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North American Border Wars: The Role of Canadian and American Scholarship in U.S. Labor Law Reform Debates

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ARTICLES

NORTH AMERICAN BORDER WARS: THE ROLE OF CANADIAN AND AMERICAN SCHOLARSHIP IN U.S. LABOR LAW REFORM DEBATES*

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I. INTRODUCTION

The economies of Canada and the United States and the organization of their societies are deeply interrelated but significant differences exist. In terms of labor law and collective bargaining, Professor Marco Biagi described a North American model[1] characterized mainly by workers' electoral selection of unionization based on the principle of exclusive representation.[2] Once certified as the majority representative, a union enjoys a monopoly in representing employees in the relevant bargaining unit.[3] Biagi noted, however, that the

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1. Professor Biagi was describing the labor relations systems of the United States and Canada as comprising the North American model. He did not include within his analysis the most southern of the North American countries – Mexico.

2. MARCO BIAGI, *Forms of Employee Representational Participation*, *in* MARCO BIAGI: SELECTED WRITINGS 191, 193-95 (Michele Tiraboschi, ed., 2003) [hereinafter *Forms of Participation*].

3. *See id.* He characterized the U.S. and Canadian approaches as "a model of selection of trade union representation based on an electoral procedure, where a trade union is recognised as the exclusive agent on the basis of majority principle." *Id.* at 193-94. He then described the exclusive bargaining status of a union as "a monopoly of representation." *Id.* at 195. But further, he attributes the low union density of union representation in the U.S. private sector– then less than 20 percent, now less than 7 percent – to its "anti-union managerial culture." *Id.* Finally, he noted that proposals to amend the National Labor Relations Act to establish alternative models of labor-management

"differentiating features" of the Canadian and U.S. systems should not be disregarded.[4] One distinctive characteristic in Canada, for example, is the use in some provinces of non-electoral "membership evidence" to demonstrate legal majority status, a mechanism favored by unions.[5] This particular differentiating feature, among others, was at the heart of recent debates about U.S. labor law reform,[6] and the extent to which the Canadian experience should serve for U.S. policymakers as an example to follow or a cautionary tale.

In exploring the interplay between the Canadian and U.S. systems, this essay will briefly trace the interaction between the two countries in the development of labor relations laws with a particular emphasis on the impact of scholarly work on U.S. labor law reform debates in the last two decades. Instructive for that purpose is the work of Professor Paul Weiler, a prominent figure in labor law policy discussions in both countries. A significant architect of labor law in Canada, Weiler came to Harvard Law School in 1978[7] and brought his experience and insights with him, rapidly becoming one of the foremost labor law scholars in the United States.[8] His influence in the 1990s, and hence the influence of Canadian ideas, on the ultimately unsuccessful labor law reform proposals of President Clinton's Dunlop Commission is detailed below.

Professor Weiler's proposals are once again the basis for scholarly and policy debate. This time, however, Canadian ideas and experience have prompted a scholarly border skirmish. Recently, when new

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relations such as "employee consultation committees" that act independently of unions had not received much support even though employers, with union opposition, appeared to favor them. *Id.* Professor Biagi's chapter first appeared as Marco Biagi, *Forms of Employee Representational Participation, in* COMPARATIVE LABOUR LAW AND INDUSTRIAL RELATIONS IN INDUSTRIALIZED MARKET ECONOMIES 483 (Roger Blainpain, Chris Engels & Greg Bamber eds., 2001). The chapter appears in updated form as Marco Biagi & Michele Tiraboschi, *Forms of Employee Representational Participation, in* COMPARATIVE LABOUR LAW AND INDUSTRIAL RELATIONS IN INDUSTRIALIZED MARKET ECONOMIES 523 (Roger Blanpain ed. 2010).

4. *Forms of Participation, supra* note 2, at 194.

5. *Id.* at 195.

6. *See Examining Rebuilding Economic Security, Focusing on Empowering Workers to Restore the Middle Class: Hearing Before the Comm. on Health, Educ., Labor, and Pensions*, 111th Cong. 4-5 (2009) (statement of Sen. John Isakson, Member, S. Comm. on Health, Educ., Labor, and Pensions); *id.* at 7 (statement of Sen. Robert Casey, Member, S. Comm. on Health, Educ., Labor, and Pensions).

7. *See* Alan F. J. Artibise, *"A Worthy, if Unlikely Enterprise": The Labour Relations Board and the Evolution of Labour Policy and Practice in British Colombia, 1973-1980*, 56 B.C. STUD. 3,10 n.24 (1982) ("Weiler served as chairman of the [Labour Relations Board] from 1973-1978. He left the Board to accept [a] position . . . at Harvard Law School.").

8. *See* John Trumpbour, *The Crisis in Workplace Governance: Special Issue in Honor of Paul C. Weiler*, 28 COMP. LAB. L. & POL'Y. J. 93, 93 (2007).

legislation – the Employee Free Choice Act – was proposed to Congress to implement a number of reforms to the National Labor Relations Act based on the Canadian experience, one U.S. researcher produced a study arguing that the actual Canadian experience where these reforms were in place resulted in higher unemployment and slower economic growth.[9] Her conclusions were widely reported in the press and disseminated by opponents of the proposed legislation.[10] The reaction from Canada was swift. Canadian labor scholars, fearing the corrosive effects of such critiques on their own labor relations regime, responded with rejoinders challenging and critiquing the work of this American scholar.[11]

Clearly, and notwithstanding American provincialism, Canadian-influenced labor law scholarship has played a central role in U.S. policy debates, creating a favorable intellectual environment for labor law convergence. Yet the opponents of U.S. labor law reform also deploy scholarship aimed at the Canadian experience in order to reinforce the divergent paths of the two systems, as do Canadian scholars acting defensively to forestall greater convergence of the Canadian regime to the U.S. model.[12]

II. PRE-WAGNER ACT LABOR LAW OF THE U.S. AND CANADA

Until the latter part of the nineteenth century, common law was the source for the regulation of labor-management disputes in both Canada and the United States.[13] In the United States, the enactment of the

9. *See* Anne Layne-Farrar, An Empirical Assessment of the Employee Free Choice Act: The Economic Implications 3-4 (March 3, 2009) (unpublished manuscript) (on file with author), *available at* http://ssrn.com/abstract=1353305.

10. *See, e.g.*, Norene Pupo, *Introduction*, 15 JUST LAB.: CANADIAN J. OF WORK AND SOC'Y (SPECIAL EDITION) 1, 1-2 (2009), *available at* http://www.justlabour.yorku.ca/volume15/pdfs/01_pupo_press.pdf.

11. *See, e.g. id.* at 2; Susan Johnson, *Comments on* "An Empirical Assessment of the Employee Choice Act: The Economic Implications" *by Anne Layne-Farrar*, 15 JUST LAB.: CANADIAN J. OF WORK AND SOC'Y (SPECIAL EDITION) 14, 15 (2009), *available at* http://www.justlabour.yorku.ca/volume15/pdfs/03_johnson_press.pdf; Open Statement by Canadian Scholars on Unionization and Free Economic and Social Well-Being of Canadians (Nov. 2009), 15 JUST LAB.: CANADIAN J. OF WORK AND SOC'Y (SPECIAL EDITION) 4, 4-5 (2009), *available at* http://www.justlabour.yorku.ca/volume15/pdfs/02_open_letter_press.pdf [hereinafter *Open Statement by Canadian Scholars*].

12. *Open Statement by Canadian Scholars*, *supra* note 11, at 4-5.

13. *See, e.g.*, Richard A. Epstein, *A Common Law for Labor Relations: A Critique of the New Deal Labor Legislation*, 92 YALE L.J. 1357, 1357 (1983); Eric Tucker, *"Great Expectations" Defeated?: The Trajectory of Collective Bargaining Regimes in Canada and the United States Post-NAFTA*, 26 COMP. LAB. L. & POL'Y J. 97, 134, 145 (2004). Civil law, however, applied in Québec in Canada and in Louisiana in the United States. *See* E. Fabre-Surveyer, *The Civil Law in Quebec*

Sherman Antitrust Act of 1890[14] moved the legal regulation of union activity from state courts and common law to the federal courts and to federal statutory law.[15] While supposedly aimed at business trusts, the Sherman Act's prohibition of "combinations in restraint of trade" became the basis for federal courts to issue injunctions against industrial actions by unions and their members.[16] This began a long era in which the primary legislative goal of the union movement in the United States was to free unions and their members from these labor injunctions.[17]

Following the 1906 Lethbridge coalfield strike, the Dominion Parliament in Canada adopted the Canadian Industrial Disputes Investigation Act of 1907.[18] Its goal aligned with the way the Sherman Act had been applied in the United States by providing for injunctions in labor disputes.[19] This Act, which applied to all employment in Canada, replaced the common law with an administrative law regime but one quite different from what labor law enforcement would become in both Canada and the United States.[20] The employer, "any of his employees," or the Minister of Labour for the Dominion could seek the appointment of a Board of Conciliation and Investigation to intervene in any "industrial dispute."[21] The application had to include a declaration that, failing adjustment, a lockout or a strike would probably occur.[22] Once a dispute was referred to a Board, it was unlawful for the employer to lockout or for the employees to strike on account of the dispute with those activities subject to an injunction.[23]

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and Louisiana, 1 LA. L. REV. 649, 649 (1939).

14. Ch. 647, 26 Stat. 209 (1890) (codified as amended at 15 U.S.C. §§ 1–7 (2006)).

15. However, § 1 of the Sherman Act channeled the common law concerning combinations in restraint of trade. "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal." *Id.* at §1; *See, e.g.,* Mason v. Provident Clothing & Supply Co., [1911-13] All E.R. Rep. 400, 403-04 (Eng.).

16. One of the earliest invocations of the Act was in 1894, against the American Railway Union led by Eugene V. Debs, with the intent to settle the Pullman Strike. *See* J. ANTHONY LUKAS, BIG TROUBLE: A MURDER IN A SMALL WESTERN TOWN SETS OFF A STRUGGLE FOR THE SOUL OF AMERICA 310-12 (1997). Several years would pass before the Act was first used against its intended perpetrator, corporate monopolies. *See id.* at 390.

17. *See* FELIX FRANKFURTER & NATHAN GREENE, THE LABOR INJUNCTION 17-19, 21, 24-25 (1930).

18. 6 & 7 Edw. 7 c. 20 (Can.).

19. *Compare* Industrial Dispute Investigation Act arts. 56-61, *with* Sherman Antitrust Act §4.

20. *Compare* Industrial Dispute Investigation Act, c. 20, *with* National Labor Relations Act, 29 U.S.C. §§151-169 (2006).

21. Industrial Dispute Investigation Act art. 5

22. Industrial Dispute Investigation Act art. 15

23. Industrial Dispute Investigation Act arts. 56, 63

The next step[24] was in 1925 when the Privy Council found that the Industrial Disputes Investigation Act violated the British North America Act of 1867[25] because the authority to regulate labor management relations was, with certain exceptions, in the provinces, not the national government.[26] In *Toronto Electric Commissioners v. Snider*,[27] the Privy Council found that section 91 of the Dominion Act gave the Dominion Parliament "a general power to make laws for Canada. But these law are not to relate to the classes of subjects assigned to the Provinces by s. 92, unless their enactment falls under heads specifically assigned to the Dominion Parliament by the enumeration in s. 91."[28] Since the challenged Act was "concerned directly with the civil rights of both employers and employed,"[29] the exclusive authority to legislate on those rights was in the provinces. The national legislation was not saved because it was not within the authority of the national government to legislate in the area of criminal law, its power to regulate trade and commerce or to make laws "for the peace, order and good government of Canada in matters falling outside the provincial powers [were] specifically conferred by s. 92."[30] So, labor law was essentially within the domain of the provinces, thus foreclosing the exercise of national power, except as to a limited range of activities such as navigation, shipping, railways, canals, telegraphs, air transportation and radio broadcasting.[31] This decision returned jurisdiction over labor-management relations and labor disputes to the provinces and to the common law.[32] About 90 percent of the private sector workers were subject to provincial labor law.[33]

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24. In the U.S., the Clayton Antitrust Act of 1914, Pub. L. No. 63-212, 38 Stat. 730, enacted October 15, 1914, (codified as amended at 15 U.S.C. §§ 12–27, 29 U.S.C. §§ 52–53), attempted to get federal courts out of the business of issuing injunctions in labor disputes but the courts nevertheless found ways to circumvent that restriction. *See* FRANKFURTER & GREEN, *supra* note 17, at 165-66.

25. This Act is still viewed by most Canadian as their core constitutional document. *See* Robert A. Sedler, *Constitutional Protection of Individual Rights in Canada: The Impact of the New Canadian Charter of Rights and Freedom*, 59 NOTRE DAME L. REV. 1191, 1193-94 (1984).

26. *See Toronto Electric Com'rs v. Snider*, [1925] 2 D.L.R. 5, 5-6 (Can.)

27. [1925] 2. D.L.R. 5 (Can.).

28. *Id.* at 10.

29. *Id.* at 8.

30. *Id.* at 14.

31. *See id.* at 15, 18 (holding that the power to govern labor laws was reserved for the provinces).

32. *See id.*

33. *See id.*; *See* Kris Warner, *Protecting Fundamental Labor Rights: Lessons from Canada for the United States*, CTR. FOR ECON & POL'Y RESEACH 5 (Aug. 2012), *available at* http://www.cepr.net/documents/publications/canada-2012-08.pdf.

In 1932, the union movement in the United States, with the enactment of the Norris-LaGuardia Act[34], achieved what had been its primary legislative goal of freeing labor disputes and industrial action from the antitrust laws.[35]

III. CONVERGENCE COMMENCES: THE WAGNER ACT MODEL

Given the dramatic impact of the Great Depression and the rise of industrial unionism, labor's legislative goal in the U.S shifted from seeking deregulation to governmental assistance through law. That goal was achieved with the enactment of the Wagner Act in 1935,[36] the first of three pieces of legislation commonly known as that National Labor Relations Act (NLRA).[37] With section 7 guaranteeing the right of workers to organize for collective bargaining,[38] section 8 providing protections of those rights,[39] and section 9 providing the administrative mechanism for unions to achieve exclusive bargaining status for workers of a particular employer at a particular workplace,[40] the model for labor law that continues in the United States and Canada was established. Instead of attempting to regulate strikes and lockouts through the use of injunctions, a purpose of the Wagner model was to reduce industrial action by the promotion and protection of collective bargaining.[41]

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34. Ch. 90, 47 Stat. 70 (1932) (codified as amended 29 U.S.C. §§ 101-15 (2006)).

35. *See id.*

36. Wagner Act, Pub.L. No. 74-198, 49 Stat. 449 (1935) (codified as amended at 29 U.S.C. §§ 151-169 (2006)).

37. The Wagner Act model was subsequently modified by two major pieces of legislation. The Taft-Hartley amendments of 1947 shifted the focus of the law from protecting the right of workers to organize to protecting the choice of workers whether or not to organize. *See* Taft-Hartley Act, Pub.L. No. 80-101, 61 Stat. 136 (1947) (codified as amended at 29 U.S.C. §§ 141-187 (2006)). The Landrum-Griffin amendments in 1959 were primarily directed at the protection of members of unions vis-à-vis their unions, including a workers Bill of Rights. *See* Landrum-Griffin Act, Pub. L. No. 86-257, 73 Stat. 519 (1959) (codified as amended at 29 U.S.C. §§ 401-531 (2006)). The Act is now known as the National Labor Relations Act, 29 U.S.C. §§ 151-169 (2006).

38. Wagner Act § 7.

39. *See id.* § 8.

40. *See id.* § 9.

41. Section 1, 29 U.S.C. § 151, sets out a principal purpose of the Act, which is to reduce strikes by providing a method for the legally imposed recognition of unions by employers:

> The denial by some employers of the right of employees to organize and the refusal by some employers to accept the procedure of collective bargaining lead to strikes and other forms of industrial strife or unrest, which have the intent or the necessary effect of burdening or obstructing commerce by (a) impairing the efficiency, safety, or operation of the instrumentalities of commerce; (b) occurring in the current of commerce; (c) materially affecting, restraining, or controlling the flow of raw materials or manufactured or processed goods from or into the channels of commerce, or the prices of such

During World War II, the labor laws enacted by the Canadian provinces, including some loosely based on the Wagner Act, failed because they did not mandate that employers bargain with unions representing a majority of their workers.[42] With the failure of effective collective bargaining, Canada suffered massive strikes.[43] In 1944, the national government, acting on its emergency powers, suspended provincial labor legislation.[44] To supplant those provincial laws, the national government issued Wartime Labor Relations Regulations, Order in Council 1003 (P.C. 1003), which more closely followed the Wagner Act model.[45] P.C. 1003 mandated the duty to meet and bargain in good faith, prohibited unfair labor practices, and introduced a labour relations board, the National War Labour Relations Board, to enforce the law.[46] It did, however, maintain several traditional Canadian labor principles that differed from the Wagner Act. The major differences were that the arbitration of rights grievances arising from a collective bargaining agreement was mandatory and that strikes and lockouts were forbidden during the term of an agreement.[47]

In 1948, the provisions of P.C. 1003 were consolidated into and became part of the Canadian Labour Code.[48] With the lifting of the emergency, the provinces followed the lead of P.C 1003 and enacted legislation more closely channeling the Wagner Act model. While there is some difference among the Canadian Labour Code and the provincial labor laws, they all have certain features that they share with the NLRA.[49] They include protection for employee freedom of association,

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materials or goods in commerce; or (d) causing diminution of employment and wages in such volume as substantially to impair or disrupt the market for goods flowing from or into the channels of commerce.

42. Judy Fudge & Eric Tucker, *Pluralism or Fragmentation? The Twentieth-Century Employment Law Regime in Canada*, 46 LABOUR/LE TRAVAIL 251, 271-72 (2000).

43. *See id.* at 274-75.

44. H.A. Logan, *The State of Collective Bargaining*, 10 CANADIAN J. OF ECON. & POL. SCI. 476, 476, 486 (1944).

45. *See* Judy Fudge & Harry Glasbeek, *The Legacy of PC 1003*, 3 CANADIAN LAB. & EMP. L.J. 357, 358 (1994-95); Logan, *supra* note 44, at 486.

46. *See* Logan, *supra* note 44, at 476.

47. Fudge & Glasbeek, *supra* note 45, at 364.

48. *See* Charles W. Smith, *The Politics of the* Ontario Labour-Relations Act: *Business, Labour, and Government in the Consolidation of Post-War Industrial Relations, 1949-1961*, 62 LABOUR/LE TRAVAIL 109, 111 (2008) (stating that Privy Council Order 1003 was passed in 1944 and was codified in the 1948 Industrial Disputes Investigations Act).

49. As noted above, Professor Marco Biagi characterized the North American model as based on selection of trade union representation through an election by the majority of workers and the maintenance thereafter of exclusive bargaining status, which he describes as "a monopoly of representation." *See Forms of Participation*, *supra* note 2, at 193-95.

mandated recognition by employers of unions that represent a majority of its workers in a particular bargaining unit, compulsory bargaining rights for certified and lawfully recognized unions, prohibition of unfair labor practices by employers and unions, and the establishment of industrial relations boards with authority to investigate and resolve issues arising under these laws.[50]

IV. CANADIAN TINKERING WITH THE WAGNER MODEL

Canadian labor codes all share certain features that are not included in the basic structure of the Wagner Act in the United States. Those features include postponement of the right to strike until conciliation fails and mandatory grievance arbitration to resolve disputes arising during the term of the collective agreement without resorting to a strike.[51] There are also some important differences among these different labor laws. Because labor law jurisdiction is divided between the national government and the ten provinces, labor law has been at issue in numerous elections and is "sensitive to sub-national swings in political strength and hence labor law reform has been more volatile."[52] On the issue of card-check certification, Professor Michael Lynk describes the shifts in less than twenty-five years as to whether or not to provide for card-check certification:

> Prior to 1984, the federal jurisdiction and nine of the ten provinces utilized the card-check system in their labour legislation. Since 1984, five provinces have set aside the card-check system and turned to the mandatory secret ballot process: British Columbia (which adopted the mandatory certification election process in 1984; reverted to the card-check process in 1992, and returned to mandatory elections in 2002); Alberta (1988); Newfoundland (1994); Ontario (1995); and Saskatchewan (2008).[53]

50. *See* National Labor Relations Act (NLRA), 29 U.S.C. §§ 153, 157-158 (2006).

51. In the United States, the Federal Mediation and Conciliation Service, which was created by the Taft-Hartley Act in 1947, replaced the United States Conciliation Service in providing voluntary mediation and conciliation services. *See* Louis Stark, *Analysis of Labor Act Shows Changed Era at Hand for Industry*, N.Y. TIMES, June 24, 1947, at 1.

52. Tucker, *supra* note 13, at 149. Since 1982, the federal and provincial governments have enacted 198 labor laws, with 189 restricting, suspending or denying collective bargaining rights of workers. Derek Fudge, Remarks at the Freedom of Association Conference 1 (Feb. 2010) (transcript available upon request to author).

53. Michael Lynk, *Labour Law and the New Inequality,* 15 JUST LAB.: CANADIAN J. WORK & SOC'Y (SPECIAL EDITION) 125, 135 (2009).

As of 2011, seven of the Canadian provinces provide for first contract arbitration.[54] Unlike card-check certification, that feature of Canadian labor law has been much less in issue politically since 1984.[55]

V. PAUL WEILER'S CANADIAN EXPERIENCE

As Canadian labor law has evolved, developed, and diverged from the Wagner model, Canadian innovations seeped south across the border and significantly influenced U.S. labor law scholarly and policy debates. While none of these ideas resulted in actual changes to U.S. labor law, they can be traced into concrete law reform proposals. One man in particular – Harvard Law School Professor Emeritus Paul Weiler – is greatly responsible for the impact of Canadian legal thinking on U.S. scholarly and policymaking circles.[56] Weiler's legal theorizing is connected directly to his experiences in Canada.

Professor Weiler's career in the Canadian legal academy began in 1965 at Osgoode Hall Law School at York University in Toronto, which is the school from which he received his LLB.[57] He also served as a labor arbitrator in those early years.[58] In 1973, Weiler was asked to help draft proposed labor legislation in British Columbia.[59] More specifically, he was asked to write the section that defined the provincial Labour Relations Board.[60] That legislation, described by one scholar as "undoubtedly the most innovative labour law in Canada," became British Columbia's Labour Code.[61] Weiler was a "principal architect[]" of this "groundbreaking" legislation, and served for five years from

54. John Logan, *Union Recognition and Collective Bargaining: How Does the United States Compare With Other Democracies?*, LAB. & EMP. REL. ASS'N, http://leraweb.org/publications/perspectives-online-companion/union-recognition-and-collective-bargaining-how-does-unit (last visited Sept. 28, 2012).

55. DOUGLAS G. GILBERT, BRIAN W. BURKETT & MOIRA K. MCCASKILL, CANADIAN LABOUR & EMPLOYMENT LAW FOR THE U.S. PRACTITIONER, 713-15 tbl.B (3d. ed. 2011).

56. Canadian labor law scholars are much more familiar with United States law and scholarship than U.S. academics are of Canadian labor law and scholarship. Many of Canada's top labor law scholars have earned LL.M. and/or S.J.D. degrees at U.S. law schools. Paul Weiler has noted the great impact that renowned U.S. labor law scholar Archibald Cox had on him when Weiler was studying for an LL.M. at Harvard Law School. *See* Paul C. Weiler, Acceptance Speech of the Bora Laskin Award, (May 5, 2005). Weiler also notes that many Canadians had similar experiences, including Professor Harry Arthurs, who was Dean of Osgoode Hall Law School when Weiler began his academic career. *Id.*

57. *Id.*

58. *Id.*

59. *See* Artibise, *supra* note 7, at 10.

60. *Id.*

61. *Id.*

1973-1978 as the first chairman of British Columbia's Labour Relations Board (LRB).[62] He describes his term on the LRB as "crucial real world experience for my teaching and writing."[63]

Among the notable aspects of the LRB's powers were two aimed at discouraging tactics used by employers to avoid unionization, conduct which had proven resistant to cease and desist orders. The first allowed the LRB not only to reinstate employees illegally dismissed during union organizing campaigns but also to certify a union where employer unfair labor practices prevent the LRB from ascertaining the employees' true wishes.[64] The second allowed the LRB to impose a first collective bargaining agreement on the parties where they were unsuccessful in bargaining on their own.[65] British Columbian innovations regarding certification procedure and first contract attainment also played a central role in Weiler's scholarly work soon after he left the LRB and joined the U.S. legal academy.

In 1978, Weiler accepted a position at Harvard Law School as Mackenzie King Professor of Canadian Studies.[66] The book he wrote during that time, *Reconcilable Differences: New Directions in Canadian Labour Law*,[67] explores the shape the government's industrial relations policy should take.[68] Weiler examines this central question through his experience with the British Columbian law that he was so instrumental in administering during its formative period.[69] Part of what makes the book so interesting is that he very successfully intertwines politics with labor policy and labor law.

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62. Harry Arthurs, *Reconciling Differences Differently: Reflections on Labor Law and Worker Voice After Collective Bargaining*, 28 COMP. LAB. L. & POL'Y J. 155, 156 n.3 (2007).

63. Weiler, *supra* note 56.

64. Artibise, *supra* note 7, at 17-18. Presently, this power is codified in section 14(4)(f) of the British Columbia Labour Relations Code. British Columbia Labour Relations Code, R.S.B.C. 1996, c. 244, §14 (B.C.). This approach appears to be a Canadian codification inspired by the principle announced by the U.S. Supreme Court in *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969). In *Gissel,* the Court held that the National Labor Relations Board may issue a bargaining order in a case where a majority of employees sign union authorization cards, and the employer rejects those cards while committing significant unfair labor practices that make a fair election unlikely. *See id.* at 599-600.

65. *See* Artibise, *supra* note 7, at 18. The present British Columbia Labour Relations Code provision on this issue is codified in section 55. R.S.B.C. 1996, c. 244, § 55 (B.C.).

66. *See supra* note 7.

67. PAUL C. WEILER, RECONCILABLE DIFFERENCES: NEW DIRECTIONS IN CANADIAN LABOUR LAW (1980) [hereinafter RECONCILABLE DIFFERENCES].

68. *See id.* at v-vii (explaining that the focus of the book is on "the analysis and appraisal of the basic policy themes themselves.").

69. *See id.* at vi (detailing his experience "grappling with . . . British Columbia labour relations.").

While Weiler describes a wide range of developments in labor law during his chairmanship, this article will focus on two important issues – card-check certification and first contract arbitration. As to card check certification, he makes an extended analysis of the pluses and minuses of it versus a mandatory election, including elections with very short electioneering periods, and comes out in favor of card-check, the approach that British Columbia adopted when he chaired its Board:

> Trade unions should be granted certification – that legal license to bargain – on the basis of signed membership cards. The real test of whether employee support will remain steadfast will come when the trade union looks for a mandate to support its efforts at the bargaining table. In the meantime, the Canadian model of representation law does a much better job than its American counterpart of performing the task we should set for it: encouraging collective bargaining through trade unions freely and peacefully chosen by the employees.[70]

Weiler starts his discussion of first-contract arbitration by laying out the underpinnings of collective bargaining that, ultimately, rely on the use of economic weapons to drive the parties to agreement.[71] He then discusses some of his experiences while on the Board that, in his view, justified first contract arbitration.[72] In what may seem surprising, he found that where the Board used first-contract arbitration, the "collective bargaining relationships did not mature."[73] Yet, he concluded that

> first-contract arbitration was a great success in its broader preventive impact. We imposed very few agreements. . . . But when we did write agreements against an anti-union employer, we made the compensation package rather generous. We stated quite forthrightly that that was what we were doing, in order to provide a disincentive to other employers adopting the kinds of tactics which would get them before the Labour Board.[74]

Weiler's real influence on the U.S. scene, however, began after he

70. *Id.* at 48-49.

71. *See id.* at 49 ("The assumption of our system is that when they do reach . . . an impasse, an economic test of strength must take place to break the logjam. It is the strike that determines which side will find it more painful to disagree, which party will be forced to make the major moves toward compromise.").

72. *See id.* at 49-53.

73. *Id.* at 54.

74. *Id.*

became a member of the Harvard Law School faculty in 1979. During his first five years on faculty, he published two articles in the Harvard Law Review that had an extraordinary impact on U.S. labor law scholarship. The two articles, *Promises to Keep*[75] and *Striking a New Balance,*[76] forcefully advocated U.S. labor law reform by drawing from the Canadian experience.[77]

VI. THE IMPACT OF CANADIAN THINKING ON U.S. LABOR LAW SCHOLARSHIP

In *Promises to Keep*, Weiler proposed Canadian-inspired reform of what he characterized as U.S. labor law's weak regulatory framework in order to circumvent "skyrocketing use of coercive and illegal tactics . . . by employers determined to prevent the unionization of their employees."[78] Weiler traced the precipitous decline in union density in the U.S. to the NLRA's representation procedure, which allows for lengthy, fiercely contested election campaigns, periods during which employers may not only make their antipathy toward unions clear to their employees but also commit unfair labor practices, such as discriminatory discharges.[79] Employers engage in the latter conduct, he argued, in order to scuttle the union's momentum during an organizing drive.[80]

The remedial structure of the NLRA, however, which relies on backpay awards and reinstatement, fails to deter such unlawful actions. This is due to the small size of back pay awards, which are subject to an employee duty to mitigate damages,[81] and the difficulty regulators have in repairing and restoring a badly damaged employment relationship, a prerequisite for effective restatement.[82] Nor do so-called *Gissel* bargaining orders, which require employer bargaining where employer unfair labor practices are so egregious that a fair election is unlikely,

75. Paul Weiler, *Promises to Keep: Securing Workers' Rights to Self-Organization Under the NLRA,* 96 HARV. L. REV. 1769 (1983) [hereinafter *Promises*].

76. Paul Weiler, *Striking a New Balance: Freedom of Contract and the Prospects for Union Representation,* 98 HARV. L. REV. 351 (1984) [hereinafter *New Balance*].

77. Alan Hyde, *Endangered Species*, 91 COLUM. L. REV. 456 (1991) (reviewing PAUL C. WEILER, GOVERNING THE WORKPLACE: THE FUTURE OF LABOR AND EMPLOYMENT LAW (1990)).

78. *Promises, supra* note 75, at 1769-70.

79. *See id.* at 1773-74, 1778-79, 1781-82.

80. *Id.* at 1788.

81. *Id.* at 1789.

82. *Id.* at 1791.

supply needed deterrence.[83] Even where such orders are granted, they can do no more than provide an opportunity to force the employer to the table. The union, which in such cases may be greatly weakened by the illegal actions of the employer, is often hard-pressed to ask employees to strike in support of its bargaining demands, making attainment of a first contract a long shot.[84]

Weiler argued that the weakness in the U.S. system was the assumption that there should be a campaign waged by the union and the employer prior to a secret ballot election.[85] Such a contest, he noted, provides the employer with time to erode the union's support and an incentive to behave illegally.[86] The solution was to be found in either one of two Canadian practices: certification of the union upon the presentation of signed authorization cards by a majority of the employees, or the holding of an instant election when the union presents enough authorization cards to indicate "substantial employee interest."[87] Although Weiler noted that card check certification was the system over which he presided in British Columbia and was superior to the U.S. approach, he ultimately endorsed the system of instant elections embraced by the Canadian province of Nova Scotia because such a proceeding can confirm in the minds of all parties the status of the union and confer legitimacy upon it.[88]

In *Striking a New Balance,* Weiler explored the difficulty for newly certified unions of negotiating a first contract and the contribution of U.S. labor law to that phenomenon, which he opined had led to the overall decline in union density.[89] One causal factor is the very narrow statutory requirement of the duty to bargain, which requires the parties to negotiate in good faith yet does not mandate that either party agree or make concessions.[90] Moreover, the remedies for bad faith bargaining do not include imposing an agreement on the violator.[91] Rather, the most the National Labor Relations Board (NLRB) can do is to order compliance with the law in the future.[92] Without enforcement power of its own, if the NLRB hopes to impose contempt proceedings on a party

83. *See supra* note 64 and accompanying text.
84. *Promises, supra* note 75, at 1794-95.
85. *See id.* at 1805.
86. *Id.* at 1805.
87. *Id.*
88. *See id.* at 1811-12.
89. *See generally New Balance, supra* note 76.
90. *See id.* at 358-59.
91. *Id.* at 360.
92. *See Id.*

that continues to flout the law, it must apply to a federal court of appeals for enforcement.[93] Finally, the employees' power of self-help is limited under the NLRA.[94] Secondary boycotts, actions taken by a union to pressure other companies to cease doing business with the employer, are subject to a broad statutory prohibition.[95] Additionally, while a strike may exert pressure on their employer to agree to their demands, where the drive for unionization has been protracted and traumatic, the employees may be reluctant to walk off the job.[96] Striking workers may be permanently replaced, a legal entitlement that undermines incentives for the employer to compromise at the bargaining table.[97] In fact, by replacing the strikers, the employer may act upon the "golden opportunity to rid itself of the union altogether."[98]

In considering possible reforms, Weiler once again recommended turning to Canadian practices. He suggested first-contract arbitration as a remedial measure for flagrant instances of bad faith bargaining.[99] Yet he acknowledged the limitations of imposing a contract on the parties:

> [T]here is no guarantee . . . that the imposed contract will have a real bearing on life at the plant or that it will be renewed. My own experience in administering the first statute containing such a remedy persuades me that if the agreement is to have any chance of enduring, the bargaining unit must be large and must display a strong initial degree of union support. More specifically, the union's support must be strong enough that when the contract is finally arbitrated, the bargaining unit will still have a solid core of union activists – people who remember the struggle . . . and who will take responsibility for administering its terms and demonstrating the advantages of collective action.[100]

Weiler's suggestion for altering the *MacKay Radio* doctrine, named for U.S. Supreme Court decision that announced in dicta that strikers could be permanently replaced,[101] also considered Canadian practice. At

93. *See id.* at 360-61.
94. *See generally id.* at 361-62 (outlining the limits of employee self-help in the context of a strike).
95. *Id.* at 398; *See also* National Labor Relations Act § 8(b)(4), 29 U.S.C. § 158(b)(4) (2006).
96. *See New Balance, supra* note 76, at 362.
97. *See id.*
98. *Id.*
99. *See id.* at 405.
100. *Id.* at 410-11.
101. NLRB v. Mackay Radio & Tel. Co., 304 U.S. 333, 345-46 (1938).

the time he was writing, a pro-labor, social democratic government in Québec had recently passed a law allowing only a skeleton crew comprised of managers to continue operating during a strike.[102] Although Weiler ultimately concluded this development went too far,[103]discussing the actions of a Canadian province in a Harvard Law Review article on U.S. labor law was novel, to say the least.

Indeed, the impact of this Canadian lawyer's scholarly work on U.S. labor law scholarship was significant. Professor Alan Hyde describes Weiler as having "burst onto the United States labor law scene in the early 1980s with a pair of remarkable articles."[104] Hyde notes that the Canadian experience had until that point been "unexplored by United States scholars."[105] Dr. John Trumpbour, director of Harvard Law School's Labor and Worklife Program, called the impact of Weiler's two articles "crucial."[106] Notably, Weiler's influence transcended the Ivory Tower.[107] Trumpbour recounts a 2006 speech by John Hiatt, the AFL-CIO's chief counsel, during which Hiatt asserted that Weiler's two articles "framed the debate about our labor laws that continues today."[108]

In 1990, Weiler published *Governing the Workplace: The Future of Labor and Employment Law*,[109] which built on his earlier work but also recommended reforms based on European practice. In particular, Weiler recommended reforming the NLRA to require the establishment of employee participation committees based on the German model of co-determination.[110] To accomplish this goal, he suggested easing section 8(a)(2)'s apparent ban on employer-sponsored employee involvement programs.[111]

The book's most Canadian-influenced proposals, however, are those related to instant elections, first-contract arbitration, and striker replacement. Regarding instant elections, Weiler argued for his strategy's viability based directly on the Canadian experience.[112] Despite similarities in "[t]he unions, the employers, the attitudes of the

102. *New Balance*, *supra*, note 76, at 412-13.

103. *See id.* at 414.

104. Hyde, *supra* note 77, at 456.

105. *Id.*

106. Trumpbour, *supra* note 8, at 93.

107. *See* H.W. Arthurs, *National Tradition in Labor Law and Scholarship: The Canadian Case*, 23 COMP. LAB. L. & POL'Y J. 645, 663-64, 675-76 (2002).

108. Trumpbour, *supra* note 8, at 93 (internal quotation marks omitted).

109. PAUL. C. WEILER, GOVERNING THE WORKPLACE: THE FUTURE OF LABOR AND EMPLOYMENT LAW (1990) [hereinafter GOVERNING THE WORKPLACE].

110. *See id.* at 283-85.

111. *See id.* at 217.

112. *See id.* at 254-55.

work force, and the legal and collective bargaining systems," Canada has a much higher union certification success rate and a much lower rate of employer unfair labor practices.[113] The difference between the two countries, in Weiler's view, is the elimination of a lengthy representation campaign in Canada.[114] To bring about needed change in the United States, Weiler recommended requiring a union to present to the NLRB authorization cards from 55 or 60 percent of the workers and those workers to pay to the union a token membership fee.[115] The NLRB would thereafter hold an election within about five days. Questions concerning bargaining unit shape and inclusion would be decided after the election.[116]

On first-contract arbitration, Weiler drew from the Canadian model, noting it would assist new unions in putting down roots in an enterprise, and provide workers with a chance to experience work life lived under a collective bargaining agreement.[117] Yet, though favoring this remedy, he quickly backed away from it, noting he doubted its "practical feasibility" in the United States.[118] In contrast, Weiler argued forcefully in favor of protecting the right to strike by legislatively overruling the *MacKay Radio* permanent replacement doctrine.[119] In place of that doctrine, he suggested the approach of Ontario's labor law, which allows strikers up to six months from the date of the strike to return to work even if replacements are displaced.[120]

By the early 1990s, Weiler's work and ideas were known among the leaders of organized labor in the United States. Writing in 1991, Professor Hyde described Weiler's thinking as "quietly influential" and noted that if American organized labor perceived the possibility of legislative victory, their agenda would evidence Weiler's influence.[121]

VII. CANADIAN INFLUENCE AND THE DUNLOP COMMISSION

A window of opportunity within which to address American labor's agenda opened in 1992, with the election of President Bill Clinton and the achievement of Democratic Party control of both the Senate and the

113. *Id.* at 255.
114. *Id.*
115. *Id.*
116. *Id.* at 255-56.
117. *Id.* at 250.
118. *Id.*
119. *See id.* at 264-68.
120. *Id.* at 268.
121. Hyde, *supra* note 77, at 456.

House of Representatives.[122] In 1993, the Clinton administration created the Commission on the Future of Worker-Management Relations, which was chaired by John T. Dunlop, Professor Emeritus at Harvard, who had also served as U.S. Secretary of Labor.[123] Professor Paul Weiler, then Harvard's Henry J. Friendly Professor of Law, served as counsel to the Commission.[124]

The Commission, which came to be known as the Dunlop Commission, was charged with reporting on three key questions, including: "What (if any) changes should be made in the present legal framework and practices of collective bargaining to enhance cooperative behavior, improve productivity, and reduce conflict and delay?"[125]

To address that question, and two others, the Commission held twenty-one public hearings, and reviewed "correspondence, studies and articles from representatives of business groups, labor organizations, professional associations, academics, women's organizations, civil rights and other interested groups, and individuals."[126] After twenty months of effort, the Commission concluded that the NLRA was not achieving its central goals of promoting collective bargaining and protecting employees' rights to choose unionization.[127] In particular, the Commission decried the importation into union representation campaigns "of the worst features of political campaigns," which resulted in hostility and confrontation among the parties.[128] Also of concern was the increase over time of discriminatory discharges of workers exercising their rights under the NLRA.[129] Finally, the Commission found that in a third of the cases where employees opt to unionize, the union is unable to successfully negotiate a first-contract with the employer.[130]

In response to these findings, the Dunlop Commission recommended three changes in U.S. labor law, two of which clearly bear Weiler's Canadian-influenced thinking. First, the Commission

122. *See* Thomas A. Kochan, *Updating American Labor Law: Taking Advantage of a Window of Opportunity,* 28 COMP. LAB. L. & POL'Y J. 101, 104 (2007).

123. Robert B. Moberly, *Labor-Management Relations during the Clinton Administration,* 24 HOFSTRA LAB. & EMP. L.J. 31, 47 (2006).

124. U.S. DEP'T OF LABOR & U.S. DEP'T OF COMMERCE, COMM'N ON FUTURE WORKER-MGMT. RELATIONS, THE DUNLOP COMM'N ON THE FUTURE OF WORKER-MGMT RELATIONS – FINAL REPORT 112 (1994) [hereinafter FINAL REPORT].

125. *Id.* at 3.

126. *Id.*

127. *Id.* at 9.

128. *Id.* at 36.

129. *See id.* at 38.

130. *See id.* at 39.

suggested that representation elections be held as quickly as administratively feasible – ideally within two weeks – and before legal hearings on bargaining unit scope.[131] Although not as "instant" an instant election as Weiler had suggested in *Governing the Workplace*, holding elections within two weeks represented a significant improvement over what then NLRB General Counsel Fred Feinstein testified was the best he could manage under the system at the time: an election within seven or eight weeks of a petition for election being filed.[132] Interestingly, the Commission encouraged employers and labor organizations to promote cooperation by eschewing an election entirely and voluntarily agreeing to determine employees' preferences via card check.[133] Yet the final report did not go so far as to suggest card check as a certification method that could be imposed upon a reluctant employer.[134]

Second, the Commission recommended the government assist employers and newly certified unions in obtaining first contracts by providing early access to mediation and creating a tripartite first contract advisory board.[135] The latter would be able to draw from a range of options to assist the parties, from encouraging them to work out their differences through self-help (strikes or lockouts) to binding arbitration in extreme cases.[136] The Commission's statement on first contract arbitration sounds a theme present in Weiler's scholarly work on the subject:

> Making arbitration available in first contract cases is crucial to the overall representation system. The Commission believes it will be necessary to invoke arbitration only rarely, but the prospect of its use in situations where one side or the other has been recalcitrant in negotiations will motivate the parties to reach mutually acceptable compromises.[137]

In other words, the great utility of first contract arbitration is its deterrent effect on parties who might otherwise delay the bargaining process or act in bad faith.

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131. *Id.*

132. *Id.* at 40-41.

133. *See id.* at 42.

134. *See id.* (noting the Commission encourages, rather than recommends, employer use of card-check to "determine the employees' majority preference").

135. *Id.* at 45.

136. *Id.* at 45.

137. *Id.* at 46.

The Dunlop Commission did not address a third Weiler-identified candidate for labor law reform: change of the *MacKay Radio* doctrine permitting the permanent replacement of striking workers.[138] At the time the Commission was at work, however, there was pending legislation that would have banned hiring permanent replacements during economic strikes.[139] Indeed, the Cesar Chavez Workplace Fairness Act, organized labor's highest priority at the beginning of the Clinton administration, died on the Senate floor in 1994.[140] The Dunlop Commission's recommendations met a similar fate. By the time the final report was issued in December 1994, the Republicans' "Contract with America" had enabled the party to seize control of the House of Representatives.[141] Nonetheless, Canadian-inspired ideas had clearly influenced labor law reform proposals and proposed legislation, and they would again during the early days of the Obama administration.

VIII. THE EMPLOYEE FREE CHOICE ACT

A version of the Employee Free Choice Act (EFCA) has been introduced in every Congress since 2003.[142] The American union movement's highest legislative priority[143] has so far not been enacted.[144] While EFCA, if adopted, would increase the remedies available for unfair labor practices committed during an election campaign, two elements have been most in contention. These two provisions track recommendations first made by Professor Weiler in the early 1980s.

First, EFCA provides for card-check certification.[145] Under the proposed legislation, a union that receives the support of a majority of workers in a bargaining unit can be certified by the NLRB as the

138. *See generally id.*

139. *See* William R. Corbett, *"The More Things Change, . . .": Reflections on the Stasis of Labor Law in the United States,* 56 VILL. L. REV. 227, 228 (2011).

140. *Id.* at 227-28.

141. *Id.* at 231.

142. H.R. 1409, 111th Cong. (2009); S. 560, 111th Cong. (2009); H.R. 800, 110th Cong. (2007); S. 1041, 110th Cong. (2007); H.R. 1696, 109th Cong. (2005); S. 842, 109th Cong. (2005); H.R. 3619, 108th Cong. (2003); S. 1925, 108th Cong. (2003). *See also* JON O. SHIMABUKURO, CONG. RESEARCH SERV., RS 21887, THE EMPLOYEE FREE CHOICE ACT 1 (2011) [hereinafter CONG. RESEARCH SERV].

143. *See* Dale Russakoff, *Labor to Push Agenda in Congress It Helped Elect*, WASH. POST, Dec. 8, 2006, at A13. (quoting AFL-CIO President John J. Sweeney as calling EFCA "the most important work we'll be doing, because it's a key to succeeding on everything else.").

144. The EFCA follows equally unsuccessful attempts to enact legislation to amend the NLRA to provide for expedited elections and/or card certification. *See* CONG. RESEARCH SERV., *supra* note 142, at 6-7.

145. *See id.* at 1.

exclusive bargaining representative without an election.[146] Second, EFCA provides for first contract arbitration.[147] If the parties engaged in first contract negotiations fail to reach an agreement after 130 days, interest arbitration would be available to them that would establish the collective bargaining agreement for them.[148] While such procedures are not unknown to American public sector labor law,[149] the primary inspiration for EFCA is the Canadian experience and one of the primary critiques of the proposed legislation is based on that experience.[150]

Before the 2008 election, Senator Barack Obama announced his support of EFCA.[151] After his election as President, EFCA's business opponents organized their opposition in a group called the Alliance to Save Main Street Jobs.[152] The Alliance, which is led by the HR Policy Association, includes as members the U.S. Chamber of Commerce, the American Hotel and Lodging Association, the International Council of Shopping Centers, the Real Estate Roundtable, the Retail Industry Leaders Association, and the Associated Builders and Contractors.[153] Financial support for the research, preparation and publication of at least two scholarly critiques of EFCA was provided by the Alliance.[154] One critique was authored by Professor Richard Epstein, who argued for the

146. *See id.* In the face of fierce resistance to card-check certification, the Senate supporters of EFCA dropped card check but replaced it with expedited, also a Canadian-inspired recommendation made by Weiler in the 1980s. *See* Steven Greenhouse, *Democrats Drop Key Part of Bill To Assist Unions*, N.Y. TIMES, July 17, 2009, at A1.

147. CONG. RESEARCH SERV., *supra* note 142, at 3 ("In addition to providing for union certification without an election, the EFCA would have amended the NLRA to allow for the involvement of the Federal Mediation and Conciliation Service ("FMCS") during the negotiation of an initial agreement following certification or the recognition of a labor organization."). *See also* Employee Free Choice Act of 2009, H.R. 1409, 111th Cong. § 3 (2009).

148. H.R. 1409 § 3.

149. *See generally* William A. Herbert, *Card Check Labor Certification: Lessons from New York*, 74 ALB. L. REV. 93 (2010) (discussing New York's fifty-year history with card check certification).

150. That is not to say that U.S. labor law scholars did not critique EFCA without looking to Canada. *See generally* Benjamin I. Sachs, *Enabling Employee Choice: A Structural Approach to the Rules of Union Organizing*, 123 HARV. L. REV. 655, 668-71 (2010) (outlining the critique that card check impeded employee choice by exposing employees to coercive pressures from union organizers).

151. *See* DEMOCRATIC NAT'L CONVENTION COMM., THE 2008 DEMOCRATIC NATIONAL PLATFORM: RENEWING AMERICA'S PROMISE 14 (2008); *see also* RICHARD A. EPSTEIN, THE CASE AGAINST THE EMPLOYEE FREE CHOICE ACT vii (2009).

152. *See* EPSTEIN, *supra* note 151, at ix (stating that Epstein himself received financial support from the Alliance to Save Main Street Jobs for writing this work critiquing the EFCA).

153. *Id.*

154. *See id.* (acknowledging financial support from the Alliance); Layne-Farrar, *supra* note 9, at 1 ("Financial support from The Alliance to Save Main Street Jobs is gratefully acknowledged.").

repeal the NLRA.[155] Epstein published an Alliance-funded book critiquing the proposed legislation.[156] He attacked EFCA using a wide range of arguments, but all were based on a domestic point of view.[157] In other words, he did not look to conditions in Canada to support his arguments. His only mention of Canada is his critique of Weiler, who he describes as a "Harvard law professor and AFL-CIO board member in both the United States and Canada."[158] His criticism was of Weiler's use of data in *Promises to Keep* dealing with the percentage of pro-union employees discharged in union organizing drives in the United States.[159]

In contrast, the other Alliance funded scholarly critique of EFCA, which apparently was only posted on the Social Science Research Network (SSRN), relied on the Canadian experience to argue against the proposed legislation.[160] This critique was authored Dr. Anne Layne-Farrar, an economist who identified herself as a director at LECG, a consulting company.[161] Layne-Farrar argued that "Canada offers a natural experiment for quantitative analysis . . . [and] a window on the most likely effects of passing EFCA in the United States."[162] This is due, she claimed, to the provincial level changes in certification procedures in Canada, and the similarities between the United States and its northern neighbor in terms of "industrial structure," as well as the economic integration of the two countries.[163]

Using Canadian data drawn from prior studies of card check certification and mandatory first contract arbitration published in Canada, Layne-Farrar concluded that "EFCA is unlikely to achieve its primary goal of improving overall social welfare."[164] While predicting that EFCA would result in higher union density, she supported her

155. Professor Epstein's opposition to the NLRA is longstanding. *See, e.g.*, Richard A. Epstein, *A Common Law for Labor Relations: A Critique of the New Deal Labor Legislation*, 92 YALE L.J. 1357 (1983) (arguing that the Norris-LaGuardia Act of 1932 and the Wagner Act of 1935 should be abolished in favor of a common law regime).

156. *See generally* EPSTEIN, *supra* note 151.

157. *See generally id.*

158. *Id.* at 52.

159. *Id.* at 52 (citing *Promises*, *supra* note 75 at 1781).

160. *See generally* Layne-Farrar, *supra* note 9.

161. *Id.* at 1 n.*. Layne-Farrar testified before Congress based on her study. *See generally Rebuilding Economic Security: Empowering Workers to Restore the Middle Class: Hearing of the S. Comm. On Health, Educ., Labor, and Pension*, 111th Cong. 27-32(2009) (statement of Anne Layne-Farrar, Ph.D., Director, LECG Consulting).

162. Layne-Farrar, *supra* note 9, at 3.

163. *Id.* at 15.

164. *Id.* at 28. "[A] card check and mandatory arbitration system which raise union membership . . . would lead to a reduction in the US employment rate and a subsequent reduction in US industry output." *Id.* at 26.

overall conclusion based on what she predicted would be the collateral effects if the Act were to be enacted:

> 1. [H]igher union density today, is associated with higher unemployment tomorrow and the effect is highly statistically significant . . . . [I]f card checks and a mandatory contract arbitration system were to increase union density by 5 percentage points . . . the US unemployment rate is predicted to increase in the following year by 1.49 to 1.77 percentage points over current levels – an increase of 2.28 million to 2.71 million unemployed workers. If union density were to increase by 10 percentage points . . . in the following year the US unemployment rate would increase by 2.97 to 3.53 percentage points over current levels – an increase of 4.56 million to 5.42 million unemployed workers.[165]

> 2. [I]f EFCA were to raise union density today by 5 percentage points, the employment rate would decrease by 0.86 to 1.14 percentage points next year, for a net loss of between 0.55 and 0.95 million jobs. If EFCA were to raise the union density today by 10 percentage points, the employment rate would decrease by 1.72 to 2.27 percentage points next year, for a net loss of between 1.81 and 2.61 million jobs.[166]

In short, Layne-Ferrar predicted sizeable adverse labor market effects in the United States would be associated with adopting card check certification and first contract arbitration, longtime aspects of Canadian labor law.

The fact that Layne-Farrar's study was funded by an association of U.S. business groups is not surprising. Nor is it remarkable that Layne-Farrar's predictions were widely reported in the mainstream media, by for example, CBS, MSNBC, The Wall Street Journal, and Fox News.[167] One is similarly loath to express shock that Layne-Farrar testified before Congress about her conclusions. Such is the state of American politics, political lobbying, and media coverage. What is notable, however, is the way Canadian scholars responded to Layne-Farrar's study. First, over "100 Canadian university-based academics working in economics, labour studies, labour or industrial relations, and other labour-related disciplines" signed a statement claiming that "Canada's more extensive

165. *Id.* at 22-24.

166. *Id.* at 25.

167. Chris Kromm, *Investigation: Business Bankrolls Study Claiming Job Losses from Employee Free Choice Act*, THE INST. FOR S. STUD. (Mar. 11, 2009, 2:50 PM), http://www.sourthernstudies.org/2009/03/investigation-business-bankrolls-sutdy-claiming-job-losses-from-employee-free-choice-act.htm.

collective bargaining system has not undermined our aggregate labour market performance, and in fact has had generally positive impacts on economic and social well-being here."[168]

Second, Canadian scholars joined together to demonstrate that Layne-Farrar's study is fatally flawed. A special issue of the journal *Just Labour: A Canadian Journal of Work and Society* was devoted to debunking Layne-Ferrar's thesis and the broader implications of her work.[169] The special issue consists of nine articles and an extensive bibliography of Canadian labor market research.[170] These articles are written by a number of Canada's leading scholars on the subject. Divided into three sections, the special edition extensively interrogates Layne-Ferrar's hypothesis, focuses on Québec's long-term experience with card check certification and first contract arbitration, and considers the link, in Canada, between unionization and economic and social well-being.[171]

In terms of the weaknesses in Layne-Farrar's methodology and findings, two kinds of data were left out of her study. First, Layne-Farrar relied on data from 1976 to 1997, even though more recent data was available through 2007.[172] Further, Layne-Farrar excluded from her study significant variables, such as demographic changes, changes in industrial structure, real or minimum wages, unemployment insurance, and, most significantly, the substantial change in the rate of participation of women.[173] Additionally, Layne-Farrar included inappropriate estimations of variables that are "non-stationary," or, variables that move in the same direction over time.[174] The problem with this is that regressing variables that move over time can erroneously produce what appears to be a causal link between them.[175] Under that approach, "[u]nionization does a better job of explaining beer and cigarette prices, than of explaining Canadian unemployment[.]"[176] Sran and Stanford reran the study, correcting for the deficiencies in Layne-Farrar's study

168. Pupo, *supra* note 10, at 2.

169. *See id.*

170. *See id.*

171. *Id.*

172. Johnson, *supra* note 11, at 21.

173. *See id.*; Pierre Fortin, *Faulty Methodology Generates Faulty Results*, 15 JUST LAB.: A CANADIAN J. OF WORK & SOC'Y (SPECIAL EDITION) 26, 27 (2009); Garry Sran & Jim Stanford, *Further Tests of the Link Between Unionization, Unemployment and Employment: Findings from Canadian National and Provincial Data,* 15 JUST LAB.: CANADIAN J. OF WORK & SOC'Y (SPECIAL EDITION) 29, 31 (2009).

174. Sran & Stanford, *supra* note 173, at 30.

175. *Id.* at 36.

176. *Id.* at 37.

and they concluded that:

> After correctly specifying the econometric methodology (in particular, by ensuring that included variables do not exhibit secular trends over time), and considering the impact of all determinants of unemployment and employment performance (in the Canadian case by including variables reflecting monetary policy, exchange rate and terms of trade issues, commodity prices, and demographic trends), there is no statistically significant relationship visible, in either direction, between unionization and either unemployment rates or employment rates in Canada. Unionization is not a significant determinant of aggregate Canadian labour market performance.[177]

Moreover, some of the scholars attempted to take the air out of inflated claims that EFCA would result in greatly elevated union density. Professors Sara Slinn and Richard Hurd, using a framework that measures the relationship between union organizing activity and private sector union density, predict that, even assuming a twenty percent increase in U.S. union organizing activity, "the model forecasts only modest growth in [U.S.] private sector union density to approximately 8%."[178] Still other scholars sought to demonstrate the potential beneficial effects of EFCA. For example, one study looked at the relationship between requiring an election, which a number of Canadian provinces do, and the effectiveness of employer unfair labor practices in comparison with card check jurisdictions. "[E]mployer unfair labour practices have been shown to be twice as effective at discouraging unionization where certification votes are required."[179]

Apparently, there has been no rebuttal to the critiques of the Canadian scholars by Layne-Farrar.[180] That may be because the opponents of EFCA have won. With the election of Scott Brown to the Senate in January 2010, and the subsequent gains for the Republicans in the Senate in the regular 2010 election, EFCA seems to be dead for now. The very effective response of the Canadian scholars to Layne-Farrar's

177. *Id.* at 59-60.

178. *See* Sara Slinn & Richard W. Hurd, *Fairness and Opportunity for Choice: The Employee Free Choice Act & the Canadian Model,* 15 JUST LAB.: CANADIAN J. OF WORK & SOC'Y (SPECIAL EDITION) 104, 110 (2009).

179. John Godard, Joseph B. Rose & Sara Slinn, *Should Congress Pass the Employee Free Choice Act? Some Neighborly Advice,* 15 JUST LAB.: CANADIAN J. OF WORK & SOC'Y (SPECIAL EDITION) 116, 118 (2009).

180. Her curriculum vitae, dated May, 2012, does not list either an article or a work-in-progress responding to her critics. *See Anne S. Layne-Farrar,* COMPASS LEXECON (May 2012), http://www.compasslexecon.com/professionals/Documents/Anne%20Layne-Farrar%20CV.pdf.

paper has not so far been able to overcome its negative impact when she first posted her work on SSRN, which was then cited in numerous press releases by interest groups opposed to EFCA's enactment and also covered by the American media. But this observation begs an important question: What accounts for the Canadian response? An attempt at answering that question will be provided below.

IX. CONCLUSION

Understanding the motivation of the Canadian scholars, whose work ably debunked Layne-Farrar's thesis, may require returning to the work of Paul Weiler, particularly his seminal article, *Promises to Keep*. In explaining why employers should have no right to extensive commentary in union organizing campaigns, Weiler drew an analogy to the interest Canada has in elections in the United States.[181] Surely, he noted, American political elections are consequential for Canada insofar as their outcomes will impact relations between the two countries.[182] But no one assumes that Canadians should participate in U.S. election campaigns "in order to try to persuade United States citizens to vote for a party that would be favorable to Canadian interests."[183]

Similarly, one should not assume that the Canadian scholars were attempting primarily to affect the outcome of the debate over EFCA. While certainly they may have had some sense of solidarity with the American supporters of EFCA, their response is best understood as an attempt to prevent spillover effects from the EFCA debate that might undermine the Canadian model by misrepresenting its labor market outcomes.[184] Since Canada's labor laws are sensitive to political change, Layne-Farrar's work represented a significant threat – or at least a risk that needed to be neutralized quickly.[185] Setting the record straight was a strategic maneuver meant to safeguard the Canadian approach from business interests, Canadian and American, intent upon initiating greater

181. *Promises, supra* note 75, at 1814.

182. *Id.*

183. *Id.*

184. *See* Pupo, *supra* note 10, at 1 (outlining the Canadian interest in the outcome of the American EFCA debate).

185. Business-friendly labor law reforms in Ontario in the 1990s, for example, were driven by discussions of the need to attract foreign investment. *See* Brian A. Langille, *Global Competition and Canadian Labor Law Reform: Rhetoric and Reality, in* GLOBAL COMPETITION AND THE AMERICAN EMPLOYMENT LANDSCAPE: AS WE ENTER THE 21ST CENTURY 630-36 (Samuel Estreicher ed., 2000). Layne-Farrar's study, if unchallenged, might have become a vehicle for business-friendly labor law reforms.

convergence of the Canadian regime to the U.S. model.[186] The irony, of course, is that two sides with significantly different ideological outlooks (American EFCA opponents and Canadian labor market scholars favoring an EFCA-like approach) both have acted through scholarly work to reinforce the divergence between the two labor law systems that make up what Professor Marco Biagi called the "North American Model."[187] Thus, while Canadian ideas, especially those advocated by Paul Weiler, have profoundly affected U.S. labor law reform proposals over the last two decades, scholarly work surrounding at least the most current debate may have contributed to the divergent paths of Canadian and U.S. labor law.

186. Pupo, *supra* note 10, at 2-3. Relatedly, Professor Harry Arthurs worries about the effects on all aspects of Canadian life – cultural, economic, legal, and intellectual – wrought by greater North American regional integration, especially the increasing domination by American corporate headquarters of the Canadian subsidiaries of U.S. transnational corporations. *See* H.W. Arthurs, *Globalization of the Mind: Canadian Elites and the Restructuring of Legal Fields,* 12 CANADIAN J. OF LAW & SOC'Y 219, 225-27, 233 (1997).

187. *See supra* notes 2-4 and accompanying text.