A Tale of Two Labor Laws

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Come to Perth next year and give us a keynote address. That was the gist of an e-mail I got one July day in 2008 from the Australian Society for the Study of Labor History. At the time, both the United States and Australia were grappling with labor law reform. In America, it was the Employee Free Choice Act (EFCA) put forth by the AFL-CIO and endorsed by the Democrats. Come November, they would almost certainly be in charge—White House, both Houses of Congress, the whole works. In Australia, after a decade in the minority, the Labor Party under the leadership of Kevin Rudd was back in power and bent on dismantling the anti-union program of its neoliberal predecessor. Labor's alternative was still a work in progress, but it already had a name, Fair Work Australia.

My thought was this: if I followed events in both counties to their conclusion, I might have a tale to tell about two labor regimes—instant comparative history, so to speak. So I accepted the invitation. At Perth I gave the Australian version, and here, in a more narrative form, the American version.

The two countries, as products of Anglo-Saxon colonization, are cousins, and if one looks only at America's trans-Mississippi West, more like mirror images, with parallel histories of frontiers, of indigenous peoples decimated, of gold rushes, distance from the core, hyper-urbanization. Even so, it is not commonalities, but differences I want to explore. And, in truth, it would be hard to find two countries so similar yet different in their approaches to industrial justice.

For Australia, the starting point is 1901, when the six colonies federated into the Commonwealth. Intertwined with this historic event was the decision to hammer out a national labor policy. What better time to settle the endemic class strife that had afflicted colonial Australia? The country could afford to be generous, with one of the highest per capita incomes in the world. There was an emergent Labor Party to be placated, and, for its foes, a significant quid pro quo: protection of Australia's budding industries. It seemed natural, with considerable precedent already in place, for Australians long accustomed by colonial rule to an interventionist state to embrace the Conciliation and Arbitration Act of 1904.

Strikes would not be tolerated. Instead, labor disputes would be settled by a Court of Conciliation and Arbitration (hereafter, the Arbitration Court) empowered to hand down compulsory awards. Trade union representation was built into the system, so that the quest for union "recognition" that so bedeviled American unions was simply off the table. Unions applied to the Court, and once "registered," represented the workers who, in the Court's judgment, fell within their jurisdictions. In 1907, in the landmark Harvester decision, the Court laid down the principle that awards should assure workers a standard of living reasonable for "a human being in a civilized community," establishing a living wage as the final building block in Australia's system of state-regulated labor relations.

Over time, this system took on a life of its own. Australia's federal-state structure, in which federal authority was less clearly demarcated than in the United States, made for many complications but ensured that most Australian workers would be covered at one level or the other. It followed, since registered unions were in some measure creatures of the state, that the state would oversee their internal conduct. After the Second World War, communist/anti-communist conflict so polluted internal union politics that the Commonwealth itself began generally to run union elections, using the very same electoral commission that ran the parliamentary elections. It similarly followed that

union growth should be encouraged, hence near-universal provisions for union preference or compulsory membership. But little in the Australian system prompted unions to develop a shop-floor presence, with the result that the workplace was a realm dominated by shop stewards who were a law unto themselves.

And this in turn helps account for the anomaly that, compulsory arbitration notwithstanding, Australians were as strike prone as American unionists, but with different ends in mind: not for a better contract, but to show muscle on the shop-floor, or to pressure employers into deviating from arbitration awards, or occasionally just to stir things up. Most famous perhaps were the "green bans" issued by a notably obstreperous Australian union, the Builders Laborers, at construction sites they considered environmentally destructive. By then, in the early 1980s, the Arbitration Court had abandoned all efforts at enforcing awards and grown adept beneath its judicial façade at negotiating compromises with recalcitrant unions.

Still, the essential elements held: arbitration courts, registered unions, industry-wide awards, and living-wage standards. There are no good American words to describe what this system, for all its flaws, meant to Australians, so I'm appropriating the words Deputy Prime Minister Julia Gillard used when, on introducing the finished Fair Work bill, she invoked the 1904 arbitration law as the foundation of Australia's attachment to the "fair go," to "mateship" at work, and to a decent life for all—a capitalist democracy like the United Kingdom and the United States, "but without their wide social inequalities."

The American counterpart, the National Labor Relations Act, came comparatively late in American history, in the throes of the Great Depression, and after an individualistic ethos had deeply embedded itself in the nation's labor jurisprudence. The ideological resonance that once animated the New Deal labor law has been overtaken by the earlier common-law tradition that, while shared by all Anglo-Saxon countries, casts an uncommonly long shadow here.

I take my starting point from Robert Steinfeld's *The Invention of Free Labor* (1991). By free labor Steinfeld means the absolute proprietorship of a worker over her person. I say "her" because Steinfeld's defining case is *Mary Clark, Woman of Color* (1821), declaring her right to walk away from the twenty-year indenture she had signed. The break here with the past can't be over-emphasized, not only because indentured servitude had largely peopled the country, but because, even aside from bound labor, employment had always and everywhere involved some degree of unfreedom. The abolition of involuntary servitude is enshrined, along with slavery, in the Thirteenth Amendment, and is the only place in the Constitution that bears directly on labor, stands in stark contrast to the "labor power" clause in the Australian Constitution that authorizes compulsory arbitration of industrial disputes.

Free labor—an unqualified right to walk away—is a grand thing, of course, but paradoxical in its effect. As the jurist A.V. Dicey once pointed out, workers have to be free before they can have unions, but unions impinge on their personal liberty. Dicey called this closed-shop paradox an insoluble problem, for which every freedom-loving country had to find its own "rough compromise." In America, just because it was the inventor of free labor, that rough compromise heavily privileged individual as against collective rights.

The American state was probably unique in never regarding unions as illegitimate or unauthorized organizations. The freedom of workers meant they enjoyed the same rights of voluntary association as anyone else. The issue was whether, in exercising those rights, they harmed other citizens, and from the very first case in 1806, private citizens were the protagonists, bringing suits in common law and, by the accretion of precedent upon precedent, making an American law of trade unionism, which had, remarkably, no other basis, except for the railroads, until far into the twentieth century. As for the judge-made law, it was unremittingly one-sided, hemming in the labor movement while unleashing anti-union employers to do their worst. Blacklists, yellow-dog contracts, court injunctions, club-wielding police, and an unparalleled cycle of industrial warfare—these were emblematic of the industrial half-century following the U.S. Civil War.

It was not as if Americans couldn't imagine

that things might be otherwise. Reform ideas flowed back and forth, and American reformers knew about and some admired Australia's answer to industrial strife. But compulsory arbitration was not an option for a country that sanctified liberty of contract. The trick was to identify a form of state intervention that ended warfare over unionization while not impeding collective bargaining. This is what New York Senator Robert F. Wagner pulled off, as renewed labor strife buffeted the New Deal, when he wrote the National Labor Relations Act of 1935.

The Wagner Act was defined by workers' rights, but with freedom of association, not individual liberty, at the center, and—a key innovation—freedom of association linked to a right to collective bargaining. The corollary—a second innovation—was an employer duty to bargain, triggered—the law's third innovation—by a democratic vote of the workers. Enforcement was lodged—the final innovation—in a quasi-judicial National Labor Relations Board (NLRB). Collective bargaining was itself not impaired. The right to strike and lockout remained, as did the weapons of economic warfare (including the use of strikebreakers), provided only that the objective be a freely agreed-upon contract.

The Wagner Act has often been described as the most radical law of the New Deal. Wagner knew better. Proceeding in the face of the gravest of constitutional crisis since the Civil War, with FDR and the Supreme Court at loggerheads, Wagner tailored his bill to pass judicial scrutiny. It's not by accident that the strongest unfair labor practice, the prohibition against company domination of a labor organization, was the one for which court precedent was unequivocally on Wagner's side. For the rest, where the reigning jurisprudence was against him, he gave ground, and, rhetoric notwithstanding, wrote a law built on weak labor rights. In the flush of victory, when the Supreme Court upheld the Wagner Act in 1937, what really mattered was, first, the surge of organizing set off by the law's promise and then the timely rescue of the fledgling CIO unions—here U.S. and Australian histories unexpectedly converged—by the compulsory arbitration of the Second World War.

Afterward, collective bargaining took hold and soon became a hallmark of the booming postwar economy. At its height in the mid-1950s, organized labor represented eighteen million workers, a third of the labor force. It was also Australia's peak moment: 59 per cent of the labor force belonged to unions in 1954. The difference was in part explained by the reach of Australian unions into the banking, clerical, and other white-collar occupations. Both movements, however, were comparably successful, in terms both of material returns and of political/economic clout. But they had arrived there by different routes, one leading to industrial awards, the other to union contracts.

And it is these differences—or, more accurately, the legal and ethical underpinnings—that explain how the two countries experienced the downward spiral that hit organized labor worldwide in the wake of the economic crisis of the 1970s. In Australia, the impact was tempered by Labor's return to power in 1983, with Bob Hawke as prime minister. To halt the inflationary spiral, Hawke bypassed the awards system and negotiated a Prices and Incomes Accord with the Australian Council of Trade Unions (which he had previously headed) and employer organizations. In 1987, as competitiveness became the big issue, another tripartite agreement linked wages to productivity gains. This in turn led in 1991, under the aegis of Paul Keating, Hawke's Treasury secretary, to the concept of "enterprise agreements," which gave firms flexibility to depart from industrial awards by negotiation with unions. When Keating became prime minister in 1993, he codified the enterprise agreement in new legislation, signaling that the corporatist phase, with the ACTU as equal partner, was over. Symbolic of its declining stature was that unions now could be bypassed in the negotiation of enterprise agreements.

In 1996, with the advent of John Howard's Liberal-National government, Labor's experiment in what the Australian scholars John Buchanan and Ron Callus have called "managed decentralism" abruptly gave way to outright demolition. Howard embraced individual contracts, an ideologically-freighted move that mainly underscored the tenacity of the old order; his Australian Work Agreements,

so-called, were subject to a "no disadvantage test"—the terms couldn't be inferior to the awards the individual contracts replaced—administered by still another layer of bureaucracy. More consequential was a multifaceted attack on the unions, limiting their access to the workplace, for example, and imposing heavy fines for industrial actions. Only in 2005, after another electoral victory, did Howard finally drive home his neoliberal program. The resulting legislation, Work Choices, made the individual agreements for new employees mandatory at the employer's behest, eliminated the "no disadvantage test," encouraged nonunion enterprise agreements, imposed a lengthy "prohibited content" list on union agreements, and in a variety of ways freed the hand of employers against the unions..

Work Choices was draconian, but in Australian terms, because, as the scholars I am following here (Rae Cooper and Bradon Ellem) have observed, while John Howard spoke in the idiom of market deregulation, Work Choices was actually the product of "a highly interventionist and extremely prescriptive state."

Any informed Australian can recite the abbreviated history I have just related—the Accord of 1983; Keating's enterprise agreements; Howard's individual contracts; and, most certainly, Work Choices. Americans, even experts in the field, would be hard put to offer a parallel account because, aside from Taft-Hartley over half a century ago, there is no political narrative to describe. That's the difference I mean to emphasize: that although both countries ended up more or less at the same place—the current parlous state of American law as equivalent to Work Choices—the United States got there via a sub-political path.

The law that Wagner crafted in the shadow of the Supreme Court can be likened to a mini-constitution, subject on a vast array of questions to interpretation by the NLRB and, ultimately, by the federal courts. An enormous case law has built up. Unlike in Australia, for example, the labor law does not provide for rules of entry. This is governed by case law, originally giving organizers access as needed, then limiting it on an equal-time basis, and finally denying it except in isolated work sites where an organizer would have no other way of reaching employees. Or consider "captive audience" meetings, in which attendance is required by the employer. Originally, captive audience meetings were unfair labor practices; then they were permitted if the union got equal time (the other side of the access issue); and finally, accepted as an absolute employer right. If this sounds familiar, of course it is, because it replicates how judges had made trade-union law for a century prior to the New Deal. The essence of that process is a balancing of one person's right against another's, and since, on all the issues I've cited, the employer's is a property right, that's the one that prevails.

It was not property rights, however, but free speech on which the law's future turned. Senator Wagner believed that anything an employer said was inherently coercive and, knowing that, the early NLRB required employer neutrality during representation campaigns. But Wagner had, after wavering, not given the Board a legislative mandate. Without it, the Supreme Court went ahead and declared in 1941 an employer free speech right, with this caveat: employers can speak, but not coercively. Wagner, however, was right. Employer speech was inherently coercive; the Court's coercive/non-coercive distinction was false; and to show that it was false, all employers needed was a platform. And that's what the NLRB provided when, for unrelated reasons, it began to rule that, although not required by the law, at the employer's request secret-ballot elections would always be held.

After the Second World War, at the height of CIO militancy, the Republicans pushed through the Taft-Hartley amendments, making elections mandatory for NLRB certification, giving employer speech greater leeway, and, for good measure, subjecting unions to unfair labor practices. The idea was to re-orient the representation process so that, instead of being an expression of self-organization, it became a contest between labor and management, with the worker as voter. Taft-Hartley was an opportunistic political event, never to be repeated, and it rested, as I've indicated, on case law already in place. In the end, as the labor law eroded, it worked only at the consent of employers.

It was, of course, up to them. In the early decades, aside from the South, a kind of low-level war went on, with the non-union sector steadily expanding but the status quo not seriously challenged. In 1973, unions still represented 29 per cent of the labor force. At that point, as the era of stagflation set in, a decision was made, reportedly at top-level Conference Board meetings, that it was time to break the union grip on the economy. And in case they had any qualms, employers had only to observe Ronald Reagan, one of whose first acts as president was to fire all 14,000 striking air controllers and destroy their union.

Between Australia and America, of course, the processes of de-unionization differed. In the United States, the switch was either on or off. Either a union was the bargaining agent or it was nothing. In practice, turning the switch off— decertifying a union—was comparatively rare. Employers found it easier to close union plants and then fight like the devil, with the law at their backs, to operate elsewhere union-free. In Australia, with its awards system, the metaphor was not America's on/off switch, but something like a commercial solvent, in which the union presence is at first intense; then dims; and, at many sites, disappears as the changing law, culminating in Work Choices, eroded state-mandated union functions, eliminated compulsory or preferential membership, and gave employers the means to erase the union presence. Yet despite these stark differences, and somewhat different timing, the outcomes were virtually identical. In both countries, union densities fell by roughly two-thirds from their mid-1950s peaks, down by 2007 to 20 percent in Australia and 12.5 percent in the United States.

At that low point, the conservative grip on power loosened and in both countries the march toward labor law reform began. But nothing else matches. The Employee Free Choice Act was hardly visible during the 2008 election, while in Australia Howard's Work Choices dominated the campaign. That's one difference. Making the case for the Employee Free Choice Act against employer propaganda—it was undemocratic, coercive, a job-killer—was hard. Work Choices was easy. What most incensed Australians was the inequity of individual bargaining, adroitly given a face by individual workers describing how badly they had fared after the lifting of the "no disadvantage" test. No comparable outrage stirred Americans. That's a second difference. Yet the Republicans didn't push their advantage—the Employee Free Choice Act went unmentioned during the presidential debates, to the frustration of employer organizations—because the labor law doesn't resonate much either way with the general public. A blitz of business-funded television ads targeting key Senate races—one featured a hit man from *The Sopranos* as a union organizer—was shown by a Peter D. Hart survey to have had no measurable impact on voters. That's a third difference.

Consider now the proposals themselves. The Employee Free Choice Act was drafted by the AFL-CIO, given a legislative dry run after the Democratic congressional successes in 2006, and reintroduced, without change, following Barack Obama's victory in 2008. The bill made no pretense at rethinking the law. All it did was patch up the holes. To curb violation of workers' rights: stiffer penalties and, for serious infractions, mandatory NLRB injunctions. To bypass employer coercion during representation elections: the option of demonstrating majority support by signed authorization cards. To counter the refusal to bargain in good faith with newly-certified unions: mediation and first-contract arbitration. These modest amendments, tailored to manifest failures of the law, provoked wall-to-wall condemnation by employers. Even liberal business interests—the Pritzker family, for example, big in hotels and Obama's key financial backer—opposed the Employee Free Choice Act.

Fair Work Australia was a far more ambitious affair. It was a government bill, presided over by the deputy prime minister, and given a full-dress inquiry. The ACTU, employer groups, even the states and territories (in hopes they might agree to a uniform system across all jurisdictions) participated. It took a full year, but what emerged was a comprehensive reworking of Australian labor law.

Fair Work Australia jettisoned Howard's individual contracts and boldly revised the awards system, dividing it into two streams: National Employment Standards, which covered ten

basic conditions, and "modern awards," which covered matters applicable to individual industries. Enterprise bargaining remained, with pattern bargaining barred so that agreements would be tailored to the efficiency needs of individual firms. Union participation, while not mandatory, was pretty well assured by stronger rules of entry and representation. Among the mandated rights that in America either do not exist or come only via a union contract were job flexibility to meet family needs, consultation and dispute-resolution procedures in every workplace, and strict protections against unfair dismissal. For the disadvantaged and low-paid, Fair Work Australia provided a minimum-wage commission and the prospect of enterprise bargaining; and for contingent workers, a pledge somehow to integrate them into the system. Of matters left undone, most rankling to unionists was Howard's special commission for the building trades. Still, in an imperfect world Fair Work Australia marked a triumph of statecraft.

It can only have been source of wonderment to Australians, who saw their own bill go off with scarcely a hitch, that the Democrats could sweep a national election and yet not deliver on the major demand of its most important constituency. The problem is that electoral success, even on the scale of 2008, does not translate into control of the Senate, where obeisance to the filibuster—good American word—gives forty-one Senators the power to block most bills. In fact, the Republicans had only forty votes, but every one of them was pledged against the Employee Free Choice Act. The Democrats enjoyed no such unity. The fact that they had sixty votes mattered less than that two came from Arkansas, whose economic heartbeat is Wal-Mart, and half a dozen others were similarly not to be counted on. Whatever momentum the bill had going into the election was overtaken by the financial meltdown, by the consuming, year-long battle over health care, and by dispiriting efforts at patching together a compromise that would hold the sixty Democratic votes. And then there weren't sixty. In a special election in early 2010, the Democrats unexpectedly lost the Massachusetts seat long held by Ted Kennedy, who, had he lived, would have led Senate fight. The Employee Free Choice Act is not America's counterpart to Fair Work Australia, but on the contrary, as it recedes into legislative limbo, just another example of how steep the road to labor law reform is in this country.

My instant comparative history offers no moral, but only, from the American standpoint, a perspective, and a question: does it really have to be this way?

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