does not promote collective bargaining” (i.e., voluntary collective bargaining, per C. 98) and 2) “when no trade union represents the absolute majority of the workers, the organizations may jointly negotiate a collective agreement applicable to the enterprise or the bargaining unit, or at least conclude a collective agreement on behalf of their members.” (International Labour Organization, 2006: para 978)

The first instance is not the Wagner model. The cases in question involved regimes in which *only* a majority union may reach a collective bargaining agreement even if the employer is willing to reach an agreement with a minority union. Under the Wagner model, an employer may only be *compelled* to bargain when a union establishes majority status. But nothing prevents him from voluntarily reaching an agreement with a minority union as long as there is no majority union, in line with ILO norms in support of voluntary collective bargaining.

The second instance contemplates a multiple minority union scenario, not a workplace where a minority forms a union (the only union—no other union is in sight) but fails to reach majority status. Even with multiple minority unions, the CFA says only that they “may” bargain, implying that bargaining would take place voluntarily, with an employer willing to bargain with them—not that the law should compel the employer to bargain involuntarily. In the United States and Canada, employers do not do it because no one can make them, and they prefer not to deal with unions unless someone makes them.

Approving the Wagner model is a paradigmatic application of the ILO’s flexibility and pragmatism. It takes into account U.S. and Canadian traditions, practices, and cultures of labour relations, recognizing a trade-off between requiring the union to establish majority status and forcing the employer to the bargaining table. This is the social “bargain” struck in the legislation of each country.

#### |||| 4.4. Practical Problems

We cannot wrench a labour relations system from its historical moorings. The unity, strength, and solidarity needed to confront determined anti-union employers (that is, most employers in North America) would be fragmented and atomized in a minority representation system. Here are some practical problems that would arise in moving the U.S. and Canadian systems from the Wagner model to minority/plural unionism:

##### |||| A. *Craft unionism*

Only subgroups with bargaining strength based on critical skills that cannot easily be replaced in a strike might be able to gain from minority bargaining. Workers would lose the tide-lifting, wage-compressing effects of bargaining units encompassing many job classifications.

Craft union mentality is still alive and well in the American labour movement. Without the glue of exclusive representation, the temptation for highly-skilled groups to break off would often be irresistible. In fact, the NLRA has a “unit clarification” mechanism for craft groups to carve themselves away from an established bargaining unit.<sup>37</sup> Thankfully, the threshold is high—the putative breakaway group would have to show that they are ignored by the bargaining agent.<sup>38</sup> But another, probably more important reason that such breakaways are rare is that skilled workers are often union leaders with a degree of class consciousness and appreciation for holding their unit together, even at some personal sacrifice of what they might otherwise obtain through separate bargaining.

37. See NLRA Sec. 9(b)(2).

38. See, for example, *Mallinckrodt Chem. Works*, 162 NLRB 387 (1966).

### |||| *B. Raiding*

Given the unfortunate history and still persistent pattern of inter-union rivalries,<sup>39</sup> multiple minority unionism would also provoke new rounds of fighting among unions for pieces of the workplace action. Believing that the proper role of a union is to make life more challenging for management (by forcing them to be better managers, not labour exploiters), I do not sympathize too much with management concerns about unions being too demanding. But I do believe that it is better for management, too, to bargain with one authoritative representative speaking for all employees, not a bunch of splinter groups each looking for its own best deal.

### |||| *C. Discrimination*

Potential unlawful discrimination problems also loom. If a minority union group is strong and wins conditions superior to unrepresented workers, the latter have a viable claim for discrimination because of their non-union membership. If members of a weak minority union get stuck with inferior conditions, they have a viable claim for discrimination because of union membership.

This problem is even more acute if it involves a minority of workers in the same “bargaining unit” with similar skills and job requirements. No employer is going to give them better terms than their non-union counterparts. That just leaves employers open to charges of discrimination under the NLRA, or to claims under equal pay statutes, or—if it involves a minority based on race or ethnicity—claims under anti-discrimination laws.

### |||| *D. Company unions*

Multiple unionism also would open the door to an abuse that afflicts labour movements in many countries: unions covertly sponsored

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39. Real recent examples in the United States include Teamsters vs. Machinists, Machinists vs. Autoworkers, Autoworkers vs. Steelworkers; Steelworkers vs. Flight Attendants (!); AFSCME vs. SEIU, SEIU vs. UNITE-HERE; UNITE HERE vs. UFCW; Carpenters vs. everyone else; and on and on.

by employers to blunt the effectiveness of real unions. Employers do not always have to push hard, either. Many workplaces have employees who are management-minded, management-oriented, management-aspiring, or otherwise willing to counter a more militant, independent union. They are certainly entitled to their views. But in the Wagner model they have to pursue them by running for leadership positions within the union, making their case to union members for a less militant stance, rather than breaking away in a separate union submissive to management.

In fact, union moderates often prevail against union militants in leadership contests (Johnson, 2009: C22). And vice versa (Swo-boda, 1999: E1). Internal debates and alternating leadership can be a healthy dynamic in a democratic union—a lot healthier than separate, moderate, and militant unions representing the same group of workers and spending more time fighting each other than confronting management.

#### |||| E. *No unions*

An even more malignant danger lurks in the way of minority unionism in the United States, again linked to our peculiar labour law history and culture. One cannot open the door to minority unionism without opening the door to no unionism—the ability of anti-union workers, of whom there are many, in any given workplace, to abjure representation and go it alone with management in the hope of favourable treatment (which management in many cases will afford them, to “stick it to” the union).

A long-sought goal of the National Right-to-Work Committee, an employer-sponsored organization devoted to undermining trade unionism in the United States, is to smash the exclusive representation system by allowing individual workers to opt out of union representation and bargain for themselves, in the name of individual freedom. The Right-to-Work Committee calls exclusive representation “monopoly bargaining [...] a special coercive privilege given to unions by federal law [...] every worker loses his or her right to negotiate directly with the employer on his or her own behalf [...] trampling of individual rights [...] coercion to herd workers into

collectives against their will [...] enthrones union-boss control over workers [...].<sup>40</sup>

Anti-union congressmen in the House of Representatives have introduced legislation in line with the wishes of the Right-to-Work Committee that would abolish exclusive representation and let individual workers make individual employment contracts that could be either better or worse than collectively-bargained terms.<sup>41</sup> Under the proposed bills, highly-skilled employees could opt out of a bargaining unit to seek higher pay than that negotiated by the union. Alternatively, unskilled workers could opt out of the bargaining unit and agree to *lower* pay in exchange for a no-layoff promise or some other perceived benefit. The result would be chaotic. Anyone who thinks this would not happen does not appreciate the individualistic, me-first, strain in American working class culture that is held at bay by the Wagner Act.

## |||| CONCLUSION

France, Italy, and Spain can live side-by-side with workers belonging to the Communist union, the Socialist union, the Christian union, the apolitical union, and so on. That arrangement grew organically from more than a century of social struggle in which left-wing parties and churches were key protagonists. Wrenching them into a Wagner model of majoritarian exclusivity would be as senseless as the reverse.

In the United States and Canada, instead of communist, socialist, and faith-based unions, multiple minority unions would likely devolve into craft unions, Anglo unions, Latino unions, immigrants' unions, French-speaking unions, English-speaking unions,

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40. See National Right to Work committee, "The Problem of Compulsory Unionism," at <http://www.nrtwc.org/about-2/the-problem/> (visited October 11, 2012).

41. For a description and discussion, see Charles W. Baird, "Unchaining the Workers," Cato Institute Briefing Paper (2001), at [www.cato.org/pubs/regulation/regv24n3/brieflynoted.pdf](http://www.cato.org/pubs/regulation/regv24n3/brieflynoted.pdf) (visited October 11, 2012).



and unions based on other fault lines in the working class of both countries. And, at least in the United States, a significant “no union” option. Majoritarian exclusivity makes unions confront and overcome internal divisions to forge unity in support of union goals.<sup>42</sup>

## |||| BIBLIOGRAPHY

- Adams, R J, “The Supreme Court, Collective Bargaining and International Law: A Reply to Brian Langille” (2008) 14 *Canadian Labour and Employment Law Journal* 111.
- Brunelle, Christian and Pierre Verge, “L’inclusion de la liberté syndicale dans la liberté générale d’association: un pari constitutionnel perdu?” (2003) 82 *Revue du Barreau canadien* 712.
- Compa, Lance, *Unfair Advantage: Workers’ Freedom of Association in the United States under International Freedom of Association Standards*, Ithaca, Cornell University Press, 2004.
- Cooper, Laura J, “Employee Voice Symposium: Responses and Critiques: Lessons from History: Letting the Puppets Speak: Employee Voice in the Legislative History of the Wagner Act” (2011) 94 *Marquette Law Review* 837.
- Crain, Marion, and Ken Matheny, “Labor’s Divided Ranks: Privilege and the United Front Ideology” (1999) 84 *Cornell Law Review* 1542.
- Dau-Schmidt, Kenneth G, “Employee Voice Symposium: Principal Paper: Promoting Employee Voice in the American Economy: A Call for Comprehensive Reform” (2011) 94 *Marquette Law Review* 765.

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42. Many friends and colleagues have eloquently made a contrary case in favor of minority/multiple unionism. See, for example, Charles J Morris, *The Blue Eagle at Work: Reclaiming Democratic Rights in the American Workplace*, Ithaca, ILR, 2005; Marion Crain and Ken Matheny, “Labor’s Divided Ranks: Privilege and the United Front Ideology” (1999) 84 *Cornell Law Review* 1542; Matthew W Finkin, “The Road Not Taken: Some Thoughts on Non majority Employee representation” (1993) 69 *Chicago-Kent Law Review* 195; Clyde Summers, “Unions Without Majority: A Black Hole?” (1990) 66 *Chicago-Kent Law Review* 531; George Schatzki, “Majority Rule, Exclusive Representation, and the Interests of Individual Workers: Should Exclusivity Be Abolished?” (1975) 123 *Pennsylvania Law Review* 897.

- Dubé, Lawrence E, "Graham Will Offer NLRB Funding Amendment to Block *Specialty Healthcare* Enforcement", *Bloomberg BNA Daily Labor Report*, June 13, 2012.
- Dubé, Lawrence E, "Groups Blast NLRB's *D.R. Horton* Ruling In a Barrage of Fifth Circuit Amicus Briefs", *Bloomberg BNA Daily Labor Report*, June 15, 2012.
- Finkin, Matthew W, "The Road Not Taken: Some Thoughts on Non majority Employee representation" (1993) 69 *Chicago-Kent Law Review* 195.
- Greenhouse, Steven, "Wal-Mart Labor Protests, Grow, Organizers Say", *New York Times*, (October 10, 2012) B2.
- International Labour Organization, *Freedom of Association: Digest of Decisions and Principles of the Freedom of Association Committee of the Governing Body of the ILO*, 2006, online: <<http://www.ilo.org/>>.
- Johnson, Julie, "United Airlines pilots union elects 1st female chairman; Wendy Morse viewed as less confrontational figure in contract talks", *Chicago Tribune* (October 14, 2009) C22.
- Kahn-Freud, Otto, "The Uses and Misuses of Comparative Law" (1974) 37 *Modern Law Review* 1
- Langille, Brian, "Can We Rely on the ILO?" (2007) 13 *Canadian Labour and Employment Law Journal* 363.
- Langille, Brian, "The Freedom of Association Mess: How We Got into It and How We Can Get Out of It" (2009) 54 *McGill Law Journal* 177.
- LeRoy, Michael H and Wallace Hendricks, "Should 'Agricultural Laborers' Continue to Be Excluded from the National Labor Relations Act?" (1999) 48 *Emory Law Journal* 489.
- Mason, Melanie, "Democrats and Labor Part Ways for Convention; Party Loses Financial Support for the Event Partly Because of its Setting in Charlotte, no Friend to Unions", *Los Angeles Times* (August 11, 2012) A10.
- McCartin, Joseph P, *Collision Course: Ronald Reagan, the Air Traffic Controllers, and the Strike that Changed America*, New York, Oxford University Press, 2011.
- Morris, Charles J, *The Blue Eagle at Work: Reclaiming Democratic Rights in the American Workplace*, Ithaca, ILR, 2005.
- Panitch, Leo and Donald Swartz, *From Consent to Coercion: The Assault on Trade Union Freedoms*, Toronto, Garamond, 2003.

- Rosenblum, Jonathan D, *Copper Crucible: How the Arizona Miners' Strike of 1983 Recast Labor-Management Relations in America*, Ithaca, Cornell University Press, 1998.
- Schatzki, George, "Majority Rule, Exclusive Representation, and the Interests of Individual Workers: Should Exclusivity Be Abolished?" (1975) 123 *Pennsylvania Law Review* 897.
- Slinn, Sara and Richard W Hurd, "First Contract Arbitration and the Employee Free Choice Act: Multi-Jurisdictional Evidence from Canada" (2011) 18 *Advances in Industrial and Labor Relations* 41.
- Summers, Clyde, Pierre Verge and Luis Medina, "Report of the Independent Advisory Committee on the Operation and Effectiveness of the North American Agreement on Labor Cooperation," Review of the North American Agreement on Labor Cooperation (Annex 1), Commission for Labor Cooperation, 1998.
- Summers, Clyde, "Unions Without Majority: A Black Hole?" (1990) 66 *Chicago-Kent Law Review* 531.
- Swoboda, Frank, "Saturn Experiment in Jeopardy; New Union Leaders Want to Alter Workplace Partnership Pact", *Washington Post* (March 6, 1999) E1.
- Verge, Pierre and Guylaine Vallée, *Un droit du travail? Essai sur la spécificité du droit du travail*, Cowansville, Yvon Blais, 1997.
- Verge, Pierre, *Configuration diversifiée de l'entreprise et droit du travail*, Québec, Presses de l'Université Laval, 2003.
- Verge, Pierre, "Inclusion du droit de grève dans la liberté générale et constitutionnelle d'association justification et effets" (2009) 50 *Les Cahiers de Droit* 267.
- Verge, Pierre, "L'affirmation constitutionnelle de la liberté d'association: une nouvelle vie pour l'autonomie collective?" (2010) 51 *Les Cahiers de Droit* 353.
- Verge, Pierre, *Les dilemmes de l'ANACT: ambigüité ou complémentarité?* (1999) 54 *Relations industrielles/Industrial Relations* 223.
- Verge, Pierre, *Présentation analytique de l'Accord nord-américain de coopération dans le domaine du travail (ANACT)*, Lima, International Labour Office (Projet CIMT-BIT), 2002.
- Verge, Pierre, "Réalité juridique du rapport du travail" in Gilles Trudeau, Guylaine Vallée and Diane Veilleux, *Études en droit du travail à la mémoire de Claude d'Aoust*, Cowansville, Yvon Blais, 1995.

